

RETHINKING THE SCOPE OF STATE POWER: TERRITORIAL
JURISDICTION, POPULAR SOVEREIGNTY, AND
EXTRATERRITORIAL LEGISLATION

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ABSTRACT

The Supreme Court applies the territorial framework of international law to resolve disputes over the reach of state power. Under this framework, a state's power is coterminous with its borders, such that a state's regulatory power within its territory is limited only by federal law. The Court recently used this framework to overrule an obscure line of Dormant Commerce Clause cases that held that a state regulation of local conduct could have impermissible extraterritorial effects.

This Article argues that the territorial model of state power from international law does not account for the division of sovereignty within our federal system. In several foundational cases, the Jay, Marshall, and Taney Courts all held that the people of each state are the source of its sovereign power, and the people of one state have no right to control the people of another sovereign. Moreover, the records of the Constitutional Convention, debates over ratification, and early court precedent show that the founding generation understood state sovereignty to include autonomy over issues not delegated to the federal government. By using what this Article calls "indirect extraterritorial legislation," a state can violate these fundamental principles of sovereignty and federalism with a regulation that formally applies only to local conduct. Although such legislation would have violated the extraterritoriality doctrine of the Dormant

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Commerce Clause, the Court eliminated that doctrine in National Pork Producers Council v. Ross without seeming to understand the values at stake or how most lower courts had dealt with the issue. Moving forward, a state like California or Texas thus could use its economic influence to push its social policy on the rest of the country. California, for example, could require any company doing business in the state to affirm that it gives all of its U.S. employees a specified minimum wage, union rights, or reproductive healthcare. And Texas could respond in kind, making national economic cohesion another casualty of the culture wars.

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INTRODUCTION

The Court has often said that state power is a function of its territorial borders.¹ Extraterritorial state legislation, a law that directly regulates conduct in another state, generally violates the regulated state's sovereignty and undermines the integrity of our federal system.² This approach to state power comes from traditional international law, which assumes that the state has absolute sovereignty within its borders.³ In the Court's most recent discussion of the scope of state power, it used the territorial model of state power to hold that a state regulation of conduct within its borders is immune from attack on extraterritoriality grounds.⁴

This Article argues that the territorial model of international law fails to account for the nature of sovereignty within our federal system.⁵ Though a nation can respond to an invasion of its sovereignty with economic and military sanctions, the Constitution clearly prohibits a state from taking such action.⁶ In a series of well-known cases, the Jay, Marshall, and Taney Courts thus all declared that the Supreme Court had the constitutional responsibility to resolve disputes over the division of sovereignty within our federal system.⁷

To remain consistent with the early Court's foundational understanding of the division of sovereignty, no state should have

1. See, e.g., *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1156 (2023) (“[T]his Court has recognized the usual ‘legislative power of a State to act upon persons and property within the limits of its own territory.’” (quoting *Hoyt v. Sprague*, 103 U.S. 613, 630 (1881))).

2. See *Bonaparte v. Tax Ct.*, 104 U.S. 592, 594 (1882) (“No State can legislate except with reference to its own jurisdiction. One State cannot exempt property from taxation in another. Each State is independent of all the others in this particular.”). Of course, when a state voluntarily extends comity to the laws of another state and applies them as a matter of its conflict of laws analysis, there is no constitutional issue because there is no conflict of sovereign authority. Cf. RESTATEMENT (SECOND) OF CONFLICT OF L. § 1 cmt. c (A.L.I. 1971).

3. See *infra* Part II. The exceptions to the territorial framework similarly track the exceptions in international law.

4. See *infra* Part IV. Doctrinally, the Court eliminated the extraterritoriality doctrine of the Dormant Commerce Clause in *Nat'l Pork Producers*, 143 S. Ct. at 1165.

5. For scholarship on how individual rights should limit state power, see, for example, Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429 (2004).

6. See U.S. CONST. art. I, § 10.

7. See *infra* Part II.C.

the power to regulate local conduct solely as an excuse to control behavior in other states. A state can violate this principle with “indirect extraterritorial legislation,” which this Article defines as a state regulation of local conduct based on actions taken in another state. This Article’s central argument is that constitutional history, structure, and precedent all dictate that a state should not be permitted to use indirect extraterritorial legislation to control conduct in another state when it has no legitimate interest in doing so. If the federal courts do not enforce such a rule, economically powerful states like California or Texas could coerce much of the country into following their lead in the culture wars. Unlike legislation that incidentally influences conduct through the filter of the free market, a state can use indirect extraterritorial legislation in a way that raises the same structural concerns as a direct regulation of conduct in another state.⁸

For example, suppose California prohibits the in-state sale of a product unless it was produced by workers who were afforded the benefits required under California law, such as a minimum wage, union rights, or even reproductive health care services. Under the territorial framework, this law would not exceed California’s power or infringe on the sovereignty of another state because it applies only to sales within California’s borders. And, of course, Texas could respond in kind, triggering the prospect of a trade war between the states. Because such legislation would not discriminate against interstate commerce under current precedent, the Court may reject any challenge to it under the Dormant Commerce Clause.⁹

Until recently, an obscure line of Dormant Commerce Clause cases prevented the states from taking such action. Throughout the twentieth century, the Court repeatedly held that a state’s regulation of local conduct could have impermissible extraterritorial effects. For example, in *Brown-Forman Distillers Corp.* the Court struck down a New York law that prohibited the sale of liquor in

8. See *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 580 (1986) (“[A] State may not ‘establish a wage scale or a scale of prices for use in other states, and ... bar the sale of the products ... unless the scale has been observed.’” (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 528 (1935))).

9. Although Congress could intervene in this example, that is not always the case; elected officials are not always well equipped to resolve culture war issues, and, most importantly, this Article argues that the Constitution requires the federal courts to intervene.

New York if the distiller offered lower prices in another state.¹⁰ The Court held that the New York law violated the Dormant Commerce Clause because a state cannot “project its legislation into [other States]” by effectively controlling the price of goods sold in another state to consumers who have no connection to New York.¹¹ But because state law often influences conduct beyond its borders, the so-called extraterritoriality doctrine of the Dormant Commerce Clause was notoriously difficult to define and frequently criticized by courts and legal scholars alike.¹²

The lower federal courts, however, consistently limited application of the extraterritoriality doctrine to avoid absurd results. State legislation that merely influenced extraterritorial conduct, such as a minimum wage law, or that served a valid state interest, such as a law requiring a label on a product with harmful chemicals, was uniformly upheld.¹³ The lower courts only applied the extraterritoriality doctrine in rare cases in which the people of the regulating state lacked a legitimate interest in the out-of-state conduct that was being controlled.¹⁴ Until recently, the doctrine developed by the federal courts over the past ninety years may not have been well understood, but it aligned well with historical principles of sovereignty.¹⁵

10. 476 U.S. at 585.

11. *Id.* at 582-83 (alteration in original) (quoting *Baldwin*, 294 U.S. at 521).

12. *See, e.g.*, Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 998-99 (2013); Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133, 1154 (2010); Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 899 (2008); Michael J. Ruttinger, Note, *Is There a Dormant Extraterritoriality Principle? Commerce Clause Limits on State Antitrust Laws*, 106 MICH. L. REV. 545, 559-60 (2007); Peter C. Felmlly, Comment, *Beyond the Reach of the States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 467, 492, 503 (2003); 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, 1896 (1987).

13. *Cf., e.g.*, Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 110-16 (2d. Cir. 2001) (upholding a Vermont law that required light bulbs sold in the state to be labeled hazardous if they contained mercury).

14. For example, the Seventh Circuit recently struck down an Indiana law that imposed regulations on out-of-state vaporizer liquid production facilities, which were so detailed that they included requirements for how the company structured agreements with employees and contractors. *See Legato Vapors, LLC v. Cook*, 847 F.3d 825, 828-29, 837 (7th Cir. 2017).

15. The origins of the doctrine are generally traced back to *Baldwin v. G.A.F. Seelig, Inc.* 294 U.S. 511, 527 (1935).

In *National Pork Producers Council v. Ross*, however, the Court rejected decades of precedent and held that the Dormant Commerce Clause does not protect against extraterritorial state legislation.¹⁶ In his opinion for the Court, Justice Neil Gorsuch stated that “[t]o resolve disputes about the reach of one State’s power,” the courts should consult “original and historical understandings of the Constitution’s structure and the principles of ‘sovereignty and comity’ it embraces.”¹⁷ Justice Gorsuch’s opinion, however, provides little indication of how those concepts limit state power. Based on the manner in which the Court actually applied the law, *National Pork Producers* is probably best read to adopt a formalist territorial framework, in which states have complete authority within their borders and none beyond them.

Ironically, the Court’s opinion in *National Pork Producers* undermines the very historical understanding of constitutional structure and values it seeks to protect. The lower courts therefore should take Justice Gorsuch’s invitation to consult “original and historical understandings” of sovereignty¹⁸ and conclude that they support the very same lower court doctrine that his opinion swept aside. Indirect extraterritorial legislation that is not connected to a legitimate state interest violates the nature of sovereignty within the Union.

16. 143 S. Ct. 1142, 1165 (2023). This Article’s view of *National Pork Producers* does not seem to be shared by other legal scholars. To date, other legal scholars who have examined *National Pork Producers*’s coverage of extraterritoriality have supported the Court’s ruling. See Jack Goldsmith & Alan Sykes, *The California Effect, Process-Based Regulation, and the Future of Pike Balancing*, 2023 SUP. CT. REV. 125, 128 (“[T]he Court correctly ruled that a nondiscriminatory state law with extraterritorial effects violates the [Dormant Commerce Clause] only when it runs afoul of *Pike* balancing (effectively extinguishing ‘extraterritoriality’ as a separate test under the [Dormant Commerce Clause].”); Katherine Florey, *The New Landscape of State Extraterritoriality*, 102 TEX. L. REV. 1135, 1140 (2024) (“To be sure, this was a more than reasonable approach, given the just and abundant criticism these cases have received.”); Bradley W. Joondeph, *The “Horizontal Separation of Powers” After National Pork Producers v. Ross*, 61 S.D. L. REV. 45, 63 (2024) (“On this matter, [the Court in *National Pork Producers*] was surely correct. It seems inconceivable that a state law could violate the Commerce Clause merely because it practically ‘controls’ activity in other states.”); Douglas A. Kysar, *State Public Morality Regulation and the Dormant Commerce Clause*, 19 DUKE J. CONST. L. & PUB. POL’Y 109, 110 (2024) (arguing that the Court rejected the extraterritoriality argument “with good reason”).

17. *Nat’l Pork Producers*, 143 S. Ct. at 1156.

18. *Id.*

I. DEFINING THE PROBLEM: THE TERRITORIAL FRAMEWORK AND INDIRECT EXTRATERRITORIAL LEGISLATION

Courts and legal scholars have long struggled to explain exactly when a state exceeds the scope of its authority.¹⁹ Territorial borders are obviously important. But, state legislation inevitably influences conduct beyond its borders. When a state raises its sales taxes, for example, consumers may increase spending in neighboring states. Moreover, traditional principles of international law have always allowed a state to apply its law extraterritorially when doing so is reasonably tied to effects within the state.²⁰ To state the issue more concretely, common sense dictates that one state cannot set a minimum wage in another. But why is it different when a state applies its family law extraterritorially, such as by requiring a father who had never set foot in the state to pay child support?²¹ There is no good explanation in the literature. As Donald H. Regan quipped in a foundational article on the topic, “[f]or the most part, states may not legislate extraterritorially, whatever exactly that means.”²²

19. See, e.g., Eric M. Berman, *P.C. v. City of New York*, 895 F. Supp. 2d 453, 478 (E.D.N.Y. 2012) (“Ultimately, as the Supreme Court has acknowledged, there is no sharply drawn line separating laws which impermissibly regulate extraterritorial commerce from those which do not.”); Rosen, *supra* note 12, at 1154 (“[C]onstitutional doctrine to this day does not clearly tell us to what extent states may regulate people and things outside their borders.”); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1112 (2009) (“[T]he current doctrine lacks coherence, clear boundaries, and ease of application.”); Farber, *supra* note 12, at 899 (“[T]he ban on extraterritoriality is logically incoherent.”); Ruttinger, *supra* note 12, at 559 (“[C]ourts struggle to apply the principle consistently, much less to define the scope of conduct it applies to.”); Felmly, *supra* note 12, at 492 (“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.”).

20. See *Strasheim v. Daily*, 221 U.S. 280, 285 (1911) (“Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.”); see also Darryl K. Brown, *Extraterritorial State Criminal Law, Post-Dobbs*, 113 J. CRIM. L. & CRIMINOLOGY 853, 861-62 (2024) (“International law recognizes several distinct bases on which nation states can exercise jurisdiction over persons outside their borders.”).

21. See, e.g., *In re Vasquez*, 705 N.E.2d 606, 610-12 (Mass. 1999).

22. See Regan, *supra* note 12, at 1896.

The Supreme Court last discussed the scope of state legislative powers in the 2023 case of *National Pork Producers Council v. Ross*.²³ *National Pork Producers* involved a challenge to California legislation that prohibited the in-state sale of products from farm animals that were confined under inhumane conditions.²⁴ Because the law classified industry-standard gestation crates used for breeding sows as cruel, two national groups of pork producers filed suit.²⁵ California imports the vast majority of its pork from other states, and the pork producers argued that it was impractical to create distinct production lines for the California market.²⁶ They thus contended that pork producers throughout the country would be forced to comply with California's law or risk being unable to sell their products to any distributor, because no major distributor was willing to be cut out of the California market.²⁷ In the real world, the pork producers argued, California's law would have the effect of controlling how pigs were confined throughout the country, even pigs that would never enter the California market.²⁸ Given the procedural posture of the case,²⁹ the Court should have assumed that these factual contentions were true.³⁰ In sum, the pork producers argued that the federal courts should not permit California to effectively dictate how a pig is raised in Missouri for local consumption.

Justice Gorsuch's majority opinion in *National Pork Producers* reflects the doctrinal and conceptual confusion surrounding the reach of state power. Quoting *Hoyt v. Sprague*, Justice Gorsuch asserted that when the Court is forced to "referee disputes about where one State's authority ends and another's begins," it has "recognized the usual 'legislative power of a State to act upon persons and property within the limits of its own territory.'"³¹ This

23. 143 S. Ct. 1142, 1165 (2023).

24. *Id.* at 1149.

25. Petition for Writ of Certiorari at ii, *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142 (2023) (No. 21-468).

26. *Id.* at 13.

27. *Nat'l Pork Producers*, 143 S. Ct. at 1151-52.

28. Petition for Writ of Certiorari, *supra* note 25, at 2, 5.

29. *See Nat'l Pork Producers*, 143 S. Ct. at 1150 ("[T]he district court and court of appeals dismissed the producers' complaint for failing to state a claim.").

30. 14 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 3637 (3d ed. 1998).

31. *Id.* at 1156 (quoting *Hoyt v. Sprague*, 103 U.S. 613, 630 (1881)).

quoted language from *Hoyt*, however, merely summarizes principles of private international law from Justice Joseph Story's *Commentaries on the Conflict of Laws*.³² Justice Gorsuch thus began his discussion of state power without seeming to consider whether the nature of the Union (vertical and horizontal federalism) might be relevant to the scope of state power.

Justice Gorsuch then provided a very odd example. He heavily edited language from *Strassheim v. Daily* to say that a state could not “prosecute the citizen of another State for acts committed ‘outside [the first State’s] jurisdiction’ that are not ‘intended to produce [or that do not] produc[e] detrimental effects within it.’”³³ The unedited language from *Strassheim*, however, actually says that when out-of-state conduct produces in-state effects, the state may apply its legislative (but not executive) authority.³⁴ So, one of Justice Gorsuch’s primary examples actually presents the core exception to the territorial framework. The opinion concluded its general discussion of extraterritoriality by stating that “[t]o resolve disputes about the reach of one State’s power, this Court has long consulted original and historical understandings of the Constitution’s structure and the principles of ‘sovereignty and comity’ it embraces.”³⁵

Although the Court in *National Pork Producers* referred to history and sovereignty, it actually applied a strict territorial framework. The Ninth Circuit opinion in *National Pork Producers* stated that “a state law is not impermissibly extraterritorial unless it directly regulates conduct that is wholly out of state.”³⁶ As will be more fully explored below, in their briefing, the pork producers and Solicitor General each argued that a state regulation should be unconstitutional unless it serves a legitimate state interest.³⁷ Justice Gorsuch’s

32. *Hoyt*, 103 U.S. at 630-31.

33. *Nat’l Pork Producers*, 143 S. Ct. at 1156 (alterations in original) (quoting *Strassheim v. Daily*, 221 U.S. 280, 285 (1911)).

34. *Strassheim*, 221 U.S. at 285 (“Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.”).

35. *Nat’l Pork Producers*, 143 S. Ct. at 1156 (quoting *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572 (1996)).

36. *Nat’l Pork Producers Council v. Ross*, 6 F.4th 1021, 1029 (9th Cir. 2021), *aff’d*, 143 S. Ct. 1142 (2023).

37. See Brief for Petitioners at 19-20, *Nat’l Pork Producers*, 143 S. Ct. 1142 (No. 21-468);

opinion completely ignored the issue. The Court's decision to uphold the California law without considering whether it served a legitimate state interest implies that as long as the law directly regulates conduct within the state's territorial borders, it cannot possibly violate the sovereignty of another state.³⁸

The Court's formalist approach to territorial power, however, fails to protect state sovereignty within our federal system. Unlike standard state economic legislation, indirect extraterritorial legislation poses a genuine threat to historically-grounded principles of federalism and state sovereignty.³⁹ As mentioned above, indirect extraterritorial legislation is a regulation of in-state conduct based on conduct in another state.⁴⁰ Of course, it is impossible for such a regulation to exceed the scope of state power under the territorial framework.⁴¹ But, a state can use indirect extraterritorial legislation to strictly control the conduct of people in other states as a condition of enjoying the benefits of the regulating state.⁴² Extraterritorial legislation therefore can raise the same issues as a direct regulation of conduct in another state.

Indiana's Vapor Pens and E-Liquid Act, which the Seventh Circuit struck down in *Legato Vapors LLC v. Cook*, is a prime example.⁴³ The law required producers of vaping devices to obtain a permit to sell within Indiana.⁴⁴ As a condition of getting a permit, the law imposed detailed requirements on all manufacturers, including out-of-state manufacturers, regarding the design, construction, and operation of production facilities.⁴⁵ Not only were these requirements incredibly specific, but out-of-state facilities were also subject to inspection by Indiana officials.⁴⁶ Such detailed control of conduct in another state was possible only with indirect extraterritorial legislation. And, although Indiana clearly had an

Brief for the United States as Amicus Curiae Supporting Petitioners at 17-23, *Nat'l Pork Producers*, 143 S. Ct. 1142 (No. 21-468) [hereinafter Brief for the United States].

38. See *Nat'l Pork Producers*, 143 S. Ct. at 1150, 1165.

39. See discussion *infra* Parts II.A, II.B.

40. See *supra* Introduction.

41. See *Nat'l Pork Producers*, 143 S. Ct. at 1156.

42. See *id.* at 1158-61.

43. 847 F.3d 825 (7th Cir. 2017).

44. *Id.* at 827-28.

45. *Id.* at 828.

46. *Id.*

interest in the health and safety of products sold in Indiana, it had no such interest in controlling “the services and commercial relationships between out-of-state manufacturers and their employees and contractors.”⁴⁷ Indirect extraterritorial legislation like Indiana’s Vapor Pens and E-Liquid Act violates core principles of state sovereignty and federalism by dictating policy in another state when doing so is unrelated to any legitimate interest of the regulating state.

Cases like *Legato Vapors* are rare because, when a state enacts indirect extraterritorial legislation, it usually has a legitimate interest in the out-of-state conduct that is the subject of the regulation. For example, many states require companies to label products containing hazardous materials like lead or mercury.⁴⁸ Labeling laws can qualify as indirect extraterritorial legislation because they regulate in-state sales based on conduct that is typically performed in another state—producing and packaging the good for sale.⁴⁹ Nevertheless, the lower courts uphold such labeling laws because the regulating state has a legitimate interest in warning its residents about the dangers of the product.⁵⁰ When a state law furthers a legitimate interest, any extraterritorial effects are incidental and consistent with state sovereignty and federalism.⁵¹

Indirect legislation that does not serve a legitimate state interest, however, is very different. By definition, such legislation forces out-of-staters to comply with detailed regulations, even when doing so does not advance the general welfare of the people of the regulating state. For example, suppose California prohibited the in-state sale of a product unless it was produced by workers who were afforded the benefits required under California law, such as a specified

47. *Id.* at 833.

48. *See, e.g., Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 110-16 (2d. Cir. 2001) (upholding a law that required light bulbs sold in Vermont to be labeled hazardous if they contained mercury).

49. *See id.* at 110.

50. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see also Nat’l Elec. Mfrs. Ass’n*, 272 F.3d at 115 (finding, under a First Amendment analysis, that Vermont’s labeling law was a sufficient means to furthering the State’s legitimate interest in “protecting human health and the environment from mercury poisoning”).

51. *See Pike*, 397 U.S. at 142; *Brown-Forman Distillers Corp. v. N.Y. Liquor Auth.*, 476 U.S. 573, 579 (1986).

minimum wage, union rights, or health care. By enacting such legislation, large states like California could use their market power to coerce out-of-staters into following their policies.⁵² Indirect extraterritorial legislation thus has the potential to raise the same structural concerns as a direct regulation of conduct in another state.⁵³

Indirect legislation that does not serve a legitimate state interest also lacks democratic legitimacy and undermines accountability. Suppose that State A imposes its policy on State B for the benefit of people (or animals) in State B. Although the law would control conduct in State B, the people of State B would have no voice in setting or amending the policy. The law would therefore lack any democratic legitimacy or accountability, as State A may ignore any complaints by the voters of State B. Similar accountability concerns underlie other federalism doctrines, such as the anticommandeering rule⁵⁴ and the test for discriminatory legislation under the Dormant Commerce Clause.⁵⁵ By denying voters the ability to set local policy, indirect legislation also undermines a core benefit of federalism: promoting citizen involvement and engagement with democracy.⁵⁶

Indirect extraterritorial legislation can also frustrate the states' ability to operate as "laboratories of democracy" in our federal system. As Justice Brandeis explained nearly one hundred years ago, another core function of federalism is to empower "a single courageous State [to] ... serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."⁵⁷ Under this "laboratory of democracy" view, competition for economic development and tax-paying citizens rewards states that promote

52. See Goldsmith & Sykes, *supra* note 16, at 141 & n.64.

53. See *Brown-Forman Distillers Corp.*, 476 U.S. at 580 ("[A] State may not 'establish a wage scale or a scale of prices for use in other states, and ... bar the sale of the products ... unless the scale has been observed.'" (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 528 (1935))).

54. See *New York v. United States*, 505 U.S. 144, 175-76 (1992).

55. See *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 675-76 (1981) ("Less deference to the legislative judgment is due, however, where the local regulation bears disproportionately on out-of-state residents and businesses.").

56. See, e.g., DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 91-92 (1995).

57. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). In fact, Justice Gorsuch cited to this very idea when discussing *Pike* balancing in a different section of his opinion in *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1160 (2023).

efficiency and the public interest.⁵⁸ Like a one-way ratchet, however, indirect extraterritorial legislation can leave a state powerless to fend off the coercive effects of the most restrictive sister-state regulation. In *National Pork Producers*, for example, California's legislation effectively displaced Iowa's ability to choose a more laissez-faire approach to farm animal confinement. And, if New York were to pass even more restrictive legislation (perhaps by requiring even larger cages for pork sold in New York), pork producers throughout the country would likely fall in line. Instead of laboratories of experimentation, indirect legislation promotes conformity to the most restrictive state policy.

Unfortunately, the Court's opinion in *National Pork Producers* does not seem to consider the possibility that a state could indirectly control extraterritorial conduct with a law that formally applies only to transactions within the state's borders. Aside from reliance on precedent, discussed below, the following were Justice Gorsuch's core arguments for applying the strict territorial framework:

In our interconnected national marketplace, many (maybe most) state laws have the "practical effect of controlling" extraterritorial behavior. State income tax laws lead some individuals and companies to relocate to other jurisdictions.... It would provide neither courts nor litigants with meaningful guidance in how to resolve disputes over them. Instead, it would invite endless litigation and inconsistent results.⁵⁹

In other words, Justice Gorsuch was arguing that because most economic legislation influences conduct beyond its borders, the extraterritorial effects of state legislation cannot render it invalid.

Although the premise of Justice Gorsuch's argument is correct, Indiana's Vapor Pens and E-Liquid Act demonstrates that his conclusion does not follow.⁶⁰ For example, standard state economic legislation like a sales tax on vaping products would result in some

58. See, e.g., *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015).

59. *Nat'l Pork Producers*, 143 S. Ct. at 1156.

60. *Legato Vapors, LLC v. Cook*, 847 F.3d 825, 833 (7th Cir. 2017). As a matter of logic, his argument is a nonsequitur. It would be similar to saying that, because many voluntary confessions involve deceptive police interrogation tactics, the deceptiveness of the police conduct is not relevant to whether the confession is admissible.

degree of increased sales in neighboring states as consumers seek lower prices. However, because the extraterritorial effect is filtered through the invisible hand of the free market, the regulating state generally only has the power to influence economic incentives beyond its borders. Indiana's Vapor Pens and E-Liquid Act is far more analogous to a direct regulation of extraterritorial conduct than the hypothetical sales or income tax.

In sum, the Supreme Court generally applies the territorial framework of international law to resolve disputes over the reach of state law. Applying this framework, the Court in *National Pork Producers* implied that it is impossible for a state regulation of conduct within its own borders to have extraterritorial effects that violate federalism or the sovereignty of another state. The following Parts argue that the Court's approach to the scope of state power unwittingly changed the law in a way that is inconsistent with the nature of sovereignty within the Union. Because the Court did not consider the lower courts' experience with the issue, Justice Gorsuch's opinion did not seem to recognize the issues presented by indirect extraterritorial legislation. However, a state can use such legislation to coerce people in other states into following detailed requirements that effectively operate like direct extraterritorial legislation.⁶¹ To protect federalism and state sovereignty, the federal courts should, at a minimum, demand that the state conditions are related to the welfare of the regulating state.

II. CONSTITUTIONAL HISTORY, POPULAR SOVEREIGNTY, FEDERALISM, AND THE PROPER SCOPE OF STATE POWER

As the Supreme Court has repeatedly explained, sovereignty is derived from the consent of the people. Because the people of one state have no right to regulate the nation, state sovereignty is inherently limited by territory. In fact, the driving goal behind federalism at the Constitutional Convention was to preserve state autonomy over local issues, largely as a means to protect state-sanctioned slavery from outside influence.⁶² And, throughout the

61. See *Nat'l Pork Producers*, 143 S. Ct. at 1169-72 (Roberts, C.J., concurring in part and dissenting in part) (discussing examples of states passing legislation that governs the legislating state's pork market but has implications for other states).

62. See generally Jeffrey Schmitt, *Slavery and the History of Congress's Enumerated*

antebellum period, the Supreme Court repeatedly asserted that it had the unique role of enforcing the division of sovereign authority within our constitutional system.⁶³

A. The Founders' Understanding of Sovereignty

Justice Joseph Story's *Commentaries on the Conflict of Laws* presents a well-known account of how his generation understood the sovereignty of an independent nation.⁶⁴ According to Justice Story, every nation possesses an exclusive sovereignty and jurisdiction within its own territory.⁶⁵ Under the traditional understanding, therefore, the supremacy of federal law dictates that the state is not truly sovereign with respect to the powers delegated to the federal government.⁶⁶ A sovereign state, Justice Story wrote, "has no admitted superior, and ... it gives the supreme law within its own domains on all subjects appertaining to its sovereignty."⁶⁷

Justice Story further explained that, because sovereignty comes from the consent of the people, a state generally lacks the power to control conduct beyond its borders in international law.⁶⁸ As a result, "no state or nation can, by its laws, directly affect, or bind property out of its own territory, or persons not resident therein."⁶⁹ Justice Story explained that "it would be wholly incompatible with

Powers, 74 ARK. L. REV. 641 (2022) (arguing that slavery influenced the development of the federal system in the Constitution).

63. See Clyde Spillenger, *Risk Regulation, Extraterritoriality, and Domicile: The Constitutionalization of American Choice of Law, 1850-1940*, 62 UCLA L. REV. 1240, 1259-60 (2015).

64. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 8, at 8-9 (Boston, Hilliard, Gray & Co. 1834). Justice Story's views are persuasive because he was among the most influential and respected jurists of the early republic. See generally R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985) (providing a historical account of Justice Story's service as a Supreme Court Justice, Harvard Law professor, and acclaimed legal scholar). In addition to serving on the Court, he wrote several widely circulated treatises and was the Dane Professor at Harvard Law School. See *id.* at 297.

65. STORY, *supra* note 64, § 8, at 8-9.

66. See *id.* § 7, at 7, § 9, at 9.

67. *Id.* § 8, at 8.

68. *Id.* § 7, at 7-8, § 8, at 8 ("[T]he laws of one country can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country.").

69. *Id.* § 20, at 21. New York Chancellor James Kent explained in his *Commentaries on American Law*, "if a statute ... was to have the same effect in one state as in another, then one state would be dictating laws for another, and a fearful collision of jurisdiction would instantly follow." 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 100 (New York, O. Halstead 1827).

the equality and exclusiveness of the sovereignty of any nation, that other nations should be at liberty to regulate either persons or things within its territories.”⁷⁰ He continued: “No nation can be justly required to yield up its own fundamental policy and institutions in favour of those of another nation.”⁷¹ Instead, “it belongs exclusively to each nation to form its own judgment of what its conscience prescribes to it; of what it can, or cannot do; of what is proper, or improper for it to do.”⁷²

Because territorial sovereignty restricted state legislative power, state courts also had no obligation to apply the law of another state. In other words, the Constitution did not limit a state court’s choice of law. Instead, state courts presumptively extended comity to the law of other states under traditional choice of law rules, unless doing so violated the forum’s public policy.⁷³ Justice Story, for example, explained that “[w]hatever extra-territorial force [state laws] are to have, is the result, not of any original power to extend them abroad, but of that respect, which from motives of public policy other nations are disposed to yield to them.”⁷⁴

In the rare instances when nineteenth century courts ruled on the territorial scope of state power, they also applied the traditional territorial framework of international law.⁷⁵ In *Ogden v. Saunders*,

70. STORY, *supra* note 64, § 20, at 21.

71. *Id.* § 25, at 26.

72. *Id.* § 37, at 36; *see also* 1 KENT, *supra* note 69, at 21 (“[E]ach nation has a right to govern itself as it may think proper, and no one nation is entitled to dictate a form of government, or religion, or a course of internal policy, to another.”).

73. STORY, *supra* note 64, § 29, at 30, § 36, at 35-36.

74. *Id.* § 7, at 7-8.

75. *See, e.g.*, *Strader v. Graham*, 51 U.S. (10 How.) 82, 94 (1851) (“[T]he government of a particular territory, could have no force beyond its limits.”); *Dearing v. Bank of Charleston*, 5 Ga. 497, 511 (1848) (“The independence of every State requires that all other States should concede to it, the right of protecting its own citizens and their rights, and of enforcing obedience to their own laws.”); *Flower v. Parker*, 9 F. Cas. 323, 324-25 (D. Mass. 1823) (“[T]he principle seems universal, and is consonant with the general principles of justice, that the legislature of a state can bind no more than the persons and property within its territorial jurisdiction.”); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 625 (1842) (“To guard, however, against any possible misconstruction of our views, it is proper to state, that we are by no means to be understood in any manner whatsoever to doubt or to interfere with the police power belonging to the states in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the states; and has never been conceded to the United States.”); *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 460 (1857) (enslaved party) (“[N]o State or nation can affect or bind property out of its territory, or persons not residing within it. No State, therefore, can enact laws to operate beyond its own dominions, and, if it

for example, the Court stated that

when ... the States pass beyond their own limits, and the rights of ... citizens of other States, there arises a conflict of sovereign power[s] ... granted to the United States, which renders the exercise of such a power incompatible with the rights of other States, and with the constitution of the United States.⁷⁶

Early court precedent on the scope of state power, however, rarely provides much insight into the issue at the center of this Article. Because antebellum jurists like Justice Story saw the common law as a set of universal and unchanging principles of law, the legal rules governing most issues were identical in each state.⁷⁷ And, when states apply the same legal rules, there is no reason for a court to decide whether one state can project its policy into another. When courts did discuss the issue, however, they uniformly said that extraterritorial legislation violates state sovereignty.

B. Slavery, Federalism, and State Sovereignty

State law, however, diverged on the subject of slavery, resulting in antebellum conflict over the reach of southern-state law. Although slavery was national at the time of the founding, the Revolutionary War had put it on the path to gradual abolition in the

attempts to do so, it may be lawfully refused obedience. Such laws can have no inherent authority extra-territorially. This is the necessary result of the independence of distinct and separate sovereignties. Now, it follows from these principles, that whatever force or effect the laws of one State or nation may have in the territories of another, must depend solely upon the laws and municipal regulations of the latter, upon its own jurisprudence and polity, and upon its own express or tacit consent.” (Nelson, J., concurring), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

76. 25 U.S. (12 Wheat.) 213, 369 (1827). The Court in *Ogden* explained that, in the absence of the Bankruptcy Clause of the Constitution, state bankruptcy law could only discharge a debt within the territorial borders of the state. *Id.* at 273-74.

77. See generally Spillenger, *supra* note 63 (examining the development of territoriality principles in American jurisprudence before the 1960s). Disputes that crossed state lines were relatively rare. See Denning, *supra* note 12, at 981; Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 464-67 (1992); James Y. Stern, Note, *Choice of Law, the Constitution, and Lochner*, 94 VA. L. REV. 1509, 1513 (2008); Alex Ellenberg, Note, *Due Process Limitations on Extraterritorial Tort Legislation*, 92 CORN. L. REV. 549, 559-60 (2007).

North.⁷⁸ At the Constitutional Convention, most delegates sought to preserve some form of state sovereignty. A majority of delegates rejected nationalist proposals like Madison's Virginia Plan out of concern that national majorities and large states could use the federal government to control and oppress the people of smaller states or even groups of states.⁷⁹ Southern delegates were particularly insistent on exclusive state sovereignty over slavery.⁸⁰ For example, when the Committee of Detail wrote the first draft of the Constitution, Charles Cotesworth Pinckney of South Carolina warned that, if the committee failed "to insert some security to the Southern States [against] an emancipation of slaves," he would be "bound by his duty to his State" to oppose it.⁸¹

Many southerners feared that a nonslaveholding majority could use the power of the federal government to undermine slavery, which they believed was necessary to preserve their way of life.⁸² For example, although Thomas Jefferson recognized the evil of slavery, he worried that "[d]eep rooted prejudices" based on race would result in "the extermination of the one or the other" in any attempt to create an interracial society.⁸³ Because of these concerns, Madison recognized that "the great division of interests in the U[nited] States ... did not lie between the large [and] small States: it lay between the Northern [and] Southern."⁸⁴

78. See MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 260-61 (2016); RICHARD BEEMAN, *PLAIN HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 311-14 (2009).

79. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787) (on file with Libr. of Cong., the James Madison Papers, Series I, microform Reel 3).

80. *Id.* (writing that South Carolina and Georgia "were inflexible on the point of the slaves").

81. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 95 (Max Farrand ed., 1911).

82. See *id.* at 369-74. Thomas Lynch declared that, "[i]f it is debated, whether their slaves are their property, there is an end of the confederation." 6 *JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789*, at 1080 (Worthington Chauncey Ford ed., 1906).

83. THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 149 (Richmond ed., Richmond, J.W. Randolph 1853) (1787). Patrick Henry likewise said: "As much as I deplore slavery, I see that prudence forbids its abolition." 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787*, at 534 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter *THE DEBATES IN THE SEVERAL STATE CONVENTIONS*]. He reasoned that it was not "practicable by any human means to liberate [the slaves] without producing the most dreadful and ruinous consequences[.]" *Id.* at 535.

84. 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 81, at 486.

Slavery's pervasive influence on the Constitution is difficult to overstate.⁸⁵ Most relevant here, American federalism emerged as a structural accommodation of the need for an effective national government while still preserving the sovereignty of the states over slavery and most local issues.⁸⁶ When the Virginia delegation introduced Resolution VI of the Virginia Plan, Pierce Butler (of South Carolina) feared that "we were running into an extreme in taking away the powers of the States" and asked Edmund Randolph to explain "the extent of his meaning."⁸⁷ Randolph, who had introduced the resolution, "disclaimed any intention to give indefinite powers to the national Legislature" and insisted that "he was entirely opposed to such an inroad on the State jurisdictions."⁸⁸ Other southern delegates similarly invoked slavery when arguing against federal authority to explain why the national government could not be trusted with supremacy over state law in most matters.⁸⁹

As the Tenth Amendment confirms, the Constitution assumes that the states have exclusive authority over all matters not ceded to the federal government.⁹⁰ Although the exact scope of federal authority has always been subject to intense disagreement, historians recognize that there was a "national consensus" that the federal government had no power over slavery within the states.⁹¹ Because American slavery was a pervasive system of social and economic control, state autonomy over slavery implied a wide range of exclusive sovereign state powers.⁹²

85. For a more comprehensive analysis of slavery's impact, see, for example, PAUL FINKELMAN, *SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT* 11-21 (2018); DAVID WALDSTREICHER, *SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* 5-10 (1st ed. 2009); BEEMAN, *supra* note 78, at 204-18, 308-36 (2009); PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS* 3-36 (2d ed. 2001); WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848*, at 64-73 (1977).

86. See H. ROBERT BAKER, *PRIGG V. PENNSYLVANIA: SLAVERY, THE SUPREME COURT, AND THE AMBIVALENT CONSTITUTION* 45 (2012).

87. 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 81, at 53.

88. *Id.*

89. See WALDSTREICHER, *supra* note 85, at 80 (noting a Maryland delegate's view that slavery was the reason he supported state sovereignty).

90. BAKER, *supra* note 86, at 45; FINKELMAN, *SLAVERY AND THE FOUNDERS*, *supra* note 85, at 9; see also SEAN WILENTZ, *NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING* 2 (2018) (explaining that Constitutional Convention delegates presumed the national government would not have the power to interfere with slavery as it already existed).

91. Schmitt, *supra* note 62, at 641, 645-46.

92. *Id.* at 645-46.

During Ratification, Federalists used state sovereignty as a way to distance northern states from the Constitution's complicity with slavery.⁹³ For example, Pennsylvania Federalist Tench Coxe stressed that, because state laws regarding slavery "can *in no wise* be [controlled] or restrained by the [federal] legislature," each state had the power not only to preserve slavery, but also to abolish it.⁹⁴ Oliver Ellsworth of Connecticut asserted that the "morality or wisdom of slavery" was a matter only for "the States themselves,"⁹⁵ and Elbridge Gerry of Massachusetts told the Convention that it "had nothing to do with the conduct of the States as to Slaves."⁹⁶ In sum, to appease both sections, the Constitution gave the states complete sovereignty over slavery and the federal government had no power to require it in the North or abolish it in the South.⁹⁷ And, by implication, no state could use extraterritorial legislation to force slavery or freedom on a sister state.

In fact, the Framers' treatment of slavery at the Convention demonstrates that, when federal powers were inapplicable, they believed that each state had the exclusive power to set policy within its borders. Southern delegates proposed the infamous Fugitive Slave Clause because they understood that, without it, northern states had the power to reject the extraterritorial reach of southern slave law and declare all fugitives to be free.⁹⁸ Northern delegates

93. WILENTZ, *supra* note 90, at 121-22.

94. *Id.* at 130. New England Federalist William Heath similarly responded to antislavery criticism by stating that "[e]ach State is sovereign and independent to a certain degree, and they have a right, and will regulate their own internal affairs." *Id.* at 121-22.

95. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 81, at 364.

96. *Id.* at 372.

97. WILENTZ, *supra* note 90, at 2, 5-6. The Fugitive Slave Clause is the exception that proves the rule. The Framers assumed that, in the absence of any specific constitutional provision saying otherwise, a nonslaveholding state could free any slave located within its borders. See WIECEK, *supra* note 85, at 20-39 (describing the development of the English common law doctrine that slavery does not exist in the absence of positive law to the contrary and its influence on American constitutional law). The Framers therefore adopted the Fugitive Slave Clause of the Constitution to prevent northern states from rejecting the extraterritorial application of southern slave law with respect to fugitives. See BEEMAN, *supra* note 78, at 329-30 (noting how the Fugitive Slave Clause made northern states "actively complicit" in perpetuating slavery).

98. See THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 83, at 453 ("At present, if any slaves elopes to any of those states where slaves are free, he becomes emancipated by their laws ... [The Fugitive Slave Clause] is a better security than any that now exists.") (statement of James Madison); see also *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 612 (1842) ("[I]f the Constitution had not contained this [Fugitive Slave] clause, every

accepted this intrusion on state sovereignty with little complaint likely because they understood that doing so was necessary in a union with slaveholders.⁹⁹

No similar provision, however, applied to “sojourning slaves,” enslaved people who were within a nonslaveholding state with their master’s consent.¹⁰⁰ The status of sojourning slaves depended entirely on whether the court applied the law of the forum or that of the enslaved person’s domicile.¹⁰¹ Prior to the 1830s, northern states either retained slavery in some form or voluntarily extended comity to southern states by applying the law of domicile.¹⁰² Much like with the general common law, therefore, uniformity and comity in the law of slavery obviated any need for judicial determination of the scope of one state’s power.¹⁰³ By the 1830s, however, public opinion on slavery became increasingly polarized due to events like the Missouri Crisis and Nat Turner’s slave revolt.¹⁰⁴ As a result, northern courts became increasingly unwilling to extend comity to

non-slave-holding state in the Union would have been at liberty to have declared free all runaway slaves coming within its limits, and to have given them entire immunity and protection against the claims of their masters.”). In *Somerset v. Stewart*, Lord Mansfield, the Chief Justice of the King’s Bench, held that, because slavery violated natural law, the English courts would not extend the type of comity normally given to the laws of other states on matters of status. (1772) 98 Eng. Rep. 499, 510; Lofft 1, 19 (K.B.) (enslaved party). For more on *Somerset*, see WIECEK, *supra* note 85, at 20-39. Comity is typically given to the place of residence for status determinations. See PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 3-4, 13-15 (1981). For example, to determine if a person traveling in London is married, English courts would look to the law of the couple’s residence.

99. BEEMAN, *supra* note 78, at 329-30, 332-33. In fact, the North had a long history of fugitive slave rendition. BAKER, *supra* note 86, at 13-14. The common law recognized a master’s right to recover fugitive slaves, and the colonies had cooperated for the return of servants and slaves informally for centuries. *Id.* The gradual emancipation laws of the 1780s also formally provided for the return of fugitive slaves from other states. See An Act for the Gradual Abolition of Slavery, 1780 Pa. Laws 492. Although many Northerners would rebel against the duty to return fugitive slaves in the 1850s, it was relatively uncontroversial in 1787. FINKELMAN, *supra* note 98, at 7-8, 11-12; BEEMAN, *supra* note 78, at 329-30.

100. See FINKELMAN, *supra* note 98, at 9-13.

101. See *id.* at 9-15.

102. See *id.* at 70.

103. *Id.* at 46.

104. See MANISHA SINHA, THE SLAVE’S CAUSE: A HISTORY OF ABOLITION 184-85 (2016); THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861, at 59-93 (1974).

southern slave law.¹⁰⁵ The litigation that ensued reveals much about antebellum views on state sovereignty and the reach of state law.

In two widely published and influential cases, the highest courts of Massachusetts and New York held that southern slave law did not apply extraterritorially in the North.¹⁰⁶ In the first such case, *Commonwealth v. Aves*, Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts held that Med, a young enslaved girl, could not be held in slavery while her master visited family in Massachusetts.¹⁰⁷ Chief Justice Shaw explained that

if a slave is brought voluntarily and unnecessarily within the limits of this State, he becomes free ... not so much because his coming within our territorial limits, breathing our air, or treading on our soil, works any alteration in his *status*, or condition, as settled by the law of his domicile, as because by the operation of our laws, there is no authority on the part of the master, either to restrain the slave of his liberty, whilst here, or forcibly to take him into custody in order to his removal.¹⁰⁸

Chief Justice Shaw reasoned that the law of Louisiana had no force in Massachusetts because “no independent community has any right to interfere with the acts or conduct of another state, within the territories of such state.”¹⁰⁹ While Chief Justice Shaw acknowledged that the court would ordinarily apply the law of the party’s domicile out of comity, he asserted that extending comity would be inappropriate in this case because slavery violated Massachusetts’s public policy.¹¹⁰

The New York courts followed Chief Justice Shaw’s lead in *People v. Lemmon*.¹¹¹ This case arose when Jonathan Lemmon traveled

105. See Paul Finkelman, *Prigg v. Pennsylvania and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision*, in *ABOLITIONISM AND AMERICAN LAW* 199, 216 (John R. McKivigan ed., 1999).

106. *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 217-18 (1836) (enslaved person at issue); *Lemmon v. People*, 20 N.Y. 562, 615 (1860) (enslaved persons at issue).

107. 35 Mass. (18 Pick.) at 207, 217. For more on *Aves* and Chief Justice Shaw’s slavery jurisprudence, see Jeffrey M. Schmitt, *The Antislavery Judge Reconsidered*, 29 L. & HIST. REV. 797, 828-33 (2011).

108. *Aves*, 35 Mass. (18 Pick.) at 207-08.

109. *Id.* at 211.

110. *Id.* at 218-19.

111. See REPORT OF THE LEMMON SLAVE CASE 3 (N.Y., Horace Greeley & Co. 1860).

from Virginia to New York City and stayed overnight in a hotel while waiting for a steamship to Louisiana.¹¹² When local residents discovered that the Lemmons were holding slaves in New York City, they filed a petition for a writ of habeas corpus, seeking to have the state court declare that the Lemmons had no legal right to hold slaves while on New York soil.¹¹³ Using the same reasoning as Chief Justice Shaw in *Aves*, Judge Elijah Paine of the Superior Court of New York granted the writ and discharged the slaves, who, after being escorted from the courthouse by a crowd of supporters, fled north to Canada.¹¹⁴

Supporters of Judge Paine's decision asserted both that it was correct under prevailing legal principles and that such principles were implied by the nature of the Union. In an address to the New York legislature, Governor Myron Clark discussed the *Lemmon* case at length while requesting funding to defend the State's interest in pending appeals.¹¹⁵ Governor Clark stated: "Slaves are property only by virtue of local law; where that ceases to have jurisdiction, they cease to be property, and cannot be recognized or treated as such."¹¹⁶ According to Governor Clark, this concept of territorial-bound legislative jurisdiction was implicit in each state's "equal sovereignty over her own domestic institutions If this right be denied

112. *Id.* at 3.

113. *Id.* at 3-4; FINKELMAN, *supra* note 98, at 296-97.

114. REPORT OF THE *LEMMON* SLAVE CASE, *supra* note 111, at 9, 12; FINKELMAN, *supra* note 98, at 304 (discussing *Lemmon's* mootness due to the enslaved being in Canada and beyond the court's jurisdiction). The Lemmons advanced several constitutional arguments for the extraterritorial application of Virginia law. REPORT OF THE *LEMMON* SLAVE CASE, *supra* note 111, at 10. Specifically, the Lemmons argued: (1) the Privileges and Immunities Clause required New York to recognize the rights conferred on them by Virginia; (2) the Fugitive Slave Clause constituted a tacit recognition of a constitutionally protected right to property in slaves; and (3) the Dormant Commerce Clause prohibited the states from regulating interstate travel with slave property. *See id.* Judge Paine rejected each argument. *Id.* at 10-11. He found that the Privileges and Immunities Clause meant only that the Lemmons were entitled to the same rights as any citizen of New York. *Id.* at 10. He then held that the Constitution did not recognize a universal right to slave property. He reasoned that, because the Constitution explicitly required the recognition of slavery only with respect to fugitive slaves, by implication it did not require the recognition of slavery in any other context. *Id.* Finally, Judge Paine ruled that slaves were not commerce (rendering the Commerce Clause inapplicable) and that the states had complete power to regulate slavery under their police powers. *Id.* at 10-11.

115. Myron Clark, *Governor's Message*, FREDERICK DOUGLASS' PAPER (Rochester), Jan. 4, 1855 (on file with Libr. of Cong., Newspaper and Current Periodical Reading Room).

116. *Id.*

her, she will be deprived the most essential attribute of sovereignty, that of deciding upon the civil condition and securing the personal rights of those who may be brought under the protection of her laws.”¹¹⁷ Governor Clark thus thought any attempt to force a New York court to apply southern law would be inconsistent with the nature of state sovereignty implicit in the federal system.¹¹⁸ This view was shared by many of Judge Paine’s supporters in the press,¹¹⁹ including at least two major southern newspapers.¹²⁰ According to one paper, the proslavery argument was “a most flagrant demonstration of the worst kind of Federalism.”¹²¹

The *Lemmon* case was finally argued before the New York Court of Appeals on January 24, 1860.¹²² In his argument for New York, William M. Evarts argued that “[s]o far as, ‘by comity,’ the laws of other sovereignties have force within this State, they derive their efficacy, not from their own vigor, but by administration as a part

117. *Id.*

118. *See id.*

119. *See, e.g., Judge Paine’s Decision—Comments on the Pro-Slavery Press*, NAT’L ERA, Nov. 25, 1852, at 190 (on file with Libr. of Cong., Chronicling America, <https://www.loc.gov/item/sn84026752/1852-11-25-ed-1/>) (“When a man held as a slave under the laws of Virginia passes beyond her jurisdiction, he becomes free, for her laws have no extra-territorial force.”); *Transportation of Slaves*, ALBANY ARGUS, reprinted in LIBERATOR, Jan. 28, 1853, at 14 (on file with Libr. of Cong., Chronicling America, <https://www.loc.gov/resource/sn84031524/1853-01-28/ed-1/>) (denouncing that statement that “[t]his test of our subservience has been demanded by the sovereign State of Virginia[:] The duty of the sovereign State of New York is to obey.”); *The Lemmon Case—Interference of Governor Cobb*, NAT’L ERA, Jan. 12, 1854, at 6 (on file with Libr. of Cong., Chronicling America, <https://www.loc.gov/resource/sn84026752/1854-01-12/ed-1/>) (“The law under which a slave is held in Virginia, is municipal, and has no extra-territorial force [C]omity cannot justify the Judiciary of New York in violating the organic law of the State, nor in any case can it justify a breach of justice.”); *The New York Slave Case*, PHILA. TRIB. PEOPLE, reprinted in LIBERATOR, Dec. 3, 1852, at 193 (on file with Libr. of Cong., Chronicling America, <https://www.loc.gov/resource/sn84031524/1852-12-03/ed-1/>) (“[W]e confess that the case seems so plain to us that any other decision would have been most unaccountable If the owners of slaves choose to bring them into States which do not recognize them as property, they have no right to complain.”) (quoting the PROVIDENCE J.).

120. *See For the Enquirer* [sic], RICHMOND ENQUIRER, Dec. 3, 1852, at 4 (on file with Libr. of Va., Virginia Chronicle), <https://www.virginiachronicle.com/?a=d&d=RE18521203.1.1&srpos=1&e=03-12-1852-04-12-1852--en-20-RE-1--txt-txIN-enquirer-----> (“I believe it is no where contended that a citizen can take the local law with him, but must be subject to the laws of the place he is in.”); *The Lemmon Case*, NAT’L ERA, Dec. 16, 1852, at 203 (“Why, had the Lemmon case been brought before the Supreme Court of Louisiana, the Supreme Court of Louisiana would have decided precisely as Judge Paine has.”) (quoting DAILY ORLEANIAN, Sep. 27, 1852).

121. *The Lemmon Case—Interference of Governor Cobb*, *supra* note 119.

122. FINKELMAN, *supra* note 98, at 303-04.

of the law of this State.”¹²³ Thus, according to Evarts, when the Lemmons argued that principles of federalism forced New York to recognize their property in slaves, they implied that federalism forced New York to use its sovereign power to recognize and enforce the law of Virginia.¹²⁴ Evarts explained:

[I]f a sovereign State has not the power of determining the political, the civil, the social, the actual condition of the persons within its borders, it is because some other power has that control [H]ow this admission can consist with the fundamental idea of sovereignty, or of the separateness of a political community, it passes my intelligence to comprehend.¹²⁵

In Evarts’s view, state sovereignty necessarily carried with it the power to prescribe the applicable regulatory law and legal status of everything within its borders.¹²⁶ The court’s resolution of this issue, Evarts thus asserted, “concerns what is of more vital importance to a political community, than anything else, its *sovereignty*.”¹²⁷

The New York Court of Appeals affirmed and held that the Lemmons had no legal claim to their slaves after voluntarily bringing them into New York.¹²⁸ The court explained that “[t]he question [presented] is one affecting the State [of New York] in her sovereignty. As a sovereign State she may determine and regulate the *status* or social and civil condition of her citizens, and every description of persons within her territory.”¹²⁹ The court continued:

The relation [of slavery] exists, if at all, under the laws of Virginia, and it is not claimed that there is any paramount obligation resting on this State to recognize and administer the laws of Virginia within her territory, if they be contrary or repugnant to her policy or prejudicial to her interests.¹³⁰

123. REPORT OF THE LEMMON SLAVE CASE, *supra* note 111, at 66.

124. *See id.* at 72.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Lemmon v. People*, 20 N.Y. 562, 615 (1860).

129. *Id.* at 616 (opinion of Wright, J.).

130. *Id.* at 628 (opinion of Wright, J.).

The court thus held that, although a forum state may voluntarily choose to recognize the law of a sister state, the application of such sister-state law is not “allowed on account of any supposed power residing in another State to enact laws which should be binding on our tribunals, but from the presumed assent of the law-making power to abide by the usages of other civilized States.”¹³¹ Under the Constitution’s federal system, Virginia had no power to force New York to apply and enforce the laws of Virginia.¹³²

The Supreme Court ruled on an analogous issue in *Strader v. Graham*.¹³³ This case arose when a Kentucky slave owner filed suit against the owner of a steamboat for transporting three enslaved people from Kentucky to Ohio without his consent, resulting in their escape to Canada.¹³⁴ The owners of the steamboat defended against the suit by arguing that the alleged slaves had obtained their freedom more than two years ago when their master allowed them to travel to Ohio to work in a free state.¹³⁵ Although the slaves returned to Kentucky, southern courts had traditionally found that, when slaves were voluntarily taken into a free state, they remained free even after returning to the slave state.¹³⁶ In the decision below, however, the Kentucky Court of Appeals changed Kentucky law by holding that slavery reattached when sojourning slaves returned to Kentucky.¹³⁷ The steamboat owners appealed to the Supreme Court, where they argued that the Kentucky decision conflicted with the Northwest Ordinance’s prohibition on slavery.¹³⁸

The Court in *Strader*, however, dismissed the case for lack of jurisdiction.¹³⁹ In an opinion by Chief Justice Taney, the Court held that the Northwest Ordinance was no longer enforceable after Ohio’s statehood, meaning that the case did not arise under federal law.¹⁴⁰ In other words, the Court held that Ohio law governed the slaves while they were in Ohio and Kentucky law governed them

131. *Id.* at 602.

132. *Id.* at 602-03.

133. 51 U.S. (10 How.) 82, 92-93 (1851) (enslaved persons at issue).

134. *See id.*

135. *Id.* at 93.

136. *See* FINKELMAN, *supra* note 98, at 181-82.

137. *Id.* at 198-99.

138. *Strader*, 51 U.S. (10 How.) at 93-94.

139. *Id.* at 97.

140. *Id.* at 95-96.

upon their return to that state.¹⁴¹ Chief Justice Taney explained: “Every State has an undoubted right to determine the *status*, or domestic and social condition, of the persons domiciled within its territory.”¹⁴² He continued:

[T]he condition of the negroes, therefore, as to freedom or slavery, after their return, depended altogether upon the laws of that State, and could not be influenced by the laws of Ohio. It was exclusively in the power of Kentucky to determine for itself whether their employment in another state should or should not make them free on their return.¹⁴³

In sum, the Constitution was heavily influenced by southern demands for state autonomy over slavery. Acceding to these demands, the Constitution limits Congress to its enumerated powers as a way to preserve state supremacy over all other matters. When legal divisions between the states emerged over slavery beginning in the 1830s, the courts were forced to analyze the nature and scope of state sovereignty within our federal system. These decisions show that historical principles of federalism and state sovereignty dictate that each state should have the power to control policy within its borders without outside interference.

C. Enforcing the Division of Sovereignty

Under the English system, Blackstone explained, Parliament had sovereign and “uncontrollable authority.”¹⁴⁴ In fact, most European scholars saw sovereignty as unitary and indivisible.¹⁴⁵ In any system

141. *See id.* at 93-94.

142. *Id.* at 93.

143. *Id.* at 94. The same issue arose in the infamous *Dred Scott* case. *Dred Scott v. Sandford*, 60 U.S. 393, 400, 452 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. Chief Justice Taney’s opinion in *Dred Scott* relied on *Strader* to hold that Scott became a slave upon his return to Missouri after his master took him voluntarily to Illinois. *Id.* at 452-53. While discussing this issue in a concurring opinion, Justice Nelson said: “No State, therefore, can enact laws to operate beyond its own dominions, and, if it attempts to do so, it may be lawfully refused obedience. Such laws can have no inherent authority extra-territorially. This is the necessary result of the independence of distinct and separate sovereignties.” *Id.* at 460 (Nelson, J., concurring).

144. 1 WILLIAM BLACKSTONE, COMMENTARIES *49.

145. *See* SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 148-49 (1993).

of divided power, they believed, power would always consolidate in the more powerful faction, which in Europe had traditionally meant the monarch.¹⁴⁶ Parliamentary sovereignty ensured that the “sovereign and uncontrollable” authority of the state rested with a group of the people’s representatives instead of an unaccountable monarch.¹⁴⁷ Parliamentary sovereignty, however, was inherently limited by principles of natural law. According to Blackstone, natural law was “superior in obligation to any other” because it represented eternal principles that had been “dictated by God himself.”¹⁴⁸ Parliamentary sovereignty, however, meant that no monarch or other official had the authority to overrule Parliament’s understanding of natural law.¹⁴⁹

The compact theory of the Union, which was primarily but not exclusively used in the antebellum South, was heavily influenced by the European tradition. Under compact theory, sovereignty ultimately resided with the states, which had entered into a compact by ratifying the Constitution.¹⁵⁰ Politicians like John C. Calhoun asserted that, because the states (rather than the people) created the Constitution, the states “can enlarge, contract, or abolish” the powers of the federal government.¹⁵¹ Calhoun explained that “a State, acting in its sovereign capacity as one of the parties to the constitutional compact, may compel the Government, created by that compact, to submit a question touching its infraction, to the parties who created it.”¹⁵² Allowing any branch of the federal government to have “the sole and final right of interpreting the Constitution,” he contended, would “revers[e] the whole system” by

146. *See id.*

147. *See id.* at 147-48.

148. BLACKSTONE, *supra* note 144, at *41.

149. *See* BEER, *supra* note 145, at 149.

150. *See, e.g.*, 1 ALFRED H. KELLY, WINFRED A. HARBISON & HERMAN BELZ, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 207-09 (7th ed. 1991).

151. 6 *THE WORKS OF JOHN C. CALHOUN* 68 (Richard K. Crallé ed., New York, D. Appleton & Co. 1857).

152. *Id.* at 68-69.

“annihilating” state sovereignty.¹⁵³ Compact theory was used to justify both nullification and secession.¹⁵⁴

The Supreme Court, however, has consistently rejected compact theory and endorsed a more nationalist view of the Union. In the years following Ratification, most Americans thought popular sovereignty meant that the people—as opposed to the states, a monarch, or even a court—would enforce constitutional principles through elections and popular action.¹⁵⁵ Popular sovereignty, however, can be a slow and clumsy process; thus even before *Marbury v. Madison*,¹⁵⁶ most Americans realized that judicial review was needed to preserve the constitutional order.¹⁵⁷

The Court laid the groundwork for its approach to the Union as early as 1793. In *Chisholm v. Georgia*, Chief Justice Jay asserted that

[e]very State Constitution is a compact made by and between the citizens of a State to govern themselves in a certain manner; and the Constitution of the *United States* is likewise a compact made by the people of the *United States* to govern themselves as to general objects, in a certain manner.¹⁵⁸

Under this more nationalist approach, the people “split the atom of sovereignty” by dividing sovereign power between two largely independent levels of government.¹⁵⁹

153. *Id.* at 69. Calhoun argued that, because the Supreme Court was merely an agent of the states much like Congress or the President, it could not render a final decision as to the powers delegated. He stressed that “*power which really controls, ultimately, all the movements, is not in the agents [federal officials], but those who elect or appoint them [the states].*” *Id.* at 71.

154. See 1 WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS AT BAY 1776-1854*, at 257 (1990); S.C. CONVENTION, *DECLARATION OF THE IMMEDIATE CAUSES WHICH INDUCE AND JUSTIFY THE SECESSION OF SOUTH CAROLINA FROM THE FEDERAL UNION; AND THE ORDINANCE OF SECESSION 8* (1860) (“[T]he constitutional compact has been deliberately broken and disregarded by the non-slaveholding States, and the consequence follows that South Carolina is released from her obligation.”).

155. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 58-59 (2004).

156. 5 U.S. (1 Cranch) 137 (1803).

157. See KRAMER, *supra* note 155, at 60.

158. 2 U.S. (2 Dall.) 419, 471 (1793) (opinion of Jay, C.J.), *overruled by amendment*, U.S. CONST. amend. XI.

159. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). The modern court shares the same view of the Union. See, e.g., *id.* (“The resulting

The Court's nationalist approach to the Union is a central feature of Chief Justice Marshall's defense of judicial review in *Marbury v. Madison*.¹⁶⁰ In *Marbury*, Chief Justice Marshall famously declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is."¹⁶¹ Chief Justice Marshall further explained, "[i]f then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply."¹⁶² Critically for purposes of this Article, Chief Justice Marshall asserted that the Constitution is "paramount law" that is "superior to any ordinary act of the legislature" because it was ratified by the People.¹⁶³

The Court expanded on the nationalist approach to the Union in *Martin v. Hunter's Lessee*.¹⁶⁴ *Martin* arose when the Virginia Court of Appeals refused to recognize a mandate from the Supreme Court regarding the application of a federal treaty.¹⁶⁵ According to Judge Roane of the Virginia Supreme Court of Appeals, the state courts were coequal with, and independent of, the federal court system because each derived its power from a different source of sovereignty.¹⁶⁶ He concluded that, because no court could command

Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."). Scholars have also argued that this view of the Union was central to the American Revolution. The colonists were willing to concede British sovereignty over national and international matters but insisted on colonial sovereignty over local matters. *See generally* BEER, *supra* note 145 (discussing the division of power leading up to independence and contrasting the colonists from the British).

160. 5 U.S. (1 Cranch) 137, 177 (1803).

161. *Id.*

162. *Id.* at 178.

163. *Id.* Chief Justice Marshall explained the basis of sovereignty as follows:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental.

Id. at 176.

164. 14 U.S. (1 Wheat.) 304 (1816).

165. *Id.* at 323.

166. *See* *Hunter v. Martin*, 18 Va. (4 Munf.) 1, 40-41 (1815) (opinion of Roane, J.), *rev'd sub. nom.*, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304. *See generally* GERALD GUNTHER,

the courts of another sovereign, the Supreme Court had no appellate jurisdiction over the Virginia Supreme Court of Appeals.¹⁶⁷ In other words, the states and federal government each had absolute sovereignty over their respective spheres, and thus federal supervision of state courts was inconsistent with state sovereignty.

In *Martin*, Justice Story explained that each level of government derives its sovereignty from the same source—the American people.¹⁶⁸ State governments derive their sovereign authority from the people and their constitution of each state. By ratifying the Constitution, the people of the nation both altered the authority conferred on each state government and conferred sovereign authority on the federal government over a limited range of subjects.¹⁶⁹ The American people thus created one system that allocated authority between two overlapping levels of government. In Article III, Justice Story asserted, the American people granted the Supreme Court the unique role of enforcing the constitutional division of sovereignty for the entire system.¹⁷⁰

Chief Justice Marshall made similar statements in *McCulloch v. Maryland*. Although *McCulloch* is famous for its broad definition of implied congressional powers, it also held that Maryland had no power to tax the national bank.¹⁷¹ Chief Justice Marshall explained that

the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations,

JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 138-54 (1969) (reprinting Judge Roane's critique of the Marshall Court).

167. See *Hunter*, 18 Va. (4 Munf.) at 40-41; GUNTHER, *supra* note 166, at 140-44.

168. *Martin*, 14 U.S. (1 Wheat.) at 324-25; see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403-05 (1819) (holding that the authority of the Constitution comes from the people).

169. *Martin*, 14 U.S. (1 Wheat.) at 325 ("The Constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions, for the powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them, according to their own views of the policy or principle.").

170. *Id.* at 328.

171. See *McCulloch*, 17 U.S. (4 Wheat.) at 436.

no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts.¹⁷²

This passage explains why the Supreme Court is the proper arbiter of conflicts over sovereignty: Unlike state courts, the federal courts represent the American people and act on their behalf. While a state court may favor in-state interests in a dispute with Congress or another state, the Supreme Court is best positioned to act as a neutral arbiter.¹⁷³

During the Nullification Crisis, however, South Carolina claimed that each state had the power to enforce its own interpretation of the Constitution. South Carolina's *Exposition and Protest*, which was secretly written by John C. Calhoun, argued that, although Congress had the power to tax for the *general* welfare, the federal protective tariff was "unconstitutional, unequal and oppressive."¹⁷⁴ The so-called tariff of abominations did not serve the general welfare, Calhoun contended, because it imposed a crushing tax on the plantation-based economy of the South only to fund industrial development in the North.¹⁷⁵ Calhoun then used the compact theory of the Union to argue that, if the federal government exceeded the scope of its authority, each state, as a sovereign member of the compact, had a duty to interpose for the protection of its citizens.¹⁷⁶

172. *Id.* at 405.

173. See *Martin*, 14 U.S. (1 Wheat.) at 347 ("The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals.")

174. SPECIAL COMM. OF THE H.R. OF S.C. ON THE TARIFF, EXPOSITION AND PROTEST (Dec. 19, 1828), *reprinted in* 1836 S.C. Acts 247. Although the state legislature adopted the Exposition, it was secretly written by Calhoun. See FREEHLING, *supra* note 154, at 257.

175. See FREEHLING, *supra* note 154, at 257.

176. FORREST McDONALD, STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776-1876, at 104-05 (2000).

During the “Great Debate” in the Senate over nullification,¹⁷⁷ Daniel Webster famously argued that nullification was inconsistent with the true nature of the Union.¹⁷⁸ He declared that the Constitution was “made for the people; made by the people; and answerable to the people.”¹⁷⁹ Because both levels of government “derive their authority from the same source,” Webster declared, “[n]either can, in relation to the other, be called primary, though one is definite and restricted, and the other general and residuary.”¹⁸⁰ Nullification, however, would make “the whole Union a rope of sand” by giving each state the power to destroy the uniformity and applicability of federal law.¹⁸¹ Because the people are sovereign, a state government, which represents only the people of one state, cannot nullify a law enacted by the people’s national representatives.¹⁸² Knowing that “some authority must, therefore, necessarily exist, having the ultimate jurisdiction to fix and ascertain” constitutional meaning, Webster asserted that the people gave this power to the courts by granting federal question jurisdiction in Article III.¹⁸³

The Taney Court endorsed the same nationalist approach to the Union in *Ableman v. Booth*.¹⁸⁴ Like many of the cases discussed above, *Ableman* arose in the context of state conflict over slavery. The federal Fugitive Slave Act of 1850 made it a crime to assist in the escape of a fugitive slave or interfere with their arrest.¹⁸⁵ After federal marshals seized Joshua Glover as a fugitive slave, local newspaper editor Sherman Booth helped organize a mass

177. See generally THE WEBSTER-HAYNE DEBATE ON THE NATURE OF THE UNION (Herman Belz ed., 2000) (reprinting the speeches of Daniel Webster and Robert Hayne); Stefan Marc Brooks, *The Webster-Hayne Debate: An Inquiry into the Nature of Union* (2006) (Ph.D. dissertation, University of Houston) (ProQuest) (discussing how the Webster-Hayne Debate reflected an unresolved tension between popular and state sovereignty).

178. Webster was the leader of the northern Whig Party in Congress. His strong and eloquent defense of nationalism earned him the nickname “Great Expounder of the Constitution.” ROBERT V. REMINI, *DANIEL WEBSTER: THE MAN AND HIS TIME* 162 (1997).

179. 6 REG. DEB. 74 (1830) (statement of Sen. Daniel Webster).

180. *Id.*

181. *Id.*

182. See *id.* at 76.

183. *Id.* at 78.

184. 62 U.S. (21 How.) 506, 516 (1859).

185. See *id.* at 507; Fugitive Slave Act, ch. 60, 9 Stat. 462, 462-63 (1850) (repealed 1864).

meeting near the Milwaukee jail.¹⁸⁶ At the end of the rally, Booth gave an impassioned speech against the Fugitive Slave Act and a crowd of supporters broke down the door to the jail and rescued Glover, who fled to the safety of Canada.¹⁸⁷ Although the rescue made Booth a local hero and celebrity, he was convicted of aiding and abetting a fugitive in violation of the federal Fugitive Slave Act.¹⁸⁸ Booth then filed a writ of habeas corpus with the Supreme Court of Wisconsin.¹⁸⁹

In a strange turn of events, the Wisconsin court granted the writ, ruled that the Fugitive Slave Act was unconstitutional, released Booth from federal custody, and held that the U.S. Supreme Court had no power to review a decision from a state's highest court.¹⁹⁰ In an opinion by Justice Smith, the Wisconsin Supreme Court held that the Fugitive Slave Clause did not grant Congress the power to pass the Fugitive Slave Act and that the law violated the right to a trial by jury.¹⁹¹ Because no "one department of the government is constituted the final and exclusive judge of its own delegated powers," Justice Smith further asserted that the Supreme Court could not be trusted to protect state sovereignty.¹⁹² The Supreme Court would inevitably expand federal power, he warned, "naturally lead[ing] to consolidation ... [and] despotism."¹⁹³ Justice Smith thus concluded that "upon the states rests the immense responsibility of preserving not only their own sovereignty, but the just constitutional powers of the general government."¹⁹⁴

Chief Justice Taney's opinion in *Ableman* responded with the same nationalist understanding of sovereignty espoused in earlier

186. See Jeffrey Schmitt, Note, *Rethinking Ableman v. Booth and States' Rights in Wisconsin*, 93 VA. L. REV. 1315, 1323-24 (2007).

187. See *id.* at 1324-25.

188. See *id.* at 1328, 1340.

189. *Id.* at 1340.

190. See U.S. 121 (21 How.) at 513-14. In fact, the Wisconsin Supreme Court refused to certify the record in the case. See *id.*

191. See *In re Booth*, 3 Wis. 1, 39-43 (1854), *rev'd sub. nom.*, *Ableman v. Booth*, 62 U.S. (21 How.) 506. The court further held that the power granted to federal commissioners who ruled on fugitive cases violated Article III. See *id.* at 46.

192. *Id.* at 23.

193. *Id.* at 25.

194. *Id.* at 35. Justice Smith's approach is similar to, but distinct from, traditionally southern constitutional arguments from public figures like Thomas Jefferson, Judge Roane, and John C. Calhoun. See Schmitt, *supra* note 186, at 1333-34.

cases. Like *Chisholm*, *Martin*, and *McCulloch*, the Court in *Ableman* asserted that the people of each state divided sovereignty by ceding control of the powers delegated to the federal government.¹⁹⁵ Therefore, as an independent branch of the federal government, the Supreme Court “was erected, and the powers of which we have spoken conferred upon it, not by the Federal Government, but by the people of the States.”¹⁹⁶ In our complex system of overlapping authority, Chief Justice Taney claimed that the Supreme Court was the final arbiter of disputes over sovereign power.

No doubt influenced by fear of sectional conflict over slavery given Wisconsin’s rejection of the Fugitive Slave Act, Chief Justice Taney argued that the Supreme Court was the only tribunal that could prevent conflict between sovereign states.¹⁹⁷ He warned that disputes over the allocation of sovereign power “would lead to acts of aggression and injustice by one State upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them.”¹⁹⁸ He continued:

The importance which the framers of the Constitution attached to such a tribunal, for the purpose of preserving internal tranquility, *is strikingly manifested by the clause which gives this court jurisdiction over the sovereign States which compose this Union, when a controversy arises between them.* Instead of reserving the right to seek redress for injustice from another State by their sovereign powers, they have bound themselves to submit to the decision of this court, and to abide by its judgment.¹⁹⁹

In other words, because Wisconsin and Kentucky (the state of Benjamin Garland, the slave catcher)²⁰⁰ surrendered their power to resolve the conflict between them, the Supreme Court had an obligation to intervene.

195. *Ableman*, 62 U.S. (21 How.) at 517 (“[I]t was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the General Government.”).

196. *Id.* at 521.

197. *Id.*

198. *Id.* at 517.

199. *Id.* at 519 (emphasis added).

200. See Schmitt, *supra* note 186, at 1323.

While antebellum cases do not always tie constitutional doctrine back to the text, Chief Justice Taney's reference to Article III is instructive. To repeat, he said that the Court's duty to resolve interstate conflict is "strikingly manifested"²⁰¹ in Article III's conferral of jurisdiction over disputes between two or more states.²⁰² As the only tribunal that represented the American people, the Court had an obligation to prevent conflict by protecting the Constitution's complex and overlapping division of sovereign power.

The Framers thus hoped that disputes between the states would be resolved in the federal courts instead of the marketplace or battlefield. Although Article III does not provide the substantive law, the Tenth Amendment recognizes that all powers not delegated to the federal government "are reserved to the States respectively, or to the people."²⁰³ And, as every elite American understood at that time, the most significant power reserved to the states, "respectively," meaning to each state separately and individually, was its police power to regulate for the general welfare of the people within its borders. While Article III implies that the federal courts have an obligation to adjudicate disputes between two states over the reach of their sovereign powers, the Tenth Amendment, when informed by constitutional history, provides the substantive law.

D. Applying Historical Principles of Sovereignty and Federalism to Indirect Extraterritorial Legislation

Although small states retain the formal ability to legislate, the territorial framework of international law fails to protect the level of autonomy that was historically seen as essential to state sovereignty. As Justice Story explained in his *Commentaries on the Conflict of Laws*, in international law, the state "has no admitted superior, and ... it gives the supreme law within its own domains on all subjects appertaining to its sovereignty."²⁰⁴ This formal autonomy, however, implies that indirect extraterritorial legislation cannot possibly violate the Constitution.²⁰⁵ The territorial

201. *Ableman*, 62 U.S. (21 How.) at 519.

202. U.S. CONST. art. III, § 2.

203. *Id.* amend. X.

204. STORY, *supra* note 64, § 8, at 8.

205. As explained above, the Ninth Circuit explicitly held that a state regulation of conduct

framework thus empowers states to condition any in-state benefit, typically the right to do business in the state, on compliance with the regulating state's policy. Large states like California therefore can use their economic power to coerce smaller states into following California policy in culture war issues in which the states diverge.

Such a power is inconsistent with the structure and original understanding of state sovereignty. As Justice Story explained, "it would be wholly incompatible with the equality and exclusiveness of the sovereignty of any nation, that other nations should be at liberty to regulate either persons or things within its territories."²⁰⁶ When one state is forced to follow the law of another, Governor Clark asserted, that state is denied "equal sovereignty over her own domestic institutions."²⁰⁷ One of the core policy concerns animating the rule against direct extraterritorial legislation is therefore to preserve federalism by ensuring that each state has the same authority to set local policy on matters not delegated to the federal government. The modern Court recognized the importance of this principle in *Shelby County v. Holder* when it struck down the preclearance formula of the Voting Rights Act in part because it violated "the principle that all States enjoy equal sovereignty."²⁰⁸

Moreover, the Framers designed our federal system to ensure that each state had complete and exclusive control over local matters like slavery.²⁰⁹ Many southern delegates worried that a

within its borders cannot violate extraterritoriality principles. See *Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021, 1029 (9th Cir. 2021) (citing *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 445 (9th Cir. 2019)), *aff'd*, 143 S. Ct. 1142 (2023). Although the circuit court in *National Pork Producers* did not make this point explicitly, the opinion strongly implied that the Ninth Circuit understood the Supreme Court to agree. *Id.* at 1027-28.

206. STORY, *supra* note 64, § 20, at 21.

207. Clark, *supra* note 115.

208. See 570 U.S. 529, 535 (2013). For a more detailed look at the equal sovereignty principle, see Jeffrey M. Schmitt, *In Defense of Shelby County's Principle of Equal State Sovereignty*, 68 OKLA. L. REV. 209, 237-61 (2016). It is worth noting that a violation of equal sovereignty by a sister state is much more concerning than one involving the federal government, as the federal government represents the people of each state.

209. See, e.g., *Mallory v. Norfolk S. Ry. Co.*, 143 S. Ct. 2028, 2049 (2023) (Alito, J., concurring) ("We have long recognized that the Constitution restricts a State's power to reach out and regulate conduct that has little if any connection with the State's legitimate interests. This principle, an 'obviou[s]' and 'necessary result' of our constitutional order, is not confined to any one clause or section, but is expressed in the very nature of the federal system that the Constitution created and in numerous provisions that bear on States' interactions with one another." (alteration in original) (quoting *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161

powerful federal government would be a threat to slavery despite the fact that the South would have a strong voice in the new government.²¹⁰ And yet, there is no record of southern delegates (or voters during Ratification) similarly worrying that a state like New York could use its economic power to undermine slavery in the southern states.²¹¹ Southerners probably did not fear coercion from other states because they assumed that constitutional background principles prevented any state from passing legislation with the purpose and effect of controlling conduct in another state.

State sovereignty over all matters not delegated to the federal government is also essential to democratic legitimacy. As Chief Justice Shaw explained in *Aves*, “no independent community has any right to interfere with the acts or conduct of another state, within the territories of such state.”²¹² Or, as New York argued in *Lemmon*,

[I]f a sovereign State has not the power of determining the political, the civil, the social, the actual condition of persons within its borders, it is because some other power has that control [H]ow this admission can consist with the fundamental idea of sovereignty, or of the separateness of a political community, it passes my intelligence to comprehend.²¹³

The rule against extraterritorial legislation protects state sovereignty by ensuring that the people of each state, including the weakest state in the Union, have the right to democratic self-rule. As Justice Story explained nearly two hundred years ago, “it belongs exclusively to each nation to form its own judgment of what its conscience prescribes to it; of what it can, or cannot do; of what is proper, or improper for it to do.”²¹⁴ Because indirect extraterritorial legislation allows one state to control policy in another, it violates these fundamental principles.

(1914)).

210. See *supra* notes 78-97 and accompanying text.

211. The Fugitive Slave Clause addressed concerns that northern states could undermine slavery in the South. See *supra* note 97 and accompanying text.

212. *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 211 (1836).

213. REPORT OF THE *LEMMON* SLAVE CASE, *supra* note 111, at 72.

214. STORY, *supra* note 64, § 37, at 36.

III. COURT PRECEDENT: THE EXTRATERRITORIALITY DOCTRINE OF THE DORMANT COMMERCE CLAUSE

Before *National Pork Producers*, the federal courts applied an obscure strand of Dormant Commerce Clause precedent to strike down the type of legislation identified above. Unfortunately, as many judges and scholars have noted, the extraterritoriality doctrine was notoriously difficult to understand and apply.²¹⁵ But, by applying the doctrine incrementally in each case, the lower courts were able to reach sensible results. Although the lower courts did not coalesce around a single doctrinal test or use this Article's terminology, they struck down only indirect extraterritorial legislation that did not serve a legitimate interest of the regulating state.²¹⁶ In *National Pork Producers*, however, the Court overruled the extraterritoriality doctrine without appreciating the lower court precedent or the constitutional values at stake.

A. *The Dormant Commerce Clause*

The Supreme Court has long held that the Commerce Clause implicitly limits the power of a state to disrupt interstate commerce.²¹⁷ This “‘negative’ or ‘dormant’ aspect of the Commerce Clause prohibits States from ‘advanc[ing] their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state.’”²¹⁸ The doctrine is thus designed to “create[] an area of trade free from interference by the States,”²¹⁹ and “avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.”²²⁰ At its core, the Dormant

215. See *supra* note 12 and accompanying text.

216. See *Legato Vapors v. Cook*, 847 F.3d 825, 834 (2017); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115-16 (2001).

217. See, e.g., *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319-21 (1852).

218. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't Nat. Res.*, 504 U.S. 353, 359 (1992) (alteration in original) (quoting *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 535 (1949)).

219. *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) (quoting *Freeman v. Hewit*, 329 U.S. 249, 252 (1946)).

220. *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979).

Commerce Clause is based on the assumption that “the peoples of the several states must sink or swim together.”²²¹

Ordinarily, to determine if a state law violates the Dormant Commerce Clause, a court must determine if the law discriminates against out-of-state commerce. Discriminatory laws are presumptively unconstitutional and can be upheld only if “justified by a valid factor unrelated to economic protectionism.”²²² Nondiscriminatory laws are presumptively constitutional and will be struck down only if the challenger demonstrates that they impose burdens on interstate trade that are “clearly excessive in relation to the putative local benefits.”²²³

B. The Origins of the Extraterritoriality Doctrine of the Dormant Commerce Clause

The genesis of the extraterritoriality doctrine of the Dormant Commerce Clause is generally attributed to *Baldwin v. G.A.F. Seelig, Inc.*²²⁴ *Baldwin* involved a challenge to the New York Milk Control Act, which essentially prohibited the sale of milk in New York unless the milk producer was paid a minimum price, even when the milk was produced in another state.²²⁵ New York argued that such minimum prices would encourage the production of a steady supply of healthy milk and thus protect the health and safety of its residents.²²⁶

Writing for the Court, Justice Cardozo began his analysis by stating that “New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there.”²²⁷ He explained that, “[i]f farmers or manufacturers in Vermont are abandoning farms or factories, or are failing to maintain them properly, the legislature of Vermont and not that of

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

222. *Fort Gratiot Sanitary Landfill, Inc.*, 504 U.S. at 359 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988)).

223. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citing *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960)).

224. See 294 U.S. at 521-22.

225. *Id.* at 519-20. This is often referred to as a “price-fixing” law. See *id.* at 514.

226. See *id.* at 522-23.

227. *Id.* at 521.

New York must supply the fitting remedy.”²²⁸ If New York could dictate the price in a transaction between a Vermont company and a Vermont farm, he warned, “[t]he next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop, or even upon proof of the profits of the business.”²²⁹ Although New York’s Milk Control Act technically applied only to sales within New York, the Court held that it was unconstitutional due to its extraterritorial effects.²³⁰

The Court struck down a similar law on extraterritoriality grounds in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*.²³¹ New York’s Alcoholic Beverage Control Law (ABC Law) required distillers to affirm that they did not sell liquor in other states at lower prices than what they charged New York wholesalers.²³² Any distiller who violated this provision was denied a license to sell liquor in New York.²³³ The Court stated “[t]hat the ABC Law is addressed only to sales of liquor in New York is irrelevant if the ‘practical effect’ of the law is to control liquor prices in other States.”²³⁴ It concluded that, because New York “may not ‘project its legislation into [other States] by regulating the price to be paid’ for liquor in those States,” the law violated the Dormant Commerce Clause.²³⁵

The Supreme Court gave its strongest formulation of the extraterritoriality doctrine in *Healy v. Beer Institute*.²³⁶ In *Healy*, a Connecticut law required any company that sold beer in Connecticut to affirm that it was not offering lower prices in any neighboring state for the next month.²³⁷ The Court held that the Connecticut price affirmation law was unconstitutional because it had “the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State.”²³⁸ The Court explained that

228. *Id.* at 524.

229. *Id.*

230. *Id.* at 528.

231. 476 U.S. 573, 582-84 (1986).

232. *Id.* at 576.

233. *Id.*

234. *Id.* at 583 (quoting *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 775 (1945)).

235. *See id.* at 582-83 (alteration in original) (quoting *Baldwin*, 294 U.S. at 521).

236. 491 U.S. 324, 335-37 (1989).

237. *Id.* at 326-27.

238. *Id.* at 337.

“[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.”²³⁹

Perhaps because the Supreme Court has ignored the extraterritoriality doctrine since *Healy* in 1989, litigants often broadly argued that any state law which impacted conduct in another state was *per se* unconstitutional under the extraterritoriality doctrine.²⁴⁰ In the interconnected modern economy, however, most state legislation affects conduct in another state. Even a law as uncontroversial as a minimum wage law, for example, could affect the price of goods and services in neighboring states. An expansive interpretation of the extraterritoriality doctrine would thus produce absurd results by crippling the regulatory authority of the states.²⁴¹

Recognizing this, the lower courts used the extraterritoriality doctrine to strike down only indirect extraterritorial legislation that did not advance a legitimate state interest.²⁴² Although the courts have not explicitly adopted this test, it clearly emerges from the cases.

Supreme Court precedent strongly supports limiting the doctrine to indirect extraterritorial legislation.²⁴³ *Healy* said that a state law

239. *Id.* at 336 (citing *Brown-Forman Distillers Corp.*, 476 U.S. at 579).

240. *See, e.g.*, *Alliant Energy Corp. v. Bie*, 336 F.3d 545, 546 (7th Cir. 2003) (“Appellants claim that such precedent mandates the *per se* invalidation of every state regulation that has any extraterritorial effect whatsoever.”).

241. *See, e.g.*, *Florex*, *supra* note 16, at 1157-58.

242. *See, e.g.*, *Alliant Energy*, 336 F.3d at 549.

243. Although they do not involve the Dormant Commerce Clause, this test is also illustrated by two Supreme Court cases involving corporate governance. The Court in *CTS Corp. v. Dynamics Corp.* upheld an Indiana statute requiring approval from a majority of the preexisting shareholders before a change in control of an Indiana corporation. 481 U.S. 69, 73-75 (1987). The plaintiffs argued that the law regulated extraterritorially because it would require state approval even when both the entity acquiring the company and the preexisting shareholders were residents of another state. *See id.* at 88. The Court, however, upheld the law, reasoning that it did not discriminate against out-of-state entities and posed no risk of inconsistent regulations because it governed only Indiana corporations. *Id.* at 88-89. As the Seventh Circuit explained, this case stands for the proposition that a state law may have the practical effect of burdening conduct in other states so long as the burden has “a corresponding and significant protection for a legitimate interest of local residents.” *Alliant Energy*, 336 F.3d at 549. Under this reasoning, the Indiana statute was valid because it applied only to Indiana corporations and the state has a legitimate interest in regulating its own corporations. *Id.* In other words, the extraterritorial conduct being regulated—the acquisition of the Indiana corporation—itself had a sufficient relationship to the regulating state.

Indiana’s interest in the extraterritorial conduct being regulated distinguishes *CTS* from *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). The Court in *Edgar* struck down an Illinois law

is invalid if it “has the *undeniable* effect of *controlling* commercial activity occurring wholly outside the boundary of the State.”²⁴⁴ Although this language is somewhat ambiguous, context strongly indicates that a law “has the *undeniable* effect of *controlling*” extraterritorial conduct only when the state legally requires a party to alter its extraterritorial conduct as a condition of taking advantage of an in-state benefit.²⁴⁵ This narrow interpretation would also capture the result in *Healy*, because the Connecticut law required companies to charge the same prices in other states as a condition of doing business in Connecticut.²⁴⁶ In other words, an out-of-state company that sold liquor in Connecticut could violate the law through the wholly extraterritorial conduct of charging lower prices in a neighboring state.²⁴⁷

Not only is this principle consistent with Supreme Court precedent, but it also avoids the absurd result of implicating ordinary state economic legislation like a minimum wage law. While the invisible hand of the market may influence a company to alter its extraterritorial conduct in response to increased labor costs in the regulating state, nothing in a state’s minimum wage law would legally require the company to do so. In other words, unlike the price affirmation law in *Healy*, a company would not violate the minimum wage law if it fails to alter its conduct in a neighboring state. The minimum wage would thus not have “the undeniable effect of controlling” conduct in a neighboring state, as required under *Healy*.²⁴⁸ Because of this limitation, the lower courts rarely struck down state legislation under the extraterritoriality doctrine prior to *National Pork Producers*. In fact, the courts often upheld

that essentially required state approval before a takeover of any corporation in which at least 10 percent of the shares were owned by Illinois residents. *Edgar*, 457 U.S. at 626-27, 630. Unlike *CTS*, the Illinois law in *Edgar* applied to a tender offer for an out-of-state corporation, even when the offer occurred through the use of interstate commerce and the corporation was majority owned by out-of-state entities. *Id.* at 642. The Court thus held that the statute had “a sweeping extraterritorial effect,” *id.*, and, unlike in *CTS*, Illinois had no interest that corresponded to the extraterritorial conduct being regulated (the takeover). *Alliant Energy*, 336 F.3d at 549.

244. *Healy*, 491 U.S. at 337 (emphasis added).

245. *Id.* at 335-37 (emphasis added).

246. *See id.* at 326-27.

247. *See id.*

248. *Id.* at 337.

state legislation that had obvious and substantial effects in other states.

The Second Circuit's decision in *National Electric Manufacturers Ass'n v. Sorrell*, is illustrative.²⁴⁹ The court in *Sorrell* upheld a Vermont law that required light bulbs sold in Vermont to be labeled as hazardous if they contained mercury.²⁵⁰ Citing *Healy*, the plaintiff light bulb manufacturers argued that the law would have the "practical effect" of forcing them to attach the Vermont label to light bulbs sold throughout the country due to their national distribution process.²⁵¹ The Second Circuit, however, held that the plaintiff's "extraterritoriality contention fails because the statute does not *inescapably* require manufacturers to label all lamps wherever distributed."²⁵² The court explained: "To avoid the statute's alleged impact on other states, lamp manufacturers could arrange their production and distribution processes to produce labeled lamps solely for the Vermont market and then pass much of the increased costs along to Vermont consumers in the form of higher prices."²⁵³

In other words, the Second Circuit held that the Vermont law did not violate the extraterritoriality doctrine because it did not have the practical effect of forcing light bulb manufacturers to follow Vermont standards in wholly extraterritorial transactions.²⁵⁴ This is quite different than *Healy*, because in that case an out-of-state beer distributor could violate Connecticut's price affirmation law by selling its goods in other states.²⁵⁵ In a sense, Vermont's law does have the practical effect of controlling conduct in another state, because the out-of-state manufacturers must change their labeling practices. Because the manufacturers must change their labels only

249. See 272 F.3d 104, 110-11 (2001).

250. *Id.* at 107.

251. *Id.* at 110 (first citing *Healy*, 491 U.S. at 332; and then citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582 (1986)).

252. *Id.* (emphasis added).

253. *Id.*

254. See *id.*

255. The only way for the supplier in *Healy* to escape the extraterritorial reach of the Connecticut law was to stop selling in Connecticut, and the court in *Healy* held that a state may not condition in-state sales on accepting extraterritorial regulation. *Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989) ("[T]he Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." (citing *Brown-Forman Distillers Corp.*, 476 U.S. at 582 (1986))).

on goods bound for Vermont,²⁵⁶ however, this is a far cry from the wholly out-of-state transactions implicated by the law in *Healy*. Connecticut's price affirmation law had the effect of regulating transactions between an out-of-state supplier to an out-of-state purchaser, and Connecticut clearly had little interest in such sales.²⁵⁷ Vermont's labeling law, by contrast, applied only to the production of light bulbs bound for the Vermont market, and Vermont has a strong interest in protecting the health of its residents.²⁵⁸

A number of other lower court decisions used similar logic. The Sixth Circuit, for example, upheld an Ohio law requiring certain information to be placed on milk labels in *International Dairy Foods Ass'n v. Boggs*.²⁵⁹ The court explained that "the Ohio Rule's labeling requirements have no direct effect on the Processors' out-of-state labeling conduct. That is to say, how the Processors label their products in Ohio has no bearing on how they are required to label their products in other states (or vice versa)."²⁶⁰ In other words, the Ohio law controls only how the out-of-state companies labeled milk bound for Ohio, and Ohio has a corresponding interest in the labelling of such milk.²⁶¹

256. See *Sorrell*, 272 F.3d at 110.

257. See *Healy*, 491 U.S. at 337-38.

258. See *Sorrell*, 272 F.3d at 110, 115.

259. 622 F.3d 628, 634, 650 (6th Cir. 2010).

260. *Id.* at 647.

261. *National Solid Wastes Management Ass'n v. Meyer* is another example. 63 F.3d 652, 653-54 (7th Cir. 1995). In this case, the Seventh Circuit struck down a Wisconsin waste disposal law on extraterritoriality grounds. See *id.* at 663. The court explained that "Wisconsin's solid waste legislation conditions the use of Wisconsin landfills by non-Wisconsin waste generators on their home communities' adoption and enforcement of Wisconsin recycling standards." *Id.* at 658. Again, this legislation forced out-of-state communities to choose between following Wisconsin law or being banned from the Wisconsin market. *Id.* at 661-62. Moreover, Wisconsin had no corresponding interest in the regulated conduct because "all persons in that non-Wisconsin community must adhere to the Wisconsin standards whether or not they dump their waste in Wisconsin." *Id.* at 658. The Tenth Circuit struck down a similar law in *Hardage v. Atkins*, 619 F.2d 871, 872 (10th Cir. 1980).

Other lower court decisions have rejected an expansive interpretation of the extraterritoriality doctrine. See *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 192-95 (2d Cir. 2007) (rejecting the argument that a state regulation of prepaid gift cards regulated extraterritorially because the law did "not, by its terms or its effects, directly regulate sales of gift cards in other states"); *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 221 (2d Cir. 2004) ("While the out-of-state wholesale prices of cigarettes may be affected by the Contraband Statutes, therefore, out-of-state actors such as appellants remain free to conduct

The Supreme Court appeared to understand and apply the doctrine in *Pharmaceutical Research and Manufacturers of America v. Walsh*.²⁶² In *Walsh*, Maine encouraged out-of-state drug companies to enter into rebate agreements with the state for drugs sold to Maine Medicaid patients.²⁶³ Under these rebate agreements, the drug companies paid a percentage of the revenue generated from sales in Maine to the state.²⁶⁴ This money was in turn given to pharmacies that agreed to sell the drugs at a discount to Maine residents.²⁶⁵ If a drug company did not agree to give the rebates, Maine subjected its drugs to a time-consuming and costly pre-approval process before its drugs could be prescribed to Maine Medicaid patients.²⁶⁶ Because the drug company plaintiffs in *Walsh* did not sell their products directly into Maine, but instead sold only to out-of-state wholesalers, they argued that the Maine plan had the practical effect of regulating extraterritorial conduct, that is, the wholly out-of-state transaction between the drug company and the wholesaler.²⁶⁷

The Court in *Walsh* rejected the plaintiff's argument with the following language, which was taken from the First Circuit's opinion below:

[T]he Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its *inevitable effect*. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price. Similarly, Maine is not tying the price of its in-state products to out-of-state prices.²⁶⁸

commerce on their own terms, without either scrutiny or control by New York State."); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794-95 (8th Cir. 1995) ("[A] statute has extraterritorial reach when it *necessarily* requires out-of-state commerce to be conducted according to in-state terms" (emphasis added)).

262. 538 U.S. 644 (2003).

263. *Id.* at 649-50, 654-57.

264. Brandon P. Denning, *The Maine Rx Prescription Drug Plan and the Dormant Commerce Clause Doctrine: The Case of the Missing Link[age]*, 29 AM. J.L. & MED. 7, 9-10 (2003).

265. *Id.*

266. *Walsh*, 538 U.S. at 649-50, 654.

267. *See id.* at 669.

268. *Id.* (emphasis added) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 249 F.3d 66, 81-82 (1st Cir. 2001)).

Although the Supreme Court provided no elaboration, the First Circuit's decision in *Pharmaceutical Research and Manufacturers of America v. Concannon*,²⁶⁹ which the Supreme Court heavily relied upon, provides further insight. In *Concannon*, the First Circuit explained that the Maine law is not direct extraterritorial legislation because the "regulation only applies to in-state activities," that is, the purchase of drugs in Maine, the negotiation of the rebate between Maine and the drug company, and the possible preauthorization required if the drug company did not agree to a rebate.²⁷⁰ Although the court conceded that the regulation could have a practical effect on the profitability of the drug companies' out-of-state transactions with wholesalers, the court found any such out-of-state effects were distinguishable from those at issue in *Healy*.²⁷¹ In *Healy*, the First Circuit explained, the Connecticut statute forced out-of-state companies to charge a particular price to out-of-state consumers.²⁷² By contrast, the First Circuit noted that although the Maine law at issue in *Walsh* influences out-of-state transactions between a manufacturer and a wholesaler, those out-of-state transactions concerned only products bound for the Maine market.²⁷³ Maine's legislation therefore had the effect of regulating only the sale of drugs bound for the Maine market. Of course, Maine had a legitimate interest in these transactions.

These limitations on the extraterritoriality doctrine, however, do not render it meaningless. In *American Beverage Ass'n v. Snyder*, for example, the Sixth Circuit struck down a Michigan law that required the sellers of beverage containers to place a certain mark on all containers sold in Michigan and prohibited containers containing such markings from being sold in other states.²⁷⁴ The court held that the Michigan statute had an impermissible extraterritorial effect because, as a condition of doing business in Michigan, it prohibited out-of-state companies from selling containers with the Michigan mark to out-of-state consumers.²⁷⁵ Although the court in

269. 249 F.3d 66 (1st Cir. 2001).

270. *Id.* at 82.

271. *Id.* at 81.

272. *Id.* at 81-82. The Second Circuit made similar arguments with respect to *Brown-Forman* and *Seelig*.

273. *Walsh*, 538 U.S. at 669-70.

274. 735 F.3d 362, 367, 376-77 (6th Cir. 2013).

275. *Id.* at 376-66.

Snyder did not reach the issue of whether Michigan had a legitimate interest in the law, it seems clear that, just as Connecticut had no interest in regulating wholly out-of-state beer sales in *Healy*, Michigan had no legitimate interest in regulating such wholly out-of-state transactions.²⁷⁶ The Michigan law therefore violated the extraterritoriality doctrine.

In a concurring opinion, however, Judge Sutton argued that the courts should abandon the extraterritoriality doctrine.²⁷⁷ He noted that the doctrine appears in only a few Supreme Court cases and was essential to the outcome of none of them.²⁷⁸ Judge Sutton also asserted that “[t]he original function of the doctrine no longer exists, and it is exceedingly difficult to understand which extraterritorial effects exceed its bounds and which do not.”²⁷⁹ The original purpose of the doctrine, he asserted, was to restrain each state to its proper sphere of regulatory authority.²⁸⁰ According to Judge Sutton, the doctrine is no longer needed because regulatory authority is no longer defined by territorial lines, as “modern reality is that the States frequently regulate activities that occur entirely within one State but that have effects in many.”²⁸¹ Moreover, he contended that the doctrine empowers judges to pick and choose the proper subjects of state regulation, because it is impossible to give a principled distinction between the lightbulb labelling law in *Sorrell* and Michigan’s labeling law *Snyder*.²⁸² Ultimately, Judge Sutton’s lengthy critique of the doctrine would soon prove influential.

Two years later, then-Judge Gorsuch followed Judge Sutton’s lead when writing the Tenth Circuit’s opinion in *Energy and Environment Legal Institute v. Epel*.²⁸³ The court in *Epel* upheld a Colorado law that requires energy electricity generators to ensure that at least 20 percent of the electricity they sell in Colorado derives from renewable sources.²⁸⁴ Colorado consumers get their electricity from a grid shared with eleven other states, and there is

276. *See id.* at 378-80.

277. *Id.* at 380-81 (Sutton, J., concurring).

278. *See id.*

279. *Id.* at 379-80.

280. *See id.* at 378.

281. *Id.* at 379.

282. *Id.* at 379-80.

283. 793 F.3d 1169, 1171 (10th Cir. 2015).

284. *See id.* at 1170-71.

no practical way to differentiate electricity bound for Colorado.²⁸⁵ The plaintiffs in *Epel* thus argued that the law violated the extraterritoriality doctrine of the Dormant Commerce Clause because, as a practical matter, Colorado required all electricity on the eleven-state grid to comply with its standards.²⁸⁶

Under the approach outlined above, Colorado's energy law is highly questionable. It fits this Article's definition of indirect extraterritorial legislation because it requires out-of-state companies to change the way they produce electricity as a condition of doing business in Colorado.²⁸⁷ And, if the plaintiffs are correct in arguing that out-of-state electricity generators are often forced to apply Colorado's standards for electricity that is not bound for Colorado,²⁸⁸ the law controls transactions in which Colorado has no legitimate interest. In fact, it functions much like the price affirmation law at issue in *Healy*. Whereas the law in *Healy* controlled the price at which out-of-state companies sold products to out-of-state consumers, the Colorado law controls the production methods used by out-of-state companies for goods bound for out-of-state markets.²⁸⁹ Both laws require out-of-state companies to change their extraterritorial conduct *in a manner that serves no legitimate state interest* as a condition of doing business in-state.²⁹⁰

Judge Gorsuch's opinion for the Tenth Circuit, however, did not consider this analysis or seem to recognize how the lower courts applied the doctrine since *Healy*. Judge Gorsuch noted that the Supreme Court has only applied the extraterritoriality doctrine to "price control or price affirmation statutes that link in-state prices with those charged elsewhere."²⁹¹ He then rejected the plaintiff's argument that all indirect extraterritorial legislation is unconstitutional for two reasons.²⁹² First, he declared that the *Healy* line of

285. *See id.* at 1171.

286. *See id.* at 1171, 1174. Portions of Canada and Mexico are also included on the shared electricity grid. *Id.* at 1171.

287. *See id.* at 1170-71.

288. *See* Appellant's Opening Brief at 39-40, *Epel*, 793 F.3d 1169 (No. 14-1216).

289. *Epel*, 793 F.3d at 1172-73.

290. *See id.* at 1173.

291. *Id.* at 1174.

292. *Id.* ("Exploiting dicta in *Healy*, [the Energy and Environmental Legal Institute] contends that these cases require us to declare 'automatically' unconstitutional any state regulation with the practical effect of 'control[ling] conduct beyond the boundaries of the State.'" (alteration in original)).

cases should be limited to their facts and thus apply only to price affirmation or price control statutes.²⁹³ Although he acknowledged that the opinions use much broader language, he argued that the Tenth Circuit should reject the core reasoning of the Supreme Court, which he referred to as dicta, because it “risk[s] serious problems of overinclusion.”²⁹⁴ He explained:

[I]f any state regulation that “control[s] ... conduct” out of state is *per se* unconstitutional, wouldn’t we have to strike down state health and safety regulations that require out-of-state manufacturers to alter their designs or labels? Certainly [the Energy and Environmental Legal Institute] offers no limiting principle that might prevent that possibility or others like it.²⁹⁵

Judge Gorsuch’s argument, however, is wholly unconvincing. Putting to one side his questionable conclusion that the doctrine is mere “dicta” that can readily be ignored by the lower courts,²⁹⁶ nothing in the Court’s precedent suggests that the doctrine should be limited to price fixing or price affirmation laws. Moreover, the reason given by Judge Gorsuch—that there is otherwise no principled way to limit the doctrine—is demonstrably false. Judge Gorsuch fails to consider the “limiting principle” found in cases like *Sorrell* and the First Circuit’s decision in *Concannon*.²⁹⁷ To repeat, the First Circuit upheld the legislation because it controlled only extraterritorial conduct—labelling and transactions with wholesalers—involving products bound for an in-state market.²⁹⁸ That distinction is critical, because a state has a legitimate interest in regulating products sold within its territory for the protection of

293. *Id.* Judge Gorsuch claims that this limitation is supported by *Walsh*. *Id.* at 1174-75 (“But, as we’ve explained, the Court’s holdings have not gone nearly so far and have turned instead on the presence of three factors not present here. In fact, the Supreme Court has emphasized as we do that the *Baldwin* line of cases concerns only ‘price control or price affirmation statutes’ that involve ‘tying the price of ... in-state products to out-of-state prices.’” (alteration in original) (quoting *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003))). In fact, however, *Walsh* says no such thing and is perfectly consistent with the doctrine outlined above. *See supra* notes 262-68 and accompanying text.

294. *Epel*, 793 F.3d at 1175.

295. *Id.* (citation omitted).

296. *Id.*

297. *See, e.g., Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 79 (1st Cir. 2001).

298. *See id.* at 85.

consumer health and welfare.²⁹⁹ By limiting the application of the extraterritoriality rule to situations in which a state has no interest, the overinclusivity problems identified by Judge Gorsuch disappear.

Judge Gorsuch's reasoning in *Epel* would later be adopted by the Ninth Circuit and his own opinion for the Supreme Court in *National Pork Producers*.³⁰⁰ At the time the Tenth Circuit decided *Epel*, however, Judge Gorsuch knowingly rejected the reasoning of binding Supreme Court precedent and ruled in manner that was inconsistent with the framework adopted by the lower courts up to that point.³⁰¹

In fact, other circuits continued to hold that indirect extraterritorial legislation was invalid when the state has no legitimate local interest. For example, the District of Minnesota struck down Minnesota's Next Generation Energy Act in *North Dakota v. Heydinger*.³⁰² This statute established standards regarding the use and generation of energy with the goal of reducing carbon emissions.³⁰³ The court held that the statute was unconstitutional because it had the practical effect of "requir[ing] non-Minnesota merchants to seek regulatory approval [in Minnesota] before undertaking transactions with other non-Minnesota entities."³⁰⁴ The court explained that

the transmission of electricity ... does not recognize state boundaries. Therefore, when a non-Minnesota entity injects electricity into the grid to satisfy its obligations to a non-Minnesota member, it cannot ensure that the electricity will not travel to and be removed in—in other words, be imported to and contribute to statewide power sector carbon dioxide emissions in—Minnesota.³⁰⁵

As a result, out-of-state entities were forced to comply with Minnesota law before generating and transmitting power to other states.

299. See Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001).

300. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023).

301. See *Epel*, 793 F.3d at 1175.

302. 15 F. Supp. 3d 891, 918-19 (D. Minn. 2014), *aff'd*, 825 F.3d 912 (8th Cir. 2016).

303. *Id.* at 897.

304. *Id.* at 918.

305. *Id.* at 917.

Although the district court did not engage in an analysis of state interests, Minnesota clearly lacked any legitimate interest in electricity sold by an out-of-state company to an out-of-state consumer.

The Eighth Circuit affirmed in an opinion that explicitly disagreed with Judge Gorsuch's reasoning in *Epel*.³⁰⁶ Relying on *Epel*, the state argued that extraterritoriality should be limited to price fixing or price affirmation laws.³⁰⁷ The Eighth Circuit rejected this argument, noting that it was inconsistent with decisions from both the Supreme Court and numerous circuits.³⁰⁸ The court ultimately agreed with the district court's conclusion that the law was unconstitutional because it allowed Minnesota to regulate energy transactions in which the state had no interest: transactions between an out-of-state merchant and an out-of-state customer.³⁰⁹

In *Legato Vapors, LLC v. Cook*, the Seventh Circuit followed a similar approach to extraterritoriality when striking down Indiana's Vapor Pens and E-Liquid Act.³¹⁰ As briefly mentioned in Part I, this law imposed detailed requirements on any manufacturer as a condition of obtaining a permit to sell e-liquid devices in Indiana.³¹¹ Even with respect to out-of-state companies and facilities, the law imposed strict requirements for the design, construction, and operation of manufacturing facilities.³¹² Not only were these requirements incredibly specific, but the out-of-state facilities were also subject to inspection by Indiana officials.³¹³

306. *Heydinger*, 825 F.3d at 921-22.

307. *Id.* at 919-20.

308. *Id.* at 920. The court recognized that the Supreme Court's decision in *Edgar*, discussed above, relied on extraterritoriality to strike down an Illinois corporate take-over law. *Id.* at 920 (citing *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982)). The court also cited cases from the Second, Seventh, and Eighth Circuits that have struck down state laws unrelated to price fixing on extraterritoriality grounds. *Id.* (first citing *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 366 (6th Cir. 2013); then citing *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 100, 103-04 (2d Cir. 2003); and then citing *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 659-60 (7th Cir. 1995)).

309. *Id.* at 921-22.

310. 847 F.3d 825, 837 (7th Cir. 2017).

311. *See id.* at 827-28.

312. *Id.* at 828. Indiana even specified the type of security arrangements needed at the facility. *Id.*

313. *Id.*

The Seventh Circuit struck down Indiana's vaping law on extraterritoriality grounds.³¹⁴ The court explained that Indiana's requirements "operate as extraterritorial legislation, governing the services and commercial relationships between out-of-state manufacturers and their employees and contractors."³¹⁵ In other words, the law constituted indirect extraterritorial legislation because it required out-of-state companies to change their conduct in other states as a condition of doing business in Indiana. Next, the court held that Indiana had not shown how it could "satisfy the 'strictest scrutiny' that would be needed to uphold a discriminatory or extraterritorial law."³¹⁶ The court had no trouble finding that Indiana's asserted interest—"protecting the health and safety of Hoosiers who consume e-liquids"—was legitimate.³¹⁷ However, the court concluded that the law was not narrowly tailored because there was no evidence "that less intrusive alternatives to these unprecedented extraterritorial provisions are incapable of serving that purpose."³¹⁸ Rather than detailed regulations of the out-of-state production process, the court explained, Indiana may have been able to serve its interests equally well with inspections or regulations regarding the *product sold within Indiana*.³¹⁹

The Seventh Circuit's approach in *Legato* has much to recommend. Essentially, the court held that indirect extraterritorial legislation is constitutional only if it is narrowly tailored to serve a legitimate state interest.³²⁰ Not only is this a familiar test, but it is also fully consistent with the approach outlined above. The test applies only when the state law constitutes indirect extraterritorial legislation, meaning that it requires a party to change its conduct in other states as a condition of a benefit in the regulating state.³²¹ Next, the narrow tailoring inquiry ensures that the state has a corresponding interest in the extraterritorial conduct that is being regulated. By putting the test into a common framework that would

314. *See id.* at 827.

315. *Id.* at 833. The court also repeatedly stressed the fact that the manufacturers could be subject to inconsistent regulations if every state adopted similar measures. *Id.* at 834.

316. *Id.* at 834-35.

317. *Id.* at 835.

318. *Id.*

319. *See id.* at 834-35.

320. *Id.* at 830.

321. *See id.*

be parallel to the test for laws that discriminate against interstate commerce, this approach could have brought clarity to the doctrine. Unfortunately, the Supreme Court took a different path in *National Pork Producers*.

IV. NATIONAL PORK PRODUCERS COUNCIL V. ROSS

National Pork Producers arose from a challenge to California's Proposition 12, a 2018 ballot initiative that imposed new requirements for all egg, pork, and veal products sold in California.³²² The law, now codified as the Prevention of Farm Animal Cruelty Act, prohibits the sale of such products if they come from an animal, or the direct offspring of an animal, that was confined in a manner that did not allow it to stand up, lie down, extend its limbs, or turn around freely.³²³ Most of the pork³²⁴ (and other animal products)³²⁵ sold in California, however, did not comply with this law. Industry-standard gestation crates confine breeding sows in cages that are only slightly larger than the sow, making it virtually impossible for them to move.³²⁶

Not only does California import virtually all of its pork, but the use of gestation crates had already been banned on farms within California.³²⁷ Any reduction in the use of gestation crates, or practical effect, would therefore be wholly extraterritorial. California therefore used its market power to potentially force out-of-state

322. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1150-51 (2023).

323. CAL. HEALTH & SAFETY CODE §§ 25990(a), 25991(e)(1) (West 2018).

324. See Caleb Pershan, *CA Voters Pass Cage-Free Egg Proposition with Consequences for Veal and Pork*, EATER (Nov. 7, 2018, at 13:58 ET), <https://sf.eater.com/2018/11/7/18072268/eggs-cage-free-hens-proposition-12-california-passed-approved> [<https://perma.cc/WC9J-EGXU>] ("Because [California] imports much of its pork products, where most is produced by methods that won't conform to Prop[osition] 12's requirements, the [California Pork Producers Association] predicts an increase in pork prices.").

325. See Gabrielle Canon, *'A Loud and Clear Message': California Passes Historic Farm Animal Protections*, GUARDIAN (Nov. 8, 2018, at 07:00 ET), <https://www.theguardian.com/us-news/2018/nov/08/california-animal-welfare-cage-free-eggs-prop-12-passes> [<https://perma.cc/D7TS-M9SL>] ("In California's billion-dollar egg industry, only a third of laying hens are currently uncaged.").

326. David J. Wolfson & Marian Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 217-18 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

327. See CAL. HEALTH & SAFETY CODE §§ 25990(a), 25991(e)(1)-(3).

pork farmers to change how they confine millions of pigs in other states.

Two organizations of pig producers—the National Pork Producers Council and the American Farm Bureau Federation—brought suit, arguing that Proposition 12 violated the extraterritoriality doctrine of the Dormant Commerce Clause.³²⁸ They argued that, although California directly regulated only in-state sales, it had the practical effect of regulating out-of-state conduct because more than 99 percent of the pork sold in California was produced outside the state.³²⁹ They further contended that, due to the structure of the pork market, it was impossible to separate out pork bound for the California market.³³⁰ As a result, California’s law had the practical effect of regulating the out-of-state production of goods bound for out-of-state markets.³³¹

The Southern District of California, however, rejected the pork producers’ arguments and granted a motion to dismiss for failure to state a claim on which relief can be granted.³³² The district court held that “a statute violates the extraterritorial principle when it is ‘directed at interstate commerce and only interstate commerce.’”³³³ Because the California law applied equally to California-based pork producers and its extraterritorial effects resulted from a regulation of in-state sales, the court held that it did not violate the extraterritoriality doctrine of the Dormant Commerce Clause.³³⁴ In other words, the district court held that indirect extraterritorial legislation, as defined by this Article, cannot violate the extraterritoriality doctrine because it directly applies only to in-state conduct.

328. See Brief for Petitioners, *supra* note 37, at 19-20. They also argued that the law failed the *Pike* balancing test. *Id.*

329. *Id.* at 21.

330. *Id.* at 19.

331. *Id.* Although these points were disputed in the briefing, see Brief of Economic Research Organizations as Amici Curiae in Support of Respondents at 4, *Nat’l Pork Producers Council v. Ross*, 143 S. Ct. 1142 (2023) (No. 21-468), the case was decided on a motion to dismiss for failure to state a claim, *Nat’l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201, 1210 (S.D. Cal. 2020), *aff’d*, 6 F.4th 1021 (9th Cir. 2021), *aff’d*, 143 S. Ct. 1142 (2023), so all reasonable inferences should have been made in the pork producers’ favor. 14 WRIGHT & MILLER’S FEDERAL PRACTICE & PROCEDURE § 3637 (3d ed. 1998).

332. *Nat’l Pork Producers*, 456 F. Supp. 3d at 1210.

333. *Id.* at 1208 (quoting *Nat’l Collegiate Athletic Ass’n v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993)).

334. *Id.*

The Ninth Circuit affirmed and expanded upon the district court's reasoning.³³⁵ The court recognized that the extraterritoriality doctrine cannot possibly invalidate all state legislation that indirectly produces effects in other states.³³⁶ But, instead of adopting the limiting principles discussed above, the court suggested that the *Healy* line of cases should be limited to their facts and thus apply only to price fixing and price affirmation laws.³³⁷ Even if the doctrine applies more broadly, the Ninth Circuit asserted, "[S]tate laws that regulate only conduct in the state, including the sale of products in the state, do not have impermissible extraterritorial effects."³³⁸ Because "Proposition 12 directly regulates only the in-state sales of 'products that are brought into or are otherwise within the borders of [California]," it did not violate the extraterritoriality doctrine.³³⁹ Like the district court, the Ninth Circuit thus held that indirect extraterritorial legislation never violates the Constitution.

The Supreme Court granted certiorari to determine whether Proposition 12 violated the Dormant Commerce Clause.³⁴⁰ Not only was the case economically important,³⁴¹ but it also presented the Court with an opportunity to clarify the extraterritoriality doctrine. As explained in detail above, the Court's precedent was difficult to understand or apply, and the circuit courts were split.³⁴² While the Ninth and Tenth Circuits had recently held that indirect economic legislation cannot violate the extraterritoriality doctrine, the Second, Sixth, Seventh, and Eighth Circuits essentially held that indirect extraterritorial legislation violates the Dormant Commerce Clause if it does not advance a legitimate state interest.³⁴³

Unfortunately, as in most cases involving indirect extraterritorial legislation, the parties did not clearly present the issue or relevant precedent. The briefing did not distinguish between direct and

335. *Nat'l Pork Producers*, 6 F.4th at 1033.

336. *See id.* at 1027.

337. *Id.* at 1028. However, the Ninth Circuit recognized that the Supreme Court had never expressly limited the doctrine to price fixing or price affirmation statutes. *Id.*

338. *Id.* at 1029.

339. *Id.* at 1031 (alteration in original) (quoting *Daniels Sharpshooters, Inc. v. Smith*, 889 F.3d 608, 615 (9th Cir. 2018)).

340. *See Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1151 (2023).

341. *See id.* ("Ultimately, petitioners estimated that 'compliance with Proposition 12 will increase production costs' by '9.2% ... at the farm level.'" (alteration in original)).

342. *See supra* Part III.B.

343. *See supra* Part III.

indirect legislation, and neither party explained the differing approaches from the circuit courts. Moreover, the pork producers' primary argument relied on an obvious misreading of Supreme Court precedent.³⁴⁴

First, by taking language from cases like *Healy* out of context, the pork producers first argued that any state legislation that has the practical effect of influencing conduct in another state is per se unconstitutional.³⁴⁵ Eliding the distinction between direct and indirect legislation, they devoted most of their argument to explaining why extraterritorial legislation violates state sovereignty and principles of federalism.³⁴⁶ Their argument, however, did not include the limiting principles identified above.³⁴⁷ The pork producers thus advanced an implausible rule that could broadly invalidate most state economic legislation in our interconnected economy.

Second, the pork producers argued that, even if there is no per se rule against regulations that have extraterritorial effects, such legislation should be struck down if it cannot be justified under the state's police powers.³⁴⁸ A state's police powers authorize it to regulate for the health and safety of its own citizens.³⁴⁹ However, the pork producers contended, a state exceeds the jurisdictional limits of the police power when it attempts to address harms outside the state.³⁵⁰ Citing cases like *Baldwin*, they contended that a state law with extraterritorial effects is valid only if it can be reasonably justified as a measure to protect local interests.³⁵¹ Proposition 12, they argued, is not such a law because it has no connection to consumer health and California lacks a legitimate interest in the welfare of farm animals in other states.³⁵²

344. See Brief for Petitioners, *supra* note 37, at 21-35.

345. See *id.* at 30-35.

346. See *id.* at 23-35.

347. To repeat, this Article argues that, to violate the extraterritoriality principle, the law must directly regulate conduct in another state, or satisfy the following two conditions: (1) The law must *require* a party to change its conduct in another state as a condition of doing something in the regulating state (that is, constitute indirect extraterritorial legislation), and (2) the regulating state must have no legitimate interest in the out-of-state conduct.

348. Brief for Petitioners, *supra* note 37, at 36-37.

349. *Id.* at 36 (quoting *Hill v. Colorado*, 530 U.S. 703, 715 (2000)).

350. *Id.* at 37.

351. *Id.* at 37-39.

352. *Id.* at 39-43.

In her amicus brief for the United States, the Solicitor General largely agreed with the pork producers' second argument. Her primary argument was that the California law fails the *Pike* balancing test because it serves no legitimate state interest.³⁵³ California, she argued, did not have a legitimate interest in the welfare of animals located in the pork-producing states and California's "philosophical disagreement with the public policy of other States" did not count as a qualifying local interest.³⁵⁴ If the Court were to reject this argument, the Solicitor General argued, the best way to understand the *Healy* and *Baldwin* line of cases is that, "when a State undertakes regulation of out-of-state commercial activity, it must at least advance a legitimate local interest and demonstrate a basis for its regulation that is not 'too remote and indirect.'"³⁵⁵ Because the law served no legitimate California interest, she argued, it violated the extraterritoriality doctrine.³⁵⁶

Although the briefing thus presented an argument that is effectively the same as the doctrine proposed in this Article, it did not present the strongest possible support. Notably, the pork producers and Solicitor General did not rely on the circuit court precedent discussed above. In fact, the pork producers cite to only one lower court case—*Legato Vapors*—striking down legislation on extraterritoriality grounds.³⁵⁷ More significantly, they did not explain why their approach would result in upholding standard legislation like the labeling law upheld by the Second Circuit in *Sorrell*. Rather than delve into the circuit court precedent, the briefing instead relied almost exclusively on general legal principles and vague Supreme Court precedents like *Healy* and *Baldwin*.³⁵⁸

353. See Brief for the United States, *supra* note 37, at 17-23.

354. *Id.* at 20.

355. *Id.* at 34 (citing *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935)).

356. See *id.* at 43. If California could enact such a law, the Solicitor General warned, then another state could enact an even more protective law, meaning that the national industry would practically be controlled by the state with the most extreme animal welfare protections. See *id.* ("Ultimately, petitioners estimated that 'compliance with Proposition 12 will increase production costs' by '9.2% ... at the farm level.'" (alteration in original)). She further warned that, if conditions can be imposed on doing business within the state that are unrelated to local interests, "[t]hen States might seek to ban the importation of particular out-of-state companies' products as a way of objecting to those companies' business practices anywhere in the world." *Id.* at 23.

357. See Brief for Petitioners, *supra* note 37, at 39.

358. See *id.* at 30-33.

Moreover, the pork producers and Solicitor General each presented the argument as a fallback position, and they did not agree on a proper framework of analysis.³⁵⁹ Given the confusing state of the briefing, without extensive independent research the Court may not have been aware of the full legal background.

In an opinion by Justice Gorsuch that is strikingly similar to his Tenth Circuit opinion in *Epel*, the Court held that Proposition 12 did not violate the Dormant Commerce Clause.³⁶⁰ First, Justice Gorsuch implausibly asserted that cases like *Healy*, *Brown-Forman*, and *Baldwin* do not hold that extraterritorial legislation violates the Dormant Commerce Clause.³⁶¹ According to Justice Gorsuch, the *Healy* Court struck down the price affirmation law at issue because it discriminated against interstate commerce by targeting out-of-state vendors and discouraging customers from crossing state lines to take advantage of lower prices.³⁶² Justice Gorsuch thus asserted that these cases should be limited to their facts—price fixing and price affirmation laws.³⁶³

Justice Gorsuch's narrow interpretation of the Court's precedent, however, ignores its reasoning and the lower court cases that faithfully applied it.³⁶⁴ Although Justice Gorsuch asserted that *many* lower courts have agreed with his narrow reading of the cases, he cited only to his own opinion in *Epel*,³⁶⁵ the Ninth Circuit decision below,³⁶⁶ and decisions from the Fourth and Sixth Circuits that *explicitly disagreed with him*.³⁶⁷ The opinion's discussion of

359. See Brief for the United States, *supra* note 37, at 23. While the pork producers framed their argument as a limitation on state police power, the Solicitor General presented her argument as stemming from *Healy* and *Baldwin*. *Id.*

360. See *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1149, 1153-54 (2023).

361. See *id.* at 1155-56.

362. See *id.* at 1154-55.

363. *Id.* at 1155.

364. See *supra* Part III; see also Brief for the United States, *supra* note 37, at 31 ("Although this Court's three principal cases invalidating state statutes based on the extraterritoriality principle involved laws concerning prices, the reasoning of the Court's decisions indicates that the Commerce Clause concern is broader.").

365. *Epel v. Energy & Env't Legal Inst.*, 793 F.3d 1169, 1174 (10th Cir. 2015).

366. See *generally Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021 (9th Cir. 2021).

367. See *Nat'l Pork Producers*, 143 S. Ct. at 1155-56 (first citing *Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021, 1028-29 (9th Cir. 2021), *aff'd*, 143 S. Ct. 1142; then citing *Ass'n for Accessible Meds. v. Frosh*, 887 F.3d 664, 669 (4th Cir. 2018); then citing *Energy and Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1174 (10th Cir. 2015); and then citing *American Beverage Assn. v. Snyder*, 735 F.3d 362, 373 (6th Cir. 2013)). See *generally Ass'n for Accessible Meds.*,

precedent is either woefully uninformed (even with respect to the cases cited in the opinion) or highly misleading.

After misrepresenting the precedent, Justice Gorsuch proceeded to attack the *per se* rule advanced by the pork producers on policy grounds.³⁶⁸ He asserted that, “[i]n our interconnected national marketplace, many (maybe most) state laws have the ‘practical effect of controlling’ extraterritorial behavior.”³⁶⁹ For example, Justice Gorsuch contended, a *per se* rule would call into question perfectly ordinary state legislation like a state income tax or environmental protection laws.³⁷⁰ Because such legislation can change the cost of doing business, he argued, it can influence where a company decides to locate offices and production facilities.³⁷¹ California’s income taxes, for example, may prompt a company to relocate to a low-tax state like Texas.³⁷² Justice Gorsuch concluded that an “‘almost *per se*’ rule against laws that have the ‘practical effect’ of ‘controlling’ extraterritorial commerce would cast a shadow over laws long understood to represent valid exercises of the States’ constitutionally reserved powers.”³⁷³

The Court’s opinion in *National Pork Producers*, however, fails to address the much stronger argument that California’s law is unconstitutional because the state has no legitimate interest in the welfare of out-of-state pigs. The opinion neither cites analogous lower court precedent nor considers any limiting principles. Instead,

887 F.3d at 670 (“We therefore reject Maryland’s argument that *Walsh* limited the extraterritoriality principle only to price affirmation statutes.”); *Am. Beverage Ass’n*, 735 F.3d at 376 (“Thus, Michigan is forcing states to comply with its legislation in order to conduct business within its state, which creates an impermissible extraterritorial effect and is in violation of the Supreme Court’s precedent stated in *Brown-Forman* and *Healy*.”). In a concurring opinion in *American Beverage Ass’n*, Judge Sutton argued that the extraterritoriality doctrine was not necessary for the outcomes in the Supreme Court’s precedent. 735 F.3d at 380 (Sutton, J., concurring). Other circuit decisions, not cited in *National Pork Producers*, also rejected a limited reading of the doctrine. *See, e.g.*, *North Dakota v. Heydinger*, 15 F. Supp. 3d 891, 912 (D. Minn. 2014) (“Other Circuits have similarly applied the extraterritoriality doctrine to non-price control statutes.”), *aff’d*, 825 F.3d 912 (8th Cir. 2016).

368. *Nat’l Pork Producers*, 143 S. Ct. at 1156.

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.* (“State income tax laws lead some individuals and companies to relocate to other jurisdictions.”).

373. *Id.*

Justice Gorsuch merely attacks the same per se strawman rule that has been rejected by every lower court to consider the issue. His opinion simply does not engage with the legal and policy issues at stake.

After rejecting *Baldwin* and *Healy*'s Dormant Commerce Clause extraterritoriality doctrine, Justice Gorsuch stated that other constitutional doctrines are available to resolve disputes over state sovereignty.³⁷⁴ He explained that, "[t]o resolve disputes about the reach of one State's power, this Court has long consulted original and historical understandings of the Constitution's structure and the principles of 'sovereignty and comity' it embraces."³⁷⁵ As an example, Justice Gorsuch cited *Bonaparte v. Tax Court*, which held that one state cannot "adopt a law exempting securities held by the residents of a second State from taxation in that second State."³⁷⁶ He also cited *Strassheim v. Daily* for the proposition that a state cannot "prosecute the citizen of another State for acts committed 'outside [the first State's] jurisdiction' that are not 'intended to produce [or that do not] produc[e] detrimental effects within it.'"³⁷⁷ These examples, however, involve only what this Article calls *direct* extraterritorial legislation, because their application is not tied to any conduct within the regulating state.

Although it is buried in a footnote, Justice Gorsuch's discussion of *Edgar v. MITE Corp.*³⁷⁸ confirmed that *National Pork Producers* does not disturb the prohibition on direct extraterritorial legislation.³⁷⁹ The Court in *Edgar* struck down an Illinois law that essentially required state approval before a takeover of any corporation in which at least 10 percent of the shares were owned by Illinois residents.³⁸⁰ The Illinois law therefore applied to a tender offer for an out-of-state corporation, even when the offer occurred through the use of interstate commerce and the corporation was majority owned by out-of-state entities.³⁸¹ The *Edgar* Court held

374. *Id.* at 1156-57.

375. *Id.* at 1156.

376. *Id.* (citing *Bonaparte v. Tax Court*, 104 U.S. 592, 592-94 (1882)).

377. *Id.* (quoting *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (alterations in original)).

378. 457 U.S. 624 (1982).

379. *See Nat'l Pork Producers*, 143 S. Ct. at 1157, n.1.

380. *Edgar v. MITE Corp.*, 457 U.S. 624, 626-27, 630 (1992).

381. *Id.* at 642.

that the statute had “a sweeping extraterritorial effect.”³⁸² As Justice Gorsuch explained in *National Pork Producers*, “[Edgar] spoke to a law that *directly* regulated out-of-state transactions by those with *no* connection to the State.”³⁸³ The Illinois law in *Edgar* was direct extraterritorial legislation because a violation of the law need not be conditioned on any activity in Illinois.³⁸⁴ In other words, a party could violate the law with conduct wholly external to Illinois. The California law at issue in *National Pork Producers* is quite different, Justice Gorsuch explained, because “Proposition 12 regulates only products that companies choose to sell ‘within’ California.”³⁸⁵

Justice Gorsuch’s discussion of *Edgar* in footnote 1 is as close as he comes to discussing indirect extraterritorial legislation. Because he uses sales within California to distinguish Proposition 12 from *Edgar*’s (direct) extraterritorial legislation,³⁸⁶ he arguably implied that indirect legislation can *never* violate the Constitution on extraterritoriality grounds. The implication becomes stronger when viewed in the context of his criticism of *Healy*, earlier reasoning in *Epel*, and affirmance of the Ninth Circuit’s decision below. In sum,

382. *Id.*

383. *Nat’l Pork Producers*, 143 S. Ct. at 1157, n.1.

384. 457 U.S. 624, 641 (1982) (“The Illinois Act differs substantially from state blue-sky laws in that it directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois.”).

385. *Id.* Although it is beyond the scope of this Article, the Court’s decision in *CTS Corp. v. Dynamics Corp.* suggests that direct extraterritorial legislation is subject to a test that is similar to the test for indirect extraterritorial legislation. 481 U.S. 69, 88, 93 (1987). The Court upheld an Indiana statute requiring approval from a majority of the preexisting shareholders before a change in control of an Indiana corporation. *Id.* at 73-74, 94. The plaintiffs argued that the law regulated extraterritorially because it would require state approval even when both the entity acquiring the company and the preexisting shareholders were residents of another state. *See id.* at 88. The Court, however, upheld the law, reasoning that it did not discriminate against out-of-state entities and posed no risk of inconsistent regulations because it governed only Indiana corporations. *Id.* at 87-89. As the Seventh Circuit explained, *CTS Corp.* stands for the proposition that a state law may have the practical effect of burdening conduct in other states so long as the burden has a “corresponding and significant protection for a legitimate interest of local residents.” *Alliant Energy Corp. v. Bie*, 336 F.3d 545, 549 (7th Cir. 2003). Under this reasoning, the Indiana statute was valid because it applied only to Indiana corporations and the state has a legitimate interest in regulating its own corporations. In other words, the extraterritorial conduct being regulated—the acquisition of the Indiana corporation—itsself had a sufficient relationship to the regulating state.

386. *Nat’l Pork Producers*, 143 S. Ct. at 1157, n.1.

the Court in *National Pork Producers* either fails to recognize indirect extraterritorial legislation or views it as immune from attack on extraterritoriality grounds. After *National Pork Producers*, the lower courts may hold that indirect extraterritorial legislation presents no federalism or state sovereignty concerns because it formally applies only to in-state conduct. But, because *National Pork Producers* does not squarely resolve this issue, the lower courts could take up Justice Gorsuch's invitation to develop a new doctrine based on "original and historical" principles of federalism.³⁸⁷

V. LEGITIMATE STATE INTERESTS

This Article's central argument is that a state should not be permitted to use indirect extraterritorial legislation to control conduct beyond its borders unless it has a legitimate interest in such out-of-state conduct. It is important to distinguish this proposed rule from the *Pike* balancing test traditionally used for state legislation that does not discriminate against interstate commerce. Under *Pike* balancing, nondiscriminatory laws are presumptively constitutional and will be struck down only if the challenger demonstrates that they impose burdens on interstate commerce that are "clearly excessive in relation to the putative local benefits."³⁸⁸ By contrast, this Article's proposed test requires no balancing of interests. Instead, indirect extraterritorial legislation could be valid if, at a minimum,³⁸⁹ the regulating state has any legitimate interest in the out-of-state conduct that is being controlled.

But when does a state have a legitimate interest in controlling conduct in another state? In some cases, the answer is obvious.

387. See *Nat'l Pork Producers*, 143 S. Ct. at 1156; see also *id.* at 1172 (Kavanaugh, J., concurring in part and dissenting in part) ("I add this opinion to point out that state economic regulations like California's Proposition 12 may raise questions not only under the Commerce Clause, but also under the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause.").

388. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citing *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960)).

389. When further developing the law, courts could apply a more demanding standard to indirect extraterritorial legislation in appropriate cases. For example, in *Legato Vapors v. Cook*, the Seventh Circuit held that an extraterritorial law must also be narrowly tailored to the state interest. 847 F.3d 825, 834-35 (7th Cir. 2017). This Article argues only that, at a minimum, the courts should require some legitimate interest.

When a state imposes labeling requirements on potentially harmful products sold within its borders, it is clearly advancing an interest in the health and safety of its residents.³⁹⁰ *Legato Vapors*, discussed above, presents the clearest example of a state regulation that controls out-of-state conduct in which the state has no legitimate interest. Although Indiana had a legitimate interest in ensuring that its residents used safe vaping products, it had no interest in security protocol or employment practices at out-of-state manufacturing facilities.³⁹¹ Requiring some legitimate interest, no matter how minimal, would invalidate the most troubling examples of indirect extraterritorial legislation.³⁹²

More difficult issues arise when the regulating state asserts an interest in morally distancing itself from conduct that occurs in another state. *National Pork Producers* is a prime example. Before the Prevention of Farm Animal Cruelty Act was put in place, California had already banned the use of gestation crates for sows located within California.³⁹³ In its briefing before the Supreme Court, California asserted that the Act “serve[d] legitimate local interests by prohibiting the in-state sale of animal products that the voters view as morally objectionable.”³⁹⁴ Because pork is not inherently objectionable, the asserted interest must be in preventing Californians from supporting or being complicit in the inhumane treatment of animals in other states. More generally, California asserted that it had a legitimate interest in distancing itself from the immoral policies of other states, even if doing so had the

390. See *Nat'l Electric Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 110, 115 (2d Cir. 2001); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 647 (6th Cir. 2010).

391. See *Legato Vapors*, 847 F.3d at 833.

392. *American Beverage Ass'n v. Snyder*, 700 F.3d 796 (6th Cir. 2012), discussed *supra*, note 274, provides another example. In *Snyder*, the Sixth Circuit invalidated a Michigan law that required the sellers of beverage containers to place a certain mark on all containers sold in Michigan and prohibited containers containing such markings from being sold in other states. 700 F.3d 796, 810 (6th Cir. 2012). Because Michigan has no apparent legitimate economic, health, moral or other interest in what containers an out-of-state company sells in other states, the law at issue here would not be saved even if it were the least restrictive means of adopting Michigan's asserted state interests.

393. See CAL. HEALTH & SAFETY CODE §§ 25990(a), 25991(e)(1)-(3) (West 2018).

394. Brief for the State Respondents at 34, *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142 (2023) (No. 21-468).

practical effect of forcing out-of-state conduct to comply with California's moral standards.³⁹⁵

The question of whether such moral interests should be considered legitimate is beyond the scope of this Article. As a first step, this Article argues that courts should strike down legislation in easy cases like *Legato Vapors* that do not raise such thorny issues. The courts should then grapple with more difficult moral questions on a case-by-case basis. But, unlike in *Pike* balancing, courts should not defer to the policy choices of states like California. While *Pike* is concerned with balancing state interests against the harm to the national economy,³⁹⁶ the extraterritoriality issue goes to a matter of state power and sovereignty. If a court were to uncritically defer to California's asserted interest, it would abdicate its responsibility to protect the sovereignty of pork-producing states that have different moral standards.

The hypotheticals found in this Article's Introduction demonstrate the problematic nature of California's asserted moral interest. If California has a legitimate interest in avoiding complicity with the inhumane treatment of animals in other states, then it may have a legitimate interest in avoiding complicity with the immoral treatment of workers who produce goods or services for sale in California. Ruling on such issues would not involve the type of value judgments associated with *Pike* balancing. Rather than weighing a state's moral interests against an economic burden, the courts would make the legal determination of whether a state's asserted moral interest is legitimate, an inquiry that is common in constitutional law.

Although this Article stakes out no position on whether such moral interests are legitimate, future scholarship could use history to help analyze the issue. To the author's knowledge, there is no directly analogous state legislation in U.S. history. However, there is a rich history of social and economic boycotts against the products of slave labor,³⁹⁷ and similar issues also arose in the context of goods

395. See *Nat'l Pork Producers*, 143 S. Ct. at 1151.

396. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

397. See generally JULIE L. HOLCOMB, *MORAL COMMERCE: QUAKERS AND THE TRANS-ATLANTIC BOYCOTT OF THE SLAVE LABOR ECONOMY* (2016) (providing a detailed history of economic boycotts against the products of slave labor in the seventeenth and eighteenth centuries).

produced by child labor.³⁹⁸ Although these boycotts did not result in state legislation, a deep historical dive could uncover historical evidence that would shed more light on the issue.

CONCLUSION

The traditional territorial model of state power does not account for the division of sovereignty within our federal system. As the Jay, Marshall, and Taney Courts all explained, the people of each state conferred sovereign authority on the states, while the people of the United States granted power to the federal government.³⁹⁹ To forestall conflict between sovereign authorities, the people also gave the Supreme Court the unique role of preserving the division of sovereignty within our complex federal system.⁴⁰⁰ And, at the time of Ratification, virtually all Americans thought that each state had complete autonomy over local policy.⁴⁰¹ A law that directly regulates conduct in another state therefore violates that state's sovereignty and structural principles of federalism.

Indirect extraterritorial legislation that does not serve a legitimate state interest raises the same concerns. Just as the people of one state cannot control the people of another, the nature of the Union dictates that a state should not be free to require national compliance with its social policy as a condition of doing business in the regulating state. When the regulating state has no legitimate interest in the out-of-state conduct that is the subject of the regulation, the state is paternalistically attempting to override the policy decisions of an equal member of the Union.

In cases like *Baldwin*, *Brown-Forman*, and *Healy*, the Court recognized that a regulation of local conduct could have impermissible extraterritorial effects.⁴⁰² Unfortunately, the Court's vague and imprecise reasoning created decades of confusion around the extraterritoriality doctrine.⁴⁰³ When ruling on the facts of concrete

398. See *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by* *U.S. v. Darby*, 312 U.S. 100 (1941).

399. See *supra* Part II.C.

400. See *KRAMER*, *supra* note 155, at 60.

401. See *supra* notes 93-97 and accompanying text.

402. See *supra* text accompanying notes 224-39.

403. See *supra* Part III.B.

cases, however, the lower courts consistently applied the doctrine to strike down indirect extraterritorial legislation that did not serve a legitimate interest.⁴⁰⁴ Starting with Judge Gorsuch's decision for the Tenth Circuit in *Epel*, however, a minority of jurisdictions took a different approach. By conflating indirect extraterritorial legislation with ordinary state laws that merely influence conduct in another state, they concluded that the doctrine was impractical and should be limited to the precise type of statute at issue in *Healy*.⁴⁰⁵ Without acknowledging the doctrine developed in most circuits or the constitutional values at stake, Justice Gorsuch made the minority approach the law of the land in *National Pork Producers*.⁴⁰⁶

In place of *Healy's* Dormant Commerce Clause analysis, *National Pork Producers* stated that extraterritoriality rules must be derived from "original and historical understandings of the Constitution's structure and the principles of 'sovereignty and comity' it embraces."⁴⁰⁷ The history of the founding, historical legal treatises, and court precedent all dictate that direct extraterritorial legislation is inconsistent with the structure of the Constitution and early American notions of sovereignty. Indirect extraterritorial legislation is no different, as it can allow the state with the most stringent regulations to effectively set policy in other states. Not only is such extraterritorial control inconsistent with basic democratic accountability, but it also violates the Constitution's commitment to a federal system composed of equal sovereign states.

Now that *National Pork Producers* has excised the extraterritoriality doctrine from the Dormant Commerce Clause, the courts should find that the doctrine is implicit in the text of the Tenth Amendment or Article III. And, while many Justices are reluctant to weigh policy interests under the Dormant Commerce Clause, the antebellum Court's most significant federalism cases teach that the federal courts have an obligation to mediate disputes between the states over the scope of their sovereign powers.

404. See, e.g., *Alliant Energy v. Bie*, 336 F.3d 545, 549 (7th Cir. 2003).

405. See, e.g., text accompanying notes 291-97.

406. *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1165 (2023).

407. *Id.* at 1156.