Extraterritoriality is a weird, one might almost say alien, incursion into judicial doctrine under the dormant commerce clause doctrine. The DCC, as it's familiarly called, prohibits discrimination against interstate commerce and undue burdens on that commerce. But industry has been attacking a wide range of state renewable energy laws under a doctrine relating to extraterritoriality.

Conservative opponents of renewable energy regulation argue that any regulation which shapes out-of-state activities is extraterritorial and therefore unconstitutional. They have also tried to leverage the fact that the grid is interconnected (except for parts of Texas) and electrons go everywhere through the wires (actually, it's electric fields that go everywhere, but that's a technicality). The argument is that anything regulating electricity in one state in effect regulates electrons (fields) from out-of -state generators and to out-of-state consumers. A district judge in Minnesota seems to have bought this idea hook, line and sinker, helped along by an inartfully drafted statute. In general, the lower courts have had a hard time trying to figure out the meaning of this doctrine (as discussed in this paper).

The Tenth Circuit decisively rejected the industry argument in a case called Energy and Environment Legal Institute v. Epel, which was a challenge to a state renewable portfolio standard. The opinion is notable for its clarity. It gives a narrow reading to the extraterritoriality doctrine, limiting the doctrine to the small category of price regulations that gave rise to the doctrine, beginning with the *Baldwin* case:

"How can we have the sort of steadfast conviction the Baldwin Court did that interstate commerce will be harmed when, if anything, Colorado's mandate seems most obviously calculated to raise price for in-state consumers? EELI offers no story suggesting how Colorado's mandate disproportionately harms out-of-state businesses. To be sure, fossil fuel producers like EELI's member will be hurt. But as far as we know, all fossil fuel producers in the area served by the grid will be hurt equally and all renewable energy producers in the area will be helped equally. If there's any disproportionate adverse effect felt by out-of-state producers or any disproportionate advantage enjoyed by in-state producers, it hasn't been explained to this court."

Thus, the Court said, "to reach hastily for *Baldwin*'s per se rule, then, might lead to the decidedly awkward result of striking down as an improper burden on interstate commerce a law that may not disadvantage out-of-state businesses and that may actually reduce price for out-of-state consumers."

By the way, the judge who wrote this opinion, Neil Gorsuch, has an interesting background. He's the son of former Reagan EPA head Anne Gorsuch Burford and a George W. Bush

appointee. He has impressive credentials — Supreme Court clerk, Harvard and Oxford degrees, Princeton University Press book. Definitely someone to keep an eye on. His opinion in this case make an interesting analogy to the way antitrust law is structured, in terms of per se rules and the rule of reason.

Hopefully the Tenth Circuit's lucid opinion will help clarify this muddled area of the law. If we're lucky, the ExtraTerritorial is now departing the planet, or at least, exiting from renewable energy cases.