



HARVARD LAW SCHOOL
Environmental Law Program
Policy Initiative

MINIMIZING CONSTITUTIONAL RISK

Crafting State Energy Policies that Can Withstand Constitutional Scrutiny

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Introduction

States play leading roles in forging American energy policy, but they are limited by the Constitution to regulating in-state activities and transactions. Congress has empowered federal agencies to regulate matters that cross state boundaries, including air pollution, interstate energy sales, and nationwide efficiency standards. As the electric grid has become more interconnected across state lines, state regulation increasingly affects and overlaps with federal authority, challenging the efficacy of historic jurisdictional lines and applicability of Constitutional doctrines.

Since 2008, parties have challenged state energy policies in more than fifteen states, asserting that federal law preempts state action, or that a state policy impermissibly regulates or discriminates against interstate commerce. Most challenges target state electricity policies, from incentives for new gas-fired generation and mandates that utilities purchase renewable energy to limits on coal-fired power and feed-in tariffs. Other lawsuits have sought to overturn regulations limiting lifecycle greenhouse gas emissions of transportation fuels, incentives for hybrid taxis, and a state building code offering incentives for installing high-efficiency appliances.

These lawsuits need not halt state clean energy policymaking. Rather, policymakers can learn from them to understand the bounds of state authority set by the Constitution and Congress and appreciate the legal risks of various policy options. Armed with this understanding, policymakers can identify legal pathways for diversifying and de-carbonizing state energy supplies in support of environmental and economic goals.

This paper extracts key lessons from recent energy policy lawsuits, weighs constitutional risks of various state energy policies, and suggests ways for states to work within constitutional limits to achieve policy goals while minimizing the risk of a constitutional challenge. The paper's Legal Appendix provides deeper background about the key constitutional doctrines and four federal statutes that have been the subjects of recent preemption challenges. To read the filings in recent energy lawsuits, please visit our website <http://www.statepowerproject.org>.

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Minimizing Dormant Commerce Clause Scrutiny

The Commerce Clause of the U.S. Constitution grants Congress the authority to “regulate commerce . . . among the several states and with the Indian tribes.” Courts read into this authority restrictions on state action that interferes with interstate commerce. Although the extent of the restrictions is up for debate, courts typically subject a state law to three inquiries under the so-called “dormant” Commerce Clause doctrine:

1. Does the law discriminate against out-of-state interests?
2. Does the law regulate commerce occurring wholly outside the state’s boundaries?
3. Does the law impose a burden on interstate commerce that is “clearly excessive” in relation to the stated local benefits?¹

“In all but the narrowest circumstances,” courts will strike down a state law that differentiates between in-state and out-of-state competing economic interests in a way that benefits the former and burdens the latter.² The Legal Appendix includes examples of discriminatory laws and state taxes or fees that courts have found unconstitutional. The prohibition on economic discrimination is the most well-established aspect of dormant Commerce Clause case law.

The inquiry into whether a law regulates outside a state’s boundaries is less established, and the Supreme Court has rarely struck down a state law because of its “extraterritorial” reach.³ That said, every federal Circuit except the Fifth includes an extraterritoriality inquiry in its dormant Commerce Clause analysis.⁴ Recent challenges attempt to capitalize on the ambiguity of the legal doctrine and expand its application to target state laws that reach entities selling in interstate markets.

For example, plaintiffs argued that Colorado’s renewable portfolio standard was unconstitutional because it “projects Colorado law and policy outside of the borders of Colorado and regulates out-of-state production practices.”⁵ In an opinion written by now-Justice Neil Gorsuch, the Tenth Circuit rejected this broad application of the dormant Commerce Clause, speculating that if successful, it could provide the basis for “a novel lawmaking project” that would seek to rewrite numerous state laws.⁶

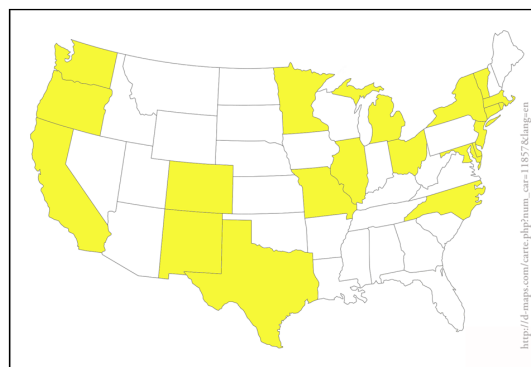
The breadth of the extraterritorial inquiry — and

indeed the appropriateness of the inquiry — will continue to vary and be a subject of debate until the Supreme Court provides clarification. Recent cases instruct that state policies can avoid the appearance of regulating out-of-state activities if they place legal obligations only on entities doing business in the state.

If a law survives the first and second inquiry, a court may subject it to what is known as the *Pike* balancing test. This inquiry requires a court to compare a law’s burden on interstate commerce against its local benefits. The court must consider the “nature of the local interest involved, and . . . whether it could be promoted as well with a lesser impact on interstate activities.”⁷

The Supreme Court has expressed skepticism about whether the judicial branch is suited to conduct this test;⁸ nevertheless, it remains part of the dormant Commerce Clause analysis. Because the inquiry is fact-intensive, it is hard to draw general conclusions about how to design a law that will survive this test. However, in practice, courts rarely strike down state programs under the *Pike* test, and no recent energy policy has been found invalid under *Pike*.¹⁰

Lawsuits can unsettle the energy regulatory landscape, potentially delaying investments and deployment. This section describes how states can achieve environmental policy goals without violating the dormant Commerce Clause doctrine.



States with energy policies that were challenged under the dormant Commerce Clause or Supremacy Clause (since 2008).

Mandates or Incentives for In-State Purchases

- States have responded to lawsuits by removing in-state requirements.
- If the state is the buyer, geographic discrimination is permissible because the dormant Commerce Clause is not implicated.
- If a state policy is motivated by non-protectionist purposes, locational limitations may be permissible.
- States should avoid rationalizing locational limitations based on economic benefits.
- A requirement to purchase environmental credits from facilities that deliver electricity into the region has been upheld.

Legal Background: A Renewable Portfolio Standard (RPS) or Renewable Energy Standard requires companies selling electricity to end-use consumers to generate or purchase a specific percentage of their energy from renewable sources. These laws typically require utilities to purchase and retire renewable energy credits (RECs) to demonstrate compliance. For example, if an RPS requires a utility to source ten percent of its sales from renewable sources, a utility may demonstrate compliance by holding RECs equivalent to at least ten percent of its sales.

A REC may signify that a quantity of electricity was generated by certain types of resources or represent the environmental attributes of a quantity of electricity.¹¹ The Second Circuit Court of Appeals recently reiterated that RECs are “inventions of state property law whereby the renewable energy attributes are ‘unbundled’ from the energy itself and sold separately.”¹²

As of July 2017, twenty-nine states and the District of Columbia had RPS laws.¹³ Some states require that utilities purchase a certain percentage of this renewable energy or RECs from renewable generators in the state, region, or utility service territory.¹⁴ Other states give utilities “bonus” credits for purchasing in-state renewable generation or RECs.¹⁵

Challenges have sought to strike in-state requirements and incentives from an RPS. Courts have not decided these claims; however, in response to lawsuits, a few states have modified the challenged provisions. For instance, Massachusetts law required distribution utilities to sign long-term contracts with renewable generators located in Massachusetts. After being sued, the Bay State suspended the in-state requirement.¹⁶ In response to a lawsuit filed against Missouri, regulators never finalized a provision that would have required utilities to meet RPS obligations with in-state renewables.¹⁷ The Colorado legislature

amended the State’s RPS to remove the phrase “in Colorado” from provisions offering REC bonuses and mandating procurement from certain resources.¹⁸

While courts have not reached the merits about these discrimination claims, the Seventh Circuit observed that the in-state requirement in Michigan’s RPS “trips over an insurmountable constitutional objection.” A state “cannot, without violating the Commerce Clause, discriminate against out-of-state renewable energy.”^a Challenges have not been mounted to state policies that require or encourage utilities to purchase types of energy available in only some states, such as offshore wind²⁰ or swine and poultry waste.²¹

Policy Workaround: Use the Market Participant Exception

Summary: Under Supreme Court case law, a state may favor in-state renewable energy generation if the state directly participates in the electricity market. According to the Court, a state participating in a market as a “purchaser, seller, or producer,”²² rather than a regulator, may favor its own citizens.²³ In these circumstances, the dormant Commerce Clause is not implicated because the state is participating in the market, not regulating it. An RPS or other program implemented through a state-run procurement process might meet the ‘market participant’ exception.

New York’s Energy Research and Development Authority (NYSERDA) implements that state’s RPS. The state agency procures RECs using funds collected from utility ratepayers to meet a statewide annual target set by the Public Service Commission (PSC).²⁴

In 2013, the PSC granted a NYSERDA petition to limit RPS eligibility to in-state renewable energy generation and off-shore wind interconnected to New York’s grid. The PSC reasoned that because NYSERDA is the only purchaser of the RECs used

A state participating in a market as a “purchaser, seller, or producer,” rather than a regulator, may favor its own citizens.

^a The case was about FERC’s approval of a MidContinent ISO tariff amendment. Michigan’s RES was not at issue in the proceeding, and was not struck down.

for RPS compliance, a New York REC is not “an article of interstate commerce” and there is no “market” for purposes of the dormant Commerce Clause.²⁵ Instead, the PSC found the REC amounts to a permissible State subsidy.²⁶

Hydro-Quebec petitioned for rehearing, arguing that a REC market does exist — consumers use RECs to demonstrate that they are purchasing renewable energy. The PSC affirmed its prior ruling and added that the state is a participant in the wider REC market. Now, the PSC found that New York could limit participation in the REC market to in-state generators because NYSERDA is a “market participant.”

According to the PSC, this exception allows NYSERDA, a public benefit corporation established under New York’s State Public Authorities Law and the sole purchaser of New York RECs for RPS compliance, to restrict its REC purchases to those generated by in-state renewable projects. No one challenged this final order in court.

Policy Workaround: Use Criteria other than Economic Protectionism for Making Locational Distinctions

Summary: Even where the dormant Commerce Clause does apply, states may be able to include locational requirements in renewable energy policies, so long as they are not primarily intended to bolster domestic economic competitiveness over out-of-state firms. Some non-economic benefits of renewable energy are contingent on the location of the generation. A state may be able to include locational requirements that are based on these types of benefits. For example, fossil-fuel fired generation uses large amounts of water²⁷ and emits pollution that is harmful to human health.²⁸ Locally sited renewable generation that can displace in-state fossil fuel generation may therefore reduce water use and local air pollution.

The California Legislature adopted this reasoning in its RPS,²⁹ which requires utilities to procure a certain amount of RPS-compliant energy from generators that connect to a California balancing authority.^b An out-of-state wind generator nonetheless filed an administrative challenge at the California Public Utilities Commission (CPUC), arguing that the interconnection requirement discriminated against out-of-state generators.

The CPUC rejected the challenge, concluding that

the requirement, along with other rules, ensured that California consumers receive RPS energy and realize the benefits articulated by the legislature. The CPUC also asserted that many out-of-state generators can connect to California, and that the rules do not create any preference for those located within California’s boundaries.³⁰ The CPUC’s rules were not challenged in court.

Distributed generation requirements are also inherently local. Colorado law requires that utilities meet a portion of their RPS obligations through distributed generation, including behind-the-meter generation. Challengers argued that the distributed generation requirement was discriminatory because it amounted to a de facto “in Colorado” requirement. The state responded that distributed generation offered several permissible benefits, including reducing energy losses due to long-distance transmission, improving reliability, and reducing peak demand.³¹ The court held that plaintiffs did not have standing to challenge this requirement and so did not issue a decision on the merits (see page 26 for more on standing).³²

States should be careful not to rationalize otherwise appropriate locational requirements based on economic benefits. The Supreme Court has said that courts “must assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces [the court] to conclude that they could not have been the goal of the legislation.”³³ Thus, if legislation is explicitly premised on permissible benefits, such as environmental protection, courts will generally be reluctant to find a discriminatory purpose. While in-state economic benefits may be politically attractive, explicitly including them in legislation or regulations may backfire in the face of a dormant Commerce Clause challenge.

States should be careful not to rationalize otherwise appropriate locational requirements based on economic benefits.

^b A balancing authority ensures that the supply of electricity is equal to consumer demand and maintains the safe operation of the electric grid in a particular region.

For instance, a district court relied on the rule's default "carbon intensity scoring" to find that California's Low Carbon Fuel Standard was discriminatory on its face (see pages 9 and 16 for a more detailed description). However, the court also quoted agency documents predicting that the regulation could lead to the construction of in-state refineries, which would "provide needed employment [and] an increased tax base for the state."³⁴ While the Ninth Circuit ultimately found that the Low Carbon Fuel Standard was not discriminatory, the stated in-state economic benefits created litigation risk for the rule.

Courts have relied on language about local economic benefits to strike down a Hawaiian statute protecting indigenous alcohols³⁵ and Illinois and Indiana statutes requiring pollution control equipment to enable the continued use of in-state high sulfur coal.³⁶

A lawful purpose does not render a discriminatory state law immune to dormant Commerce Clause claims. The Supreme Court has said that states may not pursue a legitimate goal "by the illegitimate means of isolating the State from the national economy."³⁷

Legal Challenge: New Jersey and Maryland Locational Requirements Do Not Discriminate

In 2012, generators filed separate lawsuits challenging a Maryland Public Service Commission order³⁸ and a New Jersey law³⁹ that required distribution utilities to sign contracts with developers of new natural gas-

fired power plants. Maryland's order required the new plant to be located in a particular PJM region, 98 percent of which is in Maryland. The New Jersey law established a system for evaluating potential projects that treated in-state projects more favorably. In both cases, the stated motivations for the locational requirements were to ensure in-state reliability and lower electricity prices for in-state consumers. Federal district courts in Maryland and New Jersey rejected dormant Commerce Clause challenges, although they found that the Federal Power Act preempted (See page 14).⁴⁰ The Maryland court noted that requiring the plant to be located in a particular region of the PJM interstate electricity market, rather than "in Maryland," did not save the order from Commerce Clause scrutiny.

However, the court held that the Maryland order did not discriminate against interstate commerce because the order did not erect any barriers to interstate commerce or provide any competitive advantages to the plant based on location.⁴¹ Moreover, "Maryland has a legitimate interest in ensuring that Maryland residents have available to them an adequate and reliable supply of electric energy."⁴² Under *Pike*, this non-protectionist interest outweighed any burdens on interstate commerce.⁴³

Likewise, the New Jersey court found no unconstitutional discrimination; the challengers could not overcome the "persuasive evidence" that "reliability issues could only be resolved in one of two ways – transmission . . . or additional generation *in or near the location where the reliability issue will*



occur [emphasis in original]. . . . As such, it appears reasonable that the [New Jersey] Board would incentivize construction in areas where reliability concerns are in flux.”⁴⁴

The Third and Fourth Circuits upheld these lower court decisions based on preemption and did not reach the Commerce Clause claims.⁴⁵ The Supreme Court affirmed the Fourth Circuit’s decision.⁴⁶

Legal Challenge: Connecticut Deliverability Requirement Does Not Discriminate

Connecticut’s RPS accepts RECs from a renewable energy facility located within New England or from an adjacent region that delivers energy into the New England grid. The owner of a solar project in Georgia filed suit, arguing that Connecticut law discriminates against its RECs. In 2017, the Second Circuit affirmed a lower court’s dismissal, holding that Georgia RECs are a “different product” from RECs that meet Connecticut’s requirements and the RPS “therefore does no more than treat different products differently in a nondiscriminatory fashion.”⁴⁷

Citing its previous holding that RECs are “inventions of state property law,” the court found that Connecticut has “invented a class of RECs that differs” from Georgia RECs. RECs that meet the regional deliverability requirement ensure that the RPS increases the renewable energy that Connecticut consumers receive. The court concluded that treating all REC producers similarly, regardless of location, would not serve Connecticut’s legitimate policy goals.

Preference for In-State Industry: Taxes or Fees

- State taxes may not discriminate against interstate businesses.
- Courts have not ruled whether a Systems Benefits Charge (SBC) is an acceptable mechanism for subsidizing in-state energy projects.

State taxes or fees must abide by dormant Commerce Clause limits.⁴⁸ In addition, the Supreme Court has held that proceeds of an even-handed tax on products or services subject to interstate competition may not be distributed to subsidize in-state businesses.

In *West Lynn Creamery*, the Supreme Court invalidated a tax that was applied to all milk wholesalers, regardless of location, because the revenue was then distributed only to in-state producers to maintain their competitiveness in interstate milk markets. Although the tax itself was not discriminatory, coupling the tax with payments only to Massachusetts producers “created a program

more dangerous to interstate commerce” than the tax or subsidy alone.⁴⁹

No recently filed lawsuits have challenged a state energy tax.

Policy Workaround: Structure Tax-Subsidy Schemes to Tax In-State Entities for In-State Services

Many states subsidize in-state energy projects through System Benefits Charges (SBCs) or similar items on ratepayers’ utility bills. An SBC is likely classified as a “fee” rather than a “tax,” a distinction that can be consequential as some states require legislative supermajorities to raise taxes.⁵⁰ Nonetheless, an SBC is functionally similar to a tax because state law requires all ratepayers to pay the charge.⁵¹

Regardless of whether it is classified as a tax or fee, an SBC can be distinguished from a tax on interstate commerce. Generally, an SBC is inherently intrastate; the charge appears on bills that an in-state utility sends to in-state customers for in-state purchases. An SBC can further be insulated from interstate commerce when a utility calculates it based on in-state services such as distribution of energy over local wires, rather than on retail sales that are more closely connected to interstate commerce.

SBC revenue is typically collected in a state-administered fund and then distributed to energy projects. Under some state laws, SBC revenue is distributed only to in-state projects.⁵²

Such in-state discrimination is unlikely to violate the dormant Commerce Clause because a state may use taxes on in-state services to benefit its own citizens.⁵³

Regulating In-State Participants in Interstate Markets

- Courts are likely to strike down a law that regulates a wholly out-of-state transaction.
- An extraterritorial analysis can turn on whether a state law places legal obligations on out-of-state entities or controls out-of-state transactions.
- Policies that place legal obligations on in-state entities, such as utilities selling to retail customers, should be safe from extraterritorial challenges.

When analyzing a claim that a state law regulates extraterritorially, a court’s inquiry focuses on whether the statute directly controls conduct in another state. A key part of that inquiry is determining whether the law places legal obligations on entities operating in other states. If it does, the law may be vulnerable to a legal challenge.

In 2014, a federal district court struck down Minnesota's law banning imported electricity from coal plants without carbon offsets because the statute's prohibition applied to any "person." According to the court, because the prohibition is not limited to persons in Minnesota, the statute's plain language could apply to entities buying and selling power wholly outside of Minnesota's borders.⁵⁴

Given the interstate nature of the electric grid, the court reasoned that a generator in neighboring North Dakota could import coal-fired electricity incidentally into Minnesota in violation of the statute, even if Minnesota utilities or consumers had not purchased its power. The court concluded that the law's practical effect is to "control non-Minnesota entities' conduct occurring wholly outside of Minnesota."⁵⁵ Notably, only one of the three Eighth Circuit judges reviewing the lower court's decision agreed with this reasoning (the other two judges held the law was preempted).⁵⁶

On the other hand, a federal district court determined the Colorado RPS "only regulates Colorado energy generators and the companies that do business with Colorado energy generators."⁵⁷ Although a generator selling power to a Colorado utility may be located out-of-state, the law does not regulate wholly out-of-state activity because one party to the transaction is located in Colorado. Nor did the standard impose conditions on electricity imported into Colorado. A unanimous Tenth Circuit panel affirmed the judgment.⁵⁸

The critical difference between the laws in Minnesota and Colorado is where the law places mandatory legal obligations. Minnesota's law targeted any "person" engaging in certain conduct. As noted, the court found the law unconstitutional because the unrestricted term "person" could be used by Minnesota regulators to control the conduct of out-of-state entities.

The Colorado statute targets Colorado utilities and out-of-state generators that "freely choose[] to do

business with a Colorado utility."⁵⁹ According to the district court, a voluntary incentive that induces an out-of-state generator to conform its conduct to Colorado law does not violate the dormant Commerce Clause. Similarly, narrow definitions of regulated entities have helped two California initiatives survive dormant Commerce Clause challenges (see below).

Legal Challenge: California Low Carbon Fuel Standard Does Not Regulate Extraterritorially

To comply with California's Low Carbon Fuel Standard (LCFS), California fuel blenders must purchase ethanol that on average does not exceed listed carbon intensity (CI) limits. "CI scores are based on [California's] assessment of [other] states' 'farming practices . . . crop yields; harvesting practices; and collection and transportation of the crop.'"⁶⁰ These factors track the federal government's standards for "greenhouse gas life cycle" analyses.⁶¹

In 2011, a federal district court ruled that the LCFS violated the dormant Commerce Clause, in part because it "impermissibly regulates extraterritorially."⁶² The court found that by considering how ethanol was produced and transported to the point of sale in California, the LCFS sought to regulate wholly out-of-state activities.⁶³ The Court also found that requirements like the LCFS could balkanize national ethanol markets or lead to inconsistent regulation.⁶⁴

The Ninth Circuit reversed, noting a distinction between "laws 'that regulate out-of-state actors directly' from those that 'regulate[] contractual relationships in which at least one party is located in [the regulating state]'.⁶⁵ Moreover, the court found that California did not seek to control out-of-state ethanol production or transportation; the state merely considered the effect of these factors in its life cycle analysis.⁶⁶

As for the district court's balkanization concern, the Ninth Circuit noted, "[i]f we were to invalidate regulation every time another state considered a



complementary statute, we would destroy the states' ability to experiment with regulation."⁶⁷

Legal Challenge: FERC Authorizes California CO2 Allowances in Market Rules

In 2014, a similar issue in California was brought before FERC. California law requires importers of electricity to hold allowances representing the carbon emissions associated with that energy. In June 2014, FERC approved the California ISO's Energy Imbalance Market (EIM), which extends the boundaries of the ISO's real-time market into other Western states.⁶⁸ The market rules permit a generator outside of California to include a bid adder with its energy bid to cover the cost of the GHG allowances. If a generator does not want to comply with the carbon emissions rules, it may submit a very high bid adder to ensure that its bid is uneconomic and will not be selected to serve California consumers.

A market participant requested that FERC reconsider the EIM bid adder rules, in part because they posed an "impermissible intrusion and burden by a state program on interstate commerce."⁶⁹ FERC rejected that argument, noting that participation in the new market is voluntary and that the market participant had failed to explain how incorporating California's requirement into the FERC-jurisdictional market violates the dormant Commerce Clause.⁷⁰ FERC's order was not challenged in federal court.

It is not clear that a FERC order could be challenged under the dormant Commerce Clause. The dormant Commerce Clause limits the regulatory authority of states, not federal agencies.

The Ninth Circuit [noted] a distinction between "laws 'that regulate out-of-state actors directly' from those that 'regulate[] contractual relationships in which at least one party is located in [the regulating state]'. "

Avoiding Preemption

Under the Constitution's Supremacy Clause, constitutional provisions and federal statutes are the supreme law of the land. Congress has provided federal agencies with exclusive jurisdiction over some areas of energy regulation, preempting state laws that encroach on this federal space. In other areas, federal agencies and states share responsibility, and states can supplement a federal standard or take a different approach from the federal regime. State law can still be preempted if it conflicts with federal statute or regulation.

The four federal laws most likely to overlap or conflict with states' energy regulation — the Federal Power Act, PURPA, Clean Air Act, and the Energy Policy and Conservation Act — are discussed in the Legal Appendix. Here, we highlight state energy policies at issue in recent preemption challenges. For some policies, there are “workarounds” that may enable state to avoid preemption.

Incentives for Electricity Generation

A state can choose from a number of policy options, to spur investment in new electric generation capacity or keep financially struggling plants open. States should be allowed to use standard economic development incentives, such as tax exempt bond financing or property tax relief,⁷¹ provided they align such incentives with dormant Commerce Clause doctrine.

States also have policy options specific to electricity generation. However, as discussed in more detail in the Legal Appendix, a significant limitation on state authority is that Congress granted FERC exclusive jurisdiction to regulate wholesale power sales. Direct state regulation of wholesale rates is therefore field preempted.⁷² This section examines three policies that may amount to impermissible wholesale rate making if not designed to avoid preemption: mandating feed-in tariffs, mandating purchases from specific generators or types of generators, and pricing renewable energy or environmental credits.

Designing a Feed-In Tariff (FiT)

- A state could mandate that utilities offer a FiT for generation facilities owned by a state or local government.⁷³
- A state could establish a FiT for municipal or cooperative utilities because FERC does not have jurisdiction over those entities.⁷⁴
- A state-mandated FiT may be preempted unless it meets the technical requirements of PURPA.

Because FERC has exclusive jurisdiction to regulate wholesale power sales, a state-mandated FiT with a rate set by the state may be field preempted.

Legal Background: A feed-in tariff is a standard offer contract that a utility must offer to any generation facility that meets certain criteria. Because FERC has exclusive jurisdiction to regulate wholesale power sales, a state-mandated FiT with a rate set by the state may be field preempted, although no federal court has ruled on this precise issue.

Policy Workaround: Design a FiT Within the Parameters Set by PURPA

Summary: States can avoid preemption by structuring a FiT that comports with PURPA. According to FERC, PURPA allows states to set wholesale rates for renewable energy that reflect the costs of energy generated by renewable sources and that account for reduced emissions and other benefits, provided these benefits reflect costs that the utility would otherwise incur.

How PURPA Works: In PURPA, Congress crafted an exception to the FPA restriction on state wholesale ratemaking that facilitated the creation of non-utility owned generators. PURPA requires utilities to purchase energy and capacity from a “qualifying facility” (QF) — a renewable generator 80 megawatts (MW) or less or a co-generator meeting certain efficiency requirements.⁷⁵ Congress determined that this must-purchase requirement was necessary to spur the development of QFs because utilities were vertically integrated when PURPA was enacted and would not have purchased power from competing facilities.

A FERC order implementing PURPA stipulates that the purchase price must not exceed the utility's “avoided cost.”⁷⁶ PURPA avoided cost is the cost of energy that a utility would have to buy if it were not buying energy generated by the qualifying facility. State regulators set utility-specific rates,

which FERC is “reluctant to second guess” because the determinations are “by their nature fact-specific.”⁷⁷

FERC has explained that because states can dictate a utility’s purchasing decisions, they can also determine which generators are displaced by a qualifying facility. If a state requires a utility to procure energy from renewable generators, for instance, those types of generators may provide the basis for calculating a utility’s avoided cost for that procurement requirement.⁷⁸

PURPA therefore permits (but does not require) a “tiered” avoided cost rate structure.⁷⁹ For example, a utility in a state with an RPS may have to procure energy from two tiers of generators. One tier is defined by the RPS, and the second tier consists of all other sources that the utility relies on to maintain adequate service. A state could have additional tiers, if its RPS includes a solar carve-out or other mandates for a particular type of renewable source.

Recognizing that non-utility generators may have easier access to the wholesale market than they did when PURPA was enacted, Congress amended the statute in 2005 to allow utilities to seek an exemption from the qualifying facility purchase requirement.⁸⁰ FERC’s regulations establish a rebuttable presumption that utilities participating in an RTO or ISO (see below) should be relieved of their obligation to purchase energy from qualifying facilities larger than 20 MW.⁸¹ To be relieved of its obligation for smaller facilities, a utility must demonstrate that the facility has nondiscriminatory access to competitive markets.⁸²

A PURPA-Compliant FiT: Under a multi-tier avoided-cost structure in a state with an RPS, a state can set a separate renewable energy avoided cost rate that is based on the cost of RPS-eligible generation. The rate may also include avoided environmental, transmission, or other costs, provided those costs are “real costs that would be incurred by utilities.”⁸³ States have adopted several different methodologies for calculating avoided cost rates.⁸⁴

Setting a multi-tiered avoided-cost rate structure is not without risk. While FERC has endorsed this approach, courts are not required to agree with FERC’s legal conclusions.⁸⁵

Legal Challenges: Developers Challenge FiTs in Vermont and California

Vermont Program: From 2009 to 2012, Vermont’s Sustainably Priced Energy Enterprise Development (SPEED) program set a FiT for qualifying facilities under 2.2 MW. In 2013, an auction mechanism set the SPEED rate. Neither mechanism set the rate based on a utility commission-approved avoided cost calculation. Qualifying facilities could choose to participate in SPEED and get this state-mandated rate, or take the avoided cost rate that had long been available to qualifying facilities in Vermont.

In 2013, Otter Creek, a 2 MW solar facility in Vermont, filed a complaint with FERC arguing that SPEED amounted to illegal wholesale ratemaking and was preempted by the Federal Power Act. FERC opted not to exercise its discretionary enforcement authority,⁸⁶ finding that Otter Creek had suffered no harm from the optional SPEED program because developers could take Vermont’s avoided cost rate instead of participating. According to FERC, a qualifying facility may voluntarily agree to any rate it finds acceptable. Otter Creek did not file a lawsuit.

California Program: As required by state law, each of California’s three investor-owned utilities has a renewable market adjusting tariff (ReMAT). The tariffs were available to facilities smaller than 3 MW and registered with FERC as qualifying facilities. The tariff rates were initially based on the results of an auction for new renewable capacity, and can be adjusted every two months based on market prices. Each utility offers the adjusted rate to project developers in its queue, who choose whether or not to accept the rate.

Winding Creek, a 1 MW facility in California, sued in federal district court alleging that ReMAT is inconsistent with PURPA and preempted by the Federal Power Act. In its June 2014 complaint,⁸⁷ Winding Creek alleges that ReMAT is preempted because its rate is not based on an avoided cost determination, and because it caps the total capacity of qualifying facilities that can participate. According to the complaint, while California continues to offer a short-run avoided cost rate to qualifying facilities, ReMAT has displaced the state’s long-run avoided cost rate for small facilities. The CPUC responded by arguing that PURPA does not require a state to offer a long-term avoided cost rate.

A federal court conducted a trial in the spring of 2017. As of July 2017, the case is still pending. Although neither state’s FiT has been overturned,

these two cases illustrate a FiT's legal vulnerability.

Mandating Purchases from Specific Generators or Resource Types

- A state may conduct a competitive procurement and require utilities to negotiate with the winning developers.
- A state may not change the rate that a generator receives for sales conducted through a FERC-regulated auction.

Market Background: Utilities serving approximately half of U.S. electricity customers participate in auction markets regulated by FERC through the Federal Power Act (ERCOT oversees intrastate transmission of electricity within Texas and is not regulated by FERC).⁸⁸ In these markets, generators submit offers to sell quantities of energy, while buyers, such as distribution utilities that sell electricity to consumers, submit offers to buy. The RTO/ISO computes the clearing price where supply intersects with demand, and then accepts all sellers' offers below the clearing price.

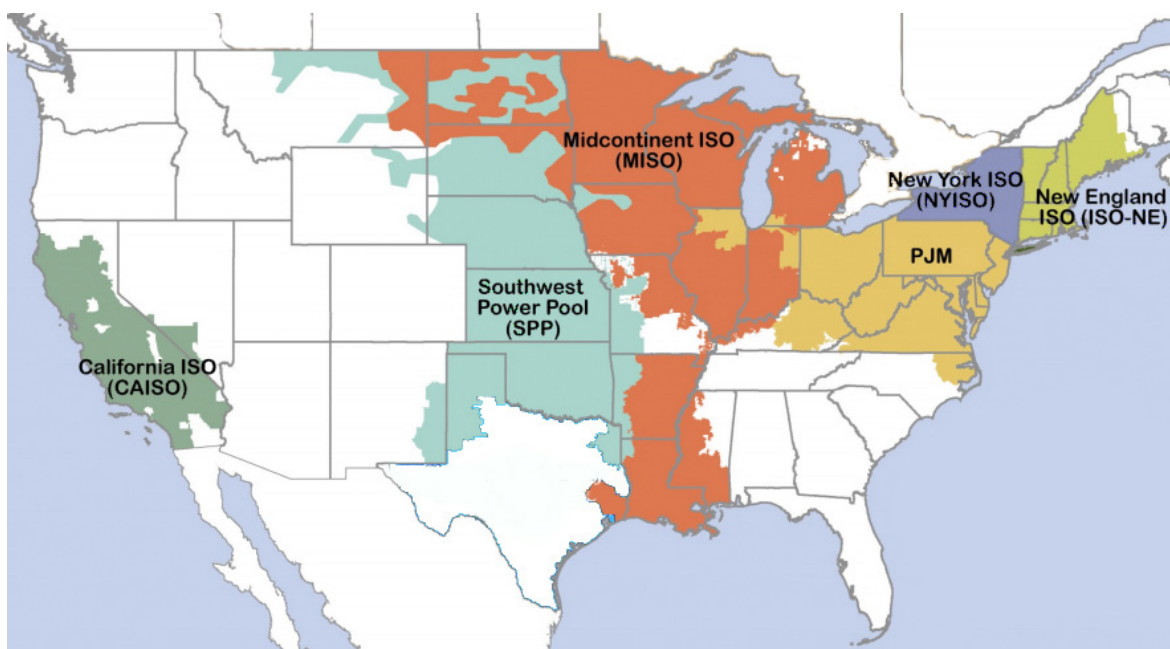
A utility typically does not procure all of its energy from an organized market. It may also procure energy

through bilateral contracts and, in some states, own its own power plants. In addition, generators in some markets can also sell future capacity bilaterally or through RTO/ISO-organized auctions. Capacity payments compensate plants for having the ability to generate energy at a later time. Under market rules, utilities have to demonstrate that they have paid for or contracted with sufficient capacity to meet their peak demand.

As long as it does not set a wholesale rate, a state should be able to require utilities to procure energy and capacity from particular types of generation resources. No one has challenged an RPS on preemption grounds, and no court has held that a state is prohibited from requiring utilities to contract with renewable generators or other specified resource types.

Moreover, it appears a state can require a utility to issue a request for proposals (RFP) for new generation or use other market-based mechanisms to procure a mandated amount of generation capacity. The Second Circuit recently called it "settled law" that "specifying the sizes and types of generators that may bid into [an RFP] . . . lies well within the scope

Map of FERC-Regulated Organized Markets



Source: FERC. Utilities in eight Western states participate in the California ISO's real-time energy market.

of [a state's] power to regulate its utilities.”⁸⁹

FERC has tacitly endorsed state authority to direct utility procurements with market-based mechanisms. When utilities in the Northeast divested their generation assets in the late 1990s, some states required utilities to participate in state-administered auctions to procure power for ratepayers that had not chosen an alternative retail supplier. FERC has repeatedly granted waivers to generation companies that allow them to sell to utilities with the same parent company.⁹⁰ These waivers suggest that FERC believes that the FPA allows states to administer a utility procurement process.

A 1995 FERC order concludes that “states have broad powers under state law to direct the planning and resource decisions of utilities,” and “assuming state law permits, may order utilities to purchase renewable generation.”⁹¹ FERC reiterated this conclusion in 2010.⁹² Yet, while it believes “states have numerous ways outside of PURPA to encourage renewable resources,” FERC does not discuss these, or identify whether specific procurement mechanisms might overstep into areas of FERC jurisdiction.

States should be careful that in mandating utilities purchase from certain types of resources they do not overstep their authority by regulating wholesale sales. Generation procurement is an area of shared authority; states retain jurisdiction over siting, environmental standards, and fuel choices, while FERC oversees wholesale sales and may assert jurisdiction over matters directly affecting those rates. State-mandated procurements lie at the confluence of this overlapping jurisdiction.

Legal Challenge: Connecticut May Set Terms of an RFP

A project developer filed multiple lawsuits in federal district court arguing that the Federal Power Act preempts Connecticut RFPs for renewable energy. State law required regulators to conduct RFPs and select the winning bids. According to the plaintiff, by “directing” utilities to “enter into” contracts with winning bidders, the law effectively “compels” utilities to sign contracts at terms that were offered by the bidders and selected by regulators. This supposed compulsion by the state amounts to regulation of a wholesale transaction and must therefore be preempted.⁹³

The Second Circuit affirmed a lower court’s dismissal of the complaint. Contrary to the plaintiff’s claim, the court found that the RFP does not obligate

utilities to actually sign contracts but instead specifies that utilities will be responsible for negotiation and execution of any final contract. The court’s opinion does not speculate whether or not an RFP could be preempted if it did, in fact, compel a utility to sign a contract with a specific generator.

The court also concluded that the RFP is not likely “to produce contracts that violate the bright line laid out in [the Supreme Court’s] *Hughes* [decision]: the RFPs do not, for instance, require bids that are ‘[]tethered to a generator’s wholesale market participation’ or that ‘condition[] payment of funds on capacity clearing the auction.’”⁹⁴

Legal Challenge: Supreme Court Holds Maryland Scheme Is Preempted

In 2016, the Supreme Court held that a state policy that guaranteed a generator revenue for sales into an RTO market was preempted because the state had “set an interstate wholesale rate, contravening the FPA’s division of authority between state and federal regulators” (the lawsuit also featured dormant Commerce Clause claims, see page 7).⁹⁵

Generators in the PJM region challenged a Maryland Public Service Commission (PSC) order that required each of the state’s distribution utilities to enter into a contract for differences with a new natural gas fired generator. For each sale it made to PJM, the developer would receive the PJM price as well as the difference between the PJM price and the contract rate. The contract was a purely financial arrangement and did not transfer ownership of energy or capacity between the generator and the utilities.

In *Hughes v. Talen*, the Court concluded that PJM’s FERC-approved auction rules are the sole mechanism for setting just and reasonable rates for sales in that market. The state-mandated contracts were preempted because they “operated within the auction” to true-up the price without transferring anything of value between the contracting parties.

States should be careful that in mandating utilities purchase from certain types of resources they do not overstep their authority by regulating wholesale sales.

While declining to opine on the legality of other state programs, the Court concluded that “[s]o long as a State does not condition payment of funds on capacity clearing the auction, the State’s program would not suffer from the fatal defect that renders Maryland’s program unacceptable.”

Although Maryland argued that the contract was motivated by concerns about reliability, the Court admonished that “States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC’s authority over interstate wholesale rates.”

The Fourth Circuit had also concluded that the PSC’s order was conflict preempted. The Supreme Court did not address this issue.⁹⁶ The Third Circuit held that a nearly identical scheme in New Jersey was field preempted but declined to reach the conflict preemption question.⁹⁷

Setting the Price of Renewable Energy or Environmental Credits

- An energy or emissions credit is an instrument certifying that electricity was generated pursuant to certain standards or representing the environmental and other non-power attributes of electricity.
- Credits provide generators with revenue that supplements income from energy and capacity sales.
- A policy that sets credit prices could be preempted when the credits are sold with wholesale power.

As mentioned above, utilities acquire renewable energy credits (RECs) to demonstrate compliance with a state’s RPS. RECs are typically sold through bilateral contracts or through auction markets not regulated by FERC.

RECs can be sold with their associated energy (bundled) or without any energy (unbundled). State laws differ on whether unbundled RECs can be used for compliance purposes. In 2012, FERC asserted that it has exclusive jurisdiction over sales of bundled RECs (but not over sales of unbundled RECs) because bundled RECs are sold “in connection with” and “directly affect” energy sales.⁹⁸ This assertion has not been challenged, but FERC’s legal test is consistent with the Supreme Court’s 2016 decision in *FERC v. Electric Power Supply Association (EPSA)*.

At issue there was FERC’s regulation of demand response^c compensation in RTO markets. The Court found that FERC has jurisdiction over demand

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response in wholesale markets because FERC demonstrated that demand response “directly affects” wholesale rates. The Court endorsed the “directly affecting” jurisdictional test as a “common-sense construction of the FPA’s language.”⁹⁹

The Court’s decision in EPSA does not address FERC’s jurisdiction over bundled RECs. However, the Court’s application of the “directly affects” test that FERC used in its REC order strongly supports the conclusion that FERC’s reasoning is on solid legal ground.

Moreover, two federal district courts relied on FERC’s REC order to dismiss preemption claims about state pricing of unbundled credits. In 2016, New York and Illinois created Zero Emission Credits (ZEC), awarding one ZEC for each megawatt-hour generated by identified nuclear plants. The states require utilities to purchase ZECs at administratively set prices. Challengers argue that ZECs are preempted by the FPA, in part because they alter the revenue paid to nuclear generators for wholesale sales.

Both courts dismissed the preemption claims on several grounds. Importantly, they concluded that because ZECs are sold unbundled from energy sales, ZECs do not directly alter a FERC-jurisdictional wholesale rate. In addition, neither court could discern a legally meaningful distinction between unbundled RECs and ZECs. The courts deferred to FERC’s determination that states have exclusive jurisdiction over unbundled credits and therefore concluded that ZECs are not subject to FERC’s exclusive jurisdiction.¹⁰⁰

^c Demand response means a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy. 18 CFR § 35.28(b)(4).

Avoiding Preemption by Federal Efficiency and Air Pollution Laws

- Federal law explicitly preempts state efficiency standards for vehicles and appliances with a federal standard.
- Federal law limits state regulation of “any characteristic or component” of vehicle fuels or fuel additives, although there are workarounds.
- Voluntary programs for efficient vehicles may be permissible depending on the program’s scope.
- States and local authorities may establish building codes.
- Federal law allows states to set air pollution standards for stationary sources that are more stringent than EPA rules.

Vehicle Standards

The federal Energy Policy and Conservation Act (EPCA) established the Corporate Average Fuel Economy (CAFE) standards, which govern efficiency standards of new cars. EPCA prohibits a state or local government from adopting other fuel economy standards,¹⁰¹ although they may set requirements for their own fleets¹⁰² and offer limited incentives to promote fuel-efficient taxis.

The federal Clean Air Act (CAA) also generally preempts state regulation of vehicle emissions.¹⁰³ However, the statute includes a conditional waiver provision for California.¹⁰⁴ If the federal EPA grants a waiver to California, that state may set more stringent standards. Moreover, once a waiver has issued, California’s vehicle emissions standards have the force of federal law; other states may then adopt California’s standards without fear of preemption.¹⁰⁵

In addition, the CAA preempts states from regulating “any characteristic or component” of a vehicle fuel.¹⁰⁶ However, California’s vehicle waiver entitles it to an exception here, too;¹⁰⁷ moreover, once EPA approves a fuel or fuel additive provision in a state’s implementation plan, that state may regulate the makeup of vehicle fuel.¹⁰⁸

When challengers argued that California’s Low Carbon Fuel Standard (LCFS) was preempted by the CAA (and under the dormant Commerce Clause, see page 9), California argued that the CAA section 211(c) waiver protected the LCFS from these claims. The challengers argued that the waiver did not apply because much of the carbon intensity value assigned to motor fuels related to their manufacture and transport rather than a “characteristic or component” of the fuel.¹⁰⁹ The district court held the LCFS properly fell within the 211(c) waiver but that the

rule could be preempted by another provision of the Clean Air Act, the Renewable Fuel Standard.¹¹⁰

On remand from the Ninth Circuit, a federal district court ruled that California’s low carbon fuel standard, which aims to lower lifecycle GHG emissions of liquid fuels consumed in California, does not conflict with the federal Renewable Fuel Standard and so is not preempted.¹¹¹ The court’s decision did not rely on any waiver for California, and if its reading of the federal standard is adopted by other courts it would allow other states to adopt similar policies.

Legal Challenges: Fuel Efficiency Rules for New York Taxis Are Preempted but Voluntary Programs and Incentives in Washington and Texas Are Not

In 2008, a federal district court barred New York City from implementing a miles-per-gallon standard for new taxis, because the rule was likely preempted by federal law.¹¹² The city did not appeal, but issued a new rule that raised the price a taxi owner can charge a driver to lease a hybrid or clean diesel taxi while lowering the cap for other vehicles. The new caps incentivized ownership of hybrid and clean diesel taxis.

The district court issued a second preliminary injunction, concluding the incentives “constitute[d] an offer which cannot, in practical effect, be refused.”¹¹³ The Second Circuit upheld the injunction, agreeing that the rules are “based expressly on the fuel economy of a leased vehicle, [and] plainly fall within the scope of the EPCA preemption provision.”¹¹⁴

A district court in Washington State held that while a “mandate” is preempted by the EPCA, a “voluntary incentive program” is not.¹¹⁵ King County issued an RFP for new taxi licenses and required winning applicants to use hybrid vehicles. The court distinguished the initial New York rules subjecting all taxis to fuel efficiency requirements from King County’s incentive program, which affected only ten percent of taxis and did not require existing taxi owners to do anything. Similarly, the Fifth Circuit upheld a Dallas ordinance granting taxis fueled by compressed natural gas (CNG) queue-jumping privileges at the airport. Plaintiffs argued that the rule was preempted by the Clean Air Act’s prohibition of state or local “standard[s] relating to the control of emissions from new motor vehicles or new motor vehicle engines.”¹¹⁶

The Fifth Circuit panel concluded that the ordinance provides an incentive and does not set a standard or

“effectively compel” taxi owners to switch to CNG vehicles.¹¹⁷ The panel declined to “parse precisely when an incentive program might turn sufficiently coercive to qualify as a de facto standard,” leaving that question for future cases.

Appliance Standards

EPCA requires the Department of Energy (DOE) to set efficiency standards for more than a dozen types of appliances,¹¹⁸ such as dishwashers and air conditioners, and authorizes DOE to set standards for other products that consume more than 100 kilowatt-hours per year in U.S. households.¹¹⁹ As of May 31, 2017, DOE had set standards for approximately fifty appliance categories.¹²⁰

A state efficiency standard for these appliances is preempted unless the state receives a waiver from DOE.¹²¹ A state must establish that a waiver is necessary to meet an “unusual and compelling” energy or water interest.¹²² As of January 2017, DOE had never granted a waiver.¹²³

A state may set an efficiency standard for appliances not covered by a federal standard.¹²⁴ Efficiency advocates have identified 21 widely-used energy- and water-consuming products that could have state-administered efficiency standards.¹²⁵ In addition, a state may include efficiency standards that are more stringent than the federal standards in its own procurement guidelines.¹²⁶

Building Codes

Federal law explicitly provides that state or local building codes are not preempted by federal law if those codes meet several conditions.¹²⁷ One condition is that a building code may not require installation of

an appliance that exceeds federal efficiency standards.

Legal Challenge: Washington Building Code May Include an Incentive for High-Efficiency Appliances

Industry groups argued that Washington State’s building code was preempted because the code’s alternatives to installing more efficient appliances were so costly that builders were economically coerced to select the high efficiency appliances. In 2012, the Ninth Circuit rejected this review, holding that “the fact that certain options may end up being less costly to builders than others does not mean the state is, expressly or effectively, requiring those options.”¹²⁸ The panel also held that a building code may not include a penalty for failing to install high efficiency appliances.¹²⁹

Regulation of Air Pollution

The Clean Air Act explicitly grants states the authority to set more stringent air pollution standards for stationary sources.¹³⁰ By contrast, the Clean Air Act prohibits states from setting mobile source standards.¹³¹ (As mentioned, California may set mobile source standards, but only after receiving a waiver from the EPA.)¹³² Therefore, preemption claims in stationary source cases turn on whether a source is truly stationary.

The Clean Air Act authorizes state regulation of stationary generators, which EPA defines as engines that remain in one place for at least twelve consecutive months.¹³³ Therefore, in 2011, the Ninth Circuit rejected a preemption challenge to California rules targeting “nonroad engines” used on farms because the generators would remain in place for at least one year.¹³⁴

Efficiency advocates have identified 21 widely-used energy- and water-consuming products that could have state-administered efficiency standards.

Legal Appendix — Overview of Constitutional Doctrines

The Commerce Clause and Supremacy Clause of the Constitution impose limits on state power. This Appendix provides an introduction to these Clauses, and describes how federal courts have applied them to state energy laws. The Appendix also summarizes four statutes implicated in recent preemption challenges to state energy policies: the Federal Power Act, Public Utilities Regulatory Policies Act (PURPA), the Clean Air Act, and the Energy Policy and Conservation Act (EPCA).

Dormant Commerce Clause

The Commerce Clause of the Constitution (Article I, § 8) authorizes Congress “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” While the Commerce Clause focuses on what Congress can do, courts have inferred in the provision a limit on state power to regulate interstate commerce. The judicial doctrine is known as the “dormant Commerce Clause.”

The “fundamental objective” of the dormant Commerce Clause is to “preserv[e] a national market for competition undisturbed by preferential advantages conferred by a state upon its residents.”¹³⁵ States retain considerable authority to regulate matters affecting local concerns,¹³⁶ but courts have invoked the dormant Commerce Clause to strike state laws that:

1. discriminate against out-of-state economic interests;
2. regulate commerce that takes place wholly outside of its borders; or
3. unduly burden interstate commerce.

A court may find that ostensibly discriminatory state action stands outside of dormant Commerce Clause scrutiny; for instance, if the state is acting as a “market participant” rather than a regulator. If a state law implicates the dormant Commerce Clause and trips the first or second test, courts will typically strike down the law as an unconstitutional assertion of state authority. The third test is a fact-based inquiry. Courts weigh whether a law’s burdens on interstate commerce are “clearly excessive” relative to its local benefits.

Across all three tests, the dormant Commerce Clause “protects the interstate market, not particular interstate firms, from prohibitive” state regulation.¹³⁷ Therefore, the fact that the burden of a state regulation falls on only some interstate firms or

impedes particular methods of operation does not, by itself, establish a claim under the dormant Commerce Clause.¹³⁸

State Laws that Discriminate against Out-of-State Interests

“In all but the narrowest circumstances,” courts will strike down a state law if it mandates differential treatment of in-state and out-of-state competing economic interests in a way that benefits the former and burdens the latter.¹³⁹ The classic example is a protective tariff, which taxes goods imported from other states but does not tax similar goods produced in state.¹⁴⁰

However, state laws can be discriminatory without being so explicitly protectionist. Courts also find unconstitutional economic protectionism on the basis of a discriminatory purpose or effect.¹⁴¹ For example, courts will typically strike down a law that is intended to protect local economic interests from outside competition,¹⁴² or that has the effect of erecting economic barriers against interstate competition.¹⁴³

Courts subject state laws that discriminate against interstate commerce to strict scrutiny.¹⁴⁴ This exacting standard requires a state to demonstrate both that the law has a non-protectionist purpose and that there is no less discriminatory means for achieving that purpose.¹⁴⁵ Shielding in-state businesses from competition is “almost never a legitimate local purpose.”¹⁴⁶ However, quarantine laws may survive; for instance, the Supreme Court determined that Maine’s ban on imports of live baitfish served the legitimate purpose of protecting the native ecology, and that there was no less discriminatory means for achieving that purpose.¹⁴⁷



On grounds of discrimination, the Supreme Court has struck down an Oklahoma law requiring ten percent of electric utilities' coal purchases to be from in-state suppliers,¹⁴⁸ an Ohio tax credit for selling ethanol produced in Ohio,¹⁴⁹ and a New Hampshire utility commission order prohibiting a utility from exporting hydropower to another state.¹⁵⁰ The Seventh Circuit struck down Illinois and Indiana laws that required generators to install pollution controls so they could continue to use in-state coal rather than purchase cleaner out-of-state coal to comply with federal sulfur dioxide limits.¹⁵¹

State tax policy must also navigate the constraints of the dormant Commerce Clause.¹⁵² The Supreme Court has held that "states may not impose taxes that facially discriminate against interstate business and offer commercial advantage to local enterprises, that improperly apportion state assessments on transactions with out-of-state components, . . . or that have the 'inevitable effect [of] threaten[ing] the free movement of commerce by placing a financial barrier around the state.'"¹⁵³

It is no defense that a law levies a discriminatory tax on intrastate commerce as well.¹⁵⁴ However, a state tax on interstate activity may be appropriate if that tax or an equivalent "compensating tax" is applied to in-state commerce.¹⁵⁵

The Supreme Court has not directly addressed a Commerce Clause challenge to subsidies; however, in passing it has distinguished "[d]irect subsidization of domestic industry" from "discriminatory taxes" in a way that appears to condone subsidies:¹⁵⁶

[t]he Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description in connection with the state's regulation of interstate commerce. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does.¹⁵⁷

The Court has also noted that a "pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business."¹⁵⁸ By contrast, subsidies funded by a tax on out-of-state competitors,¹⁵⁹ or tax exemptions withheld from an in-state entity serving out-of-state interests¹⁶⁰ or made conditional on the purchase of in-state products and the hiring of in-state workers,¹⁶¹ are problematic because each acts to "handicap[]

out-of state competitors."¹⁶²

The Sixth Circuit's decision about an Ohio tax incentive package to Daimler-Chrysler further illustrates a constitutional difference between types of tax incentives. The Court struck down an investment tax credit awarded to Ohio businesses that expand in the state rather than in other parts of the U.S., because it discriminated against interstate commerce. However, the Court upheld the property tax exemption as a subsidy that properly incentivizes the productive use of local property.¹⁶³ Scholars debate the existence of a true distinction between taxes and subsidies¹⁶⁴ but it appears to survive in Supreme Court jurisprudence.

Finally, "any notion of discrimination . . . assumes a comparison of substantially similar entities."¹⁶⁵ If businesses provide different products, serve different markets, or have other relevant differences, the dormant Commerce Clause may not apply.

The Supreme Court has therefore allowed differential tax treatment for gas sales by in-state public utilities and interstate natural gas marketers because they sold different products in different markets to different types of customers.¹⁶⁶ Relying on this Supreme Court decision, the Second Circuit concluded that RECs from facilities that provide energy to New England are a different product from RECs from other parts of the country. It therefore upheld a Connecticut RPS that only recognizes RECs from New England or an adjacent region.¹⁶⁷

State Actions that Are Outside the Scope of the Commerce Clause

The Supreme Court has held that "nothing in the purposes animating the Commerce Clause prohibits a state . . . from participating in the market and exercising the right to favor its own citizens over others."¹⁶⁸ In other words, where it is acting as a "purchaser, seller, or producer"¹⁶⁹ of products and services, a state may patronize or prefer in-state businesses.

For instance, the Supreme Court has upheld a Maryland abandoned car bounty program that required more documentation from out-of-state scrap processors;¹⁷⁰ a South Dakota policy that prioritized sales to in-state purchasers from a state-owned cement plant;¹⁷¹ and a local hiring requirement for city-financed construction projects in Boston.¹⁷²

Therefore, even as a broker of goods, "[t]he state may not impose conditions . . . that have a substantial

regulatory effect outside of that particular market.” The Court therefore rejected Alaska’s contention that as a “market participant” in the raw timber market, the state could restrict downstream processing to in-state companies.¹⁷³

Moreover, courts will not apply the exemption where a state appears to be wielding regulatory power.¹⁷⁴ As the Third Circuit has explained:

When a public entity participates in a market, it may sell and buy what it chooses, to or from whom it chooses, on terms of its choice; its market participation does not, however, confer upon it the right to use its regulatory authority to control the actions of others in that market.¹⁷⁵

On this reasoning, the Third Circuit struck down a Delaware prevailing wage law that differentiated between in-state and out-of-state apprenticeship certifications, because the law extended beyond a specific contract or project to set state-wide policy, and set penalties for employers that did not follow the payment tiers.¹⁷⁶ Likewise, the Supreme Court refused to extend the market participant exception to Los Angeles when it set requirements for trucks entering its port. The city was setting air pollution policy under threat of criminal penalties for violators, rather than acting to protect a narrow proprietary interest.¹⁷⁷

In a closely related line of cases, the Supreme Court has also allowed traditional government functions to sidestep Commerce Clause scrutiny. Therefore, while the Supreme Court has overturned local rules requiring solid waste to be deposited at a particular privately owned transfer station,¹⁷⁸ it allowed New York to require waste haulers to deliver to an in-state *public* waste processing plant.¹⁷⁹

The Court also applied this reasoning to find that Kentucky could tax interest on out-of-state public bonds while exempting interest on in-state public bonds.¹⁸⁰ The Court observed that state and local governments are “vested with the responsibility of protecting the health, safety, and welfare of [their] citizens.”¹⁸¹ Therefore, laws favoring publicly provided goods and services are not prohibited by the dormant Commerce Clause, so long as they are “directed toward any number of legitimate goals unrelated to protectionism.”¹⁸²

Finally, Congress may authorize state action that would otherwise violate the dormant Commerce Clause. When Congress does so, state action

consistent with Congress’s directive is “invulnerable” to dormant Commerce Clause claims.¹⁸³

State Laws that Regulate Extraterritorially

Courts may also strike down a state law that regulates commerce occurring wholly outside the boundaries of the state. The inquiry turns on whether the statute directly controls conduct in another state,¹⁸⁴ which could subject that conduct to inconsistent rules.¹⁸⁵

The Supreme Court has rarely invoked extraterritoriality to strike down a state law.¹⁸⁶ In 1935, the Supreme Court ruled that “New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there.”¹⁸⁷ The Court echoed this prohibition decades later to void state laws that regulated alcohol prices in other states.¹⁸⁸

The Court also discussed this prohibition in dicta in a case that struck down a New York town’s waste flow rules. The Court held that the waste flow rule was protectionist, and that the only non-protectionist argument the town could make was unjustifiably extraterritorial.¹⁸⁹

Although the Supreme Court has rarely invoked extraterritoriality to void a state or local law, all but one federal Circuit has adopted a dormant Commerce Clause analysis that considers extraterritoriality.¹⁹⁰ Extraterritorial cases turn on whether a state law “has the practical effect of controlling commerce that occurs entirely outside of the state.”¹⁹¹

A pair of cases from the Sixth Circuit suggests possible contours for this doctrine. In 2010, the court upheld Ohio’s requirements for hormone-free labeling claims on dairy products sold in that state.¹⁹² The court found that the labeling requirements did not dictate to out-of-state producers how to label their products outside of Ohio; therefore, it did not “impede or control the flow of milk products across the country.”¹⁹³

In 2013, the court voided a Michigan law requiring a “unique-to-Michigan” label on returnable bottles and cans sold in that state.¹⁹⁴ Michigan wanted to prevent people from importing empty bottles and cans to benefit from Michigan’s generous bottle deposit refund.¹⁹⁵ The law “not only requires beverage companies to package a product unique to Michigan but also allows Michigan to dictate where the resulting product can be sold.”¹⁹⁶ The two cases can be read to mean that a state may require

product labeling, but not if it effectively limits the seller's market. Requiring an out-of-state seller to use geographically explicit labels that restrict sales to a single state amounts to control of commerce occurring entirely outside of the state.

The Tenth Circuit recently adopted a much narrower reading of the doctrine, which if followed would sharply limit its application in energy cases. In its 2015 decision affirming a lower court ruling upholding Colorado's RPS (see page 9), the court concluded that the application of the extraterritorial doctrine has been limited by the Supreme Court to state laws that involve "tying the price of in-state products to out-of-state prices."¹⁹⁷

State Laws that Unduly Burden Interstate Commerce

A law that is not discriminatory, does not regulate extraterritorially, and is "directed to legitimate local concerns"¹⁹⁸ will "frequently survive" dormant Commerce Clause scrutiny notwithstanding "incidental"¹⁹⁹ effects on interstate commerce. However, a court may strike down such a law when "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."²⁰⁰

The Court established this test in *Pike v. Church*, which voided an Arizona law that required in-state processing of cantaloupes grown in Arizona. In that case, a company that shipped its fruit out of state for processing sued, alleging that the Arizona law required it to invest in new processing facilities. The Court determined that the burden on the company outweighed the purported benefit of the Arizona law, which was to enhance the reputation of Arizona growers.

The *Pike* test is fact-intensive. "Exact figures are not essential (no more than estimates may be possible) . . . but it takes more than lawyers' talk to condemn a statute under *Pike*."²⁰¹ When evaluating the burden on interstate commerce, courts will consider "the nature of the local interest involved, and . . . whether it could be promoted as well with a lesser impact on interstate activities."²⁰² A court takes a "less strict scrutiny"²⁰³ approach and "proceeds with deference" to the purported local purposes and benefits of state law.²⁰⁴

Applying *Pike*, the Supreme Court upheld an Arkansas Public Service Commission order asserting jurisdiction over wholesale rates charged by an electric cooperative to its members.²⁰⁵ The Court

determined that while the state's regulation of prices paid by cooperatives might affect interstate prices, the effect would be no more than any state regulation of retail utilities. This incidental effect did not outweigh the state's interest in regulating prices that would ultimately be paid by in-state ratepayers.²⁰⁶

The Court also upheld a Kansas Corporation Commission order extinguishing rights to produce Kansas gas if the gas is not produced in timely fashion, even though it had the effect of increasing in-state producers' sales at the expense of out-of-state producers.²⁰⁷ According to the Court, the effects on interstate markets were not "'clearly excessive' in relation to Kansas' substantial interest in stimulating production to prevent waste and protect correlative rights."

A federal district court that upheld Colorado's RPS distinguished the state's requirement that utilities procure renewable energy from state regulations that set maximum trailer lengths and requirements for mudguards for trucks that traversed a state's highways. In the truck cases, the court concluded, "a lack of uniformity among state laws can be a significant burden to interstate commerce." The RPS, however, does "not make it more difficult for electricity to flow between states that are connected via the same grid."²⁰⁸ A federal district court in Maryland similarly concluded that state support benefiting a power plant located in a particular region of the PJM grid does not constitute an undue burden on interstate commerce because the state is "not affect[ing] the ability of other market participants to sell energy and capacity in the PJM Markets."²⁰⁹

The Colorado court also concluded that a rule favoring a type of electricity generation does not burden interstate commerce. "The critical inquiry is whether market shift caused by the [law] places a greater burden on interstate commerce than is placed on intrastate commerce."²¹⁰ The court found no evidence that the RPS causes greater harm to out-of-state fossil fuel producers and generators than in-state fossil fuel interests. The Supreme Court has observed that a "nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry."²¹¹

The Supreme Court has recently expressed reservations about the judiciary's ability to engage in *Pike*'s fact-based inquiry. In the Kentucky decision upholding tax preferences for state municipal bond

income, the Court said that “the current record and scholarly material convince us that the Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary . . . to satisfy a *Pike* burden in this particular case.”²¹² A year earlier, the Court warned that it would not “rigorously scrutinize economic legislation passed under the auspices of the police power” for the purpose of judging the wisdom of such legislation.²¹³ In separate concurrences to that decision, Justice Scalia rejected the *Pike* test outright, while Justice Thomas reiterated his long-standing position that the dormant Commerce Clause “has no basis in the Constitution and has proved unworkable in practice.”

The *Pike* test, however, remains valid, and courts continue to apply it to evaluate nondiscriminatory state laws. Because the test is fact-specific, it is difficult to generalize about its application.

Supremacy Clause

The Constitution’s Supremacy Clause, Article VI, § 2, empowers federal legislative action to preempt or supersede state law. Congress can preempt state action expressly, or by implication, such as when a federal law occupies the same field as or conflicts with state law.

“The purpose of Congress is the ultimate touchstone in every preemption case.”²¹⁴ To determine whether a state law is preempted, courts first “focus on the plain wording of the [federal law], which necessarily contains the best evidence of Congress’ pre-emptive intent.”²¹⁵ If the federal law expressly preempts state action, the state law cannot stand.

If there is no express preemption, courts must determine if there is implicit preemption. If a state is acting on its “historic police power”²¹⁶ or in an area “traditionally occupied” by the states²¹⁷ courts start with a presumption against preemption. In general, traditional police powers involve matters relating to public health and safety,²¹⁸ including utility regulation.²¹⁹ By contrast, no such presumption exists if a state is regulating in an area “where there has been a history of significant federal presence.”²²⁰ When the presumption against preemption applies, courts can overcome the presumption by finding that the state law is “field” preempted or “conflict” preempted by federal law.

When the federal law “envisions a federal-state relationship marked by interdependence,” “[p]reemption inquiries . . . are particularly delicate.”²²¹ Where “coordinate state and federal efforts exist

within a complementary administrative framework, and in the pursuit of common purposes, the case for federal preemption becomes a less persuasive one.”²²² “Courts must be careful not to confuse the ‘congressionally designed interplay between state and federal regulation’ for impermissible tension that requires preemption under the Supremacy Clause.”²²³

Field Preemption

“States are precluded from regulating conduct in a field that Congress . . . has determined must be regulated by its exclusive governance.”²²⁴ Courts can glean Congress’s intent to occupy a given field of regulation from a law’s “structure and purpose;”²²⁵ for instance, where a scheme of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.”²²⁶ Similarly, courts can infer field preemption if Congress’s act relates to a field where the “Federal interest is so dominant that the Federal system can be assumed to preclude enforcement of state laws on the same subject.”²²⁷

The Supreme Court recently explained that “[f]ield preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.”²²⁸

Conflict Preemption

Courts find conflict preemption when a state law “stands as an obstacle to the accomplishment and execution of the [Congress’] full purposes and objectives.”²²⁹ For example, the Supreme Court held that an Arizona law that made it a misdemeanor for “an authorized alien to knowingly apply for work” conflicted with federal immigration law because “Congress made a deliberate choice not to impose criminal penalties.”²³⁰ The Court determined that Arizona’s conflicting method of enforcement “would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens.”²³¹

A state law is also preempted if it is impossible for a party to comply with both state and federal law.²³² When a Court determines that there is a conflict, the relative importance of the state’s interest is immaterial; state law must always yield to federal interests.²³³

Market Participant Exception

When a state government acts as a market participant, and not a regulator, its actions may not be subject to preemption (for discussion of the

dormant Commerce Clause’s market participant exception, see page 19). For example, the Supreme Court held that the National Labor Relations Act did not preempt a state construction contract that included terms about labor issues because the state was acting “as proprietor and its acts therefore are not ‘tantamount to regulation’ or policymaking.”²³⁴

On the other hand, much as in the dormant Commerce Clause context, a state may not use its purchasing power to achieve regulatory goals. Therefore, the Supreme Court struck down a Wisconsin statute that barred the state from contracting with a firm that had been repeatedly sanctioned by the National Labor Relations Board. The Court found that the Wisconsin law “functions unambiguously as a supplemental sanction for violations” of federal law, and therefore “conflicts with the [National Labor Relations] Board’s comprehensive regulation of industrial relations.”²³⁵

Federal Statutes that May Preempt State Energy Law

The Federal Power Act, the Public Utility Regulatory Policies Act (PURPA), the Clean Air Act, and the Energy Policy and Conservation Act (EPCA) have been implicated in recent preemption challenges to state energy policies. The portions of each statute relevant to recent preemption challenges are summarized below.

The Federal Power Act

The Federal Power Act (FPA) provides authority to FERC over interstate transmission and transactions while preserving states’ historic regulatory roles. In the FPA, Congress declared that FERC’s jurisdiction generally “extend[s] only to those matters which are not subject to regulation by the states.”²³⁶

One of Congress’s reasons for entering the field of electricity rate regulation was to close the “gap” identified by the Supreme Court in *Attleboro*. In that 1927 case, the Court struck down a state utility commission’s order that set the rate of a sale by a utility in Rhode Island to a utility in Massachusetts. That order imposed “a direct burden on interstate commerce” and was therefore beyond the authority of either state.²³⁷ The Court concluded that only Congress has authority to close this “gap” and regulate interstate sales.

Seventy-five years later, the Court remarked that while *Attleboro* “catalyzed the enactment of the FPA,” it is “perfectly clear that the original FPA did a good deal more than close the gap in state power.”²³⁸

To close the gap, Congress provided FERC with jurisdiction over the “sale of electric energy at wholesale in interstate commerce.” The FPA also grants FERC authority over “the transmission of electric energy in interstate commerce” and over “all facilities for such transmission or sale of electric energy.”²³⁹ Section 201 of the statute reserves state jurisdiction over “any other sale of electric energy,” such as retail sales to end users,²⁴⁰ or over facilities used for generation, local distribution, or intrastate transmission.²⁴¹

The FPA also provides FERC with jurisdiction over “rules or practices that ‘directly affect the [wholesale] rate.’”²⁴² That broad grant of authority is limited by the reservation of state authority in section 201.²⁴³ FERC may not regulate retail rates, for example, even if it concludes that retail rates “directly affect” wholesale rates. But FERC’s authority over wholesale rates, and rules and practices directly affecting those rates, is not diminished by the effects on retail rates or on other matters reserved for state authority.²⁴⁴

Similarly, state regulation, such as resource planning and generation siting, “affects” FERC-jurisdictional wholesale markets, but those effects do not limit state authority.²⁴⁵ Therefore, “FERC’s authority over interstate rates does not carry with it exclusive control over any and every force that influences interstate rates.”²⁴⁶

While “Congress meant to draw a bright line easily ascertained between state and federal jurisdiction,”²⁴⁷ the “landscape of the electric industry has changed since the enactment of the FPA [in 1935].”²⁴⁸ Some changes have been technological; others are regulatory, such as the breakup of vertically integrated utilities by some states.²⁴⁹ As a result, the jurisdictional boundaries set by the FPA more than eighty years ago can be difficult to apply.

The Supreme Court decided two FPA cases in 2016, *FERC v. EPSA* and *Hughes v. Talen*. In these cases, the Supreme Court explained that the FPA “makes federal and state powers ‘complementary’ and ‘comprehensive’”²⁵⁰ and “envisions a federal-state relationship marked by interdependence.”²⁵¹ In *EPSA*, which affirmed FERC’s jurisdiction over wholesale demand response, the Court characterized FERC’s rule as a “program of cooperative federalism.”²⁵²

These characterizations of the relationship between federal and state regulation stand in stark contrast

to the “bright line” between federal and state authority that the Supreme Court envisioned in earlier cases.²⁵³ It remains to be seen how lower courts will apply the Supreme Court’s seemingly more flexible understanding of jurisdictional boundaries.

Despite a more nuanced view of FPA jurisdiction, the Court nonetheless struck down a state program in *Hughes* that it concluded “intruded on FERC’s authority over interstate wholesale rates.” The Court affirmed a Fourth Circuit ruling that FERC’s exclusive jurisdiction over wholesale rates preempted a state public service commission order that required utilities to enter into contracts that effectively “supplant” rates generated by a FERC-approved wholesale auction market. The Court held that the “fatal defect” of the state-mandated contracts between utilities and a generator selling in the PJM markets was that they “condition[ed] payment of funds on capacity clearing the [FERC-regulated] auction.”²⁵⁵ The Court concluded that the contracts did not transfer anything of value between the parties but were a purely financial arrangement that operated “within the auction” to adjust the FERC-regulated price.

The Court has consistently held that FERC’s exclusive authority includes “the authority to determine the reasonableness of wholesale rates.”²⁵⁶ But the Second Circuit held that in setting retail rates a state may “impute” revenue from a reasonable estimate of a regulated utility’s wholesale sales because that inclusion does not constitute regulation of wholesale rates.²⁵⁷ That court drew a “distinction between, on the one hand, regulating [wholesale] sales, and on the other, reflecting the profits from a reasonable estimate of those sales in [retail] rates.”²⁵⁸

Public Utility Regulatory Policies Act (PURPA)
PURPA, enacted by Congress in 1978, opened the generation market to non-utility-owned generators. The statute directed FERC to promulgate rules requiring utilities to purchase electricity from, “qualifying cogeneration and small power production facilities.”²⁵⁹ A qualifying facility (QF) is either a renewable generator smaller than 80 megawatts or a co-generator that meets certain efficiency requirements.²⁶⁰

In 2005, Congress allowed FERC to terminate the requirement that utilities purchase energy from PURPA generators in regions where there are competitive markets for wholesale energy.²⁶¹ FERC has established a rebuttable presumption

that utilities that are members of an RTO or ISO should be relieved of their obligation to purchase energy from qualifying facilities larger than 20 megawatts.²⁶² For smaller QFs, a utility can apply for an exemption for each QF that requests a contract.

PURPA requires states to set prices at which each utility must purchase from qualifying facilities, while not allowing that price to “exceed . . . the cost to the electric utility of the electric energy which, but for the purchase from such [QF] such utility would generate or purchase from another source.”²⁶³ PURPA thus expands previous state jurisdiction under the FPA by requiring limited wholesale ratemaking. However, state regulation of wholesale rates that strays outside the boundaries of PURPA, either by regulating rates paid to generators that have not been certified by FERC as QFs or by mandating rates that are higher than “incremental cost” (also known as avoided cost), can still be preempted by the FPA.

In 2010, FERC explained that it is “reluctant to second guess the state commission’s determinations”²⁶⁴ of avoided cost for capacity and energy. A state’s determination of avoided cost “may take into account obligations imposed by the state that, for example, utilities purchase energy from particular sources of energy or for a long duration.”²⁶⁵ FERC’s decision thus allows a state to set an avoided cost rate applicable only to sources eligible to meet a state’s renewable energy mandate.

FERC regulations require that QFs have the option of either: 1) selling energy “as available” and receiving a rate based on “avoided costs calculated at the time of delivery;” or 2) providing energy or capacity “pursuant to a legally enforceable obligation . . . over a specified term” and receiving a rate based either on “avoided costs calculated at the time of delivery” or “avoided costs calculated at the time the obligation is incurred.”²⁶⁶ In 2016, a federal district court held that Massachusetts’ rule providing QFs with a single rate, equal to the hourly spot price generated by the FERC-regulated ISO New England market, violated these regulations.²⁶⁷ According to the court, the Commonwealth’s rule eliminated a QF’s ability to choose a rate “calculated at the time the obligation is incurred.”²⁶⁸ FERC has stated that QFs must have this option “unconditionally.”

FERC has also instructed that states and utilities

may not erect barriers to obtaining a “legally enforceable obligation.” A utility may not condition a contract on completion of a facilities study or interconnection agreement, because the utility may use such requirements as a means of delaying the “legally enforceable obligation.”²⁷⁰ A utility or state is also forbidden from using a competitive solicitation as the sole mechanism for obtaining a long-term contract.²⁷¹ In short, “the establishment of a legally enforceable obligation turns on the QF’s commitment, and not the utility’s actions.”²⁷²

Clean Air Act

For centuries, court-made law enabled persons harmed by pollution to seek relief on grounds that the pollution was a “nuisance” or had wrongfully trespassed on the victims’ property. The Third and Sixth Circuits have ruled that the Clean Air Act (CAA) does not preempt state common law claims for air pollution.²⁷³

The CAA assigns states a large role in regulating pollution from stationary sources such as fossil-fuel fired power plants. Upon approval by EPA, states can implement and enforce the federal permitting programs set forth under the CAA.²⁷⁴ All states set source limits that will help the state achieve federal air quality²⁷⁵ and visibility targets.²⁷⁶ Meanwhile, Section 116 of the CAA explicitly authorizes states to set emission standards for stationary sources that are more stringent than the CAA requires.²⁷⁷

However, the CAA prohibits state regulation of motor vehicle fuels,²⁷⁸ motor vehicles,²⁷⁹ non-road engines and vehicles,²⁸⁰ and aircraft.²⁸¹ A string of challenges by taxicab associations against city “clean fleet” rules suggest that states could encourage, but not require, taxi owners to drive low-emission vehicles and withstand a CAA preemption challenge (see page 16).²⁸²

Meanwhile, at least one circuit has ruled that states may regulate air pollution from off-the-grid or backup generators.²⁸³

Energy Policy and Conservation Act

The 1975 Energy Policy and Conservation Act (EPCA) requires the Department of Transportation to establish average fuel economy standards for automobiles.²⁸⁴ These standards, known as CAFE standards, preempt any state or local standard “related to fuel economy standards or average fuel economy standards for automobiles.”²⁸⁵

The EPCA also sets efficiency standards for a range of consumer products and requires the federal

Department of Energy to amend the standards, if necessary.²⁸⁶ Those federal standards preempt state appliance standards, unless DOE grants the state a waiver.²⁸⁷

Standing and Private Rights of Action: Grounds for Dismissal

Standing is the ability of a party to participate in a legal action. In response to recently filed lawsuits, states typically file motions to dismiss that argue that the challenger lacks standing. In general, a party cannot bring a legal action simply because of dissatisfaction with government policy. According to the Supreme Court, to bring an action in federal court a party must demonstrate Constitutional standing; that is, the party must show that:

1. It has suffered an “injury in fact,” defined as an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.
2. There is a causal connection between the injury and the conduct complained of; the injury is traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.
3. It is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision by the court.²⁸⁸

Even if a party can demonstrate those three elements necessary for Constitutional standing, the Supreme Court has determined that “a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim.”²⁸⁹ To demonstrate prudential standing, a party must assert his own legal interests rather than the interests of a third party.

A challenger may also need to establish that a federal court has jurisdiction under a particular statute. For example, PURPA provides a private enforcement mechanism through which “[a]ny electric utility, qualifying cogenerator, or qualifying small power producer” may petition FERC to enforce implementation of the statute.²⁹⁰ If FERC does not initiate an action, the petitioner may then file suit in a federal district court. If a petitioner has not complied with PURPA’s “administrative exhaustion” requirement, a federal court can dismiss a PURPA complaint for lack of subject-matter jurisdiction.²⁹¹

Two federal district courts ruling on challenges to states' zero emission credits in July 2017 held that the Federal Power Act does not create a "private right of action." In 2015, the Supreme Court explained that the Constitution's Supremacy Clause "is silent regarding who may enforce federal laws in court, and in what circumstances they may do so." In that case, the Court held that neither the Clause itself nor the federal law at issue provided plaintiffs with the right to bring a preemption challenge. The district courts' application of the Court's holding to the FPA is being appealed to the Second and Seventh Circuits. If upheld, states would have a complete defense to Federal Power Act preemption challenges filed by private litigants.

Endnotes

- ¹ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
- ² *Granholt v. Heald*, 544 U.S. 460, 472 (2005) (citing *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Or.*, 511 U.S. 93, 99 (1994)).
- ³ *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1101 (2013) (“In the modern era, the Supreme Court has rarely held that statutes violate the extraterritoriality doctrine.”); *see also* *American Beverage Ass’n v. Snyder*, 735 F.3d 362, 377 (6th Cir. 2013) (Sutton, J., concurring) (“I am not aware of a single Supreme Court dormant Commerce Clause holding that relied exclusively on the extraterritoriality doctrine to invalidate a state law.”).
- ⁴ *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 645–46 (6th Cir. 2010) (citing cases from all Circuits but the 5th).
- ⁵ *Energy and Environment Legal Institute v. Joshua Epel, et al.*, on appeal at the 10th Circuit from District Court for the District of Colorado, Docket No. 14–1216, opening brief, <https://statepowerproject.files.wordpress.com/2014/03/co-10th-cir-elli-appellants-opening-brief.pdf>.
- ⁶ *Energy and Environment Legal Institute v. Epel*, 793 F.3d 1169 (10th Cir. 2015).
- ⁷ *Pike*, 397 U.S. at 142.
- ⁸ *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 353 (2008).
- ⁹ Sam Kalen, *Dormancy Versus Innovation: A Next Generation Dormant Commerce Clause*, 65 OKLA. L. REV. 381, 423 (2013).
- ¹⁰ Federal courts applied the *Pike* test to state energy policies in five recent cases: *American Petroleum Institute v. Cooper*, 835 F.Supp.2d 63 (E.D.N.C. 2011) (holding that North Carolina’s ethanol blending statute was not preempted and did not violate the dormant Commerce Clause); *PPL EnergyPlus, LLC et al. v. Nazarian*, 974 F. Supp.2d 790 (D. Md. 2013) (concluding that Maryland’s state-mandated contracts were preempted by the Federal Power Act but the location restriction did not violate the dormant Commerce Clause); *Energy and Environment Legal Inst. v. Epel*, 43 F.Supp.3d 1171 (D. Col. 2014) (upholding Colorado’s RPS); *Allco Finance Ltd. v. Klee*, 861 F.3d 82 (2nd Cir. 2017) (holding Connecticut REC deliverability requirement did not violate dormant Commerce Clause); *Electric Power Supply Association v. Star*, 2017 WL 3008289 (N.D. Ill. 2017) (holding that Illinois nuclear zero-emission credit program did not violate dormant Commerce Clause).
- ¹¹ Ari Peskoe, *Emission Rate Credits in the Clean Power Plan*, p. 4 (Oct. 20, 2015), <http://environment.law.harvard.edu/wp-content/uploads/2015/08/Emission-Rate-Credits-in-the-Clean-Power-Plan.pdf>.
- ¹² *Allco Finance Ltd., v. Klee*, 861 F.3d 82, 93 (2nd Cir. 2017) (citing *Wheelabrator Lisbon, Inc. v. Conn. Dep’t of Pub. Util. Control*, 531 F.3d 183, 186 (2nd Cir. 2008)).
- ¹³ Database of State Incentives for Renewables and Efficiency, Renewable Portfolio Standards Map, <http://www.dsireusa.org/resources/detailed-summary-maps/>.
- ¹⁴ *See, e.g.*, Wash. Initiative No. 937 (2006); R.I. Gen. Laws § 39-26-4(a) (2006).
- ¹⁵ *See, e.g.*, Ariz. Admin. Code § 14-2-1618(C) (2010); Del. Code Ann. Tit. 26.1 § 356 (2009); Nev. Rev. Stat. § 704.7821(1)(h) (2009).
- ¹⁶ *See* Partial Settlement Agreement, unexecuted version available at <http://www.mass.gov/eea/docs/doctr/renewables/solar/settlement-agreement.pdf>; emergency regulations, available at: <http://web1.env.state.ma.us/DPU/FileRoomAPI/api/Attachments/Get?path=10-58%2f6910dpuord.pdf>.
- ¹⁷ *Missouri Energy Development Ass’n et al. v. Pub. Serv. Comm’n of Missouri*, WD74896 (Mo. Ct. of App. W. Dist., Nov. 20, 2012), <http://statepowerproject.files.wordpress.com/2014/03/mo-decision.pdf>, at 13-16 (holding that the Commerce Clause challenge to the in-state requirements were moot because the Commission had stayed those provisions).
- ¹⁸ *Colorado S.B. 13-252* (2013) (amending Colorado Rev. St. 40-2-124(a) (IX) (formerly VI); (c)(III), (VI); and (f)), https://statepowerproject.files.wordpress.com/2014/03/sb13252_enr.pdf.
- ¹⁹ *Illinois Commerce Comm’n v. FERC*, 721 F.3d 764 (7th Cir. 2013).
- ²⁰ MD. CODE ANN., PUB. UTIL. § 7-703(b)(17) (including tidal, wave, and ocean thermal projects as eligible to meet the RPS targets); MASS GEN. LAWS ch 188, § 12C (2016) (requiring utilities to conduct an RFP for offshore wind).
- ²¹ N.C. GEN. STAT. § 62-133.8 (requiring minimum purchases of poultry and swine waste in RPS statute). *But see* *Bacchus Imports Ltd., v. Dias*, 468 U.S. 264 (1984) (holding that a tax exemption for brandy distilled from the root of an indigenous shrub and fruit wine manufactured in Hawaii violates the dormant Commerce Clause because it has both the purpose and effect of discriminating in favor of local products). Here, the Court relied heavily on language in the challenged statute, making it clear Hawaiian legislators intended to protect indigenous wine in the marketplace. As noted in the text, a court may be more inclined to find discrimination when a law includes protectionist language.
- ²² *Atlantic Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atlantic County*, 48 F.3d 701 (3d Cir. 1995).
- ²³ State of New York Public Service Commission, Case 03-E-0188, Order Granting in Part and Denying in Part a Petition for Rehearing (Dec. 23, 2013) (citing *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976)), <http://statepowerproject.files.wordpress.com/2014/03/ny-psc-rehearing-order-12-23-13.pdf>.
- ²⁴ Illinois’ RPS is also implemented through centralized procurement. The Illinois Power Agency manages the procurement of wholesale electricity, including renewable energy to meet the State’s RPS, for two investor-owned utilities. However, unlike NYSEDA, the Illinois state agency does not purchase the RECs itself, but instead brokers contracts between utilities and supplier. The Supreme Court has said that the market participant exception still applies when the state acts as a broker of goods so long as the state does, “not impose conditions . . . that have a substantial regulatory effect outside of that particular market.” *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 83, 97 (1984).
- ²⁵ State of New York Public Service Commission, Case 03-E-0188, Order Modifying Renewable Portfolio Standard Program Eligibility Requirements (May 22, 2013), <http://statepowerproject.files.wordpress.com/2014/03/ny-psc-order-05-23-13.pdf>.
- ²⁶ As noted in the Legal Appendix, while there may not be an economic difference between a tax on out-of-state businesses and a subsidy to in-state businesses, courts have typically not subjected subsidies to the same level of scrutiny under the dormant Commerce Clause.
- ²⁷ Jordan Macknick, Robin Newmark, Garvin Heath, and KC Hallett, *A Review of Operational Water Consumption and Withdrawal Factors for Electricity Generating Technologies*, National Renewable Energy Laboratory (March 2011), <http://www.nrel.gov/docs/fy11osti/50900.pdf>.
- ²⁸ *See, e.g.*, Anil Markandya and Paul Wilkinson, *Electricity Generation and Health*, THE LANCET, Sept. 15, 2007 (Vol. 370, Issue 9591, pages 979–990).
- ²⁹ The Legislature found that “[s]upplying electricity to California end-use customers that is generated by eligible renewable energy resources is necessary to improve California’s air quality and public health . . .” (Pub. Util. Code, § 399.11, subd. (e)(1)).
- ³⁰ CPUC Decision 13-10-074.
- ³¹ *Energy and Environment Legal Institute v. Joshua Epel, et al.*, Civ. Action No. 11-cv-00859 (D. Col. 2011), Compl., <http://statepowerproject.files.wordpress.com/2014/03/second-amended-complaint.pdf>.
- ³² *Energy and Environment Legal Institute v. Joshua Epel, et al.*, 2014 WL 1715209 (D. Col. 2014), <http://statepowerproject.files.wordpress.com/2014/03/co-order-on-standing-050114.pdf>.
- ³³ *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981).

- ³⁴ *Rocky Mountain Farmers Union v. Goldstene*, 843 F.Supp.2d 1071, 1080 (E.D. Cal. 2011) (quoting California Air Resources Board Final Statement of Reasons at 479). The document had also projected that “[u]p to eighteen cellulosic ethanol and six corn ethanol plants could be built [in California] by 2020.” FSOR at 419.
- ³⁵ *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270–71 (1984) (quoting the Hawaiian legislation’s stated reason for exempting local alcohol from a state tax: to “encourage and promote the establishment of a new industry”).
- ³⁶ *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 595 (7th Cir. 1995) (calling Illinois’ law a “none-too-subtle attempt” to drive the continued use of Illinois coal, and quoting the statute which stated the legislature supported “the need to maintain and preserve as a valuable State resource the mining of coal in Illinois”); *see also* *Alliance for Clean Coal v. Bayh*, 72 F.3d 556 (7th Cir. 1995).
- ³⁷ *Chemical Waste Management v. Hunt*, 504 U.S. 334, 341 (1992).
- ³⁸ Maryland PSC Case No. 9214, Order No. 84815, April 12, 2012.
- ³⁹ New Jersey P.L. 2011, Chapter 9, Senate No. 2381, approved Jan. 28, 2011.
- ⁴⁰ *See*, *PPL EnergyPlus, LLC et al. v. Nazarian*, 974 F. Supp.2d 790 (D. Md. 2013); *PPL EnergyPlus, LLC et al. v. Hanna*, 977 F. Supp.2d 372 (D.N.J. 2013).
- ⁴¹ *Nazarian*, 974 F. Supp.2d at 851.
- ⁴² *Id.* at 854.
- ⁴³ *Id.* at 854–55.
- ⁴⁴ *Hanna*, 977 F. Supp.2d at 411–12.
- ⁴⁵ *See*, *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014); *PPL EnergyPlus, LLC v. Solomon* 766 F.3d 241 (3d Cir. 2014).
- ⁴⁶ *Hughes v. Talen Energy Marketing*, 136 S.Ct. 1288 (2016).
- ⁴⁷ *Klee*, 861 F.3d 82.
- ⁴⁸ *See, e.g.*, *Or. Waste Systems v. Dep’t of Env’tl Quality of Or.*, 511 U.S. 93, 99 (1994), *Chemical Waste Management v. Hunt*, 504 U.S. 334, 342–43 (1992), *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984).
- ⁴⁹ *West Lynn Creamery v. Healy*, 512 U.S. 186, 200 (1994).
- ⁵⁰ Ari Peskoe, *Designing Emission Budget Trading Programs Under State Law*, p. 10 (Jan. 27, 2016), <http://environment.law.harvard.edu/wp-content/uploads/2014/08/Designing-Emission-Budget-Trading-Programs-Under-Existing-State-Law.pdf>.
- ⁵¹ Steven Ferrey, *Threading the Constitutional Needle*, 7 *TEX. J. OF OIL, GAS, AND ENERGY L.*, 59, 80–85 (2012) (providing examples of SBC statutes).
- ⁵² *Id.*
- ⁵³ *See* text and accompanying notes at pages 25–26.
- ⁵⁴ *North Dakota v. Heydinger*, 15 Supp.3d 891 (D. Minn. 2014).
- ⁵⁵ *Id.* at 917.
- ⁵⁶ *North Dakota v. Heydinger*, 825 F.3d 912 (2016).
- ⁵⁷ *Energy and Environment Legal Inst. v. Epel*, 43 F.Supp.3d 1171, 1179 (D. Col. 2014).
- ⁵⁸ *Energy and Environment Legal Inst. v. Epel*, 793 F.3d 1169 (10th Cir. 2015).
- ⁵⁹ *Energy and Environment Legal Inst.*, 43 F.Supp.3d at 1179.
- ⁶⁰ California Air Resources Board, Initial Statement of Reasons (cited in *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp.2d 1071, 1091).
- ⁶¹ *Rocky Mountain Farmers Union*, 730 F.3d at 1081–82.
- ⁶² *Rocky Mountain Farmers Union*, 843 F. Supp.2d at 1078–79.
- ⁶³ *Id.* at 1092.
- ⁶⁴ *Id.* at 1092–93.
- ⁶⁵ *Rocky Mountain Farmers Union*, 730 F.3d at 1103 (quoting *Gravquick A/S v. Trimble Navigation Int’l Ltd.*, 323 F.3d 1219, 1224 (9th Cir. 2003)).
- ⁶⁶ *Id.* at 1102–03.
- ⁶⁷ *Id.* at 1105.
- ⁶⁸ Federal Energy Regulatory Commission, Order Conditionally Accepting Proposed Tariff Revisions to Implement Energy Imbalance Market, 147 FERC ¶ 61,231 (Jun. 19, 2014).
- ⁶⁹ *Powerex Corp. Request for Rehearing and Clarification*, Federal Energy Regulatory Commission Docket No. ER14-1386-001 (Jul. 21, 2014).
- ⁷⁰ Order on Rehearing, Clarification and Compliance, 149 FERC ¶ 61,058 at P 18 (2014).
- ⁷¹ *Hughes*, 136 S.Ct. at 1299 (declining to address whether “various other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities,” might be preempted by the Federal Power Act and noting that the opinion should not be read to foreclose states from using measures “untethered to a generator’s wholesale market participation.”); *Hanna*, 977 F.Supp.2d at 404 (stating that the parties agreed that the state could support construction of a new gas-fired power plant by providing tax exempt bond financing, granting property tax relief, signing favorable leases on state-owned land, gifting environmentally damaged properties for brownfield development, or accelerating permit approvals).
- ⁷² The FPA “leaves no room either for direct state regulation of the prices of interstate wholesales” or for regulation that “would indirectly achieve the same result.” *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 780 (quoting *Northern Natural Gas Co. v. State Corporation Comm’n of Kansas*, 372 U.S. 84, 91 (1963)).
- ⁷³ California Public Utilities Commission, 132 FERC ¶ 61,047 at P 71 (2010).
- ⁷⁴ 16 U.S.C. § 824(f) (2006).
- ⁷⁵ 18 C.F.R. §§ 292.203–205.
- ⁷⁶ *Orange and Rockland Utilities, Inc.* 43 FERC ¶ 61,067 (1988) (declaratory order reversing FERC’s position on avoided cost rates and now concluding that states could not set rates that exceed avoided costs). A few states had set rates higher than a utility’s avoided cost. *See, e.g.*, *Consolidated Edison, Inc. v. Public Service Comm’n*, 63 N.Y.2d 424 (N.Y. 1984).
- ⁷⁷ California Public Utilities Commission, 133 FERC ¶ 61,059, at P 24 (2010).
- ⁷⁸ California Public Utilities Commission, Order Denying Rehearing, 134 FERC ¶ 61,044 at P 30 (2011); *Solutions for Utilities, Inc. v. California Public Utilities Commission*, 2016 WL 7613906 (C.D. Cal. 2016) (emphasizing that a state *may* take into account utility obligations to purchase renewable energy in setting avoided cost rates).
- ⁷⁹ *Id.* at P 32.
- ⁸⁰ 16 U.S.C. § 824a—3(m).
- ⁸¹ 18 C.F.R. § 292.309; *Public Service Co. of New Hampshire*, 131 FERC ¶ 61,027 at P 18 (2010).
- ⁸² *Id.* at P 21.
- ⁸³ California Public Utilities Commission, 133 FERC ¶ 61,059 at P 31 (2010) (citing *SoCal Edison*, 71 FERC ¶ 61,269 at 62,080 (1995)).
- ⁸⁴ *See* Carolyn Elefant, *Reviving PURPA’s Purpose: The Limits of Existing State Avoided Cost Ratemaking Methodologies in Supporting Alternative Energy Development and a Proposed Path for Reform*, <http://www.recycled-energy.com/images/uploads/Reviving-PURPA.pdf>.
- ⁸⁵ *See* *Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485, 1488 (D.C. Cir. 1997) (explaining that FERC’s order is “of no legal moment unless and until a district court adopts that interpretation when called upon to enforce PURPA”); *see also* *Xcel Energy Servs., Inc. v. FERC*, 407 F.3d 1242, 1244 (D.C. Cir. 2005) (“An order that does no more than announce [FERC’s] interpretation of the PURPA or one of the agency’s implementing regulations is of no legal moment unless and until a district court adopts that interpretation when called upon to enforce the PURPA.”).
- ⁸⁶ *Otter Creek Solar*, 143 FERC ¶ 61,282 (2013); *reh’g denied* 146 FERC ¶

61,192 (2014).

⁸⁷ The court dismissed two earlier filed complaints for lack of standing but allowed Winding Creek to amend the complaint. *Winding Creek Solar LLC v. California Pub. Util. Comm'n*, 2014 WL 558673 (Feb. 10, 2014); *Winding Creek Solar LLC v. Peevey*, 2014 WL 2735015 (Jun. 11, 2014).

⁸⁸ ISO/RTO Council, <http://www.isorto.org/about/default>; Jared M. Fleisher, *ERCOT's Jurisdictional Status: A Leagl History and Contemporary Appraisal*, 3 TX. J. OF OIL, GAS, AND ENERGY L. 5 (2008).

⁸⁹ *Klee*, 861 F.3d at 101.

⁹⁰ See, e.g. *Allegheny Energy Supply Co.* 129 FERC ¶ 61,059 (2009) (granting authorization to a generation company make sales to an affiliate through Pennsylvania's "Provider of Last Resort" RFP and explaining that "the competitive solicitation satisfies the Commission's concerns regarding the potential for affiliate abuse"). In 2002/03, PSE&G argued that FERC did not have jurisdiction over New Jersey's Basic Generation Service auction because the purchasing utilities were acting as agents on behalf of ratepayers and not as wholesale purchasers. FERC "assumed" that it had ultimate jurisdiction over the transactions "without deciding" whether the utilities were acting as agents or wholesale purchasers. *Consolidated Edison Energy Inc. and Rockland Electric Co.*, 102 FERC ¶ 61,097 at PP 10–13 (2003).

⁹¹ *S. Cal. Edison Co. San Diego Gas & Elec. Co.*, 71 FERC ¶ 61,269, at *8 (June 2, 1995). In a 2013 decision about Vermont statutes that conditioned a nuclear power plant's continued operation on the Legislature's approval, the Second Circuit quoted this 1995 FERC order with approval. However, the legal issue was preemption under the Atomic Energy Act. The court's assertion that a state may "direct or encourage its utilities to purchase power" from specific resources could be read as dicta rather than precedent that supports state authority.

⁹² *California Public Utilities Commission*, 133 FERC ¶ 61,059 at P 31 (2010).

⁹³ *Klee*, 861 F.3d at 89 n. 3.

⁹⁴ *Id.* at 100 (quoting *Hughes*, 136 S.Ct. at 1299).

⁹⁵ *Hughes*, 136 S.Ct. 1288.

⁹⁶ *Id.* at 1299 n. 13.

⁹⁷ *Solomon*, 766 F.3d 241 (3rd Cir. 2014).

⁹⁸ *WSPP Inc.*, 139 FERC ¶ 61,061 (2012) (citing 16 U.S.C. §§ 824(d), (e)).

⁹⁹ *Electric Power Supply Association*, 136 S.Ct. at 774.

¹⁰⁰ *Coalition for Competitive Electricity, et al. v. Zibelman*, 2017 WL 3172866 (S.D.N.Y. 2017); *Electric Power Supply Association, et al. v. Star*, 2017 WL 3008289 (N.D.Ill. 2017).

¹⁰¹ 49 U.S.C. § 32919(a). The Clean Air Act allows California to apply for a waiver to adopt more stringent standards, but California agreed to the federal standard through 2025. A 2012 rule issued jointly by the Department of Transportation acting pursuant to its authority under EPCA and EPA acting pursuant to the Clean Air Act, set fuel efficiency standards through model year 2025. California's parallel vehicle regulations allow compliance with the federal standards to meet the State's standards. In their final rule, the federal agencies stated that they "fully expect that any adjustments to the standards will be made with the participation of CARB and in a manner that ensures continued harmonization of state and Federal vehicle standards." 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards; Final Rule. 77 Fed. Reg. 62624, 62784 (Oct. 15, 2012).

¹⁰² 49 U.S.C. § 32919(c); see also *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 498 F.3d 1031 (2007) (holding that fleet rules governing procurement decisions by State and local governments are not preempted by the Clean Air Act).

¹⁰³ 42 U.S.C. § 7543(a).

¹⁰⁴ 42 U.S.C. § 7543(b).

¹⁰⁵ *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007).

¹⁰⁶ 42 U.S.C. § 7545(c)(4)(A).

¹⁰⁷ 42 U.S.C. § 7545(c)(4)(B).

¹⁰⁸ 42 U.S.C. § 7545(c)(4)(C).

¹⁰⁹ *Rocky Mountain Farmers Union*, 843 F. Supp.2d at 1056.

¹¹⁰ *Id.* at 1047.

¹¹¹ *Rocky Mountain Farmers Union v. Corey*, 2017 WL 2619130, *11 (E.D. Cal. June 16, 2017).

¹¹² *Metropolitan Taxicab Bd. of Trade v. City of New York*, 2008 WL 4866021 (S.D. N.Y. 2008); see also *Ophir v. City of Boston*, 647 F.Supp.2d 86 (D. Mass. 2009), *Engine Manufacturers Association v. South Coast Air Quality Management District*, 541 U.S. 246 (2004) (holding that CAA preemption applies to state and local laws and regulations that set emission standards for purchased vehicles).

¹¹³ *Metropolitan Taxicab Bd. of Trade v. City of New York*, 633 F.Supp. 2d 83, 10399 (S.D. N.Y. 2009).

¹¹⁴ *Metropolitan Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 158 (2nd Cir. 2010).

¹¹⁵ *Green Alliance Taxi Cab Association, Inc., et al. v. King County*, 2010 WL 2643369 (W.D. WA 2010).

¹¹⁶ 42 U.S.C. § 7543(a).

¹¹⁷ *Association of Taxicab Operators USA v. City of Dallas*, 720 F.3d 534, 540–542 (5th Cir. 2013) (citing *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 541 U.S. 124 (2004) (noting that incentive programs are "significantly different from [the Clean Air Act's] command-and-control regulation."))

¹¹⁸ See 42 U.S.C. §§ 6292, 6295.

¹¹⁹ See 42 U.S.C. §§ 6292(b).

¹²⁰ Peter Ross, Columbia Law School Sabin Center for Climate Change Law, *Appliance & Equipment Efficiency Standards: A Roadmap for State and Local Action* (July 2017), http://columbiaclimatelaw.com/files/2017/07/Ross_2017-07_Appliance-Equipment-Efficiency-Standards-Working-Paper-RFS.pdf.

¹²¹ 42 U.S.C. § 6297(c).

¹²² 42 U.S.C. § 6297(d).

¹²³ Alexandra Klass, *State Standards for Nationwide Products Revisited: Federalism, Green Building Codes, and Appliance Efficiency Standards*, 34 HARVARD ENV'T'L L. REV., 335, 348 (2010); see also U.S. Dep't of Energy, *State Petitions for Exemption from Federal Preemption*, <https://energy.gov/eere/state-petitions-exemption-federal-preemption> (accessed Jan. 16, 2017).

¹²⁴ See Multi-State Appliance Standards Collaborative, <http://appliancesstandards.org/appliances/>; see also Ross, *supra* note 120, at 12 discussing several states' efficiency standards.

¹²⁵ Joanna Mauer, et al., *Appliance Standards Awareness Project and American Council for an Energy-Efficiency Economy, States Go First: How States Can Save Consumers Money, Reduce Energy and Water Waste, and Protect the Environment with New Appliance Standards* (July 2017), <https://appliance-standards.org/sites/default/files/States%20Go%20First.pdf>.

¹²⁶ 42 U.S.C. § 6297(e).

¹²⁷ 42 U.S.C. § 6297(f)(3).

¹²⁸ *Building Industry Association of America v. Washington State Building Code Council*, 683 F.3d 1144 (9th Cir. 2012).

¹²⁹ *Id.* (citing *Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque*, 2008 WL 5586316 (D. N.M. 2008)).

¹³⁰ 42 U.S.C. § 7416.

¹³¹ 42 U.S.C. § 7543(a).

¹³² 42 U.S.C. § 7543(b).

¹³³ 40 C.F.R. § 89.2.

¹³⁴ *Jensen Family Farms v. Monterey Bay Unified Air Pollution Control District*, 644 F.3d 934, 942 (9th Cir. 2011) (citing 40 C.F.R. § 89.2).

- ¹³⁵ *General Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1986) (finding tax exemptions for local natural gas distribution companies did not violate the dormant Commerce Clause because the local distribution networks serving residential households did not compete with interstate pipelines serving bulk buyers); *see also Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 522 (1935)) (“[i]f [one state], in order to promote the economic welfare of her [own industries], may guard them against competition with [out-of-state competitors], the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.”) (finding New York law requiring minimum wholesale pricing for milk resold in New York retail markets violated the dormant Commerce Clause because it set prices for out-of-state transactions); *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979) (noting the Framers’ concern about economic balkanization and finding that an Oklahoma law banning the export of minnows discriminated against interstate commerce on its face).
- ¹³⁶ *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670 (1981) (a “State’s power to regulate commerce is never greater than in matters traditionally of local concern”) (striking an Iowa law that prohibited 65-foot double trailer trucks within its borders as impermissibly burdening interstate commerce); *see also See Southern Pac. Co. v. Arizona*, 325 U.S. 761, 771 (1945) (finding “[t]here has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern.”) (striking an Arizona law limiting the number of cars that can be attached to a passenger or freight train).
- ¹³⁷ *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978) (citing *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976)). In *Exxon*, Maryland law prohibited oil producers and refiners from owning retail gas stations in the state, because they had been servicing their stations at the expense of others during periods of fuel shortage. The Supreme Court upheld Maryland’s law against dormant Commerce Clause and preemption challenges.
- ¹³⁸ *Id.* at 126–27; *see also Baude v. Heath*, 538 F.3d 608, 615 (7th Cir. 2008) (noting that “[f]avoritism for large wineries over small wineries does not pose a constitutional problem . . .”) (striking a provision in Indiana law requiring small vintners to sell into Indiana through a wholesaler, but upholding a requirement for an initial face-to-face meeting with retail purchasers to verify their age, both under the Pike balancing test).
- ¹³⁹ *Granolm v. Heald*, 544 U.S. 460, 472 (2005) (citing *Oregon Waste Systems, Inc. v. Dep’t of Env’t Quality of Oregon*, 511 U.S. 93, 99 (1994)). In *Granolm*, the Court struck down a Michigan law prohibiting out-of-state wineries from shipping directly to Michigan consumers, and a New York law making it more difficult for out-of-state wineries to make direct sales to New York consumers, as discriminatory.
- ¹⁴⁰ *West Lynn Creamery*, 512 U.S. at 193 (1994).
- ¹⁴¹ *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984).
- ¹⁴² *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980) (striking Florida laws prohibiting out-of-state bank holding companies to own or control banks, investment advising firms, or trust service providers in Florida, as discriminating against interstate commerce).
- ¹⁴³ *Baldwin*, 294 U.S. at 527; *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951).
- ¹⁴⁴ The Court has also referred to the test as “rigorous scrutiny” (*C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994); *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Auth.*, 550 U.S. 330, 343 (2007)) and “more demanding scrutiny” (*Maine v. Taylor*, 477 U.S. 131, 138 (1986)).
- ¹⁴⁵ *See New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988).
- ¹⁴⁶ *Taylor*, 477 U.S. at 148; *see also West Lynn Creamery*, 512 U.S. at 205 (“Preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits.”).
- ¹⁴⁷ *Taylor*, 477 U.S. 131; *see also Oregon-Washington R. & Nav. Co. v. Washington*, 270 U.S. 87, 96 (1926) (upholding a Washington law that blocked shipments of alfalfa, except in sealed containers, from states where fields had been infected by weevils).
- ¹⁴⁸ *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).
- ¹⁴⁹ *Limbach*, 486 U.S. 269 (1988).
- ¹⁵⁰ *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982).
- ¹⁵¹ *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 595 (7th Cir.1995); *Alliance for Clean Coal v. Bayh*, 72 F.3d 556, 560. (7th Cir. 1995). As noted, the clear intent of the law was to benefit in-state coal at the expense of western coal.
- ¹⁵² *See Walter Hellerstein and Dan T. Coenen, Commerce Clause Restraints on State Business Development Incentives*. 81 CORNELL L. REV. 789 1995–1996 (discussing four cases that found State tax incentives violated the dormant Commerce Clause: *Boston Stock Exchange v. State Tax Comm’n*, 429 U.S. 318 (1977); *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984); and *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988)). In addition to not being discriminatory, a valid state tax of interstate activity is one that: has a substantial nexus with the state; is fairly apportioned; and is fairly related to the services provided by the State. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (upholding Mississippi’s sales tax on in-state sales as a permissible cost of doing business). The Supreme Court has noted that the “fair apportionment” prong may be viewed as a subset of the discrimination inquiry. (“A tax that unfairly apportions income from other States is a form of discrimination against interstate commerce.”) *Armco v. Hardesty*, 467 U.S. 638 (1984) (striking Virginia’s gross receipts tax, levied only on out-of-state businesses).
- ¹⁵³ *American Trucking Ass’n v. Mich. Pub. Ser. Comm’n*, 545 U.S. 429, 433 (2005) (quoting *American Trucking Assns v. Scheiner*, 483 U.S. 266, 284 (1987), citations omitted).
- ¹⁵⁴ *In re Appeals of CIG Field Servs. Co.*, 112 P.3d 138 (Kan. 2005) (finding property tax statute’s differentiation between interstate and intercounty natural gas gathering systems and intracounty systems violated the dormant Commerce Clause).
- ¹⁵⁵ *Henneford v. Silas Mason Co.*, 300 U.S. 577, 583–84 (1937); *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996); *Or. Waste Systems*, 511 U.S. at 102–03.
- ¹⁵⁶ *New Energy Co. of Indiana*, 486 U.S. at 278.
- ¹⁵⁷ *Id.*; *see also Boston Stock Exchange*, 429 U.S. at 336–37; *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 591–92 (1997) (“[t]his distinction is supported by scholarly commentary as well as precedent, and we see no reason to depart from it”).
- ¹⁵⁸ *West Lynn Creamery*, 512 U.S. at 199.
- ¹⁵⁹ *Id.*
- ¹⁶⁰ *Camps Newfound/Owatonna*, 520 U.S. 564.
- ¹⁶¹ *Pelican Chapter v. Edwards*, 128 F.3d 910 (5th Cir. 1997).
- ¹⁶² *West Lynn Creamery*, 512 U.S. at 193.
- ¹⁶³ *Cuno v. DaimlerChrysler Corp.*, 386 F.3d 738 (6th Cir. 2004). The Supreme Court found that the plaintiffs had no standing to challenge the tax incentive package and did not reach the merits of the case. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006).
- ¹⁶⁴ Compare Laurence H. Tribe, *American Constitutional Law* 1021 (3d ed. 2000) with Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965 (1998).
- ¹⁶⁵ *General Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997).
- ¹⁶⁶ *Id.* at 298–305 (finding that public utilities generally provide gas “bundled with service and [consumer] protections” to a “market [not] susceptible to competition by the interstate sellers,” while interstate marketers sell “unbundled” gas to a “non-captive” market).
- ¹⁶⁷ *Klee*, 861 F.3d 82.
- ¹⁶⁸ *Alexandria Scrap*, 426 U.S. at 811.
- ¹⁶⁹ *Atlantic Coast Demolition & Recycling, Inc. v. Bd. of Chosen*

Freeholders of Atlantic County, 48 F.3d 701 (3d Cir. 1995) (rejecting New Jersey's contention that it was acting as a market participant when it required private market participants to bring waste to designated facilities).

¹⁷⁰ *Alexandria Scrap*, 426 U.S. 794.

¹⁷¹ *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980).

¹⁷² *White v. Massachusetts Council of Construction Employees, Inc.*, 460 U.S. 204 (1983).

¹⁷³ *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 83, 97 (1984).

¹⁷⁴ See *New Energy Co.*, 486 U.S. at 277 (1986) (stating that the market participant doctrine “differentiates between a State’s acting in its distinctive governmental capacity [as a regulator] and a State’s acting in the more general capacity of a market participant; only the former is subject to the limitations of the negative Commerce Clause.”).

¹⁷⁵ *Atlantic Coast Demolition*, 48 F.3d 701, 717.

¹⁷⁶ *Tri-M Group, LLC v. Sharp*, 638 F.3d 406, 422–23 (3d Cir. 2011).

¹⁷⁷ *Amer. Trucking Ass’n, Inc. v. City of Los Angeles*, 133 S. Ct. 2096, 2102–04 (2013). The constitutional issue in this case was preemption rather than dormant Commerce Clause; but the case turned on the language of a federal statute which preempted state provision “having the force and effect of law related to a price, route, or service of any motor carrier.” 49 U.S.C. § 14501(c)(1). The Court handled the inquiry as it would an analysis of a market participant defense. *Amer. Trucking Ass’n, Inc.*, 133 S. Ct. 2096.

¹⁷⁸ *C & A Carbone*, 511 U.S. 383.

¹⁷⁹ *United Haulers Ass’n*, 550 U.S. 330.

¹⁸⁰ *Davis*, 553 U.S. 328.

¹⁸¹ *Id.* at 340 (citing *United Haulers*, 550 U.S. at 342).

¹⁸² *Id.*

¹⁸³ See *Northeast Bancorp v. Bd. of Governors*, 472 U.S. 159, 174 (1985) (stating that “[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause”). The federal Bank Holding Company Act permitted interstate transactions only when authorized by State law. Massachusetts and Connecticut that allowed an out-of-state bank holding company with its headquarters in another New England state to acquire an in-state bank. The Court held that in this case “the commerce power of Congress is not dormant” because it had authorized the type of laws passed by Massachusetts and Connecticut.

¹⁸⁴ *Brown-Forman Distillers Corp. v. NY State Liquor Auth.*, 476 U.S. 573, 581 (1986).

¹⁸⁵ *Healy v. Beer Institute*, 491 U.S. 324, 337 (1989).

¹⁸⁶ *Rocky Mountain Farmers Union*, 730 F.3d at 1101 (2013) (“In the modern era, the Supreme Court has rarely held that statutes violate the extraterritoriality doctrine.”); see also *American Beverage Ass’n*, 735 F.3d at 377 (6th Cir. 2013) (Sutton, J., concurring) (“I am not aware of a single Supreme Court dormant Commerce Clause holding that relied exclusively on the extraterritoriality doctrine to invalidate a state law.”).

¹⁸⁷ *Baldwin* 294 U.S. at 521 (1935).

¹⁸⁸ *Brown-Forman Distillers Corp. v. NY State Liquor Auth.*, 476 U.S. 573 (1986); *Healy v. Beer Inst.*, 491 U.S. 324 (1989).

¹⁸⁹ *C & A Carbone*, 511 U.S. at 393 (1994) (citing to *Baldwin* and rejecting the town’s argument that the flow-control ordinance is an appropriate means for steering harmful waste away from out-of-town disposal sites because that would “extend the town’s police power beyond its jurisdictional bounds”).

¹⁹⁰ *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 645–46 (6th Cir. 2010) (citing cases from all Circuits but the 5th).

¹⁹¹ *Int’l Dairy Foods Ass’n*, 622 F.3d at 645 (citing *Healy*, 491 U.S. at 336).

¹⁹² *Id.* Part of the rule was struck, but on other grounds.

¹⁹³ *Id.* at 647.

¹⁹⁴ *American Beverage Ass’n*, 735 F.3d 362 (6th Cir. 2013).

¹⁹⁵ See *Seinfeld*, S7:Ep21–22 (“The Bottle Deposit”).

¹⁹⁶ *American Beverage Ass’n*, 735 F.3d at 376. The concurrence in this case took issue with the whole concept of extra-territoriality as a basis for voiding a state law, given the interstate nature of the U.S. economy and the difficulty courts may have in determining whether a law merely affects or actually controls out-of-state activity.

¹⁹⁷ *Energy and Environment Legal Institute*, 793 F.3d at 1174 (10th Cir. 2015) (quoting *Pharm. Research & Mfrs. Of Am. v. Walsh*, 538 U.S. 644, 669 (2003)).

¹⁹⁸ *United Haulers Ass’n*, 550 U.S. at 346 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

¹⁹⁹ *Davis*, 553 U.S. at 339.

²⁰⁰ *Pike*, 397 U.S. at 142.

²⁰¹ *Kleinsmith v. Shurtliff*, 571 F.3d 1033, 1043–44 (10th Cir. 2009) (quoting *Baude v. Heath*, 538 F.3d 608, 612 (7th Cir. 2008)).

²⁰² *Pike*, 397 U.S. at 142. The test is similar to strict scrutiny, which requires a State to demonstrate both that the law has a non-protectionist purpose and that there is no less discriminatory means for achieving that purpose. However, *Pike* is more deferential to the state.

²⁰³ *Wyoming v. Oklahoma*, 502 U.S. 437, 455 n.12 (1992).

²⁰⁴ *Yamaha v. Jim’s Motorcycle Inc.*, 401 F.3d 560, 568 (citing *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987)).

²⁰⁵ *Ark. Elec. Coop. Corp., v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375 (1983).

²⁰⁶ Arkansas’ regulation of wholesale rates was not preempted by the Federal Power Act because the Act does not provide FERC with jurisdiction over rates charged by cooperatives.

²⁰⁷ *Northwest Cent. Pipeline Corp. v. State Corp. Comm’n of Kan.*, 489 U.S. 493 (1989).

²⁰⁸ *Energy and Environmental Legal Institute*, 43 F.Supp.3d at 1182.

²⁰⁹ *Nazarian*, 974 F.Supp.2d at 854.

²¹⁰ *Energy and Environmental Legal Institute*, 43 F.Supp.3d at 1182 (citing *V-1 Oil Co. v. Utah Dep’t of Pub. Safety*, 131 F.3d 1415, 1425 (10th Cir. 1997)).

²¹¹ *Clover Leaf Creamery*, 449 U.S. at 474 (upholding Minnesota’s ban on the retail sale of milk in plastic non-returnable containers because the environmental benefits outweighed any burden on interstate commerce).

²¹² *Davis*, 553 U.S. at 353; see also *Colon Health Ctr. of America LLC v. Hazel*, 733 F.3d 535 (4th Cir. 2013) (“The *Pike* test is often too soggy to properly cabin the judicial inquiry or effectively prevent the district court from assuming a super-legislative role,” citing *Dep’t of Revenue v. Davis*).

²¹³ *United Haulers Ass’n*, 550 U.S. at 346.

²¹⁴ *Altria Group v. Good*, 555 U.S. 70, 76 (2008) (quoting *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996)); see also *Hughes*, 136 S.Ct. at 1300 (J. Sotomayor, concurring).

²¹⁵ *CSX Transp., Inc., v. Easterwood*, 507 U.S. 658, 664 (1993).

²¹⁶ *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485–486 (1996) (upholding application of Florida common law to recover damages for a defective pace maker); *Cippoline v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (upholding application of New Jersey common law to recover damages for smoking-related death, notwithstanding the federal Cigarette Labelling and Advertising Act).

²¹⁷ *Hillsborough County, Fla. v. Automated Medical Labs*, 471 U.S. 707, 715 (1985).

²¹⁸ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 304 (1932) (“It is settled that the police power commonly invoked in aid of health, safety, and morals extends equally to the promotion of the public welfare.”)

- ²¹⁹ *Arkansas Elec. Coop. Corp.*, 461 U.S. at 377 (1983); *see also* *FERC v. Mississippi*, 456 U.S. 742, n. 7 (“The Court has not explored fully the extent of ‘traditional’ state functions. Utility regulation, however, should fall within any definition of that term.”).
- ²²⁰ *U.S. v. Locke* 529 U.S. 89, 108 (2000) (finding the federal Ports and Waterways Safety Act preempted Washington’s tanker regulations because “Congress has legislated in the field [of navigation] from the earliest days of the Republic”).
- ²²¹ *Hughes*, 136 S.Ct. at 1300 (J. Sotomayor, concurring).
- ²²² *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 421 (1973).
- ²²³ *Hughes*, 136 S.Ct. at 1300 (quoting *Northwest Cent. Pipeline Corp.*, 489 U.S. at 518).
- ²²⁴ *Arizona v. U.S.* 132 S.Ct. 2492, 2501 (2012).
- ²²⁵ *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88, 98 (1992).
- ²²⁶ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).
- ²²⁷ *Id.*
- ²²⁸ *Arizona*, 132 S.Ct. at 2502 (2012).
- ²²⁹ *Hines v. Davidowitz*, 312 U.S. 52, 66–68 (1941) (voiding a Pennsylvania law requiring registration of certain aliens because it conflicted with the federal Alien Registration Act).
- ²³⁰ *Arizona*, 132 S.Ct. at 2504 (2012).
- ²³¹ *Id.*
- ²³² *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143 (1963) (upholding a California law setting maturity standards for avocados that was different than standards set under the federal Agricultural Adjustment Act, because the differences did not give rise to a conflict).
- ²³³ *Felder v. Casey*, 487 U.S. 131, 138 (1988) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).
- ²³⁴ *Bulding and Const. Trades Council of Metropolitan Dist. v. Associated Builders and Contractors of Mass./R.I., Inc., et al.* 507 U.S. 218, 229 (1993).
- ²³⁵ *Wisconsin Dept. of Industry, Labor and Human Relations v. Gould*, 475 U.S. 282 (1986).
- ²³⁶ 16 U.S.C. § 824(a).
- ²³⁷ *Pub. Utilities Comm’n of R.I. v. Attleboro Steam and Elec. Co.*, 273 U.S. 83, 89 (1927).
- ²³⁸ *New York v. FERC*, 535 U.S. 1, 21 (2002).
- ²³⁹ 16 U.S.C. § 824(b)(1). The Supreme Court has held that FERC’s jurisdiction over the *sale* of power is specifically confined to the wholesale market. However, FERC’s jurisdiction over electricity *transmissions* includes all interstate transmission, regardless of whether it is wholesale or retail. *New York*, 535 U.S. at 20 (2002).
- ²⁴⁰ *Id.*
- ²⁴¹ *Id.*
- ²⁴² *Electric Power Supply Association*, 136 S.Ct. at 774 (quoting *California Independent System Operator v. FERC*, 372 F.3d 395, 403 (D.C. Cir. 2004)).
- ²⁴³ *Id.* at 775 (“FERC cannot take an action transgressing [the § 201] limit[s] no matter how direct, or dramatic, its impact on wholesale rates.”).
- ²⁴⁴ *Id.* at 776 (“when [FERC] takes virtually any action respecting wholesale transactions—it has some effect, in either the short or the long term, on retail rates. That is of no legal consequence. . . . When FERC regulates what takes place on the wholesale market. . . then no matter the effect on retail rates, [FPA § 201] imposes no bar.”).
- ²⁴⁵ *See Solomon*, 766 F.3d at 255 (3d Cir. 2014) (“Nor do we endorse the argument that LCAPP has been field preempted because it affects the market clearing price by increasing the supply of electric capacity. . . .
- Accordingly, we do not view LCAPP’s incidental effects on the interstate wholesale price of electric capacity as the basis of its preemption problem. Indeed, were we to determine otherwise, the states might be left with no authority whatsoever to regulate power plants because every conceivable regulation would have some effect on operating costs or available supply. That is not the law.”); *Klee*, 861 F.3d at 101 (the state program’s “incidental effect on wholesale prices does not, however, amount to a regulation of the interstate wholesale electricity market that infringes on FERC’s jurisdiction.”).
- ²⁴⁶ *Id.*
- ²⁴⁷ *Fed. Power Comm’n v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964); *see also* *Conn. Light & Power Co. v. Fed. Power Comm’n*, 324 U.S. 515, 531 (1945) (Congress was “plainly was trying to reconcile the claims of federal and of local authorities and to apportion federal and state jurisdiction over the industry.”).
- ²⁴⁸ *New York*, 535 U.S. at 17 (citing Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 691 (D.C. Cir. 2000) (observing the electric industry is no longer “neatly divided into spheres of retail versus wholesale sales.”).
- ²⁴⁹ *Id.*
- ²⁵⁰ *Electric Power Supply Association*, 136 S.Ct. at 776 (quoting *FPC v. La. Power & Light Co.*, 406 U.S. 621, 631 (2003)).
- ²⁵¹ *Hughes*, 136 S.Ct. at 1300 (J. Sotomayor, concurring).
- ²⁵² *Electric Power Supply Association*, 136 S.Ct. at 780; *see also Hughes*, 136 S.Ct. at 1300 (characterizing the FPA as a “collaborative federalism statute”);
- ²⁵³ *See OneOK v. Learject*, 135 S.Ct. 1591, 1601 (“Petitioners and the dissent argue that there is, or should be, a clear division between areas of state and federal authority in natural-gas regulation. But that Platonic ideal does not describe the natural gas regulatory world.”).
- ²⁵⁴ *Nazarian*, 753 F.3d at 476; *see also Solomon*, 766 F.3d 241. Under the state-mandated contracts, the price paid is based on the difference between the current market price and a price set in the contract. In Maryland, if the PJM price was higher than a formula price approved by the PSC, distribution companies would pay the generator the difference between the two prices. If the PJM price was lower than the formula price, the generator would pay the distribution companies.
- ²⁵⁵ *Hughes*, 136 S.Ct. at 1299.
- ²⁵⁶ 16 U.S.C. § 824(b); *Hughes*, 136 S.Ct. at 1291; *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986).
- ²⁵⁷ *Rochester Gas and Elec. Corp. v. Pub. Serv. Comm’n of State of N.Y.*, 754 F.2d 99 (2d Cir. 1985).
- ²⁵⁸ *Id.* at 104.
- ²⁵⁹ 16 U.S.C. § 824a—3. These provisions of PURPA are codified in the US Code as part of the Federal Power Act.
- ²⁶⁰ 18 C.F.R. §§ 292.203–205.
- ²⁶¹ 16 U.S.C. § 824a—3(m).
- ²⁶² 18 C.F.R. § 292.309; *Public Service Co. of New Hampshire*, 131 FERC ¶ 61,027 at P 18 (2010). Prior to PURPA’s enactment in 1978, non-utility generators would have had to negotiate with utilities to connect to the grid and sell power. Utilities would have been unlikely to welcome to the competition and generally could have refused to deal with new entrants into the market. By 2005, open access transmission and regional wholesale markets made it far easier for new entrants to connect and sell power. Congress therefore allowed utilities to petition for exemptions from PURPA, which would be granted if new entrants had sufficient access to the market.
- ²⁶³ 16 U.S.C. § 824a—3(b), (d).
- ²⁶⁴ *California Public Utilities Commission*, 133 FERC ¶ 61,059 at P 24 (2010).
- ²⁶⁵ *Id.* at P 26.
- ²⁶⁶ 18 CFR § 292.304(d). *But see* *Exelon Wind v. Nelson*, 766 F.3d 380 (5th Cir. 2014) (rejecting FERC’s interpretation of its own regulations

and upholding the Texas's PUC's rule that allows only QFs capable of providing firm power the option of receiving a rate calculated at the time the obligation is incurred).

²⁶⁷ *Allco Renewable Energy v. Massachusetts Electric Company d/b/a National Grid*, et al, 2016 WL 5346937 (D. Ma. 2016).

²⁶⁸ The court rejected the state's argument that the state may decide whether a sale is "as available" or "pursuant to a legally enforceable obligation." The court concluded that "under no reasonable reading of [the regulation] does that option belong to the state regulatory authority rather than to the QF."

²⁶⁹ *FLS Energy*, 157 FERC ¶ 61,211 at P 21 (2016); *see also* *Windham Solar LLC and Allco Finance Limited*, 157 FERC ¶ 61,134 at P 4, n. 7 (2016) (noting that *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 400 (5th Cir. 2014) suggested that a state could limit the choice to QFs that can provide firm power but that no such distinction exists in FERC regulations).

²⁷⁰ *FLS Energy*, 157 FERC ¶ 61,211 at PP 20, 23 (2016).

²⁷¹ *Hydrodynamics Inc.*, 146 FERC ¶ 61,193, at P 32 (2014).

²⁷² *FLS Energy*, 157 FERC ¶ 61,211 at P 24 (2016) (citing *JD Wind 1*, 129 FERC ¶ 61,148, at P 25 (2009), *reh'g denied*, 130 FERC ¶ 61,127 (2010); *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685 (6th Cir. 2015); *see also* *Little v. Louisville Gas & Electric Co.*, 805 F.3d 695, 698 (6th Cir. 2015)

²⁷³ *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d. Cir. 2013). *But see* *Amer. Electric Power v. Connecticut*, 131 S. Ct. 2527 (2011) (holding that the Clean Air Act preempts *federal* common law claims).

²⁷⁴ *See, e.g.*, EPA Office of General Counsel "Air Pollution: Delegation of Authority" Memorandum, 1972 WL 21412 (Nov. 9, 1972).

²⁷⁵ 42 U.S.C. § 7410; 40 C.F.R. pt. 51.

²⁷⁶ 42 U.S.C. § 7491(b); 40 C.F.R. § 51.300 et seq.

²⁷⁷ 42 U.S.C. § 7416.

²⁷⁸ 42 U.S.C. § 7545(c)(4).

²⁷⁹ 42 U.S.C. § 7543(a). Because California had a comprehensive air pollution statute before enactment of the CAA, federal law allows California to seek a waiver from the prohibition on state regulation of motor vehicles.

²⁸⁰ 42 U.S.C. § 7543(e)(1). The CAA empowers EPA to authorize California's regulation of larger nonroad engines or vehicles (those larger than 175 horsepower). 42 U.S.C. § 7543(e)(2).

²⁸¹ 42 U.S.C. § 7573.

²⁸² *Compare* *Ass'n of Taxicab Operators USA v. City of Dallas*, 720 F.3d 534 (5th Cir. 2013), with *Metropolitan Taxicab Board of Trade v. City of New York*, 2008 WL 4866021 (S.D.N.Y. 2008), and *Metropolitan Taxicab Board of Trade v. City of New York*, 615 F.3d 152 (2d Cir. 2010).

²⁸³ *Jensen Family Farms v. Monterey Bay Unified Air Pollution Control District*, 644 F.3d 934, 942 (9th Cir. 2011) (citing 40 C.F.R. § 89.2).

²⁸⁴ 49 U.S.C. § 32902.

²⁸⁵ 49 U.S.C. § 32919.

²⁸⁶ 42 U.S.C. §§ 6292, 6295.

²⁸⁷ 42 U.S.C. § 6297(c).

²⁸⁸ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, (1992).

²⁸⁹ *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979).

²⁹⁰ 16 U.S.C. § 824a-3(h)(B).

²⁹¹ In 2015, the Second Circuit dismissed a complaint filed by a qualifying facility about a Connecticut because the QF had failed to exhaust administrative remedies, a prerequisite for QF seeking to bring an action in federal court to vindicate specific rights conferred by PURPA. *Allco Finance Ltd. v. Klee*, 805 F.3d 89 (2nd Cir. 2015).

²⁹² *Armstrong v. Exceptional Child Ctr.*, 135 S.Ct. 1378, 1383 (2015).

²⁹³ *Coalition for Competitive Electricity, et al. v. Zibelman*, 2017 WL 3172866 (S.D.N.Y. 2017); *Electric Power Supply Association, et al. v. Star*, 2017 WL 3008289 (N.D.Ill. 2017); *see also* Matthew Christiansen, *The FPA and the Private Right to Preempt*, 84 GEO. WASH. L. REV. ARGUENDO 129 (2016).