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Poof, up in Smoke - the Coal Industry Gets Burned: The Seventh Circuit Incinerates State Autonomy with Its Strict Interpretation of the Dormant Commerce Clause in Alliance for Clean Coal v. Miller

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POOF, UP IN SMOKE! THE COAL INDUSTRY GETS BURNED: THE SEVENTH CIRCUIT INCINERATES STATE AUTONOMY WITH ITS STRICT INTERPRETATION OF THE DORMANT COMMERCE CLAUSE IN ALLIANCE FOR CLEAN COAL v. MILLER

I. INTRODUCTION

The passage of the 1990 amendments to the Clean Air Act (CAA) forced coal-dependent, electric-generating plants throughout the country to comply with strict standards in order to reduce sulfur dioxide emissions and acid rain. In an effort to comply with the CAA, the Illinois General Assembly passed the Coal Act. Under the Coal Act, Illinois utility companies can still meet the United States Environmental Protection Agency’s (EPA) CAA standards while continuing to use Illinois coal by installing scrubbers at electric generating plants.

In Alliance for Clean Coal v. Miller, the plaintiff, Alliance for Clean Coal (Alliance), claimed that the Coal Act violated the Com-
merce Clause of the United States Constitution. Although the Commerce Clause gives Congress the power to regulate interstate commerce, the Supreme Court has interpreted the Commerce Clause as limiting the states' power to enact legislation that would interfere with the free flow of interstate commerce. This limiting interpretation, commonly referred to as the dormant Commerce Clause, was the basis of Alliance's constitutional challenge to the Coal Act.

The United States Supreme Court has developed two tests for determining the constitutionality of state legislation challenged under the dormant Commerce Clause. Under the first test, the stricter of the two, a statute violates the Commerce Clause when it discriminates against interstate commerce on its face or in its practical effect. Under the second test, however, state regulations that incidentally burden interstate commerce will be found unconstitutional only if the burdens are "clearly excessive in relation to the putative local benefits" of the regulation.

In Alliance, the United States Court of Appeals for the Seventh Circuit applied the stricter standard, holding that because implementation of the Coal Act adversely affected western coal compa-

5. Id. at 591 (stating Alliance alleged that Coal Act violated dormant Commerce Clause).

6. Id. at 595 (citing Welton v. Missouri, 91 U.S. 275 (1875); Wyoming v. Oklahoma, 502 U.S. 437, 454-55 (1992)). For a discussion of the dormant Commerce Clause, see infra notes 45-49 and accompanying text.

7. Alliance, 44 F.3d at 592. Discussing the nature of the dormant Commerce Clause, the district court in Alliance for Clean Coal v. Craig, 840 F. Supp. 554 (N.D. Ill. 1993), stated: "[a]lthough the commerce clause does not expressly address the power of the states to regulate commerce within their borders, the Supreme Court has long held that the 'negative' or 'dormant' commerce clause prohibits the states from restricting or burdening interstate commerce." Id. (citing Cooley v. Board of Wardens, 530 U.S. 299, 313 (1852); H.P. Hood & Sons, Inc. v. Dumond, 336 U.S. 525, 534-35 (1949); Hughes v. Oklahoma, 441 U.S. 322, 326 (1979)).


10. Pike, 397 U.S. at 142. See infra notes 68-75 and accompanying text for a discussion of the balancing approach to dormant Commerce Clause cases.
nies, it was unconstitutional under the Commerce Clause. Consequently, the court stripped Illinois of its power to regulate and preserve its coal industry.

This Note discusses the courts' interpretation of the Commerce Clause as it relates to state legislation which seeks to preserve the viability of a state's environmental resources. Part II of this Note describes the courts' approaches to state regulations challenged under the dormant Commerce Clause as well as the facts of *Alliance*. Part III explicates the Seventh Circuit's finding that the Illinois Coal Act places an unconstitutional burden on interstate coal commerce. Subsequently, Part IV analyzes the damaging impact of the court's holding in limiting a state's autonomy and its ability to preserve a valuable state industry. Part V concludes that the *Alliance* court's decision adversely limits state sovereignty as well as its ability to preserve the viability of its environmental resources.

II. BACKGROUND

A. Seeking Cleaner Air

Coal is the most important natural resource for producing electricity in the United States. Yet, not all coal is considered equal. The nation's coal reserves located west of the Mississippi, lying in the Plains and Rocky Mountain regions, contain mostly low-

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11. *Alliance*, 44 F.3d at 594-97 (7th Cir. 1995) (using strict standard formulated in *City of Philadelphia* to analyze *Alliance's* claims). The Seventh Circuit stated that "[t]he obvious intent was to eliminate western coal use by Illinois generating plants, thus effectively discriminating against western coal." *Id.* at 596. This discriminatory state action is forbidden under the Commerce Clause. *Id.*

12. For a discussion of how the Seventh Circuit's decision interferes with state autonomy, see *infra* notes 167-69 and accompanying text.

13. For a discussion of *Alliance*'s facts and procedural history, see *infra* notes 82-89 and accompanying text. For a discussion of the court's treatment of state regulations under the dormant Commerce Clause, see *infra* notes 45-81 and accompanying text.

14. For a discussion of the Seventh Circuit's interpretation and invalidation of the Illinois Coal Act under the dormant Commerce Clause, see *infra* notes 90-160 and accompanying text.

15. For a discussion of the impact which the Seventh Circuit's decision will have on state autonomy and a state's ability to exploit its valuable natural resources, see *infra* notes 161-72 and accompanying text.

16. For a discussion of how the *Alliance* decision adversely limits state sovereignty and consequently, a state's ability to preserve the viability of its environmental resources, see *infra* text following note 172.

17. *Alliance*, 44 F.3d at 593. Electric companies burned 78% of the 998 million tons of coal mined in 1992. *Id.*

18. *Id.* Coal contains different amounts of sulfur. The sulfur content varies according to geographical location. *Id.*
sulfur coal, while the reserves located east of the Mississippi, lying in the Illinois Basin and Appalachians, contain higher proportions of sulfur.\textsuperscript{19} Because sulfur dioxide is a primary air pollutant, monitoring the levels of these chemicals is critical to protecting the environment.\textsuperscript{20}

When Congress amended the CAA in 1970, it gave EPA the power to establish standards for regulating hazardous emissions such as sulfur dioxide.\textsuperscript{21} In 1990, Congress once again amended

\textsuperscript{19} Bruce A. Ackerman & William T. Hassler, \textit{Clean Coal/Dirty Air} (1981). These differences are significant, because burning coal produces sulfur dioxide that is proportional to the amount of sulfur contained in the coal. Miller, \textit{44 F.3d} at 593 (citing Ackerman, \textit{supra}).

\textsuperscript{20} See Ackerman, \textit{supra} note 19, at 60-65. As gleaned from the language of CAA Section 108, a "primary" pollutant is one which "may reasonably be anticipated to endanger public health or welfare." CAA § 108, 42 U.S.C. § 7408(a)(1)(A). Ackerman notes that over time, sulfur dioxide may be transformed into harmful sulfates, including sulfuric acid which can then be absorbed into human lung tissue. Ackerman, \textit{supra} note 19, at 62. In addition, sulfur dioxide can be transformed in the atmosphere, returning to the earth in the form of acid rain which damages lakes, forests and buildings in addition to reducing visibility. Acid Rain Provisions, \textit{56 Fed. Reg.} 12529 (1991). According to EPA's notice on Acid Rain Provisions, approximately 20 million tons of sulfur dioxide are emitted by electric generating plants every year. Id. See also Russell Korobkin, \textit{The Local Politics of Acid Rain: Public Versus Private Decisionmaking and the Dormant Commerce Clause in a New Era of Environmental Law}, \textit{73 B.U. L. Rev.} 689 (May 1995) [hereinafter \textit{Local Politics}] (discussing sulfur dioxide emissions and CAA Amendments).

\textsuperscript{21} CAA § 301, 42 U.S.C. § 7601(a). This subsection reads: “The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter. The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this chapter . . . .” Id. Subsections 42 U.S.C. §§ 7411(b)(1)(A) and 7411(b)(1)(B) provide that “[t]he Administrator shall . . . publish proposed regulations, establishing Federal standards of performance for new sources . . . . He shall include a category of sources in [his list] if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” Id. As of 1970, the six pollutants for which EPA had established air quality standards were ozone, lead, sulfur dioxide, particulates, nitrogen and carbon monoxide. S. Rep. No. 101-228, (1990), \textit{reprinted in} 1990 U.S.C.C.A.N. 3385, 3391.

The 1970 Amendments established a partnership between state and federal governments. S. Rep. No. 101-228, at 9, \textit{reprinted in} 1990 U.S.C.C.A.N. at 3395. Under the CAA, EPA establishes criteria for nationwide air quality standards while the states develop implementation plans “to achieve and maintain the required level of air quality.” Id. The primary goal of the CAA is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." CAA § 101, 42 U.S.C. § 7401. Additionally, Congress found that "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments." Id. Under the CAA, the EPA Administrator has a duty to encourage cooperation among the states and local governments in air pollution prevention and control activities in addition to promoting the enactment of uniform state and local laws relating to air pollution control and prevention. CAA § 102, 42 U.S.C. § 7402.
the CAA, instituting a "market-driven approach to emissions regulation and allowing for the free transfer of emission 'allowances.'" 

This system was intended to promote efficiency while combatting the ensuing sulfur dioxide and acid rain hazards.

22. Alliance for Clean Coal v. Miller, 44 F.3d 591, 593 (7th Cir. 1995). See also CAA § 403, 42 U.S.C. § 7651(b) (explaining allocations of annual allowances for existing and new generating units); Acid Rain Provisions, 56 Fed. Reg. at 12,530 (describing market approach by which allowances are transferrable and market forces control their use).

By 1990, the CAA had been amended twice, each time establishing more stringent emission standards in an effort to eradicate the elusive sulfur dioxide problem. See Pub. L. No. 101-549, 1990 Stat. 1630 (codified as amended at 42 U.S.C. § 7411 (1990)) (establishing standards of performance for sources). In 1970, EPA proposed that sulfur dioxide could be controlled by the use of low-sulfur coal or the use of pollution control devices ("scrubbers"). Alliance, 44 F.3d at 593. In 1977, Congress amended the Act so that new facilities no longer had the aforementioned options for compliance. Id. Rather, new generating plants were required to install pollution control devices. Id.

The 1990 CAA Amendments purport to permanently reduce sulfur dioxide emissions by 10 million tons or, in other words, cut the annual sulfur dioxide emissions of electric utilities in half. Acid Rain Provisions, 56 Fed. Reg. at 12,530. The 1990 plan is implemented in two phases. Id. Phase I runs from 1995 to 2000 while Phase II begins in the year 2000 and affects most utilities that emit sulfur dioxide. Id. In order to comply with the CAA, utilities must limit their sulfur dioxide emissions to levels specified in the CAA and may not emit more of the pollutant than they hold in allowance. Id.

An allowance under the CAA is a "limited authorization to emit sulfur dioxide in accordance with the provisions" of CAA Title IV. CAA § 403, 42 U.S.C. § 7651(b). Under section 403, the Administrator shall allocate annual allowances for each generating unit in an amount equal to the annual emission limitations as calculated within the subchapter and other sections of the CAA. Id. Section 403 also provides that the Administrator shall not, however, allocate allowances to emit sulfur dioxide beginning January 1, 2000, that would result in emissions in excess of 8.9 million tons. Id. In determining the emission limitations, EPA considers such factors as "the nature and severity of the health effects involved, the size of the sensitive population(s) at risk, and the kind and degree of the uncertainties that must be addressed." National Ambient Air Quality Standards for Sulfur Dioxides (Sulfur Dioxide)-Reproposal, 59 Fed. Reg. 58,958, 58,959 (1994).

Once allowances have been allocated, they may be transferred among the owners or operators of affected sources. CAA § 403, 42 U.S.C. § 7651(b). Additionally, the Administrator is also responsible for promulgating a system for issuing and tracking allowances and specifying the procedures and requirements "for an orderly and competitive functioning of the allowance system." Id. The transferability of allowances thus permits "market forces to govern their ultimate use." Acid Rain Provisions, 56 Fed. Reg. at 12,530.

23. Alliance, 44 F.3d at 593. See also CAA § 401, 42 U.S.C. § 7651 (stating Congress' findings and purposes of 1990 amendments). Among Congress' findings were:

(1) the presence of acidic compounds and their precursors in the atmosphere and in deposition from the atmosphere represents a threat to natural resources, ecosystems, materials, visibility, and public health; [and]

(2) the principal sources of the acidic compounds and their precursors in the atmosphere are emissions of sulfur and nitrogen oxides from the combustion of fossil fuels . . .
The compliance options which EPA offered enhanced the viability of western coal, because the use of low-sulfur coal would likely be less expensive than other options. The 1990 amendments, however, were potentially harmful to certain regions such as the Illinois Basin which produces high-sulfur coal. The Illinois Gen-

Pursuant to the 1990 amendments, generating plants had at least four ways to comply: 1) installing new scrubbers, 2) using low-sulfur coal, 3) using an alternative fuel source, or 4) buying emission allowances. Alliance, 44 F.3d at 593. See generally CAA §§ 401-416, 42 U.S.C. §§ 7651-7651(o) (describing compliance requirements and options for sources to control acid deposition). The primary purpose of Title IV of the CAA as stated in section 401 is "to reduce the adverse effects of acid deposition through reductions in annual emissions of sulfur dioxide" and "to encourage energy conservation, use of renewable and clean alternative technologies, and pollution prevention as a long-range strategy . . ." Id. § 401, 42 U.S.C. § 7651. According to environmental studies, the implementation of such sulfur dioxide air quality standards as those in the CAA have resulted in substantial improvements in air quality including a downward trend in the amount of sulfur dioxide in the air over the decade from 1983 to 1992. National Ambient Air Quality Standards for Sulfur Oxides (Sulfur dioxide)-Reproposal, 59 Fed. Reg. at 58,960. For example, in that decade the presence of sulfur dioxide in the air dropped 23 percent. Id.

24. Alliance, 44 F.3d at 593. Burning western, low-sulfur coal once again became less expensive than installing new scrubbers to burn high-sulfur coal. Id. According to a Senate report, "[o]ne simple method of reducing SO(2) emissions is . . . to use lower sulfur coal." S. Rep. No. 101-228, at 292, reprinted in 1990 U.S.C.C.A.N. at 3675. However, the Senate report also notes that the switching of fuel in the East is "impracticable" and that "[l]arge-scale fuel switching would also impact unfavorably on the eastern high-sulfur coal industry." Id. On the other hand, coal washing ("scrubbing") is most economical with high-sulfur coal, though this process only achieves moderate results. Id. Coal washing removes the pyritic sulfur found in coal by crushing the coal and physically separating the particles based on their gravity in water. Id. Thus, the Senate report recognized the eastern coal industry's need to minimize costs when attempting to achieve higher air quality standards. See id. at 303, reprinted in 1990 U.S.C.C.A.N. at 3682.

25. Alliance, 44 F.3d at 593 (citing Ackerman, supra note 19). The amount of sulfur dioxide that coal emits is proportional to the amount of sulfur it contains. Id. Coal mined in the Illinois Basin, an area which includes most of Illinois and parts of Indiana and western Kentucky, is relatively high in sulfur. Id. By comparison, coal mined west of the Rocky Mountains is very low in sulfur. Id.

See also Russell Korobkin, Sulfur Dioxide and the Constitution: Legal Doctrine and Responses to the Clean Air Act Amendments of 1990, 13 Stan. Envtl. L.J. 349 (1994) [hereinafter Sulfur Dioxide]. This commentator notes that "a mass substitution of low-sulfur coal . . . could cause the loss of thousands of jobs." Id. at 357. Korobkin also states that the Illinois legislature, when determining what would be the lowest cost solution for complying with the CAA amendments, considered the broader social costs that would result from a switch from high-sulfur coal to low-sulfur western coal. Id. at 367. These costs include increases in unemployment claims, decreases in tax revenues and psychological harm to displaced workers. Id. at 367 n.98. According to one legislative report, the legislators were forced to decide between dealing with unemployment costs of $36 million within three months or spreading the same cost for coal cleaning techniques over twenty years. Id. at 368.

The legislative history of the CAA reveals that Congress recognized that producers of high-sulfur coal would be at a disadvantage as a result of the Amendments for it noted that the sulfur dioxide could "be reduced sharply and
eral Assembly recognized the potential damage that the 1990 amendments would cause the Illinois coal industry if it were forced to install costly scrubbers in order to meet the CAA's requirements. In response to this concern, the legislature enacted the Illinois Coal Act (Coal Act).

...
The Coal Act requires both utility companies and the Utility Commission, which approves or rejects CAA compliance plans, to take into account “the need to maintain and preserve as a valuable State resource the mining of coal in Illinois.”28 Furthermore, the Coal Act allows generating plants to subsidize the cost of installing new scrubbers by increasing their customers’ base rates.29 Essentially, the Coal Act “does not stand as an obstacle to the accomplishment of the purposes of the federal law.” Korobkin, Sulfur Dioxide, supra note 25, at 369. Rather, Illinois’ compliance plan was among the first to be promulgated and was the first to mandate a specific compliance option. Korobkin, Local Politics, supra note 20, at 697. The Coal Act requires the state’s four largest electric utility plants to comply with the 1990 CAA Amendments by installing scrubbers. Id. (citing 220 ILL. COMP. STAT. ANN. § 5/8-402.1(a)).

First, the Coal Act requires all public utilities to file compliance plans with the Illinois Commerce Commission. Id. Second, the Coal Act requires those utilities that use Illinois coal as their primary fuel source to include pollution control devices in their compliance plans. Id. Only two generating plants, Illinois Power’s Baldwin plant and Commonwealth Edison’s Kincaid plant fall within the strictures of the second requirement. Id. According to Korobkin, “[t]echnically, all that is required from [those plants other than the named two] is that they consider compliance options other than fuel switching; they need not adopt those other strategies.” Id. For the textual language and a discussion of the Coal Act provisions, see infra notes 28-29 and accompanying text.

28. 220 ILL. COMP. STAT. ANN. 5/8-402.1(a). The statute provides in pertinent part:

(a) The General Assembly finds that (i) the health, welfare and prosperity of all Illinois citizens require that Illinois electric utilities, in complying with the provisions of the federal Clean Air Act Amendments of 1990, and that the Illinois Commerce Commission, in reviewing and approving the plans of such utilities for compliance, take into account the need for utilities to . . . use coal mined in Illinois in an environmentally responsible manner in the production of electricity, and the need to maintain and preserve as a valuable State resource the mining of coal in Illinois, and that(ii) the construction of pollution control devices for the control of sulfur dioxide emissions . . . burning Illinois coal as a fuel source can be an environmentally responsible and cost effective means of compliance when the impact on personal income in this State of changing the fuel used at such generating units so as to displace coal mined in Illinois is taken into account. . . and that the owner of such generating units should be allowed to recover through rates their prudent costs incurred in designing, acquiring, constructing, installing and testing such facilities . . . .

Id.

Furthermore, this section of the Coal Act requires that any public utility owning a coal-fired electric generating plant “shall include in its proposed CAA compliance plan the installation of pollution control devices” for sulfur dioxide pollution control “to enable them to continue to burn Illinois coal.” Id. This compliance plan design adheres to Congress’ devotion to flexibility in meeting the CAA requirements and its recognition of the need to allow eastern states’ sources to continue to burn high-sulfur coal while attaining the 1990 standards. See supra note 24.

29. 220 ILL. COMP. STAT. ANN. 5/8-402.1(e). This section provides that: the utility shall be entitled to recover its prudent costs upon the provision of such service on a consistent and sustainable basis. Any increase in rates attributable to inclusion in rate base of a public utility’s prudent investment in the costs associated with such facilities, or the recovery of
tionally, this provision enables utility companies to continue their use of Illinois coal while complying with the stringent requirements of the CAA.\(^3\) Additionally, the Coal Act requires public utilities to submit requests for "modification[s]" of fuel use to the Utility Commission.\(^3\) "Modification" is defined as any change in fuel source that would result in the decreased use of Illinois coal by ten percent or more.\(^3\) However, the Coal Act does not specify that every proposed reduction in consumption of Illinois coal will be refused, rather, it requires the Utility Commission to consider various factors before it can grant or deny a modification request.\(^3\)

B. Demonstrating Standing to Pursue a Constitutional Challenge

In order to bring a claim under the United States Constitution, Article III requires claimants to first demonstrate they have suffered an "injury in fact."\(^3\) An injury in fact is "an invasion of a

prudent costs pursuant to the use of a service contract, shall be allocated among its principal customer rate classifications on the basis of costs of services to such classifications.

\(\text{Id.}\) This provision coincides with Congress' intent to allow states to include economic incentives in their sulfur dioxide control plans. See CAA § 110, 42 U.S.C. § 7410; \textit{supra} notes 21-22.

Additionally, Illinois Code section 220 ILL. COMP. STAT. ANN. § 5/9-220 more specifically deals with a utility company's ability to increase the base rates of its customers to compensate for the cost of installing scrubbers. 220 ILL. COMP. STAT. ANN. § 5/9-220. This section states that the Commission may authorize the increase of rates based upon a change in the cost of fuel which includes "any fees paid by the utility for the implementation and operation of a process for... desulfurization" under CAA requirements. \(\text{Id.}\) In addition, this section provides that the Commission may also authorize the increase or decrease of rates based on expenditures or revenues arising from the sale or purchase of emission allowances under the 1990 CAA Amendments. \(\text{Id.}\) Furthermore, the Coal Act also authorizes a direct subsidy of $35 million to the operators of the Baldwin plant to offset the cost of installing scrubbers. Korobkin, \textit{Local Politics}, \textit{supra} note 20, at 700-01.

30. 220 ILL. COMP. STAT. ANN. § 5/8-402.1(a). For the textual language of this requirement, see \textit{supra} note 28.


32. \(\text{Id.}\)

33. \(\text{Id.}\) Section 5/8-508 provides that upon request for modification, the Commission shall conduct a public hearing and shall accept comments from interested parties who have qualified evidence pertaining to the increased cost or savings of the proposed modification or of alternative actions. \(\text{Id.}\) Indeed, the Commission "shall attach primary weight to the cost or cost savings to the customers of the utility." \(\text{Id.}\) If the Commission grants approval of a proposed modification, it may also impose such requirements as are necessary to protect the public interest. \(\text{Id.}\)

34. Mapco, Inc. v. Grunder, 470 F. Supp. 401, 404 (N.D. Ohio 1979). Under Article III of the Constitution, federal court jurisdiction may only be triggered when there is a "case or controversy." U.S. Const. art. III. For a full discussion of \textit{Mapco}'s facts and the court's holding, see \textit{infra} note 39 and accompanying text. See
legally-protected interest which is (a) concrete and particularized and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical.’”

Second, the claimant must establish a causal connection between the alleged constitutional violation and the injury. Finally, it must be likely that the court’s decision can compensate for the injury.

In Mapco v. Grunder, the United States District Court for the Northern District of Ohio articulated the requirement that a plaintiff must demonstrate the existence of an injury in fact in order to satisfy the requirements for standing. The court held that the plaintiff successfully demonstrated an injury in fact, because the tax statute at issue “operate[d] directly upon the use of Mapco’s product—low-sulfur coal.” Similarly, the United States Supreme Court in Lujan v. Defenders of Wildlife stated that the issue of standing strongly depends “upon whether the plaintiff is himself an object of the action . . . at issue.” The Lujan Court rejected the plaintiffs’


36. Lujan, 504 U.S. at 560. The Lujan court noted that the injury must be “fairly . . . trace[able] to the challenged action of the defendant . . . .” Id. (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).

37. Id. at 561. The Court stated that the proposed remedy must “likely” cure the injury as opposed to being “speculative.” Id. (quoting Simon, 426 U.S. at 38, 43).


39. Id. at 404. The plaintiff in Mapco challenged a tax imposed on the storage, use or other consumption of coal. Id. at 402-03. The rate of the tax depended on the sulfur content of the consumer’s coal, a higher tax being assessed to coal with a low-sulfur concentration. Id. For example, the tax per ton for coal that contained less than .5% sulfur was 40 cents while the tax on coal that contained 1.5% of sulfur or more was only 15 cents. Id. The court noted that although Mapco could not show any actual diminution in sales, a direct tax upon a product effectively inhibits commerce. Id. at 404.


41. Id. at 561. The Lujan Court considered the issue of whether a plaintiff could have standing if the challenged statute regulated someone other than the plaintiff. Id. at 562. The Court noted that “when the plaintiff is not himself the object of the governmental action he challenges, standing is not precluded, but is ordinarily ‘substantially more difficult’ to establish.” Id. (quoting Allen v. Wright, 468 U.S. 737, 758 (1984); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 44-45 (1976); Warth v. Seldin, 422 U.S. 490, 505 (1975)). In Lujan, the plaintiffs challenged the constitutionality of the Endangered Species Act which was amended to limit environmental protection plans to the United States and the
claim, because they failed to show that they were personally injured by the legislative amendments. The Court stated that in order to challenge a statute's constitutionality, plaintiffs need to submit evidence and specific facts which show that the statute directly affects them. Thus, the test for standing requires that claimants demonstrate a particular and direct injury to their own interests.

1. The Development of the Dormant Commerce Clause

Article I, Section 8, Clause 3 of the United States Constitution confers upon Congress the power to regulate commerce among the several states. Although the clause provides Congress with an affirmative grant of power, it has also been interpreted as having a negative component. The term "dormant Commerce Clause" stems from this negative interpretation, as the clause limits the states' ability to regulate interstate commerce even when Congress has not enacted any legislation. This reading of the Commerce high seas, excluding from its coverage actions in foreign countries. Id. at 555. Defenders of Wildlife objected to the diminished geographic scope of the amendments, alleging that funded projects abroad threatened certain species. Id.

42. Id. at 556. The Court declared that "the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." Id. at 563 (citing Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972)).

43. Id. The Court stated that the Defenders needed to show specific facts that endangered species abroad were being threatened by the funded projects in addition to showing that their members were directly affected apart from their interest in the subject. Id. (citing Hunt v. Washington State Apple Adver. Comm., 432 U.S. 333, 343 (1977)). Because the plaintiffs failed to present such evidence, they did not establish a causal connection between the government's regulation and their "injury" in addition to not fulfilling the third prong of the test. Id. at 563. Therefore, the Defenders did not demonstrate standing to challenge the constitutionality of the amendments. Id. at 562.

44. For a full discussion of the applicable test for standing, see supra notes 34-43 and accompanying text.

45. U.S. Const. art. I, § 8, cl. 3. ("Congress shall have Power ... [t]o regulate Commerce ... among the several States ... ").

46. David M. Levy, Note, Federalism and the Environment: National Solid Waste Management v. Alabama Department of Environmental Management, 12 WHtter L. Rev. 635 (1991). Levy argues that the Commerce Clause has two aspects: one that grants unlimited power to Congress and another, the negative side, which is effected without congressional action and which limits state power. Id. See also D. Lee Shields, Note, Maine v. Taylor Natural Resource Statutes Against the Commerce Clause or When Is a Hughes Not a Hughes But a Pike?, 29 Nat. Resources J. 291 (discussing Commerce Clause restraints on state control of natural resources).

47. See Levy, supra note 46, at 636. Because the clause can be activated without congressional action, dormant Commerce Clause analyses revolve around the extent to which the clause limits state legislative action and the justifications that states must provide to sustain a challenge under the clause. See City of Phila. v. New Jersey, 437 U.S. 617 (1978). The Court in City of Philadelphia stated that opinions of the Court "have reflected an alertness to the evils of 'economic isolation'
Clause denies the states' ability to enact legislation that would inhibit the free flow of interstate commerce. Therefore, judicial debate evolving out of the interpretation of the dormant Commerce Clause revolves around the types of state legislation that may or may not actually "interfere" with interstate commerce.

2. Legitimate State Interests v. Interstate Commerce

Courts have taken several different approaches to the issue of state regulation under the dormant Commerce Clause. Pursuant to the test formulated by the United States Supreme Court in City of Philadelphia v. New Jersey, a court must first decide whether the challenged statute is a protectionist measure or whether it is directed at legitimate local concerns. In discerning the statute's

48. Shields, supra note 46, at 292 (stating "[t]he Commerce Clause fosters efficient use of resources by encouraging the free flow of goods across state lines, and by prohibiting states from engaging in economic protectionism."). But see George P. Patterson, Note, Does the Commerce Clause Value Public Goods?: West Lynn Creamery v. Healy, 44 CATH. U.L. REV. 977, 979 (1994-95) (asserting dormant Commerce Clause "generates tension between the text of the Constitution, notions of federalism, and the efficient maintenance of the economic union" as well as violates principles of federalism and separation of powers).

49. See, e.g., Maine v. Taylor, 477 U.S. 131, 151 (1986) (finding state regulation of natural resources serves legitimate local purpose which cannot be served by available nondiscriminatory means); Lewis v. BT Inv. Managers, 447 U.S. 27, 36 (1980) (holding "States retain authority under their general police powers to regulate matters of legitimate local concern"); Hughes v. Oklahoma, 441 U.S. 322 (1979) (discussing differences between state legislation that discriminates and that which furthers legitimate local purpose). Another facet of the judicial debate involves whether the judiciary should involve itself in analyses of the dormant Commerce Clause at all. See also Amy M. Petragnani, Comment, The Dormant Commerce Clause: On Its Last Leg, 57 ALB. L. REV. 1215, 1243 (1994) (stating formulation of dormant Commerce Clause analyses should be role of legislature, not of courts).

50. See Levy, supra note 46, at 635 (discussing Supreme Court's evolving approaches to Dormant Commerce Clause cases). See also Lisa J. Petricone, Comment, The Dormant Commerce Clause: A Sensible Standard of Review, 27 SANTA CLARA L. REV. 443 (1987) (suggesting lower courts lack clear doctrine upon which to judge dormant Commerce Clause cases as result of Supreme Court's failure to establish "bright-line" standard).


52. Id. at 624. The Supreme Court in City of Philadelphia considered New Jersey's proposed prohibition of solid waste importation into the state. Id. at 618. While New Jersey contended that the legislation was intended to further legitimate local concerns over the health of its residents, Philadelphia and New Jersey landfill owners argued that the prohibition amounted to an economic protectionist measure. Id. at 625. The City of Philadelphia Court stated that determining whether the
purposes, courts consider the legislative intent as well as the practical effects of the legislation.\textsuperscript{53}

When analyzing a statute, courts apply a virtual \textit{per se} rule of invalidity to legislation whose form represents nothing more than pure economic protectionism.\textsuperscript{54} In \textit{Oregon Waste Systems v. Department of Environmental Quality},\textsuperscript{55} the United States Supreme Court defined the term "discriminatory" as economic protectionism which displays "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."\textsuperscript{56} The clearest example of such a discriminatory measure is one that imposes an absolute prohibition or quota on the import or export of a specific good.\textsuperscript{57}

Similarly, the Supreme Court uses the \textit{per se} rule of invalidity for state regulations that tax imported goods.\textsuperscript{58} For example, in
West Lynn Creamery v. Healy, the Court applied the rule formulated in City of Philadelphia to nullify a statute that provided for a tax on imported milk when the tax was later rebated to local milk producers. The Healy Court stated that "tariffs against the products of other States are so patently unconstitutional that our cases reveal not a single attempt by any State to enact one." Rather, such laws are protective measures because they favor local, untaxed goods over out-of-state taxed products and "are an unreasonable clog upon the mobility of commerce."

Finally, the Court has adopted the per se rule where a state purports to protect its citizens by requiring out-of-state businesses to comply with measures that raise the cost of doing business in that state. Thus, in Hunt v. Washington State Apple Advertising Commission, the Supreme Court struck down a North Carolina statute which required that only U.S. grades, and not those of individual states, could appear on the packages of apples imported into the state. The labeling requirement meant that apple growers across the country would need to alter their packaging techniques if they

60. Id. at 2211.
61. Id. (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935)). Writing for the Court in Baldwin, Justice Cardozo stated that the power to tax under such laws is "hostile in conception as well as burdensome in result." Id.
62. Id. See also Bacchus Imports, 468 U.S. at 271 (holding regulation that exempted locally-produced liquor from taxation invalid on basis that exemption was discriminatory in favor of local products both in purpose and effect); New Energy, 486 U.S. at 272-73 (holding statute which denies credit for ethanol from states that do not grant a refund, exemption, or tax credit to Ohio ethanol is "discriminating against out-of-state ethanol producers to the advantage of in-state industry.").
65. Id. at 354. In Hunt, North Carolina enacted a statute whereby all closed imported containers of apples could bear no grade other than the U.S. grade or standard. Id. at 335. This statute posed a difficult and potentially expensive marketing dilemma for the Washington apple industry, for Washington growers would have to change all of their packaging (40 million closed containers per year) in order to comply with the North Carolina regulation. Id. at 337. Although the North Carolina legislature enacted the statute to protect consumers from deceptive and confusing labeling, the regulation essentially limited Washington's ability to compete in North Carolina by drastically raising the cost of doing business in the state. Id. at 338. As a result, the Court concluded that the North Carolina statute was discriminatory. Id. at 354.
intended to export their goods into North Carolina. Additionally, the *Hunt* Court stated that it would invalidate legislation that attempted to protect state citizens if the state could have enacted a less-burdensome regulation to achieve its objective.

By contrast, the Court will apply a balancing test to legislation which does not discriminate, but rather promotes a legitimate local concern. This test, described in *Pike v. Bruce Church*, balances the need for unburdened interstate commerce against the state's protection of a legitimate local interest. The *Pike* Court stated that “[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”

Furthermore, the Supreme Court in *Minnesota v. Clover Leaf Creamery Co.* held that it would not invalidate a non-discriminatory statute merely because the statute causes some businesses to shift from out-of-state industry to in-state industry. Rather, the Court

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66. *Id.* at 338. The Court in *Hunt* found that each of the three methods that could be used to alter packaging would be extremely burdensome on out-of-state businesses. *Id.* at 349.

67. *Id.* at 354. (“[I]t appears that nondiscriminatory alternatives to the outright ban of Washington State grades are readily available.”).

68. Tortorella, *supra* note 53, at 1566. Tortorella discusses the Supreme Court's use of the balancing test in Commerce Clause challenges. *Id.*


70. Tortorella, *supra* note 53, at 1566-67. In *Pike*, the challenged statute required that cantaloupes be packaged in a certain way before they could be exported from Arizona. *Pike*, 397 U.S. at 139. The regulation's purpose was to protect consumers from fraudulent packaging while enhancing the reputation of Arizona cantaloupe growers. *Id.* at 143. A cantaloupe-growing business that packaged its produce in California rather than in Arizona opposed the statute because it claimed that the statute placed an undue burden on its business by requiring it to build a packaging center in Arizona. *Id.* at 140.

71. *Pike*, 397 U.S. at 142. The *Pike* court determined that once a legitimate local purpose is found, "the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.* The Court found the regulation's purpose of enhancing the reputation of state cantaloupe growers to be a legitimate state interest. *Id.* at 143. However, the court held that "the State's tenuous interest . . . cannot constitutionally justify the requirement that the company build an unneeded $200,000 packing plant in the State." *Id.* at 145. Such a burden on commerce "has been declared to be virtually *per se* illegal." *Id.* (citing Toomer v. Witsell, 334 U.S. 385 (1948); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928); Johnson *v.* Haydel, 278 U.S. 16 (1928)).


73. *Id.* at 474. In *Clover Leaf Creamery*, the Court considered legislation that regulated the materials used to produce milk containers. *Id.* at 456.
reasoned that an incidental burden on interstate commerce, in light of local benefits, is not always indicative of a protectionist measure. Only when the burden on interstate commerce outweighs the statute's legitimate purposes will the regulation be held unconstitutional.

3. Subsidies and the Market Participant Exception

A state's ability to subsidize local industry under the Commerce Clause raises additional concerns regarding the constitutionality of a state's legislation. Recent cases have held that a state may choose to subsidize its local industries, without subsidizing foreign businesses, as long as the subsidy does not take the form of a discriminatory tax on out-of-state products. Therefore, statutes that provide for pure subsidies will generally withstand dormant Commerce Clause violation challenges.

In *Hughes v. Alexandria Scrap Corp.*, the Court introduced a similar exemption to the dormant Commerce Clause termed the "market participant exception." Where the state itself participates in an industry by contracting as a business entity, regulations that support its business will be exempt from the dormant Commerce

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74. *Id.* at 472 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)).

75. *Id.* Ordinarily, a facially-neutral economic regulation will survive a constitutional challenge if the balancing test is applied because the court will give special consideration to legitimate environmental interests. *Tortorella*, supra note 53, at 1568 (citing *Clover Leaf Creamery*, 449 U.S. at 474). But see *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (rejecting Oklahoma's environmental argument that requiring in-state coal plants to burn 10% Oklahoma-mined coal would conserve Wyoming's cleaner coal for future use).

76. Brief for Indiana as *amicus curiae* at 6, *Alliance for Clean Coal v. Miller*, 44 F.3d 591 (7th Cir. 1995) (No. 94-1369) (citing *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988)). Consequently, the Court in *West Lynn Creamery* declared that "[a] pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business." *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2214 (1994). The Court found that a subsidy which is funded out of taxes on the sale of milk to other producers is, however, violative of the Commerce Clause. *Id.* Similarly, in *New Energy*, the Supreme Court found that a subsidy which "explicitly deprives certain products of generally available beneficial tax treatment" because they are produced out-of-state violates the Commerce Clause even though a subsidy which offers reciprocity to out-of-state manufacturers would be constitutional. *New Energy*, 486 U.S. at 274.

77. 426 U.S. 794 (1976).

78. *Id.* at 810. For example, in *Hughes* the Court considered a Maryland statutory scheme whereby the state, as a contracting party, paid bounties to Maryland scrap processors if they presented an indemnity agreement from unlicensed hulk automobile suppliers. *Id.* at 797. However, the regulation required out-of-state processors to present much more documentation than Maryland processors before they could qualify for a bounty. *Id.* at 801.
Clause requirements. Courts, therefore, will likely defer to the state legislature when a regulation is not discriminatory, but instead furthers a legitimate environmental goal without burdening interstate commerce. However, lower courts have not developed a uniform application of the two tests to environmental regulations.

III. Analysis

A. Facts

Alliance for Clean Coal, whose members included western coal companies and three coal-transporting railroads, brought suit in the United States District Court for the Northern District of Illinois to challenge the constitutionality of the Illinois Coal Act. Alliance claimed that the Coal Act discriminated against western coal producers both on its face and in its practical effect. Interestingly, Alliance did not claim that it had lost any business as a result of the

79. Id. at 809-10. The Hughes Court held that a state's entrance into the market to protect the environment did not violate the Commerce Clause. Id. See also Bruce H. Aber, State Regulation of Out-of-State Garbage Subject to Dormant Commerce Clause Review and the Market Participant Exception, 1 FORDHAM ENVTL. L. REP. 99 (1989) (discussing state planning under market participant exception). Aber notes that "[n]othing in the commerce clause prohibits a state, in the absence of congressional action, from participating in the market and thereby favoring its own citizens over others." Id. at 108. (citing Hughes, 426 U.S. at 810).

80. See Tortorella, supra note 53, at 1568 (discussing survival of environmental regulations under balancing test) (citing Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 474 (1981)).

81. Courts that have considered the validity of state regulations have applied both the per se rule and the balancing test. See Clover Leaf Creamery, 449 U.S. at 456 (applying balancing test); Alliance for Clean Coal v. Miller, 44 F.3d 591 (7th Cir. 1995) (applying only per se rule); National Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124 (7th Cir. 1995), cert. denied, 115 S. Ct. 2579 (1995) (applying balancing approach); Petricone, supra note 50, at 451-56 (discussing variances of Court's rationale). Courts, even within the same circuit, have been ambiguous about which test should generally be used for a statute which purports to protect environmental issues. Compare Alliance, 44 F.3d at 591 with National Paint, 45 F.3d at 1124. In National Paint, the Seventh Circuit reviewed a ban on spray paint and jumbo indelible markers within the city of Chicago limits. National Paint, 45 F.3d at 1124. The court found that the interest in protecting the city from vandalism was legitimate and outweighed the burden on the spray paint companies who would have to limit their sales to the suburbs. Id. at 1132.

82. Alliance for Clean Coal v. Craig, 840 F. Supp. 554, 555-56 (N.D. Ill. 1993), aff'd, Alliance for Clean Coal v. Miller, 44 F.3d 591 (7th Cir. 1995). Craig and others were Commissioners of the Illinois Commerce Commission. Id. Alliance based its constitutional challenge on the dormant Commerce Clause. Id.

83. Id. at 556. By making this claim, Alliance seemingly hoped that the court would apply the virtual per se rule of invalidity adopted in City of Philadelphia. For a full discussion of the Supreme Court's reasoning in City of Philadelphia, see supra notes 51-54, 57 and accompanying text.
Coal Act's enactment. 84 Further, Alliance conceded that its sales in Illinois had increased despite the passage of the Coal Act. 85

Both Alliance and the State of Illinois moved for summary judgment. 86 The district court granted Alliance's motion, 87 concluding that the Coal Act clearly burdened interstate commerce and also that its enactment did not seek to further a legitimate local purpose. 88 Consequently, the Illinois Commerce Commission appealed the decision to the United States Court of Appeals for the Seventh Circuit, requesting dismissal of the case for want of jurisdiction.

84. Alliance, 44 F.3d at 594.
85. Id. Alliance sought a declaratory judgment that the Coal Act violates the Commerce Clause and requested an injunction which would prevent the enforcement of the Coal Act and invalidate the environmental compliance plans thereunder. Craig, 840 F. Supp. at 555-56.
86. Alliance, 44 F.3d at 594. The Federal Rules of Civil Procedure govern when a motion for summary judgment will be granted. Rule 56(c) states: "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."
FED. R. CIV. P. 56(c).
87. Alliance for Clean Coal v. Craig, 840 F. Supp. 554, 556 (N.D. Ill. 1993) (stating Illinois' and Alliance's motions), aff'd, Alliance for Clean Coal v. Miller, 44 F.3d 591 (7th Cir. 1995). In considering the motions for summary judgment, the district court cited Celotex Corp. v. Catrett, 477 U.S. 317 (1986), which held that a movant is entitled to summary judgment when he demonstrates that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. Id. at 557. The district court found that there were no genuine issues of material fact and that "the only contested question in [the] case [was] whether the coal act impermissibly restricts the free flow of interstate commerce." Craig, 840 F. Supp. at 558.
88. Id. at 559-62. At trial, Alliance challenged two aspects of the Coal Act: the requirement that the public utilities and commission take into account the need to use Illinois coal in CAA compliance plans and the requirement of four of Illinois' generating plants to include the installation of scrubbers in their compliance plans. Id. At the circuit court level, Alliance challenged other provisions of the Coal Act. Alliance for Clean Coal v. Miller, 44 F.3d 591, 594 (7th Cir. 1995).

As the district court noted, the Act "does not directly require Illinois public utilities to use Illinois coal." Craig, 840 F. Supp. at 559. Furthermore, "the use of Illinois coal is one factor to be considered along with the other goals and objectives of the utilities act." Id. Yet, the court found that "[t]he requirement that utilities and the commission base [CAA] compliance decisions even in part-on the interests of the Illinois coal industry is pure protectionism." Id. The district court based its conclusion in part on the impossibility of determining the basis of the decisional process of the utilities commission in its approval of a compliance plan. Id. The district court, like the Seventh Circuit, failed to analyze the facts of the case under the balancing test proposed in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). Id. at 561.
tion, or in the alternative, reversal of the district court’s judgment. 89

B. Narrative Analysis

1. Departure From the Traditional Test for Standing Under Article III: Sustaining Alliance’s Jurisdictional Claim

The Alliance court refused to require Alliance to demonstrate that they had lost specific opportunities as a result of the Illinois Coal Act’s enactment. 90 As a result, the Seventh Circuit found that Alliance had standing to challenge the constitutionality of the Coal Act. 91 Despite Alliance’s failure to show specific instances of lost opportunities, the court determined that Alliance had sustained the jurisdictional challenge under Article III. 92 The court explained that the particular, actual injury was not the missing evidence of lost sales, but rather the western coal suppliers’ inability to compete on an equal footing with Illinois coal companies. 93

The court refused to accept Illinois’ argument that Alliance could not have suffered an injury in light of the increased sales of its coal. 94 Instead, the court concluded that the alleged injury was based on the fact that Alliance’s sales had not increased as rapidly as they would have had western coal companies been able to compete on an equal footing with their Illinois competitors. 95 Thus, the majority in Alliance applied a relaxed standard in order to find

89. Alliance, 44 F.3d at 594. The State’s challenge to jurisdiction was not considered by the district court, but the Court of Appeals discussed this argument because jurisdiction must be assessed before considering the merits of a case. Id.
90. Id.
91. Id. at 595. For a discussion of the Seventh Circuit’s reasoning for finding that Alliance had standing to challenge the Coal Act under the dormant Commerce Clause, see infra notes 92-98 and accompanying text.
92. Id. Declaring that the showing of lost opportunities was “neither required to establish standing nor reasonably expected under the circumstances of [the] case,” the Seventh Circuit held that Alliance had demonstrated an injury in fact under the test in Lujan. Id. at 594. For a discussion of the test to determine injury in fact as set forth in Lujan, see supra notes 36-43 and accompanying text.
93. Id. at 594 (citing Northeastern Fla. Chapter of Associated Gen. Contractors v. Jacksonville, 508 U.S. 656 (1993)); Mapco v. Grunder, 470 F. Supp. 401, 403 (N.D. Ohio 1979)). Moreover, the court found, without citing to precedent, that “it is unreasonable to expect Alliance to point to specific orders canceled or deals reneged on,” because supply arrangements with coal companies would not occur until after the Illinois generating plants had submitted their compliance plans to the commission. Alliance, 44 F.3d at 594.
94. Alliance, 44 F.3d at 595 (emphasis added).
95. Id. In addition, the court found it not unusual that the sale of western coal had increased, because the 1990 Clean Air Act made the low-sulfur coal a viable compliance option. Id. In the court’s opinion, there was no plaintiff more appropriate than Alliance to challenge the constitutionality of the Coal Act. Id.
that Alliance had standing to challenge the constitutionality of the
Coal Act under the dormant Commerce Clause.96

Judge Cudahy, in a concurring opinion, found Alliance's
standing argument to be "elusive."97 According to Judge Cudahy,
the best reason for allowing Alliance to challenge the Coal Act was
"that there will be no other plaintiffs with a basis for challenging
the Coal Act if the plaintiffs . . . are denied the right to proceed."98
Given the court's conclusion on the issue of standing, it should not
be surprising that its determination on the issue of the Coal Act's
constitutionality is equally curious.

2. Finding the Illinois Coal Act Void Under the Dormant
Commerce Clause

The Alliance court commenced its analysis of the Coal Act with
a brief outline of the negative aspect of the Commerce Clause.99
The court declared that if a statute such as the Coal Act was nothing
more than a simple economic protectionist measure which discrim-
inated against interstate commerce on its face or in its effect, the
court would apply a per se rule of invalidity.100 After stating its con-
cclusions, the Seventh Circuit offered a more detailed examination
of Alliance in support of its decision.101

At the outset, the court analogized the facts in Alliance to those
in West Lynn Creamery,102 suggesting that the provisions of the Coal

96. For a discussion of the relaxed standard the Seventh Circuit used to deter-
mine jurisdictional standing, see supra notes 90-95 and accompanying text.
97. Alliance, 44 F.3d at 597 (Cudahy, J., concurring). Judge Cudahy stated
that "[i]n the issue of standing, this is also a close case." Id.
98. Alliance, 44 F.3d at 597. Judge Cudahy noted that his stated reason in
itself would provide standing for Alliance to challenge the Coal Act. Id.
99. Id. at 595 (citing Welton v. Missouri, 91 U.S. 275 (1875); Wyoming, 502
U.S. at 454). For a full discussion of the development and implications of the
dormant Commerce Clause, see supra notes 45-49 and accompanying text.
100. Alliance, 44 F.3d at 595 (citing DeHart v. Austin, 39 F.3d 718, 723 (7th
Cir. 1994) (quoting City of Phila. v. New Jersey, 437 U.S. 617 (1978)). For a discus-
sion of the per se rule adopted in City of Philadelphia, see supra notes 51-54, 57 and
accompanying text.
101. Id.
102. Id. The court declared that this recent Supreme Court case which inter-
prets the negative aspect of the Commerce Clause is controlling. Id. The court
found that the Coal Act, like the milk-pricing order in West Lynn Creamery, Inc. v.
Healy, 114 S. Ct. 2205 (1994), had the same effect as a tariff which is repugnant to
the unitary national economy that the Commerce Clause ensures. Alliance, 44 F.3d
at 595. For a discussion of West Lynn Creamery, see supra notes 59, 76 and accompa-
nying text.
Act are comparable to a tax on out-of-state products.\textsuperscript{103} Continuing
its analysis, the \textit{Alliance} court explained why the Illinois Coal Act is
nothing more than a protective measure.\textsuperscript{104} The court listed four
reasons why the Act is discriminatory on its face: \textsuperscript{105} (1) the Coal Act
"tilts the overall playing field"; \textsuperscript{106} (2) the Coal Act requires four
large electric-generating plants to install pollution control de-
vices; \textsuperscript{107} (3) the Coal Act allows the generating plants to pass the
cost of the scrubbers on to consumers through their rate base; \textsuperscript{108}
and (4) the Coal Act requires the Commerce Commission to ap-
prove any proposed modification that would decrease the use of
Illinois coal by ten percent or more.\textsuperscript{109} Based on these provisions,
the court determined that the purpose of Illinois' Coal Act was to
discriminate against low-sulfur western coal.\textsuperscript{110}

The Seventh Circuit flatly rejected Illinois' argument that the
Coal Act does not discriminate against western coal, but merely en-
courages the use of local coal.\textsuperscript{111} Rather, the court viewed the Coal
Act as nothing more than an "ingenious" way to discriminate
against western coal, thus violating the Commerce Clause.\textsuperscript{112} Fi-

Additionally, the court relied on \textit{Oregon Waste Systems, Inc. v. Department of En-
vironmental Quality of Oregon}, 511 U.S. 93 (1994). The Seventh Circuit implied that
the Coal Act is similar to the state surcharge on the disposal of solid waste that the
Court invalidated in \textit{Oregon Waste Systems} as a violation of the Commerce Clause.
\textit{Id.} For a discussion of \textit{Oregon Waste Systems}, see \textit{supra} notes 55-56 and accompany-
ing text.

\textsuperscript{103} \textit{Alliance}, 44 F.3d at 595. \textit{But see} Brief for Indiana as \textit{amicus curiae} at 9,
\textit{Alliance}, (No. 94-1369) (arguing that Coal Act can be distinguished from tax on
goods produced out of state).

\textsuperscript{104} \textit{Alliance}, 44 F.3d at 595. The court reasoned that "[t]he Illinois coal Act
is a none-too-subtle attempt to prevent Illinois electric utilities from switching to
low-sulfur western coal as a Clean Air Act compliance option." \textit{Id.}

\textsuperscript{105} \textit{Id.} For a discussion of the provisions of the Illinois Coal Act, see \textit{supra}
notes 27-33 and accompanying text.

\textsuperscript{106} \textit{Id.} The court stated that the playing field is tilted because the Coal Act
requires the commissioners to take into account the potential effect on the local
coal industry. \textit{Id.} \textit{See also} 220 ILL. COMP. STAT. ANN. § 5/8-402.1(a) (West 1995)
(describing requirement under Coal Act).

\textsuperscript{107} \textit{Alliance}, 44 F.3d at 595 (quoting 220 ILL. COMP. STAT. ANN. §5/8-402.1).
\textit{See supra} notes 28-29 for the textual language of this provision.

\textsuperscript{108} \textit{Alliance}, 44 F.3d at 595-96. Without citing to any authority, the court
concluded that using western coal is cheaper than installing scrubbers. \textit{Id.}

\textsuperscript{109} \textit{Id.} at 596. \textit{See} 220 ILL. COMP. STAT. ANN. § 5/8-508 (describing require-
ments for proposed modifications).

\textsuperscript{110} \textit{Alliance}, 44 F.3d at 596. The court stated that "[t]he intended effect of
these provisions is to foreclose the use of low-sulfur western coal by Illinois utilities
as a means of complying with the Clean Air Act." \textit{Id.} This, the court said, amounts
to discrimination. \textit{Id.}

\textsuperscript{111} \textit{Id.} Indeed, the court stated that this argument "rings hollow." \textit{Id.}

\textsuperscript{112} \textit{Id.} (citing West Lynn Creamery v. Healy, 114 S. Ct. 2205, 2215 (1994)).
Because the Coal Act requires certain utility companies to install scrubbers, Illinois
nally, the majority rejected the State's characterization of the pass-through rates as a subsidy. Once again, comparing the provisions of the Coal Act to the tariff in *West Lynn Creamery*, the court stated that the fact that Illinois citizens will bear the cost of installing scrubbers "does not cure the discriminatory impact on western coal producers." In conclusion, the majority declared that "the obvious intent [of the Illinois Coal Act] was to eliminate western coal use by Illinois generating plants, thus effectively discriminating against western coal." Consequently, the Seventh Circuit found the Coal Act to be repugnant to the Commerce Clause and consequently invalidated the statute.

By contrast, Judge Cudahy's concurring opinion suggested that a balancing test should replace the *per se* invalidity analysis for states traditionally having plenary authority over local ratemaking and electric operations problems. According to Judge Cudahy, the

is in essence requiring that these generating plants burn high-sulfur Illinois coal. *Id.* Thus, the Coal Act inhibits the viability of western coal. *Id.* The *Alliance* court compared the Coal Act to the mandate in *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), which required Oklahoma utility companies to burn at least 10% Oklahoma coal. *Id.* The Wyoming Court found that such a requirement violated the dormant Commerce Clause. *Wyoming*, 502 U.S. at 454. For a full discussion of the *Wyoming* decision, see *supra* note 57.

113. *Alliance*, 44 F.3d at 596.

114. *Id.* (citing *West Lynn Creamery*, 114 S. Ct. at 2216-17). Distinguishing the "agreement to subsidize" from the "market participant" exception, the Court in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), noted that the fact that the Coal Act "has the purpose and effect of subsidizing the particular industry... does not transform it into a form of state participation in the free market." *Id.* (quoting *New Energy Co. v. Limbach*, 486 U.S. 269, 277 (1988)). Similarly, the Court in *New Energy* held that a state tax credit for the use of Ohio ethanol violated the Commerce Clause despite arguments that the tax fell under the "market participant" exception. *Id.*

115. *Id.* at 596 (Cudahy, J., concurring).

116. *Id.* In his concurring opinion, Judge Cudahy emphasized the dissimilarities between the "subsidy equivalent" in the Coal Act and pure subsidies, like that in *Hughes*, which do not run afoul of the Commerce Clause. *Id.* at 597 (Cudahy, J., concurring). In part, the pass-through rates may not qualify as a true subsidy because it is uncertain whether the guarantees benefit the utility companies and coal industry. *Id.* (citing *New Energy*, 486 U.S. at 277; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *South-Central Timber Dev., Inc. v. Wunnick*, 467 U.S. 82 (1984)).

117. *Id.* at 597 (Cudahy, J., concurring). Although Judge Cudahy's opinion did not use the balancing test formulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), to formulate his conclusion, he considered the externalities that Illinois has used as a basis for its regulation of coal. *Id.* at 597-98. The concurring opinion's preference for the balancing test is also apparent from its recognition of the several states' traditional plenary authority over electric operations. *Id.* at 598. Indeed, Judge Cudahy stated that this premise is Illinois' strongest argument. *Id.* Therefore, the concurring opinion's analysis of the "least cost" solutions came closer to the balancing approach than the majority's examination.
key question was whether the State arrived at a "least cost" solution when it took into account the social costs that would result from the loss of viability of Illinois coal. Additionally, Judge Cudahy noted that a State should not recognize such social "externalities," because such a consideration "handicaps" interstate commerce.

C. Critical Analysis

1. Relaxing the Requirements for Standing to Challenge the Constitutionality of a State Regulation

The Seventh Circuit's interpretation of the Article III standing issue is perplexing. In the words of concurring Judge Cudahy, "the requisite showing of injury here is elusive." Courts have traditionally allowed parties to challenge state legislation by claiming they are unable to compete on an equal footing in interstate commerce; however, courts faced with such challenges have not suggested that standing would exist if the plaintiff's business actually increased after the regulation's enactment. Consequently, it is counterintuitive to consider Alliance to be an injured party when the sale of western coal in Illinois rose. Therefore, the court's

118. Alliance, 44 F.3d at 598.
119. Id. (citing Wyoming v. Oklahoma, 502 U.S. 437, 454-55 (1992)), (concluding allowance for these externalities is simply economic protectionism).

Judge Cudahy reasoned that a state may not consider social costs "since the Commerce Clause effectively precludes consideration of local economic damage as a legitimate reason to handicap interstate commerce." Id. However, he stated that he believes no Supreme Court decision has gone so far as to suggest that a regulation like the Coal Act violates the Commerce Clause, even though this conclusion is the trend. Id. Additionally, the concurring opinion noted that the Coal Act may not have the effect of discriminating against western coal at all, as the Illinois generating plants are likely to choose Illinois coal over western coal regardless. Id.; See also Tortorella, supra note 53, at 1561-64 (discussing impact of geographical externalities on interstate commerce).

120. Alliance, 44 F.3d at 596 (Cudahy, J., concurring).

122. Alliance, 44 F.3d at 597 (Cudahy, J., concurring) (citing Appellant Reply Brief at 3). This case is clearly distinguishable from other cases, such as Wyoming v. Oklahoma, 502 U.S. 437 (1992), where standing to make a challenge under the dormant Commerce Clause was sustained only after a showing of the regulation's negative impact on the plaintiff's sale of goods in that state. Id. at 445 ("After... the effective date of the Act, these utilities reduced their purchases of Wyoming coal in favor of coal mined in Oklahoma.") The majority in Alliance stated that even given the increased consumption of western coal since the Coal Act's enactment, Alliance suffered an injury because the sale of their coal had not increased as rapidly as it would have if it was enabled to compete on the same ground as Illinois coal producers. Alliance, 44 F.3d at 594.
conclusion that Alliance's coal sales have risen at a slower rate due to passage of the Coal Act is at best speculative.\textsuperscript{123}

Additionally, if the literal test for "injury in fact" had been applied to the facts of \textit{Alliance}, the plaintiffs would have failed to demonstrate standing.\textsuperscript{124} First, given Alliance's lack of proof concerning lost sales and the resulting actual increase of sales since the Coal Act's enactment, Alliance's injury was not "concrete and particularized," but merely "conjectural."\textsuperscript{125} Under the analysis established in \textit{Northeastern Florida Contractors v. Jacksonville},\textsuperscript{126} the "inability to compete on an equal footing" is enough to sustain a claim of standing.\textsuperscript{127} Given the fact that Alliance's sales actually increased after the Coal Act's enactment, they fail to meet even this threshold requirement.\textsuperscript{128} Following this line of reasoning, Alliance's injury cannot be considered "actual or imminent."\textsuperscript{129}

Second, because they did not allege any particular injury, Alliance fails to establish a causal connection between the Coal Act and Alliance's inability to compete.\textsuperscript{130} Even without considering the issue of whether the court could compensate Alliance for its alleged injury, Alliance failed to prove the first two prongs of the standing test.\textsuperscript{131} Alliance, therefore, has no standing to challenge the constitutionality of the Illinois Coal Act.

2. Failure to Balance Competing Interests

As for its discussion of the Coal Act under the dormant Commerce Clause, the court failed to provide sufficient support for its conclusion that this statute is an economic protectionist measure.\textsuperscript{132} Additionally, the Seventh Circuit inaccurately analogized

\begin{itemize}
  \item \textsuperscript{123} \textit{Alliance}, 44 F.3d at 594. The plaintiffs failed to present any evidence that tended to show that their coal sales would have increased more rapidly had the Coal Act not existed. \textit{See id.} (evidencing lack of proof for Article III standing).
  \item \textsuperscript{124} For a discussion of the test for Article III standing ("injury in fact"), see \textit{supra} notes 34-43 and accompanying text.
  \item \textsuperscript{125} \textit{Alliance}, 44 F.3d at 594. For a discussion of the court's consideration of the increased sales and injury for standing purposes, see \textit{supra} notes 85 and 90-93 and accompanying text.
  \item \textsuperscript{127} \textit{Id.} at 664-68. \textit{See also} Mapco, Inc. v. Grunder, 470 F. Supp. 401, 403-06 (N.D. Ohio 1979) (stating requirements for Article III standing).
  \item \textsuperscript{128} \textit{Alliance}, 44 F.3d at 594 (stating sale of western coal is on rise "despite the best efforts of the Illinois legislature").
  \item \textsuperscript{129} \textit{Id.} at 594.
  \item \textsuperscript{130} \textit{Id.}
  \item \textsuperscript{131} \textit{Id.}
  \item \textsuperscript{132} Korobkin, \textit{Local Politics}, \textit{supra} note 20, at 741. Korobkin states that the court's conclusion that the Coal Act is discriminatory on its face is not clear. \textit{Id.}
\end{itemize}
the Coal Act to other regulatory measures which have been found to violate the dormant Commerce Clause.\(^\text{133}\) First, the Coal Act does not absolutely prohibit, nor set a quota for the importation of western coal.\(^\text{134}\) At most, the Coal Act requires utility companies to submit proposed modifications to the Commission if they want to reduce their use of Illinois coal by ten percent or more.\(^\text{135}\) The Coal Act does not "require" the use of Illinois coal.\(^\text{136}\) Therefore, the court should not have found the act to be facially discriminatory based on this characterization.

Second, the Coal Act does not impose a discriminatory tax on western coal.\(^\text{137}\) Thus, the Seventh Circuit's comparison of the Coal Act to the regulation involved in *West Lynn Creamery* was misplaced.\(^\text{138}\) While the Coal Act may give Illinois coal companies an advantage over western coal companies *should the Commission deny a request for modification*, this effect is speculative.\(^\text{139}\) Rather, the provisions of the Coal Act and their possible effect on the western coal industry are not nearly as overtly protectionist as a tax or surcharge.\(^\text{140}\) Further, the court should not have invalidated the

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For further discussion of the Seventh Circuit's failure to show how the Coal Act is an economic protectionist measure, violative of the dormant Commerce Clause, see infra notes 134-41 and accompanying text.

\(^{133}\) For a discussion of the Seventh Circuit's attempt to draw similarities between the Coal Act and other statutes, see supra notes 102-03, 114 and accompanying text, and infra notes 134-40 and accompanying text.

\(^{134}\) 220 ILL. COMp. STAT. ANN. § 5/8-402.1 (West 1995). See also Brief for Indiana as *amicus curiae* at 9, *Alliance for Clean Coal v. Alliance*, 44 F.3d 591 (7th Cir. 1995) (No. 94-1369) (arguing Coal Act does not create quota on amount of western coal generating plants may use).

\(^{135}\) 220 ILL. COMp. STAT. ANN. § 5/8-508 (requiring utility companies to submit proposals for modifications). For a full discussion of this provision, see supra note 33 and accompanying text.

\(^{136}\) 220 ILL. COMp. STAT. ANN. § 5/8-508; Korobkin, *Local Politics*, supra note 20, at 742. Korobkin notes that once plants install scrubbers under the Coal Act, they are not explicitly required to burn Illinois coal. *Id.*

\(^{137}\) 220 ILL. COMp. STAT. ANN. § 5/8-402.1. See also Brief for Indiana as *amicus curiae* at 9, *Alliance* (No. 94-1369) (arguing Coal Act is not discriminatory because it imposes no tax on western coal).


\(^{139}\) 220 ILL. COMp. STAT. ANN. § 5/8-508. For a full discussion of this provision, see supra note 33.

statute merely because some businesses shifted from out-of-state to in-state as a result of the provision. 141

Finally, the Coal Act does not facially or in its practical effect raise Alliance's costs of doing business in Illinois. 142 This act is not a measure of economic protectionism, rather, it is a plan which allows Illinois coal companies to subsist while complying with the CAA. 143 The court's analysis ignored Congress's intent that the installation of scrubbers be an acceptable means for complying with the 1990 CAA Amendments. 144 The court's reasoning, therefore, does not support its finding that the Coal Act is automatically void under the virtual per se rule of invalidity.

As the concurring opinion in Alliance implies, the majority concluded that the Coal Act is repugnant to the dormant Commerce Clause without first giving due consideration to the State's legitimate and important interests. 145 Because the Supreme Court has been unclear on the issue of whether courts should apply the per se rule or a balancing test in dormant Commerce Clause cases, the Seventh Circuit's decision would have been more acceptable if the court had applied both analyses. Moreover, the court might have concluded differently had it applied the balancing test as the United States Supreme Court did in Pike. 146

141. Minnesota v. Clover Leaf Creamery, 449 U.S. 456 (1981). The Court in Clover Leaf Creamery stated that the shifting of some business from out-of-state to in-state suppliers is not absolutely indicative of a Commerce Clause violation. Id.

142. Alliance, 44 F.3d at 595.


144. Alliance, 44 F.3d at 595. See also Korobkin, Sulfur Dioxide, supra note 25, at 369 (stating Amendments clearly anticipate state regulatory involvement in selecting compliance strategies and "Congress would have been explicit had it intended to prohibit states from mandating . . . specific technical solutions"); CAA §§ 415, 108, 42 U.S.C. §§ 7651(n), 7408 (1995) (describing ways in which utility companies can comply with CAA). See supra note 22 for a discussion of the flexibility of the CAA with regards to compliance options; supra notes 23-24 for a discussion of the CAA's legislative history. See also, Korobkin, Local Politics, supra note 20, at 748. This latter commentary suggests that had Congress wanted to prohibit such CAA compliance plans as the Coal Act, which may affect out-of-state coal producers, Congress would have exercised its power to preempt the plans itself. Id. Furthermore, the grant of power to Congress under the Commerce Clause "obviates any need for the courts to protect" states' competing economic and environmental interests proactively. Id.

145. Alliance, 44 F.3d at 596.

146. See Minnesota v. Clover Leaf Creamery, 449 U.S. 456 (1981) (finding environmental benefits outweighed legislation's burden on interstate commerce); Levy, supra note 46, at 635 (stating statute protecting environment is more favored than one that protecting economic interests); Shields, supra note 46, at 292-93 (stating Supreme Court uses balancing test for examining environmental regula-
If it had applied the balancing test, the Seventh Circuit would have considered both the legitimate local interests and the burden on interstate commerce. Illinois' concern that its utility companies comply with the CAA is a legitimate environmental interest which deserves far less scrutiny than pure economic regulations. In addition, a state's interest in maximizing the financial return of an industry within its borders is a legitimate interest. These legitimate interests, however, must be weighed against the burden the statute imposes on interstate commerce, and specifically the burden on the western coal industry. If the burden on the industry is unwarranted, the regulation must fall. The burden placed on Alliance by the Coal Act, however, is at most slight. Alliance did not even allege any loss of business as a result of the Coal Act, and any loss actually resulting from the modification provisions is nonetheless negligible. Illinois' substantial interest in its coal industry and the industry's ability to comply with the CAA outweighs the possible burdens on interstate commerce. Thus, if...
the court had applied the balancing test, it might have upheld the constitutionality of the Coal Act.

3. Lack of Consideration of the Market Participant Exception and the Validity of a State Subsidy

Although the court was correct in its analysis of the Coal Act under the market participant exception, the Seventh Circuit did not apply the correct standard in its analysis of the Coal Act as a state subsidy. Indeed, the Coal Act cannot fall within the market participant exception, because the state is not a purchaser of coal; rather, it is a regulator of utility companies. Consequently, the Coal Act does not deserve protection under the exception presented in Hughes.

The court, however, rejected Illinois' argument that the rate-base subsidy qualifies as an exemption to the dormant Commerce Clause requirements without first giving adequate consideration to the Supreme Court's discussion of such exemptions in West Lynn Creamery. The court once again compared the provisions of the Coal Act to a tariff. As a result, the Alliance court concluded that merely because Illinois' citizens would bear the cost of installing scrubbers did not alter the discriminatory impact on western coal producers. The court's analysis fails in Alliance because the Coal Act's subsidy is not a tax, and subsidies that do not tax foreign products will withstand a dormant Commerce Clause challenge even if

154. Alliance, 44 F.3d at 596.
155. See id. (discussing state's role in regulating electric generating plants); 220 ILL. COMP. STAT. ANN. §§ 5/8-402.1, 5/8-508 (West 1995) (setting forth state of Illinois' regulations of utility companies). See also Korobkin, Local Politics, supra note 20, at 747 (suggesting that seemingly inapposite results of applying market participant and subsidy exceptions can be avoided by applying market participant doctrine broadly).
156. Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976). See also Alliance, 44 F.3d at 596 (comparing Coal Act to act in Hughes). For a discussion of Hughes and the market participant exception, see supra notes 77-79 and accompanying text.
157. Alliance, 44 F.3d at 596. See also West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205 (1994) (discussing subsidy exception under dormant Commerce Clause challenges).
158. Alliance, 44 F.3d at 596. The Alliance court stated that the Supreme Court rejected the identical argument in West Lynn Creamery holding that "[t]he cost of a tariff is also borne primarily by local consumers yet a tariff is the paradigmatic Commerce Clause violation." Id. (emphasis added). For a full discussion of the provisions distinguishing the Coal Act from a tariff, see supra notes 137-40 and accompanying text.
159. Alliance, 44 F.3d at 596.
foreign businesses are not subsidized.\textsuperscript{160} Therefore, even if the Coal Act does not qualify for an exemption under the market participant exception, it arguably qualifies for an exemption under the subsidy exception.

\section*{IV. IMPACT}

\subsection*{A. The Loss of a Valuable State Industry and the Demise of State Sovereignty}

The potential impact of the Seventh Circuit's decision is disturbing. Because the court held that the Coal Act violated the Commerce Clause, Illinois must now promulgate an alternative CAA compliance plan.\textsuperscript{161} Additionally, the court's disapproval of the pollution control device requirements essentially leaves Illinois with one less alternative for complying with the CAA.\textsuperscript{162} This result suggests that the Seventh Circuit places a higher importance on interstate economic concerns than on the national environment.\textsuperscript{163}

As a result of the Seventh Circuit's holding, Illinois' utility companies will probably incur higher costs in complying with EPA's regulations than they would have under the Coal Act.\textsuperscript{164} It is likely that the utility companies will have no choice but to use low-sulfur west-
ern coal to meet CAA standards. As a result, Illinois' coal industry is in jeopardy of facing a rapid decline in its viability.

The impact of the Seventh Circuit's decision on state sovereignty is of additional concern. Although regulation of in-state utility companies has traditionally been a legitimate state concern, the court's holding implies that states no longer have the regulatory power they once enjoyed. The court's opinion suggests that even legitimate state interests will be held to a stricter standard under the dormant Commerce Clause. Thus, the court's holding not only serves to usurp the state's power, but also displaces the traditional analyses of the issues as well.

B. Lowering the Standing Standard and Leaving No Clear Dormant Commerce Clause Standard to Follow

The court's decision establishes a lesser standard for demonstrating standing under Article III of the Constitution. By disregarding the relevant factual situation in \textit{Alliance} and the traditional basis for proving an injury in fact, the Seventh Circuit implies that even those parties who cannot show they suffered an actual injury will have standing to challenge the constitutionality of a statute under the dormant Commerce Clause.

Finally, the \textit{Alliance} court's decision offers no clear guidance for future courts faced with dormant Commerce Clause claims. By

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165. \textit{See Alliance}, 44 F.3d at 593 (stating installing scrubbers to use high-sulfur is more expensive than using low-sulfur western coal). If the generating plants are to subsist at all, they will have no choice but to use the western coal.

166. \textit{See Korobkin, Local Politics, supra} note 20, at 697 (discussing effects of CAA Amendments on viability of high-sulfur coal). For a discussion of the Amendments and their impact on midwestern coal industry, see \textit{supra} notes 23 and 25 and accompanying text.

167. \textit{Alliance}, 44 F.3d at 598 (Cudahy, J., concurring). States traditionally have held the power to regulate the utility companies located within its borders. \textit{Id.} \textit{See also Korobkin, Sulfur Dioxide, supra} note 25, at 397 (arguing that when state requires specific method for complying with CAA, it acts as functional market participant); McGinley, \textit{supra} note 158, at 429-30 (stating Tenth Amendment affords protection of state sovereignty).

168. \textit{Alliance}, 44 F.3d at 591. The court in \textit{Alliance} suggests that the states no longer enjoy plenary power to regulate their own utility companies, thus altering the entire standard by which these regulations are judged. \textit{Id.}

169. \textit{Id.} at 597. Even where the state has ultimate control over the regulation of its utility companies, its use of this power has to be balanced against the burdens of interstate commerce. \textit{Id.} However, the majority fails to consider the state's traditional power at all and replaces the traditional balancing test with the strict scrutiny test. \textit{Id.} at 596. \textit{See also} Petragnani, \textit{supra} note 49, at 1216 (arguing judiciary should not usurp power of Congress to regulate interstate commerce).

170. \textit{Alliance}, 44 F.3d at 594. For a full discussion of the issue of standing in \textit{Alliance}, see \textit{supra} notes 90-96 and accompanying text.
disregarding the balancing test, the court fails to explain what should be the appropriate analysis of such claims. Consequently, the court’s holding does little more than demonstrate the Seventh Circuit’s ambiguous and undecided position on the relationship between state legislation and the dormant Commerce Clause. Thus, the Seventh Circuit’s decision in Alliance is both discouraging and ineffective.

V. Conclusion

In Alliance, the Seventh Circuit relaxed the standard used to demonstrate standing to make a constitutional challenge. More importantly, the court incorrectly reviewed the Coal Act under a strict standard without giving due consideration to the State’s legitimate interests. The court’s inaccurate comparison of the Coal Act to protectionist measures gives little guidance to state legislatures who, like Illinois, attempt to comply with federal regulations. The Alliance court’s failure to recognize Illinois’ interests hinders the state’s ability to regulate the environmental resources within its borders. Likewise, the court’s decision suggests that state autonomy will be sacrificed under the dormant Commerce Clause even where the state purports to further important environmental goals. Thus, the Seventh Circuit’s judgment neglects modern environmental and industrial concerns and serves only to restrict state sovereignty.

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171. Alliance, 44 F.3d at 595. For a discussion of how the court erred by not analyzing the Coal Act under the balancing test, see supra notes 145-53 and accompanying text.

172. In National Paint & Coatings Ass’n v. Chicago, 45 F.3d 1124 (7th Cir. 1994), cert. denied 115 S. Ct. 2579 (1995), the Seventh Circuit applied both tests to determine the constitutionality of a statute which banned spray paint from being sold within Chicago’s city limits. Id. For a full discussion of the court’s analysis in National Paint, see supra note 81.