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COMMENT

Pork and Windmills: Extraterritoriality Is Dead and Cannot Be Deployed to Invalidate Renewable Portfolio Standards

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Abstract. As commonly understood, the U.S. Supreme Court has interpreted the Commerce Clause to include a "dormant" component which prevents states from enacting laws that discriminate against or substantially burden interstate commerce. Through a less frequently explored strand of Dormant Commerce Clause jurisprudence, the Court has weighed in on whether and in what circumstances a state law may reach beyond the enacting state's borders. Three of the Court's decisions represent the high-water mark of this extraterritoriality principle. The extraterritorial effects test, as conveyed in these three decisions, implicates the broadest range of state statutes and stands for the proposition that statutes with extraterritorial reach "are unconstitutional virtually per se." However, in the aftermath of these decisions, courts and scholars have disagreed as to what circumstances implicate the extraterritoriality principle.

Two U.S. Courts of Appeals disagree as to whether the extraterritoriality principle applied in their review of state Renewable Portfolio Standards ("RPSs"). Many states have enacted RPSs to transition their electricity supply to renewable generation methods. Although occasionally varying in form, these laws typically require utility companies to provide customers with electricity generated from renewable sources. However, because the flow of electricity traverses state lines, plaintiffs argued that these laws ran afoul of the Dormant Commerce Clause's extraterritoriality principle. The Court of Appeals for the Eighth Circuit agreed, while the Court of Appeals for the Tenth Circuit rejected this argument.

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The U.S. Supreme Court's 2023 decision in National Pork Producers Council v. Ross *clarified key questions about the applicability of the extraterritoriality principle. Considering recent guidance, this Comment will use Virginia's RPS to demonstrate that RPSs do not implicate the three key extraterritoriality decisions and that a Dormant Commerce Clause challenge to such law based on extraterritoriality would fail.*

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Introduction

Thirty States and the District of Columbia have enacted Renewable Portfolio Standards ("RPSs") in an effort to transition electric utilities to renewable energy sources.[1] These laws have implemented varying regulatory schemes affecting nearly 60% of American electricity sales.[2] RPSs typically function by requiring a state's electric utility companies to supply customers with a certain percentage of electricity from renewable sources.[3] However, electric utility companies maintain regional grids, and the flow of electricity actively traverses state lines.[4] As such, the validity of RPS statutes has been challenged under the Dormant Commerce Clause for impermissibly regulating beyond a state's boundaries.[5]

The Commerce Clause grants Congress the authority to "regulate Commerce . . . among the several States."[6] The U.S. Supreme Court has interpreted this grant of authority as forbidding states from passing laws that discriminate against or otherwise burden interstate commerce.[7] Additionally, at times, the Court has adopted a "virtually *per se*" rule against state laws that have extraterritorial reach by affecting commerce beyond a state's borders.[8] But these cases arose in specific and factually similar contexts.[9] Further, this extraterritoriality principle was

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[1] Anthony Sacco, Comment, *Renewable Portfolio Standard Outcomes and the Dormant Commerce Clause*, 51 ENV'T. L. REP. 10947, 10948, 10950 (2021) (citing GALEN BARBOSE, LAWRENCE BERKELEY NAT'L LAB'Y & U.S. DEP'T OF ENERGY, U.S. RENEWABLES PORTFOLIO STANDARDS—2021 STATUS UPDATE: EARLY RELEASE 9 (2021), https://perma.cc/JCR9-MNKQ); *see also* Kevin Todd, Note, *The Dormant Commerce Clause and State Clean Energy Legislation*, 9 MICH. J. ENV'T. & ADMIN. L. 189, 192–93 (2019).

[2] Sacco, *supra* note 1, at 10950.

[3] *Id.* at 10947–48.

[4] *See* Todd, *supra* note 1, at 199 (citing *Electric Power Markets: National Overview*, FED. ENERGY REG. COMM'N, https://perma.cc/HM9J-VHB8); 18 C.F.R. § 35.34(c) (2024).

[5] *See infra* Part II.

[6] U.S. CONST. art. I, § 8, cl. 3.

[7] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824); Pike v. Bruce Church, Inc., 397 U.S. 137, 141–42 (1970).

[8] Or. Waste Sys., Inc. v. Dep't of Env't Quality of Or., 511 U.S. 93, 99 (1994); *see, e.g.*, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 513 (1935); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 578–79 (1986); Healy v. Beer Inst., 491 U.S. 324, 336–37 (1989).

[9] *See* Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1174–75 (10th Cir. 2015) (citing Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003)).

infrequently drawn upon by courts.[10] Therefore, significant debate ensued as to the extraterritoriality principle's continued viability.[11]

Two circuit courts of appeals have assessed the validity of state RPSs under the Dormant Commerce Clause's extraterritoriality principle.[12] However, they came to opposite conclusions.[13] Then-Judge Neil Gorsuch, writing for the Court of Appeals for the Tenth Circuit in *Energy and Environmental Legal Institute v. Epel*,[14] held that Colorado's RPS did not constitute impermissible extraterritorial regulation.[15] Conversely, Judge James Loken, writing for a fractured panel of the Court of Appeals for the Eighth Circuit in *North Dakota v. Heydinger*,[16] invalidated Minnesota's RPS on extraterritoriality grounds.[17]

In 2023, the U.S. Supreme Court decided *National Pork Producers Council v. Ross*,[18] holding that there is no per se rule against extraterritorial reach and that the precedential value of the seminal extraterritoriality cases is limited to the factual circumstances from which they arose.[19]

Considering the Court's most recent guidance, the Dormant Commerce Clause's extraterritoriality principle does not provide viable means to invalidate a state's RPS. This Comment uses the Virginia RPS to demonstrate why the extraterritoriality principle does not support a Dormant Commerce Clause challenge to a recent RPS.

Climate concerns have motivated an effort to shift Virginia to renewable energy sources.[20] Virginia is home to significant tidewater-adjacent communities, and some critical military assets are threatened by sea-level rise and weather-event-related flooding.[21] In 2020, Virginia

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10 *See id.* at 1172 (stating the Supreme Court "has used [the] extraterritoriality principle to strike down state laws only three times"); North Dakota v. Heydinger, 825 F.3d 912, 919 (8th Cir. 2016) ("The Supreme Court has applied the extraterritoriality doctrine in relatively few cases.").

11 *Compare* Brannon P. Denning, National Pork Producers Council v. Ross*: Extraterritoriality Is Dead, Long Live the Dormant Commerce Clause*, 2022–2023 CATO SUP. CT. REV. 23, 23 (2023) [hereinafter Denning, *Long Live the Dormant Commerce Clause*], *with* Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 MARQ. L. REV. 497, 498–99 (2016).

12 *Epel*, 793 F.3d at 1175; *Heydinger*, 825 F.3d at 913, 919.

13 *Epel*, 793 F.3d at 1174–75; *Heydinger*, 825 F.3d at 922.

14 793 F.3d 1169 (10th Cir. 2015).

15 *Id.* at 1174–75.

16 825 F.3d 912 (8th Cir. 2016).

17 *Id.* at 922.

18 143 S. Ct. 1142 (2023).

19 *Id.* at 1165; *see also Epel*, 793 F.3d at 1174–75 (citing Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003)).

20 *See* Katherine Hafner, *Virginia Outlines Vision to Decarbonize Industries, Move to Clean Energy*, VPM (Feb. 23, 2024, 2:09 PM), https://perma.cc/7UL3-RUH5.

21 VA. INST. OF MARINE SCI., RECURRENT FLOODING STUDY FOR TIDEWATER VIRGINIA 90–93 (2013).

enacted the Virginia Clean Economy Act, requiring Appalachian Power Company ("APCo") to sell 100% renewable energy by 2050 and Dominion Energy to sell 100% renewable energy by 2045.[22]

However, a state-mandated transition to renewable energy also raises concerns. Virginia houses the Pentagon, many intelligence agencies, and the highest concentration of data centers in the United States, making the maintenance of a stable electric grid a matter of national security.[23] Moreover, neighboring West Virginia and Pennsylvania are among the top five net electricity exporters, while Virginia is the second-highest net importer of electricity in the country.[24] States that export significant energy from legacy generation methods fear negative industry impacts when frequent electricity importers switch to renewable energy. For example, North Dakota, a net energy exporter, sued neighboring Minnesota over its 2007 RPS,[25] and threatens to sue Minnesota again over its revised 2023 RPS.[26] Additionally, some in-state politicians and consumers worry that Virginia's RPS is likely to raise consumer prices as the Act allows utility companies to recover costs related to new zero-carbon generation and storage facilities through increased rates.[27]

These competing concerns demonstrate why some entities may consider a Dormant Commerce Clause challenge to the Virginia Clean Economy Act. For example, a challenger could be motivated by a concern for "shocks," which result from intermittent renewable production and can cause "failures [that] cascade through the grid, causing widespread

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22 *See* Va. Code Ann. § 56-585.5 (LexisNexis, LEXIS through 2024 Regular Session and 2024 Special Session I). Passed in 2020, the Virginia Clean Economy Act set renewable energy benchmarks beginning at 6% in 2021 and escalating annually until reaching the 100% threshold. *Id.*

23 *See* Jackie DeFusco, *Warner Says 'Huge Vulnerabilities' in Power Grid Must Be Addressed After Attack*, WRIC ABC 8NEWS (Dec. 7, 2022, 4:43 PM), https://perma.cc/3488-YR4Y; Neal Augenstein, *Why Is Northern Va. the World's Data Center Capital?*, WTOP NEWS (Oct. 25, 2022, 1:40 PM), https://perma.cc/SXN5-BTPT (stating that Northern Virginia "encompasses almost 50% of the data centers in the United States").

24 U.S. ENERGY INFO. ADMIN., *California Imports the Most Electricity from Other States; Pennsylvania Exports the Most* (Apr. 4, 2019) [hereinafter U.S. ENERGY INFO, *California Imports*], https://perma.cc/95EY-THPB; *see also* U.S. ENERGY INFO. ADMIN., *Six U.S. States Accounted for Over Half of the Primary Energy Produced in 2019* (Aug. 31, 2021) [hereinafter U.S. ENERGY INFO, *Six U.S. States*], https://perma.cc/4EYZ-XWDF.

25 North Dakota v. Heydinger, 15 F. Supp. 3d 891, 897, 899 (D. Minn. 2014), *aff'd sub nom*. North Dakota v. Lange, 900 F.3d 565 (8th Cir. 2018).

26 Michelle Griffith, *North Dakota Officials Threaten to Sue Minnesota if It Passes 2040 Clean Energy Plan*, MINN. REFORMER (Jan. 25, 2023, 3:43 PM), https://perma.cc/X5LW-Q85U.

27 *See* Va. Code Ann. § 56-585.5(D) (LexisNexis, LEXIS through 2024 Regular Session and 2024 Special Session I) ("To the extent that a Phase I or Phase II Utility constructs or acquires new zero-carbon generating facilities or energy storage resources, the utility shall petition the Commission for the recovery of the costs of such facilities . . . ."); Sarah Vogelsong, *Ten Things to Know About the Clean Economy Act*, VA. MERCURY (Feb. 20, 2020, 12:04 AM), https://perma.cc/97GL-2WRG ("Ratepayers may see bills rise as a result of the buildouts . . . .").

power outages and damage."[28] Additionally, neighboring energy exporters could be motivated to file suit by displeasure with a reduction in traditional non-renewable energy sales to Virginian providers.[29]

This Comment argues that Virginia's RPS would not be invalidated based on the Dormant Commerce Clause's extraterritoriality principle. Part I tracks the evolution of the Court's views on the extraterritoriality principle from its inception to its heyday, and then through the Court's muddy retreat. Part II discusses the differing applications of the extraterritoriality principle used to evaluate RPSs. Finally, Part III argues that the Dormant Commerce Clause's extraterritoriality principle does not present a viable pathway to challenge Virginia's RPS for two reasons. First, the Virginia Legislature likely crafted the RPS with the *Epel* and *Heydinger* decisions and a potential Dormant Commerce Clause challenge in mind. Second, the Court's decision in *National Pork* makes clear that the circumstances surrounding Virginia's RPS are not sufficient to sustain an extraterritoriality challenge. Therefore, a lawsuit challenging the validity of Virginia's RPS under the Dormant Commerce Clause's extraterritoriality principle is unlikely to succeed.

I. Extraterritorial Effects: The Least Understood Principle of Dormant Commerce Clause Jurisprudence

Throughout *The Federalist Papers*, James Madison and Alexander Hamilton argued for a free national market amongst the states and warn against state economic protectionism.[30] The U.S. Constitution assigns Congress the power "[t]o regulate Commerce . . . among the several States . . . ."[31] The U.S. Supreme Court has come to understand this grant of authority as limiting "the authority of the States to enact legislation affecting interstate commerce."[32] Dormant Commerce Clause doctrine can be traced to the 1824 case of *Gibbons v. Ogden*.[33] Writing for the majority, Chief Justice John Marshall stated that the power to regulate interstate commerce had been placed in the hands of Congress and must otherwise "lie dormant."[34] Justice William Johnson, concurring, went

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28 *See* Oliver Smith, Oliver Cattell, Etienne Farcot, Reuben D. O'Dea & Keith I. Hopcraft, *The Effect of Renewable Energy Incorporation on Power Grid Stability and Resilience*, SCI. ADVANCES, Mar. 2, 2022, at 3.

29 *See* Griffith, *supra* note 26.

30 *See* THE FEDERALIST NO. 11 (Alexander Hamilton), NO. 42 (James Madison).

31 U.S. CONST. art. I, § 8, cl. 3.

32 Healy v. Beer Inst., 491 U.S. 324, 326 n.1 (1989).

33 22 U.S. (9 Wheat.) 1 (1824); *see id.* at 89.

34 *Id.* at 189.

further, writing that Article I is "in favour of the exclusive grants to Congress of power over commerce . . . ."[35]

Dormant Commerce Clause cases are traditionally thought of as falling within three categories.[36] The first features protectionist state laws that discriminate against interstate commerce.[37] These laws are evaluated using strict scrutiny and are invalidated unless the state demonstrates that the law protects a legitimate state interest and is the only reasonable means to protect that interest.[38]

The second features laws that are not discriminatory but otherwise burden interstate commerce.[39] These laws are evaluated using the *Pike* balancing test, which says that if the practical effect of a law burdens interstate commerce and that burden is "clearly excessive" when compared to the "putative local benefits," the law is invalid.[40]

The third category seeks to prohibit states from regulating conduct beyond their own borders.[41] The rule against such regulations is known as the extraterritoriality principle.[42] At the extraterritoriality principle's peak, the U.S. Supreme Court enforced a "virtually per se" rule against state laws that have the "'practical effect' of regulating commerce occurring wholly outside that [s]tate's borders."[43] Then-Judge Gorsuch described extraterritoriality as "the most dormant . . . in all of dormant commerce clause jurisprudence" and "the least understood of the Court's three strands of dormant commerce clause jurisprudence."[44]

The Dormant Commerce Clause's extraterritoriality principle has a clearly defined rise, peak, and fall. The Supreme Court began to police extraterritoriality in the early twentieth century but did not rely on the principle again until actively policing state laws for extraterritorial effects in the 1980s.[45] These decisions primarily arose in the price-affirmation context, with state laws tying in-state prices to out-of-state prices, or

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35 *Id.* at 236 (opinion of Johnson, J.).

36 *See* Alexandra B. Klass & Elizabeth Henley, *Energy Policy, Extraterritoriality, and the Dormant Commerce Clause*, 5 SAN DIEGO J. CLIMATE & ENERGY L. 127, 131–33 (2014).

37 *Id.* at 131; *see, e.g.*, C & A Carbone, Inc. v. Town of Clarkston, 511 U.S. 383, 392 (1994); Maine v. Taylor, 477 U.S. 131, 151–52 (1986); City of Philadelphia. v. New Jersey, 437 U.S. 617, 623–24 (1978).

38 *See, e.g.*, *C & A Carbone*, 511 U.S. at 392; *Taylor*, 477 U.S. at 151–52; *City of Philadelphia*, 437 U.S. at 623–24.

39 Klass & Henley, *supra* note 36, at 132; *see* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

40 *See Pike*, 397 U.S. at 142.

41 Martin, *supra* note 11, at 500–01 (citing Healy v. Beer Inst., 491 U.S. 324, 336–37 (1989)).

42 *Id.*

43 *Healy*, 491 U.S. at 332–33, 333 n.9; *see* Chad DeVeaux, *One Toke Too Far: The Demise of the Dormant Commerce Clause's Extraterritoriality Doctrine Threatens the Marijuana-Legalization Experiment*, 58 B.C. L. REV. 953, 976 (2017).

44 Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1172, 1175 (10th Cir. 2015).

45 *See* Brannon P. Denning, *Extraterritoriality and The Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV 979, 980–81, 986 (2013) [hereinafter Denning, *Extraterritoriality*].

otherwise implementing price controls.[46] Some courts of appeals began to deploy the extraterritorial effects test only in those limited circumstances, while other courts cited language from the prominent extraterritoriality decisions of the 1980s in cases arising outside the price-affirmation context.[47] However, the Court's two recent extraterritoriality decisions have limited the extraterritoriality principle to those statutes that involve price affirmation.[48]

The three eras of the Dormant Commerce Clause's extraterritoriality principle are distinct and easily traced. Section I.A discusses the development of the Dormant Commerce Clause's extraterritorial effects test. Section I.B then examines the extraterritoriality principle's peak and those cases that are most frequently relied on in extraterritoriality challenges. Lastly, Section I.C tracks the Court's incremental retreat from the strict extraterritorial effects test and the Court's decision to limit the precedential value of the primary extraterritorial effects cases to the price-affirmation context.

A. *The Extraterritoriality Principle's Early History*

The first case to discuss an extraterritoriality principle based on the Dormant Commerce Clause was the Court's 1851 decision in *Cooley v. Board of Wardens*.[49] During this period, jurists were split as to whether the Commerce Clause independently preempted state legislation affecting interstate commerce, or whether such laws were impermissible only if preempted by an affirmative act of Congress.[50] In *Cooley*, the Court sidestepped that question by focusing on the local or national character of the law.[51] The Pennsylvania law at issue required all ships entering the Port of Philadelphia to either use a local pilot familiar with the waterways or pay a fee.[52] Writing for the majority, Justice Benjamin Curtis acknowledged that to the extent that the Pennsylvania pilotage law may

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46 *See id.* at 986–87.

47 *Id.* at 992–95 (first citing Pharm. Rsch. & Mfrs. of Am. v. District of Columbia, 406 F. Supp. 2d 56, 67–71 (D.D.C. 2005); then citing Midwest Title Loans, Inc. v. Mills, 593 F.3d 660, 668–69 (7th Cir. 2010); and then citing Experience Hendrix, LLC v. Hendrixlicensing.com, Ltd., 766 F. Supp. 2d 1122, 1142 (W.D. Wash. 2011)).

48 *See* Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003); Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1153–55 (2023); *see id.* at 1167 (Roberts, C.J., concurring in part and dissenting in part).

49 53 U.S. (12 How.) 299 (1852); *id.* at 323–25 (McLean, J., dissenting); *see* Denning, *Extraterritoriality*, *supra* note 45, at 981.

50 Denning, *Extraterritoriality*, *supra* note 45, at 981 (citing CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836–64, at 357–95 (1974)).

51 *Cooley*, 53 U.S. at 319.

52 *Id.* at 311.

affect interstate commerce, its effects were primarily local in nature.[53] The Court held that states were within their authority to regulate local subjects.[54] However, the decision did not set forth a bright line rule against regulating conduct occurring out of state or offer substantive guidance to determine whether a law's effects were local or national in nature.[55]

The Court did not draw out this reasoning further until the late nineteenth and early twentieth century with the invention of the telegraph.[56] In an 1887 case, *Western Union Telegraph Co. v. Pendleton*,[57] the Court considered a Dormant Commerce Clause challenge to an Indiana law that mandated priority delivery for certain telegrams and required all other telegrams to be delivered in the order in which they were sent.[58] Western Union argued that by specifying the order of delivery for Indiana-originating telegrams out of state, the law was incompatible with the Dormant Commerce Clause.[59] The Court agreed, holding that while Indiana has the authority to implement this regulatory scheme wholly within its own borders, the Dormant Commerce Clause does not permit a state law that requires telegraph companies to align their operations in other states with Indiana's standards.[60] Justice Stephen Field described this regulatory scheme as "an impediment to the freedom of that form of interstate commerce, which is . . . beyond the power of Indiana to interpose . . . ."[61]

Subsequently, the Court overturned a South Carolina jury award against a telegraph company based on a state statutory cause of action for failure to deliver a telegram out of state.[62] There, the Court based its reasoning on due process grounds, but also stated that the South Carolina Act was "objectionable" because "it attempt[ed] to determine the conduct required of the telegraph company in transmitting a message from one State to another . . . by determining the consequences of not pursuing such conduct . . . ."[63] Therefore, the Court held that this law had an impermissible extraterritorial reach.[64]

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53 *Id.* at 319.

54 *Id.*

55 *Id.*; *see* Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 436 (2008).

56 Denning, *Extraterritoriality*, *supra* note 45, at 982–83.

57 122 U.S. 347 (1887).

58 *Id.* at 358.

59 *Id.* at 356, 358.

60 *Id.* at 358–59.

61 *Id.* at 358.

62 W. Union Tel. Co. v. Brown, 234 U.S. 542, 546–47 (1914).

63 *Id.* at 547.

64 *Id.*

B. *The Extraterritoriality Principle's Heyday*

The Dormant Commerce Clause's extraterritoriality principle crystalized and rose to prominence through three cases related to price-affirmation statutes.[65] First, in the 1935 case *Baldwin v. G.A.F. Seelig, Inc.*,[66] the Court considered a New York statute that banned the sale of out-of-state milk within New York unless the price paid met the state's minimum price threshold. The case involved a New York-based creamery that purchased milk in Vermont for less than New York's statutory minimum price.[67] As required by state law, the Commissioner of Farms and Markets refused to license these transactions, and the creamery brought suit.[68] Writing for a unanimous Court, Justice Benjamin Cardozo invalidated the New York law stating that "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there."[69]

The extraterritoriality principle remained dormant for about fifty years until *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,[70] in which the Court expanded upon Justice Cardozo's *Baldwin* reasoning. For the first time in an extraterritoriality case, the opinion considered the "practical effects" of the New York law, going beyond the direct textual implications of the statute.[71] New York's alcohol control law required liquor distillers and producers to sell to New York wholesalers at prices "no higher than the lowest price . . . sold by such [distiller] to any wholesaler anywhere in any other state . . . ."[72] The law also mandated specific regulatory approvals for prices each month.[73] The Court honed in on whether the New York law regulated commerce in other states.[74] Writing for the majority, Justice Thurgood Marshall reasoned that by effectively tying in-state liquor prices to prices elsewhere, New York's law was regulating market conduct outside its borders.[75] The Court considered it irrelevant that the law only addressed sales of liquor in New

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65 *See* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 518–19 (1935); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 576 (1986); Healy v. Beer Inst., 491 U.S. 324, 326 (1989).

66 294 U.S. 511 (1935).

67 *Id.* at 519–20.

68 *Id.*

69 *Id.* at 521.

70 476 U.S. 573 (1986).

71 *Id.* at 583; *see* Martin, *supra* note 11, at 504–05 (referencing the "practical effects" language as part of the extraterritorial effects test only after *Brown-Forman*).

72 *Brown-Forman*, 476 U.S. at 576 (alteration in original).

73 *Id.*

74 *Id.* at 582.

75 *Id.* at 582–83.

York because the "'practical effect' of the law [was] to control liquor prices in other States."[76]

To support his consideration of the "practical effect" of the law, Justice Marshall cited *Southern Pacific Co. v. Arizona ex rel. Sullivan*,[77] a Dormant Commerce Clause case arising under the doctrine's "substantial burden" category.[78] In *Southern Pacific*, the Court deployed a version of what came to be known as the *Pike* balancing test.[79] By considering the "practical effect" of the New York law, Justice Marshall appended an element of the "substantial burden" category's *Pike* balancing test to the extraterritorial effects test.[80] By looking for the first time beyond the direct text and traceable implications of the statute, the Court expanded the circumstances under which the extraterritoriality principle was called upon.[81]

Three years later, in *Healy v. Beer Institute,*[82] the Court considered a Connecticut law that forbade beer distributors from selling beer in any bordering state for a price lower than the price sold in Connecticut.[83] The Court reiterated the expanded extraterritoriality principle from *Brown-Forman*, stating that "a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause."[84] By fixing Connecticut prices to prices in bordering states, the law at issue had the impermissible "practical effect of establishing 'a scale of prices for use in other states,'" and was held invalid under the extraterritoriality principle.[85]

The Court's consecutive decisions in *Brown-Forman* and *Healy* represent what some have described as the extraterritoriality principle's "high water mark."[86] The extraterritorial effects test, as conveyed in these

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76 *Id.* at 583.

77 325 U.S. 761 (1945).

78 *See* DeVeaux, *supra* note 43, at 975–76.

79 *See* S. Pac. Co. v. Arizona, 325 U.S. 761, 767 (1945); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

80 Unlike the discrimination-based Dormant Commerce Clause challenges, *Pike* balancing provides courts "an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose." Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1157 (2023). This characterization of *Pike* frames the test as a means to evaluate inadvertent discrimination through a flexible balancing test. *See* Denning, *Long Live the Dormant Commerce Clause*, *supra* note 11, at 36 ("Justice Gorsuch (along with Justices Thomas and Barrett, in part) argued that the true purpose of *Pike* was to serve as an 'anti-evasion' mechanism. On this view, *Pike* allowed the Court to smoke out protectionist purposes or effects hiding in facially neutral statutes." (footnote omitted)).

81 *See* Martin, *supra* note 11, at 504–05.

82 491 U.S. 324 (1989).

83 *Id.* at 328–29.

84 *Id.* at 331–32, 333 n.9.

85 *See id.* at 336–37 (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 528 (1935)).

86 Denning, *Extraterritoriality*, *supra* note 45, at 988.

decisions, applied to the widest range of statutes, and held statutes with extraterritorial reach "unconstitutional virtually per se."[87]

Two securities cases from this period represent rare instances where the expanded extraterritoriality principle was applied outside the price-affirmation context.[88] In *Edgar v. MITE Corp.*,[89] a plurality of the Court invalidated an Illinois statute that mandated the registration of takeover attempts of certain corporations.[90] The Illinois law subjected entities pursuing control of corporations in which Illinois citizens owned more than ten percent of outstanding shares to register their takeover attempt and authorized the Secretary of State to hold a fairness hearing.[91] Justice Byron White, writing for a plurality, stated that the law had a "sweeping extraterritorial effect" by "directly regulat[ing] transactions which take place across state lines, even if wholly outside the State of Illinois."[92]

Five years later, a similar Indiana securities statute was upheld in *CTS Corp. v. Dynamics Corp. of America*.[93] The Indiana law required "approval of a majority of the pre-existing disinterested shareholders" before the acquisition of control.[94] But the law only applied to entities incorporated in Indiana, and the court found that "[s]o long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State."[95] The Indiana Act's applicability only to companies incorporated in Indiana was key to the decision because the law did not regulate transactions occurring wholly outside Indiana's borders.[96]

Ultimately, the Court's decisions in *Baldwin*, *Brown-Forman*, and *Healy* created a "virtually per se" rule against state laws that have the "'practical effect' of regulating commerce occurring wholly outside that State's borders."[97] Critics of these decisions claim the extraterritoriality principle became detached from its Commerce Clause underpinnings, was overbroad, and lacked a limiting principle.[98] However, others

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87 DeVeaux, *supra* note 43, at 976.

88 *See* Edgar v. MITE Corp., 457 U.S. 624, 642 (1982) (plurality opinion); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 93 (1987).

89 457 U.S. 624 (1982) (plurality opinion).

90 *Id.* at 643.

91 *Id.* at 626–27.

92 *Id.* at 641–42.

93 481 U.S. 69 (1987).

94 *Id.* at 73–74.

95 *Id.* at 89.

96 *Id.* at 93 ("We agree that Indiana has no interest in protecting nonresident shareholders *of nonresident corporations*. But this Act applies only to corporations incorporated in Indiana.").

97 *See* DeVeaux, *supra* note 43, at 976; Healy v. Beer Inst., 491 U.S. 324, 332, 333 n.9 (1989).

98 *See* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 806 & n.90 (2001) (characterizing the principle as restated in *Healy* as "overbroad");

considered the extraterritorial effects test, as stated in *Healy,* to be an accurate reading of prior caselaw based upon the sound and virtuous principle of preventing state economic protectionism.[99]

C. *The Court's Retreat from the Extraterritoriality Principle*

The Court was recently presented with two opportunities to build upon the *Baldwin* line of decisions and apply the Dormant Commerce Clause's extraterritoriality principle outside the price-affirmation context, yet it declined to do so both times.[100] Instead, the Court limited the extraterritoriality principle's applicability to the price-affirmation context, leading some to theorize that the extraterritoriality principle is a dead doctrine.[101]

In the 2003 case *Pharmaceutical Research and Manufacturers of America v. Walsh*,[102] the Court upheld a Maine law that sought to bring down pharmaceutical prices.[103] The Maine law required manufacturers selling drugs within the state to pay into a rebate program which subsidized pharmacies who agreed to sell drugs to customers at discounted prices.[104] Participating manufacturers were exempt from otherwise-required regulatory "authorization requirements."[105] The Court rejected Pharmaceutical Research's primary argument that the program was preempted by federal law.[106]

However, relying on the *Baldwin* line of decisions, the trade association also advanced an argument that by mandating a rebate on manufacturers whose only contact with the state is through wholesalers, the law violated the extraterritoriality principle.[107] Their position was that the Maine law regulated transactions occurring wholly outside the state.[108] The Court rejected their argument, however, and indirectly cabined the extraterritoriality principle's applicability to statutes that regulate price:

Denning, *Extraterritoriality*, *supra* note 45, at 998–99 (highlighting the "lack of a limiting principle" in *Healy*).

99 *See* Martin, *supra* note 11, at 504–05.

100 Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669–70 (2003); Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1155–56 (2023).

101 *Walsh*, 538 U.S. at 669–70; *Nat'l Pork*, 143 S. Ct. at 1153–56; *see* Denning, *Extraterritoriality*, *supra* note 45, at 995; Denning, *Long Live the Dormant Commerce Clause*, *supra* note 11, at 41.

102 538 U.S. 644 (2003).

103 *Id.* at 670.

104 *Id.* at 654 (citing ME. REV. STAT. ANN. tit. 22, § 2681 (West Supp. 2002)).

105 *Id.* at 654–55 (quoting ME. REV. STAT. ANN. tit. 22, § 2681(7) (West Supp. 2002)).

106 *Id.* at 667.

107 Denning, *Extraterritoriality*, *supra* note 45, at 991 (citing Brief of Petitioner at 28, Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003) (No. 01-188)).

108 *Id.*

> [U]nlike price control or price affirmation statutes, "the Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price. Similarly, Maine is not tying the price of its in-state products to out-of-state prices."[109]

A survey of cases after *Walsh* shows that lower courts began limiting their use of the extraterritoriality principle to cases involving price control or affirmation, or where the law clearly "enable[d] State A to control activities occurring in State B."[110] Several circuits explicitly rejected the use of the extraterritoriality principle outside the price-affirmation context.[111] At the time, however, some cautioned against a reading of *Walsh* as definitively restricting the extraterritoriality principle to the price-affirmation context.[112]

Given this uncertainty, courts wrestled with the applicability of the extraterritorial effects test on an ad-hoc basis. For example, in the 2018 case *Ass'n for Accessible Medicines v. Frosh*,[113] the Court of Appeals for the Fourth Circuit applied the extraterritoriality principle to a Maryland pharmaceutical price-gouging statute ostensibly outside the price-affirmation context.[114] Maryland law prohibited "price gouging," characterized by price increases "excessive and not justified by the cost of producing the drug . . . [r]esult[ing] in consumers . . . having no meaningful choice about whether to purchase the drug at an excessive price."[115] The act applied to any drug "made available for sale in [Maryland]," including "upstream" transactions, and targeted drug manufacturers rather than retailers or pharmacies.[116] Association for

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109 *Walsh*, 538 U.S. at 669 (quoting Pharm. Rsch. & Mfrs. of Am. v. Concannon, 249 F.3d 66, 81–82 (1st Cir. 2001)).

110 Denning, *Extraterritoriality*, *supra* note 45, at 992 (first citing Pharm. Rsch. & Mfrs. of Am. v. District of Columbia, 406 F. Supp. 2d 56, 67–71 (D.D.C. 2005); then citing Midwest Title Loans, Inc. v. Mills, 593 F.3d 660, 668–69 (7th Cir. 2010); then citing Experience Hendrix, LLC v. Hendrixlicensing.com, Ltd., 766 F. Supp. 2d 1122, 1142 (W.D. Wash. 2011); and then citing In re Nat'l Century Fin. Enters., Inc., 755 F. Supp. 2d 857, 887 (S.D. Ohio 2010)).

111 Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 681, 686 (4th Cir. 2018) (Wynn, J., dissenting) (first citing Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1172 (10th Cir. 2015); then citing IMS Health Inc. v. Mills, 616 F.3d 7, 29 n.27 (1st Cir. 2010), *vacated sub nom. on other grounds*, IMS Health Inc. v. Schneider, 564 U.S. 1051 (2011); and then citing Ass'n des Eleveurs de Canards et d'Oies du Québec v. Harris, 729 F.3d 937, 951 (9th Cir. 2013) ("*Healy* and *Baldwin* are not applicable to a statute that does not dictate the price of a product and does not 't[ie]' the price of its in-state products to out-of-state prices." (alteration in original))).

112 *E.g.*, Tyler L. Shearer, Note, *Locating Extraterritoriality: Association for Accessible Medicines and the Reach of State Power*, 100 B.U. L. REV. 1501, 1518 (2020) ("The *Walsh* decision, however, should not be overread; it did not overrule a long line of case law . . . .").

113 887 F.3d 664 (4th Cir. 2018).

114 *Id.* at 666, 670.

115 *Id.* at 666 (first alteration in original) (citing MD. CODE ANN., HEALTH-GEN., § 2-801(f)).

116 *Id.* at 666–67, 670–72 (alteration in original).

Accessible Medicines brought suit, claiming that the law impermissibly regulated conduct that may occur exclusively outside Maryland's borders.[117]

Maryland argued that *Walsh* limited the extraterritoriality principle to the price-affirmation context and that concerns about upstream transactions were improperly considered through the lens of the *Baldwin* line of decisions.[118] The majority noted that this position was adopted by two circuit courts of appeals at the time, but nonetheless dismissed this reading of *Walsh* as "too narrow."[119] In analyzing the extraterritoriality principles from *Baldwin*, *Brown-Forman*, and *Healy*, the Court of Appeals for the Fourth Circuit derived three broad factors for consideration: whether the statute (1) regulates commerce outside the state's borders; (2) has the practical effect of implicating a price control; and (3) burdens interstate commerce.[120] The court's test extracted two elements central to the *Baldwin* line of cases and then appended an examination into the burden on interstate commerce, more commonly considered as a distinct type of case under the *Pike* balancing test.[121]

In considering these factors, a majority of the court's panel read the Maryland law as impermissibly applying to transactions occurring wholly outside Maryland.[122] Further, the majority stated that because the law bans unconscionable pricing, it had the practical effect of a price control. [123] Therefore, the court held that the law burdened interstate commerce and ran afoul of the extraterritoriality principle.[124]

In dissent, Judge James Wynn took issue with the application of the extraterritoriality principle in this context.[125] He echoed the U.S. Supreme Court in *Walsh*, arguing that "[t]he extraterritoriality doctrine . . . as explicated in *Baldwin*, *Brown-Forman*, and *Healy*, applies '*only* [to] price control or price affirmation statutes that link in-state prices with those charged elsewhere and discriminate against out-of-staters.'"[126] In his view, a ban on unconscionable pricing did not serve as a price control or link in-

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117 *Id.* at 667.

118 *Id.* at 669–70.

119 *Frosh*, 887 F.3d at 670.

120 *Id.* at 671–74.

121 Shearer, *supra* note 112, at 1518 ("The decision intertwined the justifications for the other two dormant commerce clause doctrines into a singular dormant commerce clause jurisprudence . . . .").

122 *Frosh*, 887 F.3d at 671–72.

123 *Id.* at 672–73.

124 *Id.* at 674.

125 *Id.* at 686 (Wynn, J., dissenting). Judge Wynn also disagreed with the majority's preliminary finding that the Maryland law impacted wholly out-of-state transactions. *Id.* at 678.

126 *Id.* at 678, 686 (second alteration in original) (quoting Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1174 (10th Cir. 2015).

state prices with out-of-state prices.[127] Further, Judge Wynn identified that in the aftermath of *Walsh*, other courts of appeals had explicitly limited the extraterritoriality principle to the context of the *Baldwin* line of decisions.[128] Indeed, in 2013, the Court of Appeals for the Ninth Circuit clearly proclaimed that "*Healy* and *Baldwin* are not applicable to a statute that does not dictate the price of a product and does not 't[ie]' the price of its in-state products to out-of-state prices."[129]

Ass'n for Accessible Medicines v. Frosh typifies the "muddiness" that surrounded extraterritoriality at the time.[130] Courts of appeals varied wildly as to whether extraterritoriality was a distinct category of Dormant Commerce Clause jurisprudence, and if so, in what context it applied.[131]

The Court of Appeals for the Fourth Circuit's difficulty grappling with extraterritoriality in *Frosh* is just one example of the confusion surrounding the doctrine in the period between *Walsh* and *National Pork*.[132] As lower courts struggled to decipher the principles articulated in the extraterritoriality line of case, the U.S. Supreme Court stepped in with its 2023 decision in *National Pork*.[133] The Court concretely stated that the extraterritoriality principle was appropriate only in the context of the *Baldwin* line of decisions from which it prominently arose.[134]

In *National Pork*, the National Pork Producers Council challenged a California law that prohibited the sale of pork products derived from pigs confined in "cruel" conditions.[135] It argued that principles from the *Baldwin* line of cases applied and that the law violated *Baldwin*'s "almost per se" rule against state laws with extraterritorial reach.[136] The Council further argued that *Walsh* did not limit the *Baldwin* line of decisions to the price-affirmation context and that such a limitation "misses the forest for the trees."[137] The Council sought a ruling that the California law impermissibly ran afoul of the Dormant Commerce Clause's

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127 *Id.* at 686.

128 *Frosh*, 887 F.3d at 678, 686 (first citing *Epel*, 793 F.3d at 1174; then citing Ass'n des Eleveurs de Canards et d'Oies du Québec v. Harris, 729 F.3d 937, 951 (9th Cir. 2013); and then citing IMS Health Inc. v. Mills, 616 F.3d 7, 30 (1st Cir. 2010), *vacated sub nom. on other grounds*, IMS Health Inc. v. Schneider, 564 U.S. 1051 (2011)).

129 *Harris*, 729 F.3d at 951 (alteration in original) (citing Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003)).

130 Shearer, *supra* note 112, at 1510–11.

131 *Id.*

132 *See Frosh*, 887 F.3d at 678, 686 (Wynn, J., dissenting); North Dakota v. Heydinger, 825 F.3d 912, 920 (8th Cir. 2016); *Epel*, 793 F.3d at 1172–73; *Harris*, 729 F.3d at 950–51; *Mills*, 616 F.3d at 27–29; *see also* Denning, *Extraterritoriality*, *supra* note 45, at 990–94.

133 *Cf.* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1153–65 (2023).

134 *Id.* at 1155.

135 *Id.* at 1150–51.

136 *Id.* at 1154.

137 *Id.* at 1155.

extraterritoriality principle by regulating conduct beyond California's borders.[138]

Writing for the majority in Part III of his opinion, Justice Neil Gorsuch, joined by Justices Clarence Thomas, Sonya Sotomayor, Elena Kagan, and Amy Coney Barrett, rejected the Council's position and instead reaffirmed extraterritoriality's applicability only in the limited factual circumstances that gave rise to the *Baldwin* line of decisions.[139] The Court explained that the *Baldwin* line of decisions is not properly classified as a distinct extraterritorial effects category, but is more properly placed within the category of Dormant Commerce Clause cases guarding against in-state protectionism and out-of-state discrimination.[140] The majority stated that *Baldwin*, *Brown-Forman*, and *Healy* "each typifies the familiar concern with preventing purposeful discrimination against out-of-state economic interests."[141] The Court characterized the extraterritoriality language used in these cases as having "appeared in a particular context" where the state was focused on setting in-state competitive pricing and depriving out-of-state entities "of 'whatever competitive advantage they may possess.'"[142] The Court's limitation of the extraterritoriality principle to the price-affirmation context was not novel, but instead clearly restated the characterization of the *Baldwin* line of decisions by the Court in *Walsh*.[143] Additionally, the majority highlighted lower court decisions that already understood the extraterritoriality principle to be limited to laws that in some respect tie in-state prices to out-of-state prices.[144]

The Court went on to evaluate the California law under the *Pike* balancing test, which considers whether the practical effects of the law excessively burden interstate commerce in relation to the local benefits.[145] The Justices split significantly when applying *Pike* to the California law at issue. In Part IV of his opinion, Justice Gorsuch, joined by Justices Thomas and Barrett, took the position that conducting a *Pike* analysis was improper as judges are "not institutionally suited" to balance the burden on out-of-state pork producers against California's interest in the humane

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138 *Id.* at 1153–54.

139 *Nat'l Pork*, 143 S. Ct. at 1154–56.

140 *See id.*

141 *Id.* at 1154.

142 *Id.* at 1155–56 (quoting Healy v. Beer Inst., 491 U.S. 324, 338–39 (1989) (internal citation omitted)).

143 *Id.* (citing Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003)).

144 *Id.* (first citing Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1028–29 (9th Cir. 2021); then citing Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 669 (4th Cir. 2018); then citing Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1174 (10th Cir. 2015); and then citing Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 373 (6th Cir. 2013)).

145 *Nat'l Pork*, 143 S. Ct. at 1157–58.

treatment of pigs.[146] Conversely, Chief Justice John Roberts, joined by Justices Samuel Alito, Brett Kavanaugh, and Ketanji Brown Jackson, dissented in part to write that the petitioners plausibly alleged a substantial burden on interstate commerce, and that the lower court should have conducted a *Pike* balancing analysis.[147] Lastly, concurring in part, Justice Sotomayor, joined by Justice Kagan, stated that the petitioners failed to allege a substantial burden on interstate commerce.[148] However, Justice Sotomayor wrote to clarify that the precedentially binding opinion of the Court does not foreclose judges from conducting *Pike* analyses.[149]

Crucially, the Court's nine Justices all expressed a view on extraterritoriality that limits its applicability in many contexts.[150] Part III of Justice Gorsuch's opinion, the majority opinion of the court,[151] made three key pronouncements. First, it disclaimed extraterritoriality as a distinct category of Dormant Commerce Clause jurisprudence.[152] Second, it rejected a per se rule against state laws with extraterritorial reach.[153] And third, it held that the key extraterritoriality decisions are limited to the factual circumstances from which they arose.[154] Further, Chief Justice Roberts, joined by the remaining three Justices,[155] wrote "that our precedent does not support a *per se* rule against state laws with 'extraterritorial' effects."[156]

The Court's decision in *National Pork* clarified the key questions surrounding the extraterritoriality principle.[157] Before the decision, scholars disagreed as to the extent to which extraterritoriality represented a discrete category of Dormant Commerce Clause jurisprudence or

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146 *Id.* at 1159.

147 *Id.* at 1167–69 (Roberts, C.J., concurring in part and dissenting in part).

148 *Id.* at 1166 (Sotomayor, J., concurring in part).

149 *Id.*

150 *Id.* at 1154 (majority opinion) (writing that the key extraterritoriality cases "typif[y] the familiar concern with preventing purposeful discrimination against out-of-state economic interests"); *id.* at 1167 (Roberts, C.J., concurring in part and dissenting in part); *id.* at 1174 (Kavanaugh, J., concurring in part and dissenting in part).

151 *Nat'l Pork*, 143 S. Ct at 1148. *But see id.* at 1174 n.3 (Kavanaugh, J., concurring in part and dissenting in part) ("[O]n the question of whether to retain the *Pike* balancing test in cases like this one, THE CHIEF JUSTICE's opinion reflects the majority view because six Justices agree to retain the *Pike* balancing test . . . .").

152 *Id.* at 1153–54 (majority opinion); *see* Denning, *Long Live the Dormant Commerce Clause*, *supra* note 11, at 25.

153 *Nat'l Pork*, 143 S. Ct. at 1153–54.

154 *Id.* at 1155–56.

155 *Id.* at 1167 (Roberts, C.J., concurring in part and dissenting in part) (Chief Justice John Roberts was joined by Justices Samuel Alito, Brett Kavanaugh, and Ketanji Brown Jackson).

156 *Id.*

157 *See* Denning, *Long Live the Dormant Commerce Clause*, *supra* note 11, at 25–26.

whether it was distinct from the line of cases challenging protectionist and discriminatory state laws.[158] *National Pork* classified the prominent extraterritoriality cases as within the category of Dormant Commerce Clause cases evaluating discriminatory and protectionist state laws.[159] Courts and scholars also questioned the circumstances under which it was appropriate to deploy the extraterritoriality principle.[160] But *National Pork* holds that the extraterritoriality principle, as defined by *Baldwin*, *Brown-Forman*, and *Healy*, should be applied only in the price-affirmation context from which those cases arose.[161] This begs the question as to whether a Dormant Commerce Clause challenge to an RPS implicates the price-affirmation context and is properly evaluated using the extraterritoriality principle today.

II. Extraterritorial Effects Challenges to State Renewable Portfolio Standards

Renewable Portfolio Standards ("RPSs") are state laws that seek to require electricity suppliers to provide consumers with energy generated from renewable sources.[162] These laws vary in their structure.[163] Most recent RPS statutes require a certain percentage of electricity sold to retail customers each year to be from renewable sources.[164] The primary goal of an RPS is to transition a state's energy supply from traditional fossil fuels to renewable generation methods such as solar or wind.[165] However, states have also lauded "the economic development benefits" of bolstering the renewable energy industry, and RPS statutes have driven growth in the U.S. renewable energy sector.[166] About 50% of non-hydroelectric

158 *See* Denning, *Extraterritoriality*, *supra* note 45, at 980. *But see* Martin, *supra* note 11, at 499 (arguing that there is a clear test for extraterritoriality and that the principle continues to serve an important purpose).

159 *Nat'l Pork*, 143 S. Ct. at 1154 ("Instead, each typifies the familiar concern with preventing purposeful discrimination against out-of-state economic interests."); Denning, *Long Live the Dormant Commerce Clause*, *supra* note 11, at 25.

160 Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 678, 686 (Wynn, J., dissenting) (arguing that extraterritoriality should only apply in certain price-affirmation contexts).

161 Denning, *Long Live the Dormant Commerce Clause*, *supra* note 11, at 30.

162 Kelsey Gagnon, *Fact or Doctrine? Inconsistencies in the Application of the Dormant Commerce Clause's Extraterritoriality Principle to Challenges to State Climate Change Prevention Policies*, 13 SAN DIEGO J. CLIMATE & ENERGY L. 185, 190 (2022); Klass & Henley, *supra* note 36, at 175; Todd, *supra* note 1, at 192.

163 Klass & Henley, *supra* note 36, at 155 (citing U.S. Dep't of Energy, *DSIRE: Database of State Incentives for Renewables and Efficiency*, https://perma.cc/FF26-DRDE).

164 Sacco, *supra* note 1, at 10947–48.

165 Todd, *supra* note 1, at 192.

166 *Id.* at 192–93 (first citing GALEN BARBOSE, U.S. RENEWABLE PORTFOLIO STANDARDS: 2017 ANNUAL STATUS REPORT 12 (2017) (showing that from 2000 until roughly 2007 nationwide renewable

renewable energy production in the last twenty years is directly or indirectly the result of an RPS.[167]

In a 2013 case surrounding the financing of transmission lines, Judge Richard Posner included dicta regarding the constitutionality of Michigan's RPS that spurred litigation targeting the validity of RPSs.[168] Writing for the unanimous panel, he stated, "Michigan cannot, without violating the Commerce Clause of Article 1 of the Constitution, discriminate against out-of-state renewable energy."[169] Shortly thereafter, two separate plaintiffs argued that by regulating the generation method of electricity provided to customers, the laws impermissibly regulated beyond state borders by affecting out-of-state generators.[170]

This Part examines the two notable cases in which federal courts of appeals evaluated whether RPS laws violated the Dormant Commerce Clause's extraterritoriality principle. First, in *Epel*, the Court of Appeals for the Tenth Circuit rejected a Dormant Commerce Clause challenge to Colorado's RPS.[171] Second, in *Heydinger*, a fractured panel of the Court of Appeals for the Eighth Circuit found an early Minnesota RPS to violate the Dormant Commerce Clause.[172]

A. *An RPS Survives:* Energy and Environmental Legal Institute v. Epel

In 2004, Colorado became the first state to enact an RPS by ballot initiative when voters approved Amendment 37.[173] Amendment 37 required qualifying providers of retail electric services within the state to provide electricity from renewable sources in escalating minimum amounts.[174] Colorado's RPS has since been amended by statute to increase renewable targets for covered energy utility companies.[175] For example, from 2015 through 2019, providers were required to ensure that 20% of

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energy growth tightly tracked RPS requirements); and then citing Herman K. Trabish, *Modernizing Renewables Mandates Is No Longer About the Megawatts*, UTIL. DIVE (Aug. 16, 2018), https://perma.cc/3ZY5-CEBA).

167 Sacco, *supra* note 1, at 10947–48.

168 Ill. Com. Comm'n v. FERC, 721 F.3d 764, 776 (7th Cir. 2013); *see also* Thomas H. Campbell & Matt Bingham, *Judge Posner Suggests Some Renewable Portfolio Standards Are Unconstitutional*, NAT. L. REV. (July 5, 2013), https://perma.cc/DGE6-VALW.

169 *Ill. Com. Comm'n*, 721 F.3d at 776.

170 *See* Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1170–71 (10th Cir. 2015); North Dakota v. Heydinger, 825 F.3d 912, 913–14 (8th Cir. 2016).

171 *Epel*, 793 F.3d at 1175.

172 *Heydinger*, 825 F.3d at 921.

173 *Renewable Portfolio Standard: Colorado*, INT'L ENERGY AGENCY, (Feb. 9, 2017), https://perma.cc/RZP7-N524.

174 COLO. REV. STAT. § 40-2-124(1) (LexisNexis, LEXIS through 2024 legislation).

175 *Renewable Portfolio Standard: Colorado*, *supra* note 173.

retail electricity sales in Colorado came from renewable sources, and from 2020 onward, that 30% of electricity provided to Colorado customers must come from renewable sources.[176]

The Energy and Environmental Legal Institute ("EELI"), an industry advocacy group, brought suit, arguing that the Colorado RPS violated the extraterritoriality principle of the Dormant Commerce Clause.[177] EELI argued that the Colorado law impermissibly regulates how energy beyond Colorado's borders is generated.[178] The U.S. District Court for the District of Colorado rejected this argument, finding that the Colorado law, even in its broadest sense, only restricted transactions between out-of-state generators and in-state electricity providers, and thus did not regulate transactions occurring wholly out of state.[179]

On appeal, then-Judge Gorsuch, writing for a unanimous panel of the Court of Appeals for the Tenth Circuit, expressed a narrow view of extraterritoriality, a position he would later reaffirm in his *National Pork* opinion.[180] Recounting the history of extraterritoriality, he emphasized that "the *Baldwin* line of cases concerns only 'price control or price affirmation statutes' that involve 'tying the price of . . . in-state products to out-of-state prices.'"[181] Because Colorado's RPS requires utility companies to provide only a set amount of electricity from renewable sources, he emphasized that the law does not control prices, link in-state prices with out-of-state prices, or discriminate against out-of-state entities.[182] Then-Judge Gorsuch distinguished between laws that regulate prices properly evaluated under extraterritoriality, and laws that regulate the quality of a good.[183] Within Dormant Commerce Clause doctrine, laws regulating the quality of an imported good are properly evaluated "under the generally applicable *Pike* balancing test, or scrutinized for traces of discrimination" under the distinct state protectionism line of cases.[184] As

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176 COLO. REV. STAT. § 40-2-124(1)(c)(I)(D)–(E) (LexisNexis, LEXIS through 2024 legislation).

177 Energy & Env't Legal Inst. v. Epel, 43 F. Supp. 3d 1171, 1173–74 (D. Colo. 2014), *aff'd*, 793 F.3d 1169 (10th Cir. 2015).

178 *Id.* at 1179.

179 *Id.*

180 Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1172–73 (10th Cir. 2015); Nat'l Pork Producers v. Ross, 143 S. Ct. 1142, 1154–56 (2023).

181 *Epel*, 793 F.3d at 1174 (quoting Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003)).

182 *Id.* at 1173.

183 *Id.*

184 *See id.* at 1173. The district court rejected EELI's Dormant Commerce Clause arguments under each of the discrimination, burden, and extraterritoriality theories. Energy & Env't Legal Inst. v. Epel, 43 F. Supp. 3d 1171, 1178–80 (D. Colo. 2014), *aff'd*, 793 F.3d 1169 (10th Cir. 2015). However, EELI only raised the district court's disposition under extraterritoriality on appeal. *Epel*, 793 F.3d at 1172.

such, the court affirmed the dismissal of EELI's extraterritoriality claim targeting Colorado's RPS.[185]

B. *An RPS Falls:* North Dakota v. Heydinger

In 2016, a fractured panel of the Court of Appeals for the Eight Circuit invalidated the Minnesota Next Generation Energy Act, an early Minnesota RPS with a different structure than the Colorado scheme.[186] Minnesota's law focused on the source of carbon emissions at an electricity generator's facilities.[187] Specifically, Minnesota's RPS forbade the import of "power from a new large energy facility that would contribute to statewide power sector carbon dioxide emissions" and prohibited entities from "enter[ing] into a new long-term power purchase agreement that would increase statewide power sector carbon dioxide emissions."[188]

North Dakota and three non-profits brought suit, claiming that the prohibitions impermissibly regulated beyond Minnesota's borders, violating the Dormant Commerce Clause's extraterritoriality principle.[189] The U.S. District Court for the District of Minnesota agreed and granted a permanent injunction.[190] The court noted that the Midwest power grid is shared between Minnesota and eight other states.[191] Electricity providers in a given state buy energy off this shared grid and do not have the ability to specify the generation facilities from which the electricity comes.[192] The court found that as a result of the shared grid, by forbidding in-state electricity providers from entering into agreements with carbon-emitting facilities, the Minnesota statute's practical effect was a regulation of transactions wholly outside its borders.[193]

A fragmented panel of the Court of Appeals for the Eighth Circuit affirmed the district court's permanent injunction on three separate bases.[194] Judge Loken wrote that the law was invalid based on the Dormant

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185 *Epel*, 793 F.3d at 1177.

186 North Dakota v. Heydinger, 825 F.3d 912, 922 (8th Cir. 2016).

187 *Id.* at 915–16 (citing MINN. STAT. § 216H.03 subdiv. 2).

188 *Heydinger*, 825 F.3d at 913 (quoting MINN. STAT. § 216H.03 subdiv. 3).

189 *See* North Dakota v. Heydinger, 15 F. Supp. 3d 891, 899, 910 (D. Minn. 2014), *aff'd sub nom*. North Dakota v. Lange, 900 F.3d 565 (8th Cir. 2018).

190 *Id.* at 918–19.

191 *Id.* at 896. The Midcontinent Independent System Operator is an open-access independent nonprofit organization that controls the supply and demand of electricity in upper Midwest and Mississippi River Valley. *See id.* at 896–97.

192 *Id.* at 897.

193 *Id.* at 916–17.

194 North Dakota v. Heydinger, 825 F.3d 912, 922 (8th Cir. 2016); *id.* at 923 (Murphy, J., concurring in part and concurring in the judgment) (writing that the Minnesota Next Generation Energy Act was preempted by the Federal Power Act); *id.* at 928 (Colloton, J., concurring in the judgment) (writing

Commerce Clause's extraterritoriality principle.[195] Judge Loken acknowledged then-Judge Gorsuch's perceived limitation of extraterritoriality's applicability in *Epel*, but argued that the U.S. Supreme Court in *Walsh* never explicitly limited the extraterritoriality principle to the price-affirmation context.[196]

Judge Loken described the extraterritorial effects test by stating that "a statute that has the practical effect of exerting extraterritorial control over 'commerce that takes place wholly outside of the State's borders' is likely to be invalid per se."[197] Like the district court below, he noted that the flow of power is unpredictable across a regional grid where the law applies to any electricity ultimately sold into Minnesota.[198] Therefore, by requiring compliance with carbon emission standards at facilities in other states, the law's practical effect was to regulate transactions wholly outside Minnesota.[199]

Judge Diana Murphy, concurring, disagreed with this analysis, adopting a narrow reading of the statute that did not run afoul of the extraterritoriality principle.[200] According to Judge Murphy, the law would apply only to entities that import electric power within Minnesota's borders.[201] In her view, the statute was applicable only to transactions between an in-state and out-of-state entity so "[t]hese provisions would not regulate commerce 'that takes place wholly outside of [Minnesota's] borders.'"[202] Judge Murphy nonetheless concurred in the judgment on the basis that the challenged provisions of the law are preempted by the Federal Power Act.[203]

Minnesota subsequently enacted an RPS structured much more similar to Colorado's RPS.[204] However, the validity of this law under the Dormant Commerce Clause has not been tested in court, despite a threat from North Dakota to once again bring suit.[205]

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that the Minnesota Next Generation Energy Act was preempted by both the Federal Power Act and the Clean Air Act).

195 *Id.* at 921.

196 *Id.* at 919–20.

197 *Id.* at 919 (quoting Healy v. Beer Inst., 491 U.S. 324, 336 (1989)).

198 *Id.* at 921.

199 *Id.*

200 *Heydinger*, 825 F.3d at 924 (Murphy, J., concurring in part and concurring in the judgment).

201 *See id.* at 925.

202 *Id.* at 923 (second alteration in original) (quoting *Healy*, 491 U.S. at 336).

203 *Id.* at 926.

204 *Compare* MINN. STAT. § 216B.1691 subdiv. 2a (West, Westlaw through 2024 Reg. Sess.), *with* COLO. REV. STAT § 40-2-124(1)(c)(I) (LexisNexis, LEXIS through 2024 legislation).

205 Steve Karnowski, *Minn. Governor Trusts Energy Law Will Survive ND Suit Threat*, ASSOCIATED PRESS (Feb. 7, 2023, 5:15 PM), https://perma.cc/AR7R-SJEF.

III. The Virginia Clean Economy Act: Surviving an Extraterritorial Effects Challenge Post-*National Pork*

In February 2020, after more than ten hours of fierce debate, the Virginia Senate passed the Virginia Clean Economy Act.[206] This RPS requires Virginia's largest utility, Dominion Energy, to provide in-state customers with entirely renewable energy by 2045.[207] A sponsor of the bill claimed that the Act's passage would create clean energy jobs and fight climate change.[208] Passage of Virginia's RPS was not without controversy, however.[209] Critics expressed skepticism that the clean energy jobs would materialize and were wary of electricity rate increases that may accompany the transition to renewable energy.[210] Additionally, high volume energy exporters in neighboring states could be motivated to challenge the law that may reduce traditional non-renewable energy sales to Virginia's energy utility companies.[211]

Similar renewable portfolio standards have been challenged as violating the Dormant Commerce Clause's extraterritoriality principle.[212] However, in light of the Court's opinion in *National Pork*, the Dormant Commerce Clause's extraterritoriality principle does not support a challenge to Virginia's RPS.

This Part argues that, using the Court's guidance in *National Pork*, a challenge to an RPS like the Virginia Clean Economy Act would not be successful under a theory that the law violates the Dormant Commerce Clause's extraterritoriality principle. Section III.A examines how the Virginia Clean Economy Act operates and how the statute may have been drafted with a Dormant Commerce Clause challenge in mind. Section III.B then argues that Virginia's RPS does not implicate the price-affirmation context which gives rise to the extraterritorial effects test deployed in *Baldwin*, *Brown-Forman*, and *Healy.*

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206 Sarah Vogelsong, *Virginia Clean Economy Act Passes, as Debate Reveals Deep Partisan and Regional Divides*, VA. MERCURY (Feb. 11, 2020, 10:32 PM), https://perma.cc/82HT-WQ7L.

207 Gregory S. Schneider, *Virginia Becomes the First Southern State with a Goal of Carbon-Free Energy*, WASH. POST (Apr. 13, 2020, 9:26 PM), https://perma.cc/HW83-22K3.

208 *Id.*

209 *See* Vogelsong, *supra* note 206.

210 *Id.*

211 *See* Griffith, supra note 26. Neighboring West Virginia and Pennsylvania are among the top five net electricity exporters, while Virginia is the second-highest net importer of electricity in the country. *See* U.S. ENERGY INFO, *California Imports*., *supra* note 24; U.S. ENERGY INFO, *Six U.S. States*., *supra* note 24.

212 *See* Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1174–75 (10th Cir. 2015); North Dakota v. Heydinger, 825 F.3d 912, 919–21 (8th Cir. 2016).

A. *Virginia's RPS: Carefully Crafted to Incentivize Renewable Energy Development While Avoiding Dormant Commerce Clause Extraterritoriality Traps*

Proponents of Virginia's RPS tout the law's hopeful aim of eliminating carbon emissions from electricity generation and increasing renewables development.[213] To achieve these goals, the Act must survive a legal challenge. The Virginia Clean Economy Act was enacted in 2020, four years after the Court of Appeals for the Eighth Circuit struck down the Minnesota Next Generation Act in *Heydinger*.[214] Unsurprisingly, and likely in consideration of a possible legal challenge, Virginia's RPS functions in a manner far more resemblant of the Colorado RPS upheld in *Epel*. Five structural elements of the Virginia Clean Economy Act suggest the law was drafted with a potential Dormant Commerce Clause challenge in mind.

First, the Act defines key terms in a manner designed to limit the law's reach to the Commonwealth of Virginia. Virginia's RPS applies only to electricity providers under the regulatory oversight of the Virginia State Corporation Commission ("Commission").[215] The Act applies to a Phase I Utility, Appalachian Power Company ("APCo"), and a Phase II Utility, Dominion Energy.[216] These utility companies are the two providers that supply electricity to consumers within Virginia and are subject to the regulatory oversight and ratemaking processes of the Commission.[217] Although the service areas for APCo and Dominion extend beyond Virginia's borders, Virginia's RPS defines "total electric energy" as "total electric energy sold to retail customers in the Commonwealth service territory of a Phase I or Phase II Utility."[218] Such a limitation is important because to meet the RPS's renewable energy benchmarks, the Commission does not consider the percentage of renewables supplied across the entire service area, but only the electricity that is provided to

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213 *General Assembly: Thank You for Passing the Virginia Clean Economy Act*, VACLEANECONOMY.ORG, https://perma.cc/A4CB-HMX3.

214 2020 Va. Legis. Serv. Ch. 1193 (H.B. 1526) (West); *Heydinger*, 825 F.3d at 921.

215 *See* VA. CODE ANN. §§ 56-585.5(A), 56-585.1(A) (LexisNexis, LEXIS through 2024 Regular Session and 2024 Special Session I).

216 *See id.* § 56-585.1(A)(1) (LexisNexis, LEXIS through 2024 Regular Session and 2024 Special Session I). The distinction between "Phase I" and "Phase II" is based on whether the provider entered into a "rate case settlement" with the Commission. *Id.*

217 *Request for Proposals for Renewable Energy Certificates (RECs)*, APPALACHIAN POWER CO., https://perma.cc/J9ZJ-A44J; *Renewable Energy Portfolio Standard Program*, DOMINION ENERGY, https://perma.cc/C89C-7UGA.

218 VA. CODE ANN. § 56-585.5(A) (LexisNexis, LEXIS through 2024 Regular Session and 2024 Special Session I); *see Request for Proposals*, *supra* note 217.

consumers within the Commonwealth of Virginia.[219] Were the Act to require meeting renewable energy targets across the utility companies' entire service area, it would open the door for a Dormant Commerce Clause challenge. Consider a scenario in which the Act requires Dominion to provide customers with renewably generated energy across its entire service area. By doing so, the law would directly regulate commerce occurring in other states. Instead, Virginia's RPS measures only the generation source of electricity provided to Virginia customers.[220] In this way, key defined terms seek to prevent inadvertent extraterritorial reach by clearly preventing the statute from applying outside Virginia's borders.

Second, the Act does not prevent a utility company from drawing upon electricity generated from non-renewable sources in- or out-of-state, but only regulates the percentage of such electricity that can be sold to Virginia customers. The RPS sets forth an escalating percentage-based "program requirement" that must be met each year to stay in compliance.[221] The program requirement is the percentage of "total electricity energy sold," defined as "sold to retail customers in the Commonwealth" that is RPS eligible in a given year.[222] An "RPS eligible" electricity source is generated by solar, wind, or hydroelectric.[223] The Act does not restrict a covered utility company from drawing upon fossil fuel generated power, which may occur outside Virginia. Instead, as demonstrated by Table 1 below, the Act imposes escalating minimum percentages of renewable energy provided to Virginia consumers each year.[224]

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219 VA. CODE ANN. § 56-585.5(A) (LexisNexis, LEXIS through 2024 Regular Session and 2024 Special Session I).

220 *Id.*

221 *Id.* § 56-585.5(C).

222 *Id.* §§ 56-585.5(A), (C).

223 *Id.* § 56-585.5(C).

224 *Id.*

Phase I Utilities Year	RPS Program Requirement	Phase II Utilities Year	RPS Program Requirement
2021	6%	2021	14%
2022	7%	2022	17%
2023	8%	2023	20%
2024	10%	2024	23%
2025	14%	2025	26%
2026	17%	2026	29%
2027	20%	2027	32%
2028	24%	2028	35%
2029	27%	2029	38%
2030	30%	2030	41%
2031	33%	2031	45%
2032	36%	2032	49%
2033	39%	2033	52%
2034	42%	2034	55%
2035	45%	2035	59%
2036	53%	2036	63%
2037	53%	2037	67%
2038	57%	2038	71%
2039	61%	2039	75%
2040	65%	2040	79%
2041	68%	2041	83%
2042	71%	2042	87%
2043	74%	2043	91%
2044	77%	2044	95%
2045	80%	2045 and thereafter	100%
2046	84%		
2047	88%		
2048	92%		
2049	96%		
2050 and thereafter	100%		

Table 1. *RPS Program Requirement Schedule*[225]

Third, unlike the Minnesota Next Generation Energy Act, invalidated by the Court of Appeals for the Eighth Circuit, Virginia's RPS models Colorado's RPS and imposes requirements on the type of energy provided to consumers within the state, as opposed to requiring specific emission-tied generation requirements that may impact out-of-state activity.[226] This key decision, common in other RPSs enacted in the aftermath of *Heydinger*, is likely an attempt to avoid impermissible regulation of

[225] VA. CODE ANN. §§ 56-585.5(A), (C) (LexisNexis, LEXIS through 2024 Regular Session and 2024 Special Session I).

[226] *Id.* § 56-585.5(C); MINN. STAT. § 216H.03 subdiv. 3 (West, Westlaw through 2024 Reg. Sess.).

transactions that occur in other states.[227] By measuring only the percentage of electricity provided from renewable sources, Virginia took the approach of regulating only the quality of a good provided to in-state customers. As the Court of Appeals for the Tenth Circuit recognized in *Epel,* there are numerous instances in which regulating the "quality of a good sold to in-state residents" has not given rise to a viable extraterritoriality challenge.[228] Merely setting quality standards for a good or service does not implicate the price-affirmation context necessary to implicate the extraterritorial effects test.[229]

Fourth, the Virginia Clean Economy Act's limited geographic restrictions for RPS eligibility provide a procedural workaround that serves to minimize Dormant Commerce Clause concerns.[230] To qualify as RPS Eligible, the electricity must be generated in Virginia, Virginia-adjacent waters, federal waters, or within the PJM region.[231] PJM, named after the original member states—Pennsylvania, New Jersey, and Maryland—is a regional transmission organization that coordinates the movement of electricity among utility providers in thirteen states and the District of Columbia.[232] Importantly, the PJM region includes the total service area of both APCo and Dominion.[233]

Lastly, the enforcement mechanism for Virginia's RPS avoids Dormant Commerce Clause concerns arising from preventing utility companies from entering into agreements with certain out-of-state generators. Judge Loken in *Heydinger* seized upon the Minnesota Next Generation Energy Act's effective ban on in-state utility companies' ability to enter into agreements with out-of-state carbon-emitting electricity generation facilities.[234] Virginia's RPS does not impose this type of regulatory standard. Instead, the Act assigns deficiency payments for failing to meet RPS requirements.[235] If a utility company fails to provide its

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227 Todd, *supra* note 1, at 197.

228 Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1173 (10th Cir. 2015) ("[S]tate laws setting non-price standards for products sold in-state (standards concerning, for example, quality, labeling, health, or safety) may be amenable to scrutiny under the generally applicable *Pike* balancing test, or scrutinized for traces of discrimination under *Philadelphia*, but the Court has never suggested they trigger near-automatic condemnation under *Baldwin*.").

229 *Id.*

230 VA. CODE ANN. § 56-585.5(C) (LexisNexis, LEXIS through 2024 Regular Session and 2024 Special Session I).

231 *Id.*

232 *Who We Are*, PJM, https://perma.cc/2X5E-BM8Q; *PJM History*, PJM, https://perma.cc/99A5-X5JY.

233 *20230511_PJM Zone Map*, PJM, https://perma.cc/N32T-8YAS (displaying the PJM region as including the service area of both APCo and Dominion).

234 North Dakota v. Heydinger, 825 F.3d 912, 921 (8th Cir. 2016).

235 VA. CODE ANN. § 56-585.5(D)(5) (LexisNexis, LEXIS through 2024 Regular Session and 2024 Special Session I).

required percentage of energy from RPS eligible sources in a given year, it is assessed a fee of $45 per megawatt hour short of the required percentage.[236]

The Minnesota Next Generation Energy Act forbade energy utility companies from entering into new agreements with fossil fuel-emitting facilities.[237] Thus, the Act was found to impact transactions occurring wholly out-of-state.[238] But Virginia's RPS does not regulate a utility company's agreements with or use of specific generation facilities—It imposes a penalty only for noncompliance.[239] The imposition of a monetary penalty for failing to comply with in-state renewable energy requirements avoids the Dormant Commerce Clause implications created by banning agreements to import fossil fuel-generated electricity out-of-state.

Ultimately, the Virginia Clean Economy Act was structured to avoid some of the Dormant Commerce Clause pitfalls that plagued the Minnesota Next Generation Energy Act. Virginia's RPS defines key terms so as not to extend the Act's regulatory reach beyond the Commonwealth's borders. Further, the law implicates only the quality of a good being provided within Virginia, as opposed to regulating the source of the electricity which may be beyond Virginia's borders. Lastly, the penalty imposed is merely a fee. The law does not ban certain out-of-state activity or set a specific consumer electricity rate for non-compliance with the RPS program. These features demonstrate how this law was carefully crafted to avoid potential hooks a plaintiff could seize upon in a Dormant Commerce Clause challenge.

B. *Virginia's RPS Does Not Support the Application of the Dormant Commerce Clause's Extraterritoriality Principle*

A plaintiff challenging a state law on Dormant Commerce Clause grounds would benefit from invoking the *Baldwin* line of decisions. Upon a reading of these cases, the extraterritoriality principle's "near *per se* rule" dictates that when "a state law . . . has the 'practical effect' of regulating commerce occurring wholly outside that [s]tate's borders," it "*is invalid* under the Commerce Clause."[240] This extraterritorial effects test is even more difficult for a state to overcome than the strict scrutiny standard used for discriminatory and protectionist laws, which requires a state to

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236 *Id.*

237 *Heydinger*, 825 F.3d at 920–21.

238 *Id.*

239 VA. CODE ANN. § 56-585.5(D)(5) (LexisNexis, LEXIS through 2024 Regular Session and 2024 Special Session I).

240 Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1173–74 (10th Cir. 2015); Healy v. Beer Inst., 491 U.S. 324, 332–33 (1989) (emphasis added).

demonstrate that the law protects a legitimate state interest and is the only reasonable means to protect that interest.[241]

To be clear, *National Pork* did not overrule *Baldwin*, *Brown-Forman*, and *Healy*.[242] Instead, it limited the applicability of the extraterritoriality principle derived from those cases to the factual circumstances from which they arose.[243] Therefore, the question becomes: Would the factual circumstances giving rise to a Dormant Commerce Clause challenge targeting Virginia's RPS support the application of the extraterritoriality principle?

In *National Pork*, the Court broadly described the situation where the extraterritoriality principle applies as when a state is focused on setting in-state "competitive pricing" and depriving out-of-state entities "of 'whatever competitive advantage they may possess.'"[244] The Court goes on to discuss the specific statutes at issue in each of the *Baldwin*, *Brown-Forman*, and *Healy* cases.[245] In each, the state enacted "price control or price affirmation statutes" that involve setting specific prices relative to out-of-state activity or tying in-state products to out-of-state prices.[246]

In the muddiness that existed before *National Pork*, it is easy to see why *Epel* and *Heydinger* came out in different ways.[247] However, considering the Court's updated guidance, a Dormant Commerce Clause challenge to Virginia's RPS would not implicate the *Baldwin* line of decisions. First, considering the Act's stated goals and purpose, Virginia's RPS was not enacted to set competitive pricing for Virginia consumers or deprive out-of-state energy suppliers of a competitive advantage.[248] Instead, the Act requires compliance only with renewable energy benchmarks.[249] Additionally, the plain text of Virginia's RPS does not set prices at all,[250] let alone relative to or tied to out-of-state activity. Instead, the primary regulatory scheme requires regulated utility companies to provide a certain percentage of electricity from renewable sources in a

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241 *See* C & A Carbone, Inc. v. Town of Clarkston, 511 U.S. 383, 392–93 (1994); Maine v. Taylor, 477 U.S. 131, 151–52 (1986); City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

242 Denning, *Long Live the Dormant Commerce Clause*, *supra* note 11, at 30–31 (citing Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1155–57 (2023)).

243 *Id.* at 31 (citing *Nat'l Pork*, 143 S. Ct. at 1156).

244 *Nat'l Pork*, 143 S. Ct. at 1155 (quoting Healy v. Beer Inst., 491 U.S. 324, 338–39 (1989) (internal citation omitted)).

245 *Id.*

246 *Id.* (quoting Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003)).

247 *See* Shearer, *supra* note 112, at 1510–11.

248 2020 Va. Legis. Serv. Ch. 1193 (H.B. 1526) (West); *see also General Assembly: Thank You*, *supra* note 213.

249 2020 Va. Legis. Serv. Ch. 1193 (H.B. 1526) (West); *see also General Assembly: Thank You*, *supra* note 213.

250 *See* VA. CODE ANN. § 56-585.5 (LexisNexis, LEXIS through 2024 Regular Session and 2024 Special Session I).

given year.[251] In this way, the law functions to regulate the quality of a good provided to consumers by prioritizing non-carbon-emitting generation methods. This was precisely the type of regulatory scheme found not to invoke the extraterritoriality principle in *Epel* and *National Pork*.[252] Like Colorado's RPS, Virginia's RPS does not set prices in the state, relative to other states, or at all. Ultimately, because the Virginia Clean Economy Act was not enacted in the context of disadvantaging out-of-state entities, and does not implicate a price control, or tie in-state prices to out-of-state activity, this situation would not support the application of the extraterritoriality principle derived from the *Baldwin*, *Brown-Forman,* and *Healy* decisions.

Arguments to the contrary are tenuous at best. It is colorable that Virginia's RPS has some extraterritorial reach by impacting a covered entity's strategic decision-making across the entire service area. However, the statute's defined terms clearly limit its operation to within the Commonwealth of Virginia.[253] The law measures the qualifying renewable energy "sold to retail customers in the Commonwealth."[254] Even then, extraterritorial reach alone is not enough, and the challenge must arise in the price-affirmation context, which is not present here.[255]

Further, despite the possibility that the RPS may cause rate increases as a ripple effect of recouping the cost of renewable energy buildouts, such theoretical ripple effects would not implicate the price-affirmation context required to invoke the extraterritorial effects test.[256] In *National Pork*, the plaintiffs advanced an argument that the practical effects of California's restrictions on the sale of pork would raise prices for consumers in other states, justifying the application of the extraterritoriality principle.[257] However, the Court, using the petitioner's

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251 *Id.* § 56-585.5(C).

252 Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1172, 1173 (10th Cir. 2015).

253 VA. CODE ANN. §§ 56-585.5(A), (C) (LexisNexis, LEXIS through 2024 Regular Session and 2024 Special Session I).

254 *Id.* § 56-585.5(A).

255 Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1155 (2023) (citing Pharm. Rsch. & Mfr. of Am. v. Walsh, 538 U.S. 644, 669 (2003)).

256 *See id.*; VA. CODE ANN. § 56-585.5(D) (LexisNexis, LEXIS through 2024 Regular Session and 2024 Special Session I). The Virginia Clean Economy Act allows Phase I and II utility companies to petition the Commission for rate increases to recoup the costs of renewable generation facility build-outs. VA. CODE ANN. § 56-585.5(D) (LexisNexis, LEXIS through 2024 Regular Session and 2024 Special Session I) ("To the extent that a Phase I or Phase II Utility constructs or acquires new zero-carbon generating facilities or energy storage resources, the utility shall petition the Commission for the recovery of the costs of such facilities . . . ."). Although there is no clear academic consensus, many advance the position that an RPS causes rate increases across a utility company's entire service area. *See* Josh T. Smith & Vidalia Cornwall, *What Is the Relationship Between Renewable Portfolio Standards and Electricity Prices?*, CTR. FOR GROWTH & OPPORTUNITY (2019) ("Many researchers . . . also conclude that RPS lead to higher electricity prices.").

257 *Nat'l Pork*, 143 S. Ct. at 1155.

own language against them, describes this argument as "miss[ing] the forest for the trees."[258] The opinion reiterates that an incidental extraterritorial effect on price does not invoke the "specific impermissible 'extraterritorial effect' . . . 'depriv[ing] businesses and consumers in other States of whatever competitive advantages they may possess.'"[259] The Court of Appeals for the Tenth Circuit addressed this "ripple effect" pricing theory in the energy context directly when considering the Colorado RPS in *Epel*.[260] The majority stated that in a modern "interconnected national marketplace . . . regulations nominally concerning things other than price will often have ripple effects, including price effects, both in-state and elsewhere. . . . Still, without a regulation more blatantly regulating price and discriminating against out-of-state consumers or producers, *Baldwin*'s near *per se* rule doesn't apply."[261]

Taken as a whole, and considering the Court's updated guidance in *National Pork*, Virginia's RPS does not implicate the price-affirmation context necessary to call upon the *Baldwin* line of decisions. Even if the practical effects of the Act may reach beyond Virginia's borders, or lead to rippling out-of-state price increases, the Virginia Clean Economy Act does not resemble the statutes at issue in *Baldwin*, *Brown-Forman*, or *Healy*. Virginia's RPS is not aimed at benefiting in-state consumers or disadvantaging out-of-state entities. Additionally, the law does not furnish a price control, or tie in-state prices to out-of-state activity. For these reasons, a Dormant Commerce Clause challenge to Virginia's RPS would not be evaluated using the *Baldwin*-era extraterritoriality principle. Therefore, a challenge to Virginia's RPS based on the Dormant Commerce Clause's severely limited extraterritoriality principle is unlikely to be successful.

Conclusion

Prior to *National Pork*, courts and scholars were divided as to the applicability of the Dormant Commerce Clause's extraterritoriality principle outside the price-affirmation context. The Courts of Appeals for the Eighth and Tenth Circuits disagreed as to the proper use of the extraterritorial effects test in challenges to state RPSs. An examination of the Virginia Clean Economy Act shows how, in the aftermath of *Heydinger*, Virginia legislators carefully drafted the RPS to avoid potential Dormant Commerce Clause pitfalls. Considering updated guidance from the Court, the factual circumstances necessary to call upon the

258 *Id.*

259 *Id.*

260 Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1173 (10th Cir. 2015).

261 *Id.* at 1173–74.

extraterritorial effects test are not present here, and an extraterritoriality challenge to Virginia's RPS would be unsuccessful.

Following the Court's limitation on the applicability of the extraterritoriality principle in *National Pork*, it is likely that future Dormant Commerce Clause challenges to RPSs will be evaluated in the *Pike* balancing context. Instead of focusing on extraterritorial effects, litigators who challenge RPSs should prioritize identifying substantial burdens on interstate commerce to prevail. As then-Judge Gorsuch remarked in *Epel*, where the plaintiffs only appealed on the extraterritoriality question, whether an RPS survives the *Pike* test "may be [an] interesting question[]," but we "will have to await resolution in some other case some other day."[262]

262 *Id.* at 1172.