TILTING AT WINDMILLS: Finding an Alternative Dormant Commerce Clause Framework to Preserve Renewable Portfolio Standard Generator Location Requirements

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I. INTRODUCTION

As our world becomes ever more connected,[1] with a boundless supply of information and products from all over the world readily accessible through the click of a button, consumers are becoming more motivated than ever to spend their money at locally-owned businesses.[2] This "localist" movement is supported by various local organizations around the country, whose memberships are steadily increasing.[3] The localist movement has been particularly visible in Arizona. For instance, Local First Arizona, "a statewide non-profit organization working to strengthen communities and local economies through growing, supporting, and celebrating locally owned businesses throughout the state,"[4] has over 2,000 members in industries

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1. *See* Sam Kalen, *Dormancy Versus Innovation: A Next Generation Dormant Commerce Clause*, 65 OKLA. L. REV. 381, 381 (2013) (noting that the last half century of development has caused national markets and international markets to "morph[] into" one another.).

2. Consider, for example, the growth of "Small Business Saturday," a concept now officially supported by U.S. Small Business Administration. *Small Business Saturday 2014*, U.S. SMALL BUSINESS ADMINISTRATION, https://www.sba.gov/about-sba/sba-initiatives/small-business-saturday (last visited Nov. 10, 2015). On Small Business Saturday 2013, consumers aware of the event spent an estimated $5.7 billion at small businesses. Nicole Leinbach-Reyhle, *Small Business Saturday Becomes Holiday Tradition in Communities Across the Country in Only Five Years*, FORBES.COM (Oct. 16, 2014, 8:24 AM), http://www.forbes.com/sites/nicoleleinbachreyhle/2014/10/16/small-business-saturday-becomes-holiday-tradition-in-communities-across-the-country/.

3. *See Localist Champions*, BEALOCALIST.ORG, https://bealocalist.org/localist-champions (last visited Nov. 10, 2015) (listing nearly 50 nonprofit organizations in the United States and Canada dedicated to encouraging the growth and development of local business, all of whom have become members of the Business Alliance for Local Living Economies).

4. *About LFA*, LOCAL FIRST ARIZ., http://www.localfirstaz.com/about/ (last visited Nov. 10, 2015).

ranging from food service to banking and finance.[5] There is growing evidence that spending at local businesses has a significant economic impact. According to one study, for every $100 spent at a locally-owned business, $64 of that money stays within the business's own community, as compared to only $43 at non-locally owned businesses.[6]

Given the apparent connection between local spending and economic development, it may seem counterintuitive that the Constitution has been interpreted to prohibit many state-level policies that would encourage local growth and spending by giving preference to local businesses. While the Commerce Clause of the Constitution gives Congress the explicit power "to regulate Commerce . . . among the several States,"[7] the Supreme Court has recognized since the days of Chief Justice Marshall that this explicit power comes with an implicit restriction on state-level regulations impacting interstate commerce.[8] This so-called "dormant Commerce Clause" prevents states from enacting legislation that explicitly favors in-state interests or harms out-of-state interests,[9] exerts control over commerce that crosses state lines,[10] or unreasonably burdens interstate commerce in some other way.[11] Although some scholars have argued that the dormant Commerce Clause was originally interpreted as a necessary tool to stave off state-level "protectionism" that could hamper the early states' cooperation,[12] the key inquiry in Commerce Clause jurisprudence today is whether the law "discriminates" in some way, regardless of whether some protectionist intent exists.

In the last decade, battles over renewable energy policy have highlighted the conflict between the dormant Commerce Clause's 19th-century concerns

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5. *2013 End-of-Year Review*, LOCAL FIRST ARIZ., http://www.localfirstaz.com/about/2013-review.php (last visited Nov. 10, 2015).

6. CIVIC ECON., LOCAL WORKS!: EXAMINING THE IMPACT OF LOCAL BUSINESS ON THE WEST MICHIGAN ECONOMY 2 (2008), http://www.localfirstaz.com/studies/local-works/local-works-executive-summary.pdf.

7. U.S. CONST. art. I, § 8, cl. 3.

8. *See* Brannon P. Denning, *Reconstructing the Dormant Commerce Clause*, 50 WM. & MARY L. REV. 417, 428–31 (2008) (discussing Gibbons v. Ogden, 22 U.S. 1 (1824); Brown v. Maryland, 25 U.S. 419 (1827); and Wilson v. Blackbird Creek Marsh, 27 U.S. 245 (1829), three cases from the Marshall Court that developed the legal theory that would eventually become the Dormant Commerce Clause).

9. *E.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 623–24 (1978).

10. *E.g.*, Healy v. Beer Inst., Inc., 491 U.S. 324, 335–37 (1989).

11. *E.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

12. *E.g.*, Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 575 (1997) (arguing that this focus on discrimination betrays the dormant Commerce Clause's original purpose of preventing state-level protectionism).

with preventing "competing and interlocking" state economic policies[13] and the 21st-century desire for sustainability, both economic and environmental. In particular, significant debate has arisen over whether state-level Renewable Portfolio Standards (RPSs), which require utilities serving a state to prove that a certain percentage of their energy supply comes from renewable energy sources, can withstand a dormant Commerce Clause challenge.[14] Presently, 29 states and the District of Columbia have an RPS, ranging from Michigan's modest goal to receive 10% of its commercial energy from renewables by 2015 to California's aggressive goal to hit 33% by 2020.[15] Some states have included "location requirements" in their RPS programs, policies that have particularly raised objections under the dormant Commerce Clause.[16] Location requirements obligate energy providers delivering energy into a state to supply a certain amount of renewable energy through generation facilities geographically situated within the state or within the state's region.[17]

In 2014, the District Court of Colorado addressed some of the legal issues surrounding RPSs when it upheld that state's RPS in *Energy & Environment Legal Institute v. Epel*.[18] The decision was affirmed by the Tenth Circuit Court of Appeals in July 2015, which considered only whether the Colorado

13. *Healy*, 491 U.S. at 337.

14. *Id.*; NANCY RADER & SCOTT HEMPLING, THE RENEWABLES PORTFOLIO STANDARD: A PRACTICAL GUIDE C-4 to C-6 (2001), http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/narucrps.pdf; Nathan E. Endrud, *State Renewable Portfolio Standards: Their Continued Validity and Relevance in Light of the Dormant Commerce Clause, the Supremacy Clause, and Possible Federal Legislation*, 45 HARV. J. ON LEGIS. 259 (2008); William A. Griffin, *Renewable Portfolio Standards and the Dormant Commerce Clause: The Case for In-Region Location Requirements*, 41 B.C. ENVTL. AFF. L. REV. 133 (2014); Daniel K. Lee & Timothy P. Duane, *Putting the Dormant Commerce Clause Back to Sleep: Adapting the Doctrine to Support State Renewable Portfolio Standards*, 43 ENVTL. L. 295 (2013); Anne Havemann, Comment, *Surviving the Commerce Clause: How Maryland Can Square its Renewable Energy Laws With the Federal Constitution*, 71 MD. L. REV. 848 (2012); Patrick R. Jacobi, Note, *Renewable Portfolio Standard Generator Applicability Requirements: How States Can Stop Worrying and Learn to Love the Dormant Commerce Clause*, 30 VT. L. REV. 1079, 1081 (2006).

15. Jocelyn Durkay, *State Renewable Portfolio Standards and Goals*, NAT'L CONFERENCE OF STATE LEGISLATURES (Oct. 14, 2015), http://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx.

16. RADER & HEMPLING, *supra* note 14, at xiv.

17. *Id.* For a discussion of the constitutionality of various types of location requirements identified by Rader and Hempling, see Jacobi, *supra* note 14, at 1111–14.

18. 43 F. Supp. 3d 1171 (D. Colo. 2014), *aff'd*, No. 14-1216, 2015 WL 4174876 (10th Cir., July 13, 2015).

RPS resulted in impermissible extraterritorial control.[19] There is no doubt that this decision is a resounding victory for renewable energy development, and for state RPS programs as a whole. However, both courts considered an amended version of Colorado's RPS, which had eliminated certain in-state preferences.[20] The Colorado case solves one half of the puzzle: state renewables quotas are constitutional. But the constitutionality of RPS programs which offer advantages to renewable energy generated within the state remains uncertain.

The purpose of this Comment is to identify an alternative dormant Commerce Clause framework that would reduce uncertainty over the constitutionality of statutory provisions that incorporate in-state generation requirements into state RPS standards. Concededly, there are reasons to question whether in-state generation requirements are truly a useful policy strategy for encouraging the consumption and production of renewable energy within a state.[21] Such location requirements are likely more attractive for their political advantages—namely, their propensity to ensure that more of the benefits of state-level renewable energy regulations accrue to the state's ratepayers—than as a means of promoting economic efficiency.[22] Moreover, states may have a difficult time measuring the actual in-state benefits of these policies.[23] Nevertheless, location requirements present an excellent case study for discussing alternative dormant Commerce Clause frameworks because they are clearly discriminatory, their benefits are far from certain, and yet they appear to serve a state purpose—sustainability—of increasing importance.

Although in-state location requirements are not necessarily the best way to encourage renewable energy development, and can potentially discriminate against out-of-state interests, they should not be forbidden under an overly formalistic and outdated doctrine that has become detached from economic reality. Instead, states should advocate the adoption of a more relaxed dormant Commerce Clause standard that would give them more freedom to control the flow of renewable resources within their own state borders.

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19. Energy & Env't Legal Inst. v. Epel, No. 14-1216, 2015 WL 4174876 (10th Cir., July 13, 2015).

20. *Energy & Env't Legal Inst.*, 43 F. Supp. 3d at 1174.

21. *See* RADER & HEMPLING, *supra* note 14, at 32–36.

22. *Id.* at 32. *But see* Griffin, *supra* note 14, at 160–65 (arguing that in-region location requirements achieve many of the purported goals of in-state location requirements).

23. RADER & HEMPLING, *supra* note 14, at 32 ("[K]ey facets of RPS policy—electricity flow, pollution reduction, economic development, and technological development—have externalities that do not honor political boundaries.").

Part II of this Comment discusses the current state of dormant Commerce Clause jurisprudence. Part III discusses the general form and function of RPS programs, including their relationship to the dormant Commerce Clause. It also more fully describes the outcomes of *Epel* and other pending and settled dormant Commerce Clause challenges to RPSs. Part IV describes some of the commonly-identified problems with this jurisprudence and outlines three proposed alternative frameworks.[24] Part V discusses whether any of the alternative frameworks described in Part IV would allow generator location requirements to withstand a dormant Commerce Clause challenge, giving states greater discretion in enacting renewable energy legislation. Part VI concludes.

II. THE DORMANT COMMERCE CLAUSE

The Commerce Clause gives Congress the power "[t]o regulate Commerce . . . among the several States."[25] Courts have long recognized that, although the Commerce Clause reads as a grant of Congressional power, it also "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce."[26] This restriction is commonly referred to as the dormant Commerce Clause. Courts generally employ a two-tiered analysis when evaluating dormant Commerce Clause claims.[27] First, courts consider any statute or regulation that is discriminatory toward out-of-state interests, whether facially or as applied, to be "virtually per se" unconstitutional.[28] Second, if a court does not find discrimination, it may still invalidate the regulation either because it has the practical effect of controlling extraterritorial commerce,[29] or, more often, because the "burden

24. These three frameworks are (1) the "Privileges and Immunities" approach suggested in Julian Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); (2) the "protectionist-first" model approach described in O'Grady, *supra* note 12; and (3) the "next generation" approach put forth in Kalen, *supra* note 1.

25. U.S. CONST. art. I, § 8, cl. 3.

26. Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 98 (1994) (citing Welton v. Missouri, 91 U.S. 275 (1875)).

27. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 578–79 (1986).

28. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); *see also Brown-Forman*, 476 U.S. at 579 (explaining that when a state statute's "effect is to favor in-state economic interests over out-of-state interests," the "virtually per se" standard still applies).

29. *See, e.g.*, Healy v. Beer Inst., Inc., 491 U.S. 324, 337 (1989) (holding that a Connecticut law requiring that beer be no more expensive within that state than in bordering states "create[d] just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude").

imposed on [interstate] commerce [by the regulation] is clearly excessive in relation to the putative local benefits."[30]

A. Facial Discrimination

Courts consider statutes that discriminate either facially or in practical effect "virtually per se" unconstitutional.[31] The Supreme Court has defined "discrimination" as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[32] A facially discriminatory regulation can only survive a constitutional challenge if it passes a stringent two-part test: "[it] must serve a legitimate local purpose, and the purpose must be one that cannot be served as well by available nondiscriminatory means."[33]

The Supreme Court's clearest enunciation of the test for whether a discriminatory state action has violated the dormant Commerce Clause came in *Hughes v. Oklahoma*.[34] In that case, the operator of a commercial minnow business challenged an Oklahoma statute prohibiting interstate commercial transport of minnows caught within the state.[35] Because the law discriminated against interstate commerce on its face, the Court subjected it to "the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives."[36] The Court held the statute unconstitutional, saying that while the protection of local minnow populations may well have been a "legitimate local purpose," the regulation at issue was "[f]ar from . . . the least discriminatory alternative."[37] Instead, the state could have placed limits on the number of minnows that may be taken, or limited the ways minnows could be disposed within the state.[38]

Although facially discriminatory state actions have come to be seen as "virtually per se" unconstitutional,[39] the Court nonetheless has allowed such a statute to stand in at least one case. *Maine v. Taylor*[40] concerned a challenge

30. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
31. *Philadelphia v. New Jersey*, 437 U.S. at 624.
32. Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99 (1994).
33. Maine v. Taylor, 477 U.S. 131, 140 (1986) (citing Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)).
34. 441 U.S. 322, 336 (1979).
35. *Id.* at 324–25.
36. *Id.* at 337.
37. *Id.*
38. *Id.* at 338.
39. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).
40. 477 U.S. 131, 132–33 (1986).

to a Maine statute forbidding the importation of live baitfish.[41] As in *Hughes*, the Supreme Court recognized that the protection of local fish populations is a legitimate state interest.[42] Evidence presented at trial showed that baitfish from other states "posed . . . significant threats to Maine's unique and fragile fisheries."[43] But unlike in *Hughes*, the Court concluded that the District Court had correctly determined that alternative protective measures, such as inspections of incoming baitfish, would have been unreasonably burdensome to implement.[44] The importation ban protected Maine's interests more effectively than any alternative.[45]

Although states generally may not facially discriminate against out-of-state interests when acting as a *regulator*, states may discriminate when acting as a *participant* in the marketplace.[46] In those instances, such as when a state is offering a good for sale through a state-owned corporation, states may discriminate against out-of-state interests in the same way that any private participant in the marketplace might do so.[47] This "market participant" exception allows states and local governments to contract as they see fit, without fear of violating the Commerce Clause.[48]

B. Extraterritorial Control

If a statute or regulation does not facially discriminate, a court may still find it invalid if it exerts too much control over wholly out-of-state commerce.[49] The Constitution "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[50] The critical inquiry in this context is whether the regulation has the "practical effect of . . . control[ling]

41. *Id.* at 132.
42. *Id.* at 140–44.
43. *Id.* at 141.
44. *Id.* at 146–47.
45. *Id.*
46. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 809 (1976) (upholding a Maryland statutory scheme requiring out-of-state scrap processors to provide more extensive documentation than in-state scrap processors to sell old automobile hulks to the state).
47. Reeves, Inc. v. Stake, 447 U.S. 429, 438–39 (1980).
48. White v. Mass. Council of Constr. Emp'rs, Inc., 460 U.S. 204, 208 (1983).
49. *See, e.g.*, Healy v. Beer Inst., Inc., 491 U.S. 324, 335–37 (1989).
50. Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982) (plurality opinion).

conduct beyond the boundaries of the State."[51] It is immaterial whether the state intended its regulation to affect another state.[52]

In *Healy v. Beer Institute, Inc.*, for example, the Supreme Court overturned a Connecticut statute that made it illegal for out-of state shippers to sell beer in Connecticut for a higher price than could be found in neighboring states.[53] The Court found the statute invalid because it "ha[d] the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State."[54] When the statute was combined with alcohol regulations in neighboring states, it created "just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude."[55]

Despite the holdings in *Healy* and a few factually similar cases,[56] the Supreme Court rarely invokes the extraterritoriality doctrine when invalidating a statute.[57] This may be because a regulation seldom controls commerce in another state without discriminating in some way.[58]

C. Pike Balancing

Even statutes and regulations whose effects on interstate commerce are less obvious may violate the dormant Commerce Clause. In *Pike v. Bruce Church, Inc.*,[59] the Supreme Court set out a balancing test for statutes that are not facially discriminatory and do not directly implicate other states, yet nevertheless risk violating the dormant Commerce Clause. The *Pike* court established a general rule that "[w]here [a] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[60]

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51. *Healy*, 491 U.S. at 336.
52. *See, e.g.*, Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986).
53. *Healy*, 491 U.S. at 328–30.
54. *Id.* at 337.
55. *Id.*
56. *Brown-Forman*, 476 U.S. at 576–78, 583–84.
57. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1101 (9th Cir. 2013).
58. *See, e.g.*, *Healy*, 491 U.S. at 340–41 (striking down a statute on the basis of extraterritoriality while also analyzing the statute under facial discrimination principles).
59. 397 U.S. 137, 142 (1970).
60. *Id.*

Pike concerned an Arizona statute requiring that all cantaloupes grown in Arizona be packed in certain shipping containers approved by a state official.[61] That official ordered an Arizona cantaloupe producer to stop packaging its products in a facility across the California border, effectively requiring the producer to build a new facility in Arizona.[62] The Supreme Court recognized that, while upholding the reputation of Arizona cantaloupe farmers could be a legitimate interest, the interstate economic burden imposed by the law needed to be balanced against that interest.[63] In this case, the Court reasoned, the significant burden this restriction placed on the producer could not justify Arizona's "tenuous interest in having the company's cantaloupes identified as originating in Arizona."[64]

The *Pike* test has become the most common way to analyze a statute that is not discriminatory but may nonetheless violate the dormant Commerce Clause.[65] Generally, this test leads to far more statutes being upheld than not.[66] Recently, in *Department of Revenue of Kentucky v. Davis*[67] the Supreme Court evaluated Kentucky's differential tax scheme for state-issued bonds, which allowed the State's residents to exclude interest accrued from state and local bonds from their income.[68] The Court upheld the law under the market participant exception because "the issuance of debt securities to pay for public projects is a quintessentially public function."[69] While the *Davis* Court did not perform a *Pike* analysis, the majority nonetheless noted "the unsuitability of the judicial process and judicial forums for making" the sorts of policy decisions demanded by the *Pike* test.[70] However, the *Davis* Court merely declined to apply *Pike* to the fact pattern presented; the Court did not abandon the test itself.[71]

D. Taxes and Subsidies

In addition to the direct burdens already discussed, courts may find that certain subsidies for in-state business violate the dormant Commerce Clause

61. *Id.* at 138.
62. *Id.* at 139.
63. *Id.* at 145.
64. *Id.* at 145.
65. O'Grady, *supra* note 12, at 573.
66. *See id.* at 574.
67. 553 U.S. 328, 332 (2008).
68. *Id.* at 331–35.
69. *Id.* at 342.
70. *Id.* at 355.
71. *Id.* at 353–56.

"when made at the direct expense of out-of-state businesses."[72] The leading case involving this sort of argument is *West Lynn Creamery v. Healy*.[73] The *West Lynn Creamery* Court considered a tax on both in-state and out-of-state dairy farmers whose benefits only flowed to in-state dairy farmers.[74] The Court held this scheme unconstitutional, reasoning that such a subsidy "not only assists local farmers, but burdens interstate commerce . . . violat[ing] the cardinal principle that a State may not 'benefit in-state economic interests by burdening out-of-state competitors.'"[75] While the court agreed with the state "that both [the tax and subsidy] components of the pricing order would be constitutional standing alone," the two elements of the scheme ultimately worked together to assist local dairies at the expense of out-of-state interests.[76]

III. STATE RPS PROGRAMS AND THEIR RELATIONSHIP WITH THE DORMANT COMMERCE CLAUSE

This Part explains the basics of state-enacted RPS programs. The focus then shifts to the scholarship surrounding the question of whether RPS legislation is compatible with the dormant Commerce Clause. Finally, it describes the brief history of dormant Commerce Clause challenges to state RPS programs, including the recently decided *Energy & Environment Legal Institute v. Epel*, the first reported case law on the question. This history demonstrates that, while *Epel* is an apparent victory for RPSs as a viable tool for attaining certain state-level sustainability goals, the case also demonstrates that states have given up attempting to defend location requirements, which may weaken the overall effectiveness of RPS programs.

A. Renewable Portfolio Standards

Renewable portfolio standards typically "obligate[] each retail seller of electricity [within a given state] to include in its resource portfolio (that is,

72. Lee & Duane, *supra* note 14, at 304.
73. 512 U.S. 186 (1994).
74. *Id.* at 190–91.
75. *Id.* at 199.
76. *Id. West Lynn* has been applied in the energy context by the Seventh Circuit in *Alliance for Clean Coal v. Miller*, 44 F.3d 591 (7th Cir. 1995), but the statute at issue there bears only passing resemblance to an RPS. *See* Lee & Duane, *supra* note 14, at 305–06 (dismissing for the most part the connection between *Alliance for Clean Coal* and RPS challenges, while noting that "*West Lynn* could be used against RPSs that provide greater compliance credit for in-state renewable energy.").

the resources procured by the retail seller to supply its retail load) a certain amount of electricity from renewable energy resources."[77] In simpler terms, under an RPS, "retail electric utilities [must] add some renewable electricity to the supply available to customers on an annual basis."[78] Twenty-nine states, two territories, and Washington, D.C. have enacted some kind of RPS.[79] Another nine states and two territories have renewable portfolio goals, which do not create an obligation to reach the stated goal.[80]

To ensure utility compliance, a state RPS program can either issue tradable Renewable Energy Credits (RECs) or "bundle" the energy with the credit.[81] In an REC-based regime, "renewable electricity generators apply for certification as RPS-eligible generators and receive electronic, counterfeit-proof [RECs] for the energy they produce. This gives them two products: generic power, which they sell into the power market, and RECs, which they sell into the RECs market."[82]

One policy tool that has been used in some state RPS programs is the generator location requirement, which requires that a certain amount of RPS-qualifying energy delivered by an electricity provider into a state come from renewable resources located within that state.[83] Generator location requirements are purportedly useful because they not only help achieve the obvious goal of encouraging state-level development of renewable energy technologies,[84] but can make it easier for a state to track the local benefits of their renewable energy policies.[85]

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77. RADER & HEMPLING, supra note 14, at ix.

78. Jacobi, *supra* note 14, at 1082.

79. Durkay, *supra* note 15. Those twenty-nine states are Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, and Washington. The Northern Mariana Islands and Puerto Rico also have RPSs. *Id.*

80. *Id.* Those nine states are Indiana, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, Vermont, Virginia, and West Virginia. *Id.* Guam and the U.S. Virgin Islands also have Renewable Portfolio Goals. *Id.* An RPG resembles an RPS in many ways but can include language, for example, saying that utilities need only pursue the goal so far as it is "cost effective" to do so. *See, e.g.*, UTAH CODE ANN. § 54-17-602 (West 2014).

81. Jacobi, *supra* note 14, at 1091–92.

82. RADER & HEMPLING, *supra* note 14, at xvii.

83. *See supra* notes 16–17 and accompanying text.

84. RADER & HEMPLING, *supra* note 14, at 32.

85. *See* Jacobi, *supra* note 14, at 1093–95 (discussing "the complicated task of tracing the path of retail energy").

Generator location requirements, such as those previously found in the Ohio and Nevada RPSs,[86] are the most direct form of in-state preference that states have employed in RPSs. Before being amended in 2014, the Ohio RPS required that "[a]t least one-half of the renewable energy resources implemented by the utility or company shall be met through facilities located in [Ohio]."[87] Nevada's RPS, enacted in 1997, originally defined "renewable energy resources" narrowly to only include energy generated within that state.[88] However, states have tended to move away from this sort of direct preference for in-state renewable energy, in large part due to the specter of a dormant Commerce Clause challenge.

Generator location requirements are not the only state-preferential RPS provisions, however. In-state location preferences can take several forms, such as the extra credit multipliers in Arizona's RPS[89] and the in-region delivery requirement in New Jersey's.[90] Currently, at least seven states have some kind of incentive or mandate in their RPS that encourages or requires qualifying utilities to use some form of in-state renewable energy.[91]

In theory, a location requirement or other in-state incentive can help balance the higher costs imposed on consumers by RPS programs because such a requirement distributes the program's benefits more narrowly.[92] For example, without some location requirement, an electricity provider in State A can purchase all of its RECs from utilities in State B, so long as its portfolio meets the basic RPS standard.[93] Although State B's electricity consumers

86. OHIO REV. CODE ANN. § 4928.64 (West 2012) (requiring utilities to supply "[a]t least one-half of" their renewable energy "through facilities located in this state") (amended 2014); NEV. REV. STAT. § 704.989(7) (1997) (restricting the definition of "renewable energy resources" to various types of resources located "in this state") (repealed 2001).

87. OHIO REV. CODE ANN. § 4928.64 (West 2012) (amended 2014). The statute now allows a utility to use any combination of in-state and out-of state facilities to meet its RPS quota. *Id.*

88. RADER & HEMPLING, *supra* note 14, at 32 (citing NEV. REV. STAT. § 704.989(7) (1997) (repealed 2001)).

89. ARIZ. ADMIN. CODE § R14-2-1806 (2013) (providing REC multipliers for "Affected Utilities acquiring Renewable Energy Credits from a Solar Electricity Resource that was installed in Arizona on or before December 31, 2005," among other incentives).

90. N.J. ADMIN. CODE § 14:8-2.7(b) (2015).

91. *E.g.*, ARIZ. ADMIN. CODE § R14-2-1806 (2013); 26-3000-3008 DEL. ADMIN. CODE. § 3.2.12.1 (2015); ILL. ADMIN. CODE tit. 83, § 455.10 (2015) (incorporating by reference the definition found in 20 ILL. COMP. STAT. 3855/1-10 (2015), which includes only landfill gas produced in-state as renewable energy); 225 MASS. CODE. REGS. 14.05(4)(a) (2015); MICH. COMP. LAWS § 460.1039(c)–(d) (2014); MO. CODE REGS. ANN. tit. 4, § 240-20.100 (2014); 39 R.I. GEN. LAWS ANN. § 39-26.1-2 (West 2014).

92. *See* Kirsten H. Engel, *The Dormant Commerce Clause Threat to Market-Based Environmental Regulation: The Case of Electricity Deregulation*, 26 ECOLOGY L.Q. 243, 269–70 (1999).

93. *Id.*

receive fringe benefits from this heavier reliance on renewable energy, such as contributing to the overall reduction of global warming, they would miss out on "the geographically localized benefits associated with renewable power production, including cleaner air and jobs."[94] Therefore, generator location requirements can be seen as a way to ensure that a state's RPS does what it sets out to do: help the state reap benefits from renewable energy development.[95]

However, some argue that state-level location requirements make little sense, given the practicalities of energy delivery.[96] While location requirements are politically popular, "[t]he efficacy of in-state restrictions is uncertain."[97] Much of the energy delivered in the United States is done so through the power pool model, in which "electricity providers . . . contribute electrons to one central 'pool.'"[98] This pooling of resources makes it difficult to identify exactly which states a particular electron has come from or traveled through.[99] The power pool system, which supplies most of the power in the United States,[100] poses a problem for state legislators wishing to measure the effects of state location requirements.[101] The theoretical benefits of generator location requirements may not line up with the physical realities of energy delivery infrastructure, which makes those benefits difficult to track.[102]

B. Previous Scholarship on RPS Programs and the Dormant Commerce Clause

The conflict between RPS programs and the dormant Commerce Clause has been noted by several scholars. The first comprehensive analysis of the effects of the dormant Commerce Clause was performed by Nancy Rader and Scott Hempling in a paper prepared for utility regulators.[103] As described

94. *Id.* at 270.

95. *See* David Hurlbut, *A Look Behind the Texas Renewable Portfolio Standard: A Case Study*, 48 NAT. RESOURCES J. 129, 155–57 (2008) (commenting that "economically sustainable renewable energy deployment" "should be the policy end game" of an RPS).

96. *E.g.*, RADER & HEMPLING, *supra* note 14, at 32–36.

97. *Id.* at 33.

98. Jacobi, *supra* note 14, at 1093.

99. *Id.* at 1094.

100. U.S. ENERGY INFO. ADMIN., ABOUT 60% OF THE U.S. ELECTRIC POWER SUPPLY IS MANAGED BY RTOS (April 4, 2011), http://www.eia.gov/todayinenergy/detail.cfm?id=790.

101. RADER & HEMPLING, *supra* note 14, at 33–35.

102. *Id.*

103. *Id.*

above,[104] Rader and Hempling expressed doubts as to whether a state could accurately measure the benefits created by an in-state location requirement.[105] Because a state could likely not justify an in-state location requirement under the per se test, Rader and Hempling ultimately concluded that the Supreme Court would reject any RPS with a location requirement under a per se rule of invalidity.[106] However, they were far more optimistic that RPS statutes including in-state benefit requirements[107] and in-state sales requirements[108] could pass constitutional muster.

Relying heavily on Rader and Hempling, Patrick Jacobi came to similar conclusions in his article on the topic, arguing that "[s]tates can avoid the dangers of per se scrutiny by basing RPS-eligibility requirements primarily on benefit delivery instead of location."[109] Jacobi focused specifically on the need for states to provide a "thorough articulation of local benefits," so the state might benefit from the sort of state-specific analysis used in *Taylor*.[110] In other words, a state must be prepared to demonstrate the unique reasons why an in-state location requirement (or in-state benefit, consumption, or sales requirement) provides a unique benefit to that state that could not be provided through less discriminatory means.

One possible solution to the dormant Commerce Clause problem for RPSs is federal action delegating more power to the states to enact location-based statutes in the arena of renewable energy.[111] According to Nathan E. Endrud, "Congress has the power to explicitly authorize states to incorporate into their RPS programs economic restrictions that burden interstate commerce."[112] However, Endrud also acknowledged that Congress could just as easily pass a federal RPS program, which would create a different sort of Constitutional friction altogether.[113] While Endrud did not embrace a specific policy position, his writings serve as a useful reminder that confusion over the applicability of the dormant Commerce Clause to state RPS requirements could just as easily be resolved through federal action.

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104. *See supra* Part III.A.

105. RADER & HEMPLING, *supra* note 14, at 32–35.

106. *Id.* at A-1.

107. *Id.* at A-3 to A-4.

108. *Id.* at A-6 to A-7. However, Rader and Hempling also noted that "[w]hile this approach carries a smaller constitutional risk, it fails to assure that the state will receive benefits." *Id.* at A-6.

109. Jacobi, *supra* note 14, at 1107.

110. *Id.* at 1107–08.

111. Endrud, *supra* note 14, at 280.

112. *Id.*

113. *Id.*

More recently, Daniel K. Lee and Timothy P. Duane have compiled a comprehensive study of the dormant Commerce Clause implications of RPSs.[114] After a lengthy review of the relevant legal history, Lee and Duane propose a few novel solutions. First, they argue that dormant Commerce Clause analysis should have the sort of "intermediate scrutiny" employed by courts in several other constitutional tests.[115] Under this test, an RPS would survive if it serves "important governmental objectives and . . . the discriminatory means employed [are] substantially related to the achievement of those objectives."[116] "[I]n cases where the state's proffered legitimate interest is environmental," Lee and Duane argue that an intermediate level of scrutiny may serve as the "ideal compromise between traditional dormant Commerce Clause concerns . . . and the modern necessity of preserving resources."[117]

Lastly, William Griffin has argued that certain RPS in-region location requirements can already withstand a dormant Commerce Clause challenge, and that neither a shift in jurisprudence nor legislative action is required to justify their existence.[118] Instead, in-region location requirements such as the one contained within Massachusetts' RPS can be justified under the narrow exception illustrated by *Taylor*: they serve one or several legitimate local purposes, and there are no less discriminatory alternatives that could adequately serve those interests.[119] Griffin's argument does not necessarily save in-state location requirements, because his argument hinges on the practical considerations inherent in the ISO model of energy delivery.[120] Even so, it provides an innovative and convincing application of the *Taylor* test that bolsters the idea of keeping energy production close to home as an important policy goal supporting energy sustainability.

These articles generally accept the proposition that in-state location requirements cannot survive a dormant Commerce Clause challenge. And under current dormant Commerce Clause jurisprudence, they would be correct. However, while Lee and Duane properly assert that the Supreme Court's approach to the dormant Commerce Clause must be amended in some way, the Court does not need to make its approach *more* complex through the creation of another level of scrutiny.[121] Rather, the Court should reconsider

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114. Lee & Duane, *supra* note 14.

115. *Id.* at 355.

116. *Id.* (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

117. *Id.*

118. Griffin, *supra* note 14, at 135 ("RPSs explicitly favoring in-region renewable generation facilities are not inconsistent with the dormant Commerce Clause.").

119. *Id.* at 161–64.

120. *Id.* at 164–65.

121. *See infra* Part IV.

its entire approach to the dormant Commerce Clause, and create a single standard that would invalidate only the most invidious and obviously protectionist laws, giving states broad discretion to prove that seemingly discriminatory statutes are, in fact, justifiable. Should such a case ever reach the Supreme Court, RPS-related litigation would provide the Court with an opportunity to do so.

C. Previous RPS-Related Litigation and the Epel Decision

The first major challenge to a state RPS took place in Massachusetts.[122] In 2008, the state legislature amended the RPS, which already required 15% of the state's energy to come from renewable sources by 2020,[123] to further require that utilities purchase RECs from in-state generation stations.[124] TransCanada, a power supplier, opposed this provision, preferring to purchase lower-cost renewable energy from other states.[125] TransCanada challenged two provisions of the Massachusetts RPS: (1) the requirement that distributors enter into long-term contracts with renewable generators located in the state, and (2) the solar "carve-out" that required distributors' portfolios to include a certain amount of energy from Massachusetts solar generators.[126] Perhaps realizing that TransCanada would likely succeed on these claims should the litigation make its way to court, the Massachusetts Department of Public Utilities removed both location requirements.[127] The state also settled with TransCanada, agreeing that the state would not subject contracts signed before 2010 to the solar carve-out.[128]

Since Massachusetts' apparent retreat in the TransCanada litigation, states have seen mixed results in proceedings regarding RPSs and related policies.[129] The Missouri Court of Appeals considered a challenge to location

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122. This history relies heavily on the descriptions of this litigation found in Lee & Duane, *supra* note 14, at 314, and in Havemann, *supra* note 14, at 860–62.

123. 225 MASS. CODE REGS. 14.07 (2014).

124. 2008 Mass. Acts 365; *see also* Havemann, *supra* note 14, at 860–61.

125. Lee & Duane, *supra* note 14, at 314.

126. *Id.*

127. *Id.* at 315.

128. *Id.* (citing Partial Settlement Agreement, TransCanada Power Mktg. Ltd. v. Bowles, No. 4:10-cv-40070, http://www.mass.gov/eea/docs/doer/renewables/solar/settlement-agreement.pdf).

129. *See id.* at 315–17; 330–32 (describing the early stages of the California, Minnesota, and Missouri challenges, all of which have now been resolved); *State Cases*, STATE POWER PROJECT, http://statepowerproject.org/states/ (last visited Nov. 11, 2015) (summarizing "Constitutional challenges to renewable energy laws or administrative decisions in eleven states," including more in-depth summaries of the cases mentioned here).

requirements contained within that state's RPS but rejected the claim as moot because the challenged provisions had been repealed.[130] California's Public Utilities Commission denied a challenge to the implementing regulations of that state's RPS by Cowlitz County, Washington.[131] The plaintiff claimed that California's requirement that only RECs associated with energy actually delivered into California would count towards a utility's renewables portfolio violated the dormant Commerce Clause.[132] The Commission held that because both in-state and out-of-state generators were subject to the rule, and because the regulation gave ample room for out-of-state generators to qualify, no dormant Commerce Clause violation had occurred.[133] Finally, the New York Public Service Commission also upheld regulations implementing that state's RPS requiring the New York State Energy Research and Development Authority, a state agency, to only grant RPS contracts "to bidders proposing to meet their RPS obligations with renewable resource energy generated within the State or through offshore generating facilities directly connected to New York's electrical grid."[134] The statute was upheld under the market participant exception, because the regulation only applied to energy procured by a state agency.[135]

In spring 2014, the District Court of Colorado handed down the first judicial decision on the overall constitutionality of a state RPS program.[136] In granting the state's motion for summary judgment, the court held that Colorado's RPS[137] did not violate the dormant Commerce Clause.[138] The challenge was brought by the Energy and Environment Legal Institute (EELI), an industry group that promotes "rational, free-market solutions to land, energy, and environmental challenges . . . promotes coal energy, and believes that the impact human activities have had on the rise in global

130. State, ex rel. Mo. Energy Dev. Ass'n v. Pub. Serv. Comm'n, 386 S.W.3d 165, 175–77 (Mo. Ct. App. 2012).

131. Order Instituting Rulemaking to Continue Implementation and Admin. of Cal. Renewables Portfolio Standard Program, Cal. Pub. Util. Comm'n, 2013 WL 5947732 (Oct. 31, 2013).

132. *Id.* at *7–8.

133. *Id.* at *8.

134. Proceeding on Motion of the Comm'n Regarding a Retail Renewable Portfolio Standard, N.Y. Pub. Serv. Comm'n, 2013 WL 6835030, *1 (Dec. 23, 2013).

135. *Id.* at *8 (analogizing the case to Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976)).

136. Energy & Env't Legal Inst. v. Epel, 43 F. Supp. 3d 1171 (D. Colo. 2014), *aff'd*, 793 F.3d 1169 (10th Cir. 2015).

137. While both the District Court and the Tenth Circuit properly used the Colorado Legislature's preferred term "Renewable Energy Standard" and the abbreviation "RES," this paper will continue to use the term "RPS" for the sake of consistency and clarity.

138. *Energy & Env't Legal Inst.*, 43 F. Supp. 3d at 1173.

temperatures is an open question."[139] EELI challenged the entire Colorado RPS, claiming the scheme was unconstitutional.[140] When the litigation was initiated, Colorado's RPS contained certain in-state preferences, which were removed by amendment in the Colorado legislature before the court rendered its decision.[141] These amendments "remove[d] in-state preferences with respect to:

- Wholesale distributed generation;
- The 1.25 kilowatt-hour multiplier for each kilowatt-hour of electricity generated from eligible energy resources other than retail distributed generation;
- The 1.5 kilowatt-hour multiplier for community-based projects; and
- Policies the Colorado public utilities commission . . . must implement by rule to provide incentives to qualifying retail utilities to invest in eligible energy resources."[142]

The court therefore only considered EELI's challenge to the Colorado RPS' general Renewables Quota, requiring utilities to obtain between 10% and 30% of their retail electricity from renewable sources.[143]

EELI rested its argument largely on an extraterritoriality theory, claiming that Colorado's RPS "places a restriction on how out-of-state goods are manufactured."[144] While EELI argued that extraterritoriality was the only issue properly before the Court, due to the limited scope of their early motion for summary judgment, the Court analyzed facial discrimination, extraterritoriality, and *Pike* balancing.[145] The court did so because the state, in its motion for summary judgment, supported the law's constitutionality under all three theories.[146]

The court dismissed EELI's claim under all three theories. It quickly discredited the notion that a renewables quota could be facially discriminatory in the absence of a location requirement, a fact the plaintiffs appeared to concede.[147] The court then rejected the plaintiffs' argument that

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139. *Id.* at 1174.

140. *Id.*

141. *Id.* at 1174–75. *See* 2013 Colo. Legis. Serv. Ch. 414 (West).

142. S.B. 13-252, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013), http://www.leg.state.co.us/clics/clics2013a/csl.nsf/billcontainers/D1B329AEB8681D4D87257B3900716761/$FILE/252_ren.pdf.

143. *Energy & Env't Legal Inst.*, 43 F. Supp. 3d at 1174.

144. *Id.* at 1179.

145. *Id.* at 1176.

146. *Id.* at 1176–77.

147. *Id.* at 1178.

the RPS requirements created a "mandate" that reached into other states, noting that "[t]he Renewables Quota only regulat[ed] Colorado energy generators and the companies that do business with *Colorado* energy generators."[148] The court said that the plaintiffs' argument amounted to asking that the statute be declared invalid simply because it differed from other states' laws.[149] According to the court, the dormant Commerce Clause does not demand this sort of state uniformity, except when "the federal need for uniformity outweighs the state's ability to devise its own regulations."[150] The court further determined that the plaintiffs "failed to demonstrate that there exists such a compelling need for uniformity in the market for renewable energy credits."[151] Finally, the court addressed *Pike* balancing, concluding that the RPS "does not make it more difficult for electricity to flow between the states," nor does it burden commerce in any other significant way.[152] The Colorado RPS merely caused a shift from one supplier (nonrenewable energy producers) to another (renewable energy suppliers) without decreasing the amount of energy exchanged between Colorado and other states.[153]

EELI appealed only the extraterritoriality finding to the Tenth Circuit, who upheld the District Court.[154] The Tenth Circuit interpreted the extraterritoriality line of cases as barring only interstate price control schemes, making the decision to uphold the RPS, which says nothing about prices, an easy one.[155] The court questioned how EELI could claim an RPS is discriminatory toward out-of-state interests "when, if anything, Colorado's mandate seems most obviously calculated to raise price for *in-state* consumers?"[156] Like the District Court, the Tenth Circuit ultimately noted that to grant EELI's request would open the possibility of litigation any time a state law, such as standard health and safety regulations, required out of state actors to shift their actions in any way.[157]

Although these decisions are an important victory for Colorado and other states with RPS programs, that victory is limited for two reasons. First, as

148. *Id.* at 1179 (emphasis added).

149. *Energy & Env't Legal Inst.*, 43 F. Supp. 3d at 1180–81.

150. *Id.* at 1181.

151. *Id.*

152. *Id.* at 1182.

153. *Id.* In fact, the court noted that demand for energy had *increased* since the passage of the RPS. *Id.* at 1183.

154. Energy and Env't Legal Inst. v. Epel, 793 F.3d 1169, 1171 (10th Cir. 2015).

155. *Id.* at 1173 ("For that mandate just doesn't share any of the three essential characteristics that mark [extraterritoriality] cases: it isn't a price control statute, it doesn't link prices paid in Colorado with those paid out of state, and it does not discriminate against out-of-staters.").

156. *Id.* at 1174.

157. *Id.* at 1175.

mentioned above, by the time that the District Court reached its decision, Colorado's RPS had been amended so as to make most of the plaintiffs' claims obsolete. These amendments removed any preferences for Colorado energy within the RPS, leaving only the energy goal and a few other facially neutral policies untouched. Second, the District Court employed the standard Commerce Clause analysis: it searched for any signs of discrimination, extraterritorial control, or undue burden, and after it could find no evidence of a constitutional defect, subjected the statute to *Pike* balancing. The Court of Appeals interpreted the extraterritoriality doctrine in a limited fashion, but stopped short of any revolutionary doctrinal shifts. While RPS programs may be constitutional at their core, it remains to be seen just how far the Constitution will bend to accommodate state-preferential schemes.

IV. CRITICISMS OF THE DORMANT COMMERCE CLAUSE AND THREE ALTERNATIVE FRAMEWORKS

The dormant Commerce Clause is sometimes viewed as confusing and unnecessary legal, even by members of the Supreme Court. As early as 1959, a decision of the Court referred to dormant Commerce Clause jurisprudence as a "quagmire."[158] Although the intervening years saw the development of the current, easily-applied per se and *Pike* tests, there still seems to be a general sense on the Court that the doctrine could (and perhaps should) be modified or abandoned to prevent courts from having too much law-making authority.[159] Justice Scalia has criticized the current dormant Commerce Clause framework's unpredictability and instability[160] and has indicated that he continues to adhere to the doctrine only in limited situations—and even then, he does so mostly for *stare decisis* reasons.[161] And for nearly two decades, Justice Thomas has advocated abolishing (or seriously modifying) the dormant Commerce Clause altogether, claiming the doctrine "makes little

158. Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959).

159. *See* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 355 (2008).

160. *E.g.*, Am. Trucking Ass'n v. Smith, 496 U.S. 167, 201–03 (1990) (Scalia, J., concurring) ("[N]o body of our decisional law has changed as regularly as our "negative" Commerce Clause jurisprudence. Change is almost its natural state . . . . "). For a broader discussion of Justice Scalia's feelings on the dormant Commerce Clause, see Mark V. Tushnet, *Scalia and the Dormant Commerce Clause: A Foolish Formalism?*, 12 CARDOZO L. REV. 1717 (1991).

161. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 210 (1994) (Scalia, J., concurring) ("I will, on *stare decisis* grounds, enforce a self-executing "negative" Commerce Clause in two situations: (1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court.").

sense."[162] Several scholars have advocated alterations to the doctrine in response to these and other concerns.

This Part describes three of these proposed alternative frameworks. The first, and most radical of these alternative frameworks, suggests that the Constitution's real safeguard against state protectionism can be found in the Privileges and Immunities Clause and that suspect regulations should be subjected to a less formalistic, more fact-intensive four-part balancing test.[163] A second alternative approach involves a much more modest shift, adjusting the current framework to more accurately prevent invidious protectionism, while leaving intact laws evincing more harmless forms of discrimination.[164] A third and final framework advocates a middle-road strategy and has been referred to by its creator as a "next generation" of dormant Commerce Clause jurisprudence.[165]

A. The Privileges and Immunities Approach

The Privileges and Immunities approach was suggested in a seminal 1982 law review article by Professor Julian Eule.[166] Professor Eule traces the history of the dormant Commerce Clause doctrine, referring to the doctrine as a Congressional "crutch" used by early Congresses to assert their complete authority over matters of interstate commerce.[167] However, considering the strong positive power given to Congress by the dormant Commerce Clause jurisprudence of the twentieth century,[168] Professor Eule argues that "Congress . . . no longer needs such assistance."[169] In Professor Eule's view, the current judicial framework invites courts to invalidate laws with heavy

162. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) ("The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application."). *See also* Dep't of Revenue of Ky., 553 U.S. at 355 (Thomas, J, concurring) ("[T]he text of the Constitution makes clear that the Legislature—not the Judiciary—bears the responsibility of curbing what it perceives as state regulatory burdens on interstate commerce."); United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 349 (2007) (Thomas, J., concurring) ("As the debate between the majority and dissent shows, application of the negative Commerce Clause turns solely on policy considerations, not on the Constitution. Because this Court has no policy role in regulating interstate commerce, I would discard the Court's negative Commerce Clause jurisprudence.").

163. Eule, *supra* note 24, at 428.

164. O'Grady, *supra* note 12, at 575.

165. Kalen, *supra* note 1, at 384.

166. Eule, *supra* note 24.

167. *Id.* at 434–35.

168. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942).

169. Eule, *supra* note 24, at 428.

national and interstate implications, "precisely the situation[s] in which action by Congress or administrative agencies is most likely."[170]

Professor Eule's alternative framework redirects the doctrine's focus toward interstate anti-democracy concerns.[171] He argues that "[w]hen regulations promulgated by a legislative body fall solely or predominantly on a group represented in the legislature there is cause to believe the enactment will be rationally based, efficacious, and no more burdensome than is necessary to achieve the proffered purpose."[172] However, when the effects of legislation fall largely on out-of-state interests, "such a presumption is unwarranted."[173] In Professor Eule's view, the Constitution demands the protection of the state-level democratic process; it does not require free trade or federal exclusivity in the interstate arena.[174]

To better protect all out-of-state interests, both commercial and non-commercial, Professor Eule advocates abandoning the dormant Commerce Clause, and instead using the Privileges and Immunities Clause of Article IV of the Constitution as the main safeguard against state-level protectionism.[175] While admitting that the current interpretation of the Privileges and Immunities Clause would render this solution practically difficult,[176] Professor Eule nonetheless argues that the Framers intended that provision, and not the Commerce Clause, to guard against invidious protectionism.[177]

Professor Eule's alternative framework proceeds in four steps. First, a state must prove the existence of some "legitimate end" in the challenged statute, and the court must decide "whether there is a legitimate purpose under the state's police power, or whether the state legislature has merely attempted discrimination to achieve commercial advantage for its constituents."[178] Second, the burden shifts to the challenger to demonstrate that the statute has a disparate impact on out-of-state interests sufficient to raise the level of review from rational basis.[179] This burden can be satisfied

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170. *Id.* at 436.

171. *See id.* at 444–46.

172. *Id.* at 445.

173. *Id.*

174. *Id.* at 437–43.

175. U.S. CONST. art. IV, § 2. The Privileges and Immunities clause guarantees that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." *Id.*

176. Professor Eule points out, for example, that long-standing precedent exempts corporations from the guarantees of Article IV. Eule, *supra* note 24, at 449–450 (citing Paul v. Virginia, 75 U.S. 168, 177–78 (1868)).

177. *Id.* at 446–48.

178. *Id.* at 457.

179. *Id.* at 461.

by demonstrating (1) the existence of a facial disparity in the treatment of out-of-state interests,[180] (2) the existence of regulatory and administrative exemptions obtainable only by in-state interests, (3) that the nature of the regulated industry would lead to disproportionate harm to out-of-state interests,[181] or (4) that the nature of the regulation lends itself to an in-state competitive advantage.[182] The third step of Professor Eule's process "requires the state to demonstrate that it has in fact considered the efficacy of the promulgated means, that it has concluded that the end will be obtained by the means selected, and that its conclusion is empirically sound,"[183] otherwise the statute must be invalidated.[184] Lastly, a reviewing court should offer the challenger a final chance "to disprove the validity of the articulated rationale or to demonstrate the existence of equally effective, yet less disproportional, means available to the state."[185] Overall, the goal of this analysis is to balance the democracy interests of out-of-state parties with the enacting state's power to regulate commerce within its own borders in ways that benefit its residents.[186]

B. The "Protectionist-First" Approach

Scholars since Professor Eule have similarly focused on the frustrating nature of "discrimination" as the main inquiry of dormant Commerce Clause cases, but have instead urged the adoption of intent-based analyses of dormant Commerce Clause questions.[187] Professor Catherine O'Grady, for example, argues that dormant Commerce Clause analysis should have as its primary objective the identification of economic protectionism, with discrimination as only a secondary concern.[188] She concludes that "[a] rule of per se invalidity, or even 'virtual' per se invalidity, is not appropriate for all 'discriminatory' regulations; rather, it should govern only those regulations that are economic protectionist measures."[189]

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180. *Id.* at 463.

181. *Id.* at 465. Professor Eule offers the example of a New York statute forbidding the sale of orange juice, supported by the legitimate end of preventing the importation of a certain kind of fruit fly. *Id.* While not facially discriminatory, this statute would have a far greater impact on out-of-state interests, because oranges are not widely grown in New York. *Id.*

182. *Id.* at 467.

183. *Id.* at 471.

184. *Id.* at 472.

185. *Id.* at 474.

186. *Id.* at 437–43.

187. *E.g.*, O'Grady, *supra* note 12.

188. *Id.* at 576.

189. *Id.*

Professor O'Grady identifies three key ways in which reviewing a statute for protectionism differs from a discrimination review. First, "a protectionism determination does not require a court to engage in the precise comparisons of similarly situated classifications demanded by a discrimination review."[190] Thus, a reviewing court must first ask "whether the decisionmakers sought purposefully to protect a segment of their own and, in doing so, impacted or disrupted the national market."[191] Second, "a review for protectionism focuses directly on legislative purpose."[192] While courts are generally reluctant to delve too far into legislative motives, Professor O'Grady argues that such an analysis makes sense in a dormant Commerce Clause review.[193] Lastly, a protectionism review "permits a reviewing court to consider the magnitude of a statute's impact on interstate commerce."[194] Unlike discrimination analysis, under which "even slightly disproportionate[]" burdens lead to invalidation, protectionism review would invalidate those statutes whose "burdens are substantially disproportionate" because "the degree of impact indicates protectionist motive."[195]

While Professor O'Grady puts much focus on determining the difference between protectionism and discrimination, her work also requires a court to properly differentiate between economic development and protectionism. Land use law can provide some insights into how courts deal with economic development plans—which are generally formulated to maximize putative local benefits—that raise questions of protectionism.[196] The creation of zoning laws is generally seen as a proper exercise of the government's police power.[197] Traditionally, a zoning statute must be justified by one of the "orthodox quartet" of "health, safety, morals, [and] general welfare."[198] However, these statutes are often born of a complex mix of regulatory goals. Courts have generally adopted one of two approaches for so-called "mixed motive" cases: they either employ a comprehensive cost/benefit analysis, or

190. *Id.* at 589.

191. *Id.* at 591.

192. *Id.* at 589.

193. *Id.* at 594–600. Professor O'Grady concludes that "in dormant Commerce Clause review, to ignore clear evidence of protectionist purpose is unjustified, unnecessary, and wrong." *Id.* at 599–600.

194. *Id.* at 589.

195. *Id.* at 601.

196. *See* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 112–33 (3d ed. 2005).

197. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 386–90 (1926).

198. ELLICKSON & BEEN, *supra* note 196, at 114–15. While Ellickson and Been focus on the question of anticompetitive purpose in the Substantive Due Process context, the general themes of their discussion are applicable to dormant Commerce Clause analysis.

"invalidate zoning decisions in which the influence of the anticompetitive motive reache[s] some threshold level."[199] Anticompetitive zoning laws are more likely to stand if they are a part of a comprehensive economic development plan.[200] Essentially, the settled law in zoning demonstrates a similar conclusion to the one O'Grady suggests: truly protectionist policies are those that have no convincing purpose other than stifling competition in the interest of economic development.

Professor O'Grady's "protectionist-first" model "respect[s] the seminal principles that have evolved in the Court's contemporary dormant Commerce Clause jurisprudence."[201] Under her model, a court must first use the three criteria outlined above to determine whether a statute is impermissibly "protectionist."[202] If the challenged regulation fails this factual inquiry, then the court should use the per se rule of invalidity.[203] The review would end there for non-protectionist, non-discriminatory statutes.[204] However, Professor O'Grady would retain the *Pike* balancing test for any statute that is found to be discriminatory, but not protectionist.[205]

C. The "Next Generation"

Situated somewhere between Professor Eule's complete overhaul of dormant Commerce Clause jurisprudence and Professor O'Grady's minor modifications, Professor Sam Kalen has recently offered what he refers to as the "next generation" of dormant Commerce Clause analysis.[206] His proposal reflects a concern for the decreasing importance of borders in the national and international marketplace,[207] especially in the environmental context.[208] His framework involves three substantial changes to the current analysis that

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199. *Id.*

200. *See* Murray S. Levin, *The Antitrust Challenge to Local Government Protection of the Central Business District*, 55 U. COLO. L. REV. 21 (1983); Clifford L. Weaver & Christopher J. Duerksen, *Central Business Planning and the Control of Outlying Shopping Centers*, 14 URB. L. ANN. 57 (1977).

201. O'Grady, *supra* note 12, at 629.

202. *Id.*

203. *Id.*

204. *Id.* at 631.

205. *Id.* Professor O'Grady offers *Scariano v. JJ of the Sup. Ct. of Ind.*, 38 F.3d 920, 926 (7th Cir. 1994), as an example of a case where the court itself acknowledged that "no discrimination can be said to exist," then performed a *Pike* analysis regardless. *Id.* at 621 n.205.

206. Kalen, *supra* note 1, at 381.

207. *Id.*

208. *Id.* at 381–83.

create more efficiency and cohesion, while encouraging greater innovation at the state level.

First, Professor Kalen would do away entirely with the "extraterritorial control" doctrine.[209] He claims that this doctrine often causes courts to "struggle with how to differentiate when a program reaches conduct beyond a state's borders and when it merely influences conduct in other states."[210] Professor Kalen convincingly argues that a hypothetical version of the price-control regulation at issue in *Healy*, traditionally seen as the quintessential version of extraterritorial control, in fact only regulates commerce within the state's own borders.[211] Drawing on the history of the Court's dormant Commerce Clause jurisprudence, Professor Kalen concludes that the extraterritoriality doctrine is "an abandoned nineteenth-century relic" that grew out of the Court's brief infatuation over 100 years ago with "a spheres-of-jurisdiction paradigm."[212]

Second, Professor Kalen argues that courts should scale back the *Pike* balancing test and other inquiries into the discriminatory *effects* of otherwise nondiscriminatory legislation, which he argues exist only "to tease out of otherwise nondiscriminatory programs hidden discrimination against interstate commerce."[213] The current test asks a court "to render a subjective judgment about the economic marketplace, based solely on the information and parties before it."[214] The *Pike* test leads to few invalidations, meaning its elimination would lead to judicial efficiency and properly pass the issue of "balkanization" to Congress, who is better-equipped to deal with such specific economic inquiries.[215]

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209. *Id.* at 415.

210. *Id.* at 420.

211. *Id.* at 421. Professor Kalen's hypothetical asks the reader to imagine a state (state A) that "informs all sellers of widgets into [its] markets that those sellers must sell their widgets in state A for no more than those widgets are sold for in the bordering states." *Id.* This statute is facially non-discriminatory, but "undoubtedly influences the conduct of the sellers of widgets in the neighboring state." *Id.* However, Professor Kalen argues that this does not *directly* regulate out-of-state sellers, because they must first choose to sell in State A. *Id.* The statute, therefore, "influences and perhaps, in effect, burdens—arguably even impermissibly burdens—interstate commerce. But it is not because the law either can or does regulate extraterritorially." *Id.*

212. *Id.*

213. *Id.* at 424.

214. *Id.* at 423. This echoes the concerns voiced by the majority in *Dep't of Revenue of Ky. v. Davis*. *See supra* notes 67–71 and accompanying text.

215. Kalen, *supra* note 1, at 423–24.

Finally, Professor Kalen contends that courts should consider lowering the level of scrutiny for facially discriminatory regulations.[216] Per se invalidity closely resembles the strict scrutiny test employed in other constitutional contexts, often to protect closely-guarded individual rights.[217] Professor Kalen argues that the interests implicated by the dormant Commerce Clause do not generally need such zealous protection.[218] He offers as an example *New Energy Co. of Indiana v. Limbach*,[219] in which the Supreme Court invalidated an Ohio law granting a fuel tax credit for ethanol created in-state or in a state with an equivalent credit for ethanol produced in Ohio.[220] While this law was no doubt discriminatory, "it's not altogether clear why a state may not decide how to best shape its own land uses, based on infrastructure, economics, topography, geography, culture, demographics, and climate, and why each state shouldn't be able to make that decision for itself."[221] The dormant Commerce Clause forces states to avoid promoting the efficient use of resources within their own borders, and encourages the development of industry in other states without regard to the particular needs of those states' residents.[222]

V. RE-SHAPING (OR ESSENTIALLY ELIMINATING) THE DORMANT COMMERCE CLAUSE TO PROTECT LOCATION REQUIREMENTS

This Part applies the alternative frameworks discussed in Part IV to the apparent conflict between the dormant Commerce Clause and in-state generator location requirements. While the "Privileges and Immunities" model and the "protectionism-first" models would likely lead courts down the same fact-intensive, quasi-legislative path demanded by the current analysis, the "next generation" approach would likely allow states to dictate their own energy future through the use of location requirements.

This look at alternative frameworks is necessary because a state-level location requirement would almost certainly fail the current dormant Commerce Clause test. Since the beginning of the 2000s, when the first major scholarship began on RPS programs, it has been taken as a given that a pure

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216. *Id.* at 424–25. ("[A]lthough facial or purposeful discrimination should continue to be considered in any [dormant Commerce Clause] analysis, it might be worth exploring whether the Court needs to apply a stricter standard of scrutiny.").

217. *Id.*

218. *Id.* at 425.

219. 486 U.S. 269, 278 (1988).

220. *Id.* at 274.

221. Kalen, *supra* note 1, at 425.

222. *Id.*

location requirement, requiring energy providers to obtain a certain amount of renewable energy from in-state resources, would fail under the per se test.[223] There is simply no scholarship which suggests that the current framework would be amenable to such a blatant example of facial discrimination against out-of-state interests.[224]

While Lee and Duane's proposal to introduce an intermediate level of scrutiny has some appeal as a simple augmentation of the current rules, it seems to only perpetuate the issues of the current system, because it continues to focus the analysis on discrimination.[225] As has been pointed out by scholars[226] and Supreme Court Justices[227] for decades, dormant Commerce Clause jurisprudence is simply too unpredictable, in large part because discrimination simply is not a valid proxy for protectionism. Using intermediate scrutiny for sustainability-conscious statutes may be more practical to implement than some of the other alternative frameworks discussed in this Comment, but it does not solve the root defects of current dormant Commerce Clause jurisprudence. And adding another level of scrutiny without further simplifying the framework would only cloud the already-muddled analysis further.

Predicting the outcome of a challenge to an in-state location requirement under Professor Eule's four-step Privileges and Immunities analysis is a nearly impossible task. Under the first step of this framework, the state likely would meet its initial burden of proving that location requirements are supported by "a legitimate purpose under the state's police power."[228] State police power is a state's general power "to enforce laws for the health, welfare, morals, and safety of its citizens, if enacted so the means are reasonably calculated to protect those legitimate state interests."[229] Despite the dubious nature of the benefits likely conferred by state location requirements,[230] a state could nonetheless reasonably argue that such a

223. *E.g.*, RADER & HEMPLING, *supra* note 14, at A-1. This assumption is given great support by the outcome in *Wyoming v. Oklahoma*, 502 U.S. 437, 461 (1992), in which the Supreme Court invalidated an Oklahoma law requiring that all coal-fired power plants in the state burn a mixture of fuel made up of at least 10% Oklahoma-mined coal.

224. While Griffin suggests that *in-region* location requirements might survive under the *Maine v. Taylor* test, even he is doubtful that in-state requirements could meet the same threshold. Griffin, *supra* note 14, at 160–65.

225. Lee & Duane, *supra* note 14, at 355.

226. *See supra* Part IV.

227. *See, e.g.*, Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959).

228. Eule, *supra* note 24, at 457.

229. *State Police Power*, BLACK'S LAW DICTIONARY (10th ed. 2014).

230. *See supra* notes 94–100 and accompanying text.

requirement was passed in the interest of the public welfare.[231] Given the low burden placed on states in this step, the burden would likely shift to the challenger.[232]

Assuming the reviewing court found a legitimate purpose, the challenger would then need to prove that the location requirement has a disproportionate impact on non-represented interests. This step requires a fact-intensive inquiry, rendering this sort of predictive analysis both abstract and difficult. It is difficult to say in the abstract whether 50% of the impact of a location requirement would fall on out-of-state interests. On one hand, every electricity provider delivering into the state would see its pool of potential retail energy sources shrink by a state-mandated percentage. On the other hand, an in-state location requirement would burden every in-state electricity provider with the task creating enough renewable energy and corresponding RECs to service the state's needs.[233] And in theory the state's residents would benefit from the jobs produced in the state's renewable energy sector and the state's commitment to a more sustainable energy supply.[234]

If the court decides that out-of-state interests are not disparately impacted by the location requirement, then the RPS would face only rational basis review[235] and would likely stand. However, if the challenger satisfies the burden of persuasion, then the state must prove the efficacy of the location requirement. Although a state could pass the previous steps by citing the *potential* benefits of a location requirement, states would not be able to hide behind mere speculation in this step. The tangible benefits of in-state location requirements are simply too difficult to measure.[236] While Professor Eule's model provides two decent chances for a state to defend an in-state location requirement, this fact-based third step renders the entire proceeding a gamble. Professor Eule's framework, like the current test, asks the court to make determinations better suited to the legislature.[237] And in any case, the safety net provided to the challenger in Professor Eule's fourth step would likely spell doom for an in-state location requirement.

The "protectionist-first model" of dormant Commerce Clause analysis put forth by Professor O'Grady does not hold much promise for in-state location requirements either. The first step in O'Grady's analysis is to determine

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231. *See supra* notes 90–93 and accompanying text.

232. Eule, *supra* note 24, at 458.

233. And, in a regime with freely tradable RECs, out-of-state providers would be burdened with purchasing qualifying RECs from those in-state producers.

234. Engel, *supra* note 92, at 269–70.

235. Eule, *supra* note 24, at 458.

236. RADER & HEMPLING, *supra* note 14, at 33–35.

237. *See* Dept. of Revenue of Ky. v. Davis, 553 U.S. 328, 355 (2008).

whether the law is protectionist by considering three factors.[238] First, the court should consider "whether the decisionmakers [who passed the regulation under dormant Commerce Clause challenge] sought purposefully to protect a segment of their own and, in doing so, impacted or disrupted the national market."[239] It is difficult at first blush to see how an in-state location requirement could possibly pass this test. It explicitly "protects a segment of [the state's] own," by compelling all energy providers to purchase some amount of renewable energy produced within that state. This appears to be a clear protection of the state's renewable energy market. However, this step, like the rest of the protectionist-first model test, raises the question of where to draw the line between economic sustainability,[240] economic development, and economic protectionism.

Tenets of land use law, where the line between stifling competition and economic development have been drawn more clearly,[241] might assist a court in determining whether a location requirement is focused more on protectionism or economic development. A location requirement is generally part of a larger statutory scheme, the RPS itself. Recall that in land-use law, anti-competitive measures are often more readily approved when proposed as part of a more comprehensive plan. The municipality's interest in controlling the use of land resources within their own borders is greater than the interest of business owners to develop however they want, wherever they want. The more plain it is that a land use control is attached to a more comprehensive plan, the easier it is to divine whether the control is intended to benefit the public welfare. However, it is not clear whether a court would use cost/benefit analysis or would analyze whether anticompetitive purpose made up a threshold amount of the state's intent. The adoption of the former would likely lead to invalidation, but the latter might allow a location requirement to stand.

If the reviewing court uses a "threshold test," then a location requirement may pass the second part of Professor O'Grady's test for protectionism, which asks if the implementing state had a protectionist purpose.[242] This step bears much similarity to the first step of Professor Eule's test, as it places the burden on the state to convincingly use legislative history to justify the law

238. O'Grady, *supra* note 12, at 591.

239. *Id.*

240. A term with an admittedly nebulous definition. For discussions of perceptions of economic sustainability, its place as a useful term, and methods of measuring it, see MEASURING ECONOMIC SUSTAINABILITY AND PROGRESS (Dale W. Jorgenson et al., eds. 2014).

241. *See supra* notes 194–98 and accompanying text for the background discussion of land use law relied upon here.

242. O'Grady, *supra* note 12, at 593–94.

on some non-protectionist grounds. The same reasons that would allow a state to prevail there control here.

The third and final component of O'Grady's test for protectionism reveals the biggest hurdle for location requirements. In the absence of a clearly evinced legislative purpose, a court would examine the magnitude of the impact of the regulation.[243] Unlike discrimination, which exists "if a statute's compliance burdens are even slightly disproportionate[]," protectionism exists if "the statute's burdens are *substantially* disproportionate."[244] Here we run into the same roadblock as was found in Professor Eule's analysis and the first step of Professor O'Grady's analysis: how do we measure the respective benefits to in-state interests and burdens to out-of-state interests placed by a location requirement? If the statute fails this "substantially disproportionate" test, it would be considered per se invalid. And even if a location requirement is found to not substantially burden out-of-state interests, could it possibly pass the *Pike* balancing test demanded by the final step of Professor O'Grady's analysis?[245] The "protectionist-first" framework leaves intact one of the key defects of dormant Commerce Clause analysis, identified by the *Davis* court: courts are simply unsuited for the kind of factual inquiry demanded by *Pike*.[246]

The "next generation" framework holds the most promise for the validity of state location requirements. The first two of Professor Kalen's suggested modifications are not directly helpful to the constitutionality of generator location requirements, but they create a constitutional framework that is much friendlier to state control of renewable resources in general.

First, although a location requirement does not raise extraterritoriality concerns, Professor Kalen's proposal to remove the extraterritoriality test works generally to the favor of states seeking to implement more strenuous RPS requirements. Courts have occasionally invalidated policies which have a significant impact on interstate commerce but arguably do not *directly* impact entirely extraterritorial commerce.[247] A state defending a particularly strenuous RPS, even one including a generator location requirement, would no longer have to worry about a court invoking the extraterritorial doctrine against the scheme as a whole.

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243. *Id.* at 600–01.

244. *Id.* at 601 (emphasis added).

245. *Id.* at 629.

246. Dept. of Revenue of Ky. v. Davis, 553 U.S. 328, 355 (2008).

247. *See* Kalen, *supra* note 1, at 421 n.234 (describing contradictory outcomes in cases concerning similar legislation because of the confusion in the lower courts as to the doctrine's application).

Second, Professor Kalen's proposal to abandon effects analysis under *Pike* does not directly benefit the constitutionality of location requirements, but it removes a key defect of dormant Commerce Clause analysis as a whole. Predicting the other two analyses applied in this Part became nearly impossible because of the difficulties associated with measuring the benefits of a generation location requirement. Any test which avoids this sort of judicial balancing act is therefore an indirect victory for states seeking to justify a location requirement, because it shifts the focus of the discussion to the policy's theoretical reasonability, and not its possibly dubious effects.

The lowered scrutiny of the "next generation" analysis likely saves location requirements. Of course, this fix was also proposed on a limited basis by Lee and Duane,[248] and a state could certainly argue for the adoption of their proposal to save a location requirement. However, the "next generation" analysis applies generally to *all* dormant Commerce Clause cases. Thus, it has the added benefit of promoting future innovations in *many* policy areas; an economically harmless instance of facial discrimination will no longer lead to a nearly-instant invalidation.[249] Under a lowered standard of review, a court could very well find that a location requirement is rationally related to a legitimate state interest[250] or even substantially related to some important state objective.[251]

Ultimately, the "next generation" approach re-orients the discussion of the dormant Commerce Clause. While the doctrine is typically defended as a safeguard against state "balkanization," it is becoming increasingly difficult for a state to cut itself off from the national (or even international) economy in any meaningful way. Additionally, 200 years ago the legitimate policy goal of "sustainability," which asks states to intentionally look inward and preserve their own resources, did not exist. The "next generation" proposal recognizes that, while some states will always attempt to egregiously give themselves an unfair advantage in the national economy, for the most part states should have the freedom to make decisions for themselves based on

248. Lee & Duane, *supra* note 14, at 355.

249. However, the main focus of Professor Kalen's proposal *is* reshaping the dormant Commerce Clause to meet sustainability-related challenges. Kalen, *supra* note 1, at 383–84. He briefly discusses challenges to RPS programs as one particularly vexing current dormant Commerce Clause controversy. *Id.* at 401–02.

250. The test for "rational basis" scrutiny. *See, e.g.*, Mass. Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

251. The test for "intermediate" scrutiny. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); *see also* Lee & Duane, *supra* note 14, at 355 (suggesting the use of intermediate scrutiny for sustainability-related statutes).

their own particular, even idiosyncratic, "infrastructure, economics, topography, geography, culture, demographics, and climate."[252]

VI. CONCLUSION

If a state wants to implement an in-state location requirement for compliance with its renewable portfolio standard, the federal Constitution should not bar it from doing so. The dormant Commerce Clause is an artifact from a time in our nation's history when competition between the states threatened the fabric of the union. Today, however, the national economy needs no such protection. State efforts to encourage renewable energy development within their own borders should not be impeded merely because out-of-state energy generators feel they are being treated unfairly. Future applications of the dormant Commerce Clause analysis should allow states to use a greater variety of tools to protect their own resources and consumers. While their actual utility may be contested, in-state generator location requirements nonetheless deserve to be one of the tools available to a state for achieving their sustainability goals.

252. Kalen, *supra* note 1, at 425.