

# The Extraterritoriality Doctrine of the Dormant Commerce Clause is Not Dead

Susan Lorde Martin

*Frank G. Zarb School of Business, Hofstra University*

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Constitutional Law Commons](#)

---

### Repository Citation

Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause is Not Dead*, 100 Marq. L. Rev. 497 (2016).  
Available at: <http://scholarship.law.marquette.edu/mulr/vol100/iss2/6>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

# THE EXTRATERRITORIALITY DOCTRINE OF THE DORMANT COMMERCE CLAUSE IS NOT DEAD

SUSAN LORDE MARTIN\*

## *Abstract*

*In 1895, the New York Court of Appeals, in refusing to enforce a Kansas statute, referred to “a principle of universal application, recognized in all civilized states, that the statutes of one state have . . . no force or effect in another.” In 1897, the Court of Appeals of Kentucky noted that “[t]he statute of another state has, of course, no extraterritorial force.” That old notion describes the extraterritoriality doctrine of the dormant Commerce Clause. In recent years, the doctrine has become problematic for several reasons. One, the line between intrastate and interstate business has become blurred with many fewer transactions falling clearly in the former category. Two, when Congress does not act on issues that affect many, if not all, states, it creates the impression that federalism is not working and states need to undertake a larger role in regulating commerce. Three, there is a clear two-part test for the out-of-state-discrimination strand of the dormant Commerce Clause, so it is easy to confuse it with an appropriate test for the extraterritoriality doctrine. Therefore, some commentators have said that the extraterritoriality doctrine serves no useful purpose. This article argues that there is a reasonably clear test for extraterritoriality, and the doctrine serves the important purposes of discouraging undue burdens on interstate commerce and of not giving preference to one state’s policy decisions over the decisions of other states.*

I.	INTRODUCTION.....	498
II.	THE DORMANT COMMERCE CLAUSE.....	499
III.	THE EXTRATERRITORIALITY ASPECT OF THE DORMANT COMMERCE CLAUSE .....	502
	A. The Classic Extraterritoriality Cases .....	502
	1. <i>Baldwin v. G.A.F. Seelig, Inc.</i> .....	502
	2. <i>Edgar v. MITE Corp.</i> .....	503

---

\* Cypres Family Distinguished Professor of Legal Studies in Business, Frank G. Zarb School of Business, Hofstra University. Preparation of this article was supported by a Hofstra University Special Scholarly Leave.

3.	<i>Brown-Forman Distillers Corp. v. New York State Liquor Authority</i> .....	504
4.	<i>Healy v. Beer Institute</i> .....	504
B.	Energy Cases .....	505
C.	Bottle Redemption Cases.....	507
D.	Subprime Loan Cases .....	509
E.	The Foie Gras Case.....	511
F.	An Abortion Case .....	512
G.	An Artist Royalty Case.....	513
H.	Internet Cases.....	514
IV.	ALCOHOLIC BEVERAGE REGULATION .....	515
V.	THE STRANGE <i>EMPIRE WINE</i> CASE AND EXTRATERRITORIALITY .....	517
VI.	EXTRATERRITORIALITY IN STATE LAW.....	521
VII.	OPPOSITION TO THE EXTRATERRITORIALITY DOCTRINE IN THE COMMERCE CLAUSE .....	522
VIII.	CONCLUSION .....	526

## I. INTRODUCTION

The Commerce Clause in the U.S. Constitution explicitly gives a power to the U.S. Congress and implicitly limits states' powers. The purpose of the Clause in its entirety is to promote a national economy, and its parts contribute to that purpose in several different ways. The least understood of the parts is the extraterritoriality doctrine of the negative implication of the Clause that limits the way states can regulate.

The extraterritoriality doctrine has been an issue in important recent cases and, as a result, has also been the subject of recent articles, some of which call for its elimination or pronounce it already dead. This article demonstrates that the doctrine still serves well the dual purposes of promoting interstate commerce and discouraging hostility among states while each carries out its own policies in its own best interest.

The first part of the article gives a brief description of the negative implication of the Commerce Clause. Then there is an explanation of the extraterritoriality doctrine of the Commerce Clause and a review of cases in which courts applied it. The following two sections explain the dormant Commerce Clause's relationship to alcoholic beverage regulation, focusing on the State of New York's strange extraterritorial regulation of a retail New York wine business. Next are some examples of state common law references to extraterritoriality. Finally, there is a summary of the opposition to the extraterritoriality doctrine.

The article concludes that courts have adequately defined a test for extraterritoriality, which serves to invalidate states' attempts at regulating beyond their borders; thus, discouraging burdens on interstate commerce and encouraging states to refrain from imposing their own policies and regulations on other states that may have different legitimate ideas about the best way to govern.

## II. THE DORMANT COMMERCE CLAUSE

The Commerce Clause grants Congress the power “[t]o regulate Commerce . . . among the several States.”<sup>1</sup> The U.S. Supreme Court has said that in addition to creating this federal power to regulate interstate commerce, the Commerce Clause has negative implications to the so-called dormant Commerce Clause.<sup>2</sup> The purpose of the dormant Commerce Clause is to establish a free market across the entire nation by restricting states and localities from impeding the free flow of goods across state lines.<sup>3</sup> “[L]ocal needs” should not restrict “the overriding requirement of freedom for the national commerce.”<sup>4</sup>

In a recent Commerce Clause case, Justice Alito, writing for the Court, noted that “a central concern of the Framers . . . was . . . to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies.”<sup>5</sup> Justice Alito continued that “[a]lthough the Clause is framed as a positive grant of power to Congress, ‘we have consistently held this language to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state [regulation] even when Congress has failed to legislate on the subject.’”<sup>6</sup>

In spite of the Supreme Court’s recognition for almost two hundred years

---

1. U.S. CONST. art. I, § 8, cl. 3.

2. See, e.g., *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of Or.*, 511 U.S. 93, 98 (1994) (Commerce “Clause has long been understood to have a ‘negative’ aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce”); *Healy v. Beer Inst.*, 491 U.S. 324, 326 n.1 (1989) (“This Court long has recognized that this affirmative grant of authority to Congress also encompasses an implicit or ‘dormant’ limitation on the authority of the States to enact legislation affecting interstate commerce.”).

For an historical analysis of the dormant Commerce Clause see Peter C. Felmly, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 467, 471–75 (2003).

3. *Wyoming v. Oklahoma*, 502 U.S. 437, 469–70 (1992) (Scalia, J., dissenting).

4. *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976) (quoting *Freeman v. Hewit*, 329 U.S. 249, 253 (1946)).

5. *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1794 (2015) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979)).

6. *Id.* (quoting *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995)).

that the Commerce Clause has implications for states,<sup>7</sup> the dormant Commerce Clause still remains a controversial subject.<sup>8</sup> In 2015, the late Justice Scalia called it “a judge-invented rule” that is “a judicial fraud.”<sup>9</sup> Nevertheless, Court jurisprudence has created a basic two-tiered method for deciding whether state regulation violates the dormant Commerce Clause.<sup>10</sup> “A discriminatory [state] law is ‘virtually per se invalid,’ and will survive only if it ‘advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.’”<sup>11</sup> If a state law is not discriminatory on its face, “[t]he decisive question is whether in the circumstances the total effect of the law [in accomplishing the legitimate state purpose] is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it.”<sup>12</sup> The resulting judicial exercise is known as the *Pike* balancing test.<sup>13</sup> Since the balancing test was named in 1970, it has been referred to in eighty-two federal appellate court cases and in all federal circuit courts first through eleventh.<sup>14</sup>

Although, “[m]odern dormant Commerce Clause jurisprudence primarily ‘is driven by concern about “economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors,””<sup>15</sup> dormant Commerce Clause interpretation also includes the notion of extraterritoriality which has been described as “the least under-

---

7. *S. Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945); *Gibbons v. Ogden*, 22 U.S. 1, 75–77 (1824).

8. *See, e.g., Comptroller*, 135 S. Ct. at 1807–08 (Scalia, J., dissenting); *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 609–20 (1997) (Thomas, J., dissenting); *Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 254–65 (1987) (Scalia, J., concurring in part and dissenting in part).

9. *Comptroller*, 135 S. Ct. at 1807–08 (Scalia, J., dissenting).

10. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578–79 (1986).

11. *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (internal citations omitted) (quoting *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of Or.*, 511 U.S. 93, 101 (1994)); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

12. *S. Pac. Co.*, 325 U.S. at 775–76. *See, e.g., Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 350 (1977) (holding North Carolina statute discriminated against Washington apples and burdened interstate sales of Washington apples).

13. *Brown-Forman*, 476 U.S. at 579; *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

14. *See, e.g., Energy & Env’t Legal Inst. v. Epel*, 793 F.3d 1169, 1172–73 (10th Cir. 2015); *Pharm. Research & Mfrs. of Am. v. Cty. of Alameda*, 768 F.3d 1037, 1043–44 (9th Cir. 2014); *Heffner v. Murphy*, 745 F.3d 56, 73–74 (3d Cir. 2014).

15. *Int’l Franchise Ass’n v. City of Seattle*, 803 F.3d 389, 399 (9th Cir. 2015) (quoting *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988))).

stood of the Court's three strands of dormant commerce clause jurisprudence."<sup>16</sup> The extraterritorial doctrine applies when a state regulates conduct that is wholly outside its own borders and, under the doctrine, unconstitutionality does not depend on the regulation's discriminating against out-of-staters.<sup>17</sup> One articulated reason for the doctrine is that if more than one state were to regulate extraterritorially in the same sphere, the result could be inconsistent rules and a stifling of interstate commerce.<sup>18</sup> But the actual existence of a legislative conflict is not a necessary prerequisite for the extraterritoriality doctrine to apply.<sup>19</sup> It has just been long and well accepted that a state's regulatory power stops at its own borders.

In 1834, U.S. Supreme Court Justice Joseph Story wrote in his *Commentaries on the Conflict of Laws* that "no state or nation can, by its laws, directly affect, or bind property out of its own territory, or bind persons not resident therein."<sup>20</sup> In 1881, U.S. Supreme Court Chief Justice Morrison Waite opined that "[n]o State can legislate except with reference to its own jurisdiction."<sup>21</sup> Justice Cardozo noted that "[i]t is the established doctrine of this [C]ourt that a State may not, in any form or under any guise, directly burden the prosecution of interstate business."<sup>22</sup>

---

16. *Epel*, 793 F.3d at 1172.

17. *See, e.g., Healy v. Beer Inst.*, 491 U.S. 324, 336–37 (1989) (asserting three extraterritoriality propositions: (1) state statute may not apply to commerce wholly outside state's borders; (2) legislative intent is not relevant if regulation controls commerce wholly outside state's borders; (3) Commerce Clause prohibits one state projecting its regulation into another state); *see also Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103–04 (2d Cir. 2003) (citing *Healy* and asserting that Vermont's Internet regulation projects its legislation into other states, directly regulating commerce there and violating dormant Commerce Clause).

18. *Edgar v. Mite Corp.*, 457 U.S. 624, 642–43 (1982).

19. Barbara O. Bruckmann, *The Case for a Commerce Clause Challenge to State Antitrust Laws Banning Minimum Resale Price Maintenance*, 39 HASTINGS CONST. L.Q. 391, 415 (2012). One commentator has actually suggested that a state's extraterritorial regulation should be invalid only if it would require "the regulated party to break the law of one state in order to follow the law of another." Michael J. Ruttinger, Note, *Is There a Dormant Extraterritoriality Principle?: Commerce Clause Limits on State Antitrust Laws*, 106 MICH. L. REV. 545, 550 (2007).

20. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS: FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS § 20 (1834).

21. *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881).

22. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935) (quoting *Int'l Textbook Co. v. Pigg*, 217 U.S. 91, 112 (1910)).

### III. THE EXTRATERRITORIALITY ASPECT OF THE DORMANT COMMERCE CLAUSE

The extraterritoriality doctrine has been applied in a wide variety of cases. In most of those cases, a plaintiff has argued that a state law should be struck down because it attempts to regulate beyond the state's borders. Sometimes a private plaintiff has been joined by the state in which he or she resides.<sup>23</sup> In other extraterritoriality cases, the plaintiff is seeking to be covered by the law of a state with which he or she, arguably, has no connection, and it is the defendant who raises the extraterritoriality claim.<sup>24</sup> This section describes a sampling of dormant Commerce Clause extraterritoriality cases, the heavily cited U.S. Supreme Court cases first, then recent cases. The purpose of reviewing a variety of recent cases is to demonstrate that courts generally have a good idea of how to apply the doctrine and that the doctrine serves the constitutional purpose of limiting burdens on interstate commerce even when those burdens do not arise from intended or unintended state economic protectionism.

#### A. *The Classic Extraterritoriality Cases*

There are four cases that the U.S. Supreme Court decided between 1935 and 1989 that set the basic precedents for finding a state's regulation unconstitutionally extraterritorial: three involved price regulation<sup>25</sup> and one involved securities regulation.<sup>26</sup>

##### 1. *Baldwin v. G.A.F. Seelig, Inc.*<sup>27</sup>

The first of the four involved New York State's Milk Control Act, which set minimum prices that milk distributors had to pay to New York milk farmers.<sup>28</sup> The Act also prohibited distributors from selling milk in New York pur-

---

23. See, e.g., *North Dakota v. Heydinger*, 15 F. Supp. 3d 891, 899 (D. Minn. 2014) ("Plaintiffs are the State of North Dakota, the Industrial Commission of North Dakota, the Lignite Energy Council, Basin Electric Power Cooperative, the North American Coal Corporation, Great Northern Properties Limited Partnership, Missouri Basin Municipal Power Agency d/b/a Missouri River Energy Services, and Minnkota Power Cooperative, Inc.").

24. See, e.g., *Sawyer v. Mkt. Am., Inc.*, 661 S.E.2d 750, 751–53 (N.C. Ct. App. 2008). See *infra* text at note 192 for a description of the case.

25. *Baldwin*, 294 U.S. at 519; *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 575 (1986); *Healy v. Beer Inst.*, 491 U.S. 324, 326 (1989).

26. *Edgar v. MITE Corp.*, 457 U.S. 624, 627 (1982).

27. 294 U.S. 511 (1935).

28. *Id.* at 519.

chased from out-of-state producers unless the price paid was at least the minimum price that had to be paid to New York producers.<sup>29</sup> A Vermont milk producer challenged the latter requirement, and Justice Cardozo said 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.”<sup>30</sup> He asserted that “commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another.”<sup>31</sup>

## 2. *Edgar v. MITE Corp.*<sup>32</sup>

The Illinois Business Take-Over Act required a business making a takeover offer to register the offer with the Illinois Secretary of State if ten percent of the takeover target’s shares were owned by shareholders in Illinois and two of the following conditions existed: the target had its principal office in Illinois, was organized under the laws of Illinois, and had at least ten percent of its capital in Illinois.<sup>33</sup> The MITE Corporation made a tender offer for all shares of Chicago Rivet & Machine Company, a publicly held Illinois company, but MITE did not register with the Illinois Secretary of State.<sup>34</sup> Instead, MITE filed an action to have the Illinois law declared unconstitutional for, *inter alia*, violating the Commerce Clause.<sup>35</sup>

The Court reasoned that the Illinois law would affect all of Chicago Rivet’s shareholders including those who lived outside of Illinois and had no connection to Illinois; in fact, it is possible that the tender offer would not affect any Illinois shareholders.<sup>36</sup> Therefore, the Court concluded that the Illinois Act had “a sweeping extraterritorial effect.”<sup>37</sup> The Court held that the Commerce Clause “precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.”<sup>38</sup> That language has become the *de facto* test for impermissible extraterritorial regulation: “commerce that takes place *wholly* outside of the [regulating] [s]tate’s borders.”<sup>39</sup> The Court also mentioned that attempts at

---

29. *Id.*

30. *Id.* at 518, 520–21.

31. *Id.* at 524.

32. 457 U.S. 624 (1982).

33. *Id.* at 626–27.

34. *Id.* at 627–28.

35. *Id.* at 628.

36. *Id.* at 642.

37. *Id.*

38. *Id.* at 642–43.

39. *Id.* at 642 (emphasis added).

extraterritorial regulation “offend sister [s]tates.”<sup>40</sup>

3. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*<sup>41</sup>

New York’s Alcoholic Beverage Control Law required alcoholic beverage producers to file a monthly schedule of the prices at which their products would be sold to wholesalers in New York.<sup>42</sup> In addition, the producers had to affirm that they would not sell their products for a lower price in any other state.<sup>43</sup> The latter requirement meant that if a producer sold liquor in New York, once it filed its prices with New York State, it was bound for the month to use those prices in its sales in every other state.<sup>44</sup> It could not offer distributors in other states special lower prices because of any marketing decision or change in circumstances.

Brown-Forman, a distiller that sold several different brands of liquor in New York and other states, challenged New York’s law as violative of the Commerce Clause.<sup>45</sup> Citing Justice Cardozo in *Baldwin* and the Court’s opinion in *Edgar*, the Court concluded that New York “may not ‘project its legislation into [other States] by regulating the price to be paid’ for liquor in those States.”<sup>46</sup>

4. *Healy v. Beer Institute*<sup>47</sup>

The *Healy* case against the State of Connecticut was very similar to *Brown-Forman* in that both were about price affirmation statutes.<sup>48</sup> The State of Connecticut determined that Connecticut residents frequently crossed the border into New York, Massachusetts, or Rhode Island to buy beer because it was cheaper there.<sup>49</sup> To remedy that situation, the Connecticut Legislature enacted a statute requiring anyone shipping beer into Connecticut to post its prices and not to sell beer in any bordering state for a price lower than the price in Connecticut.<sup>50</sup> Citing *Baldwin*, *Edgar*, and *Brown-Forman* in its opinion, the U.S. Supreme Court reiterated its “established view that a state law that has the

---

40. *Id.* at 643.

41. 476 U.S. 573 (1986).

42. *Id.* at 575.

43. *Id.* at 576.

44. *Id.* at 575–76.

45. *Id.* at 576–78.

46. *Id.* at 582–83 (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935)).

47. 491 U.S. 324 (1989).

48. *Id.* at 326; *Brown-Forman*, 476 U.S. at 581.

49. *Healy*, 491 U.S. at 326.

50. *Id.* at 328–29.

‘practical effect’ of regulating commerce occurring wholly outside that [s]tate’s borders is invalid under the Commerce Clause.’<sup>51</sup>

The Court said that the extraterritoriality doctrine of the Commerce Clause is based on three principles: (1) A state statute may not apply to commerce wholly outside the state even if the commerce has effects within the state; (2) A state statute that regulates commerce wholly outside the state’s borders is unconstitutional even if the legislature did not intend for the statute to apply extraterritorially; and (3) A state statute must be evaluated by considering how it would interact with legitimate regulation in other states, and what would happen if another state or every state enacted similar laws.<sup>52</sup>

Applying the principles specifically to the *Healy* case, the court said that a state “may not adopt legislation that has the practical effect of establishing ‘a scale of prices for use in other states.’”<sup>53</sup> The effect of the Connecticut statute was to control commerce occurring wholly outside Connecticut.<sup>54</sup>

### B. Energy Cases

It is not surprising that state regulations whose purpose is to improve environmental conditions would engender extraterritoriality allegations: such regulations would often have effects across state lines and can increase costs for energy companies.

The challenged statute in *North Dakota v. Heydinger* was Minnesota’s Next Generation Energy Act (NGEA), which established standards for carbon dioxide emissions.<sup>55</sup> The State of North Dakota and electric power cooperatives alleged, *inter alia*, that Minnesota’s NGEA violated the extraterritoriality doctrine of the dormant Commerce Clause because the NGEA controlled conduct occurring wholly outside of Minnesota.<sup>56</sup> The federal district court in Minnesota, after analyzing more than a half dozen cases, agreed with the plaintiffs.<sup>57</sup> The court concluded that the NGEA would require out-of-state power companies to seek regulatory approval in Minnesota before doing business in other states, a classic extraterritoriality situation.<sup>58</sup> Minnesota would be regulating

---

51. *Id.* at 332–33, 333 n.9.

52. *Id.* at 336.

53. *Id.* (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 528 (1935)).

54. *Id.* at 337.

55. *North Dakota v. Heydinger*, 15 F. Supp. 3d 891, 897 (D. Minn. 2014).

56. *Id.* at 910.

57. *Id.* at 910–13.

58. *Id.* at 916.

economic activity that has no relationship to Minnesota.<sup>59</sup> The court recognized Minnesota's "admirable" goal of reducing carbon dioxide emissions, but nevertheless, by projecting its legislation into other states and regulating in other states, it violated the extraterritorial doctrine of the dormant Commerce Clause.<sup>60</sup> The court noted that "if other states adopt[ed] similar legislation, it could lead to balkanization."<sup>61</sup>

In contrast, in *Rocky Mountain Farmers Union v. Corey* the U.S. Court of Appeals for the Ninth Circuit upheld a California energy statute in the face of an extraterritoriality challenge.<sup>62</sup> The California legislature outlined the dangers of global warming in California and enacted the Global Warming Solutions Act of 2006.<sup>63</sup> Part of the Act created the Fuel Standard, which required producers and distributors of transportation fuels to reduce their carbon intensity.<sup>64</sup> More than a dozen plaintiffs in industries involving corn ethanol, gasoline production, trucking, and petrochemicals alleged that the Act violated the dormant Commerce Clause.<sup>65</sup> After citing *Baldwin*, *Edgar*, *Brown-Forman*, and *Healy*, the Ninth Circuit concluded that the Fuel Standard

says nothing at all about ethanol produced, sold, and used outside California, it does not require other jurisdictions to adopt reciprocal standards before their ethanol can be sold in California, it makes no effort to ensure the price of ethanol is lower in California than in other states, and it imposes no civil or criminal penalties on non-compliant transactions completed wholly out of state.<sup>66</sup>

The Fuel Standard created a system of credits and caps that merely encouraged the use of cleaner fuels and applied it only to fuel blenders in California.<sup>67</sup> Because the court concluded that the Fuel Standard had only "incidental effects on interstate commerce," but did not "control conduct wholly outside the state," the court held that the California regulation was not "an impermissible extraterritorial regulation."<sup>68</sup>

---

59. *Id.*

60. *Id.* at 918–19.

61. *Id.* at 916.

62. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1078, 1107 (9th Cir. 2013), *reh'g en banc denied*, 740 F.3d 507 (9th Cir. 2014).

63. *Id.* at 1079.

64. *Id.* at 1080.

65. *Id.* at 1070, 1077.

66. *Id.* at 1102–03.

67. *Id.* at 1103.

68. *Id.* at 1106–07. Older energy cases with extraterritoriality issues are discussed in Alexandra B. Klass & Elizabeth Henley, *Energy Policy, Extraterritoriality, and the Dormant Commerce Clause*,

A couple of years later, a similar case arose in Oregon after the state legislature had enacted a law to attempt to reduce greenhouse gas emissions in order to improve Oregon's economy, quality of life, and global warming.<sup>69</sup> The law set fuel standards and established a system of clean fuel credits and debits, which applied to fuel "produced, imported, dispensed, or used in Oregon."<sup>70</sup> Several energy industry groups sued the state claiming that the law violated the extraterritoriality principle of the dormant Commerce Clause.<sup>71</sup> The U.S. District Court in Oregon concluded that because the Ninth Circuit held in *Rocky Mountain* that an analogous fuel standard did "not control conduct wholly outside the state," and [was] not "an impermissible extraterritorial regulation," [the] plaintiffs' claim fail[ed] as a matter of law."<sup>72</sup>

### C. Bottle Redemption Cases

A bottle bill is a container deposit law requiring a refundable deposit on beverage containers to encourage their recycling.<sup>73</sup> With beverage containers constituting forty to sixty percent of all litter in the United States, bottle bills were supposed to reduce litter, conserve natural resources, and reduce the amount of solid waste going to landfills.<sup>74</sup> Ten states currently have bottle bills that require deposits of two, five, ten, or fifteen cents on containers for a wide variety of beverages.<sup>75</sup>

Michigan's bottle bill required a ten-cent deposit that is refunded to consumers and distributors when they return a container.<sup>76</sup> A problem arose because people would buy beverages out of state (where no deposit was required) and then return the containers in Michigan to receive the ten-cent deposit.<sup>77</sup> To eliminate the problem, Michigan amended its bottle bill to require, in addition to a "MI 10¢" mark on each redeemable container, an identifiable symbol that is "unique to the state," and can be "used only in this state and 1 or more other

---

5 SAN DIEGO J. CLIMATE & ENERGY L. 127 (2014).

69. *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 134 F. Supp. 3d 1270, 1274 (D. Or. 2015).

70. *Id.* at 1275.

71. *Id.* at 1274, 1276.

72. *Id.* at 1284 (quoting *Rocky Mountain Farmers Union*, 730 F.3d at 1106–07).

73. *What Is a Bottle Bill?*, BOTTLE BILL RESOURCE GUIDE, <http://www.bottlebill.org/about/whatis.htm> [<https://perma.cc/9ZVF-NDPP>] (last visited Feb. 6, 2017).

74. *Id.*

75. *All US States*, BOTTLE BILL RESOURCE GUIDE, <http://www.bottlebill.org/legislation/usa/all-statestable.htm> [<https://perma.cc/9KRA-ZX8E>] (last visited Feb. 7, 2017) (states with bottle bills: California, Connecticut, Hawaii, Iowa, Massachusetts, Maine, Michigan, New York, Oregon, Vermont).

76. *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 366–67 (6th Cir. 2013).

77. *Id.* at 367.

states that have laws substantially similar to this act.”<sup>78</sup>

An association of non-alcoholic beverage manufacturers, marketers, distributors, and bottlers sued the Governor of Michigan claiming, *inter alia*, that the new legislation was impermissibly extraterritorial because it regulated containers sold in other states.<sup>79</sup> The U.S. Court of Appeals for the Sixth Circuit decided that “[t]he relevant inquiry is whether the ‘practical effect of the regulation is to control conduct beyond the boundaries of the State.’”<sup>80</sup> The court noted that an important part of the inquiry was determining what would occur if many other states enacted similar laws.<sup>81</sup> The court then found that the regulation allows Michigan to dictate where beverages can be sold and requires other states to comply with the legislation.<sup>82</sup> Thus, the court concluded that “the Michigan statute is extraterritorial in violation of the dormant Commerce Clause because it impermissibly regulates interstate commerce by controlling conduct beyond the State of Michigan.”<sup>83</sup>

Two years later, a California state court heard a bottle redemption case that had similar bottle-redemption facts but a different procedural circumstance.<sup>84</sup> California is one of the ten states with a bottle bill.<sup>85</sup> Similar to the Michigan law, California’s law requires beverage containers (containing beverages such as beer, wine coolers, carbonated water, and soft drinks) sold in California to be marked “CA Redemption Value” or one of four other similar markings.<sup>86</sup> Consumers receive a refund, usually five cents, when they return a container to a certified recycling center.<sup>87</sup> The law requires recycling centers to accept only eligible redemptions, that is, those purchased in California.<sup>88</sup> Two recycling

---

78. *Id.* (quoting MICH. COMP. LAWS § 445.572a(10) (2008)).

79. *Id.* at 366, 368.

80. *Id.* at 373 (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)).

81. *Id.* at 373, 376.

82. *Id.* at 376.

83. *Id.* Four years before the Michigan case, the United District Court for the Southern District of New York held that it had properly enjoined the State of New York from enforcing a provision of the New York Returnable Container Act (bottle bill) that required a New-York-specific product code for beverages to be sold exclusively in New York to prevent the redemption of containers purchased in other states. *Int’l Bottled Water Ass’n v. Paterson*, No. 09 Civ. 4672(DAB), 2009 WL 2482137, at \*2–3 (S.D.N.Y. Aug. 13, 2009). The court held that “the plaintiffs not only have a likelihood of success, they are sure of success as a matter of . . . law on the question of whether the New York-exclusive provisions of the Bottle Bill violate the Dormant Commerce Clause.” *Id.* at \*2.

84. *Alamo Recycling, LLC v. Anheuser Busch InBev Worldwide, Inc.*, 239 Cal. App. 4th 983, 988 (Cal. Ct. App. 2015).

85. *Id.* at 988–89.

86. *Id.* at 988.

87. *Id.* at 989.

88. *Id.* at 989, 991.

companies brought the suit against a group of beverage manufacturers, including Anheuser Busch, Coca Cola, Pepsi Cola, and Snapple, claiming that the defendants knowingly sold “CA Redemption Value” beverages outside California and that when those beverage containers were redeemed in California it subjected the recyclers to fines, penalties, criminal convictions, and revocation of their certification under the California law.<sup>89</sup>

Unlike the Michigan case, the California case was not about the constitutionality of the California container statute.<sup>90</sup> The plaintiffs wanted the court to enjoin the defendants from putting the “CA Redemption Value” or a similar mark on beverages that they sold outside of California and to pay damages to the recyclers for the expenses they had because of the out-of-California sales.<sup>91</sup> The California appellate court, citing *Edgar, Brown-Forman, Healy*, and *Snyder*, reiterated the applicable impermissibly-extraterritorial test: if a state law directly controls commerce occurring wholly outside the state’s borders, it is invalid.<sup>92</sup> Because the constitutionality of the California statute was not at issue here, the court concluded that “[t]here is no practical difference between the extraterritorial consequences of a state statute, and a court’s issuance of an injunction or a damages award, because an injunction or damages award judgment may impermissibly burden interstate commerce as much as a state statute.”<sup>93</sup> The court cited the U.S. Supreme Court for the propositions that the test is whether state power is being exercised, not by the form which it takes, and the form can be by a judge’s or jury’s application of a state statute as well as by the statute itself.<sup>94</sup> Thus, the court held that prohibiting the beverage producers from putting the “CA Redemption Value” mark on containers outside of California would violate the dormant Commerce Clause.<sup>95</sup>

#### D. Subprime Loan Cases

A comparison of two recent cases about state regulation of subprime loans provides a good example of the efficacy of the directly-controlling-commerce-wholly-outside-the-state’s-borders test. There are a variety of subprime loan types, but they all involve a rate of return that is higher than that charged by traditional commercial lenders because the borrowers are individuals who do

---

89. *Id.* at 987, 987 n.1, 992.

90. *Id.* at 997.

91. *Id.*

92. *Id.* at 996, 998.

93. *Id.* at 997.

94. *Id.* (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 n.17 (1996) and *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)).

95. *Id.* at 997–98.

not qualify for prime loans.<sup>96</sup> One of the cases involves car-title loans, and the other is about payday loans.<sup>97</sup> Borrowers getting car-title loans usually borrow a few hundred up to a few thousand dollars for thirty days, giving lenders their titles and a set of duplicate keys as security.<sup>98</sup> Borrowers pay a fee up front for an above-100% interest rate, and if they cannot pay when the loan comes due, they are charged another fee plus interest.<sup>99</sup> If borrowers cannot pay the fees and interest, they lose their cars.<sup>100</sup> In a typical payday loan arrangement, the borrower gives the lender a post-dated check for the amount of the loan principal plus the finance charge, and the lender gives the borrower a loan in cash with repayment due at the borrower's next payday, usually two weeks.<sup>101</sup> If the borrower does not pay the principal and finance charge at the end of the loan period, the lender cashes the check.<sup>102</sup> With a great deal of room for abuse in subprime loan transactions, it is not surprising that states legislate to try to protect their citizens.

In a 2010 case, an Illinois car-title lender complained that Indiana's Uniform Consumer Credit Code deemed a loan as occurring in Indiana "if a resident of the state 'enters into a consumer . . . loan transaction with a creditor . . . in another state and the creditor . . . has advertised . . . loans in Indiana.'"<sup>103</sup> If the loan falls under the Code, the lender must get an Indiana license and is subject to a limit on the interest rate it may charge.<sup>104</sup> The U.S. Court of Appeals for the Seventh Circuit, citing *Healy*, said, "The 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."<sup>105</sup> The court explained that "[t]o allow Indiana to apply its law against title loans when its residents transact in a different state that has a different law would be arbitrarily to exalt the public policy of one state over that of another."<sup>106</sup> The court

---

96. For a brief discussion of subprime loans and predatory lending see Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 *FORDHAM J. CORP. & FIN. L.* 55, 63–67 (2004).

97. See *infra* text accompanying notes 98 and 101.

98. Jane Bryant Quinn, *Dragged Down by Debt: People with Shaky Credit are Getting Suckered by Risky Loans Against Their Paychecks, Homes—and Even Cars*, *NEWSWEEK*, May 7, 2007, at 49.

99. *Id.*

100. *Id.*

101. *Cash in a Flash, Inc. v. McCullough*, 853 N.E.2d 533, 535–36 (Ind. Ct. App. 2006).

102. *Id.* at 536.

103. *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 661–62 (7th Cir. 2010) (quoting IND. CODE § 24-4.5-1-201(1)(d)(2007)).

104. *Id.* at 662.

105. *Id.* at 665 (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989)).

106. *Id.* at 667–68.

concluded that “[a] state may not ‘take the commercial speech that is vital to interstate commerce and use it as a basis to allow the extraterritorial regulation that is destructive of such commerce.’”<sup>107</sup> Although the Seventh Circuit did not invoke the “wholly” test specifically, it did in fact when it held that because the car-title loan was made and executed in Illinois, the Indiana law regulating it violated the extraterritoriality doctrine of the Commerce Clause.<sup>108</sup>

The Minnesota Supreme Court decided the payday loan case in 2015.<sup>109</sup> The court held that Minnesota’s payday lending law did not violate the extraterritoriality principle of the dormant Commerce Clause.<sup>110</sup> The law provided that “a consumer short-term loan transaction is deemed to take place in the state of Minnesota if the borrower is a Minnesota resident and the borrower completes the transaction, either personally or electronically, while physically located in the state of Minnesota.”<sup>111</sup> The difference between this law and the Indiana law is immediately apparent. The Indiana law attempted to apply to transactions between the lender and an Indiana resident when the resident was in another state.<sup>112</sup> Minnesota’s law applied only when the Minnesota resident was in Minnesota, clearly not “commercial activity occurring wholly outside the boundary of the [regulating] State.”<sup>113</sup> The court noted that the Minnesota law did not control the terms of loans in other states nor did it require lenders to obtain Minnesota’s approval when lending to borrowers in other states.<sup>114</sup>

### E. *The Foie Gras Case*

Two companies that produce foie gras, one in Canada and one in New York, and a California restaurant that sold foie gras sought to enjoin a section in California’s Force Fed Birds statute.<sup>115</sup> The section reads, “A product may not be sold in California if it is the result of force feeding a bird for the purpose of enlarging the bird’s liver beyond normal size.”<sup>116</sup> The plaintiffs argued that the

---

107. *Id.* at 669 (quoting *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 491 (4th Cir. 2007)).

108. *See id.*

109. *Swanson v. Integrity Advance, LLC*, 870 N.W.2d 90, 92 (Minn. 2015).

110. *Id.*

111. *Id.* (quoting MINN. STAT. § 47.601, subd. 5 (2014)).

112. *Id.* at 95; IND. CODE § 24-4.5-1-201(1)(d) (2007).

113. *Swanson*, 870 N.W.2d at 94 (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989)).

114. *Id.* at 96.

115. *Ass’n des Eleveurs de Canards et d’Oies du Que. v. Harris*, 729 F.3d 937, 942 (9th Cir. 2013).

116. *Id.* (quoting CAL. HEALTH & SAFETY CODE § 25982 (West 2012)). During the last two weeks of the lives of ducks raised for foie gras, feeders hand-feed the ducks using “a tube to deliver the feed to the crop sac at the base of the duck’s esophagus,” to increase the size of the fattened duck

statute “controls commerce outside of California;” requires all farmers to comply with California standards; and “will result in conflicting legislation.”<sup>117</sup> The U.S. Court of Appeals for the Ninth Circuit disagreed.<sup>118</sup>

The court’s primary basis for its decision was that the plaintiffs did not provide evidence that force-feeding was the only way to produce foie gras.<sup>119</sup> California’s law did not prevent the farmers from selling foie gras in California; it only prevented them from using their most profitable method for doing so, and “the dormant Commerce Clause does not . . . guarantee [p]laintiffs their preferred method of operation.”<sup>120</sup> In addition, the farmers could produce foie gras for sale in other states by any method they chose.<sup>121</sup> Finally, with reference to extraterritoriality, the plaintiffs did not cite any actual competing legislation in other states to indicate balkanization.<sup>122</sup> The court noted that the Supreme Court “has never invalidated a state or local law under the dormant Commerce Clause based upon mere speculation about the possibility of conflicting legislation.”<sup>123</sup>

#### *F. An Abortion Case*

The Missouri Supreme Court made an interesting maneuver in correctly describing unconstitutional extraterritorial conduct, applying the description to a clearly unconstitutional statute, but then declaring the statute constitutional.<sup>124</sup> The Missouri legislature enacted a statute requiring parental consent for a minor seeking an abortion and prescribing civil penalties for violations.<sup>125</sup> Planned Parenthood of Kansas challenged the constitutionality of the statute.<sup>126</sup> Part of the statute stated that “[i]t shall not be a defense to a claim brought under this section that the abortion was performed or induced pursuant to a consent to the abortion given in a manner that is otherwise lawful in the state or place where the abortion was performed or induced.”<sup>127</sup> The court stated that “[o]f course,

---

liver. *Id.* at 941–42.

117. *Id.* at 949.

118. *Id.*

119. *Id.*

120. *Id.* (quoting Nat’l Ass’n of Optometrists & Opticians v. Harris, 682 F.3d 1144, 1151 (9th Cir. 2012)).

121. *Id.* at 950.

122. *Id.* at 951.

123. *Id.* (quoting S.D. Myers, Inc. v. City & Cty. of San Francisco, 253 F.3d 461, 470 (9th Cir. 2001)).

124. See Planned Parenthood of Kan. v. Nixon, 220 S.W.3d 732, 742–43 (Mo. 2007).

125. *Id.* at 736 n.2.

126. *Id.* at 742.

127. *Id.* at 743 (quoting MO. REV. STAT. § 188.250.3 (2005)).

it is beyond Missouri's authority to regulate conduct that occurs wholly outside of Missouri . . . . Missouri simply does not have the authority to make lawful out-of-state conduct actionable here, for its laws do not have extraterritorial effect."<sup>128</sup> But then the court held that the statute "is valid only to the extent that it applies to in-state conduct and not wholly out-of-state conduct," and, thus, the court was able to hold that the statute did not violate the dormant Commerce Clause.<sup>129</sup> Nevertheless, the holding stopped the State of Missouri from applying and enforcing its law extraterritorially, protecting the policy decisions of bordering states.

### G. *An Artist Royalty Case*

If a sale of fine art took place in California or the seller resided in California, California's Resale Royalty Act required the seller to pay the artist a five percent royalty.<sup>130</sup> When Christies and Sotheby's, auction houses, and eBay failed to pay the royalties, several artists or their representatives sued to recover the payments.<sup>131</sup> The defendants argued that the Act violated the dormant Commerce Clause because it regulated sales that occurred outside of California.<sup>132</sup>

The U.S. Court of Appeals for the Ninth Circuit found it easy to conclude that applying the royalty mandate to out-of-state sales by California residents violated the extraterritoriality principle of the dormant Commerce Clause.<sup>133</sup> Citing *Healy*, the court held that "the state statute facially regulates a commercial transaction that 'takes place wholly outside of the State's borders'" and, therefore, it violates the dormant Commerce Clause.<sup>134</sup>

The plaintiffs filed a petition for a writ of certiorari and, echoing the reluctant concurrence of a Ninth Circuit judge, they said, "The question presented is: If a state statute does not in any way discriminate against, or impose an excessive burden on, interstate commerce, does the Commerce Clause . . . require the statute's invalidation *solely* because it regulates commerce occurring beyond the borders of the state that enacted it?"<sup>135</sup> As the preceding cases indicate, so far the answer is, yes, but these plaintiffs are not alone in their opposition to the existing extraterritoriality doctrine.

---

128. *Id.* at 742.

129. *Id.* at 743, 745.

130. *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1322 (9th Cir. 2015).

131. *Id.*

132. *Id.* at 1322–23.

133. *Id.* at 1323.

134. *Id.* (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)).

135. Petition for Writ of Certiorari at § i, *Sam Francis Found. v. Christie's, Inc.*, 784 F.3d 1320 (9th Cir. 2015) (No. 15-280).

### H. Internet Cases

Finally, internet cases have suggested to some commentators that the extra-territoriality doctrine of the dormant Commerce Clause should be eliminated,<sup>136</sup> but, in fact, these cases indicate that the doctrine works quite well. Two cases involved Backpage.com, one in Washington and the other in Tennessee.<sup>137</sup> Backpage.com is one of the largest online advertising services and, despite Backpage.com's attempts to screen "adult" ads, online ads involving minors still appear.<sup>138</sup> Clearly, states have an interest in protecting minors by prohibiting such ads. So, Washington enacted a law prohibiting ads depicting minors in commercial sex acts that would occur in the State of Washington.<sup>139</sup> Backpage.com sued the state claiming, *inter alia*, that the law violated the dormant Commerce Clause because it regulated conduct that took place wholly outside the State of Washington.<sup>140</sup> The United States District Court for the Western District of Washington agreed because "the advertisement itself may occur entirely outside of the state and no act need take place in the state of Washington to trigger liability under the statute. Therefore it is a statute that regulates conduct that occurs wholly outside of the state of Washington."<sup>141</sup>

Tennessee enacted a similar law prohibiting ads "that would appear to a reasonable person to be for the purpose of engaging in what would be a commercial sex act . . . with a minor."<sup>142</sup> Tennessee's law, however, did not even limit the prohibition to acts that would occur in Tennessee.<sup>143</sup> Responding to a Backpage.com constitutional challenge, the United States District Court for the Middle District of Tennessee held that the Tennessee statute was "a per se violation because it likely impermissibly regulates commerce wholly outside the state's borders. Nowhere in the language of the statute is there any limit on the statute's geographic scope that specifies what conduct, if any, must take place in Tennessee."<sup>144</sup> The court concluded that "liability could be imposed when

---

136. Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 1000 (2013); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 786–87 (2001).

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

138. *McKenna*, 881 F. Supp. 2d at 1266–67.

139. *Id.* at 1265, 1268; S. 6251, 62d Leg., Reg. Sess. § 2(1)(a)–(b) (Wash. 2012).

140. *McKenna*, 881 F. Supp. 2d at 1285.

141. *Id.*

142. *Cooper*, 939 F. Supp. 2d at 816 (quoting S. 2371, 107th Gen. Assemb. Reg. Sess. § 3(a) (Tenn. 2012)).

143. *Id.* at 817.

144. *Id.* at 841.

no party has a[ny] connection to Tennessee whatsoever.”<sup>145</sup>

These two cases can encourage wrong conclusions with respect to the extraterritoriality strand of the dormant Commerce Clause because they involve the Internet, a mode of advertising that can be anywhere and everywhere in the world, and a universally hated behavior, the sexual abuse of children. But a closer look suggests that first, the states can regulate Internet advertising just as they regulate advertising in other media; they just have to be more precise in their language.<sup>146</sup> And second, although policies about child sexual abuse might be universal among fifty states, not every state policy on other subjects would be agreeable to every other state.<sup>147</sup> The section below about alcoholic beverage regulation illustrates this point.

#### IV. ALCOHOLIC BEVERAGE REGULATION

Alcoholic beverage regulation is a good example of states having very different laws<sup>148</sup> reflecting very different policies, and, therefore, it is a good indicator for the wisdom of prohibiting states from regulating outside their own borders. Alcoholic beverage use and regulation in the United States has a history of being problematic and peculiar. On the one hand, from the days of the earliest settlers through the nineteenth century, Americans were very heavy wine, beer, and rum drinkers.<sup>149</sup> On the other, over three generations starting in the mid-nineteenth century, the temperance movement was successful in getting states to enact prohibition statutes<sup>150</sup> and to ratify the Eighteenth Amendment to the Constitution prohibiting “the manufacture, sale, or transportation of intoxicating liquors” within the United States and their importation into or exportation from the United States.<sup>151</sup>

The ratification of the Twenty-First Amendment to the Constitution<sup>152</sup> re-

145. *Id.* at 842.

146. *See id.* at 842–43.

147. *See* Backpage.com LLC v. McKenna, 881 F. Supp. 2d 1262, 1285 (W.D. Wash. 2012).

148. *See generally* RICHARD F. HAMM, SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880–1920 20 (1995).

149. DANIEL OKRENT, LAST CALL: THE RISE AND FALL OF PROHIBITION 7–8, 25–26 (2010); IAN R. TYRRELL, SOBERING UP: FROM TEMPERANCE TO PROHIBITION IN ANTEBELLUM AMERICA, 1800–1860 16–24 (1979).

150. By 1855 thirteen of thirty-one states had prohibition statutes. NORMAN H. CLARK, DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN PROHIBITION 36 (1976); HAMM, *supra* note 148, at 20–21; W.J. RORABAUGH, *Reexamining the Prohibition Amendment*, 8 YALE J.L. & HUMAN. 285, 289 (1996).

151. U.S. CONST. amend. XVIII, § 1 (ratified in 1919 and in effect from 1920 until 1933).

152. U.S. CONST. amend. XXI, § 1.

pealed the Eighteenth Amendment putting an end to Prohibition, but the language, the meaning, and the intent of Section Two of the Twenty-First Amendment remains ambiguous and continues to give rise to litigation in the twenty-first century.<sup>153</sup> Section Two states: “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”<sup>154</sup> The cases that consider this language giving states the power to regulate alcoholic beverages often are about how this mandate interacts with other federal interests and constitutional requirements.<sup>155</sup>

For example, in *Wisconsin v. Constantineau*, the United States Supreme Court held that the Twenty-First Amendment does not overcome Fourteenth Amendment due process requirements.<sup>156</sup> In *44 Liquormart, Inc. v. Rhode Island*, the Court held that Rhode Island’s ban on price advertising for liquor violated the First Amendment’s free speech protection, which does not give way to states’ Twenty-First Amendment power.<sup>157</sup> Similarly, the Twenty-First Amendment does not overcome the Fourteenth Amendment’s equal protection requirements.<sup>158</sup> The most recent well-publicized confrontation between states’ power to regulate alcoholic beverages and the U.S. Constitution pitted the Twenty-First Amendment against the dormant Commerce Clause in cases involving the direct shipment of wine to out-of-state consumers.<sup>159</sup>

In *Granholm v. Heald*, the U.S. Supreme Court had to decide whether state laws in Michigan and New York that allowed in-state wineries to ship wine directly to consumers in the state, but prohibited out-of-state wineries from doing likewise (either literally or by imposing extra economic requirements), were unconstitutional.<sup>160</sup> The Court decided that the states’ differential treatment was explicit discrimination against interstate commerce and fell under “a virtually *per se* rule of invalidity.”<sup>161</sup> The Court concluded that the Twenty-First

---

153. See *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 107 n.10 (1980) (noting records of state conventions do not indicate consensus on meaning of Section Two).

154. U.S. CONST. amend. XXI, § 2.

155. See, e.g., *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331–32 (1964); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996).

156. *Constantineau*, 400 U.S. at 436.

157. *44 Liquormart, Inc.*, 517 U.S. at 489.

158. *Craig v. Boren*, 429 U.S. 190, 204–05 (1976) (holding that Oklahoma’s statute prohibiting sale of 3.2% beer to males under twenty-one and females under eighteen was unconstitutionally discriminatory and not saved by Twenty-First Amendment).

159. See *Granholm v. Heald*, 544 U.S. 460, 466 (2005).

160. *Id.* at 465–66.

161. *Id.* at 466, 476 (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

Amendment does not overcome the anti-discrimination requirements of the dormant Commerce Clause.<sup>162</sup> It is not a stretch to assume that the Twenty-First Amendment does not overcome the extraterritoriality requirements of the dormant Commerce Clause either.

#### V. THE STRANGE *EMPIRE WINE* CASE AND EXTRATERRITORIALITY

After *Granholm v. Heald*, almost all states changed their laws so that out-of-state wineries would be allowed to ship wine directly to consumers, all with a variety of limitations including permit, tax, and reciprocity requirements and maximum amounts.<sup>163</sup> Only six states remain that do not allow out-of-state wineries to direct-ship to consumers.<sup>164</sup> The six stay within the constitutional boundaries set by *Granholm* by not allowing in-state wineries to ship directly to consumers either.<sup>165</sup> Although some argue otherwise,<sup>166</sup> so far *Granholm* does not generally apply to wine retailers.<sup>167</sup> Only fourteen states allow out-of-state wine retailers to ship directly to consumers.<sup>168</sup> It is that fact that has given

---

162. *Id.* at 487–88 (relying on *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275 (1984), for foreclosing “any contention that § 2 of the Twenty-[F]irst Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny”).

163. *Direct Shipment Laws by State for Wineries*, WINE INSTITUTE, [http://www.wineinstitute.org/files/direct\\_shipping\\_laws\\_map.pdf](http://www.wineinstitute.org/files/direct_shipping_laws_map.pdf) [https://perma.cc/F6VZ-W6AG] (last visited Feb. 7, 2017).

164. *Id.* (Alabama, Delaware, Kentucky, Mississippi, Oklahoma, and Utah).

165. *Granholm*, 544 U.S. at 467.

166. Eric Asimov, *A Befuddlement of Liquor Laws*, N.Y. TIMES (Jan. 30, 2008), at F7, <http://www.nytimes.com/2008/01/30/dining/30pour.html> [https://perma.cc/T97F-N25R] (noting that Specialty Wine Retailers Association, a trade group, asserts that *Granholm* applies to retailers as well as to wineries).

167. *See, e.g., Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 821 (5th Cir. 2010) (holding that the limited rights Texas gives its in-state retailers to make deliveries do not discriminate against out-of-state retailers and do not violate dormant Commerce Clause); *Arnold’s Wines, Inc. v. Boyle*, 571 F.3d 185, 186, 191–92 (2d Cir. 2009) (holding that New York subjects both in-state and out-of-state liquor retailers to its three-tier system, a system upheld by U.S. Supreme Court, and, therefore, prohibiting out-of-state retailers from shipping directly to consumers does not violate dormant Commerce Clause). *But see Siesta Vill. Mkt., LLC v. Granholm*, 596 F. Supp. 2d 1035 (E.D. Mich. 2008). The federal district court in Michigan said although the Supreme Court approved the three-tier system, it did not approve a system that discriminates against out-of-staters. *Id.* at 1039. The court held that the Twenty-First Amendment did not save rules that discriminated against out-of-state wine retailers. *Id.* The court also held that allowing out-of-state retailers to comply with Michigan law by establishing a location in Michigan was discriminatory because the “prohibitive” expense of opening physical stores in multiple states gave a clear advantage to in-state retailers. *Id.* at 1040. Thus, the court held the Michigan laws violated the dormant Commerce Clause. *Id.*

168. *Retail-to-Consumer Direct Wine Shipping Guide*, SHIPCOMPLIANT, [http://www.shipcompliant.com/media/40066/retail\\_to\\_consumer\\_updated.pdf](http://www.shipcompliant.com/media/40066/retail_to_consumer_updated.pdf) [https://perma.cc/DYC9-75R4] (last visited Feb. 7, 2017) (Alaska, California, Idaho, Louisiana, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Virginia, West Virginia, Wyoming, and D.C.).

rise to the *Empire Wine* case.<sup>169</sup>

Empire Wine & Spirits LLC, (Empire) located in and licensed by the State of New York, uses the Internet to sell and deliver wine to consumers in and outside of New York.<sup>170</sup> This is the strange part: New York is one of thirty-six states that prohibits retailers from shipping any alcoholic beverages into New York to anyone who does not have a license to sell them, that is, to consumers;<sup>171</sup> however, New York does not have a law that prohibits anyone in New York from shipping wine or other alcoholic beverages to anyone in another state.<sup>172</sup> Empire admitted that it shipped wine to retail customers in sixteen other states.<sup>173</sup> All but two of them prohibit out-of-state retailers from shipping wine directly to in-state consumers, and one of the two would not permit shipping from New York State because it is a reciprocity state.<sup>174</sup> So, the New York State Liquor Authority (NYSLA) threatened to revoke Empire's license for "improper conduct."<sup>175</sup> It is unclear what New York's interest is in enforcing laws of other states against a New York business when the business did not violate any New York laws.

In response, Empire brought an action to enjoin the NYSLA from proceeding with the license revocation hearing on the grounds that the NYSLA's assertion of authority over wine shipments to another state violated the dormant Commerce Clause.<sup>176</sup> The New York Supreme Court dismissed the case without prejudice requiring Empire first to exhaust its administrative remedies.<sup>177</sup>

---

169. *Empire Wine & Spirits LLC v. N.Y. State Liquor Auth.*, 988 N.Y.S.2d 835, 837 (N.Y. Sup. Ct. 2014).

170. Verified Petition & Complaint at 4, *Empire Wine & Spirits LLC v. N.Y. State Liquor Auth.*, 988 N.Y.S.2d 835 (N.Y. Sup. Ct. 2014).

171. N.Y. ALCOHOLIC BEVERAGE CONTROL LAW § 102(1)(a) (LexisNexis 2016).

172. *Id.*

173. Memorandum of Law in Support of Verified Petition and Complaint at 4, *Empire Wine & Spirits LLC v. N.Y. State Liquor Auth.*, (N.Y. Sup. Ct. filed Sept. 22, 2014).

174. John Trinidad, *Lex Vini—21st Amendment Litigation: NY Wine Retailer Sues NYSLA*, DICKENSON PEATMAN & FOGARTY (Sept. 24, 2014), <http://www.dpf-law.com/blogs/lex-vini/empire-wine-nysla-lawsuit> [<https://perma.cc/FK5X-M5NB>]. See also CAL. BUS. & PROF. CODE § 23661.2 (West 2014); *Retail-to-Consumer Direct Wine Shipping Guide*, *supra* note 168.

175. N.Y. COMP. CODES RULES & REGS. tit. 9, § 53.1(n) (2011).

176. Verified Petition & Complaint at 6, *Empire Wine & Spirits LLC v. N.Y. State Liquor Auth.*, 988 N.Y.S.2d 835 (N.Y. Sup. Ct. 2014). Empire also asserted that the regulation allowing the NYSLA to revoke a license for "improper conduct" was unconstitutionally vague. *Id.* at 3. A discussion of vagueness is beyond the scope of this article. N.Y. ALCOHOLIC BEVERAGE CONTROL LAW § 79-c (West 2005).

177. Yoni Bashan, *Interstate Shipping Flap Rattles N.Y. Wine Retailers*, WALL ST. J., Dec. 10, 2014, at A21; Casey Seiler, *Empire Wine's Lawsuit Against SLA is Dismissed*, TIMES UNION CAPITOL CONFIDENTIAL (Nov. 20, 2014), <http://blog.timesunion.com/capitol/archives/224803/empire-wines-lawsuit-against-sla-is-dismissed> [<https://perma.cc/C2QR-H3CF>]; Lauren Halligan, *Wine Industry*

There is no indication that any of the states to which Empire shipped wine took any action against Empire,<sup>178</sup> or any other out-of-state retail wine shipper.<sup>179</sup> In fact, California, which allows out-of-state retail wine shipping into California only by retailers in states that allow reciprocal shipping privileges,<sup>180</sup> has stipulated in a court proceeding that its Department of Alcoholic Beverage Control has never taken any enforcement action against any retail licensees in other states that have sold and shipped wine directly to California adults.<sup>181</sup> The Department explained that it devotes its limited resources to higher priorities that directly impact Californians' health and safety.<sup>182</sup>

If California's regulatory agency deems the violation of its rule to be of too little consequence to act on, how does it serve New York's interest to deem the behavior "improper conduct"<sup>183</sup> and use it to severely penalize a New York business? If other states do not see it as in their interest to prosecute Empire for violating their laws, it would seem to be an unconstitutional extraterritorial dormant Commerce Clause violation for the NYSLA to do so. Many court opinions suggest as much.<sup>184</sup> The Supreme Court of Wisconsin has noted that a state lacks the authority to regulate a person's activities in another state because "[t]he general rule, unquestionably, is that the laws of a state have no extraterritorial effect.' . . . Although limited exceptions to this general rule might exist, explicitly prohibiting 'persons' from engaging in activities outside the state does not fall within one of those exceptions."<sup>185</sup> The Supreme Court

*Keeping Eye on Empire Wine Dispute*, SARATOGIAN (Feb. 23, 2015), <http://www.saratogian.com/article/ST/20150223/NEWS/150229926> [<https://perma.cc/QSY3-KPVJ>].

178. Robert Taylor, *New York State Cracks Down on Its Top Wine Merchants*, WINE SPECTATOR (Oct. 9, 2014), <http://www.winespectator.com/webfeature/show/id/50661> ("Empire Wine owner . . . said that [he] had never received a complaint or cease-and-desist order from any of the states to which [he] had shipped wine."); Tom Wark, *New Cause to "Wine" about New York Business Climate*, N.Y. POST (Apr. 10, 2015), <http://nypost.com/2015/04/10/new-cause-to-wine-about-new-york-business-climate/> [<https://perma.cc/SFL4-R94T>] (noting that Empire has not been charged with or convicted of any wrongdoing in any state to which it has shipped wine, nor had any state investigated Empire until asked for help by New York).

179. Bashan, *supra* note 177, at A25 (mentioning that legal experts say states are generally lax about enforcing out-of-state wine shipping laws).

180. CAL. BUS. & PROF. CODE § 23661.2 (West 2014).

181. Stipulation, Agreement, and Order at 2, *Knightsbridge Wine Shoppe, Ltd. v. Jolly*, No. 5:06-cv-02890-JF (N.D. Cal. filed Nov. 15, 2006).

182. *Id.* at 2–3.

183. Verified Petition & Complaint at 3, *Empire Wine & Spirits LLC v. N.Y. State Liquor Auth.*, 988 N.Y.S.2d 835 (N.Y. Sup. Ct. 2014).

184. See *Wis. Indus. Energy Grp., Inc. v. Pub. Serv. Comm'n*, 819 N.W.2d 240 (Wis. 2012); *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671 (Tex. 2006), *reh'g denied*; *Oregon v. Meyer*, 53 P.3d 940 (Or. Ct. App. 2002).

185. *Wis. Indus. Energy Grp., Inc.*, 819 N.W.2d at 252–53 (quoting *State v. Mueller*, 171 N.W.2d

of Texas has argued similarly against states attempting to govern beyond their borders.<sup>186</sup> The Court of Appeals in Oregon held that Oregon officers cannot issue traffic violations in a state outside of Oregon unless that state authorized such an action.<sup>187</sup>

As far as can be determined, no state has asked New York to enforce its alcoholic beverage retail shipping laws. Without such a request, what would New York's interest be in enforcing another state's shipping law when the other state is not interested enough to enforce it itself? New York is burdening interstate commerce and acting impermissibly extraterritorially by undertaking a procedure to revoke Empire's license based on Empire's actions in other states.

In response to this case, the New York Assembly and Senate both passed bills amending New York's Alcoholic Beverage Control Law (NYABCL) to eliminate the NYSLA's authority to penalize licensees based on possible violations of other states' laws unless the conduct violates a specific provision of NYABCL or the licensee's conduct resulted in a criminal conviction in another state.<sup>188</sup> The governor vetoed the bill explaining it would send "a clear signal that New York is a haven for entities intent on breaking other states' laws."<sup>189</sup> He might have added, even those which other states do not consider important enough to enforce themselves.

State alcoholic beverage laws make a good case for the importance of the extraterritoriality doctrine of the Commerce Clause because the laws are so varied across states.<sup>190</sup> Different states have made different judgments about what is and is not important in the regulation of alcoholic beverages. One state should not be able to regulate beyond its borders because its perception of appropriate regulation and enforcement could be completely different from that of its neighbors.

---

414, 416 (Wis. 1969)).

186. *Coca-Cola*, 218 S.W.3d at 680–81.

187. *Meyer*, 53 P.3d at 945–46.

188. 2015 N.Y. SESS. LAWS S.4446, <http://assembly.state.ny.us/leg/?term=2015&bn=S04446> [<https://perma.cc/LCD4-CFHJ>]; 2015 N.Y. SESS. LAWS A.5920, [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A05920&term=2015&Summary=Y&Actions=Y&Memo=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A05920&term=2015&Summary=Y&Actions=Y&Memo=Y&Text=Y) [<https://perma.cc/R4KC-L565>].

189. David Lombardo (@poozer87), *Letter from New York Governor Andrew Cuomo to the New York Assembly*, TWITTER (Dec. 12, 2015, 5:26 AM), <https://twitter.com/poozer87/status/675668081700691969/photo/1> [<https://perma.cc/E4S2-UEUT>] (citing N.Y. Executive Chamber, Opinion Letter on Veto to Assembly Bill 5920 (Dec. 11, 2015)).

190. See *supra* notes 164 and 171 and accompanying text.

## VI. EXTRATERRITORIALITY IN STATE LAW

The extraterritoriality doctrine exists not only in Commerce Clause constitutional jurisprudence but also in state common law.<sup>191</sup> For example, an Oregon resident signed an independent contractor agreement with a North Carolina company in North Carolina but did all his work for the company outside of North Carolina.<sup>192</sup> The worker then sued the company for violating the North Carolina Wage and Hour Act.<sup>193</sup> The North Carolina appellate court held that the Act does not provide a cause of action for someone who neither lived nor worked in North Carolina because states have no extraterritorial jurisdiction, and according to the North Carolina Supreme Court “[t]he presumption is always against any intention to attempt giving to the act an extraterritorial operation and effect.”<sup>194</sup> In 1894, the North Carolina Supreme Court noted that “[i]t is a general principle of universal accepta[nce] that one state . . . cannot enforce the penal or criminal laws of another, or punish crimes or offenses committed in and against another state or sovereignty.”<sup>195</sup>

The following year, 1895, the New York Court of Appeals, in refusing to enforce a Kansas statute, referred to “a principle of universal application, recognized in all civilized states, that the statutes of [one] state have . . . no force or effect in another.”<sup>196</sup> In 1897, the Court of Appeals of Kentucky noted that “[t]he statute of another state has, of course, no extraterritorial force.”<sup>197</sup>

In the twenty-first century, courts continue to cite the same principle. In 2012, the U.S. Court of Appeals for the Second Circuit opined that “California courts have long recognized a presumption against the extraterritorial application of state law,” and therefore, “California statutory remedies are not available ‘for injuries suffered by non-California residents, caused by conduct occurring outside of California’s borders, by defendants whose headquarters and principal places of operations are outside of California.’”<sup>198</sup> The court explained that in the case at hand, the plaintiff was a Kansas corporation with its

---

191. *Crippen v. Loughton*, 44 A. 538, 541 (N.H. 1899) (“It is universally agreed that the laws of a state have, ex proprio vigore [of its own force], no extraterritorial force; that is to say, no state ‘can by its laws, directly affect or bind property out of its own territory, or bind person not resident therein.’”).

192. *Sawyer v. Mkt. Am., Inc.*, 661 S.E.2d 750, 751–52 (N.C. Ct. App. 2008).

193. *Id.* at 752.

194. *Id.* at 754 (quoting *McCullough v. Scott*, 109 S.E. 789, 796 (N.C. 1921)).

195. *State v. Hall*, 19 S.E. 602, 602 (N.C. 1894).

196. *Marshall v. Sherman*, 42 N.E. 419, 423 (N.Y. 1895).

197. *Louisville & N.R. Co. v. Whitlow’s Adm’r*, 43 S.W. 711, 713 (Ky. 1897).

198. *Anschutz Corp. v. Merrill Lynch & Co.*, 690 F.3d 98, 111 (2d Cir. 2012) (quoting *Norwest Mortg., Inc. v. Superior Court*, 85 Cal. Rptr. 2d 18, 25 (Cal. Ct. App. 1999)); *Sullivan v. Oracle Corp.*,

principal place of business in Colorado.<sup>199</sup> The plaintiff did not allege any injury or communication with the defendant in California or any conduct by the defendant in California.<sup>200</sup> Therefore, California law could not control the transactions between them.<sup>201</sup>

## VII. OPPOSITION TO THE EXTRATERRITORIALITY DOCTRINE IN THE COMMERCE CLAUSE

In spite of its long-standing acceptance as a way of organizing regulation, the extraterritorial doctrine has been the subject of much criticism in recent years.<sup>202</sup> An impetus for the criticism is the increasing overlap of federal and state jurisdiction in matters having interstate implications.<sup>203</sup> With the broad interpretation of interstate commerce in the 1960s and 1970s enabling the federal government to regulate commerce that was seemingly intrastate,<sup>204</sup> and states regulating commerce that has great interstate impact,<sup>205</sup> some argue that the boundary between territorial and extraterritorial regulation has blurred too much to make the doctrine workable.<sup>206</sup> Some argue that the only use for the dormant Commerce Clause now is to prevent in-state favoritism, and the extraterritoriality strand of Commerce Clause jurisprudence should be eliminated.<sup>207</sup>

254 P.3d 237, 248 (Cal. 2011).

199. *Anschutz Corp.*, 690 F.3d at 111.

200. *Id.*

201. *Id.* at 112.

202. Denning, *supra* note 136, at 980–81.

203. Recent Cases, *Dormant Commerce Clause—Extraterritoriality Doctrine—Sixth Circuit Invalidates Michigan Statute Requiring Bottle Manufacturers to Use Unique Mark on All Bottles Sold Within Michigan—American Beverage Ass’n v. Snyder*, 700 F.3d 796 (6th Cir. 2012), 126 HARV. L. REV. 2435, 2438–39 (2013) [hereinafter *Recent Cases*].

204. See, e.g., *Perez v. United States*, 402 U.S. 146, 146–47, 147 n.1 (1971) (applying federal law to local loan shark because of money flowing to and from interstate criminal enterprise); *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (applying federal law to local restaurant because of purchase of foodstuffs from out of state).

205. See, e.g., *Cities Serv. Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 180 (1950) (state fixing price of gas drilled and purchased within state but mostly shipped and used out of state).

206. See, e.g., *Am. Beverage Ass’n v. Snyder*, 735 F.3d 362, 377–78 (6th Cir. 2013) (Sutton, J., concurring).

207. *Id.*; *Sam Francis Found. v. Christie’s, Inc.*, 784 F.3d 1320, 1332–34 (9th Cir. 2015) (Reinhardt, J., concurring in part and dissenting in part) (asserting that in extraterritoriality cases, the Supreme Court wrongly ignores primary dormant Commerce Clause issue of protectionism and recommending that Supreme Court should reconsider its *per se* extraterritoriality rule); *Recent Cases*, *supra* note 203, at 2438.

Some assert that the extraterritoriality doctrine is already dead.<sup>208</sup>

One specific problem that commentators mention is that extraterritoriality does not fit well within accepted Commerce Clause notions of discrimination so courts get confused.<sup>209</sup> Courts will mistakenly apply the test for statutes that discriminate against out-of-staters to statutes regulating extraterritorially.<sup>210</sup> That argument is not very persuasive. The extraterritoriality doctrine is an important element in preserving the federal government's right and responsibility to regulate interstate commerce without infringement by the states. Although in the modern economy, it would be impossible for states to regulate without having some effect on interstate commerce, the dormant Commerce Clause serves the important purpose of putting limits on that regulation. The extraterritoriality principle also keeps states from enacting and enforcing regulations that would promote hostility when there are differences of opinion among them about appropriate policies to pursue, the untoward notion of balkanization.<sup>211</sup>

One way the limiting purpose is served is the better-known principle of prohibiting a state from discriminating against out-of-staters in economic regulation. Applying this principle through the use of the *Pike* balancing test has been well-accepted.<sup>212</sup> The doctrine of extraterritoriality has become a Commerce Clause step-child merely because it is not specifically about discrimination but more generally about not putting an undue burden on interstate commerce and not contributing to legislative balkanization, and it does not have a neatly named test for deciding when it does or does not apply.<sup>213</sup> Instead, it has a simpler method for application: deciding whether the state regulation at issue regulates "wholly outside" the state.<sup>214</sup> That seems like an easy test as long as a court resists confusing the issue with the *Pike* balancing test, which does not apply. "Wholly" makes the statute *per se* impermissible; less than "wholly" and the statute stands.<sup>215</sup> Cases described above suggest that the distinction is fairly easy to discern.<sup>216</sup> One commentator has opined that an appropriate test

---

208. Denning, *supra* note 136, at 979–80; Sam Kalen, *Dormancy Versus Innovation: A Next Generation Dormant Commerce Clause*, 65 OKLA. L. REV. 381, 421 (2013) (asserting that extraterritoriality notion "is an abandoned nineteenth-century relic").

209. Felmlly, *supra* note 2, at 492.

210. *Id.* at 492–93 (citing Nat'l Solid Wastes Mgmt. Ass'n v. Meyer, 63 F.3d 652, 658 (7th Cir. 1995)).

211. See *North Dakota v. Heydinger*, 15 F. Supp. 3d 891, 916 (D. Minn. 2014).

212. See *supra* note 14 and accompanying text.

213. See generally *supra* notes 17–18 and accompanying text.

214. *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982).

215. *Id.* at 643.

216. See discussion *supra* Section III.

for extraterritorial invalidity is if a state regulation “*inescapably*” regulates beyond the state’s borders as a practical matter.<sup>217</sup> It is unclear why “inescapably” is an improvement over “wholly,” which has been generally accepted and understood by courts.

That judges are not necessarily careful in applying tests and principles, as suggested by some commentators,<sup>218</sup> does not indict the tests and principles. In fact, and putting to lie assertions that courts do not understand extraterritoriality jurisprudence, the Sixth Circuit, citing *Baldwin* and *Healy*, explained that in addition to protectionist regulations, a second category that is invalid under the dormant Commerce Clause includes regulations that control commerce wholly outside the borders of the regulating state.<sup>219</sup> “A state, in other words, cannot ‘project its legislation’ into another state,” the court said.<sup>220</sup> Then the court cited the First, Second, Third, Fourth, Seventh, Eighth, Ninth, and Eleventh Circuits for recognizing the extraterritoriality doctrine of the dormant Commerce Clause as being a distinct *per se* violation not subject to the *Pike* test.<sup>221</sup> This recitation indicates that courts are not having unusual difficulty applying extraterritoriality principles.

Unfortunately, some commentators have encouraged the misapplication of the *Pike* test by arguing that only extraterritorial regulations that discriminate against out-of-staters are unconstitutional; extraterritorial regulation that does not prefer in-staters to out-of-staters should be subjected to balancing and held constitutional if the state benefits outweigh the burden on interstate commerce.<sup>222</sup> An asserted reason for this position is that there are legitimate state interests that occur beyond a state’s borders.<sup>223</sup> What is missing from this analysis is the requirement for a finding of unconstitutional extraterritoriality, indicated in the cases above, that states are regulating *wholly* outside their borders. That is a high standard, and meeting it is an indication that a state is attempting to regulate beyond the scope of its legitimate interest. In the *Sam Francis* case, for example, the Ninth Circuit hypothesized that a California resident with a

---

217. Jeffrey M. Schmitt, *Making Sense of Extraterritoriality: Why California’s Progressive Global Warming and Animal Welfare Legislation Does Not Violate the Dormant Commerce Clause*, 39 HARV. ENVTL. L. REV. 423, 425 (2015).

218. Katherine Florey, *State Extraterritorial Powers Reconsidered: A Reply*, 85 NOTRE DAME L. REV. 1157, 1160 (2010).

219. *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 645 (6th Cir. 2010).

220. *Id.*

221. *Id.* at 645–46.

222. Mark D. Rosen, “*Hard*” or “*Soft*” Pluralism?: Positive, Normative, and Institutional Considerations of States’ Extraterritorial Powers, 51 ST. LOUIS U. L.J. 713, 727–28, 730 (2007).

223. *Id.* at 730.

part-time New York apartment bought a sculpture in New York from a North Dakota artist to furnish her New York apartment and then sold the sculpture to a friend in New York.<sup>224</sup> If the sculpture, the artist, the buyer, and the location of the transaction have absolutely no connection to California, why should California's decision to make the seller pay royalties to the North Dakota artist overcome New York's decision or North Dakota's decision not to require such a payment? Perhaps other states view a required "tax" on art to be an undesirable impediment to commerce in art objects, a more important concern than providing ongoing royalties for artists beyond the first sale of their works.

Another cited problem is the perception that there is not only a dormant Commerce Clause extraterritoriality doctrine, but also a Due Process extraterritoriality doctrine.<sup>225</sup> It is unclear why this is a problem at all when the two doctrines apply in different situations and have different purposes. Unlike the dormant Commerce Clause, the purpose of which is preventing states from putting undue burdens on interstate commerce,<sup>226</sup> extraterritoriality in a Due Process context has as its purpose protecting individuals without sufficient state contacts from being unreasonably subjected to its laws.<sup>227</sup> As others have concluded, these two uses of extraterritoriality are not necessarily at odds with each other, but merely different and may complement each other.<sup>228</sup>

Finally, there is the problem of a dysfunctional Congress. Some of the problems addressed in cases described above, like advertising sex acts involving minors or encouraging clean energy, would be better resolved with national regulation. In 1899, the Supreme Court of New Hampshire said, "If it is an evil that the laws . . . of one state cannot be directly enforced in another, the mischief can be easily cured by congress."<sup>229</sup> But if Congress is not acting, then it is not surprising that states attempt to do so and, in so doing, sometimes go beyond their geographic authority. Those facts do not indicate a problem with constitutional requirements; they indicate a problem with the current political will of the people and their political parties. Political will comes and goes, flows and ebbs; that should not be the case with constitutional principles.

---

224. *Sam Francis Found. v. Christie's, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015).

225. 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, 1065–66 (2009).

226. Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133, 1138 (2010); *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 668 (7th Cir. 2010).

227. Rosen, *supra* note 226, at 1137–38; *Midwest Title Loans*, 593 F.3d at 668.

228. See *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 380 (6th Cir. 2013); *Midwest Title Loans*, 593 F.3d at 668.

229. *Crippen v. Loughton*, 44 A. 538, 541 (N.H. 1899).

## VIII. CONCLUSION

The demise of the dormant Commerce Clause's extraterritoriality doctrine has been greatly exaggerated. The cases above indicate that states, unsurprisingly, sometimes attempt to regulate beyond their borders. When those disadvantaged by the extraterritorial regulation have sought to have courts declare the regulation unconstitutional, courts have routinely relied on several precedential U.S. Supreme Court cases to make principled decisions on whether the state is regulating wholly outside its borders. If so, then the regulation is impermissibly extraterritorial. Merely because a state has a good purpose and one it would like its sister states to embrace as well, does not suggest that it should be able to impose its will on other states whose voters may have different priorities. Invalid extraterritoriality is a bedrock of a federalist system that seems unnecessary only when the federal part of that system is underperforming.