Many modern energy dialogues gravitate toward a conversation about the present status of the jurisdictional divide between state and federal authority over the regulation of wholesale sales of energy. A March 3, 2017 Bureau of National Affairs (BNA) article began by observing how the utility industry believes the biggest challenges for the Federal Energy Regulatory Commission (FERC) will involve “[j]urisdictional battles between state and federal control in the energy markets.” And last fall, a joint report by centers at Duke University, University of North Carolina, and Harvard observed how “[t]he line between federal and state jurisdiction over the electricity sector is shifting. FERC once played a limited role in sector oversight, but regionalization of the electric grid and development of interstate markets for electricity, electric capacity, and transmission development have expanded its responsibilities.” A similar theme echoed in the Obama Administration Department of Energy (DOE) Quadrennial Energy Report.

This jurisdictional conundrum primarily has played out on two fronts: first, whether state-related energy programs are preempted by the Federal Power Act (FPA), and second, whether such state programs run afoul of the dormant Commerce Clause. As the electric grid began expanding across state boundaries in the first quarter of the twentieth century, a similar question surfaced about which entities—whether states, the federal government, or regional agencies—ought to regulate sales and transmission of electric energy. Indeed, Justice Frankfurter and James Landis published a landmark 1925 article on the potential use of interstate compacts for promoting regional electric “superpowers,” an idea supported by such notables as Herbert Hoover.1 The Federal Power Commission (FPC), which at the time only enjoyed jurisdiction over hydroelectric facilities,

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opposed the development of such interstate compacts and instead seemingly favored expanding its own jurisdiction over interstate transactions. The Supreme Court boosted the FPC’s prospects when the Court addressed whether a rate for the sale of energy from a utility in Rhode Island to a utility in Massachusetts violated the dormant Commerce Clause—even if the rate did not discriminate against the receiving state’s customers. In Public Utilities Commission v. Attleboro Steam & Electric Co., the Court held that rates for the interstate sales of electricity was of national, not local concern, and as such it impermissibly burdened interstate commerce. Congress then responded by passing the 1935 Federal Power Act, assigning to the FPC jurisdiction over the wholesale sales of electricity in interstate commerce and electric transmission in interstate commerce. And the Court, with Attleboro’s ghost retaining continuing resonance, has since described the jurisdictional divide between state and federal authority as a “bright line” that now allocates authority between the states and the FPC—now FERC.

Today, this bright line and the residual effects of Attleboro infect state policies toward energy and climate. When the FPC transitioned into FERC, its first Chairman characterized efforts to navigate Attleboro’s jurisdictional divide as “muddl[ing] through” it. That muddling includes state efforts—so far unsuccessful—to remove from FERC’s domain the ability to control aspects of local or regional electric generation capacity markets. The Fourth Circuit, for instance, invalidated Maryland’s program for encouraging new capacity in the wholesale market, reasoning that the Attleboro line and resulting FPA placed that authority exclusively within FERC’s jurisdiction, with the Supreme Court agreeing that the FPA preempted Maryland’s program. The Third Circuit similarly held that the FPA preempted New Jersey’s program for encouraging the construction of new electric generation facilities. And the Second Circuit rejected New York’s challenge to FERC’s presumption for the dividing line between the bulk power system under its domain and local distribution under state jurisdiction.

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2. See 3 FED. POWER COMM’N ANN. REP. 2, 7–8 (1923); 8 FED. POWER COMM’N ANN. REP. 8–13 (1928).
7. PPL Energyplus, LLC v. Solomon, 766 F.3d 241 (3d Cir. 2014); see also N.J. Bd. of Pub. Utilis. v. FERC, 744 F.3d 74, 80 (3d Cir. 2014) (discussing the jurisdictional divide).
Conversely, the Supreme Court upheld the FERC’s authority to promote demand response and reduce greenhouse gas (GHG) emissions, against a claim that regulating demand response impermissibly intrudes into state jurisdiction over consumers and retail transactions. In Order No. 745, FERC required that certain large customers, including factories and commercial facilities, receive full market prices when they reduce their electric consumption. The concept is simple. Instead of increasing generation of electricity to meet consumer demand, possibly from fossil fuel fired plants, the grid operator can request that certain consumers reduce their demand and thus avoid the need for additional energy generation. Demand response, therefore, provides an attractive option for “greening” the grid. Simply put, FERC provided a compensation mechanism for enticing entities that regulate the grid and operate wholesale markets (Independent System Operators and Regional Transmission Organizations) “to use demand-side resources to meet their systems’ needs for wholesale energy, capacity, and ancillary services.” Although the D.C. Circuit held that FERC intruded into states’ authority to regulate retail sales—embodied in the FPA, the Supreme Court found no such intrusion. In upholding FERC’s program, the Court nonetheless echoed how it had previously prohibited states from regulating wholesale interstate sales when it “created what became known as the ‘Attleboro gap’”—the dormant Commerce Clause gap limiting some state action.

A companion Article to this one examines these and subsequent cases, and it explores why the FPA does not necessarily preempt state policy choices for energy resources within their state. But assuming such programs are not preempted, the question persists whether they might, harkening back to Attleboro, violate the dormant Commerce Clause. As such, it now appears almost obligatory for scholars to include a dormant Commerce Clause cautionary discussion in articles promoting renewable energy and climate change programs.

12. See also Steven Ferrey, Supreme Court Strips States of their Power Over the World’s Second Most Important Technology, 69 BAYLOR L. REV. 315 (2017).
This Article unpacks that discussion, by examining the recent commerce clause challenges to state energy policy choices. It first reviews the Court’s current approach toward the dormant Commerce Clause. From there, the Article examines how and why the recent dormant Commerce Clause challenges to state energy policy choices appropriately have been rejected.

A. DORMANT COMMERCE CLAUSE ANALYSIS

Modern-day dormant Commerce Clause opinions generally follow a structured analysis for reviewing the constitutionality of state or local regulations. First, if a regulatory program discriminates on its face or in effect against interstate commerce, a court is likely to apply a strict scrutiny analysis to that program. The strict scrutiny approach effectively creates a presumption against the program’s constitutionality, a presumption that is difficult to overcome. This examination is designed to prevent economic protectionism: having one state benefiting its in-state economic interests while burdening out-of-state competitors. The exception, however, is when the state or local government acts as a “market participant,” which allows a state or local entity to discriminate against interstate commerce when acting in a proprietary rather than a regulatory role.

If, however, the program is neutral, courts apply an even-handed balancing test, which weighs the state or local interests and national interests against each other. In practice, it is often difficult to convince a court that an otherwise neutral program offends the dormant Commerce Clause because the burden on national interests outweigh the purported putative state or local benefits.

Next, an appendage to dormant Commerce Clause analysis inhibits states from regulating activities beyond their borders—referred to as extraterritorial application. Surfacing in the Court’s opinions in the 1980’s, the principle counsels that a state program targeting conduct outside the state is per se unconstitutional. The Court invoked this principle in Brown-Forman Distillers Corp. v. New York State Liquor Authority, when it invalidated New York’s regulation of liquor sales in the state.14 The Court reasoned that New York’s program had the “practical” effect of regulating transactions in other states, and as such—even though not discriminatory—was an impermissible direct regulation of interstate commerce.15 For precedent, the Court referenced a case a few years earlier where Justice White, in somewhat unartful fashion, struck

15. Id. at 583.
down a state securities law, which a plurality of the Court claimed directly burdened interstate commerce with a “sweeping extraterritorial effect.”  

One recent instance where the doctrine surfaced involved California’s adoption of a low carbon fuel standard, requiring that fuel providers establish the “carbon intensity” of their fuels based on a life-cycle analysis, and where those providers produced the fuel affected its carbon intensity level. Because corn-based ethanol from the Midwest enjoyed a higher “carbon intensity” level, those adversely affected claimed that the program not only violated traditional dormant Commerce Clause doctrine but also impermissibly operated extraterritorially. While the district court agreed, the Ninth Circuit on appeal accepted an extraterritoriality analysis but concluded the program regulated only the California market and did not attempt to control out-of-state conduct. Of course, in doing so, it added how “[i]n the modern era, the Supreme Court has rarely held that statutes violate the extraterritoriality doctrine.”

That admonition did not deter the Eight Circuit. In North Dakota v. Heydinger, the court confronted a constitutional challenge to Minnesota’s Next Generation Energy Act (NGEA). NGEA prohibited importing “power from a new large energy facility that would contribute to statewide power sector carbon dioxide emissions” and barred entities from entering “into a new long-term power purchase agreement that would increase statewide power sector carbon dioxide emissions.” The lower court held the law operated extraterritorially, and on appeal the Eighth Circuit agreed.

The Eighth Circuit observed how “[a] state statute has undue extraterritorial reach and ‘is per se invalid’ when it ‘requires people or businesses to conduct

18. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1101 (9th Cir. 2013). On remand, the lower court rejected the continuing dormant Commerce Clause claims that the standard discriminated against interstate commerce or otherwise failed the Pike balancing test. Rocky Mountain Farmers Union v. Corey, 258 F. Supp. 3d 1134, 1158–1164 (E.D. Cal. 2017).
19. Rocky Mountain Farmers Union, 730 F.3d at 1101. The Ninth Circuit, however, later found that California’s Resale Royalty Act, which requires resellers of some works of art to pay a royalty to the artist, operated impermissibly outside the state—even though the Act itself focused on sellers or sales in the state. Sam Francis Found. v. Christie’s, Inc., 784 F.3d 1320, 1323–1325 (9th Cir. 2015). The court held the Act “involves regulation of wholly out-of-state conduct.” Id. at 1324. Conversely, however, the Ninth Circuit concluded that California’s Shark Fin Law did not operate outside the state, when it regulated the flow of shark fins in the state by targeting transactions that involved California parties. Chinatown Neighborhood Ass’n v. Harris, 794 F.3d 1136, 1147 (9th Cir. 2015). When Oregon adopted a low carbon fuel regulation and it was challenged, the court rejected the suggestion that it discriminated against interstate commerce or impermissibly burdened out-of-state producers. See generally Steven Ferrey, Moving the Legal Needle of Western Climate and Energy Options, 8 SAN DIEGO J. CLIMATE & ENERGY L. 129, 158–160 (2014) (discussing American Fuel & Petrochemical Manufacturers v. O’Keeffe, 134 F.Supp.3d 1270, 1284 (D. Ore. 2015), appeal docketed and scheduled for argument in 2018, American Fuel & Petrochemical v. O’Keeffe, No. 15-35834 (9th Cir.).
21. Id. at 913.
their out-of-state commerce in a certain way.’”

It's sister court in the Tenth Circuit previously rebuffed a dormant Commerce Clause challenge to Colorado’s program requiring electric generators to ensure that 20 percent of the electricity sold to Colorado consumers originate from renewable resources. That court, when commenting on extraterritoriality, observed “if any state regulation that ‘control[s] . . . conduct’ out of state is per se 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?” And while it declined to infuse the doctrine with life, the Eight Circuit conversely concluded “[n]ot only do the challenged prohibitions apply to non-Minnesota utilities, they regulate activity and transactions taking place wholly outside of Minnesota.”

That NGEA affected transactions outside Minnesota, though, seems unexceptional, because the electric grid within Minnesota is part of a regional grid operated by the Midwest Independent System Operator Transmission Owners—MISO. Yet, because, according to the court, other states within MISO had not adopted similar programs—and further assuming that NGEA restricted the “use of the currently most cost-efficient sources of generating capacity” (both factually suspect today and likely not part of a dormant Commerce Clause analysis), NGEA effectively imposed Minnesota’s “policy on neighboring States by preventing MISO members from adding capacity from prohibited sources anywhere in the grid, absent Minnesota regulatory approval or the dismantling of the federally encouraged and approved MISO transmission system.” Of course, if NGEA did what the court suggested, it would be preempted by the FPA (as Judge Colloton opined in concurrence) and not necessarily suspect under the dormant Commerce Clause, and few commentators consequently find the court’s reasoning persuasive.

B. ECONOMIC PROTECTIONISM AND THE ELECTRIC GRID

As state and local programs respond to the challenges confronting our modern electric grid, the dormant Commerce Clause operates as the proverbial sword of Damocles hanging over these programs. With the emphasis on reduced

22. Id. at 919 (quoting Cotto Waxo Co. v. Williams, 46 F.3d 790, 793 (8th Cir. 1995)).
23. Energy and Environment Legal Institute v. Epel, 793 F.3d 1169, 1173–74 (10th Cir. 2015).
24. Id. at 1175.
25. North Dakota, 825 F.3d at 921.
26. Id. at 922. Judge Murphy disagreed with this analysis. Id. at 923 (Murphy, J., concurring). Judge Colloton found it unnecessary to address the dormant Commerce Clause, if the statute was preempted. Id. at 927.
fossil fuel dependence and the need for local communities to secure new energy resources, the likelihood of an ever-growing movement toward distributed energy is poised to have local communities become energy islands, marginally tied to an interstate grid. But with such a future, subnational-level communities are likely to protect themselves through some trade barrier restrictions, only to implicate dormant Commerce Clause concerns. The dormant Commerce Clause surfaces, for instance, when states restrict the import of carbon-intensive energy or when they require the purchase of local renewable resources. Also, states’ coordinated regional efforts for addressing climate change may prompt dormant Commerce Clause inquiries to the extent that such programs address the problem of leakage of GHG emissions to areas outside of the regional effort.

Other programs designed to shape their energy futures and quite possibly incrementally whittle away at rising GHGs appear threatened by an ill-equipped use of the dormant Commerce Clause. During the past several decades, the Court has circumscribed the states’ abilities to distinguish between in-state and out-of-state fuels and power generation. In New Energy Co. of Indiana v. Limbach, for instance, the Court invalidated Ohio’s ethanol motor vehicle fuel tax credit for ethanol produced either in the state or from a state that granted an equivalent tax credit for Ohio produced ethanol. Relying on


Spohase and Great Atlantic & Pacific Tea Co. v. Cottrell, the Court concluded that Ohio’s reciprocity measure constituted discrimination and did not survive a strict scrutiny analysis into whether the ends were legitimate and the means were the least discriminatory alternatives available.\(^\text{36}\) And, when the New Hampshire public utility commission prohibited New England Power from selling in-state generated energy to out-of-state entities, even though the company had been selling into the interstate market inexpensive hydroelectric power generated in the state for over fifty-four years, the Court treated this prohibition as offending the dormant Commerce Clause.\(^\text{37}\) The law undoubtedly served an economic protectionism purpose and the Court noted that “[o]ur cases consistently have held that the Commerce Clause . . . precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom.”\(^\text{38}\)

Armed with such cases, disappointed energy service providers have challenged recent state energy policies affecting the interstate electric grid. Connecticut, for instance, developed two programs triggering dormant Commerce Clause challenges. The first involved the state’s effort to promote renewable energy, by soliciting bids for providing wholesale energy contracts. The second involved the state’s requirement that in-state electric utilities either produce a certain amount of renewable energy (a renewable portfolio standard, or RPS) or purchase renewable energy credits (RECs) from other regional renewable energy generators. When the state solicited bids, it received 47 project proposals, including from Number Nine, HelioSage Energy, and Allco Renewable Energy, Ltd. It selected both Number Nine (a 250 megawatt wind project located in Maine) and HelioSage Energy (the 20 megawatt “Fusion Solar” project in Connecticut). And it directed that those two companies enter into power purchase contracts (a bilateral market transaction) with Connecticut’s electric distribution companies, The Connecticut Light and Power Company (CL&P) and The United Illuminating Company (UI). The power purchase agreements then required that the renewable energy generator obtain market-based rate approval from the FERC.

Disappointed, Allco, who had submitted five solar projects—all qualifying facilities under the Public Utilities Regulatory Policies Act (PURPA), challenged

\(^{36}\) Id. at 274–76 (utilizing the holdings from Spohase v. Nebraska, 458 U.S. 941 (1982) and Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976)).


\(^{38}\) New England Power Co., 455 U.S. at 338; see also Wyoming v. Oklahoma, 502 U.S. 437, 461 (1992) (invalidating law that required Oklahoma coal-fired electric utilities to burn at least ten percent Oklahoma mined coal).
Connecticut’s program. Its challenge to the solicitation program focused primarily on federal preemption, not the dormant Commerce Clause. When challenging Connecticut’s REC program, however, Allco claimed that the state was only allowing “RECs from certain States [those in New England] or Canadian provinces to qualify toward a utility’s obligations.” According to Allco, this effectively constituted a “ban on certain out-of-state RECs” and, consequently, “facially discriminates, and also has the effect of discriminating, against [Allco’s] out-of-state renewable energy facilities [in New York and Georgia] in violation of the dormant Commerce Clause.”

In June 2017, the Second Circuit rejected Allco’s challenge. In Allco Finance Ltd. v. Klee, the court quickly dispatched Allco’s discrimination claim. It accepted Connecticut’s argument that RECs, as creatures of state law, are different than RECs generated in other states. RECs created in different states are “different products. Connecticut’s RPS program therefore does no more than treat different products differently in a nondiscriminatory fashion.” Next, the court examined whether Connecticut’s program survived a balancing inquiry. Here, the court first addressed whether in-state and out-of-state generated RECs were sufficiently similar products to warrant a balancing inquiry. “This action,” the court reasoned, “addresses state laws that raise questions regarding the ‘comparability of taxed or regulated entities as operators in arguably distinct markets.’” And thus, while in-state and out-of-state RECs may enjoy some similarities, out-of-state generated RECs as creatures of state law are necessarily a different product.

But the similarities warranted further examining “whether there is a market that only one of the two entities serves, and in which competition would not be increased if the differential treatment of the two entities were removed.” The court answered, no. It reasoned:

Connecticut’s consumers’ need for a more diversified and renewable energy supply, accessible to them directly through their regional grid or indirectly

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39. PURPA is a federal statutory scheme, enacted in 1978, that – among other things – created a category of power producers called “qualifying facilities” that could demand that a utility purchase their generation. Allco’s proposal allowed its projects to be downsized to 20 megawatts, the threshold maximum that UI had established for its obligation to purchase power from a PURPA qualifying facility.

40. Allco also had two district court actions. See Allco Finance Ltd. v. Klee, 2016 WL 4414774 (D. Conn. 2016); Allco Finance Ltd. v. Klee, 805 F.3d 89 (2d Cir. 2016).


42. Allco Finance Ltd., 861 F.3d at 108.

43. Id. at 103.

44. Id. at 105.

45. Id.
through adjacent control areas, would not be served by RECs produced by Allco’s facility in Georgia—which is unable to transmit its electricity into [ISO-NE (Independent System Operation-New England)].

From there, the court then explored whether RECs produced in-state and out-of-state were separate markets “in which competition potentially would be served if Connecticut were prohibited from treating them disparately.” Because there is a national market for RECs, the court did conclude that national competition would be furthered if Connecticut expanded its program. But when it then balanced Connecticut’s interest in protecting the market for RECs produced within an area tied to the regional electric grid—and, consequently, promoting renewable energy in the region and “protecting its citizens’ health, safety, and reliable access to power,” the court concluded that the burden on interstate commerce was not “clearly excessive in relation to the putative local benefits.”

While much of its reasoning and conclusion is eminently sensible, the court’s concluding discussion of the federal regulatory regime for the electric grid seems out of place in the dormant Commerce Clause analysis. The court observed how Connecticut’s program operated in a coordinated way with the regional electric grid, supervised by FERC, ISO-NE, and the New England Power Pool Generation Information System (NEPOOL-GIS). “It is they,” the court reasoned, “that in this setting, are best suited to decide which products ought to be treated similarly, and which should not.” If, however, that were true, then the issue ought to be whether the federal regime displaced the state program (which the court answered elsewhere and which is discussed in an accompanying Article), or alternatively, whether Congress effectively blessed the State’s ability to establish its REC program—in which case, the dormant Commerce Clause is no longer an issue.

Not too longer after Allco, the United States District Court in Illinois addressed Illinois’s zero emission credit (ZEC) program. The state’s ZEC program, by awarding credits to zero-emission qualifying facilities in the state, effectively reduced the price of wholesale energy sold by two nuclear power plants operated by Exelon. In addition to challenges under the FPA, the plaintiffs argued that Illinois’s ZEC program is facially discriminatory and violates the dormant Commerce Clause. The plaintiff’s argument, giving them the benefit of the doubt, was premised upon the process for awarding the ZECs, suggesting that the program was rigged to select only in-state facilities. To be sure, their complaint misstated the dormant Commerce Clause analysis and even referenced a 1924 case as its leading authority. In their subsequent motion for preliminary

46. Id.
47. Id. at 106.
48. Id. at 107.
49. Id. at 107.
injunction, they carried forward their dormant Commerce Clause challenge, albeit with equal obscurity:

The ZEC charges to all Illinois electricity consumers harm and discriminates against Plaintiffs and other Illinois electricity consumers who all either purchase or are eligible to purchase electricity supply from competitive retail suppliers, who, in turn, purchase their electricity from interstate wholesale suppliers adversely affected by the ZEC program. The ZEC program unduly burdens interstate commerce, does not regulate evenhandedly to effectuate a local public interest and its effects on interstate commerce are substantial. Implementation of the ZEC charges would violate the Commerce Clause and deprive Plaintiffs of ‘rights, privileges, or immunities’ within the meaning of the Commerce Clause.\textsuperscript{51}

Later, during oral argument over a motion to dismiss, plaintiffs’ counsel pressed the court that, until after trial, the court had to accept plaintiffs’ assertion that the program was “a subsidy program directed to” Exelon’s two facilities. “That’s what this program is. It is—and so they can bend over backwards to try and say that others can apply, but the reality is—this is alleged in our complaint and needs to be accepted for purposes of the motion to dismiss—that this is a subsidy program” for those facilities.\textsuperscript{52}

Defendant intervenor Exelon, conversely, defended the law as facially neutral, and added that absent any hint of “mild discrimination” the issue ought to be dismissed.\textsuperscript{53} When then pressed by the court, Exelon’s counsel explained why \textit{Pike Bruce} balancing was unnecessary. Absent some indicia of discrimination, counsel asserted first, the plaintiffs would lack sufficient standing to prosecute a \textit{Pike Bruce} based claim. Counsel then argued that, regardless, \textit{Pike} still requires identifying at the outset an alleged burden on commerce, and stated:

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\text{[h]ere, we don’t have any burden imposed at all. All we have is the State essentially offering a payment, and everyone is free to participate in commerce as they would like before. There may be an effect on contenders, yes, but there’s not a burden on commerce, and that distinction is critical in explaining why the \textit{Pike} claim should be dismissed.}\textsuperscript{54}
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\begin{footnotesize}
\textsuperscript{52} Transcript of Proceedings at 11, Village of Old Mill Creek, 2017 WL 3008289 (N.D. Ill. July 14, 2017) (No. 17-cv-1163). Plaintiffs’ counsel argued that the output of Exelon’s facilities matched the required amounts for ZEC purchase requirement, and effectively precluded any other entity from securing the ZECs. \textsuperscript{id.}  
\textsuperscript{53} \textit{Id.} at 22.  
\textsuperscript{54} \textit{Id.} at 23; see also Memorandum of Law in Support of Motion to Dismiss of Intervenor Exelon Generating Company, LLC at 30–40, Village of Old Mill Creek, 2017 WL 3008289 (N.D. Ill. July 14, 2017) (No.17-cv-1163) (noting that plaintiffs raised a facial challenge to the statute and made some of the claims not susceptible to a dormant Commerce Clause challenge). Illinois’ brief focuses on establishing the environmental and health importance of state renewable energy programs, including its, and then asserts how the law “does not discriminate against other sellers of nuclear power in other states, nor against fossil fuel generators,” and that “[a]s long as there is no overt discrimination between in-state and out-of-
\end{footnotesize}
Given the paucity of the dormant Commerce Clause discussion, the district court had little trouble dismissing the claim even on a motion to dismiss. To begin with, because the plaintiffs waged a facial challenge to the statute, the court rejected any suggestion that the program, either on its face or necessarily in its administration, would be discriminatory. As such, the only arguable claim was a balancing inquiry under *Pike Bruce*. While appreciating that *Pike Bruce* balancing involves a factual inquiry, the court followed *Alco’s* reasoning by concluding that when “the complaints allege a state-created commodity that only indirectly burdens other generators’ ability to compete in wholesale actions, they fail to state a dormant commerce clause claim.” The court signaled, however, that perhaps what it was implicitly concluding, as a matter of law, was that under no circumstances could the court conclude that the national interests would outweigh what it viewed as considerable local interests. This is either because the state was creating the market in the first place, and as such, free from dormant Commerce Clause constraints under the market participant theory, or because the burden on interstate commerce is merely incidental.

Neither of those two conclusions when applied in this case, though, is nestled neatly in our modern constitutional construct under *Pike Bruce*, and so it seems more likely that the court’s analysis is premised upon a conclusion that the complaint lacked sufficient evidence of burdening interstate commerce to warrant any additional inquiry. That seems consistent with the court’s concluding statement that “[t]he alleged harm to out-of-state power generators who will be competing in auctions against subsidized participants is not clearly excessive when balanced against these weighty and traditional areas of permissible state regulation.” Perhaps the court was signaling, somewhat unartfully, that energy credit programs are matters of acute state importance and constitutional unless there is evidence of purposeful or actual discrimination or *prima facie* evidence of an undue burden on interstate commerce.

Comparably, a U.S. district court in New York shortly thereafter resolved a similar dormant Commerce Clause issue in a challenge to New York’s Clean Energy Standard (CES). Promoting GHG reductions, the State’s CES awarded credits to certain nuclear generators for producing zero-emission electricity. The plaintiffs argued that the law, as it was being administered, “discriminates against out-of-state energy producers, including nuclear and other carbon-free energy producers, by selecting only New York nuclear power plants to receive ZECs” and that it also “imposes an undue burden on interstate commerce by distorting market pricing and incentives, which will cause energy generators, including out-

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56. *Id.* at *17.
of-state energy providers, to leave the market or discourage their entry into the market.”

But before the court confronted these issues directly, it first concluded that it would apply a “zone of interests” test to determine whether the plaintiffs had prudential standing to even assert its claims. Answering in the negative, the court concluded that plaintiffs failed to show how they were injured from any alleged discrimination or undue burden on out-of-state economic interests, and as such they failed to establish a cause of action. Plaintiffs did not claim they owned any out-of-state nuclear generators, and the court rejected their discrimination claim premised upon harm to other out-of-state non-nuclear renewable generators.

The court similarly determined that plaintiffs failed the zone of interests test for its undue burden claim. Again, because plaintiffs did not own any out-of-state nuclear generators, if the state had awarded ZECs to all nuclear generators across the country plaintiffs would be equally injured nevertheless. Therefore, plaintiffs’ harm, the court implicitly reasoned, was not from an “undue burden on out-of-state economic interests.” Finally, the court added, that plaintiffs’ claim, even if it survived the zone of interests test, would be barred by the market participant exception to the dormant Commerce Clause. New York, the court reasoned, was not regulating the market but rather participating in the market and favoring its own citizens. That favoritism makes sense, according to the court, because it is New York ratepayers – not out-of-state ratepayers - who would be the ones paying for the ZECs.

C. MOVING FORWARD WITH THE DORMANT COMMERCE CLAUSE

In the modern era imbued with energy federalism, consisting of an electric grid sharing overlapping regulatory space among federal, regional, and state entities, the dormant Commerce Clause retains little currency. The New York and Illinois cases, along with *Allco*, demonstrate some of the difficulty with modern dormant Commerce Clause doctrine and the hurdles parties confront when a plaintiff unsheathes the clause as a sword to try to strike down a state’s energy policy choice. There rarely is overt discrimination against out-of-state interests, and when the energy policy choice is motivated by environmental and health concerns, the in-state attributes render the out-of-state interests a different product.

The concept of RECs, therefore, defies normal limitations that can be derived by invoking the dormant Commerce Clause. This is largely because, as

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58. Id. at 582–583. There is some question about why a zone of interests test is necessary rather than simply applying principles of Article III standing to constitutional challenges, and undoubtedly this issue will require an analysis by a higher court.
59. Id. at 583.
60. Id. at 585. The court emphasized that state subsidies are unique, and when a state enters the market and subsidizes its own in-state economic interests, the dormant Commerce Clause does not bar it from doing so unless the state impedes private trade in the national marketplace.
Allco recognizes, a REC is a thing of value created by the state to meet many legitimate state interests, such as reducing GHG emissions for which in-state customers are responsible, and keeping utility rates affordable.\textsuperscript{61} To test the merits of deferring to a legitimate state purpose underlying a state-created market, consider the reverse situation:

As the California Attorney General noted in its Allco amicus brief, “unlike traditional commodities such as milk, beer, or gasoline, neither the demand [RECs], nor the instruments themselves, exists before the State creates the instruments and the regulatory program that requires them.”\textsuperscript{62} If the state can create the instrument, it can eliminate it – which would be a reasonable step to take if the program fails to meet the state’s objectives. Is there anything about the interests of generators in other states that would require the state to retain an otherwise discretionary program that it no longer wants?

If a state can close a market it created, how would out-of-state generators benefit? They are certainly no worse off if the program continues in a form that precludes or limits their participation. In fact, they may be better able to sell their RECs in other state markets, as generators that do qualify might be trying to sell

\textsuperscript{61} Allco focused first on deflecting the suggestion that Connecticut was acting as a market participant, rather than as a regulator—because private actors could not otherwise create such a renewable energy program. Next, it suggested that Connecticut engaged in discrimination because it erected a regional barrier, favoring one region over another, and as such impermissibly facially discriminated. Opening Brief of Appellant Allco Finance Ltd at 62–64, Allco Finance Ltd. v. Klee, 861 F.3d 82 (2d Cir.) cert. denied, 138 S. Ct. 926 (2018) (No. 16-2946, 16-2949). And here, Allco asserted that the state’s regional preference further undermined the state’s claim to be acting as a market participant. But Allco’s argument overlooked the State’s claim that it created the product, and Allco simply assumed that if a state creates a demand, whether in creating the product or the market, that the state cannot then define the contours of that product or market. \textit{Id.} at 67–68.

Connecticut argued that not all RECs are created equal, and as such it would ignore the reality of the transmission grid and the attributes of RECs to suggest that the state was discriminating. Brief of Defendant-Appellee Robert Klee at 43, Allco Finance Ltd. v. Klee, 861 F.3d 82 (2d Cir.) cert. denied, 138 S. Ct. 926 (2018) (No. 16-2946 & 16-2949). Indeed, the state argued that Allco was free to sell its RECs into the Connecticut market through other programs. \textit{Id.} at 44. And, as part of this argument, Connecticut urged that, because it created and could eliminate the REC market, it was not impeding any pre-existing natural national market or required to offer the benefits of its subsidiary program to Georgia generators. \textit{Id.} at 46. Separately, under an entirely different heading, Connecticut pressed the market participant exception. \textit{Id.} at 47. While the state referenced \textit{General Motors Corp. v. Tracy}, 519 U.S. 287 (1997), when noting that discrimination required similarity of products, it was the \textit{amici} brief by other states that discussed \textit{Tracy} and the need for similarity of products. It was this brief, as well, that emphasized \textit{Kentucky v. Davis}, 553 U.S. 328 (2008). Brief of Massachusetts, New York, Oregon, Vermont, and Washington and the California Air Resources Board as Amici Curiae in Support of Defendants-Appellees and Affirmance at 28–35; Allco Finance Ltd. v. Klee, 861 F.3d 82 (2d Cir.) cert. denied, 138 S. Ct. 926 (2018) (No. 16-2946, 16-2949). The states argued that, in \textit{Davis}, “the Court upheld [a] Kentucky-only, origin-specific tax exemption as non-discriminatory, concluding that the State’s legitimate policy objectives were a far cry from the economic protectionism prohibited by the dormant Commerce Clause,” and that same reasoning applied here. \textit{Id.} at 28–29. The Second Circuit relied heavily on both \textit{Tracy} and \textit{Davis}.

into the policy state’s markets, potentially freeing up other demand that the aggrieved generators might serve.

In any event, it may not be accurate to consider RECs as comprising a market, interstate or otherwise. More precisely, RECs are a compliance mechanism. The obligation is expressed in the form of a renewable power policy such as RPS – some portion of the power in the utility’s portfolio must come from qualifying renewable sources. As FERC has acknowledged, “states have broad powers under state law to direct the planning and resource decisions of utilities under their jurisdiction. States may, for example, order utilities to build renewable generators themselves, or . . . order utilities to purchase renewable generation.”

What if the state had no REC program at all, but instead insisted that each utility ensure that a certain amount of power from renewable sources is introduced into the grid to serve its customers? If shifting to renewable energy is a decision consistent with the state’s authority, then insisting that the power actually is delivered within its balancing authority would be a logical and necessary component. REC programs that are limited to power that is produced and delivered regionally are arguably consistent with the state’s authority, as well.

Next, the claim that state energy policy choices might trigger an extraterritoriality problem rests on dubious pre-New Deal era cases when the Court struggled with talismanic tests such as local versus national, and direct versus indirect regulation of commerce. Those tests, though, have since been supplanted by asking whether a regulation discriminates on its face or in effect, or otherwise fails the Pike Bruce balancing test. Adding the notion that a regulation might also fail because it practically operates extraterritorially implicitly resurrects another fungible test.

Assume, for instance, Wyoming informs all sellers of automobiles into Wyoming’s markets that those sellers must offer to sell the same type of electric vehicles as they are selling in bordering states. The law, on its face, is non-discriminatory. Yet, the electric vehicle Wyoming wants sold into its market is produced only in its neighboring state of Colorado. It, therefore, undoubtedly influences the conduct of the Colorado electric car manufacturer—indeed, that manufacturer may decide not to sell any of its other non-electric cars in Wyoming! But does it directly regulate that company? Only if the company wants to sell cars in Wyoming; and then, once it chooses to send its cars into Wyoming for sale, the law operates within Wyoming, not extraterritorially in Colorado. To be sure, the company may be forced to change its marketing plan, and possibly avoid selling any cars in Wyoming, but, again, it is only because it has first decided to take advantage Wyoming’s market. And so, Wyoming’s regulation influences and undoubtedly, in effect, burdens interstate commerce—

and would be subjected to Pike Bruce’s balancing test, but it is not because the law either can or does regulate extraterritorially.

Second, invoking a concern over extraterritoriality is both anachronistic and dubious. Its roots reach back toward the era of dual federalism and opinions marred by a paradigm focused on geographically based spheres of jurisdiction. One element of this nineteenth century construct was that states could exercise jurisdiction over persons and property within their geographic borders—but not beyond. With roots in international law and conflict of laws, the paradigm is best characterized by cases involving personal jurisdiction, such as Pennoyer v. Neff, where the Court examined whether a state law operated directly on persons or conduct outside the state. The Court then employed this analysis elsewhere, such that if a regulation operated beyond a state’s borders it fell within another sphere, such as the federal government’s commercial sphere. This type of paradigmatic analysis lost currency by the first half of the Twentieth Century, however. And, consequently, to allow it to be deployed once again to thwart state energy policy choices, as the Eighth Circuit did in North Dakota v. Heydinger, serves little purpose.

CONCLUSION

The focus in recent years on programs in individual states designed to reduce GHG emissions, or to increase reliance on renewable power in what have increasingly become regional markets, has by necessity led to outcomes of interest to businesses in other states. These programs, recognized by the courts as serving legitimate public purposes, run up against the Commerce Clause — written 220 years ago when few could have imagined the need for states to act responsibly in the face of challenges and opportunities that do not fit neatly within political borders.

Early on, some scholars feared that, in a battle between the need for responsible state action and the constraints of the dormant Commerce Clause, well-intended state efforts would fail. In response, some states have refined programs or entered settlements to avoid adverse court rulings. With the passage of time and the development of additional case law, the picture has become far from dismal. Indeed, dormant Commerce Clause barriers to state energy policy choices ought to be limited to preventing in-state economic protectionism, and

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66. See Adler, supra note 13; see also Ferrey, supra note 31; Steven Ferrey, Carbon Outlasts the Law: States Walk the Constitutional Line, 41 B.C. ENVTL. AFF. L. REV. 309 (2014).
nothing more. When a state chooses to promote for economic reasons its own in-state economic interests, a legitimate argument exists that a court can apply the discrimination arm of existing dormant Commerce Clause analysis and review the constitutionality of the measure—assuming Congress has not otherwise allowed the state discrimination. But otherwise, there is little room for the awkward and misplaced extraterritorial analysis tried in Heydinger, and any suggestion that Pike Bruce’s balancing is worthwhile is unwieldy with the modern electric grid—and the test is questionable and possibly suggests why courts may be demanding prima facie evidence of an undue burden before allowing the claim to proceed.

Thoughtfully designed programs with clearly identifiable objectives that are consistent with traditional state interests are well-positioned to survive challenges based on the dormant Commerce Clause. There is every reason to expect that they will continue to do so.