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# TRANSMISSION SITING IN DEREGULATED WHOLESALE POWER MARKETS: RE-IMAGINING THE ROLE OF COURTS IN RESOLVING FEDERAL-STATE SITING IMPASSES

JIM ROSSI†

## INTRODUCTION

During most of the twentieth century, state and local regulatory bodies coordinated the siting of power plants and transmission lines.<sup>1</sup> These bodies focused on two important issues: (1) the determination of “need,” so as to avoid unnecessary economic duplication of costly infrastructure; and (2) environmental protection, so as to provide local land use and other environmental concerns input on the placement of necessary generation and transmission facilities.<sup>2</sup> With the rise of a deregulated wholesale power market, the issue of need is increasingly determined by the market, not regulators. Environmental concerns with siting, however, frequently remain contested, especially locally, but the regulatory apparatus for processing these concerns faces new challenges in deregulated markets. As this Article suggests, environmental concerns in transmission line siting will increasingly be addressed at the federal level, with federal concerns predominating consideration of the issues. The dormant commerce clause does much

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† Harry M. Walborsky Professor and Associate Dean for Research, Florida State University College of Law. Email: jrossi@law.fsu.edu.

1. See THE ENERGY FOUNDATION/THE HEWLETT FOUNDATION, SITING POWER PLANTS: RECENT EXPERIENCES IN CALIFORNIA AND BEST PRACTICE IN OTHER STATES (2002), at [http://www.ef.org/documents/Siting\\_Report.pdf](http://www.ef.org/documents/Siting_Report.pdf) (describing the traditional power plant siting practices in California and other states); EDISON ELECTRIC INSTITUTE, STATE-LEVEL ELECTRIC TRANSMISSION LINE SITING REGULATIONS (2001), at [http://www.eei.org/industry\\_issues/energy\\_infrastructure/transmission/siting\\_directory.pdf](http://www.eei.org/industry_issues/energy_infrastructure/transmission/siting_directory.pdf) (noting that siting of transmission lines has traditionally been regulated at the state level). See also Linda L. Randell & Bruce L. McDermott, *Chronicle of a Transmission Line Siting*, PUB. UTILS. FORTNIGHTLY, Jan. 1, 2003, at 1 (referring to the “good old days” of transmission line siting).

2. Ashley C. Brown & Damon Daniels, *Vision Without Site; Site Without Vision*, ELEC. J., Oct. 2003, at 23, 24 (“The traditional siting regime . . . envisioned a two-part analysis: one to ascertain need and one to judge the environmental effects of available options.”).

of the work towards making this a predominantly federal concern, but eventually the Federal Energy Regulatory Commission's ("FERC's") jurisdiction over such matters must be expanded by statute.

Even if Congress does not expand FERC's jurisdiction, this Article argues that courts can play a positive role to facilitate the resolution of state-federal siting conflicts. A recent siting dispute involving a power line in the Long Island Sound illustrates this fundamental shift in the environmental discourse of siting proceedings, as a well as a need for modifications to federal law regarding transmission siting.<sup>3</sup> Ultimately, FERC may need authority to preempt state siting laws, but absent congressional action, courts might empower state and local siting boards to take into account federal goals in competitive markets in making siting decisions.

### I. THE CROSS-SOUND KEYSpan TRANSMISSION LINE SITING DISPUTE

A recent example of the conflict between state siting and deregulated wholesale power markets involves the Cross-Sound KeySpan transmission project. Regulatory officials in the state of Connecticut have strongly opposed the Cross-Sound Cable, a 23-mile merchant transmission line that would allow Long Island Power Authority to import power to Brook Haven, Long Island from New Haven, Connecticut, leading to significant delays in the operation of the project.<sup>4</sup> The project sponsor built the line in 2002, following FERC's approval of retail sales at negotiated transmission rates,<sup>5</sup> as well as permit approvals by the Army Corp of Engineers, the New York Public Service Commission, the Connecticut Siting Council, and the Connecticut Department of Environmental Protection.<sup>6</sup> The project complied with all state siting and environmental statutes, except for a provision of its state-issued permit that required the lines to be buried at a certain depth.<sup>7</sup> Expansion of transmission access to locations such as New York City would provide important capacity, and may have helped in

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3. See *infra* Part I.

4. See Randall & McDermott, *supra* note 1.

5. TransEnergie U.S., Ltd., 91 F.E.R.C. ¶ 61,230 (2000).

6. See *Regional Energy Reliability And Security: Doe Authority To Energize The Cross Sound Cable: Hearing before the Subcomm. on Energy and Commerce, House Comm. on Energy and Commerce*, 108th Cong. 55-56 (May 19, 2004) [hereinafter *Hearing*] (statement of Jeffrey A. Donahue, Chairman & CEO, Cross-Sound Cable Co.).

7. *Id.* at 18 (referring to Connecticut DEP refusal to modify permit).

absorbing some of the transmission shortages that exacerbated the Summer 2003 blackout.<sup>8</sup>

In burying the transmission line, the project sponsor encountered some problems. It discovered hard sediments and bedrock protrusions along portions of the route, and immediately notified the Army Corps and the Connecticut Department of Environmental Protection.<sup>9</sup> Some Connecticut officials cited environmental concerns in opposing the project, such as impacts on shellfish beds and operations in the New Haven Harbor.<sup>10</sup> The transmission line was built, however, and according to the project sponsor's CEO the line was "buried to the permit depth along 98 percent of the entire span and over 90% of the route with the Federal Channel to an average of 50.7 feet below mean low water, well below the required level of minus 48 feet."<sup>11</sup>

Nevertheless, the opposition of Connecticut officials kept the transmission line from becoming operational until 2004.<sup>12</sup> This may be a well-intended dispute over environmental regulation, but the line was opposed not only by environmental interests in the state of Connecticut. As often is the case with blocking a new entrant to a state's power industry, there is also an anti-competitive angle to opposition to the Cross-Sound line. Northeast Utilities, a major investor-owned utility whose customers reside primarily in Connecticut (and which also services customers in Massachusetts and New Hampshire), owns an older, competing transmission line (the 1385 cable) that runs parallel to the Cross-Sound Cable.<sup>13</sup> Northeast Utilities favored updating its line over approving the Cross-Sound line, with which it would compete, and requested FERC to use its authority under Section 210 of the FPA to order New York to assist in replacing the 1385 cables.<sup>14</sup>

After the Cross-Sound transmission line was built, Connecticut passed a moratorium on the siting of new or expanded transmission

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8. The technical advantage to operating two transmission lines between Connecticut and Long Island, as opposed to one, is that this would allow electric power to travel in a semi-circular loop – in and out of Long Island, depending on load.

9. *Id.* at 56.

10. *Id.* at 59.

11. *Id.* at 56.

12. Linda Randell & Bruce McDermott, *Cross-Sound Blues: Legal Challenges Continue for the Undersea Transmission Line*, PUB. UTILS. FORTNIGHTLY, Feb.2004, at 20.

13. Bruce W. Radford, *Cross-Sound Cable Puts Feds on the Spot*, FORTNIGHTLY'S SPARK, June 2004, at 1, 3.

14. *Id.* at 10.

lines across Long Island Sound,<sup>15</sup> effectively limiting the project sponsors' ability to make the project comply with Connecticut's understanding of the permits. The Cross-Sound Cable was authorized to operate under an emergency order issued by the U.S. Secretary of Energy following the August 2003 blackout, but that order was lifted in early 2004, leaving the Cross-Sound line without permission to go live.<sup>16</sup> So effectively, the Cross-Sound cable was completed in 2002, but remained dormant as a permanent transmission alternative until Summer 2004, due to a regulatory impasse between the state of Connecticut, on the one hand, and Cross-Sound's investors and the state of New York, on the other. As of Summer 2004, a settlement between the parties allowed the line to go live.<sup>17</sup>

As FERC Chairman Pat Wood indicated before Congress in May 2004, Federal regulation seems ill-equipped to resolve the issue.<sup>18</sup> In the context of the 1385 line dispute, Long Island Power Company requested that FERC use its authority under the Federal Power Act to direct KeySpan to recommence commercial operation of the Cross-Sound line, notwithstanding the objections of state regulators.<sup>19</sup> However, although FERC has embraced wholesale deregulation, FERC lacks the authority to preempt the state environmental siting process for the transmission line.<sup>20</sup> Connecticut's Attorney General, backed by environmental interest groups and Northeast Utilities, threatened litigation if the Cross-Sound line is allowed to go live again, instead favoring expansion of the existing transmission line, owned by Northeast Utilities.<sup>21</sup>

To the extent that transmission remains entirely within the control of local, rather than national, regulators, states have strong incentives to protect their own incumbent firms or citizens, rather than

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15. *Conn. Governor Signs Moratorium on Grid Projects, Keeping Cross Sound in Limbo*, POWER MARKETS WEEK, June 30, 2003, at 31.

16. Under Section 202(c) of the FPA, the U.S. Secretary of Energy can mandate operation of a transmission line over objections of state regulators, but only in the context of an emergency – not where it is merely found to be in the public interest.

17. *Parties Set Deal to Energize Cross Sound Cable*, INSIDE F.E.R.C., June 28, 2004, at 1 [hereinafter *Parties Set Deal*].

18. *Hearing*, *supra* note 6 (statement of Patrick Wood, III, Chairman, FERC).

19. Radford, *supra* note 13, at 10.

20. *See supra* notes 1 & 2 (describing state siting process). *See also* Donald F. Santa & Richard Sikora, *Open Access and Transition Costs: Will the Electric Industry Transition Track Natural Gas Industry Restructuring*, 25 ENERGY L. J. 113, 123 (2004) (noting "state regulators' jurisdiction over a traditional electric utility's retail operations include: retail rate setting, construction and siting of generating and transmission facilities").

21. Radford, *supra* note 13.

supporting interstate cooperative market norms. Only after threatening to approve expansion of the 1385 cables, was FERC able to force the parties to the bargaining table.<sup>22</sup> FERC could not preempt the states and mandate operation of the Cross-Sound transmission line, but the threat of it making a decision elsewhere led stakeholders to negotiate a settlement that allowed the line to operate.<sup>23</sup>

The Cross-Sound transmission line is not a unique example of state or local regulation blocking the expansion of infrastructure that is critical to interstate power markets. As Ashley Brown reports, transmission expansion projects spawn massive NIMBY concerns, frequently generating state and local opposition.<sup>24</sup> To make matters worse, many state legislatures fail to authorize state siting boards to even take into account interstate concerns and some states even allow localities to block transmission expansion projects.<sup>25</sup>

## II. THE DORMANT COMMERCE CLAUSE AS A NECESSARY CONSTITUTIONAL SOLUTION

Although it is not an express mandate of the text of the U.S. Constitution's Commerce Clause,<sup>26</sup> the dormant commerce clause doctrine limits of the power of a state government to impair free trade. As Oliver Wendell Holmes once remarked:

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.<sup>27</sup>

Among recent judicial skeptics, such as Justices Scalia and Thomas, the doctrine is referred to as the "negative" commerce clause, indicating its lack of textual basis in the Constitution.<sup>28</sup> Notwithstanding the

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22. *Parties Set Deal*, *supra* note 17.

23. *New York and Connecticut Agree to End Cable Dispute*, N.Y. TIMES, June 25, 2004, at B6. Interestingly, the most vocal opponent of the transmission line, Connecticut Attorney General Richard Blumenthal, was excluded from the negotiations. *They Can Bury the Cable, But Not the Controversy*, HARTFORD COURANT, July 7, 2004, at A9.

24. Brown & Daniels, *supra* note 2.

25. *Id.*

26. The Commerce Clause provides that "the Congress shall have power . . . to regulate Commerce . . . among the several States . . ." U.S. CONST. art. I, § 8, cl. 3.

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

28. Skeptics believe that the purposes of the dormant commerce clause can readily be served by other more textually explicit constitutional doctrines, such as the Import-Export Clause of Article I,

lack of textual support for the doctrine in the Constitution, the jurisprudence of the dormant commerce clause has a long-standing basis in American constitutional jurisprudence. 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 the avowed purpose of the [law], as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states.”<sup>29</sup> The Court invoked this general principle to strike a New York regulatory scheme that had been used to deny a license to an out-of-state milk processing facility.<sup>30</sup> Since the licensing provision had been enacted “solely [for] protection of local economic interests, such as supply for local consumption and limitation of competition,” the Court found it to be unconstitutional.<sup>31</sup>

Since the 1980’s, when deregulation began to take hold in a variety of industries, the Supreme Court has had several occasions to address dormant commerce jurisprudence. In one of its cases on the topic, *General Motors v. Tracy*,<sup>32</sup> the Court evaluated Ohio’s differential tax burdens for in-state and out-of-state natural gas suppliers, but refused to find a violation of the dormant commerce clause on the particular facts that had been raised. 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 local distribution company (“LDC”).<sup>33</sup> However, absent competition between the LDC 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 upon it, to which the dormant Commerce Clause may ap-

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Section 10 or the Privileges and Immunities Clause of Article IV, Section 2. These alternatives are not without their own critics. See, e.g., Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 84 MINN. L. REV. 284 (2003); Brannon P. Denning, *Justice Thomas, The Import-Export Clause, and Camps Newfoundland/Owatonna v. Harrison*, 70 U. COL. L. REV. 155 (1999). However, for purposes of this Article, let it suffice to emphasize that the alternatives would make protections against interstate regulatory barriers much narrower.

29. *Baldwin v. G.A.F. Selif, Inc.*, 294 U.S. 511, 522 (1935).

30. *Id.*

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

32. 519 U.S. 278 (1997).

33. *Id.* at 281-82.

ply.”<sup>34</sup> The case illustrates how intra-state regulation, which may impede competition (as where, for example, state regulators retain jurisdiction over retail rates), poses a potential tension under the dormant commerce clause, which protects interstate competition where national regulators have made a policy decision favoring competitive markets. FERC clearly has made such a decision in the context of the wholesale power market, making the dormant commerce clause relevant.

Other recent cases extend the dormant commerce clause beyond merely protecting the external (interstate) market. In *C&A Carbone, Inc. v. Town of Clarkstown*, the Supreme Court invalidated a municipally-imposed monopoly over non-recyclable solid waste collected for processing and transfer.<sup>35</sup> 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 in excess of the disposal cost of solid waste in the private market.<sup>36</sup> C&A Carbone, Inc. processed solid waste and operated a recycling center, as it was permitted to do under the Clarkstown flow control ordinance.<sup>37</sup> The flow control ordinance required companies like Carbone to bring nonrecyclable waste to the locally-franchised transfer station and to pay a fee, while prohibiting them from shipping the waste themselves.<sup>38</sup> “[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 five years.”<sup>39</sup> The Court reasoned that the local law violates the dormant commerce clause because “in practical effect and design” it bars out-of-state sanitary landfill operators from the participating in the local market for solid waste disposal.<sup>40</sup> In so reasoning, the majority drew from a 1925 case, written by Justice Brandeis, which held unconstitutional a statute prohibiting common carriers from using state highways over certain routes without a certificate of convenience and necessity.<sup>41</sup>

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34. *Id.* at 301.

35. 511 U.S. 383 (1994).

36. *Id.* at 386-87.

37. *Id.* at 387-88.

38. *Id.* at 386-87.

39. *Id.* at 393.

40. *Id.* at 389, 394.

41. *Buck v. Kuykendall*, 267 U.S. 307 (1925). Justice Brandeis wrote for the Court:



If a municipal government created and owned the facility itself, this would bring the monopoly within an exemption to the dormant commerce clause—the market-participant exemption.<sup>42</sup> In creating monopolies, however, local governments frequently work with private firms, using the advantages of the state—subsidies, below-market interest rates from non-taxable bonds, bypassing state or local restrictions on use of municipal tax powers, etc.—to assist firms and provide incentives for them to provide service. Since municipal governments often help to pay for privately-operated infrastructure, such as waste disposal facilities, through the issuance of bonds, it is understandable that a local government may want to create a monopoly, in order to ensure that the facility maintains sufficient revenues to cover its costs and to avoid jeopardizing the government's bond rating. Such facilities are allowed to collect charges, which serve the same basic function as a tax. If the government itself were to build, own, and operate a facility, the political process would impose a general tax, but with private operations subsidized by a state or locally enforced monopoly, the tax implications of such projects are obscured. 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.<sup>43</sup> One way of understanding the Court's rejection of the Clarkstown flow control ordinance is based on its concerns with impermissible government-assisted monopolies against the backdrop of interstate competition.

The basic animating principle of the recent dormant commerce clause cases has frequently been described as the protection against

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[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 very same purpose and in the same manner.

*Id.* at 315-16.

42. *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). While many have criticized this exemption to dormant commerce clause jurisprudence, it is defended as a pragmatic balance between competing federalism concerns. Dan T. Coenen, *Untangling the Market-Participant Exception to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989). 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. v. Wunnicke*, 467 U.S. 82 (1984).

43. *C&A Carbone*, 511 U.S. at 387.

discrimination between in-state and out-of-state competitors.<sup>44</sup> If these decisions are taken at face value, the Supreme Court's dormant commerce clause jurisprudence might be said to embrace a pro-competition stance, consistent with the ideology and goals of a neo-classical economic conception of federalism. In *Tracy*, for example, Justice Souter, writing for the Court, stated, "[t]he dormant commerce clause protects markets and participants in markets, not tax payers as such."<sup>45</sup> He 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.<sup>46</sup>

This—the neoclassical view of the dormant commerce clause—sees the role of federal courts as protecting states from interfering with the economic exchange of a free market economy.<sup>47</sup> On this view, its primary purpose is to guard against balkanization by protecting free trade from state government interference in the external market.

It would be a mistake, however, to read the dormant commerce clause as a constitutional mandate for competition, let alone deregulation. As dormant commerce clause jurisprudence itself recognizes, there are exceptions to the dormant commerce clause where the state itself takes on the role of market participant.<sup>48</sup> Further, the dormant commerce clause 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.<sup>49</sup> Moreover, since the dormant commerce

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

45. *General Motors Corp v. Tracy*, 519 U.S. 278, 300 (1997).

46. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949).

47. McGreal, *supra* note 44; Steven Gey, *The Political Economy of the Dormant Commerce Clause*, 17 NYU REV. OF L. & SOC. CHANGE 1 (1989-90); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L. J. 425 (1982).

48. *See supra* note 42 (discussing the market participant exception).

49. For example, one of the leading cases suggesting that the dormant commerce clause allows the setting of rates is *Munn v. Illinois*, 94 U.S. 113 (1876) (upholding legislative approval of joint price

clause is not derived from the express language of the U.S. Constitution, Congress can override it by adopting a national policy that preempts, or overrides, the competitive market between individual states. *General Motors v. Tracy*, for example, seems to carve out a safe harbor for state regulation of natural gas distribution.<sup>50</sup> Under the Commerce Clause, Congress has the express authority to establish an agency such as the Interstate Commerce Commission, giving it the jurisdiction to regulate railroad rates previously left to individual states. "Our Constitution," the late Julian Eule wrote, "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".<sup>51</sup>

To take a more modern example than the now-defunct ICC railroad regulation regime, Congress has created FERC, which has made a major policy choice to implement regional competitive wholesale power markets.<sup>52</sup> Congress has the power to override FERC's decision to implement regional competitive wholesale markets, but no one has seriously proposed this. Alternatively, Congress might expand FERC's jurisdiction, taking some or all regulatory authority over retail markets away from state regulators. If it did so, by occupying the lawmaking field, Congress might preclude states from enacting some laws that discriminate against out-of-state suppliers in deregulated wholesale markets. But again, Congress has not done so. Congress' inaction, however, does not mean that preemption plays no role in this context. Congress' acquiescence in FERC's competitive policies serves as one legal source for a type of federal preemption of individual states acting in ways that impair commerce between the states. Absent a change in federal policy, state efforts to curtail competition in wholesale electric power markets could be suspect under the dormant commerce clause, to the extent that they undermine the interstate markets created by FERC. While a federal preemption argument for interstate market norms is based in a positive legal source of congressional or federal agency enactments which preclude con-

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agreement by grain elevators in Chicago against a dormant commerce clause challenge, given concern with regulating a common carrier as a monopoly in the "public interest").

50. 519 U.S. at 825.

51. Eule, *supra* note 47, at 430.

52. *Order No. 888, Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities and Recovery of Stranded Costs by Public Utilities*, 61 FED. REG. 21,540 (May 10, 1996).

trary state laws, the dormant commerce clause also arguably finds some source in the cooperative behavior between two or more states that have adopted a competitive norm of exchange in which Congress acquiesces.<sup>53</sup>

Many have suggested that the neoclassical account of the dormant commerce clause—as a legal source of free trade policies between the states—is flawed.<sup>54</sup> An alternative view understands the dormant commerce clause not as inherently protecting competition itself, let alone free markets, but as protecting a political process that makes markets possible. For instance, in *West Lynn Creamery, Inc. v. Healy*, the Supreme Court struck down a Massachusetts tax and rebate scheme for milk, even where the tax operated neutrally without regard to the milk's place of origin, but where tax revenues went into a subsidy fund and were distributed solely to Massachusetts milk producers.<sup>55</sup> In writing for the majority, Justice Stevens embraced a political process account of the dormant commerce clause, in which its role is seen as representative-enforcing in a manner similar to *Carolene Product's* famous footnote 4.<sup>56</sup> As Justice Stevens remarked in striking down the tax and subsidy regime in *West Lynn Creamery*:

Nondiscriminatory measures, like the evenhanded tax at issue here, are generally upheld, in spite of any adverse effects on interstate commerce, in part because 'the 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 process 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.<sup>57</sup>

Rather than inherently protecting competition and free markets, the purposes of the dormant commerce clause doctrine can be understood with the framework of Madisonian democracy as well as effi-

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53. Jim Chen, *A Vision Softly Creeping: Congressional Acquiescence and the Dormant Commerce Clause*, 88 MINN. L. REV. 1764 (2003).

54. See *supra* note 47.

55. 512 U.S. 186 (1994).

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

57. 512 U.S. at 200 (citing *Minnesota v. Clover Leaf Creamery Co.*, 499 U.S. 456, 473 n.17 (1981) and other cases).

ciency—specifically, limiting welfare-reducing interest group rent-seeking in the state regulatory process.<sup>58</sup>

Unlike the traditional public choice critique, which condemns all state and local rent-seeking, the political process account of the dormant commerce clause targets only those rent-seeking laws that restrain commerce pursuant to implicit or explicit contracts between other states. 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 enact a law that undermines a desirable pro-commerce regime that has been put into place through the implicit or explicit cooperation of states, any more than it can undermine a pro-commerce regime adopted formally by Congress or a federal agency (under the preemption clause).

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. Florida's Supreme Court rejected a dormant commerce clause challenge to use of the state's restrictive power plant siting statute to restrict the building of new plants by out-of-state suppliers,<sup>59</sup> but the inadequacy of a record establishing discrimination against out-of-state merchant suppliers may have impeded the development of this legal argument. At a minimum, dormant commerce clause jurisprudence requires states and localities to 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.

More challenging is the constitutional status of state or local-franchised monopolies against the backdrop of dormant commerce clause jurisprudence. On the political process account, the Town of Clarkstown, New York violated the dormant commerce clause by granting a monopoly that imposed a veiled tax on users of waste dis-

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58. For elaboration of this view, see Maxell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine*, 45 WM & MARY L. REV. 1 (2003).

59. *Tampa Elec. Co. v. Garcia*, 767 So. 2d 428, 436 (Fla. 2000).

posal outside of the locally-sponsored facility, including out-of-state facilities. Its monopoly franchise was invalidated. In *Carbone*, Justice Souter wrote a dissent, joined by Chief Justice Rehnquist and Justice Blackmun, arguing that the majority had ignored the distinction between private and public enterprise and that the monopoly created by the flow control ordinance is easily distinguished from the "entrepreneurial favoritism" the Court has previously condemned as protectionist.<sup>60</sup> What distinguishes this monopoly from a constitutionally permissible monopoly, or do local and state electric, natural gas, and telecommunications monopolies risk the same fate if they do not open their service territories and network facilities to competitors? The historical lack of a background norm of competition excuses many historical monopolies from the constitutional reach of the dormant commerce clause: if there is no interstate market, a state or locally imposed monopoly cannot discriminate against out-of-state commerce. With the development of interstate markets in telecommunications and electric power, however, more difficult questions emerge. Will any state or local monopoly raise dormant commerce clause problems? For example, is it unconstitutional for a utility to impose a surcharge on all users of distribution service, regardless of whether they purchase their power from local or out-of-state suppliers?

If a municipality, such as the City of Clarkstown, operates a government-owned monopoly over telecommunications or electric distribution service, the market participant exception to the dormant commerce clause shields its conduct from the reach of the commerce clause.<sup>61</sup> Franchised private utilities—such as investor-owned utilities—pose a potential problem but are not necessarily unconstitutional, even under the political process account of the dormant commerce clause. The political process account, however, warns state and local governments to approach the financing of such operations with care. 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.<sup>62</sup> What the dormant commerce clause seems to prohibit is a local government

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60. *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 416 (1994) (Souter, J., dissenting). According to the dissent, "The Commerce Clause was not passed to save the citizens of Clarkstown from themselves." *Id.* at 432. Thus, the dissent rejects extending the political process account beyond scenarios that discriminate between local and out-of-town participants.

61. See *supra* note 42 (describing the market participant exception).

62. See *supra* notes 35-43.

explicitly indemnifying a private monopoly out of the public fisc, even where these impose the same monopoly and fees on both in-state and out-of-state providers of service. The Takings Clause does not require governments to take on such obligations, but the dormant commerce clause may prohibit them if they are the result of rent-seeking that imposes burdens on the interstate market. Further, as in *Carbone*, authorizing above-market fees solely for purposes of maintaining the monopoly may be constitutionally suspect.<sup>63</sup> As we move from local to state monopoly franchises, concerns with a single firm capturing the political process are weaker—a single firm that dominates municipal politics may have little power in state-wide regulatory and political processes—so 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.

To return to the Cross-Sound example and other state moratoria on siting new facilities, to the extent that FERC has deregulated wholesale power, such disputes raise potential issues of great concern under the dormant commerce clause. While the state of Connecticut certainly may impose legitimate environmental restrictions on permits, its moratorium raises serious anticompetitive concerns—particularly where it is used to keep a project that has already been built from becoming operational. The dormant commerce clause will be a likely tool for challenging such restrictions, especially where, as in Connecticut, competitors stand to benefit from the restriction. State and local environmental regulation can survive such dormant commerce clause challenges. However, refusing siting due to state-based claims of need, or where in-state competitors are aligned with environmental interests, will increasingly raise concerns under the dormant commerce clause.

### III. LOOKING TO CONGRESS AND COURTS TO OVERCOME IMPASSES

While the dormant commerce clause may be a necessary limit on states' ability to limit siting, it is not sufficient to ensure competitive interstate power markets. The dormant commerce clause will invalidate only the most blatantly protectionist state regulations. It certainly does not deal well with the problem of state inaction, or state stonewalling against interstate power markets due to a lack of state

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63. *Id.*

legislative authorization to approve new transmission projects.<sup>64</sup> Given the combination of prevalent state inaction in expanding transmission facilities, along with the many legitimate environmental concerns behind state and local siting laws, the dormant commerce clause will probably not be sufficient to overcome impasses between states, or between state and federal regulators. Dormant commerce clause principles will likely be under enforced in this context.

In this context, federal preemption is one way of bolstering the interstate market coordination goals of the dormant commerce clause. Ideally, Congress needs to expand FERC's authority over transmission line siting. If Congress does not do so—and Congress certainly is not the institution on which we should rely—federal courts have the power to nudge states towards action by empowering state siting boards to take into account federal goals in interstate transmission markets, even absent state legislative authorization.

#### A. Congress' Obstacles

Proposals to expand FERC's authority over transmission siting are not new. For more than a decade, industry experts have recognized that such modifications to the FPA will be necessary for competition to thrive.<sup>65</sup> The most recent proposals do not vest FERC with primary authority over siting, but envision FERC as playing a back-up role where individual states fail to reach closure on siting disputes

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64. As Ashley Brown and Damon Daniels observe, "Because very few states include explicit reference to regional considerations in the substantive law governing eminent domain or siting authority, it is left to siting officials and reviewing courts to factor regional effects into the calculation of which projects serve the public interest." Brown & Daniels, *supra* note 2, at 26. If a state legislature fails to delegate such authority to a regulator, there is a potential problem of inaction on the part of both state legislatures and regulators.

65. Judge Richard Cudahy sees federal regulation of electric power transmission "more or less inherent in the scheme of deregulation and competition, which depends for its functioning upon widespread access to the transmission network." Richard D. Cudahy, *Full Circle in the Formerly Regulated Industries?*, 33 LOY. U. CHI. L.J. 767, 768 (2002). Richard Pierce embraces expanded congressional authorization for the Federal Energy Regulatory Commission to resolve transmission siting disputes, noting the inevitable incentives states face to erect impediments to interstate commerce. Richard J. Pierce, Jr., *Environmental Regulation, Energy & Market Entry*, 15 DUKE ENVTL. L. & POL'Y FORUM 167 (2005) (Duke Environmental Law & Policy symposium contribution). For more than a decade, Pierce has been arguing for the same basic congressional solution. Richard J. Pierce, Jr., *The State of the Transition to Competitive Markets in Natural Gas and Electricity*, 15 ENERGY L. J. 323 (1994). Jim Chen advocates increased federal authority over telecommunications for similar reasons. Jim Chen, *Subsidized Rural Telephony and the Public Interest: A Case Study in Cooperative Federalism and Its Pitfalls*, 2 J. TEL. & HIGH TECH. L. 307 (2003).



on their own.<sup>66</sup> Regional transmission operators (“RTOs”) will provide an important forum for the resolution of these disputes, with FERC having the ultimate authority to order expansion where states fail to do so on their own.<sup>67</sup> It is likely that such proposals will continue to be proposed to Congress, although it is questionable whether they will be adopted into law.

As many have suggested, FERC’s authority to preempt state siting of transmission lines needs to be modified.<sup>68</sup> Unfortunately, Congress faces some institutional obstacles of its own in implementing reforms. In a recent defense of the “presumption against preemption,” which would empower states to take the initiative to solve many of these issues on their own, Roderick Hills summarizes three main failures in the federal government, and particularly Congress, in setting statutory reform agendas.<sup>69</sup> Each of these applies to energy legislation, such as recent proposals to expand FERC’s transmission jurisdiction.

First, Hills observes that collective action problems allow narrowly focused interest groups to control even national regulatory processes, echoing what Richard Stewart has referred to as “Madison’s Nightmare”<sup>70</sup>—a faction-ridden maze of capture of national majoritarian political processes by interest groups. In the context of energy legislation, it is quite common for Congress to bundle together multiple unregulated reforms, producing logrolling solutions that may confront obstacles due to one or two high-profile objectionable provisions. For example, the main energy bill before Congress in 2003 contained provisions that would have more clearly expanded FERC’s authority over transmission in order to enhance reliability.<sup>71</sup> This bill

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66. Edward Comer, *FERC and the States: A Marriage of Necessity*, ELEC. J., November 2004, at 85, 87 (advocating “national energy legislation that contains a provision for the Commission to have limited backstop transmission siting authority to help site transmission lines in ‘interstate congestion areas’ designated by the Department of Energy if states have been unable to agree or move forward.”).

67. *Id.* at 86 (“Regional transmission organizations can play an important part in planning and expanding transmission systems to meet the needs of regional electricity markets.”).

68. In this symposium issue, for instance, Professor Pierce embraces expanded congressional authorization for FERC to resolve transmission siting disputes. Pierce, *Environmental Regulation, Energy & Market Entry*, *supra* note 65. However, Congress has consistently failed to act to adopt such proposals.

69. Roderick M. Hills, Jr. *Against Preemption: How Federalism Can Improve the National Law-making Process*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=412000](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=412000) (last visited Mar. 5, 2005).

70. Richard B. Stewart, *Madison’s Nightmare*, 57 U. CHI. L. REV. 335. (1990).

71. Peter Berh & Dan Morgan, *Without Energy Legislation, Grid, Power Policy in Limbo*, WASH. POST, Nov. 27, 2003, at E01.

failed to pass primarily because of unrelated statutory provisions limiting state tort liability for the fuel oxygenate methyl tertiary-butyl ether (MTBE).<sup>72</sup>

In addition, as Hills suggests, individual representatives are frequently preoccupied with pleasing constituents—by approving earmarks and pork-loaded packages—leading Congress to neglect general policymaking.<sup>73</sup> Again, energy legislation provides an example of the failures of the national political process. The 2003 energy bill contained multiple provisions on different topics aimed at local or regional constituents, such as provisions aimed to provide federal aid for a Shreveport, Louisiana shopping mall which houses the chain restaurant “Hooters.”<sup>74</sup> Senator John McCain dubbed the proposed legislation a bill for “Hooters and polluters.”<sup>75</sup>

Finally, Hills observes, what Samuel Beer has called “political overload”<sup>76</sup> plagues the ability of Congress to set the regulatory agenda, since only a small number of issues can effectively occupy Congress’ decision agenda.<sup>77</sup> In the energy context, again, Congress is unlikely to even consider national energy legislation unless a major national or international crisis brings it to the agenda—the OPEC oil embargo (leading to passage of Carter’s energy plan in 1978), the Gulf War (leading to passage of the Energy Policy Act of 1992), or post-September 11 concerns over the relationship between terrorism and oil (leading to Congress’ failed energy bill in 2003). On occasion, individual members of Congress propose stand-alone bills designed to expand FERC’s authority, but these generally have little support in Congress and frequently disappear without a hearing.<sup>78</sup>

Even if Congress fails to expand FERC’s authority—as much of the political science Roderick Hills cites to would predict—the Cross-Sound line dispute illustrates that FERC may increasingly play a role

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72. Carl Hulse, *Even With Bush's Support Wide-Ranging Legislation May Have Been Sunk With Excess*, N.Y. TIMES, Nov. 26, 2003, at A17.

73. Bruce Cain, John Ferejohn, & Morris Fiorina, *THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE* (1987).

74. Dan Morgan, *The GOP Congress, High on the Hog*, WASH. POST, Jan. 18, 2004, at B01.

75. *Id.*

76. Samuel H. Beer, *Political Overload and Federalism*, 10 POLITY 5 (1977).

77. JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 16-18 (1995).

78. In 2004, Senator Hillary Clinton proposed a stand-alone reliability bill, presumably because she had concluded that the larger energy bill was doomed. *See Senator Clinton to Push Reliability Bill, Urges Lawmakers to Pass It Apart from the Energy Bill*, ELEC. UTIL. WEEK, Jan. 20, 2004 at 3. However, with an election year in 2004, many considered a more streamlined bill unlikely to pass Congress unless it was very modest.

in related regulatory proceedings over which it has jurisdiction and can play a positive role in the process. The Cross-Sound dispute illustrates how FERC has some limited powers to do things on its own, absent Congressional authorization through new statutes. For example, in the Cross-Sound dispute, FERC threatened to make a decision in a related proceeding that would involve updating an older transmission line, and this threat of regulatory action brought the state regulators to the negotiation table.<sup>79</sup> FERC's cognate authority over related projects is a powerful tool to bring parties to the bargaining table. Although not every environmental concern was placated by the resulting settlement, Long Island Power Authority ("LIPA"), Cross-Sound and Connecticut Light & Power Company ("CL&P") each agreed to contribute \$2 million to a fund, to be administered jointly by New York and Connecticut, which would be dedicated to the study and preservation of Long Island Sound.<sup>80</sup> In some instances, FERC may be able to use its clear regulatory authority—over mergers, transmission tariffs, and RTOs—to bring parties to the table when impasses occur, even if it is unable to preempt state siting processes. Yet, it is well recognized that FERC cannot solve these disputes on its own.<sup>81</sup>

As counterintuitive as it might sound, absent action by Congress and FERC, the presumption should be in favor of state siting boards acting to solve the problems with interstate transmission. If nothing else, a presumption in favor of state jurisdiction might work to set the national lawmaking agenda, but more important, it might place clear incentives with state regulators, making action more likely in contexts where state and federal regulators seem to have reached an impasse.

### B. *How Federal Courts Can Overcome Recalcitrant State Legislatures*

Many state siting statutes were adopted with old regulatory structures—a nationally-uniform cost-of-service structure—in mind. In many states, siting statutes do not authorize state or local regulators to act to open up their network access facilities to out-of-state competitors.<sup>82</sup> In this sense, one barrier to interstate power markets is state legislatures, which lack the institutional incentive to modify old regulatory statutes. To the extent the problem is state legislature re-

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79. See *supra* note 65 (describing the prospect of federal intervention).

80. *Parties Set Deal*, *supra* note 17.

81. See, e.g., Pierce, *Environmental Regulation, Energy & Market Entry*, *supra* note 65; Comer, *supra* note 66.

82. See Brown & Daniels, *supra* note 2.

calcitrance (whether tacit or explicit), federal courts might attempt to draw on preemption principles to overcome the impasses by introducing greater competition in the state political process, reducing the power of any one branch or level of state or local government to be recalcitrant through inaction.

As an illustration, consider the issue of a state legislature's failure to authorize regulatory action by state or local agencies under state siting statutes. State siting bodies may not be able to act to site facilities, or even to consider the interstate implications of siting, absent authorization by a state legislature. In the context of deregulated wholesale power markets individual states frequently face strong incentives to protect firms in their own internal market, such as local utilities. Several states have adopted moratoria on exempt wholesale generators, or have limited regulators' authority to site such plants to in-state utilities only.<sup>83</sup> Florida's Supreme Court, for example, has interpreted a state power plant siting statute to limit plant siting to those suppliers who are Florida utilities or who have contracts with Florida utilities.<sup>84</sup> Effectively, merchant power plants are precluded from siting in Florida for purposes of entering the interstate market. Perhaps taking a cue from Florida's success in blocking the development of new wholesale power plants that do not directly serve in-state customers, other state and local governments, particularly in the Southeastern United States, have imposed moratoria on merchant plants.<sup>85</sup> Pursuant to the siting statute passed by the Florida Legislature, Duke Energy's application was rejected by the state Supreme Court, even though the state agency initially had accepted the application under a belief that it had the legal jurisdiction to do so.<sup>86</sup>

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83. Concerned with their states becoming transmission superhighways or power plant siting grounds for others, many states have considered or adopted such moratoria. *See, e.g., Conn. Governor Signs Moratorium on Grid Projects, Keeping Cross Sound in Limbo*, POWER MARKETS WEEK, June 30, 2003, at 31 (describing Connecticut's moratorium on new transmission lines); *Florida County Imposes Power Plant Moratorium*, ELEC. DAILY, July 2, 2001, at 1 (describing Broward County, Florida, moratorium that stalled a 511 MW merchant power plant that had been approved by city officials in Deerfield Beach, Florida); *Indiana Communities Press for Power Plant Moratorium*, INDIANAPOLIS STAR, March 1, 2000 (indicating governor's support for power plant moratorium).

84. *Tampa Elec. Co. v. Garcia*, 767 So. 2d 428, 435 (Fla. 2000) (holding that state's power plant 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 power at retail rates,").

85. Deisinger, 2000; *Nervous of NOx, Southern Govs. Put Plants on Hold*, ELEC. DAILY, Aug. 28, 2001; *State Limits on Merchant Plants a Growing Worry*, GENERATION WEEKLY, Aug. 22, 2001.

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

However, even where a state legislature is recalcitrant and fails to authorize local or state-wide regulatory agencies to take into account federal goals (such as concerns with reliability in deregulated wholesale power markets) while siting transmission lines or power plants, courts could presumptively authorize such officials to act to pursue federal goals. Roderick Hills has argued for a presumption against preemption<sup>87</sup>—and the political science reasons he gives for it have particular resonance in the context of electric power—but in many instances (as in Florida), state officials and local political bodies lack the authority to act. As Hills has argued elsewhere, state regulatory initiative on issues might be facilitated by “dissecting the state” if state and local agencies are presumptively authorized to implement federal goals, even where state enabling legislation is ambiguous as to state agency jurisdiction.<sup>88</sup> When a federal program gives grant money directly to a state governor or local governments, it plays the executive branch or local governments off against the state. Similarly, when Congress has passed a statute such as the Federal Power Act and a federal agency has clearly articulated general goals in implementing this statute (as FERC has articulated the goal of deregulated interstate wholesale power markets),<sup>89</sup> even if Congress has not delegated specific implementation authority to the agency, it might be implied that it has given remedial implementation authority to state agencies, overriding state constitutional doctrines such as separation of powers. Presumptive preemption of structural constraints in state constitutions serves the function of allowing states to work towards correcting congressional failures that may remain in statutes.

Instead of deferring to state court interpretations of limited authority for siting boards, an alternative approach to reviewing the agency’s jurisdiction would ignore the ambiguous jurisdictional limits in the state statute, presumptively authorizing the state officials to consider the application—and to site the facility—if this were related to the pursuit of clear (albeit general) federal goals in reliable deregulated wholesale power markets. This presumption would be overcome only if the state legislature is explicit in its recalcitrance, adopting a statute that precludes consideration of the issue by state regulators.

By simultaneously embracing a presumption against federal preemption in interpretation of statutes and regulations and a presump-

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87. See Hills, *supra* note 69.

88. Roderick M. Hills, Jr. *Dissecting the State: The Use of Federal Law to Free State and Local Officials From State Legislatures’ Control*, 97 MICH. L. REV. 1201 (1999).

89. See *supra* note 52 (referencing Order No. 888).

tion in favor of state or local regulatory action (*i.e.*, authorizing state and local officials to act, notwithstanding a tacitly recalcitrant legislature), public law could align incentives to favor national reform of statutes or regulations in the context of economic regulation. In contrast to the current approach, a presumption against preemption would leave responsibility clearly in the hands of state actors. State and local officials would presumptively be authorized to act to pursue federal goals, although if a state legislature wishes to override the authority of a state agency to implement a federal program, it would possess the authority to do so expressly. So understood, a judicially-imposed set of default rules could promote coordinated federalism, even where Congress has not acted. Judicially-led coordinated federalism would replace court-mediated competition between the federal government and the states, which often leads to regulatory impasse, with cooperation. Simultaneously, federal courts may stimulate some regulatory action to address interstate network problems in states where none currently exists by introducing competition within the branches of state government. There are two primary objections to such a set of default rules: first, that federal courts lack the power to implement them and that they are internally inconsistent; and second, that this approach glorifies states' rights or idealizes states as innovators.

To address the second objection first, this is not a states' rights view of economic regulation. Indeed, there is no such thing, given that Congress has broad power to override states on most, if not all, issues of economic regulation. Even this, though, does not make states black boxes in discussion of the allocation of jurisdictional authority. States have an important role to play. The point is not, however, that states are inherently superior over the national government as innovator. Nor is it to promote decentralization as an end state of affairs. Instead, states would act as facilitators and agenda-setters in national lawmaking, helping national solutions to adapt to regulatory problems where the national lawmaking process fails to do so on its own. Judicially-led coordinated federalism is a second-best solution to congressional reforms of national regulatory statutes that fail to give federal agency regulators the necessary jurisdiction, but it also may prove necessary to overcome existing obstacles to regulatory reform in network industries.

The first objection—that federal courts lack the power to apply these default rules and they are internally inconsistent—also does not withstand scrutiny. These proposals are not premised on any constitu-

tional power that that the conventional set of default rules in public law do not also rely on. The power to vest state and local officials with authority to implement federal goals, like conventionally-accepted judicial power to create implied preemption, can be derived from the Commerce Clause.<sup>90</sup> Where Congress or federal regulators, within their constitutional authority, have stated a general goal, courts presumably would look to state or local regulators to implement it.<sup>91</sup> This is not coercive, as state political actors still would have to make the choice to regulate. If the state political process, such as by legislative action, explicitly overrides this choice, state action is more likely to exist for purposes of mounting a dormant commerce clause challenge if the state approach imposes spillover costs on interstate commerce.<sup>92</sup> This approach downplays the significance of “independent” state constitutions, but many states already recognize in their constitutional jurisprudence that state constitutions are not to be interpreted in isolation where a state is implementing a federal program.<sup>93</sup> As a matter of constitutional law, federal courts have as much power to implement such a set of default rules as they do to read implied preemption of state law into federal statutes and regulations.<sup>94</sup> In fact, to the extent that the presumptive authorization of state executive or local agency regulation to implement federal goals is based on political process considerations, rather than a substantive legal mandate that altogether precludes state regulation, it should be less controversial than implied preemption of substantive law, under which a federal court forces a state to make a substantive policy choice that is consistent with federal law even where Congress has not clearly spoken. Rather than reading judicial power broadly by expansive jurisdictional readings of federal statutes and regulations—as tra-

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90. The Commerce Clause authorizes Congress to regulate activities such as electric power transmission. Federal Courts interpret the scope of delegations to federal agencies. Thus, under federal preemption doctrine, federal courts have the authority to override state legislatures where national interests authorized by Congress warrant it.

91. Much as *Hills* envisions courts presumptively authorizing state and local officials to pursue national goals. *Hills*, *supra* note 88.

92. See *supra* Part II (discussing dormant commerce clause).

93. See, e.g., *Ex Parte Elliott*, 973 S.W.2d 737 (Tex. App. 1998); *McFaddin v. Jackson*, 738 S.W.2d 176 (Tenn. 1987); *Dep't of Legal Affairs v. Rogers*, 329 So. 2d 257 (Fla. 1976). Thus, even where federal courts do not exercise such authority, state courts might authorize such action as the best interpretation of state constitutional separation of powers doctrine. As I have argued elsewhere, implicit authorization for state executive and local agencies to act on behalf of federal goals is the best interpretation of state separation of powers—a matter of state constitutional law. Jim Rossi, *Dual Constitutions and Constitutional Duels*, \_\_ WM. & MARY L. REV. \_\_ (forthcoming 2005).

94. See *supra* note 90.

ditional jurisdictional federalism would envision—the default rules for preemption envision a more modest role for the courts, as they align political incentives to favor cooperative federalism approaches even where Congress has not explicitly done so. While a presumption against preemption of substantive statutes and regulations may seem at odds with a presumption that preempts state constitution allocations of powers, these default rules are no less inconsistent than the conventional public law approach, which favors preemption of substantive law but disfavors preemption of state constitutions.

Such an approach gives state and local governments a more positive role to play in deregulated markets than judicial federalism currently envisions under public law. It creates a political process that is more likely to clarify jurisdictional responsibility, while also lowering the costs of using state government to implement federal goals. In the long run, it might also promote a more stable national solution on important issues than the conventional approach of relying on courts to draw the lines between incomplete federal regulation and the states.

For example, in the context of electricity transmission siting, if state and local regulatory commissions are granted presumptive authority to consider national goals in reliable wholesale power markets, states would clearly share responsibility with Congress for transmission expansion. At least some state regulator in each state would clearly possess the regulatory power to expand transmission to accommodate deregulated markets. States might also be implicitly authorized to build pricing for such transmission expansion into their own regulatory structures for retail rates. This will not solve every problem with regulation of electric power transmission, for which a national solution is necessary. Some states may choose to expand transmission, allowing deregulated markets to work, while others may not, creating chokehold regions that could force consideration of a more national solution to state-based transmission regulation. At the same time, responsibility for the lag clearly would sit with the states or Congress. If states are presumptively authorized to take such goals into account, presumably a state's failure to act to site transmission in response to requests for transmission expansion could be brought within the realm of the dormant commerce clause, ultimately facilitating the emergence of more cooperative solutions between states where national regulators fail to take action. At a minimum, recalcitrant state legislatures would be required to explicitly reject state participation in national markets. Designing default rules for judicial re-



view with these bargaining problems in mind will not bring an end to all jurisdictional conflicts and impasses. Such design can, however, make explicit previously hidden institutional preferences within states for recalcitrance with national competition policies, better facilitating disruption of the jurisdictional impasses that plague the current approach to federal preemption.

#### IV. CONCLUSION

FERC's wholesale competition policies increasingly make dormant commerce clause principles relevant. This will have important implications for state siting processes, in which many environmental concerns with power plants and transmission lines are raised. But there is reason to think that the dormant commerce clause will not be strong enough as a legal norm to overcome siting impasses. Ultimately, Congress needs to act to expand FERC's authority over transmission siting. As FERC Chairman Pat Wood stated before Congress in 2004:

The view of one State should not be the sole determinant of whether a region's electrical customers receive the economic and reliability benefits of facilities that have already been built. In these narrow circumstances, the protection of interstate commerce may warrant a greater federal role.

This suggestion is related to, but separate from, the issue in the pending energy bill of having a federal backstop for siting of significant new interstate power transmission projects . . . .<sup>95</sup>

FERC itself has recognized the need for expanded jurisdiction. Once Congress approves it—and that may take some time—the expansion of FERC's authority over transmission siting may require modification of state environmental regulation in the context of power plant transmission statutes. Environmental regulation will not necessarily be rendered redundant, although some modification of state laws will be necessary. States may retain the authority to consider local land use concerns, as well as pure environmental protection concerns under state siting statutes. Protectionist barriers to siting, even those that are politically aligned with environmental protection, will increasingly bump up against the dormant commerce clause. Further, with modification to the FPA, FERC will increasingly play some role in overriding states where impasses result. One solution may be for states to play a more coordinated role in raising environmental concerns in the context of an RTO.

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95. *Hearing, supra* note 6 (statement of Patrick Wood, III, Chairman, FERC).

As Chairman Woods has recognized, FERC has some role under existing law to arbitrate siting disputes where states are at an impasse, even where Congress fails to act. Even if Congress does not act to expand FERC's jurisdiction over transmission siting, FERC has some important tools at its disposal which can help to bring states and stakeholders to the bargaining table. The Cross-Sound dispute illustrates the positive role that FERC may be able to play in this process. However, FERC may not be able to solve impasses on its own. If Congress does not expand FERC's jurisdiction and role, it is entirely appropriate for federal courts to step up to the plate in resolving siting impasses by looking to the dormant commerce clause and to federal preemption principles to override recalcitrant state legislatures.

