ARTICLE

MUST THE STATES DISCRIMINATE AGAINST THEIR OWN PRODUCERS UNDER THE DORMANT COMMERCE CLAUSE?

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ABSTRACT

This Article works out the implications of an insight mentioned, but not developed, in the literature on free trade law: A polity that regulates its own producers without regulating outside producers serving that polity discriminates against its own producers. This insight gives rise to a question. Should laws serving free trade values require polities to discriminate against their own producers?

This Article examines the legitimacy of requiring discrimination against in-state producers through the dormant Commerce Clause’s extraterritoriality doctrine—which prohibits regulating wholly outside the enacting state’s borders. This doctrine, by prohibiting regulation of producers outside the regulating state, seems to require discrimination against the enacting state’s producers.

Descriptively, it shows that governments rarely discriminate against their own producers, instead commonly using import restrictions to facilitate evenhanded regulation. This practice suggests that evenhanded regulation may have some justification. It then examines the normative case for allowing states to regulate evenhandedly and explains how this case challenges the extraterritoriality doctrine. The analysis developed to explore the extraterritoriality doctrine’s legitimacy also informs domestic and international free trade law more broadly and contributes to an

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emerging literature on “horizontal federalism”—the law of interstate relations.

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I. INTRODUCTION

Suppose that a state concerned about climate disruption decides to prohibit construction of new coal-fired power plants in the state because coal-fired power plants emit a lot of carbon dioxide (CO₂), the principle greenhouse gas.¹ If it does so, neighboring states’ utilities may construct new coal-fired power plants and export that power back to the regulating state, displacing cleaner local power. The neighboring states’ electric utilities may thus thwart achievement of the regulating state’s goal to protect its citizens’ health and welfare by reducing greenhouse gas emissions. For CO₂ increases climate disruption regardless of the emissions’ location.² Furthermore, the neighboring utilities’ actions will cause a loss of revenue to the regulated state’s electricity producers. The state’s ban appears neutral on its face. But, in fact, it discriminates against in-state producers for the benefit of foreign producers. It imposes burdens on in-state producers that it does not impose on out-of-state producers selling electricity within the regulating state.

This climate example illustrates a broader problem. When a state seeks to regulate, it confronts a “leakage” problem.³ If it imposes costs on its own producers to meet some regulatory goal—such as reducing pollution, ensuring a healthy food supply, providing clean water, or adequately informing consumers—it faces a possibility that producers outside its jurisdiction will render the regulation ineffective by producing products that undermine the regulatory goal and then exporting them to the

¹. I, like former White House science advisor John Holdren, use the term “climate disruption” rather than the more common terms “climate change” or “global warming” because “climate disruption” more accurately conveys the essentials of the climate problem. See DAVID M. DRIESEN, ROBERT W. ADLER & KIRSTEN H. ENGEL, ENVIRONMENTAL LAW: A CONCEPTUAL AND PRAGMATIC APPROACH 24 (2016). The term “climate disruption” captures the scientific concern that the climate is very likely to harm ecosystems and may well change abruptly. The term “climate change” says almost nothing about the nature of the change and therefore proves vacuous. The term “global warming” captures a central scientific finding that the average mean surface temperature of the earth has increased, but suggests something benign and fails to account for the possibility of local cooling. Cf. id. (quoting John Holdren as characterizing global warming as a “misnomer” because it suggests something gradual and benign).

². Daniel A. Farber, Climate Policy and the United States System of Divided Powers: Dealing with Carbon Leakage and Regulatory Linkage, 3 TRANSNAT’L ENVTL. L. 31, 40 (2014) (noting that carbon emissions’ effects on a regulating state is the same “regardless of where . . . the emissions take place”).

regulated state. If this happens, the regulating state may harm or even destroy the businesses of local producers, who must pay high costs that their competitors do not face, without achieving its regulatory goal. Faced with this possibility, the state confronts a choice. The state may discriminate against its own producers by only imposing regulatory obligations on them, while not insisting on similar treatment of producers sending goods to the regulated state from outside. Or the state can insist that its regulatory requirements apply to relevant goods consumed in the state, regardless of where they are produced.

Minnesota recently did prohibit construction of new coal-fired power plants. But it avoided discrimination against its own producers by generally banning the importation of power from new coal-fired power plants in neighboring states. Accordingly, it made its law likely to achieve its regulatory goal of ameliorating the harms to Minnesota residents from increasing climate disruption, while avoiding losing revenue to neighboring producers.

This Article will define any regulation that will likely influence conduct outside the state’s boundaries as extraterritorial regulation. Under this definition, the Minnesota law regulates extraterritorially for two reasons. First, it might induce utilities outside of Minnesota that serve the Minnesota market to refrain from building new coal-fired power plants, because any such plants could not serve the Minnesota market. Second, even if utilities outside the state construct new coal-fired power plants, this law might influence dispatch orders, and therefore,

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4. See, e.g., Alcorn, supra note 3, at 107–10 (discussing the possibility that electricity suppliers could evade a regional cap on carbon dioxide by importing power from producers outside the region using a cap-and-trade program).


8. See id. (stating that this statute prohibits importation of electricity generated by new coal-fired power plants outside the state unless offset).
generation outside of Minnesota so that none of the electricity from new coal-fired power plants reaches Minnesota. For example, the Minnesota law might encourage the dispatch of electricity generated by natural gas-fired units in Iowa to Minnesota, thereby encouraging more use of those plants.

Previous work on international trade law has pointed out that in an integrated world, a regulation that applies only to a polity’s producers usually discriminates against that polity’s producers.9 But no work in this area systematically explores how this insight helps explain existing law or should inform legal doctrine. This Article explores the legitimacy of laws avoiding discrimination against in-state producers by seeking to influence the conduct of parties exporting products or services into the regulating jurisdiction. It argues that recognizing that discriminatory regulation serves as the alternative to extraterritorial regulation should lead to greater acceptance of extraterritorial regulation.

Descriptively, this Article shows that the insight that states must regulate extraterritorially to realize regulatory goals in an integrated world explains a lot of existing law, and not just state law within the United States. Polities regularly enact laws that apply not only to their own producers, but also to producers outside the regulating polity who might otherwise render a regulatory regime ineffective while harming domestic producers. This insight suggests that a lot of this law may serve legitimate purposes.

Doctrinally, this Article examines the question of whether the dormant Commerce Clause requires discrimination against in-state producers. Evenhanded state regulation gives rise to concerns under the dormant Commerce Clause—the body of case law implying limitations on state regulation from the Constitution’s granting Congress authority to regulate interstate commerce.10 Indeed, a federal district court struck down the

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9. See Belina Anderson, Unilateral Trade Measures and Environmental Protection Policy, 66 TEMPLE L. REV. 751, 767–78 (1993) (arguing that the Tuna/Dolphin I case effectively barred evenhanded treatment in favor of discrimination against domestic products); Driesen, supra note 6, at 309 (“Only regulation that discriminates against domestic production for the domestic market can avoid creation of burdens on international trade.”); see also Panel Report, United States—Restrictions on Imports of Tuna, ¶¶ 2.9–2.12, WTO Doc. DS29/R (adopted June 16, 1994) (finding U.S. restrictions on importing tuna that the U.S. also generally applied to its own fleet inconsistent with GATT).

10. See, e.g., Bolster, supra note 3, at 738–39 (explaining that states may limit emissions associated with energy imports to defend their regulation of carbon dioxide). See generally Allan Erbse, Horizontal Federalism, 93 MINN. L. REV. 493 (2008) (explaining that Congress’s power over interstate commerce gives it federal supremacy and the right to intervene when there is friction between multiple states); Julian N. Eule, Laying the Dormant Commerce Clause to Rest, 91 YALE L. J. 425 (1982); Katherine Florey, State Courts, State Territoriality, State Power: Reflections on the Extraterritoriality Principle in Choice of
Minnesota law, evenhandedly regulating power plant CO₂ emissions under the dormant Commerce Clause.¹¹

The suggestion that the dormant Commerce Clause might require discrimination may appear novel to dormant Commerce Clause scholars, for they know that the dormant Commerce Clause prohibits discrimination. But it prohibits discrimination against out-of-state producers—not against in-state producers. The Minnesota district court’s decision raises the less obvious question of whether the dormant Commerce Clause requires discrimination against in-state producers.

This concern about required discrimination arises primarily because of the dormant Commerce Clause’s extraterritoriality doctrine. That doctrine forbids laws regulating commerce “wholly outside” the regulating state’s borders.¹² If applied broadly it would require discrimination against in-state producers. For that reason, this Article primarily focuses on the extraterritoriality doctrine. The Minnesota district court relied on this doctrine in striking down the Minnesota statute.¹³

Although the Supreme Court has not relied on the extraterritoriality doctrine in decades and commentators have savaged it and declared it dead, some lower courts continue to treat it as established law.¹⁴ Hence, the question of whether governments must discriminate against their own producers remains alive and well, and not only in the area of climate law.

¹³ See Heydinger, 15 F. Supp. 3d at 910–11 (finding that the Minnesota statute “violates the extraterritoriality doctrine”).
In spite of this somewhat narrow doctrinal focus, this Article has broad implications. This Article contributes to a literature on horizontal federalism—the law addressing relationships between states.\textsuperscript{15} This literature has questioned the suggestion found in a variety of areas of law that we should understand states as wholly independent entities acting legitimately only in their own territory.\textsuperscript{16} Instead, this literature insists that states necessarily seek to influence each other and that doing so is quite legitimate.\textsuperscript{17} This Article supports and in some ways limits this insight through a focused inquiry into extraterritorial regulation’s legitimacy.

This discussion also has implications for international trade law, which—as I have already suggested—deals with the same problem of one polity’s regulation seeking to change conduct outside the polity.\textsuperscript{18} Because nations do not wish to invite leakage or discriminate against their own producers, national laws regulating domestic industry regularly influence conduct beyond the regulating nation’s border.\textsuperscript{19} For example, a recent scandal involving Volkswagen’s violation of U.S. pollution control law stemmed from a violation of an extraterritorial Clean Air Act requirement that foreign producers making products for the domestic market (like domestic producers) adhere to domestic pollution control standards and not install pollution control bypass devices.\textsuperscript{20}

This Article’s second Part accomplishes much of its descriptive mission and an important analytical task. The second Part begins by developing a new analytical framework for thinking about extraterritorial regulation, designed to go beyond the Minnesota case and explain several possible rationales for

\textsuperscript{15} See Joseph F. Zimmerman, Horizontal Federalism: Interstate Relations 33, 100 (2011); Erbsen, supra note 10, at 547–59 (mentioning dormant Commerce Clause doctrine as an example of law addressing horizontal federalism); Heather K. Gerken & Ari Holtzblatt, The Political Safeguards of Horizontal Federalism, 113 Mich. L. Rev. 57, 60 n.6, 62 (2014) (noting that the dormant Commerce Clause’s extraterritoriality doctrine addresses horizontal federalism).

\textsuperscript{16} See Gerken & Holtzblatt, supra note 15, at 62 (noting that most scholars think that the courts should “prevent spillovers” but suggesting that spillovers are pervasive and generate underappreciated benefits).

\textsuperscript{17} See id. at 63 (suggesting that states’ influence on each other generates productive democratic dialogue).

\textsuperscript{18} See generally Daniel A. Farber & Robert E. Hudec, Free Trade and the Regulatory State: A GATT’s-Eye View of the Dormant Commerce Clause, 47 Vand. L. Rev. 1401, 1404–08 (1994) (pointing out that free trade values animate both the dormant Commerce Clause’s regulation of states and the General Agreement on Tariffs and Trade’s regulation of nations).

\textsuperscript{19} See Driesen, supra note 6, at 364–68 (providing numerous examples of U.S. federal regulations aimed at influencing conduct abroad).

extraterritorial regulation that might inform our sense of their legitimacy. This same part explains how a desire to avoid loss of regulatory benefits in a world full of interstate and international commerce leads governments to eschew regulation that discriminates against their producers in favor of evenhanded regulation, which necessarily has impacts beyond its borders, providing a variety of examples.

The third Part introduces the dormant Commerce Clause with an emphasis on the extraterritoriality doctrine. This third Part also canvasses the scholarly literature on the extraterritoriality doctrine, which has generally been very critical of the doctrine.

The fourth Part uses the insight that purely domestic regulation discriminates against domestic producers to illuminate and inform an evaluation of the extraterritoriality doctrine. This fourth Part evaluates concerns about state sovereignty, protectionism, balkanization, and democratic representation through this lens. These concerns underlie dormant Commerce Clause doctrine, but have received insufficient treatment in the extraterritoriality doctrine literature, which has mostly focused on the doctrine’s economic irrationality and archaic formalism. This Part shows that the courts should generally evaluate conformity with the dormant Commerce Clause primarily using the tests that supplanted the idea that states could not regulate interstate commerce at all: The prohibition against discriminatory regulation and the rule that state regulation must not impose burdens clearly excessive relative to its putative local benefits.

In the fifth Part, I discuss this thesis’ implications and limitations. I flag a few concerns flowing from my analysis of extraterritorial regulation’s legitimacy that may qualify this conclusion. And I explain briefly how this analysis should inform both the dormant Commerce Clause, antidiscrimination doctrines

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21. See, e.g., Healy v. Beer Inst., 491 U.S. 324, 335–36 (1989) (discussing the Constitution’s concern about states’ “autonomy . . . within their respective spheres” in the context of adjudicating a dormant Commerce Clause claim); Gergen, supra note 14, at 1739 (discussing the doctrine’s archaic formalism); Goldsmith & Sykes, supra note 14, at 827 (suggesting that economic rationality requires a focus on the relationship between costs and benefits rather than a focus on the existence of out-of-state costs); Allan Rostron, The Supreme Court, the Gun Industry, and the Misguided Revival of Strict Territorial Limits on the Reach of State Law, 2003 L. REV. MICH. ST. U. DET. C.L. 115, 116 (linking the extraterritoriality doctrine to a long dead “conception of state authority”).

22. A few commentators have reached a similar conclusion on different grounds. See, e.g., Goldsmith & Sykes, supra note 14, at 827 (identifying the “real concern” underlying extraterritoriality as not about out-of-state effects but about the relationship between these effects and local benefits).
and wider discourses about free trade law and horizontal federalism.

II. WHY AND HOW EVENHANDED REGULATION OF INTERSTATE COMMERCE REACHES BEYOND THE JURISDICTION PROMULGATING A REGULATION

In a world in which no commerce existed between differing political jurisdictions, a state could achieve its public welfare objectives by simply regulating its own citizens. In the world we now live in, states often cannot achieve valid welfare objectives effectively and evenhandedly without a regulatory effect on out-of-state actors.

A. A Typology of Evenhanded Regulation

A state’s regulation beyond its borders may have varying effects reflecting various legislative purposes. In the Minnesota case, two effects help explain the regulation. First, Minnesota needs to avoid the leakage that might come with accepting imports of electricity produced by new coal-fired power plants. Thus, the extraterritorial extension of its prohibition on new coal-fired power plants makes it likely that the prohibition would be effective in avoiding the emission increases new Minnesota coal-fired power would otherwise produce. More generally, the regulation promotes the health and welfare of Minnesota citizens even when conduct from outside the state has the potential to undermine the state’s effort to benefit its citizenry. Second, the extraterritorial feature levels the playing field for electricity producers. That is, Minnesota’s lawmakers do not want its producers to face burdens

23. See Driesen, supra note 6, at 310 (“A jurisdiction with no international trade could evenhandedly tax and regulate everything sold in the jurisdiction with no impact upon international trade.”).

24. See Farber, supra note 2, at 33 (stating that “[t]o be successful” state efforts to regulate greenhouse gases “cannot simply focus on local carbon emissions but must include the carbon tied with the production of all of the goods consumed locally”); cf. Driesen, supra note 6, at 310 (“More integration implies greater burdens upon international trade from routine domestic regulation and taxes.”). See generally Gillian E. Metzger, Congress, Article IV, and Interstate Relations, 120 HARV. L. REV. 1468, 1521 (2007) (“In practice, states exert regulatory control over each other all the time.”), Gerken & Holtzblatt, supra note 15, at 80 (“Almost any state activity causes spillovers.”).


26. I am assuming this is a legitimate motive for the time being, fully aware that some free trade advocates doubt its legitimacy. I will address this problem later in the Article. See infra notes 200–205 and accompanying text.
not borne by their competitors, lest they lose market share to them as a result. In the Minnesota example, these two effects—preservation of health benefits and competitiveness—are tightly linked, but they might be separated.27

For example, consider state regulation of child support. States frequently demand that fathers living outside the state pay child support to mothers residing in the state.28 In such a case, the state acts extraterritorially to protect the welfare of its citizens (children of divorced couples, in particular). It does not, however, seek to level any competitive playing field. This Article will denominate laws that only seek to protect citizens’ health, safety, or welfare a “welfare law.”

An extraterritorial pollution regulation might also benefit a state’s citizens’ health and welfare without impacting local companies’ competitiveness. So, for example, suppose that California regulated CO₂ emissions emanating from New York electric utilities as well as its own electric utilities. Because of transmission losses, New York electric utilities cannot sell power

27. See Klass & Henley, supra note 7, at 129, 135, 145.

28. See Kulko v. Superior Court of Cal., 436 U.S. 84, 98 (1978) (suggesting that California’s interest in its resident children’s welfare might favor application of California law to a child support obligation of a father who never resided in California). The Constitution imposes limits on state court personal jurisdiction over fathers residing out-of-state that complicate enforcement of child support orders. See id. at 92–101 (holding that California lacks personal jurisdiction over a father who never resided in the state and did not have minimum contacts with the state). See generally Gerken & Holtzblatt, supra note 24, at 78 (mentioning the problem of enforcing child support awards out-of-state as an example of “spillunders” between states). But these limits no longer wholly forbid jurisdiction over fathers who live outside of the state, instead limiting such jurisdiction to cases where some minimum contacts with the state make jurisdiction fair and just under the Due Process Clause. Kulko, 436 U.S. at 92 (holding that International Shoe’s minimum contacts test applies to personal jurisdiction over absent fathers). More importantly, due process limits do not defeat the point that states may create extraterritorial legal obligations for fathers living outside the state. See id. at 98–99 (pointing out that a model statute adopted by California allows a resident to have a support obligation created in the absent father’s state without her leaving the state); UNIF. INTERSTATE FAMILY SUPPORT ACT §§ 201, 205, 211 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2008) (providing for personal jurisdiction over fathers living outside the state to establish child support laws in various situations and for continuous jurisdiction to modify the awards); Kathleen A. Burdette, Comment, Making Parents Pay: Interstate Child Support Enforcement After United States v. Lopez, 144 U. PA. L. REV. 1469, 1473 (1996) (discussing a federal law designed to simplify extraterritorial enforcement of child support obligations); see, e.g., CAL. FAM. CODE §§ 4001, 4905 (West 2013); In re Chataqua Cty. Dep’t of Soc. Servs. v. Rita, 94 A.D. 3d 1509, 1512 (N.Y. App. Div. 2012) (ordering parents residing in New Mexico to pay child support for their children residing in New York when the parents authorized the children’s placement in New York). See generally Vanderbilt v. Vanderbilt, 354 U.S. 416, 417 (1957) (holding that a court must have personal jurisdiction over both spouses to alter property rights as between the spouses); Williams v. North Carolina, 325 U.S. 226, 239–41 (1945) (holding that a state must grant full faith and credit to a divorce established by another state when one of the spouses is domiciled in the state granting the divorce and the non-appearing spouse receives adequate notice).
in California, and therefore, cannot compete with California utilities. The CO₂ emissions from New York, however, raise global CO₂ concentrations and can contribute to drought and other impacts in California. In this case, California’s regulation of New York utilities does not address a competitiveness problem. It does, however, contribute to the realization of the objective of protecting California citizens from climate impacts. Thus, it constitutes a “welfare law” as this Article defines it, just as the child support regulation does.

Many readers’ intuitions may suggest that the child support regulation is legitimate and that the California regulation of New York electric utilities is not. But both regulations have the same basic justification; both protect the welfare of California’s citizens. So, it is not obvious why one should be legitimate and not the other.\textsuperscript{29} I will address that problem in due course, but for now, simply note that both the child support regulation and this California regulation of New York utilities exemplify welfare regulation—regulation protecting state citizens’ health and welfare without protecting any domestic producers’ competitive position.

Conversely, a state might regulate extraterritorially to preserve the competitive position of regulated producers, without the extraterritorial law contributing to the more general health or welfare of its citizens. So, for example, imagine that California decided to regulate carcinogenic air pollution from its petroleum refineries, thereby imposing a cost on domestic oil producers. Suppose that California then decided to impose similar regulations on Louisiana petroleum refineries producing fuel for the California market, which compete with California refineries to sell gasoline. Lest this appear too fanciful, suppose that instead California imposed a compensating tariff, equal to the cost California petroleum refineries incurred to comply with California regulations of carcinogenic air pollutants, on all Louisiana refineries producing fuel for California without complying with standards for hazardous air pollutants that approximate the stringency of California standards. Assume that the Louisiana air pollutants have no significant effect on cancer rates in California. The extraterritorial components of this law would serve to level the playing field and prevent the California regulations from eroding California refineries’ competitive positions, but would not

contribute to California citizens’ health. Let us call this a “level playing field law.”³⁰

Hence, an extraterritorial regulation might compensate for the competitiveness effects of domestic regulation (“level playing field law”), attempt to benefit the health and welfare of the regulating state’s citizens more directly (“welfare law”), or do both:

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Notice that none of these laws discriminate against out-of-state entities or interstate commerce, for they all impose equal burdens on in-state and out-of-state entities.

This table might suggest that laws like the Minnesota law, which both preserve domestic competitiveness and protect residents from the effects of out-of-state pollution, simply provide extra health and safety benefits by regulating extraterritorially. But this suggestion ignores the dynamic interaction between competitiveness effects and pollution levels. Purely domestic regulation (i.e., discriminatory regulation) might cause the regulated domestic producer to lose market share. This loss of market share would prevent the full benefits of cleaner domestic production from being realized. In other words, the extraterritorial regulation does not necessarily add environmental benefits from outside producers to those generated by in-state producers. Rather it allows the retention of health and safety benefits generated by the in-state producers’ compliance, which might be lost without an extraterritorial regulation.

This is very different from the way welfare laws like the child support law (or California regulation of New York utilities’ greenhouse gas emissions) work. The absence of extraterritorial child support regulation does not undermine collection of child

³⁰ Notice that I define “level playing field law” much more narrowly than the literature on the level playing field concept in international trade implies. The economic concept refers not only to cases where a polity imposes a regulation or charge on imports to compensate for a burden that it imposes on its producers, but also to cases where a state imposes a countervailing duty or export restriction to address foreign actions aiding exports. See, e.g., Ronald A. Cass & Richard D. Boltuck, Antidumping and Countervailing-Duty Law: The Mirage of Equitable International Competition, in 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 351, 355–60 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) (critiquing the level playing field concept as an underpinning to antidumping and countervailing duty laws). I choose this narrower definition because so far as I know there are no antidumping state laws, so this narrower definition suits my specific inquiry better.
support from fathers living within the state. The extraterritorial extension of this welfare law simply adds to the benefits child support laws generate by increasing the number of children supported. A California regulation of New York utilities’ greenhouse gas emissions works the same way. California could regulate its own energy market and get a set of greenhouse gas reductions from the energy producers serving the California market. The regulation of New York utilities (which do not sell power in the California market) adds to those benefits, but is not necessary for their retention. Accordingly, I will henceforth refer to the extraterritorial regulations described in the third row, which function both as “welfare law” and “level playing field law,” as “synergistic law.”

This completes a typology contrasting synergistic law with welfare law and level playing field law. This Article focuses primarily upon synergistic law. But the level playing field and welfare law concepts will prove useful in examining potential limits on extraterritorial state legislation.

B. Examples of Synergistic Law

States seeking to ensure that their citizens eat healthy food must not only regulate their own food production; they must (if their regulation is to adequately protect their citizens) ban imports from out-of-state producers that do not produce food in a safe manner. Relevant state statutes have required other states to certify that their cattle are free of a particular disease in order for any of their producers to ship cattle into the regulating state, thus requiring other states to establish regulatory regimes as a condition for export.31

Effective state environmental standards sometimes reach across borders in order to avoid having activities outside the state cancel the standards’ benefits. For example, California recently enacted low carbon fuel standards to encourage production of fuels with lower CO₂ emissions for the California market.32 California’s lawmakers recognized, however, that sometimes firms can emit more carbon dioxide by producing and transporting low carbon

31. See Mintz v. Baldwin, 289 U.S. 346, 347–50 (1933) (upholding New York’s prohibition of Wisconsin shipments of cattle to New York absent a certificate from Wisconsin’s chief sanitary officer that the cattle are free of Bang’s disease); see also Reid v. Colorado, 187 U.S. 137, 150–52 (1902) (upholding a New York statute prohibiting importing of horses or cattle unless the exporting state’s veterinary board has certified them as free of diseases or they are kept north of the 36th degree of latitude for at least ninety days).

32. See Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1080 (9th Cir. 2013) (describing the basics of the fuel standard).
fuel than drivers save when vehicles burn low carbon fuel.\textsuperscript{33} Accordingly, the California Air Resources Board (CARB) evaluates compliance with low carbon fuel standards using lifecycle analysis of the fuel, which takes into account how the fuel is produced and transported.\textsuperscript{34} Because some out-of-state fuel producers help supply the California market, this approach influences the conduct of out-of-state entities, encouraging them to choose production processes that minimize CO\textsubscript{2} emissions.

Similarly, CARB recognizes that imports of electricity from coal-fired power plants operating in neighboring states could undermine its cap-and-trade program reducing CO\textsubscript{2} emissions from electric utilities and other large emitters.\textsuperscript{35} Accordingly, it imposes compliance obligations on importers of electricity into the California grid that encourage production of clean electricity outside California’s borders.\textsuperscript{36}

Nor is the frequent extraterritorial reach of standards beyond the enacting polities’ borders confined to state law. Examples abound at the federal level, showing that legislatures at every level regularly reject discrimination against their own residents (usually without contradiction from international and domestic tribunals).

Thus, federal emissions standards for vehicles and fuels not only burden U.S. vehicle makers and refiners, they regulate production practices for fuel and vehicles made outside the U.S. for the U.S. market (as the Volkswagen scandal illustrates).\textsuperscript{37} Federal pesticide law prohibits importation of pesticides violating domestic pesticide control provisions.\textsuperscript{38} Federal trade law prohibits misbranding of various products, discriminating against nationally produced goods and, to avoid discriminating against nationally produced goods, prohibits importation of misbranded products as well.\textsuperscript{39} Consumer protection law imposes safety

\begin{thebibliography}{99}
\bibitem{33} See id. at 1080–81 (noting that fuel standards focused only on consumption would let "emissions rise during fuel production" thereby potentially raising net emissions).
\bibitem{35} See Alcorn, \textit{supra} note 3, at 110–11 (stating that California regulates imported electricity to prevent leakage and "resource shuffling" from undermining its cap-and-trade program).
\bibitem{36} See id. (describing the scheme).
\bibitem{38} 7 U.S.C. § 136o(c) (2012).
\bibitem{39} See, \textit{e.g.}, 15 U.S.C. §§ 68a, 68f, 69j, 1125(b), 1273(a) (2012).
\end{thebibliography}
standards on U.S. products and then applies them to products made outside the United States through import prohibitions. Federal food and drug laws, like state statutes, reach beyond the enacting polity to prohibit importation of goods not complying with our standards, thereby, in some cases, requiring foreign governments to establish inspection programs if they wish to export goods to the U.S. Instead of discriminating against domestic appliance manufacturers, U.S. energy conservation laws prohibit importation of products that do not comply with U.S. energy efficiency standards, thereby again regulating production processes abroad when foreign producers choose the U.S. market for export. The normal structural pattern of any set of standards involves regulating practices within the polity and then applying them either directly or indirectly to foreign entities that wish to export goods that would undermine the polity’s standards.43 Synergistic law is the rule, not the exception. And synergistic law, unlike welfare law, is essential to preserving the regulatory gains a state could make if it existed in an autarky.

III. THE DORMANT COMMERCE CLAUSE AND THE EXTRATERRITORIALITY DOCTRINE

The Constitution affirmatively grants Congress the power to regulate interstate commerce and provides that federal law preempts inconsistent state laws. Although the Commerce Clause does not explicitly limit state regulation of interstate commerce absent federal legislation preempting state law, the Supreme Court has developed a set of limitations on state authority that apply even when Congress has not exercised its authority to regulate interstate commerce, i.e., when the affirmative authority to regulate interstate commerce lies dormant. This dormant Commerce Clause doctrine rests on a judicial inference that the Commerce Clause’s affirmative grant of regulatory authority to Congress implies a set of limitations on

41. See 21 U.S.C. §§ 355a, 458(a)(2), 460(a), 466(a), 620(a), 641 (2012).
43. Cf. Alice Kaswan, Decentralizing Cap-and-Trade? State Controls Within a Federal Greenhouse Gas Cap-and-Trade Program, 28 VA. ENVTL. L. J. 343, 409 n.244 (2010) (explaining that if a state sets in-state regulatory standards and then attempts to control imported goods not made in accordance to those standards, the regulation could face Commerce Clause challenges).
44. See U.S. CONST. art. I, § 8, cl. 3; id. art. VI.
state law even when Congress does nothing. 46 Because it negates state authority based on text containing only a positive grant of authority to Congress, the Court sometimes refers to the dormant Commerce Clause doctrine as the “negative” Commerce Clause doctrine. 47

The Court, however, long ago accepted the idea that states may impose regulation having extraterritorial effects. Instead of banning all state regulation of interstate commerce, it created two much narrower limitations on state authority. This part begins with an account of early dormant Commerce Clause jurisprudence and a summary of the modern approach. The stage thus set, it then analyzes the extraterritoriality doctrine.

A. From Hostility Towards Extraterritorial Regulation to an Emphasis on Nondiscrimination

In Gibbons v. Ogden, 48 Justice Marshall suggested that Congress’s right to regulate interstate commerce implied that states have no right to regulate interstate commerce at all. 49 This would suggest that any state regulation having an effect beyond the state’s borders would violate the Constitution. The Marshall Court, however, declined to decide Gibbons on the ground that state action could not have an extraterritorial impact, but instead relied on a relevant federal statute’s preemptive effect. 50 In subsequent cases, the Court accepted the idea that states often could achieve valid regulatory objectives employing the police power, even if the laws they enacted addressed interstate commerce. 51 In Cooley v. Board of Warrens of the Port of Philadelphia, however, the Court held that states had no power to regulate subjects deemed “in their nature national, or admit[ting]
only of one uniform system.”\textsuperscript{52} This doctrine proved unworkable because of the difficulty of determining which subjects were inherently national.\textsuperscript{53} The Court eventually abandoned the Cooley doctrine and established a new formalist doctrine, in which states could not regulate interstate commerce “directly” but could do so “indirectly.”\textsuperscript{54}

In justifying allowing state laws indirectly regulating interstate commerce to stand, the Court recognized that laws protecting the “life, safety, and health of their citizens” may affect commerce or persons engaged in it.\textsuperscript{55} Accordingly, in a long line of decisions, it upheld safety and health measures that burdened interstate commerce.\textsuperscript{56} In this way, the Court apparently recognized that states must regulate extraterritorially in order to retain the police power—i.e., the power to protect public welfare and health.\textsuperscript{57}

The modern Court has abandoned the formalist direct/indirect and the naturally national/local distinctions in favor of an emphasis on prohibiting discrimination.\textsuperscript{58} It subjects state law discriminating against interstate commerce or out-of-state economic interests to a rule of virtual per se invalidity.\textsuperscript{59} On the other hand, under \textit{Pike v. Bruce Church, Inc.},

\begin{itemize}
  \item \textsuperscript{52} Cooley, 53 U.S. at 319.
  \item \textsuperscript{54} See Felmy, supra note 14, at 472–73 (discussing the evolution from a test focusing on distinguishing local from national subject matter to one focused on direct versus indirect effects); see, e.g., Smith v. Alabama, 124 U.S. 465, 474 (1888) (applying the idea that states may protect life, safety, and health to uphold a wrongful death action for an accident occurring during an interstate steamer voyage); \textit{Smith}, 124 U.S. 465 at 474, 480–81 (applying this principle to a state statute licensing locomotive engineers and holding them to safety standards).
  \item \textsuperscript{55} See Sherlock v. Alling, 93 U.S. 99, 103 (1876) (aplying the idea that states may protect life, safety, and health to uphold a wrongful death action for an accident occurring during an interstate steamer voyage); \textit{Smith}, 124 U.S. 465 at 474, 480–81 (applying this principle to a state statute licensing locomotive engineers and holding them to safety standards).
  \item \textsuperscript{56} See, e.g., Chicago, R.I. & Pac. Ry. Co. v. Arkansas, 219 U.S. 453 (1911) (upholding law requiring three brakeman on large trains); Erb v. Morasch, 177 U.S. 584 (1900) (upholding municipal speed limit for trains); cf. Seaboard Air Line Ry. v. Blackwell, 244 U.S. 310, 313, 316 (1917) (striking down a law requiring trains to come to a complete stop more than once per mile for over 100 miles).
  \item \textsuperscript{57} See Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443–44 (1960) (stating that the Commerce Clause allows states to legislate “on all subjects relating to the health, life, and safety of their citizens” even if the legislation “indirectly” affects commerce).
  \item \textsuperscript{58} See Michael J. Ruttinger, Note, \textit{Is There a Dormant Extraterritoriality Principle?: Commerce Clause Limits on State Antitrust Laws}, 106 Mich. L. Rev. 545, 552 (2007) (characterizing the modern court’s doctrine as a “nondiscrimination rule”).
  \item \textsuperscript{59} See Or. Waste Sys., Inc. v. Dep’t of Envtl. Quality, 511 U.S. 93, 99 (1994).
\end{itemize}
it upholds nondiscriminatory state law that serves a legitimate public purpose unless a challenged state law imposes a “clearly excessive” burden on interstate commerce relative to the “putative local benefits.” Thus, instead of a blanket rule prohibiting state laws with effects beyond the state’s territory, the Court developed two limitations focused primarily on preventing enactment of laws favoring in-state business at the expense of out-of-state competition.

This very simple summary of basic rules, while sufficient for my purposes, belies the dormant Commerce Clause jurisprudence’s inconsistency, complexity, and unpredictability. It has proven difficult to predict when a court will find a rule having disparate impacts discriminatory (and therefore almost surely unconstitutional) or evaluate it under the friendlier Pike balancing test. Indeed, Justice Scalia has characterized the Court’s dormant Commerce Clause jurisprudence as a “quagmire” and joined in Justice Thomas’s conclusion that it makes “little sense.” He has been especially harsh in his condemnation of Pike balancing. Commentators generally echo his conclusions about the jurisprudence’s incoherence. Indeed, some find the incoherence, along with the lack of a textual justification for this

60. 397 U.S. 137, 142 (1970).
61. See CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87 (1987) (declaring statutes that discriminate against interstate commerce the “principal objects of dormant Commerce Clause scrutiny”).
62. See Farber, supra note 2, at 42 (finding the ban on facially neutral regulation that discriminates “in effect . . . particularly poorly defined”); Felmly, supra note 14, at 483 (noting that circuit court opinions reveal confusion about when to apply Pike balancing and when to apply the per se rule against discrimination); Steven Ferrey, The Double Helix of Supremacy and Commerce Clause Constitutional Restraints Encircling the New Energy Frontier, 7 N.W. INTERDISC. L. REV. 1, 9 (2014) (noting that state regulations have a “better than average chance” of surviving dormant Commerce Clause review when the court applies Pike balancing).
64. See CTS Corp., 481 U.S. at 95–96 (Scalia, J., concurring) (suggesting that because judges are not qualified to decide whether an impact on commerce outweighs local benefits, nondiscriminatory regulation should survive judicial scrutiny); Dep’t of Revenue v. Davis, 553 U.S. 328, 360 (2008) (Scalia, J., concurring) (describing Pike balancing as “quintessentially legislative judgments” for which courts are “ill suited”).
65. See Farber & Hudec, supra note 18, at 1409 (noting that a “phalanx of scholars” echo Justice Scalia’s criticisms).
doctrine in the Constitution, sufficiently troubling to seek its abandonment.66

Some of the best commentary seeking to make some sense of the doctrine has concluded that the dormant Commerce Clause aims to extinguish laws reflecting a protectionist purpose.67 Thus, for example, the Pike Court in striking down burdensome Arizona labeling requirements, did not give much weight to the law’s local benefits because it sought to enhance the reputation of local cantaloupe growers—an apparently protectionist purpose.68 In other cases, the Court has upheld rules imposing much greater burdens on interstate commerce because they genuinely aimed at protecting public health or safety.69 The Court generally focuses on the “practical effects” of challenged laws in evaluating them under the modern tests, reflecting its rejection of the formalist tests of the 19th century.70 The Court usually does not examine purpose through analysis of legislative motive, but rather by tacitly assuming that a challenged law’s effects reflect its purpose.71 Although predicting when a Court will find a protectionist purpose also poses great difficulties, many commentators agree that avoidance of protectionism constitutes a major aim of the jurisprudence.72

66. See, e.g., Redish & Nugent, supra note 45, at 573 (claiming that the dormant Commerce Clause is invalid because it has no textual basis and the Constitution allows states to regulate commerce unless Congress decides otherwise).

67. See Goldsmith & Sykes, supra note 14, at 797–98 (describing prevention of protectionism as “the central purpose of the dormant Commerce Clause”); Regan, supra note 10, at 1094–95 (stating that the dormant Commerce Clause forbids protectionism and defining protectionism primarily in terms of purpose); accord Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 648–49 (6th Cir. 2010) (examining explicitly whether a statute governing labeling of dairy products was protectionist).

68. Regan, supra note 10, at 1210–15 (explaining that the motive behind the statute at issue in Pike is protectionist and that protectionism, rather than balancing, explains Pike’s result).


71. See, e.g., Regan, supra note 10, at 1222–23 (explaining how the Court infers protectionist purpose from protectionist effect).

72. See, e.g., Catherine Gage O’Grady, Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause, 34 SAN DIEGO L. REV. 571, 575 (1997) (identifying avoidance of protectionism as the primary purpose of dormant Commerce Clause analysis).
B. The Extraterritoriality Doctrine

The lower courts sometimes add a third element to the dormant Commerce Clause doctrine—a prohibition on extraterritorial regulation.73 In recent years, the lower courts have sometimes used this doctrine to invalidate state statutes regulating the Internet and, more recently, state environmental laws.74

1. Supreme Court Cases. This doctrinal addition relies upon a number of passages in Supreme Court opinions stating that the Commerce Clause prohibits regulation of “commerce that takes place wholly outside of the [s]tate’s borders.”75 Most of these statements occur in dicta or in concurring opinions. For example, in Edgar v. Mite Corp., the Court held that a state statute potentially limiting takeovers of Illinois corporations violated the Pike balancing test.76 Only a plurality endorsed the extraterritorial rationale offered in support of this decision.77 And in a subsequent case, CTS Corp. v. Dynamics Corp. of America, the Court upheld a very similar statute.78 In Southern Pacific Co. v. Arizona, the Court noted that a regulation of train length has effects on trains outside the state’s borders, but rested its holding on the gross imbalance between the supposed benefits of the regulation and the burdens it placed on interstate commerce.79 Similarly, in Baldwin v. G.A.F. Seelig, the Court noted in dictum that New York had no power to regulate the price of milk paid by Vermont consumers for Vermont milk.80 Subsequent opinions frequently cite this dictum to justify a prohibition on regulation operating “wholly” outside the regulating jurisdiction’s territory.81

73. See Goldsmith & Sykes, supra note 14, at 790–92.
74. See id. (discussing several lower court cases invoking the extraterritoriality doctrine to invalidate state regulation of the Internet); Bruce P. Keller, The Game’s the Same: Why Gambling in Cyberspace Violates Federal Law, 108 YALE L.J. 1569, 1593–96 (1999); Klass & Henley, supra note 7, at 140–41 (discussing lower court cases addressing energy legislation).
76. Id. at 626–27, 643 (describing the Illinois statute and finding it unconstitutional under Pike).
77. See id. at 624–25, 640–43.
78. See CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 94 (1987) (upholding an Indiana statute requiring shareholder approval of takeovers of Indiana corporations).
79. See 325 U.S. 761, 775–76 (1945) (noting that regulation of train lengths has the practical effect of controlling change operations beyond the state’s borders but describing the “decisive question” as focusing on the balance between safety and burdens on commerce).
80. 294 U.S. 511, 521 (1935).
81. See Healy v. Beer Inst., 491 U.S. 324, 332 (1989) (discussing Baldwin and Brown-Forman to justify a rule that a state may not regulate “commerce occurring wholly
But the Seelig Court did not suggest that the statute before it only regulated prices paid by Vermont consumers. Instead, it stated that the statute before it, which it struck down, required New York milk dealers to pay Vermont farmers the same high prices that the statute required New York dealers to pay to New York farmers, thereby preventing interstate price competition. This law thus regulated an interstate transaction having effects both inside and outside the regulating state.

Only in the context of price fixing regulation has a Supreme Court majority relied upon a prohibition on extraterritorial regulation to justify a holding, and even in the price fixing context it often does not apply the prohibition. Thus, the Court has invalidated statutes requiring sellers of liquor to affirm that the prices they charge in the regulating state would not be higher than the prices they charge in other states. These price affirmation statutes seek to protect in-state business by removing incentives for in-state consumers to cross state boundaries to buy liquor at cheaper prices. Thus, they appear to have a protectionist purpose. While acknowledging the protectionist purpose of price affirmation statutes, the Court suggested the existence of a blanket prohibition on regulation of commerce taking place wholly outside the state enacting the statute. In some earlier cases, however, the Court upheld price fixing statutes, which also had the effect of fixing prices charged out-of-state. And the Court subsequently upheld a statute designed to lower drug prices that

outside its borders; Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582–83 (1986) (citing this dictum to support the idea that a state “may not project” its price fixing regulation "into other states").

82. See Baldwin, 294 U.S. at 519, 521–22.
83. See id.; see also Regan, supra note 10, at 1258 (noting that the New York statute invalidated in Baldwin regulates New York sales).
85. See Healy, 491 U.S. at 326.
86. See Brown-Forman, 476 U.S. at 580 (describing the price affirmation statute before it as protectionist).
87. See id. at 582–83 (prohibiting New York from regulating liquor prices in other states); Healy, 491 U.S. at 336; cf. id. at 339–41 (holding that Connecticut’s price affirmation statute discriminates against interstate commerce).
88. See Cities Serv. Gas Co., v. Peerless Oil & Gas Co., 340 U.S. 179, 189 (1950) (upholding price fixing for gas, even though ninety percent is shipped out of state); Parker v. Brown, 317 U.S. 341, 345 (1943) (upholding price fixing for raisins even though ninety percent were shipped out of state); Milk Control Bd. v. Eisenberg Farm Prods., 306 U.S. 346, 352–53 (1939) (upholding a statute establishing minimum prices for milk); cf. Lemke v. Farmers Grain Co., 258 U.S. 50, 58 (1922) (striking down a statute fixing the price of grain in the absence of a substantial local market for the good subject to the state price fixing statute).
out-of-state pharmaceutical companies offer state residents in Pharmaceutical Research & Manufacturers of America v. Walsh. The Supreme Court has not only applied the doctrine only in narrow circumstances, it has not invoked it at all in the last quarter century.

2. Lower Federal Courts. Because the Supreme Court has never explicitly repudiated the extraterritoriality doctrine, lower courts have relied on it long after the Supreme Court stopped employing it. To get a feel for this, this subsection canvasses two types of cases frequently highlighted in the extraterritoriality literature—environmental cases and Internet cases.

a. Environmental Cases. The Minnesota district court case discussed above held that Minnesota’s ban on importing electricity from new coal-fired power plants in other states violated the extraterritoriality doctrine mainly because of the possibility that the statute might reach power purchase contracts in other states that cause electrons generated by power plants outside the state to pass through Minnesota. The Eighth Circuit affirmed the result in this case, but only one judge accepted the dormant Commerce Clause as a ground of decision. The other two judges relied on varying preemption theories. One of those judges construed the import ban to apply only to power purchased by

89. 538 U.S. 644, 669 (2003); cf. Felmly, supra note 14, at 495–96 (discussing lower court cases finding that contracts with local entities took place “wholly outside” the local jurisdiction through application of conflict of law principles).  
91. See, e.g., Dan L. Burk, Federalism in Cyberspace, 28 Conn. L. Rev. 1095, 1127–34 (1996) (discussing the extraterritoriality doctrine’s implications for the Internet); Goldsmith & Sykes, supra note 14, at 790 (reevaluating the extraterritoriality doctrine in light of Internet cases); Keller, supra note 74, at 1573–96 (discussing lower court cases germane to regulating Internet gambling under the dormant Commerce Clause); Klass & Henley, supra note 7, at 135–42 (discussing lower court cases addressing energy legislation); Glenn Harlan Reynolds, Virtual Reality and “Virtual Welters”: A Note on the Commerce Clause Implications of Regulating Cyberporn, 82 Va. L. Rev. 535, 537–42 (1996) (suggesting that state Internet regulation may violate the dormant Commerce Clause).  
92. North Dakota v. Heydinger, 15 F. Supp. 3d 891, 916–18 (D. Minn. 2014), aff’d on other grounds, 825 F.3d 912 (8th Cir. 2016) (characterizing the Minnesota statute as “the paradigm of extraterritorial legislation” because it regulates transactions between power purchasers in another state and power generators in a third state).  
93. See North Dakota v. Heydinger, 825 F.3d 912, at 918–23 (8th Cir. 2016).  
94. See id. at 920–29 (Murphy & Colloton, JJ., concurring).
Minnesota electricity providers, thereby avoiding the problem of electrons passing through on their way to other states, raising a dormant Commerce Clause issue for the statute.95

Similarly, in Rocky Mountain Farmers Union v. Goldstene, the U.S. District Court for the Eastern District of California invalidated California’s low carbon fuel standard under the extraterritoriality doctrine.96 Because the California standard sought emission reductions from producers of fuel outside of the state, the court found that California impermissibly “controlled conduct beyond” the state boundary.97 The Ninth Circuit, however, reversed.98 It held that California may regulate “commerce and contracts” within its boundaries with the goal of influencing out-of-state conduct.99

In National Solid Wastes Management Ass’n v. Meyer, the Seventh Circuit invalidated a provision of Wisconsin’s waste disposal law under the extraterritoriality doctrine.100 This provision only permitted out-of-state shipments of certain waste to Wisconsin landfills if the communities shipping this waste established recycling programs meeting Wisconsin standards.101 The court relied heavily on the point that the out-of-state recycling programs the statute encouraged would necessarily reach some waste disposed of in third states.102 The Meyer court also bolstered its ruling by resurrecting the discarded prohibition on “direct” regulation of interstate commerce.103

In American Beverage Ass’n v. Snyder, the Sixth Circuit invalidated a requirement that beverages sold in Michigan bear a unique mark designed to discourage redemption of bottles and cans in Michigan when consumers purchase beverages and pay the

95. See id. at 925 (Murphy, J., concurring) (interpreting the statute’s import prohibition to apply to “bilateral contracts in which a Minnesota utility agrees to purchase power from a new large energy facility” in another state).


97. Id. at 1091 (citing Healy v. Beer Inst., 491 U.S. 324, 336–37 (1989)).

98. Corey, 730 F.3d at 1101 (stating its disagreement with the district court’s extraterritoriality ruling).

99. Id. at 1103. The court of appeals also upheld reporting requirements on out-of-state producers as a prerequisite to in-state sales. Id. at 1104.

100. 63 F.3d 652, 657–61 (7th Cir. 1995) (invalidating the Wisconsin law under Healy).

101. See id. at 654 (stating that the Wisconsin law prohibits disposal of eleven listed recyclable wastes unless the community generating the waste has a recycling program meeting Wisconsin’s requirements).

102. See id. at 655, 658, 661 (emphasizing the recycling program’s applicability to waste not sent to Wisconsin).

103. See id. at 660 (claiming that the circuits have consistently applied a “prohibition against direct regulation of interstate commerce”).
related deposits in a neighboring state. In response to claims that the statute would force beverage companies to change their out-of-state operations, the court found a violation of the extraterritoriality doctrine.

The same court, however, rejected a very similar argument by dairy processors that an Ohio labeling requirement would offend the extraterritorial doctrine because, as a practical matter, the requirement would force the manufacturers to change their labels for products shipped nationwide. And in National Electric Manufacturers Ass’n v. Sorrell, the Second Circuit upheld a statute requiring that light bulb manufacturers label light bulbs containing mercury as hazardous, rejecting an argument that its requirement would as a practical matter force the manufacturers to so label light bulbs sold in other states. Thus, the lower federal courts have applied the doctrine at times to invalidate environmental laws.

b. Internet Cases. In American Libraries Ass’n v. Pataki the U.S. District Court for the Southern District of New York struck down a law prohibiting use of the Internet to intentionally send

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104. 735 F.3d 362, 367–68, 376 (6th Cir. 2013) (describing the bill and concluding that it had an “impermissible extraterritorial effect”).

105. Id. at 368, 373–76. The opinion purporting to justify this conclusion shows even greater confusion than the average opinion in this realm. The court faults the defendant for not exploring “alternative measures.” Id. at 375. But the court does not claim that the Constitution requires it do so because the extraterritoriality doctrine does not have a least restrictive means test. It also emphasizes, for no apparent reason, the existence of civil and criminal penalties for violations. Id. at 376 (emphasizing that “[p]laintiff must comply with the statute now or face criminal sanctions” without explaining why that should matter). The court also attaches great significance to the statute’s requiring bottlers to “package a product unique to” the state and forbidding its sale elsewhere. Id. at 368, 376. But the statute did not require a specific Michigan product; it only required Michigan-specific labeling. Id. at 367 (describing the statute as requiring a mark unique to Michigan, which can only be used in Michigan and states with similar laws). It then said that Michigan is “forcing states to comply with its legislation in order to conduct business within its state.” Id. at 376. But the sanctions apply only to beverage companies and they, not the states, conduct business within Michigan. This seems to an attempt to capture the pressure on states exerted by the requirement that bottlers use the Michigan mark only in states with deposit laws similar to Michigan. Id. at 367, 376 (describing the law and then stating that “other states must react . . . to Michigan’s unique-mark requirement or . . . face legal consequences”). Two judges filed separate concurring opinions in this case, thereby suggesting some discomfort with the reasoning. See id. at 377–82 (Sutton & Rice, JJ., concurring).

106. Int’l Dairy Foods Ass’n v. Boggs, 622 F.3d 628, 647–48 (6th Cir. 2010) (rejecting an argument that an Ohio statute creating economic pressures to produce a nationwide label conforming to Ohio’s requirements offends the extraterritoriality doctrine).

107. 272 F.3d 104 (2d Cir. 2001); see also Cotto Waxo Co. v. Williams, 46 F.3d 790, 792–95 (8th Cir. 1995) (upholding a prohibition on the sale of petroleum-based sweeping compounds even though this prohibition reduces sales in neighboring states because Minnesota wholesalers and distributors stop purchasing the compounds).
pornography to minors.\textsuperscript{108} Because the Internet makes communications sent from other states readable in New York, users of the Internet in other states could violate the statute without intending to send communication into New York.\textsuperscript{109} For that reason, the court found a violation of the extraterritoriality doctrine.\textsuperscript{110} The extremely broad reasoning of \textit{Pataki} suggests that the dormant Commerce Clause forbids any state regulation of Internet communications.\textsuperscript{111} Courts adjudicating facial challenges brought by companies and associations with an interest in open communication have followed \textit{Pataki}'s reasoning and invalidated state laws protecting minors from pornography.\textsuperscript{112}

Courts facing the same argument under very similar statutes in the context of an actual conviction for violating an anti-pornography statute have generally rejected \textit{Pataki}'s reasoning, even in a case where the communication forming the basis for a criminal conviction did go out of state.\textsuperscript{113} Similarly, the Washington Supreme Court declined to follow \textit{Pataki} in a dormant Commerce Clause challenge to application of an anti-spam statute

\begin{footnotes}
\item [109] \textit{Id.} at 177 (finding that “[a]n Internet user may not intend” to make his message accessible to New Yorkers, but cannot “prevent New Yorkers from visiting a . . . Website” displaying the users' pornography).
\item [110] \textit{See id.} at 173–77 (finding that New York had “overreached” by regulating conduct outside its borders).
\item [111] \textit{See} Goldsmith & Sykes, \textit{supra} note 14, at 786–87 (pointing out that the court’s rationale would invalidate practically all state regulation applying to the Internet).
\item [112] \textit{See}, e.g., PSINet, Inc. v. Chapman, 362 F.3d 227, 229–30, 239–40 (4th Cir. 2004) (invalidating a Virginia statute extending a prohibition on sending minors pornography via the Internet under the extraterritoriality doctrine); Am. Booksellers Found. v. Dean, 342 F.3d 96, 99, 103–04 (2d Cir. 2003) (invalidating a Vermont statute extending a prohibition on sending pornography to minors to the Internet under the extraterritoriality doctrine).
\end{footnotes}
to an out-of-state firm sending spam to Washington residents.\textsuperscript{114} Often, the courts declining to apply \textit{Pataki} have applied \textit{Pike} balancing without engaging \textit{Pataki}'s broad extraterritoriality rationale.\textsuperscript{115} The Fifth Circuit rejected an application of \textit{Pataki}'s reasoning to state law prohibiting automakers from directly selling vehicles to consumers.\textsuperscript{116} It noted that \textit{Pataki}'s reasoning would “lead to absurd results”—allowing corporations to “circumvent otherwise constitutional state laws” by simply moving transactions to the Internet.\textsuperscript{117}

This tendency to uphold statutes’ application but to invalidate them in the abstract suggests that a concrete context makes the courts appreciate that extraterritorial law is essential to ordinary police power functions, like protecting minors from sexual predators and keeping spammers from destroying the utility of a vital communication technology. When confronted with the infinite varieties of possible extraterritorial spillovers in an abstract context, some courts, however, find constitutional violations.\textsuperscript{118}

c. \textit{Contradictions and Spillovers.} These cases show that the extraterritoriality doctrine produces very contradictory results in the lower courts. They also show that the cases invalidating statutes on extraterritoriality grounds often do so on the ground that the law may influence some transaction between a party outside the regulating state with a party in a third state. Other courts, however, uphold such laws. Parts IV & V will address the question of whether a justification exists for such a rule against third party transactions in the context of a more general analysis of extraterritoriality.

3. \textit{Scholarly Response to the Extraterritoriality Doctrine.} Commentators have doubted the extraterritoriality doctrine's


\textsuperscript{115} See, e.g., Hatch, 80 Cal. App. 4th at 193–97 (finding no burden on commerce from enforcing a California law barring seduction of minors through the Internet); Backlund, 672 N.W.2d at 436–38 (upholding a statute prohibiting luring minors over the Internet based on \textit{Pike} balancing without engaging the extraterritoriality rationale) (citing New York v. Ferber, 458 U.S. 747, 761–62 (1982)).

\textsuperscript{116} Ford Motor Co. v. Tex. Dep't of Transp., 264 F.3d 493, 498, 505 (5th Cir. 2001) (describing the Texas statute and then rejecting application of \textit{Pataki} to the case).

\textsuperscript{117} Id. at 505.

\textsuperscript{118} See Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 164, 167 (S.D.N.Y. 1997) (striking down an Internet regulation after noting the difficulty of restricting the effects of the statute given the uncertain boundaries of the Internet).
wisdom and even its existence. They doubt its existence not only because the Supreme Court has not employed it for two decades, but also because it does not fit the Supreme Court’s modern jurisprudence, which requires courts to uphold neutral legislation having extraterritorial effects as long as the burden on interstate commerce is not grossly disproportionate to the putative local benefits. Commentators also point out that the Court’s rejection of extraterritorial regulation’s legitimacy under the dormant Commerce Clause seems out of keeping with the Court’s abandonment of the territorial theory of personal jurisdiction articulated in *Pennoyer v. Neff*. Under *Pennoyer*, a court could only exercise personal jurisdiction over parties present in the state where the court sat. The Court considered state exercise of power over parties outside the state illegitimate. But the Court abandoned this theory in *International Shoe v. Washington* in favor of a theory of jurisdiction accepting extraterritorial applications of state adjudicative power to entities having “minimum contacts” with the state exercising jurisdiction.

Doubts about the extraterritorial doctrine’s wisdom stem from its economic irrationality, because it focuses on the location of regulatory effects rather than their magnitude. It certainly bears no relationship to the efficiency principle at the heart of a


120. See Denning, *supra* note 119, at 989 (noting that the Court last invoked the doctrine in 1989).

121. See *id.* at 996 (explaining that the extraterritorial doctrine grew out of an effort to distinguish direct from indirect regulation of commerce, and does not fit the modern emphasis on nondiscrimination).

122. 95 U.S. 714 (1877); see, e.g., Denning, *supra* note 119, at 985–86 (contrasting the death of territorial personal jurisdiction under *Pennoyer* with the brief revival of territorialism in 1980s dormant Commerce Clause cases).

123. See *Pennoyer*, 95 U.S. at 723 (stating that courts may only exercise jurisdiction over persons or property within their state).

124. Cf. *id.* (recognizing that the exercise of jurisdiction over property and persons within the state legitimately affects those outside of it).

125. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (holding that a court may exercise jurisdiction over defendants not present in the forum state if the defendant has minimum contacts with the forum state such that jurisdiction does not offend “fair play and substantial justice”).

126. See Goldsmith & Sykes, *supra* note 14, at 802 (noting that laws imposing out-of-state burdens can be efficient so that inquiry should focus on balancing); Regan, *supra* note 14, at 1866, 1874 (pointing out that extraterritoriality focuses on conduct’s location whilst the location of effects is irrelevant to *Pike* balancing).
doctrine that has sought to ensure free trade. More precisely, Jack Goldsmith and Alan Sykes have argued that in the presence of externalities it makes no economic sense to invalidate a law just because it has extraterritorial effects. Finally, a blanket prohibition on extraterritorial regulation clearly sweeps too broadly. The Court routinely upholds state laws that have extraterritorial effects. Indeed, this Article shows that in a world where we have a robust national market and numerous multistate firms, most government standards must have an interstate effect in order to function properly.

This concern about the doctrine’s potential breadth may explain why the Court’s extraterritorial pronouncements only prohibit regulation of commerce taking place “wholly” outside the jurisdiction of the regulating state. Unfortunately, no cases employing this rubric apply only to commerce taking place “wholly” outside of the regulating state. All of them address laws that apply to some activity within the regulating state.

The price affirmation statute at issue in *Healy*, for example, regulated the price of liquor sold in Connecticut, the regulating state. But by tying the price of liquor sold in Connecticut to the price sold in neighboring states, the Connecticut statute was likely to influence prices in those states. All sorts of valid state law, however, influence prices out of state. In most cases, the Court evaluates such effects under *Pike* balancing, not a per se rule against regulation of interstate commerce. Similarly, the antitakeover statute at issue in *Edgar* only applied to corporations having some connection to Illinois, if only through a substantial number of resident shareholders. Thus, the statute regulated takeover attempts having effects both inside and outside the state,

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127. *See Goldsmith & Sykes, supra* note 14, at 795 (explaining that the dormant Commerce Clause’s goal of securing free trade is grounded in economic efficiency).
128. *See id.* at 798–801 (explaining why location’s effects are irrelevant to a law’s efficiency).
129. *See generally id.* at 795 (discussing numerous state laws that generate out-of-state costs and noting that the dormant Commerce Clause obviously does not strike down all of these laws).
130. *See Healy v. Beer Inst.,* 491 U.S. 324, 326 (1989) (noting that the statute before it requires an affirmation that the Connecticut price was no higher than the prices charged in neighboring states); *see also Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.,* 476 U.S. 573, 583 (1986) (noting that the statute at issue was directed at liquor sales within New York, the enacting state).
132. *See id.* at 345 (Scalia, J., concurring) (noting that innumerable valid state laws affect pricing decisions in other states); Regan, *supra* note 14, at 1878 (stating that a prohibition on state laws having substantial interstate effect would invalidate too much legislation).
just like the antitakeover statute that the Court upheld in *CTS Corp*. No wonder that the Court’s application of the extraterritoriality doctrine in *Edgar* could only command a plurality’s assent, with a majority coalescing on the more modest conclusion that the burdens on interstate commerce outweighed the seemingly paltry local benefits.\(^{134}\) Because the Court sometimes applies the extraterritoriality doctrine to regulations having “practical effect[s]” outside its jurisdiction and sometimes applies its antidiscrimination rules instead, the doctrine performs the role of an unpredictable wildcard.\(^ {135}\) It can create, in effect, a rule of per se invalidity for nondiscriminatory rules having an effect outside the state’s borders, i.e., for just about any state rule that addresses, as most state laws must these days, interstate commerce.\(^ {136}\) It has this effect rarely, only because the Court rarely uses it.

Commentators doubt whether the mere existence of an effect outside the borders of an enacting state, that is, a broad extraterritoriality principle, can explain the extraterritorial cases. For example, in the price affirmation cases, the Court expressed anxiety about the proliferation of price affirmation statutes causing conflicts among state laws.\(^ {137}\) Differences among state laws, however, are commonplace and routinely impose burdens on businesses engaged in interstate commerce that vary by state.\(^ {138}\) Normally, the Court evaluates the constitutionality of burdens under *Pike*, rather than simply considering the existence of actual or potential conflict dispositive by itself.\(^ {139}\) Nevertheless, the possibility remains that the extraterritoriality doctrine reflects some intuition that an unspecified subgroup of differing state laws poses an especially grave risk to interstate commerce flowing from conflicts.\(^ {140}\)

\(^{134}\) Compare *id.* at 641–43 (plurality opinion) (finding the Act invalid because it affects commerce “wholly outside” the regulating state), *with id.* at 643 (majority opinion) (holding that the Act flunks the *Pike* balancing test).

\(^{135}\) See *Healy*, 491 U.S. at 336 (affirming that the Court evaluates extraterritorial reach through an analysis of “practical effect[s]”); *Florey*, *supra* note 10, at 1060 (describing the extraterritoriality doctrine’s scope as “notoriously unclear”).

\(^{136}\) See *Am. Beverage Ass’n v. Snyder*, 735 F.3d 362, 379 (6th Cir. 2013) (Sutton, J., concurring) (stating that he cannot tell what divides laws that violate the extraterritorial doctrine from those that do not because state laws so often influence conduct outside of the state).

\(^{137}\) See *Felmly*, *supra* note 14, at 486–87.

\(^{138}\) See *Farber & Hudec*, *supra* note 18, at 1403 (characterizing the lack of uniformity in regulation as “unavoidable” and burdensome).

\(^{139}\) See *Edgar*, 457 U.S. at 640–43 (invalidating statute under *Pike* balancing test).

\(^{140}\) Cf. *Healy*, 491 U.S. at 334 n.10 (noting that “39 States . . . had adopted affirmation laws” when the Court decided *Brown-Forman*).
IV. MUST STATES DISCRIMINATE AGAINST THEIR OWN PRODUCERS?

We have seen that states and other polities generally do not discriminate against their own citizens. Instead, they frequently apply the standards they impose on their own citizens to foreign producers who export goods into the standard-imposing jurisdiction.\textsuperscript{141} This section asks whether this practice is justified.

A. Some Preliminary Analysis

The insight that laws regulating only domestic producers discriminate against them in the presence of trade between states leads to the following typology to distinguish discriminatory from nondiscriminatory regulation:

<table>
<thead>
<tr>
<th>Domestic Regulation</th>
<th>Extraterritorial Regulation</th>
<th>Effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>X</td>
<td></td>
<td>Discriminates Against Domestic Producers</td>
</tr>
<tr>
<td></td>
<td>X</td>
<td>Discriminates Against Foreign Producers</td>
</tr>
<tr>
<td>X</td>
<td>X</td>
<td>Evenhanded Regulation</td>
</tr>
</tbody>
</table>

This typology shows that two types of discriminatory regulation can arise solely based on the presence or absence of extraterritorial regulation. Laws that regulate domestic producers, but not foreign producers, discriminate against domestic producers. Conversely, laws that regulate foreign producers, but not domestic producers, discriminate against foreign producers.

This observation, simple as it is, leads to a significant conclusion about the relationship between the extraterritoriality rule and the antidiscrimination rule in dormant Commerce Clause cases. Generally, in cases where the stated extraterritoriality rule really does apply, there is no need for it. That is, if a law regulates only outside the jurisdiction, while not regulating domestic

\textsuperscript{141} Although I frame this discussion in terms of producer regulation, the same principles apply to extraterritorial regulation of others engaged in commerce, such as distributors and transporters. See, e.g., id. at 328 (noting that the price affirmation statute before the court applied to shippers of liquor).
competitors, it discriminates against foreign producers.\textsuperscript{142} Hence, regulation literally applying “wholly” outside the jurisdiction of the regulator often discriminates against foreign producers in violation of the antidiscrimination rule.\textsuperscript{143} This coincidence of the antidiscrimination rule and the literal language of the extraterritoriality rule helps explain why, notwithstanding the framing of the rule as one against regulating activities wholly outside of the regulating state’s jurisdiction, the Court never applies it to that situation.\textsuperscript{144}

The purely domestic law suggested by Row II in the above table proves somewhat hard to come by. States rarely wish to discriminate against their own producers. And even when states seek to write purely domestic law, that law will almost always apply to out-of-state firms. So, for example, Oregon has a state land use statute that only applies to the management of land within the state.\textsuperscript{145} But its restrictions on zoning apply to any out-of-state firm undertaking building in Oregon. And a law designed to operate solely within a state can change operations out of state. The Sixth Circuit labeling cases in Part III illustrate this. Both of those cases involve a requirement that products sold within the regulating state bear a particular label.\textsuperscript{146} But this apparently domestic requirement in effect requires out-of-state producers to change their practices if they ship goods to the regulating state.

This insight helps explain why the jurisprudence of extraterritorial legislation under the dormant Commerce Clause focuses on the evenhanded regulation found in Row III. To be sure, legislators can write a law that regulates both inside and outside

\textsuperscript{142} Cf. id. at 340–41 (holding that Connecticut’s price affirmation statute discriminates against interstate commerce because it limits the pricing of interstate brewers and beer shippers, but does not apply to firms engaged solely in commerce within Connecticut); Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 670 (2003) (holding that a statute requiring out-of-state pharmaceutical manufacturers to pay rebates to in-state pharmacies and customers passes muster because it does not impose a disparate burden on any competitors).

\textsuperscript{143} Cf. Rosen, supra note 29, at 1140 (arguing that a rule against one state regulating activities in a neighboring state having no effect in the regulating state does little work, because there is a political consensus rejecting such regulation).


the legislators’ state but imposes more burdensome rules outside the state than within it. But the antidiscrimination rule covers that case as well. So, if we need any prohibition on extraterritorial regulation, it must stem from a need to police evenhanded regulation that does not discriminate against interstate commerce or out-of-state business.

Level playing field, welfare, and synergistic laws can all be evenhanded or discriminatory. The remainder of this part will focus mostly on the case of primary interest— evenhanded synergistic law. The welfare and level playing field law cases will prove useful in exploring the outer limits of extraterritorial legitimacy in Part V.

B. State Sovereignty

The literature on horizontal federalism and Supreme Court extraterritoriality cases suggest that concerns about state sovereignty play a role in constructing constitutional limits on a state’s extraterritorial laws. Accordingly, it is worth asking whether concerns for state sovereignty support limits on synergistic regulation.

Before doing that, it will prove helpful to define state sovereignty. Although no consensus exists on how to define sovereignty generally, I define it for purposes of this Article’s federalism analysis as a condition that allows states to choose which laws to enact, and enforce or refrain from enacting based upon their own assessment of what is needed to advance their citizens’ welfare.

State sovereignty in this sense does not necessarily imply complete state control over everything done in the state. In a democratic capitalist system, states do not control everything their citizens do. And much of what citizens do will respond to incentives from beyond state boundaries. Thus, if a state’s citizens crowd the state’s roads on Thanksgiving due to the attraction of visiting out-of-state relatives, start a new business to serve out-of-state demand, or shut down a business because economic conditions

147. See, e.g., Healy, 491 U.S. at 335–36 (noting the constitutional concerns of “autonomy of the . . . [s]tate” and “national economic union”).
outside the state have declined so that a decent market no longer exists for that business’s product, no violation of state sovereignty occurs, even though these examples imply that forces outside the state powerfully influence the citizens’ conduct within it.

1. The Regulating State’s Sovereignty. It would undermine the regulating state’s sovereignty in any realistic sense to say that producers making products for the importing state’s market need not comply with that state’s laws.149 Exempting importers would suggest that a state that sets a standard cannot enforce it within the enacting state if doing so has an effect outside the state, thereby greatly limiting enforcement of standards within the enacting state.150

A prohibition on nondiscriminatory state law could, as we have seen, render many state laws incapable of meeting their objectives.151 If a state must discriminate against its own producers, the out-of-state producers not required to make products in a safe and environmentally sound manner could take over the market, making many uses of state sovereignty to achieve legitimate police power objectives a nullity. Even when a state’s citizens, acting through their elected officials, conclude that they wish to shoulder the costs of more expensive goods in order to address great danger, their elected officials cannot adequately address this danger in a world where states must discriminate against their own producers.152 Requiring discrimination against in-state producers would fundamentally undermine state sovereignty by depriving states of the right to determine the levels of health and safety they wish to achieve.

The crippling effect of demanding discrimination against in-state producers on state sovereignty would go beyond undermining enacted state laws. The demand for discrimination against in-state interests would prevent the enactment of many laws that states need to protect their citizens’ vital interests. In the world we live in, corporations already spend a lot of money dissuading state legislatures from burdening them with standards


150. See, e.g., Cotto Waxo Co. v. Williams, 46 F.3d 790, 794 (8th Cir. 1995); cf. Gerken & Holtzblatt, supra note 15, at 78 (discussing the parallel problem of state’s inability to enforce laws against people passing through its state under the old territorial theory of personal jurisdiction).

151. See Goldsmith & Sykes, supra note 14, at 786–87, 794 (pointing out that the court’s rationale would invalidate practically all state regulation applying to the Internet).

152. See generally id. at 796 (noting that citizens’ willingness to bear costs to alleviate various harms can vary between jurisdictions).
that would serve citizens’ interests even after consumers’ costs are taken into account. If corporations’ lobbyists can plausibly argue, as well, that any law passed would prove futile, damaging domestic business without materially advancing the safety, health, or environmental objective motivating a proposed law, then many states may simply give up the use of the police power to advance their citizens’ welfare in contexts where interstate commerce exists (almost all of the time). Thus, a demand for discrimination would substantially diminish state sovereignty.

2. Sovereignty of States with Producers Exporting to the Regulating State. It might seem that extraterritorial regulation would threaten the sovereignty of non-regulating states in which an extraterritorial provision had influence by threatening a supposed state monopoly on the power to coerce its citizens. But laws having the structure focused on in this Article may not coerce parties outside the regulating state’s borders at all. Foreign producers, after all, typically have a choice when the effort to influence conduct arises through a limitation on importation of goods or services into the standard setting state. Producers may wholly avoid the standards at issue if they cease exporting into the standard setting jurisdiction.

The formal structure of most of this synergistic law avoids coercion of foreign producers. Recall that this Article defines extraterritoriality very broadly, because the location of directly regulated parties does not determine whether a regulation has an impact beyond a polity’s borders. But these regulations typically apply to those importing or selling goods and services within the regulating state. These obligations only influence producers in


154. See Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1101 (9th Cir. 2013) (stating that out-of-state firms may “elect” to respond to the incentives in California’s clean fuel standard “if they wish to gain market share in California” but need not do so); Regan, supra note 14, at 1903 (pointing out that the distiller subject to New York’s price affirmation statute in Brown-Forman could avoid New York’s requirements by not selling liquor in New York).

155. See, e.g., Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1091 (E.D. Cal. 2011), rev’d on other grounds, 930 F.3d 1070 (9th Cir. 2013); Corey, 730 F.3d at 1101–06 (suggesting that California’s low carbon fuel standard only indirectly regulates out-of-state fuel producers).

156. See Corey, 730 F.3d at 1101–06. (noting that California’s low carbon fuel standard regulates only California fuel providers); cf. id. at 1080 n.2 (noting that California’s low carbon fuel standard applies to fuel blenders and distributors, but that a fuel producer may assume a compliance obligation if selling to a regulated party); Goldstene, 843 F. Supp. 2d
neighboring states to the extent they want to sell goods or services in the regulating states.

Accordingly, evenhanded synergistic laws express the principle that those who wish to benefit from selling products or services to citizens of a state must comply with that state’s laws. This principle appears unobjectionable. In any case, state sovereignty cannot be understood coherently in a capitalist democracy as a condition that precludes all out-of-state influence on private actors’ conduct. Out-of-state demands from either out-of-state customers or the laws in the customers’ states routinely have an influence on private actors’ conduct.

Nor does nondiscriminatory regulation seriously threaten the sovereignty of an affected non-regulating state by forcing that state to regulate. Take the example of state food regulation. Suppose that a state established a safety standard for meat produced within its borders and applied this standard to meat imported into the state. The neighboring state, however, prefers cheaper meat and does not wish to regulate meat. Nothing in this regulation requires the neighboring state to regulate meat production within the state for state citizens. For that matter, if the standard setting state enforces its standard by inspecting imported meat, the non-regulating state does not need to regulate meat for export either.

Some standards, however, cannot be enforced at the border. If the regulating state’s inspectors cannot determine food safety through inspection of the food itself, polities apply standards to food production, including food produced outside its borders but sent into the regulated state. In this situation, the state still retains the ability to leave food produced for the local market unregulated, thereby retaining the ability to choose the level of health and safety it wants to provide for its citizens. An exporting state can also choose to leave the food produced for the standard setting state’s market unregulated. But if the regulating state requires state inspection of plants as a condition of import, its producers might find it impossible to meet the regulating state’s

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at 1091 (pointing out the caps on carbon in the fuel only apply to California fuel blenders and the producers who contract with them).

157. Rosen, supra note 149, at 883 (arguing that extraterritoriality is fair because without it, state laws could be easily skirted).

158. Gerken & Holtzblatt, supra note 15, at 80 (“Almost any state activity causes spillovers.”).

standards without state regulation. The state then faces a choice between enacting a regulation to allow producers to prove compliance and leaving them to lose sales in the regulating state’s market because they cannot. The cases allowing states to demand that neighboring states inspect cattle before they can enter the regulating state suggest that the Constitution does not forbid even this form of regulation, which does put some pressures on states to adopt policies they might not otherwise adopt.

Although I have focused on a food example, this possibility that a regulation’s enforcement might require inspection or monitoring abroad can be generalized. It can occur outside the context of food regulation and indeed outside the context of state regulation.

International trade tribunals concerned about domestic laws pressuring one country to enforce another’s standards briefly embraced a distinction between regulating a product and regulating a process. The World Trade Organization (WTO), however, abandoned the idea of a categorical rule against process regulation when it realized that “conditioning access to [an importer’s] domestic market on [compliance with the importer’s policies]” is a common feature of domestic regulation. In its place, the WTO articulated a standard not wholly unlike the Pike balancing test, requiring some proportionality between the


161. The price affirmation cases may appear to state a contrary rule, but they do not. The Court in Brown-Forman Distillers v. New York Liquor Authority stated that requiring a “regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce.” 476 U.S. 573, 582 (1986) (emphasis added). It said this, however, in the context of evaluating the prospective effect of New York’s prohibition on distillers selling liquor in other states at lower prices than it had promised New York consumers. Id. at 579–80, 582. And this statement has to be read this narrowly in order to avoid contradicting the cattle cases. The Court in Healy v. Beer Institute restated this dictum but did not emphasize it in its analysis. 491 U.S. 324, 337 (1989) (citing Brown-Forman, 476 U.S. at 582). Furthermore, in a footnote appended to this restatement, the Healy Court characterized its restatement of Brown-Forman’s regulatory approval statement as an application of the rule against discrimination. Id. at 337 n.14.


measure’s scope and the targeted ill and a nexus between the process restriction and the targeted problem.\textsuperscript{164}

Indeed, no distinction of constitutional significance differentiates regulating a process from regulating a product.\textsuperscript{165} Suppose that a state demands that food be free of certain bacteria and enforces this prohibition by having its own inspectors test imported food.\textsuperscript{166} This appears like a regulation of a product, but the producer will have to employ processes that avoid contamination by the targeted bacteria in order to comply. So, this product regulation regulates a process as well. The fact that one might not be able to test the bacteria, and therefore might require a food processor to certify that it employed practices known to prevent contamination, has no constitutional significance. Both regulations have the same extraterritorial effect—altering production processes of those who wish to sell goods in the regulating state.

States may regulate in a nondiscriminatory fashion because they have a legitimate interest in advancing their citizens’ welfare. This police power does not depend on the mechanism through which a production process might deliver a safety, health, or environmental hazard.\textsuperscript{167}

Thus, most synergistic law does not interfere with state sovereignty because it only affects private producers. Some of it does create pressures on states to take actions they might not otherwise choose. But synergistic law does not require such actions, and states always face external and internal pressures to help producers access foreign markets, whether that pressure comes from other states’ actions or just general competition in markets.\textsuperscript{168}

\textsuperscript{164} See \textit{Shrimp/Turtle I}, supra note 163, ¶¶ 133, 141.

\textsuperscript{165} See \textit{United States v. Darby}, 312 U.S. 100, 116 (1941) (stating that a distinction between regulating a process and regulating a product to limit the Commerce Clause’s scope “has long since been abandoned”); \textit{Baldwin v. G.A.F. Seelig, Inc.}, 294 U.S. 511, 524 (1935) (recognizing that New York could constitutionally require out-of-state milk producers to meet its food safety requirements).

\textsuperscript{166} I do not mean to posit a discriminatory regulation here, so the reader should assume this inspection would apply to domestic products as well. One should also assume that the other strictures on imports described in this paragraph have a domestic parallel.

\textsuperscript{167} \textit{Cf. Wickard v. Filburn}, 317 U.S. 111, 124–25 (1942) (describing how the question of whether federal regulation targets “production,” “consumption,” or “marketing” is [no longer] material for purposes of deciding the question of federal power).

\textsuperscript{168} See Peter D. Enrich, \textit{Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business}, 110 \textit{Harv. L. Rev.} 377, 380 (1996) (explaining the pressures states feel to offer subsidies to businesses, even when they do not serve the public’s interest). Even if one considered the pressure from a state statute requiring other states to regulate in some way as a condition of export an interference with state sovereignty under my definition, it would constitute a relatively minor interference.
3. Sovereignty of Third Party States. We have seen that some of the lower court cases reflect anxiety about the problem of a state law designed to influence goods coming into that state having an effect on a third state—i.e., a state where the imported goods are not produced or regulated. These sorts of ripple effects have no effect on state sovereignty; they simply represent the inevitable spillovers of a common market in goods and services. The basic point is well made in the horizontal federalism literature: Spillover effects are the norm, not some aberration.169

To see this, imagine that Louisiana regulates its own petroleum refineries to reduce hazardous air emissions, thereby raising its refiners’ production costs and forcing their owners to raise the cost of gasoline. Sensing an opportunity, Texas refiners ramp up production and increase their gasoline sales to third states. The Louisiana law thereby causes increased shipment of Texas petroleum to third states. In other words, the Louisiana law has an extraterritorial impact on transactions that do not involve Louisiana at all.

These increased sales do not interfere with the sovereignty of the states purchasing more petroleum from Texas. Nor would the Louisiana law do so if it had a detrimental effect on third states. For example, Texas refiners might raise their prices, knowing that the price increases can stick in light of Louisiana producers’ increased production costs. This still does not limit the third state’s sovereignty. It remains free to impose whatever constitutional regulation it wants on petroleum sales. The point is generalizable. The production of spillovers affecting third party states is an inevitable feature of any state regulation, whether extraterritorial or not.170 And spillovers of similar concern can arise from voluntary producer actions not subject to regulation. None of these things by themselves impede state sovereignty.

C. Balkanization

This analysis showing that horizontal spillover effects do not defeat state sovereignty has implications for another theme of the extraterritorial case law—fear of Balkanization.171 The Supreme

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169. See, e.g., Gerken & Holtzblatt, supra note 15, at 78–80 (describing spillovers as an “absolutely routine” byproduct of state economic regulation).

170. Id. at 79–80.

Court cases finding a violation of the extraterritoriality doctrine find a risk that extraterritorial law will create inconsistent legislation. The judges mentioning these concerns, however, generally fail to identify an actual conflict between state laws in the cases before them or to explain why extraterritorial legislation would systematically create a greater risk of such conflicts than purely domestic regulation or of regulations of interstate commerce that the courts have upheld.

In a federal system, state laws necessarily create an array of varying requirements to the extent that they address interstate commerce at all, even if those laws appear purely domestic. Balkanization in this sense is an inevitable byproduct of tolerating multiple jurisdictions through a federal system that also allows for interstate commerce. So, for example, California requires its producers to label carcinogens in its products. Most other states do not. Even if the California law only applied to California producers, those producers would face “inconsistent” laws. They would have to label their products sold in California, but need not label their products shipped out-of-state. This does complicate producers’ lives, but it does not create an actual conflict between the laws precluding compliance. California producers can elect to label goods shipped out-of-state for carcinogens, even if the other states’ laws do not require this. Or, they can undergo the extra trouble of labeling their California goods and not labeling their goods shipped out-of-state. The only way to avoid this sort of Balkanization is to end state sovereignty.

172. See Felmly, supra note 14, at 486–89 (finding concerns about conflicting state laws central to the Court’s extraterritorial doctrine cases); see, e.g., Healy v. Beer Inst., 491 U.S. 324, 336–37 (1989) (claiming that the dormant Commerce Clause “protects against inconsistent legislation” arising from extraterritorial regulation). See generally Gerken & Holtzblatt, supra note 15, at 70 (linking concern for Balkanization to a worry that conflicting state laws will undermine national markets).

173. See, e.g., Healy, 491 U.S. at 337–39 (showing that brewers could comply with all the various relevant state laws simultaneously); cf. Int’l Dairy Foods Ass’n v. Boggs, 622 F.3d 628, 647 (6th Cir. 2010) (rejecting an extraterritoriality argument because out-of-state milk processors’ compliance with an Ohio labeling statute would not violate other states’ laws); Ruttinger, supra note 58, at 563 (proposing a rule against inconsistent legal obligations as a useful substitute for the vague extraterritoriality doctrine).

174. See Goldsmith & Sykes, supra note 14, at 806 (“There is nothing unusual about nonuniform regulations in our federal system.”).

175. See CAL. HEALTH & SAFETY CODE § 25249.6 (West 2012).

176. See Boggs, 622 F.3d at 647 (discussing a dairy association argument that because of the cost of labeling milk products, Ohio labeling requirements in effect control labeling nationwide).

The point is that the possibility of differing requirements is ever present because of spillover effects.\textsuperscript{178} It does not follow that a conflict not present in purely domestic regulation will rear its ugly head when the regulation reaches imported goods. California’s statute, in fact, does reach goods imported from other jurisdictions.\textsuperscript{179} This means that manufacturers in other states face the same labeling choices that California manufacturers do, but in reverse. They must label goods including carcinogens shipped to California but need not do so if the goods are consumed locally or shipped to other states.

The point is generalizable. Varying laws face any company providing products in multiple sovereign jurisdictions. Actual conflicts arise fairly seldom, but are possible. There is no reason to think that the law’s geographic locus greatly augments the amount of actual conflict.

The cases also express a more generalized Balkanization concern—that extraterritorial legislation may exacerbate conflicts among states, perhaps even destroying the union. This concern, however, arises under almost any state law, given the inevitability of interstate effects. The courts do not appear to have the capacity to distinguish between laws that threaten to destroy the union from the hundreds of laws that cause some friction with other states or to handle such conflicts in a politically satisfactory way if they arise.\textsuperscript{180} We should have learned that from the \textit{Dred Scott} decision,\textsuperscript{181} which by some accounts helped trigger the civil war by clumsily addressing fugitive slave laws’ spillover effects.\textsuperscript{182} Outside the context of discriminatory regulation of interstate commerce, we should usually depend on political processes, not courts, to identify and mediate interstate frictions sufficiently serious to potentially cause disunion.\textsuperscript{183}

\begin{footnotesize}
\begin{enumerate}
\item[178.] See, e.g., Cotto Waxo Co. v. Williams, 46 F.3d 790, 792 (8th Cir. 1995) (noting that a law prohibiting the sale of petroleum-based sweeping compounds in Minnesota caused Minnesota distributors and wholesalers to stop purchasing the products, thereby reducing sales in neighboring states).
\item[179.] See \textsc{Cal. Health \\& Safety Code § 25249.6} (West 2012).
\item[180.] Cf. Gerken \& Holzblatt, supra note 16, at 85 (expressing the view that run-of-the-mill spillovers, unlike those creating the Civil War, are unlikely to split the union).
\item[181.] See \textit{Dred Scott v. Sandford}, 60 U.S. 393, 406–07, 452 (1856) (invalidating compromise legislation on slavery and refusing to allow a former slave to bring a case to resist application of the fugitive slave laws).
\item[182.] See Roberta Alexander, \textit{Dred Scott: The Decision That Sparked a Civil War}, 34 \textsc{N. Ky. L. Rev.} 643, 649 (2007) (explaining why many historians have concluded that the \textit{Dred Scott} decision helped spark the civil war).
\item[183.] Cf. Gerken \& Holzblatt, supra note 16, at 105 (discussing some of the advantages of political compromises in addressing interstate conflict).
\end{enumerate}
\end{footnotesize}
The reasoning I have offered in defense of nondiscriminatory synergistic state law, however, faces a difficulty. State laws regulating goods from out-of-state appear protectionist.

D. Protectionism

It is one thing to protect in-state businesses from advantages that competitors enjoy because of more efficient operations, higher quality products, or other attributes that make their products superior. It is quite another to protect them from disadvantages that states impose on their own producers through regulation.

This explains why the Supreme Court has accepted compensatory taxation, where a state levies a tax on imports to compensate for a local tax that its own businesses must pay. As Donald Reagan explains, “this merely compensatory . . . purpose to avoid disfavoring local retailers . . . is not

184. See Regan, supra note 10, at 1246; see, e.g., Nat’l Geographic Soc’y v. Cal. Bd. of Equalization, 430 U.S. 551, 552–53 (1977) (upholding a use tax on National Geographic’s California offices to compensate for uncollected sales taxes for items shipped from Washington to California residents); Alaska v. Arctic Maid, 366 U.S. 199, 204 (1961) (upholding a tax on freezer ships off the Alaska coast that process fish, which compensates for tax levied on local canneries); Henneford v. Silas Mason Co., 300 U.S. 577, 581, 583–84 (1937) (upholding a use tax’s application to imports as compensating for uncollected sales tax on goods entering from out of state); Gregg Dyeing Co. v. Query, 286 U.S. 472, 477 (1932) (upholding a tax on imported petroleum products that compensates for a state licensing tax imposed on dealers of petroleum products sold within the state); Gen. Am. Tank Car Corp. v. Day, 270 U.S. 367, 372, 374–75 (1926) (upholding a tax on railroad “rolling stock” to compensate for exemption from local parish taxes); Hinson v. Lott, 75 U.S. 148, 153 (1868) (upholding a tax on liquor imported into Alabama equal to the tax imposed on liquor distilled within Alabama); cf. Fulton Corp. v. Faulkner, 516 U.S. 325, 331, 335 (1996) (holding that a tax on the fair market value of stock held by North Carolina stockholders in out-of-state corporations did not compensate for the burden of corporate income tax on North Carolina corporations); Associated Indus. of Mo. v. Lohman, 511 U.S. 641, 643 (1994) (striking down a tax on imported goods because it was higher than some of the local sales taxes it compensated for); Or. Waste Sys., Inc. v. Dep’t of Envtl. Quality of Or., 511 U.S. 93, 100, 108 (1994) (invalidating a surcharge on waste imported from outside Oregon, when no parallel charge was levied on in-state waste producers); Tyler Pipe Indus., Inc. v. Wash. Dep’t of Revenue, 483 U.S. 232, 240 (1987) (striking down a use tax because of a failure to provide an exemption for production already subject to state sales tax); Armaco, Inc. v. Hardesty, 467 U.S. 638, 643 (1984) (striking down a tax on wholesalers designed to compensate for a West Virginia tax on its manufacturers); Maryland v. Louisiana, 451 U.S. 725, 759 (1981) (striking down a tax on imported natural gas designed to compensate for a state tax on natural gas extraction within the state); Ernest J. Brown, The Open Economy: Justice Frankfurter and the Position of the Judiciary, 67 YALE L.J. 219, 2334–36 (1957) (discussing the compensatory tax cases); Waler Hellerstein, Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination, 39 TAX L. 405, 406 (1986) (noting examples of when discriminatory taxes on interstate commerce were upheld by claiming to be compensatory); Reid S. Okimoto, Close but No Cigar: Is a Use Tax Valid in a Gross Receipts Tax State Under the Supreme Court’s Compensating Tax Doctrine?, 62 TAX L. 1113 (2009) (explaining that a court may examine other sections of a state’s tax code in order to find a tax on interstate commerce compensatory).
objectionable in the way that protectionism is objectionable.”\textsuperscript{185} As Walter Hellerstein has explained, compensatory state taxation arose precisely because of strictures prohibiting states from taxing sales occurring outside their borders.\textsuperscript{186} States employ compensatory taxation to avoid the loss of revenue and business that might occur if sales taxes caused local merchants to purchase more goods from out of state.\textsuperscript{187} Commentators have explained that a carbon tax on imports that applies equally to domestic goods should be accepted as a compensatory tax.\textsuperscript{188} An evenhanded regulation that applies to imported goods likewise compensates for burdens imposed on domestic producers.

By contrast, cases where the Court finds impermissible extraterritoriality address statutes that seem merely compensatory but go beyond securing compensation to take away all preexisting competitive advantages.\textsuperscript{189} So, for example, the statute at issue in Baldwin appears compensatory, since it tried to remove the disability created by minimum payments to dairy farmers by forbidding the sale of milk imported from other states at prices less than those paid to New York dairy farmers.\textsuperscript{190} But the statute does more than compensate for the price supports paid to New York dairy farmers; it prohibits states able to produce cheaper milk from competing on the basis of price at all.\textsuperscript{191} Thus, these cases do not conflict with the principle that states may create a level playing field for their own producers when they choose to regulate.

Notice too, that Baldwin does not involve synergistic law protecting public health and welfare, but rather level playing field law concerned solely with maintaining the competitive position of local producers.\textsuperscript{192} Reflection suggests that level playing field cases may face unique challenges under the Pike balancing test because

\begin{itemize}
  \item \textsuperscript{185} Regan, supra note 10, at 1246.
  \item \textsuperscript{186} See Hellerstein, supra note 184, at 406–07 (explaining that prohibitions on taxing outside the jurisdiction create a “gap” in state sales taxes).
  \item \textsuperscript{187} Id. at 407.
  \item \textsuperscript{189} See, e.g., Brown-Forman Distillers Corp. v. N.Y. Liquor Auth., 476 U.S. 573, 580 (1986) (suggesting that New York's price affirmation statute forces producers in other states to surrender all competitive advantages).
  \item \textsuperscript{190} See Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 519 (1935) (describing the requirement to pay out-of-state producers the same price as paid in-state producers as “keep[ing] the system unimpaired by competition from afar”).
  \item \textsuperscript{191} Regan, supra note 10, at 1247–48.
  \item \textsuperscript{192} Id. at 1248.
\end{itemize}
they may appear protectionist. Recall that Part II explained that level playing field law regulates extraterritorially in order to compensate for burdens imposed on domestic producers, even though the extraterritorial regulation produces no general benefit to the health and welfare of the regulating state’s citizens. An absence of a health or welfare benefit for the regulating state’s citizens might mean that any burdens imposed out of state grossly outweighed the putative local benefit, since there is no benefit to the general welfare. Accordingly, level playing field law might flunk the Pike test. This may seem like a difficult prediction to make, as the test’s wording suggests that the outcomes it produces depend on a fact-specific cost-benefit analysis. Yet, in practice, as Pike itself illustrates, the analysis treats protectionist purposes as basically valueless, no matter how great the protectionist benefit’s dollar value. Since a level playing field goal is difficult to distinguish from a protectionist goal in the absence of some local health and safety purpose, pure level playing field law faces a potential challenge under Pike.

The compensatory tax reasoning, however, calls into question the idea that level playing field law should flunk the Pike balancing test, since it undercuts the notion that creation of a level playing field is protectionist. In any case, synergistic law has a greater claim to legitimacy than level playing field law because it not only levels the playing field, but also protects general welfare. Synergistic law should not be seen as merely protectionist, because

193. Id. at 1210–11.
194. See Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970) (describing the test as hinging on the relationship between “the burden imposed on commerce” and “the putative local benefits”).
195. See id. at 140 (stating that the law at issue in Pike caused a $700,000 loss to the Bruce Church, and that avoiding future losses would require a capital expenditure of $200,000); Ferrey, supra note 62, at 15 (noting that the Pike Court did not think the purpose of protecting the reputation of local cantaloupe growers weighty enough to justify any burden on commerce). See generally Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 443 (1978) (noting the Court’s reluctance to invalidate state safety legislation).
197. A full treatment of whether level playing field law is protectionist would require another article. A substantial literature in the international trade context cites protectionism as a major concern with allowing level playing field concepts too broad a role in international trade law. See, e.g., id. at 164 (critiquing the level playing field concept and expressing concerns about it serving as disguised protectionism). This literature does not, so far as I know, define protectionism or address Regan’s distinction between protectionism and compensation for burdens a polity imposes on its own firms head on. Cf. id. at 167–68 (seeking to undercut support for level playing field concepts by pointing out that there are legitimate reasons for disparate regulatory standards among countries).
it is essential to preserving the benefits that purely local regulation could realize in an autarky.

E. Democracy Problems

One might ask whether the problem of political representation might justify constitutional norms against extraterritorial regulation. The Court has invoked such concerns in justifying its dormant Commerce Clause jurisprudence.198 The state may not consider the out-of-state producer’s interests in crafting regulations affecting interstate commerce.199 The out-of-state producer has no vote within the regulating state, so one might argue that the regulating state’s officials have no reason to consider the economic impact of its regulations on out-of-state producers or its customers.200 This concern may help justify policing of discriminatory regulation even though the Constitution does not spell out such a prohibition.

This political representation concern, however, does not necessarily justify application of the extraterritoriality doctrine to evenhanded laws. The concerns of an out-of-state producer providing goods or services to customers within the regulating state will likely play a role in the regulating state’s legislative process when it considers evenhanded regulation. When the law affecting the foreign producer also impacts domestic competition, the domestic producers have an interest in avoiding excessive economic burdens that makes them representative of out-of-state interests. Also, in this situation the foreign producer’s customers, who might experience a price increase because of the regulation, do have a vote within the regulating state. So, the state imposing evenhanded regulation has an interest in considering its regulations’ economic impact, even if that impact falls, in part, on out-of-state producers.201

198. See Goldsmith & Sykes, supra note 14, at 795 (describing protection of out-of-state actors lacking a voice in state legislative processes as “[a] secondary justification for the dormant Commerce Clause”).

199. See S.C. State Highway Dep’t v. Barnwell Bros., Inc., 303 U.S. 177, 185 n.2 (1938) (expressing concern that legislation placing burdens primarily on “those without the state” will not be subject to ordinary political restraints); Farber & Hudec, supra note 18, at 1404–05 (describing the problem of trade restrictions harming outsiders as a “conventional explanation” of the reason free trade enjoys “extraordinary legal protection”).

200. Farber & Hudec, supra note 18, at 1404–05.

201. Martin Redish and Shane V. Nugent argue that the democratic rationale for judicial policing of discriminatory legislation justifies judicial policing of any regulation of interstate commerce whether discriminatory or not, because as long as any affected interest is not represented in the legislative process, the outcome is not fully democratic and might have been different if all affected interests had been represented. Redish & Nugent, supra note 45, at 613–15. Yet, it is reasonable to confine judicial policing to cases where there is
Furthermore, an out-of-state producer large enough to export across state lines may well have enough resources to provide campaign contributions and lobby to protect its interests outside of the state within which it operates.\(^{202}\) It is a bit of a fiction, in light of *Citizens United*\(^{203}\) and modern political reality, to insist that large out-of-state producers have no voice in a regulating state’s legislature. We have seen a huge growth in out-of-state money influencing state election campaigns in recent years.\(^{204}\)

This does not mean that the Court necessarily errs when it relies on representation problems to justify policing discrimination. The arguments I have made do not necessarily undercut the notion that a state legislature may give less weight to the interests of out-of-state business in competition with in-state producers providing local jobs. But where no discrimination exists, representation concerns seem too attenuated to justify judicial interference with state sovereignty.\(^{205}\)

These democracy rationales apply fully to both synergistic and level playing field regulation because both involve products that will be consumed and, to some extent, produced in state. Welfare regulation, however, does not necessarily raise prices on

likely almost no representation of the relevant economic interests, rather than to cases in which some defect could be theoretically relevant to outcomes. After all, even in an autarky some interests may be underrepresented in a legislative process, either because of malapportionment of legislative districts or a lack of the resources (principally time and money) needed to participate fully in legislative processes. My rationale is consistent with the main tradition of process reasoning in dormant Commerce Clause doctrine, which focuses on a problem of grossly unfair processes, not mere incompleteness of participation.


\(^{205}\) See generally Goldsmith & Sykes, supra note 14, at 795 (finding this process justification too broad, as few of the state laws affecting outsiders violate the dormant Commerce Clause).
domestic goods, thereby undercutting the democracy argument made here in that case, at least when regulated out-of-state parties lack capacity to make significant contributions to political campaigns.

F. Conclusions About Synergistic Law

The literature treats the extraterritoriality doctrine as an economically unjustifiable and formalist doctrine, which the Supreme Court has wisely abandoned. The doctrine, however, lives on to some extent in the lower courts since the Supreme Court has not expressly repudiated it.

This Article shows that, in an interconnected world, governments must and do regulate extraterritorially to avoid discriminating against their own producers. Viewing the extraterritoriality doctrine through the lens this insight provides adds to this picture, primarily by focusing on the political economy concerns that figure prominently in cases where the courts choose to rely on the extraterritoriality doctrine. The analysis above shows that the extraterritoriality doctrine usually interferes with, rather than protects, state sovereignty. It shows that concerns about adequate representation should not loom large for synergistic and level playing field laws. And it shows that protectionism concerns do not justify focusing on the geographic locus of synergistic law’s effects.

All of this suggests that the lower courts should follow the Supreme Court’s lead and let the extraterritoriality doctrine die, at least as applied to synergistic law. The analysis provided thus far suggests that the courts should generally uphold laws that do not discriminate against interstate commerce or flunk the Pike balancing test.

Courts can reconcile this result with the relevant Supreme Court cases’ language and holdings. The Pike case explicitly commands lower courts to uphold nondiscriminatory laws where the burdens do not clearly outweigh the putative local benefits. See, e.g., Healy v. Beer Inst., 491 U.S. 324, 335–36 (1989) (describing the constitutional concern for state autonomy as a reason for the extraterritoriality doctrine). Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (holding that evenhanded laws with incidental effects on interstate commerce “will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits” (emphasis added)). The reference to laws with “incidental effects” read out of context could conceivably be understood as limiting the Pike test to cases where states directly regulate commerce, thereby resurrecting the long-abandoned direct/indirect distinction. But Pike itself dismissed the direct/indirect language of previous cases as a manner of speech and
Striking down evenhanded laws under the extraterritoriality doctrine violates *Pike*’s explicit command. To be sure, the lower courts do face a difficulty because the Supreme Court’s price affirmation cases rely heavily on extraterritorial reasoning. But the lower federal courts must reconcile these contradictions in a way that minimizes them, not multiplies them. Since *Pike* is well established and the extraterritoriality doctrine has seemingly been abandoned (at least in the Supreme Court), the solution involves reading the price affirmation cases narrowly. Judges should understand statements about the invalidity of laws regulating “wholly outside” the jurisdiction as overly broad dictum, since they do not explain the price affirmation cases themselves and are inconsistent with *Pike* and numerous other cases. Treating the “wholly outside” dictum as a categorical holding deepens the dormant Commerce Clause morass and makes the law unpredictable across a very broad range of cases.
V. LIMITS AND IMPLICATIONS

The analysis supporting the conclusion that synergistic law does not violate the dormant Commerce Clause has broad implications for laws addressing free trade, but also invites a question: Does the Constitution contain any limits on the power of states to regulate beyond their borders evenhandedly? 212 More precisely, can states pass welfare laws (which regulate extraterritorially to protect their citizens’ health and welfare when no competitive disadvantage looms for some domestic companies)? And can states pass level playing field laws (which regulate evenhandedly to avoid creating competitive disadvantages when doing so does not protect the general health and welfare of citizens)?

This Part will not provide a final answer to these questions about extraterritoriality’s limits, because these questions raise broad issues about the limits of legislative jurisdiction beyond the scope of this Article. But it will show that the answer to these questions proves difficult. By establishing that any boundary on legislative jurisdiction that one might find in the Constitution must lie somewhere in the fairly rare cases of extraterritorial welfare or level playing field laws, where no synergy arises threatening the core of state sovereignty, this Part bolsters the argument that synergistic evenhanded regulation must be valid, absent violation of the Constitution’s antidiscrimination principles.

After doing this, this Part will briefly show that the analysis provided in Part VI has implications going beyond the extraterritoriality doctrine. In particular, it suggests that this analysis should inform both laws animated by free trade values even outside the context of the dormant Commerce Clause’s extraterritoriality doctrine and the emerging debate on horizontal federalism more generally.

A. May States Regulate Anything Affecting Them?

The principle that states may often establish child support obligations for fathers (or mothers, where the father has custody) residing outside the state’s borders suggests a quite general principle going beyond importing and exporting: States may regulate conduct that affects their citizens’ health or welfare. 213

212. See Rostron, supra note 21, at 120, 172 (arguing that the Constitution “places some sort” of limit on state law’s extraterritorial reach).

213. See Burnham v. Superior Court, 495 U.S. 604, 607 (1990) (allowing a California resident to use California courts to get a divorce from a spouse living in New Jersey when
For the child support award rests on the idea that the state has a valid interest in obtaining adequate private support for children residing in the state. This interest allows the state to impose a financial obligation on a private party residing outside the state, even if the absent party does not voluntarily conduct any commercial activity within the state.

1. Lessons from Choice of Law Doctrine. This idea that any legitimate state interest can justify extraterritoriality, although not entirely necessary where a foreign producer voluntarily profits from contacts with the standard-imposing states, draws support from choice of law doctrine. At one time, the predominant approach to choice of law only allowed a court to apply the laws of the state where a litigated activity occurred (e.g., a contract or tort). Most states long ago abandoned this approach in favor of an approach that favors application of the law of the state that has the greatest policy interest in a case’s outcome. This approach depends on the principle that the Constitution allows imposition of a state’s law to extraterritorial events in which it has a legitimate interest. Absent this principle, the Constitution might ban most state conflict of law regimes.

the New Jersey resident was served in California); John DeWitt Gregory et al., Understanding Family Law § 9.02[D] (4th ed. 2013) (pointing out that a number of states have long arm statutes for the purpose of imposing child support orders on spouses outside the state); see, e.g., N.Y. Jud. Ct. Acts Law §§ 413(a), 580-201 (McKinney 2008) (declaring that parents must support their children financially if able to do so and establishing jurisdiction over parents outside of the state for that purpose); cf. Kulko v. Superior Court, 436 U.S. 84, 101 (1978) (holding that a state court can only assert personal jurisdiction over fathers having minimum contacts with the state for purposes of awarding child support). See generally Rosen, supra note 149, at 865–66 (arguing that a state has the power to protect itself from harms stemming from outside its borders).

214. See Zablocki v. Redhail, 434 U.S. 374, 388 (1977) (accepting the welfare of “out-of-custody children” as a “legitimate and substantial” state interest); Ann Bradford Stevens, Is Failure to Support the Minor Child in the State Sufficient Contact with That State Sufficient to Justify In Personam Jurisdiction?, 17 S. Ill. U. L.J. 491, 521 (1993) (“In child support jurisdiction cases, the lower courts have had no difficulty in finding a significant state interest.”).

215. Florey, supra note 10, at 1075–76 (noting that the Supreme Court’s choice of law decisions suggest that any jurisdiction with a “minimal interest” in a dispute may apply its law to that dispute); cf. Philipps Petroleum Co. v. Shutts, 472 U.S. 797, 821–22 (1985) (suggesting that somewhat more demanding limits may apply to choice of law in the class action context).


217. See Florey, supra note 10, at 1068, 1070–71 (explaining that modern choice of law doctrine gives states “great license to apply their own law to out-of-state events” over which they have “some plausible interest”).


219. Cf. id. (finding application of Minnesota law to a Wisconsin accident consistent with the Full Faith and Credit and Due Process Clauses); Alaska Packers Ass’n v. Indus.
The interest-based conflict of laws framework illuminates what is at stake in allowing extraterritorial welfare laws.\textsuperscript{220} Welfare laws advance the sorts of legitimate state interests that have long been understood to lie within states’ police power—i.e., an interest in protecting state citizens’ health and welfare.\textsuperscript{221} Conflict of law regimes’ acceptance of state law application to transactions occurring outside the enacting state when such application advances a state’s legitimate interest suggests the validity enactment of extraterritorial welfare law.

Although in some areas of law the idea that a state may regulate parties wholly outside the state based primarily on their impact on parties within the state (e.g., child support) is well established, states have rarely protected health and safety in that way.\textsuperscript{222} Instead, they have tended to confine themselves to synergistic regulation, where the extraterritorial regulation involves products coming into the state.\textsuperscript{223} Acceptance of welfare regulation more broadly could suggest, for example, that a state might regulate pollution emanating from outside of the state even if the polluters did not make products consumed within the state. In the case of climate disruption, it might suggest that a single state could regulate all sources of greenhouse gas emissions nationally.

No such breadth is necessary to effectuate a rule that states must be free to adopt regulation that does not discriminate against their own producers making goods and providing services for the

\textsuperscript{220} See Restatement (Second) of Conflicts of Laws § 6 (Am. Law Inst. 1971) (applying state interest analysis to conflict of laws); Brainerd Currie, The Constitution and the Choice of Law: Governmental Interests and the Judicial Function, 26 U. Chi. L. Rev. 9, 47–48 (1958) (setting out the central tenets of state interest analysis); Brainerd Currie, Married Women’s Contracts: A Study in Conflict-of-Laws Method, 25 U. Chi. L. Rev. 227, 249–51 (1958) (suggesting an approach to conflict of laws where an effort is made to choose the law that best advances the policy interests behind state law); Noll, supra note 216, at 60 (stating that the Second Restatement of Conflicts of Law focuses on the relative interests of states in a litigated matter).

\textsuperscript{221} See, e.g., Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996) (stating that a state traditionally has had “great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons” (quoting Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985)))

\textsuperscript{222} Cf. Massachusetts v. EPA, 549 U.S. 497, 519–20, 534 (2007) (explaining why Massachusetts has a sovereign prerogative to prescribe standards applicable to air pollutants coming from out-of-state sources).

\textsuperscript{223} See, e.g., Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1102–03 (9th Cir. 2013) (noting that California’s Fuel Standard applies to fuel coming into California).
domestic market. Still, we may learn something of interest by asking whether there is reason for viewing some welfare regulation as going “too far,” other than its lack of orthodoxy.

2. Lessons from Due Process. Welfare laws might offend due process because they regulate producers who make nothing for the regulating state’s market. A producer exporting no goods and providing no services within the regulating state may be said to lack minimum contacts with that state. Therefore, a regulating state’s courts would not have personal jurisdiction over such a foreign producer and could not directly enforce its law under the due process clause of the Constitution. This judicial due process problem raises the question of whether legislation regulating the conduct of a foreign entity lacking minimum contacts with the regulation offends due process (prior to its enforcement in court).

Some commentators have suggested that the Supreme Court is right to find an extraterritorial doctrine in the Constitution, but that the doctrine emanates from the Due Process Clause, not the Commerce Clause. That idea suggests that courts should require minimum contacts to establish legislative, not just judicial, jurisdiction. The minimum contacts test would probably distinguish regulation of an out-of-state producer deliberately exporting goods to the regulating state and one that did not, as selling goods in a state can establish minimum contacts.

224. See, e.g., id. at 1102–03 (noting that California’s low carbon fuel standards say nothing about fuels “produced, sold, and used” outside of California).

225. See generally BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562–63, 571–72 (1996) (holding that a punitive damage award violates due process because it interferes with the autonomy of other states by seeking to change BMW’s nationwide policy).

226. See Healy, 491 U.S. 324, 336 n.13 (1989) (suggesting that limits on state legislative authority are similar to the jurisdictional limits on state courts); Florey, supra note 10, at 1059–60 (seeing no reason at first glance why a minimum contacts test would not apply to legislative jurisdiction); William L.M. Reese, Legislative Jurisdiction, 78 COLUM. L. REV. 1587, 1589 (1978) (arguing that due process concerns limit state legislative jurisdiction); Rostron, supra note 21, at 121–22 (distinguishing legislative from adjudicative jurisdiction).

227. Cf. Regan, supra note 14, at 1885 (noting that commentators sometimes locate the extraterritoriality principle in the due process clause, but opining that it stems from the Constitution’s structure).

228. See Quill Corp. v. North Dakota, 504 U.S. 298, 308 (1992) (holding that mail order sales to a state can justify personal jurisdiction in that state); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–99 (1980) (holding that merely having an accident in the forum state does not establish minimum contacts when the vehicle manufacturer sold no cars in the forum state); McGee v. Int’l Life Ins. Co, 355 U.S. 220, 223–24 (1957) (holding that the sale of a life insurance contract to a California resident establishes California’s jurisdiction over the insurer); cf. Daimler v. Bauman, 134 S. Ct. 746, 751–52, 761–62 (2014) (holding that sales and other contacts in California cannot justify general jurisdiction for purposes of adjudicating a suit about legal violations occurring abroad); J. McIntyre Mach.,
Such an approach would be compatible with interpreting the extraterritoriality doctrine to likewise draw a distinction between out-of-state producers exporting goods to the regulated state and those that do not. Regulation of the former does not involve regulating activities “wholly outside” of the regulating jurisdiction. Regulation of the latter does involve regulating conduct “wholly outside” of the jurisdiction. In other words, the existence of contacts within the regulating jurisdiction shows that the conduct does not, as a practical matter, fall “wholly outside” of the regulating jurisdiction. This view would imply that synergistic law and level playing field law pass constitutional muster, but that welfare law can offend due process.

But it is not clear that the Constitution imposes a strict minimum contacts test on state legislation, as opposed to judicial jurisdiction.229 One reason to resist a bright line rule making legislative jurisdiction dependent upon a robust minimum contacts test involves its potential conflict with child support law, which accepts continuing legislative jurisdiction over absent fathers whose only current contact with the regulating state involves the presence of the child the law aims to protect within the state.230 The minimum contacts test functions as a malleable way to achieve “fair play and substantial justice.”231 So, it is possible that it is fair and just to allow a legislature to establish a child support obligation for an absent father, without forcing him to travel to a distant state when the mother wants to enforce the obligation. Perhaps though, the concerns discussed above about political representation suggest that fair play and substantial justice do not countenance legislative jurisdiction over producers making nothing used in the regulated polity. Fully resolving the legislative jurisdiction question is outside the


229. Cf. Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981) (plurality opinion) (stating that the Court invalidates choices to apply a state’s law to a particular case when that state has no significant contact with the parties or the transaction at issue to create a valid state interest).

230. See UNIF. INTERSTATE FAMILY SUPPORT ACT § 205a(1) (NAT’L CONF. OF COMM’RS ON UNIF. STATE LAWS 2008); cf. ZIMMERMAN, supra note 15, at 76 (describing federal efforts to make enforcement of interstate child support obligations easier in light of due process limitations on enforcement).

231. See Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (holding that “due process requires only . . . minimum contacts” to make personal jurisdiction compatible with “traditional notions of fair play and substantial justice”).
scope of this Article.\textsuperscript{232} Suffice it to say that whatever the outer limits of state legislative jurisdiction might be under the Commerce or Due Process Clauses, those clauses do not require states to discriminate against their own producers.

B. Evenhandedness as a Key to the Limits of Extraterritorial Jurisdiction

Finally, recognizing that states must, in many situations, regulate extraterritorially in order to regulate evenhandedly invites some questions about whether the ideal of evenhanded regulation might explain an intuition that a California law demanding child support from fathers living in New York is legitimate, whilst a California law demanding reductions in New York electric utilities’ greenhouse gas emissions is not.\textsuperscript{233} Since both laws exemplify evenhanded regulation, it might appear that both are consistent with normal notions of fair play and substantial justice. But let us examine the link between evenhandedness and intuitions about fairness a little more deeply.

Generally, evenhanded regulation appears fair and just. We can see that a sense of justness and fairness would require that fathers living outside California have child support obligations, just as fathers living in the state do. But justice and fairness do not generally require that all similarly situated industries be regulated alike. Instead, the economic concept of a level playing field motivates the impulse for uniform regulation.\textsuperscript{234} And that rationale only supports uniform regulation of competitors, not of firms with which domestic firms do not compete.

Unless we are prepared to allow a state to be a global regulator, even of companies with no particular ties to the regulating jurisdiction other than the effects of their pollution, perhaps we cannot completely accept the principle that a state may regulate everything that might influence its citizens’ health and safety. The unattractiveness of this concept tends to produce some search for a limiting principle.

The foregoing analysis does not establish that the Constitution limits extraterritorial welfare regulation. It only

\textsuperscript{232} Scholars have written articles addressing this question. See, e.g., Florey, \textit{supra} note 10, at 1058 (asking whether state courts have greater or lesser extraterritorial powers than state legislatures).

\textsuperscript{233} See generally Gerken & Holtzblatt, \textit{supra} note 15, at 66 (“There is something disquieting about one state’s citizenry regulating another’s.”).

\textsuperscript{234} Cf. Regan, \textit{supra} note 14, at 1890 (explaining why extraterritorial legislation may not violate a due process constraint grounded in “fundamental fairness”).
seeks to suggest that there are some reasons to be suspicious of it in some contexts.

But in figuring out what, if any, impact such suspicions should have on dormant Commerce Clause doctrine, we need to take into account the unhappy experience with the Cooley doctrine, which invalidated laws addressing subjects that seemed best suited to uniform national regulation. The Court found such a doctrine unworkable. This suggests that courts should hesitate to invalidate extraterritorial state law that raises the specter of global regulation when the law before the court does not go nearly that far.

This analysis, indefinite as it may be, helps explain the case law, including the Minnesota case discussed at the outset. The Minnesota statute on its face provides an example of a synergistic law because it only bars importation of power produced from new coal-fired power plants into the state. It was not designed to function as a welfare law because it did not on its face prohibit neighboring states (or any other state) from using power from new coal-fired power plants. The district court invalidated the law because it believed that the statute as applied would function, in part, as a welfare law, limiting the use of new coal-fired power in a neighboring state to produce electricity exported not to Minnesota, but to a third state. This concern arose from the problem of separating the origin and destination of electrons in an electricity grid.

The case implicitly relies on acceptance of synergistic regulation and rejection of extraterritorial welfare regulation because regulation of power produced for consumption in a neighboring state is a form of welfare regulation. But the Minnesota court nowhere explains why this distinction should matter. Both forms of regulation, after all, influence the conduct of power plants solely outside the enacting state and both


237. MINN. STAT. § 216H.03, subdiv. 3 (West 2010).

238. See North Dakota v. Heydinger, 15 F. Supp. 3d 891, 916–17 (D. Minn. 2014) (explaining why the court concluded that this law would apply to transactions not touching Minnesota).

239. See id. at 917 (stating that when operators outside Minnesota feed their electricity into the grid they cannot know whether the grid’s electricity will land in Minnesota).
influence climate disruption within Minnesota. The specter of a state as a global regulator may haunt decisions of the Minnesota court and other courts that have likewise struck down synergistic laws that seem to function as welfare laws in some instance.

My analysis suggests that some reasons exist to accept even deliberate comprehensive welfare regulation, but provides stronger grounds for accepting incidental welfare-law-like impacts from narrower schemes. In the context of the Minnesota case, Minnesota has a legitimate interest in limiting greenhouse gas emissions of plants in neighboring jurisdictions because those emissions will influence Minnesota’s environment. Even if the Constitution does not allow comprehensive state welfare regulation of pollution coming from multiple states, it does not follow that a court should vigorously police incidental welfare regulation created by a synergistic scheme. To do so imposes an inappropriate limit on a state’s ability to protect its own sovereignty over the pollution associated with its citizens’ purchases in cases where regulating synergistically tends to create spillover effects going beyond transactions touching the regulating state. Both the Internet and the environmental cases suggest that states may find it impossible to effectively regulate transactions within their states without reaching some transactions not involving their state. This seems obvious in cases involving networking technologies like the Internet and the electricity grid. But this is also true of any domestic law that might influence a foreign (or domestic) company’s operations. In this context, vigorously policing any incidental effects “wholly outside” of a state’s borders just makes no sense. It also flatly contradicts the Pike Court’s statement that laws incidentally impacting interstate commerce will be upheld if the law’s costs are not wholly disproportionate to its benefits.

The ability of a state to serve its citizens’ legitimate interests lies at the heart of “our federalism.” The constitutional structure therefore demands tolerance of extraterritorial effects when states seek to protect their citizens’ health and welfare. The Constitution


241. Heydinger, 15 F. Supp. 3d at 916–17 (finding that some technologies inevitably cross borders).

242. See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (holding that evenhanded laws with incidental effects on interstate commerce will be upheld unless they excessively burden interstate commerce).

does not render the police power a nullity by allowing those coming into the state to sell goods or services to evade state laws serving legitimate state interests.

C. Some Implications

Although this Article focuses on the dormant Commerce Clause's extraterritoriality doctrine, its analysis has implications for other doctrines and theories. I make some suggestions about these implications, but cannot fully explore or defend them in this space.

A recognition that evenhanded regulation demands extraterritorial regulation should perhaps generate less demanding scrutiny of discrimination claims than one sometimes sees, at least for synergistic regulation. It is almost impossible to regulate effectively without having some disparate impacts on regulated parties. Therefore, entities from outside the regulating polity can almost always find a case where the disparate impact disfavors some out-of-state entities or activities, even if the regulation on the whole is crafted in as neutral of a manner as is humanly possible while making the regulation effective at achieving its goals. The sense that extraterritorial regulation is inevitable and legitimate counsels against using disparate impact as a reason to invalidate neutrally drafted regulation too readily when it advances the general welfare.244 The Supreme Court's civil rights jurisprudence recognizes that disparate impact does not always imply a discriminatory motive.245 A decent respect for state sovereignty similarly requires resisting the notion that the existence of disparate treatment necessarily implies a protectionist motive in light of the legitimacy of nondiscriminatory synergistic law.

This analysis should inform and may help explain WTO law. It helps explain the move away from the product/process distinction that the WTO heavily relied upon in the past. This doctrine simply is not tenable in a world where evenhanded regulation must extend beyond the territory of the enacting state.


245. Regan, supra note 10, at 1145–46 (noting that the Court treats disparate racial impact as evidence of a discriminatory motive, but not as proof of discrimination in and of itself).
Finally, the analysis provided above contributes to the emerging debate on horizontal federalism. It shows that synergistic regulation enhances, rather than diminishes, state sovereignty. And it provides a useful analytical framework for understanding laws generating spillover effects, a primary concern of the horizontal federalism literature.

VI. CONCLUSION

The Constitution does not require discrimination against in-state producers. Although it may impose some limits on states’ territorial jurisdiction, it should not invalidate state laws that seek to preserve benefits sought for citizens’ health or welfare through local regulation by demanding that foreign producers play by the same rules as domestic producers.