2015

Revitalizing Dormant Commerce Clause Review for Interstate Coordination

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Article

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INTRODUCTION

Much like federalism itself, U.S. energy policy relies heavily on the coordination of state and local governments. Building new high-voltage transmission lines is essential for large-scale energy projects such as wind turbine farms and solar thermal facilities—and increasingly also is necessary for large-scale energy storage. But each state controls its own project approval process through agency siting and judicial eminent domain proceedings,[1] so any project spanning multiple jurisdictions depends on the coordination of multiple states. Most states grant their public utility commissions (PUCs) authority to review and

1. In previous work we each have focused on legal aspects of electric power transmission line siting. *See, e.g.*, Ashley C. Brown & Jim Rossi, *Siting Transmission Lines in a Changed Milieu: Evolving Notions of the "Public Interest" in Balancing State and Regional Considerations*, 81 U. COLO. L. REV. 705 (2010) (highlighting how state public utility laws tend to embrace a narrow definition of "public interest" in siting proceedings); Alexandra B. Klass, *The Electric Grid at a Crossroads: A Regional Approach to Siting Transmission Lines*, 48 U.C. DAVIS L. REV. 1895 (2015) (suggesting options for creating regional authority for transmission line siting); Alexandra B. Klass, *Takings and Transmission*, 91 N.C. L. REV. 1079 (2013) (addressing mismatch between some state eminent domain laws and state preferences for energy development); Alexandra B. Klass & Elizabeth J. Wilson, *Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch*, 65 VAND. L. REV. 1801 (2012) (highlighting the need for process preemption and additional federal encouragement for states to join regional efforts to address transmission); Jim Rossi, *The Trojan Horse of Transmission Line Siting Authority*, 39 ENVTL. L. 1015 (2009) (arguing that focus on expanding federal transmission siting authority is misplaced, given the need of federal regulators to address other issues such as energy efficiency and cost allocation in operation of the grid).

approve transmission lines based on a determination of whether there is a "need" for the line, alternatives to the line, and the potential environmental impacts of the line. If successful, the line receives a certificate of need, sometimes also called a "certificate of public convenience and necessity." For example, a transmission line connecting proposed wind turbines in Wyoming to export power supply to customers in California must pass through and seek regulatory approvals in at least two other states.[2] States also play the primary role in the approval of interstate oil pipelines, as reflected by Nebraska's longstanding objections to the location of the proposed Keystone XL pipeline.[3]

Though some national interest in connecting the supply and demand of energy across jurisdictions seems obvious, existing law allows a state regulator to reject an electric transmission line or oil pipeline proposal for almost any reason—including, at the extreme, anticompetitive or protectionist motivations.[4] State or local decision makers have rejected project applications outright where regulators determine that local firms or consumers will not benefit.[5] In some instances, a state or local agency regulator can lack statutory authorization to even consider an application from a non-local project developer.[6] For example, in approving a 500-mile, $2 billion "Rock Island Clean Line" electric transmission project to allow wind

2. *See* Rebecca Smith & Michael Calia, *Companies Propose $8 Billion Green-Energy Project for California*, WALL ST. J. (Sept. 23, 2014, 5:23 PM), http://www.wsj.com/articles/companies-propose-8-billion-green-energy-plan-for-los-angeles-1411478019.

3. Most recently, following much back and forth between the Nebraska governor, legislature, and courts, the Nebraska Supreme Court rejected a constitutional challenge to the state's oil pipeline siting and approval process on standing grounds but, after the TransCanada filed eminent domain proceedings, landowners filed a new lawsuit challenging the law. *See* Thompson v. Heineman, 857 N.W.2d 731 (Neb. 2015); Grant Schulte, *Nebraska Opponents of Keystone XL Oil Pipeline Reignite Legal Fight*, STAR TRIB. (Sept. 29, 2015), http://www.startribune.com/keystone-xl-developer-drops-landowner-lawsuits-in-nebraska/330005521/.

4. Federal statutes relegate to the states primary authority over the siting and permitting approval for interstate electric transmission lines and oil pipelines. *See infra* Part I (describing state public interest determinations and the state and local eminent domain process). By contrast, under section 7 of the Natural Gas Act, the Federal Energy Regulation Commission (FERC) has plenary authority to conduct the review of a proposed interstate gas pipeline (including a right of eminent domain). FERC determines whether a proposed pipeline meets the "public convenience and necessity" and, although it coordinates with state and federal environmental agencies in pipeline review, it possesses the ultimate power of eminent domain. *See* 15 U.S.C. § 717f (2012).

5. *See infra* Part III.A.

6. *See infra* Part III.C.

power from Iowa and other plains states to reach Chicago customers, Illinois regulators were presented with objections from property owners and Commonwealth Edison, the state's largest electric utility, both of which argued that the project developer did not qualify for eminent domain because it was not a "public utility" under state law.[7]

As much as any contemporary issue in American federalism, multi-state energy infrastructure project approval illustrates the challenge of regulatory "holdouts."[8] As with private property holdouts, a government decision whether to coordinate with other jurisdictions depends on how the benefits of participating in a multi-state project are perceived. Citizens in an energy destination state like California may stand to benefit as consumers through decreased electricity costs, more diversified sources of power supply, and increased availability of renewable energy to meet state mandates. However, a government regulator in a "pass-through" state, which would neither export nor consume power from a proposed transmission line, is especially likely to face considerable interest group pressure to hold out from approving a project. Indeed, if the regulator evaluating such a project defines the benefits narrowly to focus only on in-state firms or citizens (i.e., those who are most likely to be voting in that state's elections), and if in assessing project costs the regulator concentrates on anticipated costs to those same

7. *See* Julie Wernau, *Clean Line's Wind Power Superhighway Approved in Illinois*, CHI. TRIB. (Nov. 25, 2014, 3:51 PM), http://www.chicagotribune.com/business/ct-clean-line-1126-biz-20141125-story.html. The same project is facing vocal opposition from landowners in Iowa, which has yet to approve it. *See Thousands Voice Concern over Rock Island Clean Line*, RADIOIOWA (Nov. 25, 2014), http://www.radioiowa.com/2014/11/25/thousands-voice-concerns-over-rock-island-clean-line.

8. In this Article we focus on multi-state projects, though some of the same tensions can certainly arise with inter-local project approval. A county disagreeing with an adjacent municipal government can present a similar dynamic. Of course, legal analysis of this problem could differ to the extent that interstate commerce is not implicated by entirely intrastate projects; still, dormant Commerce Clause principles have also been applied to intra-state conflicts between utilities. *See, e.g.*, Shelley Ross Saxer, *Eminent Domain, Municipalization, and the Dormant Commerce Clause*, 38 U.C. DAVIS L. REV. 1505, 1524–25 (2005) (explaining that dormant Commerce Clause principles may keep municipalities from establishing programs which may impact or burden interstate commerce). It is also well established that a state cannot selectively protect parts of its geographic market, while claiming other parts are open to interstate commerce. *See* Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res., 504 U.S. 353, 361 (1992) ("[O]ur prior cases teach that a State . . . may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself.").

firms or citizens (as is often perceived), the project probably will not gain approval. To name one example, Wisconsin regulators have faced considerable opposition to a proposed electric transmission line that is primarily intended to benefit producers and customers in other states.[9]

At the same time, as with private property holdouts, a decision not to approve a project can present externalities in the form of impacts (both positive and negative) that transcend any particular state's borders. For example, a multi-state infrastructure project may serve regional or even national interests in enhancing grid reliability, promoting energy diversity, or addressing climate change. In short, under existing law, regulators considering multi-state infrastructure projects are often confronted with a jurisdictional mismatch between those who stand to benefit the most from a project, and those who are anticipated to bear its costs. This invites and increases the likelihood of isolationist holdouts that can serve as a barrier to new multistate energy projects and initiatives.

Recent developments in federal constitutional law favor deference to state legislative and regulatory determinations as a way of promoting federalism, increasing even further the potential for regulatory holdouts to impede coordination. The Roberts Court's application of dormant Commerce Clause review, along with recent federal appellate court cases reviewing state energy and climate change initiatives, show some judicial reluctance to scrutinize the federalism implications of individual state decisions.[10] On top of this, after the Supreme Court's 2005 decision in *Kelo v. City of New London*,[11] courts also routinely defer to state or local determinations of "public use" (including recent state legislation that narrows definitions of public use to protect private property) for purposes of assessing whether an eminent domain action is valid under the Fifth Amendment to the U.S. Constitution.

The energy infrastructure coordination problem is readily solvable by Congress, if it were so inclined. Under the Supremacy Clause of the U.S. Constitution, Congress could establish a federal process for siting and eminent domain for interstate electric transmission lines and oil pipelines similar to the re-

9. *See* Mike Ivey, *Environmentalists Split over Badger-Coulee Power Line*, CAP. TIMES (Dec. 9, 2014), http://host.madison.com/news/local/writers/mike_ivey/environmentalists-split-over-badger-coulee-power-line/article_548379a0-7fcb-11e4-9748-27b73b15eee6.html.

10. We discuss this line of cases *infra* at Part II.

11. 545 U.S. 469 (2005); *see infra* Part III.B.

gime it created in the 1930s for interstate natural gas pipelines.[12] Under the Natural Gas Act, a company seeking to build an interstate natural pipeline applies for a certificate of public convenience and necessity from the Federal Energy Regulatory Commission (FERC) and if approved, the pipeline company is given federal eminent domain authority to build the pipeline and state law is preempted.[13] In 2005, Congress declined to significantly expand FERC or other federal agency authority over electric transmission line siting, and new congressional action along these lines appears highly unlikely in the current political climate in the absence of a major blackout or other disaster.[14] Just as important, there are strong state and local land use interests that are vocally opposed to any expansion of federal preemption of energy infrastructure siting and permitting.[15]

In recognition that congressional action is not forthcoming, this Article considers ways in which constitutional dormant Commerce Clause principles can help address the state holdout problem while still preserving federalism principles, such as state sovereignty over land use. We advance an argument for revitalizing dormant Commerce Clause review of discriminatory state siting and eminent domain regimes, with the goal of better promoting interstate coordination in energy markets. Application of dormant Commerce Clause principles and doctrine calls into question whether broad judicial deference to state siting and eminent domain decisions under the banner of federalism makes sense, especially given the interstate coordination problem. Our analysis also has important implications for the considerations that state or local regulators balance as they make their decisions under existing regulatory siting and eminent domain regimes. Courts routinely accept state regulatory procedures so long as they meet Due Process requirements, but our approach highlights how, in this context and others, the dormant Commerce Clause provides an important

12. One proposal for federal preemption along such lines is discussed in Klass & Wilson, *supra* note 1, at 1859–69.

13. 15 U.S.C. § 717f (2012); *see also* Minisink Residents for Envtl. Pres. & Safety v. FERC, 762 F.3d 97 (D.C. Cir. 2014) (describing broad FERC authority over siting and eminent domain for interstate natural gas pipelines).

14. *See* Klass & Wilson, *supra* note 1, at 1818–19; Rossi, *supra* note 1, at 1033–38.

15. *See, e.g.*, Nancy A. McLaughlin, *Condemning Open Space: Making Way for National Interest Electric Transmission Corridors (or Not)*, 26 VA. ENVTL. L.J. 399 (2008) (highlighting land use and environmental concerns presented with expansive condemnation of open space for transmission projects).

safeguard against state and local regulatory procedures that enable economic protectionism.

Part I presents the multi-state coordination problem as posing a real tension among states in the United States today, using interstate electric transmission line projects as an example. One solution to regulatory holdouts between jurisdictions is for states to bargain among themselves to arrive at a multi-state solution—either through regional governance or through private compensation to dilute interest group dynamics supporting holdouts. Unfortunately, these interstate bargaining solutions do not occur routinely today in the context of electric transmission line siting. Regional governance solutions have proved ineffective at promoting coordination in transmission line approval because, short of formal and binding interstate compacts, state regulators lack the authority to address the holdout problem on their own. While Congress has given advanced consent to the creation of interstate transmission siting compacts,[16] no such agreements have been adopted to date, perhaps because pass-through states do not perceive reciprocal benefits and lack strong incentives to make binding commitments. It is certainly possible that project developers could offer payments to private entities and local governments in pass-through states, perhaps creating sufficient in-state benefits to overcome regulatory and public opposition. However, this kind of private Coasean bargaining approach (where holdouts are offered some form of payment to cooperate with others) has also fallen short of its theoretical ideal. This is in part because of remote benefits and uncertainty, given that many multi-state projects will not realize benefits for decades into the future and there is frequently a manifold potential for private or regulatory holdouts. We describe how the interest group dynamic, coupled with many existing siting and eminent domain laws, enables, and may even encourage, these kinds of state and local government holdouts.

Part II highlights one promising and under-examined legal basis for addressing state holdouts in multi-state infrastructure

16. The 2005 Amendments to the Federal Power Act established advanced consent for interstate compacts between three or more continuous states. 16 U.S.C. § 824p(i) (2012). The National Center for Interstate Compacts, along with the Council of State Governments, has even drafted model language to assist states with these efforts. *See Transmission Line Siting Compact*, COUNCIL ST. GOV'TS, http://www.csg.org/NCIC/TransmissionLineSitingCompact.aspx (last visited Oct. 16, 2015). For a discussion of why states have not used this authority to enter into interstate compacts, see Klass, *The Electric Grid at a Crossroads*, *supra* note 1.

projects—constitutional dormant Commerce Clause doctrine. Despite revived interest of late in federalism, the Roberts Court has not been a champion of invalidating discriminatory state laws under dormant Commerce Clause principles, particularly given consistent vocal criticism of the doctrine by Justices Scalia and Thomas. Highlighting the continued relevance of dormant Commerce Clause doctrine, however, several recent federal courts have addressed whether state climate initiatives, including renewable energy requirements, are consistent with federalism.[17] Despite some signals to the contrary, including dictum from Judge Richard Posner on the U.S. Court of Appeals for the Seventh Circuit,[18] recent appellate court opinions show some judicial appetite for upholding state clean energy, renewable energy, and carbon emission regulation initiatives.[19] Against the backdrop of these decisions, the interstate holdout problem presented by energy infrastructure siting highlights the need to step back to first principles related to interstate coordination and the political process, in order to evaluate whether it is appropriate for federal courts to routinely defer to state regulatory decisions. We advance an alternative approach to dormant Commerce Clause review that calls for courts to evaluate whether state or local regulators have been attentive to benefits outside of the particular jurisdiction as a way of improving the political process behind legislative and regulatory decisions and better encouraging coordination among states.

Part III evaluates three common features of state siting and eminent domain regimes against these dormant Commerce Clause principles and established doctrine. First, we contend that dormant Commerce Clause doctrine prevents state regulatory agencies from considering only in-state need in granting or

17. *See, e.g.*, Energy & Envtl. Legal Inst. v. Epel, 793 F.3d 1169 (10th Cir. 2015) (upholding Colorado RPS standard against a dormant Commerce Clause challenge); Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2875 (2014) (upholding California renewable fuel standard); North Dakota v. Heydinger, 15 F. Supp. 3d 891 (D. Minn. 2014) (holding that a Minnesota ban on new coal-fired power generated in or imported into Minnesota constitutes extraterritorial legislation that violates the dormant Commerce Clause). A recent case, filed in federal court in 2015, challenges the in-region deliverability requirements of Connecticut's RPS standard. *See Lawsuit Challenges a Bedrock of Connecticut's Energy Policy*, HARTFORD COURANT (Apr. 28, 2015, 3:16 PM), http://www.courant.com/business/hc-connecticut-clean-energy-lawsuit-allco-story.html.

18. *See* Ill. Commerce Comm'n v. FERC, 721 F.3d 764, 776 (7th Cir. 2013) (noting that a Michigan preference for in-state renewable energy violates dormant Commerce Clause doctrine).

19. *See* s*upra* note 17; *infra* Part II.

denying certificates of need or state siting permits for multi-state transmission lines. Second, we argue that dormant Commerce Clause principles should also prevent state courts from considering only benefits to in-state residents in making public use determinations for purposes of eminent domain authority for multi-state transmission lines. While the U.S. Supreme Court's decision in *Kelo v. City of New London* affords great deference to local "public use" determinations,[20] that case did not involve a multi-state project where, we maintain, dormant Commerce Clause principles place independent limits on state or local decision makers. Third, and most novel, we propose that dormant Commerce Clause review should serve to protect against a form of structural discrimination that can be created by the procedures in many state siting and eminent domain regimes. In particular, some states limit siting applications to only in-state public utilities, or allow only in-state incumbent firms to challenge or intervene in proceedings regarding new proposed lines. Even if such procedures are not facially discriminatory, we maintain that litigants should be allowed to present evidence of whether these kinds of procedures produce a discriminatory effect against out-of-state applicants. Where there is a discriminatory effect, states should be required to justify them by reference to a non-discriminatory purpose that is legitimate and non-illusory—and we argue many of the alleged consumer protection benefits used to justify these kinds of bans and nonreciprocal procedures do not withstand scrutiny. The constitutional concern we identify is hardly an academic one: for example, FERC Chairman Norman Bay has recently questioned whether a state right of first refusal for incumbent utilities to propose transmission lines violates the dormant Commerce Clause in his concurrences in two FERC decisions addressing industry compliance with the agency's electricity transmission planning rules.[21]

Part IV evaluates the scope and practical implications of our approach to dormant Commerce Clause review. Where an infrastructure project requires the action of two or more states, we argue that, at a minimum, each state is not only allowed

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20. Kelo v. City of New London, 545 U.S. 469, 485–89 (2005) (concluding that "public use," as the term is used in the Fifth Amendment's Takings Clause, need not be interpreted literally to require actual use by the public of land taken under the power of eminent domain, but should instead be interpreted broadly to include land taken for a "public purpose").

21. *See, e.g.*, *In re* Southwest Power Pool, 151 FERC ¶ 61,045, 2015 WL 1736849, at *17–18 (Apr. 16, 2015) (Bay, J., concurring); PJM Interconnection, LLC, 150 FERC ¶ 61,038 (Jan. 22, 2015) (Bay, J., concurring).

but is in fact *required* to consider impacts outside of its particular jurisdiction and make explicit political tradeoffs, especially before making a decision to hold out from project approval. This raises some important questions about the scope of our proposal. Importantly, while not a toothless approach to dormant Commerce Clause review, we do not advance this as a roving invitation for courts to engage in cost-benefit assessment. We believe that courts can review how states make their regulatory decisions without federal judges substituting their own policy preferences for politically accountable state decision makers. At the same time, such an approach is not appropriate for every dormant Commerce Clause challenge. We do not go as far as to look with suspicion on virtually any state-specific climate initiative or subsidy, as some would.[22] We evaluate the implications of our approach for other state renewable energy initiatives that might (implicitly or explicitly) include coordination features, such as the renewable energy initiatives recently upheld by the Ninth Circuit in *Rocky Mountain Farmers Union v. Corey*.[23] In terms of scope, we see our proposal as having the most direct application in instances where coordination is necessary to the success of state regulatory goals that are shared by two or more states, and especially where existing procedures serve as an obstacle to a state making any regulatory decision in the first instance.

Part IV also addresses the practical implications of constitutionally requiring state regulators to engage in a more robust, regional cost/benefit assessment where multi-state regulatory approvals are necessary. Given their potential legal vulnerabilities, we have several suggestions for how states can reform and clarify their siting and "need" laws and regulations to allow for some consideration of benefits beyond a particular state's borders. We also highlight how state "public use" determinations under the Takings Clause (especially under post-*Kelo* statutes that limit or ban economic development takings in order to expand private property rights protections) are vul-

22. *See, e.g.*, Steven Ferrey, *Carbon Outlasts the Law: States Walk the Constitutional Line*, 41 B.C. ENVTL. AFF. L. REV. 309, 309–13 (2014) (discussing briefly several challenges to California's energy regulations); Harvey Reiter, *Removing Unconstitutional Barriers to Out-of-State and Foreign Competition from State Renewable Portfolio Standards: Why The Dormant Commerce Clause Provides Important Protection for Consumers and Environmentalists*, 36 ENERGY L.J. 45, 50 (2015) ("The focus of this article is on the pernicious impact of [state] renewable resource legislation . . . .").

23. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1107 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2875 (2014).

nerable under dormant Commerce Clause principles when they fail to contain clear safe harbors for interstate energy infrastructure project development. In addition, our dormant Commerce Clause analysis exposes the potential for facial judicial challenges to state procedures—even (and perhaps especially) where there is regulatory inaction. Even absent evidence of a substantial record supporting actual discrimination against a particular out-of-state producer, it is possible that a state siting process can violate dormant Commerce Clause doctrine, and we make several suggestions for how states can reform their procedures to address this concern.

In sum, the dormant Commerce Clause analysis proposed in this Article is intended to address the holdout problem with energy infrastructure approvals by state and local regulators where projects require multi-state coordination, and in particular state laws that facilitate such holdouts by imposing discriminatory substantive or procedural constraints on the siting application process. It is not intended to force a state to adopt laws and regulations or to exercise eminent domain powers to benefit the citizens of other states. Nor is it intended to discourage a state from regulating any time that it determines that regulation imposes broader costs than its citizens, under principles of fairness, will or should bear. We limit the scope of our proposal to infrastructure or other projects where the approval of two or more states will be necessary for the project to go forward at all—though we think there may be opportunities for extension in other contexts where market coordination is required to achieve regulatory objectives or where structural procedures in state laws promote economic protectionism. Judicial evaluation of state regulatory decisions and frameworks does not authorize federal courts to make the substantive choice for state regulators, as some skeptics of dormant Commerce Clause review fear. Instead, as we hope our study of state siting and eminent domain regimes shows, dormant Commerce Clause review can help to address deficiencies in the state political process that thwart interstate coordination, making it more likely that when state or local regulators make a substantive choice, they are considering the broader benefits of regulatory decisions.

I. THE REGULATORY "HOLDOUT" PROBLEM

Perhaps no issue involving energy and climate regulation today depends as much on coordination between state regulators as does the siting of interstate electric transmission lines.

Building transmission lines involves multiple regulatory approvals—and this depends primarily on state regulators. This Part discusses how, despite significant federal authority over most aspects of interstate energy markets, expansion of the transmission grid and the oil pipeline network still depends heavily on the initiatives of state regulators. We highlight how these kinds of infrastructure projects depend on interstate coordination and present state and local regulation as a type of holdout problem that threatens its achievement and its benefits, including addressing climate change issues.

A. THE ENERGY GRID'S SIGNIFICANCE FOR RELIABILITY AND CLIMATE POLICY

The U.S. electric power grid evolved from independent municipal power systems to interlinked systems designed to promote grid reliability, to the regional, interconnected transmission planning and electric markets that cover much of the country today. It powers modern society, providing the critical infrastructure for food, transportation, health care, and virtually every other conceivable need. Today, electricity from nearly 5,800 power plants travels over 450,000 miles of high voltage transmission lines in the United States, connecting with nearly 6 million miles of lower voltage distribution cables, to provide power to homes, businesses, and industrial facilities.[24] The U.S. electric grid constitutes an $876 billion asset managed by over 3,000 utilities serving nearly 300 million customers.[25]

A 2013 report by the U.S. House of Representatives highlights the importance and vulnerability of the nation's electric grid:

> The vast majority of grid assets are owned and operated by private companies and other non-federal institutions. The components of the grid are highly interdependent and, as history has shown, a line outage or system failure in one area can lead to cascading outages in

24. AM. SOC'Y OF CIVIL ENG'RS, FAILURE TO ACT: THE ECONOMIC IMPACT OF CURRENT INVESTMENT TRENDS IN ELECTRICITY INFRASTRUCTURE 4, n.3 (2011), http://ascelibrary.org/doi/pdf/10.1061/9780784478783 [hereinafter FAILURE TO ACT]; BIPARTISAN POLICY CTR., CAPITALIZING ON THE EVOLVING POWER SECTOR: POLICIES FOR A MODERN AND RELIABLE U.S. ELECTRIC GRID 16–17 (Feb. 2013).

25. *See* MIT, THE FUTURE OF THE ELECTRIC GRID VII (2011); Mark Chediak et al., *Crumbling U.S. Grid Gets Jolt Creating Smarter Power in Houston, Across County*, BLOOMBERG (June 25, 2014), http://www.bloomberg.com/news/articles/2014-06-25/crumbling-u-s-grid-gets-jolt-driving-smart-houston-power; HARRIS WILLIAMS & CO., TRANSMISSION AND DISTRIBUTION INFRASTRUCTURE 2 (Summer 2014), http://www.harriswilliams.com/sites/default/files/industry_reports/ep_td_white_paper_06_10_14_final.pdf.

> other areas. For example, on August 14, 2003, four sagging high-voltage power lines in northern Ohio brushed into trees and shut off. Compounded by a computer system error, this shut-down caused a cascade of failures that eventually left 50 million people without power for two days across the United States and Canada. This event, the largest blackout in North American history, cost an estimated $6 billion and contributed to at least 11 deaths.[26]

The U.S. high voltage power system is divided into three synchronous grids (or "interconnections")—the Eastern Interconnection, the Western Interconnection, and Texas.[27] While electricity movements within each interconnection are relatively easy, power flows between interconnections are very limited. Within the interconnections, eight regional entities work with the non-governmental North American Electric Reliability Corporation (NERC) to ensure the reliability of the high-voltage power grid. Approximately half of the nation's electric grid is further divided among seven Regional Transmission Organizations (RTOs).[28] These are voluntary associations of utilities and other grid participants, subject to FERC oversight, which manage the grid and regional markets for wholesale power.[29] When a utility joins an RTO it delegates the operational control of its transmission lines to the RTO.[30]

Many experts warn that the U.S. transmission grid must be modernized and expanded to maintain reliability, anticipate increasingly severe weather events brought about by climate change, address cyber security concerns, and integrate more domestic renewable energy into the grid to achieve federal and state climate change goals.[31] They point out that power outages are becoming more frequent in the United States and in order to maintain even current levels of grid reliability, the electric

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26. U.S. HOUSE OF REPRESENTATIVES, ELECTRIC GRID VULNERABILITY: INDUSTRY RESPONSES REVEAL SECURITY GAPS 4 (2013).

27. BIPARTISAN POLICY CTR., *supra* note 24, at 15; NAT'L ACAD. OF SCIS. ET AL., AMERICAN ENERGY FUTURE: TECHNOLOGY AND TRANSFORMATION fig.9.4 (2009).

28. *See* BIPARTISAN POLICY CTR., *supra* note 24, at fig.2; MIT, *supra* note 25, at 4.

29. *See* BIPARTISAN POLICY CTR., *supra* note 24, at 21.

30. *See id.* at 16; *Regional Transmission Organizations (RTO)/Independent System Operators (ISO)*, FERC (July 16, 2015), http://www.ferc.gov/industries/electric/indus-act/rto.asp; *see, e.g.*, Ill. Commerce Comm'n v. FERC, 721 F.3d 764, 776 (7th Cir. 2013).

31. *See, e.g.*, FAILURE TO ACT, *supra* note 24, at 46; BIPARTISAN POLICY CTR., *supra* note 24, at 28–33, 79, 101; RICHARD J. CAMPBELL, CONG. RESEARCH SERV., R423923, ELECTRICAL POWER: OVERVIEW OF CONGRESSIONAL ISSUES 7 (2013) (discussing the aging nature of the transmission grid); MIT, *supra* note 25, at 77; Klass, *Takings and Transmission*, *supra* note 1, at 1115–16; Klass & Wilson, *supra* note 1, at 1812–14; Rossi, *supra* note 1, at 1019.

industry must make total investments on the scale of $1.5 to $2 trillion dollars and investments in transmission and distribution alone of nearly $900 billion.[32] Likewise, a 2013 White House report notes that "[s]evere weather is the number one cause of power outages in the United States and costs the economy billions of dollars a year in lost output and wages, spoiled inventory, delayed production, inconvenience and damage to grid infrastructure."[33] More important, the report points out that the "aging nature of the grid," most of which was constructed over a period of more than one hundred years, makes the country more susceptible to severe weather-related power outages.[34] The report also warns that the number of outages caused by severe weather events is expected to rise as climate change increases the frequency of floods, blizzards, and hurricanes.[35] "In 2012, the United States suffered eleven billion-dollar weather disasters—the second-most for any year on record, behind only 2011."[36] Indeed, the blackouts caused by Hurricane Sandy on the east coast in 2012 have called into question the ability of the U.S. transmission infrastructure to withstand more frequent extreme weather events, which may be made worse by climate change.[37]

Although demand for electricity increased 25% between 1990 and 2009, transmission construction deceased by 30%

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32. *See, e.g.*, THE BRATTLE GRP., TRANSFORMING AMERICA'S POWER INDUSTRY: THE INVESTMENT CHALLENGE 2010–2030 iv–xi (Nov. 2008), http://www.eei.org/ourissues/finance/Documents/Transforming_Americas_Power_Industry_Exec_Summary.pdf (summarizing the costs of grid investment); Massoud Amin, *Toward a More Secure, Strong, and Smart Electric Power Grid*, IEEE SMART GRID, http://smartgrid.ieee.org/newsletter/january-2011/105-toward-a-more-secure-strong-and-smart-electric-power-grid (last visited Oct. 16, 2015) ("In the electricity sector, outages and power quality disturbances cost the economy, on average, more than $80 billion annually and sometimes as much as $188 billion in a single year."); Chediak et al., *supra* note 25 ("Power outages are up 285 percent since 1984 and the U.S. ranks last among the top nine western industrialized nations in the average time it takes to get the lights back on after power failures. Outages cost businesses as much as $150 billion a year in lost continuity. . . ."); Jonathan Fahey, *U.S. Power Grid Costs Rise but Service Slips*, ASSOCIATED PRESS (Mar. 5, 2013), http://bigstory.ap.org/ article/us-power-grid-costs-rise-service-slips.

33. EXEC. OFFICE OF THE PRESIDENT, ECONOMIC BENEFITS OF INCREASING ELECTRIC GRID RESILIENCE TO WEATHER OUTAGES 4 (Aug. 2013), http://energy.gov/sites/prod/files/2013/08/f2/Grid%20Resiliency%20Report_FINAL.pdf.

34. *Id.*

35. *Id.*

36. *Id.*

37. *See, e.g.*, Matthew L. Wald & John Schwartz, *Rise in Weather Extremes Threatens Infrastructure*, N.Y. TIMES, July 26, 2012, at A4.

during the same period.[38] While more recent investments in transmission show an improved outlook through 2020, a significant investment gap remains.[39] The American Society of Civil Engineers estimates that failure to address transmission grid needs will result in annual costs to businesses and households as a result of blackouts and brownouts of $23 billion in 2020, increasing to $44 billion by 2040.[40] Moreover, some experts opine that the EPA's Clean Power Plan—designed to significantly reduce use of coal-fired power and replace it with gas turbines and renewable energy—cannot succeed without major expansions to the electric transmission grid to connect these new generation resources to load centers and ensure reliability.[41]

As for increasing the role of renewable energy in the U.S. energy portfolio, it is important to keep in mind that, unlike traditional energy sources for electricity (such as coal and natural gas, which can be transported to power plants near load centers by train, truck, ship, or rail), renewable energy in the form of wind or solar power can only be transported to load centers through electric transmission lines. This presents a challenge because the best on-shore sources of wind and solar energy are often far from population centers, with wind resources centered in the upper Midwest and Plains states and solar resources centered in the desert southwest.[42] Major new transmission infrastructure built in areas of the country currently not well served by long-distance, high-voltage, electric transmission lines is critical to integrating these resources into the grid.

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38. AM. SOC'Y OF CIVIL ENG'RS, 2009 REPORT CARD FOR AMERICA'S INFRASTRUCTURE 134 (2009).

39. *See generally* EDISON ELEC. INST., TRANSMISSION PROJECTS AT A GLANCE iii (March 2014) (showing increases in transmission investment from 2011–13 but then a projecting a slight decline in investment from 2013–16).

40. FAILURE TO ACT, *supra* note 24, at 40.

41. *See* Peter Behr, *Can EPA's Climate Plan Work Without a National Transmission Plan?*, ENERGYWIRE (Jan. 9, 2015), http://www.eenews.net/stories/1060011373.

42. *United States—Annual Average Wind Speed at 80 m*, NAT'L RENEWABLE ENERGY LAB., http://www.nrel.gov/gis/images/80m_wind/USwind300dpe4-11.jpg (last visited Oct. 16, 2015); Photovoltaic Solar Resource of the United States, NAT'L RENEWABLE ENERGY LAB., http://www.nrel.gov/gis/images/eere_pv/national_photovoltaic_2012-01.jpg (last visited Oct. 16, 2015).

B. FEDERAL LAWS AND POLICIES FAVORING GRID DEVELOPMENT

The Federal Power Act of 1935 (FPA) provides the "statutory foundation for regulating the business of transmitting and selling electricity across state lines."[43] The FPA grants FERC jurisdiction over "transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce."[44] States, however, retain authority over retail electricity sales and over the location and construction of both intrastate and interstate electric transmission lines.[45] This stands in stark contrast to FERC's authority in the area of natural gas, where it has jurisdiction over both the pricing of natural gas transportation rates as well as the approval of interstate natural gas pipelines.[46]

Until recently, the electric industry was vertically integrated with investor-owned utilities (IOUs) owning generation facilities, transmission lines, and distribution lines and states granting them exclusive service territories for selling electricity to customers. The regulatory structure created in the FPA, with some modifications contained in the Public Utility Regulatory Policies Act of 1978 (PURPA), remains mostly in place today.[47] PURPA expanded FERC's jurisdiction over interstate electricity transmission. In addition, PURPA provided incentives for the growth of renewable energy resources for electric power generation, requiring utilities to buy back the surplus power from alternative generators at the same rate it would cost the utilities to produce the power (known as the utility's

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43. New York v. FERC, 535 U.S. 1, 18–20 (2002).

44. 16 U.S.C. § 824(b) (2012).

45. The FPA expressly states that FERC

> shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

Id.; *see also New York v. FERC*, 535 U.S. at 5–8.

46. Natural Gas Act, 15 U.S.C. § 717–717z (2012); Minisink Residents for Envtl. Pres. Safety v. FERC, 762 F.3d 97 (D.C. Cir. 2014) (describing broad FERC authority over transportation and sale of natural gas in interstate commerce, including federal siting and eminent domain authority for interstate natural gas pipelines); *see also* 15 U.S.C. § 717f (FERC authority over siting and eminent domain for interstate natural gas pipelines).

47. *See* LINCOLN L. DAVIES ET AL., ENERGY LAW AND POLICY 306–12, 435 (2014) ("[W]ith respect to rates and siting, transmission regulation at the beginning of the 21st century looks very much like it did throughout the 20th.").

"avoided cost").[48] This helped to usher in a new era of interstate energy markets by allowing non-utility generators to compete with investor-owned utilities (IOUs), which otherwise often had monopoly power over electricity sales and transmission lines within their service territories.[49] From the perspective of power supply, the electric industry has undergone a remarkable transformation nationwide. As of 2013, non-utility generators, known as "independent power producers," owned approximately 40% of the nameplate generation capacity that produces electricity.[50]

At the retail sales level, however, the industry is far less competitive. Today, IOUs sell 68% of retail electricity in the United States with public municipal utilities selling 15%, rural electric cooperatives 13%, and power marketers only about 4%.[51] In exchange for this "natural monopoly" over retail sales, IOUs are subject to state requirements that electricity rates remain reasonable and service is not provided in a discriminatory manner. Many states began to restructure their electricity markets in the 1990s to split the vertically integrated utility functions of generation, transmission, and distribution and create a more market-based system, but the Enron scandal and problems in California led many states to revert back to their original structures. Today, about half the states are traditionally regulated and the rest are restructured or partially restructured—creating a fragmented and very parochial approach to regulating many aspects of the industry.[52]

Congress built on the FPA and PURPA in the Energy Policy Act of 1992, in which it authorized FERC to require utilities to grant widespread access to the transmission grid, creating more opportunities for competition in power supply.[53] Congress followed this with the Energy Policy Act of 2005 (EPAct 2005),

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48. *See id.* at 393–94, 481–83.

49. *See id.*; *see also* Richard D. Cudahy, *PURPA: The Intersection of Competition and Regulatory Policy*, 16 ENERGY L.J. 419 (1995).

50. *See* U.S. ENERGY INFO. ADMIN., ELECTRIC POWER ANNUAL 2013, tbl.4.4 (2015), http://www.eia.gov/electricity/annual/pdf/epa.pdf.

51. As of 2014, the percentage of total electricity sold by the various types of power providers was: investor-owned utilities (68.5%), publicly owned utilities (14.4%), electric cooperatives (12.8%), federal power agencies (less than 1%), and power marketers (4.3%). AM. PUBLIC POWER ASS'N, 2014–15 ANNUAL DIRECTORY & STATISTICAL REPORT 26 (2014).

52. *Status of Electricity Restructuring by State*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/electricity/policies/restructuring/restructure_elect.html (last visited Oct. 16, 2015).

53. *See* 16 U.S.C. § 824j–824k (2012); Klass & Wilson, *supra* note 1, at 1816.

which Congress enacted to diversify fuel sources, promote energy efficiency, and strengthen the interstate electric transmission system.[54] EPAct 2005 amended the FPA and added a number of policies to create explicit federal "backstop" siting authority for interstate electric transmission lines in areas of the country subject to significant transmission congestion by allowing FERC to override certain state siting decisions.[55] However, despite federal endorsement of multiple goals related to expanding the transmission grid, the direct impact of these federal siting provisions has been extremely limited, in no small part because federal courts have interpreted these statutes as granting FERC very little real authority to override state transmission siting decisions.[56] Since EPAct 2005, Congress authorized $4.5 billion in the American Recovery and Reinvestment Act of 2009 to modernize the country's transmission grid.[57] The Obama Administration has also created an Interagency Rapid Response Team for Transmission to coordinate the siting of interstate electric transmission lines that cross federal lands and to integrate more renewable energy into the grid.[58]

Although there is still virtually no federal authority over electric transmission line siting off federal lands, the laws summarized above did grant FERC authority to require utilities, RTOs, and states to engage in planning for interstate transmission lines and to increase access to the grid for renewable and other non-utility generators. FERC has exercised this authority by issuing industry-wide regulations in three major sets of orders (all challenged in court and upheld), which have consistently emphasized the fundamental importance of transmission infrastructure to the operation of interstate energy markets:

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54. *See* Klass & Wilson, *supra* note 1, at 1861; *see also* DAVIES ET AL., *supra* note 47, at 463–64 (discussing EPAct 2005).

55. *See* 16 U.S.C. § 824p; Klass & Wilson, *supra* note 1, at 1818–19 (discussing FERC backstop siting authority).

56. *See* Klass & Wilson, *supra* note 1, at 1817–19; *see also* Piedmont Envtl. Council v. FERC, 558 F.3d 304, 313 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 1138 (2010) (interpreting FERC's backstop siting authority narrowly and invalidating FERC rule that would allow it to override state denial of a transmission line siting permit).

57. *See* DAVIES ET AL., *supra* note 47, at 718–19; *Recovery Act*, U.S. DEP'T OF ENERGY, http://energy.gov/oe/information-center/recovery-act (last visited Oct. 16, 2015).

58. *Interagency Rapid Response Team for Transmission*, WHITE HOUSE, http://www.whitehouse.gov/administration/eop/ceq/initiatives/interagency-rapid-response-team-for-transmission (last visited Oct. 16, 2015).

Order 888 (1996): Required all transmission line owners subject to FERC jurisdiction to allow "open access" to electricity transmission by transmitting wholesale power at rates, terms, and conditions identical to those applied to their own wholesale power supplies.[59] This order served to usher in unbundling of transmission from power supply, which would be priced competitively by market-based rates.[60]

Order 2000 (1999): Encouraged the creation of RTOs, which as discussed above operate the transmission grid in organized markets to provide access at unbundled rates established through a single grid-wide tariff.[61] In follow-up regulations implementing this, FERC required transmission line operators to include large generator interconnection procedures and agreements in their transmission tariffs,[62] and required public utilities to participate in open and transparent transmission-planning processes.[63]

Order 1000 (2011): Directed RTOs, utilities, and states to cooperate and consider the benefits of interstate electric transmission lines. It required each public utility transmission provider to (1) participate in a regional transmission planning process; (2) establish procedures to identify transmission needs based on public policy requirements (including state renewable energy goals) in state or federal laws and regulations and evaluate proposed solutions; and (3) coordinate with public utility transmission providers in neighboring transmission-planning regions to determine solutions to mutual transmission needs. One purpose of the order was to give more priority to lines that will serve renewable energy goals and to make those lines more affordable by sharing the cost of those lines over a wider area.[64]

Thus, there is an established federal policy supporting interstate power markets, on which Congress, FERC, and courts have all agreed: Congress has given FERC authority to set fed-

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59. Order No. 888, FERC Stats. & Regs., 75 FERC ¶ 31,036, 18 C.F.R. pts. 35 & 385 (1996), *aff'd*, New York v. FERC, 535 U.S. 1 (2002).

60. *See* David B. Spence, *Can Law Manage Competitive Energy Markets?*, 93 CORNELL L. REV. 765, 773–74 (2008).

61. Order No. 2000, FERC Stats. & Regs., 89 FERC ¶ 61,285, 18 C.F.R. pt. 35 (1999), *appeals dismissed sub nom*. Pub. Util. Dist. No. 1 v. FERC, 272 F.3d 607 (D.C. Cir. 2001).

62. Order No. 2003, FERC Stats. & Regs., 104 FERC ¶ 61,103, 18 C.F.R. pt. 35 (2003).

63. Order No. 890-A, FERC Stats. & Regs., 121 FERC ¶ 61,297, 18 C.F.R. pt. 37 (2007).

64. Order No. 1000, FERC Stats. & Regs., 136 FERC ¶ 61,051, 18 C.F.R. pt. 35 (2011), *aff'd*, S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41 (D.C. Cir. 2014).

eral policies on interstate electric transmission line planning and approval to increase reliability and to increase the use of renewable energy in the electricity grid. For nearly three decades FERC has consistently used the authority granted to it by Congress and the courts to expand interstate energy markets over electricity—in a manner parallel to FERC's development and expansion of interstate markets over natural gas.[65] FERC's major market restructuring initiatives addressing competitive wholesale power supply and transmission access and planning have also consistently met success before the judiciary.

Despite these actions by Congress and FERC, the simple reality is that, as we discuss below, under existing law, transmission line siting and permitting decisions remain state prerogatives. For example, one of the prominent interstate electric transmission line projects put on the "fast-track" under the Obama Administration's Rapid Response Team for Transmission described above is the SunZia Southwest Transmission Project, which has been in the review and planning process since 2008.[66] This project consists of two bi-directional 500-kV lines in Arizona and New Mexico designed to spur development of renewable energy in those states and is hoped to be in service by 2018.[67] In January 2015, the U.S. Department of Interior announced with great fanfare the approval of the lines across federal lands, which required significant negotiations between numerous federal agencies including the Department of Defense, which operates a missile site on land along the proposed line.[68] But almost immediately after announcement of the federal approval, the New Mexico Land Commissioner announced a 60-day "hold" on the project to address issues associated with the lines' impact on state public lands and expressed concern that the state had not had a sufficient voice in the proceedings to date.[69]

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65. *See generally* Richard J. Pierce, Jr., *Reconstituting the Natural Gas Industry from Wellhead to Burnertip*, 9 ENERGY L. J. 1 (1988) (discussing government regulation of the natural gas industry).

66. *See* Rachel Giron, *Struggles on the Path to Renewable Energy: Lessons from SunZia*, 54 NAT. RESOURCES J. 81 (2014) (examining the SunZia project and offering solutions to issues that may arise during the transmission siting process); SUNZIA, http://www.sunzia.net (last visited Oct. 16, 2015).

67. *See* SUNZIA, *supra* note 66.

68. Press Release, U.S. Dep't of Interior, Interior Department Greenlights Transmission Line to Modernize Grid, Unlock Renewable Energy Sources in Southwest (Jan. 24, 2015), http://www.doi.gov/news/pressreleases/interior-department-greenlights-transmission-line-to-modernize-grid-unlock-renewable-energy-sources-in-southwest.cfm.

69. Associated Press, *NM Land Commissioner Puts the Brakes on SunZia*,

C. STATE REGULATORY PRIMACY OVER SITING AND EMINENT DOMAIN

As noted above, although FERC has jurisdiction over wholesale, interstate power sales and may act to prevent discrimination in access to transmission lines, it is the states that exercise primary authority over the permitting and siting of transmission lines. Thus, an interstate line must receive approval from all the states in its path following each state's permitting processes and standards. Most states grant their public utility commissions (PUCs) authority to review and approve transmission lines based on a determination of whether there is a "need" for the line, alternatives to the line, and the potential environmental impacts of the line. If successful, the line receives a certificate of need, sometimes also called a "certificate of public convenience and necessity." Once the transmission operator receives its certificate, in most states that authorizes it to exercise the power of eminent domain to build the line if voluntary negotiations for easements with landowners fail. In a few states, a transmission operator may exercise eminent domain even without obtaining a certificate of need.[70]

States differ as to whether only "public utilities," which sell power directly to customers within the jurisdiction, can exercise eminent domain authority to build transmission lines or whether that authority also extends to "independent transmission companies" and "merchant transmission companies." These are companies that do not own generation assets or sell retail electricity, as do public utilities, but instead are simply in business to build transmission lines and to operate the lines. As we discuss below,[71] some states specify by statute that only public utilities can exercise eminent domain to build transmission lines and thus merchant transmission lines do not have that power. Other states specify by statute that transmission lines are a per se "public use" for Takings Clause purposes and do not specifically limit eminent domain authority to public utilities. Other states' statutes, however, are unclear as to what types of entities qualify to exercise the power of eminent do-

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ALBUQUERQUE J. (Jan. 29, 2015), http://www.abqjournal.com/533310/news/nm-land-commissioner-puts-the-brakes-on-sunzia.html.

70. Details and examples are discussed in Brown & Rossi, *supra* note 1, at 714–27. *See also infra* Part III.A (discussing factors balanced in a certificate of need determination).

71. *See infra* Part III.C (discussing limits on siting applicant due to public utility status).

main for electric transmission lines.[72]

The virtually exclusive state authority over electric transmission line siting and eminent domain authority stands in contrast to the regulatory regime for interstate natural gas pipelines.[73] Under the Natural Gas Act, FERC has exclusive jurisdiction to grant siting certificates for interstate natural gas pipelines, and the certificate authorizes the natural gas pipeline company to exercise eminent domain authority in all the states through which the proposed pipeline will pass.[74] Although the drastically different permitting authorities for interstate electric transmission lines and interstate natural gas pipelines may seem surprising, federal regulation of each industry arose in very different eras with very different concerns.[75] The interstate natural gas industry was relatively new in the 1930s and there were significant concerns about discrimination, overcharging customers, and unfair negotiations with producers and pipelines, many of which sold gas on a national scale.[76] The same concerns regarding the electricity industry were not as prevalent at that time, with states regulating most utilities and grids and most utilities producing and selling power in a much more localized fashion than they do today.[77]

D. THE PUBLIC GOVERNANCE "HOLDOUT" PROBLEM WITH THE TRANSMISSION GRID

Transmission lines remain extremely unpopular. Although everyone wants the grid to work and the lights to go on, few people want high-voltage transmission lines near their homes and businesses or, worse, on their properties. Indeed, even though environmental nonprofit groups generally favor renewable energy, they have historically been the primary plaintiffs in lawsuits challenging transmission lines on environmental protection and aesthetic grounds.[78] Although this has shifted somewhat in recent years as many environmental groups rec-

72. *See infra* Part III.B (discussing eminent domain issue).

73. *See supra* note 13 and accompanying text.

74. *See, e.g.*, Klass, *The Electric Grid at a Crossroads*, *supra* note 1 (discussing federal process for obtaining approval and eminent domain authority for interstate natural gas pipelines).

75. *See* Klass & Wilson, *supra* note 1, at 1862–64.

76. *Id.*

77. *Id.* at 1897–99.

78. *See, e.g.*, Robert L. Glicksman, *Energy Transmission Across Wild and Scenic Rivers: Balancing Increased Access to Nontraditional Power Sources with Environmental Protection Policies*, 34 PUB. LAND & RESOURCES L. REV. 1, 6 (2013); McLaughlin, *supra* note 15, at 404–05.

ognize that interstate electric transmission lines are critical to integrating large-scale wind and solar energy into the grid, public opposition to transmission lines remains.[79] Moreover, in many cases where a new transmission line is proposed to bring power across state lines, in-state residents often see themselves as incurring only the costs of the line and none of the benefits of the line. It is not surprising, then, that when a state PUC or a state court is considering the "need" for the line or whether the line is a "public use," it will weigh the interests of its own citizens more heavily than those in other states who are not natural constituents of the state agency or court. Indeed, under most state statutes authorizing PUCs to approve transmission lines based on "need," there are no specific provisions authorizing state PUCs to consider regional need as opposed to in-state need.[80] The same is true for a state court determination of "public use" under the applicable state statute or the state constitution.[81]

From a public governance perspective, this can be understood as a regulatory "holdout" problem. Building a new transmission line requires the coordination of two or more states. Each state may incur costs in issuing a siting permit or granting eminent domain power. However, each state may not value the benefits of siting the transmission line in the same manner. The benefits of a new line are especially likely to be questioned in a "pass-through" state, which will not directly benefit from either the export of power or from the consumption of out-of-state sources of electricity. Regulators in such states are likely to face political pressure from both property owners and consumer groups to oppose such lines. In addition, regulators may face strategic pressure from incumbent firms who own transmission lines—often public utilities who have a monopoly over incumbent customers within the jurisdiction—and who stand to lose a share of the current market power to competitors. In this context, incentives surrounding the private interest group dynamic can also present the possibility for a state or local government actor to hold out.

In theory, any project developer could buy out private holdouts, as is well chronicled in the law and economic litera-

79. *See, e.g.*, John Dillon, *Energy Bill Splits Environmentalists over Role of Act 250*, VT. PUB. RADIO (Mar. 19, 2013, 7:34 AM) http://www.vpr.net/news_detail/97837/energy-bill-splits-environmentalists-over-role-act/ (discussing split in environmental community over renewable energy development); Ivey, *supra* note 9.

80. *See infra* Part III.

81. *Id.*

ture surrounding property law. Of course, this can be incredibly costly where a transmission line crosses a large number of property owners' parcels—and especially when these property owners are not concentrated in the same geographic area but instead span hundreds of miles and multiple jurisdictions. In addition, non-land use interest groups complicate the public governance holdout aspect of siting transmission lines. Consumer interests often oppose lines, out of fears that they will bear new costs in the future. So too do competitors, such as the incumbent utility firm that opposes a line or would prefer to own and control it locally. This makes for a particularly difficult type of interest group maneuvering for any developer who wishes to present a transmission line as a win-win proposition for all affected stakeholders. Looking to the pragmatics of modern transmission line projects, some transmission line developers certainly have attempted forward-looking initiatives to discourage such holdouts, such as investing in community outreach and public projects that may be attractive to a state and its citizens, such as parks and bike paths, as well as more attractive payment structures.[82] However, most transmission line developers rely on revenue streams over time to finance their projects and, given that these projects already face high capital costs and risks, they may lack the up-front capital necessary to go beyond traditional easement-based payments. This is a context where eminent domain approvals remain essential for a project to succeed, and public governance holdouts can serve as an obstacle to a project getting off the ground in the first place.

By limiting the substantive considerations for a regulatory decision, or by limiting participation in the process, the regulatory frameworks of state siting and eminent domain law may enable these kinds of state holdouts. For instance, in *Mississippi Power and Light Co. v. Conerly*, the Mississippi Supreme Court held in 1984 that there was no "public necessity" and no "public use" for a line proposed by a Mississippi power company

82. *See* Dan Haugen, *If Landowners Get Annual Payments for Wind Turbines, Why Not Transmission Lines*, MIDWEST ENERGY NEWS (Oct. 23, 2013), http://www.midwestenergynews.com/2013/10/23/if-landowners-get-annual-payments-for-wind-turbines-why-not-transmission-lines; Lu Nelson, *From the Ground up: Addressing Key Community Concerns in Clean Energy Transmission*, CTR. FOR RURAL AFF. (2013), http://files.cfra.org/pdf/Energy-From-the-Ground-Up.pdf; Rosalie Winn, *Landowner Compensation in Transmission Siting for Renewable Energy*, CTR. FOR RURAL AFF. (May 2014), http://www.cfra.org/sites/www.cfra.org/files/publications/landowner-compensation-052014_0.pdf.

to transmit power from the state to a Louisiana power company for distribution in Louisiana.[83] The Mississippi PUC had granted a certificate of public convenience and necessity for the line, and when the company sought to take property in the line's path by eminent domain, the landowners argued there was no public necessity or public use for the line.[84] In siding with the landowners, the state supreme court quoted the lower court's findings and agreed that "[n]ot one Mississippi customer is to be served by the transmission line," "that the terms 'public necessity' and 'public use' . . . contemplate use by the citizens of this state," and that the power company's contention that it would be able to run power back to citizens of Mississippi in the future if warranted was speculative.[85] Similarly, in *Clark v. Gulf Power Co.*, the Florida District Court of Appeal held in 1967 that a state's power of eminent domain exists "only within its territorial limits for the use and benefit of the people within the state."[86] Thus, a "one way transmission line" from Florida to Georgia from which Florida citizens "will not derive one iota of benefit" was outside the state's eminent domain authority.[87] Similarly, as we discuss below, many states limit procedural rights in eminent domain and siting proceedings, including who can apply and who can intervene to challenge a decision.[88]

Although the regulatory holdout problem we describe is, by its very nature, beyond the power of any individual state to solve on its own, not every state's regulatory process succumbs to it. Some states have adopted broader definitions of need and public use that encompass out-of-state benefits, including improvements to reliability. In *Oxendine v. PSI*, the Indiana Court of Appeals held in 1980 that a power company could exercise eminent domain authority to build a line to increase the reliability of the network, even though it would not provide electricity to customers in its service territory.[89] In rejecting the challenge by landowners to the eminent domain action, the court held that the grant of eminent domain authority was to furnish electricity to "the 'public' not to Indiana residents alone."[90] States facing incentives to export power for economic

83. 460 So. 2d 107, 113 (Miss. 1984).
84. *Id.* at 108–13.
85. *Id.* at 113.
86. Clark v. Gulf Power Co., 198 So. 2d 368, 371 (Fla. Dist. Ct. App. 1967).
87. *Id.*
88. *See infra* Part III.C.
89. Oxendine v. Pub. Serv. Co. of Ind. 423 N.E.2d 612, 617 (Ind. Ct. App. 1980).
90. *Id.* at 617.

development purposes also may be likely to view public purposes in an expansive manner.[91] For example, the North Dakota Supreme Court held in 1976, in *Square Butte Electric Cooperative v. Hilken*, that an electric cooperative could exercise eminent domain to build a line to provide electricity to its members in Minnesota.[92] In finding a public use, the court held that citizens of North Dakota would benefit from the additional reliability the line would provide to the electric grid as a whole.[93] The concurring opinion by Justice Pederson relied on the broad statutory grant of eminent domain authority to build transmission lines which he stated was a reflection of the state's desire to "market our natural resources and excess energy" and to "bolster[] the state economy."[94]

II. FEDERALISM, POLITICAL PROCESS, AND INTERSTATE COORDINATION

While most states have not addressed the issue of how broadly to interpret their statutes governing "need" and "public use" in the context of interstate electric transmission lines, the issue is certain to arise much more frequently as new lines are proposed to be built across the country. Moreover, the potential conflict between localized state interests and federal or regional interests in promoting interstate lines will become increasingly acute because of the regionalization of the grid, the new investments utilities and merchant companies are making in interstate transmission, and the new federal policies in place to promote interstate energy markets and to plan interstate lines for reliability and renewable energy purposes.

Dormant Commerce Clause doctrine derives from the U.S. Constitution's grant of power to Congress "[t]o regulate Commerce . . . among the several states."[95] Modern dormant Commerce Clause jurisprudence "is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'"[96] Contemporary judicial skeptics, most prominently Justices Scalia and Thomas, refer to the doctrine as the "negative" Commerce Clause, indicating its lack of any explicit

91. See Brown & Rossi, *supra* note 1, for further discussion.

92. 244 N.W.2d 519, 530 (N.D. 1976).

93. *Id.* at 526–27.

94. *Id.* at 532 (Pederson, J., concurring).

95. U.S. CONST. art. I, § 8, cl. 3.

96. Dep't. of Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2008) (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988)).

textual basis in the Constitution.[97] At the extreme, Justice Thomas has indicated he would scrap the doctrine altogether;[98] while skeptical about the doctrine, Justice Scalia seems more inclined to want to follow the longstanding precedent that supports it but limit its scope.[99] Even beyond its most extreme critics, from time to time the Supreme Court has questioned the judiciary's institutional capacity to use dormant Commerce Clause doctrine to scrutinize state regulations in any consistent or principled way, especially since courts lack the expertise or political accountability of legislators or regulators in assessing the costs and benefits of state initiatives—a concern the Roberts Court has cited in recent opinions that narrow application of the doctrine.[100]

Despite criticism from some corners, dormant Commerce Clause doctrine limits on state protectionism have a longstanding basis in constitutional law and continue to be widely understood as essential to American understandings of federalism.[101] As Justice Cardozo famously remarked in striking down a New York law that set minimum prices all milk dealers were required to pay New York milk producers, the Commerce Clause prohibits a state law that burdens interstate commerce "when

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97. This skeptical view has been criticized for its misplaced reading of constitutional text, history, and federalism. *See, e.g.*, Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 MINN. L. REV. 384 (2003) (questioning whether using other textual provisions of the Constitution to limit state regulations impairing trade can advance the same federalism values as dormant Commerce Clause doctrine); Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877 (2011) (questioning the accuracy of those who claim no textual or historical support for dormant Commerce Clause doctrine).

98. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610–20 (1997) (Thomas, J., dissenting).

99. "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." West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 210 (1994) (Scalia, J., concurring).

100. *See infra* note 110 and accompanying text.

101. As Oliver Wendell Holmes once stated:

> I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end.

OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 295–96 (1920).

the avowed purpose of the [law], as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states."[102] This general principle was also invoked to strike down a New York regulatory scheme that had been used to deny a license to an out-of-state milk processing facility. Since the licensing provision had been enacted "solely [for] protection of local economic interests, such as supply for local consumption and limitation of competition," it was found to be unconstitutional.[103]

It is less commonly understood that dormant Commerce Clause doctrine played an important role in the history of contemporary energy law. Modern federal energy statutes, such as the FPA, were adopted in large part to address some of the constitutional limits faced by states in regulating energy markets. Prior to 1935, states possessed the primary authority over energy sales. Courts, however, recognized limits on the ability of any state to regulate extra-jurisdictional transactions. Most prominently, in the 1920s, the Supreme Court invalidated Rhode Island's regulation of the rates charged by a plant in the state selling electricity to a Massachusetts company to resell to a utility serving Massachusetts customers, reasoning that it imposed a "direct burden upon interstate commerce."[104] These limits on state authority to regulate extra-jurisdictional energy transactions came to be known as the "*Attleboro* Gap," a jurisdictional problem Congress addressed when it adopted federal energy statutes in the 1930s. As the Supreme Court has noted, "When it enacted the FPA in 1935, Congress authorized federal regulation of electricity in areas beyond the reach of state power, such as the gap identified in *Attleboro*, but it also extended federal coverage to some areas that previously had been state regulated."[105]

Thus, notwithstanding some contemporary critics, dormant Commerce Clause doctrine is steeped in the American constitutional tradition and remains of particular significance to energy markets. It is alive and well as a constitutional basis for constraining state and local protectionism, as reflected in the Roberts Court's consistent refusal to reject the doctrine despite critics on the Court, as well as advocates who regularly plea for the

102. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935).

103. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 531 (1949).

104. Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83, 89 (1927).

105. New York v. FERC, 535 U.S. 1, 6 (2002).

doctrine to be abandoned.[106] This Part discusses why dormant Commerce Clause doctrine is especially well suited to address problems in energy transportation infrastructure, insofar as it focuses on promoting a norm of coordination between states that is essential to both federalism and energy markets. Section A introduces modern dormant Commerce Clause doctrine and highlights some of the key debates that inform the application of this jurisprudence to the regulation of energy, focusing in particular on market entry barriers and discriminatory regulations and fees. Section B summarizes the most recent new set of dormant Commerce Clause challenges to state energy initiatives involving state renewable energy and climate initiatives. Although these cases have for the most part upheld the primary features of these state initiatives, there remains some uncertainty about how much deference lower courts will afford in this context. In recognition that courts need to be consistent not only in doctrine but in the principles that are informing the application of that doctrine, Section C calls for a revitalization of dormant Commerce Clause review to focus on interstate coordination as an essential federalism value. The holdout problem faced in energy transportation infrastructure can be overcome if jurisdictions broaden their assessment of the benefits of projects to include out-of-state interests. We propose a way for courts to do this that is consistent with existing doctrine and mindful of concerns regarding potential judicial overreach.

A. DORMANT COMMERCE CLAUSE DOCTRINE AND ITS APPLICATION TO ENERGY MARKETS

Modern dormant Commerce Clause doctrine applies three distinct analytical approaches in assessing whether subnational regulations discriminate against or impermissibly burden interstate commerce. Courts review laws or regulations that discriminate on their face (often called "per se" discrimination) or discriminate in purpose or effect under a form of strict scrutiny.

106. *See, e.g.*, *infra* note 110. Underscoring the continued vitality of the doctrine, the Supreme Court has recently held that Maryland's income tax for nonresidents (based on income earned based on work or sources within the state) is unconstitutional on dormant Commerce Clause grounds. The Court reasoned that the tax is discriminatory because it fails the "internal consistency" test used to isolate the effects of tax schemes, which "looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1802–04 (2015) (citing Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995)).

When a law discriminates in its purpose or has a significant discriminatory effect, reviewing courts generally require a state to demonstrate that it enacted the law for a legitimate, non-protectionist purpose and that there are no less discriminatory means that would advance this purpose.[107]

Nondiscriminatory laws that impose only an incidental effect on interstate commerce are subject to a balancing test (known as "*Pike* balancing"), which would uphold the law unless a challenger can prove that the "burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."[108] By not requiring a least restrictive alternative, by its very nature this is a much more deferential standard of review—perhaps more akin to rational basis review. Still, over the years *Pike* balancing has been used by the Court to reject multiple initiatives, including an Iowa law that limited the length of double semi-trailers on interstate highways based on what the Court cited as an "illusory" claim to safety benefits by the state.[109] Nevertheless, it has been more than 25 years since the Supreme Court has invalidated a state law based on *Pike* balancing. The Roberts Court has not rejected this strand of dormant Commerce Clause doctrine, but its opinions show some wariness regarding the judiciary's institutional capacity to engage in this kind of judicial review—primarily out of fear that courts will overstep in weighing the costs and benefits of state regulation.[110] Lower courts, however, continue to see the

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107. *See, e.g.*, Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270–71 (1984) (invalidating a law that exempted local production of liquor and wine from a 20% excise tax on the grounds that this had no purpose other than to insulate local producers from competition); Philadelphia v. New Jersey, 437 U.S. 617, 624–28 (1978) (applying "a virtually *per se* rule of invalidity" to explicit ban on in-state disposal of out-of-state garbage); Hunt v. Wash. Apple Advert. Comm'n, 432 U.S. 333, 352–53 (1977) (finding that a facially neutral law applying to apple distribution discriminated in effect against out-of-state apple suppliers and was invalid); *see also* Cachia v. Islamorada, 542 F.3d 839, 842 (11th Cir. 2008) (finding unconstitutional a local ordinance that would have prohibited chain retail establishments, such as a Starbucks coffee shop).

108. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

109. Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1981); *see also* Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) (invalidating similar Wisconsin law).

110. *See, e.g.*, Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 353 (2008) (refusing to apply *Pike* balancing and expressing skepticism about the use of the judicial branch's ability to balance the general costs and benefits of regulation); United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 347 (2007) (noting that a state law that favors a traditional government function but does not favor local private entities is not discriminatory, and observing that finding otherwise would "reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause").

Pike balancing approach as "deferential but not toothless,"[111] questioning or invalidating state or local laws when the alleged local benefits are a pretext for discrimination or are trivial.[112]

A third, and much more controversial, prong of dormant Commerce Clause review prohibits "exterritorial regulation" by prohibiting a state from attempting to control activities that occur entirely outside of its jurisdiction.[113] Such laws are also subject to strict scrutiny but unlike laws that discriminate against interstate commerce, if a law is deemed to constitute extraterritorial regulation, the state has no opportunity to attempt to show there are no less discriminatory means to advance its legitimate local purpose.[114]

Although the Roberts Court has consistently favored fram-

111. *See* Colon Health Ctrs. of Am. v. Hazel, 733 F.3d 535, 545 (4th Cir. 2013) (citing *Dep't of Revenue of Ky.*, 533 U.S. at 339 (2008)).

112. *Id*. at 545–46 (holding that a district court erred in granting a motion to dismiss challenging Virginia's certificate of need law based on *Pike* balancing); Walgreen Co. v. Rullan, 405 F.3d 50, 59–60 (1st Cir. 2005) (invalidating a facially neutral Puerto Rico law that required new pharmacies to obtain a certificate of convenience and necessity but exempted existing local pharmacies and allowed them to object to proposed new pharmacy applications); Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc., 401 F.3d 560, 569–74 (4th Cir. 2005) (invalidating a Virginia law that limited the ability of motorcycle manufacturers to open new dealerships in the state); Union Pac. R.R. Co. v. Cal. Pub. Util. Comm'n, 346 F.3d 851, 870–72 (9th Cir. 2003) (invalidating a California regulation that implemented performance standards for railroad companies); McNeilus Truck & Mfg., Inc. v. Ohio, 226 F.3d 429, 444 (6th Cir. 2000) (finding that an Ohio motor vehicle licensing dealer statute, which failed strict scrutiny, also would fail *Pike* balancing, because the burden it imposes is clearly excessive in relation to any local benefits); Medigen of Ky., Inc. v. Pub. Serv. Co. of W. Va., 985 F.2d 164, 166–67 (4th Cir. 1992) (invalidating a West Virginia medical waste transport certification requirement under *Pike* balancing, noting that restricting market entry does not advance consumer protection or reasonable service goals, and that a state cannot deny an applicant certification solely on the ground that "the area it seeks to serve already has reasonably efficient and adequate service").

113. *See, e.g.*, Midwest Title Loans, Inc. v. Mills, 593 F.3d 660, 668–69 (7th Cir. 2010) (invalidating state's application of its consumer protection code to an out-of-state lender). The extraterritorial doctrine finds root in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). As one court notes, however, it is not clear that this is "really a distinct line of dormant commerce clause jurisprudence at all." Instead, "one might see *Baldwin* and its progeny as no more than instantiations of the *Philadelphia* anti-discrimination rule." Energy & Envtl. Legal Inst. v. Epel, 793 F.3d 1169, 1173 (10th Cir. 2015). For criticism of the extraterritorial doctrine, see Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979 (2013); *see also* Alexandra B. Klass & Elizabeth Henley, *Energy Policy, Extraterritoriality and the Dormant Commerce Clause*, 5 SAN DIEGO J. CLIMATE & ENERGY L. 127 (2013–14).

114. *See* Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 381–82 (6th Cir. 2013) (Rice, J. concurring).

ing its own approach to dormant Commerce Clause review to focus on facially discriminatory laws or those that discriminate significantly in purpose or effect, rather than evaluating the other two strands of the dormant Commerce Clause, all three tests remain valid approaches and are used routinely in assessing the constitutionality of state regulation of energy markets. These doctrines have particularly important implications for state regulations that ban or limit access to markets, such as certificates of need, as well as to differential regulations and fees that states routinely impose on energy firms.

1. Market Bans

There is little doubt that there are clear instances in energy markets where states can go too far in treating out-of-state suppliers differently in an interstate market. Outright bans on the export or import of energy from particular sources are the most obviously suspect. For example, in *New England Power Co. v. New Hampshire*, the Supreme Court struck down a New Hampshire regulation that prohibited the export of hydroelectric power produced in the state, noting the obviously discriminatory effect this has on interstate commerce.[115] Such bans may, in limited circumstances, be justified where a state has no other options to achieve an important environmental objective. The Court upheld a Maine statute that prohibited imports of live baitfish because of the parasite threat to Maine fisheries in *Maine v. Taylor*.[116] Maine, the Court observed, is under no obligation under the Commerce Clause "to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are and are not dangerous before it acts to avoid such consequences."[117] As the Court reasoned, "[t]his is not a case of arbitrary discrimination against interstate commerce; the record suggests that Maine has legitimate reasons, 'apart from their origin, to treat [out-of-state baitfish] differently.'"[118]

Short of outright bans, the Supreme Court has invalidated state certificate of need requirements (requiring preapproval by regulators to participate in the market) where these lack a legitimate, non-protectionist rationale and effectuate an obstacle

115. New England Power Co. v. New Hampshire, 445 U.S. 331 (1982).

116. Maine v. Taylor, 477 U.S. 131 (1986).

117. *Id.* at 148 (quoting U.S. v. Taylor, 585 F. Supp. 393, 397 (D. Me. 1984)).

118. *Id.* at 151–52 (citing City of Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978)).

to interstate commerce by denying access to the market. *Buck v. Kuykendall* rejected a Washington statute that prohibited common carriers from using public highways in the state without a certificate of need.[119] There Justice Brandeis observed:

> [The statute's] primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner.[120]

With a nod to federal preemption the Court observed that this "also defeats the purpose of Congress expressed in the legislation giving federal aid for the construction of interstate highways"[121]—though the same day the Court also held unconstitutional a Maryland statute governing highways with no federal funding.[122]

Even a facially neutral licensing scheme can have a similar discriminatory effect to a ban and raise dormant Commerce Clause concerns under this line of cases. Such a program can effectuate significant discrimination against interstate commerce even if out-of-state firms are allowed to apply. To take one example, the U.S. Court of Appeals for the Sixth Circuit rejected a motor vehicle dealer-licensing program that gave established local interests the ability to block licensing of out-of-state dealers by refusing to contract with them for warranty services.[123] This illustrates how even if a law is facially neutral, where there is a discriminatory effect a state needs to justify its regulatory program and to establish that there is no less restrictive alternative that can achieve the same regulatory purposes.[124]

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119. Buck v. Kuykendall, 267 U.S. 307 (1925).

120. *Id.* at 315–16.

121. *Id.* at 316.

122. George W. Bush & Sons Co. v. Maloy, 267 U.S. 317, 324–25 (1925) (holding a similar Maryland statute unconstitutional, even though the highways at issue were not constructed or improved with any federal aid, on the grounds that it is clear that "the purpose of Congress is that the state highways shall be open to interstate commerce"). A summary of multiple cases reaching a similar result in the transportation context appears in *Medigen of Kentucky, Inc. v. Public Service Comm'n of West Virginia*, 787 F. Supp. 590, 597 (S.D.W.V. 1991).

123. McNeilus Truck & Mfg. Inc., v. Ohio, 226 F.3d 429, 444 (6th Cir. 2000).

124. As the Sixth Circuit noted, such program also may fail *Pike* balancing. *Id.* at 444. Indeed, under *Pike*, licensing programs that restrict market entry and favor incumbents have been struck down by federal appellate courts, despite state claims to some benefits to consumers. *See, e.g.*, Walgreen Co. v.

2. Discriminatory Regulations and Fees

In addition to state regulatory bans or licensing programs that serve as a barrier to entry from out-of-state firms operating in that state's market in the first instance, programs that impose differential regulations or fees on out-of-state sources of energy also have been challenged under dormant Commerce Clause doctrine. In *Wyoming v. Oklahoma*, the Supreme Court struck down an Oklahoma law requiring coal-fired power plants located in the state to burn at least ten percent Oklahoma-mined coal.[125] The Court determined that the statute discriminated against interstate commerce "on its face" because it "expressly reserve[d] a segment of the Oklahoma coal market for Oklahoma-mined coal, to the exclusion of coal mined in other States."[126]

Not every regulation or fee is facially discriminatory, and many will require a more nuanced analysis—as the Supreme Court has recognized. In *C & A Carbone, Inc. v. Town of Clarkstown*, the Court invalidated a municipally imposed monopoly over non-recyclable solid waste collected for processing and transfer.[127] To guarantee a minimum stream of revenues for the project, the Town of Clarkstown, New York adopted a flow control ordinance, allowing the private operator of a transfer station to collect a fee of $81 per ton, which was higher than the disposal cost of solid waste in the private market. C & A Carbone, Inc. processed solid waste and operated a recycling center, as it was permitted to do under the Clarkstown flow control ordinance. The flow control ordinance required companies like Carbone to bring non-recyclable waste to the locally franchised transfer station and to pay a fee, while prohibiting them from shipping the waste themselves. "[A] financing measure," the flow control ordinance ensured that "the town-sponsored facility will be profitable, so that the local contractor can build it and Clarkstown can buy it back at nominal cost in

Rullan, 405 F.3d 50, 59–60 (1st Cir. 2005) (invalidating a facially neutral Puerto Rico law requiring new pharmacies to obtain a certificate of convenience and necessity, but exempting existing local pharmacies and allowing them to object to proposed new pharmacy applications); *Medigen of Ky., Inc.*, 985 F.2d at 167 (invalidating a West Virginia medical waste transport certification requirement under *Pike* balancing, noting that restricting market entry does not advance consumer protection or reasonable service goals and that a state cannot deny an applicant certification "solely on the ground that the area it seeks to serve already has reasonably efficient and adequate service").

125. Wyoming v. Oklahoma, 502 U.S. 437, 461 (1992).

126. *Id.* at 455.

127. C & A Carbone, Inc., v. Town of Clarkstown, 511 U.S. 383, 394–95 (1994).

five years."[128] The Court reasoned that the local law violated the dormant Commerce Clause because in "practical effect and design" it bars out-of-state sanitary landfill operators from participating in the local market for solid waste disposal.[129]

Differential taxes and fees are especially vulnerable under dormant Commerce Clause principles where, as in *Carbone*, fees serve to benefit local industry at the expense of out-of-state firms. For example, *New Energy Co. of Ind. v. Limbach* invalidated a state tax credit that was designed to promote in-state renewable fuels.[130] Ohio argued that its law was designed to encourage other states to grant similar tax benefits to stimulate the interstate sale of ethanol. The Court, however, rejected these arguments in favor of interstate coordination, found the law discriminated on its face, and characterized the main purpose of the Ohio statute as "favorable tax treatment for *Ohio*-produced ethanol."[131]

These cases hinge not only on whether a fee is imposed on out-of-state firms, but also on whether a specific in-state industry stands to benefit from the particular regulation or fee. In *West Lynn Creamery, Inc. v. Healy*, the Court invalidated a subsidy for in-state dairy farmers funded through a tax on both the out-of-state and in-state milk industry.[132] The tax was not paid into the state's general funds, but went directly into a special fund from which only in-state farmers received subsidies.[133] Yet not all taxes are structured in this manner, and separating the tax aspect of a burden on out-of-state suppliers from the subsidy that benefits in-state firms can help a program to survive. For example, in *General Motors v. Tracy*,[134] the Court evaluated Ohio's differential tax burdens for in-state and out-of-state natural gas suppliers, but refused to find a dormant Commerce Clause violation on the particular facts that had been raised.[135]

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128. *Id.* at 393.

129. *Id.* at 389, 394.

130. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 279–80 (1988).

131. *Id.* at 279.

132. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 206–07 (1994).

133. *Id.* at 188.

134. 519 U.S. 278, 280–81 (1997).

135. General Motors, which mounted a legal challenge to Ohio's differential tax, was a large enough customer to purchase its gas from the open market (rendered competitive by national regulators) rather than bundled gas from a state-regulated regulated gas distribution company. However, absent competition between the local company purchasing gas and the open market serving General Motors, the Court reasoned, "there can be no local preference, whether by express discrimination against interstate commerce or undue burden up-

B. STATE CLIMATE INITIATIVES AND DORMANT COMMERCE CLAUSE DOCTRINE

Recent cases involving dormant Commerce Clause challenges to state renewable energy programs and other climate initiatives indicate the doctrine's continued relevance—including for efforts to build out new energy infrastructure such as transmission lines. More than 30 states have adopted renewable portfolio standards (RPSs), requiring that a certain percentage of electricity sold to customers be supplied from renewable sources of power.[136] Although there is nothing constitutionally suspect about encouraging or even requiring renewable energy, some particular aspects of RPS standards have raised dormant Commerce Clause concerns. For example, some of these state RPS requirements have "in-region" or "in-state" restrictions on power generation; some have special "multipliers" that favor in-state sources; and many are coupled with tax subsidies favoring in-state sources.[137] Some states also differ in how they allow the trading of renewable energy credits in interstate commerce.[138] Steven Ferrey has sounded a consistent alarm that such initiatives may violate the dormant Commerce Clause. As he argues, "state renewable energy programs that discriminate against power in interstate commerce bear some resemblance to earlier discriminatory programs that states set up for giving preference to in-state dairy and other interests."[139] He is not without company on the judiciary. Judge Richard Posner has also raised specific concerns about some RPS requirements, suggesting (albeit in dictum) that "Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable ener-

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on it, to which the dormant Commerce Clause may apply." *Id.* at 301.

136. DAVIES ET AL., *supra* note 47, at 484–87 (describing RPSs); *Renewable Portfolio Standard Policies*, DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY (June 2015), http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2014/11/Renewable-Portfolio-Standards.pdf. Some of these state laws set voluntary goals rather than mandatory requirements. *See* DAVIES ET AL., *supra* note 47, at 484–87.

137. For a summary of some of these provisions, see Brannon Denning, *Environmental Federalism and State Renewable Portfolio Standards*, 64 CASE W. RES. L. REV. 1520 (2014).

138. *See* Daniel K. Lee & Timothy Duane, *Putting the Dormant Commerce Clause Back To Sleep: Adapting the Doctrine To Support State Renewable Portfolio Standards*, 43 ENVTL. L. 295, 317–18 (2013) (discussing Missouri-bundled REC requirement).

139. Steven Ferrey, *Threading the Constitutional Needle with Care: The Commerce Clause Threat to the New Infrastructure of Renewable Power*, 7 TEX. J. OIL GAS & ENERGY L. 60, 61 (2012); *see also* Ferrey, *supra* note 22, at 314–19.

gy."[140]

Despite these claims that some state RPS standards are unconstitutional, to date federal appellate courts have not rejected any of the key features of state RPS standards.[141] Although it did not involve an RPS standard, the most important appellate court decision on the topic comes from the Ninth Circuit—*Rocky Mountain Farmer's Union v. Corey*,[142] a decision that Brannon Denning has heralded as a "roadmap" for courts considering dormant Commerce Clause challenges to state RPS programs.[143]

This case addressed, and ultimately upheld, a state renewable fuel requirement that, like RPS standards, regulates how energy sold in the state is produced—even if that energy is produced elsewhere. In 2009, California adopted a low-carbon fuel standard as a part of its Global Warming Solutions Act (AB 32), which aimed to reduce California's greenhouse gas (GHG) emissions to 1990 levels by 2020. To comply with the cap, fuel producers who wish to sell fuel in California are required to either meet a specific carbon intensity requirement or to purchase credits offsetting their fuel's higher carbon content.[144] The California fuel standard calculates the carbon intensity of a particular fuel based on its life-cycle carbon content—i.e., not only the carbon produced by burning the fuel, but also the carbon associated with producing the fuel and transporting it to California.[145] In a dormant Commerce Clause challenge brought by Midwestern ethanol producers, a federal district court determined that factoring in the distance a fuel travels from production source to California in determining carbon content facially discriminates against out-of-state ethanol producers and constitutes extraterritorial regulation in violation of the

140. Ill. Commerce Comm'n v. FERC, 721 F.3d 764, 776 (7th Cir. 2013).

141. *See* Denning, *supra* note 137 (discussing how constitutional doctrines could limit state environmental initiatives); Ferrey, *supra* note 139, at 97; Lee & Duane, *supra* note 138, at 298.

142. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2875 (2014).

143. Denning, *supra* note 137, at 1547.

144. *See Rocky Mountain*, 730 F.3d at 1085.

145. CA AIR RES. BD., ESTABLISHING NEW FUEL PATHWAYS UNDER THE CALIFORNIA LOW CARBON FUEL STANDARD: PROCEDURES AND GUIDELINES FOR REGULATED PARTIES AND FUEL PROVIDERS, 1 (Aug. 2, 2010), http://www.arb.ca.gov/fuels/lcfs/122310-new-pathways-guid.pdf. Carbon Intensity values are calculated by a standard greenhouse gas emissions equation (gCO2e/MJ is the unit of measurement), which provides total greenhouse gas emissions on a CO_2 equivalent basis per unit of energy for a fuel.

dormant Commerce Clause.[146]

In *Rocky Mountain*, the U.S. Court of Appeals for the Ninth Circuit reversed the district court's decision that the California fuel standard discriminates against interstate commerce and violates the extraterritoriality doctrine.[147] The court of appeals reasoned that a law is not discriminatory simply because it has unequal effects on in-state and out-of-state interests.[148] Instead, the question is whether California's decision to assign different values to ethanol from different locations was based solely on origin or whether there was "some reason, apart from their origin to treat them differently."[149] If the California fuel standard imposes higher costs on Midwestern ethanol by virtue of its greater GHG emissions, there is a nondiscriminatory reason for the higher carbon impact.[150] The court noted that California could not successfully promote low carbon-intensity fuels and decrease GHG emissions associated with those fuels if it ignored the real factors behind GHG emissions, which include transportation and source of electricity used to produce the ethanol.[151] As the court noted, "[t]he Fuel Standard does not isolate California and protect its producers from competition."[152] The court ended its discussion of facial discrimination by declaring that its conclusion "is reinforced by the grave need in this context for state experimentation" to address increasing GHG emissions and its potentially disastrous consequences.[153]

The court of appeals also rejected the argument that the California fuel standard constitutes extraterritorial regulation in violation of dormant Commerce Clause doctrine.[154] Instead, "[t]he Fuel Standard," the court wrote, "regulates only the California market."[155] As the court observed:

> It says nothing at all about ethanol produced, sold, and used outside California, it does not require other jurisdictions to adopt reciprocal standards before their ethanol can be sold in California, it makes no

146. Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1042 (E.D. Cal. 2011).

147. *Rocky Mountain,* 730 F.3d at 1077.

148. *Id.* at 1089.

149. *Id.* (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978)).

150. *Id.* at 1089–90.

151. *Id.* at 1090.

152. *Id.*

153. *Id.* at 1097.

154. *Id.* at 1101.

155. *Id.*

> effort to ensure the price of ethanol is lower in California than in other states, and it imposes no civil or criminal penalties on non-compliant transactions completed wholly out of state.[156]

Even though states may not require compliance with their laws in wholly out-of-state transactions, the court observed, "they are free to regulate commerce and contracts within their boundaries with the goal of influencing out-of-state choices of market participants."[157] The court of appeals directed the district court to determine on remand whether the challenged fuel standard provisions discriminate in purpose or effect and, if not, to apply the *Pike* balancing test.[158]

The *Rocky Mountain* decision does not mean that every state climate initiative or RPS standard will survive a dormant Commerce Clause challenge. Indeed, challenges will continue to be brought and some of these are having an impact on state regulatory initiatives. As in *Rocky Mountain*, there are a number of pending and recent cases that involve out-of-state energy producers mounting challenges to state energy policy and climate change initiatives. To take one example, a challenge to the Massachusetts RPS requirement that companies "enter into cost effective long-term contracts to facilitate the financing of renewable energy generation within the jurisdictional boundaries of the commonwealth,"[159] led Massachusetts to drop the in-state requirement for long-term renewable energy contracts and to remove locational requirements in its RPS.[160] Although not an RPS case, a district court in Minnesota invalidated Minnesota's ban on use of new coal-fired power in the state in 2014 based on the somewhat controversial "extraterritoriality" prong of dormant Commerce Clause doctrine, with potential implication for other state climate policies that may impact interstate energy transactions.[161] But in 2015, the U.S. Court of Appeals for the Tenth Circuit upheld Colorado's facially neutral RPS in response to a dormant Commerce Clause challenge alleging that the law adversely impacted coal interests outside the state and regulated extraterritorially.[162] The continued vitality of

156. *Id.* at 1102–03.

157. *Id.* at 1103.

158. *Id.* at 1107.

159. An Act Relative to Green Communities, ch. 169, § 83, 2008 Mass. Acts 308, 365; 220 MASS. CODE REGS. § 17.01 (2010).

160. *See* Partial Settlement Agreement, TransCanada Power Mktg. Ltd. v. Bowels, No. 4:10-cv-40070 (D. Mass. 2010).

161. North Dakota v. Heydinger, 15 F. Supp. 3d 891, 910–11 (D. Minn. 2014).

162. Energy & Envtl. Legal Inst. v. Epel, 793 F.3d 1169, 1173–74 (10th Cir. 2015) (upholding Colorado RPS against a dormant Commerce Clause chal-

these lower court challenges underscores the importance of courts applying consistent principles as they evaluate state climate initiatives under dormant Commerce Clause doctrine.

C. REVITALIZING DORMANT COMMERCE CLAUSE REVIEW FOR INTERSTATE COORDINATION

These kinds of recent applications of dormant Commerce Clause review, along with tepid applications of the doctrine by the Roberts Court, underscore a need to revisit its first principles. Courts frequently described the basic animating principle of dormant Commerce Clause jurisprudence as the protection against discrimination between in-state and out-of-state competitors in interstate markets.[163] In *General Motors v. Tracy*, for example, Justice Souter, writing for the Court, stated, "[t]he dormant commerce clause protects markets and participants in markets, not taxpayers as such."[164] Justice Cardozo once described the doctrine as protecting "competition between the states."[165] Such claims appear to embrace a pro-market stance or to even require competition between states. Taken to an extreme, such a view of dormant Commerce Clause principles disfavors government intervention in economic markets, viewing the primary role of federal courts as protecting states from interfering with the economic exchange of a free market economy.[166] In addition to reinforcing a neoclassical economics understanding of competitive markets, which would general favor market initiatives over regulation, such a view values federal-

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163. *See* Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191, 1223 (1998).

164. General Motors v. Tracy, 519 U.S. 278, 300 (1997). Justice Souter bolstered this vision of the dormant Commerce Clause by referencing the famous words of Justice Jackson:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Id. at 299 (quoting H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949)).

165. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935).

166. *See* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 437–43 (1982); Steven G. Gey, *The Political Economy of the Dormant Commerce Clause*, 17 N.Y.U. REV. L. & SOC. CHANGE 1, 75–77 (1989–90); McGreal, *supra* note 163.

ism primarily for encouraging state experimentation because it promotes competition between states for citizens and economic capital.

It would be a mistake, however, to understand dormant Commerce Clause principles as endorsing a constitutional preference for private markets, requiring competitive markets, or mandating competition between states. To begin, dormant Commerce Clause jurisprudence certainly does not disfavor government regulation over markets. Indeed, despite Justice Souter's rhetoric preferring competitive markets in *Tracy*, there the Court appeared to carve out a safe harbor favoring state regulation of natural gas distribution.[167] Established dormant Commerce Clause doctrine suggests that when the state itself takes on the role of market participant it is exempt from the doctrine. For example, if a municipal government itself had built and owned the facility in *Carbone*, this would bring the monopoly within what is known as "the market-participant exception,"[168] allowing an otherwise discriminatory state regime to continue to operate without constitutional challenge.

In fact, states regulate and protect monopolies all the time and provide advantages to them—such as subsidies, below-market interest rates from non-taxable bonds, bypassing state or local restrictions on use of municipal tax powers, etc.—as a way of providing incentives for investment in capital, such as infrastructure. For example, municipal governments often help to pay for privately operated infrastructure (such as waste disposal facilities) through the issuance of public bonds. It is understandable that a local government would want to create a monopoly for firms operating such infrastructure, to help ensure that the operator maintains sufficient revenues to cover its costs and to avoid jeopardizing the government's bond rating. Such facilities are allowed to collect charges in regulated rates and fees, which can serve the same basic function as a

167. *Tracy,* 519 U.S. at 278.

168. Reeves, Inc. v. Stake, 447 U.S. 429, 440 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 806 (1976). While many have criticized this exemption to dormant Commerce Clause jurisprudence, it is defended as a pragmatic balance between competing federalism concerns. *See* Dan T. Coenen, *Untangling the Market-Participant Exception to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989) (discussing and exploring the market-participant exception). The exemption is limited, and is not automatically available where the state could expand into the market; to avail itself of the exemption the state must establish that it is a market participant and may not use mere contractual privity to immunize downstream regulatory conduct in a market in which it is not a direct participant. South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 97–98 (1984).

tax. If the government itself were to build, own, and operate a facility, the political process would impose a general tax; however, with private operations subsidized by a state or locally enforced private utility, the tax implications of such projects are more obscured.

One way of understanding the Court's rejection of the Clarkstown flow control ordinance in *Carbone* is based on its concerns with impermissible government-aided private monopolies. The Town of Clarkstown, New York, for example, guaranteed revenue for its solid waste transfer station—it promised a minimum of 120,000 tons of waste per year, allowing the firm to make more than $9.7 million in annual revenue—and, after a period of five years, the town agreed to buy it for $1.[169] Dormant Commerce Clause doctrine allows substantial state government intervention in the setting of prices, subsidies, and taxes, so long as a state does not engage in differential treatment in the same market in ways that burden interstate competition.

Moreover, since dormant Commerce Clause doctrine is not derived from the express language of the U.S. Constitution, Congress can adopt a national policy that preempts, or overrides, the competitive market between individual states—even if this is not a free market policy. Under the Commerce Clause, there is no doubt that Congress has the express authority to establish a federal agency such as the Interstate Commerce Commission, giving it the jurisdiction to regulate railroad rates previously left to individual states. There is also no doubt that Congress could delegate significant authority over the siting of interstate electric transmission lines to FERC, as it has done for interstate natural gas pipelines. "Our Constitution," the late Julian Eule has written, "did not attempt to solve economic parochialism by an express prohibition against interference with free trade. Instead, it shifted legislative power over economic matters that affect more than one state to a single national body."[170]

Nor do dormant Commerce Clause principles mandate competition between states, as a neoclassical economic understanding of federalism would suggest. A number of other scholars have highlighted how requiring competition between states is a flawed understanding of constitutional federalism.[171] In-

169. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 387 (1994).

170. Eule, *supra* note 166, at 430.

171. *See id.*; Gey, *supra* note 166, at 429–30; McGreal, *supra* note 163, at 1228.

stead of requiring competition between states, the dormant Commerce Clause is focused primarily on preserving or promoting reciprocity or coordination between subnational governments—to ensure that subnational regulation is not occurring for the kinds of parochial or isolationist reasons that make interstate commerce impossible. Dormant Commerce Clause doctrine attempts to evaluate this by looking to the purposes behind subnational laws when they are adopted. These purposes are not always clear, nor are they always singular in nature; for example, a statute may have both protectionist and nonprotectionist motives.

A good proxy for evaluating whether parochialism and nonreciprocal motivations, such as economic protectionism, are driving a law is to consider the state or local political process that leads to its adoption in the first place. In *West Lynn Creamery, Inc. v. Healy*, the Supreme Court found unconstitutional a Massachusetts tax and rebate scheme for milk (even where the tax operated neutrally without regard to the milk's place of origin) where tax revenue went into a subsidy fund and was distributed solely to Massachusetts milk producers.[172] As Justice Stevens reasoned in his majority opinion striking down this tax and subsidy regime:

> Nondiscriminatory measures, like the evenhanded tax at issue here, are generally upheld, in spite of any adverse effects on interstate commerce, in part because "[t]he existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse." However, when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy.[173]

In stark contrast to the neoclassical economics goal of courts protecting markets and competition in dormant Commerce Clause review, this "political process approach" would see courts as taking on more of a political process approach in reviewing state and local laws. Rather than protecting competition or requiring competition between states, the purposes of dormant Commerce Clause doctrine can be understood within the framework of Madisonian democracy—specifically, limiting narrow forms of interest group rent-seeking in the state or local regulatory process.[174] On this view, courts engaged in dormant

172. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 194 (1994).

173. *Id.* at 200 (citing Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 n.17 (1981), and other cases).

174. For a game-theory elaboration of this view, see Maxwell L. Stearns, *A*

Commerce Clause review would play a representative-enforcing role, in a manner similar to what is envisioned by *Carolene Products*' famous footnote four, which emphasizes using judicial doctrine interpreting the Constitution to improve the political process.[175] Unlike the traditional public choice critique, which condemns all state and local rent-seeking, dormant Commerce Clause review focused on political process concerns would only target those rent-seeking laws that restrain commerce in ways that undermine reciprocity norms between states.[176]

As a practical matter, what does this alternative approach mean for courts reviewing state siting or permitting plans under dormant Commerce Clause doctrine? We are sympathetic to those (including members of the Roberts Court) who are concerned about how dormant Commerce Clause doctrine invites a reviewing judge to sit as a super-legislature in balancing the substantive costs and benefits of different state laws, especially under *Pike* balancing. With this in mind, we do not propose that a court reviewing state or local programs under the dormant Commerce Clause always engage in strict scrutiny or open-ended balancing of the costs and benefits of regulation. However, we also do not believe that a reviewing court should give a free pass under the dormant Commerce Clause simply because a state claims neutrality in the treatment of regulated firms—especially if a program has the effect of limiting market entry to out-of-state firms. Nor do we believe it is appropriate for a reviewing court to use *Pike* balancing to uphold a state program that ignores the impacts on out-of-state firms, espe-

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Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine, 45 WM. & MARY L. REV. 1 (2003).

175. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). John Hart Ely has famously applied the representation-reinforcing role of *Carolene Products* to equal protection jurisprudence. JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

176. The state political process allows states, like the U.S. Congress, to adopt rent-seeking legislation, in the form of regulation, subsidies, and taxes. However, an individual state cannot use regulation to foreclose an interstate market or tie taxes and subsidies together to benefit in-state firms in a manner that undermines interstate competition. On this view, some rent transfers are permissible, if not desirable, in state and local political processes. For example, rent-seeking in the form of a neutral corporate tax exemption for utilities, or rent-seeking in the setting of utility rates to favor industrial growth, is likely permissible, and subject only to the safeguards of the local political process. However, rent-seeking in the form of exclusionary regulation that limits access to the interstate market is more suspect as an approach to regulating economic matters, especially where market exchange is the background norm as a matter of national policy.

cially when the affected stakeholders have no recourse at all in the state or local jurisdiction's political process.

At a minimum, if a law does discriminate on its face, the burden is on a state to show some legitimate regulatory purpose beyond protecting incumbent firms and that there is no less restrictive regulatory alternative. Laws that restrict market entry, such as limits on licensing and permitting, must be evaluated for their discriminatory effects and challengers should be allowed to present evidence of the impact of a permitting or eminent domain regime on interstate markets. Where there is a significant burden on interstate commerce, such laws cannot be justified solely by making reference to protecting reliability or prices for in-state consumers. Instead, the assertion of justifications by states must occur with a decision-making framework that, at a minimum, shows some opportunity for the consideration of out-of-state benefits. As states or localities explain how regulatory actions and legislation restricting power supply in the wholesale market or transmission expansion might serve legitimate purposes, such as environmental or consumer protection, courts need to play some role in evaluating these claims to benefits, especially where affected interests lacked any voice or opportunity for participation in the state political or regulatory process.

Although this is a fact-bound inquiry, whether a court invokes either strict scrutiny or more deferential *Pike* balancing, it is not appropriate for a court itself to assess whether, based on the weight of the evidence, the benefits of a state program justify its costs. Rather, we believe that the tradeoffs made in this balancing must ultimately occur in the state political process. The relevant factual inquiry for a reviewing court is whether the state provided sufficient consideration of costs and benefits of regulation in making its own tradeoffs in the political and regulatory process. Dormant Commerce Clause principles require that a state's claim to benefits must be attentive to the political process and to concerns about its impacts on interstate coordination. In order to ensure that a state's claim to benefits matches the lawmaking or regulatory process that led to a decision in the first place, the benefits must be claimed in the legislative or regulatory process, not merely asserted post hoc in briefs filed before a reviewing court. Moreover, to ensure that the legislative and regulatory process does not facilitate further protectionism or thwart interstate coordination, federal courts must play some role in evaluating the range of benefits that has been considered by a state. Specifically, a state's

claims to benefits cannot be unduly narrow, and cannot be based on a process or substantive choice that ignores out-of-state benefits in making a regulatory choice—any more than a state can ignore out-of-state harms in discriminating against out-of-state firms. For strict scrutiny, this is relevant to assessing whether the benefits claimed by a state are legitimate, as well as in comparing the restrictions of various alternative regulatory approaches. In *Pike* balancing, where the burdens are only incidental, the Supreme Court has recognized the danger of a state making "illusory" claims to benefits where the broader effects of its regulations outside of its jurisdiction have been ignored.[177] States can best overcome concerns with illusory benefits by ensuring their law making and regulatory processes contemporaneously provide for some mechanism, either procedurally or in substance, for it to consider out-of-state as well as in-state concerns.

To take an example, in the *Carbone* case, the Town of Clarkstown promised to make up losses from operating the transfer facility at competitive rates, presumably by taking these losses out of its general revenues.[178] Even if the town imposes the same monopoly and fees on both in- and out-of-state providers of service, the result of upholding it would be to allow a local government to take money from the public fisc to effectively indemnify a private monopoly's investors. As the Court held in *Carbone*, dormant Commerce Clause doctrine prohibits this, especially where it significantly burdens the interstate market without allowing those who are potentially most affected any opportunity for consideration in the state regulatory process.[179] Such a program may be upheld, in our view, but only if it provides some reasons contemporaneous with its enactment that show the town made some effort to consider the broader benefits of the program and made a decision to use

177. *See, e.g.*, Kassel v. Consol. Freightways Corp., 450 U.S. 662, 670–71 (1981) ("The State's [purported] safety interest has been found to be illusory, and its regulations impair significantly the federal interest in efficient and safe interstate transportation.").

178. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 387 (1994).

179. Further, as in *Carbone*, authorizing above-market fees solely for purposes of maintaining a private monopoly is especially suspect. As we move from local to state monopoly franchises, concerns with a single firm capturing the political process are perhaps weaker—a single firm that dominates municipal politics may have little power in statewide regulatory and political processes. State-franchised monopolies may be more likely to pass constitutional muster, but even neutral financing arrangements may be suspect if they favor local enterprise and have the "practical effect and design" of impeding out-of-state competitors.

public money to favor one monopolist over another for legitimate, and non-illusory, public reasons.

Paying attention to the political process and broader consideration of benefits in dormant Commerce Clause review is not inconsistent with the approach of the Roberts Court. In *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*, the Court upheld a flow control ordinance on a similar rationale.[180] The Court reasoned that "the most palpable harm imposed by the ordinances—more expensive trash removal—is likely to fall upon the very people who voted for the laws."[181] Echoing Justice Stevens' political process rationale in *West Lynn Creamery*, Chief Justice Roberts' plurality opinion framed dormant Commerce Clause jurisprudence as protecting parties not effectively represented in the legislative process:

> Our dormant Commerce Clause cases often find discrimination when a State shifts the costs of regulation to other States, because when "the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected."[182]

However, Justice Roberts reasoned, when the burdened out-of-state party was effectively represented by an in-state party, there was "no reason to step in and hand local businesses a victory they could not obtain through the political process."[183] After finding no facial discrimination against interstate commerce, Justice Roberts' opinion also suggested that the law in question was not invalid under the *Pike* balancing test, relying on the "significant health and environmental benefits" conferred on county citizens from the county processing facility.[184] According to Justice Roberts, the ordinance "conferr[ed] significant health and environmental benefits upon the citizens of the Counties" by not charging for many recycling services, producing incentives for recycling and taking responsibility for disposal of hazardous waste by routing all recyclables through one facility.[185]

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180. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007).

181. *Id.* at 345.

182. *Id.* (quoting S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 767–68 n.2 (1945)).

183. *Id.*

184. *Id.* at 346–47.

185. *Id.* A majority of the Justices did not join the part of the opinion that would have upheld the law under *Pike* balancing (Justices Scalia and Thomas, in particular, rejected the *Pike* analysis as a basis for dormant Commerce

Understood in a similar manner, recent appellate court cases applying dormant Commerce Clause review to state renewable energy initiatives such as *Rocky Mountain* may be said to reinforce two important federalism principles. One principle is promoting state experimentation in financing clean energy innovations and firms to advance a variety of state goals, including job creation and environmental objectives related to addressing climate change. Such tradeoffs, if made in a state political process, are subject to considerable deference. The Ninth Circuit panel in *Rocky Mountain* observed that a few other states were considering similar legislation but that "[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."[186] The court concluded its discussion by stating that California "should be encouraged to continue and to expand its efforts to find a workable solution to lower carbon emissions, or to slow their rise."[187] Of course, at the extreme, programs that in fact attempt to regulate extraterritorial conduct may be suspect, as are programs that discriminate on their face to foreclose any opportunities for out-of-state suppliers. In each of these cases, neither of the groups bearing the primary burden has any representation in the political process. Even still, as long as a state can justify differential treatments of in- and out-of-state suppliers in terms of some legitimate, non-protectionist goal, such as promoting energy reliability or sustainability or reducing carbon emissions to address climate change, discriminatory treatment can be justified.

An equally important principle that *Rocky Mountain* recognizes is how the consideration of out-of-state benefits can serve to justify a state's initiatives under dormant Commerce Clause principles. The consideration of such benefits (such as the regional, national, or global benefits associated with addressing climate change) suggests that a state is choosing to impose some costs on its own residents in order to promote norms of cooperation among states. Promoting the kind of coordination that is required to address these goals is consistent with federalism principles such as avoiding balkanization. And

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Clause review). Despite this, it appears that a majority of the Justices still would accept *Pike* balancing as an approach to reviewing a state law with only incidental burden on interstate commerce—they just disagreed on application to the *United Haulers* facts.

186. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1105 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2875 (2014).

187. *Id.* at 1107.

it also is consistent with the political process view of dormant Commerce Clause review endorsed by Justice Stevens, and more recently, the Roberts Court. Coordination in state policies, as reflected in energy market initiatives that take into account out-of-state benefits, is certainly allowed under dormant Commerce Clause doctrine. Indeed, we maintain that it ought to be encouraged and, in some instances, required. When a state does consider these kinds of benefits in making distinctions, it seems unlikely that such laws can be said to facially discriminate against out-of-state firms, as long as those firms are not foreclosed altogether from participating in the market. At the very minimum, a legislative record endorsing these kinds of interstate coordination benefits should be considered a "plus" factor in both *Pike* balancing and in assessing a legitimate state purpose or comparing a least restrictive alternative pursuant to strict scrutiny review.

The converse also follows. Where there is conflicting evidence of legislative motive, a lack of any initiative on the part of a state to take into account broader interstate goals should be reason for a court to pause and question whether the law is justified. When facing a dormant Commerce Clause challenge to a state initiative, if a state fails to present any evidence of legislative motive a state should not be able to use silence or ambiguity to justify laws that have a discriminatory purpose or effect. This does not mean every state law that is silent or ambiguous about motive will fail or be subject to scrutiny; laws that, on their face, do not discriminate between in-state and out-of-state interests are still subject to review under *Pike* balancing. Despite the generally deferential approach courts take in evaluating initiatives under *Pike* balancing, where state laws involve social initiatives that depend on interstate coordination to achieve their objectives, such silence may be reason for serious judicial evaluation under dormant Commerce Clause principles—if for no other reason than to encourage public officials to provide better reasons for why programs need to discriminate against those outside of a state.

III. CONSTITUTIONAL FLAWS WITH SITING AND EMINENT DOMAIN REGIMES

By its very nature, interstate electric transmission line siting requires states to go beyond parochial concerns and recognize larger interstate benefits associated with approving transmission lines. It is true that many states stand to benefit from approving transmission lines—especially states that are

consistently exporting or importing sources of power. States producing a surplus of renewable energy in particular stand to benefit economically from approving new lines. Many of these states face no disincentive to approve new transmission lines—and some of these states have even reformed their transmission line siting procedures to recognize the particular benefits that siting can produce. For instance, New Mexico has enacted legislation creating a state Renewable Energy Transmission Authority that is authorized to participate in regional transmission forums and has the power of eminent domain to acquire property if needed for regional transmission projects.[188] The Wyoming legislature created the Wyoming Infrastructure Authority to, among other things, improve the state's electricity transmission infrastructure and to facilitate the consumption of Wyoming energy, and authorizes the authority to use eminent domain to accomplish its purposes.[189] North Dakota, Idaho, and Kansas have also created state agencies to address transmission planning and facilitate the export of both renewable and nonrenewable energy resources generated in those states and to address reliability concerns.[190] Finally, Texas is able to engage in more streamlined transmission planning, siting and eminent domain because unlike any other state, it has its own, in-state grid and has significant wind and solar resources as well as major population centers all within a single jurisdiction.[191]

For all these states, there are significant economic incentives to facilitate the siting of high-voltage, long distance electric transmission lines. All these states have significant renewable and nonrenewable energy resources, have vast amounts of open space within their borders, rely heavily on energy exports to support their economies, and have low electricity prices. Texas has an incentive to transport its wind resources from sparsely populated parts of the states to its cities and the other states can export their surplus energy to other states for eco-

188. N.M. STAT. ANN. § 62-16A-4b(6) (2015) (allowing the state authority to coordinate and plan with other states and entities for interstate transmission); *Id.* at § 62-16A-4b(8) (providing that the state authority may exercise eminent domain for projects).

189. WYO. STAT. ANN. §§ 37-5-303(a), 304(a) (2015).

190. *See* Klass, *Takings and Transmission*, *supra* note 1, at 1142–43 (discussing state laws).

191. *See* Klass & Wilson, *supra* note 1, at 1843–47 (discussing Texas grid and Texas PUC actions to facilitate transmission lines to connect wind resources to population centers through the state's Competitive Renewable Energy Zone (CREZ) program).

nomic gain. These states recognize that to meet all these goals it is necessary to reduce barriers to the siting and construction of long-distance transmission lines.

But not every state has similar incentives to approve new lines. A state in the path of a proposed line that will not receive or sell the electricity transported faces pressure to "hold out," because a new transmission line will not produce the same benefits for its citizens as for citizens from neighboring states seeking to import or export energy. These regulatory holdout problems appear to occur regularly in transmission line siting—at a minimum they lead to delays in the siting of new lines (and in developers obtaining financing); at the extreme they may lead proposals for new lines to be dropped altogether. The holdout problem with transmission line siting is enabled and encouraged by the legal structure of public utility and property law in many states.

As we highlight in this Part, substantive and procedural aspects of many state siting and eminent domain regimes enable the kinds of state holdout problems that can thwart coordination in energy markets. We maintain that dormant Commerce Clause doctrines and principles provide an appropriate and powerful framework for challenging such laws and practices, and help to expose many of their constitutional deficiencies.

A. NARROW ASSESSMENT OF BENEFITS BY REGULATORS IN GRID SITING DETERMINATIONS

In considering approval of transmission line applications, a number of states limit the consideration of "need" in siting transmission lines to in-state benefits.[192] In such states, a narrow assessment of the benefits of a new line by regulators can give rise to potential challenges under the dormant Commerce Clause. States' refusal to take into account any benefits that extend beyond their own borders in considering applications for interstate electric transmission lines are especially problematic on the political process understanding of dormant Commerce Clause doctrine, or on any understanding of its principles as focused on preserving or promoting interstate coordination.

Such challenges may occur where a state regulator refuses to take into account any out-of-state or regional benefits associated with a transmission line. For example, in 2006, Southern

192. *See, e.g.*, Brown & Rossi, *supra* note 1, at 721–27 (highlighting how many state "need" statutes explicitly, in the criteria they require regulators to consider, or implicitly, through incorporation of traditional state public utility principles, limit the assessment of benefits to native load customers).

California Edison proposed to build a 230-mile high voltage transmission line from Blythe, California to the Palo Verde Nuclear Generating Station, located fifty miles west of Phoenix, Arizona.[193] California regulators approved the line.[194] However, Arizona regulators rejected the proposal, even though California ratepayers would have paid for the project.[195] One Arizona regulator bluntly characterized the proposed line as a "230-mile extension cord."[196] Another explained his opposition to the line: "I don't want Arizona to become an energy farm for California. This project, if we approved it, would use our land, our air and our water to provide electricity to California."[197]

Similarly, in 2015 the Missouri PUC denied a request by Clean Line Energy Partners,[198] a merchant transmission line company, for a certificate of convenience and necessity for the "Grain Belt Express" transmission line that would transport wind energy through four states.[199] Prior to the final decision, the Missouri commissioners opposed to the project took the position that "the project wasn't needed in the state and may not have an immediate benefit to Missouri ratepayers."[200] One commissioner stated that "[m]y first thought was that I need to

193. So. Cal. Edison Co., No. 07-01-040, 7–8 (Cal. Pub. Utils. Comm'n Jan. 25, 2007) (granting a Certificate of Public Convenience and Necessity); Press Release, Heather Murphy, Public Information Officer, Ariz. Corp. Comm'n, Regulators Reject "Extension Cord for California" (May 30, 2007), http://www.azcc.gov/divisions/administration/news/Devers_II_Vote.pdf.

194. So. Cal. Edison Co., No. 07-01-040, at 112.

195. So. Cal. Edison Co., Case No. 130, Decision No. 69638, 1 (Ariz. Corp. Comm'n June 6, 2007), http://images.edocket.azcc.gov/docketpdf/0000073735.pdf (denying Certificate of Environmental Compatibility).

196. Murphy, *supra* note 193, at 1.

197. *Id.*

198. *See* CLEAN LINE ENERGY PARTNERS, http://www.cleanlineenergy.com (last visited Oct. 16, 2015).

199. *See* Grain Belt Express Clean Line LLC, No. EA-2014-0207, 26–27 (Mo. Pub. Servs. Comm'n July 1, 2015), http://www.eenews.net/assets/2015/07/02/document_ew_03.pdf (denying certificate of convenience and necessity for Grain Belt Express); *see also* Jacob Barker, *Mo. Regulators Face Hard Choice over Renewable Energy Highway*, ENRMIDWEST (June 14, 2015), http://midwest.construction.com/yb/mw/article.aspx?story_id=id:GorCQj4HR0BvDSmjfbOKWxV0Qz25cxq0TFY8CBI_pheOenKLw0cJhcIwM2g3iXj3 (discussing positions of various Missouri PUC commissioners and status of Grain Belt Express in other states); Jeffrey Tomich, *Clean Line Transmission Project in Limbo After Mo. Rejection*, ENERGYWIRE (July 2, 2015), http://www.eenews.net/stories/1060021203 (reporting on Missouri PUC denial of certificate of convenience and necessity for Grain Belt Express); Jeffrey Tomich, *Clean Line Transmission Project Gets Chilly Reception in Missouri*, MIDWEST ENERGY NEWS (Aug. 14, 2014), http://midwestenergynews.com/2014/08/14/clean-line-transmission-project-gets-chilly-reception-in-missouri.

200. *See* Barker, *supra* note 199.

look after Missourians first and go from there."[201]

If a dormant Commerce Clause challenge were brought to Arizona's or Missouri's rejections of the proposed transmission lines, we maintain that these would be likely cases for courts to declare the actions of state regulators unconstitutional. In another infrastructure context, in *Dakota & Minnesota Eastern Railroad Corporation v. South Dakota*, the U.S. District Court for the District of South Dakota invalidated a state statute that allowed the use of eminent domain for railroads in the state only for purposes of providing railroad transportation to shippers in South Dakota, solely for commodities produced, mined, grown or consumed in the state. The court found this to be a violation of dormant Commerce Clause doctrine, noting how the law allows eminent domain "only" to benefit South Dakota interests rather than merely requiring that South Dakota interests "be on par with the interests of shippers in other states."[202]

Arizona's and Missouri's rejections of the proposed transmission lines raise similar constitutional concerns. Focusing entirely on local costs and benefits, in a manner that fails to consider any of the benefits outside of a state's border, allows a state to serve as a regulatory holdout for reasons that, in effect, are parochial and even protectionist. A straightforward application of dormant Commerce Clause doctrine shows how this is suspect. Such a scheme may be discriminatory on its face to the extent that a legislature prohibits state regulators from taking into account benefits to out-of-state producers and consumers altogether. A siting statute that allows regulators discretion to accept or reject a siting application based on their determinations of the costs and benefits allows regulators considerable discretion to frame costs and benefits, and may not constitute per se discrimination. However, even if such a regulatory scheme is not facially discriminatory, it is clearly discriminatory in purpose and effect. In fact, discrimination against any sales of Arizona produced power to California is exactly what the Arizona regulator characterizing the line as an "extension cord" intended. Likewise, the Missouri regulators denied the line at least in part because of the lack of in-state benefits and appeared to ignore the regional, out-of-state benefits.

Application of the more deferential *Pike* balancing test also reinforces how Arizona's and Missouri's refusals to site the

201. *Id.*

202. Dakota, Minn. & E. R.R. Corp. v. South Dakota, 236 F. Supp. 2d 989, 1016 (D.S.D. 2002), *aff'd in part, rev'd in part on other grounds*, 362 F.3d 512 (8th Cir. 2004).

transmission lines are susceptible to challenge, even if their actions impose only incidental burdens on interstate commerce. Such a balancing test would weigh the costs of discriminating against sales of power to other states against the benefits. In the case of the Arizona line, the benefits of refusing to site the line are not to Arizona ratepayers; the line would have been be paid for by California customers. Perhaps Arizona sees the benefits as losing its lowest cost power to California once the transmission is built—the comments of the regulator hints that this is the case. Notably, however, that benefit would make refusal to approve the line per se discriminatory insofar as it suggests that Arizona is prohibiting exports to keep the cheapest cost energy within its borders.[203] In its regulatory decision Arizona decided to characterize the benefits of refusing to approve the line as primarily environmental, with respect to its potential impact on watershed, desert, wildlife, and archaeological sites. This may justify discrimination under the *Pike* balancing test. However, these benefits need to be placed explicitly in the balance along with other benefits. To the extent Arizona downplayed or explicitly ignored any out-of-state benefits this should be considered as negative factors in the weight of the evidence regarding its justifications for refusing to approve the line. Similar arguments apply to Missouri's rejection of the Grain Belt Express transmission line, to the extent state regulators appear to have ignored the out-of-state, regional benefits, and instead focused only on the alleged paucity of benefits for Missouri residents. The fact that this line was proposed by a merchant developer whose business model would not allow it to serve Missouri retail customers makes the denial even more constitutionally suspect, insofar as this appears to favor a state's incumbent utility developers over non-utility developers.

An approach to dormant Commerce Clause review that is attentive to concerns about the political process preserving opportunities for interstate coordination would look with particular suspicion on a regulatory decision that was made based on such limited consideration of the benefits. Arizona's refusal to site the proposed transmission line benefitted in-state interests—especially consumers who did not want to pay market rates for electricity or producers who did not want to face new

203. *See, e.g.*, New England Power Co. v. New Hampshire, 455 U.S. 331, 339 (1982) ("The order of the New Hampshire Commission, prohibiting New England Power from selling its hydroelectric energy outside the State of New Hampshire, is precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states.").

competition—but this also worked to harm interests (out-of-state suppliers and consumers) who have little or no mechanism to participate in the political process that holds a state's regulators or politicians accountable. The Missouri regulators also cited the lack of benefits to Missouri ratepayers as the reason for opposing the line without considering the wind generators and ratepayers in other states that would benefit. Such an analysis seems to undermine the kinds of coordination benefits reinforced by dormant Commerce Clause principles. Such benefits could be framed in terms of promoting grid reliability or in terms of the climate change benefits associated with greater deployment of renewable energy sources on the grid; but ignoring them altogether seems to border on the exact kind of discrimination that dormant Commerce Clause doctrine prohibits. What seems most troubling is that there appears to be no evidence that Arizona and Missouri regulators even considered these benefits or weighed them in making their final decisions.

B. WHITTLING DOWN "PUBLIC USE" AND EMINENT DOMAIN POST-*KELO*

In *Kelo v. City of New London*,[204] the Supreme Court held that a city's decision to take private property by eminent domain in connection with a private redevelopment project was a "public use" under the Takings Clause of the Fifth Amendment, based on the city's determination that the project would reinvigorate the city core and increase its tax base. In finding this "economic development taking" valid under the U.S. Constitution, the *Kelo* court emphasized that states could define public use more restrictively in their state statutes or constitutions. As the Court noted, "our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[205]

More than half the states have revised their eminent domain laws to limit the economic development takings at issue in the *Kelo* case itself and to more narrowly define what constitutes a "public use" for general eminent domain purposes—primarily to expand protections for private property owners.[206] By whittling down the categories of "public use," many of these revisions are certain to make the exercise of eminent domain authority to facilitate energy exports potentially more difficult.

204. 545 U.S. 469, 489 (2005).
205. *Id.* at 483.
206. *See* Klass, *Takings and Transmission, supra* note 1, at 1093–94.

While many of the statutes states have enacted post-*Kelo* specifically provide that electric transmission lines or pipelines remain a public use, others do not, creating the potential that proposed projects that were once thought to be a classic public use might not be when analyzed under a state's post-*Kelo* legislation. Some states have in effect limited the ability to use eminent domain to authorize a "pass through" transmission line or pipeline sponsored by an out-of-state applicant.

For instance, in 2013, the Missouri Supreme Court held in *Missouri ex rel. Jackson v. Dolan*[207] that a port authority could not exercise eminent domain to build a "loop track" to accommodate larger train cars that would bring oil from the Bakken shale area of North Dakota to the port area where the oil would travel down the Mississippi River to refineries on the Gulf Coast.[208] In reaching its decision, the court recognized that Missouri had long ago adopted a broad interpretation of "public use" but that post-*Kelo* state legislation prohibited all condemning authorities from acquiring property by eminent domain "for solely economic development purposes."[209] Because the port authority had testified that the purpose for the taking was to promote jobs and commerce through the use of the additional rail facilities, the court found that the taking was solely for economic development purposes and thus was contrary to the state statute.[210] Even though the port authority also testified that the taking "would improve river commerce"[211] the court found that the only improvement to river commerce would be by drawing more economic development to the area.[212]

While the *Jackson* case involved a rail track linked to interstate river transport rather than an interstate electric transmission line, it raises potential concerns for lines being built in states with bans on economic development takings where the purpose of the line is to export the state's renewable resources, which could be argued to promote economic development. Moreover, to the extent lines are being built in states solely for reliability or energy export purposes, it is much easier for landowners opposing the line to argue first, that there is no

207. 398 S.W.3d 472 (Mo. 2013) (en banc).

208. *See* David A. Lieb, Associated Press, *Mo. Court Blocks Eminent Domain by SEMO Port Authority*, SOUTHEAST MISSOURIAN (May 29, 2013), http://www.semissourian.com/story/1973038.html.

209. *Jackson*, 398 S.W.3d at 478.

210. *Id.* at 481–82.

211. *Id.* at 480.

212. *Id.* at 481–82.

in-state public use to justify the taking and, second, that bans on economic development takings are an additional obstacle to eminent domain. Indeed, even before *Kelo*, there were many examples of state courts requiring significant local benefits in order for an interstate electric transmission line to exercise eminent domain authority. The Mississippi Supreme Court in 1984, in *Mississippi Power & Light Co. v. Conerly*, refused to allow the exercise of eminent domain authority for a high-voltage power line between Mississippi and Louisiana because "the terms 'public necessity' and 'public use' . . . contemplate use by the citizens of this state" and Mississippi customers would not directly benefit from the line.[213] This is consistent with a Florida court's 1967 decision in *Clark v. Gulf Power Co.*, where the court held that a state's eminent domain power exists "only within its territorial limits for the use and benefit of the people within the state."[214]

Even in states where courts have recognized the regional benefits of interstate transmission to allow the use of eminent domain, they have been careful to point out that such power cannot be used without a showing of a significant, local public use. For instance, in 1934, the Indiana Supreme Court held in *Shedd v. Northern Indiana Public Service Corp*. that a utility could exercise eminent domain authority to build an interstate line and rejected arguments that a state-regulated public utility could not exercise eminent domain authority for any use in interstate commerce, as opposed to solely in-state uses.[215] In so holding, however, the court made it clear that the state "will take care to use this power for the benefit of its own people" but would not refuse to exercise it simply because "the inhabitants of a neighboring state may incidentally partake of the fruits of its exercise."[216] Likewise, in *Square Butte Electric Cooperative v. Hilken*,[217] the North Dakota Supreme Court in 1976 upheld eminent domain authority for a transmission line to provide power from North Dakota to members of an electric cooperative in

213. 460 So. 2d 107, 113 (Miss. 1984).

214. Clark v. Gulf Power Co., 198 So. 2d 368, 371 (Fla. Dist. Ct. App. 1967).

215. Shedd v. N. Ind. Pub. Serv. Co., 188 N.E. 322, 325–27 (Ind. 1934).

216. *Id.* at 325; *see also* Oxendine v. Pub. Serv. Co. of Ind., 423 N.E.2d 612, 617 (Ind. Ct. App. 1980) (citing *Shedd* and allowing exercise of eminent domain authority for an interstate electric transmission line to improve reliability for in-state customers even while it provided power to out-of-state customers and finding that the authority was "to furnish electricity to the 'public' not to Indiana residents alone").

217. 244 N.W.2d 519, 530 (N.D. 1976).

Minnesota.[218] The court found that North Dakota residents received benefits of increased electric service reliability even though the direct energy benefits of the line went primarily to out of state interests.[219] While the opinion embraces a broader vision of public use than many other states, the Court was careful to say that the law in the state was that in-state residents must receive a "substantial and direct benefit"[220] (not merely an indirect advantage) even if other states are also benefited and that the benefit to the state must be "attached to the territorial limits of the state because the state's sovereignty is also so constrained."[221]

Notably, at least some state regulators and courts appear more willing to consider regional need and not require in-state need in the context of interstate energy transportation infrastructure. For instance, in 2010, in *Pliura Intervenors v. Illinois Commerce Commission*, the Illinois Court of Appeals upheld the grant of eminent domain authority to an interstate oil pipeline on a showing of public need.[222] Like interstate electric transmission lines and unlike interstate natural gas pipelines, authority for siting interstate oil pipelines rests with the states.[223] In that case, the interveners argued the commission erred in considering regional, national, and global need in granting eminent domain authority rather than solely the need of Illinois citizens.[224] The court deferred to the commission's broader view of public need based on the fact that the statute did not require the narrow view.[225] Thus, at least in Illinois, there does not appear to be a requirement that there be a significant in-state benefit as opposed to a public benefit more generally, in order to obtain eminent domain authority for an interstate oil pipeline.

These cases illustrate the tension between federal policies promoting increased interstate transmission of electricity and a state regulatory system designed primarily to recognize in-state interests. It is perhaps understandable why a state court,

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218. *Id.* at 530–31.

219. *Id.* at 525.

220. *Id.* (citing Adams v. Greenwich Water Co., 83 A.2d 177 (Conn. 1951)).

221. *Id.* (citing Clark v. Gulf Power Co., 198 So. 2d 368, 371 (Fla. Dist. Ct. App. 1967), and Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co., 131 P. 43, 55 (Wyo. 1913)).

222. Pliura Intervenors v. Ill. Commerce Comm'n, 942 N.E.2d 576, 584–85 (Ill. App. Ct. 2010).

223. *See supra* Part I.C.

224. *Pliura Intervenors*, 942 N.E.2d at 584.

225. *Id.*

especially one that is subject to judicial elections, may wish to weigh the costs of the line for its own citizens, while not paying any attention to the benefits of the line that are felt by out-of-state interests. But this also will encourage individual landowners to challenge eminent domain proceedings and may lead states in the path of a proposed interstate line to refuse to approve the line where the in-state benefits are small and there are more significant out-of-state benefits.

Such a myopic analysis of benefits in defining "public use" not only interferes with federal policies regarding interstate lines; it also allows existing monopolies such as incumbent state utilities to extract monopoly rents because, in effect, the law limits the ability of competing transmission operators (which are often not based in that state) to obtain reciprocal access to eminent domain authority. To be sure, the *Kelo* Court emphasized deference to state public use determinations, which also means that states are free to adopt a broader, regional approach to public use as illustrated above by the North Dakota and Indiana cases.[226] But in the context of an interstate electricity market and strong federal policies in favor of planning and constructing interstate transmission lines, dormant Commerce Clause principles provide a plausible constraint on a state's narrow assessment of benefits in its definition of "public use"—much as it allows for constitutional challenges to narrow benefit assessments under state utility siting laws. We return to the force of this argument below.

C. BANS ON OUT-OF-STATE APPLICANTS AND DIFFERENCES IN PARTICIPATION RIGHTS

State laws not only limit what can be considered in approving a siting or eminent domain application. Some states also limit who can apply or, through strict intervention standards, limit the procedural rights of participants in the siting or eminent domain process. Although basic procedural questions of state law are seldom questioned beyond the Due Process Clause, the interstate transmission siting issue highlights how such procedures also can effectuate violations of dormant Commerce Clause principles and doctrine.

Under the utility laws of many states, out-of-state applicants are banned altogether from applying for either siting or eminent domain powers. Some state siting authorities lack the power to even consider applications where a state legislature

226. *See* Kelo v. City of New London, 545 U.S. 469, 482–83 (2005).

has not authorized them to do so. Many state siting statutes limit applicants to those who are a "public utility"—which typically means that a firm is taking on an obligation to serve retail customers in that particular state.[227] For example, Florida's Supreme Court has interpreted its power plant siting statute to limit siting to only those suppliers who are Florida utilities or who have contracts with Florida utilities.[228] The court reasoned that the state's siting statute "was not intended to authorize the determination of need for a proposed power plant output that is not fully committed to use by Florida customers who purchase electrical output at retail rates."[229] Effectively, merchant power plants—who sell power in bulk power markets but do not serve retail customers—are precluded from locating in Florida for purposes of entering the interstate market unless they have already contracted to serve Florida customers.[230]

In the context of electric transmission lines (as opposed to power plants themselves), many states limit the ability to obtain a siting certificate to "public utilities." The question of whether merchant lines, which are often in the business of building interstate lines to transport renewable energy and compete with incumbent public utilities, can obtain a certificate or exercise eminent domain authority at all is unclear in many states—because they cannot apply to obtain approval in the first instance. Recent research shows that some states expressly ban merchant lines from exercising eminent domain authority, other states expressly allow merchant lines to exercise eminent domain authority, and the law is unclear in a majority of states.[231] This research concludes that as of 2013, Florida, Kentucky, Michigan, Montana, New Mexico, Oregon, Rhode Island, Vermont, and Wisconsin grant merchant transmission lines eminent domain authority by statute; Kansas and Oklahoma grant such rights through PUC orders; Illinois, Maryland, New Hampshire, and Nebraska prohibit merchant transmission lines from exercising eminent domain by statute; Arkansas and Connecticut prohibit such rights through PUC orders; and all other states have statutes that are unclear and lack a definitive interpretation by a state PUC or court.[232] Moreover, the issue is

227. *See* Klass, *Takings and Transmission, supra* note 1, at 1124–26.

228. Tampa Elec. Co. v. Garcia, 767 So. 2d 428, 435 (Fla. 2000).

229. *Id.*

230. *See id.*

231. *See* Klass, *Takings and Transmission*, *supra* note 1, at 1124–26.

232. *Id.*; *see also id.* at app. A. Notably, although the *Tampa Electric Co.* case placed limits on the ability of power plants to obtain a siting certificate unless it was selling significant power to Florida utilities, the Florida statute

arising more frequently, especially where legislation is ambiguous, as the cases below illustrate.

For instance, in 2008, the Montana Department of Environmental Quality issued a Certificate of Compliance for the Montana-Alberta Tie Line, a 214-mile merchant transmission line now owned by Enbridge Energy, to transmit primarily renewable energy from Montana to Alberta, Canada.[233] When the proposed transmission line developers began eminent domain proceedings against a landowner in the path of the line, the landowner argued there was no public use justifying eminent domain because the proposal was for a merchant line rather than a public utility that would serve Montana customers. The district court agreed and dismissed the eminent domain action. Soon after, the Montana legislature enacted a law that made clear that all transmission lines that receive a certificate of compliance are a per se public use and authorized to exercise eminent domain. Thus, when the district court's decision went up to the Montana Supreme Court on appeal, the court reversed based on the new legislation. While there were additional challenges to the new law, the courts ultimately dismissed them and the line went into service in 2013.[234] The initial lawsuit challenging eminent domain authority illustrates, however, the uncertainty in this area of law, the wide divergences in state approaches, and the difficulty these uncertainties pose to those who wish to invest in interstate transmission lines.

Indeed, the issue has come up in many states that have not responded with clarifying legislation, like Montana, to address ambiguities in statutes or outright bans that prevent out-of-state merchant transmission companies from competing with in-state utilities to build interstate transmission lines. For example, Clean Line Energy Partners has proposed five, separate direct current (DC) high voltage transmission projects to bring wind energy to population centers in different parts of the country. One of the lines, the Plains & Eastern Clean Line, is

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governing electric transmission lines explicitly includes "independent transmission systems" within the definition of an "[e]lectric utility" eligible to apply for siting certification and to exercise eminent domain. *See* FLA. STAT. §§ 403.522(12), 403.531(1), 403.539 (2015).

233. *See Montana-Alberta Tie-Line*, ENBRIDGE, http://www.enbridge.com/DeliveringEnergy/Power-Transmission/Montana-Alberta-Tie-Line.aspx (last visited Oct. 16, 2015).

234. *Montana-Alberta Tie Line Now Fully Operational*, POWERING ALBERTA (Sept. 18, 2013), http://poweringalberta.com/2013/09/18/montana-alberta-tie-line-now-fully-operational.

designed to bring wind energy from the Oklahoma Panhandle region to southeastern states.[235] As part of the siting process, Clean Line sought a certificate of public convenience and necessity along with a separate certificate of environmental compliance and public need from the Arkansas Public Service Commission in 2010.[236] The Arkansas PUC denied Clean Line's request without prejudice because such certificates could only be granted to a "public utility" in the state. Because Clean Line was proposing the line as a "merchant" transmission project, it was not assuming any obligation to provide customers retail electric service and therefore could not obtain public utility status.[237] The Arkansas PUC stated:

> The difficulty the Commission now faces is that the law governing public utilities was not drafted to comprehend changes in the utility industry such as this one—where a non-utility, private enterprise endeavors to fill a void in the transmission of renewable power that is much needed but for which the Commission is unable to afford any regulatory oversight. . . . [T]he Commission's decision is based on that fact that it cannot grant public utility status to Clean Line based on the information about its current business plan and present lack of plans to serve customers in Arkansas.[238]

The Kentucky PUC issued a similar decision in 2013, finding that a transmission-only company could not obtain a certificate of public convenience or exercise eminent domain authority because it would not be providing retail utility service in Kentucky subject to PUC jurisdiction.[239] A Kentucky state cir-

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235. *See Welcome to the Plains & Eastern Clean Line Website*, CLEAN LINE ENERGY PARTNERS, http://www.plainsandeasterncleanline.com/site/home (last visited Oct. 16, 2015).

236. PLAINS & EASTERN CLEAN LINE, CLEAN LINE ENERGY PARTNERS 9 (2011) http://www.cleanlineenergy.com/sites/cleanline/media/resources/1222 Update_ PLains_Eastern_August2011.pdf (seeking partnership with Southwestern Area Power Administration to use federal siting authority under the Energy Policy Act of 2005 to address limitations in state law preventing Clean Line from obtaining state approval for lines).

237. *Id.*; *In re Plains & E. Clean Line L.L.C.*, Docket No. 10-041-U, Order No. 9, 9–10 (Ark. Pub. Serv. Comm'n Jan. 11, 2011), http://www.apscservices.info/pdf/10/10-041-u_41_1.pdf.

238. *In re Plains & E. Clean Line L.L.C.* at 10–11.

239. AEP Kentucky Transmission Co., Case No. 2011-00042, 2013 WL 2639388, at *3–6 (Ky. Pub. Serv. Comm'n June 10, 2013); *see also* CONN. GEN. STAT. §§ 16-50x(b), 16-50z, 16-244p (2015); Conn. Light & Power Co. v. Huschke, 409 A.2d 153, 155 (Conn. Super. Ct. 1979); Transenergie U.S. Ltd., No. 00-06-14, 2000 WL 33121599, at *4 (Conn. Dep't Pub. Util. Control Oct. 18, 2000) (holding that Transenergie was not an "electric distribution company" because it did not provide retail or distributed electric service within the state and thus could not exercise eminent domain to build a transmission line); James J. Hoecker & Douglas W. Smith, *Regulatory Federalism and Development of Electric Transmission: A Brewing Storm?*, 35 ENERGY L.J. 71,

cuit judge also ruled in 2014 that a proposed 1100-mile natural gas liquids pipeline, known as the Bluegrass Pipeline, does not qualify for an eminent domain in the state because it would not have an "off-ramp" allowing the delivery of such liquids to Kentucky customers.[240] Despite a post-*Kelo* state law that clearly recognized an exception for "common carriers" the court emphasized that the pipeline was not "in public service" and therefore not regulated as a utility in the state, so the Bluegrass applicant in effect had no power to condemn under the state's law.[241]

In addition, many states have long-standing laws or practices (sometimes grounded in obscure adjudicative orders) that grant incumbent utilities a "right of first refusal" to construct electric transmission lines that connect to the local utility. Although FERC Order No. 1000 placed some limits on these kinds of preferences for incumbent utilities in FERC jurisdictional tariffs and agreements, it did not disturb rights of first refusal under state siting and permitting laws. As James Hoecker and Douglas Smith describe in a 2014 article, many state first refusal preferences apply only to low-voltage, local transmission lines and thus do not interfere with Order No. 1000's goal of facilitating regional transmission planning and encouraging non-utility, merchant companies from participating in order to create a more dynamic market for regional transmission lines.[242] Still, Hoecker and Smith identify multiple states that in recent years have created broad first refusal preferences for incumbent utilities that include such rights for high-voltage, interstate lines, including Minnesota, North Dakota, South Dakota, North Carolina, and Nebraska.[243] They observe that these state laws "threaten to prevent or significantly reduce the competition that FERC sought to establish in Order No. 1000 among multiple potential transmission developers for large regional

86–88 (2014) (discussing state barriers to transmission line siting and highlighting proceedings in Kentucky, Arkansas, and Missouri).

240. Robert H. Thomas, *Kentucky Judge: Private Pipeline Lacks Eminent Domain Power—Not in Public Service Because It Is Transporting Through Kentucky, Not to Kentucky*, INVERSECONDEMNATION.COM (Mar. 26, 2014), http://www.inversecondemnation.com/inversecondemnation/2014/03/kentucky-judge-private-pipeline-lacks-eminent-domain-power-not-in-public-service-because-it-is-trans.html.

241. Kentuckians United to Restrain Eminent Domain, Inc. v. Bluegrass Pipeline Co., No. 13-CI-1402, 2014 WL 10246980, at *11–17 (Ky. Cir. Ct. Mar. 25, 2014), *aff'd*, No. 2014-CA-000517-MR, 2015 WL 2437864 (Ky. Ct. App. May 22, 2015).

242. Hoecker & Smith, *supra* note 239, at 88–90.

243. *Id.*

projects."[244]

In a recent series of decisions reviewing RTO compliance filings under FERC Order 1000, FERC Chairman Bay has expressly questioned whether state right of first refusal laws violate the dormant Commerce Clause.[245] From a practical litigation perspective, challenging such preferences and bans on out-of-state or non-utility applicants under dormant Commerce Clause doctrine could well prove difficult. Often, all that may be present is summary dismissal of an application as beyond the authority of the regulator, under a statute that was enacted decades earlier and without any legislative history or, worse still, under a longstanding practice supported by an obscure agency adjudicative order that only state agency lawyers or repeat players in the state siting process will know. Litigants challenging such regimes are likely to be relying on facial challenges, rather than as applied challenges—especially where the application of the statute gives no discretion to the regulator.[246]

However, whether a facial or as applied challenge is brought, under dormant Commerce Clause doctrine these distinctions that prohibit out-of-state applications would appear to be per se discriminatory. Even if not discriminatory on their face, there is little doubt that such restrictions are discriminatory in their purposes and effect. In some instances, there may be legislative history indicating a clear discriminatory purpose. Yet this seems unlikely as many state siting statutes that limit applicants to "public utilities" are relics of an earlier era.

Until the 1990s, transmission lines were primarily built by vertically-integrated utilities serving customers in a particular state, not large utilities serving customers across multiple states.[247] However, in today's energy industry, where power is more actively supplied and traded in interstate commerce, the effects of this kind of discrimination seem obvious—merchant transmission lines simply will not be proposed at all in these states. This can potentially restrict sources of energy from other states from becoming available to customers in that state at all. Perhaps such a distinction is grounded in goals such as en-

244. *Id.* at 90; *see also* Linda L. Walsh & Noelle J. Coates, *Walking the Fuzzy Bright Line: The Legality of State ROFR Laws Under FERC Order 1000*, PUB. UTIL. FORTNIGHTLY, Sept. 2013, at 40.

245. *See supra* note 21 and accompanying text.

246. If the statute is not clear, this arguably would give some discretion to the regulator, and an "as applied" challenge would seem appropriate. But if all the regulator does is conclusively assert that it lacks authority, a reviewing court is effectively forced to address the issue as a facial challenge.

247. *See supra* Part I.B.

suring the protection of ratepayers within a state, but a state would be hard-pressed to maintain that limiting out-of-state applicants for new transmission lines is the least discriminatory alternative available to it when it comes to protecting ratepayers. For example, state regulators typically retain authority over retail rates and have ample opportunity to protect customers through retail ratemaking proceedings. Foreclosing the ability of out-of-state sources to become available to customers in the first place does not even allow state regulators the opportunity to compare the relative costs of power in the first instance. Moreover, merchant transmission companies, unlike public utilities, do not receive any recovery at all from ratepayers but instead take on the full risk of the project's success in the market—a fact that could make any effort to justify such restrictions on the grounds that they benefit in-state consumers appear "illusory" at best.

Indeed, even under the more deferential *Pike* balancing test, these kinds of bans raise dormant Commerce Clause problems. In challenging such bans under this more deferential test, applicants may be hard pressed to lay out a full legislative record of a discriminatory purpose at the time of enactment—especially where many of these statutes were codified decades ago. However, given the changes that have occurred to the utility industry over the past several decades, and the obvious incentives incumbent utilities in some states may have to use old statutes to foreclose any new entrants, states should not be allowed to use the passage of time to evade the reach of dormant Commerce Clause principles. At a minimum, *Pike* balancing would require a state to explain why, given the way the industry operates today, the restrictions on who can apply under its siting statute continue to produce legitimate benefits under the *Pike* balancing test, in terms of consumer and environmental protection. A state's failure to provide such an explanation alone should lead to failure to meet the *Pike* balancing test—and this seems to be relevant whether the challenge is a facial challenge or an applied challenge to the state siting regime. It is also well established that, when such explanations are provided, they must be non-illusory, suggesting that using blanket consumer protection rationales as a basis for bans on out-of-state applicants is likely to fail as a legitimate justification under both a strict scrutiny and *Pike* analysis.

Even states that do not ban out-of-state applicants outright or prioritize local over out-of-state applications may face problems with their siting or eminent domain procedures under

state law to the extent that these procedures work to, in effect, impose a significant burden on interstate commerce. This can occur most obviously through procedural limits on intervention or standing. Many states have laws or established practices that allow incumbent utilities to drive the energy resource planning process[248] or that leave regulators considerable discretion to limit intervention in utility siting or eminent domain proceedings to those who are most directly affected by a regulator's decision.[249] It is not always clear that an out-of-state firm would have an opportunity to intervene in a proceeding where it is not filing a transmission proposal application. Even if the right to intervene in a siting or eminent domain proceeding can be established, the costs of participating in a state siting proceeding will typically be higher for any out-of-state firm, who may need to hire local counsel and assert their interests from afar. As compared to an in-state firm already providing service, any out-of-state firm seeking to enter and provide new service to a market is likely to face a serious disadvantage in a siting process (where it would typically be requesting approval in the face of opposition from an incumbent firm) or in an eminent domain process (where it would be challenging a narrow "public use" assertion).

In allowing challengers to litigate whether Virginia's hospital certificate of need program procedures produce a significant burden on out-of-state applicants and whether any legitimate local benefits can justify it, the U.S. Court of Appeals for the Fourth Circuit, in *Colon Health Centers v. Hazel*, recognized how the lack of a level procedural playing field in a state permitting process that bans access to a market can raise serious questions under dormant Commerce Clause doctrine.[250] The challengers were out-of-state firms that sought to offer radiology and imaging services in Virginia. They faced the same certificate of need requirement as did Virginia firms, but they did not wish to undergo the state's "lengthy, costly, and unpredictable application process," which takes years and provides multiple opportunities for in-state firms to challenge the appli-

248. *See, e.g.*, Uma Outka, *Siting Renewable Energy: Land Use and Regulatory Context*, 37 ECOLOGY L.Q. 1041, 1058–59 (2010) (describing the planning process in Florida).

249. Typically, state administrative procedure would allow those directly affected to intervene, but absent an express statutory standard recognizing out-of-state firms, intervention is likely relegated to the discretion of agency regulators.

250. Colon Health Ctrs. of Am., L.L.C. v. Hazel, 733 F.3d 535, 542–45 (4th Cir. 2013).

cant.[251] The court highlighted the challenger's allegations that:

> Virginia's certificate-of-need program grants established, in-state economic interests the power to obstruct the market entrance of new, primarily out-of-state competitors in two ways. First, by requesting fact-finding conferences, established interests can dramatically lengthen the application process, thus increasing the costs and uncertainty borne by the applicant. Second, objecting firms may influence the substantive outcome of the process through an effective adversarial presentation at the conference.[252]

Notably, without even getting to the substance of the certificate standards, the court observed how the state's intervention process can "grant[] a structural edge to local firms: if an established, in-state facility desires to expand its operations, it will necessarily face one fewer objector than would an out-of-state firm that seeks to enter the market de novo—itself."[253] Although the court did not find Virginia's scheme unconstitutional, it reversed a district court dismissal of the challenger's claim. In requiring further factual findings, it noted that even if the law is not facially discriminatory, "[t]he *Pike* test requires closer examination . . . when a court assesses a statute's burdens, especially when the burdens fall predominantly on out-of-state interests."[254] Similarly, if an out-of-state competitor can present actual evidence of a discriminatory effect on interstate commerce under a state siting or eminent domain transmission process, it may be able to successfully mount a similar dormant Commerce Clause attack to a state regime's claim to procedural neutrality.

IV. TAILORING STATE LAWS AND PRACTICES TO FACILITATE COORDINATION

In a 2014 case dismissing a legal challenge to an interstate natural gas facility, the U.S. Court of Appeals for the D.C. Circuit stated:

> Given the choice, almost no one would want natural gas infrastructure built on their block. "Build it elsewhere," most would say. The

251. *Id.* at 540–41.

252. *Id.* at 544.

253. *Id.*

254. *Id.* at 545 (quoting Yamaha Motor Corp. v. Jim's Motorcycle, Inc., 401 F.3d 560, 569 (4th Cir. 2005)). On remand, the district court granted summary judgment for the defendant after evaluating additional evidence, including new evidence of the benefits of the program by the state and statistical evidence that the approval rate for in-and out-of-state firms was roughly equal. *See* Colon Health Ctrs. of Am., L.L.C. v. Hazel, No. 1:12-CV-615, 2014 WL 5430973, at *7 (E.D. Va. Oct. 23, 2014).

> sentiment is understandable. But given our nation's increasing demand for natural gas (and other alternative energy sources), it is an inescapable fact that such facilities must be built somewhere. Decades ago, Congress decided to vest the Federal Energy Regulatory Commission with responsibility for overseeing the construction and expansion of interstate natural gas facilities. And in carrying out that charge, sometimes the Commission is faced with tough judgment calls as to where those facilities can and should be sited.[255]

The same considerations are present in siting and permitting of interstate electric transmission lines: the nation's citizens want the lights to stay on but no one wants a high-voltage transmission line where it may interfere with their home, view, favorite park, or farming operations.[256] The difference, of course, between the siting of interstate natural gas facilities and interstate electric transmission lines is that many decades ago, Congress recognized the potential holdout problem in the context of natural gas facilities and created a federal process to override parochial concerns in favor of the national interest.[257] Because of the history of the development of the electric grid, which did not require a national infrastructure until recent years, there is no federal authority to override state holdouts as there is in the natural gas context. Certainly, Congress could address this issue and create a federal siting process for interstate electric transmission lines just as it did decades ago for natural gas pipelines and related facilities. We and other scholars have analyzed the benefits and costs of such a transfer of authority—as well as the dim prospects for such a transfer in today's political climate—in earlier work.[258] Of course, there are other approaches as well, such as Congress creating a regional transmission siting framework or FERC issuing more orders along the line of Order No. 1000 to require regional collaboration between states and utilities and attempting to preempt state barriers to out-of-state entrants that exist currently through state right-of-first-refusal laws granted to incumbent utilities.[259]

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255. Minisink Residents for Envtl. Pres. and Safety v. FERC, 762 F.3d 97, 100 (D.C. Cir. 2014) (dismissing claims that FERC's decision to approve a natural gas compressor station was arbitrary and capricious and a violation of the Natural Gas Act).

256. *See, e.g.*, Glicksman, *supra* note 78, at 6–11; McLaughlin, *supra* note 15, at 404–05.

257. *See generally* Alexandra B. Klass & Danielle Meinhardt, *Transporting Oil and Gas: U.S. Infrastructure Challenges*, 100 IOWA L. REV. 947 (2015) (discussing the reasons behind Congress's enactment of the Natural Gas Act and the law's provisions relating to interstate natural gas pipeline siting).

258. *See supra* note 1 and accompanying text.

259. *See, e.g.*, 18 C.F.R. pt 35, *supra* note 64; Hoecker & Smith, *supra* note

Our central claim in this Article is that dormant Commerce Clause review provides an independent ground for courts to help overcome regulatory holdout problems and promote interstate coordination where state laws are challenged, even absent any affirmative federal action on the issue. We maintain that, in considering dormant Commerce Clause challenges to such regimes, courts must, at a minimum, evaluate political process concerns with state regulation in order to help ensure that the state decision-making framework allows for some consideration of out-of-state benefits. This Part clarifies the scope and practical implications of our proposal.

We first explain in Section A why dormant Commerce Clause challenges will likely have different implications for state policies governing siting and eminent domain for interstate energy transportation infrastructure, like electric transmission lines, than for many state energy and climate policies such as RPSs and renewable fuel mandates. Put simply, there are greater concerns over state holdouts and assembly problems in cases involving physical, interstate infrastructure—concerns that threaten the very heart of interstate markets in energy. We discuss some limitations on the scope of our proposal, in terms of its application to different problems, including the problem of inertia and state regulatory inaction.

Then in Section B, building on Part III, we provide some practical guidance for state legislatures and PUCs, with the goal of retaining state control over the process without discriminating against out-of-state actors or interstate energy markets. We recommend that state legislatures adopt laws explicitly allowing and clarifying the appropriateness of considering "regional benefits" of new transmission lines, rather than focusing solely on instate benefits in both siting and eminent domain proceedings. We also recommend that post-*Kelo* limits on economic development takings designed to protect private property owners include clear safe harbors for interstate projects that operate as common carriers in interstate commerce or that are regulated as public utilities at the federal level. Finally, our study of state siting and eminent domain regimes highlights how states must be attentive to how the regulatory process can create structural barriers for out-of-state participants. States should eliminate statutory provisions that prevent out-of-state actors from applying for certificates or exercising eminent domain authority, so long as they meet other statutory require-

239, at 88–90 (discussing first refusal rights and their impact on interstate competition to build regional transmission lines); *see also supra* Part III.C.

ments that ensure the state can fully consider the environmental and economic costs and benefits of the line. Some states have moved in this direction, but many states have not. Our study of state siting and eminent domain regimes shows how, in the absence of state legislative and PUC actions to reduce barriers to out-of-state stakeholders, project developers who are not able to avail themselves of state siting or eminent domain approval are in a strong position to bring dormant Commerce Clause challenges to many existing state laws, PUC decisions, and court decisions denying market entry or eminent domain authority to out-of-state applicants.

A. SCOPE OF THE CONSTITUTIONAL REQUIREMENT TO CONSIDER OUT-OF-STATE BENEFITS

We have argued for a revitalized approach to dormant Commerce Clause review aimed at reducing the kinds of regulatory holdouts that can impair coordination in energy policy and markets. This approach requires courts to evaluate whether state siting and eminent domain regimes allow for consideration of benefits beyond a particular state's jurisdiction. The approach has doctrinal implications: it opens up the possibility for challenges based on evidence of a significant discriminatory effect, requires states to provide a justification for discriminatory approaches, and also requires states to show that any discriminatory regimes are narrowly designed to achieve this purpose. Even where there is not a significant discriminatory impact, it also challenges regulators to articulate non-illusory reasons for nonreciprocal differences in procedures and considerations. Under such an approach to dormant Commerce Clause review, courts would focus on whether the political and regulatory process under which decisions are made allows for some consideration of benefits that are not based solely on in-state interests. We also see courts as having some role in evaluating the legitimacy of state justifications, but only insofar as those claims of benefits do not meet the threshold for being legitimate and non-illusory. Importantly, our proposal is not a roving invitation for reviewing courts to balance or engage in cost-benefit analysis themselves. In this sense, it addresses objections to dormant Commerce Clause review raised by those who are concerned about the institutional capacity of courts to second-guess the policy choices of politically accountable state

decision makers,[260] or the incommensurability problem presented with cost benefit balancing by judges.[261]

Our approach to revitalizing dormant Commerce Clause doctrine in reviewing state energy infrastructure siting regimes may appear to be in tension with the spirit, if not the results, of some recent cases addressing constitutional challenges to state climate change initiatives and renewable energy programs. To date, when presented with dormant Commerce Clause challenges to initiatives to promote renewable and clean energy programs, reviewing courts have been largely deferential to state programs.[262] For example, in *Rocky Mountain*, the Ninth Circuit upheld California's low carbon fuel standard, applying a deferential approach to assessing the state's objectives in addressing climate change.[263] According to the Ninth Circuit, the state's objectives in addressing the carbon impacts of various fuels served to justify the differential impact on Midwestern fuel producers.[264]

As we highlight above, this approach serves to encourage state experimentation and flexibility in addressing the difficult problems presented with climate change. Indeed, some environmental law scholars praise such forms of "adaptive federalism," to the extent that they allow climate policy to flourish in states even when Congress and federal regulators have taken no action at all.[265] Shouldn't judicial deference to these kinds of pro-environment state regulatory programs be a cause célèbre for anyone concerned with the environment? And why shouldn't a reviewing court apply a similarly deferential approach to

260. *See supra* note 110 and accompanying text (citing Roberts Court decisions that raise concerns about unnecessary judicial supremacy in dormant Commerce Clause review).

261. *See, e.g.*, Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (noting the inappropriateness of a scale analogy or of balancing where there is incommensurability, because "[i]t is more like judging whether a particular line is longer than a particular rock is heavy").

262. *See supra* Part II.B. There are, of course, exceptions, but these seem largely limited to dicta, settled cases, or outlier district court opinions. *See supra* notes 159–61 and accompanying text.

263. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1107 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2874 (2014).

264. *Id.* at 1105–06.

265. *See, e.g.*, David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1827–31 (2008); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1102, 1158–61 (2009) (lauding "iterative federalism schemes" as "innovative regulatory mechanisms [which] can have the best of both worlds").

state decisions not to site interstate transmission lines—which also might be said to promote greater experimentation in state approaches to addressing energy issues? Our analysis of the holdout problem created by transmission line siting and eminent domain regimes shows why linking deference to federalism has only limited appeal.

To begin, it is not at all clear to us that *Rocky Mountain* is inconsistent with the approach to dormant Commerce Clause review that we advance in this Article. As the Ninth Circuit emphasized in its *Rocky Mountain* decision, in adopting its policies the State of California emphasized not only the benefits to firms and residents in the state, but it also placed a particular emphasis on the out-of-state benefits created by addressing the grave and difficult problems associated with carbon emissions.[266] The court even lauded California for not isolating the state's renewable fuel market.[267] This is exactly the approach we are urging in the evaluation of transmission line siting. As we have argued, state and local weighing of benefits beyond its borders serves to provide for a broader set of political process concerns in siting decisions and promotes the forms of interstate coordination reinforced by dormant Commerce Clause principles by helping to overcome the isolated parochialism reflected by holdouts. *Rocky Mountain* reinforces how the consideration of out-of-state benefits by a state can be considered as evidence that a state is not relying solely on protectionist motives in adopting an approach to promoting clean energy.

Nevertheless, although there are some definite parallels, dormant Commerce Clause review of interstate transmission line siting and eminent domain decisions is required to address a special type of problem that is not presented by new state renewable fuel standards. *Rocky Mountain* allowed the state to consider out-of-state benefits; but our approach to dormant Commerce Clause review would go even further, requiring the state or local government to allow for consideration of such benefits even where a legislature or regulator has failed to do so on its own. In the context of energy infrastructure, unlike state fuel standards, the necessity of coordination among regulators for any jurisdiction to succeed with its regulatory initiatives makes the consideration of out-of-state benefits even more essential. In the context of multi-jurisdictional energy infrastructure projects, a single state or local holdout can keep an infrastructure project from going forward. By contrast, with

266. *Rocky Mountain*, 730 F.3d at 1097.
267. *Id.* at 1092, 1096.

state renewable electricity or renewable fuel standards, coordination across jurisdictions is not necessarily a predicate to pursuing any particular state's regulatory goals. California, for example, can pursue its regulatory goals in addressing the carbon content of fuel consumed in California regardless of how Arizona or Wyoming regulates the carbon content of fuel. Although coordination may be desirable to advancing California's interests, from a broader regional or national policy basis, its renewable fuel program does not require coordination between adjacent states or rely on any type of interstate reciprocity.[268]

Yet another structural feature of energy infrastructure siting presents a unique concern for a dormant Commerce Clause challenge that new renewable energy requirements do not. Many energy infrastructure-siting regimes are steeped in longstanding (and sometimes even informal) traditions of local land use regulation or in siting statutes that predate the contemporary changes that have transformed energy industries.[269] This temporal mismatch between energy infrastructure siting regimes and the current issues facing the industry creates a particularly disturbing opportunity for incumbent monopolists who wish to use state laws to isolate themselves from interstate markets: such regimes allow regulators to hide behind the complacency of the status quo, sometimes even benefitting in-state monopolists at the expense of out-of-state firms seeking to compete in the provision of interstate energy infrastructure for power supply. This concern is of undoubtedly greater significance in assessing the federalism aspects of energy infrastructure siting than in assessing statutes of more recent vintage, such as state renewable energy requirements. The environmental and land use concerns that are sometimes used to justify continued state or local attention to siting transmission lines are not unimportant—and we are not arguing that they should be ignored or preempted by federal law—but courts also should not allow them to be used as a silent subterfuge to protect incumbent monopolists under outdated regulatory programs that

268. Some renewable energy programs may be more steeped in coordination or reciprocity between states than others. For example, some state RPS programs rely on regional coordination in renewable energy certificate trading. To the extent that a state RPS program depends on this kind of coordination and states in the same regional market fail to recognize nonreciprocal terms in their renewable electricity regulations, a similar dormant Commerce Clause analysis would be appropriate in evaluating state renewable energy program features that pose a similar holdout challenge.

269. This particular concern of fitting new wine into old bottles with transmission line siting is also discussed in Brown & Rossi, *supra* note 1.

no longer fit the reality of interstate energy markets.

Nor should regulators be allowed to hide behind legislative action or to claim that their permitting and siting regimes should escape constitutional scrutiny because they are not authorized to act. As has been recognized in other constitutional contexts, the failure of government regulators to act against the backdrop of changing circumstances can still constitute a constitutional violation. Christopher Serkin, for example, argues that the ecological threat presented by sea level rise may either require the government to act to address it or, if it fails to do so, pay damages under the Takings Clause.[270] Similarly, it does not seem relevant to whether there is a dormant Commerce Clause violation if legislators or regulators fail to act to approve a line at all. Instead the question is whether existing state siting and permitting regulatory regimes, as reflected in the laws and practices of a state, present an obstacle to the federalism values the doctrine is designed to promote. A dormant Commerce Clause violation can just as readily occur through a process that presents a structural obstacle to out-of-state firms[271] as it can through the more conventional approach of challenging the discriminatory aspects of a substantive decision by state regulators.

B. PROMOTING COORDINATION BY ELIMINATING DISCRIMINATORY BARRIERS

As explained in Part III, the energy infrastructure siting regimes in states around the country contain significant barriers that prevent out-of-state developers or merchant transmission lines from receiving approval, including eminent domain authority, to build lines, or from exercising the same procedural rights as incumbent utilities in the siting process. This serves as a significant obstacle to entry in interstate electricity and electricity infrastructure markets. These barriers include: (1) regulator refusals to site lines based on a narrow assessment of benefits; (2) refusing to grant eminent domain authority to a transmission line or other energy infrastructure project based on post-*Kelo* legislation or by requiring local need to establish "public use"; or (3) explicit bans on out-of-state applicants for transmission line siting permits or use of eminent domain au-

270. *See* Christopher Serkin, *Passive Takings: The State's Affirmative Duty To Protect Property*, 113 MICH. L. REV. 345, 390 (2014).

271. The U.S. Court of Appeals for the Fourth Circuit recently recognized this as potentially problematic in the health certificate of need approval process. *See supra* Part III.C and accompanying text.

thority in the state, or other differences in procedural rights.[272] This Subpart first considers actions states can take to eliminate some of the more significant substantive legal barriers under state law to facilitating coordination in interstate energy markets and to ensure that the decisions of regulators do not run afoul of the dormant Commerce Clause. It then suggests ways in which states can correct the procedural aspects of state siting and eminent domain laws that serve to limit any new market entry to incumbent utilities, effectuating a form of structural discrimination against interstate commerce. In both instances, we maintain, would-be applicants have a compelling basis for bringing challenges to state regimes under the dormant Commerce Clause, providing state legislatures and regulators a propitious opportunity to reform and clarify their laws to correct any constitutional deficiencies.

1. Correcting the Myopic Stance in Siting and Eminent Domain Decisions

State regulators often balance factors in making decisions to approve new energy infrastructure projects in ways that that impose a significant discriminatory burden on interstate commerce. To take a common example discussed above, state siting laws will often explicitly limit a regulator's considerations in assessing "need" to in-state interests—as may occur when a state regulator is charged by statute to favor the protection of native load customers—presenting deficiencies under dormant Commerce Clause doctrine. Where such statutes expressly foreclose any consideration of out-of-state benefits, or limit the "need" determination to benefits for in-state customers only, they are particularly likely to face dormant Commerce Clause challenges. States that continue to use siting statutes that make "need" determinations dependent on only in-state benefits should make revising their laws to allow for a broader range of considerations a high legislative priority, given their legal vulnerability.

If a state's legal regime completely forecloses any consideration of out-of-state benefits, this is especially problematic under the dormant Commerce Clause. As we show above, even regimes that leave regulators discretion to weigh different costs and benefits can be successfully challenged where regulators fail to balance any out-of-state considerations in making a decision. Open-ended discretion to regulators may, in theory, allow

272. *See supra* Part III.

for consideration of a broader range of benefits in approving "need" based on the public interest. However, to the extent that regulators exercise their discretion narrowly and refuse to consider any out-of-state benefits, instead focusing entirely on in-state beneficiaries in making their public interest determinations, their decisions may be legally vulnerable.

For those states with ambiguous statutory language—leaving regulators discretion to adopt a narrow determination of "need" or "public use" that excludes regional need or regional benefit—state legislatures can amend their statutes to clarify that it is appropriate and, in fact, required, for PUC regulators and courts to consider regional need and regional use along with local need and local use in their decision-making process. This would address the dormant Commerce Clause deficiencies in the Arizona Corporation Commission's rejection of the proposed Southern California Edison interstate transmission line and the Mississippi and Florida cases discussed in Part III that excluded regional need and regional public use in barring out-of-state project applicants and the interstate transmission lines in question.[273] State regulators or courts can readily accomplish the same result without new legislation by recognizing regional need and regional use in interpreting ambiguous statutes to avoid dormant Commerce Clause violations, as the Illinois Court of Appeals did in the *Pliura Intervenors* case.[274] State courts considering such language would be well advised to consider this as a straightforward application of a canon to interpret ambiguous language to avoid constitutional deficiencies.

With regard to post-*Kelo* barriers to economic development projects, some state "public use" statutes limit or ban the use of eminent domain for solely economic development purposes, such as the Missouri law at issue in the *Jackson* case.[275] After *Kelo*, how a state defines "public use" for Takings Clause purposes is generally subject to considerable legislative deference. However, our analysis highlights how state definitions of "public use" should not escape the scrutiny of federal courts, especially for large-scale energy infrastructure projects that require the approval of multiple jurisdictions. Instead, we maintain that, at some level, the dormant Commerce Clause must constrain states from adopting unduly narrow assessments of "public use" if they limit or ban interstate infrastructure devel-

273. *See id.*

274. 942 N.E.2d 576 (Ill. App. Ct. 2010).

275. 398 S.W.3d 472, 476 (Mo. 2013); *see also supra* notes 207–12 and accompanying text.

opment. In other words, even after *Kelo*, the dormant Commerce Clause provides an independent constitutional constraint on a state's definition of "public use."

One objection to imposing a dormant Commerce Clause constraint on state definitions of "public use" may be to argue that state or local eminent domain powers are a sovereign function and therefore exempt from dormant Commerce Clause scrutiny under the market participant exemption.[276] However, the mere fact that a state or local government exercises its power as a sovereign, such as invoking eminent domain authority, does not limit the application of the dormant Commerce Clause.[277] To take one example, zoning is a well-accepted sovereign power of state and local governments. Yet it has been held that a state or local government cannot appeal to its status as a sovereign in exercising zoning powers to prohibit a retail chain, such as Starbucks, from operating in its jurisdiction through a discriminatory zoning ordinance.[278] Certainly, the market participant doctrine can serve as an established exception to the dormant Commerce Clause where the state itself acts as a consumer or producer in an interstate market, but the Court consistently has subjected sovereign functions such as taxation to dormant Commerce Clause scrutiny.[279] Eminent domain authority is no different, and it is thus appropriate to apply the dormant Commerce Clause to the assessment of "public use" by state courts, legislatures, and regulators—especially in scenarios where there is reason to be concerned about adverse effects

276. Thanks to Ilya Somin for raising this point with us.

277. Indeed, the Court has recognized limits to the market participant exception when states exercise sovereign functions. *See* Sporhase v. Nebraska *ex rel*. Douglas, 458 U.S. 941 (1982) (holding that a state's property interest in water does not limit dormant Commerce Clause scrutiny of a ban on the export of water without first obtaining a permit).

278. *See* Cachia v. Islamorada, 542 F.3d 839, 842 (11th Cir. 2008) (finding unconstitutional a local ordinance that would have prohibited chain retail establishments, such as a Starbucks coffee shop).

279. *See supra* Part II, which discusses tax cases such as *General Motors v. Tracy*, 519 U.S. 278 (1997). Even if state ownership and control were recognized as the formal touchstone for application of dormant Commerce Clause doctrine, there still would need to be some qualifications to its application. Clearly, if a state itself owns a public road, this would not allow the state to limit its use by out-of-state trucks—a state may be able to avail itself of the market participant exemption when it is one of many participating in the market, but courts still seem wary of extending this exemption to dormant Commerce Clause doctrine where the state owns the entire market or controls all of the means of commerce in a market. *See, e.g*., Coenen, *supra* note 168, at 450 (citing state-owned highways as an example of the principle that states cannot "deny *all forms* of state-made benefits to outsiders").

on interstate coordination.

Post-*Kelo*, as state legislatures have renewed their attention to spelling out what is and is not a public use, the resulting enactments vary considerably. To their credit, many post-*Kelo* enactments expressly recognize traditional common carrier or regulated utility projects as automatically qualifying for "public use." At first blush, this kind of a safe harbor would appear to be designed to address the kind of problem we have highlighted. However, if through ambiguity this safe harbor is somehow tethered to a narrow understanding of benefits by the utility regulator, there is still a possibility that, even in a state that enacts a common carrier or public utility safe harbor, such a regime can impose a significant burden on interstate commerce and present the same problems as an overly narrow definition of "need" in siting statutes. In Kentucky, for example, despite a defined apparent safe harbor in post-*Kelo* legislation for common carriers and utilities, state courts still seem to interpret "public use" narrowly to exclude an entity that is not a utility delivering energy to customers in the state.[280] To avoid such issues, states should consider expressly recognizing as a "public use" any facility that is required to transport energy as a common carrier or utility in interstate commerce, even if that transport is not regulated by the state. To the extent that this definition of "public use" is tied to federal regulation of oil pipelines or electric transmission lines to achieve goals such as energy reliability, it certainly does not threaten the ability of a state legislature to continue to address the kinds of economic development purposes with which *Kelo* was most concerned.

Other post-*Kelo* laws that ban economic development leave still more ambiguity. To the extent that this is the case, a party bringing a dormant Commerce Clause challenge should be allowed some opportunity to present evidence of whether a regime significantly burdens interstate commerce. In *Jackson*, the post-*Kelo* statute was applied to an in-state port authority and the court did not find any preference for in-state economic development over out-of-state or regional economic development.[281] Any burden on interstate commerce on these facts was thus incidental, at most, and subject to more deferential review. This would therefore be evaluated under the more deferential *Pike* test, which weighs the benefits of the ban and the burdens on interstate commerce. As we have argued, however, even under *Pike*, an assessment of benefits for such a regime

280. *See supra* note 241 and accompanying text.

281. Missouri *ex rel*. Jackson v. Dolan, 398 S.W.2d 472, 478–83 (Mo. 2013).

can still be illusory. At a minimum, a jurisdiction would be required to show it did not foreclose the consideration of out-of-state benefits in adopting or applying the "public use" definition. But it will prove difficult for challengers to win such cases without good evidence that the state legislature had a discriminatory purpose or was seeking to foreclose any evaluation of broader benefits. When state legislatures enacted their post-*Kelo* bans (mostly in the late 2000s), most state legislatures were focused on local government exercise of eminent domain for urban and suburban redevelopment and perceived abuses of that authority—much like the facts in *Kelo* itself. It is unlikely state legislatures even contemplated how the new legislation might apply to efforts to build energy transportation infrastructure.

The best way for states to avoid these kinds of federalism challenges to eminent domain authority is through legislative clarity in statutory definitions of "public use." States concerned with limiting abuses of economic development post-*Kelo* should focus on correcting actual abuses of their eminent domain process—whether by governmental entities or private parties—rather than using the occasion for new legislation to expand bans on new market entrants. Indeed, such bans do nothing to hinder abuses of eminent domain by government actors or by the most powerful private energy developer interests in a state, which is typically an incumbent private monopolist. To avoid dormant Commerce Clause problems the focus should be on ensuring that any regulator's failure to site pipelines or transmission lines does not effectuate a significant burden on interstate commerce, and that the consideration of out-of-state benefits associated with a line is not completely prohibited in post-*Kelo* eminent domain statutes. Clarifying the availability of a "public use" safe harbor for interstate infrastructure facilities that are regulated as common carriers or in the public interest at the federal level seems to be the safest path for a state to avoid dormant Commerce Clause challenges to post-*Kelo* eminent domain statutes.

2. Fixing Procedures that Run Afoul of Dormant Commerce Clause Principles

Perhaps many states will chose to retain the status quo in siting and eminent domain law and practices out of inertia, to protect incumbent utilities, or as a result of political pressure by in-state actors who either want to retain a competitive advantage in interstate energy markets or wish to limit the con-

struction of such infrastructure for environmental or other reasons. Indeed, as described in Part III, in recent years, several states have enacted new right-of-first-refusal laws that give incumbent utilities a significant advantage over merchant transmission lines in obtaining permission to construct regional transmission lines in those states. The approach to dormant Commerce Clause review that we advance in this Article offers out-of-state firms an option to do more than only challenge the substance of a state decision, as routinely occurs in dormant Commerce Clause litigation. We also propose that disfavored applicants be allowed to use the dormant Commerce Clause to challenge procedures that expressly exclude them from applying for transmission lines permits or exercising eminent domain, as well as structural processes that impose a significant burden on interstate commerce.

As noted in Part III, many states have explicit statutory bans on out-of-state applicants applying for transmission line siting permits or exercising eminent domain authority. These statutes generally state that only "public utilities" can apply for permits or exercise eminent domain authority, thus preventing merchant transmission lines and other out-of-state applicants from building and operating interstate transmission lines that cross the state. In light of the regional nature of the electric grid, the need for transmission expansion throughout the country to meet reliability and clean energy goals, and the opportunity for states to benefit from electricity exports or imports, particularly renewable energy exports and imports, it is critical for states to address these issues.

To the extent that there are express bans on out-of-state applicants or laws that limit participation in the market for building new interstate transmission lines or exercising eminent domain to incumbent utilities, such laws may well discriminate against interstate commerce. For instance, Maryland law states that only "electric companies" may build transmission lines in the state and may only exercise eminent domain if the power is needed to serve Maryland electric customers;[282]

282. MD. CODE ANN., PUB. UTIL. § 7-207(b)(3) (2015). This statutory section also contains a right of first refusal in favor of the incumbent utility in the portion of the state where the line is proposed. *Id.*; *see also* MD. CODE ANN. PUB. UTIL., § 7-103(a) (1998) ("An electric company incorporated in Maryland may . . . construct a power line . . . ."); MD. CODE ANN., PUB. UTIL. § 1-101(h)(1) (2015) ("'Electric company' means a person who physically transmits or distributes electricity in the State to a retail electric customer."); MD. CODE REGS. 20.79.04.01 (2015) (setting forth requirements of application for building a transmission line, including the need for the project to meet demands for

Nebraska law permits only an "electric supplier" defined as a public power district, municipality, or cooperative to exercise eminent domain for transmission lines;[283] and New Hampshire grants eminent domain authority for transmission lines or related infrastructure only to a "public utility" where necessary to meet "reasonable requirements of service."[284]

Moreover, dormant Commerce Clause case law would appear to support standing by merchant transmission operators and others who would benefit from an enhanced transmission line market to challenge such laws even without the need to go through the application process and obtain a denial. In general, courts have found that both in-state and out-of-state market participants may challenge state laws on dormant Commerce Clause grounds if they can show the law's restrictions limit the plaintiff's access to the interstate market in question.[285] However, to the extent standing or ripeness may be an issue, the out-of-state applicant or non-incumbent utility can apply for a permit or seek to exercise eminent domain and then, if there is a denial, can argue on appeal that the denial violates dormant Commerce Clause principles. This could have been a basis for appeal in the Arizona case involving Southern California Edison if the out-of-state utility had chosen to appeal the Arizona decision.

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service and impact on the economy of the state); Maryland Office of People's Council, *Regulatory Activities—Electricity—Significant Cases*, MARYLAND http://www.opc.state.md.us/RegulatoryActivities/Electricity/SignificantCases .aspx#PSC_Case_No_9223 (stating, in connection with an interstate PATH transmission line proceeding, that "[t]he PSC agreed with OPC's position that Maryland law permits only an electric company—that is, a company that transmits or distributes electricity to retail customers—to apply for and receive a CPCN, and that Potomac Edison could not just file on behalf of PATH, an affiliate company").

283. NEB. REV. STAT. § 70-301 (2009); *see id.* §§ 70-1014.02(1)(a) (2011), 70-1014.02(6) (2011), 76-710.04(3)(a) (2010).

284. N.H. REV. STAT. ANN. § 371:1 (2012).

285. Florida Trans. Serv., Inc. v. Miami-Dade Cty., 703 F.3d 1230, 1256 (11th Cir. 2012) (summarizing numerous Supreme Court dormant Commerce Clause decisions, including standing requirements, and stating that "the dormant Commerce Clause may bar . . . laws that protect local economic interests and squelch outside competition, even where in-state *and* out-of-state companies are affected"); Freeman v. Corzine, 629 F.3d 146 (3d Cir. 2010); S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (setting forth constitutional standing requirements as follows: first, the plaintiff must have suffered "an injury in fact," meaning that the injury is (a) "concrete and particularized" and (b) "actual or imminent, not 'conjectural' or 'hypothetical'" (quoting Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)); second, the injury must be traceable to the defendant's challenged action; third, it must be "likely" rather than "speculative" that a favorable decision will redress the injury).

Indeed, as discussed in Part III, there is some precedent that states cannot discriminate against out-of-state entities in connection with the exercise of eminent domain to build energy transportation infrastructure. For instance, in *Kern River Gas Transmission Co. v. Clark County*, the U.S. District Court for the District of Nevada held that a statute that limited eminent domain authority for natural gas pipelines to projects that promoted "local" concerns rather than the interests of interstate commerce violated the dormant Commerce Clause.[286] Similarly, in *Dakota, Minnesota & Eastern Railroad Corp. v. South Dakota*, the U.S. District Court for the District of South Dakota found that a South Dakota statute that allowed eminent domain only when it had the purpose of benefitting South Dakota interests discriminated against interstate commerce and violated dormant Commerce Clause doctrine as applied to a proposed interstate railway line.[287]

For states with express bans on out-of-state applicants, a court would likely apply strict scrutiny to the law in question, as the courts did in the Nevada and South Dakota cases just described, and it would be very difficult for states to demonstrate that these bans on out-of-state applicants are for a legitimate, non-protectionist purpose and that there are no less discriminatory means that would advance this purpose.[288] Indeed, for most states, the reason for the bans is to protect incumbent, in-state utilities—if there was a reason at all rather than merely an assumption decades ago that only public utilities would build transmission lines. With regard to whether there are less discriminatory means of ensuring that transmission lines are built only when there is a public need and only for a public use,

286. Kern River Gas Transmission Co. v. Clark Cty., 757 F. Supp. 1110, 1118–19 (D. Nev. 1990) ("[A] state statute requiring the exercise of eminent domain over public lands to be dependent on whether it is 'necessary' to local concerns, rather than the concerns of interstate commerce, is a clear violation of the Commerce Clause.").

287. Dakota, Minn. & E. R.R. Corp. v. South Dakota, 236 F. Supp. 2d 989, 1016 (D.S.D. 2002), *aff'd in part, rev'd in part on other grounds*, 362 F.3d 512 (8th Cir. 2004) (holding that a statute stating that the "exercise of the right of eminent domain is a public use consistent with public necessity only if the use of eminent domain has as its purpose providing railroad transportation to shippers in South Dakota, for commodities produced, manufactured, mined, grown, used, or consumed in South Dakota" violates dormant Commerce Clause doctrine because it "purposefully discriminates against out-of-state commerce on its face"); *see also* Saxer, *supra* note 8, at 1505, 1538–40 (discussing the *Kern River* and *Dakota, Minnesota & Eastern Railroad* cases).

288. *See supra* Part II.A.1 (discussing the burden on states to justify market bans that discriminate against interstate commerce or impose a significant burden on out-of-state participants in interstate markets).

in each case, state regulators can ensure they have sufficient regulatory oversight over the out-of-state applicant, by requiring them to apply for status as a state-regulated "independent transmission company" or similar entity and requiring them to meet the same standard as incumbent utilities to build the line or exercise eminent domain authority. Moreover, any given transmission line has the same potential impacts on private property rights in the state regardless of whether the line is built by an incumbent utility or a merchant transmission company, again, assuming the same regulatory oversight of in-state and out-of-state actors. Even if a court were to find that such laws were nondiscriminatory, the same factors above would appear to weigh in favor of a dormant Commerce Clause violation. It is unclear how the state benefits from excluding out-of-state applicants other than for the discriminatory purpose of protecting incumbent utilities and the burdens of such exclusion, in the form of burdening state efforts to meet state RPS requirements and impeding development of renewable electricity, are significant.

With regard to state right-of-first-refusal laws, which give a hard or soft preference to incumbent utilities in siting and permitting transmission lines, FERC has stated expressly that its Order No. 1000 does not invalidate state preferences but instead merely limits their use and application in FERC jurisdictional tariffs and agreements.[289] FERC found that a federal right of first refusal has "the potential to undermine the identification and evaluation of more efficient or cost-effective solutions to regional transmission needs, which in turn can result in rates for Commission-jurisdictional services that are unjust and unreasonable or otherwise result in discrimination by public utility transmission providers."[290] This speaks very clearly to the right of first refusal in FERC-approved tariffs and as a part of the tariff filing in RTO markets. However, FERC did not preempt or take a clear position on state laws that contain a right of first refusal—in fact it expressly stated it did not intend to "limit, preempt, or otherwise affect" any state or local law regarding the construction of transmission facilities, including "authority over siting or permitting of transmission facilities."[291] To the extent that these are not incorporated into tariffs filed with FERC, they are not preempted or otherwise

289. Order No. 1000, FERC Stats. & Regs., 136 FERC ¶ 61,051, 18 C.F.R. pt. 253 (2011).

290. *Id.*

291. *Id.* pt. 227.

affected by Order No. 1000. In fact, FERC itself recognized "that removing federal rights of first refusal in Commission-jurisdictional tariffs and agreements will not eliminate all obstacles to transmission development that may exist under state or local laws or regulations and, therefore, may not address all challenges facing non-incumbent transmission development in those jurisdictions."[292]

As FERC Chairman Bay has recently noted,[293] it remains an open question whether the in-state preference in a state right of first refusal law conforms to dormant Commerce Clause principles. If such a right of first refusal is directly provided to a municipal utility or government-owned entity, in effect the law is providing a preference to the government, it thus becomes a "market participant," and that removes its regulatory treatment from any dormant Commerce Clause scrutiny. However, as FERC recognized, to the extent some states continue to allow private incumbent utilities a right of first refusal, these can continue to serve as a significant obstacle to transmission line development in interstate commerce. We believe that there are compelling arguments that any conclusive state right of first refusal favoring incumbent firms, in the form of a non-rebuttable presumption, runs afoul of dormant Commerce Clause principles. By providing incumbent utilities a right of first refusal to build high-voltage transmission lines, whether or not these are a part of regional transmission plans, states act to discriminate against merchant lines and other out-of-state actors that would potentially create a more vibrant interstate power market and reduce electricity costs for states and regions, particularly for renewable energy.[294] Regardless of the validity of state rights of first refusal under Order No. 1000 as matter of federal preemption, such laws appear to constitute a facial violation under dormant Commerce Clause doctrine. A merchant transmission or other non-incumbent utility company that does not qualify for a first refusal preference and is not given the opportunity to build a regional transmission line under the same criteria as an incumbent utility could seek to challenge any line approved under such a preference. States seeking to avoid constitutional challenges to their siting regimes would be well advised to revisit these kinds of preferences for

292. *Id.* pt. 257.

293. *See supra* note 21 and accompanying text.

294. Ill. Commerce Comm'n v. FERC, 721 F.3d 764, 774–75 (7th Cir. 2013) (discussing the importance of renewable energy, transmission grid expansion, and grid reliability).

private incumbent utilities—and to ensure that, to the extent that any in-state priority exists at all, it is rebuttable and serves some legitimate purpose.

More generally, the examples we discuss in this Article highlight how states must be attentive to their eminent domain and siting procedures to ensure that the framework of state laws and practices does not, in practical effect, impose a significant burden on interstate commerce. The particular interstate coordination problem with transmission siting shows how entrenched state procedures can present serious obstacles for new entrants in interstate energy markets. Even if a state does not ban out-of-state applicants, the participation rights afforded in the application and hearing process may systematically disfavor out-of-state applicants. A process that routinely favors the ability of in-state incumbents to object to new proposals may present a form of structural discrimination against out-of-state applicants, and is subject to a facial challenge under dormant Commerce Clause doctrine. For example, if a challenger is able to show a disparity in outcomes between incumbent and out-of-state firms that imposes a significant burden on interstate commerce, a state would need to show a legitimate public purpose and the availability of no less restrictive procedural alternative in order for its program to stand. It may prove difficult to bring facial challenges to existing regulatory procedures, as it will inevitably require extensive factual development by challengers, but evidence of the discriminatory burden such procedures impose in different scenarios can better allow state regulatory procedures to conform to dormant Commerce Clause principles.[295]

By eliminating incumbent rights of first refusal and reforming intervention rules to accommodate out-of-state firms on neutral terms, states may better ensure an even-handed siting approval process for new transmission lines. In many cases, the state statutes limiting siting permits or eminent domain authority to public utilities were drafted many decades ago when merchant transmission lines and regional transmission organizations did not exist, wind and solar energy for electricity was negligible, transmission lines were built exclusively by public utilities that also provided in-state retail service, and the need for interstate electricity markets and transmission was

295. *See, e.g.*, Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 ILL. L. REV. 145 (2011) (discussing the role of foundational facts to understanding doctrine, its underlying assumptions, and its evolution and change).

not viewed as critical for reliability and clean energy goals. For some states, inviting more participants to the decision-making process for constructing and operating transmission lines is in their economic interest—if not the interests of their incumbent utilities—particularly where a state has ample wind and solar resources that would benefit from energy exports, or faces high relative electricity prices (as does, for example, California) that could benefit from energy imports. To the extent procedural features such as bans on out-of-state applicants are merely a function of obsolete laws on the books, we would encourage state legislatures to revise those laws to remove language limiting applicants to incumbent utilities, and grant siting and eminent domain authority to all transmission lines that meet the criteria to obtain a certificate of need. The same is true for those states where the statute is ambiguous as to whether out-of-state applicants and merchant lines can seek a siting permit or exercise eminent domain. Many of these states, which constitute a majority, may make reference to "utilities" as applicants, which does not make clear whether a merchant line can apply for some sort of "utility" status for purposes of building the line. These states can follow the lead of Montana, which clarified that all transmission lines may seek siting permits and exercise eminent domain authority, or Florida, which specifically includes "independent transmission systems" within the definition of an "electric utility" eligible to apply for siting permits and exercise eminent domain authority.[296]

Through legislative, regulatory, and judicial actions, states can eliminate laws on their books that raise dormant Commerce Clause suspicions, and avoid future procedures that unconstitutionally limit interstate transmission lines and entry to interstate markets by out-of-state applicants. In each of the situations we describe, there is no legitimate reason that out-of-state firms or merchant transmission companies proposing to build interstate transmission lines should not be able to apply for certificates of need and exercise eminent domain authority if they can meet the economic, environmental, and other requirements that in-state actors must meet in order to build such lines. In this sense, state PUCs and state courts still retain significant authority to reject an application for economic or environmental reasons or find there is no public use for eminent domain purposes based on market factors or other reasons—but not based on whether the applicant is an incumbent utility or a new entrant coming from outside of the state. Thus,

296. FLA. STAT. § 403.522(12) (2015); *see also supra* note 228.

our approach retains state authority over physical energy infrastructure siting and eminent domain while removing existing state barriers that violate federalism principles under dormant Commerce Clause doctrine.

CONCLUSION

It would be a mistake for federal courts reviewing state regulatory regimes to embrace blanket deference under dormant Commerce Clause principles, especially in contexts where multi-state coordination is necessary for energy transportation projects and climate initiatives to succeed. Such an approach only serves to encourage more state and local holdouts in addressing new energy infrastructure and challenging problems such as climate change, and is not true to federalism's core value of promoting interstate coordination.

Revitalizing dormant Commerce Clause review in this context would allow courts to ensure that, at the very minimum, states allow for some consideration of out-of-state benefits in siting and eminent domain regimes. By giving a voice to consumers and firms who otherwise would lack a role in a state's political process, our proposed approach addresses the regulatory holdout problem and helps to reduce the likelihood that states will barricade themselves from energy infrastructure projects and interstate markets. More than approaches that link judicial deference and federalism and encourage each state to go it alone, our approach encourages states to coordinate with each other in the consideration of policies that produce benefits that transcend jurisdictional boundaries. Perhaps more than any other example where dormant Commerce Clause principles have been used to question state laws, the examples of siting and eminent domain in energy transportation infrastructure highlight how judicial scrutiny of state procedures and participation rights can also facilitate better coordination in interstate commerce.

Our approach is sensitive to concerns raised by critics of dormant Commerce Clause review, including some current Supreme Court Justices, who are skeptical about the institutional capacity of courts to balance costs and benefits in reviewing state regulations. Only a state legislature or regulator will be able to weigh the costs and benefits of a project and make the ultimate political choice to participate or not participate in a multi-state infrastructure project. This is a state prerogative and recognizes that politicians and regulators must evaluate the interests of citizens, landowners, and the environment as

they balance various considerations. But state regulators and courts should not be allowed to hide behind obsolete laws or practices, including entrenched and established procedures, that limit who can propose an interstate transmission line, who can intervene to oppose it, or what can be considered in weighing its merits. At a minimum, we maintain that a decision-making framework must allow legislators or regulators to make a choice and that this choice must make some legitimate effort to balance the benefits of regional energy infrastructure and climate initiatives against the backdrop of interstate coordination. By contrast, applying strong judicial deference to state regulators under the banner of federalism only allows outdated regulatory regimes, practices, and procedures to encourage isolationism and parochialism and serves to obstruct interstate coordination.

A revitalized approach to dormant Commerce Clause review also has some very practical consequences for state utility laws as well as the practices of regulators. It highlights the potential legal vulnerability of many extant state siting and permitting regimes, and especially procedures that are designed to favor the proposals or concerns of incumbent monopolists. It also suggests how regulators and lawmakers can improve these regimes to better advance the goals of federalism and interstate power markets. Energy markets today have evolved far beyond the traditional utility model that developed in the twentieth century. In previous eras (when interstate power markets were very limited) it may have been consistent with federalism to allow states to isolate their power supply and demand from neighboring jurisdictions by embracing protections for incumbent utilities in the planning and construction of transmission lines. However, given the importance of interstate coordination to the operation of modern energy markets, state and local governments should no longer be allowed to use existing utility and permitting laws to isolate energy markets and imperil the values of federalism.