

Extra Legal

Tripping Over Power Lines: Heydinger, Epel, and States' Autonomy in Setting Renewable Energy Standards

*By Devan Braun**

“The challenge to leaving it in the ground is not technological; it is legal.”¹

I. Introduction

In the wake of the federal government’s failure to implement policies designed to adequately mitigate climate change in the United States, action taken by individual states is now at the forefront of reducing emissions and incentivizing renewable energy.² This has drawn strong opposition to both new and existing programs such as renewable

* Juris Doctor, 2018, Northeastern University School of Law. Ms. Braun wrote this article while she was a law student.

¹ Steven Ferrey, *Legal Challenges for "Leaving It in the Ground": Touchstone Developments and Holdings*, 47 ENVTL. L. REP. NEWS & ANALYSIS 10312, 10326 (2017).

² See, e.g., 42 R.I. GEN. LAWS § 42-64-13.2 (2018) (establishing a Renewable Energy Fund to support offshore wind development); MASS. GEN. LAWS ch. 21N, § 3(d) (2018) (requiring mandatory limits for all sources that emit GHGs).

portfolio standards and renewable energy mandates, which have helped for some time now to decarbonize and diversify the electric grid from which we, as consumers, receive our power.³ We now find ourselves in a position in which cost-effective renewable generation exists and can provide a realistic alternative to the use of traditional fossil fuels,⁴ but legal uncertainty as to the viability of state renewable energy programs is a potential barrier slowing down our ability to decarbonize the electric grid and reduce greenhouse gas (“GHG”) emissions.

This article will examine one of the constitutional barriers raised by the recent wave of challenges to state efforts to implement renewable portfolio standards: the dormant Commerce Clause. After reviewing the relevant nature and scope of state renewable energy standards, it will explore the potential impact of the dormant Commerce Clause on such programs, as presented in two cases: *North Dakota v. Heydinger* and *Energy & Environment Legal Institute v. Epel*.⁵ Finally, because renewable energy standards do not intend to “wholly control” conduct beyond the boundaries of the state, this analysis concludes by arguing that the extraterritoriality principle should not apply, and cautions against judicial interference right now in what amounts to state-led experiments in incentivizing renewable energy aimed at reducing GHG emissions.

³ See discussion *infra* Part II.

⁴ See, e.g., Dominic Dudley, *Renewable Energy Will Be Consistently Cheaper Than Fossil Fuels By 2020, Report Claims*, FORBES (Jan. 13, 2018, 4:00 AM), <https://www.forbes.com/sites/dominicdudley/2018/01/13/renewable-energy-cost-effective-fossil-fuels-2020/#183181ba4ff2>; Simon Evans, *Analysis: Low-Carbon Sources Generated More UK Electricity Than Fossil Fuels in 2017*, CARBONBRIEF (Jan. 3, 2018, 5:00 AM), <https://www.carbonbrief.org/uk-low-carbon-generated-more-than-fossil-fuels-in-2017>.

⁵ *North Dakota v. Heydinger*, 825 F.3d 912 (8th Cir. 2016); *Energy & Env’t Legal Inst. v. Epel*, 793 F.3d 1169, 1169 (10th Cir. 2015).

II. Renewable Energy Standards

Providing electricity through renewable resources in addition to traditional supply-side fossil fuel resources is a strategy utilized to encourage the generation of renewable energy facilities for use in a carbon-constrained world.⁶ Renewable Energy Standards (“RESs”), also referred to throughout this article as Renewable Portfolio Standards (“RPSs”), refer to policies that require utility companies to sell a certain amount of renewable energy to the consuming public as a way of diversifying its energy portfolio.⁷

Mandating the diversification of companies’ energy portfolios and requiring that renewable standards be included in options for fuel sources is a strategy that allows states to meet future electricity demand requirements while providing cost-effective resource options.⁸ These renewable standards also reduce the electric grid’s excessive contributions to GHG emissions,⁹ and often coincide with state legislation aimed at reducing its GHG contributions.¹⁰ In fact, the Federal

⁶ *Renewable Energy Standards*, SOLAR ENERGY INDUSTRIES ASS’N. (2017), <https://www.seia.org/initiatives/renewable-energy-standards> (last visited July 29, 2018).

⁷ *Id.*

⁸ WILLIAM STEINHURST ET AL., SYNAPSE ENERGY ECONOMICS, ENERGY PORTFOLIO MANAGEMENT: TOOLS & RESOURCES FOR STATE PUBLIC UTILITY COMMISSIONS 4 (2006).

⁹ *Benefits of Renewable Energy Use*, UNION OF CONCERNED SCIENTISTS, (last updated Dec. 20, 2017), <https://www.ucsusa.org/clean-energy/renewable-energy/public-benefits-of-renewable-power#.WnNz5pM-fBI>.

¹⁰ For example, California adopted its Global Warming Solutions Act in 2006, which aimed to lower the state’s GHG emissions to 1990 levels by the year 2020. The Act directed the California Air Resources Board to issue regulations to reduce GHG emissions from the transportation sector. To comply with the Act, the Board issued the “low carbon fuel standards,” which established standards and caps on carbon in California’s transportation-fuel market. These standards were subsequently challenged.

Energy Policy Act of 2005 actually requires state and governmental agencies to consider adopting a fuel source diversity standard.¹¹

To date, more than half of all states in the U.S. have implemented some type of renewable energy standard,¹² and geographic preferences for in-state renewable electricity is not an uncommon feature of many of these state programs.¹³ Although the specific requirements, mandates, and goals of each state's legislative program differ, most state laws provide incentives to increase the use of renewable energy as a fuel source, and many state laws also discourage, or even restrict entirely, the use of certain forms of non-renewable energy.¹⁴

The goal of providing renewable energy standards is accomplished by several legislative variants, including: clean energy standards (which can allow for certain, low-polluting non-renewables); renewable goals (which are generally non-binding aspirations); renewable mandates (which are binding); and carve-outs (which are specific requirements to

See Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir.), *reh'g denied*, 740 F.3d 507 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2884 (2014).

¹¹ *See* Energy Policy Act of 2005, Pub. L. No. 109-58, §1251, 119 Stat. 601 (2005).

¹² *See Renewable Energy Standards*, *supra* note 6.

¹³ *See, e.g.*, ARIZ. ADMIN. CODE § R14-2-1806 (2007) (extra credit multipliers to incentivize in-state solar generation); 225 MASS. CODE REGS. 14.05(4)(a), 14.07(2) (2018) (in-state solar carve out); DEL. CODE. ANN. tit. 26, § 356 (2018) (renewable multipliers for in-state solar and wind facilities); *see also* Steven Ferrey, *Threading the Constitutional Needle with Care: The Commerce Clause Threat to the New Infrastructure of Renewable Power*, 7 TEX. J. OIL, GAS & ENERGY L. 59, 72 (2012) (noting that geographic preferences “fall into several categories: (1) larger REC multipliers for geographic preferences, (2) in-state REC preferences, (3) in-region geographic preferences, (4) absolute requirements for geographic discrimination, and (5) geographic preferences for use of in-state businesses, products, or both.”).

¹⁴ *See, e.g.*, HAWAII REV. STAT. §§ 269-91 to 176 (2018) (seeking 100% of its energy from only renewable sources by 2045).

incentivize particular energy technologies).¹⁵ Notably, RPS and RES programs in many states require that a specific percentage of energy sold by a utility to its in-state consumers must come from renewable energy resources, which is of particular importance to the dormant Commerce Clause challenges, as discussed below. For example, Colorado and Massachusetts mandate that, by 2020, thirty-percent and twenty-seven percent of each state's electricity, respectively, must come from renewable energy sources like wind and solar power.¹⁶ Therefore, utilities in those states will be required to provide electricity from sources that emit fewer carbon dioxide emissions than traditional fossil fuel resources." By contrast, other state programs seek to enhance renewable energy production by discouraging or even prohibiting entirely the use of traditional resources, such as coal and natural gas, which contribute substantially to a state's carbon emissions. These efforts often coincide with a legislative solution to reduce global warming and mitigate climate change.¹⁷ For example, Oregon recently became the first state to pass legislation which aims to completely ban the use of coal-fired power by

¹⁵ See *Renewable Energy Standards*, *supra* note 6.

¹⁶ *State Renewable Portfolio Standards and Goals*, NAT'L CONF. OF ST. LEGISLATURES (July 20, 2018), <http://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx#co>; SEC'Y OF ENERGY AND ENVTL. AFFAIRS, MASSACHUSETTS CLEAN ENERGY AND CLIMATE PLAN FOR 2020 40 (Dec. 29, 2010), <http://www.mass.gov/eea/docs/eea/energy/2020-clean-energy-plan.pdf> (noting that "[i]n total, all [renewable energy] classes will account for 27 percent of electricity supply in [2020]").

¹⁷ See, e.g., *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir.), *reh'g denied*, 740 F.3d 507 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2884 (2014).

2035,¹⁸ and Hawaii aims to have 100 percent of its electricity come only from renewable energy sources by 2045.¹⁹

But despite these many state-led experiments, a wave of legal challenges threatens the continuing viability and scope of renewable energy standards. Though several of the legal challenges also involve claims of preemption by the Federal Power Act (“FPA”),²⁰ this article examines a separate line of cases involving the application of the dormant Commerce Clause of the U.S. Constitution. Notably, in two recently decided cases, *North Dakota v. Heydinger* and *Energy & Environment Legal Institute v. Epel*, the Eighth and Tenth Circuits addressed whether the particular state scheme aimed at incentivizing renewable energy to reduce GHG emissions ran afoul of the dormant Commerce Clause.²¹ The sections that follow examine these cases by outlining the applicable law, describing the two state programs at issue, and looking to the Courts’ arguably contradictory holdings on the question of state renewable energy standards.

¹⁸ S.B. 1547, 78th Or. Leg. Assemb., Reg. Sess. (Or. 2016), <https://olis.leg.state.or.us/liz/2016R1/Downloads/MeasureDocument/SB1547/Enrolled>

¹⁹ See, e.g., HAWAII REV. STAT. § 269-92 (2018).

²⁰ The Federal Power Act gives exclusive jurisdiction over wholesale power transmission and rate-setting to the federal government, preempting state authority to regulate the wholesale markets. 16 U.S.C. § 824(a) (2018); see also *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986); *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 371 (1988) (“FERC has exclusive authority to determine the reasonableness of wholesale rates.”). Several courts have noted that state involvement in renewable contracts interferes with FERC’s exclusive authority to regulate wholesale power rates. See, e.g., *Hughes v. Talen Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016); *North Dakota v. Heydinger*, 825 F.3d 912, 913-14 (8th Cir. 2016).

²¹ Compare *Heydinger*, 825 F.3d 912, with *Energy & Env’t Legal Inst. v. Epel*, 793 F.3d 1169, 1169 (10th Cir. 2015).

III. The Dormant Commerce Clause

The Commerce Clause of the U.S. Constitution grants Congress the power “to regulate Commerce . . . among the several States.”²² This power to regulate commerce is not limited to positive grants of legislation, but, impliedly includes a negative or “dormant” limitation as well.²³ Under the dormant Commerce Clause, state laws are deemed unconstitutional if they facially discriminate against or place an undue burden on interstate commerce.²⁴ As such, the dormant Commerce Clause inquiry is driven primarily by concerns about “economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”²⁵

Modern dormant Commerce Clause jurisprudence has proceeded down two separate avenues. In the first, the court inquires as to whether the state legislation discriminates on its face.²⁶ If so, strict scrutiny review applies and the legislation is *per se* unconstitutional.²⁷ In the second, the court asks whether the legislation has the incidental effect of burdening interstate commerce.²⁸ If so, it may be discriminatory in effect and the court applies a balancing test.²⁹

a. *Pike* Balancing Test

²² U.S. CONST. art. I, § 8, cl. 3.

²³ See, e.g., *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of Or.*, 511 U.S. 93, 98–100 (1994).

²⁴ *Id.*

²⁵ *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988).

²⁶ *Id.*

²⁷ *Id.* at 274–75, 279.

²⁸ *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

²⁹ *Id.*

When state legislation appears to regulate “even-handedly” a legitimate local public interest but the regulation has an incidental discriminatory effect on interstate commerce, the court applies a balancing test in which it weighs the “extent of the burden [on interstate commerce]” against the local “[state] interest” achieved by the statute.³⁰ This balancing approach, first articulated in *Pike v. Bruce Church*, requires that courts uphold a statute unless the burden imposed on the regulated commerce at issue is “clearly excessive in relation to the putative local benefits.”³¹

b. Extraterritoriality Principle

The extraterritoriality principle further complicates the dormant Commerce Clause analysis. The extraterritoriality principle applies when state legislation regulates conduct that occurs “wholly outside” its own borders.³² To determine whether a state statute controls extraterritorial commerce, a court must inquire as to “whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.”³³ “[L]aws of that sort are deemed almost *per se* invalid.”³⁴

Notably, however, the Supreme Court applies the extraterritoriality principle “in relatively few cases” and has utilized the

³⁰ *Id.* at 142.

³¹ *Id.*

³² *Healy v. Beer Inst.*, 491 U.S. 324, 336–37 (1989).

³³ *North Dakota v. Heydinger*, 825 F.3d 912, 919 (8th Cir. 2016) (quoting *Healy*, 491 U.S. at 336).

³⁴ *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1172 (10th Cir. 2015) (quoting *KT&G Corp. v. Attorney Gen. of Okla.*, 535 F.3d 1114, 1143 (10th Cir. 2008)).

“extraterritoriality principle to strike down state laws only three times.”³⁵ The principle has also been applied relatively inconsistently, especially as it pertains to the question of whether the extraterritoriality principle applies exclusively to statutes that effectuate price controls and price affirmations.³⁶ Finally, when it comes to RPS and RES legislation, the U.S. Circuit Courts of Appeals are split as to whether and to what extent the extraterritoriality principle applies.

IV. Reconciling *Heydinger* and *Epel*

Despite the relative infrequency with which the Supreme Court utilizes the extraterritoriality aspect of the dormant Commerce Clause, the Eighth and Tenth Circuits examined it in two recent challenges to state renewable energy standards: *Heydinger* and *Epel*. The following section will outline those two cases and examine the courts’ contradictory approaches to interpreting the extraterritoriality principle as applied to RPS and RES legislation.

a. *Energy & Environment Legal Institute v. Epel*

³⁵ *Epel*, 793 F.3d at 1172.

³⁶ The First, Ninth, and Tenth Circuits have limited the extraterritoriality principle’s scope solely to price control statutes, while the Second, Sixth, Seventh, and Eighth Circuits have applied the extraterritoriality principle more broadly to non-price control statutes. *Compare* *IMS Health Inc. v. Mills*, 616 F.3d 7, 42 n. 50 (1st Cir. 2010), *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1103 (9th Cir. 2013), *rehearing denied*, 740 F.3d 507 (9th Cir. 2014), *cert. denied*, 134 S. Ct. 2884 (2014) and *Epel*, 793 F.3d at 1172–73, *with* *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 100, 103–04 (2d Cir. 2003), *Am. Beverage Ass’n v. Snyder*, 735 F.3d 362, 366 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 61 (2013), *Nat’l Solid Waste Mgmt. Ass’n v. Meyer*, 63 F.3d 652, 659–60 (7th Cir. 1995), *cert. denied*, 517 U.S. 1119 (1996), *North Dakota v. Heydinger*, 825 F.3d 912, 912 (8th Cir. 2016).

In 2015, the Tenth Circuit confronted a dormant Commerce Clause challenge to Colorado’s renewable energy standards in *Energy & Environment Legal Institute v. Epel*.³⁷ The Colorado statute at issue in *Epel* involved a state renewable energy mandate enacted by voters through a referendum petition.³⁸ Specifically, the statute “require[d] electricity generators to ensure that 20% of the electricity they sell to Colorado consumers comes from renewable sources.”³⁹

In challenging this legislation, the plaintiffs claimed that Colorado’s renewable energy mandate of twenty percent ran afoul of the dormant Commerce Clause because it had the “practical effect” of limiting out-of-state actors from participating in Colorado’s electricity market unless they generated electricity through renewable means.⁴⁰ Because certain out-of-state actors could not participate, the plaintiffs argued that the renewable scheme essentially effectuated price controls and thus controlled “extraterritorial” conduct. Finally, the plaintiffs contended that such a statute was *per se* invalid.⁴¹

The *Epel* decision, notably authored by now-Justice Gorsuch, ultimately upheld Colorado’s renewable mandate, rejecting the dormant Commerce Clause challenge and the extraterritoriality principle as applied in this context.⁴² Specifically, the Court noted that because Colorado’s renewable mandate was not a price-control statute in that it did not “link prices paid in Colorado with those paid out of state” and did

³⁷ *Epel*, 793 F.3d at 1170.

³⁸ *Energy & Env’t Legal Inst. v. Epel*, 43 F. Supp. 3d 1171, 1174 (D. Colo. 2014).

³⁹ *Epel*, 793 F.3d at 1170.

⁴⁰ *Id.* at 1171, 1174.

⁴¹ *Id.* at 1174–75.

⁴² *Id.*

not disproportionately harm out-of-state businesses, the extraterritoriality principle and the “near *per se* rule” of invalidity did not apply to this legislation.⁴³

b. North Dakota v. Heydinger

Although the Tenth Circuit in *Epel* ultimately concluded that the Constitution’s bar against extraterritorial state legislation involving interstate commerce is limited to price-affirmation and price-control statutes, the Eighth Circuit in *North Dakota v. Heydinger* disagreed. The statute at issue in this case was Minnesota’s RESs.

Like Colorado, Minnesota experimented with legislation aimed at reducing GHG emissions by requiring that renewable resources make up 25% of utilities’ electricity sales by 2025.⁴⁴ To meet this mandate, the state passed legislation which, *inter alia*, prohibited the import of power into Minnesota from a “new large energy facility” that would contribute to statewide emissions.⁴⁵ It also prohibited long-term power contracts that would increase Minnesota’s carbon emissions.⁴⁶ Although neutral on its face, the effect of this statute was to burden interstate commerce by

⁴³ *Id.* at 1173–75.

⁴⁴ MINN. STAT. § 216B.1691 (2018) (amended to eliminate this provision in 2017).

⁴⁵ The statute defined “new large energy facility” to exclude sources that 1) use natural gas as a primary fuel; 2) are designed to combine heat and power to provide peaking, intermediate, emergency backup, or contingency services; and 3) use turbine technology, among others. MINN. STAT. § 216H.03, 3(2)–(3) (2016) (statute subsequently amended to eliminate these provisions on May 31, 2017).

⁴⁶ *Id.* (statute subsequently amended to eliminate these provisions on May 31, 2017).

restricting new out-of-state coal coming into Minnesota from neighboring North Dakota.⁴⁷

In *Heydinger*, the plaintiffs successfully challenged the Minnesota legislation as an extraterritorial reach which ran afoul of the dormant Commerce Clause.⁴⁸ Unlike in *Epel*, however, the lead opinion in *Heydinger* applied the extraterritoriality principle to strike down Minnesota's renewable energy and emissions reduction standards, despite finding that the Minnesota statutory scheme was *not* a price-control statute.⁴⁹ Notably, the opinion concluded that isolating the application of the extraterritoriality principle to price-control or price-affirmation laws would effectively “insulate all environmental prohibitions from . . . Commerce Clause scrutiny” and ultimately refused to do so in this instance.

c. “*Epel v. Heydinger*”

The lead opinion in *Heydinger*, however, misses the mark. Indeed, two of the judges on the three-judge panel in *Heydinger* wrote separately to concur in the judgment only, disagreeing that the scheme violated the

⁴⁷ See, e.g., Amended Complaint for Declaration & Injunctive Relief, *North Dakota v. Swanson*, No. 11-CV-3232, 2011 WL 7783395 (D. Minn., Nov. 23, 2011) (“In practical effect, a ‘new large energy facility’ includes only coal-powered facilities.”).

⁴⁸ *North Dakota v. Heydinger*, 15 F. Supp. 3d 891, 910 (D. Minn. 2014), *aff'd*, 825 F.3d 912 (8th Cir. 2016). In determining that the statute was constitutionally invalid under the dormant commerce clause, the district court did not reach the question of whether the statute was preempted by the Clean Air Act or the Supremacy Clause. *Id.* In affirming, two of the judges on the Eighth Circuit's three-judge panel did find that the statute was preempted by the Federal Power Act or the Clean Air Act. *North Dakota v. Heydinger*, 825 F.3d 912, 913–14 (8th Cir. 2016).

⁴⁹ *Heydinger*, 825 F.3d at 922. By contrast, the Tenth Circuit in *Epel* refused to extend the extraterritoriality principle because Colorado's renewable energy mandate was *not* a price control statute. *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1174 (10th Cir. 2015).

extraterritorial aspect of the dormant Commerce Clause.⁵⁰ In RESs and RPSs, there is no attempt at “price control” or “price affirmations,” as both Courts explicitly found. And, when combined with the fact that there is neither an attempt to control out-of-state prices nor a disproportionate burden on out-of-state energy producers, the near *per se* rule of invalidity under the extraterritoriality principle does not apply to state renewable energy portfolio standards. For this reason, the approach taken by the Tenth Circuit in *Epel* was the correct application of the extraterritoriality principle in the context of renewable energy standards.

First, although there may be minor tangential effects felt by the grid as a result of RPSs and RESs, the Colorado and Minnesota statutes could not be said by either court to “effectuate price control,” and this will invariably be true for the vast majority of state RPSs. If the legislation cannot be said to generally effectuate price controls or serve as a price affirmation statute, the extraterritoriality principle does not apply. And at this stage, the cumulative effects of adding diverse energy mandates to the electric power grid are uncertain, both for the grid itself and for consumers. Rather than attempts to control pricing, state-led RPS and RES initiatives are intended to incentivize providers to help advance states’ legitimate interests in reducing their GHG contributions. Such a goal is permissible and cannot feasibly be said to affirm or control pricing, in intent or in effect. In fact, Justice Gorsuch explicitly noted in *Epel* that calling the Colorado legislation a price-control scheme “might lead to the

⁵⁰ Judge Murphy disagreed that the Minnesota statute violated the dormant Commerce Clause and instead concluded that the statute was preempted by the FPA because it was interfering with wholesale power rates. *Heydinger*, 825 F.3d at 923, 926 (Murphy, J., concurring); Judge Colloton also disagreed and instead concluded that it was preempted under the CAA. *See Heydinger*, 825 F.3d at 927 (Colloton, J., concurring).

decidedly awkward result of striking down as an improper burden on interstate commerce a law that may not disadvantage out-of-state businesses and that may actually *reduce prices* for out-of-state consumers.”⁵¹

Next, at this stage in state-led experimentation with RES and RPS statutes, the legislation cannot be said to attempt to “wholly control” conduct occurring beyond the boundaries of the state. Because of the nature of the grid and the inter-connectedness of our energy needs, some state renewable legislation will, of course, have the potential to reach outside state borders. But *some* extraterritorial reach is permitted,⁵² and the extraterritorial principle of the dormant Commerce Clause does not apply “merely because [a statute] affects in some way the flow of commerce between the States.”⁵³

Finally, there is no evidence that out-of-state producers are disproportionately burdened by a state’s RPS legislation such that a state’s scheme would implicate concerns of economic protectionism that underlie the dormant Commerce Clause analysis. Whether it is a coal company in Pennsylvania or in Maryland, both will be equally frustrated by Maryland legislation that aims to encourage the use and sale of renewable energy for power, as opposed to traditional carbon-emitting resources like coal. In fact, Justice Gorsuch acknowledged in the *Epel* decision that although it is true that “fossil fuel producers . . . will be

⁵¹ *Epel*, 793 F.3d at 1174 (emphasis added).

⁵² Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 923 (2002).

⁵³ See *Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937, 940 (9th Cir. 2013).

hurt,” it is likely that “*all* fossil fuel producers in the area . . . will be hurt equally and all renewable energy producers in the area will be helped equally.”⁵⁴ Thus, the Court implied that in order for the extraterritoriality principle to apply, and with it, the presumption of *per se* invalidity, there must be a *disproportionate* effect felt by out-of-state producers or consumers in price.⁵⁵ Such an effect is not presented by this legislation.

In sum, the extraterritorial aspect of the dormant Commerce Clause has been incorrectly applied to RPSs and RESs. As Justice Gorsuch notes, the extraterritoriality principle is “the most dormant doctrine in dormant [C]ommerce [C]ause jurisprudence.”⁵⁶ In fact, the principle has not been used by the Supreme Court in over two decades,⁵⁷ and it should not be revitalized in the renewable energy context today.

d. The Uncertain Future for States and Renewable Energy Standards

Heydinger and Epel illustrate the confusion over the extraterritoriality principle’s scope, as well as the infeasibility of imposing a *per se* test of invalidity onto legislation related to the electric grid. The cases examined here, however, represent just two examples of a wide-

⁵⁴ *Epel*, 793 F.3d at 1174 (emphasis added).

⁵⁵ *See id.* (“The mandate does have the effect of increasing demand for electricity generated using renewable sources and . . . you might expect that to lead to higher prices for electricity of that sort for everyone in the market, . . . [b]ut the mandate also reduces demand for and might be expected to reduce the price everyone in the market has to pay for electricity generated using fossil fuels. So the net price impact on out-of-state consumers is far from obviously negative and, for all we know, may tip in favor of those willing to shift usage toward fossil fuel . . . electricity.”).

⁵⁶ *Epel*, 793 F.3d at 1170.

⁵⁷ The Supreme Court last explored extraterritoriality in *Healy v. Beer Inst.*, 491 U.S. 324 (1989).

spread problem with judicial interference in renewable energy legislation at this stage. There exists a similar conflict among other courts in determining the correct standards to apply to RESs, RSPs, and other renewable energy legislation.⁵⁸

Notably, the structure and wording of each state's renewable scheme is a crucial consideration for legislators.⁵⁹ In the *Heydinger* court's analysis, it appears as though the language surrounding the "import" of new energy from certain facilities, as well as Minnesota's connection to a regional transmission grid, may have influenced the court's decision to strike down the legislation as geographically or economically protectionist. By contrast, the fact that Colorado did not use any language that referenced where the energy must come from, and the fact that Colorado is not connected in the same way to a regional transmission grid, may have influenced the alternative outcome in the *Epel* case. But regardless of the slight differences between the two states' schemes, it does not make sense to invite the application of extraterritoriality, and indeed to apply it so inconsistently, in this context.⁶⁰

⁵⁸ In *Rocky Mountain Farmers Union v. Corey*, 730 F.3d at 1078, 1104 (9th Cir. 2013), for example, the Court held that California's scheme did not run afoul of the extraterritoriality ban under the dormant Commerce Clause and that California was properly regulating internal markets by setting incentives to produce less environmentally harmful products.

⁵⁹ For example, states can withstand constitutional challenges if they word their RSP statutes in a way that does not give preferential treatment to in-state facilities as opposed to out-of-state since the Supreme Court's 2016 decision in *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016).

⁶⁰ See, e.g., Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 923 (2002) ("[A]ll but one of the Supreme Court cases that have struck down state regulations on the basis of extraterritoriality have concerned statutes that are readily characterized as protectionist."). RPSs and RESs that seek only to reduce GHG emissions and barriers to entry for renewable energy technologies in markets dominated by fossil fuels are not "protectionist" legislation in

As discussed above, legislation that aims to achieve the important state interest in reducing state contributions to GHG emissions through increased use of renewable energy cannot be said to “effectuate price control” or to “wholly control” conduct outside of the state. Legislation that incidentally burdens interstate commerce is not enough to constitute *per se* invalidity. And the nature of the grid requires an alternative approach. The proper approach to examining states’ renewable energy standards is judicial deference to valid legislative goals and the *Pike* balancing test. Under the *Pike* balancing approach, in which the Court would weigh the local benefits to the state against the incidental burden on out-of-state commerce, several state RPS and RES statutes would indeed withstand *Pike* scrutiny.

An analysis by which judges scrutinize but exercise considerable deference to a state’s legitimate local interests would be proper in the context of RPSs. For example, Colorado’s or Minnesota’s strong state interest in promoting renewable energy, reducing GHG emissions, and lowering pollution-related health care expenses would likely outweigh any incidental burdens on interstate energy sales, and would therefore satisfy the *Pike* test. Similarly, in *Rocky Mt. Farmers Union*,⁶¹ the Court held that California’s initiative did not run afoul of the extraterritoriality principle under the dormant Commerce Clause and that California was

the same way as other Supreme Court cases. *See, e.g.*, *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 585 (1986) (prohibiting alcohol distillers from selling alcohol in NY for a higher price than in other states); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) (prohibiting NY milk distributors from buying milk in Vermont at a lower price).

⁶¹ *Rocky Mountain Farmers Union*, 730 F.3d at 1104.

properly regulating internal markets by incentivizing the production of less environmentally-harmful products.

Under either approach, however, the current statutory landscape will remain outdated and will continue to stall the United States' progress in this field unless Congress creates and implements a national renewable energy portfolio standard.⁶² As Justice Brandeis once noted, “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁶³ It is in this precise circumstance where courageous states undertake a social and economic risk by incentivizing the eventual transition to renewable energy sources in a carbon-constrained world. Those states should be left free from judicial interference to “serve as a laboratory” in such a compelling experiment in renewable energy policies.⁶⁴

In sum, the nature of the electric grid is unique; it involves complex networks in which electrons flow constantly between borders. The reality remains that anything that a state does to regulate the electric grid could affect the flow of electrons and the price of energy outside of its borders; as Justice Gorsuch notes, this could ultimately favor of out-of-state producers and consumers. Judges should leave the states to experiment with their important local interests and utilize their technical

⁶² The federal statutory landscape was initially not designed to account for such a growingly complex and interconnected grid, given the technology advancements that have occurred since the mid-20th century. *See, e.g.*, Federal Power Act, 16 U.S.C. § 791(a) (1920); Natural Gas Act 15 U.S.C. §§ 717-717(z) (1938).

⁶³ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 386–87 (1932) (Brandeis, J., dissenting).

⁶⁴ *See id.*

and legislative expertise in mitigating climate change by encouraging the generation of renewable energy facilities and diversification of energy portfolios.

Courts should adopt a consistent approach to analyzing local RPS and RES legislation, as such legal uncertainty discourages investors and impedes the potential for advancing state renewable energy initiatives. At this stage, states will not be able to ensure the regulatory and legal certainty that is necessary to attract investors in the renewable sphere if courts cannot agree on the correct standard to apply. States are best advised to push ahead with RESs and RPSs until either the Supreme Court clarifies the correct constitutional standard to apply, or until Congress defines a more uniform and concrete federal energy standard.

V. Conclusion

In light of the disagreement regarding the scope of the extraterritoriality principle under the dormant Commerce Clause, I contend that *Heydinger* was wrongly decided. The extraterritoriality principle does not, or at least should not, apply to renewable energy statutes that do not affirmatively effectuate price controls. Although there are differences in form between the two statutes at issue in *Heydinger* and *Epel*, as will often be true of state statutes prescribing renewable energy standards, the discrepancies in these two notable cases create legal uncertainty for the future of renewable energy legislation. As a result, the question remains as to whether a state can permissibly restrict or prohibit the use of traditional, non-renewable electricity. It also remains to be seen whether states are permitted under the dormant Commerce Clause

of the U.S. Constitution to incentivize use of renewable energy in a utility's portfolio.

Inconsistent judicial interference in a matter best left to the “courageous states”⁶⁵ and their legislative expertise could continue to result in a climate of uncertainty. Such an approach will hinder our ability to move forward in the eventual and necessary transition to renewable energy in a carbon-constrained world. Until the Supreme Court clarifies the correct standard to apply in this context, or until Congress steps in to create a uniform federal policy, the various branches of government will only continue to trip over power lines in regulating renewable energy.

⁶⁵ See *New State Ice Co.*, 285 U.S. at 386–87 (Brandeis, J., dissenting).
