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Bounded Extraterritoriality

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BOUNDED EXTRATERRITORIALITY

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Twenty-first-century politics has inspired a new mode of interstate rivalries and reprisals consisting not of the tariffs that plagued the Founding but rather of regulations with significant impacts outside the enacting state's borders. Employing the dormant Commerce Clause doctrine of extraterritoriality, the Supreme Court has limited overbroad state regulations, but the extraterritoriality doctrine is unclear both in its normative grounding and practical application. This Article proposes a conceptual framework that situates the prohibition of extraterritoriality as an aspect of horizontal federalism. Our conceptualization of extraterritoriality enables us to distinguish it from two dormant Commerce Clause doctrines with which it is often conflated—nexus and "undue burdens" on interstate commerce. We also propose several approaches to deciding extraterritoriality cases.

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INTRODUCTION

In 1979, the punk rock band Dead Kennedys debuted their hit *California Über Alles*. The song foretold a dystopian future in which California's governor became president and forcefully imposed California's hippie, organic culture-of-cool on the rest of the nation.[1] A look at the federal docket suggests that the Dead Kennedys were on to something.

Consider recent challenges to California regulations banning eggs or pork from animals housed in cages that California deems too small.[2] Although these regulations apply to only in-state activity—namely, the sale or production of eggs or pork in California—they undoubtedly impact out-of-state farmers seeking access to the nation's largest consumer market. Other California regulations have threatened Delaware's primacy in corporate law. For example, before it was judicially precluded on state equal protection grounds, a recent California regulation required public companies with their principal offices in California to appoint women and members of other underrepresented groups

1. DEAD KENNEDYS, CALIFORNIA ÜBER ALLES (Optional Music 1979).

2. Nat'l Pork Producers Council v. Ross, 143143 S. Ct. 1142, 1145 (2023) (upholding dismissal of a challenge to the pork regulation); Missouri *ex rel.* Koster v. Harris, 847 F.3d 646, 650 (9th Cir. 2017) (upholding dismissal of a six-state challenge to California's egg regulation on grounds of lack of standing), *cert. denied* 581 U.S. 1006 (2017).

to their corporate boards.[3] Regulation on the basis of principal office creates a potential conflict with other states'—especially Delaware's—regulation on the basis of place of incorporation.[4]

Those cheering California's progressive triumphs should not get too comfortable. California's outsized influence means that when California makes a regulatory error, the whole nation suffers. A memorable example involved California's fire-safety requirement for certain products. To ensure access to the California market, manufacturers nationwide added flame retardants to products sold in every state, including states that did not require the chemical additives.[5] The chemicals were later discovered to have serious environmental and health consequences. California eventually repealed the regulation but only after dangerous flame retardants appeared for many years in products across the country.[6]

Moreover, just as progressive Californian policies may spill over to other states, so may conservative policies. A classic example is Texas's regulation of textbooks to exclude evolution.[7] Likewise, scholars have described how, in the wake of *Dobbs v. Jackson Women's Health Organization*,[8] states such as Texas and Missouri have sought to impose abortion restrictions that reach beyond their territorial borders.[9] As the nation becomes more divided, more states

3. *See* Crest v. Padilla, No. 20 STCV 37513, 2022 WL 1073294, at *14, *19 (Cal. Super. Ct. Apr. 01, 2022) (precluding, inter alia, the women-on-boards rule because it violated the Equal Protection Clause of the California Constitution).

4. Joseph A. Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826* (Rock Ctr. for Corp. Governance, Working Paper Series No. 232, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248791 [perma.cc/87UC-5DEZ] (discussing the conflict). Lively debate surrounds whether the Supreme Court would resolve differences in corporate law in favor of the incorporation state. *See, e.g.*, Richard M. Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 CALIF. L. REV. 29 (1987); Jill Fisch & Steven Davidoff Solomon, Centros*, California's "Women on Boards" Statute and the Scope of Regulatory Competition*, 20 EUR. BUS. ORG. L. REV. 493 (2019).

5. Dashka Slater, *How Dangerous Is Your Couch?*, N.Y. TIMES MAG. (Sept. 6, 2012), https://www.nytimes.com/2012/09/09/magazine/arlene-blums-crusade-against-household-toxins.html [perma.cc/ARW3-YNFH].

6. Jessica A. Knoblauch, *How Two Women Teamed Up to Take on the Chemical Industry—and Won*, EARTHJUSTICE (Jan. 24, 2018), https://earthjustice.org/article/how-two-women-teamed-up-to-take-on-the-chemical-industry-and-won [perma.cc/K2WC-YMRW].

7. *See* DIANE RAVITCH, THE LANGUAGE POLICE (2003)*; sees also* Sanya Mansoor, *Texas Education Board Tentatively Votes to Change High School Biology Standards*, TEX. TRIB. (Apr. 19, 2017, 4:00 PM), https://www.texastribune.org/2017/04/19/texas-education-board-evolution-standards [perma.cc/XUM4-U23C] ("The Texas State Board of Education tentatively voted to remove language in high school biology standards that would have required students to challenge evolutionary science.").

8. 142 S. Ct. 2228 (2022).

9. David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 22–27 (2023) (describing legislative proposals).

may press the limits of their regulatory authority, which gives cause for concern regardless of one's political preferences.

One possible response to regulatory differences across states—and the inevitable conflicts that result from such differences—is to embrace them as not only inevitable but as a salutary aspect of our federal form of government, which invites and constitutionally protects regulatory diversity. But although our federalism celebrates pluralism, an obvious question arises as to the limits the Constitution places on the ability of one state to regulate behavior in another state.

Many articles and cases explore limits on states' ability to invade the prerogatives of the *federal* government—a question of vertical federalism—but relatively less attention has been paid to limits on states' ability to invade the prerogatives of *other states*, which is a question of horizontal federalism.[10] In addition to mostly focusing on vertical, rather than horizontal, federalism, we typically think about "states' rights" and state autonomy in an affirmative sense; they describe what states are entitled to do. But the prohibition of extraterritoriality—which has been called "our central principle of state legislative jurisdiction"[11]—is a negative concept; it describes what states may not do.

This Article situates the prohibition of extraterritoriality as a principle of horizontal federalism. When a court precludes a state regulation as impermissibly extraterritorial, the court implicitly holds that the state exceeded limits on its own autonomy and invaded the regulatory prerogatives of another state or states. Likewise, when a court sustains a state regulation against an extraterritoriality claim, it holds that the state acted within the legitimate scope of its autonomy, and, as such, the state need not give way to sister states' policies. In this way, extraterritoriality cases fundamentally concern allocation of power among the states. We argue that enforcing limits on extraterritoriality helps preserve the "values of federalism" that derive from regulatory pluralism, such as regulatory experimentation, regulatory competition, preference satisfaction, and preservation of individual liberty.[12] Likewise, the prohibition of extraterritoriality can be expected to both reduce interstate frictions that undermine federal unity and reduce actual regulatory mismatches that burden interstate commerce.

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10. *See* Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 494, 501, 529 (2008) (referring to horizontal federalism as "chronically undertheorized and unstable"); *see also* Erin F. Delaney & Ruth Mason, *Solidarity Federalism*, 98 NOTRE DAME L. REV. 617 (2022) (describing constitutional duties states owe each other).

11. Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1894 (1987) [hereinafter Regan, *Essays*].

12. For more on federalism's values, see *infra* Section I.B.

This Article explains how doctrinal confusion has arisen from failure to distinguish three closely related, but conceptually and legally distinct, constitutional doctrines that limit state regulatory authority: nexus, extraterritoriality, and burdens on interstate commerce. The Supreme Court has elaborated all three concepts as dormant Commerce Clause doctrines, and all three implicate important federalism concerns. But each has a different emphasis. We argue that violations of nexus involve regulating the *wrong people or activities*—namely, people or activities that are beyond the state's power to reach. Violations of extraterritoriality involve regulating *too broadly*, thereby invading other states' regulatory prerogatives. Impermissible burdens on interstate commerce involve regulating *in the wrong way* because the regulation discriminates against or unduly burdens interstate commerce. Our reframing encourages clearer thinking about extraterritoriality and its distinction from the other dormant Commerce Clause doctrines.[13]

We use our theoretical account of extraterritoriality to reexamine the Supreme Court's extraterritoriality cases. In 1989, in *Healy v. Beer Institute*, the Supreme Court said that the Constitution "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[14] The problem with such pronouncements, as scholars have long recognized, is that they are too broad, potentially calling into question any state regulation that impacts behavior in other states. The ubiquity of regulation with extraterritorial *effects*—such as product safety or labeling regulation—led one scholar to conclude that

13. Our analysis responds to Donald Regan's observation that "we hardly know how to begin thinking about what the [extraterritoriality] principle entails in any but the easiest cases." Regan, *Essays*, *supra* note 11, at 1885. Many have attempted to explain extraterritoriality. *See, e.g.*, Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 MARQ. L. REV. 497 (2016); *see also* Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133 (2010) [hereinafter Rosen, *State Extraterritorial Powers*]; Michael J. Ruttinger, Note, *Is There a Dormant Extraterritoriality Principle?: Commerce Clause Limits on State Antitrust Laws*, 106 MICH. L. REV. 545 (2007); Peter C. Felmly, Comment, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 467 (2003); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855 (2002) [hereinafter Rosen, *Extraterritoriality*]; Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973 (2002); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 812 (2001); Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873 (1993); Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992); Mark P. Gergen, *Territoriality and the Perils of Formalism*, 86 MICH. L. REV 1735 (1988).

14. Healy v. Beer Inst., 491 U.S. 324, 336 (1989) (quoting Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982) (plurality opinion)).

the Supreme Court's statements in cases like *Healy* are so broad that they "cannot mean what they appear to say."[15] Another scholar was equally blunt, concluding that extraterritoriality "lack[s] . . . a limiting principle."[16] We explain that, although the Court employs broad language in its extraterritoriality cases, the facts and reasoning in those cases suggest a more limited scope for the doctrine.

Finally, we make several normative proposals for how courts can cabin extraterritoriality doctrine, including the suggestion that the Supreme Court could use a variant of the "internal consistency" doctrinal test that it originally developed to determine whether state assertions of *fiscal* jurisdiction are extraterritorial. Under the internal consistency test,[17] the Supreme Court asks: *If all states applied the challenged state's tax rule, would interstate commerce be taxed by more than one state?* If the answer to this question is yes, the Supreme Court almost always precludes the challenged tax.[18] We explain that, as applied to regulations, the internal consistency test for extraterritoriality would ask, *If all states regulated using the same jurisdictional basis as the challenged state, would interstate commerce be subject to regulation by more than one state?* We argue that, if, when used by all states, the challenged state's jurisdictional basis would lead inevitably to regulation by two or more states, courts could presume that the challenged state regulated too broadly. We briefly sketch the consequences of adopting an internal consistency test approach to extraterritoriality.

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15. Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1090 (2009) [hereinafter Florey, *State Courts*].

16. Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 998–99 (2013) [hereinafter Denning, *Mortem*].

17. Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983) (introducing the "internal consistency" test). An extensive literature addresses state tax jurisdiction. *See, e.g.*, Hayes R. Holderness, *Navigating 21st Century Tax Jurisdiction*, 79 MD. L. REV. 1 (2019); John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective*, 45 WM. & MARY L. REV. 319 (2003); Bradley W. Joondeph, *The Meaning of Fair Apportionment and the Prohibition on Extraterritorial State Taxation*, 71 FORDHAM L. REV. 149 (2002); Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138 (1988); *see also Container Corp.*, 463 U.S. at 164 (acknowledging that states cannot tax "extraterritorial values," and noting that "arriving at precise territorial allocations of 'value' is often an elusive goal").

18. *See Container Corp.*, 463 U.S. at 169 ("The first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency—that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed."). The one case where the Court appeared to uphold an internally inconsistent tax was *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987). A majority of the Supreme Court in *Wynne* claimed that the *American Trucking* Court never conceded that the tax failed the test. Comptroller of the Treasury of Md. v. Wynne, 575 U.S. 542, 563–64 n.7 (2015).

I. UNDERSTANDING EXTRATERRITORIALITY

States can regulate on multiple bases; they can regulate conduct in their territory by the residents of any state, some out-of-state conduct by their residents, and some conduct outside their territory by residents of any state when that conduct has in-state effects.[19] Such wide prescriptive jurisdiction leads to problems: If states regulate too broadly, they may crowd out regulation by other states. Additionally, states' assertions of regulatory authority may overlap, subjecting the same activity to regulation by more than one state. For example, a good or service may itself cross a state border—as when a producer manufactures a good in one state but sells it in another. Such cross-border movement may subject the good to regulation by the state of production and the state of sale. The rise of e-commerce has vastly expanded interstate provision of goods and services, increasing the incidence of regulatory spillovers and instances in which a single product or action is subject to regulation by multiple states.

This Article explains the role of the extraterritoriality doctrine in handling interstate regulatory conflicts and overlaps.[20] Limits on extraterritorial state regulation are a matter of horizontal federalism.[21] The principle of extraterritoriality can be described affirmatively or negatively. In the affirmative, it asks whether a state is entitled to regulate behavior that has connections to other states. In the negative, it asks whether the Constitution bars or limits a state from regulating behavior that is connected to other states. As this Part explains, whether viewed affirmatively or negatively, the extraterritoriality principle is essential to federalism. Extraterritoriality cases raise fundamental questions: Where does one state's legislative jurisdiction end and another's begin? When states' regulatory entitlements overlap, must any state give way? If so, which state's regulation prevails? Any federation that guarantees state autonomy—and guarantees citizens democratic control over the laws that affect them—must confront these questions. Federalism's values, including the desire to accommodate regulatory diversity and reduce interstate rivalries, must inform answers to these questions.

Because the Supreme Court has interpreted extraterritoriality as a strand of the dormant Commerce Clause, Section I.A provides background on the dormant Commerce Clause, briefly describes the current state of Supreme Court extraterritoriality doctrine, and observes uncertainty in lower courts regarding how to apply that doctrine. Section I.B approaches the notion of extraterritoriality principally from a theoretical perspective, viewing it as an

19. *Cf.* RESTATEMENT (FOURTH) FOREIGN RELS. L. § 402 (AM. L. INST. 2017).

20. Our discussion relies principally on structuralist and consequentialist arguments. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION, 12–13 (1991) (identifying six modalities of constitutional interpretation).

21. *See* Regan, *Essays*, *supra* note 11, at 1895 (describing extraterritoriality as an element of structural federalism); Florey, *State Courts*, *supra* note 15, at 1093 ("[Extraterritoriality] is perhaps best understood as a means of establishing order—and confining each state to its proper sphere of authority—in a federalist system.").

element of horizontal federalism. Section I.C begins to distinguish extraterritoriality from two other strands of the dormant Commerce Clause with which it has often been conflated: nexus and burdens. Section I.D considers whether the dormant Commerce Clause is the right judicial doctrine to house the extraterritoriality principle.

A. *Extraterritoriality as the "Most Dormant" Commerce Clause Doctrine*

The Supreme Court has long read the Commerce Clause, which grants Congress the power to regulate interstate commerce, to entail a "dormant" aspect that *disables* the states from regulating in ways that undermine federalism and the national marketplace.[22] For example, the Supreme Court has held that the dormant Commerce Clause precludes state regulation that discriminates against interstate commerce or residents of other states. Likewise, by precluding regulation that unduly burdens interstate commerce, the doctrine protects both the national marketplace and individuals who engage in interstate commerce.[23] At the same time, by limiting states' ability to discriminate against or unduly burden interstate commerce, the dormant Commerce Clause advances horizontal federalism interests by dampening interstate "rivalries and reprisals."[24] In short, the dormant Commerce Clause does a lot of work, especially for a doctrine that Justice Scalia condemned as "a judicial fraud" due to its atextuality.[25] Despite its atextuality, dormant Commerce Clause doctrine has maintained a stalwart presence in our constitutional jurisprudence for two hundred years,[26] and it is unlikely that the modern Court will abandon it completely.

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22. A vast literature considers the dormant Commerce Clause. *See, e.g.*, Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417 (2008) [hereinafter Denning, *Reconstructing*]; Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191 (1998); Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43 (1988); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 599 (1987); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563 (1983); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 (1979).

23. *See, e.g.*, Kassel v. Consol. Freightways Corp. of De., 450 U.S. 662, 675–76 (1981); S. Pac. Co. v. Ariz. *ex rel.* Sullivan, 325 U.S. 761, 767 n.2 (1945).

24. H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 532 (1949).

25. Comptroller of the Treasury of Md. v. Wynne, 575 U.S. 542, 572 (2015) (Scalia, J., dissenting).

26. Dormant Commerce Clause doctrine arguably emerged in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), but no later than *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299 (1852). Denning, *Reconstructing*, *supra* note 22, at 428–36.

Like other aspects of the dormant Commerce Clause, extraterritoriality doctrine has been criticized. Writing for the Tenth Circuit, then-Judge Gorsuch declared extraterritoriality the "most dormant" and "least understood" strand of the dormant Commerce Clause.[27] The principal source of perplexity regarding the meaning of extraterritoriality has been the Supreme Court's own vague and overbroad descriptions of the doctrine. For example, in 1989 in *Healy v. Beer Inst.*, the Supreme Court provided its most detailed description of the constitutional limits on state extraterritoriality.[28] It observed that the doctrine reflected

> [T]he Constitution's special concern both with . . . national economic un[ity] . . . and with the autonomy of the individual States within their respective spheres. Taken together, our cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following propositions: First, the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State; and, specifically, a State may not adopt legislation that has the practical effect of establishing a scale of prices for use in other states. Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.[29]

In the passage above, the *Healy* Court used several vague expressions to describe extraterritoriality, including "wholly outside," "practical effect," "scale of prices," "directly controls," "inconsistent legislation," and "projection."[30] In particular, the language referring to the "practical effect" of "controll[ing] conduct beyond the boundaries of the State"[31] suggests a broad scope for extraterritoriality doctrine because state regulations, even when targeted narrowly to in-state behavior, often have impacts in other states. States, therefore, are often susceptible to the allegation that they "project" their regulation

27. Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1172 (10th Cir. 2015).

28. Healy v. Beer Inst., 491 U.S. 324 (1989).

29. *Id.* at 335–37 (cleaned up).

30. *Id.*

31. *Id.* at 336.

across borders. Likewise, the *Healy* Court's statement that the prohibition of extraterritoriality "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State"[32] suggests a wide ambit for extraterritoriality.

The main problem with the Court's descriptions of extraterritoriality is that they are "clearly too broad."[33] Regulations with extraterritorial *effects* are not only commonplace but many such regulations are widely regarded as unproblematic. For example, if one state enacts a high minimum wage, some low-productivity work might migrate from the enacting state to neighboring states with lower wages. Such a regulation may have practical impacts on prices or behavior in neighboring states, but we do not generally think that such external effects constitute unconstitutional extraterritoriality or that they prevent any other state from regulating wages within its territory. If these effects were unconstitutionally extraterritorial, then no state could regulate wages—or much else.

Not only do many regulations have indirect effects outside the regulating state but many state regulations directly and uncontroversially target activity that, although it takes place outside the state, has effects within it. As examples of such activity, Jack Goldsmith and Alan Sykes offered spam emails and child pornography delivered over the internet.[34] Gillian Metzger likewise concluded that "some extraterritoriality is not only inevitable, but appropriate" to a federal system.[35] The observations of these commentators, while unobjectionable, are hard to reconcile with the *Healy* Court's insistence that states must not directly regulate outside their borders.[36] At the same time, extraterritoriality challenges under the dormant Commerce Clause remain rare, suggesting that extraterritorial effects are mostly accepted. The paucity of extraterritoriality cases is telling, particularly because it is commonplace to refer to extraterritoriality as a "per se" prohibition, suggesting that economic operators would be assured relief if they could make out an extraterritoriality claim.[37]

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32. *Id.*

33. *See, e.g.*, Goldsmith & Sykes, *supra* note 13, at 790.

34. *Id.* at 790–94.

35. Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1521–22 (2007).

36. *Healy*, 491 U.S. at 336 ("[T]he 'Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.' " (quoting Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982) (plurality opinion))).

37. *See, e.g.*, Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1172 (10th Cir. 2015). We confess that we are unsure what it means for a vague standard to apply per se. Perhaps attempting to square the circle, in *Epel*, then-Judge Gorsuch argued that the per se conception of extraterritoriality applied only when one state regulated prices in other states. *Id.*

Uncertainty surrounding the meaning of extraterritoriality has led to divergence among lower courts in how they apply the doctrine. Some judges have expressed discomfort with the unbridled discretion extraterritoriality doctrine seems to afford courts to preclude state laws that have impacts outside the state's borders. These judges have sought to limit the scope of extraterritoriality doctrine, applying it only in cases with facts very similar to the few Supreme Court cases that have resulted in preclusion of state laws for extraterritoriality. For example, because two of the Supreme Court cases that led to preclusion on grounds of extraterritoriality involved price regulations, some courts have concluded that the doctrine of extraterritoriality limits *only* state pricing regulations,[38] a reading that would, Brannon Denning observed, lead to the death of extraterritoriality doctrine.[39] Other lower courts, recognizing that the Supreme Court's extraterritoriality cases deal with topics beyond price regulations, have struggled to interpret the doctrine.[40] These attempts have led to accusations that extraterritoriality raises a "*Lochnerian* specter."[41] Specifically, critics argue the breadth of extraterritoriality doctrine creates a situation in which "numerous state laws regulating health and safety can be invalidated on the thinnest of constitutional grounds."[42] Although those leveling the *Lochner* charge are correct that the Supreme Court used broad language in its extraterritoriality cases, we will show in Part II that the Court's holdings are much more limited. Nevertheless, because there are so few Supreme Court extraterritoriality cases, commentators and lower courts are understandably unsure of the limits of the extraterritoriality doctrine.

The Supreme Court did not take the opportunity offered in 2023 by *National Pork Producers Council v. Ross* to clarify the extraterritoriality doctrine.[43] *National Pork* involved a challenge to a California regulation that prohibited

38. *Epel*, 793 F.3d at 1174–75; Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1028 (9th Cir. 2021) (holding that extraterritoriality only applies to pricing regulations), *aff'd on other grounds*, 143 S. Ct. 1142 (2023); *see also* Denning, *Mortem*, *supra* note 16, at 992 (arguing that certain lower courts have narrowed extraterritoriality to price cases).

39. Denning, *Mortem*, *supra* note 16, at 979–80 (claiming, in 2013, to perform a doctrinal "autopsy" on extraterritoriality and providing examples of lower federal courts applying the doctrine narrowly).

40. Robin Feldman & Gideon Schor, Lochner *Revenant: The Dormant Commerce Clause and Extraterritoriality*, 16 N.Y.U. J.L. & LIB. 209, 264–95 (2022) (providing examples of lower courts striking down regulations on extraterritoriality grounds).

41. *Id.* at 214.

42. *Id.* at 209.

43. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023). For analysis of *National Pork*, see Bradley W. Joondeph, *The "Horizontal Separation of Powers" after* National Pork Producers Council v. Ross, 61 SAN DIEGO L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4525502 [perma.cc/8FK5-PA5M], and Katherine Florey, *The New Landscape of State Extraterritoriality*, TEX. L. REV (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4541791 [perma.cc/8ATH-45CA].

both the holding of breeding sows in cages deemed too small and the in-state sale of pork from breeding sows or their immediate offspring kept in cages deemed too small.[44] Petitioners were trade associations representing hog breeders and pork producers located in states that permitted smaller cages than did California.[45] Quoting *Healy*, the pork producers argued that, because the "practical effect" of California's regulation was "to control conduct beyond the boundaries of the State," the regulation was extraterritorial and invalid.[46] Even though the pork producers supported their claims about extraterritoriality by pointing to expansive language in *Healy* and other cases, the *National Pork* Court concluded that the mere fact that a state regulation has impacts in another state was insufficient to invalidate it.[47] Despite an otherwise "fractured"[48] decision—consisting of a main opinion (which was at times a majority opinion and at other times a plurality opinion), two concurrences, and two partial concurrences with partial dissents—the Supreme Court in *National Pork* unanimously rejected the conception of extraterritoriality advanced by the pork producers.[49] Specifically, the five-justice majority rejected the pork producers' conception of extraterritoriality, which the Court characterized as an " 'almost *per se*' rule forbidding enforcement of state laws that have the 'practical effect of controlling commerce outside the State,' even when those laws do not purposely discriminate against out-of-state economic interests."[50] Likewise, in their partial concurrence, the remaining four justices said the Court's "precedent does not support a *per se* rule against state laws with 'extraterritorial' effects."[51] Although the Court unanimously rejected the petitioners' particular "per se" conception of extraterritoriality under which *all*

44. California's Proposition 12 "forbids the in-state sale of whole pork meat that comes from breeding pigs (or their immediate offspring) that are 'confined in a cruel manner,' " where confinement is cruel if "it prevents a pig from 'lying down, standing up, fully extending [its] limbs, or turning around freely.' " *Nat'l Pork*, 143 S. Ct. at 1150–51 (quoting CAL. HEALTH & SAFETY CODE §§ 25990(b)(2), 25991(e)(1)).

45. *Id.* at 1149.

46. Brief for Petitioners at 35, Nat'l Pork Producers Council v. Ross, 143 S. Ct. 11421, 2022 WL 2165184 [hereinafter Petitioners' Nat'l Pork Brief] ("[E]xtraterritorial laws, like discriminatory laws, should be 'deemed almost *per se* invalid' ")" (quoting Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1172 (10th Cir. 2015), *cert. denied*, 577 U.S. 1043 (2015)).

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

48. *Id.* at 1165 (Sotomayor, J., concurring in part).

49. *Id.* at 1165, 1167.

50. *Id.* at 1154 ("They [the petitioners] contend that our dormant Commerce Clause cases suggest an additional and 'almost *per se*' rule . . . [that] follows ineluctably from three cases—*Healy*, . . . *Brown-Forman*, . . . and *Baldwin*") (internal citations omitted). In ten different instances, the majority characterized the petitioners as advocating a "per se" view of extraterritoriality. *Id.* at 1148, 1154, 1155–57, 1163, 1165.

51. *Id.* at 1167 (Roberts, C.J.); *id.* at 1156 (Gorsuch, J.) (describing the majority as "rejecting petitioners' 'almost *per se*' theory").

regulatory spillovers violated the Constitution, the Court did not reject the idea that the Constitution requires courts to "sometimes referee disputes about where one State's authority ends and another's begins."[52] Other than affirming that the "horizontal separation of powers"[53] limits state regulatory authority, and offering caution against the tendency to overread the *Healy* line of cases,[54] the majority did little in *National Pork* to clear up doctrinal confusion surrounding extraterritoriality—nor did the concurring justices. Most notably, the majority in *National Pork* neither rejected extraterritoriality nor defined extraterritoriality; it did not even conclude that extraterritoriality is not a per se doctrine. It merely rejected the petitioners' sweeping per se conception of extraterritoriality.

B. *Extraterritoriality and Horizontal Federalism*

This Section identifies the prohibition of state extraterritoriality as a principle of horizontal federalism. Limits on state extraterritoriality serve as a bulwark of state autonomy, and state obligations to observe limits on extraterritoriality can be understood as duties of federal solidarity that arise from states' membership in the federal union. The prohibition of state extraterritoriality promotes the values of federalism, including regulatory pluralism and democratic accountability.

The main distinction between federations and unitary countries is the presence in federations of constitutionally protected semiautonomous subnational states. Constitutional structures of state autonomy are common to federations worldwide, although they differ from federation to federation. They include guarantees of territorial integrity, state equality, and state reservation of powers not delegated to the federal government.[55] Such autonomy structures generate state *entitlements*, the most important of which for purposes of understanding extraterritoriality is states' ability to regulate in their own territory. But states also undertake *obligations* as part of their membership in the federal union.[56] Some of these obligations run from states to the central government and have been referred to abroad as obligations to "federal solidarity;"[57] such federal solidarity obligations include express or implied duties of

52. *Id.* at 1156.

53. *Id.*

54. *Id.* at 1155 ("[P]etitioners read too much into too little.").

55. *See* PATRICIA POPELIER, DYNAMIC FEDERALISM (2021) (conducting a worldwide empirical review of features of state autonomy in federations).

56. *See* Delaney & Mason, *supra* note 10, at 626–28 (explaining that states' membership in the federal union generates not only vertical duties to the federal government but also horizontal duties to fellow states and citizens of fellow states).

57. *Id.* at 623–24.

loyalty, cooperation, mutual assistance, and similar obligations.[58] Interstate solidarity obligations, by contrast, run from states to fellow states and include duties of good faith, restraint, cooperation, and mutual aid.[59] The implications of state autonomy and solidarity for extraterritoriality are straightforward. Whereas state autonomy implies that every state may regulate its own sphere independently of all other states, interstate solidarity obliges states not to interfere with the regulatory autonomy of other states, provided that those other states exercise their autonomy within its proper scope.[60]

Preventing extraterritoriality promotes the normatively desirable outcomes or "values" typically ascribed to federalism.[61] For example, the ability of one state to set nationwide standards would erode benefits said to arise from policy diversity across states. These benefits include political accountability, accommodation of individual choice, and even individual liberty.[62] For states to serve as laboratories of democracy, policy marketplaces to which citizens subscribe through migration, or havens for minority views, each must be capable of effective self-regulation. In addition to undermining regulatory pluralism, overbroad assertions of state regulatory authority may undermine democratic accountability. Specifically, when a state regulates outside its borders, out-of-state regulated parties typically lack democratic means to hold the regulating state accountable for the consequences of the regulation. In a democratic federation, it is important to maintain a good match between the set of people subject to a state's regulation and the set of people entitled to vote to determine the regulation's content. In this way, the doctrine of extraterritoriality can be understood as a tool of representation reinforcement; it helps decrease the risk that people will be subject to laws they had no say in creating. Limits on extraterritoriality may also prevent overbroad state regulation that

58. *See generally* POPELIER, *supra* note 55 (conducting an empirical study surveying what Popelier dubs the "cohesion" structures of the world's federations).

59. Delaney & Mason, *supra* note 10, at 637–44.

60. *Cf id.* (discussing interstate sovereign immunity and the burdens strand of the dormant Commerce Clause, but not extraterritoriality, as doctrines dominated by state solidarity concerns).

61. *See* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 533–39 (1995) (citing as values of federalism: community, utility, liberty, anti-tyranny, democracy, and policy experimentation); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 51–65 (2004) (discussing federalism's values).

62. *See* Chemerinsky, *supra* note 61, at 533–39; Young, *supra* note 61, at 51–65.

otherwise would inspire interstate "rivalries and reprisals"[63] that could destabilize the federation.[64] Finally, enforcement of limits on state extraterritoriality may reduce *actual* interstate regulatory conflicts.[65] These values-based justifications for limiting state extraterritoriality in a federation often overlap. For example, in addition to safeguarding democracy, ensuring a good match between voters and regulated parties will tend to reduce regulatory spillovers, thereby reducing instances in which state laws conflict in an antagonizing or burdensome way.

Enforcement of limits on state extraterritoriality occurs through judicial review. Regulated parties bring dormant Commerce Clause claims against a state whose regulation they perceive as extraterritorial. The role of courts in extraterritoriality review is analogous to their role in reviewing burdens on interstate commerce under the dormant Commerce Clause. Under the burdens doctrine, states are free to regulate interstate commerce where Congress has not acted, but courts preclude state regulation that discriminates against or unduly burdens interstate commerce.[66] In this way, courts protect the national marketplace from state obstruction. Likewise, by restraining states from invading the regulatory prerogatives of other states, courts that apply the extraterritoriality doctrine safeguard state autonomy and the values of federalism, including regulatory pluralism and democratic accountability.

Extraterritoriality cases are fundamentally about allocating power among the states and preserving each state's autonomy against invasion by other states. When a court precludes a state regulation as impermissibly extraterritorial, it implicitly holds that the state exceeded its own autonomy limits and violated its complementary solidarity obligation to not invade other states' regulatory prerogatives.[67] Likewise, when a court sustains a state regulation

63. H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 532 (1949); *id.* at 533 (claiming that such rivalries would "threaten at once the peace and safety of the Union" (quoting JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 180 (Boston, Little, Brown & Co., 4th ed. 1873))).

64. Edgar v. MITE Corp., 457 U.S. 624, 643 (1982) (plurality opinion of White, J.) ("[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States" (quoting Shaffer v. Heitner, 433 U.S. 186, 197 (1977))).

65. *See, e.g.*, Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 583 (1986) (warning that extraterritorial regulation would lead to interstate sellers being "subjected to inconsistent obligations in different States"); Healy v. Beer Inst., 491 U.S. 324, 335–36 (1989) ("[T]he Constitution [has a] special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres") (footnotes omitted); *see also* Regan, *Essays*, *supra* note 11, at 1875 ("[O]ne reason to prohibit extraterritoriality is to avoid inconsistency.").

66. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2464 (2019).

67. *Brown-Forman*, 476 U.S. at 585 (arguing that a precluded law might otherwise "interfere with the ability of other States to exercise their own authority").

against an extraterritoriality claim, it holds that that state acted within the legitimate scope of its autonomy and, as such, the state need not give way to sister states' policies.[68]

Our description of the *principle* of extraterritoriality generates expectations for extraterritoriality *doctrine*. An appropriate doctrine of extraterritoriality, grounded in principles of horizontal federalism, would provide guidance as to when overlapping or conflicting claims of regulatory authority are problematic; it would also provide guidance about which state's law prevails in such cases. Prioritizing state regulations is a difficult problem. As Allan Erbsen explained in his foundational article on horizontal federalism, the Constitution reserves powers not delegated to the federal government to the states *collectively*, without specifying limits on each state's power when it acts alone.[69] The Supremacy Clause specifies that, when states and the federal government clash, the federal government prevails as long as it regulates within its constitutional powers.[70] But, as Erbsen pointed out, there is no textual priority rule that the Supreme Court can use to resolve horizontal regulatory disputes between states.[71]

Although the *National Pork* majority recognized that "courts must sometimes referee disputes about where one State's authority ends and another's begins" in order to "allow[] 'different communities' to live 'with different local standards,' "[72] the justices did not agree on how to treat the California pork regulation. Three justices in the majority worried that a conception of extraterritoriality that focused on cross-border spillovers would constrain states with larger markets relative to "[s]tates with smaller markets."[73] It would mean that "voters in States with smaller markets are constitutionally entitled to greater authority to regulate in-state sales than voters in States with larger markets" and violate "the Constitution's 'fundamental principle of *equal* sovereignty among the States,' " where equal sovereignty refers to each state's ability and opportunity to regulate in its own sphere.[74]

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68. *See* S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 195 (1938).

69. Erbsen, *supra* note 10, at 509 ("The Constitution thus confirms that states in the aggregate possess a bundle of powers . . . without explaining how the existence of multiple states affects the exercise of particular powers by any one of them.").

70. U.S. CONST. art. VI, cl. 2.

71. Erbsen, *supra* note 10, at 506.

72. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1156 (2023) (quoting Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)).

73. *Id.* at 1164 (Gorsuch, J., concurring). Only Justices Barrett and Thomas joined this part of Justice Gorsuch's opinion.

74. *Id.* (quoting Shelby Cnty. v. Holder, 570 U.S. 529, 544 (2013)). Notice that the state equality principle at work in *National Pork* is the states' co-equal entitlement to regulate themselves. It thus differs from the issue raised by *Shelby County*, in which the Court held that a federal constitutional principle of state equality prevented *Congress* from differentially regulating the states. For more on this distinction and the history of the equal-sovereignty-as-equal-autonomy

At the same time, it is hard to ignore that California's size means that, relative to smaller states, California possesses greater potential to crowd out or undermine the regulations of other states—a potential that political leaders could harness to deliberately undermine policies of other states.[75] As a result, pointing to the same constitutional value—the need to preserve states' co-equal regulatory autonomy—Justice Kavanaugh observed in his partial dissent in *National Pork* that California "has aggressively propounded a 'California knows best' economic philosophy," and the state has sought "to unilaterally impose its moral and policy preferences . . . on the rest of the Nation."[76] Such California regulation may crowd out smaller states' regulation, at least in the absence of congressional intervention. Justices Kagan and Alito expressed similar concerns at oral argument.[77] These concerns highlight that failing to restrain California's spillover effects might jeopardize states' co-equal entitlements to regulatory autonomy as much as restraining California regulation would. Although we can say with certainty that the prohibition of extraterritoriality aims to prevent states from regulating too broadly, it is much harder to say what the prohibition of extraterritoriality means for deciding particular cases.

The most obvious choice for a priority rule to resolve interstate disputes is territory. But it is not always obvious which state, if any, has the better territorial claim to regulate. Think, for a moment, of *National Pork* as involving a dispute between California and, say, Iowa about which state should regulate the size of cages that house hogs raised in Iowa that will produce pork consumed in California. By excluding Iowa pork that satisfies Iowa's regulatory standards, California, in Iowa's view, interferes with Iowa's ability to set production standards within its own territory. Under this scenario, California's

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argument, see Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087 (2016), and Jeffrey M. Schmitt, *In Defense of* Shelby County*'s Principle of Equal State Sovereignty*, 68 OKLA. L. REV. 209 (2016).

75. Conor Dougherty, *A Conversation with Gavin Newsom About the 'California Effect'*, N.Y. TIMES: CAL. TODAY (June 2, 2023), https://www.nytimes.com/2023/06/02/us/gavin-newsom-california-effect.html [perma.cc/5DCK-JRS7] (quoting California governor Gavin Newsom asking himself "Am I just going to express my outrage by having a glass of wine watching Rachel Maddow every night? Or are we going to start using the power of the [world's] fifth- or fourth-largest economy to exercise ourselves more muscularly?"). In the same interview, Newsom explained that he sees himself as needing to "get on offense." *Id.*

76. *Nat'l Pork*, 143 S. Ct. at 1174 (Kavanaugh, J., concurring in part and dissenting in part).

77. Justice Kagan observed at oral argument in *National Pork* that, in response to a strict Wyoming regulation, a commercial actor "could easily just cut off the Wyoming market." Transcript of Oral Argument at 13, Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023) (No. 21-468). Following the same line of questioning, Justice Alito asked the lawyer representing California, "Is California unconcerned about all this because it is such a giant, you can wield this power, Wyoming couldn't do it, most other states couldn't do it, but you can do it? You can bully the other states, and so you're not really that concerned about retaliation?" *Id.* at 116.

regulation spills over into Iowa's territory. From California's perspective, however, the sale in California of pork produced in Iowa under Iowa's lower standards inhibits California's ability to accommodate Californians' preferences—expressed via a ballot initiative[78]—that only ethically produced pork be produced or sold in California. In effect, Iowa's hog regulation would apply within California through pork imported from Iowa. In these ways, territoriality, although intuitively attractive, quickly breaks down as the sole guiding principle for resolving interstate regulatory conflicts.[79] Moreover, as endless disputes in the context of conflict of laws have taught us, it is far from clear that territoriality, rather than some other metric—such as maximizing efficiency, minimizing frustration of state policy, or minimizing interstate conflict—is the right priority rule for horizontal federalism.[80]

This brings us back to our starting point: A doctrine of extraterritoriality should specify *when* potentially overlapping or conflicting claims of regulatory authority must be resolved and *how* those claims should be resolved. One thing is clear—the Supreme Court neither can nor should eliminate all overlaps and conflicts. Regulatory conflict and overlap is the unavoidable result of regulatory pluralism, and that pluralism not only emanates from states' constitutional entitlement to regulatory autonomy[81] but also promotes federalism's normatively desirable outcomes, which include efficiency, preference satisfaction, accountability, experimentation, and, ultimately, individual liberty.[82] Our federal system anticipates regulatory diversity and competition among the states and also welcomes those phenomena as means to advance the ultimate goal of any federation: the freedom and welfare of its citizens.

Citing the Due Process, Full Faith and Credit, and dormant Commerce Clauses, the *National Pork* Court described the difficulty with judicial review of horizontal federalism questions. Referring to "the Constitution's structure" that establishes "principles of [interstate] 'sovereignty and comity,' "[83] but not

78. *Nat'l Pork*, 143 S. Ct. at 1150.

79. Scholars have reached similar conclusions about territoriality in the conflict-of-laws contexts. *See* Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2454–77 (1999) (describing the move away from territoriality).

80. Scholars have made suggestions for resolving conflict-of-laws disputes in state courts. Among the most promising are those of Doug Laycock and Kim Roosevelt. *See* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992) (advocating that the Supreme Court fashion a jurisprudence for resolving such disputes using the principles of equal states, equal citizens, and territorial states); Roosevelt, *supra* note 79 (reviewing various methods for resolving conflict-of-laws cases before recommending what he calls a "mirror" approach, which we see as the same, or at least consonant with, the internal consistency approach we recommend for extraterritoriality *infra* Part III).

81. *See infra* Part III.

82. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985) (discussing values of federalism).

83. *Nat'l Pork*, 143 S. Ct. at 1156 (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572 (1996)).

referring specifically to the extraterritoriality doctrine, the majority observed that courts must "mediate competing claims of sovereign authority under our horizontal separation of powers."[84] The Supreme Court had never used the term "horizontal separation of powers" in this way before *National Pork*.[85] Previously, the Court had used separation of powers to refer to the balance of powers between the federal legislative, executive, and judicial branches.[86] On our account of extraterritoriality, however, this phrase is entirely apt as a description of horizontal federalism generally and extraterritoriality in particular. The prohibition of extraterritoriality concerns the division of power among the states. But understanding that extraterritoriality is a principle of horizontal federalism that prevents regulatory overreach does not tell us *how* to apply the principle to cases.

C. *Untangling Doctrinal Strands*

Equipped with our conceptual account of extraterritoriality as a principle of horizontal federalism, we now distinguish three related, but distinct, subdoctrines of the dormant Commerce Clause: nexus, extraterritoriality, and burdens. Scholars have remarked on the overlaps between these doctrines.[87] In our view, the area of worst confusion is the distinction between extraterritoriality and regulatory mismatches, which are one particular type of burden analyzed under the dormant Commerce Clause.[88] Although all three doctrines have overlapping normative justifications—including fairness, representation reinforcement, the need to safeguard federalism by quelling interstate rivalries, and a desire to promote the smooth functioning of the national marketplace—we describe a distinct role for each doctrine. We regard defining and disentangling these doctrines as a major contribution of this Article.

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84. *Id.* at 1157.

85. We searched the Supreme Court cases database in Westlaw on September 15, 2023, for "horizontal" in the same paragraph as "separation of powers." In the only case besides *National Pork* to connect "horizontal" with "separation of powers," *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring), the Supreme Court used it to refer to the three branches of government.

86. *See, e.g.*, *Clinton*, 524 U.S. at 452; Richard Albert, *The Separation of Higher Powers*, 65 SMU L. REV. 3, 6 (2012).

87. *See, e.g.*, Felmly, *supra* note 13, at 508 (remarking on the overlap of nexus and extraterritoriality); Martin, *supra* note 13, at 497 (observing that "it is easy to confuse" extraterritoriality with discrimination).

88. *See* Goldsmith & Sykes, *supra* note 13, at 789 (calling these doctrines "unsettled and poorly understood"). *See also* references *supra* note 65 and *infra* note 103.

1. Distinguishing Nexus

Nexus is the *sine qua non* of prescriptive jurisdiction; without it, a state cannot tax or regulate. Due process nexus and dormant Commerce Clause nexus both concern the connection between a state and a regulated party.[89] The connection must be sufficient to prevent the state's imposition of a tax or regulation from being arbitrary or unfair.[90]

Courts and commentators have noticed conceptual overlaps between nexus and extraterritoriality.[91] Taking a historical view, Denning has emphasized that, before the Supreme Court subsumed it under the dormant Commerce Clause, extraterritoriality began as a doctrine embedded in both the Due Process and dormant Commerce Clauses.[92] The ways we talk about nexus and extraterritoriality also reflect their overlaps. When we conclude that, due to insufficiency of contacts, a state lacks prescriptive jurisdiction; we often say it lacks nexus. But we might also describe the state's attempt to assert prescriptive jurisdiction as "extraterritorial."

Normative overlaps between nexus and extraterritoriality add to the confusion. For example, decisions finding a lack of nexus are disempowering to the state involved, but the notion that one or more *other states* are more appropriate regulators because they are better connected to the regulated activity or person is typically implicit in a court's denial of nexus. Both nexus and extraterritoriality allocate regulatory power among the states, and both define a state's power, in part, by reference to the powers of other states with the goal of minimizing regulatory overlaps and conflicts.

In our view, avoidance of extraterritoriality is an additional requirement that a state must meet after meeting nexus. There are many possible connections between a state and a regulated party that can support nexus to regulate. A state may *legitimately* regulate (it has nexus with or prescriptive jurisdiction over) a person based on their presence, residence, and activities of many kinds.[93] And nexus is a permissive requirement. Claims of extraterritoriality

89. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2093, 2099 (2018) ("[Dormant Commerce Clause] nexus is established when the taxpayer . . . 'avails itself of the substantial privilege of carrying on business' in that jurisdiction." (quoting Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 11 (2009)).

90. *See id.* at 2091–93.

91. Edgar v. MITE Corp., 457 U.S. 624, 643 (1982) ("The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts."); Florey, *State Courts*, *supra* note 15, at 1060–64.

92. Denning, *Mortem*, *supra* note 16, at 980 (noting due process receded from extraterritoriality in the 1980s).

93. *See* Brilmayer, *supra* note 13, at 877 ("Among the various contacts that have been used to justify application of a particular body of law are the place where a contract was signed, the place where an accident occurred, the place of employment, the location of defendant's unrelated business, and the residence of the regulated party.").

emerge when the regulating state has nexus but the way that it regulates arguably infringes upon the regulatory authority of other states. Extraterritoriality encompasses the notion that a state is not free, in a federal system characterized by obligations to respect the regulatory entitlements of other states, to assert regulatory authority to the fullest extent on *all* permissible jurisdictional bases. Instead, the regulatory entitlements of other states generate additional limits on the scope of any state's prescriptive jurisdiction. Likewise, because, on our account, extraterritoriality primarily protects *state* prerogatives, not individual rights, a person cannot waive extraterritoriality the way a person might consent to assertions of nexus.[94]

2. Distinguishing Burdens

Just as nexus and extraterritoriality feature similar reasoning and are justified by similar normative goals, extraterritoriality and the burdens doctrines of the dormant Commerce Clause have many similarities. Although burdens are not the main focus of this Article, to distinguish extraterritoriality from burdens, we need to understand burdens. Our discussion of burdens enables us to explain why courts, litigants, and commentators have conflated the extraterritorial *effects* that are a principal focus of burdens analysis with the principle of extraterritoriality.

Most first-year law students learn that the dormant Commerce Clause forbids states from discriminating against or imposing undue burdens on interstate commerce.[95] Whereas we described extraterritoriality as a federal solidarity obligation that states owe to other *states*, the duty to avoid discrimination against residents of other states is a solidarity obligation that states owe to *citizens of other states*. In this sense, the duty not to discriminate can be described as an obligation of horizontal federalism.[96] In addition to protecting citizens of fellow states, the nondiscrimination obligation also protects interstate commerce. It, therefore, can also be conceived as an aspect of vertical federalism that promotes the national marketplace.[97] Facially discriminatory rules—those that explicitly treat nonresidents or interstate commerce worse than residents or in-state commerce—are easy for courts to identify and

94. *Cf.* Regan, *Essays*, *supra* note 11, at 1904–05 (posing, but not answering, the question of whether businesses can consent to violations of extraterritoriality as a condition of doing business in a state).

95. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2464 (2019).

96. *See* Delaney & Mason, *supra* note 10, at 637–44.

97. *See generally* Michael S. Knoll & Ruth Mason, *The Economic Foundation of the Dormant Commerce Clause*, 103 VA. L. REV. 309 (2017).

are "virtually *per se*" invalid.[98] Precluding discriminatory state regulations prevents interstate retaliation that might undermine the union.[99]

In addition to its nearly per se prohibition on discrimination, the dormant Commerce Clause also prohibits "undue burdens" on interstate commerce. These are facially neutral rules that interfere with interstate commerce. Courts evaluate such rules under *Pike* balancing, which weighs the state's interest in the regulation against the regulation's burden on interstate commerce.[100] *Pike* balancing has been described as an effort to "smoke out" impermissible protectionist intent.[101] When courts uncover such intentional protectionism, they typically preclude the challenged regulation.[102]

The most difficult cases under the dormant Commerce Clause are those involving facially neutral rules that the state enacted with no clear protectionist intent, but that nevertheless have a disproportionate impact on interstate commerce. Such cases include regulatory "mismatches"; these are policy differences between states where the difference in the content of the regulation results in greater burdens for interstate than in-state commerce.[103]

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98. Or. Waste Sys., Inc. v. Dep't of Env't Quality, 511 U.S. 93, 100 (1994) (describing the legal standard for discriminatory rules). Rarely, states manage to justify discriminatory rules. *See* Maine v. Taylor, 477 U.S. 131 (1986) (accepting a facially discriminatory rule as justified for public policy reasons).

99. H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 533 (1949) (stating that such legislation would "threaten at once the peace and safety of the Union" (quoting JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 180 (Boston, Little, Brown & Co., 4th ed. 1873))).

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

101. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1164 n.4 (2023) ("When it comes to *Pike*, a majority agrees that heartland *Pike* cases seek to smoke out purposeful discrimination in state laws . . . ."); *see also* Regan, *Protectionism*, *supra* note 22, at 1229 (advancing the notion that *Pike* is about "smoking out" protectionist intent).

102. *See generally* Regan, *Protectionism*, *supra* note 22.

103. *See generally* Michael S. Knoll & Ruth Mason, Bibb *Balancing: Regulatory Mismatches Under the Dormant Commerce Clause*, 91 GEO. WASH. L. REV. 1 (2023) [hereinafter Knoll & Mason, Bibb *Balancing*]. When mismatches are intentionally protectionist, courts tend to strike them down. *Id.* at 29–33. Instead of referring to "mismatches," some commentators use the Supreme Court's term, which is "inconsistent regulations." Regan, *Essays*, *supra* note 11, at 1880. In using the term "mismatches," rather than "inconsistencies," we follow the international arbitrage literature. *See, e.g.*, Ruth Mason & Pascal Saint-Amans, *Has Cross-Border Arbitrage Met Its Match?* 41 VA. TAX REV. 137 (2021) (reviewing international efforts to defeat mismatches). Mismatches need not involve *inconsistent* regulations to be problematic; for example, burdens (and extraterritorial effects) arise when one state's law is stricter than (but not necessarily inconsistent with) another's, even if both laws can be satisfied by compliance with the stricter rule. Mismatches also occur when one state regulates while another state has no regulation. *See infra* text accompanying notes 127–135 (discussing *Southern Pacific*). Regardless of terminology, commentators observe the difficulties in distinguishing extraterritoriality and mismatches. Regan, *Essays*, *supra* note 11, at 1882. ("[E]xtraterritoriality is bound up with the issue of inconsistent regulations"); Florey, *State Courts*, *supra* note 15, at 1088 ("[T]he Court has left ambiguous the

In addition to being the hardest undue-burdens cases to resolve, mismatch cases cause the most confusion between burdens doctrine and extraterritoriality doctrine because both types of cases involve regulatory spillovers or what the Supreme Court often refers to as "extraterritorial effects." Consider *South Carolina Highway Dep't v. Barnwell*, in which South Carolina imposed strict weight and width limits on trucks.[104] South Carolina's rules spilled over to other states, causing trucking companies carrying goods between states to either avoid South Carolina or use smaller trucks. In refusing to preclude South Carolina's regulations, the *Barnwell* Court described the burden the South Carolina regulations imposed as "an inseparable incident of the exercise of a legislative authority . . . left to the states."[105] The Court further observed that "bare possession of power by Congress to regulate the interstate traffic" did not "curtail[]" state "power."[106] The Court held that South Carolina regulated well within "the authority of the state over its own highways,"[107] and the state's regulation did not disproportionately burden interstate commerce, but rather had an "unavoidable effect upon interstate and intrastate commerce alike."[108] In addition to these vertical federalism considerations, the *Barnwell* Court also considered horizontal federalism, observing that the South Carolina "legislature, being free to exercise its own judgment, is not bound by that of other [state] legislatures."[109] Thus, according to the *Barnwell* Court, regulatory mismatches do not violate the Constitution, despite their spillover effects. Instead, mismatches are an inevitable consequence of interstate policy diversity, which can be remedied only legislatively, either via preemptive federal legislation or state-level coordination.[110]

The *Barnwell* Court's holding was consistent with the notion that states retained autonomy on joining the union and that regulatory pluralism is an inevitable, even salutary, outcome of such autonomy. But the Supreme Court

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relationship between concerns about inconsistent regulation and extraterritoriality more generally."). Some commentators see virtues in uniting extraterritoriality and burdens. *See* Goldsmith & Sykes, *supra* note 13, at 806 (claiming that folding extraterritoriality into burdens would be simplifying). Such folding in would, of course, eliminate the distinct role of extraterritoriality. Other commentators argue that burdens and extraterritoriality are redundant. *See* Darien Shanske, *Proportionality as Hidden (but Emerging?) Touchstone of American Federalism: Reflections on the* Wayfair *Decision*, 22 CHAP. L. REV. 73, 81 (2019). A purpose of this Article is to distinguish extraterritoriality and burdens.

104. S.C. Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938).

105. *Id.* at 189.

106. *Id.* at 187.

107. *Id.* at 189.

108. *Id.* at 187.

109. *Id.* at 195.

110. *Id.* at 190 (refusing to require South Carolina to conform its rules to those of other states because "that is a legislative, not a judicial function, to be performed in the light of the Congressional judgment of what is appropriate regulation of interstate commerce").

has not consistently treated mismatches this way.[111] Instead, it has precluded mismatches in two circumstances. The first involves regulatory areas that the Court concludes demand uniform national regulation. The second involves mismatches that are so severe that the Court judges them to unduly burden interstate commerce.

An example of the first circumstance is *Southern Pacific v. Arizona*, in which Arizona adopted a maximum train-length limit at a time when almost no other state regulated train lengths.[112] A state has nexus to regulate trains within its territory. But, like the highway regulation in *Barnwell*, the train regulation in *Southern Pacific* generated spillovers because trains heading into Arizona would need to comply before they entered the state.[113] The need for such out-of-state compliance represented an extraterritorial effect, which the Court specifically acknowledged.[114]

In our view, the Supreme Court correctly analyzed *Southern Pacific* as a burdens case (a case about extraterritorial *effects*), arising from mismatches between the regulations of two or more states, rather than as an extraterritoriality case (a case about an overbroad assertion of prescriptive regulation by a single state that invades the regulatory prerogatives of another state or states). The problem in *Southern Pacific* was not the *scope* of Arizona's regulation, nor did the Court, in precluding it, express any concern that Arizona had violated its horizontal obligations to other states by encroaching on their autonomy.[115] Instead, the Court held that the Arizona rule was too burdensome when considered in light of the *content* of other states' laxer or nonexistent regulation of the same subject matter in their own territories. As the Supreme Court observed, if every state adopted its own train-length limits, then an interstate train operator would have to "conform to the lowest train limit restriction of any of the states through which its trains pass, whose laws thus control the carriers' operations both within and without the regulating state."[116] After weighing the safety advantage from shorter trains against the burden on interstate commerce that would arise if different states applied different length limitations, the Court not only held that Arizona could not have its rule but also

111. For more on mismatches, see Knoll & Mason, Bibb *Balancing*, *supra* note 103.

112. S. Pac. Co. v. Ariz. *ex rel.* Sullivan, 325 U.S. 761, 773–74 (1945).

113. *Id.* at 773 ("Compliance with a state statute limiting train lengths requires interstate trains of a length lawful in other states to be broken up and reconstituted as they enter each state . . . .").

114. *Id.* at 775 ("The practical effect of such regulation is to control train operations beyond the boundaries of the state . . . .").

115. *Id.* at 767.

116. *Id.* at 773.

held that *no state could regulate* train lengths at all.[117] Instead, only Congress could do so. The *Southern Pacific* holding reflects the age of the case; it was decided at a time when the Supreme Court viewed Congress as exclusively entitled to regulate certain aspects of interstate commerce.[118] Today, by contrast, the Court recognizes that states are concurrently entitled to regulate interstate commerce, at least in the absence of preemptive federal regulation.[119]

In the mid-twentieth century, the Court adopted a new approach to mismatches, under which it sometimes required a state with an outlier rule to conform to the dominant state practice.[120] For example, in *Bibb v. Navajo Freight Lines, Inc.*, Illinois introduced a curved-mudflap rule at a time when all other states required or permitted straight mudflaps.[121] In the Court's view, Illinois's outlier rule imposed a burden on interstate commerce; it caused trucks traveling interstate to either divert around Illinois or stop at the border to change mudflaps.[122] The Court precluded Illinois's rule after weighing Illinois's policy interest in its outlier rule against both the burden on interstate commerce arising from the mismatch and other states' interests in the dominant rule.[123] Because the modern Supreme Court takes a balancing approach to mismatches, sometimes it precludes them, whereas other times it upholds them.[124]

This Article does not attempt to resolve which of these judicial approaches to mismatches is best or when a mismatch is so severe that it warrants judicial preclusion. Instead, our goal is to explain that extraterritoriality—that is, the

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117. In dissent, Justice Black argued that only Congress, not courts, could prevent burdens on interstate commerce that arise from regulatory mismatches. *S. Pac.*, 325 U.S. at 793–94 (Black, J., dissenting).

118. *See id.* at 767–69.

119. For history of the dormant Commerce Clause, see generally Denning, *Reconstructing*, *supra* note 22.

120. *See, e.g.*, Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (precluding a mismatched mudflap rule); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) (precluding a mismatched truck-length limit); Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1981) (precluding a mismatched truck-length limit). *But see* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (upholding a mismatched milk-carton rule).

121. *Bibb*, 359 U.S. at 521–23.

122. *Id.* at 527–28.

123. *Id.* at 529–30.

124. *Compare id.* (precluding mismatch), *with Clover Leaf*, 449 U.S. (upholding mismatch). In prior work, we argued that balancing analysis in mismatch cases differs sufficiently from *Pike* balancing that it deserves its own name, and we offered the name *Bibb* balancing after the famous mudflaps case. Knoll & Mason, Bibb *Balancing*, *supra* note 103. We explained that, in *Pike* balancing cases, the Court examines the law of only the challenged state. *See id.* at 55. But *Bibb* balancing involves analysis of multiple states' laws. The outlier state's regulatory interest is any *relative* advantage the outlier rule produces over and above the advantages produced by the dominant rule (for example, the *additional* safety gained by requiring curved mudflaps relative to straight mudflaps). *See id.* at 8. The burden in a mismatch case consists of the increased costs the challenged state imposes on interstate commerce relative to the dominant rule. *Id.* at 18.

use by one state of an overbroad regulatory basis that invades other states' regulatory prerogatives—differs from extraterritorial *effects*, which are interstate spillovers that arise from two or more states' mismatched regulations. Extraterritorial effects may arise from different states' mismatched rules even when those states apply their regulations on an appropriately narrow basis; extraterritorial effects are inevitable in a federation characterized by retained state autonomy.

Sometimes, the Supreme Court finds regulatory mismatches to be so burdensome that they unconstitutionally interfere with the national market; other times, the Court allows mismatches to persist. Eliminating all mismatches (that is, eliminating all spillovers) would inhibit regulatory diversity too much, but allowing all spillovers would inhibit the national market too much—hence, the Supreme Court's use of a balancing approach in mismatch cases. By contrast, no amount of extraterritoriality—defined as encroachment by one state on the regulatory entitlements of another—must be tolerated in a federation. States' solidarity obligations prevent them from invading each other's regulatory prerogatives, but when states refuse to observe their duties, federal courts may intervene to hold states to their constitutional obligations. In this way, we can make sense of the common claim that extraterritoriality operates per se; it means that violations of extraterritoriality are not susceptible to justification.

An important distinction between mismatches and extraterritoriality, then, is that extraterritoriality is a characteristic of a single state's law considered alone, whereas the existence and intensity of mismatch burdens depend on the laws of at least two states, and a change of law by just one of those states can eliminate (or create) a mismatch burden. For example, in *Southern Pacific*, if all other states had adopted the same rules as Arizona, the mismatch burden never would have developed.[125] By contrast, like nexus, extraterritoriality is a feature of a single state's law, considered alone. If a state's assertion of regulatory jurisdiction violates the prohibition on extraterritoriality, it does so independently of the actions of any other state. And, when a court precludes a state's assertion of regulatory jurisdiction as extraterritorial, the state must narrow its assertion of jurisdiction; nothing any other state does is relevant to a judgment about the legality of the new (or former) rule.

Extraterritoriality cases, therefore, do not admit of the same dynamism that characterizes mismatch cases, which involve balancing and weighing policy interests against burdens on interstate commerce, and which change as state policies change and as regulated parties adjust their behavior. Extraterritoriality can coincide with actual regulatory mismatches in the real world or not. When states regulate too broadly (a problem of extraterritoriality), they are more likely to create conditions under which states subject the same cross-border commercial actor to mismatched rules (a problem of burdens). The creation of this risk could be seen as an additional justification—along with the need in a federation to reserve to each state in the union its proper share

125. S. Pac. Co. v. Ariz. *ex rel.* Sullivan, 325 U.S. 761 (1945).

of regulatory autonomy—for the prohibition of extraterritoriality, but it should not be seen as the *principal* justification. The Supreme Court has not regarded actual overlaps in the content of regulation to be a necessary condition for a finding of extraterritoriality,[126] nor has it regarded actual overlaps in regulation as a sufficient condition for a finding of extraterritoriality.[127] Such decisions make sense on our account of extraterritoriality, which sees the doctrine as a limit on the breadth of state assertions of prescriptive jurisdiction. They do not make sense, however, if extraterritoriality is merely a doctrine to prevent actual regulatory mismatches.

By the same token, although holding states to their obligations not to invade other states' regulatory autonomy may (because it tends to reduce regulatory mismatches) promote national market integration and reduce economic balkanization, this is not the unique role the extraterritoriality principle plays in our constitutional jurisprudence. Extraterritorial assertions of prescriptive jurisdiction by states are problematic not merely because they generate risks of protectionism, market segmentation, cumulative regulation, or regulatory conflict. They are also *intrinsically* problematic, even if the regulation does not otherwise disrupt cross-border commerce (e.g., because no other state imposes a contrary regulation).[128] Extraterritorial assertions of regulatory jurisdiction are problematic because they threaten the "horizontal separation of powers" as articulated in *National Pork*.[129] A state may exercise its policy prerogatives by regulating, or by *not regulating*, according to the will of its voters. Just as vertical federalism places some limits on the ability of states to soak up regulatory entitlement that Congress does not exercise, extraterritoriality as an aspect of horizontal federalism should be understood to limit the ability of one state to soak up regulatory authority that other states do not exercise.[130]

We conclude our discussion distinguishing burdens from extraterritoriality with a quotation from Justice Robert Jackson in *H.P. Hood & Sons, Inc. v. Du Mond*.[131] Justice Jackson observed that, as one of the "great silences of the Constitution," the dormant Commerce Clause "has advanced the solidarity and prosperity of this Nation."[132] "Prosperity" points to the national marketplace and, therefore, to burdens on interstate commerce; "solidarity" points to

126. *See infra* Section II.A (discussing *Edgar*).

127. *See, e.g.*, S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 195–96 (1938) (upholding mismatched regulation despite its extraterritorial effects).

128. *See, e.g.*, Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 376 (6th Cir. 2013) (holding Michigan's regulation to be extraterritorial in violation of the dormant Commerce Clause, even though no other state had similar or conflicting regulation).

129. *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1157 (2023) (Gorsuch, J.).

130. *Cf.* Austin v. New Hampshire, 420 U.S. 656, 658–59, 666 (1975) (forbidding state soak-up taxes). Soak-up taxes are taxes assessed by a source state, but only to the extent the tax would be credited by the resident's home state. The source state thereby "soaks up" any tax entitlement that the residence state otherwise would have exercised.

131. H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949).

132. *Id.* at 535.

obligations and relationships. As described above, states have solidarity duties to the federal government, fellow states, and citizens of fellow states. These include duties not only to refrain from discriminating against other states' citizens but also to refrain from invading other federal partners' regulatory prerogatives. Prosperity and solidarity are inextricably linked and mutually reinforcing.

3. Extraterritoriality as an Independent Doctrine

As elements of federalism, each of the dormant Commerce Clause strands we have discussed has a different central function. Nexus is about connection; it ensures that the state regulates the *right person or activity*, that the regulated person has notice, and that the state's exercise of prescriptive jurisdiction over them is fair and not arbitrary. Extraterritoriality aims to ensure that the state does not regulate *too broadly*—that is, that the state does not invade other states' proper regulatory spheres.[133] And the burdens doctrine prevents states from *discriminating against or unduly burdening* interstate commerce. Another way to put this is that nexus is principally about protecting people, extraterritoriality is principally about protecting fellow states, and the burdens doctrine is principally about protecting the national marketplace.[134]

This is not to say that the doctrines are unrelated. When a court holds that a state violated any of these strands, and the court either prevents the state from exercising jurisdiction or precludes the challenged regulation, the court implicitly invokes the challenged state's duties of federal solidarity. All three strands implicate state sovereignty and comity, and all implicitly involve allocation of power among the states. Each is important for dampening interstate frictions that otherwise might threaten the federation itself. By ensuring a match between the laws that apply to a person and that person's entitlement to vote on the content of those laws, all three doctrines also, to some extent, serve democratic accountability goals. And all three play an important role in safeguarding the national marketplace, which is a key vertical federalism value promoted by the dormant Commerce Clause.

But each strand of the dormant Commerce Clause differs from the others. For example, a violation of the extraterritoriality principle means that the state lacks the power to apply that regulation even if the state has nexus over the person it hopes to regulate, the regulation is not protectionist, and the regulation would not conflict with the regulation of any other state. A state that violates the principle of extraterritoriality seeks to regulate too broadly; it thereby invades the regulatory autonomy of other states. Such an invasion can be rebuffed even if the other state has not, in fact, exercised its prerogative to regulate the relevant area. Extraterritoriality, therefore, principally concerns

133. Healy v. Beer Inst., 491 U.S. 324, 336 (1989) ("[Extraterritorial regulations] exceed[] the inherent limits of the enacting State's authority").

134. The burdens doctrine also protects people from discrimination. *See* Delaney & Mason, *supra* note 10, at 638.

horizontal federalism, and it only secondarily concerns vertical federalism. Likewise, although extraterritoriality decisions may impact the national marketplace, the national market is not the central focus of extraterritoriality. Instead, the national market is the central concern of the burdens strand of the dormant Commerce Clause. Despite overlaps in the doctrines' normative goals, keeping the doctrines straight is important for understanding extraterritoriality's unique normative function in our federal system. By enforcing ground rules for how states may exercise their coequal—and often overlapping—powers, extraterritoriality represents a crucial bulwark of federalism; it reserves, even to the smallest states with the smallest markets, some measure of regulatory autonomy.

4. Analytical Approach in Cases

So far, we have argued that nexus, extraterritoriality, and burdens are independent doctrines serving different, but related goals under the dormant Commerce Clause. Under our framing, a court would analyze nexus first. If a state lacks nexus, then it cannot apply any regulation. If the state possesses nexus, the reviewing court would go on to consider claims about extraterritoriality. Last, assuming the state's regulation was not extraterritorial, the reviewing court would consider burdens on interstate commerce. Dormant Commerce Clause cases often involve both extraterritoriality and burdens complaints. This should not surprise us—one state's particularly burdensome regulation may spill over into other states, triggering complaints of regulatory overbreadth. And a state's overbroad regulation may overlap with the regulations of other states, resulting in what commercial parties perceive as unduly burdensome regulation. Although elucidating burdens analysis is not our principal aim, throughout the next Part, we pay special attention to burdens—especially mismatch burdens—because they are so often conflated with extraterritoriality.

D. *Extraterritoriality as a Dormant Commerce Clause Doctrine*

Before turning to extraterritoriality cases in Part II, we conclude this Part by considering the appropriateness of propounding extraterritoriality doctrine under the dormant Commerce Clause. Although the Supreme Court has generally invoked the dormant Commerce Clause in applying limits on state extraterritoriality, other constitutional provisions, or the whole structure of the Constitution, could also support such limits. [135] The other doctrines we have discussed—nexus and burdens—likewise find support outside the Com-

135. *Cf.* Denning, *supra* note 22, at 980.

merce Clause. Most obviously, nexus is now mostly a matter of the Due Process Clause.[136] The burdens doctrine, too, could reside comfortably in other textual provisions of the Constitution. Specifically, some have argued that it would be more appropriate to elaborate the burdens doctrine under the Import-Export Clause, the Privileges and Immunities Clause, or, per the *National Pork* majority, as a "principle [that] inheres in the very structure of the Constitution."[137] Similarly, although extraterritoriality cases traditionally have been decided under the dormant Commerce Clause, commentators and jurists—including most recently Justice Kavanaugh in *National Pork*[138]—have raised questions about whether that doctrine would sit more comfortably elsewhere, such as under the Due Process Clause, the Full Faith and Credit Clause, or the Privileges and Immunities Clause. Donald Regan argued that extraterritoriality is best understood as arising not from a particular provision of the Constitution but, rather, as "one of those foundational principles of our federalism which we infer from the structure of the Constitution as a whole."[139] Looking to case law, the Supreme Court may have positioned extraterritoriality doctrine as part of the dormant Commerce Clause because, similar to burdens on interstate commerce, judicial review is needed only when Congress has not exercised its affirmative power to preempt states via national regulation. Or the Supreme Court may have located extraterritoriality in the dormant Commerce Clause due to the close connections between extraterritoriality and mismatch burdens.

The observation that fundamental principles of horizontal federalism lack both clear textual bases and agreed upon normative foundations has been explored by others.[140] Despite these concerns, the dormant Commerce Clause has been a convenient—if atextual—home for both horizontal and vertical federalism interests, including fairness, anti-discrimination, extraterritoriality, and interests associated with the national marketplace, such as limits on state

136. *But see* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2093 (2018) (observing that there may yet be a separate role for the dormant Commerce Clause to play in nexus inquiries in state tax cases).

137. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1153 (2023) (recounting these arguments).

138. *See, e.g.*, *id.* at 1172 (Kavanaugh, J., concurring in part and dissenting in part) ("[Overbroad state economic regulations] . . . may raise questions not only under the Commerce Clause, but also under the Import–Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause.").

139. Regan, *Essays*, *supra* note 11, at 1885 (arguing that extraterritoriality is better understood as a principle of structural federalism, derived from no particular provision of the Constitution).

140. *See generally* Erbsen, *supra* note 10. Despite a lack of clear textual language, the Supreme Court recently held that what we would call obligations of horizontal federalism required states to recognize other states' sovereign immunity. *See* Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485 (2019).

protectionism and market segmentation.[141] Dormant Commerce Clause doctrine is a pastiche, sometimes imitating doctrines under the Due Process, Full Faith and Credit, and Privileges and Immunities Clauses. Rather than being preoccupied with "doctrinal pigeonhole[s],"[142] our attempt at untangling nexus, extraterritoriality, and burdens aims to better understand the unique function of each doctrine in our constitutional federalism.

We do not suggest that concerns about allocation of power among the states fall exclusively in the purview of the Commerce Clause, that other provisions of the Constitution do not contribute to the meaning of extraterritoriality within our particular federation, or even that extraterritoriality must necessarily be grounded in specific constitutional provisions rather than in the structure of the Constitution as a whole. On the contrary, we acknowledge that interstate allocation-of-power questions take many doctrinal forms and trigger analysis under a variety of provisions of our Constitution. All we claim is that our federation guarantees the states some degree of policy autonomy and that maintaining such autonomy requires the states to refrain from invading each other's regulatory entitlements, an obligation which has been enforced judicially.[143] We are not opposed to the textual reassignment of the doctrines we discussed here; we do not think that such reassignment would change the core analysis we provide, although other legal consequences would follow from such reshuffling.[144]

II. EXTRATERRITORIALITY CASES

Case law is consistent with our account. Specifically, the prohibition of extraterritoriality aims to prevent one state from invading the regulatory prerogatives of other states. The Supreme Court enforces the obligations of extraterritoriality as a matter of horizontal federalism and, in particular, as an obligation of state-to-state solidarity that arises from membership in the federal union. In this Part, we explore the Supreme Court's extraterritoriality cases, which fall into two main groups: corporate cases and pricing cases. In doing so, we continue to emphasize the distinction between extraterritoriality, which is a constitutional infirmity caused by a single state acting alone, and mismatch burdens, which arise from conflicts in the content of regulations enacted by more than one state.

A. *Corporate Cases*

Corporations, as legal fictions, are hard to pin down geographically. It is commonplace for companies to be established in one jurisdiction but conduct

141. *See generally* Knoll & Mason, Bibb *Balancing*, *supra* note 103.

142. Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1173 (10th Cir. 2015).

143. *Id.* at 1174.

144. If, for example, the Court shifted the doctrines from the dormant Commerce Clause to other clauses of the Constitution, or if those doctrines were understood as structural principles, then, at a minimum, the ability of Congress to grant states consent to violate them would be affected.

all, or nearly all, of their business in one or more other jurisdictions. This practice creates a risk of double or multiple regulation. Regulation by more than one state raises the specter that a single company could be subject to duplicative or even mutually inconsistent obligations. To some extent, states prevent multiple corporate regulation through conflicts rules. Such conflict rules include the internal-affairs doctrine, under which states defer to a company's state of incorporation regarding regulations that govern the company's "internal affairs," which are "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders."[145]

Despite widespread state adherence to the internal-affairs doctrine, states sometimes vary from it, as *Edgar v. MITE* illustrates. When states vary from the internal-affairs doctrine, extraterritoriality challenges may arise. In *Edgar*, Illinois applied a restrictive antitakeover rule on the basis of several types of connections that the target company might have had with Illinois, including the residence in Illinois of 10 percent of the target's shareholders.[146] MITE was a company incorporated in Delaware that initiated a tender offer for a target company incorporated in Illinois.[147] The MITE tender offer was subject to Illinois's restrictive antitakeover regulation, and MITE challenged it on dormant Commerce Clause grounds.[148]

Four justices in *Edgar* would have precluded Illinois's antitakeover regulation solely due to its "sweeping extraterritorial effect."[149] The plurality observed that, by applying its regulation to target companies when only 10 percent of their shareholders were Illinois residents, Illinois prevented an out-of-state company "from making its offer . . . [to] those living in other States and having no connection with Illinois."[150] The *Edgar* plurality also gave us what would become—once adopted by a majority of the Court in *Healy*—the following oft-quoted description of extraterritoriality: "The Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[151] The *Edgar* plurality explained that "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property [outside Illinois] would offend sister States and exceed the inherent limits of the

145. Edgar v. MITE Corp., 457 U.S. 624, 645 (1982) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (AM. L. INST. 1971)).

146. *Id.* at 627.

147. *Id.* at 626–27.

148. *See id.* at 627–28.

149. *Id.* at 642.

150. *Id.* The majority in *Healy* would later refer to the *Edgar* plurality's decision as "illuminat[ing] the contours of the constitutional prohibition on extraterritorial legislation." Healy v. Beer Inst., 491 U.S. 324, 333 n.9 (1989).

151. *Edgar*, 457 U.S. at 642–43; *Healy*, 491 U.S. at 336.

State's power."[152] These are concerns about horizontal federalism, interstate solidarity, and the allocation of power across states. The plurality's concern about "offending sister states" refers both to Illinois's encroachment on other states' regulatory entitlements and to conflicts such encroachment could inspire.

Although there were not five votes to preclude the Illinois regulation on extraterritoriality grounds, Justice Powell joined the four justices in the plurality to form a majority that used *Pike* balancing to preclude Illinois's regulation on undue-burden grounds. Under *Pike* balancing, the Court weighs the state's regulatory interest against the burden the challenged regulation imposes on interstate commerce.[153] The five-justice majority took extraterritoriality considerations into account on both sides of the balancing scale. In the majority's view, "the most obvious burden" of Illinois's antitakeover law was its broad scope. The Court specifically pointed to the regulation's "nationwide reach which purports to give Illinois the power to determine whether a tender offer may proceed anywhere."[154] Against this burden, the majority weighed Illinois's policy interest. Here, too, the Court considered the broad scope of Illinois's regulation. The majority observed that the Illinois regulation was so broad that it applied to the offeror's dealings with both Illinois-resident shareholders and nonresident shareholders. Because Illinois had "no legitimate interest in protecting nonresident shareholders," however, the Court concluded that there was "nothing to be weighed in the balance to sustain the law."[155] Overbreadth, thus, made Illinois's regulation more burdensome, and it also weakened Illinois's interest in it.[156] The *Edgar* Court's blending of extraterritoriality and burdens in this way probably has made it more difficult for commentators and lower courts to understand how the two doctrines differ.

Five years later, in *CTS Corp. v. Dynamics Corp. of America*, the Supreme Court considered Indiana's antitakeover regulation.[157] Unlike Illinois's regulation, the Indiana rule adhered to the internal-affairs doctrine, meaning it applied only to targets that were incorporated in Indiana.[158] The case involved no claim questioning Indiana's nexus to regulate, and the Court rejected a claim that the Indiana rule discriminated against interstate commerce.[159] Remember that the *Edgar* Court decried the "nationwide reach" of the Illinois

152. *Id.* at 643 (quoting Shaffer v. Heitner, 433 U.S. 186, 197 (1977)).

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

154. *Edgar*, 457 U.S. at 642–43 (citing *Pike*, 397 U.S. at 142).

155. *Id.* at 644.

156. *Id.* at 645–46 (precluding Illinois' regulation).

157. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987).

158. *Id.* at 73.

159. *Id.* at 88.

regulation, which applied to both Illinois shareholders and nonresident shareholders.[160] Like Illinois in *Edgar*, Indiana in *CTS* applied its antitakeover regulation to protect both resident and nonresident shareholders.[161] In this sense, the regulation in *CTS*, like that in *Edgar*, arguably had "nationwide reach."[162] The difference in the two statutes was the states' connection to the target company. Whereas, in *Edgar*, Illinois regulated tender offers if 10 percent of the target's shareholders resided in Illinois, Indiana regulated offers for targets only if the target was incorporated in Indiana. Whereas the *Edgar* Court concluded that Illinois had no interest in protecting out-of-state shareholders of targets incorporated in other states, the *CTS* Court held that Indiana had a significant interest in protecting the out-of-state shareholders of companies that it chartered.[163] In the *CTS* Court's view, this interest outweighed the burden on interstate commerce that arose from "limit[ing] the number of successful tender offers" for companies Indiana chartered.[164]

When we compare the *content* of the two antitakeover rules, we find that both Illinois and Indiana severely restricted takeovers. The *Edgar* regulation gave the Illinois Secretary of State the power to stop acquisitions that the Secretary deemed unfair;[165] the *CTS* regulation made acquirers' ability to vote certain shares in Indiana targets dependent on a majority vote of pre-existing disinterested shareholders.[166] Both regulations strictly limited tender offers, and both could be expected to impact interstate commerce because tender offers are often made across state lines. By burdening takeovers, states might hamper the efficient nationwide market for corporate control, a point the *CTS* dissenters emphasized.[167] The difference in outcome between the two cases, thus, cannot be traced to differences in the severity of the two regulations. Rather, it can be traced to differences in the regulations' jurisdictional scope. By using a 10-percent-of-the-shareholders rule, Illinois regulated too broadly; it invaded other states' regulatory spheres by asserting the "power to determine whether a tender offer may proceed anywhere."[168] By contrast, Indiana applied its regulation on a narrower basis—incorporation—which the Court held did

160. *Edgar*, 457 U.S. at 642–43.

161. *CTS*, 481 U.S. at 93–94.

162. *Edgar*, 457 U.S. at 643.

163. *CTS*, 481 U.S. at 93 (distinguishing the resident shareholders of *nonresident* companies protected under the anti-takeover regulation at issue in *Edgar* from the nonresident shareholders of *resident* companies protected by the anti-takeover regulation at issue in *CTS*).

164. *Id.*

165. *Edgar*, 457 U.S. at 626–27.

166. *CTS*, 481 U.S. at 73–74.

167. *Id.* at 97, 99–101 (White, J., dissenting).

168. *Edgar*, 457 U.S. at 643.

not invade other states' regulatory prerogatives.[169] The reasoning in both *Edgar* and *CTS* reflected extraterritoriality concerns about interstate solidarity and the horizontal allocation of regulatory power across states.

B. *Pricing Cases*

The other group of Supreme Court extraterritoriality cases involved pricing regulations. Although often cited among extraterritoriality cases, *Baldwin v. G.A.F. Seelig, Inc.* was a burdens case.[170] It involved a New York regulation requiring milk dealers to affirm that the milk they sold in the state had been purchased for a minimum price set by a New York statute.[171] A New York milk dealer, who bought milk in Vermont at a price below the New York minimum, lodged a dormant Commerce Clause complaint.[172] There was no question that New York possessed nexus to regulate prices in its territory, and the Court did not explicitly consider extraterritoriality.[173] Instead, the Court analyzed *Baldwin* as a burdens case, precluding the price regulation as an impermissible "customs dut[y]" and "barrier to traffic,"[174] which would "suppress or mitigate the consequences of competition between the states"[175] and "neutralize the economic consequences of free trade among the states."[176] These are classic burdens concerns involving the efficiency of the national market. Of course, the harms from protectionism are not limited to the market. The *Baldwin* Court also expressed concern that protectionist regulation of the type New York applied could "open[] [the door] to rivalries and reprisals" from Vermont and "invite a speedy end of our national solidarity."[177] *Baldwin* is usually (rightly in our view) classified as a burdens case because the Court did not consider the principal question that would govern any extraterritoriality case: namely, whether New York invaded any prerogative of Vermont.[178] Thus, the

169. *CTS*, 481 U.S. at 91, 93.

170. *See, e.g.*, *Brown-Forman*, 176 U.S. at 584; *Healy*, 194 U.S. at 336; *Nat'l Pork*, 143 S. Ct. at 1146

171. Baldwin v. G.A.F. Seelig Inc., 294 U.S. 511, 519–20 (1935).

172. *Id.* at 520–21.

173. *Id.* at 519, 521.

174. *Id.* at 521.

175. *Id.* at 522.

176. *Id.* at 526; *see also id.* at 527 (observing that a state cannot "establish[] an economic barrier against competition," impose an "unreasonable clog upon the mobility of commerce," or erect a "rampart of customs duties designed to neutralize advantages belonging to the place of origin," calling such moves "hostile" and "burdensome").

177. *Id.* at 522–53.

178. Although the Court observed that "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there," that observation went to nexus, not extraterritoriality. *See id.* at 521; *supra* Section I.C. This is not to say that one could not have constructed an extraterritoriality argument in *Baldwin*; indeed, Justice Cardozo

erosion of solidarity that concerned the Court was not the type that would arise from New York improperly meddling in Vermont's affairs, but, rather, it concerned the threat of tit-for-tat trade retaliation.

We can contrast the milk regulation in *Baldwin* with subsequent alcohol-price-affirmation statutes that the Court analyzed explicitly as extraterritoriality cases. These regulations required alcoholic beverage sellers to sell in the state at prices no higher than those sellers charged in other states.[179] Again, there was no issue of nexus in these cases; states are entitled to regulate prices for alcohol sold in their territory.[180] States adopted price-affirmation regulations for a variety of reasons, including to discourage residents from driving across the border to buy cheaper alcohol and to protect residents from perceived price discrimination.[181] In 1986, in *Brown-Forman Distillers Corp.*, a seller attempted to circumvent New York's alcohol price affirmation rule by granting rebates to buyers outside the state.[182] New York interpreted such rebates as a violation of its affirmation law and suggested that the seller remedy the violation by charging the net-of-rebate price in New York.[183] But lowering the price in New York to the net-of-rebate price it had charged in other states would have caused the seller to violate the price-affirmation laws of those other states.[184] Caught in a web of different state affirmation rules, the seller challenged New York's regulation under the dormant Commerce Clause, and the Supreme Court precluded it as extraterritorial.[185] A Connecticut alcohol price-affirmation regulation met a similar fate in *Healy v. Beer Institute* in 1989.[186]

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pointed in that direction when he imagined a statute in which one state conditioned the importation of products upon "proof of a satisfactory wage scale" having been paid in the exporting state's factory, a regulation that Cardozo thought would improperly "put pressure" on other states to "reform their economic standards." *Baldwin*, 294 U.S. at 524. Moreover, although the *Baldwin* Court used the term "projecting" to refer to nexus, the *Brown-Forman* and *Healy* Courts used it to refer to extraterritoriality. See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 584 (1986) (quoting *Baldwin*, 294 U.S. at 521); Healy v. Beer Inst., 491 U.S. 324, 336–37 (1989). *But see* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1146 (2023) (characterizing all three cases—*Baldwin*, *Brown-Forman*, and *Healy*—as burdens cases "concern[ed] with preventing purposeful discrimination against out-of-state economic interests.").

179. *Brown-Forman*, 476 U.S. at 575–76; *Healy*, 491 U.S. at 326–27.

180. *Healy*, 491 U.S. at 334.

181. *Id.* at 326. They might have also adopted such laws to protect less efficient in-state competitors from more efficient out-of-state competitors.

182. *Brown-Forman*, 476 U.S. at 576–77.

183. The regulator suggested this because New York law forbade rebates on alcohol. *Id.* at 578.

184. *Id.*

185. *Id.* at 583–85.

186. 491 U.S. 324 (1989). New York's statute in *Brown-Forman* was retrospective; it required the price in New York to be no higher than the price charged anywhere else in the nation in the previous month. Connecticut's statute in *Healy* was contemporaneous; it required that the price be no higher than that charged in border states in the same month. Connecticut hoped, in

In both *Brown-Forman* and *Healy*, the Supreme Court referred to the regulations' "extraterritorial effects,"[187] and, in *Healy*, the Court expressly touched on the normative underpinnings for extraterritoriality identified in Part I, citing concerns about "the autonomy of the individual States within their respective spheres."[188] Picking up on language from *Edgar*, the *Healy* Court raised issues of solidarity, interstate frictions, and the horizontal allocation of power among the states when it observed that a state's "attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power."[189] The *Brown-Forman* Court likewise observed that "New York's affirmation law may interfere with the ability of other States to exercise their own authority."[190] In both *Brown-Forman* and *Healy*, the Court concluded that, through their pricing regulations, the states had "regulate[d] out-of-state transactions,"[191] impermissibly "project[ing]" their legislation into other states.[192] The *Healy* Court observed that "the Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[193] It further concluded that "a State may not adopt legislation that has the practical effect of establishing 'a scale of prices for use in other states' "[194] or of "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another."[195] The main problem with the regulations in both *Brown-Forman* and *Healy* was that the challenged states "tied" in-state prices to out-of-state prices, thereby effectively regulating both.[196] The Court concluded that such "tying"

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vain, that the contemporaneous aspect of its regulation would give sufficient price flexibility to avoid the constitutional infirmity of *Brown-Forman*. *See Healy*, 491 U.S. at 331–38 (describing the differences among the various statutes). In an early price-affirmation case, *Seagram*, the Court approved New York's price-affirmation rule. Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35 (1966). The Court distinguished *Seagram* in *Brown-Forman* by saying that, although the extraterritorial effects in *Seagram* were conjectural, the effects of the rule in *Brown-Forman* were clear. *Brown-Forman*, 476 U.S. at 581.

187. *Brown-Forman*, 476 U.S. at 581; *see also Healy*, 491 U.S. at 338.

188. *Healy*, 491 U.S. at 336.

189. *Id.* at 336 n.13 (quoting Edgar v. MITE Corp., 457 U.S. 624, 643 (1982)).

190. *Brown-Forman*, 476 U.S. at 585.

191. *Id.* at 582.

192. *Id.* at 584 ("[P]rojected its legislation") (citing Baldwin v. G.A.F. Seelig Inc., 294 U.S. 511, 521 (1935)); *Healy*, 491 U.S. at 337 ("Commerce Clause protects against inconsistent legislation arising from the projection of one state['s'] regulatory regime into the jurisdiction of another State") (comparing CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987)).

193. *Healy*, 491 U.S. at 336 (quoting Edgar v. MITE Corp., 457 U. S. 624, 642–43 (1982)).

194. *Id.* (quoting *Baldwin*, 294 U.S. at 528).

195. *Id.* at 334 (quoting *Brown-Forman*, 476 U.S. at 582).

196. *Id.* at 343 (discussing the holding in *Brown-Forman*, 476 U.S.).

results in an "extraterritorial effect [that] violates the Commerce Clause."[197] Both decisions focused on what the *National Pork* Court would later dub "horizontal separation of powers."[198] Specifically, both decisions involved allocation of powers across the states and the importance of preventing one state from invading the regulatory prerogatives of other states, lest such invasion "offend[] sister States."[199] Although the price regulations undoubtedly also burdened the national market, the Court principally focused on the implications of the regulations for other states' autonomy.

C. *Distinguishing Burdens, Again*

To further get a handle on extraterritoriality doctrine, we need to continue to distinguish burdens. When New York in *Baldwin* applied what was effectively an import tariff, the Supreme Court precluded it on burdens grounds, relying on the need to ensure "free trade among the states."[200] By contrast with this national market concern, the Supreme Court emphasized autonomy concerns in the extraterritoriality cases. For example, the plurality in *Edgar* warned that, by "assert[ing] extraterritorial jurisdiction over persons or property," Illinois "would offend sister States and exceed the inherent limits of the State's power."[201] The *Healy* Court picked up this exact language when striking Connecticut's alcohol-price-affirmation regulation as extraterritorial."[202] The *Brown-Forman* Court used similar language to hold that the challenged regulation would "interfere with the ability of other States to exercise their own authority."[203] By contrast, in upholding Illinois's antitakeover rule in *CTS* against an extraterritoriality challenge, the Supreme Court emphasized that Illinois did not invade any other state's authority as "[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations."[204]

Another important difference between extraterritoriality analysis and burdens analysis that emerges from the cases has to do with the Court's reliance on counterfactual reasoning as part of its extraterritoriality analysis. To explain the Court's use of counterfactuals, we return to the reasoning of the *Edgar* plurality. The language the *Edgar* plurality used to describe the Illinois

197. *Id.* (describing the decisions in the instant case and *Brown-Forman*, 476 U.S.).

198. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1157.

199. *Healy*, 491 U.S. at 336 n.13.

200. *Baldwin*, 294 U.S. at 526.

201. Edgar v. MITE Corp., 457 U.S. 624, 643 (1982) (quoting Shaffer v. Heitner, 433 U.S. 186, 197 (1977)).

202. *Healy*, 491 U.S. at 336 n. 13.

203. *Brown-Forman*, 476 U.S. at 585.

204. *CTS*, 481 U.S. at 89.

regulation did not seem to match the facts. The plurality said that the commerce that Illinois attempted to regulate took place "wholly outside the State of Illinois,"[205] but the target of MITE's tender offer was an Illinois-incorporated company,[206] and a quarter of the target's shareholders were Illinois residents.[207] Thus, it does not seem accurate to conclude that Illinois was attempting to regulate activity "wholly outside" the state. The problem in *Edgar* was not that Illinois had no valid claim that would entitle it to regulate the tender offer—Illinois surely possessed regulatory nexus over the target. Instead, the plurality's central concern seemed to be that *multiple states* could claim regulatory jurisdiction over the same company for the same act, using different, but equally plausible, jurisdictional bases than that which Illinois used.[208] For example, a tender offer could be understood to occur in target shareholders' residence state(s), in the offeror's state of incorporation, the offeror's state of domicile, the target's state of incorporation, or the target's state of domicile, and each of these states could seek to regulate it.

To evaluate the risk of regulation by multiple states, the *Edgar* plurality engaged in counterfactual reasoning. It hypothetically generalized the challenged Illinois regulation, imagining that other states enacted the same law. The plurality observed that, "if Illinois may impose such regulations, so may other States."[209] Recall that one of the jurisdictional bases for Illinois to apply its regulation was residence in the state of 10 percent of the target's shareholders. If every state sought to regulate tender offers whenever 10 percent of the target's shareholders resided in the state, then any tender offer could be regulated by up to ten different states. As the plurality observed, by regulating so broadly, Illinois encroached on the regulatory authority of fellow states and impermissibly increased the risk of excessive or duplicative regulation of interstate commerce. As the *Edgar* plurality put it, if every state regulated as Illinois did, "interstate commerce in securities transactions generated by tender offers would be thoroughly stifled."[210]

Similarly, in *CTS*, a majority of Justices evaluated extraterritoriality by applying the exact same type of hypothetical reasoning as the plurality employed in *Edgar*; namely, the *CTS* Court imagined that every state regulated using the same jurisdictional basis as Indiana.[211] Unlike Illinois in *Edgar*, however, In-

205. *Edgar*, 457 U.S. at 641.

206. *Id.* at 627 ("MITE initiated a cash tender offer for all outstanding shares of Chicago Rivet & Machine Co., a publicly held Illinois corporation . . . .").

207. *Id.* at 642 (plurality opinion).

208. *See id.* at 642–43.

209. *Id.* at 642.

210. *Id.*

211. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89 (1987).

diana in *CTS* applied its antitakeover rules only to targets incorporated in Indiana. This difference in regulatory scope was crucial, leading the *CTS* Court to reason that

> So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State. No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders. Accordingly, we conclude that the Indiana Act does not create an impermissible risk of inconsistent regulation by different States.[212]

Both the plurality in *Edgar* and the majority in *CTS* looked solely to the basis the challenged state chose for applying its law—to the law's jurisdictional basis—to determine whether it was extraterritorial. And both the *Edgar* plurality and the *CTS* majority engaged in counterfactual reasoning as part of this determination. Specifically, in each case, the justices evaluated what would have been the result if other states also had used the same regulatory basis as did the challenged state. Because generalizing Illinois's 10-percent-of-the-shareholders rule in *Edgar* could result in tender offers being regulated by multiple states, resulting in tender offers being "thoroughly stifled," the plurality in *Edgar* viewed Illinois's rule as extraterritorial.[213] By contrast, if every state followed Indiana's practice in *CTS* of regulating tender offers only when the target was incorporated in its territory, a tender offer would "be subject to the law of only one State."[214] What mattered for extraterritoriality was the breadth of the challenged state's regulatory jurisdiction and whether the generalization of that jurisdictional basis would create a risk of inconsistent regulation.[215]

The reasoning of the *Edgar* plurality and the *CTS* majority highlights an important difference between extraterritoriality and mismatch burdens. A state violates the prohibition of extraterritoriality when it uses a jurisdictional basis that is so broad that, if used by all the states, it would lead to an impermissible risk of inconsistent regulations. It does not matter for this analysis

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212. *Id.* at 89 (citations omitted); *id.* at 90 ("This beneficial free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation.").

213. *Edgar*, 457 U.S. at 642 (plurality opinion).

214. *CTS*, 481 U.S. at 89.

215. In *CTS*, after concluding that the Indiana regulation did not create an impermissible *risk* of inconsistent regulation, the Court went on to consider whether Indiana's antitakeover regulation nevertheless created an undue burden on interstate commerce. *CTS*, 481 U.S. at 89. Under our schema, this is the right order in which to consider the dormant Commerce Clause strands. The reviewing court analyzes nexus, then extraterritoriality, then burdens. The *Edgar* Court likewise approached the doctrines in this order. *Edgar*, 457 U.S. at 641–43 (plurality opinion); *id.* at 643–44 (majority opinion).

what other states actually do or whether that risk actually materializes. Reflecting this logic, in evaluating claims of extraterritoriality, neither the *Edgar* plurality nor the *CTS* majority examined the law of states other than the challenged state. By contrast, mismatch burdens arise when two or more states actually subject interstate commerce to conflicting regulation. As such, mismatch cases require the Court to consider the actual laws of more than one state.[216]

We can distinguish extraterritoriality from mismatch burdens by distinguishing risks of inconsistent regulations introduced by a single state acting alone from actual mismatch burdens arising from the regulations of two or more states acting in parallel. When one state regulates too broadly, it not only invades other states' regulatory prerogatives but also increases the risk of overlapping and mismatched regulations. For example, in *Brown-Forman*, the Court observed that the "proliferation of state affirmation laws . . . has greatly multiplied the likelihood that a seller will be subjected to inconsistent obligations in different States."[217] Although the Court has insisted that what matters in extraterritoriality cases is the regulation's "practical effect,"[218] what really seems to matter is not the actual outcome of applying the regulation but, rather, the risk of multiple or inconsistent regulations arising from overbroad assertions of prescriptive jurisdiction. As discussed above, in *Edgar* and *CTS*, the Supreme Court analyzed the risk of inconsistent regulations using a thought experiment in which it counterfactually assumed that other states applied the challenged state's law. The Court took the same approach in *Healy*; it determined the severity of the risk of inconsistent regulations by generalizing the challenged rule.[219] The *Healy* Court explained that:

> [T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.[220]

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216. For more on mismatch burdens, see generally Knoll & Mason, Bibb *Balancing*, *supra* note 103.

217. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 583 (1986) (emphasis added).

218. *E.g.*, *id.* (quoting S. Pac. Co. v. Ariz. *ex rel.* Sullivan, 325 U.S. 761, 775 (1945)).

219. Healy v. Beer Inst., Inc., 491 U.S. 324, 337 (1989) (referring to "the practical effect of this affirmation law, in conjunction with the many other beer-pricing and affirmation laws that have been or might be enacted throughout the country"); *id.* at 339 (imagining the result if "every other State in the Nation" enacted price rules like Connecticut's).

220. *Id.* at 336–37.

In this way, the *Healy* Court, like the *Edgar* plurality and *CTS* Court, generalized the defendant state's regulatory basis to evaluate its extraterritoriality. Actual regulatory mismatches in the real world may arise in at least two different ways. First, they may arise from unconstitutional extraterritoriality. Second, they may arise because two or more different states, regulating well within their autonomous spheres, simply have different policies. *Barnwell* and *Bibb* are good examples of the latter. Although each state in those cases regulated only trucks driving in its own territory, and, thus, they regulated within their autonomous spheres, the impact of their regulation spilled over to other states.[221] Sometimes the Supreme Court upholds such mismatches; other times, it precludes them after balancing analysis, which gives the state an opportunity to offer policy justifications for the mismatch.[222] By contrast, under the plurality's approach in *Edgar*, and the Court's approach in *CTS* and *Healy*, if generalizing a state's regulatory basis would inevitably result in multiple or inconsistent regulatory bases, the state's regulatory assertion would be precluded as extraterritorial.[223] We will return to this generalization test in Part III when we propose it under the rubric "internal consistency" as a general method for evaluating extraterritoriality cases.

We emphasize that extraterritoriality inheres in a single state's law whereas mismatch burdens arise from interactions between the actual laws of two or more states. *Brown-Forman* and *Healy* both pointed to the practice of tying in-state prices to out-of-state prices in concluding that the challenged regulations were extraterritorial.[224] When a state ties prices in its jurisdiction to out-of-state prices, it constrains the behavior of economic actors in other states *even if no other state regulates*. Of course, if other states likewise adopt rules that tie in-state prices to out-of-state prices, the problem worsens as multistate actors become trapped in a web of tying regulations.

D. *Bounding Extraterritoriality*

One reason extraterritoriality as a constitutional doctrine has proved so controversial is that the language the Supreme Court uses when precluding

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221. S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 180, 183 (1938); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 521–23 (1959). As noted above, the Supreme Court held in *Southern Pacific* that Arizona could not regulate train lengths at all. The holding did not preclude Arizona's law because Arizona invaded the regulatory prerogatives of other states, as it might have done in an extraterritoriality case. Instead, the Court precluded the Arizona law in favor of exclusive federal regulation even though Congress had not regulated. *See* discussion *supra* Section I.C.2

222. *E.g.*, *Barnwell*, 303 U.S. at 196 (upholding); *Bibb*, 359 U.S. at 530 (precluding).

223. *See supra* notes 235–237 and accompanying text.

224. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 746 U.S. 573, 573 (1986); Healy v. Beer Inst., 491 U.S. 324, 324 (1989).

regulations for extraterritoriality suggests a nearly unlimited scope for the doctrine. For example, as Justice Gorsuch observed in *National Pork*, "many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior."[225] Likewise, any regulation with spillover effects could be understood as an instance of one state "projecting" its regulation into another. [226] We agree that the language used in the cases is too broad and gives insufficient direction to lower courts about how to decide cases. Nevertheless, the *facts* of both the antitakeover and alcohol-price-affirmation cases suggest a narrower scope for extraterritoriality doctrine than does the *language* the Court used in those cases. Recall that the Court analyzed *Baldwin* as a burdens case but *Brown-Forman* and *Healy* as extraterritoriality cases. The *Baldwin* statute forbade milk from being sold in New York unless its purchase price met a certain *prescribed minimum* set by New York. Although this regulation stripped out-of-state milk of its comparative price advantage, thereby burdening interstate commerce, it did not prevent Vermont from setting its own minimum price regulation for milk sold in Vermont.[227] But in *Healy* and *Brown-Forman*, instead of setting a specific price, the states *linked* in-state prices to out-of-state prices, constraining the ability of distributors to set prices elsewhere and thereby interfering with the ability of regulators to control prices in their states. New York required distributors in New York to charge no more than they charged elsewhere.[228] This is substantively equivalent to a demand by New York that distributors charge outside of New York at least as much as they charged in New York.[229] This is the sense in which New York's rule controlled prices elsewhere. Viewed in this sense, it is hard to see how New York could have the authority to set minimum prices in other states.[230] This important

225. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1156 (2023) (quoting Brief for Petitioners, *supra* note 46, at 19); *see id.* at1154 (quoting petitioners' proffered conception of extraterritoriality as "laws that have the 'practical effect of controlling commerce outside the State' " (quoting Brief for Petitioners, *supra* note 46, at 19)).

226. Commentators have criticized the notion that all spillovers constitute unconstitutional extraterritoriality. Regan, *Essays*, *supra* note 11, at 1878 ("Such a prohibition would invalidate much too much legislation."); Goldsmith & Sykes, *supra* note 13, at 790 ("Scores of state laws validly apply to and regulate extrastate commercial conduct that produces harmful local effects.").

227. *See supra* Section II.B.

228. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 576 (1986).

229. *Id.* at 585 ("New York has attempted to regulate sales in other States of liquor that will be consumed in other States . . . ."). As the Court summarized the appellant's position, "New York makes it illegal for a distiller to reduce its price in other States during the period" covered by the affirmation. *Id.* at 579. As the *Brown-Forman* Court explained, the Twenty-First Amendment repealing Prohibition "gives New York only the authority to control sales of liquor in New York, and confers no authority to control sales in other States," but the New York pricing rule "may force other States . . . to abandon regulatory goals." *Id.* at 585.

230. *See id.* ("The Commerce Clause operates with full force whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in . . . another State.").

difference in the facts of *Baldwin*, on the one hand, and *Brown-Forman* and *Healy*, on the other, also helps us distinguish extraterritoriality from undue burdens.[231] Specifically, whereas setting a minimum in-state price was burdensome, but not extraterritorial, linking in-state and out-of-state prices was not only burdensome but also interfered with other states' regulatory autonomy in setting alcohol prices in their own territory.[232] By such interference, New York and Connecticut fell short of their solidarity obligations to respect other states' autonomy interests.

Another feature of extraterritoriality cases is the Court's use of hypothetical reasoning to analyze the basis upon which the state regulates. The plurality in *Edgar* and the majority in *CTS* both considered what would happen if other states adopted the same basis for applying corporate regulation as did the challenged state.[233] The *Healy* Court likewise conducted a similar generalization hypothetical to determine what would happen if all states tied in-state prices

231. The *National Pork* majority took some pains to recharacterize *Baldwin*, *Brown-Forman*, and *Healy* as not just burdens cases but as discrimination cases. *See Nat'l Pork*, 143 S. Ct. at 1154 ("A close look . . . reveals . . . [that each case] typifies the familiar concern with preventing purposeful discrimination against out-of-state economic interests"). For the reasons we gave in Part I, the logically correct order for considering the three dormant Commerce Clause strands is nexus, then extraterritoriality, then burdens. *See supra* Part I.C. The question of burdens arises only *after* the confirmation that the state possesses nexus and has not regulated extraterritorially. For us, the notion that the regulations in *Brown-Forman* and *Healy* also imposed unconstitutional burdens on interstate commerce, in addition to being extraterritorial, presents no conceptual inconsistency. *See supra* Section II.C. We merely observe that, because a state that lacks nexus or regulates extraterritorially already regulates unconstitutionally, there is no need to go on to consider whether the regulation also imposes an undue burden. Nevertheless, we acknowledge that it may be easier for courts to invalidate regulations on burdens grounds than nexus or extraterritoriality grounds, as when the regulation facially discriminates against interstate commerce. *See supra* Section I.A, Section I.B.

232. *Nat'l Pork*, 143 S. Ct. at 1154–55; *contra* Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003). In *Walsh*, Maine sought to tie *in-state* prices for drugs purchased by Mainers who were not covered by Medicaid to *in-state* prices Maine had negotiated with pharmaceutical companies for Mainers who were covered by Medicaid. 538 U.S. at 649–50. Maine sought to "tie" some in-state prices to other in-state prices. In unanimously rejecting an extraterritoriality challenge to this regime, the Supreme Court observed that "the Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price. Similarly, Maine is not tying the price of its in-state products to out-of-state prices." *Id.* at 669 (quoting Pharm. Rsch. & Mfrs. of Am. v. Concannon, 249 F.3d 66, 81–82 (1st Cir. 2001)).

233. Edgar v. MITE Corp., 457 U.S. 624, 642 (1982) ("[I]f Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled."); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89 (1987) ("So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State. . . . Accordingly, we conclude that the Indiana Act does not create an impermissible risk of inconsistent regulation by different States.").

to out-of-state prices in the same manner as Connecticut had.[234] In all three cases, the aim of hypothetical generalization of the challenged state's regulatory basis was to uncover risks, not present realities, of double or multiple regulation. That these risks relate to impacts on the national market—that they relate to the potential for overlapping burdens—has understandably led scholars to conflate extraterritoriality and burdens. Nevertheless, there is a difference between regulatory overbreadth that invades other states' autonomy and creates a risk of mismatch burdens and actual mismatch burdens. And although it has gone unnoticed by commentators, the Supreme Court has provided a means for distinguishing extraterritoriality from mismatch burdens, namely, its hypothetical generalization approach, which we address more fully in the next Part under the rubric "internal consistency."

III. NORMATIVE PROPOSALS

Throughout this Article, our focus has been on extraterritoriality, the most dormant and least understood of three strands of dormant Commerce Clause doctrine—nexus, extraterritoriality, and burdens. There are hardly any cases in which the Supreme Court has precluded regulations on grounds of extraterritoriality, and, as recently as 2023 in *National Pork*, the Court declined to elucidate—or eliminate—the doctrine. Because the Supreme Court has provided so little direction, some lower court judges and commentators have used the *facts* of extraterritoriality cases to argue that the doctrine should be construed narrowly to apply to only pricing cases.[235] Some have even described the doctrine as dead.[236] Conversely, focusing on the *language* in the cases, other commentators have argued that extraterritoriality raises a "Lochnerian specter" because the Court's language in extraterritoriality cases is so broad that it invites courts to invalidate legislation simply because they disapprove of it.[237] Indeed, if we were to take at face value the Court's language about impacts "wholly outside the state" and "project[tion]", the extraterritoriality doctrine would have a nearly unlimited scope because most laws have effects beyond the boundaries of the enacting state.[238] But, in our view, neither of these approaches is acceptable; the future of extraterritoriality doctrine lies neither in the grave nor with the ghost of *Lochner*.

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234. *Healy*, 491 U.S. at 339 (imagining the result if "every other State in the Nation" enacted price rules like Connecticut's).

235. *See, e.g.*, Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1028 (9th Cir. 2021) ("[T]he extraterritoriality principle is 'not applicable to a statute that does not dictate the price of a product and does not tie the price of its in-state products to out-of-state prices.' " (quoting Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris, 729 F.3d 937, 951 (9th Cir. 2013))), *aff'd*, 143 S. Ct. 1142 (2023).

236. Denning, *Mortem*, *supra* note 16, at 1006.

237. Feldman & Schor, *supra* note 40, at 214, 257–59 (referring to extraterritoriality's "Lochnerian specter").

238. *See* discussion *supra* Section II.D; Brown-Forman Distillers Corp. v. N.Y. Liquor Auth., 476 U.S. 573, 582, 583 (1985) (quoting U.S. Brewers Ass'n v. Healy, 692 F.2d 275, 279 (2d Cir. 2982) and Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935)).

Up to this Part, we have tried to give the doctrine direction by explaining its role in horizontal federalism and how that role differs from the other strands of the dormant Commerce Clause. Specifically, we have argued that, by preventing states from invading each other's regulatory entitlements, the prohibition of extraterritoriality enforces state solidarity obligations and serves as a bulwark of state autonomy. Instrumentally, judicial enforcement of limits on state regulatory overreach promotes regulatory diversity and experimentation, dampens interstate rivalries, promotes democratic accountability by ensuring a good match between the people who vote for regulations and those governed by them, and promotes national market interests by reducing risks of regulatory mismatches. Equally importantly, we have identified factors—such as protectionism or the presence of *actual* regulatory mismatches—that should *not* inform the resolution of extraterritoriality cases. Understanding the normative underpinnings of extraterritoriality allows us to distinguish it from other strands of the dormant Commerce Clause, especially mismatch burdens.

But the values underpinning the prohibition on extraterritoriality—state autonomy, solidarity, regulatory pluralism, political accountability, and so on—do not readily point to rules or standards courts can use to decide cases. Consider, for example, state autonomy as an interest in extraterritoriality cases. The typical case implicates the autonomy interests of *multiple* states. For example, California's pork regulation arguably undercuts Iowa's autonomy, but precluding it would undercut California's autonomy. Likewise, both California and Iowa can credibly argue that the other should yield as a matter of state solidarity. For example, at oral argument in *National Pork*, two justices warned that California's size would enable it to crowd out other states' regulations.[239] But three other justices concluded that California should not face more restrictions on its ability to regulate merely because, due to its size, its regulations tend to spill over more than do the regulations of smaller states.[240] Extraterritoriality cases, thus, raise autonomy concerns for both big states and little states. We have also claimed that limits on extraterritoriality promote democratic accountability by maintaining a good match between the scope of a regulation and the community entitled to vote for its content. But state regulations are generally considered to be the result of democratic processes so that, for example, precluding California's pork regulation—which arose from a ballot initiative—would undermine the democratic will of Californians. At the same time, by upholding the ban, the Court impeded the ability of Iowa's voters to determine how Iowa hog farms should operate. Yet another normative justification for limiting extraterritoriality was that limits would prevent interstate frictions. But preventing frictions likewise does not always point in a clear direction. The easiest way to prevent frictions would be to minimize regulatory spillovers as much as possible. But, in a federation, some degree of regulatory spillover has to be tolerated.

239. *See supra* note 77 (discussion of the *National Pork* oral argument).

240. *Nat'l Pork*, 143 S. Ct. at 1164 (Gorsuch, J.).

Identifying the factors that properly inform analysis of extraterritoriality cases, although useful for understanding the role of extraterritoriality in federalism theory, does not provide courts with a clear roadmap as to how to decide particular cases. Understanding how extraterritoriality operates, therefore, awaits clearer statements (and more decisions) by the Supreme Court. In this Part, we suggest "firmer rules" that courts could apply in extraterritoriality cases. [241] For each suggestion, we explain how it would apply to the California hog-cage regulation challenged in *National Pork*.

A. *Prior Scholarly Proposals*

Before suggesting our own firmer rules, we first review and reject proposals of other scholars.[242] Due to widespread agreement that the language the Supreme Court has used in its extraterritoriality cases is too broad, commentators have offered various prescriptions for how to cabin the doctrine. But such proposals are impractical, indeterminate, or divorced from extraterritoriality's special role in horizontal federalism, which is to limit state actions that impermissibly intrude upon other states' autonomy. For example, observing that "formalism is not all bad"—a proposition with which we agree—Donald Regan argued that, to resolve extraterritoriality cases, courts should map commercial actions to a particular physical territory and then recognize that state as *exclusively* entitled to regulate within its territory. Under this approach, any other state's regulation would be impermissibly extraterritorial. Focusing on "the location of the regulated behavior," rather than "the location of the effects," would, in Regan's view, solve the problem of extraterritoriality's overbreadth.[243] As Katherine Florey pointed out, however, Regan's approach is impractical because it would require a "unique territorial jurisdiction" to be "unambiguously assigned" to every single regulated person or act, an effort that would not only have unpredictable results but would also raise serious risks of conflicting decisions by different courts.[244]

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241. Sitting on the Tenth Circuit, then-Judge Gorsuch described the Supreme Court as identifying a set of "firmer rules" within the larger dormant Commerce Clause standard. Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1171–72 (10th Cir. 2015) (Gorsuch, J.) (arguing that, for example, the Court's nearly per se invalidation of discriminatory state regulations represents an attempt to carve "firmer rules" out of dormant Commerce Clause balancing).

242. We do not explore ending extraterritoriality review not only because we regard the doctrine as important, but because none of the justices in *National Pork* suggested abandoning the doctrine. *See generally* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023).

243. Regan, *Essays*, *supra* note 11, at 1899.

244. *See* Florey, *State Courts*, *supra* note 15, at 1089; *see also* Gergen, *supra* note 13, at 1737 (arguing that Regan's proposal would not restrain the states because "[w]hatever ends a state might wish to accomplish by directly regulating foreign behavior usually can be met by indirect regulation"). Regan's suggestion, likewise, would be susceptible to criticisms analogous to the realist critique of the "vested rights" notion of conflict of laws, which notion took a similarly

Lea Brilmayer made a similar argument for territoriality.[245] Rather than assigning, as Regan would, every potential action to a single regulating state, Brilmayer argued that, in actual cases of regulatory conflict, there is, as a factual matter, always a single state that has the *best* territorial claim to regulate, and that state's claim should prevail. Because the specific issue Brilmayer sought to understand was how to resolve conflicts among state morality regulations, the cases she considered involved natural persons. One of her examples involved a clash between a state that seeks to criminalize its residents' receipt of abortions outside the state and a state that permits people present in the state to receive abortions. In her view, the second state's regulation would prevail because it has a closer territorial connection to the abortion than does the person's residence state.[246] Brilmayer premised her argument on the notion that our federal system includes a preference for territorial regulation over residence-based regulation.[247]

Yet, as Mark Gergen argued, it is not clear that our federal system favors territorial regulation over residence-based regulation.[248] For example, as discussed above, most states recognize—some even codify—the entitlement of the state of incorporation to regulate a company's internal affairs even when the company transacts business mostly (or even exclusively) outside the chartering state. In the case of certain types of corporate regulation, then, states have essentially accepted the priority of the residence state over the territorial state or states.[249] Moreover, as Brilmayer herself recognized, often more than one state will claim to have a territorial interest in regulating. Accordingly, whether we seek to map regulations ex ante to a single location or seek to ascertain ex post the state with the closest connection, there is a serious risk of indeterminacy and conflicting decisions.

Mark Rosen made a different suggestion for cabining extraterritoriality doctrine. Acknowledging that the Supreme Court has applied extraterritoriality doctrine more broadly, Rosen argued that the Court nevertheless should

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territorial focus. *Cf.* Roosevelt, *supra* note 80, at 2458–61, 2472–74 (describing, in the conflict-of-laws context, criticism of territorialism for its formalism).

245. *See* Brilmayer, *supra* note 13.

246. *See id.* at 884–86.

247. Brilmayer supports this inference using accepted constitutional interpretive methods, such as language and structure. *See* Brilmayer, *supra* note 13.

248. *See* Mark P. Gergen, *Equality and the Conflict of Laws*, 73 IOWA L. REV. 893, 908–09 (1988) (arguing that, because states are "both places and communities," it is not surprising that the Constitution does not grant priority of territorial connections over personal (interest-based) connections in conflicts-of-law disputes).

249. The Supreme Court itself has declared that there is no priority to tax between source states and residence states. Comptroller of the Treasury of Md. v. Wynne, 575 U.S. 542, 568 (2015) ("[T]he principal dissent claims that the analysis outlined above requires a State taxing based on residence to 'recede' to a State taxing based on source. We establish no such rule of priority.") (internal citations omitted).

limit preclusion on grounds of extraterritoriality to cases involving protectionism.[250] But Rosen offered little justification for such limits on extraterritoriality other than the Court's placement of extraterritoriality doctrine in the dormant Commerce Clause.[251] While we are sympathetic to Rosen's desire to cabin extraterritoriality doctrine, Rosen's addition of a protectionism requirement to extraterritoriality would essentially eliminate extraterritoriality as a separate dormant Commerce Clause doctrine because the dormant Commerce Clause already addresses protectionism under its burdens strand.

Similarly, Susan Lorde Martin argued that the Court should use extraterritoriality to prevent "legislative balkanization."[252] "Legislative balkanization" refers to market segmentation that arises from regulatory diversity—that is, from mismatched regulations. Mismatches may discourage economic actors from entering other states because doing so subjects them to new and different regulations.[253] Examples of "balkanizing" regulations include the mudflap mismatch in *Bibb v. Navajo Freight Lines*.[254] Because they have the potential to segment the national market, mismatches are a proper focus of dormant Commerce Clause review. As with Rosen's proposal, however, the problem with Martin's is that the Supreme Court already reviews the impact of mismatches on the national marketplace under the burdens strand of the dormant Commerce Clause. Following either scholar's proposal would essentially eliminate extraterritoriality as a separate constitutional limitation.

Jack Goldsmith and Alan Sykes took a more economics-oriented approach to simplifying and rationalizing extraterritoriality.[255] They advocated for cost-benefit analysis to decide both extraterritoriality cases and burdens cases, especially burden cases that involve regulatory mismatches.[256] The authors rightly see extraterritoriality and mismatch cases as similar because both involve regulatory spillovers.[257] Goldsmith and Sykes argued that courts confronting either extraterritoriality challenges or mismatch challenges should compare the in-state benefit of the challenged regulation to the out-of-state detriment of that regulation and uphold the regulation whenever the in-state

250. Rosen, *Extraterritoriality*, *supra* note 13, at 922–26; *id.* at 924 n.287 ("[E]xtraterritoriality is a tool that can help to smoke out protectionism").

251. *See id.* at 925. Rosen also bases his advocacy for protectionism as a minimum threshold for extraterritoriality on the fact that some protectionist regulations, namely facially discriminatory regulations, receive strict scrutiny, which extraterritoriality also seems to receive. *Id.* at 923.

252. *See* Martin, *supra* note 13, at 523.

253. *See* Hughes v. Oklahoma, 441 U.S. 322, 325 (1979) ("[A] central concern of the Framers . . . was [the need] . . . to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies . . . .").

254. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).

255. Goldsmith & Sykes, *supra* note 13.

256. *Id.* at 813–18.

257. *See id.* at 802–03.

benefit exceeds the out-of-state detriment.[258] But Goldstein and Sykes' suggestion is divorced from state autonomy, interstate harmony, and the other constitutional values that traditionally motivate extraterritoriality analysis. Like Rosen's and Martin's approaches, Goldsmith and Sykes' approach would eliminate extraterritoriality as a separate doctrine from dormant Commerce Clause burdens doctrine.[259] Worse, their approach—do whatever maximizes welfare—would eliminate the need for any legal doctrine at all.

The least controversial way to simultaneously enforce and bound extraterritoriality would be to use the cases to interpret the doctrine narrowly. For example, Susan Lorde Martin suggested that the Supreme Court should forbid a state from regulating activity that takes place " 'wholly outside' the state."[260] Jeffrey Schmitt proposed that courts should find extraterritoriality only when a regulation "inescapably" impacts conduct beyond the state's borders and the regulating state lacks an interest in the regulation.[261] Such suggestions take the Court's case law seriously and admirably attempt to limit extraterritoriality in keeping with the Court's own pronouncements. But such approaches are unlikely to quell complaints that the doctrine is unbounded or insufficiently directed. For example, disputes would inevitably arise over what constitutes regulation "wholly outside" a state's borders, what it means for a regulation to "inescapably" impact activity in other states, and how broadly to construe a state's interest.[262] Likewise, Denning observed (although he did not endorse) that lower courts have limited extraterritoriality to pricing cases,[263] a result that some appellate courts and scholars have approved, including, most recently, Robin Feldman and Gideon Schor.[264] Again, although we are sympathetic to the need to cabin extraterritoriality, the constitutional obligation of states to observe limits on their powers imposed by the "horizontal separation of powers" goes beyond pricing regulations.

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258. *Id.* at 802, 803 (arguing that the Court should ask whether "the benefits to the regulating jurisdiction and its citizens exceed the losses to those outside the jurisdiction . . . . [and] check whether state regulation makes things better or worse").

259. *See id.* at 806 (touting that their approach "folds the extraterritoriality concern into" burdens analysis).

260. *See* Martin, *supra* note 13, at 523 (quoting Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982)).

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

262. Schmitt considers a state's interest in the moral preferences of its residents as a relevant interest for this purpose. *Id.* at 425 ("California arguably has an interest in making sure that its citizens do not participate in animal cruelty . . . .").

263. Denning, *Mortem supra* note 15, at 992–99 (attributing the narrowing of extraterritoriality to both a loss of fit between the dormant Commerce Clause and concerns about the scope of prescriptive jurisdiction and the lack of a limiting principle for extraterritoriality).

264. Feldman & Schor, *supra* note 40. As we observed in *supra* Section II.C, a slightly broader approach, drawing on the pricing cases, would limit the extraterritoriality doctrine to "tying" cases, where a party's permissible behavior in the regulating state is tied to how that party behaves in other states.

B. *Alternative Normative Proposals*

In this Section, we make four suggestions for deciding extraterritoriality cases, spending the most time on the Supreme Court's own hypothetical generalization approach that we earlier highlighted in our discussion of *Edgar*, *CTS*, and *Healy*. In this Part, we refer to it as the "internal consistency" approach, following the Supreme Court's own terminology in tax cases. All four approaches would provide courts and legislatures more explicit guidance on extraterritoriality than current doctrine does. If implemented, any of these approaches would do more than present doctrine does to promote extraterritoriality's values while producing more predictable outcomes. Adopting any of the four would replace the status quo, which, because it currently provides lower courts no guidance, allows lower courts to take a wide variety of approaches to extraterritoriality. That is, all four approaches fall in the vast gulf between a narrow reading of the Supreme Court's extraterritoriality cases as constrained by the facts of past cases and an expansive reading based on the broad language the Court offered in those cases. Although any of these approaches would be preferable to the status quo, internal consistency is the most promising because, for reasons we explain, it has the best support from the Supreme Court's own cases.

1. Intentionality, Process-Based Embargoes, and Mutual Recognition

This Subsection presents and criticizes three plausible alternative approaches to extraterritoriality cases. First, courts could preclude regulations when they find the enacting state intended to regulate conduct in other states. Second, courts could strictly scrutinize state manufacturing-process-based bans on imports. And third, courts could emulate the approach taken by the EU courts and adopt a mutual-recognition approach to extraterritoriality.

Intentional Extraterritoriality. Donald Regan argued that the Supreme Court should not and does not engage in balancing in dormant Commerce Clause burdens cases.[265] Instead, Regan argued that such cases amount to an attempt by the Court to "smoke[] out" intentional protectionism, and, regardless of how the Court explains its decision-making process, the absence or presence of intentional protectionism predicts the outcome of almost all dormant Commerce Clause cases.[266] Specifically, Regan explained that the Court precludes a regulation if the state enacted it with protectionist intent, but, otherwise, the Court upholds the regulation. Regan's view has been widely

265. Regan, *Protectionism*, *supra* note 22 (directing his argument to what he terms "free movement of goods" cases, which include products regulation and corporate regulations, such as that at issue in *CTS*).

266. *Id.* at 1229.

influential, and the majority in *National Pork* even cited Regan for the proposition that *Pike* balancing was about "smoking out" protectionism.[267] One reason Regan thought it made sense to examine only intention is that determining the practical effects of state regulation on the national market is difficult.

Taking a page from Regan's book, one possible way forward for extraterritoriality would be to evaluate whether states *intended* for their laws to have impacts outside their state. Some support for an intent-based approach can be found in the extraterritoriality cases: Although the Supreme Court has said that a *lack* of extraterritorial intent does not preclude a holding of extraterritoriality,[268] it arguably took presence of extraterritorial intent into account when invalidating the price regulation in *Healy*.[269] Applying strict scrutiny in cases in which states intend to regulate outside their territory could also properly focus the Court's attention on what matters in extraterritoriality cases—regulatory encroachment that simultaneously undermines interstate solidarity and regulatory pluralism.

A problem common to all intent-based constitutional doctrines is how to establish legislative intent. In his original article, Regan grappled with and made suggestions for how to establish intent.[270] But applying an intent-based standard to *National Pork* highlights the difficulty. Whereas California did not attempt to conceal that a primary goal of its legislation was to secure out-of-state impacts, California operated in a landscape where such intentional extraterritorial effects were not necessarily legally relevant. If the state legislature knew it would be judged based on extraterritorial intent, it would presumably emphasize the in-state impacts of its regulation.[271] Moreover, a longstanding criticism of the extraterritoriality doctrine is that it may preclude regulations that properly target out-of-state behavior that has in-state effects, such as the sending of spam. Because many laws have appropriate or unavoidable out-of-state impacts, courts

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267. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1158 (2023).

268. Healy v. Beer Inst., 491 U.S. 324, 333 n.9 (1989) ("[U]nder the Commerce Clause the projection of these extraterritorial 'practical effect[s],' *regardless of the statute's intention*, 'exceed[ed] the inherent limits of the State's power' ")" (emphasis added) (quoting Edgar v. MITE Corp., 457 U. S. 624, 642 (1982)).

269. *Id.* at 330 (describing Connecticut's statute's " '*purposeful* interaction with border-state regulatory schemes,' mean[ing] that shippers [could] not, as a practical matter, set prices based on market conditions in a border State without factoring in the effects of those prices on its future Connecticut pricing options") (emphasis added) (quoting *In re* Beer Institute, 849 F.2d 753, 760–61 (2d Cir. 1988)).

270. *See* Regan, *Protectionism*, *supra* note 22, at 1147–52 (addressing what he called the "ascertainability problem"). Regan concludes that "[w]hen the direct evidence is sparse or nonexistent, motive review will effectively reduce to the hypothetical innocent legislature test"—could an innocent legislature have passed the law without protectionist intent? *Id.* at 1156.

271. Determining legislative intent is notoriously fraught even if we do not assume strategic behavior by states to conceal intent. For a history of Supreme Court approaches to determining legislative intent, see Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U L. REV. 1784 (2008).

would have to develop doctrines for when intentional external spillovers are permissible.

Process-Based Embargoes. Another way to bound extraterritoriality could be for courts to strictly scrutinize process-based embargoes. Process-based embargoes are those that ban products based on how they were made rather than based on those products' qualities or characteristics.[272] In his dissent in *National Pork*, Justice Kavanaugh focused on the novelty of California's pork regulations. He began by acknowledging that, in the absence of congressional action, each state could regulate "farming, manufacturing, and production practices *in that State*."[273] Likewise, each state could "adopt health and safety regulations for products sold *in that State*."[274] But Justice Kavanaugh concluded that California was doing something different. In his view

> [California] has attempted, in essence, to unilaterally impose its moral and policy preferences for pig farming and pork production on the rest of the Nation. It has sought to deny market access to out-of-state pork producers unless their farming and production practices in those other States comply with California's dictates.[275]

That California did not defend its law by pointing to any health or safety benefits the law would bestow on Californians tends to confirm Justice Kavanaugh's view that the regulation was about moral preferences, not health and safety. California voters viewed the close confinement of breeding sows as immoral, and their market power enabled them to ban the practice widely, including in other states.[276]

If California can ban imported products that are *physically identical to domestic products that the state allows* simply because those imported products were produced in a way that California residents consider morally objectionable, the obvious question is how far such laws might go. Justice Kavanaugh raised several worrisome examples in his partial dissent, including whether states may exclude products made by undocumented workers or "from 'producers that do not pay for employees' birth control or abortions' (or alternatively, that do pay for employees' birth control or

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272. International trade rules require national treatment for imported products that are "like" domestic products, meaning "directly competitive or substitutable." Hence, trade rules would prohibit process-based embargoes. *See* Knoll & Mason, Bibb *Balancing*, *supra* note 103, at 72–74.

273. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1175 (2023) (Kavanaugh, J., dissenting).

274. *Id.* at 1174.

275. *Id.*

276. Transcript of Oral Argument at 80, *Nat'l Pork*, 143 S. Ct. (No. 21-468) ("[A]s I [Justice Gorsuch] understand California's position charitably, it's that Californians, 63 percent of them, voted for this law. They don't wish to have California be complicit, even indirectly, in . . . livestock practices that they find abhorrent, wherever they occur, in California or anywhere else.").

abortions)."[277] Revisiting a question Justice Cardozo first raised in *Baldwin*, Justice Kavanaugh wondered if a state could exclude products manufactured in another state by "workers paid less than $20 per hour."[278] As the Justices recognized repeatedly at oral argument, the leverage states have to export such policy preferences is likely to differ. States with large markets will have more ability to export their preferences than do those with small markets,[279] arguably jeopardizing the state autonomy, democratic accountability, and preference satisfaction that arise from policy diversity among the states. Finally, as the justices also recognized at oral argument,[280] failing to limit such outwardly targeted morals regulation is likely to generate interstate frictions.[281] In his partial dissent in *National Pork*, Justice Kavanaugh concluded that regulations like California's "undermine[] federalism and the authority of individual States."[282]

If the Supreme Court wanted to limit the ability of a state to "unilaterally impose its moral and policy preferences . . . on the rest of the Nation,"[283] one possibility it could consider would be to apply strict scrutiny to process-based embargoes, upholding them only when the state offers a compelling policy objective that cannot be achieved via other means. Applying a standard of strict scrutiny to such process-based embargoes would

277. *Nat'l Pork*, 142 S. Ct. at 1174 (Kavanaugh, J., dissenting) (quoting Brief of Indiana and 25 Other States as Amici Curiae in Support of Petitioners at 33, *Nat'l Pork*, 143 S. Ct. (No. 21-468), 2022 WL 2288157). At oral argument, the United States offered the example of banning products depending on whether they were made with union labor. Transcript of Oral Argument at 83, *Nat'l Pork*, 143 S. Ct. (No. 21-468). Justice Alito offered the example of banning agricultural products, such as almonds, that were produced using irrigation in areas suffering water shortages. *Id.* at 115.

278. *Nat'l Pork*, 143 S. Ct. at 1174 (Kavanaugh, J., dissenting). Justice Cardozo, writing for a unanimous Court, first posed this hypothetical in *Baldwin*, suggesting it would raise extraterritoriality issues, though he did not analyze the question further. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 524 (1935) ("The next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop, or even upon proof of the profits of the business.").

279. At oral argument, Justices Alito and Kagan both raised this issue. *See* discussion *supra* note 77.

280. Transcript of Oral Argument at 95, *Nat'l Pork*, 143 S. Ct. (No. 21-468) (Justice Kagan asked, "[D]o we want to live in a world where we're constantly at each others' throats and, you know, Texas is at war with California and California at war with Texas?").

281. Twenty-six states argued that the Supreme Court should reverse the dismissal of the pork producers' case; whereas fourteen states and the District of Columbia argued that the Supreme Court should affirm the decision. *Compare* Brief of Indiana and 25 Other States as Amici Curiae in Support of Petitioners, *supra* note 277, *with* Brief of Illinois, et al., as Amici Curiae in Support of Respondents, *Nat'l Pork*, 143 S. Ct. (No. 21-468), 2022 WL 3449159. The U.S. Solicitor General filed an amicus brief arguing that the Supreme Court should reverse and remand the case. Brief for the United States as Amicus Curiae Supporting Petitioners, *Nat'l Pork*, 143 S. Ct. (No. 21-468), 2022 WL 2288169.

282. *Nat'l Pork*, 143 S. Ct. at 1174 (Kavanaugh, J., dissenting).

283. *Id.*

eliminate most such restrictions without completely preventing states from applying them when states have compelling interests.[284] Under such an approach, California's hog-cage regulation would presumably be precluded because California offered no health or safety defense of it.[285] But our conclusion that the California regulation would be precluded under such an approach assumes the conclusion to the most important undecided issue in *National Pork*: whether moral or ethical concerns can, absent any health or safety concern, constitute a compelling state interest.[286]

Mutual Recognition. A third alternative method for deciding extraterritoriality cases would be for the Supreme Court to adopt mutual-recognition rules, which are rules for picking the prevailing rule. This would be similar to the approach the Court of Justice of the European Union and the EU legislator have taken to handle spillovers under the Treaty on the Functioning of the European Union (TFEU). Like the U.S. states, the EU member states possess regulatory autonomy, and the Court of Justice has interpreted the TFEU to prevent discrimination against, or undue burdens on, intra-EU commerce.[287] And, like the U.S. Constitution, the TFEU provides no clear rules for how to resolve disputes among the member states that arise from overbroad assertions of state regulatory power or from state regulatory spillovers.[288]

The 1978 case *Cassis de Dijon* involved two EU member states' mutually inconsistent regulations—France required fruit liqueurs to contain *at*

284. Nor would such a rule prevent states from enacting inwardly focused morals regulations. The state could ban unethical production practices in its own territory. Assuming such regulations could survive burdens review, the state could also require imported pork produced via unethical practices to be labeled as such; the state could subsidize ethically produced pork from any source, and the state may be able to tax pork produced via unethical methods. Likewise, applying strict scrutiny to process-based bans would not preclude a state from banning both imported and domestic products based on those products' actual physical characteristics. States could, therefore, constitutionally ban horsemeat. *See id.* at 1163 (expressing concern that precluding California's hog-cage rule would imply that California could not ban horsemeat).

285. *See id.* This does not mean that California's Proposition 12 could not be supported by health and safety concerns, but California offered none in *National Pork*. *See id.*

286. This question has no clear answer in the literature or in the Court's extraterritoriality or burdens caselaw. *But see Nat'l Pork*, 143 S. Ct. at 1166–6767 (Barrett, J., concurring) (concluding that, because moral interests cannot be balanced against other types of values, dormant Commerce Clause cases involving morals are essentially nonjusticiable). Justice Barrett's view would lead to upholding process-based bans supported solely by moral justifications.

287. *See* CATHERINE BARNARD, THE SUBSTANTIVE LAW OF THE EU 25 (7th ed. 2022) (discussing not "undue burdens," but "restrictions" on intra-EU commerce).

288. Consolidated Version of the Treaty on the Functioning of the European Union, 2010 O.J. (C83), 2012 O.J. (C326).

most 20 percent alcohol, whereas Germany required such liqueurs to contain *at least* 25 percent alcohol.[289] To resolve the conflict, the Court of Justice announced the principle of mutual recognition, under which a product manufactured to the standards of one state is presumptively free to circulate in all other member states.[290] In Europe, mutual recognition is not absolute; if the destination state can point to a sufficiently important interest not addressed by the origin state's regulation, then the destination state can apply its own rule to imports.[291] A mutual recognition rule would be something of a "two for one" because it would address both extraterritoriality and mismatch burdens; it would reduce mismatches by allowing manufacturers to sell everywhere as long as they follow the regulations of their origin state. Since *Cassis*, the principle of mutual recognition has been incorporated into EU regulations governing, among other topics, service providers.

Mutual recognition—which prohibits the destination state from excluding goods (or services) that do not meet domestic standards—favors the origin state's claim to regulate over the destination state's claim. But our Constitution provides no clear preference for origin rules over destination rules, and courts, therefore, may regard establishing mutual-recognition rules as outside their institutional competence. That a simple majority of Congress could alter judicially created mutual-recognition rules may provide some comfort in adopting such a judicial approach. Mutual recognition, nevertheless, would represent a radical departure from current U.S. law, which generally allows the destination state to apply its own rule.[292] Under mutual recognition, Iowa would set the rules for rearing hogs in Iowa, and California would have to accept the resulting pork, although California could require labels regarding the manufacturing process.[293]

289. Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), 1979 E.C.R. 649, ¶¶ 1–3.

290. *Id.* at ¶ 14; *see* BARNARD, *supra* note 287, at 26.

291. *Cassis de Dijon*, 1979 E.C.R. at ¶ 8.

292. *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1150 (2023) ("Companies that choose to sell products in various States must normally comply with the laws of those various States.").

293. This assumes that California's interest in excluding unethically produced pork is not compelling, an issue that the Court did not need to resolve in *National Pork*. *See* discussion *supra* note 285.

2. Internal Consistency

Our final suggestion for a "firmer rule" is the "internal consistency test," which is a tool the Supreme Court originally developed to evaluate *fiscal* extraterritoriality.[294] The internal consistency test is the same approach taken by the *Edgar* plurality and the majorities in *CTS* and *Healy* to evaluate regulatory extraterritoriality. Specifically, this approach involves counterfactual reasoning under which the Court assumes that every state taxes or regulates on the same basis as the challenged state. If universalizing the tax or regulatory basis across the fifty states would lead inevitably to double taxation or double regulation, the Court would strictly scrutinize the tax or regulation under the dormant Commerce Clause.

Consider taxation: Just as a particular state's overbroad assertion of prescriptive jurisdiction may invade the regulatory entitlements of other states, so may a particular state's assertion of tax jurisdiction invade the tax entitlements of other states. When evaluating state taxes for extraterritoriality under the dormant Commerce Clause, the Supreme Court has long applied what it refers to as the internal consistency test, which asks: If every state applied the challenged state's tax, would double or multiple taxation of interstate commerce inevitably arise?[295] If the answer is yes, then the Supreme Court precludes the tax as overbroad and in violation of the dormant Commerce

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294. *See, e.g.*, Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169–70 (1983) (distinguishing between two requirements under the dormant Commerce Clause: fairness of the apportionment formula, which it judged under the internal consistency test, and nondiscrimination, which it judged separately). For more on state taxes under the dormant Commerce Clause, see also Bradley W. Joondeph, *State Taxes and "*Pike *Balancing"*, 99 IND. L.J. (forthcoming 2024); Hayes R. Holderness, *Individual Home-Work Assignments for State Taxes*, 98 WASH. L. REV. 53 (2023); Adam B. Thimmesch, *The Unified Dormant Commerce Clause*, 92 TEMP. L. REV. 331 (2020); Ryan Lirette & Alan D. Viard, *Putting the Commerce Back in the Dormant Commerce Clause: State Taxes, State Subsidies, and Commerce Neutrality*, 24 J.L. & POL'Y (2016); Ruth Mason & Michael S. Knoll, *What Is Tax Discrimination?*, 121 YALE L.J. 1014 (2012).

295. *See Container*, 463 U.S. at 164 (acknowledging that states cannot "tax value earned outside its borders. . . . however, arriving at precise territorial allocations of 'value' is often an elusive goal") (quoting ASARCO Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 315 (1982)); *id.* at 169 (referring to the issue of fiscal extraterritoriality as one of "fairness" to states); Am. Trucking Ass'ns v. Scheiner, 483 U.S. 266, 269, 284 (1987) (referring to "each State's authority to collect its fair share of revenues"); Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995) ("[F]ailure of internal consistency shows as a matter of law that a State is attempting to take *more than its fair share* of taxes from the interstate transaction . . . .") (emphasis added); *see also* Comptroller of the Treasury of Md. v. Wynne, 575 U.S. 542, 562–64 (2015) (citing to seven cases that applied the internal consistency test, three of which involved failure of internal consistency and resulted in invalidation); *cf.* Joondeph, *supra* note 17, at 150 ("The fair apportionment requirement serves two distinct functions . . . . [It] eliminates the risk of multiple or duplicative taxation . . . . [and] effectively prevents state governments from projecting their taxing powers beyond their borders.").

Clause.[296] Although we have shown in other work that internally inconsistent taxes are *protectionist*, which gives the Supreme Court an additional reason to preclude them besides extraterritoriality, the Supreme Court originally adopted the internal consistency test to evaluate not protectionism, but rather fiscal extraterritoriality.[297]

Modifying the test for regulations, an assertion of regulatory jurisdiction would be internally inconsistent if adoption by all states of the challenged state's regulatory basis—that is, its *jurisdictional basis*—would lead inevitably to double or multiple regulation of interstate commerce. The reason to apply the test to the regulation's jurisdictional basis, rather than its content, is that extraterritoriality concerns the scope of a state's exercise of prescriptive jurisdiction; it does not concern the content of that regulation. One way to think about extraterritoriality is that, although the state clearly possesses nexus to regulate, the state propounds its regulation on the basis of too many nexuses simultaneously.

Consider the application of the internal consistency test in tax cases. In *Jefferson Lines*, the Supreme Court considered Oklahoma's sales tax rule that taxed the full price of bus tickets for trips that originated and were sold in the state.[298] Upholding the tax, the Supreme Court pointed to the internal consistency of Oklahoma's rule: If all states adopted it, no interstate trips would face double taxation.[299] But the *Jefferson Lines* Court also readily acknowledged that Oklahoma's allocation rule could lead to actual double taxation if other states adopted different, but internally consistent, rules, such as a rule that taxed bus tickets proportional to miles driven in the taxing state.[300] If such double taxation emerged from the application by two different states of two different, but equally internally consistent, taxes, then, in the Court's view, such double taxation "is not a structural evil that flows from either tax individ-

296. *See Wynne*, 575 U.S. at 563–54 n.7; *Jefferson Lines*, 514 U.S. at 185

297. In the tax cases, the Supreme Court uses the internal consistency test as a per se rule. *See Jefferson Lines*, 514 U.S. at 185. The Court uses the internal consistency test in tax cases as both a test of extraterritoriality and discrimination, whereas, for regulations cases, we suggest that it serve as a test of extraterritoriality only. As we have explained elsewhere, internal consistency functions as a test of whether state taxes are protectionist. Knoll & Mason, *supra* note 97. The Supreme Court accepted our analysis in *Comptroller of the Treasury of Maryland v. Wynne*. 575 U.S. at 565 ("[T]he internal consistency test reveals what the undisputed economic analysis shows: Maryland's tax scheme is inherently discriminatory and operates as a tariff.") (citing our amicus brief). Internal consistency, therefore, is an effective test for protectionism in tax cases, and the Supreme Court precludes protectionist taxes. Nevertheless, the Court originally devised the internal consistency test to evaluate not protectionism, but rather whether tax apportionment rules were extraterritorial. *See* sources cited *supra* note 294.

298. *Jefferson Lines*, 514 U.S. at 177–78.

299. *Id.* at 185.

300. *Id.* at 192. Another example would be a tax based on the destination of the bus.

ually, but it is rather the 'accidental incident of interstate commerce being subject to two different taxing jurisdictions.' "[301] The *Jefferson Lines* Court's framing encapsulates the difference we have been drawing in this Article between extraterritoriality and mismatch burdens.

The Supreme Court reaffirmed the relevance of internal consistency for taxes as recently as 2015 in *Comptroller of the Treasury of Maryland v. Wynne*, which involved a resident of Maryland who earned income from other U.S. states and was taxed on that income by both the other states ("source states," in tax parlance) and by Maryland.[302] To determine whether Maryland's tax regime violated the dormant Commerce Clause, the Supreme Court applied the internal consistency test, emphasizing that the test "looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate."[303] The *Wynne* Court confirmed that it did not have authority to choose uniform tax jurisdictional rules for states or to establish a *priority rule* that would declare that, as between the taxpayers' residence state and the source state, the source state's tax entitlement should prevail, thereby obliging the residence state to relieve double taxation. Instead, according to the *Wynne* Court, the Constitution required only that each state's tax regime be independently internally consistent.[304]

Just as the Supreme Court uses internal consistency to identify fiscal extraterritoriality, it could use internal consistency to identify *regulatory* extraterritoriality. Under an internal consistency approach to regulatory extraterritoriality, if, under a hypothetical fifty-state adoption of the regulation's jurisdictional basis, interstate commercial activity would be subject to regulation by two or more states, then the regulation would be overbroad, and it would warrant strict scrutiny.

For example, suppose a state demanded that companies meet certain capitalization requirements if they were *either* incorporated in the state *or* had

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301. *Id.* (quoting William B. Lockhart, *Gross Receipts Taxes on Interstate Transportation and Communication*, 57 HARV. L. REV. 40, 75 (1943)). The *Jefferson Lines* Court suggested that two different taxes that were assessed on different, but equally internally consistent, jurisdictional bases—that is, mismatched, but internally consistent bases—would not be analyzed as undue burdens. The literature observes this difference—that the Court analyzes mismatched regulations (but not mismatched taxes) as potential undue burdens on interstate commerce. *See, e.g.*, Thimmesch, *supra* note 294 (arguing for a unified approach that would also analyze taxes as undue burdens). The difference in treatment of tax and regulations cases is justified in our view, but we do not have space to address the issue here.

302. *Wynne*, 575 U.S. at 545–46.

303. *Id.* at 562 (quoting *Jefferson Lines*, 514 U.S. at 185).

304. The *Wynne* majority specifically observed that, if one state taxed only on a residence basis, whereas another taxed only on a source basis, then interstate commerce could be fully subject to double taxation, but such double taxation would not offend the Constitution. *Id.* at 566, 568 (disclaiming the principal dissent's charge that the majority established a tax priority rule).

their principal office in the state. Such a jurisdictional basis, if universalized, would subject companies that are incorporated in one state, but have their principal office elsewhere, to the capitalization laws of two states simultaneously. It is the *breadth* of the assertion of regulatory jurisdiction, not the *content* of the capitalization rule, that is the problem. Notice that the rule is internally inconsistent even if it is possible for companies to comply with the *content* of the rules of both the principal-office state and the incorporation state simultaneously (for example, because both states have rules with the same content or because the company could satisfy both states' rules by complying with the stricter rule). Internal consistency does not depend on the existence of actual mismatches or inconsistent regulations. This is consistent with our framing of extraterritoriality as a "structure[al]" limit on the reach of state law.[305]

An argument can be made that the Court has implicitly used internal consistency reasoning in extraterritoriality cases involving regulations, in addition to using it explicitly in extraterritoriality cases involving taxation. In seeking to understand the effect for the rest of the union of the breadth of Illinois's antitakeover statute, the *Edgar* plurality observed that "if Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled."[306] As we observed in our discussion of *Edgar*, if every state sought to regulate tender offers whenever 10 percent of the target's shareholders resided in the state, then every tender offer could be regulated by up to ten different states.[307] The *CTS* Court likewise used an internal consistency approach in evaluating Indiana's antitakeover statute, which statute applied only to Indiana-incorporated companies. The *CTS* Court concluded that "[s]o long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State. . . . Accordingly, we conclude that the Indiana Act does not create an impermissible risk of inconsistent regulation by different States."[308] The *Healy* Court similarly considered what would happen "if not one, but many or every, State adopted similar legislation."[309] The *Healy* Court implied that a state's regulation is extraterritorial if universalizing it would result in "inconsistent legislation."[310]

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305. *See, e.g.*, *id.* at 562 ("[The internal consistency] test . . . 'looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.' " (quoting *Jefferson Lines*, 514 U.S. at 185)).

306. Edgar v. MITE Corp., 457 U.S. 624, 642 (1982).

307. *See supra* Section II.A.

308. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89 (1987).

309. Healy v. Beer Inst., 491 U.S. 324, 336 (1989).

310. *Id.* at 337.

Recall that the Supreme Court decided the extraterritoriality question in *National Pork* narrowly, rejecting the interpretation offered by the pork producers that the Constitution imposed an "'almost *per se*' rule against state laws with 'extraterritorial effects.' "[311] Although the majority recognized that "[c]ourts must sometimes referee disputes about where one State's authority ends and another's begins,"[312] the Court gave no real insight as to its view of the positive content of the extraterritoriality principle. Now, consider *National Pork* under an internal consistency approach to extraterritoriality: California applied its cage-size regulation to both pork *produced* in California *and* pork *sold* in California.[313] California undoubtedly has nexus over both pork produced and sold in California, but regulating on both jurisdictional bases simultaneously is internally inconsistent. If every state regulated pork on the basis of both sale and production, then every interstate pork sale would be regulated by two states. On the view proposed here, California's statute is internally inconsistent and, therefore, it would be strictly scrutinized as extraterritorial.

Finally, consider abortion. If a state wanted to attach liability to its residents for purchasing abortion services both within and without the state, such a jurisdictional basis would be internally consistent and, on our account, not extraterritorial.[314] But, to maintain internal consistency, a state banning its residents from seeking out-of-state abortions would have to forgo regulating nonresidents who seek abortions within the state's territory. For example, if Texas wanted to attach civil liability to a Texan receiving an out-of-state medication abortion, then it must not prevent non-Texans from receiving medication abortions in Texas. Put to that choice, Texas voters might choose to ban medical abortions from taking place inside Texas, regardless of whether the recipient is a resident or nonresident. But if it banned both residents and nonresidents from receiving abortion medication in Texas, then it could not also—consistently with the internal consistency test—ban Texans' access to out-of-state medication abortions. To ban all inbound, outbound, and domestic abortion services would be internally inconsistent and extraterritorial. Banning abortions for Texans and non-Texans *in Texas* would leave Texans free to seek abortion services in other states.[315] Such a result protects other states (and residents of every state) from Texas's regulatory overreaching.

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311. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1146 (2023).

312. *Id.* at 1147.

313. Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1025 (9th Cir. 2021), *aff'd*, 143 S. Ct. 1142 (2023).

314. Imposing liability for the receipt of abortion services outside the jurisdiction could, however, violate other constitutional guarantees, such as the right to travel. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

315. Although we arrive there by a different route, our conclusion on abortion is consonant with Lea Brilmayer's. *See* Brilmayer, *supra* note 13, at 885–89 (arguing that (1) direct jurisdictional clashes between residence and territorial states regulating abortion must be resolved; and (2) if forced, states would choose to regulate territorially, rather than by residence; so (3) conflicts should be resolved by courts in favor of territorial states).

An internal consistency approach to extraterritoriality would have several advantages. It would recognize that the states themselves are competent to determine which regulatory basis is most important to them, and it would preserve state autonomy to do so, provided states choose an internally consistent rule. Whereas courts may not regard themselves as competent to choose regulatory priority rules for states, they presumably would be willing to enforce priority rules that the states set for themselves. The approach also would encourage states to choose a jurisdictional basis that genuinely affects local activity. This channeling effect would serve multiple values of federalism. For example, it would promote policy experimentation and the tailoring of policies to local voter preferences, and, by encouraging legal pluralism, it would promote individual liberty by offering mobile citizens and businesses an array of regulatory options. Finally, it would reduce the likelihood that individuals would be subject to regulation promulgated by states where they lack the entitlement to vote.

C. *Burdens Doctrine as a Backstop*

Regardless of the alternative chosen, it is important to recognize that extraterritoriality is only one of the three strands of the dormant Commerce Clause. State regulations that pass the hurdles of nexus and extraterritoriality could still be analyzed for discrimination or because they unduly burden interstate commerce.

Suppose, for example, that the Supreme Court adopted an internal consistency approach to extraterritoriality. Now consider the mismatched truck width-and-weight limits in *Barnwell* or the mismatched mudflap requirements in *Bibb*.[316] In both of those cases, the state applied its rule on an internally consistent jurisdictional basis—namely, the rule applied only to trucks driving within the state's territory. If all states regulated only trucks driving on their own roads, no single truck would be subject simultaneously to the rules of two different states. While such assertions of regulatory jurisdiction would not be extraterritorial on an internal consistency approach, it is equally clear that, in those circumstances, promulgation by different states of rules with different *content* will have spillover *effects*. Trucks wishing to drive into South Carolina would have to meet its weight limits, perhaps by jettisoning weight at the border, and trucks wishing to drive into Illinois would have satisfy Illinois's mudflap rule, perhaps by changing mudflaps at the border. Even if all states applied their regulation on an internally consistent basis—and, indeed, even if all states used the *same* internally consistent jurisdictional basis as each other—if the *content* of their regulation differed, those differences might burden interstate commerce.

Likewise, continue to assume that the Supreme Court adopted an internal consistency approach to extraterritoriality and return to the California hog-cage regulation in *National Pork*. Now imagine California promulgated it on

316. *See* discussion *supra* Section II.C.

the exclusive basis of sale. California might select sale (rather than production) because Californians desire to harness their consumer power to change farming practices in other states. Although this would raise the risk that California would become a haven for production of inhumanely raised pork, assume California's voters are willing to take that risk to project their moral preferences externally. On an internal consistency approach, such a regulation would not be extraterritorial, though it would undoubtedly have spillover effects. Those spillover effects, arising from regulatory mismatches between California and, say, Iowa, could amount to an undue burden on interstate commerce.[317] If California applied its cage rule on the basis of sale, and Iowa applied a more permissive cage law on the basis of production, there would be an *actual* regulatory mismatch.

Because our federation accommodates regulatory diversity, however, it would not make sense to apply strict scrutiny to such mismatches. As we noted above, the Supreme Court has not been consistent in how it analyzes mismatch burdens. Some justices regard regulatory mismatches as an inevitable and unobjectionable consequence of state autonomy and regulatory pluralism. These justices would apply only rational-basis review to such mismatches.[318] On this view, if such mismatches become unduly burdensome, Congress could intervene. Other justices regard mismatch burdens as an appropriate subject of undue-burden balancing analysis.[319] These justices would engage in balancing of the type seen in *Bibb*. We do not express a view here on how mismatch cases should be decided.[320] Instead, we mention mismatches here to remind the reader that a finding of "no extraterritoriality" is not the same as concluding that a state's law is constitutional. Indeed, there were at least four votes in *National Pork* to remand the case on burdens grounds.[321]

CONCLUSION

It is easy to accept that the Constitution limits states' entitlement to regulate activity outside their borders. Vastly more difficult is describing the precise contours of any such limit. No clear definition of extraterritoriality has

317. Following *Edgar*, a court considering *National Pork* afresh might take into consideration, on the burdens side of the balance scale, the broad scope of California's rule, and it might discount California's state interest to the extent that California directs its regulation to out-of-state conduct. *See* discussion *supra* Section II.A. At oral argument in *National Pork*, the United States argued that California had offered no "cognizable local interest" to support its regulation of hog cages outside the state; in particular, that Californians "disagreed" with other states' regulations did not constitute a legally relevant local interest. Transcript of Oral Argument at 52–53, Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023) (No. 21-468) (contrasting local health and safety interests, which were relevant to *Pike* analysis).

318. *See* Knoll & Mason, Bibb *Balancing*, *supra* note 103, at 46–49, 51–52.

319. *See id.* at 49–51.

320. For more on mismatches, see *id.* at 46–49, 51–52.

321. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1172 (2023) (Roberts, C.J., dissenting in part).

emerged from the literature or the cases, and scholars deride the overbroad language the Supreme Court has used in extraterritoriality cases.

This Article sought to clarify extraterritoriality by conceptualizing it as an aspect of horizontal federalism. Specifically, state duties to avoid extraterritoriality are obligations of federal solidarity that protect state autonomy, and such duties indirectly promote interstate harmony, democratic accountability, legal pluralism, and individual liberty. Limits on extraterritoriality also reduce the risks that interstate commerce will be subject to multiple or inconsistent regulations; such limits thereby contribute to the efficiency of the national market.

Courts and commentators have obscured the unique role of extraterritoriality doctrine in part by conflating three distinct strands of the dormant Commerce Clause—nexus, extraterritoriality, and burdens. Under our framework, each strand of the dormant Commerce Clause buttresses federalism by providing a different kind of protection from overzealous states. Nexus doctrine protects people; extraterritoriality doctrine protects states; and burdens doctrine protects the national market. Each doctrine has independent force and importance. But they also reinforce and support one another.

Properly construed, the principle of extraterritoriality simultaneously limits and accommodates regulatory autonomy and diversity, but the Constitution does not provide clear insight about how to navigate those competing demands. Acknowledging this indeterminacy, we made several suggestions for firmer rules the Supreme Court could use to decide extraterritoriality cases. In particular, we suggested that the test the Supreme Court developed for *fiscal* extraterritoriality—the internal consistency test—could also become its test for *regulatory* extraterritoriality. These normative suggestions aim to narrow extraterritoriality doctrine as compared to the overbroad descriptions the Court has given the doctrine in past cases.

The question of how to properly recognize, define, and cabin extraterritoriality is critical for maintaining a healthy federal system that acknowledges not only each state's authority to regulate within its territory for the benefit of its citizens but also each state's obligation to avoid invading the regulatory domain of sister states. *National Pork* raised, but did not answer, this critical question. But a properly bounded extraterritoriality doctrine is needed to avoid the risk voiced by Dead Kennedy's frontman Jello Biafra—*California Über Alles*.