

Interstate Commerce x Due Process

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ABSTRACT: The extraterritoriality doctrine of the Commerce Clause forbids a state from regulating activities wholly outside of its borders. There are three primary criticisms of the doctrine: first, that any “dormant” or “negative” component of the Commerce Clause is not supported by the text, structure, or history of the Constitution; second, that to recognize a specific ban on extraterritorial legislation is to misread core Commerce Clause cases; and third, that, even if there is a sound basis for a ban on extraterritorial legislation, such a prohibition is no longer needed because in today’s modern economy regulated entities can comply easily with diverse state regulations.

Despite these textual, jurisprudential, and practical criticisms, courts continue to invoke the doctrine to restrict the traditional police powers of the state. Recently, courts used the doctrine to block Maryland from ensuring that live-saving prescription drugs are affordable and New York from requiring that opioid manufacturers contribute to a fund for addiction treatment. To make matters worse, the courts’ use of the doctrine is inconsistent, if not incoherent. Indeed, there are three live circuit splits on the existence and meaning of the doctrine.

A new model is needed. This Article proposes that the extraterritoriality doctrine be collapsed into a Due Process inquiry. Doing so will give courts a familiar availment standard to deploy, will restore the authority of the states to set the terms of access to their market, and will respect the ability of market actors to weigh whether the proposed terms are worth the prospects of market entry. This Article offers this model as a reasoned and workable alternative to the current extraterritoriality framework, outlining its theoretical basis and applying it to recent circuit court cases as well as to responses to the COVID-19 pandemic.

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I. INTRODUCTION

In 2015, Turing Pharmaceuticals AG acquired the exclusive rights to distribute Daraprim, the leading treatment for a life-threatening infection, and promptly raised the per tablet price for the drug from \$13.50 to \$750.¹ In 2007, Mylan Pharmaceuticals acquired the exclusive rights to distribute EpiPen, a primary treatment for life-threatening allergies, and by 2016 raised the price of a two-pack of injections from \$94 to \$609.² The price for Naloxone, which reverses the effects of an opioid overdose, went up 680 percent from 2014 to 2018.³ In response to these price increases, Maryland

1. See Andrew Pollack, *Drug Goes from \$13.50 a Tablet to \$750, Overnight*, N.Y. TIMES (Sept. 20, 2015), <https://www.nytimes.com/2015/09/21/business/a-huge-overnight-increase-in-a-drugs-price-raises-protests.html> [<https://perma.cc/Y83C-MV9U>].

2. See Juliette Cubanski, Tricia Neuman & Anthony Damico, *How Much Has Medicare Spent on the EpiPen Since 2007?*, KAISER FAM. FOUND. (Sept. 20, 2016), <https://www.kff.org/medicare/issue-brief/how-much-has-medicare-spent-on-the-epipen-since-2007> [<https://perma.cc/ABF6-98NX>].

3. See Stephen P. Wood, *As Opioid Overdose Numbers Rise, So Does the Cost of Naloxone*, BILL OF HEALTH (June 4, 2018), <http://blog.petrieflom.law.harvard.edu/2018/06/04/as-opioid-overdose-numbers-rise-so-does-the-cost-of-naloxone> [<https://perma.cc/JV7J-BSLK>].

prohibited pharmaceutical companies from charging “unconscionable” prices for essential drugs made available for sale in the state.⁴

At the same time, opioids have ravaged communities across the country. In 2018 alone, over 47,000 Americans overdosed and died from opioids.⁵ Put differently, nearly 130 Americans die per day from opioid overdoses.⁶ About 80 percent of heroin use can be traced to the initial use of prescription opioids.⁷ Recent research indicated that, during a six-year period, drug companies flooded the nation with 76 billion oxycodone and hydrocodone pills.⁸ In response to this crisis, New York enacted a sweeping law requiring opioid manufacturers to contribute to a program that funds addiction treatment and prevention services. The law sets contribution requirements based on a drug manufacturer’s in-state sales and prohibits manufactures from imposing the cost of that contribution onto the consumer.⁹

But federal courts struck down both Maryland’s statute¹⁰ and New York’s statute.¹¹ In both instances, the courts relied on the extraterritoriality doctrine—one of three doctrines that are said to comprise the “dormant” or “negative” Commerce Clause of Article I—which provides that States cannot regulate commercial conduct outside of their borders. That doctrine is not without criticism. Indeed, there are three primary criticisms of the doctrine: first, it lacks textual, structural, and historical support;¹² second, it is not a stand-alone doctrine given a proper reading of key Commerce Clause cases;¹³ third, it has minimal relevance in a modern economy in which businesses are able easily to participate in multistate markets without needing the courts to unlog the streams of interstate commerce.¹⁴

4. MD. CODE ANN., HEALTH-GEN. § 2-802 (West 2017), *invalidated by* Ass’n for Accessible Meds. v. Frosh, 887 F.3d 664 (4th Cir. 2018).

5. *See Data Overview: Overview of the Drug Overdose Epidemic: Behind the Numbers*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Dec. 7, 2020), <https://www.cdc.gov/drugoverdose/data/index.html> [<https://perma.cc/EVH6-8V6T>].

6. *See Opioid Overdose Crisis*, NAT’L INST. ON DRUG ABUSE (May 27, 2020), <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis> [<https://perma.cc/QN75-CB5H>].

7. *See id.*

8. *See* Scott Higham, Sari Horwitz & Steven Rich, *76 Billion Opioid Pills: Newly Released Federal Data Unmasks the Epidemic*, WASH. POST (July 16, 2019, 7:19 PM), https://www.washingtonpost.com/investigations/76-billion-opioid-pills-newly-released-federal-data-unmasks-the-epidemic/2019/07/16/5f29fd62-a73e-11e9-86dd-d7foe60391e9_story.html [<https://perma.cc/TJM9-HEMY>].

9. *See* New York Opioid Stewardship Fund Act, N.Y. PUB. HEALTH § 3323 (McKinney 2018) (repealed 2018).

10. *See generally* Ass’n for Accessible Meds. v. Frosh, 887 F.3d 664 (4th Cir. 2018) (striking down Maryland’s statute).

11. Healthcare Distrib. All. v. Zucker, 353 F. Supp. 3d 235, 243 (S.D.N.Y. 2018). Following the ruling, New York amended its statute to remove the offending provision. *See* Ass’n for Accessible Med. v. James, 974 F.3d 216, 218 (2d Cir. 2020).

12. *See infra* Section III.A.

13. *See infra* Section III.B.

14. *See infra* Section III.C.

These arguments, either alone or in combination, have not brought about much-needed change or clarification to the doctrine. Accordingly, widespread confusion as to the existence and meaning of the extraterritoriality doctrine remains. Indeed, there are three live circuit splits concerning the doctrine: first, whether the doctrine is a third, independent prong of the Dormant Commerce Clause; second, whether and when courts should apply a presumption against extraterritorial application to the relevant law; and third, whether a finding of extraterritorial application marks a *per se* constitutional violation.¹⁵ The extraterritoriality doctrine is incoherent and yet still used like a sword to strike down socially beneficial exercises of states' traditional police powers.

This Article recognizes a new paradigm. It argues for a model in which extraterritoriality considerations are collapsed into a due process inquiry. The touchstone of any such inquiry thus will be reciprocal fairness: whether the regulation applies due to the market actor's voluntary availment of the state's market.¹⁶ This framework places a premium on the sovereign authority of the state to establish conditions for market access and participation, and on the ability of the market actor to consider whether the economic gains of entering a state's market are worth the regulatory burdens of complying with that state's regulatory scheme. It pays tribute to the bargain between the state and the regulated entity, and does not disturb this equilibrium unless due process considerations are offended. Moreover, in the face of extraterritoriality challenges, courts will be able to pick up a familiar, well-worn instrument of constitutional adjudication. As such, this model has a sound theoretical foundation and is administrable, two hallmarks of a principled and durable doctrine.

This Article is structured as follows: Part II sketches the development and meaning of the extraterritoriality doctrine. Part III outlines and endorses the primary current criticisms of the doctrine: it is without textual, structural, or historical support, it is not an independent doctrine at all, and it is anachronistic in light of modern companies' abilities to navigate diverse regulatory requirements. Part IV introduces due process considerations as a pathbreaking solution to the wide-ranging frustration with the Dormant Commerce Clause's meaning and application. It does so by showing how recent circuit court cases and responses to the COVID-19 pandemic would fare under this proposed model. Part V concludes.

II. THE EXTRATERRITORIALITY DOCTRINE

This Part offers an overview of the Dormant Commerce Clause generally, focuses on the major cases—both historic and modern—involving the

15. See *infra* Section IV.A.

16. "Reciprocal fairness" is a term used by Justice Sotomayor. See *Daimler AG v. Bauman*, 571 U.S. 117, 151 (2014) (Sotomayor, J., concurring).

extraterritoriality doctrine, and finally summarizes exceptions to the Clause and by extension to the extraterritoriality doctrine.

A. DORMANT COMMERCE CLAUSE GENERALLY

The Commerce Clause, located in Article I, Section 8, authorizes Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹⁷ The Supreme Court has held that the Commerce Clause has two components: It serves as an affirmative grant of authority to Congress to regulate interstate commerce, and it also has a “dormant” or “negative” component that prohibits the states from impairing interstate commerce.¹⁸ As to the latter component, the Court reasoned that the free flow of commerce between the states is a matter textually committed to Congress, and by implication removed from the hands of the states.¹⁹ Because the Dormant Commerce Clause is a creature of the courts, it has been likened to a “judicial free trade policy.”²⁰

A preliminary question is why the courts would recognize the Dormant Commerce Clause despite its atextual nature. The Dormant Commerce Clause, and by extension the extraterritoriality doctrine, is said to have several purposes. First, in terms of political theory and historical outlook, the Framers expected the Union to rise or fall as one. Justice Cardozo captured this view of the Clause in the following passage: “The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”²¹ The Clause, in the context of trade, fulfills the general vision of a unified nation that rises and falls as one.

17. U.S. CONST. art. I, § 8, cl. 3.

18. See *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996) (“The constitutional provision of power ‘[t]o regulate Commerce . . . among the several States,’ has long been seen as a limitation on state regulatory powers, as well as an affirmative grant of congressional authority.” (alterations in original) (citation omitted) (quoting U.S. CONST. art. I, § 8, cl. 3)).

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

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

See also *FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 16 (1937) (characterizing the Dormant Commerce Clause as an “implicit veto upon state legislation from the mere grant to Congress of power over foreign and interstate commerce”).

20. *Energy & Env’t. Legal Inst. v. Epel*, 793 F.3d 1169, 1171 (10th Cir. 2015) (Gorsuch, J.).

21. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

Second, and relatedly, the health of the general economy is jeopardized when any constituent part of the market acts in its self-interest to the detriment of the other parts. That is, the Dormant Commerce Clause eliminates only those laws that impair interstate commerce. “[O]ne state in its dealings with another may not place itself in a position of economic isolation,” continued Justice Cardozo.²² Similarly, Justice Jackson wrote that, “our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units.”²³

Third, the Dormant Commerce Clause reflects the unfairness of one state to impact out-of-state individuals who are not part of that state’s political process and thus can neither approve the relevant statute on the front-end nor hold the state accountable on the back-end.²⁴ The Dormant Commerce Clause therefore restricts, at least in the commerce context, attempts by states to impact commerce outside of their territorial bounds while skirting popular consent and avoiding any public costs of that impact.²⁵

1. Historic Considerations

In implementing the Dormant Commerce Clause’s general principle that the states cannot impair interstate commerce, the Supreme Court initially focused on the threshold question of ‘what constituted interstate commerce.’ In the founding era, whether the state law concerned national or local matters in turn determined whether the law regulated interstate commerce. In the

22. *Id.* at 527.

23. *Du Mond*, 336 U.S. at 537–38.

24. *See* *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767–68 n.2 (1945) (“[When] the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.”); *see also* Earl M. Maltz, *How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47, 78 (1981) (“[W]hen . . . the challenged regulation disadvantages only the out-of-state producers, this ‘internal political check’ is absent,” triggering “stricter judicial scrutiny.”).

25. The Dormant Commerce Clause must be distinguished from preemption. The Dormant Commerce Clause is similar to preemption in that “[b]oth doctrines work to preserve the United States as a single integrated commercial market in the face of state legislation that threatens to create multiple markets of suboptimal scale,” and both can be invoked to “wipe[] out state law.” Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 733 (2008). But preemption requires some congressional act in order for its preemptive force to kick in; by contrast, a state can violate the Dormant Commerce Clause even in the absence of any congressional action. *See* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2098 (2000) (“[I]n express preemption cases, Congress has specifically legislated and defined the areas where state laws are displaced. . . . [The] dormant Commerce Clause analysis displaces certain state laws absent any congressional action at all on the subject.”). Moreover, the Dormant Commerce Clause is limited only to state acts implicating interstate commerce, whereas preemption does not have this doctrinal limitation and applies to all legal contexts, such as immigration. *See, e.g., Arizona v. United States*, 567 U.S. 387, 401–03, 415–16 (2012).

seminal *Gibbons v. Ogden*²⁶ opinion, authored by Chief Justice Marshall, the Supreme Court ruled that the issuance of a federal license to operate a ferry between New Jersey and New York City was a proper exercise of the Commerce Clause. The Court reasoned that the ferry was an instrumentality of interstate commerce, that interstate commerce itself covers commercial activity within a state that may “affect” other states, and that the license affecting two states therefore had a national, or interstate character.²⁷ *Gibbons* therefore teaches that Congress could regulate “national” economic interests pursuant to the Commerce Clause, and that the states were confined to regulating “local” economic interests.²⁸ The scope of that which was “national” under the *Gibbons* formulation was rather broad, as intrastate activity that impacted other states was deemed interstate for purposes of the Commerce Clause.²⁹

In the mid-1800’s to the early-1900’s, however, the Court shifted from this expansive conception of interstate commerce to one that was rather narrow. The Court eschewed the “national” and “local” distinction in favor of one that drew a line between “direct” and “indirect” impact on interstate commerce.³⁰ In *Schechter Poultry Corp. v. United States*,³¹ the Court determined that Congress did not have the power under the Commerce Clause to require that chickens be sold by the coop, and thus to prohibit customers from being able to select chickens on an individual basis.³² The Court reasoned that the regulation concerned point of sale transactions at the end of the stream of commerce, and that these sales had at most an indirect impact on interstate commerce.³³ As a result, states were allowed to regulate economic activity either at the beginning of the commercial process, such as production, and when the relevant products were at rest, such as sales.

26. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 239–40 (1824).

27. *See id.* at 194–95.

28. *See* Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine*, 45 WM. & MARY L. REV. 1, 28 (2003) (explaining this “formalistic conception” in which “commerce reside[s] in discrete and non-overlapping spheres,” with the national category indicating that which required a “uniform rule”).

29. *See* *Wickard v. Filburn*, 317 U.S. 111, 120 (1942) (“At the beginning Chief Justice Marshall described the Federal commerce power with a breadth never yet exceeded.” (citing *Gibbons*, 22 U.S. (9 Wheat.) at 1, 194, 195)).

30. *See* *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319 (1851).

31. This case should not be confused with *Rhode Island v. Schechter Poultry*, a case referenced by Philip Banks in a courtroom scene of the *Fresh Prince of Bel-Air*, having “to do with the right to hang dead chickens in a butcher-shop window.” *The Fresh Prince of Bel-Air: Will Goes a Courtin’* (NBC television broadcast Oct. 18, 1993).

32. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935).

33. *Id.*

2. Modern Approach

Today, courts reviewing a Dormant Commerce Clause challenge to a state statute will ask, first, whether the statute in question treats out-of-state individuals or entities differently than in-state individuals or entities. Courts identify such discrimination in one of two ways: the statute, on its face, treats out-of-state individuals or entities differently,³⁴ or the statute has the purpose or effect of treating out-of-state individuals or entities differently.³⁵

A classic type of discriminatory statute is one regulating the importing or exporting of goods to and from the state. A seminal Dormant Commerce Clause case, *City of Philadelphia v. New Jersey*,³⁶ exemplifies an import statute that is facially discriminatory. The statute, enacted in New Jersey, prohibited the importation of out-of-state waste into in-state landfills.³⁷ The statute was discriminatory because it banned out-of-state waste while permitting in-state waste.³⁸

A discriminatory statute encounters “a virtually *per se* rule of invalidity.”³⁹ If a state statute discriminates against out-of-state individuals or entities, courts presume that the statute in question violates the Dormant Commerce Clause. The state may overcome this presumption by showing three things: first, the statute’s ends are legitimate, such as furthering the police power of the state and not engaging in economic protectionism; second, the source of the problem is out-of-state; and third, no non-discriminatory alternatives were viable, leaving only discriminatory means available to the state.

34. See *United Haulers Ass’n, Inc. v. Oneida–Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (noting that the initial inquiry is whether the reviewed statute is discriminatory on its face).

35. See *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (noting that, in addition to facial discrimination, the Court will assess whether the reviewed statute is discriminatory “in practical effect”); see also *E. Ky. Res. v. Fiscal Ct. of Magoffin Cnty.*, 127 F.3d 532, 540 (6th Cir. 1997) (“A statute can discriminate against out-of-state interests . . . facially, . . . purposefully, or . . . in practical effect.”).

36. See generally *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (invalidating a New Jersey statute that prohibited the importing of out-of-state waste, as New Jersey failed to justify the distinction between in-state and out-of-state waste).

37. *Id.* at 618–19.

38. *Id.* at 629. Taxes on imports and exports are other examples of discriminatory policies. See *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994) (describing such laws as “[t]he paradigmatic example of” discriminatory laws); see also *infra* notes 120–23 and accompanying text (discussing the Framers’ concerns about such taxes).

39. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 596 (1997). In *Camps Newfound/Owatonna, Inc. v. Town of Harrison* for example, the Court emphasized the exacting nature of judicial review of any discriminatory statute. *Id.* at 575. In this case, a Maine statute exempted in-state non-profit organizations from certain taxes, but a more limited exemption was available to in-state non-profit organizations that primarily served non-residents. *Id.* at 568. The Court stated that the statute was “all but *per se*” impermissible, and that Maine faced the “strictest scrutiny,” which is “an extremely difficult burden, ‘so heavy that “facial discrimination by itself may be a fatal defect.”” *Id.* at 581–82 (quoting *Or. Waste Sys., Inc. v. Dep’t of Env’t Quality of Or.*, 511 U.S. 93, 101 (1994)). Perhaps unsurprisingly, Maine could not surpass this high barrier to constitutionality. *Id.* at 595.

The first requirement—the reasons offered in support of the statute—bears emphasizing.⁴⁰ The heartland of a state's authority is to promote the health, safety, and morals of its residents,⁴¹ or the “police power” of a state.⁴² A state's use of its police power is legitimate for Dormant Commerce Clause purposes.⁴³ In *City of Philadelphia*, for example, New Jersey claimed that environmental concerns were the basis for the statute.⁴⁴ The Court accepted this rationale as valid, as health and safety are legitimate reasons for state legislation.⁴⁵

On the other hand, if the purpose of the statute is simply to favor the economic interests of in-state individuals or companies, the statute will be automatically invalidated.⁴⁶ Put differently, economic protectionism falls within the core of what the Dormant Commerce Clause is designed to prohibit, and would constitute a *per se*, automatic violation of the Clause.⁴⁷ A generic example of an impermissible economic protectionist statute would be a Florida statute that prohibits the importation of out-of-state oranges in order to promote the sale of in-state oranges. An actual example of such protectionism is *Bacchus Imports v. Dias*, in which Hawaii exempted only in-state manufacturers from an excise tax on wholesale liquor sales.⁴⁸ The avowed purpose of the exemption was to boost the in-state liquor industry.⁴⁹ This in-state economic favoritism is a textbook demonstration of an invalid reason to discriminate against out-of-state individuals or entities.

That said, it is not economic protectionism for a State to avoid a health and safety problem the source of which is out-of-state. For example, a Florida

40. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (asking whether the reviewed statute has “a legitimate local purpose”).

41. See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827) (“[T]he police power . . . unquestionably remains, and ought to remain, with the States.”); *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504, 583 (1847) (characterizing the police powers as “the powers of government inherent in every sovereignty to the extent of its dominions. . . . [T]hat is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion.”).

42. See *R.R. Co. v. Husen*, 95 U.S. 465, 470–71 (1877) (“[The police power] is generally said to extend to making regulations promotive of domestic order, morals, health, and safety.”); *Home Bldg. & Loan Ass’n. v. Blaisdell*, 290 U.S. 398, 437 (1934) (“[T]he police power . . . is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people . . .”).

43. See *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) (“No one disputes that a State may enact laws pursuant to its police powers . . .”).

44. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 625 (1978).

45. *Id.* at 625–26.

46. See *id.* at 624 (“[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.”).

47. See *id.*; see also Note, *Functional Analysis, Subsidies, and the Dormant Commerce Clause*, 110 HARV. L. REV. 1537, 1537 (1997) (“[T]he guiding principle behind its dormant commerce clause jurisprudence is the prevention of “economic protectionism.”); *id.* at 1548 (“[T]he primary purpose of the dormant commerce clause is to combat economic protectionism.”).

48. *Dias*, 468 U.S. at 265.

49. *Id.* at 271.

statute that prohibits the importation of out-of-state oranges because of a disease found only in out-of-state oranges could be justified on isolationist grounds. In *Asbell v. Kansas*, for example, the Court approved a Kansas statute that allowed for the inspection of any imported cattle and that banned any cattle deemed to be diseased upon inspection.⁵⁰ The Court noted that the statute was predicated on legitimate health and safety reasons.⁵¹ The Court further suggested that a statute that stopped the importation of any cattle, regardless of disease, would lose its character as an exercise of the police power.⁵²

Alternatively, if a state statute is non-discriminatory, courts generally will consider the statute to be presumptively valid.⁵³ A defendant may prevail nonetheless upon winning the balancing of interests, specifically by showing that the benefits of the statute are outweighed by the burdens to interstate commerce.⁵⁴ *Pike v. Bruce Church, Inc.* is most synonymous with balancing in the Dormant Commerce Clause context.⁵⁵ *Pike* concerned an Arizona statute that required all cantaloupes offered for sale in Arizona to be packed in containers, and to be packed in a specified way.⁵⁶ The plaintiff, a produce company, did not have a requisite packing facility in-state, and thus sought to ship its cantaloupes out-of-state for packing, and eventual reentry into Arizona for sale.⁵⁷ Arizona prohibited this out-of-state shipment, unless the cantaloupes were first packed in the prescribed manner.⁵⁸ In assessing whether the statute comported with the Dormant Commerce Clause, the Court balanced the competing interests at stake: On one hand, the burden of the law on interstate commerce, namely the plaintiff having to incur costs to

50. *Asbell v. Kansas*, 209 U.S. 251, 256 (1908).

51. *Id.* at 254, 256.

52. *Id.* at 256.

53. In addition to the standard discriminatory and non-discriminatory frameworks, in 2019 the Court appears to have created a separate, narrow category of Dormant Commerce Clause jurisprudence, one governing regulations of alcohol. In *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, the Court reviewed the constitutionality of a two-year durational residency requirement for those seeking to obtain or renew a license to operate a liquor store. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2457 (2019). The Court stated that a “different inquiry” applies to alcohol-related regulations, adding that such regulations would pass constitutional muster if they “address the public health and safety effects of alcohol use,” without resorting to “protectionist measures with no demonstrable connection to those interests.” *Id.* at 2474; *see also* *Lebamoff Enters. Inc. v. Whitmer*, 956 F.3d 863, 873 (6th Cir. 2020) (recognizing that “ordinary” Dormant Commerce Clause standards do not apply to this context, pointing to this “different” standard instead).

54. *See* *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338–39 (2008) (“Absent discrimination for the forbidden purpose, however, the law ‘will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” (alteration in original) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970))).

55. *See id.* at 339 (referring to the balancing test as “*Pike* scrutiny”).

56. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 138 (1970).

57. *Id.* at 139.

58. *Id.* at 139–40.

build and operate an in-state packing facility and, on the other, the law's local benefits, here protection against deceptive packing practices and promoting local products.⁵⁹ The Court, holding that the former outweighed the latter, invalidated the statute.⁶⁰ Since its inception, however, the *Pike* balancing test has rarely resulted in a finding of unconstitutionality.⁶¹

B. EXTRATERRITORIALITY DOCTRINE

The anti-discrimination and anti-protectionism represent two prongs of the Dormant Commerce Clause. The extraterritoriality doctrine arguably is the third. Under this doctrine, a state may not directly regulate commercial activity that is “wholly” out-of-state.⁶² That is, a state's authority extends to its borders, but no further. Justice Story wrote, for example, “that no state or nation can, by its laws, directly affect, or bind property out of its own territory, or persons not resident therein.”⁶³

The Supreme Court's use of the extraterritoriality principle can be traced back to at least 1873. In the *Case of the State Freight Tax*, Pennsylvania imposed a tonnage tax on the freight carried into the state by carriers, including steamboat companies.⁶⁴ The Court observed that the tax could be imposed even if a company did not use Pennsylvania's canals or railways.⁶⁵ Because the tax could “reach[] freight passing up and down the Delaware and the Ohio Rivers carried by companies who derive no rights from grants of Pennsylvania, who are exercising no part of her eminent domain,”⁶⁶ the Court concluded that the tax impermissibly regulated interstate commerce.

In another case from the extraterritoriality canon, the Court in *Lemke v. Farmers' Grain Company of Embden*, ruled in 1922 that a North Dakota statute that authorized a state inspector to prescribe the margin of profit that an out-of-state exporter of grain may realize violated the Dormant Commerce Clause.⁶⁷ The Court emphasized that while the regulation of a point-of-sale transaction may be deemed intrastate, the sale of an item intended to be exported occurs in the stream of commerce and therefore is part of an overall interstate transaction.⁶⁸ Here, the buyer had the intention

59. *Id.* at 143–44.

60. *Id.* at 144–46.

61. *See* LSP Transmission Holdings, LLC v. Sieben, 954 F.3d 1018, 1031 (8th Cir. 2020).

62. *See* Healy v. Beer Inst., 491 U.S. 324, 336 (1989) (“[A] statute that *directly controls* commerce occurring *wholly outside* the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature.” (emphasis added)).

63. JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* § 20, at 21 (1834).

64. *The Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 244 (1872).

65. *Id.* at 278.

66. *Id.*

67. *Lemke v. Farmers' Grain Co. of Embden*, 258 U.S. 50, 60–61 (1922).

68. *Id.* at 56.

to export the grain, particularly as there was virtually no in-state market.⁶⁹ Accordingly, the sale had an interstate character and was beyond the reach of the state. One may contrast this case with *Schechter Poultry*, in which the goods at issue were at the end of the stream of commerce and had “come to rest” in-state.⁷⁰

Shortly thereafter, in *Southern Pacific Co. v. Arizona ex rel. Sullivan*, the Court addressed whether a state law regulating in-state activity on its face could nonetheless violate the Dormant Commerce Clause because of its out-of-state impact. In particular, the Court considered the constitutionality of an Arizona statute that prohibited “any person or corporation to operate within the state a railroad train of more than fourteen passenger[s] or seventy freight cars.”⁷¹ The Court determined that the law effectively required railway carriers in Arizona, at least 93 percent of which would travel interstate, to break down and reconstitute trains out-of-state prior to entry in Arizona, or to maintain an Arizona-compliant train length throughout a carrier’s entire trip.⁷² The Court thus held that these laws regulated interstate commerce by forcing carriers to shoulder the additional cost and expense of the varying modifications, or to comport with the least common denominator among the railway length laws.⁷³ The law was held unconstitutional due to its practical, extraterritorial effects.

One of the extraterritoriality cases most invoked in contemporary extraterritoriality cases is *Baldwin v. G.A.F. Seelig, Inc.*⁷⁴ Under review in *Baldwin* was a New York statute that prohibited the in-state re-sale of milk bought out-of-state, “unless the price paid to the [out-of-state] producers was one that would be lawful upon a like transaction within the state.”⁷⁵ The purpose of the statute, according to the Court, was “[t]o keep the [in-state] system [of milk production] unimpaired by competition from afar.”⁷⁶ The Court struck down the statute, noting, among other things, that “New York has no power to project its legislation into [another state] by regulating the price to be paid in that state for milk acquired there” and that “New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in [another state], whether at high prices or at low ones.”⁷⁷

The Court revisited the extraterritoriality principle in earnest in the 1980’s. The first such case arose when Connecticut residents were traveling

69. *Id.* at 53.

70. *See* A.L.A. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 543, 550 (1935).

71. *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 763 (1945).

72. *Id.* at 771.

73. *Id.* at 771–72.

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

75. *Id.* at 519.

76. *Id.*

77. *Id.* at 521.

out-of-state to purchase cheaper beer. Connecticut responded to this market reality by requiring beer brewers to “affirm[] that its posted per-unit prices will be no higher than its prices for the corresponding units sold in any state bordering Connecticut,” and by “prohibit[ing] a brewer from selling beer to a Connecticut wholesaler at a unit price higher than the lowest price charged for that unit by the brewer in any state bordering Connecticut.”⁷⁸ It was “undisputed that the purpose of these provisions was to lower the retail price of beer in Connecticut, thereby increasing the purchase of beer by Connecticut residents within the state and generating increased tax revenues for the state.”⁷⁹ The Court affirmed a Second Circuit holding that the statute violated the Dormant Commerce Clause because, in posting in-state beer prices, brewers were effectively setting their beer prices for neighboring states—an infringement of the extraterritoriality principle.⁸⁰

In another major extraterritoriality case, the Supreme Court, in *Healy v. Beer Institute*, reviewed a variation of the Connecticut statute. Whereas the prior statute required brewers to affirm that subsequent out-of-state prices would be no lower than an existing in-state posted price, the new iteration required brewers to affirm that, at the time of the affirmation, out-of-state prices were no lower than in-state prices.⁸¹ The modification in the affirmation made no constitutional difference. The Court “concluded that the Connecticut statute has the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the state,” in that once a brewer affirms its Connecticut price, it will be effectively “locked into” prices in border states.⁸² The Court expressed concern about the aggregate impact of price-affirmation statutes in multiple states: Such statutes would “create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude.”⁸³

The Court next addressed the extraterritoriality principle outside of the price affirmation context. In *Edgar v. MITE Corp.*, the Court considered the constitutionality of an Illinois statute that required any company seeking to takeover an Illinois corporation to register the tender offer with the Illinois Secretary of State, who could check the offer for substantive fairness.⁸⁴ A Delaware corporation sought to issue a tender offer for an Illinois corporation.⁸⁵ The offeror did not comply with the registration statute, deciding instead to challenge the statute’s requirements as inconsistent with

78. *U.S. Brewers Ass’n, v. Healy*, 692 F.2d 275, 277 (2d. Cir. 1982) (footnote omitted).

79. *Id.* at 276.

80. *Id.* at 282, *aff’d*, 464 U.S. 909 (1983).

81. *Healy v. Beer Inst.*, 491 U.S. 324, 328 (1989).

82. *Id.* at 337–38.

83. *Id.* at 337.

84. *Edgar v. MITE Corp.*, 457 U.S. 624, 626–27 (1982).

85. *Id.* at 626–27.

the Dormant Commerce Clause.⁸⁶ A majority of the Court struck down the statute, enlisting a *Pike* balancing analysis.⁸⁷ A plurality would have held that the statute regulated wholly out-of-state conduct because a single shareholder need not be in Illinois for the registration requirement to take effect.⁸⁸

Four years after *Edgar*, the Court in *Brown-Forman Distillers Corp. v. New York State Liquor Authority* reviewed a New York statute that required an alcohol distiller or agent to affirm that the price of liquor to be sold to an in-state wholesaler “is no higher than the lowest price at which such item of liquor will be sold” to an out-of-state wholesaler.⁸⁹ The Court held that the statute did not comport with the Dormant Commerce Clause. “While a [s]tate may seek lower prices for its consumers,” the Court assured, “it may not insist that producers or consumers in other [s]tates surrender whatever competitive advantages they may possess.”⁹⁰ The Court explained that once a covered entity affirmed its price in New York, the price functionally acted as an extraterritorial ceiling for what the covered entity could charge in other states.⁹¹ The Court also was troubled by “the proliferation of” such statutes, which would subject covered entities “to inconsistent obligations in different [s]tates.”⁹²

A 1994 decision, *West Lynn Creamery, Inc. v. Healy*, centered around a Massachusetts statute that sought to help the dwindling in-state dairy farm industry by requiring in-state milk dealers purchasing in-state or out-of-state milk to contribute a premium towards a fund, the proceeds of which would then be distributed only to in-state milk producers.⁹³ Most of the in-state milk was purchased from out-of-state producers.⁹⁴ A milk dealer stopped paying the premium and later protested the statute as inconsistent with the Dormant Commerce Clause.⁹⁵ The Court struck down the statute because the undisputed purpose of the statute was to prop up in-state dairy farmers, and because the effect of the premium was extraterritorial: to burden out-of-state milk producers, as their milk was taxed on the front-end and yet they did not receive any proceeds at the back-end.⁹⁶

Whereas the prior decisions arguably marked an expansive view of the extraterritoriality doctrine, the Supreme Court limited the reach of the

86. *Id.* at 628.

87. *Id.* at 643–44.

88. *Id.* at 641 (plurality opinion).

89. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 576 (1986).

90. *Id.* at 580 (citations omitted).

91. *Id.* at 583.

92. *Id.*

93. *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 190–91 (1994).

94. *Id.* at 199 n.16.

95. *Id.* at 191.

96. *Id.* at 203.

doctrine in 2003.⁹⁷ In *Pharmaceutical Research & Manufacturers of America v. Walsh*, the Court assessed the constitutionality of a Maine program that sought to make prices for prescription drugs more affordable to Maine residents by “negotiat[ing] rebates with drug manufacturers to fund the reduced price for drugs offered to Maine [program] participants.”⁹⁸ The Court upheld the program against a Dormant Commerce Clause challenge, observing that *Baldwin* and *Healy* do not apply to Maine’s program because the program does not involve price-control or price-affirmation.⁹⁹ Nor does *West Creamery* apply, the Court added, because the program does not take mainly from out-of-state entities to give only to in-state entities.¹⁰⁰

More recently, in 2018 the Court confronted a question that lied at the intersection of the Dormant Commerce Clause and Internet sales. South Dakota required out-of-state merchants to pay tax on sales made in-state, even if the merchants did not have physical presence in the state.¹⁰¹ In *South Dakota v. Wayfair, Inc.*, the Court held that physical presence was not necessary for a state to impose a tax on out-of-state merchants.¹⁰² The Court rejected any suggestion that South Dakota’s tax scheme constituted impermissible extraterritorial action, reasoning that the sale itself constituted a sufficient nexus between a merchant and the taxing state because “a sale is attributable to its destination.”¹⁰³ Accordingly, a physical presence requirement constituted an arbitrary distinction between in-state and out-of-state merchants, and would give an unfair advantage to out-of-state merchants who could escape an in-state tax.¹⁰⁴

C. EXCEPTIONS

A statute that violates the Dormant Commerce Clause may be saved from invalidation if one of two exceptions applies. The first, and most obvious, is where Congress is not “dormant” or silent on the issue in question and instead has acted in a manner that approves the state action. This exception pays tribute to the fact that interstate commerce is the province of Congress and that Congress can permit state conduct that otherwise would be recognized by a court to be an undue impairment of interstate commerce. In *Parker v. Brown*, for example, the Court entertained a Dormant Commerce Clause

97. See Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 979 (2013) (suggesting that *Healy* and *Edgar* “represented extraterritoriality’s high tide” and that “[t]he Court has since retreated”).

98. *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 649 (2003).

99. *Id.* at 669.

100. *Id.* at 670.

101. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018).

102. *Id.* at 2093.

103. *Id.* at 2092–93 (quoting 2 CHARLES A. TROST & PAUL J. HARTMANN, *FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION* § 11:1 (2d ed. 2003)).

104. *Id.* at 2092–94.

challenge to a California program designed to promote in-state raisins by effectively restricting supply and raising the price of raisins.¹⁰⁵ The Court concluded that the limits of the Dormant Commerce Clause were not breached because the program was consistent with corresponding federal legislation, and because of federal governmental approval of, if not involvement in, the California program.¹⁰⁶

Under the second exception, a state may treat an out-of-state individual or entity differently, without running afoul of the Dormant Commerce Clause, if the state is acting not as a regulator (e.g., establishing the outer bounds of what a vendor can do), but as an ordinary participant in the market (e.g., being another vendor). A bedrock example of when a state can put on this different hat, and thereby trigger a different constitutional outcome, comes from the educational context: When a public university offers in-state tuition to residents, the state is deciding how it will operate as one of multiple in-state universities, rather than directing how all other (public and private) in-state universities must operate.¹⁰⁷

It should be noted that the market participant exception applies only to a point-of-sale transaction and does not permit a state, acting as a market participation, to regulate later the transaction “downstream.”¹⁰⁸ For example, the Court has held that Alaska could sell timber it owned, but could not require the timber, once purchased from it, to be processed in-state prior to export.¹⁰⁹

This Part provided a descriptive overview of the extraterritoriality doctrine. With this foundation in place, it is now appropriate to proceed to the three main critiques of the doctrine.

III. CURRENT CRITICISMS OF THE EXTRATERRITORIALITY DOCTRINE

This Part summarizes the three arguments against the doctrine as currently formulated: first, it (and the Dormant Commerce Clause as a whole) lacks textual, structural, and historical support; second, it is wrongly interpreted as a stand-alone prong of the Dormant Commerce Clause and instead is a manifestation of anti-discrimination and anti-protectionist prongs; and third, it cannot be squared with modern economic realities. These criticisms carry persuasive weight and exhibit the need for a new approach to the extraterritoriality doctrine.

105. *Parker v. Brown*, 317 U.S. 341, 349–50 (1943).

106. *Id.* at 368.

107. See Dan T. Coenen, *State User Fees and the Dormant Commerce Clause*, 50 VAND. L. REV. 795, 806–07 n.60 (1997).

108. See S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 97 (1984) (“[T]he market-participant doctrine . . . allows a state to impose burdens on commerce within the market in which it is a participant, but allows it to go no further.”).

109. See *id.* at 97–98.

A. *THE DOCTRINE LACKS TEXTUAL, STRUCTURAL, AND HISTORICAL SUPPORT*

Examining the text, structure, and history of a constitutional provision is the traditional method by which to give meaning to the provision.¹¹⁰ Unfortunately, the extraterritoriality doctrine—and even the Dormant Commerce Clause as a whole—lacks these traditional hallmarks of a sound constitutional provision. For starters, the Dormant Commerce Clause is not found in the text of the Constitution. Article I, Section 8, Clause 3, the ostensible textual source of the Dormant Commerce Clause, refers only to the power of Congress to regulate “[c]ommerce . . . among the several [s]tates.”¹¹¹ As Justice Scalia has pointed out, the Clause mentions only an affirmative authority vested in the Congress and says nothing at all about the states.¹¹²

In addition, the Dormant Commerce Clause does not fit the structure of the Constitution. The Constitution has a sensible, straightforward structure. Simply put, Article I, Section 8 enumerates the specific things that Congress can do, while Article I, Section 9 lists specific things that Congress cannot do¹¹³ and Article I, Section 10 lists specific things that the states cannot do.¹¹⁴ If Section 8 is to be the constitutional home for the Dormant Commerce Clause, it is an odd choice because Section 8 speaks to what Congress affirmatively has the power to do—not what the states cannot do. Moreover, if the Dormant Commerce Clause is to operate as the restriction on the authority of the states, it should be situated in Section 10.¹¹⁵ But Section 10 contains no such prohibition.

Another component in the Constitution, one relating to federal and state relations, also casts doubt on the constitutional basis for the Dormant Commerce Clause. The Tenth Amendment states that the authority of the federal government is confined to that which is enumerated and otherwise delegated, and that the remainder of authority rests with the states and the people.¹¹⁶ The Tenth Amendment seems to support the existence of state

110. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 85 (3d ed. 2000).

111. U.S. CONST. art. I, § 8, cl. 3.

112. See *Am. Trucking Ass’n v. Smith*, 496 U.S. 167, 202 (1990) (Scalia, J., concurring) (“The text from which we take our authority to act in this field . . . is nothing more than a grant of power to Congress . . .”).

113. See Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1395 (1987) (“Article I, section 8, contains an extensive list of separate, discrete, and enumerated powers granted to Congress, whereas article I, section 9, contains a comparable list of powers specifically denied to it.”).

114. See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 343 (1816) (“[Section 10 is] a long list of disabilities and prohibitions imposed upon the states.”).

115. See *Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 261 (1987) (Scalia, J., concurring in part and dissenting in part) (“[T]here is no correlative denial of power over commerce to the States in Art. I, § 10 . . .”).

116. U.S. CONST. amend. X; see also *Nevada v. Hall*, 440 U.S. 410, 425 (1979) (characterizing the Tenth Amendment as a “reminder that powers not delegated to the Federal Government nor prohibited to the States are reserved to the States or to the people”).

power to impact interstate commerce, as it is not specifically rejected in Article I, Section 10, or any other provisions of the Constitution.

To be sure, some argue that, akin to the penumbras and emanations explanation for the fundamental right to privacy, the Dormant Commerce Clause is based on general concepts emerging from the overall structure. According to Professor Regan, for example, “the extraterritoriality principle is not to be located in any particular clause. It is one of those foundational principles of our federalism which we infer from the structure of the Constitution as a whole.”¹¹⁷

But there are several problems with this argument: there is no limiting principle to an abstract pursuit of federalism, and similarly no guiding principle as to when furthering federalism—and hence invalidating state laws—is constitutionally mandated. The open-ended interest in federalism enables judicial creativity and arbitrariness, to the detriment of regulations enacted pursuant to the state police power and the individuals sought to be protected by such regulations. Moreover, such an approach may conflict with the Tenth Amendment’s suggestion that, where the federal government is not affirmatively acting pursuant to delegated power and a state is acting in a manner not expressly prohibited to it, the state retains the sovereign authority to act.¹¹⁸ In addition, and perhaps most persuasive of all, alternative constitutional provisions may be enlisted—without questionable constitutionality—in the effort to promote federalism and confine states to their proper spheres. The Due Process Clause, for example, would free an out-of-stater from the grasp of a state statute if the out-of-stater has an insufficient connection with the state, and conversely would limit the reach of the state to those possessing a substantial enough relationship to the regulating state.¹¹⁹

In addition to its textual and structural issues, the Dormant Commerce Clause also has questionable historical support. At the time of the founding,

117. Donald H. Regan, Essay, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1885 (1987).

118. See Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 73–74 (1989) (sketching two formulations of the Tenth Amendment, both of which recognize that state sovereignty is absent when the federal government has affirmatively acted pursuant to delegated authority).

119. See *Am. Beverage Ass’n v. Snyder*, 735 F.3d 362, 380 (6th Cir. 2013) (Sutton, J., concurring) (“Territorial limits on lawmaking underlie, indeed animate, many other constitutional imperatives. The most powerful of these, due process, limits a State’s power to extend its law outside its borders.”). The Due Process Clause thus may serve as a useful guide in extraterritorial challenges. For arguments that other textual provisions can be similarly helpful, see Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133, 1141–42 (2010) (“The Full Faith and Credit Clause’s Effects Clause gives Congress the role of determining by statute the scope of state extraterritorial powers . . .” (emphasis omitted)); and Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 446–55 (1982) (arguing that the courts should utilize the Article IV Privileges and Immunities Clause to promote interstate commerce).

Madison expressed concern about the ability of states to tax goods imported from other states, and thus believed that the Commerce Clause contained a dormant dimension “that was intended as a negative and preventive provision against injustice among the states themselves, rather than [just] as a power to be used for the positive purposes of the General Government.”¹²⁰ This concern about state import taxes is reflected in several essays in the *Federalist Papers*.¹²¹

This concern was echoed by the early Supreme Court. Chief Justice Marshall asserted that, while the power of the state to tax is “sacred,” that power cannot “be used so as to obstruct the free course of a power given to Congress.”¹²² Similarly, in *Baldwin*, Justice Cardozo wrote that:

Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce.¹²³

In response, Justice Scalia surmised that Madison’s comment was offered in the context of Article I, Section 10, not Article I, Section 8, the ostensible textual home for the Dormant Commerce Clause.¹²⁴ Justice Scalia therefore concluded that “[t]he historical record provides no grounds for reading the Commerce Clause to be other than . . . an authorization for Congress to regulate commerce.”¹²⁵

Writing for the Court, Justice Alito recently countered. He claimed that the Dormant Commerce Clause has “deep roots,” referencing the Framers’ concerns about the impact of state taxes on a healthy national economy.¹²⁶ With respect, Justice Alito’s analysis is wanting. The only founding-era source he cites is *dicta* from the seminal case of *Gibbons v. Ogden*.¹²⁷ *Gibbons* involved an actual conflict or “collision” between a license issued pursuant to a federal statute, on one hand, and a state-issued license, on the other.¹²⁸ The Dormant

120. *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994) (quoting 3 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 478 (1911)).

121. *See* *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 549 (2015) (“By prohibiting States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval, it strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce.”) (citing, among other things, THE FEDERALIST NOS. 7, 11 (Alexander Hamilton), NO. 42 (James Madison)).

122. *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827).

123. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935).

124. *Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 263 (1987) (Scalia, J., concurring in part and dissenting in part).

125. *Id.*

126. *Wynne*, 575 U.S. at 549.

127. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

128. *See id.* at 2.

Commerce Clause applies, however, when Congress has stayed its hand, and the Commerce Clause is “unexercised.”¹²⁹ As the Court has repeatedly stressed, *dicta* is owed no allegiance.¹³⁰ Accordingly, *Gibbons* is a weak foundation on which to rest an entire constitutional provision. In the other oldest “root” cited by Justice Alito, the Court in 1852 embraced the Dormant Commerce Clause, but in doing so acknowledged that the “question ha[d] never been decided by this court” or “come before this court.”¹³¹ In light of the nature of *Gibbons* and the admission by the Court in 1852, the historical support for the Clause is mixed at best.

Even assuming that Madison was addressing Article I, Section 8, the notion that the affirmative grant of authority to Congress in this Section impliedly withdraws state authority over the same subject cannot be squared with the text or structure of the Constitution. The Framers could have enumerated a power of Congress in Article I, Section 8, and decided to explicitly prohibit that identical power to the states in Article I, Section 10, as it did in other contexts. For example, the authority of Congress to coin money is listed in Section 8 and, at the same time, Section 10 by its terms provides that “No state shall . . . coin money.”¹³² The Framers did not follow the same process with respect to the Dormant Commerce Clause, undercutting the viewpoint that an abstract federalist concern has constitutional status. Indeed, the gulf between the import-tax concerns of Madison and others, on the one hand, and the actual text of the Constitution, on the other, is the distance between a constitutional aspiration and a constitutional command. This is not to ignore the merits of the import-tax issue identified by Madison and others, but this is to question its constitutional character and whether it can be deployed to negate the will of the people and the power of the states.

In short, the Framers did contemplate the Commerce Clause serving as a restriction on state authority. And perhaps the most revered jurist in American history shared Madison’s concerns about states’ extraterritorial commerce powers. But the concerns animating a negative Commerce Clause fall short because they were not added to the Constitution and a negative Commerce Clause construction produces undeniable anomalies in the Constitution’s structure.

129. *Wardair Can., Inc. v. Fla. Dep’t of Revenue*, 477 U.S. 1, 8 (1986).

130. *See, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 66–67 (1996) (“We adhere . . . not to mere *obiter dicta*, but rather to the well-established rationale upon which the Court based the results of its earlier decisions.”); *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 13 U.S. 18, 24 (1994) (“This seems . . . a prime occasion invoking our customary refusal to be bound by *dicta*, . . .” (emphasis added)).

131. *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 318 (1852), *abrogated by* *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995).

132. *See* U.S. CONST. art. I, § 8; U.S. CONST. art. I, § 10.

B. THE DOCTRINE IS NOT A STAND-ALONE PRONG

The extraterritoriality doctrine is better understood as another representation of the core anti-discrimination and anti-protectionist components of the Clause rather than an independent prong of the Dormant Commerce Clause. For starters, the doctrine was not recognized by the Supreme Court until at least 1873. Moreover, cases seemingly providing critical support for the extraterritoriality doctrine are not about extraterritoriality at all. As put by Judge Sutton of the U.S. Court of Appeals for the Sixth Circuit, “I am not aware of a single Supreme Court dormant Commerce Clause holding that relied exclusively on the extraterritoriality doctrine to invalidate a state law.”¹³³

Professor Regan offers perhaps the most detailed explanation of this criticism. In his tome on the Dormant Commerce Clause, he notes that *Baldwin* and *Hood* are, in fact, cases tied to economic protectionism, the core evil guarded against by the Dormant Commerce Clause.¹³⁴ In *Baldwin*, the avowed purpose of the statute was “[t]o keep the [in-state] system [of milk production] unimpaired by competition from afar.”¹³⁵ In *Hood*, the Court struck down a Massachusetts statute that permitted a public commissioner to deny a license to a milk distributor if “the license [would] not tend to a destructive competition” in the state.¹³⁶ In both cases, the statutes were predicated on the protectionist purpose that lies at the heart of what the Dormant Commerce Clause seeks to forbid. These impermissible purposes are sufficient to understand why the reviewed statutes were invalidated. Then-Judge Gorsuch made the same observation, writing that “*Baldwin* and its progeny [are] no more than instantiations of the [*City of Philadelphia* anti-discrimination rule].”¹³⁷

In another recent case, *Edgar*, only a plurality would have deemed the statute inconsistent with the extraterritoriality doctrine;¹³⁸ it was the *Pike* balancing analysis that commanded a majority and it is this part of the discussion that constitutes the holding of the Court.¹³⁹ Taken together, these observations suggest that the extraterritoriality doctrine is superfluous as an independent strand of the Dormant Commerce Clause and that the work of the Clause may be accomplished by way of other concepts, including the

133. See *Am. Beverage Ass’n v. Snyder*, 735 F.3d 362, 381 (6th Cir. 2013) (Sutton, J., concurring).

134. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1245–52 (1986); see also Regan, *supra* note 117, at 1905–06 (“The statute in *Baldwin* was struck down, not because it operated extraterritorially (although some people have read the case that way), but because of the statute’s clear purpose to protect in-state milk producers . . .” (footnote omitted)).

135. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 519 (1935).

136. *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 528 (1949).

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

138. *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality opinion).

139. *Id.* at 643–44.

presumption against discriminatory statutes and the flat ban on protectionist statutes.

C. *THE DOCTRINE IS UNNECESSARY IN THE MODERN ECONOMY*

In 2018, the Supreme Court handed down *South Dakota v. Wayfair*, an important decision for purposes of this Article because it represents the Court's latest attempt to meaningfully decipher the meaning of the Dormant Commerce Clause and because it may forecast how the Court may respond to the extraterritoriality doctrine in light of modern economic circumstances.¹⁴⁰ *Wayfair* concerned whether the Dormant Commerce Clause permitted South Dakota to impose taxes on Internet sales by out-of-state merchants that did not have an in-state physical presence.¹⁴¹ The trial court and the Supreme Court of South Dakota agreed that *Quill Corp. v. North Dakota* prohibited the state from imposing such a tax.¹⁴² In 1992, the *Quill* Court made two points. First, the Court held unanimously that a state could, consistent with the Due Process Clause, impose a use tax on an out-of-state merchant lacking physical presence in the state.¹⁴³ The Court explained that an out-of-state merchant may purposefully avail itself of an economic market—and thus satisfy the minimum contacts requirements of the Due Process Clause—without having a brick and mortar location in the market itself.¹⁴⁴

Second, however, the Court held that North Dakota's use tax constituted an impermissible burden on interstate commerce.¹⁴⁵ The Court reasoned that the relevant inquiry for purposes of the Due Process Clause is materially different than that for the Dormant Commerce Clause, with the latter requiring a much more demanding "substantial nexus" between the out-of-state merchant and the taxing state.¹⁴⁶ The Court acknowledged that Due Process considerations had evolved, but asserted that its understanding of the Dormant Commerce Clause had not sufficiently changed over time to alter its view that physical presence is necessary to satisfy the heightened "substantial nexus" requirement.¹⁴⁷ Justice White issued a lone and prescient dissent,

140. For an argument that the Dormant Commerce Clause has not kept up with modern environmental harms, see generally Sam Kalen, *Dormancy Versus Innovation: A Next Generation Dormant Commerce Clause*, 65 OKLA. L. REV. 381 (2013).

141. See S.B. 106, 2016 Leg., 91st Sess. (S.D. 2016); Brief in Support of Defendants' Motion for Summary Judgment at 1, *State v. Wayfair, Inc.*, 229 F. Supp. 3d 1026 (D.S.D. 2017) (No. 3:16-CV-03019-RA L).

142. *Wayfair, Inc.*, 229 F. Supp. 3d at 1028, *aff'd*, 901 N.W.2d 754 (S.D. 2017), *vacated and remanded sub nom.* *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

143. *Quill Corp. v. North Dakota*, 504 U.S. 298, 308 (1992) (declining to overrule *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753 (1967)), *overruled by South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018)), *overruled by Wayfair, Inc.*, 138 S. Ct. 2080.

144. *Id.* at 307.

145. *Id.* at 317–18.

146. *Id.* at 312–13.

147. *Id.* at 307–09, 313.

observing that “in today’s economy, . . . [w]ire transfers of money involving billions of dollars occur every day; purchasers place orders with sellers by fax, phone, and computer linkup; sellers ship goods by air, road, and sea through sundry delivery services without leaving their place of business.”¹⁴⁸ Based on these economic developments, Justice White called the physical presence requirement “anachronistic.”¹⁴⁹

In a 2015 case, Justice Kennedy, echoing Justice White’s dissent, wrote a concurring opinion in a Tax Injunction Act case to express his view that the physical presence requirement for a state’s ability to collect taxes for online sales by out-of-state retailers should be reconsidered.¹⁵⁰ Justice Kennedy noticed that online sales had grown significantly since *Quill* was handed down over two decades earlier and that the Dormant Commerce Clause has not kept up with the times, to the detriment of states seeking to collect taxes for online sales.¹⁵¹ In bringing *Wayfair* to the Court, South Dakota picked up on Justice Kennedy’s concurrence, and asked the Justices to revisit the “outdated” physical presence requirement.¹⁵² In an opinion written by Justice Kennedy, the Court in *Wayfair* held that states may impose taxes on out-of-state online merchants regardless of the merchants’ lack of physical presence in the state.

Importantly, *Wayfair* eschews the formalistic fixation on geographic location (e.g., whether the regulated drugs are manufactured out-of-state). Instead, *Wayfair* instructs that, for purposes of the Dormant Commerce Clause, attention should be paid to the nature of the regulated transaction (e.g., whether goods are directed in-state) and to the nature of today’s economy (e.g., that regulated entities easily can reach and advertise to consumers from across the country).¹⁵³ Indeed, sophisticated commercial realities served as the critical context for the Court’s understanding of the meaning and scope of the Dormant Commerce Clause. “The Internet’s prevalence and power have changed the dynamics of the national economy,”

148. *Id.* at 328 (White, J., dissenting).

149. *Id.*; see also David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370 (1996) (“Cyberspace radically undermines the relationship between legally significant (online) phenomena and physical location.”).

150. *Direct Mktg. Ass’n v. Brohl*, 575 U.S. 1, 18 (2015) (Kennedy, J., concurring) (“Given these changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court’s holding in *Quill*.”).

151. *Id.* (“By 2008, e-commerce sales alone totaled \$3.16 trillion per year in the United States. . . . [Yet] [s]tates have been unable to collect many of the taxes due on these purchases.”).

152. Petition for Writ of Certiorari at 17, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (No. 17-494), 2017 WL 4404984, at *17.

153. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2092–93 (2018) (emphasizing the regulated entity’s affirmative decision to enter an in-state market, not the initial location of the inventory); *Ass’n for Accessible Meds. v. Frosh*, 742 F. App’x 720, 723 (4th Cir. 2018) (mem.) (Wynn, J., dissenting from the denial of rehearing en banc) (“The majority’s myopic focus on the location of the transaction is precisely the ‘physical presence’ approach *Wayfair* rejected as ‘artificial in its entirety.’”) (quoting *Wayfair*, 138 S. Ct. at 2095).

the Court recognized.¹⁵⁴ The Court took note of “[t]he ‘dramatic technological and social changes’ of our ‘increasingly interconnected economy’” and “the continuous and pervasive virtual presence of retailers today,” which “mean that buyers are ‘closer to most major retailers’ than ever before—‘regardless of how close or far the nearest storefront.’”¹⁵⁵ In light of these economic conditions, the Court determined that “[m]odern e-commerce does not align analytically with a test that relies on . . . physical presence.”¹⁵⁶ In the modern economy, territorial limits—which are the touchstone of the extraterritoriality doctrine—are undeniably less meaningful.¹⁵⁷

Relatedly, the Court in *Wayfair* acknowledged that “[s]tate taxes differ, not only in the rate imposed but also in the categories of goods that are taxed and, sometimes, the relevant date of purchase” and that “[t]hese burdens may pose legitimate concerns in some instances, particularly for small businesses that make a small volume of sales to customers in many [s]tates.”¹⁵⁸ But the Court asserted that “software that is available at a reasonable cost may make it easier for small businesses to cope with these [compliance] problems.”¹⁵⁹ Put differently, modern economic conditions have enabled merchants to be able to navigate successfully these various regulatory systems, and have made it less likely that in-state regulations will adversely impact interstate commerce necessitating judicial involvement. Thus, a justification for the extraterritoriality doctrine—to unclog diverse regulatory policies—is less applicable in today’s sophisticated economy. *Wayfair* codifies an updated understanding of the Dormant Commerce Clause, and it calls for the extraterritoriality doctrine similarly to catch up with the times. The doctrine, predicated on formal territorial borders and not the way in which society practically functions, is a “relic of the old world,” as Judge Sutton has observed.¹⁶⁰

Wayfair is instructive in other respects. According to some surveys of constitutional history, the Dormant Commerce Clause served the important role of patrolling the exclusive power of Congress over commerce and thereby

154. *Wayfair*, 138 S. Ct. at 2097.

155. *Id.* at 2095 (quoting *Direct Marketing Ass’n*, 575 U.S. at 17–18 (Kennedy, J., concurring)).

156. *Id.* at 2086; see also *Frosh*, 742 F. App’x at 723 (Wynn, J., dissenting from the denial of rehearing en banc) (“[E]-commerce and nationwide distribution chains rendered the physical presence rule outmoded . . .”).

157. *Cf.* *Am. Beverage Ass’n v. Snyder*, 735 F.3d 362, 378 (6th Cir. 2013) (Sutton, J., concurring) (“[T]hat line has come and gone.”).

158. *Wayfair*, 138 S. Ct. at 2098.

159. *Id.*

160. *Snyder*, 735 F.3d at 378–79 (6th Cir. 2013) (Sutton, J., concurring) (“[T]he original function of the extraterritoriality doctrine has been lost to time . . .”); *Ammex, Inc. v. Wenk*, 936 F.3d 355, 369 (6th Cir. 2019) (Bush, J., concurring) (discussing the doctrine, adding “assuming the doctrine remains relevant today”).

of preventing the states from stepping into that same sphere of power.¹⁶¹ Today, however, the Court noted that “the National Government and states largely have *overlapping* power over most sectors of commerce[.]”¹⁶² With federal exclusivity over commerce diminished, so too is the purpose of the extraterritoriality doctrine. As Judge Sutton pointed out, “the original function of the extraterritoriality doctrine has been lost to time.”¹⁶³ In *Wayfair*, the Court clarified that, even as a historical matter, “the power to regulate commerce in some circumstances was held by the States and Congress concurrently.”¹⁶⁴ Accordingly, in considering either the original or current role of the Clause to manage federal and state relations in economic matters, the Clause and the doctrine are not needed.

This Part summarized the primary criticisms of the extraterritoriality doctrine, specifically the absence of any textual support or similar constitutional pedigree for the doctrine; the doctrine merely repackaging the primary prongs of the Dormant Commerce Clause; and the doctrine not being necessary given the ability of companies in the modern economy to navigate multimarket regulations. Having exposed the faults in the extraterritoriality doctrine’s position within the Dormant Commerce Clause framework, Part III seeks to reestablish the doctrine’s ideals within a due process analysis.

IV. A NEW EXTRATERRITORIALITY DOCTRINE

This Part offers a reasoned and administrable way to sort through the extraterritoriality doctrine’s thicket of uncertainty. It first highlights the confusion with the current doctrine by examining three live circuit splits concerning the doctrine. It then describes the theoretical support and contents of the new paradigm, one that collapses extraterritoriality challenges into a due process inquiry. Finally, it demonstrates how this principle would work in practice by applying the principle to several recent circuit court cases.

A. THE NEED FOR A NEW PARADIGM

The status quo is not sustainable. The doctrine at present seems incapable of precise definition or principled application. As noted by then-Judge Gorsuch, the extraterritoriality doctrine is “the least understood” aspect of the Dormant Commerce Clause.¹⁶⁵ The incoherence of the Dormant Commerce Clause is well-established by the Court and leading scholars

161. See *Byrd v. Tenn. Wine & Spirits Retailers Ass’n*, 883 F.3d 608, 629 (6th Cir. 2018) (Sutton, J., concurring in part and dissenting in part) (“If Congress had authority over a form of commerce, the states usually did not.”).

162. *Id.* at 631.

163. *Snyder*, 735 F.3d at 378–79 (Sutton, J., concurring) (concluding that the doctrine is a “relic of the old world”).

164. *Wayfair*, 138 S. Ct. at 2090.

165. *Energy & Env’t Legal Inst. v. Epel*, 793 F.3d 1169, 1172 (10th Cir. 2015).

alike.¹⁶⁶ A survey of recent cases provides further proof of the unsound state of the doctrine.

There are multiple live circuit splits on the doctrine.¹⁶⁷ The circuit courts disagree as to three questions. First, is the extraterritoriality doctrine an independent doctrine, as most circuits seem to accept, or does it not exist as a stand-alone basis to evaluate or strike down challenged laws? The Second Circuit has answered in the affirmative, while the Third Circuit summarily dismissed the notion that the extraterritoriality doctrine represents a third, conceptually unique prong to the Dormant Commerce Clause.¹⁶⁸ Second, when is a presumption against extraterritorial application overcome? The First, Fifth, Eighth, Ninth, and Tenth Circuits apply such a presumption, unless the legislature intended otherwise.¹⁶⁹ By contrast, the Second, Fourth,

166. See, e.g., *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959) (acknowledging past Dormant Commerce Clause decisions are a “quagmire”); *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting) (“[T]he jurisprudence of the ‘negative side’ of the Commerce Clause remains hopelessly confused.”); *Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 260 (1987) (Scalia, J., concurring in part and dissenting in part) (“[O]ur applications of the [Dormant Commerce Clause] doctrine have, not to put too fine a point on the matter, made no sense.”); *Byrd*, 883 F.3d at 631 (Sutton, J., concurring in part and dissenting in part) (explaining that, in the modern era, the Dormant Commerce Clause “is much more difficult to articulate and police”); see also ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 445 (4th ed. 2013) (observing that the Court’s Dormant Commerce Clause cases are “inconsistent”); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 125–26 (describing the “incoherence,” “confusion,” and “conceptual muddle” of the Supreme Court’s Dormant Commerce Clause jurisprudence); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1060 (2009) (observing that the scope of the extraterritoriality doctrine “remains notoriously unclear”); Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 899 (2008) (“[T]he ban on extraterritoriality is logically incoherent.”); Regan, *supra* note 117, at 1884 (“[W]e have no acceptable account of the constitutional underpinnings of the principle.”); *id.* at 1896 (“For the most part, states may not legislate extraterritorially, whatever exactly that means.”); Jeffrey M. Schmitt, *Making Sense of Extraterritoriality: Why California’s Progressive Global Warming and Animal Welfare Legislation Does Not Violate the Dormant Commerce Clause*, 39 HARV. ENV’T L. REV. 423, 424 & n.3 (2015) (collecting cases and articles suggesting that the extraterritoriality jurisprudence is “confusing and seemingly inconsistent”).

167. These splits are a focus of an ably drafted petition for Supreme Court review. See *Petition for Writ of Certiorari at 36–42, Rosenblatt v. City of Santa Monica*, 140 S. Ct. 2762 (2020) (No. 19-1081), 2020 WL 391911, at *36–42.

168. Compare *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 212 n.14 (3d Cir. 2002) (explaining that *Baldwin* did not establish an extraterritoriality prong, but the ruling instead was predicated on the Dormant Commerce Clause’s anti-discrimination prong), with *Coal. for Competitive Elec., Dynergy Inc. v. Zibelman*, 906 F.3d 41, 57 (2d Cir. 2018) (listing the extraterritoriality prong as a third way in which a challenged law may violate the Dormant Commerce Clause).

169. See *Weaver’s Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council*, 589 F.3d 458, 470–71 (1st Cir. 2009); *North Dakota v. Heydinger*, 825 F.3d 912, 921 (8th Cir. 2016); *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 447–48 (9th Cir. 2019); *Johnson & Johnson Vision Care, Inc. v. Reyes*, 665 F. App’x 736, 746 (10th Cir. 2016); *S&M Brands, Inc. v. Caldwell*, 614 F.3d 172, 177–78 (5th Cir. 2010).

Sixth, Seventh, and Eleventh Circuits apply a presumption against extraterritorial application, unless the practical effects of the law suggest otherwise.¹⁷⁰ Third, what is the legal effect of a finding of extraterritorial application? The prevailing approach is that a finding of extraterritoriality—that is the effect of controlling wholly out-of-state activity—is all but fatal, akin to a *per se* constitutional violation.¹⁷¹ The Ninth Circuit, however, suggests that statutes with direct extraterritorial effects will be saved if any extraterritorial “effects result from the regulation of in-state conduct.”¹⁷²

More fundamentally, an examination of recent extraterritoriality cases reveals that the courts are unclear as to what extraterritoriality means in the first place. For example, to give meaning to the doctrine, courts have probed whether the reviewed statute precludes an out-of-state regulated entity from complying with out-of-state laws,¹⁷³ or whether it precludes an out-of-state entity from participating in an in-state commercial activity partially or completely.¹⁷⁴ Alternatively, judges have asked whether the in-state statute precludes or frustrates federal policy.¹⁷⁵ Other dispositive questions include whether the regulated activity is situated “upstream” and therefore located out-of-state,¹⁷⁶ or whether it is in the “stream of commerce” and therefore construed to be in state.¹⁷⁷ Another standard—endorsed in Section III.B. *supra*—is whether a statute is no longer extraterritorial because the regulated entity voluntarily enters the in-state market.¹⁷⁸ Courts also have concerned themselves with hypothetical situations in which other states adopt statutes similar or identical to the one under consideration, the idea being that additional statutes would further grind interstate commerce to a halt.¹⁷⁹ Yet a further consideration has been whether the state considered alternative

170. See *Legato Vapors, LLC v. Cook*, 847 F.3d 825, 836 (7th Cir. 2017); *Ass’n for Accessible Meds. v. Frosh*, 887 F.3d 664, 672–73 (4th Cir. 2018); *Am. Beverage Ass’n v. Snyder*, 735 F.3d 362, 376 (6th Cir. 2013); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003); *PSINet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004); *Bainbridge v. Turner*, 311 F.3d 1104, 1111 (11th Cir. 2002).

171. See *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 646 (6th Cir. 2010).

172. *Chinatown Neighborhood Ass’n v. Harris*, 794 F.3d 1136, 1145–46 (9th Cir. 2015).

173. See *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Harris*, No. 2:12-cv-05735-SVW-RZ, 2012 WL 12842942, at *8 (C.D. Cal. Sept. 28, 2012).

174. See *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Harris*, 729 F.3d 937, 948 (9th Cir. 2013).

175. See *Byrd v. Tenn. Wine & Spirits Retailers Ass’n*, 883 F.3d 608, 629 (6th Cir. 2018) (Sutton, J., concurring in part and dissenting in part) (“Whatever else this [state] requirement does, it does not purport to displace or contradict congressional regulation of commerce among the States.”).

176. *Ass’n for Accessible Meds. v. Frosh*, 887 F.3d 664, 671 (4th Cir. 2018).

177. *Id.* at 679 (Wynn, J., dissenting).

178. See *Energy & Env’t Legal Inst. v. Epel*, 43 F. Supp. 3d 1171, 1179–81 (D. Colo. 2014), *aff’d but criticized*, 793 F.3d 1169 (10th Cir. 2015); *Ass’n for Accessible Meds. v. Frosh*, No. MJG-17-1860, 2017 WL 4347818, at *6 (D. Md. Sept. 29, 2017), *rev’d*, 887 F.3d 664 (4th Cir. 2018).

179. See *Frosh*, 887 F.3d at 673; *Am. Beverage Ass’n v. Snyder*, 735 F.3d 362, 375–76 (6th Cir. 2013).

solutions.¹⁸⁰ Courts also have invoked industry-specific rules, probing whether the statute implicates a commercial sector that requires uniform or national regulatory standards.¹⁸¹

That these federal courts launched various, conflicting inquiries in reviewing extraterritoriality challenges raises many questions. Among them: Which of these considerations, individually or collectively, should courts apply? Which considerations, if any, should be given greater or determinative weight compared to the others? Do the relevant considerations change depending on the industry involved?

The extraterritoriality doctrine is mired in a problem of proper line-drawing. The general interests in ensuring that the commercial regulatory authority of a state is limited to in-state matters, and in facilitating a robust national economy, have not yielded a single standard or metric by which to define extraterritoriality. The diversity of approaches invoked across the country to give meaning to the extraterritoriality doctrine suggest widespread confusion and thus an additional reason to reinvent the doctrine. A touchstone to enable consistent or principled application of the doctrine is needed.¹⁸²

B. A DUE PROCESS SOLUTION

The most defensible option stems from Due Process considerations. In order for a state to exercise personal jurisdiction over an individual or corporation in compliance with the Due Process Clause,¹⁸³ the individual or corporation must have “minimum contacts” with the forum state.¹⁸⁴ The “minimum contacts” test is satisfied when the individual or corporation has “purposefully avail[ed] itself of the privilege of conducting activities within the forum [s]tate.”¹⁸⁵ The focus of the Due Process inquiry is the mutuality and reciprocal relationship between the State and the regulated entity.

Applied to the commercial context, extraterritoriality principles would not be offended where the out-of-state actor voluntarily reaches into the regulating state to obtain benefits from that state’s market, and where the state regulates the very market giving rise to the opportunity for those benefits. In this sense, a sort of “reciprocal fairness” exists: the out-of-state

180. See *Snyder*, 735 F.3d at 375.

181. See *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Harris*, 729 F.3d 937, 950 (9th Cir. 2013).

182. Judges have hinted at their frustration with the status of the doctrine. See *Epel*, 793 F.3d at 1171 (“[A]s an inferior court we [must] take Supreme Court precedent as we find it . . .”).

183. U.S. CONST. amends. V, XIV, § 1.

184. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); see also *id.* at 319 (“That clause does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations.”).

185. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

actor may pursue and realize benefits in the state's market only if it abides by the state regulations governing the relevant market, and the state may regulate an out-of-state actor only if the state's regulations are tied to a market that the actor voluntarily participates in. A regulation loses offensive extraterritorial characteristics when such mutuality exists: There is a fit or convergence between the voluntary choice of the out-of-state actor's activities in the state and the state's regulation of those activities.

By contrast, it would be unfair to subject out-of-state actors to regulations when such mutuality is non-existent. Expressed in negative terms, an out-of-state market actor cannot access a state's market and consumers without being amenable to policies applicable to the market.¹⁸⁶ At the same time, a state cannot regulate an out-of-state actor without that actor opening itself up to those regulations.¹⁸⁷ Extraterritoriality exists where, for example, the state attempts to regulate the out-of-state actor in the absence of affirmative choice of the actor to enter the state's market, or the out-of-state actor does enter the market but the regulations imposed on it are unrelated to those market activities.¹⁸⁸

The touchstone for extraterritoriality should be reciprocal fairness, rather than borders, intent, or effect. As such, it would be a mistake for courts to make a formalistic extraterritoriality determination only on the basis of location. What matters, as Justice Sotomayor has observed in the Due Process context, is whether the activities are meaningfully connected to the State and not whether the boardroom where the market entry decision is made, or the incidental impact is located.¹⁸⁹ Otherwise, an out-of-state actor could participate in a market, and defeat any regulations, by situating a corporate office out of state or claiming that it now has to change some aspect of its out-of-state activities because of its own decision to participate in the market.¹⁹⁰ The decision becomes part of the in-state activity itself, and the impact

186. See Michael Farbiarz, *Extraterritorial Criminal Jurisdiction*, 114 MICH. L. REV. 507, 531 (2016) (identifying the expectations of the parties as the first principled reason for extraterritorial constraints on state authority).

187. This limitation ensures that the state stays "in its proper lanes," meaning it does not unduly interfere with other sovereigns. See *id.* at 521 (identifying "structural concerns" as the second principled reason for extraterritorial constraints on state authority).

188. Cf. *Int'l Shoe Co.*, 326 U.S. at 318 (discussing scenarios where out-of-state actors have been subject to suit in foreign states).

189. *Daimler AG v. Bauman*, 571 U.S. 117, 151 (2014) (Sotomayor, J., concurring).

190. Cf. *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1173–75 (10th Cir. 2015) (avoiding overbroad interpretations of the extraterritoriality principle that would swallow virtually every commercial regulation). The extent to which an entity with an in-state presence and an out-of-state headquarters may be considered in-state for Dormant Commerce Clause purposes is an open question. See, e.g., *LSP Transmission Holdings v. Sieben*, 954 F.3d 1018, 1029 n.7 (8th Cir. 2020) (noting that it would be strange to say that a Minnesota law that benefits an out-of-state company with operations in Minnesota is discriminatory).

becomes part of the cost of the decision to participate in the market; they are part, in other words, of “a unitary business.”¹⁹¹

With respect to the reciprocal ingredients of the due process inquiry, first, as to state regulations, it cannot be disputed that a state has the sovereign power to set the regulatory terms of in-state market participation. The authority of the state to set the terms of market participation is predicated on the bedrock notion that a sovereign can fix the laws within its jurisdiction.¹⁹² A State can specify, for example, its speed limits: ‘if you want to drive on road x, you may drive no more than y miles per hour.’¹⁹³ A state also can specify the rules that apply in the commercial space: ‘if you want to do commercial activity x in the state, you must follow y regulations.’ Take for example a Maryland statute that prohibits manufacturers and distributors from charging “unconscionable” prices for essential, off-patent medications. The price-gouging statute provided that no critical prescription drug could be “made available for sale” in the state at an unconscionable price.¹⁹⁴ That is, ‘if you want to manufacture critical pharmaceutical drugs that are made available in the state, you may not charge an unconscionable price.’ Similarly, New York asserted that, ‘if you manufacture opioids and have sales in the state, you must contribute a share of those sales to a fund that finances treatment.’

States invariably will have diverse terms of market participation. Indeed, a hallmark of the American system is the variety of regulatory approaches to otherwise shared or common issues. A state should determine what economic terms make most sense for those within its jurisdiction. Those terms may differ from the democratic choices made by other states. Regulatory diversity—the existence of varying state policies—is a natural incident of the diverse needs, circumstances, and preferences of the states in the Union. Through such diversity, states, as Justice Brandeis famously wrote, may serve as laboratories of experimentation, testing novel approaches to common issues and facilitating the development of policy solutions.¹⁹⁵ Regulatory diversity therefore is both an organic and positive feature of a heterogeneous nation. As regulatory uniformity is neither a national value nor is a constitutional command, a state cannot be expected to eliminate those policies that diverge

191. *Hunt-Wesson, Inc. v. Franchise Tax Bd.*, 528 U.S. 458, 460 (2000).

192. *See Hoyt v. Sprague*, 103 U.S. 613, 630 (1880) (“With regard to the general legislative power of a State to act upon persons and property within the limits of its own territory there can be no doubt . . . [E]very nation possesses an exclusive sovereignty and jurisdiction within its own territory.” (internal quotes and citation omitted)).

193. *See* John Carr, *State Traffic and Speed Laws*, MIT (Apr. 12, 2015), <http://www.mit.edu/~jfc/laws.html> [<https://perma.cc/GT5A-EB9X>] (summarizing the maximum speed limits in each state).

194. *See* MD. CODE ANN., HEALTH–GEN. §§ 2-801, 2-802 (West 2017).

195. *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

from those laid down by other states. Put differently, courts cannot clear the national economy of divergent state laws simply on the basis that they are different.¹⁹⁶

As to the second ingredient, actor choice, the out-of-state actor possesses the agency to decide which of those terms are acceptable or worth the cost of doing business. The importance of the voluntary decision of the market participant to assume these terms is drawn from classic and contemporary sources. To participate in the state's market is to accept, expressly or tacitly, the legal terms held out by that jurisdiction. An appreciation for this sort of contract-like, bilateral relationship with a jurisdiction stretches back to the ancient times,¹⁹⁷ was embraced by the Framers,¹⁹⁸ and was reinforced by the Supreme Court following the Civil War.¹⁹⁹

This understanding also applies to the economic context. Indeed, *Wayfair* places a premium on the affirmative choice of the market participant. In *Wayfair*, the Court recognized the convergence of the Dormant Commerce Clause and the Due Process Clause.²⁰⁰ As noted above, central to the Due Process Clause is the concept of "purposeful availment," the notion that an individual or entity that deliberately elects to take advantage of a jurisdiction's laws, infrastructure, and environment cannot later complain when subjected to the laws that make the infrastructure and environment possible to begin

196. To be sure, the ability of a state to set these terms is not unlimited. A state has all the general powers of any sovereign, *see generally* THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) (establishing that the "Free and Independent States . . . have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do"), minus those that have been prohibited by the Constitution, *see, e.g.*, U.S. CONST. amend. X. Nor can states craft commercial regulations that are protectionist or discriminatory.

197. *See* PLATO, *Crito*, in DIALOGUES OF PLATO 41, 50–52 (Benjamin Jowett trans., The Colonial Press rev. ed. 1900):

Any of you who does not like us and the city . . . may go where he likes, and take his goods with him. But he who has experience of the manner in which we order justice and administer the State, and still remains, has entered into an implied contract that he will do as we command him. . . . [Y]ou were at liberty to leave the city . . . if our covenants appeared to you to be unfair. You had your choice, and might have gone [to another state]

198. *See* THE FEDERALIST NO. 2 (John Jay) (suggesting that to join a sovereign is to surrender certain natural rights to the sovereign in exchange for better protection of the residual rights).

199. *See* *Munn v. Illinois*, 94 U.S. 113, 124 (1876) ("When one becomes a member of [organized] society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. '[The resulting] body politic . . . is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.'" (quoting MASS. CONST. pmb1.)).

200. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2093 (2018) ("Due Process and Commerce Clause standards may not be identical or coterminous, but there are significant parallels.").

with.²⁰¹ In *Wayfair*, the out-of-state merchants' purposeful availment of the in-state market, by way of a sale that originated out-of-state and that was directed to in-state customers, was sufficient to negate any Dormant Commerce Clause challenge.²⁰² *Wayfair* also instructs that purposeful availment is about both the sovereign reach of the in-state jurisdiction and the autonomy of the market participant,²⁰³ reflecting the two-way street between market actor and the state.

There are clear parallels between the Due Process Clause and the extraterritoriality doctrine. In both contexts, an out-of-state individual or corporation is complaining that the forum or regulating state is reaching out of the state and should keep its hands off. In both contexts, the underlying issue is the same: when it is appropriate for the state to be able to exert its judicial or regulatory authority over that out-of-state individual or corporation. The answer provided by the Due Process Clause—the state may exercise its sovereign authority provided that the individual or corporation affirmatively availed itself of the state—should apply to the extraterritoriality doctrine as well.

C. WORKABILITY

This Subpart explains how the “reciprocal fairness” principle would apply to recent cases from the Fourth, Sixth, and Seventh Circuits,²⁰⁴ as well as to State responses to the COVID-19 pandemic.

The Fourth Circuit case, *Association for Accessible Medicines v. Frosh*, involves a Maryland statute that followed significant price hikes for critical drugs. In 2017, Maryland enacted “An Act concerning Public Health—Essential Off-

201. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (“The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct.”).

202. *Wayfair*, 138 S. Ct. at 2096 (“[T]here is nothing unfair about requiring companies that avail themselves of the States’ benefits to bear an equal share of the burden of tax collection. Fairness dictates quite the opposite result.”).

203. See *J. McIntyre Mach., Ltd.*, 564 U.S. at 884 (“[W]hether a judicial judgment is lawful [for purposes of the Due Process Clause] depends on whether the sovereign has authority to render it.”).

204. As this Article prepared for print, the Ninth Circuit adopted the very proposal advanced here, further proving its workability. The court reviewed an Arizona statute that required all out-of-state simulcasts of horse racing be shown in-state to certain racing and wagering facilities in Arizona, ARIZ. REV. STAT. ANN. § 5-112 (U) (2019), and to avoid “any anticompetitive or deceptive practice,” *id.* These two requirements also applied to simulcasts originating in-state. *Id.* § 5-112 (T). The Ninth Circuit had no trouble holding that “the statute does not regulate extraterritorially[.]” *Monarch Content Mgmt. LLC v. Ariz. Dep’t of Gaming*, 971 F.3d 1021, 1031 (9th Cir. 2020). The court explained that the statute “merely sets the terms of doing business if [a party] chooses to provide simulcasts in the state.” *Id.*

Patent or Generic Drugs—Price Gouging—Prohibition.”²⁰⁵ The statute forbade “[a] manufacturer or wholesale distributor’ from ‘engag[ing] in price gouging in the sale of an essential off-patent or generic drug,” defining “price gouging” as “an unconscionable increase in the price of a prescription drug.”²⁰⁶ In the event that the price of a qualifying drug increased fifty percent or more in one year, the statute authorized the Maryland Attorney General to demand that the relevant manufacturer or distributor justify the increase.²⁰⁷ The statute also empowered the Maryland Attorney General to bring suit against a relevant manufacturer or distributor for civil penalties and/or a price restoration to pre-violation levels.²⁰⁸

The district court rejected the plaintiff’s challenge, but the Fourth Circuit reversed over a dissent.²⁰⁹ The circuit court recounted major extraterritoriality cases, particularly *Baldwin*, *Edgar*, *Brown-Forman*, and *Healy*, and reduced the extraterritoriality analysis to the following elements: 1) a state may not regulate commerce, including prices, wholly out-of-State; 2) whether a state so regulates commerce depends on the practical effect of the statute, and not the intent of the state; and 3) the practical effect is to be assessed in accordance with the consequences of the statute as well as the consequences if other states were to adopt similar statutes.²¹⁰

With respect to Maryland’s argument that *Walsh* limited the extraterritoriality doctrine to price-affirmation or price-fixing statutes, the court acknowledged that “two of our sister circuits”—presumably the Ninth and Tenth (discussed *infra*)—appeared to agree with Maryland’s reading of *Walsh*.²¹¹ But the Fourth Circuit expressly disagreed with Maryland and these circuits, interpreting the extraterritoriality doctrine to apply beyond the price-affirmation and price-fixing contexts for several reasons: the first element above does not depend on whether the state regulation concerns prices, the statute reviewed in *Walsh* did not regulate prices out-of-state, and the Supreme Court in *Edgar* invalidated a statute that did not regulate prices.²¹²

As the extraterritoriality doctrine applies outside of price-related statutes, the court invalidated Maryland’s price-gouging statute, relying on four conclusions to support this determination: first, the language of the statute—drugs “made available for sale”—does not necessarily limit the statute’s application to in-state sales, as a drug could be made available for sale in the

205. *Ass’n for Accessible Meds. v. Frosh*, 887 F.3d 664, 666 (4th Cir. 2018); MD. CODE ANN., HEALTH-GEN. § 2-802 (West 2017).

206. *Frosh*, 887 F.3d at 666; MD. CODE ANN., HEALTH-GEN. § 2-801(c) (West 2017).

207. *Frosh*, 887 F.3d at 666–67; MD. CODE ANN., HEALTH-GEN. § 2-803(a)–(b) (West 2017).

208. *See Frosh*, 887 F.3d at 666; MD. CODE ANN., HEALTH-GEN. § 2-803(d) (West 2017).

209. *Frosh*, 887 F.3d at 674.

210. *Id.* at 668–69.

211. *Id.* at 669–70.

212. *Id.* at 667–70.

state and in other states as well;²¹³ second, the statute targets the “upstream” prices charged by out-of-state manufacturers and wholesalers, before the drugs are then distributed and sold by retailers in-state;²¹⁴ third, the statute controls, and not just influences, the out-of-state prices by capping the prices that may be charged by manufacturers and wholesalers;²¹⁵ and fourth, similar statutes enacted by other states would burden interstate commerce by subjecting manufacturers and wholesalers to potentially conflicting price caps, such that a sale that is permissible in one state could at the same time be impermissible in another.²¹⁶

In dissent, Judge James Wynn Jr., claimed that the majority utilized the wrong standard to assess whether the Maryland statute complied with the extraterritoriality doctrine. According to Judge Wynn, the majority adopted an outdated and abandoned view of commerce that chops up the stream of commerce into discrete parts (such as manufacturing or distribution).²¹⁷ The Supreme Court, Judge Wynn observed, no longer splits “commerce” into discrete phases and instead construes “commerce” to be a continuous, holistic stream that encompasses the distinct phases.²¹⁸ Based on this conception of commerce, Judge Wynn posited that the extraterritoriality principle is violated “if no transactions in that stream take place within the State’s borders.”²¹⁹ Here, Judge Wynn wrote, the covered drugs ultimately “end” up in Maryland,²²⁰ thus the statute does not regulate transactions that are wholly outside of Maryland.²²¹ Further, he suggested that *Baldwin*, *Brown-Forman*, and *Healy* all concerned statutes that implicated the core concerns of the Dormant Commerce Clause, namely discrimination against out-of-state commerce or economic protectionism.²²² The Maryland statute, by contrast, is neither discriminatory nor is it predicated on economic protectionism, Judge Wynn added.²²³

Using this Article’s Due Process inquiry, the Maryland statute would be upheld. First, as to the sovereign authority of the state, the statute is designed to promote access to life-saving medication, and thus furthers the health and welfare of its residents. Accordingly, the statute is a product of the state’s police powers. Moreover, it is not predicated on a protectionist purpose, and

213. *Id.* at 670–71.

214. *Id.* at 671–72.

215. *Id.* at 672–73.

216. *Id.* at 673–74.

217. *Id.* at 681–88 (Wynn, J., dissenting) (discussing the development of the “modern” dormant Commerce Clause).

218. *Id.* at 681–83.

219. *Id.* at 683.

220. *Id.* at 679–80.

221. *Id.* at 680.

222. *Id.* at 684–86.

223. *Id.*

applies even-handedly to in-state and out-of-state actors.²²⁴ Second, as to the autonomy of out-of-state market participant, the statute expressly requires purposeful availment—covering only those drugs made available for sale in Maryland—thus establishing an affirmative connection with the state and negating any suggestion that the statute applies to “wholly” extraterritorial economic activity. Because the statute is a valid exercise of the state’s police powers and applies only if the regulated entities seek access to Maryland customers, the statute would satisfy a due process-infused conception of the extraterritoriality doctrine. As this straightforward analysis demonstrates, the two-step framework also is easier to administer than the convoluted, outdated approach taken by the Fourth Circuit.

Next, the Sixth Circuit reviewed the constitutionality of a Michigan statute that calls to mind an episode of *Seinfeld*.²²⁵ Michigan was concerned that out-of-staters—like Kramer and Newman, both of New York—would accumulate bottles in their home states, and deposit these out-of-state bottles in Michigan in order to receive a higher bottle refund in Michigan.²²⁶ In response to this supposed fraud, Michigan required certain bottle manufacturers to place a Michigan-unique mark on bottles sold within the state and limited the refunds to those bottles bearing the state-specific mark.²²⁷ The district court dismissed the subsequent Dormant Commerce Clause challenge, reasoning, in part, that the Supreme Court has confined the extraterritoriality doctrine to price-affirmation statutes.²²⁸ The Sixth Circuit saw things differently, acknowledging that “[t]he Supreme Court has applied the extraterritoriality doctrine only in the limited context of price-affirmation statutes,”²²⁹ but applied nonetheless general propositions from the price-affirmation cases—including whether the state considered alternative approaches and how the statute may interact with other, similar state regulations—to strike down the Michigan law.²³⁰

The statute would be upheld under a Due Process reciprocal fairness principle.²³¹ The fact that the Michigan statute required bottle manufacturers to produce Michigan-specific bottles, which ostensibly could not be used in

224. For an example of a statute that limits pharmaceutical prices and that is discriminatory, see generally *Pharm. Rsch. & Mfrs. of Am. v. Dist. of Columbia*, 406 F. Supp. 2d 56 (D.D.C. 2005) (striking down a statute that exempted in-state entities from liability).

225. See *Seinfeld: The Bottle Deposit* (NBC television broadcast May 2, 1996) (characters Kramer and Newman concocted a scheme in which they would round up empty bottles in New York and drop them off in Michigan, where they would receive a whopping five-cents more per bottle than if they had deposited them in New York).

226. *Am. Beverage Ass’n v. Snyder*, 735 F.3d 362, 367 (6th Cir. 2013).

227. *Id.*; MICH. COMP. LAWS ANN. § 445.572a(10) (West 2008).

228. *Am. Beverage Ass’n v. Snyder*, 793 F. Supp. 2d 1022, 1033–37 (W.D. Mich. 2011), *aff’d in part and rev’d in part*, 735 F.3d 362 (6th Cir. 2013).

229. *Snyder*, 735 F.3d at 373.

230. *Id.* at 375–76.

231. See *supra* Section III.B.

other states,²³² is not material: All manufacturers are subject to the requirement, it is predicated on a legitimate interest (i.e., fraud prevention), the out-of-state manufacturers may avoid the production issues by declining Michigan's terms of market entry, and the acceptance of the terms would provide an affirmative nexus between the out-of-state manufacturers and Michigan. The costs associated with Michigan-only production would be a highly relevant factor in a *Pike* balancing inquiry, but the Sixth Circuit expressly declined to engage in a *Pike* analysis.²³³ If Due Process were deployed, however, the extraterritoriality doctrine would not be implicated, and the court would review the non-discriminatory statute under *Pike*.

Nearby, the Seventh Circuit examined a Wisconsin statute that authorized companies to dump certain waste products in-state provided that the companies operated in a region possessing a qualifying recycling program.²³⁴ The district court rejected the Dormant Commerce Clause challenge, primarily because the condition applied equally to in-state and out-of-state waste companies.²³⁵ The Seventh Circuit reversed. While the statute did not discriminate against out-of-state companies, the Seventh Circuit was troubled by the impact of the statute.²³⁶ That is, the court asserted that the Wisconsin statute, in effect, regulated the recycling programs of participating out-of-state companies.²³⁷

In contrast to the statutes discussed in this Section, the Wisconsin statute reviewed by the Seventh Circuit would not be consistent with due process considerations. This is because the application of the statute is not predicated on the affirmative choice of a market participant. Rather, the statute requires that a market participant may enter the market only if it operates in a "region" possessing a qualifying recycling program.²³⁸ While a prospective market participant has control over economic and regulatory decision-making, and thus can determine whether to enter the market based on its considered judgment, it does not have meaningful control over the policy choices of its jurisdiction (i.e., whether a local government wants to run a certain recycling program). The Wisconsin statute therefore severed the link between the terms of a statute and the ability to accept those terms. Accordingly, a court applying the reciprocal fairness principle would agree with the Seventh Circuit that the Wisconsin statute is unconstitutional. To be fair, a court using explicitly due process considerations would reach the same conclusion, albeit on different grounds. The Seventh Circuit suggested that Wisconsin was

232. See *Snyder*, 735 F.3d at 372–73.

233. See *id.* at 376 n.7.

234. Nat'l Solid Wastes Mgmt. Ass'n v. Meyer, 63 F.3d 652, 653 (7th Cir. 1995).

235. See *id.* at 657–58.

236. See *id.* at 658.

237. *Id.* at 655.

238. *Id.* at 653.

projecting its policy onto other jurisdictions.²³⁹ Under a Due Process inquiry, by contrast, the problem is not that Wisconsin sought to force its policy preference on other jurisdictions. Instead, the constitutional infirmity is in the imposition of a condition that lies outside of the agency of the prospective market participant.²⁴⁰

The discussion of the Seventh Circuit case also is helpful in addressing why the extraterritoriality doctrine should not hinge on the price-affirming or price-matching nature of the reviewed statute—a myopic debate that has split the Ninth and Tenth Circuits, on the one hand, and the Fourth, on the other. Should a prospective market participant seek to enter a market, where a term of market entry is price-affirmation or price-matching, Due Process would not be offended because the decision to raise, lower, or hold prices still would rest with the prospective market participant. Put differently, the scope of the extraterritoriality doctrine should focus on terms and the choice to accept the terms, not whether the terms relate to price.

One may object that, of the three reviewed statutes, only one would fall short. That one of the relevant statutes would fail under this analysis indicates that the extraterritoriality doctrine would have some teeth under a Due Process inquiry. As the Seventh Circuit case demonstrates, a statute that regulates out-of-state actors in the absence of any affirmative choice on their part to participate in the in-state market would violate due process considerations and thereby the extraterritoriality doctrine.

The COVID-19 pandemic has compelled states to determine how they may both protect their residents from exposure and how everyday aspects of life (e.g., business, school, worship) should continue in light of the extraordinary and unprecedented circumstances created by the pandemic. Some contemplated or actual responses impose restrictions or otherwise depend on state-lines, thus implicating and generating renewed interest in the Dormant Commerce Clause.²⁴¹

One question that has arisen is whether states may prohibit out-of-state individuals from entering the states, or at least requiring such individuals to

239. See *supra* notes 236–37 and accompanying text.

240. The determination that the Wisconsin statute violates the market election principle does not alter my primary argument, that the extraterritoriality doctrine should be eliminated. The Seventh Circuit held in the alternative that the Wisconsin statute should fall because the burdens outweighed the benefits under *Pike. Meyer*, 63 F.3d at 663. If the extraterritoriality doctrine is scrapped, as I suggest, nothing practical would be lost: The Wisconsin statute still would be invalidated, further demonstrating that the extraterritoriality strand of the Dormant Commerce Clause is superfluous.

241. See Hugh Hewitt, *Attorney General William Barr on the Crisis*, HUGHHEWITT (Apr. 21, 2020), <https://hughhewitt.com/attorney-general-william-barr-on-the-crisis> [<https://perma.cc/32ZV-7J85>] (“When a governor acts, especially when a governor does something that intrudes upon or infringes on a fundamental right or a Constitutional right, they’re bounded by that. . . . [I]t is possible that governors will take measures that impair interstate commerce. And just where that line is drawn, you know, remains to be seen.”).

quarantine upon arrival, on the theory that limiting interaction may in turn limit the spread of virus transmission.²⁴² Several states have imposed such restrictions, mandating that all or certain out-of-state individuals quarantine upon arrival.²⁴³ Policies that treat out-of-state individuals differently than someone already in-state are discriminatory and thus would be presumptively unconstitutional.²⁴⁴ Under a dispassionate application of current law, the policies would face an uphill climb with respect to surviving a constitutional challenge. While the policies would be based on pressing health and safety justifications, the states may have a tough time convincing the court that transmission from out-of-state individuals is the source of the problem giving rise to the different treatment of out-of-state individuals, or that there are no alternatives to the discriminatory policies.²⁴⁵

If a court were to apply the extraterritoriality doctrine, as contemplated by this Article, a quarantine statute would at first blush satisfy the reciprocal fairness principle: The regulatory terms are predicated on health concerns, and an individual would have the choice to decide whether the terms of state entry, such as a quarantine, are worth it. But there are limits to the terms that can be offered, and one such limit is that the terms may not be discriminatory. Accordingly, the extraterritoriality doctrine would kick the inquiry over to the discrimination prong of the Dormant Commerce Clause for final resolution.

242. See Dessie Otachliska, *Travel Restrictions During Coronavirus*, HARV. L. (Nov. 9, 2020), <https://covidseries.law.harvard.edu/travel-restrictions-during-coronavirus> [https://perma.cc/NKY3-JCZB] (“Whether by airplane, bus, train, or car, traveling increases a person’s chances of contracting and spreading COVID-19. Travelling [sic] inevitably puts people in close contact, often for prolonged periods of time, and exposes them to more and different pathogens. . . . [H]ealth experts recommend minimizing number of such stops precisely because it is next to impossible to control one’s risk of exposure.”).

243. See Forrest Brown & Megan Marples, *Covid-19 Travel Restrictions State by State*, CNN (Feb. 1, 2021), <http://www.cnn.com/travel/article/us-state-travel-restrictions-covid-19/index.html> [https://perma.cc/43GE-LM2L]. A constitutionally safer approach would be to impose restrictions on everyone (e.g., anyone who crosses state lines), regardless of whether they are an out-of-state individual or in-state individual. See Tariro Mzezewa, 3 *Baltic States Announced a ‘Travel Bubble.’ What Is It and Could It Work in the U.S.?*, N.Y. TIMES (Aug. 6, 2020), <https://www.nytimes.com/2020/04/29/travel/coronavirus-travel-bubble.html> [https://perma.cc/G6HX-E2SP] (“[A] state can deploy nondiscriminatory public health measures like taking the temperature of everyone entering the state or requiring them to go into quarantine, as long as it imposes that rule on every person, regardless of where the person is from.”).

244. See, e.g., Akiva Shapiro, Avi Weitzman, Patrick Hayden, Alex Bruhn, Jason Bressler & Parker W. Knight III, *The Constitutional Consequences of Governmental Responses to COVID-19: The Right to Travel and the Dormant Commerce Clause*, GIBSON DUNN (May 1, 2020), <http://www.gibsondunn.com/the-constitutional-consequences-of-governmental-responses-to-covid-19-the-right-to-travel-and-the-dormant-commerce-clause> [https://perma.cc/XgV7-RKQ8]; Otachliska, *supra* note 242.

245. Others are more confident that the policies would survive constitutional scrutiny. See, e.g., Anthony Michael Kreis, *Contagion and the Right to Travel*, HARV. L. REV. BLOG (Mar. 27, 2020), <http://blog.harvardlawreview.org/contagion-and-the-right-to-travel> [https://perma.cc/SgTH-KSR9] (citing *Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 387 (1902)).

Another issue presented by the coronavirus concerns states granting the “diploma privilege”—or license to practice law to anyone who graduates from an in-state law school, in lieu of a bar examination, provided that the graduate receives some additional instruction on state law—due to the challenges of safely administering the bar examination in-person and questions as to the reliability and accessibility of remote testing.²⁴⁶ A statute that confers a conditional or temporary license only to graduates of in-state law schools, and denies such license options to graduates of out-of-state law schools, would be discriminatory and therefore would be presumptively unconstitutional.²⁴⁷

Even if a diploma privilege is supported by a legitimate justification, it would be difficult for a state to argue that out-of-state law school graduates (which ostensibly would include individuals who have moved in-state following graduation) are the source of the problem giving rise to the discrimination, or that there are no non-discriminatory alternatives, such as an online examination or supplementary instruction on state law for in-state or out-of-state graduates. Some have argued that, under the market participant exception, states could permissibly extend the diploma privilege to graduates of public in-state law schools.²⁴⁸ But, as Professor Vikram David Amar has pointed out, the market participant doctrine applies when the state is acting as a market participant, not a market regulator.²⁴⁹ Here, even if in-state schools themselves are considered market participants (producing law school graduates), the decision as to who is granted the diploma privilege lies outside of those law schools and is a regulatory action (determining which graduates of these law schools *and* other law schools can practice law in the state).²⁵⁰ Put differently, the law schools may be gatekeepers as to who is admitted to their own schools and who receives in-state tuition at their own schools, but are not gatekeepers as to who may be an attorney within the state.

Whether the diploma privilege would survive an extraterritoriality challenge as contemplated by this Article would depend first on the justifications for the statutes, specifically whether they are truly predicated on health and safety, or whether they are instead an effort to insulate graduates from in-state law schools to competition from out-of-state graduates. Assuming that the statutes are legitimate exercises of the police power, a law

246. See *Bar Exam Modifications During COVID-19: 50-State Resources*, JUSTIA, <https://www.justia.com/covid-19/50-state-covid-19-resources/bar-exam-modifications-during-covid-19-50-state-resources> [<https://perma.cc/JNK5-HYPV>] (last updated Jan. 2021).

247. See Vikram David Amar, *Why It is Unconstitutional for State Bars, When Doling Out Bar-Exam Seats, to Favor In-State Law Schools*, JUSTIA: VERDICT (May 21, 2020), <https://verdict.justia.com/2020/05/21/why-it-is-unconstitutional-for-state-bars-when-doling-out-bar-exam-seats-to-favor-in-state-law-schools> [<https://perma.cc/TJK8-RQ7Y>].

248. See Collaboratory on Legal Education and Licensing for Practice, *Constitutional Constraints on Lawyer Licensing in the Age of COVID-19*, NW. UNIV. L. REV. NOTE (June 3, 2020), <https://blog.northwesternlaw.review/?p=1451> [<https://perma.cc/U9XQ-2MYM>].

249. Amar, *supra* note 247.

250. See *id.*

student ostensibly would have a choice as to whether to attend a law school that confers the benefit of the diploma privilege. To this extent, the diploma privilege seems constitutionally safe. But, as with the quarantine statutes, the constitutional status of the diploma privilege would move from the extraterritoriality prong to the discrimination prong, and in particular whether a state can offer a term of market entry that is discriminatory.

V. CONCLUSION

States are attempting to apply their traditional police powers to critical public health crises, including access to life-saving medications and the scourge of opioid addiction. In between these legislative initiatives and the people in need are judges, specifically a judicially-created doctrine that finds dubious support in the Constitution, that defies reasoned or consistent application, and that has deeply divided the federal appeals courts in several meaningful ways.

This Article gives principled meaning to the extraterritoriality doctrine by shifting the focus of the doctrine from formal territorial lines, which companies and other entities can transcend with ease, to the relationship between out-of-state market participants and the regulating state. That is, the touchstone for extraterritoriality is reciprocal fairness, rather than borders, intent, or effect. This Article also demonstrates that a principle of reciprocal fairness can be easily applied to actual cases. As such, the Article aimed to prove both the principled basis for an upgraded doctrine and its workability.