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Lochner Revenant: The Dormant Commerce Clause & Extraterritoriality

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LOCHNER REVENANT: THE DORMANT COMMERCE CLAUSE & EXTRATERRITORIALITY

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Abstract

During the Lochner *era, the Supreme Court, relying on broad interpretations of constitutional doctrine, struck down scores of state statutes with an essentially free hand. Today, some federal courts are heading towards a new* Lochner *era, in which numerous state laws regulating health and safety can be invalidated on the thinnest of constitutional grounds. The*

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issues implicate not only a vast amount of national commerce but also the Constitution's careful balance between federal and state power.

Specifically, in two decisions from the late 1980s, the Supreme Court extracted language from a 1935 decision and used that language to fashion a new extraterritoriality principle within dormant Commerce Clause jurisprudence. In the midst of disarray in the circuits, extraterritoriality has now taken on a life of its own. It has been applied by the lower courts to overturn a host of state statutes, including ones related to ads depicting sexual acts with minors, online auctions, anti-spoofing laws (which ensure the number showing on a cell phone is the origin of the call), and the online publication of public officials' home addresses. With the extraterritoriality principle, the dormant Commerce Clause has now morphed from a narrow anti-discrimination rule into a broad restriction on state sovereignty. Absent Supreme Court intervention, the nation appears to be verging on a new Lochner *era. This article unwinds the misinterpretations that are leading the lower courts astray and points the way out of this dangerous path.*

INTRODUCTION

The Supreme Court's decision in the 1905 case of *Lochner v. New York*[1] inaugurated an era in which federal courts—relying on broad interpretations of constitutional doctrine—struck down scores of state police-power statutes at will.

This article demonstrates that federal courts are potentially starting a new *Lochner* era, in which numerous state laws regulating health and safety will be invalidated on the thinnest of constitutional grounds: the so-called extraterritoriality principle of the dormant Commerce Clause. Absent Supreme Court intervention, the nation appears to be verging on a revival of *Lochner*-style jurisprudence—the creation of expansive doctrine that gives federal courts essentially limitless authority to strike down state laws. To be clear, the reference

[1] 198 U.S. 45 (1905).

here to *Lochner* is not to the *Lochner* Court's substantive commitment—its valorization of economic liberty[2]—but rather to its mode of rule articulation. That mode, which states constitutional norms in unusually sweeping terms, gives federal courts correspondingly broad power to restrict, even nullify, state sovereignty.

The historical backdrop provides the starting point. The main constitutional doctrine used by the Supreme Court in the *Lochner* era to invalidate state laws was a version of substantive due process that understood "liberty" to include freedom of contract. But another constitutional doctrine used in the *Lochner* era was a version of the dormant Commerce Clause. In general, the dormant Commerce Clause bars states from burdening interstate commerce, even when Congress has not exercised that authority.[3]

In any attempt to understand the dormant Commerce Clause, the same question always arises: How much burdening is too much? The *Lochner* era's answer, and hence its version of the dormant Commerce Clause, went as follows: A state law impermissibly burdens interstate commerce when it "inhibits" interstate commerce "directly or indirectly." As one can immediately see, what inhibits interstate

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[2] Strong arguments continue to be made in support of that substantive commitment, with which this article does not take issue. *See, e.g.*, Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 NYU J.L. & LIBERTY 334, 336 (2005) ("As a matter of intellectual temperament, I align myself closely with those who think that the Lochnerian balance between the notion of ordinary liberty and the police power is far more faithful to the constitutional structure than the Progressive and New Deal conception that wholly eviscerates any constitutional protection of economic liberty."). In his response accompanying this article, Professor Epstein makes similar arguments in support of *Lochner*'s substantive commitment. *See* Richard A. Epstein, *Market Competition as a Constitutional Virtue: A Defense of* Lochner *and a Revitalized Dormant Commerce Clause*, 16 NYU J.L. & LIBERTY (forthcoming 2022) (on file with journal) [hereinafter Epstein, *Market Competition*].

[3] Dormant Commerce Clause is a nickname for the negative implication of the Commerce Clause's affirmative grant to Congress of authority over interstate commerce.

commerce, like what restricts freedom of contract, is in the eye of the beholder—or at least in the eye of the beholding judge. Thus, a capacious understanding of both substantive due process and the dormant Commerce Clause gave the *Lochner*-era Court essentially untrammeled authority to void the states' police-power legislation.

As the *Lochner* era's version of substantive due process became moribund in the late 1930s, a similar fate befell the era's version of the dormant Commerce Clause. The commerce-inhibition test fell out of favor and, over the ensuing decades, was narrowed into what became the modern doctrine of the dormant Commerce Clause. That modern doctrine, as articulated in the 1970s, has two distinct branches—consisting of an anti-discrimination rule and a balancing test—that together involve a two-step inquiry: First, did the state law at issue discriminate against interstate commerce or otherwise favor in-state over out-of-state economic interests? Second, even absent discrimination and favoritism, did the state law place on interstate commerce a non-incidental burden sufficient to obligate the state to demonstrate, by balancing the law's local benefit against its burden on interstate commerce, that the local benefit was weightier?

Had the modern, two-branch doctrine remained as it was, this article would never have been written, as the doctrine did not enable federal courts to invalidate state legislation except in limited circumstances and with strong justification. But in the late 1980s, the Supreme Court created what some have called a third branch, now known as the extraterritoriality principle, which *does* enable federal courts to invalidate state legislation with a virtually free hand. According to that principle, a state statute may not control commerce occurring wholly outside the enacting state's boundaries, even if the statute treats in-state and out-of-state interests evenhandedly. That is, a statute can violate the extraterritoriality principle even if it neither discriminates against out-of-state interests nor favors in-state interests. Given how economically interconnected the states are, and how frequently each state's laws have out-of-state effects, the principle essentially gives federal courts carte blanche to strike down state laws.

The irony is that, in the 1980s cases launching extraterritoriality, the Supreme Court traced the principle to a 1935 decision concerning the very discrimination that the dormant Commerce Clause has long barred. In fact, a great mystery of dormant Commerce Clause jurisprudence is how a 1935 decision condemning statutory discrimination later birthed a principle to which statutory discrimination was irrelevant.

The irony did not stop there. As with the 1935 decision, the two decisions in which the Supreme Court in the 1980s formalized the exterritoriality principle concerned discriminatory statutes. And the statutes in all three cases belonged to a self-limited category of laws known as price-affirmation statutes. Perhaps for this reason, the Supreme Court in 2003 held—at least according to several courts and many observers—that the extraterritoriality principle may be used to invalidate only price-affirmation statutes, not other kinds of statutes.

Many lower federal courts have effectively ignored that 2003 decision. As a result, these courts have run with the extraterritoriality principle and have used it to invalidate all types of state police-power statutes, although none of those statutes constituted price-affirmation. And the pace of such invalidation is accelerating. The many examples of non-price-affirmation statutes invalidated in recent years under the extraterritoriality principle are detailed in the body of this article.

The bad news here is also the good news. While the extraterritoriality principle has been used by lower federal courts to void numerous state statutes just in the last decade, the Supreme Court has used the principle to void state statutes only three times in the last century. Thus, the Supreme Court still has plenty of doctrinal room to make crystal clear what many thought had been made sufficiently clear in 2003: The extraterritoriality principle may not be used in this expansive manner. In fact, having recently granted certiorari in a dormant Commerce Clause case, the Supreme Court has an opportunity to bring much-needed clarity to the law, depending on how the Court chooses to resolve the case and the extent to which guidance is provided.

Not only are billions of dollars in commerce at stake. So are bedrock principles of federalism. Although in theory the extraterritoriality principle is just as invocable by state courts as by federal courts, in practice state judiciaries almost never strike down state laws under the principle. Use of the principle to void state laws is almost entirely a federal-court phenomenon. The Lochnerian specter of federal courts using a legal cudgel, in the form of the extraterritoriality principle, to strike down state laws at will, and thereby tilt the state-federal balance decidedly and improperly against the states, creates an urgent need for attention to this matter.

The body of this article proceeds in four parts. The first part addresses the origin and essence of the dormant Commerce Clause generally. The second part describes the version of the dormant Commerce Clause developed during the *Lochner* era, and its narrowing during the New Deal era. The third part describes the origin of the modern dormant Commerce Clause's two established branches—the anti-discrimination rule and the balancing test—and its controversial third branch, the extraterritoriality principle. That discussion engages in a close reading of the Supreme Court cases that have given rise to the extraterritoriality principle, examining how subtle changes in the Court's language between 1935 and 1989 caused the anti-discrimination principle to morph into the exterritoriality principle. Next is an analysis of the Supreme Court's decision in 2003 that, by any reasonable reading, limited the use of the extraterritoriality principle to cases involving price-affirmation statutes. The third part concludes with a discussion of lower-court decisions that, notwithstanding the Supreme Court's 2003 decision, have invalidated numerous state statutes under the exterritoriality principle.

The fourth part discusses the importance of the issues raised by the extraterritoriality principle, and the fact that the federal circuit courts have split over each aspect of the issue. The first aspect is: Did the Supreme Court's 2003 decision limit the use of the exterritoriality principle to cases involving price-affirmation statutes? The second aspect is: Can the extraterritoriality principle ever be violated by a

statute that controls a single out-of-state transaction, when the transaction is part of a stream of commerce that ultimately enters the enacting state? The third aspect is: Can a nondiscriminatory statute violate the extraterritoriality principle? The article then explains how the Supreme Court has the opportunity to bring clarity to this troubled area of the law, which implicates not only a vast amount of national commerce but also the Constitution's careful balance between federal and state power. Finally, the article concludes with an assessment of the extraterritoriality principle, in retrospect and prospect.

I. THE ORIGIN AND ESSENCE OF THE DORMANT COMMERCE CLAUSE[4]

The Commerce Clause grants Congress "Power . . . To regulate Commerce . . . among the several States . . . ."[5] This grant enables

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[4] For analysis of the dormant Commerce Clause and its extraterritoriality principle generally, *see* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569 (1987) (arguing that dormant Commerce Clause has no basis in constitutional text, upsets Constitution's state-federal balance, and cannot be justified by non-textual rationales, and that other parts of constitutional text can address problem of discriminatory state legislation); Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986) [hereinafter Regan, *Making Sense*]; Donald Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865 (1987) [hereinafter Regan, *Siamese Essays*] (arguing that extraterritoriality principle originates in Constitution's federal structure rather than in Commerce Clause and should be used to invalidate only statutes discriminating against interstate commerce and only in movement-of-goods cases); Brandon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979 (2013) (examining theory and history of extraterritoriality principle and noting principle's lack of internal limitation and poor fit between rule and purpose); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785 (2001) (noting difficulties of strictly applying extraterritoriality principle to new types of state laws); Katherine E. Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057 (2009) [hereinafter Florey, *Reflections*] (arguing that extraterritoriality principle as stated in Supreme Court precedent is too broadly worded to be taken literally); Katherine E. Florey, *State Extraterritorial Powers Reconsidered: A Reply*, 85 NOTRE DAME L. REV. 1157 (2010) [hereinafter Florey, *A Reply*] (similar); Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483 (1997) (reconceptualizing Roosevelt era's constitutional revolution as separation-of-powers-related ascendancy of legislative power over judicial power—with result that state legislative power was freed from *Lochner*-era Court's distrust of populist legislation—rather than as federalism-related ascendancy of federal power over state power); Peter C. Felmly, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 467 (2003) (arguing that extraterritoriality principle should not be part of dormant Commerce Clause jurisprudence and that attempts to apply unchecked extraterritoriality principle to real-world arenas consistently yield counterintuitive results and pragmatic concerns

Congress to pass laws regulating interstate commerce.[6] While one might plausibly read the Commerce Clause as doing nothing other than empowering Congress to legislate, the Supreme Court has long read the Clause as a self-executing prohibition against the states.[7] Since 1873 if not earlier, the Court has elevated the Clause's negative implication[8]—that the states, which are *not* mentioned by the Clause, have *no* power to regulate interstate commerce—to the level of

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matching those that principle purports to avoid); Tessa Gellerson, *Extraterritoriality and the Electric Grid:* North Dakota v. Heydinger, *A Case Study for State Energy Regulation*, 41 HARV. ENVTL. L. REV. 563 (2017) (reviewing recent extraterritoriality cases, recent divergences in federal circuits, and scholarly critiques as well as exposing shortcomings of extraterritoriality principle); Recent Case, *Dormant Commerce Clause – Extraterritoriality Doctrine – Sixth Circuit Invalidates Michigan Statute Requiring Bottle Manufacturers to Use Unique Mark on All Bottles Sold Within Michigan* – American Beverage Ass'n v. Snyder, *700 F.3d 796 (6th Cir. 2012)*, 126 HARV. L. REV. 2435 (2013) (critiquing recent extraterritoriality caselaw); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855 (2002) (arguing that any state's prohibitions can be sidestepped when state's citizens travel to other states lacking such prohibitions and that Constitution's federal structure gives each state power to avoid such "travel-evasion"); Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 MARQUETTE L. REV. 497 (2016) (asserting that extraterritoriality principle is still good law in contemporary dormant Commerce Clause jurisprudence).

[5] U.S. Const. art. I, § 8, cl. 3.

[6] *See, e.g.*, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2089 (2018) ("The Constitution grants Congress the power '[t]o regulate Commerce . . . among the several States.' Art. I, § 8, cl. 3. . . . [T]he Commerce Clause is written as an affirmative grant of authority to Congress . . . . [W]hen Congress exercises its power to regulate commerce by enacting legislation, the legislation controls.").

[7] *See* S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984) ("Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.").

[8] *See* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337 (2008) ("[A]lthough [the Commerce Clause's] terms do not expressly restrain 'the Several States' in any way, we have sensed a negative implication in the provision since early days . . .") (citing Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 318-19 (1852); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209 (1824)); Huish Detergents, Inc. v. Warren Cty., Ky., 214 F.3d 707, 712 (6th Cir. 2000) ("The Clause, by negative implication, restricts the States' ability to regulate interstate commerce.").

constitutional doctrine.[9] That doctrine, known as the "dormant Commerce Clause," bars the states from interfering with interstate commerce, even where Congress's power to legislate is unexercised (or "dormant").[10] The purpose of the dormant Commerce Clause is to prevent each state from engaging in economic protectionism, i.e., protection of in-state entities from their out-of-state competitors.[11] Historically, the driving force behind the doctrine was always the desire to avoid the states' economic balkanization that helped doom the Articles of Confederation.[12]

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[9] *See, e.g.*, Tyler Pipe Indus., Inc. v. Wash. State Dep't of Rev., 483 U.S. 232, 259-60 (1987) (Scalia, J., concurring in part) (noting that the dormant Commerce Clause doctrine was formally adopted as a holding of the Court in Case of the State Freight Tax, 8 U.S. (15 Wall.) 232 (1873), and that "in the 50 years prior to that . . . it was alluded to in various dicta of the Court" (citing *Cooley*, 54 U.S. at 319; *Gibbons v. Ogden*, 22 U.S. at 209 (Johnson, J., concurring in judgment))).

[10] Because the dormant Commerce Clause arose by negative implication, it is sometimes referred to as the "negative Commerce Clause." *See, e.g.*, Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200 (1995) (Scalia, J., concurring in judgment) ("The negative Commerce Clause . . . is 'negative' not only because it negates state regulation of commerce, but also because it does *not* appear in the Constitution." (citation, brackets, and some internal quotation marks omitted)); Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 609 n.1 (1997) (Thomas, J., dissenting) ("Although the terms 'dormant' and 'negative' have often been used interchangeably to describe our jurisprudence in this area, I believe 'negative' is the more appropriate term."); Redish & Nugent, *supra* note 4, at 570 n.8 ("The label 'dormant' has been criticized as misleading: 'The term connotes something with the potential for action, yet currently in repose. It is clear that what remains dormant is Congress, and not the commerce clause. The clause's limitation on state regulation can certainly be termed implicit, silent, or negative, but dormancy does not accurately describe the situation.'" (quoting Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 425 n.1 (1982))).

[11] *Davis*, 553 U.S. at 337-38 ("The modern law of what has come to be called the dormant Commerce Clause is driven by concern about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.").

[12] *Id.* at 338 ("The point [of the dormant Commerce Clause] is to effectuate the Framers' purpose to prevent a State from retreating into the economic isolation that had plagued relations among the Colonies and later among the States under the Articles

While the dormant Commerce Clause has existed for more than a century, it is nonetheless controversial. It is nowhere in the text of the Constitution.[13] The textual provision from which it assertedly derives, the Commerce Clause, resides not in the portion of Article I setting *limits* on *state* power[14]—where the dormant Commerce

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of Confederation." (citations, brackets, and internal quotation marks omitted)); Hughes v. Oklahoma, 441 U.S. 322, 325 (1979) ("The Commerce Clause . . . reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." (citation omitted)); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949) ("When victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began. '* * * each state would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view.' This came 'to threaten at once the peace and safety of the Union.'" (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 259, 260)).

[13] *See, e.g.*, Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992) (recognizing that the Commerce Clause "says nothing about the protection of interstate commerce in the absence of any action by Congress"), *overruled on other grounds*, South Dakota v. Wayfair, 138 S. Ct. 2080, 2099 (2018); Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978) ("The bounds of [the restraints imposed by the Commerce Clause itself, in the absence of federal legislation], appear nowhere in the words of the Commerce Clause"); *H.P. Hood & Sons, Inc.*, 336 U.S. at 534-35 (describing the negative Commerce Clause as filling in one of the "great silences of the Constitution"); *see also* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2477 (2019) (Gorsuch, J., dissenting) ("Unlike most constitutional rights, the dormant Commerce Clause cannot be found in the text of any constitutional provision but is (at best) an implication from one."); Pharm. Rsch. and Mfrs. of Am. v. Walsh, 538 U.S. 644, 674-75 (2003) (Scalia, J., concurring in judgment) ("[T]he negative Commerce Clause [has] no foundation in the text of the Constitution . . . ."); *id.* at 683 (Thomas, J., concurring in judgment) ("The negative Commerce Clause has no basis in the text of the Constitution . . . ." (citation, brackets, and internal quotation marks omitted)); C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 401 (1994) (O'Connor, J., concurring in judgment) ("The scope of the dormant Commerce Clause is a judicial creation."); Redish & Nugent, *supra* note 4, at 573 (noting absence of any "textual basis" for dormant Commerce Clause).

[14] *See, e.g.*, U.S. Const. art I, § 10 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . . No State shall,

Clause's genuine textual basis (if it had one) would naturally reside—but rather in the portion of Article I making *affirmative grants* of power to *Congress*.[15] Its jurisprudence asks courts to make essentially legislative judgments.[16] And its check on each state's police power to address local problems, where exercise of that power might burden interstate commerce, is in tension, and arguably incompatible, with the state autonomy guaranteed by the

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without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . . . No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power or engage in War . . . .").

[15] U.S. Const., art. I, § 8.

[16] *See* Comptroller of Treasury of Md. v. Wynne, 575 U.S. 542, 576-77 (2015) (Scalia, J., dissenting) ("A final defect of our Synthetic Commerce Clause cases is their incompatibility with the judicial role. The doctrine does not call upon us to perform a conventional judicial function, like interpreting a legal text, discerning a legal tradition, or even applying a stable body of precedents. It instead requires us to balance the needs of commerce against the needs of state governments. That is a task for legislators, not judges. . . . [I]t is only fitting that the Imaginary Commerce Clause would lead to imaginary benefits."); Bendix Autolite Corp. v. Midwesco, Enters., 486 U.S. 888, 897-98 (1988) (Scalia, J., concurring in judgment) (critiquing precedent-dictated balancing of burden on interstate commerce against benefit to local interests: "Having evaluated the interests on both sides as roughly as this, the Court then proceeds to judge which is more important. This process is ordinarily called 'balancing,' [citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970),] but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy. . . . I would therefore abandon the 'balancing' approach to these negative Commerce Clause cases, first explicitly adopted 18 years ago in *Pike* . . . , and leave essentially legislative judgments to the Congress. . . . In my view, a state statute is invalid under the Commerce Clause if, and only if, it accords discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state purpose. When such a validating purpose exists, it is for Congress and not us to determine it is not significant enough to justify the burden on commerce."); McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176, 189 (1940) (Black, J., dissenting) (criticizing the negative Commerce Clause as arising out of "[s]pasmodic and unrelated instances of litigation [that] cannot afford an adequate basis for the creation of integrated national rules" that "Congress alone" is positioned to develop).

Constitution's federal structure.[17] For these reasons, the dormant Commerce Clause has faced criticism from numerous Justices of the

[17] *See* Redish & Nugent, *supra* note 4, at 573 ("[N]ot only is there no textual basis [for it], the dormant Commerce Clause actually contradicts, and therefore directly undermines, the Constitution's carefully established textual structure for allocating power between federal and state sovereigns."); Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008) ("the Framers' distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy"); Maine v. Taylor, 477 U.S. 131, 138 (1986) ("[States] retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected."); Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 596 (1997) (Scalia, J., dissenting) ("[T]he Commerce Clause was not intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." (citation and internal quotation marks omitted)); *id.* at 611-12 (Thomas, J., dissenting) ("[T]he expansion effected by today's holding further undermines the delicate balance in what we have termed 'Our Federalism,' . . ." (citing Younger v. Harris, 401 U.S. 37, 44 (1971))).

Supreme Court.[18] The Court has nonetheless affirmed that the doctrine is here to stay.[19]

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[18] *See supra* notes 13, 16, 17; *see also, e.g.*, Tyler Pipe Indus., Inc. v. Wash. State Dep't of Rev., 483 U.S. 232, 259-65 (1987) (Scalia, J., concurring in part) ("The fact is that in the 114 years since the doctrine . . . was formally adopted as a holding of this Court, . . . our applications of the doctrine have, not to put too fine a point on the matter, made no sense. . . . The historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce. . . . [T]o the extent that we have gone beyond guarding against rank discrimination against citizens of other States—which is regulated not by the Commerce Clause but by the Privileges and Immunities Clause, U.S. Const., Art. IV, § 2, cl. 1 ('The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States')—the Court for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent non-textual theory, that it was almost certainly not intended to undertake, and that it has not undertaken very well."); *Walsh*, 538 U.S. at 683 (Thomas, J., concurring in judgment) ("The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application." (citation, brackets, and internal quotation marks omitted)); Wardair Can. Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 17 (1986) (Burger, C. J., concurring in part and concurring in judgment) (referring to "the cloudy waters of this Court's 'dormant Commerce Clause' doctrine"); Nw. States Portland Cement Co. v. Minn., 358 U.S. 450, 458 (1959) (Clark, J.) (calling negative Commerce Clause jurisprudence 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."); *Tenn. Wine & Spirits Retailers*, 139 S. Ct. at 2477 (Gorsuch, J., dissenting) (holding that dormant Commerce Clause doctrine is "peculiar" and referring to invalidation of state laws under dormant Commerce Clause as "judicial activism"); *Wayfair*, 138 S. Ct. at 2100-01 (Gorsuch, J., concurring) ("My agreement with the Court's discussion of the history of our dormant commerce clause jurisprudence, however, should not be mistaken for agreement with all aspects of the doctrine. . . . Whether and how much of [our dormant commerce clause jurisprudence] can be squared with the text of the Commerce Clause, justified by *stare decisis*, or defended as misbranded products of federalism or antidiscrimination imperatives flowing from Article IV's Privileges and Immunities Clause are questions for another day."); *see also* DAVID CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888, 234 (1985) (describing the negative Commerce Clause as "arbitrary, conclusory, and irreconcilable with the constitutional text").

II. THE DORMANT COMMERCE CLAUSE'S PRE-MODERN DOCTRINE: THE *LOCHNER* ERA AND THE NEW DEAL

The story of the *Lochner* era's restrictions on state power is so well-known and well-documented that only a summary is needed here. During that era, the Supreme Court struck down many dozens of state-police power statutes with a free hand.[20] The most well-known of the doctrines justifying that restriction of state sovereignty was a version of substantive due process that included freedom of contract in the "liberty" protected by the Fourteenth Amendment's Due Process Clause.[21]

But another doctrine on which the *Lochner*-era Court relied for the same ends was a version of the dormant Commerce Clause invalidating any state statute that "inhibits" interstate commerce "directly or indirectly."[22] That understanding of the dormant

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[19] *See Tenn. Wine & Spirits Retailers*, 139 S. Ct. at 2460-61 (holding that the dormant Commerce Clause "has a long and complicated history. . . . In recent years, some Members of the Court have authored vigorous and thoughtful critiques of this interpretation. . . . But the proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law. . . . In light of this history and our established case law, we reiterate that the Commerce Clause by its own force restricts state protectionism.").

[20] *See, e.g.*, Gardbaum, *supra* note 4, at 494 ("During the Lochner era, over two hundred state statutes regulating 'local' economic activity were declared unconstitutional under the Due Process Clause by the Supreme Court alone, mainly in the areas of labor legislation, regulation of prices, and restrictions on entry into businesses. This figure, of course, omits those state statutes struck down by state and other federal courts following Supreme Court precedent, as well as statutes never enacted because of their presumed unconstitutionality.").

[21] *See, e.g.*, *id.* at 488 (describing substantive due process as the "best-known" among the *Lochner*-era Court's limitations on state power).

[22] *See, e.g.*, Leisy v. Hardin, 135 U.S. 100, 123 (1890) (holding that the dormant Commerce Clause bars state law from "inhibit[ing], directly or indirectly, the receipt of an imported commodity"); Gardbaum, *supra* note 4, at 510, 516, 519-20 (calling *Leisy* "the Lochner of dormant Commerce Clause cases" and noting that in 1917 the Supreme Court reaffirmed the "*Leisy* principle" that "all . . . articles of commerce" should be "free from all state control absent congressional authorization").

Commerce Clause amounted to "a strict prohibition against state laws affecting interstate commerce"[23] and a principle stating that, in the absence of congressional action, "the movement of goods in interstate commerce was free from all state control."[24] Consequently, a state statute's discrimination against goods from out of state was sufficient, but not necessary, to violate the dormant Commerce Clause.[25]

Between those two broad readings of constitutional doctrine, the Supreme Court had virtually untrammeled power to invalidate state statutes. Although the *Lochner*-era Court did strike down some federal legislation, it was state legislation that bore the brunt of the

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Some scholars of dormant Commerce Clause jurisprudence focus less on *Leisy*'s language and more on what has come to be called the direct-indirect test, pursuant to which a statute imposing a direct burden on interstate commerce was invalidated while a statute imposing an indirect burden was not—though some maintain that even the latter could still be invalidated. *See, e.g.*, Michael Jenkins & Paul Hribernick, *State Taxation of Interstate Commerce: "It Is a Question of Power*," 42 LA. L. REV. 951, 961 (1982); James M. Goldrick, Jr., *The Dormant Commerce Clause: The Origin Story and the "Considerable Uncertainties," 1824-1945*, 52 CREIGHTON L. REV. 243, 268, 276-78 & n.141, 282-83 (2019). But the general consensus is that, in the *Lochner* era, the Supreme Court managed to create and use legal standards—the commerce-inhibition test and the direct-indirect test being two well-known examples—that gave the Court broad discretion to invalidate state legislation.

[23] Recent Case, *Dormant Commerce Clause – Extraterritoriality Doctrine – Sixth Circuit Invalidates Michigan Statute Requiring Bottle Manufacturers to Use Unique Mark on All Bottles Sold Within Michigan* – American Beverage Ass'n v. Snyder, *700 F.3d 796 (6th Cir. 2012)*, 126 HARV. L. REV. 2435 (2013).

[24] Gardbaum, *supra* note 4, at 520.

[25] *See id.* at 520.

Court's onslaught.[26] The resulting double-barreled attack on state legislative power has drawn much criticism.[27]

Beginning in the New Deal era with *West Coast Hotel Co. v. Parrish*[28] and *NLRB v. Jones & Laughlin Steel Corp.*,[29] the Supreme Court abandoned the *Lochner* era's substantive due process and broad view of the dormant Commerce Clause.[30] From 1938 to 1945, the dormant Commerce Clause was narrowed into a doctrine that

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[26] *See, e.g.*, *id.* at 494 ("[E]ven though during its reign the courts consistently stated that substantive due process applied to Congress through the Fifth Amendment just as much as it did to the states through the Fourteenth, the actual impact of the doctrine in terms of invalidated statutes was borne overwhelmingly by the states . . . ."); United States v. Lopez, 514 U.S. 549, 605-06 (1995) (Souter, J., dissenting) ("These restrictive views of commerce subject to congressional power complemented the Court's activism in limiting the enforceable scope of *state* economic regulation. It is most familiar history that during this same period the Court routinely invalidated *state* social and economic legislation under an expansive conception of Fourteenth Amendment substantive due process [citing, *inter alia*, Lochner v. New York, 198 U.S. 45 (1905)]. The fulcrums of judicial review in these cases were the notions of liberty and property characteristic of laissez-faire economics, whereas the Commerce Clause cases turned on what was ostensibly a structural limit of federal power, but under each conception of judicial review the Court's character for the first third of the century showed itself in exacting judicial scrutiny of a legislature's choice of economic ends and of the legislative means selected to reach them." (emphasis added)); Allstate Ins. Co. v. Dorr, 411 F.2d 198, 200 (9th Cir. 1969) ("At an earlier period, though not much earlier, in our legal history many attacks were made upon legislation, *usually state legislation*, on the asserted ground that the legislation deprived persons of liberty of contract, one of the liberties guaranteed by the Fourteenth Amendment. An example was the case of Lochner v. New York . . . ." (emphasis added)).

[27] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 165-66 (1995) (Souter, J., dissenting) ("History confirms the wisdom of Madison's abhorrence of constitutionalizing common-law rules to place them beyond the reach of congressional amendment. The Framers feared judicial power over substantive policy and the ossification of law that would result from transforming common law into constitutional law, and their fears have been borne out every time the Court has ignored Madison's counsel on subjects that we generally group under economic and social policy. It is, in fact, remarkable that as we near the end of this century the Court should choose to open a new constitutional chapter in confining legislative judgments on these matters by resort to textually unwarranted common-law rules . . . .").

[28] 300 U.S. 379 (1937).

[29] 301 U.S. 1 (1937).

[30] *See* Gardbaum, *supra* note 4, at 498, 501-04.

barred each state from discriminating against out-of-state goods.[31] State legislative power was correlatively expanded.[32] In 1945, the Court began formulating, alongside the anti-discrimination rule, a separate test that required a balancing of state interests against national interests, but even that balancing test, at heart, was a soft version of the anti-discrimination rule.[33] Some scholars of New Deal-era jurisprudence view the constitutional revolution reflected by these developments as an exaltation of national power over state power.[34] But since the end result of narrowing the dormant Commerce Clause into an anti-discrimination rule (whether hard or soft) was the *expansion* of state legislative power, it is more accurate to see the revolution as the ascendancy of judicial restraint and as an exaltation of legislative power over judicial power.[35] In any event, the key point is that, following the demise of *Lochner*-era jurisprudence, the rise of the anti-discrimination rule (hard or soft) as the regnant

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[31] *See, e.g.*, *id.* at 520-21 ("During the period from 1938 to 1945, this strongly nationalist conception of the Commerce Clause as mandating a common market was rejected in favor of one that effectively understood the clause as establishing only a customs union among the states, so that the only limitation it placed on their sovereignty was the duty of nondiscrimination against out-of-state goods. This represented a very significant enhancement of state power."); Recent Case, *supra* note 23, at 2439. Over the succeeding decades, Supreme Court opinions included various formulations of the anti-discrimination rule, but the final formulation did not appear until the 1970s. *See infra* Part A.

[32] *See* Gardbaum, *supra* note 4, at 521; *supra* note 31.

[33] *See* Gardbaum, *supra* note 4, at 521 ("[T]he Court upheld virtually every state regulation challenged on Commerce Clause grounds until 1945 when Chief Justice Stone had a change of heart and introduced the balancing test of state and national interests that remains the official position today. Although even under this balancing test state interests are significantly more protected than under the common market position that prioritizes the national interest in unrestricted trade, there is good reason to believe this official position masks an actual practice of adhering to a nondiscrimination standard." (footnote omitted)). Like the anti-discrimination rule, the balancing test did not attain its final form until the 1970s. *See supra* note 31, *infra* Part B.

[34] *See* Gardbaum, *supra* note 4, at 483-91.

[35] *See id.* at 483-91.

principle of the dormant Commerce Clause resulted in the unhobbling of state legislative power.[36] It also resulted in the dissipation of the federal judiciary's previous entitlement to pass on the wisdom of state legislation.[37]

III. THE MODERN DOCTRINE'S TWO ESTABLISHED BRANCHES AND CONTROVERSIAL THIRD BRANCH

The modern doctrine of the dormant Commerce Clause solidified in the 1970s, when Supreme Court holdings established beyond doubt that the doctrine has two branches. The first branch[38] imposes an extremely strict test invalidating state laws that discriminate against interstate commerce. The second branch[39]

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[36] *See id*. at 483-91, 521.

[37] *See, e.g.*, *id.* at 483-91, 523; Baude v. Heath 538 F.3d 608, 611 (7th Cir. 2008) (noting that the Supreme Court is "wary of reviewing the wisdom of legislation (after the fashion of *Lochner*) under the aegis of the commerce clause"); *see also, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 728-30 (1963) ("Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy [citing, *inter alia*, Lochner v. New York, 198 U.S. 45 (1905)]. . . . The doctrine that prevailed in Lochner . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded.").

[38] *See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617 (1978).

[39] *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). For two reasons, *Philadelphia*'s anti-discrimination rule is referred to herein as the "first" branch, and *Pike*'s balancing test as the "second" branch, even though *Pike* preceded *Philadelphia*. First, historically, preventing discrimination—that is, preventing each state from engaging in economic protectionism—was always at the core of dormant Commerce Clause doctrine. *See, e.g.*, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2459-61 (2019) (noting that prevention of state economic protectionism was historically at heart of dormant Commerce Clause jurisprudence). Moreover, in judicial discussions of the modern doctrine, *Philadelphia*'s anti-discrimination rule often precedes *Pike*'s balancing test. *See, e.g.*, Department of Revenue of Ky. v. Davis, 553 U.S. 328, 338-39 (2008) (citing *Philadelphia*'s anti-discrimination rule before *Pike*'s balancing test); Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 433 (2005) (same); C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 390 (1994) (same);

prescribes a balancing test for state laws that regulate evenhandedly, rather than discriminatorily, but that nonetheless burden interstate commerce.[40] Two 1970s-era cases, *Pike* and *Philadelphia,* are regarded by subsequent holdings as the leading cases representing the two branches, and thus form a collective inflection point in the development of modern doctrine.[41]

Although the two branches are well-established within modern doctrine, there is uncertainty—evidenced by a circuit split—as to whether and to what extent the dormant Commerce Clause has a third branch. That uncertainty is of particular relevance here: The main, and often the only, dormant Commerce Clause challenge to state health-and-safety laws is made under that purported third branch.[42] The divide among federal appellate courts concerning the reach of the third branch cries out for jurisprudential resolution. Though the Supreme Court recently granted certiorari in a dormant

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Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986) (same). Second, numerous cases predating *Pike* anticipated *Philadelphia*'s anti-discrimination rule, even though the Supreme Court's final formulation of the anti-discrimination rule, as set forth in *Philadelphia*, did not come down until eight years after *Pike*. *See, e.g.*, Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1173 (10th Cir. 2015) (arguing that Supreme Court's holding in Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), "anticipated" *Philadelphia*'s anti-discrimination rule).

[40] The two branches are discussed more fully below at Part A and B.

[41] Numerous cases cite *Philadelphia* and *Pike* as holdings representative of the first and second branches, respectively, of the dormant Commerce Clause. *See, e.g.*, *Am. Trucking Ass'ns*, 545 U.S. at 433; *Carbone*, 511 U.S. at 390; *Brown-Forman*, 476 U.S. at 579; *Philadelphia,* 437 U.S. at 624; *Epel*, 793 F.3d at 1171 (Gorsuch, J.); Association des Eleveurs de Canards et d'Oies du Quebec v. Harris, 729 F.3d 937, 948 (9th Cir. 2013) (quoting *Brown-Forman*, 476 U.S. at 579, which in turn cites *Philadelphia* and *Pike*).

[42] *See* Gardbaum, *supra* note 4, at 483-91 (arguing that New Deal's constitutional revolution was not creation of national economic market or federalism-related exaltation of national over state legislative power, but rather separation-of-powers-based ascendancy of legislative power and of judicial restraint, which ascendancy unshackled state legislatures' regulatory power by narrowing doctrines—like *Lochner* era's dormant Commerce Clause and substantive due process—that had enabled federal courts to strike down state police-power legislation).

Commerce Clause case that raises both second- and third-branch issues, it remains to be seen whether the Court's decision—assuming that it resolves the case under the third branch—will give meaningful guidance as to that branch's true scope.

A. THE FIRST BRANCH, PER *PHILADELPHIA* AND PROGENY

The first branch invalidates any state law that "discriminates against out-of-state goods or nonresident economic actors . . . ."[43] In this context, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[44] As explained in *Philadelphia*, the motive for or objective of a forbidden law is "simple economic protectionism."[45]

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[43] *Tenn. Wine & Spirits Retailers*, 139 S. Ct. at 2461; *see also Davis*, 553 U.S. at 338 (Court asks "whether a challenged law discriminates against interstate commerce"); *Carbone*, 511 U.S. at 390 (Court asks "whether the ordinance discriminates against interstate commerce"). Some earlier holdings qualify the word "discriminates" with "clearly," "affirmatively," or "on its face." *See, e.g.*, Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992) ("clearly"); Maine v. Taylor, 477 U.S. 131, 138 (1986) ("affirmatively"); United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007) ("on its face"). Other earlier holdings qualify "discriminates" with "on its face or in practical effect," Hughes v. Oklahoma, 441 U.S. 322, 336 (1979), where "practical effect" refers to the effect of a statute that does not facially discriminate but that nonetheless "favor[s] in-state economic interests over out-of-state interests . . . ." *Brown-Forman*, 476 U.S. at 579; *see also* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 340, 350-51 (1977) (affirming lower court's determinations "that the North Carolina statute, while neutral on its face, actually discriminated against Washington State growers and dealers in favor of their local counterparts[,]" and that "the challenged statute has the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them[,]" and noting statute's "disparate effect" on in-state and out-of-state apple producers).

[44] *United Haulers*, 550 U.S. at 338 (citations and internal quotation marks omitted); *see also* Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298 n.12 (1997) (to "discriminate" is to "impose disparate treatment on similarly situated in-state and out-of-state interests").

[45] *Philadelphia,* 437 U.S. at 624 ("[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. . . . The crucial inquiry, therefore, must be directed to determining whether [the statute] is basically a protectionist measure . . . ."); New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-74

A discriminatory law is virtually per se invalid; it must be struck down unless the state shows, by way of "independent defense,"[46] that the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[47]

(1988) (dormant Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors"); *Carbone*, 511 U.S. at 390 ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent"); *United Haulers*, 550 U.S. at 338 ("Discriminatory laws motivated by simple economic protectionism are subject to a virtually *per se* rule of invalidity . . . ." (citation and internal quotation marks omitted)).

Although some scholars distinguish between discrimination and protectionism, *see, e.g.*, Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 575 (1997), the distinction is not relevant to the substance of this article.

[46] By "independent defense," the Supreme Court appears to have meant "affirmative defense." *See Tenn. Wine & Spirits Retailers*, 139 S. Ct. at 2474. But the Court did not use the phrase "affirmative defense," perhaps to avoid deciding prematurely—i.e., where the issue was not squarely raised—that the "independent defense" of the first branch fits in all respects within the pleading category of the "affirmative defense." For ease of reference, this article uses "affirmative defense" to describe what the Supreme Court has called the first branch's "independent defense."

[47] Or. Waste Sys., Inc. v. Dep't of Env. Quality of State of Or., 511 U.S. 93, 100-01 (1994) ("Because the Oregon surcharge is discriminatory, the virtually *per se* rule of invalidity provides the proper legal standard here . . . . As a result, the surcharge must be invalidated unless respondents can show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." (brackets, citation, and internal quotation marks omitted)); *Taylor*, 477 U.S. at 138 ("[O]nce a state law is shown to discriminate against interstate commerce either on its face or in practical effect, the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means." (citation and internal quotation marks omitted)); *Hughes*, 441 U.S. at 336 ("The burden to show discrimination rests on the party challenging the validity of the statute, but when discrimination against commerce is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." (citation, ellipsis, brackets, and internal quotation marks omitted)); *Tenn. Wine & Spirits Retailers*, 139 S. Ct. at 2474

Facially discriminatory laws require "the strictest scrutiny" of "any purported legitimate local purpose" and of "the absence of nondiscriminatory alternatives."[48]

B. THE SECOND BRANCH, PER *PIKE* AND PROGENY

The second branch applies where, as explained in *Pike*, the statute at issue does not discriminate on its face or in practical effect, but nonetheless burdens interstate commerce: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[49] The test is referred to as the *Pike* "balancing" test because the burden on

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(noting that, the state law at issue having been found expressly discriminatory, "the state itself mounted no independent defense" and thus "the record is devoid of any concrete evidence showing that the 2-year residency requirement actually promotes public health or safety; nor is there evidence that nondiscriminatory alternatives would be insufficient to further those interests" (citation and internal quotation marks omitted)); Rack Room Shoes v. United States, 718 F.3d 1370, 1377 (Fed. Cir. 2013) (referring to "government's defense" under dormant Commerce Clause); *see also United Haulers*, 550 U.S. at 338-39 (discriminatory laws are virtually per se invalid unless the state "has no other means to advance a legitimate local purpose"); *Tenn. Wine & Spirits Retailers*, 139 S. Ct. at 2454 (2019) (discriminatory law "can be sustained only on a showing that it is narrowly tailored to advance a legitimate local purpose" (brackets, citation, and internal quotation marks omitted)).

[48] *Hughes*, 441 U.S. at 337 ("Such facial discrimination by itself may be a fatal defect, regardless of the State's purpose, because the evil of protectionism can reside in legislative means as well as legislative ends. At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." (citation, footnote, and internal quotation marks omitted)); *see also Taylor*, 477 U.S. at 144 ("[T]he proffered justification for any local discrimination against interstate commerce must be subjected to the strictest scrutiny . . . ." (citation and internal quotation marks omitted)).

[49] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); *see also Philadelphia,* 437 U.S. at 623 ("[W]here other legislative objectives [besides "simple economic protectionism"] are credibly advanced and there is no patent discrimination against interstate trade," then the "more flexible" *Pike* test applies).

commerce must be balanced against the asserted local benefits.[50] The burden to satisfy the test is on the party challenging the statute.[51] A contention that a statute passes the *Pike* balancing test is subject to a level of scrutiny significantly lower than that applied in connection with the first branch.[52]

The Supreme Court has clarified that the phrases *incidental effects on interstate commerce* and *incidental burdens on interstate commerce* are interchangeable.[53] Although the Supreme Court has never explicitly defined the term "incidental," it is clear that an "incidental" burden can be sizeable (indeed, "excessive"[54]), and that "incidental" in context is therefore shorthand for the phrase *incidental to the*

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[50] *See, e.g.*, Nw. Cent. Pipeline Corp. v. State Corp. Comm'r of Kan., 489 U.S. 493, 525-26 (1989).

[51] Pac. Nw. Venison Producers v. Smitch, 20 F.3d 1008, 1012 (9th Cir. 1994) ("[I]f the regulations apply evenhandedly to in-state and out-of-state interests, the party challenging the regulations must establish that the incidental burdens on interstate and foreign commerce are clearly excessive in relation to the putative local benefits." (citations omitted)).

[52] How much lower is a matter of debate. *See, e.g.*, All. of Auto. Mfrs. v. Gwadowsky, 430 F.3d 30, 35 (1st Cir. 2005) (holding that, while discriminatory statutes receive "strict scrutiny so rigorous that it is usually fatal," statutes under *Pike* balancing test receive "lower level of scrutiny"); Lebamoff Enters., Inc. v. Snow, 757 F. Supp. 2d 811, 819, 821 n.4 (S.D. Ind. 2010) (holding that *Pike* standard falls in between strict scrutiny and rational basis review); Aqua Harvesters, Inc. v. N.Y. State Dep't of Env't Conservation, 399 F. Supp. 3d 15, 70 (E.D.N.Y. 2019) (holding that *Pike* standard is "potentially easier" to satisfy than "rational basis review"); Just Puppies, Inc. v. Frosh, 565 F. Supp. 3d 665, 724-25 (D. Md. 2021) (holding that assessment of statute's purpose and benefits under *Pike* standard is subject to rational basis review, but that statute's burden on interstate commerce requires closer scrutiny), *notice of appeal filed,* Nos. 21-2169, 21-2170 (4th Cir. Oct. 14, 2021).

[53] *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981) ("Even if a statute regulates 'evenhandedly,' and imposes only 'incidental' burdens on interstate commerce, the courts must nevertheless strike it down if 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" (citing *Pike*, 397 U.S. at 142)).

[54] *Pike*, 397 U.S. at 142.

effectuation of that legitimate local public interest.[55] Few holdings turn on the word "local": State statutes are routinely held to have a "legitimate *local* public interest," even when the problem addressed by the statutes exists in most or all states, as long as the statutes address local *instances* of the problem. Thus, for example, milk safety

[55] *See, e.g.*, Milk Control Bd. of Pa. v. Eisenberg Farm Prods., 306 U.S. 346, 351-53 (1939) ("One of the commonest forms of state action is the *exercise of the police power* directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens. Every *state police statute* necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it *incidentally or indirectly involves or burdens interstate commerce*. . . . The question is whether the prescription of prices to be paid producers in the effort to accomplish these ends constitutes a prohibited burden on interstate commerce, or an *incidental burden which is permissible* until superseded by Congressional enactment. . . . These considerations we think justify the conclusion that the effect of the law on interstate commerce is *incidental and not forbidden* by the Constitution, in the absence of regulation by Congress." (emphasis added)); Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 378 (1964) (explaining that, in *Milk Control Board of Pennsylvania*, the burden on interstate commerce was "indirect and only *incidental to the regulation of an essentially local activity*" (emphasis added)).

issues[56] and smoking-related health issues[57] exist in many states, yet a particular state's statute that addresses that state's *portion* of the issues—the milk safety issues in *the enacting state*, or the cigarette consumption in *the enacting state*—will indisputably have a legitimate local public interest. That the kinds of issues addressed by the statute exist in many other states does not make the statute's legitimate public interest any less local.

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[56] *See, e.g.*, Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 649-50 (6th Cir. 2010) (holding that an Ohio regulation barring milk processors from making claims on milk labels about non-use of artificial hormones did not violate dormant Commerce Clause: "Ohio has a reasonable basis to believe that the Rule's intended benefit—consumer protection—is significant. 'The supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern,' and states 'have always possessed a legitimate interest in the protection of their people against fraud and deception in the sale of food products.'" (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 144 (1963) (brackets omitted))); *see also Milk Control Bd. of Pa.*, 306 U.S. at 351-53 (holding that a Pennsylvania statute requiring milk dealers to obtain license from Milk Control Board did not violate dormant Commerce Clause: "The [Commerce Clause's] grant of the power of regulation to the Congress necessarily implies the subordination of the states to that power. This court has repeatedly declared that the grant established the immunity of interstate commerce from the control of the states respecting all those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation must be prescribed by a single authority. But in matters requiring diversity of treatment according to the special requirements of local conditions, the states remain free to act within their respective jurisdictions until Congress sees fit to act in the exercise of its overriding authority. . . . The Commonwealth does not essay to regulate or to restrain the shipment of the respondent's milk into New York or to regulate its sale or the price at which respondent may sell it in New York. If dealers conducting receiving stations in various localities in Pennsylvania were free to ignore the requirements of the statute on the ground that all or a part of the milk they purchase is destined to another state the uniform operation of the statute locally would be crippled and might be impracticable." (footnote omitted)).

[57] *See, e.g.*, Star Sci. Inc. v. Beales, 278 F.3d 339, 355-56 (4th Cir. 2002) (holding that, despite dormant Commerce Clause, "[s]tates retain authority under their general police powers to regulate matters of legitimate local concern," and that Virginia's statute effecting compliance with global tobacco settlement, in which 46 states joined, did not violate dormant Commerce Clause because statute governed cigarette sales in Virginia (citations and internal quotation marks omitted)).

The line between the first and second branches is not always clear.[58] It is particularly challenging to distinguish between a statute that non-facially discriminates against interstate commerce (as per the first branch) and a statute that incidentally burdens interstate commerce (as per the second branch).[59] But the distinction appears to turn, ineffably, on whether the statutes, despite their facial neutrality, are *designed to* and *do* favor in-state interests over out-of-state interests.[60]

C. THE THIRD BRANCH—A STUDY IN "DOCTRINE CREEP"

The third branch arises from a grand total of three Supreme Court opinions. That is, in only three cases has the Supreme Court ever struck down a state law under the third branch, the last one in 1989. More important, by the advent of the second and third cases, the Court's language had become needlessly, even recklessly, overbroad. With the addition of the third branch, the dormant Commerce Clause has crept from a narrow anti-discrimination doctrine[61] to a vastly broader restriction on state sovereignty.[62]

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[58] Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298 n.12 (1997) ("There is, however, no clear line between these two strands of analysis, . . . and several cases that have purported to apply the undue burden test (including *Pike* itself) arguably turned in whole or in part on the discriminatory character of the challenged state regulations . . . ." (citations omitted)).

[59] *See supra* note 33 and accompanying text (noting that some scholars see *Pike* balancing test as soft version of anti-discrimination rule).

[60] *See, e.g.*, C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 392-94 (1994) (invalidating ordinance that discriminates not "in explicit terms" but rather "by its practical effect and design").

[61] *See* Recent Case, *supra* note 23, at 2439 (noting that, beginning in the New Deal era, the Supreme Court "has effectively transformed the dormant commerce clause from a strict prohibition against state laws affecting interstate commerce into a more modest antidiscrimination principle" (citation and internal quotation marks omitted)); Gardbaum, *supra* note 4, at 520-21; *supra* notes 31-33.

[62] The anti-discrimination rule itself resulted from a narrowing of the *Lochner*-era version of the dormant Commerce Clause, a version that gave federal courts vast

1. *BALDWIN*

In the 1935 case of *Baldwin*,[63] New York created a price-support law, setting a minimum price that in-state milk dealers had to pay to in-state milk producers.[64] The law also required in-state dealers to agree in writing not to sell *any* milk purchased from out-of-state producers, if the price paid to the out-of-state producers was less than that minimum price.[65] A New York milk dealer purchased milk from a Vermont milk producer at a price lower than the minimum price, hoping evidently to resell in-state and undercut competitors, who were purchasing milk from producers at the higher minimum price.[66] The New York milk dealer sued to enjoin enforcement of the law.[67]

The Court held, unanimously, that the law violated the Commerce Clause because the law's purpose and effect were to "protect" in-state milk producers from "competition" by out-of-state milk producers.[68] The Court explained that the law effectively imposed a tax on the milk produced out of state: "Such a power, if exerted, will set a barrier to traffic between one state and another as

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power to strike down state police-power legislation. *See* Gardbaum, *supra* note 4, at 520-21; *supra* note 61. Thus, the "doctrine creep" described in the heading of this section is, in a sense, a regression from the narrow anti-discrimination rule of modern jurisprudence *back* to the broader *Lochner*-era version.

[63] Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).

[64] *Id.* at 519.

[65] *Id.* at 519-20.

[66] *Id.* at 520.

[67] *Id.*

[68] *Id.* at 522 ("[T]he avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. . . . If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation."); *see also id.* at 527 (observing that the motive for New York's law was "to protect her inhabitants from the cut prices and other consequences of Vermont competition").

effective as if customs duties, equal to the price differential, had been laid upon the thing transported."[69] A tax on out-of-state goods is lawful, the Court noted, "only when the tax is not discriminating in its incidence against the merchandise because of its origin in another state."[70] The Court also rejected any argument that the law, by ensuring an income for New York farmers, was an exercise of the police power to ensure a supply of milk for New York consumers, and that any burden on interstate commerce was incidental to this assertedly health-based purpose.[71] The Court concluded: "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."[72] The vice in such a barrier is that, besides helping in-state interests, it affirmatively harms out-of-state interests by seeking to "neutralize economic advantages belonging to the place of origin."[73]

When explaining its anti-protectionism rationale, the Court in passing employed a phrase that, decades later, would make mischief when it was quoted *without* crucially qualifying language—as if the phrase were a free-standing doctrine unrelated to protectionism or its medium, price-setting.[74] Specifically, the Court stated that "New

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[69] *Id.* at 521.

[70] *Id.* at 526.

[71] *Id.* at 523; *id.* at 524 (referring to health as "sanitation," the Court held: "Whatever relation there may be between earnings and sanitation is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between states.").

[72] *Id.* at 527.

[73] *Id.* at 527-28.

[74] *See, e.g.*, Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 584 (1986) ("Thus, *New York has 'project[ed] its legislation' into other States*, and directly regulated commerce therein, in violation of [*Baldwin*]." (quoting *Baldwin*) (emphasis added)); Healy v. Beer Inst., Inc., 491 U.S. 324, 336-37 (1989) ("Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the *projection of one state regulatory regime into the jurisdiction of another State*." (emphasis added)); Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 668-69, 673 (4th Cir 2018)

York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there."[75] The mischief-making phrase—"New York has no power to project its legislation into Vermont"—was highly qualified by the rest of the sentence. Far from being a general prohibition against state A's projection of its law into state B, the law-projection phrase was self-limited to a specific mechanism effectuating a specific legislative purpose: a price-setting rule designed to protect in-state producers from competition by lower-priced goods produced out of state.[76] Any use of the law-projection phrase severed from mention of protectionism and price-setting vastly over-expands *Baldwin*'s holding and language.

Fast forward to the 1980s—after issuance of *Philadelphia* and *Pike*—and such a severance is precisely what eventuates, in *Brown-Forman* and *Healy*.

2. *BROWN-FORMAN*

The 1986 case of *Brown-Forman*[77] concerned a New York law requiring that distillers file with the New York State Liquor Authority (the "Authority") a schedule listing the price for each item

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(quoting *Baldwin* and *Healy*); Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 376 (6th Cir. 2013) (quoting *Brown-Forman* and citing plaintiff's argument that Michigan was "projecting" its regulatory regime into other states).

[75] *Baldwin*, 294 U.S. at 521.

[76] Even apart from the very sentence in which the law-projection language appeared, the *Baldwin* opinion repeatedly notes that protectionism and price-setting were essential to the Court's holding and language. *See, e.g.*, *Baldwin*, 294 U.S. at 524 ("[C]ommerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another . . . ."); *id.* at 528 (noting that a state, while it may require an importer to adhere to "fitting standards of sanitation," may not "establish a wage scale or scale of prices for use in other states, and to bar the sale of the products . . . unless the scale has been observed").

[77] *Brown-Forman*, 476 U.S. at 582.

intended to be sold in-state.[78] The schedule was to be filed by the 25th day of the month, and the prices listed would become effective on the first day of the second following month.[79] The listed prices were to be in effect for one month, and all sales by the distiller to any wholesaler had to be at the listed prices.[80] Of particular relevance, the law also required the distillers to affirm in writing that the prices in the schedule were no higher than the lowest price at which the distiller sold the same item to any wholesaler in any other state during the month covered by the schedule.[81] The effect of the law, as the distiller forcefully contended, was that, for the month in which the prices were in effect in New York, the distiller could not lower its price in any other state—to the detriment of consumers in those other states—unless it first obtained the Authority's approval.[82] Twenty states besides New York had similar price-affirmation laws.[83]

To defray its wholesaler clients' costs, the plaintiff distiller made payments to both in-state wholesalers and out-of-state wholesalers, all of which payments ended up being credited against amounts due the distiller from the wholesalers. [84] Finding that the in-state payments violated the New York law and that the out-of-state payments lowered the effective price charged by the distiller to out-of-state wholesalers, the Authority determined that the plaintiff distiller violated the New York law.[85] The distiller sued, claiming, among other things, that the New York law violated the Commerce Clause.[86]

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[78] *Id.* at 575.
[79] *Id.*
[80] *Id.* at 575-76.
[81] *Id.* at 576.
[82] *Id.* at 579-80.
[83] *Id.*
[84] *Id.* at 576-77.
[85] *Id.* at 577.
[86] *Id.* at 577-78.

The Supreme Court agreed and struck down the New York law. The Court's core holding was that requiring a distiller to seek "regulatory approval" from New York before the distiller could undertake an out-of-state transaction—i.e., a sale to out-of-state consumers at a price reduced below the scheduled price—constituted direct regulation of interstate commerce.[87] Such direct regulation, the Court held, violated the dormant Commerce Clause.[88] The Court explained that, as in *Baldwin*, New York had "projected its legislation" into other states by regulating product prices in those states. [89] The Court further explained that permitting price-affirmation laws (like New York's) to stand will increase the likelihood that distillers will be subject to "inconsistent obligations." [90] For this proposition, the Court cited the fact that, while cost-covering allowances (e.g., for advertising) were legal under other states' price-affirmation laws, they were illegal under New York's, and that this illegality could effectively force distillers to abandon the giving of such allowances in those other states.[91]

What is remarkable about the Court's opinion is its multi-dimensional expansion of dormant Commerce Clause doctrine. The expansion began when, early in the opinion, the Court baldly altered the dormant Commerce Clause's first branch. Prior to *Brown-Forman*, the first branch erected a "virtually *per se* rule of invalidity" for state laws that, facially or practically, effected "simple economic protectionism"[92]—that is, "favor[ed] in-state economic interests over

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[87] *Id.* at 582-83.
[88] *Id.* at 579, 582.
[89] *Id.* at 582-83.
[90] *Id.* at 583.
[91] *Id.* at 583-84.
[92] Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). The word "virtually" is prefixed to the phrase "*per se* rule of invalidity" because of the narrow exception to per se invalidity, namely, where the

out-of-state interests."[93] Thus, for modern cases that predated (or ignored) *Brown-Forman*, the question was not whether the state law at issue regulated interstate commerce *at all,* but rather whether it did so *discriminatorily* or *evenhandedly*.[94]

In *Brown-Forman*, however, the Court held that the first branch is violated if the state law discriminates against *or directly regulates* interstate commerce: "When a state statute *directly regulates or* discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statue without further inquiry."[95] The Court's addition of the notion of "direct[] regulat[ion]" to the prior grounds of "discriminat[ion]" and "favor[itism]" as a trigger for virtually per se invalidity effected a sweeping extension of modern doctrine. Indisputably, a regulation, even a direct regulation, of interstate commerce can still be "evenhanded[]"—for the simple reason that it does not discriminate against out-of-state interests or favor in-state interests—and hence subject only to the lenient *Pike*

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state made a showing, subject to the court's strict scrutiny, that the state law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." Or. Waste Sys., Inc. v. Dep't of Env. Quality of State of Or., 511 U.S. 93, 100-01 (1994); *Hughes*, 441 U.S. at 337.

[93] *Hughes*, 441 U.S. at 336.

[94] Fulton Corp. v. Faulkner, 516 U.S. 325, 331 (1996) ("In evaluating state regulatory measures under the dormant Commerce Clause, we have held that the first step . . . is to determine whether it regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce." (citations and internal quotation marks omitted)); C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 389-90 (1994) ("At the outset we confirm that the flow control ordinance does regulate interstate commerce . . . . The real question is whether the flow control ordinance is valid despite its undoubted effect on interstate commerce. For this inquiry, our case law yields two lines of analysis," namely, whether the ordinance discriminates against interstate commerce or not (citing *Philadelphia* and Pike v. Bruce Church, Inc., 397 U.S. 137 (1970))); *Hughes*, 441 U.S. at 336 (initial inquiry is "whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect" (citation omitted)); *Pike*, 397 U.S. at 142 (holding that test is whether a challenged law "regulates evenhandedly").

[95] *Brown-Forman*, 476 U.S. at 579.

test. Thus, the category of state laws that were subject to virtually per se invalidity was mightily enlarged.

Moreover, for this sweepingly broadened rule, the only holding cited by the Court that was consistent with modern doctrine was *Philadelphia*,[96] but *Philadelphia* decidedly conditions the first branch's virtually per se invalidity on discrimination *and not direct regulation*. In fact, the Court had to go all the way back to a 1925 holding—that is, to the *Lochner* era[97]—to find a holding that cited *direct regulation* of interstate commerce, without mention of *discrimination* against interstate commerce, as a ground for invalidating a state law.[98] In other words, the Court not only departed drastically from modern doctrine, but also had to resurrect ancient case law in order to have any holding at all to cite in support of that departure.

Brown-Forman's expansion of modern Commerce Clause doctrine did not end there. Recall that, even as expanded by *Brown-Forman*, the first-branch test was still phrased in the disjunctive:

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[96] *See id.* at 579.

[97] *See supra* note 22 (discussing *Lochner* era's "direct-indirect" test for dormant Commerce Clause violation).

[98] *See Brown-Forman*, 476 U.S. at 579 (citing Shafer v. Farmers Grain Co., 268 U.S. 189 (1925)). Besides *Philadelphia* and *Shafer,* the Court cited Edgar v. MITE Corp., 457 U.S. 624, 640-43 (1982), which, as a plurality opinion, never commanded a majority of the Court. Moreover, the plurality in *Edgar* relied on *Shafer* for the assertion that "direct regulation" of interstate commerce is barred by the first-branch test, but that reliance was insufficiently weighty to command a majority. *See Edgar*, 457 U.S. at 640. In any event, five years later, the Supreme Court departed significantly from the *Edgar* plurality's view: "[I]n CTS Corp. v. Dynamics Corp. of America, [481 U.S. 69 (1987)], the Supreme Court rejected the [*Edgar*] plurality's reasoning and upheld a non-protectionist statute that was virtually indistinguishable from what had been struck down in [*Edgar*], using a legal test that deployed lower-level scrutiny than the virtual per se rule." Rosen, *supra* note 4, at 925-26 ("[T]aking into account *CTS*'s reworking of [*Edgar*], it is fair to say that under the current state of Dormant Commerce Clause law, the per se invalidation rule concerning extraterritoriality is invoked only with respect to protectionist statutes." (citing *CTS*, 481 U.S. at 81 ("As the plurality opinion in [*Edgar*] did not represent the views of a majority of the Court, we are not bound by its reasoning." (footnote omitted)))).

Virtually per se invalidity was triggered by (i) direct regulation of interstate commerce *or* (ii) discrimination against interstate commerce *or* (iii) favoritism in effect of in-state interests over out-of-state interests.[99] A holding that any *one* of these three conditions was met would have been sufficient for virtually per se invalidity to apply, and there would have been no need to reach the issue of whether either of the other two conditions was met. In the event, the Court—before even reaching the direct-regulation condition—made out a clear case that both the discrimination condition and the favoritism condition were met. The Court's analysis showed that the New York law discriminated (at least in practical effect, if not facially) against interstate commerce and that the law's effect was to favor in-state interests over out-of-state interests. No other conclusion can be drawn from these two sentences within that analysis: "While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess. . . . Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States."[100] The implication here was that the New York law, while regulating all *distillers* evenhandedly,[101] did not regulate all *consumers* evenhandedly. The law's protectionist benefit for in-state consumers, to the detriment of out-of-state consumers, was unmistakable, and this protectionism favoring in-state consumers was held to be just as offensive to constitutional principles as was the protectionism favoring in-state producers in *Baldwin*.

So unmistakable was the law's protectionism that, under *Baldwin* and *Philadelphia*, the Court could have, and should have, ended the

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[99] *Brown-Forman*, 476 U.S. at 579.

[100] *Id.* at 580 (citing, *inter alia*, *Baldwin*, 294 U.S. at 528).

[101] *Id.* at 579 ("Appellant does not dispute that New York's affirmation law regulates all distillers of intoxicating liquors evenhandedly . . . .").

analysis there—with a finding of discrimination or in-state favoritism—without reaching out to decide whether the law directly regulated interstate commerce. Indeed, legally mandated price scales that govern in-state interests and that hurt out-of-state interests are inherently protectionist, as *Baldwin* taught[102] and as *Brown-Forman* and *Healy* reaffirmed.[103] Yet the Court conspicuously reached out to decide the direct-regulation issue. The only conclusion to be drawn is that, having newly expanded the first-branch test, the *Brown-Forman* Court was determined to apply the new expansion.[104]

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[102] *Baldwin*, 294 U.S. at 528.

[103] *Brown-Forman*, 476 U.S. at 580, 582-83; Healy v. Beer Inst., Inc., 491 U.S. 324, 332-33, 336, 340-41 (1989).

[104] *Brown-Forman* expanded existing doctrine in at least two other respects. First, the *Brown-Forman* Court held that its central inquiry—notwithstanding its articulation of principles that clearly rendered New York's law unconstitutional as discriminatory and as favoring in-state over out-of-state consumers—was "whether New York's affirmation law *regulates* commerce in other States." *Brown-Forman*, 476 U.S. at 580 (emphasis added). The Court explained that the law's facial applicability to in-state purchases "does not validate the law if it *regulates* the out-of-state transactions of distillers who sell in-state." *Id.* (emphasis added). In both of these statements, note the Court's repeated omission of the modifier "directly" from the rule it had articulated just one page earlier ("When a state statute *directly* regulates or discriminates against interstate commerce . . . ," *id.* at 579 (emphasis added)). By the point in the opinion when the Court applied the newly broadened rule, the Court stripped the word "regulates" of its limiting qualification. The version sans limiting qualification has been quoted in subsequent holdings. *See, e.g.*, Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 671 (4th Cir. 2018) (quoting *Brown-Forman*, 476 U.S. at 580); Instructional Sys., Inc. v. Comput. Curriculum Corp., 35 F.3d 813, 825 (3d Cir. 1994) (same); Brown-Forman Corp. v. Tenn. Alcoholic Beverage Comm'n, 860 F.2d 1354, 1359 (6th Cir. 1988) (same); *see also Healy*, 491 U.S. at 332 (noting *Brown-Forman*'s holding that "a state law that has the 'practical effect' of *regulating* commerce occurring wholly outside that State's borders is invalid under the Commerce Clause" (emphasis added)). Second, the Court similarly stripped *Baldwin*'s law-projection holding of its own limiting language. *Baldwin* had held that "New York has no power to project its legislation into Vermont *by regulating the price to be paid in that state* for milk acquired there." *Baldwin*, 294 U.S. at 521 (limiting language italicized). Yet, after accurately quoting and

3. *HEALY*

The doctrinal expansion begun in *Brown-Forman* continued in the 1989 case of *Healy*.[105] There, a Connecticut law required out-of-state brewers and importers of beer (collectively, "out-of-state shippers") to post, in Connecticut, the price of each beer bottle, can, and case intended to be sold in-state.[106] The prices would become effective on the first day of the following month and would remain in effect for the remainder of the month.[107] The law also required out-of-state shippers to affirm that, as of the time of the posting in Connecticut, the posted prices were no higher than the lowest prices those shippers charged in the states bordering Connecticut (Massachusetts, Rhode Island, and New York).[108] Any promotional discount given to out-of-state purchasers was treated as a reduction of the out-of-state price.[109] The law prohibited out-of-state shippers from selling beer in-state at a price higher than the price at which beer would be sold during the month in which the posted prices were in effect.[110] But the law permitted out-of-state shippers to change their out-of-state

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paraphrasing this language in an earlier part of its opinion, the *Brown-Forman* Court in its ultimate holding went on to quote *Baldwin* again, only this time *without* that limiting language: "Thus, New York has 'project[ed] its legislation' into other States, and directly regulated commerce therein, in violation of [*Baldwin*]." *Brown-Forman*, 476 U.S. at 582-84. *Brown-Forman* thereby purported to expand *Baldwin*'s law-projection holding from a rule concerning price-affirmation cases to a rule effectively without limit. Like the unqualified term "regulates," the unqualified phrase "projected its legislation" has been quoted in subsequent holdings. *See* Am. Booksellers Found. v. Dean, 342 F.3d 96, 104 (2d Cir. 2003); Old Bridge Chems., Inc. v. N.J. Dep't of Env't Prot., 965 F.2d 1287, 1293 (3d Cir. 1992); Nat'l Solid Wastes Mgmt. Ass'n v. Meyer, 63 F.3d 652, 660 (7th Cir. 1995).

[105] *Healy*, 491 U.S. at 343.

[106] *Id.* at 326-27.

[107] *Id.* at 327.

[108] *Id.* at 328.

[109] *Id.* at 338-39.

[110] *Id.* at 329.

prices after the posting.[111] Out-of-state shippers sued to enjoin enforcement, claiming that the law violated the Commerce Clause.[112]

The Supreme Court agreed and held the law invalid. Canvassing precedent—principally *Baldwin* and *Brown-Forman*—the Court reiterated by-now familiar principles: that no state may pressure out-of-state interests to surrender their "competitive advantages"; that no state may compel a merchant to seek "regulatory approval" in state before undertaking a transaction out of state; that no state may "project its legislation" into other states by regulating product prices in those states; and that, because many states have price-affirmation laws, allowing the challenged price-affirmation law to stand would create a significant risk of "inconsistent obligations."[113]

But *Healy*'s canvass of precedent sounded new and startling notes. Above all, the Court characterized the "regulatory approval" requirement—struck down in *Brown-Forman*—as an "impermissible extraterritorial effect." The use of the phrase "extraterritorial effect" was not accidental. What purported, during the canvass of precedent, to be a mere characterization of an unconstitutional requirement became, later in *Healy*, a constitutional principle unto itself. Indeed, *Healy*'s conspicuous reliance on the term "extraterritorial" led lower courts subsequently to refer to the third branch of the dormant Commerce Clause as the "extraterritoriality principle."[114] ("Third branch" and "extraterritoriality principle" are hereinafter used interchangeably.)

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[111] *Id.*

[112] *Id.*

[113] *Id.* at 333-34.

[114] *See, e.g.*, Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1172 (10th Cir. 2015) (referring to "*Baldwin*'s extraterritoriality principle"); Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 667-68 (4th Cir. 2018) (referring to "principle against extraterritoriality" and "extraterritoriality principle"); Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1027-28 (9th Cir. 2021) (referring to "extraterritoriality principle");

Another jarring note was the Court's introduction of the "autonomy of the individual States within their respective spheres"[115] as a value protected by the dormant Commerce Clause, *separate from* the more commonly invoked value of ending "state-imposed limitations on interstate commerce."[116] This newly imputed value of "state autonomy" had not been mentioned anywhere in *Baldwin* or *Brown-Forman*.[117] Nor was it mere happenstance that the Commerce Clause's rationale had now expanded from economic balkanization to state autonomy generally. As will shortly become evident,[118] a later part of the *Healy* decision has that expansion play a leading role in the Court's analysis.[119]

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cf. Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 373 (6th Cir. 2013) (referring to "extraterritoriality doctrine"); *Frosh*, 887 F.3d at 675 (Wynn, J., dissenting) (referring to "extraterritoriality doctrine").

[115] *Healy*, 491 U.S. at 336 & n.13.

[116] *Id.* at 336.

[117] The only authority cited by the *Healy* Court for the value newly imputed to the dormant Commerce Clause was a plurality opinion, which, needless to say, never commanded a majority of the Court. *See Healy*, 491 U.S. at 336 n.13 (citing Edgar v. MITE Corp., 457 U.S. 624, 643 (1982) (plurality opinion)). The plurality opinion, in turn, cited *Shaffer v. Heitner*'s holding, under the Due Process Clause rather than the dormant Commerce Clause, that "any attempt [by a State] 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." Shaffer v. Heitner, 433 U.S. 186, 197-98 (1977).

[118] *See infra* pp. 250-51.

[119] Meanwhile, litigants have capitalized on the new value's appearance, causing the new value to eclipse the old. In its amicus brief to the Ninth Circuit arguing that a California animal-protection law violated the dormant Commerce Clause, the United States chose, as its opening line, the proposition from *Healy* that "The Constitution takes 'special concern' with 'the autonomy of the individual States within their respective spheres.'" Brief for the U.S. of Am. in Support of Appellants at 1, Nat'l Pork Producers Council v. Ross, 6 F.4th 1021 (9th Cir. 2021) (No. 20-55631), 2020 WL 5984650, at *1 (quoting *Healy*, 491 U.S. at 335-36). That opener made no mention at all of "state-imposed limitations on interstate commerce." *See id.* Following the Supreme Court's grant of certiorari in that case, *see infra* Part IV, the United States filed an amicus brief on the merits that mentioned both values in the same breath. Brief for the U.S. of Am. as Amicus Curiae Supporting Petitioners at 13-14, Nat'l Pork Producers Council v. Ross, 6 F.4th 1021 (9th Cir. 2021) (No. 21-468), 2022 WL 2288169, at *13-14

Having completed its canvass of precedent, *Healy* articulated three principles arising from such precedent and, in particular, from the newly prominent concepts of extraterritorial effect and state autonomy.[120] In the process, small wording changes have had a massive impact on the depth and breadth of the doctrine. First, the Commerce Clause bars "'the application of a state statute to commerce that takes place wholly outside of the state's borders, whether or not the commerce has effects within the State.'"[121] Note the breadth of the language used to describe what was prohibited by the dormant Commerce Clause: What had begun as a narrow rule barring "discrimination" against out-of-state commerce (in *Philadelphia* and progeny[122]) and had broadened into a rule barring "regulation" of out-of-state commerce (in *Brown-Forman*[123]) had now stretched into a rule barring mere "application" to out-of-state commerce (in *Healy*).[124] Given the states' economic interconnection

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(noting "'the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres.'" (quoting *Healy*, 491 U.S. at 335-36)).

[120] Whether the principles, which were all articulated in exceedingly broad terms, were dicta or, alternatively, extremely broad holdings, is addressed below at pp. 256-59. For present purposes, it is sufficient to address them as broadly worded principles.

[121] *Healy*, 491 U.S. at 336 (quoting *Edgar*, 457 U.S. at 642-43 (plurality opinion)).

[122] *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 582 (1997).

[123] Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 580 (1986).

[124] As a specific example of the forbidden "application" to interstate commerce, the *Healy* Court cited any legislatively adopted "'scale of prices for use in other States.'" *Healy*, 491 U.S. at 336 (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 528 (1935)). But the violation of the Commerce Clause caused by regulatory price scales was so clear and long recognized, so narrow and self-limited, that one wonders why the *Healy* Court's rule resorted to as capacious and ill-defined a term as "application." *See, e.g.*, RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING 196 (Little, Brown, 2d ed. 1994) (the verb "'apply' . . . rarely communicate[s] a precise relationship

caused by the "stream of commerce" coursing through the country,[125] and given the nebulosity of the word "application" as

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between a subject and an object"). Courts that invalidate state legislation under the extraterritoriality principle embrace *Healy*'s "application" formulation. *See, e.g.*, Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 668 (4th Cir. 2018) (quoting *Healy*'s "application" language).

[125] *See, e.g.*, *Camps Newfound/Owatonna*, 520 U.S. at 580 (relying on "stream of commerce" for dormant Commerce Clause holding: "For over 150 years, our cases have rightly concluded that the imposition of a differential burden on any part of the stream of commerce—from wholesaler to retailer to consumer—is invalid, because a burden placed at any point will result in a disadvantage to the out-of-state producer." (citation and internal quotation marks omitted)); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980) (relying on "stream of commerce" for Due Process Clause holding: "The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."); Quality King Distribs., Inc. v. L'anza Rsch. Int'l, Inc., 523 U.S. 135, 152 (1998) (relying on "stream of commerce" for copyright law holding: "The whole point of the first sale doctrine is that once the copyright owner places a copyrighted item in the stream of commerce by selling it, he has exhausted his exclusive statutory right to control its distribution."); Stafford v. Wallace, 258 U.S. 495, 518-19 (1922) (holding that conduct constitutes interstate commerce if it is part of a "stream of commerce," regardless of whether "incidents and facilities" that are an "essential but subordinate part" of that stream have a "noninterstate character": "Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce. . . . Th[is] application of the commerce clause . . . was the result of the natural development of interstate commerce under modern conditions. It was the inevitable recognition of the great central fact that such streams of commerce from one part of the country to another, which are ever flowing, are in their very essence the commerce among the states and with foreign nations, which historically it was one of the chief purposes of the Constitution to bring under national protection and control. This court declined to defeat this purpose in respect of such a stream and take it out of complete national regulation by a nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilities, when considered alone and without reference to their association with the movement of which they were an essential but subordinate part." (citation and internal quotation marks omitted)); *Frosh*, 887 F.3d at 682 (Wynn, J., dissenting) ("[I]n cases involving the

used in *Healy*,[126] one could readily argue that much, even most, state economic regulation "applies" in some way to out-of-state commerce.

Second, "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."[127] With this sentence, the scope of Commerce Clause jurisprudence had now shifted from its tight historical focus on economy and commerce—on the interstate transport of goods and on state discrimination against such transport[128]—to an all-encompassing

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scope of the federal government's power under the Commerce Clause, the Supreme Court now interprets the term 'commerce' as encompassing a stream of transactions—including those transactions necessary to produce a good, such as labor contracts, and those by virtue of which the good is distributed and sold to end-users."); ADIE TOMER & JOSEPH KANE, MAPPING FREIGHT: THE HIGHLY CONCENTRATED NATURE OF GOODS TRADE IN THE UNITED STATES 16 (Global Cities Initiative, a Joint Project of Brookings and JP Morgan Chase, 2014) ("[I]nterstate trade amounts to $15.6 trillion annually and accounts for 77.3 percent of the country's goods trade, signaling the importance of distant markets to drive local goods production and consumption."); *cf.* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 881-82 (2011) (plurality opinion) (although "[t]he stream of commerce, like other metaphors, has its deficiencies," the phrase "refers to the movement of goods from manufacturers through distributors to consumers").

[126] *See supra* note 124.

[127] *Healy*, 491 U.S. at 336.

[128] Regan, *Making Sense*, *supra* note 4, at 1092 ("In the central area of dormant commerce clause jurisprudence, comprising what I shall call 'movement-of-goods' cases (Pike v. Bruce Church, Inc. may be taken as paradigmatic), the Court has been concerned exclusively with preventing states from engaging in purposeful economic protectionism."); *see also* Regan, *Siamese Essays*, *supra* note 4, at 1867 ("Movement-of-goods cases constitute the central line of dormant commerce clause cases . . . ."); *id.* at 1867 n.6 ("'Movement-of-goods' cases include all dormant commerce clause cases except those involving taxation, or regulation of the instrumentalities of transportation, or the state as market participant. I explain why this seemingly ad hoc definition-by-exclusion produces a significant category, indeed the central category for dormant commerce clause analysis . . . .").

panorama: the ambit of state power itself.[129] And since "control" is often in the eye of the beholder, the language chosen by the *Healy* Court—"controls" commerce—enlarges the category of laws potentially invalid under the Commerce Clause just as surely as does use of the word "application" in lieu of "discrimination" and "regulation." Note, too, that the Court's immediately ensuing rephrasing of the "critical inquiry" in this second principle omits both adverbs "wholly" and "directly" and substitutes the capacious term "conduct" for the (relatively) narrower term "commerce": "The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."[130] The omission of the limiting adverbs and the narrower term yet further broadened the category of potentially invalid laws.[131]

The first two principles announced in *Healy* were unusually far-reaching and un-nuanced. With respect to the first principle—which prohibited "application" of state law to extraterritorial commerce—the *Healy* Court specified that the prohibition was effective "whether or not the commerce has effects within the State."[132] By this phrase, the Court presumably meant that even where State B's interests have

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[129] *See, e.g.*, Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 378 (6th Cir. 2013) (Sutton, J., concurring) ("The key point of today's dormant Commerce Clause jurisprudence is to prevent States from discriminating against out-of-state entities in favor of in-state ones. Yet the extraterritoriality doctrine, if taken seriously (or at least as seriously as Healy has taken it), has nothing to do with favoritism. Even state laws that neither discriminate against out-of-state interests nor disproportionately burden interstate commerce may run afoul of extraterritoriality, as this case well shows."); *see also* Denning, *supra* note 4, at 988-90 (observing that "[e]xtraterritoriality hit its high water mark . . . in Healy v. The Beer Institute").

[130] *Healy*, 491 U.S. at 336.

[131] Again, litigants (as well as lower courts) have noticed. In its opening mention of *Healy*, a now-granted cert petition—which challenges the Ninth Circuit's narrow reading of *Healy* and unambiguous rejection of petitioners' dormant Commerce Clause claim—quotes *Healy*'s broad rephrasing. *See* Petition for a Writ of Certiorari at 3, Nat'l Pork Producers Council v. Ross, No. 21-468 (U.S. Sept. 27, 2021), 2021 WL 4480405, at *3; *see also, e.g.*, North Dakota v. Heydinger, 825 F.3d 912, 919 (8th Cir. 2016) (quoting *Healy*'s broad rephrasing).

[132] *Healy*, 491 U.S. at 336.

effects *inside of* State A, and thus even where State A's justification for legislation to address those effects is strong, the prohibition still requires invalidation of State A's law. In other words, the Court was forbidding future courts from even contemplating whether extraterritorial application of law might, in usual cases, be justified. Any possibility of an effects-based justification was foreclosed. With respect to the second principle—which prohibited legislation that (directly) controls commerce (or conduct) occurring (wholly) outside the state—the *Healy* Court specified that the prohibition was effective "regardless of whether the statute's extraterritorial reach was intended by the legislature."[133] By this phrase, as illuminated by the next sentence's emphasis on the statute's "practical effect," the Court was emphasizing that the prohibition barred legislation regardless of whether the "direct[] control[]" of extraterritorial commerce appeared on the statute's face or arose only in practical effect.[134]

Third, a state statute's "practical effect" must be assessed by examining not only the statute itself but also its interaction with other states' regulatory regimes and, of particular note, "what effect would arise if not one, but many or every, State adopted similar legislation."[135] Combining the "inconsistent legislation," "law projection," and "regulatory approval" rationales of earlier decisions, the Court explained that the Commerce Clause "protects against inconsistent legislation arising from projection of one state regulatory regime into the jurisdiction of another State" and "dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another."[136] Notwithstanding the *Healy* Court's tripartite declaration of principles, the Court's actual analysis focused almost entirely on the

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[133] *Id.*
[134] *Id.*
[135] *Id.* at 336.
[136] *Id.* at 336-37.

third principle and, specifically, the problem not of inconsistent obligations but rather of "interlocking local economic regulation" and "price gridlock."[137] That analysis demonstrated that, when multiple states have similar price-affirmation laws, the out-of-state shipper—who should be free to set prices in State B based on market conditions prevailing in State B—must instead set prices in State B based on the same shipper's pricing in State A per State A's statute:

> The Connecticut statute, like the New York law struck down in *Brown-Forman*, requires out-of-state shippers to forgo the implementation of competitive-pricing schemes in out-of-state markets because those pricing decision are imported by statute into the Connecticut market regardless of local competitive conditions. . . . Suppose, for example, that the border States each enacted statutes essentially identical to Connecticut's. . . . [U]nless a beer supplier declined to sell in one of the States for an entire month, the maximum price in each State would be capped by previous prices in the other States. This maximum price would almost surely be the minimum price as well, since any reduction in either State would permanently lower the ceiling in both. Nor would such 'price gridlock' be limited to individual regions. The short-circuiting of normal pricing decisions based on local conditions would be carried to a national scale if a significant group of States enacted contemporaneous affirmation statutes that linked in-state prices to the lowest price in any State in the country. This kind of potential regional and even national regulation of the pricing mechanism for goods is reserved by the Commerce Clause to the Federal Government and may not be accomplished piecemeal

[137] *Id.* at 337, 340.

> through the extraterritorial reach of individual state statutes.[138]

The emergence of the dormant Commerce Clause's third branch—the extraterritoriality principle[139]—was now complete. Having finished articulating the "test" portion of the extraterritoriality principle, the Court had now propounded the "rationale" portion. And its rationale strayed as far from dormant Commerce Clause rationales as had the test of extraterritorial application strayed from tests of discrimination and in-state favoritism. No longer was the Court's rationale for invalidating statutes focused on economic protectionism and discrimination against interstate commerce. Instead, the Court's rationale focused on the problem of nationally uniform pricing resulting from nationally uniform legislation (that is, legislation uniformly adopted by multiple states). True, the Court's underlying analysis, along with the key facts of the case, was still protectionism-oriented (albeit directed to preventing protectionism of in-state *consumers* as opposed to in-state *producers*). But the language had wandered a long way away from what had been the usual phrasing of rationales under the modern dormant Commerce Clause.

Notably, the party challenging the statute under the third branch has the burden to prove that the statute has an impermissible extraterritorial effect (or otherwise violates *Healy*'s articulation of the extraterritoriality principle). But, unlike the first branch, the third branch has no affirmative defense;[140] once the challenger establishes

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[138] *Id.* at 339-40.
[139] *See supra* note 114.
[140] *See supra* note 46 and accompanying text.

an impermissible extraterritorial effect, the state has no opportunity to offer a justification-based defense.[141]

Healy also proved illuminating in two key respects. The Court first acknowledged the self-limited nature of this "extraterritoriality principle." The Court went out of its way to note that *Healy* was one of a special, narrowly defined category of cases: "In deciding this appeal, we engage in our fourth expedition into the area of *price-affirmation statutes*."[142] In combination with how *Healy* repeatedly

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[141] *See* Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 376 (6th Cir. 2013) ("Having found that the statute has an impermissible extraterritorial effect, we have no need to consider whether the state had some legitimate local purpose or whether there is a reasonable nondiscriminatory alternative."); *infra* note 275. Contrary to the Sixth Circuit, the Seventh Circuit has asserted that the state has the same defense under the extraterritoriality principle as it has under the anti-discrimination rule. *See* Legato Vapors, LLC v. Cook, 847 F.3d 825, 834 n.1 (7th Cir. 2017). But the reed on which the Seventh Circuit's assertion hangs is too slim—the Supreme Court's *supposed* use of the word "virtually" in its description of discriminatory laws and extraterritorial laws *each* as "virtually *per se* invalid." *Id.* In the first place, while *Legato* cites *Brown-Forman* in support, *Brown-Forman* calls "virtually *per se* invalid" only discriminatory laws, not extraterritorial laws. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986). Indeed, the Supreme Court has never described the extraterritoriality principle as a rule of "virtually *per* se" invalidity, or extraterritorial laws as "virtually *per se*" invalid. More important, the Supreme Court's holdings explicitly provide for the defense with respect to the anti-discrimination rule, *see, e.g.*, Maine v. Taylor, 477 U.S. 131, 138 (1986), but conspicuously fail to provide for it with respect to the exterritoriality principle. Thus, the Sixth Circuit's understanding in *American Beverage* is preferable to the Seventh Circuit's understanding in *Legato*.

[142] *Healy*, 491 U.S. at 331. In reverse chronological order, the three prior cases were *Brown-Forman*; U.S. Brewers Ass'n, Inc. v. Healy ("*Healy I*"), 464 U.S. 909 (1983); and Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966). *Brown-Forman* is discussed above at Part I.A.2; though not counting *Baldwin* as one of the three prior forays into "price-affirmation statutes," the *Healy* Court lengthily discussed *Baldwin* as the ultimate basis for *Brown-Forman*. *See Healy*, 491 U.S. at 331-33. *Healy I* involved a closely similar, predecessor version of the statute challenged in *Healy*, 491 U.S. 324; the Court in *Healy I* did not issue an opinion but rather summarily affirmed a Second Circuit decision that had held the statute invalid for reasons similar to those cited in *Healy*, 491 U.S. 324. *Seagram* involved a New York price-affirmation statute that required liquor label owners to ensure that their prices were no higher than the lowest price at which such liquor was sold anywhere in the country in the preceding month; the Court upheld the statute against a dormant Commerce Clause challenge, holding,

noted that the focus of the case was price scales and price-affirmation statutes, *Healy* shows that the Court's *holding*, however distant its *dicta* were from core dormant Commerce Clause jurisprudence, was limited to price-affirmation cases.[143] In addition, the Court expressly held that, in any event, the Connecticut statute facially discriminated against interstate commerce [144] and, thus, the extraterritoriality principle and the anti-discrimination rule were alternative bases for the Court's decision to strike down the Connecticut statute.[145]

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inter alia, that the statute's alleged discriminatory effects against the plaintiff owners' business outside of New York were "too conjectural to support a facial challenge." *Healy*, 491 U.S. at 331. *Seagram* was overruled in *Healy*, 491 U.S. at 343, because the Court no longer viewed the discriminatory effects of price-affirmation statutes—effects that the final part of the *Healy* decision called "extraterritorial effects"—as conjectural.

[143] *See* RLH Indus. Inc. v. SBC Comm'ns, Inc., 35 Cal. Rptr. 3d 469, 477-78 (Cal. App. 2005) (holding that because *Healy* referred to its own analysis as "our fourth expedition into the area of price-affirmation statutes," *Healy*'s extraterritoriality principle should not be extended beyond price-affirmation statutes: "We cannot blindly wield [*Healy*'s extraterritoriality] principle SBC cites without taking a closer look at the issue actually decided in *Healy*. *Healy* was the high court's 'fourth expedition into the area of price-affirmation statutes.' [*Healy*, 491 U.S. at 331.] It reviewed a Connecticut statute requiring out-of-state beer shippers to affirm they charged the same prices in Connecticut as in neighboring states. [*Id.* at 324.] It relied upon or discussed previous cases reviewing price-affirmation and price-setting statutes [citing *Baldwin*, *Seagram*, *Healy I*, and *Brown-Forman*]. It therefore focused on the commerce clause's prohibition against state laws controlling retail prices in other states. The principle that SBC cites—and always redacts with an ellipsis—goes on to say, 'and, specifically, a State may not adopt legislation that has the practical effect of establishing "a scale of prices for use in other states."' . . . [T]he principle SBC cites restates the 'specific concerns' that *price-affirmation statutes* have raised under the commerce clause. [*Healy*, 491 U.S. at 337 n.14.] . . . Although *Healy* distilled commerce clause jurisprudence to a few general principles for reviewing *price affirmation statutes*, it left the basic consideration of commerce clause jurisprudence intact: Taking everything into account, does the state law unreasonably burden interstate commerce?" (second emphasis added)).

[144] *Healy*, 491 U.S. at 340-41.

[145] *See, e.g.*, Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1173 (10th Cir. 2015) ("*Healy* applied *Baldwin*'s rule only as an alternative holding to an application of anti-discrimination doctrine."); *Am. Beverage*, 735 F.3d at 380-81 (Sutton, J., concurring) ("In

The weight of scholarly and judicial comment establishes that *Healy*'s broad language is dictum, not holding. Certainly, after *Walsh*, that language cannot be anything but dictum, as *Walsh* held that the extraterritoriality principle applies only to price-control or price-affirmation statutes.[146] But many authorities have called the language dictum *even apart from Walsh*. For example, in rejecting a dormant Commerce Clause challenge to a Colorado statute, then-Judge Gorsuch, writing for a Tenth Circuit panel, repeatedly called *Healy*'s broad language "dicta," and read *Walsh* as simply confirming (rather than causing) Gorsuch's view.[147] Commentators have similarly referred to *Healy*'s "overbroad extraterritoriality dicta" without remotely suggesting that the *Healy* language at issue would not have been "dicta" absent *Walsh.*[148] Most basically, *Healy*'s broad

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Healy, extraterritoriality was an alternative holding. The Court independently held that Connecticut's law discriminated against brewers who engaged in interstate commerce . . . . Justice Scalia, indeed, joined the anti-discrimination holding but not the extraterritoriality one, concluding that the Court should have resolved the case solely on the former ground.").

[146] *See, e.g.*, Association des Eleveurs de Canards et d'Oies du Quebec v. Harris, 729 F.3d 937, 951 (9th Cir. 2013) ("The Supreme Court has explained that *Healy* and *Baldwin* involved 'price control or price affirmation cases.' [quoting Pharm. Rsch. and Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003)]. Accordingly, the Court has held that *Healy* and *Baldwin* are not applicable to a statute that does not dictate the price of a product and does not 't[ie] the price of its in-state products to out-of-state prices.' *Id.*").

[147] *See Epel*, 793 F.3d at 1174-75 ("Exploiting dicta in Healy, EELI contends that these cases require us to declare 'automatically' unconstitutional any state regulation with the practical effect of 'control[ling] conduct beyond the boundaries of the State.' See Br. for Appellants at 30 (quoting *Healy*, [491 U.S. at 336]). But, as we've explained, the Court's holdings have not gone nearly so far and have turned instead on the presence of three factors not present here. In fact, the Supreme Court has emphasized as we do that the Baldwin line of cases concerns only 'price control or price affirmation statutes' that involve 'tying the price of ... in-state products to out-of-state prices.' [*Walsh*, 538 U.S. at 669]." (emphasis added)); *id.* at 1175 ("[EELI] seems to call on us not merely to respect the actual holdings of the most dormant in all of dormant commerce clause jurisprudence but to revive and rebuild them on the basis of dicta into a weapon far more powerful than Pike or Philadelphia." (emphasis added)).

[148] *See, e.g.*, Goldsmith & Sykes, *supra* note 4, at 806 & n.90 ("Our balancing-test gloss on the extraterritoriality decisions does not accord with some of the Court's overbroad

language was dictum because the generality of its terms went so vastly far beyond the facts of the case[149] that it swept in innumerable fact patterns to which the *Healy* Court could not possibly have given adequate consideration. As Chief Justice Marshall famously explained in *Cohens v. Virginia*:

> The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the Court, in the case of *Marbury* v. *Madison*. It is a maxim not to be disregarded, that *general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control* the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. *The question actually before the Court is investigated with care and considered in its full extent*. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but *their possible bearing on all other cases is seldom completely investigated*.[150]

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extraterritoriality dicta." (citing *Healy*, 491 U.S. at 336 ("[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."))); Florey, *Reflections*, *supra* note 4, at 1090 (noting that *Healy*'s three principles, *see supra* pp. 248-54, were articulated "in dicta").

[149] The facts of *Healy* concerned a discriminatory price-control or price-affirmation statue that linked in-state to out-of-state prices. *See Epel*, 793 F.3d at 1173.

[150] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821) (emphasis added); *see also* Michael C. Dorf, *Dicta & Article III*, 142 U. PA. L. REV. 1997, 2007 (1994) ("Asides—justifiable or not—comprise one category of statements commonly labeled dicta. *A second category is somewhat more amorphous. It consists of those elaborations of legal principle broader than the narrowest proposition that can decide the case*." (emphasis added)); Andrew C. Michaels, *The Holding-Dicta Spectrum*, 70 ARK. L. REV. 661, 663 & n.11 (2017)

Even assuming that the problem language in *Healy* constituted a broad holding rather than dictum, it would have little more binding force than dictum would have in any event. Many scholars maintain that the broader a holding is—the more factually distinct cases are swept in by the holding, without adequate consideration having been given by the Court to each such case—the less binding force that holding has.[151] And the *Healy* language in question is as broad as it gets—which means that, even as a holding, it has limited binding power in future cases.[152]

("Michael Dorf has distinguished between two types of statements which are sometimes called dicta: asides and broad statements."); *id.* at 670-72 ("The broader a proposition is, the further it reaches beyond the facts that were directly at issue. Cases that sweep too broadly in their reasoning can create problematic law if applied rigidly to new facts. . . . Given that the Supreme Court in cases such as *Cohens* has cautioned that broad statements (or general expressions) must be considered in the context of the facts of the case, there should be some understanding that such statements may not always be rigidly applied to new facts." (footnote omitted)).

[151] *See, e.g.*, Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 382 n.14 (1985) ("Some commentators propose that the breadth of a legal directive is inversely proportional to its strength."); Michaels, *supra* note 150, at 664, 672 ("Statements narrowly tailored to the facts have greater constraining force and approach the status of binding holding. Broader or more general statements have less constraining force and tend to approach dicta. . . . Because broader statements encompass a wider array of different facts, reliance should tend to decrease as breadth increases." (footnotes omitted)); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 NYU L. REV. 1249, 1258 & n.23 (2006) ("There is no line demarcating a clear boundary between holding and dictum. What separates holding from dictum is better seen as a zone, within which no confident determination can be made whether the proposition should be considered holding or dictum. As to utterances falling within this zone, it is unclear to what degree a future court should consider itself bound by them."); Sean Farhang et al., *The Politics of Opinion Assignment and Authorship on the US Court of Appeals: Evidence from Sexual Harassment Cases*, 44 J. LEG. ST. S59, S66 (2015) ("excessively overbroad holdings are more likely to be treated by future courts as nonbinding dicta").

[152] *See, e.g.*, Florey, *Reflections*, *supra* note 4, at 1090 ("The extraterritoriality principle articulated in *Edgar* and *Healy* is so sweeping that most commentators have assumed that these cases cannot mean what they appear to say. . . . Some scholars have thus attempted to make sense of *Edgar*, *Brown-Forman*, and *Healy* by proposing a narrower,

D. *WALSH* LIMITS THE THIRD BRANCH

The final chapter in the Supreme Court's development of the dormant Commerce Clause's third branch is *Walsh*.[153] *Walsh* concerned legislation enacted by Maine to control skyrocketing drug prices.[154] Under the legislation, the state sought to persuade drug manufacturers to pay rebates to the state, which then distributed the rebate money to Maine pharmacies in compensation for their sale of prescription drugs to Maine residents at discounted prices.[155] If the manufacturer did not agree to pay, its sale of certain drugs to Medicaid beneficiaries would require prior authorization by the state.[156] While many manufacturers agreed to pay the rebates, an association of manufacturers that sold drugs predominantly outside of Maine sued to enjoin enforcement of the statute, contending that the law was preempted by the federal Medicaid Act and was invalid under the dormant Commerce Clause.[157]

Rejecting both contentions, the Supreme Court upheld the Maine law. Regarding the dormant Commerce Clause claim, the Court's opinion was short and clear. The Court understood plaintiff to be claiming, under the third branch, that the Maine law's rebate

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more plausible reading of the principles for which these cases stand." (footnotes omitted)); Florey, *A Reply*, *supra* note 4, at 1159 ("[T]he Edgar/Healy standards, if applied literally, have the potential to invalidate such a wide swath of state legislation that many commentators have concluded that the Court cannot possibly be taken at its word in those cases." (footnote omitted)); Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1027-28 (9th Cir. 2021) (holding that, according to legal scholars, *Healy*'s extraterritoriality principle "cannot strictly bar laws that have extraterritorial effect . . . because '[i]n practice, states exert regulatory control over each other all the time.'" (quoting Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1521 (2007))).

[153] Pharm. Rsch. and Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003).

[154] *Id.* at 649.

[155] *Id.* at 649, 654.

[156] *Id.* at 649-50, 655.

[157] *Id.* at 650, 656.

requirement constituted "impermissible extraterritorial regulation."[158] But to dispose of the third-branch claim, the Court did not need to discuss any of the many issues raised by third-branch challenges to state law—inconsistent obligations, law projection, regulatory approval, direct control of commerce outside the state, the nature of the regulation, the extent to which it operated outside Maine's boundaries, and the interaction between the Maine law and the regulatory regimes of other states. The reason for avoiding all such discussion was that a threshold condition for application of the *Baldwin-Healy* line of decisions was not remotely met. Indeed, *Walsh*'s holding consisted purely of identifying that unmet threshold and doing so by paraphrasing and then quoting the First Circuit's decision below.[159] This is the Supreme Court's holding, in its entirety:

> Petitioner argues that the reasoning in [*Baldwin* and *Healy*] applies to what it characterizes as Maine's regulation of the terms of transactions that occur elsewhere. But, as the Court of Appeals correctly stated, unlike price control or price affirmation statutes, "the Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price. Similarly, Maine is not tying the price of its in-state products to out-of-state prices." 249 F.3d, at 81–82 (footnote

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[158] The Court also understood the plaintiff to be making a claim under the first branch, that the Maine law discriminated against interstate commerce. *Id.* at 669.

[159] The Court's vote on the portion of the opinion rejecting the dormant Commerce Clause claims, including the claim under the third branch, was not close: Seven justices joined in this portion of the Court's opinion, *id.* at 647; Justice Scalia expressly endorsed that portion, *id.* at 674; and Justice Thomas rejected the entire doctrine of the dormant Commerce Clause, as it is nowhere to be found in the text of the Constitution and is unworkable, *id.* at 683.

> omitted). The rule that was applied in *Baldwin* and *Healy* accordingly is not applicable to this case.[160]

Much hangs on these sentences, so they are worth a close read. Note, at the outset, the structure of the analysis. According to Petitioner, *Baldwin* and *Healy* require invalidation of Maine's law because of the law's "regulation of the terms of transactions that occur elsewhere."[161] But, the Court held, Petitioner is mistaken, because the Maine law does not "regulate the price of any out-of-state transaction." The reason, the Court continued, is that the Maine law does not insist on sale at a "certain price" and, similarly, does not tie in-state to out-of-state prices. Thus, the Court concluded, the rule applied in *Baldwin* and *Healy* is inapplicable. In so concluding, *Walsh* effectively limited *Baldwin* and *Healy* to their facts.[162]

The conclusion is illuminating in several respects.

First, *Walsh* corrected a misimpression, advanced by Petitioner, that *Baldwin* and *Healy* require invalidation of any law that "regulat[es] the *terms* of a transaction" out-of-state.[163] Rather, *Walsh* corrected, *Baldwin* and *Healy* require invalidation of any law that regulates the *price* of an out-of-state transaction. Of the many terms at play in a transaction, it is only the price term that, if regulated out of state, requires invalidation under *Baldwin* and *Healy*.

Second, with respect to the third branch's bar to a law that "regulate[s] the price" of an out-of-state transaction, *Walsh* expressly narrowed the term "regulates." *Walsh* made clear that, in this context, "regulates" means "insist[s]" on a "certain price" or "ties" in-state to

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[160] *Id.* at 669 (quoting Pharm. Rsch. & Mfrs. of Am. v. Concannon, 249 F.3d 66, 81-82 (1st Cir. 2001)).

[161] *Id.*

[162] *See* Denning, *supra* note 4, at 990 ("In 2003, [in *Walsh*], the Court retreated from Healy's broad pronouncements and largely restricted earlier cases to their facts.").

[163] *Walsh*, 538 U.S. at 669 (emphasis added).

out-of-state prices.[164] The statement that the Maine law did not insist on a "certain price" or "tie" in-state to out-of-state prices was sufficient, to the *Walsh* Court, to establish that the Maine law did not "regulate the price" of an out-of-state transaction. Because of that sufficiency, the scope of the term "regulate the price" was necessarily limited to laws insisting on a "price certain" or laws "tying" in-state to out-of-state prices.[165] As a result, the term "regulate" cannot be understood out of context; it must be understood with reference to the two sentences that follow and define the term "regulate." Because the Maine law did not regulate out-of-state pricing—meaning that the Maine law did not insist on a price certain or tie in-state to out-of-state prices—"[t]he rule that was applied in *Baldwin* and *Healy* accordingly is not applicable to this case."[166]

Third, by "price control" and "price affirmation" statutes, the Court was clearly referring to the narrow category of laws addressed in the *Baldwin-Healy* line of cases—what the *Healy* Court had called, collectively and simply, "price-affirmation statutes."[167] The full context of the First Circuit's opinion, the precise words of which formed the core of the *Walsh* holding, supports this conclusion. Immediately after discussing the statutes challenged in *Healy*, *Brown-Forman*, and *Baldwin*, the First Circuit held: "Unlike *these* price affirmation and price control statutes, the Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect. . . ."[168] Thus, the use of "these"

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[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] Apparently, since *Baldwin* involved not a price *affirmation* but rather a price *agreement*, the Court referenced "price control" as a way of including *Baldwin*, and "price affirmation" as a way of including the other holdings, in the category of what *Healy* called "price-affirmation statutes." But for that trivial difference, this article regards "price-control statute" as synonymous with "price-affirmation statute," though the *Frosh* majority's rather slanted use of the term "price control" is discussed at length *infra* pp. 277-78.

[168] Pharm. Rsch. & Mfrs. of Am. v. Concannon, 249 F.3d 66, 81 (1st Cir. 2001).

demonstrates that the phrase "price affirmation and price control statutes" was meant to refer exclusively to the statutes in *Healy*, *Brown-Forman*, and *Baldwin*, of which the *Healy* and *Brown-Forman* statutes required price "affirm[ation]" and the *Baldwin* statute required a price "agreement" and "established . . . a scale of prices" for out-of-state use. Clearly, statutes that merely "affect" or "impact" price are not included in the forbidden category; the only statutes included in that category are statutes that, by compulsory affirmation or agreement, set certain prices or tie in-state to out-of-state prices.

E. LOWER FEDERAL COURTS HAVE RUN ROUGHSHOD OVER *WALSH*

Thanks to *Walsh*, some say, the extraterritoriality principle is now a dead letter.

Or is it? Reports of its demise have turned out to be premature. Notwithstanding *Walsh*, lower federal courts have picked up on *Healy*'s broad language and run with it, striking down indisputably nondiscriminatory statutes that regulate health and safety. The courts and their recent legislative casualties include: the Sixth Circuit, which invalidated Michigan's bottle-labeling law;[169] the Seventh Circuit, which invalidated Indiana's law regulating e-cigarettes;[170] the Eighth Circuit, which invalidated a Minnesota energy statute setting standards for carbon dioxide emissions;[171] the Middle District of Tennessee and the Western District of Washington, which respectively invalidated Tennessee's and Washington's laws that barred ads depicting sexual acts with minors;[172] the District of North Dakota,

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[169] Am. Beverage Ass'n v. Snyder, 735 F.3d 362 (6th Cir. 2013).

[170] Legato Vapors, LLC v. Cook, 847 F.3d 825 (7th Cir. 2017).

[171] North Dakota v. Heydinger, 825 F.3d 912 (8th Cir. 2016).

[172] Backpage.com, LLC v. Cooper, 939 F. Supp. 2d 805 (M.D. Tenn. 2013); Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262 (W.D. Wash. 2012).

which invalidated North Dakota's anti-spoofing law;[173] the Middle District of Tennessee (again), which invalidated Tennessee's law regulating online auctions;[174] the Eastern District of California, which invalidated California's law restricting online publication of public officials' home addresses and personal information, and then later invalidated California's statute rendering "pay-for-delay agreements" presumptively anticompetitive under state antitrust law;[175] the District of Minnesota, which invalidated a section of Minnesota's law regulating bullion dealers;[176] the Fourth Circuit, which invalidated Maryland's statute against price-gouging for certain lifesaving drugs;[177] and the Ninth Circuit, which invalidated California's statute requiring sellers of fine art to pay the artist 5% of sale proceeds, and subsequently affirmed the invalidation of California's statute regulating disposal of medical waste.[178]

Indisputably, the lower federal courts are more eager than the Supreme Court is to void state laws under the extraterritoriality principle. Under the principle, the Supreme Court has struck down only three statutes in the last century, while lower federal courts have struck down at least thirteen statutes in the last decade (and more before). The broadening of judicial language from *Baldwin* to *Healy* was referred to earlier as "doctrine creep." But given the quickening pace of invalidations under *Healy*, the "creep" has now become a "gallop."

In short, the summary of *Lochner*-era jurisprudence above serves not just as helpful background but also as cautionary tale. Where

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[173] SpoofCard, LLC v. Burgum, 499 F. Supp. 3d 647 (D.N.D. 2020).

[174] McLemore v. Gumucio, No. 3:19-CV-00530, 2019 WL 3305131 (M.D. Tenn. July 23, 2019).

[175] Publius v. Boyer-Vine, 237 F. Supp. 3d 997 (E.D. Cal. 2017); Ass'n for Accessible Meds. v. Bonta, 562 F. Supp. 3d 973 (E.D. Cal. 2021).

[176] Styczinski v. Arnold, 550 F. Supp. 3d 637 (D. Minn. 2021).

[177] Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664 (4th Cir. 2018).

[178] Close v. Sotheby's, Inc., 894 F.3d 1061 (9th Cir. 2018); Daniels Sharpsmart, Inc. v. Smith, 889 F. 3d 608 (9th Cir. 2018).

federal courts are insufficiently attentive to breadth of language and to concerns of federalism, that inattention can easily lead to a renewal of *Lochner*-type trammeling of state power. Clearly, that is where some federal courts are heading, if they are not already there. Fortunately, given how few state laws the Supreme Court has invalidated under the extraterritoriality principle, the Court has plenty of room doctrinally to cut back on lower-court excesses. If it so desires, the Court can readily correct the lower courts' errant extraterritoriality jurisprudence. The question is: Will it?

A spur to future corrective action by the Supreme Court may well be the array of admonitions from existing judicial decisions. Indeed, this article is not the first time an alarm has been sounded about improvident use of the dormant Commerce Clause, and the resulting recrudescence of restrictions on state power reminiscent of the *Lochner* era.

Consider first the caution advised by Chief Justice Roberts, in his opinion for the Court in *United Haulers*, concerning improper use of the dormant Commerce Clause: "The dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition."[179] Later in the same decision, the Chief Justice, writing for a plurality, expressed this caution more broadly:

> The Counties' ordinances are exercises of the police power in an effort to address waste disposal, a typical and traditional concern of local government. The haulers nevertheless ask us to hold that laws favoring public entities while treating all private businesses the same are subject to an almost per se rule of invalidity, because of asserted discrimination. In the

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[179] United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 354-55 (2007).

> alternative, they maintain that the Counties' laws cannot survive the more permissive Pike test, because of asserted burdens on commerce. . . . There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. See Lochner v. New York . . . . We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause.[180]

Although Chief Justice Roberts's remarks commented on the first two branches of the dormant Commerce Clause and not the third, he did so because no third-branch issue was addressed in his opinion. Had it been, the Chief Justice's warning would have been just as, if not more, apt.

Then there is the Second Circuit's warning in *Freedom Holdings, Inc. v. Cuomo* [181] , which rejected a challenge under the extraterritoriality principle:

> Ultimately, plaintiffs' Commerce Clause claim fails . . . because mere upstream pricing impact is not a violation of the dormant Commerce Clause, even if the impact is felt out-of-state where the stream originates. . . . Courts have consistently recognized that the mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids. . . .[182] Innumerable valid state laws affect pricing decisions in other States. . . .[183] [A]lmost every state and local law—indeed, almost every private transaction—affects interstate commerce . . . . [If the]

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[180] *Id.* at 347.

[181] 624 F.3d 38 (2d Cir. 2010).

[182] *Id.* at 67.

[183] *Id.* at 67 (quoting Healy v. Beer Inst., 491 U.S. 324, 345 (1989) (Scalia, J., concurring)).

> dormant Commerce Clause applied to all laws affecting commerce—that is, to all state and local laws addressing a subject that Congress could regulate, if it chose—then judicial review of statutory wisdom after the fashion of Lochner would be the norm. . . .[184] Commentators have also cautioned that the Commerce Clause's ban on extraterritorial regulation must be applied carefully so as not to invalidate many state laws that have permissible extraterritorial effects.[185]

Notably, the Second Circuit's *Lochner*-themed caution—drawn from a Seventh Circuit decision—concerned both the dormant Commerce Clause in general and the extraterritoriality principle in particular.

Justice Souter, too, in a well-turned dissent, warned of *Lochner*'s specter looming in dormant Commerce Clause cases.[186] In particular, he warned against the Court's "exacting judicial scrutiny" of state legislation, in both Lochnerian substantive due process cases and in dormant Commerce Clause cases.[187]

There are more judicial warnings, but the law of diminishing returns militates against quoting them. Suffice it to say that, in view of all these prophetic admonitions, it is no surprise that the Supreme Court recently granted certiorari in a case whose resolution may well address the issues and conflicts raised by the extraterritoriality principle (*see infra* Part IV).

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[184] *Id.* at 68 (quoting Nat'l Paint & Coatings Ass'n v. City of Chi., 45 F.3d 1124, 1130–31 (7th Cir. 1995) (Easterbrook, J.)).

[185] *Id.* at 68 n.19.

[186] United States v. Lopez, 514 U.S. 549, 603-15 (1995) (Souter, J., dissenting).

[187] *Id.* at 606.

IV. THE SUPREME COURT OPPORTUNITY IN *NATIONAL PORK PRODUCERS*

As noted below in Point IV.A, the circuits have split over numerous issues concerning the third branch of the dormant Commerce Clause. At least one of those splits could soon be resolved by the Supreme Court, which recently granted certiorari to review the Ninth Circuit's decision in *National Pork Producers*.[188] There, the Ninth Circuit rejected a challenge, brought under both the second and third branches of the dormant Commerce Clause, to a California law banning the sale of pork from animals whose confinement did not comply with California standards for humane sow-raising (with apologies for the mixed metaphor).[189] Though only one of the splits is mentioned in the certiorari submissions, it is possible that the Supreme Court could resolve all of the splits, given that all are fairly encompassed in the merits briefing.[190] It is also possible, however, that the Supreme Court could resolve the case entirely under the second branch—for example, by holding that the law fails the *Pike* balancing test—and never reach any of the third-branch issues. Thus, for this and future opportunities, it is important to illuminate the precise nature of each split, in hopes of facilitating the creation of order amidst the disarray.

A. THE CIRCUITS DIVIDE

The circuits disagree on three issues concerning the third branch of the dormant Commerce Clause. First, and most demonstrably, the circuits have divided over whether *Walsh* limited the third branch to

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[188] Nat'l Pork Producers Council v. Ross, 6 F.4th 1021 (9th Cir. 2021), *cert. granted*, 2022 WL 892100 (U.S. Mar. 28, 2022) (No. 21-468).

[189] *Id.* at 1025.

[190] *See* Brief for the State Respondents, at 13-18, National Pork Producers Council, et al., Petitioners v. Karen Ross, et al., Respondents (No. 21-468), 2022 WL 3284512, at *13-18.

"price-affirmation statutes."[191] That is, can a state statute violate the third branch if it is not a "price-affirmation statute"? It is this first issue that grounded the certiorari petition in *National Pork Producers*. Second, the circuits have divided over whether, for purposes of determining if a state statute controls "commerce" occurring wholly outside its borders,[192] a single out-of-state transaction can constitute such "commerce" if the transaction is part of a stream of transactions that passes into the state. That is, can a state statute violate the third branch if it controls a single out-of-state transaction, but the transaction is part of a transaction stream that ultimately enters the state? Third, the circuits have divided over whether a state statute that indisputably controls commerce occurring wholly outside its borders violates the third branch if the statute does not discriminate against interstate commerce.

1. DID *WALSH* LIMIT THE THIRD BRANCH TO PRICE AFFIRMATION STATUTES?

In quick succession, the Ninth and Tenth Circuits held that *Walsh* limited the third branch to price-affirmation statutes. In *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*[193] ("*Eleveurs*"), non-California producers and sellers of foie gras sued to enjoin enforcement of a California statute barring sale of products that result from the use of force feeding to enlarge bird livers. Among their contentions under the dormant Commerce Clause,[194] plaintiffs argued, citing *Baldwin* and *Healy*, that the statute's practical effect

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[191] *Healy*, 491 U.S. at 331 (defining "price-affirmation statutes" as kinds of statutes addressed in *Baldwin*, *Seagram*, *Healy I*, *Brown-Forman*, and *Healy* (*see supra* note 142)).

[192] *Healy*, 491 U.S. at 336.

[193] 729 F.3d 937 (9th Cir. 2013).

[194] Plaintiffs also made claims under the Due Process Clause. *Id.* at 946-47 (rejecting plaintiffs' due process claims).

was "to control conduct outside the boundaries of California."[195] But the Ninth Circuit held that *Walsh* understood *Healy* and *Baldwin* as involving "'price control or price affirmation statutes.'"[196] Because the California statute did not "impose any prices" and did "not tie prices for California liver products to out-of-state prices," the Ninth Circuit held that *Healy* and *Baldwin* were "inapplicable in this case."[197] In many cases, including *National Pork Producers*, the Ninth Circuit has reaffirmed that *Walsh* limited the extraterritoriality principle to "price control or price affirmation statutes."[198]

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[195] *Id.* at 950-51.

[196] *Id.* at 951 (quoting Pharm. Rsch. and Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003)).

[197] *Id.*

[198] *See* Chinatown Neighborhood Ass'n v. Harris, 794 F.3d 1136, 1146 (9th Cir. 2015) ("The plaintiffs' reliance on *Healy* [], *Brown-Forman* [], and *Baldwin* [] is misplaced. In each of those cases, the Supreme Court struck down price-control or price-affirmation statutes that had the effect of preventing producers from pricing products independently in neighboring states. . . . We have recognized the sui generis effect on interstate commerce of such price-control regimes and the correspondingly limited scope of these cases. *See* [] *Eleveurs*, 729 F.3d at 951 ('*Healy* and *Baldwin* are not applicable to a statute that does not dictate the price of a product and does not tie the price of its in-state products to out-of-state prices.')." (citation omitted)); Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1028 (9th Cir. 2021) (Supreme Court "has indicated that the extraterritoriality principle in *Baldwin*, *Brown-Forman*, and *Healy* should be interpreted narrowly as applying only to state laws that are 'price control or price affirmation statutes,' [*Walsh*, 538 U.S. at 669]. We have adopted this interpretation and held that the extraterritoriality principle is 'not applicable to a statute that does not dictate the price of a product and does not tie the price of its in-state products to out-of-state prices.' [*Eleveurs*, 729 F.3d at 951]. The Tenth Circuit has followed suit. *See* [Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1172 (10th Cir. 2015)]."). In Sam Francis Found. v. Christies, Inc., 784 F.3d 1320, 1324 (9th Cir. 2015) (en banc), a California law that was not a price-control or price-affirmation statute was invalidated under *Healy*'s extraterritoriality principle as regulating out-of-state conduct. But the majority opinion conspicuously declined to overrule *Eleveurs*, instead distinguishing it as a case in which the challenged statute regulated in-state conduct. *Id.* Whatever the merits of that distinction, *Chinatown Neighborhood* and *National Pork Producers* both cited *Sam Francis* yet both reaffirmed the relevant portion of *Eleveurs*, leading to the conclusion that *Eleveurs* on that point (indeed, on all points) is still good law.

A much fuller critique of the third branch followed in then-Judge Gorsuch's opinion for the court in *Energy and Environment Legal Institute v. Epel*.[199] The case involved a challenge, under the third branch, to a Colorado law that required electricity generators to ensure that 20% of the electricity sold to Coloradans came from renewable sources.[200] Because Colorado obtained electricity from a multi-state electric grid and was a net importer of electricity, the law's effect was to cause out-of-state coal producers (including a member of the plaintiff organization) to lose business with out-of-state utilities that provided power to the electric grid.[201] As relevant here,[202] the opinion rejected the plaintiff's claim that *Baldwin*, *Brown-Forman*, and *Healy* render "'automatically' unconstitutional" any state regulation whose practical effect is to control conduct beyond

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National Pork Producers requires further comment. The decision purports to clarify that, although the *Eleveurs* holding adopted *Walsh*'s narrow view of the extraterritoriality principle, *Walsh*'s narrow view was merely an "indicat[ion]" rather than an "express" ruling. But indisputably *Eleveurs* read *Walsh*'s narrow view as a *holding:* According to *Eleveurs*, *Walsh* "*held* that *Healy* and *Baldwin* are not applicable to a statute that does not dictate the price of a product and does not 't[ie] the price of its in-state products to out-of-state prices.'" *Eleveurs*, 729 F.3d at 951 (emphasis added) (quoting *Walsh*, 538 U.S. at 669). That is, *Eleveurs* made it binding Ninth Circuit law that *Walsh*'s narrow reading of *Healy* was the Supreme Court's *holding*. How *National Pork Producers* can suggest that *Eleveurs* does not mean what it says is mystifying. In addition, *National Pork Producers* oddly asserts that a broader reading of the extraterritorial principle than the *Walsh* view adopted by *Eleveurs* "may apply outside this context." *National Pork Producers Council*, 6 F.4th at 1028. But the case cited by *National Pork Producers* in support of that assertion, Ward v. United Airlines, Inc., 986 F.3d 1234, 1240-41 (9th Cir. 2021), reaffirmed *Eleveurs* and simply held that, even accepting such a broader reading *arguendo*, United Airlines' dormant Commerce Clause challenge was still meritless, for other reasons. *See Ward*, 986 F.3d at 1240 ("Under that narrow understanding [in *Eleveurs*], United's extraterritoriality challenge obviously fails. But even under a broad understanding of the extraterritoriality principle, United's challenge lacks merit.").

[199] 793 F.3d 1169 (10th Cir. 2015).

[200] *Id.* at 1170.

[201] *Id.* at 1170-71.

[202] Then-Judge Gorsuch's analysis is also discussed below at Part I.A.3.

the state's boundaries.[203] A key basis for that rejection was the Court's holding that *Baldwin* and progeny were limited by *Walsh* precisely as the Ninth Circuit had held in *Eleveurs*:

> [T]he Supreme Court has emphasized as we do that the *Baldwin* line of cases concerns only "price control or price affirmation statutes" that involve "tying the price of . . . in-state products to out-of-state prices." [*Walsh*, 538 U.S. at 669]. The Ninth Circuit has made the same point, too, explaining that "*Healy* and *Baldwin* are not applicable to a statute that does not dictate the price of a product and does not 't[ie] the price of its in-state products to out-of-state prices." [*Eleveurs*, 729 F.3d at 951].[204]

Just three years later, however, the Fourth Circuit took the opposite position in *Frosh*.[205] Indeed, in *Frosh*, both the majority and the dissent recognized that the majority's decision created a circuit split regarding whether *Walsh* limited the third branch to "price affirmation statutes."[206] As the following discussion of *Frosh* will show, the reasoning of the Fourth Circuit on the key issue—whether *Walsh* so limited the third branch—is no match for that of the Ninth and Tenth Circuits.

Frosh concerned Maryland legislation enacted because generic drug manufacturers had imposed multiple-thousand-fold price increases for single-source generic drugs that treat rare and life-threatening disease. The legislation barred "unconscionable"[207] price

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[203] *Epel*, 793 F.3d at 1174.

[204] *Id.* at 1174-75.

[205] Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1168 (2019).

[206] *Id.* at 670 (majority opinion); *id.* at 687 (dissenting opinion).

[207] "Unconscionable" is defined in the statute as "'excessive and not justified by the cost of producing the drug or the cost of appropriate expansion of access to the drug to promote public health'" and "'[r]esults in consumers . . . having no meaningful

increases for "essential off-patent or generic drug[s]" that are "made available for sale" in Maryland.[208] An organization consisting primarily of prescription drug manufacturers and wholesale distributors sued to enjoin enforcement of the Maryland act.[209] Most of the manufacturers, and all of the distributors, were based outside of Maryland, and most of the sales from the manufacturers to the distributors occurred outside of Maryland.[210] The primary claim, and the only claim addressed by the Fourth Circuit, was that the Maryland act violated the third branch of the dormant Commerce Clause.[211]

Seizing on the most expansive language in third-branch jurisprudence, the majority first articulated the extraterritoriality principle in the broadest terms. The majority asserted that a state may not "regulate" commerce occurring wholly outside its borders, that a state law is invalid if it "applies" to out-of-state commerce expressly, and that the extraterritoriality principle reflects the Constitution's concern with not only avoiding economic

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choice about whether to purchase the drug at an excessive price'" due to the drug's "'importance . . . to their health'" and "'[i]nsufficient competition in the market.'" *Id.* at 666 (quoting Md. Code Ann., Health-General § 2-801(f)).

[208] The Maryland statute authorized, but did not require, the Maryland Medical Assistance Program to inform the Maryland Attorney General of any particular price increase and provided non-limiting examples. *Id.* at 666-67 (Act provides that Program "'*may* notify the Attorney General' in the event of a particular price increase, *including* when an increase '[w]ould result in an increase of 50% or more in the wholesale acquisition cost of the drug within the preceding 1-year period' or when a 30-day supply of the drug 'would cost more than $80 at the drug's wholesale acquisition cost.'" (quoting Md. Code Ann., Health-General § 2-803(a) (emphasis added)). Apparently because of the authorization's discretionary, non-binding character, and because the 50% and $80 figures were merely non-limiting examples, this provision played no meaningful role in the Fourth Circuit's holding or in the dissent's analysis.

[209] *Id.* at 667.

[210] *Id.*

[211] *Id.*

balkanization but also preserving state "autonomy."[212] After canvassing the law from *Baldwin* through *Brown-Forman*, the court concluded by noting that the *Brown-Forman* Court struck down the Connecticut price-affirmation statute because it had the "undeniable effect of *controlling* commercial activity" occurring wholly outside Connecticut.[213] The word "controlling" was used *not* in sense of the phrase "price control or price affirmation statutes"[214]—i.e., a formal category of statutes that insisted on certain prices or tied in-state to out of-state prices.[215] Rather, the word "controlling" was used in the sense of *Brown-Forman*'s functional principle that a forbidden extraterritorial effect was one that "*controls* conduct beyond the boundaries of the state."[216]

On the issue of particular relevance here, the *Frosh* majority rejected defendant Maryland's claim that *Walsh* "limited the principle against extraterritoriality in the dormant commerce clause context to price affirmation statutes."[217] But only by selectively quoting *Walsh*, and omitting two key sentences of *Walsh*'s holding, could the majority reach this conclusion. *Frosh*'s improperly selective reading of *Walsh* is shown by a close reading of *Frosh*. The *Frosh* majority stated:

> The Supreme Court [in *Walsh*] concluded that "[t]he rule that was applied in *Baldwin* and *Healy*" did not apply to [Maine's] rebate program because "unlike price control or price affirmation statutes, '[the program] does not regulate the price of any out-of-state transaction either by its express terms or by its inevitable effect.'" Maryland's reading of *this*

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[212] *Id.* at 667-68; *see supra* p. 247.

[213] *Frosh*, 887 F.3d at 669 (emphasis added).

[214] Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003).

[215] *Id.*

[216] Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989) (citing Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986)).

[217] *Frosh*, 887 F.3d at 669.

> *language,* while adopted by two of our sister circuits, is too narrow. The Supreme Court's statement does not suggest that "[t]he rule that was applied in *Baldwin* and *Healy*" applies *exclusively* to "price control and price affirmation statutes."[218]

Above all, the *Frosh* majority here omitted *Walsh*'s two key sentences that, as noted above, immediately followed, and defined, the phrase "does not regulate the price of any out-of-state transaction": "Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price. Similarly, Maine is not tying the price of its in-state products to out-of-state prices."[219] To the *Walsh* Court, the Maine statute's failure to insist on a "certain price" or to "t[ie]" in-state to out-of-state prices was *sufficient* to prove that the Maine statute did not "regulate the price of any out-of-state transaction."[220] That is, where a state statute does *not* set a "certain price" or "t[ie]" in-state to out-of-state prices, then it *cannot* "regulate the price of any out-of-state transaction" for purposes of *Baldwin*, *Healy*, and the extraterritoriality principle.[221] By omitting those two sentences of *Walsh*—by omitting any reference to *Walsh*'s reliance on the absence of price-setting or price-tying—the *Frosh* majority exponentially and improperly expanded *Walsh*'s holding. The *Frosh* majority would call "too narrow" Maryland's (and two other circuits') reading of "this language." What the *Frosh* majority was essentially stating, however, was that *Walsh* itself was too narrow for the *Frosh* majority's taste and that the *Frosh* majority would accordingly re-write the Supreme Court decision by excising the Justices' own narrowing language. In sum, contrary to the *Frosh*

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[218] *Id.* at 669-70.
[219] *Walsh*, 538 U.S. at 669.
[220] *Id.*
[221] *Id.*

majority, *Walsh* indeed holds that the extraterritoriality principle of *Baldwin* and *Healy* applies exclusively to price-control or price-affirmation statutes.

The *Frosh* majority's opinion had yet other failings. To bolster its own reading of *Walsh*, the *Frosh* majority inaccurately asserted that the plurality opinion in *Edgar* was the opinion of "the Court"[222]—when that section of the plurality opinion never commanded a Court majority.[223] With respect to the dormant Commerce Clause, a majority of Justices joined only in the portion of the plurality opinion finding a violation under the *second* branch (i.e., the *Pike* test),[224] and only the plurality joined the portion of the opinion finding a violation of the *third* branch.[225]

Furthermore, the *Frosh* majority omitted any reference to *Healy*'s statement that the *Healy* case was the Court's fourth foray into the realm of "price-affirmation statutes."[226] Thus, the *Frosh* majority ignored an important proof that the Court itself regarded the extraterritoriality principle as applying only in cases concerning price-affirmation statutes.

A final source of puzzlement in *Frosh* is that, having expressly (and erroneously) held that *Walsh* did not limit the extraterritoriality principle to price-affirmation or price-control statutes, the *Frosh* majority went on to hold that the Maryland statute was indeed a price-control statute. But insofar as the phrase "price control statute" meant the same thing as it meant in *Walsh*—i.e., a statute that insists on a "certain price" or "t[ies]" in-state to out-of-state prices, even if it does not require an actual affirmation from anyone[227]—the *Frosh* majority was mistaken. The Maryland statute did not insist on a

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[222] *Frosh*, 887 F.3d at 670.
[223] *Id.* (citing Edgar v. MITE Corp., 457 U.S. 624, 627, 641-42 (1982)).
[224] *See* Edgar v. MITE Corp., 457 U.S. 624, 643-46 (1982) (Part V-B of opinion).
[225] *See id.* at 641-43 (Part V-A of opinion); *see also* Denning, *supra* note 4, at 996.
[226] Healy v. Beer Inst., Inc., 491 U.S. 324, 331 (1989).
[227] *Walsh*, 538 U.S. at 669.

"certain price."[228] As the dissent stated, quoting from the majority opinion, the statute "does not 'compel[] manufacturers to sell prescription drugs . . . *at a particular price*.' Rather, it forbids manufacturers from imposing an 'unconscionable' price increase for essential generic drugs. Generic drug manufacturers, therefore, *retain broad discretion to set prices for essential generic drugs and to increase the prices of such drugs*, even if another state adopted a similar law."[229] And the *Frosh* majority itself conceded that the statute did not "t[ie]" in-state prices to out-of-state prices.[230]

At bottom, the *Frosh* majority's contention that the Maryland act is a price-control statute[231] depends on a sleight-of-hand. The word "control" is used by Supreme Court precedent in two wholly distinct senses for two wholly distinct purposes. First, "control" is used, in *Walsh*'s phrase "price control or price affirmation statutes,"[232] to define a formal category of statutes to which application of the extraterritoriality principle is limited: statutes that insist on a "certain price" or "t[ie]" in-state to out-of-state prices. If a statute does not fall within that formal category, then the extraterritoriality principle is inapplicable, and discussion must end. In this first sense, "control" is an essential, well-defined element of a threshold prerequisite for

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[228] *Id.*

[229] Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 689 (4th Cir. 2018) (Wynn, J., dissenting) (brackets and first emphasis added by dissent) (citations omitted); *see also id.* at 686 (Wynn, J., dissenting) (noting that Maryland act "does not dictate the prices that manufacturers or distributors charge to downstream purchasers in States other than Maryland").

[230] *Id.* at 672 ("We acknowledge that the Act does not establish a price schedule for prescription drugs, nor does it aim to tie the prices charged for prescription drugs in Maryland to the prices at which those drugs are sold in other states."); *see also id.* at 686 (Wynn, J., dissenting) (noting that Maryland act "is not a price affirmation statute *nor does it link in-state prices to out-of-state prices*" (emphasis added)).

[231] *See, e.g.*, *id.* at 672 ("the Act is effectively a price control statute"); *id.* at 671 ("the Act . . . controls the price of transactions that occur wholly outside the state"); *id.* at 672 ("The Act Implicates a Price Control as Opposed to an Upstream Pricing Impact").

[232] *Walsh*, 538 U.S. at 669.

application of the extraterritoriality principle. Second, "control" is used in the extraterritoriality principle itself as a capacious, nebulously defined term for the regulation forbidden by that principle, namely, the "control [of] conduct beyond the boundaries of the state."[233] Plainly, "control" in the second (i.e., conduct-regulating) sense is vastly broader than "control" in the first (i.e., price-setting and price-tying) sense. Yet, the *Frosh* majority, having decided that the Maryland act engages in "control" in the second, broad sense, concluded that the act necessarily engages in "control" in the first, narrow sense. The conclusion did not follow, however, because price-setting and price-tying are not interchangeable with conduct-regulation. Had the *Frosh* majority acknowledged that *Walsh* limited application of the extraterritoriality principle to price-control and price-affirmation statutes, and that such statutes insist on a "certain price" or "t[ie]" in-state to out-of-state prices, then *Frosh* would have come out differently. The *Frosh* majority would have been forced to conclude that the Maryland statute was not a price-control or price-affirmation statute and that the extraterritoriality principle was simply inapplicable.

Because the *Frosh* majority first held (incorrectly) that *Walsh* did not limit the extraterritoriality principle to price-control or price-affirmation statutes, one might erroneously regard as an alternative holding the *Frosh* majority's subsequent determination that the Maryland act was still a price-control statute. But that subsequent determination was not an alternative holding. It was not logically independent of the first holding. On the contrary, it was inextricably intertwined with the first holding's erroneous omission of *Walsh*'s two key sentences, which established that, if a statute does not insist on a "certain price" or "t[ie]" in-state prices to out-of-state prices, then the statute does not "regulate the price of any out-of-state

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[233] Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989) ("The critical inquiry is whether the practical effect of the regulation is to *control conduct beyond the boundaries of the state*." (emphasis added)); *Frosh*, 887 F.3d at 672-73 (quoting *Healy*, 491 U.S. at 336).

transaction."[234] Indeed, it was only by erroneously assuming that "control" in the second sense (i.e., the broad sense in which the extraterritoriality principle itself used the term "control") was equivalent to control in the first sense (i.e., the narrow sense in which the threshold prerequisite for application of the extraterritorial principle used the term "control")—which it was not—that the *Frosh* majority was able to conclude that the Maryland act was a price-control statute. In other words, the error that infected the *Frosh* majority's first holding—namely, the failure properly to understand the word "control"—also infected the subsequent determination. In any event, the *Frosh* majority's first holding is stated unequivocally in its opinion and stands to confuse and mislead sister courts and district courts if left uncorrected.[235]

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[234] *Walsh*, 538 U.S. at 669; *supra* Part D.

[235] Other aspects of the majority-dissent dialogue in *Frosh* deserve mention, for the sake of completeness. First, according to the *Frosh* majority, the statute's requirement that the drugs whose sale was being regulated by the statute be merely "available for sale" in Maryland did not guarantee that the drugs would actually be "sold" in Maryland. *Frosh,* 887 F.3d at 671. The dissent hotly disputed the majority's reading because defendant Maryland construed the statute to reach only those drugs that are actually sold in Maryland, and because the plaintiff itself acquiesced in Maryland's construction. *Id.* at 678-79. Second, the majority held that if other states were to enact legislation similar to Maryland's, then the subjectivity of the definition of "unconscionable" could render a single manufacturer subject to inconsistent legislative commands, as a manufacturer's price increase might be legal in one state yet "unconscionable" in Maryland. *Id.* at 673. The dissent responded that the majority's view was impermissibly speculative, and that a manufacturer could avoid any conflict by entering into a single contract with a distributor, under which contract the distributor could resell pills to out-of-Maryland purchasers at a price different from the price at which it could resell pills to in-state purchasers. *Id.* at 690. Third, the majority held that the Maryland act, by (assertedly) setting drug prices, impermissibly interferes with the "natural function of the interstate market" by "superseding market forces that dictate the price of a good." *Id.* at 673. The dissent responded that the market for health-care products does not "natural[ly] function" because the patients protected by the statute "were at a gross disadvantage in terms of bargaining power," face "debilitating illness or even death absent these drugs," and thus "must accept whatever price a manufacturer charges." *Id.*

As to why the Supreme Court Justices in *Walsh* would want to limit the extraterritoriality principle to price-control or price-affirmation statutes, there are two possible answers. One is that, after *Healy* had expanded the rationale for, and the terms of, the extraterritoriality principle, the Justices realized that *Healy* had gone too far. The principle had become a Frankenstein monster enabling federal courts[236]—absent any basis in the text of the Constitution—to invalidate much, maybe even most, state legislation. Accordingly, the fact that the three key decisions—*Baldwin*, *Brown-Forman*, and *Healy*—had all arisen in the context of price-control and price-affirmation statutes presented a convenient basis for limiting the extraterritoriality principle and shrinking the monster's destructive path. This is reflected in Justice Scalia's view, as in his *Walsh* concurrence he opined that the dormant Commerce Clause "should not be extended beyond" facially discriminatory action and "nondiscriminatory action of the *precise sort hitherto invalidated*."[237] The other answer is that the category of price-affirmation and price-control statutes was not an artificial-but-convenient way to draw a line around the extraterritoriality principle. Rather, it was an inherent, express line drawn by Supreme Court precedent all along. Thus, the *Healy* Court began its discussion by stating that the case was the Court's "fourth expedition into the area of price-affirmation statutes."[238] That is, long before *Walsh*, the Supreme Court itself had recognized that the extraterritoriality principle, however broad its terms, was limited to a narrow category of statutes—namely, price-setting or price-tying statutes. *Healy*'s own express concern about "price gridlock"[239] supports this view, as such gridlock could not

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[236] As explained *infra* at Part C, use of the extraterritoriality principle to void state statutes is almost completely a federal-court phenomenon.

[237] *Walsh*, 538 U.S. at 674-75 (Scalia, J., concurring) (emphasis added).

[238] *Healy*, 491 U.S. at 331.

[239] *Id.* at 340.

easily arise in any context other than price-setting and price-tying statutes.

2. CAN A STATE STATUTE VIOLATE THE THIRD BRANCH IF IT CONTROLS A SINGLE OUT-OF-STATE TRANSACTION, BUT THE TRANSACTION IS PART OF A STREAM OF COMMERCE THAT ULTIMATELY ENTERS THE STATE?

The *Frosh* dissent points up another circuit split, concerning the definition of "commerce" and, more generally, the scope of the Supreme Court's rule in *Healy* that the extraterritoriality principle is violated if a state statute "directly controls commerce occurring wholly outside" the state.[240] The majority in the Fourth Circuit's *Frosh* decision holds that a single transaction can constitute "commerce" for purposes of the principle. Thus, in the majority's view, a single out-of-state transaction can constitute "commerce occurring wholly outside" the state, even if the transaction is part of a stream of transactions that ultimately enters the state.[241]

In contrast, the *Frosh* dissent opines that "commerce" can be constituted only by a stream of transactions. Thus, in the dissent's view, a single out-of-state transaction cannot constitute "commerce occurring wholly outside" the state if the transaction is part of a stream of transactions that ultimately enters the state.[242] Because

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[240] *Id.* at 336.

[241] *Id.* at 337.

[242] This was essentially the conclusion drawn by the Minnesota Supreme Court in rejecting a challenge under the extraterritoriality principle to Minnesota's payday lending law. *See* Swanson v. Integrity Advance, LLC, 870 N.W.2d 90, 94-96 (Minn. 2015) (upholding Minnesota payday lending law against challenge under third branch of dormant Commerce Clause). There, an out-of-state lender argued under *Healy* that because the loan agreements that allegedly violated Minnesota law were all signed in Delaware, the law regulated "commerce" occurring wholly out of state. *Id.* at 95. Disagreeing, the Minnesota Supreme Court held that the lender's definition of

modern commerce is inherently a stream of transactions, from production to sale to consumption,[243] the *Frosh* dissent's view makes it unlikely that a particular transaction, even if it occurs out-of-state, will constitute "commerce wholly outside" the state.[244] Such a conceptualization goes a long way toward limiting the ultra-broad scope of the extraterritoriality principle as articulated in *Healy*.

Having so defined "commerce," the *Frosh* dissent spots a conflict between the Fourth Circuit (per the *Frosh* majority) and the Seventh Circuit. The Fourth Circuit holds that a state statute that controls an upstream transaction—for example, sale of the product by an out-of-state manufacturer to an out-of-state wholesaler as part of the stream of commerce—constitutes controlling commerce "occurring wholly"

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commerce was "too narrow." *Id.* "Commerce," the Court held, is "economic activity," including "production, distribution, and consumption." *Id.* (citations and internal quotation marks omitted). The Court concluded that "commerce" included not just the signing of the loan agreements but also the calls and emails from lender to in-state borrowers and the receipt of the loan proceeds by in-state borrowers—which calls, emails, and proceeds were all received in Minnesota. *Id.* at 93, 95. Although the single transaction of signature occurred out-of-state, the regulated "commerce" still occurred in-state, and thus the extraterritoriality challenge under *Healy* failed because the regulated "commerce" did not occur "wholly" out of state. *Id.* at 94-96.

[243] *See supra* pp. 248-50 and note 125.

[244] Defining "commerce" as a stream of transactions has never been thought, by itself, to presuppose a market that is inherently national and thus in need of nationally uniform regulation that would displace state regulation. *See* Association des Eleveurs de Canards et d'Oies du Quebec v. Harris, 729 F.3d 937, 952 (9th Cir. 2013). The category of endeavors held to be inherently national and requiring nationally uniform regulation is small and includes primarily transportation, taxation, and professional sports leagues. *Id.*; *see also* Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1031 (9th Cir. 2021) (holding that, while dormant Commerce Clause can also be violated by statutes regulating "activities that are inherently national or require a uniform system of regulation," there is only a "small number" of cases dealing with such statutes, which "generally concern taxation or interstate transportation."); Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 649-50 (6th Cir. 2010) (holding that Ohio milk labeling statute did not violate the extraterritoriality principle and distinguishing Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945), as involving an area of endeavor that *required* nationally uniform rules: "National uniformity in the regulation of railroads, the Court pointed out, was practically indispensable to the operation of an efficient and economical national railway system." (internal quotation marks omitted)).

outside the state, even if the product is ultimately sold in-state. But the Seventh Circuit has held the opposite. In *Brand Name Prescription Drugs Antitrust Litigation*,[245] out-of-state drug manufacturers sold to out-of-state wholesalers, which sold to in-state pharmacies, which sold to in-state consumers. The consumers then brought claims against the out-of-state manufacturers under Alabama state antitrust law for price-fixing. Specifically, the claims alleged that the manufacturers conspired with wholesalers to deny pharmacies the same discounts being given to favored purchasers, like hospitals, nursing homes, and HMOs. The claims would not have been allowed under federal law, because federal law bars such "indirect purchaser" claims (i.e., claims against the manufacturer where the claimant purchased not from the manufacturer but from an intermediary). Alabama state antitrust law, however, permitted "indirect purchaser" claims.

The Seventh Circuit, per Judge Posner, held that, while a state may regulate interstate commerce, its power to do so is limited by the extraterritoriality principle.[246] Of particular relevance here, Judge Posner framed the extraterritorial principle thus: "State A cannot use its antitrust law to make a seller in State *B* charge a lower price to a buyer in *C*." [247] The Alabama state antitrust law, Judge Posner continued, violates the extraterritoriality principle insofar as it

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[245] In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599 (7th Cir. 1997).

[246] Judge Posner wrote that state power to regulate interstate commerce is limited by the "provisions of the federal Constitution that limit the extraterritorial powers of state government," and thus that the state may not regulate sales that take place "wholly outside" it. That was indisputably a reference to the extraterritoriality principle, not only because Judge Posner used the phrase "extraterritorial powers" and referred to the bar against regulating sales "wholly outside" the state, but also because he cited K-S Pharmacies, Inc. v. Am. Home Prods. Corp., 962 F.2d 728, 730 (7th Cir. 1992), which explicitly references the dormant Commerce Clause's extraterritoriality principle and cites *Healy*.

[247] *Brand Name*, 123 F.3d at 613.

permits suit challenging sales by out-of-state entities to out-of-state pharmacies.[248] But, Judge Posner concluded, there is no violation insofar as the statute permits suit challenging sales by out-of-state entities to *in-state* pharmacies.[249] In other words, if the stream of transactions enters the state, as a sale from out-of-state manufacturer to out-of-state wholesaler to *in-state* pharmacy would, then the challenged sales do not "take place wholly outside" the state.[250] The extraterritoriality principle is therefore not violated.

This comparison of *Frosh* and *Brand Name* enables a succinct articulation of the conflict between the Fourth and Seventh Circuits. Does a state statute that controls a transaction occurring wholly out-of-state—the sale of an item from out-of-state manufacturer to out-of-state wholesaler—control "commerce occurring wholly outside" the state if the item is then sold in-state? That is, does the statute control commerce occurring wholly outside the state if the transaction stream ultimately enters the state? The Fourth Circuit says yes; the Seventh Circuit says no.[251]

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[248] *Id.* ("Insofar as the [suit under the Alabama antitrust law] challenges sales from plants or offices in other states to pharmacies in other states, it exceeds the constitutional scope of the Alabama antitrust law.").

[249] *Id.* ("But insofar as [the suit under the Alabama antitrust law] challenges sales from other states to pharmacies in Alabama, it is within the intended and permissible scope of the [Alabama antitrust law] . . . .").

[250] *Id.*

[251] For purposes of clarity, one may inquire whether the conflict concerns the *definition* of "commerce" (individual transaction vs. transaction stream) *or* the *location* of "commerce" (wholly out-of-state vs. partially in-state). But these are two sides of the same coin. If one defines commerce as a transaction stream, then the location of the commerce will be partially in-state, and therefore the extraterritoriality principle will not be violated. And a variant of this conflict appears in the different language used by the Fourth and Tenth Circuits to describe the degree to which a state statute must affect commerce in order to violate the extraterritoriality principle: The difference concerns not the definition or the location of commerce, but rather the severity of the restriction on commerce. The Tenth Circuit's holding in *Epel* suggests that where a state law regulates something other than price (e.g., labeling), the law may well "impact" price, but there is no violation of the extraterritorial principle unless the law "blatantly regulat[es] price," is "clearly invidious," or "is obviously

The *Frosh* dissent and the Seventh Circuit have the better of the argument. Where a state, through its police power, enacts nondiscriminatory legislation to protect its citizens, the dormant Commerce Clause was never meant to permit wrongdoers to move a harm-initiating transaction across the state line and thereby defeat the legislation. It does not matter whether the transaction is a price-fixing agreement, as in *Brand Name*, or a price-gouging agreement, as in *Frosh*, or a pay-for-delay agreement, as in *Bonta*. Because of the states' economic interconnectedness and the rise of multi-state companies, the dormant Commerce Clause today does not shield out-of-state wrongdoers who aim economic weapons across the border at a state's citizens. Nor does it leave the state helpless to protect its citizens who are in the crosshairs.[252] As the dissent noted

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inimical to interstate commerce." Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1173-74 (10th Cir. 2015). By contrast, the Fourth Circuit's holding in *Frosh*—while not a model of terminological consistency—suggests that a law violates the extraterritorial principle if it "impacts" out-of-state transactions. *See* Ass'n for Accessible Meds. v. Frosh, 887 F.3d 644, 671 (4th Cir. 2018) ("The Act *Impacts* Transactions that Occur Wholly Outside Maryland" (emphasis added)); *id.* at 673 ("The district court erred by failing to account for this *impact*." (emphasis added)); *see also* Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 379 (6th Cir. 2013) (Sutton, J., concurring) (noting that California emissions standards "*impact* businesses and commerce in other States," and wondering why California law does not therefore violate extraterritoriality principle, as its extraterritorial effect is no less direct than that of Michigan law held violative of extraterritoriality principle).

[252] The text above focuses on the conflict between the Fourth and Seventh Circuits because both *Frosh* and *Brand Name* interpret the dormant Commerce Clause. But the conflict as to the meaning of "commerce" sweeps in other circuits insofar as one includes cases under the Commerce Clause itself (as opposed to the dormant Commerce Clause). For example, the Sixth Circuit, agreeing with the Seventh, has held, under the Commerce Clause, that "commerce" refers to a business *stream*. *See, e.g.*, McCoy-Elkhorn Coal Corp. v. EPA, 622 F.2d 260, 265 (6th Cir. 1980) ("[O]ur review of Congressional legislation under the Commerce Clause itself is limited to whether the regulated activity is in the *stream* of interstate commerce . . . . It is beyond question that the sale of coal or other energy sources is in the stream of interstate commerce. Therefore, Congress clearly has the power to regulate coal purchases."). It makes sense to

in *Frosh*, "the dormant Commerce Clause is not a 'roving license' for federal courts to strike down non-discriminatory state consumer protection laws, like HB 631."[253]

3. CAN A NONDISCRIMINATORY STATE STATUTE VIOLATE THE THIRD BRANCH?

A third circuit split centers on the following question: Does a state statute that indisputably controls commerce occurring wholly outside its borders violate the third branch if the statute does not discriminate against interstate commerce? In short, can a nondiscriminatory state statute violate the third branch?

The Fourth Circuit, per the *Frosh* majority, answers yes. The Maryland statute at issue in *Frosh* was concededly nondiscriminatory. It was not economically protectionist. It did not favor in-state interests over out-of-state interests. Yet the majority held that it nonetheless violated the extraterritoriality principle.

The Tenth Circuit, on the other hand, answers no. Writing for the panel in *Epel*, then-Judge Gorsuch explained that there are only three cases in which the Supreme Court invalidated a state statute under the extraterritoriality principle—*Baldwin*, *Brown-Forman*, and *Healy*—and all three had a signature fact pattern. All three involved a price-control or price-affirmation statute. All three involved a statute that tied in-state prices to out-of-state prices. And, significantly, all three involved a statute that favored in-state over out-of-state interests, and hence discriminated against out-of-state interests. Accordingly, there was no warrant to apply the extraterritoriality principle in cases that did not involve all of these factual elements: a price-control or

include Commerce Clause cases in the mix. The Supreme Court has long held that there is only one definition of "commerce" for purposes of both the Commerce Clause and the dormant Commerce Clause. *See* Philadelphia v. New Jersey, 437 U.S. 617, 621-23 (1978) (rejecting "two-tiered definition of commerce").

[253] *Frosh*, 887 F.3d at 693 (Wynn, J., dissenting).

price-affirmation statute that tied in-state to out-of-state prices and that discriminated against out-of-state interests.

Then-Judge Gorsuch has the more compelling argument. In his view, dormant Commerce Clause jurisprudence has developed two kinds of inquiries: a "laborious" inquiry (the *Pike* balancing test); and "*per se*" rules (the anti-discrimination rule and the extraterritoriality principle) for specific conditions that experience has shown to create a "certainty" of liability and that therefore do not require a laborious inquiry.[254] Before the extraterritoriality principle can be used to invalidate a state statute, the statute must satisfy three conditions that assure such certainty (because each statute challenged in *Baldwin*, *Brown-Forman*, and *Healy* satisfied all three conditions). Specifically, the statute must be "(1) a price control or price affirmation regulation, (2) linking in-state prices those charged elsewhere, with (3) the effect of raising costs for out-of-state consumers or rival businesses."[255] As Gorsuch explained:

> State regulations and standards across a wide spectrum may invite *Pike* balancing. But only price control or price affirmation statutes that link in-state prices with those charged elsewhere and discriminate against out-of-staters are considered by the Court *so obviously inimical to interstate commerce that we will forgo that more searching inquiry* [*i.e.*, *Pike* balancing] *in favor of* Baldwin*'s shortcut* [*i.e.*, the extraterritoriality principle].[256]

And the three conditions must be genuinely satisfied. Given the "interconnected[ness]" of the "national marketplace," a non-price regulation may "impact" out-of-state prices, but mere impact does

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[254] *Epel*, 793 F.3d at 1172, 1174.
[255] *Id.* at 1173; *see also id.* at 1174.
[256] *Id.* at 1174.

not rise to the level of "price control"—and invoke the extraterritoriality principle—absent "a regulation more blatantly regulating price and discriminating against out-of-state consumers or producers."[257]

Failure to limit the extraterritoriality principle's use to statutes satisfying the three conditions leads to the worst outcome: per se invalidation of state statutes by federal courts[258] precisely where the prerequisite "certainty" of liability is absent. As Gorsuch explained, *Healy*'s "dicta," which are "sweeping" and "overbroad," purport to invalidate any state statute whose practical effect is to "control conduct beyond the boundaries of the State,"[259] but the Supreme Court's "holdings" in *Baldwin*, *Brown-Forman*, and *Healy* "have not gone nearly so far."[260] The "holdings" in the three cases "have turned instead on the presence of the three factors not present here."[261] Any other view would "audacious[ly]" create a doctrine without a "limiting principle"—a doctrinal "weapon" that is "far more powerful than *Pike* or *Philadelphia*" and that would "risk serious problems of overinclusion."[262] For example, it would enable federal

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[257] *Id.* at 1173-74.

[258] *See infra* Part C.

[259] *Epel*, 793 F.3d at 1174-75 (citations and internal quotations marks omitted).

[260] *Id.* at 1174.

[261] *Id.* As Gorsuch noted, *Walsh* itself emphasized that *Baldwin* and progeny (along with *Eleveurs*) concern "only" price-control or price-affirmation statutes that tie in-state to out-of-state prices. *See id.* at 1174-75. And the Eighth Circuit even held pre-*Walsh* that, because *Healy* and *Brown-Forman* concerned statutes that discriminated against interstate commerce, extraterritoriality claims fail if the statute challenged is nondiscriminatory. *See* S. Union Co. v. Mo. PSC, 289 F.3d 503, 507-08 (8th Cir. 2002) (rejecting extraterritoriality challenge to Missouri statute that required public utilities in Missouri to obtain advance approval from Commission for purchase of stock in other utilities: "Here, no discrimination against interstate commerce, or other form of 'economic protectionism,' is at work, as it was in the Commerce Clause cases on which Southern Union primarily relies—*Healy* . . . [and] *Brown-Forman* . . . .").

[262] *Epel*, 793 F.3d at 1175; *see also* Denning, *supra* note 4, at 998-99 (noting that a "problem with [dormant Commerce Clause doctrine] extraterritoriality, at least with Healy's sweeping restatement of the doctrine, was its lack of a limiting principle. Had

courts to strike down "state health and safety regulations that require out-of-state manufacturers to alter their designs or labels."[263] Given *Walsh*, such an unbounded doctrine is unlikely to receive Supreme Court approval.[264]

While Gorsuch's analysis is sound, a detail merits explication. The analysis suggests that, far from constituting a third branch of dormant Commerce Clause jurisprudence, the line of cases from *Baldwin* through *Healy* is just a subset of the first branch:

> The usual telling of the law in this area suggests [the extraterritoriality principle] is one of three separate strands of authority. But a careful look at the holdings in the three leading cases suggests a concern with preventing discrimination against out-of-state rivals or consumers. And given this, one might see *Baldwin* and its progeny as *no more than instantiations of the* Philadelphia *anti-discrimination rule*.[265]

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the [Supreme] Court pressed Healy to its limits, [dormant Commerce Clause doctrine] extraterritoriality could have become a significant restriction on state regulatory power.").

[263] *Epel*, 793 F.3d at 1175.

[264] *Id.*

[265] *Id.*; *see also* IMS Health Inc. v. Mills, 616 F.3d 7, 42-43 (1st Cir. 2010) (Lipez, C.J., concurring) ("[W]hether extraterritoriality is impermissible in every instance, or whether it transgresses the dormant Commerce Clause only when the challenged statute is discriminatory or protectionist in nature, appears to be a relevant consideration." (citation, brackets, and internal quotation marks omitted)); Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 378-80 (6th Cir. 2013) (Sutton, J., concurring) (noting that nondiscriminatory state laws may be invalidated under extraterritoriality principle as articulated in *Healy*, but concluding that, under modern dormant Commerce Clause jurisprudence, it makes no sense to treat extraterritoriality principle as separate from first branch: "Is it possible that the extraterritoriality doctrine, at least as a freestanding branch of the dormant Commerce Clause, is a relic of the old world with no useful role to play in the new? I am inclined to think so. . . . The key point of

Yet if the extraterritoriality rule is simply an "instantiation" of the anti-discrimination rule, then what does the extraterritoriality rule accomplish that is not already accomplished by the anti-discrimination rule? Why weren't the statutes at issue in *Baldwin, Brown-Forman,* and *Healy* simply struck down under the anti-discrimination rule, without the need to spill ink and expend analytic energy developing the extraterritoriality principle? Striking down those statutes under the anti-discrimination rule would have been the shortest "shortcut"[266] of all. Indeed, a prima facie violation of the extraterritoriality principle requires discrimination *plus two other factors* (price control and price-linking)[267] while a prima facie violation of the anti-discrimination rule requires only

today's dormant Commerce Clause jurisprudence is to prevent States from discriminating against out-of-state entities in favor of in-state ones. . . . A law that does not discriminate against interstate commerce, that complies with the traditional requirements of due process and that complies with [other constitutional] limitations, it seems to me, should not be invalidated solely because of an extraterritorial effect."); *id.* at 381 (noting that statutes struck down in *Baldwin*, *Brown-Forman*, and *Healy* all discriminated against out-of-state interests: "All told, 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."). Close reading shows that *Healy* itself used "discriminatory effects" and "extraterritorial effects" interchangeably. *Compare* Healy v. Beer Inst., Inc., 491 U.S. 324, 331 (1989) ("Although the appellant brand owners in *Seagram* had alleged that the New York law created serious *discriminatory effects on their business outside New York*, the Court considered these injuries *too conjectural* to support a facial challenge to the statute . . . ." (emphasis added)), *with id.* at 342 (while *Seagram* stated that "the *extraterritorial effects* of New York's retrospective affirmation statute were *too conjectural* to support [a Commerce Clause] claim," *Brown-Forman* stated, "in light of 20 years of experience with the affirmation laws that proliferated after *Seagram*, that prospective affirmation statutes have such *extraterritorial effects*." (emphasis added)).

[266] *Epel*, 793 F.3d at 1174.

[267] *Id.* at 1173 (noting that Colorado law being challenged lacks "three essential characteristics that mark [*Baldwin*, *Brown-Forman*, and *Healy*]: it isn't a price control statute, it doesn't link prices paid in Colorado with those paid out of state, and it does not discriminate against out-of-staters.").

discrimination.[268] Why would *Baldwin*, *Brown-Forman*, and *Healy* prefer a *longer* shortcut?

The answer suggested by *Epel*, and indicated somewhat more expressly by *American Beverage*,[269] is that there are actually three kinds of inquiry. First is *Pike* balancing, which is the most searching. It asks whether "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[270] Second is the extraterritoriality principle, which is not searching at all. It is a per se rule and has no affirmative defense[271]: If a state statute violates the principle (i.e., if it is a discriminatory, price-linking, price-control statute), it must be invalidated full stop, without any laborious inquiry. Third, in between *Pike* balancing and the extraterritoriality principle is the *Philadelphia* anti-discrimination rule. That rule contemplates a semi-searching sub-inquiry: If a state statute violates the rule (i.e., if it is discriminatory), then it must be invalidated *unless* the state can show that the statute "advances a legitimate local purpose that cannot be adequately served by reasonable

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[268] To be clear, Gorsuch's analysis does not regard the assessment of any of these factors—discrimination, price control, price-linkage—as "searching" or "laborious." Rather, that assessment is formal and straightforward. Only *Pike* balancing is regarded by Gorsuch as "searching" or "laborious." *See id.* at 1172, 1174.

[269] *Am. Beverage Ass'n*, 735 F.3d at 369-70, 376.

[270] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). In *Epel*, Gorsuch described the *Pike* test as a "pretty grand, even 'ineffable,' all-things-considered sort of test" that is not only "unwieldy" but also requires judges to attempt to "compare wholly incommensurable goods for wholly different populations (measuring the burdens on out-of-staters against the benefits to in-staters)." *Epel*, 793 F.3d at 1171. Justice Scalia likewise criticized the test for requiring courts to make commensurate matters that are inherently incommensurate, like asking "whether a particular line is longer than a particular rock is heavy." Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

[271] *See supra* note 46 and accompanying text.

nondiscriminatory alternatives."[272] In other words, establishing that justification-based defense[273] inherently draws the court and parties into something of a laborious exercise, though it is narrower in scope than *Pike* balancing. The Sixth Circuit in *American Beverage* noted expressly that, while the anti-discrimination rule does have the above-described defense,[274] the extraterritoriality principle does not and hence involves no searching inquiry at all.[275] Putting all three together, the Gorsuch analysis contemplates that, against the backdrop of *Pike*'s "more searching inquiry," the *Philadelphia* anti-discrimination rule is a per se rule with a defense that involves a semi-searching sub-inquiry, and the extraterritoriality principle is a per se rule that involves no searching inquiry whatsoever.

So, what does the extraterritoriality principle accomplish that is not already accomplished by the anti-discrimination rule? As the Gorsuch analysis noted, per se rules apply only in cases where specific factors create a "certainty" of liability. [276] The extraterritoriality principle eliminates any searching inquiry by ensuring "certainty" of liability, and it accomplishes that "certainty" by requiring the presence of two factors *additional to* the discrimination required by the anti-discrimination rule: price control and price-linking. By requiring those two additional factors, the extraterritoriality principle ensures such "certainty" of a dormant Commerce Clause violation that no searching inquiry—no laborious analysis—is necessary.

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[272] Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 328 (2008); *see supra* note 46 and accompanying text; *see also Epel*, 793 F.3d at 1171-72 (discriminatory statute must be invalidated unless "justified by a factor unrelated to economic protectionism").

[273] *See supra* note 47 (citing cases that characterize the "unless" clause of anti-discrimination rule as state's "defense").

[274] Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 370 (6th Cir. 2012).

[275] *Id.* at 376; *supra* note 141.

[276] *Epel*, 793 F.3d at 1174.

A glimmer of the Gorsuch analysis in *Epel* appears in the Supreme Court's *Wayfair* decision.[277] More specifically, *Wayfair* supports the proposition that only discriminatory state statutes can violate the third branch—that is, that the third branch is simply an "instantiation" of the first branch, to use *Epel*'s language.[278] In *Wayfair*, the Court stated that the modern doctrine of the dormant Commerce Clause rests on "*two* primary principles"—the anti-discrimination rule and the *Pike* balancing test.[279] The decision conspicuously fails to identify the extraterritoriality principle as a *third* primary principle. Instead, the Court stated that the two primary principles are subject to "exceptions and variations"[280] and cited two cases as examples: *Hughes*[281] and *Brown-Forman*.[282] But since *Hughes* recognized the market-participant "exception" to the dormant Commerce Clause,[283] it would appear that *Wayfair* regarded *Brown-Forman*'s holding as a "variation." But a "variation" of what? Surely it is not a variation of the *Pike* balancing test; no precedent refers to *Brown-Forman*'s holding or to the extraterritoriality principle as a variant of the *Pike* test. So, it would appear, simply by process of elimination, that *Wayfair*, as *Epel*, relegated the extraterritoriality principle to the status of a mere "variation" on the anti-discrimination rule—suggesting implicitly, as *Epel* did explicitly, that

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[277] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).

[278] *See Epel*, 793 F.3d at 1173.

[279] *Wayfair*, 138 S. Ct. at 2090-91.

[280] *Id.* at 2091.

[281] Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

[282] *See supra* Part I.A.2.

[283] *Hughes* and progeny held that where a state acts as a market participant (e.g., as a purchaser of goods) rather than as a regulator, the state may favor in-state over out-of-state entities without violating the dormant Commerce Clause. *See, e.g.*, Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337, 339 (2008) (noting "'market-participant' exception to the dormant Commerce Clause limit on state regulation" and citing *Hughes*, 426 U.S. at 810).

a nondiscriminatory state law cannot violate the extraterritoriality principle.

B. THE SUPREME COURT'S UPCOMING DECISION IN *NATIONAL PORK PRODUCERS*

How the Supreme Court will rule in *National Pork Producers*, or even what issues it will reach, cannot be readily determined from the certiorari filings or from the merits briefing. Nonetheless a few points about the case are worth making, after a brief summary of the facts.

California's Proposition 12, a ballot measure that passed in 2018 and took effect in 2022, prohibits the in-state sale of pork derived from sows whose housing did not conform to California's special requirements.[284] California accounts for a substantial percentage of the national pork market (13%) but for a much smaller percentage of national pork production. [285] Few commercially bred sows are housed in facilities that meet California's requirements, and California imports over 99% of its pork.[286] Petitioners, associations representing pork producers and farmers, assert that because of the nature and costs of pork production, Proposition 12 forces out-of-state manufacturers to comply with California regulations throughout its production chain: "The massive costs of complying with Proposition 12 fall almost exclusively on out-of-state farmers. And because a single pig is processed into cuts that are sold nationwide in response to demand, those costs will be passed on to consumers everywhere, in countless transactions having nothing to do with California."[287] Petitioners sued to enjoin enforcement of the law, claiming that it violated the *Pike* balancing test and the extraterritoriality principle; apparently because the law did not favor

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[284] Petition for a Writ of Certiorari at *i, Nat'l Pork Producers Council v. Ross, No. 21-468 (U.S. Sept. 27, 2021), 2021 WL 4480405, at *i.

[285] *Id.*

[286] *Id.* at *2.

[287] *Id.* at *i.

in-state over out-of-state pork producers, but rather applied evenhandedly to all pork producers, Petitioners made no claim under the anti-discrimination rule.[288] The district court dismissed the complaint for failure to state a claim, and the Ninth Circuit affirmed.[289]

If the Court reaches the claim under the extraterritoriality principle, it will have the opportunity to address the issue of whether *Walsh* limited the principle to price-affirmation statutes. That issue was raised head-on by both parties at the certiorari phase and in the merits briefing. The Court could also reach the issue of whether Proposition 12—assuming that it controls a transaction outside of California, namely, pig confinement—controls commerce occurring "wholly" outside of California if the pig confined outside of California ends up being sold as pork within California. The issue, in other words, is whether the transaction constitutes commerce "wholly" outside of California if the pig at issue is part of a stream of commerce that enters California in the form of pork meat. The Court could further reach the issue of whether a nondiscriminatory state law—which Proposition 12 undisputedly is—can *ever* violate the extraterritoriality principle. As noted above, *Epel* and *Wayfair* both suggest that it cannot, and providing clear guidance that the boundaries of this doctrine are not porous could bring order to the doctrinal morass in the lower courts.

Then again, the extraterritoriality claim may not be reached, as the Court could resolve the entire case on *Pike* balancing grounds. Although most state laws survive *Pike* balancing, some do not; indeed, the statute in *Pike* itself did not survive. Thus, the Court could conceivably hold that Proposition 12's burden on interstate

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[288] Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1025-26, 1028, 1032 (9th Cir. 2021).

[289] *Id.* at 1025.

commerce—impose new farming methods on out-of-state pork producers—is excessive compared to the local benefit of barring sale of meat from animals that, prior to slaughter, were raised in cramped quarters.

C. THE EXTRATERRITORIALITY PRINCIPLE IN ACTION

Individually and collectively, the divisions among the courts raise an issue of critical importance: Does the extraterritoriality principle—when used in accordance with the *Healy* dicta and without the constraints held necessary by the Seventh, Ninth, and Tenth Circuits—give federal courts[290] an unduly powerful weapon with which to neutralize state legislative authority?

It is ironic and sobering that, of the two per se rules, the anti-discrimination rule permits the state a justification-based defense for the challenged statute, *but the extraterritoriality principle does not*. The anti-discrimination rule represents the value—avoidance of economic protectionism—that is, and has always been, at the heart of the dormant Commerce Clause. But the extraterritoriality principle (as articulated in the *Healy* line of cases) represents a value—state autonomy—distant from that heart.[291] Thus, if any branch of the dormant Commerce Clause should be absolute and have no affirmative defense at all,[292] it should be the anti-discrimination rule. For why permit a justification-based defense when the statute offends the core value underlying the dormant Commerce Clause? And if any branch should contemplate a justification-based defense, it is the extraterritoriality principle. For why *not* permit a justification-based defense when the statute does not offend that core value?

On top of that irony is the increasing tendency of federal courts to apply the extraterritoriality principle even absent the three factors

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[290] *See infra* Part C.
[291] *See supra* text accompanying notes 115-117.
[292] *See supra* note 46 and accompanying text.

(price control, price-linking, and discrimination) that the Gorsuch analysis suggested must be present before the extraterritoriality principle can invalidate a state law.[293] That tendency is concerning. It is crucially important that courts limit application of the extraterritoriality principle to cases where those three factors are present. The doctrinal balance described by the Gorsuch analysis—that the extraterritorial principle eliminates any searching inquiry, whether under the first branch's defense or the second branch's balancing test, *provided* all three factors are present—is not *just* a "shortcut": The doctrinal balance also eliminates the government's ability to make a justification-based defense of the challenged statute (an ability that the government continues to have under the anti-discrimination rule). Because states today are so economically interconnected, and out-of-state transactions are therefore especially likely to cause in-state harms, the state's need for legislation to address those harms is at its apex. And the state's ability to justify such legislation is also at its apex. Yet federal courts' misuse of the *Healy* dicta—their determination to apply the extraterritorial principle absent the three critical factors—*destroys* each state's ability to make its case for the challenged legislation.

For example, if a state statute that *is* discriminatory is challenged under the extraterritoriality principle, then the challenge, by the challenger's unilateral pleading choice to make *no* claim under the anti-discrimination rule, forecloses the state from making a justification-based defense, though the state has at least some

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[293] *See, e.g.*, Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664 (4th Cir. 2018) (invalidating Maryland price-gouging statute under extraterritoriality principle, even though statute is nondiscriminatory, is not price-control statute, and does not link in-state to out-of-state prices); Ass'n for Accessible Meds. v. Bonta, 562 F. Supp. 3d 973 (E.D. Cal. 2021) (invalidating California statute regulating pay-for-delay agreements under extraterritoriality principle, even though statute is nondiscriminatory, is not price-control statute, and does not link in-state to out-of-state prices, *modified*, 2022 WL 463313 (E.D. Cal. Feb. 15, 2022).

protection if the other two factors identified by the Gorsuch analysis (besides discrimination) are present. And if a state statute that is *not* discriminatory is challenged under the extraterritoriality principle, then the state faces a problem even bigger than the foreclosure of an opportunity to make a defense: It faces liability when the extraterritoriality principle, properly understood, should never have been applied to it in the first place.

Application of the extraterritoriality principle absent the three critical factors identified in the Gorsuch analysis tilts the federal-state equilibrium decidedly against the states. It vastly increases federal courts' power to neutralize each state's authority to enact health-and-safety legislation pursuant to long-established police powers. That, by some odd twist of jurisprudential evolution, the extraterritoriality principle contemplates no affirmative defense, and thus is absolute, proves that the principle—when applied in the absence of the three factors—is an unconstrained, excessively dangerous weapon for federal courts to wield against state legislatures.

And let there be no doubt: Use of the extraterritoriality principle to void state laws is almost exclusively a federal-court phenomenon. Research reveals no state-court decisions invalidating a state statute under *Healy*'s extraterritoriality principle,[294] with one insignificant exception.[295] Moreover, a review of all state-court decisions mentioning *Healy* shows that, while decisions of lower state courts have been known to invalidate state statutes under *Healy*'s extraterritoriality principle, those decisions are always reversed on

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[294] This assessment excludes state-court invalidations that were reversed on appeal or that voided non-statutory (i.e., judicial) acts (like injunctions and class-certification orders).

[295] The exception was a non-citable and largely unintelligible decision that—inverting the doctrine of constitutional avoidance—bypassed a dispositive statutory issue in order to reach the constitutional question and that has been called into question by the Ninth Circuit's subsequent decision in *Eleveurs* (*supra* Part I.A.1 at pp. 270-71).

appeal.[296] The reason is not hard to fathom; at their highest levels, state judiciaries are deferential to state legislation safeguarding the health and safety of state citizens. It also bears noting that the vast majority of decisions mentioning *Healy*, *Walsh*, or the dormant (or negative) Commerce Clause are from federal courts; only three state-court decisions have ever even considered the interaction of *Healy* and *Walsh*, and all upheld the statute challenged under the dormant Commerce Clause.[297] Ultimately, what emerges from this analysis is that the use of the principle to invalidate state statutes occurs almost entirely in federal court. Thus, besides creating a problem of economic and social consequence, the principle also creates a considerable problem for our federalism.

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[296] *See* Minn. Chamber of Com. v. City of Minneapolis, 928 N.W.2d 757, 766-68 (Minn. App. 2019) (reversing trial court's holding that Minnesota law violated *Healy*'s extraterritoriality principle); MaryCLE, LLC v. First Choice Internet, Inc., 890 A.2d 818, 840-44 (Ct. Special App. 2006) (reversing trial court's decision that Maryland statute violated dormant Commerce Clause and holding that statute does not violate dormant Commerce Clause, including extraterritoriality principle); District of Columbia v. Beretta, U.S.A., Corp., 872 A.2d 633, 656-58 (D.C. 2005) (reversing trial court's conclusion that District of Columbia's statute that imposes strict liability on gun manufacturers violates all three branches of dormant Commerce Clause); Ind. Wholesale Wine & Liquor Co. v. State ex rel. Ind. Alcoholic Beverage Comm'n, 695 N.E.2d 99, 106-08 (Ind. 1998) (holding that intermediate appellate court's decision to invalidate Indiana statute under *Healy* violated principle of constitutional avoidance, and reinstating Commission's reasonable interpretation of statute).

[297] *See* Jamgotchian v. Ky. Horse Racing Comm'n, 488 S.W.3d 594, 610-20 (Ky. 2016) (upholding Kentucky horse-racing regulations against challenge under first and third branches of dormant Commerce Clause); Swanson v. Integrity Advance, LLC, 870 N.W.2d 90, 94-96 (Minn. 2015) (upholding Minnesota payday lending law against challenge under third branch of dormant Commerce Clause); *Beretta*, 872 A.2d at 656-58 (holding that District of Columbia's statute that imposes strict liability on gun manufacturers survives challenge under all three branches of dormant Commerce Clause).

D. A REPLY TO PROFESSOR EPSTEIN: AGREEMENTS AND DISAGREEMENTS

Professor Epstein's accompanying response to this article [298] reflects many areas in which the authors hereof (the "Authors") and Professor Epstein agree, or at least do not materially disagree.

First and foremost, Professor Epstein asserts that the rule of decision to be applied in *National Pork Producers* should be the *Pike* balancing test. The Authors have no objection to that assertion. It would be preferable if, in addition to applying the *Pike* balancing test, the Supreme Court made clear that the extraterritoriality principle should be applied only in the three limited circumstances discussed by then-Judge Gorsuch in *Epel*. But even if the Supreme Court applies the *Pike* balancing test without mentioning the extraterritoriality principle, the Supreme Court's implicit rejection of the extraterritoriality principle as a rule of decision will still be clear enough to astute observers. Indeed, if *Wayfair* is any indication, it may well be that the Supreme Court going forward will simply view the extraterritoriality principle as a "variation" of the anti-discrimination rule, [299] and will have no cause to apply the extraterritoriality principle where, as in *National Pork Producers*, there is no first-branch claim.

Second, Professor Epstein takes issue with the criticism leveled by Justice Scalia *et al.* at the dormant Commerce Clause in general, and the *Pike* balancing test in particular. It was for the sake of completeness that the Authors mentioned that criticism; for the same reason, the Authors also mentioned the Supreme Court's holding in *Tennessee Wine & Spirits Retailers* that the dormant Commerce Clause is here to stay, as explained in Justice Alito's opinion for the Court in that case. [300] Nothing in the Scalian criticism of the dormant

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[298] Epstein, *Market Competition*, *supra* note 2.

[299] *See supra* Part I.A.3.

[300] *See supra* note 19 (quoting Justice Alito's opinion for Court in *Tennessee Wine & Spirits Retailers*).

Commerce Clause or the *Pike* balancing test is necessary to, or even part of, this article's thesis, which is that the extraterritoriality principle, if not limited per the Gorsuch analysis in *Epel*, presents a significant danger to our federalism.

Third, after stating the uncontroversial proposition that *Baldwin* was a discrimination case, Professor Epstein goes on to state that *Brown-Forman* was also an (implicit) discrimination case.[301] The Authors agree. In fact, it was because *Brown-Forman* was a discrimination case that then-Judge Gorsuch's opinion in *Epel* limits application of the extraterritoriality principle—as it emerged from *Brown-Forman* and its offspring *Healy*—to discrimination cases.[302]

Finally, Professor Epstein acknowledges that the dormant Commerce Clause cannot "be read to prevent every form of regulation because in practice it has negative effects on out of state firms."[303] The Authors agree—the only issue being whether the extremely broad language of *Brown-Forman* and *Healy* gives lower courts carte blanche to indulge in exactly the reading that Professor Epstein would forbid. Over that question, Professor Epstein loses no sleep[304] while the Authors suffer insomnia unrelenting.

The main area of disagreement lies in Professor Epstein's suggestion that *Brown-Forman* and *Healy* "do not represent any breaking trend in Supreme Court case law, and *properly analyzed* they do not pose any great peril to federalism."[305] The problem is that lower courts have *not* "properly analyzed" *Brown-Forman* and *Healy*. Lower courts have fashioned, out of extremely broad language in

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[301] Epstein, *Market Competition*, *supra* note 2 (manuscript at 22).

[302] *See* Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1173 (10th Cir. 2015); *supra* Part IV.A.3.

[303] Epstein, *Market Competition*, *supra* note 2 (manuscript at 51-52).

[304] *Id.* (manuscript at 30) ("I can see no dangerous growth potential from *Brown-Forman* . . . ").

[305] *Id.* (manuscript at 22) (emphasis added).

both cases, a third branch of the dormant Commerce Clause—the extraterritoriality principle—that has been applied without any of the limits recognized in then-Judge Gorsuch's *Epel* opinion. As a result, that third branch has enabled lower courts to invalidate state laws that are not discriminatory[306] and whose only vice, to use Professor Epstein's language, is that they have "negative effects on out of state firms."[307] It bears noting that, contrary to Professor Epstein's response, the three-branch division of dormant Commerce Clause doctrine is described in the case law; it is not a construct of the Authors.[308] Nor was the third branch "add[ed]" by the Authors. It, too, was added, as well as described, by the courts.[309]

Part of the problem may be that, in order to move quickly to the prescriptive point, Professor Epstein passes too quickly over the Authors' descriptive point. The Authors' descriptive point is that lower courts have, in fact, fashioned a third branch, which permits invalidation of nondiscriminatory state laws simply because those laws have out-of-state effects. Professor Epstein, moving quickly past that point, simply asserts that *Brown-Forman*—the font from which the extraterritoriality principle sprang—"*should be* discussed as forms of implicit discrimination covered by *Pike*."[310] Note the prescriptive "should." How *Brown-Forman is* discussed, and how it *should be* discussed, are two different things. Professor Epstein's prescriptive point glosses over an important, stubborn reality: *Brown-Forman* is *not* being discussed by lower courts as a "discrimination [case] covered by *Pike*." Instead, it is being discussed

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[306] *See supra* Part E.

[307] Epstein, *Market Competition*, *supra* note 2 (manuscript at 52).

[308] *Id.* (manuscript at 21); *supra* Part C.

[309] Epstein, *Market Competition*, *supra* note 2 (manuscript at 22); *supra* Part I.A.3 (citing, *e.g.*, Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1172 (10th Cir. 2015); Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 667-68 (4th Cir. 2018); Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1027-28 (9th Cir. 2021); Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 373 (6th Cir. 2013)).

[310] Epstein, *Market Competition*, *supra* note 2 (manuscript at 22) (emphasis added).

by lower courts as the source (along with *Healy*) of the extraterritoriality principle, applied without any of the limits set forth in *Epel*. The Authors extensively explore that reality and hence are more disturbed by it than is Professor Epstein.

Professor Epstein makes light of *Brown-Forman*'s expansion of the relevant prohibition from discrimination to direct regulation.[311] But that expansion was verbally exponential, giving federal courts vastly greater power—with relatively few inherent limits—to invalidate state laws than they had previously been given by the modern doctrine of the dormant Commerce Clause. Nor was that expansion consistent with the historical understanding of the dormant Commerce Clause as a bar to laws that discriminate, not to laws that simply have out-of-state effects. It may be that Professor Epstein trusts federal courts to use that ballooning power wisely; or perhaps he is less concerned about unwise use of that power, on the theory that the gains from the extra federal firepower will outweigh any harms. Either way, the Authors are less willing to load up federal judges with weapons for shooting down state laws that have out-of-state effects. The addition of the word "direct" to the word "regulation" does little to assuage the Authors' concerns.

Professor Epstein contends that the effectiveness of the *Pike* balancing test "will be blunted if it is applied only to 'price affirmation' cases."[312] This article, however, argues that the extraterritoriality principle *and not the* Pike *balancing test* should be limited to price-affirmation cases. Contrary to Professor Epstein's contention, the Authors think it clear that, as a matter of plain doctrinal formulation, the *Pike* balancing test and the extraterritoriality principle are not interchangeable and that neither is a component of the other. Professor Epstein refers to "extended

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[311] *Id.* (manuscript at 29).
[312] *Id.* (manuscript at 2) (article's Abstract).

Pike cases,"[313] apparently meaning that *Pike* should be understood to control price-affirmation cases. But it is important to make clear that the price-affirmation cases formed an entirely different doctrinal line than *Pike* did. Indeed, the extraterritoriality principle emerged from *Brown-Forman*'s misreading of *Baldwin*, and from *Healy*'s development of *Brown-Forman*; it did not emerge from *Pike*. The holding of neither *Brown-Forman* nor *Healy* rested on *Pike*; *Brown-Forman* mentioned *Pike* only in passing, and *Healy* ignored *Pike* completely. Thus, it cannot possibly be the *holdings* of *Brown-Forman* and *Healy* that are subsumed by *Pike*. To the extent Professor Epstein is arguing that the *Pike* balancing test should be applied to price-affirmation *fact patterns*, that is all well and good—but it is the broad holdings, not the fact patterns, of these two price-affirmation cases that are so troubling. Professor Epstein's attention to the fact patterns does little to address those problematically broad holdings.

Finally, a critical element of *Pike* balancing, as Professor Epstein notes, is the opportunity for the state whose law is being challenged to present a justification.[314] But the extraterritoriality principle does not permit the state any justification-based defense at all.[315] That lack of permission is not the Authors' invention; it is clear in the case law. The consequence is that there is *nothing to balance* once the court, applying the extraterritoriality principle, finds that the statute regulates commerce occurring outside the state. When that extraterritorial effect is found, the discussion ends, without any possibility of justification. That foreclosure of justification is the antithesis of *Pike* balancing. In short, any version of the extraterritoriality principle that does not include the limits set forth by then-Judge Gorsuch in *Epel* seems to the Authors to be wholly inconsistent with *Pike* balancing. The Authors, therefore, are at a loss as to how Professor Epstein can simultaneously embrace both the

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[313] *Id.* (manuscript at 42).
[314] *See, e.g.*, *id.* (manuscript at 42-43, 49-50).
[315] *See supra* Parts I.A.3, I.A.2, C.

Pike balancing test and the extraterritoriality principle emerging from *Brown-Forman* and *Healy*.

CONCLUSION: THE EXTRATERRITORIALITY PRINCIPLE, IN RETROSPECT AND PROSPECT

As many childhood fables can attest, a dormant power that lies sleeping beneath the surface has the potential to rise up and wreak havoc in the land. With the dormant Commerce Clause, what lies dormant is the federal government's commerce power. And yet today, the yawning beast is the judiciary's reliance on this unexercised power as an excuse to strike down state laws. What is at risk of being devoured in the jaws of this beast is federalism—the right of states to exercise their police powers to govern their territory in the best interests of their citizens.

If one looks back over the last century of dormant Commerce Clause jurisprudence, a key point emerges. The dormant Commerce Clause—if used improvidently, without regard to breadth of language or to the Constitution's delicate state-federal balance—can easily be transformed into a tool enabling federal courts to invalidate state statutes at will. That transformation happened in the *Lochner* era, until the discrediting of *Lochner*-style judicial supremacy and the rise of judicial restraint combined to narrow the dormant Commerce Clause into the modern, two-branch formulation.

Just as the transformation could happen then, so too it can happen now. In two decisions from the late 1980s, the Supreme Court extracted language from *Baldwin*, a 1935 decision invalidating a statute as impermissibly protectionist, and used that language to fashion a principle having nothing to do with protectionism. That triad of cases—*Baldwin*, *Brown-Forman*, and *Healy*—gave rise, particularly through dicta in *Healy*, to the extraterritoriality principle. The extraterritoriality principle has taken on a life of its own and has come to be used by federal courts to void even nondiscriminatory statutes. With the rise of the third branch, the dormant Commerce

Clause has now morphed from a narrow anti-discrimination rule into a broad limit on state power.

Now that certiorari has been granted in *National Pork Producers*, the Supreme Court has the opportunity to curtail the damage caused, and to be caused, by the extraterritoriality principle. Most important, the case must be resolved with great sensitivity to bedrock principles of federalism. Otherwise, we risk raising the Lochnerian specter, and returning to an era in which the federal courts liberally strike down vast numbers of state statutes reflecting the exercise of legitimate police powers in the interests of their own citizens.