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Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism

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BEYOND THE REACH OF STATES: THE DORMANT COMMERCE CLAUSE, EXTRATERRITORIAL STATE REGULATION, AND THE CONCERNS OF FEDERALISM

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BEYOND THE REACH OF STATES: THE DORMANT COMMERCE CLAUSE, EXTRATERITORIAL STATE REGULATION, AND THE CONCERNS OF FEDERALISM

I. INTRODUCTION

The Commerce Clause of the United States Constitution provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Interpreting this explicit grant of power to Congress, the Supreme Court has long recognized the existence of an implied limitation on the power of a state to legislate in areas of interstate commerce when Congress has remained silent. Under what is referred to as the negative or "dormant" Commerce Clause, the federal courts have thus scrutinized state legislation for well over one hundred years.

In the past several decades, countless articles and numerous concurring and dissenting opinions have addressed the issues involved with the use of the Commerce Clause to strike down state legislation. Like many of those materials, this Comment generally disagrees with an expansive use of the Commerce Clause as a vehicle to invalidate state legislation. Unfortunately, the abundance of criticism of the United States Supreme Court's current approach to restraining state legislation has yielded no solution to the mounting problems faced by state legislatures, law students, counselors, and those on the bench in discerning any sense of modern dormant Commerce Clause jurisprudence. In fact, the courts have recently struck out at state legislation to a greater degree by adding the extraterritoriality principle to the dormant Commerce Clause analysis. Under this principle, a variety of state regulations dealing with waste disposal, college athletics, price affirmation, tender offers, and the Internet have been invalidated on the grounds that the regulations had effects beyond the borders of the enacting state. The rationale for the decisions of the federal courts in this regard is not clear.

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1. U.S. CONST. art. I, § 8, cl. 3 (emphasis added). The Supreme Court has broadly defined the term "commerce." In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), for example, Chief Justice Marshall stated that "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse." Id. at 189 (emphasis added). By this, he meant that commerce "describes the commercial intercourse between nations, and parts of nations, . . . in all its branches, and is regulated by prescribing rules for carrying on that intercourse." Id. at 189-90; see generally Randy E. Barnett, The Original Meaning of the Commerce Clause, 68 U. CHI. L. REV. 101, 146 (2001) (reviewing the historical definitions of "commerce" and concluding that the term "means the trade or exchange of goods (including the means of transporting them")


3. The term "dormant" has been used to connote the fact that Congress has not acted. Julian N. Eule, Laying the Dormant Commerce Clause to Rest, 91 YALE L. J. 425, 425 n.1 (1982). Although the terms "negative" and "dormant" may be, and have been, used interchangeably, this Comment will use only the latter in the interest of consistency.


5. Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 639 (9th Cir. 1993).


In light of the considerable federalism concerns involved with striking down state legislation, it is imperative that the courts and the legal community understand the implications of such a methodology. Consequently, this Comment will begin by examining the dormant Commerce Clause jurisprudence in detail. It will review the historical underpinnings of the dormant Commerce Clause in an effort to discover the underlying concerns of the federal courts concerning state legislation. This Comment will then examine not only the various facets of the modern dormant Commerce Clause jurisprudence, but also the many challenges to the current methodology. Surveying the dormant Commerce Clause jurisprudence in this manner will reveal that it is ailing and, more importantly, that it serves as a poor host for the extraterritoriality principle.

After reviewing the dormant Commerce Clause jurisprudence and exposing the underlying concerns of the courts concerning state legislation that is either discriminatory or protectionist in nature, this Comment will explore the extraterritoriality principle. It will review the Supreme Court cases decided in the 1980s, which suggested that the federal courts should analyze the extraterritoriality principle under the rubric of the dormant Commerce Clause. This Comment will then expose the problems with such an approach by examining a number of lower federal court decisions considering state initiatives having extraterritorial effects.

The discussion section of this Comment will further address the problems inherent with the use of the extraterritoriality principle under a dormant Commerce Clause framework. It will conclude that such an approach unduly endangers state legislation, particularly in today’s modern commercial environment. Moreover, the discussion section will attempt to expound upon the underlying concerns with extraterritorial state legislation. Finally, this Comment will briefly propose a more practical scheme for analyzing statutes with extraterritorial effects that does not jeopardize the viability of innovative state legislation to the extent that the current approach does.

The objectives of this Comment are not only to argue in favor of separating the extraterritoriality principle from the dormant Commerce Clause, but also to strike a delicate balance between ensuring that states act within their respective spheres and allowing them the opportunity to respond to pressing social problems with innovative legislative initiatives. Most importantly, however, this Comment seeks to shed light on the extraterritoriality principle in order to achieve not only a greater level of understanding, but also more predictable decisions. Difficult as the task may be, it is imperative that the extraterritoriality principle be clarified, for, as one commentator has expressed, “clarity is a virtue that cannot be valued too much in constitutional law.”

II. DEVELOPMENT OF THE DORMANT COMMERCE CLAUSE AS A VEHICLE TO INVALIDATE STATE LEGISLATION

The Constitution does not explicitly provide that states are limited in their capacity to legislate matters involving interstate commerce. In the absence of

9. Mark Tushnet, Rethinking the Dormant Commerce Clause, 1979 WIS. L. REV. 125, 150. See also Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 464 (1897) (“By ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought.”).

any clear assertion within the Commerce Clause for the notion that states are so limited, the Court has looked to the intent of the Framers of the Constitution for such support.\textsuperscript{11} Unfortunately, this task has proved exceptionally difficult because those who were present at the Constitutional Convention spent very little time explaining their specific intentions in drafting the Commerce Clause. The Court, in \textit{H.P. Hood & Sons v. Du Mond},\textsuperscript{12} noted this glaring omission and defended the Framers on the ground that, at the time of the Constitutional Convention, the need for a clause ensuring free trade was “so obvious and so fully recognized” that it hardly required exposition.\textsuperscript{13} As a result, for more than a century, the federal courts have inferred the Framers’ intent by considering the events that made the Convention necessary.\textsuperscript{14} Specifically, the Court has looked to the turmoil under the Articles of Confederation and the “tendencies toward economic Balkanization that had plagued relations among the Colonies” to justify its reading of an implied limitation on state power under the Commerce Clause.\textsuperscript{15} Writing for the Court in a 1949 decision, Justice Jackson described the interaction among the new states during the era immediately following the American Revolution as follows:

\begin{quote}
[A] drift toward anarchy and commercial warfare between the 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.”\textsuperscript{16}
\end{quote}

Essentially, the states instituted trade barriers and regulations designed to protect their own interests to the injury and disadvantage of those states and interests that had no voice in the political processes of the enacting state.\textsuperscript{17}

Arguably, the concern over the protective measures undertaken by the individual state, coupled with the very convening of the Constitutional Convention to rectify such state actions, provide the basis for the inference that the Framers intended the Commerce Clause to be construed as a significant source of congressional power.\textsuperscript{18} Such a strong national power would enable Congress to regulate

\textsuperscript{11} See Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935) (“[A] chief occasion of the commerce clauses was ‘the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.’”) (citations omitted); see also \textit{H.P. Hood & Sons, Inc. v. Du Mond}, 336 U.S. 525, 532 (1949).
\textsuperscript{12} 336 U.S. 525 (1949).
\textsuperscript{13} Id. at 534.
\textsuperscript{14} E.g., Eule, \textit{supra} note 3, at 430.
\textsuperscript{15} Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979).
\textsuperscript{16} H.P. Hood & Sons v. Du Mond, 336 U.S. at 533 (quoting \textit{Joseph Story, Commentaries on the Constitution of the United States} §§ 259-60 (3d ed. 1858)).
\textsuperscript{17} \textit{David A.J. Richards, Foundations of American Constitutionalism} 159-61 (1989).
\textsuperscript{18} See id. (noting that James Madison adamantly believed in a strong congressional regulatory power for the new republic); see also \textit{John E. Nowak et al., Constitutional Law} 145-46 (2d ed. 1983), in which the authors state:

[History demonstrates] two general concerns for the drafting of the Constitution in general and the commerce clause in particular: (1) the power must have been meant to put an end, either in itself or through federal legislation, to the trade barriers and tariffs which had led to the economic problems during the preceding period; (2) the national power must have been intended to be broad enough to deal with the type of economic problems of the nation as a unit.
trade among the states in such a way as to ensure the solidarity of the new nation.\textsuperscript{19} However, the drafters of the Constitution did not forget to provide the states with their own innate powers. Indeed, the Tenth Amendment specifically provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."\textsuperscript{20} This catch-all provision effectively ensures that the federal and state governments will coexist, each within their own respective spheres. Beyond the powers specifically granted to Congress\textsuperscript{21} and those specifically denied to the states,\textsuperscript{22} the Constitution does not define the exact rights of the states in our federal system. Consequently, the judiciary has historically assumed the role of defining and limiting the rights of the states. The dormant Commerce Clause doctrine exemplifies one mechanism by which the judiciary has defined the powers of the states to regulate matters involving interstate trade and commercial activity.\textsuperscript{23}

\textbf{A. The Origins and Development of the Dormant Commerce Clause Doctrine}

\textit{1. Traditional Historical Analysis}

The concept that the Commerce Clause may contain within it a "silent" restriction on how far the states may go in regulating interstate commerce surfaced in the early years of our country. As early as 1824, in the case of \textit{Gibbons v. Ogden},\textsuperscript{24} Chief Justice Marshall implicitly identified the restrictions on a state's ability to regulate commerce among the states in the absence of congressional action.\textsuperscript{25} In \textit{Gibbons}, the Court found unconstitutional a New York law authorizing a ferry monopoly to operate between New York and New Jersey due to an impermissible conflict with an act of Congress authorizing coastal vessels to navigate the waters of the United States.\textsuperscript{26} Although the \textit{Gibbons} Court did not find it necessary to decide to what extent a state may regulate commerce, it certainly suggested that the several states have some ability to do so. Noting that the Constitution specifically granted Congress the power to regulate interstate commerce and remained silent as to the power of the states, the Chief Justice stated that the very meaning of the phrase "to regulate" necessarily precludes a state from exer-

\textsuperscript{20} U.S. CONST. amend. X.
\textsuperscript{21} U.S. CONST. art. I, § 8.
\textsuperscript{22} U.S. CONST. art. I, § 10.
\textsuperscript{23} See Richard B. Collins, \textit{Economic Union as a Constitutional Value}, 63 N.Y.U. L. REV. 43, 43 (1988) ("Absent any congressional action, the Court has construed Congress' power to regulate commerce in its dormant state as an important limit on state regulation."); James E. Gaylord, Note, \textit{State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie}, 52 \textit{VAND. L. REV.} 1095, 1106 (1999) ("[T]he Supreme Court has found in the Commerce Clause a fount of power for striking down state legislation which discriminates against or unduly interferes with interstate commerce.").
\textsuperscript{24} 22 U.S. (9 Wheat.) 1 (1824).
\textsuperscript{25} \textit{Id.} at 209-10.
\textsuperscript{26} \textit{Id.} at 239-40.
cising its power concurrently with that of Congress. 27 Yet, Chief Justice Marshall went on to mention in dicta that there might be instances where a state may regulate commerce. 28 Specifically, Marshall opined that states may enact laws so long as such laws do not contradict or interfere with a validly enacted Congressional statute. 29

Chief Justice Marshall further refined the notion that the Commerce Clause may contain a negative aspect just five years later in the case of Willson v. Black Bird Creek Marsh Co. 30 In Willson, the State of Delaware passed an act authorizing the Black Bird Creek Marsh Company to build a dam on Black Bird Creek. 31 When Willson challenged the act on the ground that it authorized the building of a dam that interfered with interstate navigation, the Court upheld the Delaware act because it was not "repugnant to the power to regulate commerce in its dormant state." 32 Marshall reasoned that because Delaware endeavored merely to protect the health of those living near the marsh, the act fell squarely within the state’s province of regulation. 33 Thus, Willson can be read to support the proposition that the states have some power to regulate matters of particular importance to their citizens even though such regulations affect interstate commerce. Despite the Court’s early recognition of the negative implications of the Commerce Clause, the Court did not embrace the doctrine until the mid to late nineteenth century. 34

Early interpretations of the dormant Commerce Clause not only do away with the notion that Congress alone may regulate under Article I, but also evidence a concentration on distinguishing state legislation based on whether the subject of the regulation is “national” or “local” in nature. To illustrate, the seminal case of Cooley v. Board of Wardens 35 recognized the right of states to regulate in areas found to be “local and not national” in the absence of a congressional exertion of power. 36 Determining that a 1789 federal statute clearly authorized state regula-

27. Id. at 209. The Chief Justice wrote:
   It has been contended . . . that, as the word “to regulate” implies in its nature, full
   power over the thing to be regulated, it excludes, necessarily, the action of all others
   that would perform the same operation on the same thing . . . . There is great force in
   this argument, and the court is not satisfied that it has been refuted.

Id.

28. Id. at 209-10.

29. Id.

30. 27 U.S. (2 Pet.) 245 (1829).

31. Id. at 245-46.

32. Id. at 252 (emphasis added).

33. See id. at 251. Marshall stated that such matters are “are undoubtedly . . . reserved to the
   states.” Id.

34. The legal community is in disagreement as to when the Court formally adopted the doc-
   (noting that the doctrine was formally adopted in 1873 in Case of the State Freight Tax, 82 U.S.
   (15 Wall.) 232 (1873)); Eule, supra note 3, at 425 n.1 (1981) (recognizing The License Cases, 46
   U.S. (5 How.) 504 (1847), as the cases of adoption); Earl M. Maltz, How Much Regulation is
   Too Much—An Examination of Commerce Clause Jurisprudence, 50 GEO. WASH. L. REV. 47, 47
   case of formal adoption).

35. 53 U.S. (12 How.) 299 (1851). This case involved an 1803 Pennsylvania law requiring
   boats entering the Philadelphia harbor to hire a “pilot” and a 1789 federal statute authorizing the
   states to regulate guide services. Cooley failed to hire a guide in the harbor in violation of the
   state regulation and was fined. Id. at 311-12.

36. Id. at 319.
tion of pilot services in a port, the Cooley Court held that states may legislate in areas of particularly local concern that do not require a single uniform rule. Focusing its analysis on the subjects of state legislation, the Court reasoned that, although some subjects require a single uniform rule, others demand a "diversity, which alone can meet the local necessities of navigation." Conspicuously absent from the Court's opinion, however, was a suggested means of distinguishing between subjects that are truly local and those that are national. At the turn of the century, the Court replaced the Cooley test because of these difficulties and because of the test's failure to consider a statute's purpose or effect. Despite the inherent limitations of a local-national approach, the states' local interests as well as the concern for uniformity continue to play significant roles in contemporary dormant Commerce Clause cases.

Replacing the local-national scheme in the early part of the twentieth century was another formalistic approach designed to take into account the effects of regulation on interstate commerce. This new test analyzed individual cases in terms of whether a regulation's effect either directly or indirectly impeded the flow of interstate commerce. Employing the direct-indirect analysis, the Court examined several state regulations during the first half of the century to determine whether the effect of the legislation served as a direct burden upon interstate commerce, and therefore exceeded the state's powers of regulation. For example, in Southern Railway Co. v. King, the Court applied the direct-indirect analysis in upholding a Georgia statute requiring railway engineers to blow the locomotive's whistle and to slow at highway crossings. Justice Day concluded that the petitioner failed to

37. Id. at 321. The majority's opinion in Cooley has been referred to as the "Cooley Compromise." The decision avoided a political calamity in that it "simultaneously avoided confrontation with states' rights advocates, yet reserved for the Court the ability to invalidate objectionable state legislation under a theory of partial exclusivity." Martin H. Redish & Shane V. Nugent, The Dormant Commerce Clause and the Constitutional Balance of Federalism, 1987 DUKE L.J. 569, 579 (1987).


41. Id. (Professor Lawrence writes that "[t]he Court's reasoning in Cooley endures, however, in the sense that the resolution of a particular case today will turn in large part on a consideration of the local (state) interest in regulating local affairs as it relates to the national interest in promoting interstate commerce."); see, e.g., CTS Corp. v. Dynamic Corp. of Am., 481 U.S. 69, 88 (1987) (citing Cooley for the proposition that state statutes may be invalidated if they "adversely affect interstate commerce by subjecting activities to inconsistent regulations").

42. See, e.g., S. Ry. Co. v. King, 217 U.S. 524, 531-32 (1910). The Court stated: It has been frequently decided in this court that the right to regulate interstate commerce is, by virtue of the Federal Constitution, exclusively vested in the Congress of the United States. The states cannot pass any law directly regulating such commerce. Attempts to do so have been declared unconstitutional in many instances, and the exclusive power in Congress to regulate such commerce uniformly maintained. While this is true, the rights of the states to pass laws not having the effect to regulate or directly interfere with the operations of interstate commerce, passed in the exercise of the police power of the state in the interest of the public health and safety, have been maintained by the decisions of this court.

43. 217 U.S. 524 (1910).

44. Id. at 531.
establish that the Georgia initiative imposed a direct burden on interstate commerce.\textsuperscript{45} Similarly, in \textit{Di Santo v. Pennsylvania},\textsuperscript{46} the Court considered a 1921 Pennsylvania law requiring a license to sell passenger steamship tickets.\textsuperscript{47} The act also required each applicant for such a license to publish his application in several publications, to prove his good moral character, and to post a $1000 security bond.\textsuperscript{48} Although designed to prevent fraudulent conduct on the part of steamship agents, the Court held that the act violated the Commerce Clause because it imposed a direct burden on interstate commerce.\textsuperscript{49} Over a vigorous dissent from Justices Brandeis and Holmes, and a separate dissent filed by Justice Stone, the majority suggested that a state may not directly interfere with interstate commerce even to further a legitimate state interest.\textsuperscript{50} The direct-indirect analysis also surfaced in \textit{Atchison, Topeka \& Santa Fe Railway Co. v. Railroad Commission},\textsuperscript{51} where the Court considered an order by the California state railroad commission requiring interstate railroad companies to build a passenger station for the convenience of passengers.\textsuperscript{52} Writing for the majority, Chief Justice Hughes determined that the state’s order would only create an incidental burden on the interstate railroad companies.\textsuperscript{53} In any event, the Court found that the track relocation and financial expense necessary to carry out the state’s order did not “unnecessarily or arbitrarily trammel or interfere with the operation and conduct of railroad properties and business.”\textsuperscript{54}

Like the national-local test examined above, the direct-indirect analysis was not without limitations. Unable to adopt a meaningful distinction between statutes that burden interstate commerce directly and those that do so indirectly, the direct-indirect scheme led to unpredictable and somewhat arbitrary decisions.\textsuperscript{55} As a result, the new test failed to garner the undivided support of the Court. In his famous dissent in \textit{Di Santo}, Justice Stone described the analysis employed by the majority in that case as “too mechanical, too uncertain in its application, and too remote from actualities, to be of value.”\textsuperscript{56} Stressing that the purpose of the Com-

\textsuperscript{45} Id. at 537. Justice Day stated that the Georgia law was “only a reasonable police regulation, and not an unlawful attempt to regulate or hinder interstate commerce.” Id.
\textsuperscript{46} 273 U.S. 34 (1927).
\textsuperscript{47} Id. at 35.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 37.
\textsuperscript{50} Id. (“A state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed.”).
\textsuperscript{51} 283 U.S. 380 (1931).
\textsuperscript{52} Id. at 386. The building of the station would also require a relocation of existing tracks. Id. at 387.
\textsuperscript{53} See id. at 396; see also S. Ry. Co. v. King, 217 U.S. 524, 537 (1910) (upholding a Georgia statute regulating the speed of trains at in-state crossings because the law was “only a reasonable police regulation, and not an unlawful attempt to regulate or hinder interstate commerce”).
\textsuperscript{54} Atchison, Topeka \& Santa Fe Ry. Co. v. R.R. Comm’n, 283 U.S. at 395.
merce Clause was “to prevent discrimination and the erection of barriers or obstacles to the free flow of commerce, interstate or foreign,” Stone argued that there are instances where “matters of local concern” necessitate state regulation.\(^{57}\) However, Stone suggested the use of a more “trustworthy formula” that considered “all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce” in discerning whether the state regulation had gone too far.\(^{58}\)

2. Contemporary Dormant Commerce Clause Jurisprudence

In the early 1940s, the Court embarked on a new campaign to “simplify” the dormant Commerce Clause jurisprudence. Purporting to set aside the formulaic national-local and direct-indirect tests of prior eras, the Court opted instead for a more comprehensive approach to determine the constitutionality of state regulation.\(^{59}\) The Court professed to adopt a two-tiered approach that classified state regulations according to whether they directly discriminated against out-of-state interests or regulated evenhandedly, but with indirect effects on interstate commerce.\(^{60}\) The hope with this new approach was to do away with the arbitrary local-national and direct-indirect tests utilized by previous Courts. However, even a cursory review of modern dormant Commerce Clause case law reveals that the Court’s current approach is not as straightforward as it first appears to be.\(^{61}\)

\(\text{\^{57}}\) Id.

\(\text{\^{58}}\) Id.

\(\text{\^{59}}\) See S. Pac. Co. v. Arizona, 325 U.S. 761, 770-71 (1945). Chief Justice Stone, endorsing a pragmatic balancing approach, stated:

[T]he matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference.

Id. (emphasis added).

\(\text{\^{60}}\) Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 578-79 (1986). The Court described the current test as follows:

When a 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 statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State’s interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Id. at 579 (citations omitted).

\(\text{\^{61}}\) See West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 210 (1994) (Scalia, J., concurring) (referring to the current status of the dormant Commerce Clause as a “quagmire”); Am. Trucking Ass’ns v. Smith, 496 U.S. 167, 201-03 (1990) (Scalia, J., concurring) (expressing dissatisfaction with the current dormant Commerce Clause jurisprudence and stating that “no [other] body of our decisional law has changed as regularly”); Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting) (arguing that the plurality decision of the Court offered no guidance to future courts and that the “jurisprudence of the ‘negative side’ of the Commerce Clause remains hopelessly confused”). See also Maltz, supra note 34, at 55; Eule, supra note 3, at 428. See generally Redish & Nugent, supra note 37 (arguing that the dormant Commerce Clause is completely without textual justification).
spective of its purpose, the modern approach is saturated with the language, methodologies, and fundamental concerns of prior eras.62

Modern cases evidence a focus towards a statute’s purpose and effect as well as a clear disdain for statutes that discriminate against interstate commerce in favor of in-state interests.63 The Court has recently defined discrimination against interstate commerce as the “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”64 As recently stated by the Court, statutes that discriminate against out-of-state commerce tend to “excite those jealousies and retaliatory measures the Constitution was designed to prevent.”65

Contemporary dormant Commerce Clause jurisprudence also reveals the modern Court’s reasonable concern with the process of state regulation.66 In this respect, the dormant Commerce Clause seeks to ensure adequate political representation. In the often-quoted words of Justice Cardozo, the Constitution was created in order to ensure that the “peoples of the several states [would] sink or swim together,” and that national uniformity would prevail over division.67 Thus, where a state statute undermines this essential premise by unreasonably favoring the economic interest of an in-state entity or individual over one from out-of-state, a court will subject the statute to a rigorous judicial examination.68 The Court has adequately articulated the rationale behind such a critical examination by noting that out-of-state individuals or entities may have little opportunity to voice their objection to a proposed regulation in the legislature of the enacting state.69

The hallmark of the modern dormant Commerce Clause jurisprudence is the Court’s use of different levels of scrutiny in examining state legislation. The Court

62. See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. at 579 (indicating that the focus of the modern analysis is on not only the direct and indirect effects of the statute, but also the local interests involved); Lawrence, supra note 40, at 410 (“The Court’s reasoning in Cooley endures... in the sense that the resolution of a particular case today will turn in large part on a consideration of the local (state) interest in regulating local affairs...”) (emphasis added); see also West Lynn Creamery, Inc. v. Healy, 512 U.S. at 192 (noting that the focus of the dormant Commerce Clause is on statutes that discriminate against interstate commerce and merely “benefit in-state economic interests by burdening out-of-state competitors”).

63. West Lynn Creamery, Inc. v. Healy, 512 U.S. at 201 (stating that recent cases “have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects”); Or. Waste Sys., Inc. v. Dep’t of Envtl. Quality, 511 U.S. 93 (1994). This Comment does not attempt to enter into the debate over whether the dormant Commerce Clause is concerned with discriminatory or protectionist state legislation. Compare Catherine Gage O’Grady, Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause, 34 San Diego L. Rev. 571, 575-76 (1997) (arguing that the focus of the courts in analyzing the validity of state statutes should be on whether the statute impermissibly protects the economic interests of the residents of the state enacting the statute), with Mark P. Gergen, Territoriality and the Perils of Formalism, 86 Mich. L. Rev. 1735, 1740-41 (1988) (arguing that the focus of the courts in the dormant Commerce Clause analysis should be on “state laws of disutility,” that is, “laws that enrich states but at the greater expense to out-of-staters or the nation”).


66. See Lawrence, supra note 40, at 411-13.


69. See S. Pac. Co. v. Arizona, 325 U.S. 761, 767-68, 767 n.2 (1945). The Court wrote: “[T]he Court has often recognized that to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.” Id. at 767 n.2.
will apply either a rule of per se invalidity to discriminatory statutes or a balancing approach that affords state legislatures some deference. Recent case law also demonstrates that the Court prefers a heightened level of judicial intervention and balancing of local and national interests. However, the Court appears to have considerable difficulty defining the precise level of scrutiny to be applied to individual cases. Unfortunately for those desiring to find any rhyme or reason to the Court's modern decisions, identifying the appropriate level of scrutiny is perhaps the most critical element in the dormant Commerce Clause analysis. As one commentator has noted, defining the appropriate standard is "essentially . . . outcome determinative." The Court's difficulty in this regard has thus prompted a warranted flurry of criticism from commentators and judges alike. As the following discussion elucidates, the Court has created what amounts to three separate levels of scrutiny under the dormant Commerce Clause. Essentially, the Court has distinguished between statutes that facially discriminate against interstate commerce, those that discriminate against interstate commerce in purpose or effect, and those that are facially neutral but impose an undue burden on interstate commerce. Equally important is that the dormant Commerce Clause restriction on a state's ability to regulate is not absolute. In certain rare instances, states retain the ability to regulate matters of local concern even when such legislation may adversely affect interstate commerce.

a. Statutes Openly Discriminating Against Interstate Commerce

For statutes that openly discriminate against out-of-state economic interests in order to protect in-state interests, the Court has imposed a per se rule of invalidity. Only if a state is able to establish that it has not "needlessly obstruct[ed]"

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71. See Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 443-44 (1978) (unanimously invalidating a Wisconsin law prohibiting the use of trucks longer than fifty-five feet in length on state motorways and noting that regulations of a sufficiently local character are afforded a strong presumption of validity in the balancing scheme); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (noting that where a "legitimate local purpose" is found, the statute's validity becomes a question of degree). See generally Maltz, supra note 34, at 47-65. Professor Maltz's central thesis is that the hallmark of the modern dormant Commerce Clause jurisprudence is its heavy reliance on an ad hoc balancing approach that suffers from both a lack of flexibility and an inability to adequately measure the competing interests involved.
72. See discussion infra text accompanying notes 99-114.
73. Whereas a state statute discriminating against interstate commerce is invariably struck down without further inquiry, courts generally afford statutes with only incidental effects on interstate commerce considerable deference. See O'Grady, supra note 63, at 574.
74. Id. Compare Wyoming v. Oklahoma, 502 U.S. 437 (1992) (invalidating an Oklahoma statute requiring power plants to burn a coal mixture containing at least ten percent Oklahoma-mined coal on the grounds that it discriminated against interstate commerce on its face and in practical effect), with Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981) (upholding a Minnesota law prohibiting sale of milk in plastic containers, but allowing the sale of milk in paper containers).
75. See supra note 61 and accompanying text.
interstate trade or attempted to "place itself in a position of economic isolation." It will survive the level of scrutiny applied in cases of affirmative discrimination. The Court has noted that the "State's burden of justification [for discriminatory restrictions] is so heavy that "facial discrimination by itself may be a fatal defect." The argument against such statutes, best phrased by the Court in Baldwin v. G.A.F. Seelig, Inc., is that they encourage the states to erect barriers to competition and "invite a speedy end of our national solidarity." The Court also addressed its focus on a state's economic objective in H.P. Hood & Sons, Inc. v. Du Mond. Stating that "our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy," the majority noted that the focus of the Commerce Clause is not only to ensure free market access and free competition, but also to do away with home embargoes and customs duties.

In 1978, the Court provided additional insight into its concerns with discriminatory state regulation. In Philadelphia v. New Jersey, the Court considered a New Jersey statute prohibiting the importation of solid or liquid waste from surrounding states. Noting that the crucial first step in the analysis is to determine whether the statute in question "is basically a protectionist measure," the divided Court expressed its apprehension with the "evils of economic isolation." In the eyes of the Court, the "evils" of economic isolationism and protectionism could devastate a national free market economy and could rest in either the legislative means or the legislative ends. Relying heavily on the fact that the statute prohibited certain waste solely on the basis of origin, the Court found that, regardless of the New Jersey Legislature's environmental and health related aims, the statute violated the Commerce Clause "[b]oth on its face and in its plain effect" by "impos[ing] on out-of-state commercial interests the full burden of conserving the State's remaining landfill space."

78. Maine v. Taylor, 477 U.S. at 151 (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935)). Maine v. Taylor involved a Maine regulation prohibiting the importation of baitfish into the state. Id. at 132. Finding that the preservation of the state's lakes served a legitimate objective and that the only way in which to achieve that objective was to discriminate against interstate commerce, the Court sustained the regulation. Id. at 151.


80. 294 U.S. 511 (1935) (unanimously invalidating a New York statute prohibiting the sale of out-of-state milk in New York at less than a fixed price in order to protect local economic interests).

81. Id. at 523.

82. 336 U.S. 525 (1949). In this case, the State of New York denied H.P. Hood & Sons, Inc. a license to build a milk plant in the village of Greenwich on the grounds that it would destroy the New York milk market and increase costs to in-state plants. Id. at 527-28. Finding that a state may not "burden or constrict the flow of . . . commerce for their economic advantage," the Court invalidated New York's determination. Id. at 533.

83. Id. at 537.

84. Id. at 539. Notably, the Court in both Baldwin and H.P. Hood & Sons, Inc. recognized that the states have extensive powers to protect the citizens of a state "against perils to health or safety." Id. at 531-32.

85. 437 U.S. 617 (1978)

86. Id. at 618. The State of New Jersey had essentially blocked the importation of solid and liquid waste from neighboring states under the purported aim of protecting the citizens of New Jersey from the harmful effects of pollutants. Id. at 618-19.

87. Id. at 624.

88. Id. at 626.

89. Id. at 626-28.
Similarly, in *West Lynn Creamery, Inc. v. Healy*, the Court again focused its attention on the protectionist nature of a Massachusetts pricing order that imposed an assessment on all milk sales within the state, but distributed the proceeds of the assessment fund only to in-state dairy farmers. Finding that the "avowed purpose and undisputed effect [of the law is] to enable higher cost Massachusetts dairy farmers to compete with lower cost dairy farmers in other states," the Court found the statute to be "clearly unconstitutional." Writing for the majority, Justice Stevens reasoned that because the effect of the Massachusetts statute was to allow local producers to fully develop their market share at the expense of out-of-state producers, it undeniably created an "economic barrier against competition" and "neutralized[ed] advantages belonging to the place of origin." As the *Baldwin and Philadelphia v. New Jersey* line of cases suggest, the Court’s focus in this field is on statutes that serve merely to protect in-state commercial interests. The Court has repeatedly stated that free market access and national solidarity are fundamental ideals under the Commerce Clause. Presumably, the Court’s concern with state actions designed to favor in-state interests over out-of-state interests is that if such initiatives were allowed, a return to the "economic Balkanization" under the Articles of Confederation would be inevitable. Consequently, where a state regulation inhibits free market access by erecting unreasonable barriers to commerce solely based on origin, the Court has consistently held that the state regulation will be subject to the most exacting scrutiny.

b. Statutes Discriminating Against Interstate Commerce in Purpose or Effect

The Court purports to subject statutes that are facially neutral but discriminatory in purpose or effect to a similarly strict test of constitutionality. As the Court noted in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, it

90. 512 U.S. 186 (1994).
91. Id. at 188.
92. Id. at 194. The Court divided 7-2 in holding that the statute violated the Commerce Clause. Chief Justice Rehnquist and Justice Blackmun dissented, arguing not only that the statute was evenhanded in its similar treatment of in-state and out-of-state interests, but also that the Court’s current dormant Commerce Clause policy “bodes ill for the values of federalism which have long animated our constitutional jurisprudence.” Id. at 214-17.
94. See, e.g., O’Grady, supra note 63, at 634 ("There is value in a dormant Commerce Clause review model that expressly recognizes resident protectionism as a concept unique from discrimination and as the primary evil to be addressed by the dormant Commerce Clause."); see generally Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1094-98 (1986).
95. See supra text accompanying notes 65-67.
96. See supra text accompanying notes 15-18.
will generally invalidate discriminatory statutes "without further inquiry."98 In practice, however, the standard of review in cases involving latent discrimination is far from uniform.99 Arguably, the Court considers statutes with a discriminatory purpose or effect to be per se invalid unless the state is able to satisfy its heavy burden of demonstrating not only a legitimate local purpose, but also that the purpose could not be obtained by less discriminatory means.100 For example, in Hunt v. Washington State Apple Advertising Commission,101 the Court considered a North Carolina law requiring that imported apple cartons bear a "U.S. grade" as opposed to individual state grades.102 The undeniable effect of the North Carolina statute was to discriminate against produce from the State of Washington, whose standards were equal to or greater than the U.S. standard.103 Although the Court found the statute to be neutral on its face in that it subjected all produce to the same grading specifications, the Court nevertheless determined that the statute impermissibly burdened interstate commerce.104 In so deciding, the Court conspicuously applied an enhanced level of judicial scrutiny to the North Carolina carton-labeling requirement.105 The test applied by the Court required an elevated burden on the part of the state to substantiate the regulation "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."106 After all was said and done, the Court concluded that North Carolina did not carry its elevated burden by failing to show not only that the challenged regulation furthered the purported goal of eliminating deceptive labeling, but also that the scheme was the only available alternative.107 Comparing Hunt with Minnesota v. Clover Leaf Creamery Co.,108 it becomes evident that the Court has managed to tangle itself in the web of the dormant Com-

98. Id. at 579.
99. Compare Kassell v. Consol. Freightways Corp. of Del., 450 U.S. 662, 671 (1981) (plurality holding that an Iowa statute prohibiting sixty-five-foot trucks on its freeways violated the Commerce Clause where the law impermissibly interfered with commerce of other states and the safety benefits were illusory), Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 350-51 (1977) (invalidating a North Carolina law requiring that imported apple cartons bear a "U.S. grade" and not individual state grades, thereby discriminating against Washington, whose standards were equal to or greater than the U.S. standard), and H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 545 (1949) (striking down a New York law denying a milk dealer's license to build and operate an additional facility within the state to protect in-state dealers), with Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473-74 (1981) (sustaining a Minnesota statute prohibiting the sale of milk in plastic nonreturnable containers because the regulation was not "clearly excessive" and advanced the legitimate interests of conserving resources).
102. Id. at 335.
103. Id. at 351-52. The Court agreed with the district court's finding that the statute had the effect of "raising the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected." Id. at 351. Moreover, the statute effectively stripped Washington of its competitive advantage in the apple industry—an advantage it earned by way of an expensive inspection and grading system. Id.
104. Id. at 351-54.
105. Id. at 353.
106. Id.
107. Id. at 353-54.
merce Clause. In Clover Leaf Creamery Co., the Court considered a Minnesota statute that banned the sale of milk in plastic nonreturnable, nonrefillable containers, but allowed the use of nonrefillable paperboard cartons. The declared purpose of the statute was to promote conservation and ease the burden on state disposal methods. Although not discriminatory on its face in that in-state and out-of-state firms would both need to change from plastic to paperboard cartons, the Minnesota Legislature’s initiative unquestionably favored Minnesota pulpwood manufacturers over out-of-state plastic producers. Instead of applying the elevated level of scrutiny described above for discriminatory-in-effect state statutes, however, the Court scrutinized the Minnesota statute under a lower level of scrutiny. Applying the lower standard, the Court upheld the Minnesota law because the incidental burden on interstate commerce did not clearly outweigh the local benefits involved.

As noted, the level of scrutiny applied in cases involving state regulations with latent discriminatory effects is, at best, erratic. In certain instances, a heightened scrutiny analysis will be applied: the state must demonstrate not only a legitimate objective, but also that it has chosen the least discriminatory means available. In other cases, a lower level of scrutiny will be applied that tests whether the benefits outweigh the burden on interstate commerce. In evaluating state regulations with discriminatory effects, the Court has thus chartered an uneven course without providing a meaningful explanation of why certain statutes are evaluated under a lower level of scrutiny.

c. Statutes Imposing an Incidental Burden on Interstate Commerce

Statutes that do not discriminate towards out-of-state interests, but that incidentally affect the free flow of commerce, receive a unique and controversial treatment by the Court. The Court’s contemporary approach in this area appears to have stemmed from Justice Stone’s dissent in Di Santo v. Pennsylvania, which suggested a more comprehensive analysis of purposes and effects as well as balancing competing interests. The seminal case of Pike v. Bruce Church, Inc. embodies the Court’s current formulation towards these “evenhanded” state statutes. Justice Stewart described the test for evenhanded state regulations as follows:

109. Id. at 458.
110. Id. at 458-59.
111. Id. at 472-73.
112. See Maltz, supra note 34, at 53-54. Reasoning that “Minnesota’s statute does not effect ‘simple protectionism,’ but ‘regulates evenhandedly,’” the Court scrutinized the state law under the Pike balancing scheme, discussed infra. Minnesota v. Clover Leaf Creamery Co., 449 U.S. at 471-72.
113. Minnesota v. Clover Leaf Creamery Co., 449 U.S. at 472-74. The Court reasoned that a facially nondiscriminatory statute is “not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry. Only if the burden on interstate commerce clearly outweighs the State’s legitimate purposes does such a regulation violate the Commerce Clause.” Id. at 474.
115. See infra notes 127-32 and accompanying text.
117. See supra notes 56-58 and accompanying text.
119. Maltz, supra note 34, at 49; O’Grady, supra note 63, at 613-14.
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. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.120

In effect, Pike stands for the proposition that many facially neutral statutes that survive the Court’s categorical rules may still fall to an ad hoc balancing scheme.121 In Pike, the Court evaluated an Arizona statute that prohibited the interstate shipment of cantaloupes grown in-state unless shipped in approved containers bearing the Arizona name.122 An Arizona grower, Bruce Church, Inc., opted instead to send its cantaloupes to a processing plant thirty-one miles away in California, which happened to be the closest packaging plant.123 Finding that the Arizona statute regulated “evenhandedly,” the Court formulated a test that considers the effect of the state regulation to determine whether the local benefits outweigh the burdens on out-of-state commercial interests.124 Applying this test, the Court determined that the state interest in protecting and preserving the reputation of Arizona growers was legitimate.125 Nevertheless, the Court invalidated the act because the $200,000 cost to construct a new packing facility was a burden that outweighed any state interests involved.126

Critics are particularly opposed to the Court’s modern approach of employing the Pike balancing test to invalidate facially neutral state legislation. The argument raised most often by those challenging the use of balancing in cases involving evenhanded statutes is that the weighing of legitimate competing interests is best left either to the legislatures of the states or to Congress.127 Arguments have also been made that a judicial balancing approach leads to imprecise and unpredictable results because it weighs dissimilar concerns and could involve the “per-

120. Pike v. Bruce Church, Inc., 397 U.S. at 142 (citation omitted).
121. Eule, supra note 3, at 474-75.
123. Id. at 139.
124. Id. at 142-43.
125. Id. at 143.
126. Id. at 146. See also Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 891 (1988) (invalidating an Ohio law tolling limitations period to out-of-state corporations that did not consent to jurisdiction where the “significant” burden exceeded benefits to the state); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 444-45 (1978) (finding a Wisconsin law prohibiting the use of fifty-five-foot trailers on interstate highway unconstitutional where the safety benefits were illusory).
127. Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. at 897-98 (Scalia, J., concurring) (arguing that the Court should “abandon the ‘balancing’ approach [in] negative Commerce Clause cases . . . and leave essentially legislative judgments to Congress”); CTS Corp. v. Dynamic Corp. of Ariz., 481 U.S. 69, 95 (Scalia, J., concurring) (arguing that the courts are ill suited to weigh benefits and burdens and that such an approach “should be undertaken rarely if at all”); Maltz, supra note 34, at 59-61 (ardently opposing judicial interference because the role of interest-weighing should be left to the legislature); Eule, supra note 3, at 442 n.89 (“If democracy means anything, it is that the choice between competing substantive political values must be made by representatives of the people rather than by unelected judges.”).
sonal value judgments and prejudices of the judge.” Although Pike continues to be cited by the federal courts, a review of circuit court opinions reveals that judges are not certain as to when to apply the balancing test. Specifically, there appears to be a split among the circuits concerning whether a court will apply the ad hoc balancing scheme to all evenhanded statutes or merely to those that result in disparate treatment between in-state and out-of-state interests. Several circuit judges have thus interpreted the Pike case as the Supreme Court’s directive to balance the putative local benefits against the burdens on interstate commerce only in cases where the state regulation is neutral on its face, but clearly disfavors out-of-state interests. That the lower federal courts have had considerable difficulty in ascertaining when to apply the Court’s featured balancing scheme merely lends credence to the arguments of several present Justices of the Court that the current dormant Commerce Clause jurisprudence is utterly “unworkable.”

B. The Extraterritoriality Principle

Against the legal template described above, a line of cases has developed wherein federal courts have, under the dormant Commerce Clause, invalidated state legislation having “the ‘practical effect’ of regulating commerce occurring wholly outside” the boundaries of the state. This principle, commonly referred

129. See O’Grady, supra note 63, at 620-21.
130. Compare Grant’s Dairy-Maine, LLC v. Comm’r, 232 F.3d 8, 24 (1st Cir. 2000) (finding that an evenhanded statute did not trigger the Pike balancing test where plaintiff did not make a sufficient showing of a substantial burden and noting that the test stands on “uncertain legal terrain”), Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc., 155 F.3d 59, 75 (2nd Cir. 1998) (recognizing that a statute must have a disparate impact between intrastate and interstate interests to warrant invalidation under the Pike test), Instructional Sys., Inc. v. Computer Curriculum Corp., 35 F.3d 813, 825-26 (3rd Cir. 1994) (stating that nondiscriminatory state statutes are not subject to the balancing scheme of Pike), and Nat’l Paint & Coatings Ass’n v. City of Chicago, 45 F.3d 1124, 1131 (7th Cir. 1995) (noting that Pike is not universally applicable and that only laws with “mild disparate effects and potential neutral justifications” are subject to the balancing test), with E. Ky. Res. v. Fiscal Court, 127 F.3d 532, 544-45 (6th Cir. 1997) (calling for the use of the balancing test so long as the statute regulates evenhandedly), and Am. Target Adver., Inc. v. Giani, 199 F.3d 1241, 1254 (10th Cir. 2000) (finding the Pike analysis applicable if an act simply regulates evenhandedly).
131. See, e.g., Nat’l Paint & Coatings Ass’n v. City of Chicago, 45 F.3d at 1130-31 (stating that balancing is not “universally applicable”); Instructional Sys., Inc. v. Computer Curriculum Corp., 35 F.3d at 826-27 (stressing that legislation “will not be invalidated under the Pike test unless it imposes discriminative burdens on interstate commerce”); but see Medigen of Ky., Inc. v. Public Serv. Comm’n, 985 F.2d 164, 165-67 (4th Cir. 1993) (balancing the restrictions on market entry with the goal of providing universal service in evaluating a statute which required haulers of infectious waste to obtain a certificate from the Public Service Commission of Kentucky without first considering discrimination or state protectionism).
132. E.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 636 (1997) (Thomas, J., dissenting). Justice Thomas stated that “[p]recedent as unworkable as our negative Commerce Clause jurisprudence has become is simply not entitled to the weight of stare decisis.” Id.
to by judges and commentators as the extraterritoriality principle, holds that a state "may not project its legislation into [other States]." The focus of the courts in this area is whether the "practical effect of the regulation is to control conduct beyond the boundaries of the State." The Court, in Healy v. Beer Institute, succinctly stated that state regulations of this nature offend 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 State within their respective spheres." As section II.A.1 and Part III of this Article discuss in detail, these concerns are not new nor are they illegitimate. Consequently, courts generally consider state initiatives that run contrary to these interests virtually invalid per se. Generally, the courts have used this principle under the Commerce Clause. However, at least one commentator has questioned the characterization of the extraterritoriality principle as a dormant Commerce Clause issue.

In order to tackle the question of where, if at all, the extraterritoriality principle "fits" into the dormant Commerce Clause, reviewing the decisions of the federal courts that implicate the principle is important. Reviewing the decisions implicating the principle in section II.B.1 will shed some light on both the elements as well as the underlying concerns of the extraterritoriality principle. The focus of section II.B.2 builds upon the discussion in the preceding section and, more importantly, exposes the difficulties the lower federal courts have had in interpreting the language and directives of the Supreme Court concerning extraterritorial state legislation. The following sections attempt to garner support for the ultimate assertion of this Comment—that integrating the extraterritoriality principle into the framework of the dormant Commerce Clause merely confuses the underlying issues involved in particular disputes.


135. Id. at 55-36 (footnote omitted).


137. Id. at 335-36 (footnote omitted).

138. 1 Laurence H. Tribe, American Constitutional Law § 6-8, at 1074 (3d ed. 2000). E.g., Healy v. Beer Inst., 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."); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. at 579 (stating that a statute which directly regulates interstate commerce will "generally [be] struck down . . . without further inquiry").

139. E.g., Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. at 582 ("[w]e agree . . . [that the New York affirmation law] regulates out-of-state transactions in violation of the Commerce Clause").

140. Donald H. 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, 1873 (1987). At one point in his article, Professor Regan considers whether the extraterritoriality principle should be located under a clause other than the Commerce Clause. Specifically, he considers whether the principle should be located within the Privileges and Immunities Clause, the Due Process Clause, or the Full Faith and Credit Clause. Id. at 1887-94. Professor Regan concludes that these alternate clauses are not likely candidates for containing the extraterritoriality principle; rather, he argues that the principle is best viewed as an independent principle operating to restrain state legislation in certain instances. Id. at 1895.
1. The Supreme Court Framework

To properly evaluate the extraterritoriality principle and to attempt to devise a workable framework, discussing the principle in light of the decisions that brought it to life is essential. The early decisions of the Court in this area tended to involve challenges to state affirmation laws. These laws require that distributors avow that they will sell certain products in-state at a price equivalent to that which they receive for out-of-state sales. The fundamental problem with such laws, aptly stated by Judge Easterbrook of the Seventh Circuit Court of Appeals, is that they also carry with them the “implied command: ‘Charge outside this state the same price you charge inside it.’” This implied command is what exceeds a state legislature’s power. Other decisions involved challenges to state anti-takeover statutes. These laws, enacted by over two-thirds of the states, served to protect local corporations from hostile tender offers made by companies seeking to take control of the local “target” corporation. The following Supreme Court cases provide the constitutional framework for the extraterritoriality principle. More importantly, they assist with uncovering the concerns that underlie the enactment of the legislation, the effects of which may be felt outside a state’s borders.

a. Brown-Forman Distillers v. New York State Liquor Authority

In Brown-Forman Distillers Corp. v. New York State Liquor Authority, the Court examined a New York price affirmation law requiring liquor distillers to affirm that the prices of beverages sold in-state were no higher than the lowest prices in other states. When the Brown-Forman Distillers Corporation offered promotional allowances to wholesalers in other states, the New York State Liquor Authority instituted license revocation proceedings against the company. Brown-Forman subsequently brought suit in state court, challenging the law on Commerce Clause grounds. After losing in both the New York Supreme Court as well as the Court of Appeals, Brown-Forman appealed to the United States Supreme Court. On appeal, the Supreme Court noted that, by its terms, the regulation at issue in Brown-Forman was directed at liquor sales occurring within the State of New York. Nevertheless, by finding that the affirmation law had the effect of not only forcing distilleries to abandon promotional plans in other states, but also forcing other states to alter their regulatory schemes, the Court invalidated

144. 476 U.S. 573 (1986).
145. Id. at 575.
146. Id. at 576-77.
147. Id. at 578.
148. Id.
149. Id. at 583.
the New York legislation as a direct restraint on interstate commerce.\textsuperscript{150} Drawing upon an implicit assertion in the plurality opinion of Edgar \textit{v. MITE Corp.},\textsuperscript{151} to support this holding, the Court reasoned that the Commerce Clause mandates that a state may not force an out-of-state merchant "to seek regulatory approval in one State before undertaking a transaction in another."\textsuperscript{152} In so holding, the Court established that a state may not regulate transactions occurring beyond its borders.\textsuperscript{153}

The \textit{Brown-Forman} Court's basis for concluding that the affirmation law was unconstitutional likely did not rest solely on the grounds that the "practical effect" of the law was to control the price of liquor in neighboring states. Significantly, at the time of the \textit{Brown-Forman} decision in 1986, thirty-nine states had adopted affirmation statutes to regulate the prices of liquor to be distributed within their respective borders.\textsuperscript{154} Judging by the numbers alone, the fear that the proliferation of state affirmation laws would impede the interstate distribution market by subjecting liquor distributors to numerous and conflicting regulations was very real indeed.\textsuperscript{155} This fact tends to suggest that the Court's underlying concern with the New York statute was, in large part, due to the probability that the inconsistent regulations would clog the channels of interstate commerce.\textsuperscript{156} The Court likely envisioned a scenario where a New England liquor distributor would be forced to engage in the insufferable task of calculating, on a monthly basis, the different prices that it could charge in the six separate New England states.

\textsuperscript{150} Id. at 583-84. Notably, the decision was not unanimous. Justice Stevens, joined by Justices White and Rehnquist dissented, noting, inter alia, that the majority's reliance on \textit{Baldwin v. G.A.F. Seelig, Inc.}, 294 U.S. 511 (1935) to invalidate the New York Act was misplaced. The dissent distinguished \textit{Baldwin} from the New York Act on the grounds that the Act "was designed to keep the prices of liquor down in order to give New York consumers the benefit of out-of-state competition." \textit{Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.}, 476 U.S. at 590. In the eyes of the dissenter, the regulation at issue in Baldwin differed in that it "was designed to inflate milk prices in order to protect New York producers from out-of-state competition—a classic illustration of economic provincialism." Id. (citation omitted).

\textsuperscript{151} 457 U.S. 624, 642 (1982) (plurality opinion). In \textit{MITE}, the Court considered requirements under an Illinois corporations statute that tender offers be filed with the state and the target company twenty days before the offer would become effective. Id. at 627. Moreover, the statute not only gave the state of Illinois the opportunity to hold a hearing on the substantive fairness of the offer, but also required corporations to register their tender offers if the corporation was either organized under Illinois law or had ten percent of its assets located in Illinois. Id. The statute thus applied to a great number of corporations, many without significant ties to Illinois. Justice White and Chief Justice Burger determined that such provisions had a "sweeping extraterritorial effect" and that the statute was a direct restraint on interstate commerce because the Illinois law "could be applied to regulate a tender offer which would not affect a single Illinois shareholder." Id. at 642. In effect, the decision instigated the use of the dormant Commerce Clause as a vehicle to invalidate state regulation thought to overstep its bounds. \textit{See} Gaylord, \textit{supra} note 23, at 1110-11.

\textsuperscript{152} \textit{Brown-Forman Distillers Corp. v. N.Y. State Auth.}, 476 U.S. at 582.

\textsuperscript{153} Id. at 585. The Court stated that "the most important issue [is] whether the statute regulate[s] out-of-state transactions." Id. at 581.

\textsuperscript{154} \textit{Healy v. Beer Inst.}, 491 U.S. 324, 334 n.10 (1989). According to the \textit{Healy} Court, twenty states had statutes that were similar to the New York statute at issue in \textit{Brown-Forman}. Id.

\textsuperscript{155} \textit{Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.}, 476 U.S. at 583.

\textsuperscript{156} The Court mentioned this concern at one point in the opinion in dicta, but seemed to rely more heavily on the premise that the effect of the affirmation law was to "project" its legislation into surrounding states. Id. at 583-84.
b. CTS Corp. v. Dynamics Corp. of America

A year after Brown-Forman, the Court appeared to elaborate upon the principles underlying the extraterritoriality principle in the case of CTS Corp. v. Dynamics Corp. of America. The issue in CTS concerned the validity of an Indiana statute (Indiana Act) designed to protect shareholders from hostile tender offers and to ensure that investors had a voice in corporate affairs. The Indiana Act attempted to further these goals by conditioning the power to vote a controlling block of shares on the approval of a majority of the incumbent disinterested shareholders. Dynamics Corporation made a tender offer for the CTS Corporation and, shortly thereafter, filed suit in federal court challenging the constitutionality of the Indiana Act on Commerce Clause grounds.

The Court noted that the Indiana Act could not withstand constitutional scrutiny under the Commerce Clause if the effect of the statute was either to discriminate against interstate commerce or to “adversely affect interstate commerce by subjecting activities to inconsistent regulations.” However, the Court held that the Indiana Act did not offend either principle. The majority reasoned that the Indiana Act was not discriminatory because it similarly affected in-state and out-of-state offerors. Furthermore, the Court found that the Indiana Act merely defined shareholder voting rights in corporations organized under Indiana law—a power traditionally viewed as within the province of state corporation statutes. The Court concluded that, because the Indiana Act applied only to corporations organized under Indiana law, a corporation would be subject to the law of only one state as opposed to several.

As one commentator has suggested, Justice Powell’s reference to “inconsistent regulations” implicated the Court’s concern with the extraterritorial effects of the Indiana Act. This suggestion has considerable merit because the majority cited both MITE and Brown-Forman for the proposition that a central concern of the Commerce Clause is to avoid subjecting entities to conflicting regulations. The sections cited from the two opinions are those in which the Court discussed the extraterritoriality principle and the underlying concern with impeding the flow of interstate commerce. Interestingly, the Court also cited language from Cooley v. Board of Wardens in support of its assertion that the Commerce Clause prohibits the interference with interstate commerce by way of inconsistent regulations. That the Court quoted language from Cooley not only sheds some light

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158. Id. at 75-76, 91.
159. Id. at 74.
160. Id. at 75.
161. Id. at 87-88 (citations omitted). Justice Scalia, concurring in the judgment, also agreed that a statute that subjects activities to inconsistent regulations may violate the Commerce Clause. Id. at 95.
162. Id. at 94.
163. Id. at 87.
164. Id. at 88-89.
165. Id. at 89.
166. Regan, supra note 140, at 1869.
167. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. at 88.
168. 53 U.S. (12 How.) 299 (1851).
169. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. at 88-89 (stating that “the Commerce Clause prohibits States from regulating subjects that ‘are in their nature national, or admit only of one uniform system, or plan of regulation’”) (quoting Cooley v. Bd. of Wardens, 53 U.S. (12 How.) at 319).
on the Court's expanding view of the extraterritoriality principle, but also lends credence to Professor Michael A. Lawrence's assertion that the national-local distinction still plays a significant role in modern dormant Commerce Clause decisions.171

The majority responded to these concerns regarding the extraterritorial effect of the Indiana Act in an interesting way. Justice Powell began by noting that every state in the country had enacted general corporation statutes governing and prohibiting various business transactions.172 He continued by observing that these corporation statutes, with their myriad of limitations on business transactions, are legitimate and enforceable against both resident and nonresident shareholders of the corporation.173 In effect, Justice Powell asserted that the Indiana Act could legitimately affect out-of-state shareholders. Justice Powell's assertion to this effect suggested that a state may enact legislation that, to a certain extent, reaches beyond the borders of a state.174 Fortunately, he hinted as to where the line distinguishing valid from invalid extraterritorial state statutes may lie. He noted that the Indiana Act applied only to corporations with a "substantial number" of Indiana shareholders and, more importantly, that "every application of the Indiana Act will affect a substantial number of Indiana residents."175 One may infer from this suggestion that where a state has a significant interest in regulating a particular aspect of interstate commerce, it may do so, regardless of the extraterritorial effect of the legislation, if the regulation also affects a substantial number of in-state residents. Denying a state the ability to legislate in all instances where the legislation has effects beyond the borders of the state seems unreasonably restrictive.176

c. Healy v. The Beer Institute

The implied assertion in CTS that the extraterritoriality principle embodies an underlying concern with inconsistent regulations was made explicit in the case of Healy v. Beer Institute.177 The statute at issue in Healy required out-of-state brewers to affirm that beer prices in Connecticut were, at the moment they were posted, no higher than the prices in Massachusetts, New York, and Rhode Island.178 The law further required that the affirmed price remain in effect for a period of one month.179 The Connecticut Legislature enacted the statute to ensure that Connecticut consumers received the lowest possible prices for beer purchases.180 In

170. Associate Professor of Law, Detroit College of Law at Michigan State University.
171. See supra notes 40-41 and accompanying text.
172. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. at 89-90. Justice Powell listed several examples of restrictions that a state corporation statute may contain that serve to protect against unwanted mergers, including: supermajority voting provisions, dissenter's rights provisions, restrictions on payment of dividends, and staggered board provisions. Id. at 90, 90 n.12.
173. Id. at 90 n.12.
174. See id. at 92-93. See also Regan, supra note 140, at 1877-78.
175. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. at 93.
176. See Regan, supra note 140, at 1878 ("It is clear that the Court cannot flatly prohibit all state laws that have extraterritorial effects, or even all state laws that have substantial extraterritorial effects. Such a prohibition would invalidate much too much legislation.").
178. Id. at 326.
179. Id. at 329.
180. Id. at 341.
examining the Connecticut statute, the Healy Court summarized the attributes of the extraterritoriality principle. According to the Court, the extraterritoriality principle stands for several related propositions. These principles, listed in full for the sake of clarity, include:

First, the “Commerce Clause . . . precludes 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” . . . and, specifically, a State may not adopt legislation that has the practical effect of establishing “a scale of prices for use in other states.” 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. . . . Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.\(^{181}\)

In passing, the majority likened the restraint on a state’s ability to legislate extraterritorially to the restrictions on a state’s power to obtain personal jurisdiction over an out-of-state individual or entity.\(^{182}\) Applying the above principles, the Court invalidated the Connecticut statute on the grounds that it impermissibly controlled commercial activity occurring in the surrounding states.\(^{183}\)

Over a vigorous dissent by Chief Justice Rehnquist, the majority reasoned that the effect of the statute would be to not only control commercial activity beyond the state’s borders, but also generate competing regulatory regimes in neighboring states.\(^{184}\) Specifically, the majority noted that the interaction of the Connecticut statute with discount statutes in Massachusetts, New York, and Rhode Island resulted in beer shippers being forced to abandon competitive pricing schemes in other states based on prevailing market conditions in those states.\(^{185}\) Due to this interaction as well as the potential that other states in the nation could enact similar affirmation statutes, the majority concluded that Connecticut’s statute had an impermissible “extraterritorial effect.”\(^{186}\) In essence, the majority determined that, because of the risk of “price gridlock” on a regional and perhaps even a national scale, the regulation of such pricing mechanisms should be left to Congress.\(^{187}\)

The majority’s conclusion in Healy did not go unchallenged. Agreeing only with the majority’s determination that the Connecticut affirmation statute effected an impermissible facial discrimination against interstate commerce, Justice Scalia

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181. Id. at 336-37 (citations omitted). It is the third of these propositions that makes explicit what Justice Powell implied in CTS. Notably, the Court cited the CTS opinion as support for its assertion.

182. Id. at 336 n.13 (citing Edgar v. MITE Corp., 457 U.S. 624, 643 (1982), and Shaffer v. Heitner, 433 U.S. 186, 197 (1977)).

183. Id. at 337-39.

184. Id. at 337-38.

185. Id. at 338-40.

186. Id. In addition, the Court found that the Connecticut statute also violated the Commerce Clause on the ground that it discriminated against brewers and shippers engaged in interstate commerce. Id. at 340.

187. Id.
refused to accept the view that the statute had an extraterritorial effect.\textsuperscript{188} Calling the majority's rationale "questionable," Justice Scalia found it unreasonable to invalidate the statute merely because of the "economic reality that the challenged act will require sellers in [surrounding states] to take account of the price that they must post and charge in Connecticut when setting their prices in... other states."\textsuperscript{189} Justice Scalia's argument in this regard seems to parallel Justice Powell's suggestion in \textit{CTS} that a state law may legitimately affect out of state residents.\textsuperscript{190} In fact, he remarked that "innumerable valid state laws" exist that compel a seller to alter pricing decisions in other states.\textsuperscript{191} Thus, Justice Scalia implied that to accept the majority's view of the extraterritoriality principle, the courts would be required to invalidate an excessive amount of state legislation.

In his dissent, Chief Justice Rehnquist similarly disagreed with the majority's holding that the Connecticut statute had an extraterritorial reach. In a dissent similar to that in Brown-Forman, Justice Rehnquist opposed the use of the extraterritoriality principle to invalidate the Connecticut statute.\textsuperscript{192} He first noted that the parties had not put forth any evidence to show that beer prices in neighboring states had been in any way affected by the Connecticut law.\textsuperscript{193} Next, he rejected the view that Connecticut had forced its regulatory regime controlling beer prices into other states.\textsuperscript{194} Rather, he stated that such a view "is simply the Court's personal forecast about the business strategies that distributors may use to set their prices in light of regulatory obligations in various states."\textsuperscript{195} In making this statement, the Chief Justice clarified that the indirect effect of the Connecticut legislation may be to influence business transactions and marketing activities in surrounding states. However, he observed that distributors are under no legal obligation to consider the affirmation law when planning their pricing schemes in other states.\textsuperscript{196}

In this sense, at least in the eyes of the dissenters, the Connecticut Legislature did not force or project its legislation into neighboring states. Rather, it enacted a law that would constrain the ability of a distiller to charge higher prices in Connecticut without similarly charging higher prices in neighboring states. Thus, the statute served as one consideration of a distiller when deciding whether or not to charge particular prices in the region. The Chief Justice's argument suggests that a state regulation should not be struck down as a per se violation of the Commerce Clause where a party has the freedom to choose whether to enter into a particular transaction.

In summary, the line of decisions extending from \textit{MITE} to \textit{Healy} essentially suggests that the Court views state regulations that extend beyond the borders of the enacting state to be per se invalid under the Commerce Clause. The extraterritoriality line of cases seems to have markedly expanded the traditional dormant Commerce Clause jurisprudence by further restraining the ability of states to enact

\textsuperscript{188} \textit{Id.} at 345.
\textsuperscript{189} \textit{Id.} (emphasis added). He argued that such rationale would have the objectionable consequence of having decisions turn on the "degree of economic effect" of the statute in question. \textit{Id.}
\textsuperscript{190} See supra text accompanying notes 173-75.
\textsuperscript{191} Healy v. Beer Inst., 491 U.S. at 345.
\textsuperscript{192} \textit{Id.} at 346-47. See also sources cited supra note 150.
\textsuperscript{193} Healy v. Beer Inst., 491 U.S. at 347.
\textsuperscript{194} \textit{Id.}
\textsuperscript{195} \textit{Id.}
\textsuperscript{196} \textit{Id.}
advantageous legislation. The extraterritoriality cases decided by the Supreme Court have effectively introduced a new inquiry into the traditional dormant Commerce Clause analysis: whether a state legislature has the power to influence activity beyond the borders of the state in which it sits. This focus on the territorial reach of state legislation stands in stark contrast to the long-established concentration on state regulations that are discriminatory or protectionist in nature.

The Court has not only expanded the traditional scope of the dormant Commerce Clause by incorporating an inquiry into the legislation’s extraterritorial effect, but has also confused the analysis in such a way that raises significant concerns. First, the language chosen by the Court to define the elements of the extraterritoriality principle and the standard of review lacks clarity. Conspicuously absent from the decisions implicating the extraterritoriality principle is a discussion of what constitutes an “inconsistent regulation” and when a statute has effects occurring “wholly outside” the borders of the state. The Court’s omission in defining these elements is troubling because of the lack of guidance it gives to lower federal courts that must employ the Supreme Court’s analysis in adjudicating other matters raising extraterritoriality concerns.

Additionally, the Court’s approach evidences a concentration on distinguishing state legislation based on whether the regulation directly or indirectly regulates commerce beyond the enacting state’s borders. Under the Supreme Court framework, outlined in *Healy*, the federal courts are required to strike down state legislation that directly controls commerce beyond the enacting state’s borders. The Court’s concentration on such a formal, direct-indirect distinction is even more disconcerting than its inability to adequately define the elements of the extraterritoriality principle. Nowhere in the decisions of the Court does it define “direct legislation;” rather, it offers only case-specific functional definitions of when legislation directly regulates conduct beyond a state’s borders. Such an ad hoc approach tends to contribute little to the development of a consistent body of legal principles. In fact, it serves merely to confound both the federal judiciary and state legislatures.

Furthermore, the Court’s language suggests that the discarded direct-indirect test of the first half of the twentieth century is creeping back into the analysis. The problems with such a test, discussed above, were several. The direct-indirect distinction was cast aside for being too abstract and for contributing little to an otherwise difficult task of determining how far state regulations may go before they run afoul of the Constitution. The Court’s insistence on applying such a formal distinction does not bode well for future state legislation, especially the pioneering state legislation needed to respond to the ever-changing economy.

### 2. Extraterritoriality in the Lower Federal Courts: Confusion and Uncertainty

Relying on the Court’s “guidance” from cases such as *Brown-Forman* and *Healy*, the lower federal courts have employed the extraterritoriality principle as a
means to strike down state legislation that extends beyond the boundary of the enacting state. The courts have, however, struggled to ascertain just where, if at all, the principle fits into the dormant Commerce Clause jurisprudence. Specifically, the lower federal courts have had considerable difficulty defining the appropriate level of scrutiny to apply, defining the scope of the Court’s ban on statutes giving rise to conflicting obligations between states, and determining when a statute has effects “wholly outside” the enacting state’s borders in cases implicating the doctrine. Essentially, the lower federal courts, following the lead of the Supreme Court, have utilized the extraterritoriality principle without comprehending exactly what the principle is and without any clear understanding of how to define it. This section will demonstrate the problems that the circuits and several district courts have had in this regard and will attempt to garner support for the assertion that such problems have resulted in unpredictable legal standards and inconsistent decisions.

a. Defining the Appropriate Level of Scrutiny

Because the level of scrutiny applied to a particular statute may very well determine its constitutionality, applying the appropriate level of scrutiny is essential in the dormant Commerce Clause analysis. The circuit courts have had difficulty in construing the principles laid out in Healy with respect to defining the appropriate level of scrutiny to be used for statutes that implicate the extraterritoriality principle. For example, in National Solid Wastes Management Ass’n v. Meyer,202 the Seventh Circuit Court of Appeals considered a Wisconsin statute that conditioned the use of Wisconsin landfills by cities, counties, or states (whether or not they were located within Wisconsin) on their compliance with Wisconsin recycling standards.203 Relying heavily on the extraterritoriality principle, the Seventh Circuit invalidated the Wisconsin statute on Commerce Clause grounds.204 Stating that “the Wisconsin statute seeks to force Wisconsin’s judgment with respect to solid waste recycling on communities in its sister states ‘at the pain of an absolute ban on the flow of interstate commerce,’” the court found the statute to be an impermissible direct regulation of interstate commerce.205 As a result, the court applied the near-fatal rule of per se invalidity.206 More importantly, the court noted that because the practical effect of the statute was to regulate extraterritorially, the statute could also be viewed as impermissibly discriminating against interstate commerce.207 Thus, the court did not treat separately the question of whether the statute had “extraterritorial reach” from the question of whether that statute discriminated against interstate commerce.208 Although the court stated

202. 63 F.3d 652 (7th Cir. 1995).
203. Id. at 658.
204. Id. at 659. The court stated that “the Commerce Clause constrains a state from projecting its economic legislation onto commerce wholly occurring in its sister states.” Id. The court further implied that merely affecting commerce beyond a state’s borders is sufficient to invalidate the statute as a direct regulation of interstate commerce. Id. at 659-60.
205. Id. at 660-61 (quoting Baldwin v. G.A.F. Seeling, Inc., 294 U.S. 511, 524 (1935)).
206. Id.
207. Id. at 661 (“Although we have characterized the Wisconsin statute as impermissibly regulating directly interstate commerce, we note that the practical effect of the statute could also be analyzed as working a discrimination on interstate commerce.”).
208. See id. at 662.
that it did not need to decide whether the two questions should be analyzed distinctly from one another, it did so nonetheless by noting that the extraterritorial effect of the Wisconsin statute was sufficient to invalidate the statute under the heightened, but not per se invalid, level of scrutiny for discriminatory state regulations.\textsuperscript{209} Analyzing the Wisconsin statute in this manner, the Seventh Circuit held that the regulation failed to pass muster under the "heightened level of scrutiny" where a state must demonstrate that no other less discriminatory alternatives were available to the state legislature.\textsuperscript{210} In so holding, the Seventh Circuit essentially infused the extraterritoriality principle into the test for state statutes that discriminate against interstate commerce in effect.\textsuperscript{211} The court thus effectively substituted the question of whether the statute impermissibly extended beyond the Wisconsin border for the traditional protectionist purpose analysis.

Comparing \textit{Meyer} with \textit{Cotto Waxo Co. v. Williams},\textsuperscript{212} the circuits apparently differ in their approach of defining the appropriate level of scrutiny applicable in cases implicating the extraterritoriality principle. In \textit{Cotto Waxo}, the Eighth Circuit considered a Minnesota regulation prohibiting the sale of petroleum-based "sweeping compounds" within the State of Minnesota.\textsuperscript{213} Plaintiff-appellant Cotto Waxo Co. filed suit in order to challenge the statute on the grounds that, inter alia, it violated the Commerce Clause.\textsuperscript{214} Cotto Waxo Co. argued that the statute effectively destroyed the company's market for petroleum-based sweeping compounds in the Midwest.\textsuperscript{215} Specifically, it argued that the Minnesota statute exerted extraterritorial reach by affecting conduct occurring wholly out-of-state.\textsuperscript{216}

In determining which level of scrutiny to apply to the Minnesota regulation, the court conspicuously noted that regulations effecting extraterritorial reach are treated separately and apart from those raising questions of discrimination against interstate commerce.\textsuperscript{217} The Eighth Circuit clarified that for statutes effecting extraterritorial reach, a rule of per se invalidity would attach.\textsuperscript{218} In contrast, it

\begin{itemize}
\item \textsuperscript{209} \textit{Id.}
\item \textsuperscript{210} \textit{Id.} at 661-62. The court found that the State of Wisconsin failed in this regard: "Wisconsin could realize its goals of conserving landfill space and protecting the environment by mandating that all waste entering the State first be treated at a materials recovery facility with the capacity to effect this separation." \textit{Id.} at 662.
\item \textsuperscript{211} See Eric Anthony Braun, Note, National Solid Wastes Management Association v. Meyer: The Dormant Commerce Clause Claims Another Environmental Victim, 11 J. NAT. RESOURCES & ENVTL. L. 135, 144-46 (1996).
\item \textsuperscript{212} 46 F.3d 790 (8th Cir. 1995).
\item \textsuperscript{213} \textit{Id.} at 792.
\item \textsuperscript{214} \textit{Id.}
\item \textsuperscript{215} \textit{Id.}
\item \textsuperscript{216} \textit{Id.} at 793.
\item \textsuperscript{217} \textit{Id. Cf. Nat'l Elec. Mfrs. Ass'n v. Sorrell}, 272 F.3d 104 (2d Cir. 2001) (treating separately the question of whether a state law impermissibly regulated conduct beyond the enacting state's borders from the question of whether the statute created an actual conflict between the regulatory regimes in other states).
\item \textsuperscript{218} Cotto Waxo Co. v. Williams, 46 F.3d at 793 ("A state regulation is per se invalid when it ... has the practical effect of controlling conduct beyond the boundaries of the state."); \textit{see also} Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc., 155 F.3d 59, 77 (2d Cir. 1998) (noting that the appropriate standard in extraterritorial cases is the "invalid per se" standard of review); Instructional Sys., Inc. v. Computer Curriculum Corp., 35 F.3d 813, 824 (3rd Cir. 1994) (employing per se standard); Dean Foods Co. v. Brancel, 187 F.3d 609, 616 (7th Cir. 1999) (employing the per se standard).
\end{itemize}
noted that statutes discriminating against interstate commerce "either on its face or in practical effect" are subject to strict scrutiny. The court further observed that, under strict scrutiny, the statute could survive only if the state is able to demonstrate that the regulation serves a legitimate local purpose that: (a) is not related to economic protectionism; and (b) could not be adequately served by other, less discriminatory measures. Finding that the extraterritoriality doctrine arises where a state regulation "requires out-of-state commerce to be conducted according to in-state terms," the Eighth Circuit held that the Minnesota regulation did not implicate the extraterritoriality doctrine. Judge Beam remarked that although the statute had undeniably affected Cotto Waxo's business, it was not per se invalid because of its "indifference to sales occurring out-of-state." Moreover, the court found that the Minnesota statute did not rise to the level required for invalidation under strict scrutiny. Finding that the statute prohibited the sale of sweeping compounds without regard to the product's origin, the court determined that the statute did not favor in-state business. Accordingly, the Eighth Circuit held not only that the statute did not directly regulate interstate commerce, but also that a strict scrutiny analysis was not applicable.

Considering the Wisconsin statute in Meyer alongside the Minnesota statute in Cotto Waxo, the problem in applying the appropriate level of scrutiny stands in stark relief. The statute at issue in Meyer was arguably less restrictive than the one considered in Cotto Waxo. Whereas the Minnesota statute precluded the sale of petroleum sweeping compounds within the State of Minnesota, the Wisconsin statute merely conditioned the use of the state landfills on compliance with the regulatory framework. Despite this important distinction, the Seventh Circuit invalidated the statute on extraterritoriality grounds. The approach taken by the Seventh Circuit in Meyer is rather problematic for at least two reasons. First, the decision in Meyer provides very little guidance to the legal community as to where the extraterritoriality principle fits into the dormant Commerce Clause framework. The opinion hopelessly intertwined the standard used for per se statutory violations with that used for discriminatory legislation. After reading the decision, judges and lawyers alike will likely be unable to grasp, with any level of certainty, how a court will or should come down in a particular case.

Moreover, the decision seems to extend the principles set forth in the language of the Supreme Court opinions by allowing the extraterritoriality principle to enter into the "discrimination against interstate commerce" analysis. Such an expansion confuses the protectionism and discrimination issues involved with a

219. Cotto Waxo Co. v. Williams, 46 F.3d at 793.
220. Id. (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)).
221. Id. at 794. See also Ford Motor Co. v. Texas Dep't of Transp., 264 F.3d 493 (5th Cir. 2001) (involving a statute that only prohibited automobile manufacturers from engaging in retail sales in Texas, not in other states); Philip Morris, Inc. v. Reilly, 267 F.3d 45, 64 (1st Cir. 2001), withdrawn, rev'd en banc, 312 F.3d 24 (1st Cir. 2002) (unanimously sustaining a Massachusetts law requiring manufacturers of tobacco products to disclose additional ingredient information on the ground that it did not force transactions occurring out of state to follow the labeling requirement).
222. Cotto Waxo Co. v. Williams, 46 F.3d at 794.
223. Id.
224. Id.
225. Id. ("[T]he Act does not directly burden interstate commerce and strict scrutiny does not apply.").
dormant Commerce Clause analysis with the federalism and sovereignty issues involved with an extraterritoriality analysis. As one commentator has noted, such an expansion serves to augment the ability of the judiciary to invalidate state legislation.\textsuperscript{226} The discrimination-extraterritoriality distinction drawn by the court in \textit{Cotto Waxo} avoids the above problems that the Seventh Circuit will inevitably face in future cases involving questionable state legislative initiatives.

\textit{b. Problems Determining When a Statute Affects Commerce "Wholly Outside" the Enacting State's Borders}

In addition to having considerable difficulty in determining what level of scrutiny to apply to statutes implicating traditional extraterritoriality concerns, several courts have also struggled to resolve the intricate difficulties involved with the extraterritoriality principle analysis. Perhaps the most difficult portion of the analysis to unravel has been determining when, under the blueprint the Supreme Court laid down in \textit{Healy}, a state’s law has effects which occur “wholly outside” the boundaries of the state.\textsuperscript{227} This inquiry, as observed by several Justices on the Supreme Court, is more difficult than it first appears.\textsuperscript{228} Several circuits have floundered in their efforts to answer this complex question and have resorted to more familiar and comfortable methods of analysis as a result.

In \textit{Dean Foods Co. v. Brancel},\textsuperscript{229} for example, the Seventh Circuit chose to rely on traditional contract principles to answer the difficult question of whether a statute’s effects occurred solely outside a state’s borders. \textit{Dean Foods} involved a challenge by an Illinois milk processing company to a State of Wisconsin law governing milk prices.\textsuperscript{230} The Wisconsin law sought to curtail the Dean Food Company’s payment of “volume premiums” to those producers supplying it with larger quantities of milk.\textsuperscript{231} Alleging that the Wisconsin ban on volume premiums regulated transactions occurring in Illinois, Dean Foods Company filed suit in the United States District Court for the Western District of Wisconsin seeking injunctive relief.\textsuperscript{232} The Secretary of the Wisconsin Department of Agriculture appealed the District Court’s grant of injunctive relief.\textsuperscript{233}

On appeal, the Seventh Circuit affirmed the decision of the District Court that the Wisconsin law violated the ban on extraterritorial legislation.\textsuperscript{234} Reviewing de novo the District Court’s decision as to where the transactions in commerce took place, the Seventh Circuit rejected the state’s assertion that the numerous contacts Dean Foods had with Wisconsin farmers supported its argument that some sales contracts were formed within the borders of Wisconsin.\textsuperscript{235} Rather, the court

\textsuperscript{226} Braun, supra note 211, at 147-48.
\textsuperscript{228} See supra notes 188-96 and accompanying text.
\textsuperscript{229} 187 F.3d 609 (7th Cir. 1999).
\textsuperscript{230} Id. at 610.
\textsuperscript{231} Id. at 611. These “volume premiums” apparently had the effect of favoring those producers with large herds of cattle and forcing smaller dairy farms in Wisconsin to go out of business. Id.
\textsuperscript{232} Id. at 610-11.
\textsuperscript{233} Id. at 612.
\textsuperscript{234} Id. at 620.
\textsuperscript{235} Id. at 617.
looked to the Uniform Commercial Code and state common law governing contract formation in an effort to determine whether the parties completed their contract in the State of Wisconsin or elsewhere. Concluding that neither a meeting of the minds nor a binding commitment as to essential terms occurred until the milk arrived in Illinois, the court determined that the transactions "indisputably occurred in Illinois, and that no contracts were formed in Wisconsin." Finding that the commercial transactions involved all occurred outside Wisconsin, the court concluded that the Wisconsin law violated the extraterritoriality principle.

The Seventh Circuit is not alone in utilizing more traditional methods of analysis to solve the puzzle over when a statute crosses the hazy line into the area of extraterritorial reach. In Instructional Systems Inc. v. Computer Curriculum Corp., the Third Circuit similarly encountered the question of whether a state regulation had effects occurring wholly outside New Jersey. The dispute involved the New Jersey Franchise Practices Act as it pertained to a contract between a computer learning system producer and a northeastern United States distributor. Instructional Systems, Inc. argued that Computer Curriculum Corporation had violated the Act, which required franchisors to terminate franchises only for good cause. Computer Curriculum moved for summary judgment on the grounds that, inter alia, the Act violated the dormant Commerce Clause due to its application to franchise territory outside of the State of New Jersey. The District Court held that the Act governed the agreement and that it violated the extraterritoriality principle.

On appeal, the Third Circuit reversed the District Court’s ruling on the extraterritoriality issue and concluded that the application of the Act to the parties’ agreement did not violate the Commerce Clause per se. The court reasoned that traditional contract matters concerning multiple states frequently involve “difficult choice of law question[s]” where one state’s law will apply to a contract governing out-of-state transactions. Extending that rationale to the facts of the

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236. Id.; cf. K-S Pharmacies, Inc. v. Am. Home Prods. Corp., 962 F.2d 728, 730-31 (7th Cir. 1992) (resorting to statutory interpretation and reading "most favored purchaser" as "most favored purchaser in Wisconsin" in order to answer the question as to whether a Wisconsin statute prohibiting price discrimination in pharmaceutical sales regulated sales outside Wisconsin).


238. Id. at 620. The court distinguished the facts in Dean Foods from a case where elements of the deal occurred in separate states. Id. (referencing A.S. Goldman & Co. v. N.J. Bureau of Sec., 163 F.3d 780 (3rd Cir. 1999)). In Golden, the court seemed to suggest that the result might be different because both states would have an interest in regulating the terms of the contract. Id. at 787.


240. Id. at 816. The parties to the dispute had agreed that Instructional Systems, Inc. (ISI) would, from 1984 to 1989, be the exclusive distributor of Computer Curriculum Corporation’s (CCC) product in Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, Vermont, and Washington, D.C. Id. By agreement of the parties, California law would govern any dispute. Id. The fighting issue arose in 1989 when CCC opted to limit ISI’s marketing territory, thereby prompting ISI to sue for injunctive relief. Id.

241. Id. ISI argued that the written agreement for a specific period granting it the right to market and sell CCC’s product constituted a franchise under the Act. Id.

242. Id. at 816-17.

243. Id. at 823.

244. Id. at 826.

245. Id. at 825.
case, the court determined that, by agreeing to the terms of the exclusive distribution agreement, the parties chose to have the Act govern their situation. In effect, under a choice of law analysis the parties themselves had therefore caused the Act to reach beyond the borders of New Jersey.246 Due to this finding, the Third Circuit concluded that the instant case was distinguishable from Healy and Brown-Forman in that those cases involved situations where the state itself “dictated [a regulation’s] extraterritorial effect.”247 However, finding that such cases were inapposite did not end the inquiry. The court continued to analyze the “‘practical effect’” of the statute; specifically, the court inquired as to the likelihood that the statute could result in subjecting parties to inconsistent legislation from different states.248 On this point, the Third Circuit found that the Act did not raise a constitutional problem for creating a likelihood of inconsistent regulations.249

A recent case arising in the United States District Court for the District of Maine, Pharmaceutical Research & Manufacturers of America v. Concannon,250 reveals the inherent difficulty in determining when a statute regulates transactions occurring completely out-of-state. For purposes of discussing the extraterritoriality issues raised in the case, it may help to briefly outline the relevant sections of the challenged statute at issue, which provides for the “Maine Rx Program.”251

The State of Maine passed a statute providing for a program designed to provide affordable prescription drugs to all qualified residents within Maine. Basically, the statute requires drug manufacturers wishing to sell prescription pharmaceuticals in Maine to enter into negotiated rebate agreements with the program commissioner.252 The rebate amounts are determined by a process of negotiation in which the state may consider the amounts calculated under the federal Medicaid program.253 The amounts received under the rebate program are then used to reimburse pharmacies that offer prescription drugs to participating state residents

246. Id. The court stated: “[I]t is the parties’ own agreement which operated to project the New Jersey law outside of New Jersey’s borders, a result which CCC will find ironic but which inevitably follows from the choice-of-law analysis.” Id.

247. Id. at 826. But see Connecticut v. Crotty, 180 F. Supp. 2d 392 (N.D.N.Y. 2001). Crotty involved a New York Department of Environmental Conservation emergency regulation restricting commercial lobstering off Fisher’s Island to those individuals who obtained a permit and who agreed to surrender their right to lobster in the waters of any other state. Id. at 394. Relying heavily on Healy v. Beer Inst., the District Court granted the injunction on the ground that the regulation impermissibly regulated extraterritorially by precluding those who lobstered off Fisher’s Island from engaging in the commercial lobstering trade in any other state. Id. at 399-402. The court’s reliance on Healy may have been misplaced. Notably, the lobstermen were not, under the terms of the regulation, required to obtain a Fisher’s Island permit. Rather, they had the ability to decide for themselves whether to lobster either the waters off Fisher’s Island or the waters of surrounding states. It follows that the State of New York did not necessarily “dictate” the effect of the regulation and that the statute merely had, at best, an indirect extraterritorial effect.


249. Id. See also discussion infra text accompanying notes 272-76.


252. Id. § 2681.

253. Id. § 2681(4)(A). The State is required to use its “best efforts to obtain an initial rebate amount equal to or greater than the rebate calculated under the Medicaid program.” Id. § 2681(4)(B).
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The First Circuit disagreed with the argument put forth by PhRMA. Rather, the court determined that, on its face, the statute merely regulated transactions occurring within the state. In particular, the First Circuit found that the statute regulated the purchase of prescription drugs triggering the rebates, the rebate negotiation process, and the prior authorization process—transactions all occurring within Maine. The court also noted that the statute neither required manufacturers to sell at a particular price nor tied the price of in-state products to out-of-state prices. Thus, the court found that the statute was not per se invalid for regulating extraterritorially.

The United States Supreme Court accepted the drug manufacturer’s petition for certiorari and reviewed the First Circuit’s decision this past term. On ap-

254. Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66, 71 (1st Cir. 2001), aff’d sub nom. Pharm. Research & Mfrs. of Am. v. Walsh, 123 S. Ct. 1855 (2003). Notably, the program is, unlike the federal Medicaid statute, open to all state residents regardless of economic well-being.
255. 22 M.R.S.A. § 2681(7).
256. Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d at 72.
257. Id. at 81-82. PhRMA also argued that the Maine statute was unconstitutional under both the Supremacy Clause and the Pike balancing scheme of the dormant Commerce Clause. Id. at 73, 80.
258. Id. at 82.
259. Id.
260. Id. at 81-82; accord Phillip Morris, Inc. v. Reilly, 267 F.3d 45, 64 (1st Cir. 2001), withdrawn (unanimously concluding that a Massachusetts law requiring cigarette manufacturers to disclose the identity of all ingredients did not regulate extraterritorially on the grounds that the act did not require out-of-state commerce in tobacco products to be conducted according to in-state terms); Star Scientific, Inc. v. Beales, 278 F.3d 339, 356 (4th Cir. 2002) (sustaining a Virginia statute authorizing the state to receive in excess of $4 billion arising out of a settlement agreement between Virginia and several tobacco manufacturers on the grounds that the statute “specifically limit[ed] its applicability to the sale of cigarettes ‘within the Commonwealth,’ . . . impose[d] a fee only for cigarettes actually sold within the State . . . [had] no effect on transactions undertaken by out-of-state distributors in other States . . . [and did] not insist on price parity with cigarettes sold outside of the State”) (citation omitted).
261. Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d at 82.
262. Pharm. Research & Mfrs. Of Am. v. Concannon, 249 F.3d 66 (1st Cir. 2001), cert. granted, 122 S. Ct. 2657 (2002). The two questions presented by the drug manufacturer were as follows:
1. Whether the federal Medicaid statute, 42 U.S.C. § 1396 et seq., precludes Maine from limiting Medicaid patients’ access to prescription drugs as a means of compelling drug manufacturers to subsidize price discounts [on prescription drugs] for non-Medicaid populations?
peal, the United States Supreme Court flatly rejected the nonresident drug manufacturer’s dormant Commerce Clause challenge. With regard to the argument that the Maine Rx Program constitutes impermissible extraterritorial legislation, the Court succinctly reasoned that the statute neither regulates the price of any out-of-state transaction nor insists that the drug manufacturers sell their products at a set price. The Court likely determined correctly that the program would not regulate activity occurring completely outside the borders of Maine. The negotiation process would occur between the state administrator and the manufacturers and the rebate would likely be paid within the state. Furthermore, in a facial challenge to the program, discerning whether the ostensibly “voluntary” negotiation process would actually remain voluntary or would become coercive is often difficult. In its perfunctory discussion of the drug manufacturer’s dormant Commerce Clause challenge, however, the Court unfortunately offered very little guidance to the circuit courts to assist them in their struggle to determine just when a state regulation has effects completely outside the borders of the enacting state.

The Maine Rx Program was saved both at the First Circuit and at the Supreme Court by the fact that PhRMA’s challenge was facial as opposed to as applied. However, the program, if instituted, could raise legitimate extraterritorial concerns. First, as noted by the First Circuit, the program could become an unconstitutional vehicle for Maine to regulate prices beyond its borders if Maine were to dominate the negotiation process. Second, the program might create an inevitable ripple effect within the pharmaceutical industry. The program could not only jeopardize the sale of certain pharmaceuticals within Maine, but also could increase the likelihood that the manufacturers would need to raise their prices in other states due to the lower priced pharmaceuticals in Maine. This inevitable effect would require a court to consider whether Maine, by enacting its program, had impermissibly affected conduct outside its borders. Finally, and perhaps most importantly, the program will likely be followed by other state legislatures. If allowed to proceed, the Maine Rx Program will effectively provide affordable prescription drugs to a large segment of Maine citizens. Other states will likely promulgate similar programs in an effort to combat rising health care costs and promote the health and well being of their constituents. The inevitable effect of the various state statutes would be to subject manufacturers of pharmaceuticals to multiple regulatory schemes that could very well conflict with one another.

2. Whether Maine violates the Commerce Clause by requiring an out-of-state manufacturer that sells its products to wholesalers outside the state to remit a payment to the state each time one of the manufacturers’ products is subsequently sold by a retailer within the state?

Brief of Petitioner at 1, Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66 (1st Cir. 2001) (No. 01-188). Oral argument was held on January 22, 2002.


264. Id.

265. Id.

266. See discussion infra Part II.B.2.c.

As noted earlier, the Supreme Court has suggested that courts may also invalidate state legislation that has the effect of creating inconsistencies between the regulatory regimes of other states. Generally, the federal courts will apply a rule of per se invalidity to a statute that conflicts with regulations enacted by other states. The rationale typically stated by courts when invalidating statutes creating the risk of inconsistent regulatory regimes is that they create confusion for interstate businesses and unnecessarily burden interstate commerce. Some suggest that the underlying rationale for preventing the establishment of conflicting regulatory regimes is that the compliance costs for multistate businesses can be prohibitive.

Under the Healy framework, the lower federal courts need to determine whether particular state regulations interfere to such a degree that they may be invalidated under the dormant Commerce Clause. Of importance in this inquiry are the concept of sovereignty and the broad powers of individual states to decide for themselves how to manage the affairs of their citizens. Of equal importance in the analysis is the question whether the subjects of the regulation “are in their nature national, or admit only of one uniform system, or plan of regulation.”

In determining at what point state regulatory regimes become “inconsistent,” the Third Circuit has clarified that laws merely creating additional demands over regulations from other states do not satisfy the definition of “inconsistent” legislation. Rather, in Instructional Systems, Inc. v. Computer Curriculum Corp. the court noted that to meet such a definition, one must allege that the respective statutes have more than a mere “difference in approach” or possibly conflicting schemes. The court suggested that such a violation would occur if another state “impose[d] demands on [a party] which would require them to violate New Jersey law or vice versa.” Applying that analysis, the court found that because no other state had imposed any irreconcilable obligations, the New Jersey Franchise Practices Act at issue could withstand constitutional scrutiny.

269. Id. at 367; accord Pharm. Research & Mfrs. of Am. v. Concanon, 249 F.3d 66, 79 (1st Cir. 2001); but see Gaylord, supra note 23, at 1116 (suggesting that the burden caused by inconsistent regulations should be factored in as a burden within the Pike v. Bruce Church, Inc. balancing analysis).
270. E.g., S. Pac. Co. v. Arizona, 325 U.S. 761, 773-74 (1945); Am. Libraries Ass’n v. Pataki, 969 F. Supp. 160, 169 (S.D.N.Y. 1997) (noting that “[t]he menace of inconsistent state regulation invites analysis under the Commerce Clause . . . because that clause represented the framers’ reaction to overreaching by the individual states that might jeopardize the growth of the nation—and in particular, the national infrastructure of communications and trade—as a whole”).
272. See Regan, supra note 140, at 1909; Richards, supra note 17, at 107-19.
273. Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 319 (1851). See also Nat’l Collegiate Athletic Ass’n v. Miller, 10 F.3d 633, 640 (noting the need for uniformly national procedures among the individual members of the National Collegiate Athletic Association).
274. Instructional Sys., Inc. v. Computer Curriculum Corp., 35 F.3d 813, 826 (3rd Cir. 1994) (stating that “laws which merely create additional, but not irreconcilable, obligations are not considered to be ‘inconsistent’”).
275. Id.
276. Id.
277. Id.
278. Id.
The Third Circuit's suggestion that regulations must be in direct conflict to render them inconsistent appears to have widespread support in other federal courts. Although the federal courts agree for the most part that regulations must be in direct conflict in order to render them "inconsistent," they nevertheless have difficulty employing the Healy framework with any consistency in cases involving avant-garde state legislation. For example, in American Libraries Ass'n v. Pataki, the United States District Court for the Southern District of New York invalidated a New York statute criminalizing the dissemination of obscene materials to minors over the Internet. In considering the challenged statute, district court judge Loretta A. Preska observed that the very nature of the "borderless world of the Internet raises profound questions concerning the relationship among the several states and the relationship of the federal government to each state, questions that go to the heart of 'our federalism.'" Specifically, the court observed that the nature of the Internet allows for information to be simultaneously transmitted to every state and every nation worldwide. After noting that the Internet represents an innovative instrument of interstate commerce, the court proceeded to invalidate the New York regulation on several grounds. Subjecting the New York statute to a three-tiered level of review, the court concluded that the regulation: (1) impermissibly regulated extraterritorially; (2) failed to pass muster under the Pike balancing scheme; and (3) unconstitutionally subjected Internet users to inconsistent regulations.

Concerning the issue of whether the New York legislation regulated extraterritorially, the court noted that the nature of cyberspace all but precluded states from regulating the Internet. Perhaps the most interesting portion of Judge Preska's opinion, however, dealt with the discussion of inconsistent regulations. On this point, the court stressed that the Internet represents an area requiring "consistent treatment" by "regulation only on a national level... [and that] [r]egulation by any single state can only result in chaos, because at least some states will likely enact laws subjecting Internet users to conflicting obligations." Thus, the court

279. See Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66, 83 (1st Cir. 2001) (requiring actual conflict or "price gridlock"); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 112 (2d Cir. 2001) (requiring a "substantial" or "actual" conflict); S.D. Meyers, Inc. v. City & County of San Francisco, 253 F.3d 461, 470-71 (9th Cir. 2001) (noting that "mere speculation about the possibility of conflicting legislation" is insufficient); but see Nat'l Coll. Athletic Ass'n v. Miller, 10 F.3d 633, 639 (9th Cir. 1993) (suggesting that a statute could violate the Commerce Clause's extraterritoriality prong simply due to its "potential interaction or conflict with similar statutes in other jurisdictions") (emphasis added).

280. E.g., Ferguson v. Friendfinders, Inc., 115 Cal. Rptr. 2d 258, 266 (Cal. Ct. App. 2002) (rejecting an extraterritorial reach challenge to a California law governing the transmittal of unsolicited commercial email advertisements despite the presence of an actual conflict between the California law and a similar Pennsylvania law because the company had failed to show that it would be forced to comply with both laws at the same time).

282. Id. at 183-84.
283. Id. at 168 (quoting Younger v. Harris, 401 U.S. 37, 44 (1971)).
284. Id. at 167 ("Once a provider posts content on the Internet, it is available to all other Internet users worldwide.") (quoting Am. Civil Liberties Union v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996), aff'd, 521 U.S. 844 (1997)).
285. Id. at 173.
286. Id. at 177, 181.
287. See id. ("New York has deliberately imposed its legislation on the Internet and, by doing so, projected its law into other states whose citizens use the Net.").
288. Id. at 181.
suggested that all state regulations concerning Internet use violate the dormant Commerce Clause because they inescapably subject users to conflicting regulatory schemes.289

The Pataki decision has come under attack from judges and commentators alike.290 Although the United States District Court for the Southern District of New York was likely correct in determining that the statute at issue in Pataki impermissibly regulated extraterritorially,291 the court's sweeping rationale renders any state regulation of the Internet susceptible to invalidation. The California courts seem to be leading the movement away from the Pataki court's broad suggestion that states may not engage in regulation of the Internet. In Ferguson v. Friendfinders, Inc.,292 for example, a California district court candidly rejected the Pataki rationale when considering a California statute governing the transmission of unsolicited commercial e-mail advertisements to unsuspecting recipients.293 After finding that the California law did not regulate conduct occurring wholly outside of California,294 the court suggested that states could regulate the Internet to a certain degree.295 The court then clarified that, in addition to only regulating conduct within the state borders, the California law did not generate an issue over inconsistency with unsolicited e-mail regulations in other jurisdictions.296 Notwithstanding the existence of eighteen similar state regulations, Judge Haerle determined that California's ban on unsolicited e-mail did not violate the Constitution per se.297 In the court's view, even the existence of an actual conflict with a Pennsylvania statute was not enough to limit California's ability to proscribe e-mail transmissions not meeting the criteria set out in its statute.298 Because the

289. Id. at 169. The court stated: "[T]he Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether." Id.; see also ACLU v. Johnson, 194 F.3d 1149, 1161 (10th Cir. 1999) (adopting the Pataki rationale). But cf. Hatch v. Superior Court, 94 Cal. Rptr. 2d 453, 471-72 (Cal. Ct. App. 2000) (declining to follow the Pataki rationale that mere usage of the Internet insulates individuals from state regulation).


291. By its very terms, the statute regulated all Internet activity and not just that directed to or from New York residents. Am. Libraries Ass'n v. Pataki, 969 F. Supp. 169, 171 (S.D.N.Y. 1997).


293. Id. at 265-66. The statute required that persons or entities sending unsolicited e-mail establish a toll-free number and have that number listed in the first line of e-mail text so as to allow the recipient to notify the sender that he or she no longer wished to receive such material. It further required the sender to include in the subject line of each e-mail message "ADV:" as the first four characters or "ADV:ADLT" if the advertisement concerned adult material. Id. at 261.

294. Id. at 264 ("[T]he statute] does not . . . directly regulate commerce occurring wholly outside the State. It expressly applies only when [unsolicited commercial e-mail] is sent to a California resident by means of an electronic-mail service provider who has equipment in the State.").

295. Id. at 265. The court stated: "Initially, we join the other California courts . . . by rejecting Pataki's holding that any State regulation of Internet use violates the dormant Commerce Clause." Id. (citations omitted) (second emphasis added).

296. Id. at 266.

297. Id. The court went on to find that the law also passed constitutional scrutiny under the Pike scheme. Id. at 266-69.

298. Id. at 266. The Pennsylvania statute cited in the case required that the first nine characters of the subject line of an unsolicited commercial e-mail containing explicit sexual material be "ADV ADULT." California's version instead required the subject line to read "ADV:ADLT."
challenger of the statute could not show that there would ever be a situation where a sender would be required to comply with both state statutes, the court determined that the California statute did not create a risk of inconsistent regulations.\textsuperscript{299} Thus, the court suggests that despite the vast borderless world of the Internet, states can nevertheless enact legislation regarding the Internet without subjecting users to a chaotic regulatory environment.

The above examination reveals that the Supreme Court and the lower federal courts use the extraterritoriality principle as a way in which to check the regulatory powers of the states\textsuperscript{300} However, the federal courts struggle to define and use the principle. The \textit{Meyer} opinion reveals the problems that may arise when the Supreme Court does not adequately define the terminology it uses in its opinions. There, the Seventh Circuit hopelessly confused the levels of scrutiny in trying to incorporate the extraterritoriality principle into the dormant Commerce Clause framework.\textsuperscript{301} Additionally, several lower federal courts have struggled, in the absence of a clear mandate from the Court, to determine whether or not extraterritorial legislation is a particularized form of direct regulation.\textsuperscript{302} At least one court has even gone so far as to assert that the Supreme Court did away with the "direct regulation" inquiry with two 1994 decisions.\textsuperscript{303} Although the courts have mainly utilized the extraterritoriality doctrine separate and apart from the discriminatory purpose and excessive burden tests, they have unfortunately failed to clearly articulate what the principle is and where it fits into the modern dormant Commerce Clause jurisprudence.\textsuperscript{304} Because the courts have been unable to decipher the broad, yet cryptic language set forth in the line of cases extending from \textit{MITE} to \textit{Healy}, they have developed a patchwork approach to dealing with the problem of restraining extraterritorial state legislation. In this regard, courts have not only applied dissimilar levels of scrutiny to legislation having extraterritorial effects, but also resolved the questions involved with the extraterritorial analysis by varying means. The inevitable result of such a patchwork approach is that states cannot be certain whether their planned legislation will survive constitutional scrutiny.

\section*{III. Discussion}

Without question, the federal courts have struggled in following the Supreme Court's directive to invalidate state legislation with extraterritorial effects. As the previous Part of this Comment reveals, the courts have had considerable difficulty doing so because they are unable to conceptualize the extraterritoriality principle and determine how it fits within the dormant Commerce Clause framework. Consequently, the decisions within the various federal courts lack consistency and fail to provide a useful framework for dealing with state legislation having extraterritorial effects. In fact, courts have invalidated state statutes on extraterritorial reach.

\textsuperscript{299} Id.  
\textsuperscript{300} See Gergen, \textit{supra} note 63, at 1735.  
\textsuperscript{301} See \textit{supra} notes 208-09 and accompanying text.  
\textsuperscript{302} See, \textit{e.g.}, Cotto Waxo Co. v. Williams, 46 F.3d 790, 793 n.3 (8th Cir. 1995) (remarking that the Supreme Court has not clarified the question of whether extraterritorial reach is a "special example" of directly regulating interstate commerce).  
\textsuperscript{303} Grant's Dairy-Maine, LLC v. Comm'r, 232 F.3d 8, 19 (1st Cir. 2000) (citations omitted).  
\textsuperscript{304} See Goldsmith & Sykes, \textit{supra} note 271, at 789 (quoting Regan, \textit{supra} note 140, at 1884).
grounds where the state does not impose its legislation on those outside its borders but merely requires compliance with the terms of its legislation once the choice is made to enter into a particular transaction. In this sense, the federal courts have invalidated state initiatives on extraterritorial reach grounds where the state has not projected its legislation into neighboring states.

Unfortunately, the risks involved with invalidating state legislation on uncertain grounds are considerable. Decisions that haphazardly invalidate state initiatives offer legislators little guidance on how to defend their legislation and thus provide little incentive for states to launch new programs designed to respond to the changing needs of their citizens. In this regard, Justice Louis Brandeis once stated:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent [such] an experiment. . . . But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

Moreover, when courts decide cases based upon uncertain grounds, there exists a risk that individual cases will turn in large part upon the "personal value judgments and prejudices of the [presiding] judge." This phenomenon calls into question the "institutional integrity" of the court and opens the ensuing decision to criticism from those believing that the courts should not be in the business of making substantive policy decisions.

Due to these significant concerns, the federal courts must have a clear understanding of what the extraterritoriality principle is and how best to employ it. Proceeding in two sections, this Part attempts to shed light on the extraterritoriality principle. The first section discusses the problems inherent with the approach the federal courts have taken in deciding cases implicating the extraterritoriality principle. It stresses the problems associated with marrying the extraterritoriality principle to an ailing dormant Commerce Clause as well as the changing face of our economy and the growing need to rethink how we are to deal with extraterritorial issues in the coming years. The next section examines the extraterritoriality principle in light of the case discussions in Part II. It attempts to come up with a workable and limited definition of the principle in order to assist with the discussion of the development of a new approach to dealing with extraterritorial state legislation.

306. See Lawrence, supra note 40, at 398.
308. See, e.g., HENNESSEY, supra note 128, at 55 (discussing not only the role of the judiciary in making policy judgments, but also the problems involved with a nonmajoritarian branch of government making such decisions).
309. Id.; see also Eule, supra note 3, at 442 n.89 (stating that "the choice between competing substantive political values must be made by representatives of the people rather than by unelected judges").
A. What Are We Doing? The Argument for Separation

There are several problems with the approach of the federal courts of haphazardly invalidating state initiatives under the dormant Commerce Clause. To begin with, the dormant Commerce Clause jurisprudence has been the subject of countless attacks from critics emphasizing that the jurisprudence is merely a judicial creation without textual justification.310 That determining the appropriate level of scrutiny is nearly impossible,311 and that the heavy reliance on balancing leads to inconsistent results and unpredictability.312 Despite the obscurity encompassing the dormant Commerce Clause, the Supreme Court has suggested that the federal courts should integrate the extraterritoriality principle into the dormant Commerce Clause analysis.313 Specifically, the Court has asked the federal courts to analyze extraterritoriality issues under the per se invalid category initially created to deal with discriminatory or protectionist state legislation.314

With the benefit of hindsight, we are in a position to recognize the inherent problems with the Court's suggestion. As discussed above in Part II.C, utilizing the extraterritoriality principle under the rubric of the dormant Commerce Clause has confounded the federal judiciary. The difficulties defining the appropriate level of scrutiny, determining when legislation reaches "wholly outside" the state, and identifying when regulations may be "inconsistent" have played themselves out in the federal courts.315 Marrying the extraterritoriality principle to an already besieged dormant Commerce Clause not only expands an ailing body of jurisprudence, but also subjects state initiatives that reach beyond a state's borders to a constitutional doctrine that rests on an unstable legal foundation.

Embedding the extraterritoriality principle within the dormant Commerce Clause framework poses additional problems as well. First, applying the dormant Commerce Clause's per se invalid level of scrutiny to extraterritorial state legislation generates a significant risk that novel state legislation will be invalidated.316 Invalidating state initiatives before affording the enacting state the opportunity to demonstrate that the means chosen are the least burdensome means available runs the risk of striking down too much legislation.

An even greater reason for separating the extraterritoriality principle from the dormant Commerce Clause inquiry is that the modes of commerce have changed since the time the Supreme Court devised the framework for dealing with legisla-

310. See generally, Redish & Nugent, supra note 37.
311. Maltz, supra note 34, at 53-58.
312. See supra notes 116-20 and accompanying text (addressing problems with balancing).
313. See, e.g., Healy v. Beer Inst., 491 U.S. 324, 336 (1989) ("[T]he 'Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders."").
314. Id. at 337 n.14 (citing Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986), for the proposition that extraterritorial state legislation, as a direct regulation of commerce, should be "struck down . . . without further inquiry").
315. See discussion supra Part II.C.2.c.
316. Cf. O'Grady, supra note 63, at 627-29 (arguing that the per se invalid category should be narrowed to include only protectionist measures on the grounds that a "more focused per se constraint" allows a state to exercise its own judgment, affords deference to the state judgments, and encourages state experimentation). Although Professor O'Grady limited her discussion to the distinction between discriminatory and protectionist state legislation, her conclusion that the Court should "focus" the dormant Commerce Clause analysis is consistent with the central argument in this Comment.
tion having an extraterritorial effect.\textsuperscript{317} Today, companies make a remarkable number of interstate sales by way of the Internet. Online banking, investing, and electronic contract formation have become prevalent and can be expected to become even more so in the coming years.\textsuperscript{318} With the expansion of the Internet and a proliferation in cyberspace traffic, there exists a great need to ensure the protection of cyberspace users.\textsuperscript{319} Moreover, in the health care field, states have been looking for new ways in which to alleviate the substantial cost and access concerns since the early 1990s.\textsuperscript{320} If the Maine RX Program is any indication of the solutions that we may expect from states to these problems, individual states will likely make an effort to enact programs similar to the one that survived constitutional scrutiny in the United States Court of Appeals for the First Circuit and the United States Supreme Court.\textsuperscript{321}

In short, states will likely endeavor to experiment with techniques that assist them in their efforts to wrestle with the changing needs of their citizens. Due to the nature of the recent changes in the modes of commerce, however, legislative experiments can be expected, which will involve legislation with effects that can be felt beyond the borders of the enacting state.\textsuperscript{322} These changes call into question the Court's suggested approach of dealing with extraterritorial state legislation under the labyrinthine dormant Commerce Clause framework. More importantly, these changes require a rethinking both of our notions of federalism and of our concerns with extraterritorial state legislation. Part III.B will attempt to do just that.

Some argue that the extraterritoriality principle is not a dormant Commerce Clause problem. In his often-cited article, Professor Donald Regan\textsuperscript{323} asserts that the extraterritoriality principle is not contained within the Commerce Clause.\textsuperscript{324} He bases such a broad assertion on the fact that instances exist in which the extra-

\textsuperscript{317} See, e.g., Gaylord, supra note 23, at 1097-98 (observing that the expansion of cyberspace has greatly increased the likelihood that state regulations concerning the internet will reach beyond the borders of the enacting state).

\textsuperscript{318} See RAYMOND T. NIMMER, THE LAW OF COMPUTER TECHNOLOGY § 14.01 (1997) (commenting on the emergence of a new commercial environment in which commerce is conducted).

\textsuperscript{319} E.g., Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 183 (S.D.N.Y. 1997) (suggesting the need of national regulation of website content to avoid exposing unsuspecting individuals to indecent materials). See also NIMMER, supra note 318, at § 14.02 (observing that electronic environments capable of "more rapid processing" raise the "susceptibility to different types of fraud and errors" than were present under "manual environments").

\textsuperscript{320} E.g., Wendy E. Parmet, Regulation and Federalism: Legal Impediments to State Health Care Reform, 19 AM. J.L. & MED. 121, 121 (1993).

\textsuperscript{321} Cf. Rachel Regenold, Tobacco Litigation: Manufacturers Required to Disclose Ingredients Under State Disclosure Law—Phillip Morris, Inc. v. Reilly, 27 AM. J.L. & MED. 493, 494 (2001) (discussing the First Circuit's decision in Phillip Morris v. Reilly and observing that the likely fallout from the decision will be that other states will "follow Massachusetts" lead and pass similar disclosure acts in order to protect the public health").

\textsuperscript{322} See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting) (noting that "technology [has] converted every local problem into a national one").

\textsuperscript{323} William W. Bishop Jr. Collegiate Professor of Law, University of Michigan Law School.

\textsuperscript{324} Regan, supra note 140, at 1873.
territoriality principle is implicated, but that do not involve the flow of commerce. Although his example may be correct, it does not assist the reader in understanding why the extraterritoriality principle is not embedded within the dormant Commerce Clause. Rather, his example provides only one hypothetical case and thus offers very little in the way of support for his ultimate assertion. Comparing the underlying concerns of the dormant Commerce Clause and the extraterritoriality principle may make a more convincing argument.

As discussed in Part II above, the dormant Commerce Clause is concerned with the process of state legislation as well as with statutes that either discriminate against interstate commerce or protect in-state interests. Indeed, our Constitution was drafted in part to evade the economic Balkanization and tariff wars experienced by the colonies and the states under the Articles of Confederation. Although states have not gone so far as to enact tariffs since the Constitution took effect, they have established other measures creating economic barriers against competition so as to "reap . . . the benefits of tariffs by other means." State initiatives that create economic barriers to competition serve merely to impede the free flow of commerce and impose a substantial burden on the national economy. Such measures conflict with the Framers' "intention of preventing states from isolating themselves and destroying all hope of national unity." In light of the above concerns, the Commerce Clause ensures that an area of free trade exists in which the several states may operate.

On the other hand, the extraterritoriality principle is not concerned with discrimination, protectionism, or with the process of state legislation. Rather, the Court's current interpretation of the extraterritoriality principle is concerned with limiting the number of state regulatory regimes to which an individual or corpo-

325. Id. at 1888. The example Professor Regan offers bears repeating: Now, imagine that Georgia adopts a law expressly forbidding acts of homosexual sodomy committed by any person anywhere in the United States. An Illinois citizen, traveling in Georgia, is arrested and prosecuted by Georgia authorities for a recent act of homosexual sodomy that occurred in Illinois. The Illinois traveler objects that Georgia cannot do this. And, of course, he is right. The Georgia law is a classic example of extraterritorial legislation, and it is forbidden by the Constitution.

The unconstitutionality of the Georgia law has nothing to do with the commerce clause. No commerce is involved.

Id.

326. See supra text accompanying notes 61-63.
327. See supra text accompanying notes 15-19.
328. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 192-94 (1994) (noting that tariffs are "so patently unconstitutional that our cases reveal not a single attempt by any State to enact one").
329. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 ("Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin.").
330. O'Grady, supra note 63, at 627.
331. Wyoming v. Oklahoma, 502 U.S. 437, 470 (1992) (Scalia, J., dissenting) (stating that "the very purpose of the Commerce Clause was to create an area of free trade among the several States . . . [and the Clause] by its own force created an area of trade free from interference by the States") (quoting Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 402-03 (1984)). See also NOWAK et al., supra note 18, at 145-46 (arguing that the Commerce Clause was designed to ensure a national power "broad enough to deal with the type of economic problems of the nation as a unit").
332. TRIBE, supra note 138, at 1079-80 (noting that protectionist and extraterritorial legislation are very different); LAURENCE H. TRIBE, CONSTITUTIONAL LAW 409 (2d ed. 1988) (noting that the theme of political representation is inapposite to the extraterritoriality analysis).
rate entity will be subjected. In cases involving extraterritorial state legislation, the Court further focuses on the authority of an individual state to enact substantive legislation. In this sense, the principle has been compared with the ability of a state to assert jurisdiction over individuals outside its borders. In fact, the similarities between the ability of a state to assert jurisdiction over and pass legislation concerning individuals beyond its borders have thus raised the question of whether the extraterritoriality principle should be located within the Due Process Clause of the Fourteenth Amendment. However, such an argument appears to miss the mark. The Due Process Clause serves as a limitation on state action vis-à-vis individuals and says nothing concerning any limitation on the actions of a state vis-à-vis other states.

The elements of state sovereignty and federalism also run deep within the current formulation of the extraterritoriality principle. According to the Supreme Court, "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority." This statement implies that distinct spheres of power exist in which states may operate and that each state retains full authority within its respective sphere. However, in light of the fact that our nation is comprised of fifty-one individual sovereign governments, if one state legislates so as to exceed its sphere it runs the risk of interfering with the authority of another state properly operating within its own sphere. The extraterritoriality principle serves to manage this delicate

334. Edgar v. MITE Corp., 457 U.S. 624, 643 (1982) (noting that the Court will strike down state laws having the "practical effect of... [controlling conduct] beyond the boundaries of the state") (quoting S. Pac. Co. v. Arizona, 325 U.S. 761, 775 (1945)).
335. *Id.* (citing Shaffer v. Heitner, 433 U.S. 186, 197 (1977), a case holding, on due process grounds, that a state may not maintain in rem jurisdiction unless individuals have sufficient "minimum contacts" with the state). Notably, the statement comparing the two did not command a majority of the Court in *Edgar v. MITE Corp.*
336. *E.g.*, Regan, *supra* note 140, at 1890-92 (considering such a question).
337. U.S. Const. amend. XIV, § 1. The Fourteenth Amendment states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law ... ." *Id.* (emphasis added).
338. *See, e.g.*, Regan, *supra* note 140, at 1891-92 (arriving at the same conclusion).
340. *Id.* at 336 (emphasis added).
341. *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (noting that states have broad powers within their respective spheres to govern the "lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State") (quoting *The Federalist No. 45*, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)). That the states possess broad powers can be further inferred from the Tenth Amendment, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The limitations on state sovereign powers can be found in Article I, section 10, clauses 1-3.
342. The fifty-one sovereign governments are comprised of the government of the individual fifty states as well as the national government. *See* Gregory v. Ashcroft, 501 U.S. at 457 (observing that the "Constitution establishes a system of dual sovereignty between the States and the Federal Government" and that the several "States possess sovereignty concurrent with that of the Federal Government") (internal citations omitted).
balance of power between the states.\textsuperscript{343} The principle ensures that a state will not overstep its bounds and unreasonably trample upon the authority of another sovereign.\textsuperscript{344} Comparing these concerns with those underlying the federal courts' disdain for discriminatory or protectionist state legislation illustrates that they are distinct and are thus deserving of singular treatment.

\textbf{B. A New Approach: Arriving at a Workable Framework for Evaluating Extraterritorial State Legislation}

Unfortunately, the line determining when a state has overstepped its bounds by legislating extraterritorially is not clear.\textsuperscript{345} The problems that the federal courts have had in employing the principle are merely a testament to the blurred constraints on states to affect those beyond their borders. What is clear is that, to a certain extent, states may enact legislation having extraterritorial effects.\textsuperscript{346} In order to ensure both that states act within their respective spheres and that novel state initiatives are not undeservedly invalidated, arriving at a paradigm for the extraterritoriality principle that is clear and that allows for some extraterritorial reach by states is essential. This section attempts to devise such a framework.

Defining the extraterritoriality principle is challenging. One commentator has defined the principle as follows: "For the most part, states may not legislate extraterritorially, whatever exactly that means."\textsuperscript{347} That definition suggests the inherent difficulties with constructing a coherent and workable framework for analyzing state regulations having effects outside a state. It suggests not only that states may legislate such that the effects of its legislation are felt outside the state, but also that the line distinguishing acceptable and objectionable state initiatives is

\textsuperscript{343} The Full Faith and Credit Clause, U.S. Const. art. IV, § 1, also plays an important role in ensuring this balance in some cases involving the applicability of state legislation in other states. That Clause states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. It thus requires that, provided state X had jurisdiction to enact a law or enter a judgment, state Y must be prepared to honor the law or judgment of state X. 16B AM. JUR. 2D Constitutional Law § 975 (1998). Some have stated that the Full Faith and Credit Clause expresses the principle that the rights and obligations created in each state are afforded the maximum level of enforcement by sister states. Hughes v. Fetter, 341 U.S. 609, 615 (1951) (Frankfurter, J., dissenting). In this respect, the concern of the Full Faith and Credit Clause is somewhat different from the concerns of the extraterritoriality principle. Specifically, the extraterritoriality principle is distinct because it "forbids a state from acting on its own laws when it should not" and does not concern itself with the issue of ensuring that a state's laws are honored by sister states. Regan, supra note 140, at 1894 (emphasis added).

\textsuperscript{344} See Healy v. Beer Inst., 491 U.S. at 337; Tribe, supra note 138, at 1078 n.21.

\textsuperscript{345} Regan, supra note 140, at 1896; Goldsmith & Sykes, supra note 271, at 789.

\textsuperscript{346} CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 92-93 (1987) (suggesting that a state may legislate extraterritorially to a certain extent); Regan, supra note 140, at 1896; see also Healy v. Beer Inst., 491 U.S. 324, 345 (1989) (Scalia, J., concurring) (arguing for a less expansive extraterritoriality doctrine on the grounds that a broad prohibition against extraterritorial state legislation would invalidate too many state initiatives).

\textsuperscript{347} Regan, supra note 140, at 1896.
often blurred. Vague as the definition is, there appears to be some general agreement with it.\textsuperscript{348}

Unfortunately, a workable and dependable framework cannot end there. Even Professor Regan, the author of the above definition, recognized this reality. Regan qualified his definition of the extraterritoriality principle by including a formalistic distinction: states may legislate extraterritorially and indirectly affect conduct occurring beyond their borders so long as they do not directly regulate out-of-state behavior.\textsuperscript{349} Again, Professor Regan provides a single hypothetical in support of his belief that a framework grounded in formalism is the means by which the courts should evaluate extraterritorial legislation. Such a mechanical approach lacks the degree of clarity necessary in order to provide state legislatures guidance and incentive to experiment. The approach also fails to appreciate the difficulties in distinguishing between direct and indirect action, especially in situations involving complicated interstate transactions.\textsuperscript{350} Further, it not only generates a risk that valid state initiatives will be swept away by the judiciary, but also increases the possibility that arbitrary decisions will result.\textsuperscript{351} In short, a framework resting on a formalistic distinction between direct and indirect activity fails short of striking the delicate balance between ensuring both that states do not exceed their legislative authority and that novel state initiatives will not be needlessly invalidated.\textsuperscript{352}

Alternative schemes exist that reject such a mechanical approach to dealing with the extraterritoriality principle. Directly responding to Regan's article on the extraterritoriality principle, Professor Gergen\textsuperscript{353} similarly recognized the problems associated with states reaching beyond their respective spheres.\textsuperscript{354} Noting that Regan's scheme "does not seriously restrain the states" in that the "ends a state might wish to accomplish by directly regulating foreign behavior usually can be met by indirect legislation," Professor Gergen eschews formalism for a balancing approach.\textsuperscript{355} Arguing that the "hard cases" to which Regan referred may be more prevalent than suggested, he instead selected a framework that would afford

\begin{itemize}
\item \textsuperscript{348} CTS Corp. v. Dynamics Corp. of Am., 481 U.S. at 92-93 (suggesting that a state may legislate extraterritorially to a certain extent). \textit{See also} Gergen, supra note 63, at 1735-37 (suggesting that Professor Regan's basic definition is difficult to argue with, but expressing his clear disdain for Regan's additional comment that the principle must be further qualified by including a formalistic ban on direct regulation of behavior beyond a state's borders); Gaylord, supra note 23, at 1123-27 (implicitly supporting Regan's basic definition).
\item \textsuperscript{349} \textit{See} Regan, supra note 140, at 1899-900. Professor Regan clarifies this distinction with a hypothetical: Michigan can prohibit smoking within the state of Michigan regardless of the effects on the cigarette industry, but may not prohibit cigarette manufacturing in North Carolina.
\item \textsuperscript{350} \textit{E.g.}, Gergen, supra note 63, at 1738-39.
\item \textsuperscript{351} \textit{Id.}
\item \textsuperscript{352} Professor Regan does not disregard the problems with a formalistic approach. Regan, supra note 140, at 1879. He realizes that difficult cases will arise that challenge his framework. He argues, however, that "[i]n the end, some hard cases must simply be decided by judicial intuitions concerning the spirit of the Constitution." \textit{Id.} The problems that arise from a heavy reliance on "judicial intuitions" were discussed in the introductory paragraphs to this Part. \textit{See} supra text accompanying notes 305-09.
\item \textsuperscript{353} Joseph C. Hutcheson Professor, University of Texas School of Law.
\item \textsuperscript{354} Gergen, supra note 63, at 1738.
\item \textsuperscript{355} \textit{Id.} at 1737-42.
\end{itemize}
the state some deference while allowing the court to balance the costs and the benefits of the enacted legislation.\textsuperscript{356}

The weakness with Gergen's proposal comes sharply into focus upon close analysis. Gergen suggests that the courts should defer to the legislative product, yet turns around and states, within the very same paragraph, that "though a law seems a product of no ill will [by the state], the Court should not be reluctant to strike it down if it seems the costs greatly outweigh the benefits."\textsuperscript{357} The weighing of legitimate competing interests is best left to the state legislatures. Many have argued that the courts are ill suited to engage in such activities.\textsuperscript{358} Professor Eule's statement concerning judicial intervention bears repeating:

The failure to defer to the legislative product undercuts the democratic process in a multitude of ways. It permits substitution of judicially imposed polices for evenhanded and rationally based state legislative efforts. It encourages politically influential interest groups to seek remedies in judicial rather than legislative tribunals. It induces congressional and agency abrogation of responsibility. Finally, it subverts the silently expressed will of the majority . . . despite [the legislature's] considered refusal or inability to achieve legislatively the same result.\textsuperscript{359}

Therefore, even with the qualification that the courts should adhere as closely as possible to precedent when they balance, Professor Gergen's proposal similarly falls short of establishing an appropriate framework for coping with the issues concerning extraterritorial state legislation.

The schemes for employing the extraterritoriality principle outlined above lack the necessary deference to the legislative product and the understanding that extraterritorial state legislation will be more prevalent in years to come. A new approach is thus needed—one that not only affords considerable deference to state legislatures, but also appreciates the intergovernmental relationships involved with extraterritorial state legislation. This subsection briefly suggests a very different form of analysis for cases implicating the extraterritoriality principle.

First, for the reasons discussed in the various sections of this Comment, the recommended model frees the extraterritoriality principle from the tangled dormant Commerce Clause web. The recommended model also disregards a formalistic approach to evaluating extraterritorial state legislation. As mentioned at several points in this Comment, distinctions based on whether a state regulates "directly" or "indirectly" involve intractable inquiries that the courts are ill suited to handle. Moreover, formalistic approaches are unforgiving; they generate arbitrary and unpredictable results and are insensitive to changing circumstances.\textsuperscript{360} A formal approach is particularly ill suited to dealing with modern extraterritoriality cases for this very reason. As the elected representatives of the citizens of a state, state legislators need the ability to respond to the needs of their constituents as

\textsuperscript{356} Id. at 1742 (stating that the "major difference" between his proposal and Regan's "is that rather than saying the Court should never balance, I say that it may sometimes do so"). Fortunately, Gergen qualifies his support of a balancing scheme somewhat. In order to "constrain [the court's] discretion," he suggests that the courts should "pay close attention" to and endeavor not to "vary too far, too fast" from precedent. Id. at 1741-42.

\textsuperscript{357} Id.

\textsuperscript{358} See sources cited supra notes 127-28.

\textsuperscript{359} Eule, supra note 3, at 442-43 (footnote numbers omitted).

circumstances change. Applying a mechanical test to state initiatives hinders their ability to meet the wishes of their constituents by gratuitously endangering inventive legislation.

The recommended model also avoids a balancing approach. Weighing the costs and benefits of particular legislative initiatives is a job that should be left to those best able to accomplish it.\textsuperscript{361} Courts have neither the available resources nor the expertise needed to tackle such an endeavor. Moreover, although ad hoc balancing may tend to produce results more tailored to the individual facts of particular cases, it fails to contribute to the development of a consistent body of legal principles.\textsuperscript{362} State legislators need predictable legal principles in order to respond appropriately to the needs of their constituents. Prior fact-specific case holdings oftentimes do little to assist state legislators in their efforts to evaluate proposed solutions to the issues raised by the latest technological advances.

Instead, the suggested framework is marked by considerable deference to the decisions of state legislatures. It gives the states the ability to enact legislation that may well extend beyond their borders in certain situations. These situations include instances where out-of-state parties choose to subject themselves to the law of the enacting jurisdiction\textsuperscript{363} and where the state has a substantial relationship to the entities involved.\textsuperscript{364} Thus, where an out-of-state individual or entity wishes to conduct business affecting the lives of the citizens of the enacting state, a state has a legitimate interest in legislating to ensure that its citizens are treated fairly. Under the suggested scheme, a state would violate the extraterritoriality principle when it enacted legislation affecting out-of-state parties without any connection to the state. Such parties are properly within the regulatory jurisdiction of another sovereign. State legislation that disrupts the delicate balance of federalism and state sovereignty in this manner should not be afforded the deference enjoyed by statutes not interfering with these concerns. And, of course, a state would not be permitted to legislate so as to discriminate against interstate commerce or to favor in-state interests over out-of-state interests. Such legislation runs afoul of the innate concerns of the dormant Commerce Clause as articulated by the Court in various opinions.\textsuperscript{365}

\textsuperscript{361} See sources cited supra note 127.
\textsuperscript{362} See T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943, 1005 (1987) ("But balancing, whatever its merits as a way out of formalism, has itself become rigid and formulaic. It gives answers, but it fails to persuade.").
\textsuperscript{363} The case of Instructional Sys., Inc. v. Computer Curriculum Corp., 35 F.3d 813, 825-26 (3rd Cir. 1994), provides an apposite example. The case is discussed in detail supra at text accompanying notes 239-49 & 274-78.
\textsuperscript{364} The statute at issue in Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 163 (S.D.N.Y. 1997), would not fall within either category. Specifically, the statute regulated conduct irrespective of a party's choice to subject itself to the regulatory jurisdiction of New York. Moreover, as noted supra at footnote 287, the broad language of the statute essentially reached beyond the New York borders to touch all Internet activity and not just that directed to or from New York residents. Am. Libraries Ass'n v. Pataki, 969 F. Supp. at 171. Cf. generally Gaylord, supra note 23 (arguing that a "nexus" requirement should determine the outcome of cases involving extraterritorial state legislation of the Internet). The similarity between Gaylord's "nexus requirement" and substantial connection requirement suggested in this Comment is apparent. However, the recommended framework, unlike Gaylord's proposal, is not limited to Internet cases and does not locate itself within the First Amendment. Id. at 1129-30.
\textsuperscript{365} See supra text accompanying notes 63-69, 79-84, and 94-96.
The proposed model does not involve the judiciary with intractable inquiries concerning direct and indirect effects or require that it perform difficult balancing acts. Rather, the suggested approach limits the role of the courts to inquiring into whether the legislation is protectionist and whether a sufficient connection exists between the state and the out-of-state parties. The suggested model therefore limits the discretion of the courts and ensures that states will not legislate for those who are properly subject to the legislation of another sovereign. In short, the recommended model suggests a backseat role of the federal judiciary when considering state legislation having effects beyond the borders of the enacting state.

However, states are not given free reign to enact self-serving legislation that affects the national economy under the recommended model.\textsuperscript{366} Although they are not significantly hindered in this regard by the federal judiciary, they are limited nonetheless by the concerns of federalism and by the Supremacy Clause.\textsuperscript{367} The onus of supervising the states to ensure that they do not adversely affect the national commercial interest should be on Congress, not the courts.\textsuperscript{368} Congress is not only better able to recognize when national interests are involved, but also adequately equipped to protect such interests.\textsuperscript{369}

\textbf{IV. CONCLUSION}

Since the 1980s, the federal courts have relied rather heavily on the extraterritorial-reach line of cases to invalidate a variety of state initiatives. Tempted by the broad and undefined language employed by the Supreme Court in the line of cases running from \textit{MITE} to \textit{Healy}, the courts have invalidated numerous state initiatives that reach beyond their state’s borders under the Commerce Clause. The extraterritoriality principle has thus become another powerful weapon in the judiciary’s arsenal to combat state legislation thought to overstep its bounds. Confounded by the sweeping language of the Court, the federal judiciary has heedlessly struck down state legislation having nominal extraterritorial effects because it has been unable to conceptualize or adequately constrain the extraterritoriality principle. In essence, because the federal courts have been unable to ascertain with any confidence what the extraterritoriality principle is, or how to contain it, they have struck blindly at state initiatives having effects beyond the borders of the enacting state. Instead of devising a coherent framework, the federal courts have created what amounts to a patchwork approach for dealing with extraterritorial state legislation. In doing so, they have not only offered very little guidance to state legislatures concerning how to defend initiatives that they have already enacted, but also placed in jeopardy the willingness of the states to experiment with new legislation designed to respond to the changing needs of their citizens. In the immortal words of Justice Brandeis, such reluctance by states to experiment with

\textsuperscript{366} See Younger v. Harris, 401 U.S. 37, 44, (1971) ("[Federalism] does not mean blind deference to ‘States’ Rights’ any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses.").

\textsuperscript{367} U.S. Const. art. VI, cl. 2. The Supremacy Clause states, in part: "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . ." \textit{Id}.

\textsuperscript{368} Eule, \textit{supra} note 3, at 483-84.

\textsuperscript{369} Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (noting that the "Federal Government holds a decided advantage [in checking the abuses of government]: the Supremacy Clause").
pioneering new initiatives "may be fraught with serious consequences to the nation."\textsuperscript{370}

The difficulties encountered by the federal judiciary in adjudicating disputes implicating the extraterritoriality principle are in large part the result of marrying the extraterritoriality principle to the dormant Commerce Clause. Embedding the principle within the dormant Commerce Clause framework has augmented the murkiness of an already besieged body of jurisprudence. Furthermore, such an approach unjustifiably places state initiatives in jeopardy by subjecting state legislation having extraterritorial effects to several levels of scrutiny,\textsuperscript{371} thereby increasing the likelihood that the federal courts will determine that the legislation is unconstitutional. In order to clarify the extraterritoriality cases and to ensure that state initiatives are afforded appropriate respect, the federal courts should extract the extraterritoriality principle from the dormant Commerce Clause framework.

Separating the extraterritoriality principle from the dormant Commerce Clause analysis solves only one half of the problem. The second half of the solution requires that the courts achieve a greater level of understanding of the extraterritoriality principle. The Court has regrettably failed to articulate a workable definition of the principle. It has further failed to draw a line to distinguish legitimate from illegitimate extraterritorial state regulations. Such a line must be drawn. We live in an age of multistate transactions where state boundaries have an ever-increasing significance.\textsuperscript{372} Individual transactions may have ripple effects in several states; to some degree, such effects are inevitable. Moreover, with the modernization of our economy and our modes of commerce, the likelihood that states will need to respond with pioneering legislation is on the rise.\textsuperscript{373}

This Comment has attempted to sketch a proposal that eliminates many of the problems inherent within the Court's current framework for dealing with extraterritorial state legislation. It has argued in favor of reducing judicial intrusion into matters of legislative policy and relied instead on the informed judgment of Congress to resolve issues of the public interest.\textsuperscript{374} By relying heavily on our very notions of federalism, the framework suggested in this Comment has endeavored to reduce the risk that innovative state initiatives will be struck down by the federal courts. Consequently, it has taken steps to preserve the powers of the state governments.\textsuperscript{375} Chief Justice Marshall's comment in \textit{Gibbons v. Ogden} that "the State governments remain, and constitute a most important part of our system" rings true even today.\textsuperscript{376} By ensuring that state governments play an active role

\textsuperscript{370} New State Ice Co. v. Liebmann, 285 U.S. 262, 310 (1932) (Brandeis, J., dissenting).
\textsuperscript{371} \textit{E.g.}, Nat'l Solid Waste Mgmt. Ass'n v. Meyer, 63 F.3d 652 (7th Cir. 1995).
\textsuperscript{372} See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting) (noting that "technology [has] converted every local problem into a national one").
\textsuperscript{373} See Regan, \textit{supra} note 140, at 1913 (observing that "it is possible to imagine considerably more sympathetic uses of a state power to legislate extraterritorially for its own citizens than any we have yet discussed").
\textsuperscript{374} \textit{Cf.} RICHARDS, \textit{supra} note 17, at 158. \textit{See also} Aleinikoff, \textit{supra} note 362, at 1004 (noting that "[c]onstitutional law will have trouble helping to define the arena of politics if it is seen simply as an act of ordinary politics").
\textsuperscript{376} 22 U.S. (9 Wheat.) 1, 199 (1824).
within our federal system, this Comment has sought, above all, to guarantee the "promise of liberty."377

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377. U.S. v. Lopez, 514 U.S. 549, 575-76 (1995) (Kennedy, J., concurring) (remarking that the Framers created our unique system of government, comprised of separate national and state governments, in order to ensure greater freedom by adding an additional layer of political accountability); see also Gregory v. Ashcroft, 501 U.S. 452, 458-59 (1991). The Court stated:

Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty.

Id.