BOUNDING EXTRATERRITORIALITY

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[Abstract to come]

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I. INTRODUCTION

In 1979, the punk-rock band the Dead Kennedys debuted their hit song, *California Über Alles*, foretelling 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] Reading the complaints in several recent court cases suggests that the Dead Kennedys were on to something.[2]

Consider recent California regulation banning eggs or pork from animals housed in cages that California deems too small.[3] Although these regulations apply only to in-state activity—namely the in-state sale or production of eggs and pork—they undoubtedly impact out-of-state farmers seeking access to the nation's largest market. By far the largest and most productive U.S. state, California has outsized regulatory influence on the nation. In 1997, political scientist David Vogel coined the term "California Effect" to describe the spillover of California's stricter environmental laws—such as fuel efficiency standards—to other states, and the term has since come to refer to the tendency of stricter regulations to affect behavior in other states, either because other states copy the strict regulations, or because economic actors comply with the rules of the strictest state to secure nationwide market access.[4]

California has also threatened Delaware's primacy in corporate law, setting up a battle between the California Effect and the Delaware Effect.[5] Named in honor of Delaware's overwhelming success in corporate charter competition, the Delaware Effect describes the tendency of laxer regulations to spillover to other jurisdictions.[6] New California regulation requires public companies with their *principal offices* in California to appoint women and other underrepresented people to their corporate boards.[7] 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.

Those cheering California's progressive triumphs should not get too comfortable. California's outsized influence has meant that, for example, when business captures the California legislature, the whole nation suffers the consequence. A memorable example involved California's requirement that certain products, such as mattresses and children's pajamas, include chemical flame retardants that were later discovered to have serious environmental and

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[1] Dead Kennedys, CALIFORNIA ÜBER ALLES (Optional Music 1979).

[2] See references in *infra* note ___.

[3] Cal. Health & Safety Code § 25990 *et seq* ("Proposition 12").

[4] DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 5 (1995) (using the terms "Delaware Effect" and "California Effect").

[5] *See generally* VOGEL, *supra* note ___.

[6] VOGEL, *supra* note ___, at 5.

[7] Cal. Corp. Code § 301.3.

health consequences.[8] Moreover, just as progressive California policies on fuel standards, animal welfare, and corporate-board composition may spill over to other states, so may conservative policies. A classic example of a California Effect arising from a politically conservative state is Texas's regulation of textbooks to exclude evolution.[9] Likewise, referring to impeding "interjurisdictional abortion wars," scholars also have described how, in the wake of *Dobbs v. Jackson Women's Health Organization*,[10] states such as Texas and Missouri have sought to impose abortion restrictions that reach beyond their territorial borders.[11] As the nation becomes more divided, more states 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 celebrate them as not only as inevitable, but as a salutary aspect of our federal form of government, which invites and constitutionally protects regulatory diversity. At the same time that our federalism celebrates pluralism, however, an obvious question arises as to the limits the Constitution places on the ability of one state to use its regulatory power to influence behavior in another state. The question is one of "extraterritoriality." And the California regulations just mentioned have put that question on the dockets of federal courts, including the Supreme Court.[12]

As "our central principle of state legislative jurisdiction,"[13] extraterritoriality concerns allocation of power among the states—it is thus an essential question of federalism, and in particular, of horizonal federalism. Many law school courses, law review articles, and Supreme Court cases explore the limits on states' ability to invade the prerogatives, privileges, and rights of people or of the federal government, but relatively less attention has been paid to limits on states' ability to invade the prerogatives of *other states*.[14] We typically think about "states' rights" or state autonomy in an affirmative

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[8] Dashka Slater, *How Dangerous is Your Couch?*, N.Y. Times Magazine, Sept. 9, 2012, at SM22, https://www.nytimes.com/2012/09/09/magazine/arlene-blums-crusade-against-household-toxins.html.

[9] *See* DIANE RAVITCH, THE LANGUAGE POLICE (2003).

[10] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 597 U.S. ___ (2022).

[11] David S. Cohen, Greer Donley and Rachel Rebouché, The New Abortion Battleground, 123 COLUM. L. REV. 1, 37 (2023) (describing extraterritoriality as "notoriously underdeveloped," but not offering to develop it).

[12] *See, e.g.*, Nat'l Pork Producers Council v. Ross, 6 F.4th 1021 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 1413 (2022) (challenging California's regulation of hog-cage sizes); Missouri ex rel. Koster v. Harris, 847 F.3d 646 (9th Cir. 2017) (dismissing for lack of standing a challenge to the egg regulation), *cert. denied* 137 S.Ct. 2188 (2017).

[13] 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*].

[14] Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 529 (2008) (referring to doctrines implicating states' horizontal relationships as "chronically undertheorized and unstable"). *Id.* at 580–83 (identifying extraterritoriality as promoting horizontal federalism).

sense, as describing what states are entitled to do. But extraterritoriality is a negative concept—it describes what states may not do. According to the Supreme Court, the doctrine 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."[15] Elsewhere, the Court said that extraterritoriality prevents a state from "project[ing] its legislation into" other states.[16]

But many—maybe most—state regulations have some impact outside of the regulating state. Consider any number of state regulations governing product safety or labeling: these regulations cause out-of-state producers to change their products to meet the standards of the state of sale. The ubiquity of regulations with such extraterritorial effects calls into doubt whether any judicially cognizable, much less enforceable, limit can be drawn around regulatory spillovers.[17] One prominent scholar put it bluntly: extraterritoriality "lack[s]… a limiting principle."[18] Another observed that the Supreme Court's extraterritoriality cases are so broad that they "cannot mean what they appear to say."[19]

This Article makes two contributions, one primarily descriptive, the other normative. First, we define extraterritoriality from a structural constitutional perspective, situating it as an element of horizonal federalism. We argue that doctrinal confusion arises from failure to distinguish three closely related, but conceptually and legally distinct, strands of dormant Commerce Clause doctrine—nexus, extraterritoriality, and regulatory mismatches. Although these concepts all implicate important horizontal federalism concerns, we explain that each has a different emphasis.[20] Described colloquially, nexus cases involve states that regulate the *wrong people or activities* (because those people or activities are beyond the state's power to reach), extraterritoriality involves states that regulate *too broadly*, and regulatory mismatches involve states that regulate *too differently* from

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[15] Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989) (quoting *Edgar*, 457 U.S. at 642-43 (plurality opinion)).

[16] Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935) ("New York has no power to project its legislation into Vermont.").

[17] *See, e.g.*, Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 812 (2001) ("Regulatory slippage is a fact of life.");

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

[19] 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). See also Goldsmith & Sykes, *supra* note ___, at 790 (deeming "clearly too broad" one of the Supreme Court's most famous formulations of the extraterritoriality principle). Regan, *Essays*, *supra* note ___, at 1898 (identifying the "overbreadth in extraterritoriality review," but making "no attempt" to resolve it).

[20] Peter C. Felmly, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 467, 491, 503 (2003) (describing Supreme Court's "disconcerting" inability to explain how extraterritoriality "fits within the dormant Commerce Clause framework")

other states. This reframing encourages clearer thinking about extraterritoriality.

Second, we also advocate a normatively and doctrinally justified bright-line test for extraterritoriality. Specifically, to determine whether state assertions of *regulatory* jurisdiction are extraterritorial, the Supreme Court should use the same doctrinal test that it uses to determine whether state assertions of *fiscal* jurisdiction are extraterritorial, namely, the "internal consistency test."[21] We explain that, as applied to regulations, the internal consistency test would ask whether, if all states promulgated regulation on the same basis as the challenged state, interstate commerce would be subject to regulation by more than one state, whereas in-state commerce would be subject to regulation by only one state.[22] An internal-consistency approach to extraterritoriality in regulations cases could dramatically clarify and simplify that Court's "murky and contradictory"[23] doctrine.

As just one example, an internal-consistency approach to extraterritoriality would prevent California from regulating eggs or pork on the basis of both sale and production. If every state regulated goods based on both *sale* in the state and *production* in the state, then goods produced in one state, but sold in another would be subject to regulation by two states, but goods sold and produced in a single state would not. Thus, under an internal-consistency approach to extraterritoriality, California would have to choose only one of these bases. If forced, we predict California would choose to regulate production (rather than sale) lest its territory become a haven for the inhumane treatment of animals. A virtue of internal consistency as a test for extraterritoriality is that it would channel states to choose the nexus that best reflects its actual regulatory interest, without dictating to the state what that nexus is, let alone what the content of its regulation should be. In this way, internal consistency as a test of extraterritoriality would protect states from overreaching by other states, but it would not tell any state how to regulate. As we explain, this serves federalism goals.

Another virtue of internal consistency as a limiting principle for extraterritoriality under the dormant Commerce Clause is that it is purely formal and so does not involve judicial balancing, a technique increasingly

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[21] Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983) ("[T]he formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business's income being taxed."). *See also* Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138, 186 (1988) ("fair apportionment criterion serves to limit the territorial reach of state power"); Bradley W. Joondeph, *The Meaning of Fair Apportionment and the Prohibition on Extraterritorial State Taxation* , 71 FORDHAM L. REV. 149, 150 (2002) ("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").

[22] X-ref.

[23] Florey, *supra* note ___, at 1061.

anathema to justices and judges.[24] At the same time, it has some bite, and it targets the right types of commercial regulation, at least if we understand extraterritoriality as a principle of federal comity that imposes constraints on the breadth of each state's commercial regulatory power in order to preserve sister states' regulatory autonomy.[25] Our account also provides a more focused, and thus more defensible, conception of extraterritoriality than those offered in the literature.[26]

We did not invent internal consistency as a test of a state's overreaching in assertion of jurisdiction. On the contrary, the Supreme Court has used it since at least the early 1980s to evaluate state tax laws. As part of our argument to extend internal consistency to regulations, we explain how judicial perceptions of differences between taxes and regulations—perceptions that no longer prevail—led the Supreme Court to adopt of internal consistency in tax, but not regulations cases. We also uncover instances of internal-consistency reasoning in extraterritoriality cases involving regulations.

In addition to being of immediate use in deciding important pending cases, there is another reason to reexamine extraterritoriality. Technological changes have unmoored commerce from geography, putting pressure on concepts of jurisdiction centered on territory. Behavior, such online work and communication, increasingly can be understood to take place in more than one state simultaneously. Likewise, as companies become larger and penetrate more markets, more regulation that applies to seemingly local corporate activity may have nationwide effects. Thus, it would be wrong to conclude that extraterritoriality as a limit on state autonomy is unimportant or can safely be ignored. On the contrary, the problem of regulatory spillovers has become more acute as economic integration and regulatory leakage have increased.

II. FEDERALISM AND EXTRATERRITORIALITY

The Supreme Court has long read the affirmative Commerce Clause, which grants Congress the power to regulate interstate commerce, to include a negative implication that *disables* the states from regulating in ways that undermine federalism and the national marketplace.[27] Dormant Commerce

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[24] *See, e.g.*, *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 61 (1987) (Scalia, J., concurring in part) (condemning balancing as "ill suited to the judicial function").

[25] *See* Regan, *Essays*, *supra* note ___, at 1891 ("Other federal systems no doubt have comparable internal extraterritoriality principles").

[26] X-ref

[27] A vast literature considers the dormant Commerce Clause. For the leading accounts, see Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43 (1988); Brannon Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417 (2008); 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*

Clause doctrine protects national and federal interests, and by extension, individual interests. For example, by precluding discriminatory or unduly burdensome commercial regulation, the doctrine protects not only the national marketplace, but also individuals engaged in interstate commerce who lack democratic representation in host states.[28] At the same time, by limiting states' ability to enact tariffs or tariff-like measures, the dormant Commerce Clause advances horizontal federalism interests by dampening interstate rivalries and reprisals.[29] The doctrine likewise safeguards vertical federalism by balancing Congress's entitlement to regulate interstate commerce against the states' interests in regulatory autonomy. In short, the dormant Commerce Clause does a lot of work, especially for a doctrine the late Justice Scalia condemned as "a judicial fraud."[30] Notwithstanding that critics—including Justice Thomas—have complained that it is "unmoored from any constitutional text,"[31] dormant Commerce Clause doctrine has maintained a stalwart presence in our constitutional jurisprudence for nearly two hundred years.[32] But it broad scope, combined with its atextuality, have made the dormant Commerce Clause one of the "most litigated" areas of the Constitution.[33]

This Part accomplishes three goals; it defines extraterritoriality as a subdoctrine of the dormant Commerce Clause, provides a theoretical account of extraterritoriality steeped in federalism, and presents the most important criticisms of the doctrine.

A. Defining Extraterritoriality

Writing for the Tenth Circuit, then Judge Gorsuch called extraterritoriality the "least understood" strand of the dormant Commerce

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Protectionism: Making Sense of the Dormant Commerce Clause, 84 MICH. L. REV. 1091 (1986) [hereinafter Regan, *Protectionism*]; Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 (1979).

[28] *See, e.g.*, Kassel v. Consolidated Freightways Corp. of Delaware, 450 U.S. 662, 675-76 (1981) (normally, "a State's own political processes will serve as a check against unduly burdensome regulations," but "less deference to the legislative judgment is due, however, where the local regulation bears disproportionately on out-of-state residents and businesses").

[29] H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533, 539 (1949) (the doctrine prevents "rivalries and dislocations and reprisals" that would "threaten at once the peace and safety of the Union").

[30] Wynne, 575 U.S. 542, 572 (2015) (Scalia, J., dissenting).

[31] Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 610 (1997) (Thomas, J., dissenting).

[32] Dormant Commerce Clause doctrine arguably emerged in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), but certainly no later than Cooley v. Board of Wardens, 53 U.S. 299 (1852). The most recent Supreme Court decision precluding a state regulation on dormant Commerce Clause was *Tennessee Wine and Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019).

[33] Norman R. Williams, *The Foundations of the American Common Market*, 84 NOTRE DAME L. REV. 409, 411 (2008).

Clause.[34] Indeed, the most notable aspect of extraterritoriality is that no one seems to know what it means. Expressing a sentiment shared by many, Donald Regan wryly observed—that "states may not legislate extraterritorially, whatever exactly that means."[35] No clear definition has emerged from the literature, and the Supreme Court's own definitions have met derision and disbelief from scholars as well as resistance in lower courts.[36]

Acknowledging both frustration with and uncertainty about the meaning of extraterritoriality, we begin with a rough definition. The Supreme Court typically frames extraterritoriality under the dormant Commerce Clause as a prohibition on regulating commerce that takes place in other states.[37] For example, the Supreme Court's best-known formulation of extraterritoriality, from *Healy v. Beer Institute*, is that it "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."[38] Because, however, state regulation of in-state commerce so frequently has out-of-state impacts—think of product safety or labeling rules—commentators rightly complain that such judicial pronouncements are overbroad and provide little guidance.[39] As a subdoctrine of the dormant Commerce Clause, extraterritoriality has waxed and waned, but the Supreme Court has never repudiated it.[40]

Claims of extraterritoriality arise in various ways. A good or service may itself cross a state border—like 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 more than one state, with attendant claims of extraterritoriality. A familiar example is *Washington Apple Commission v. Hunt*,[41] which involved the sale in one state of apples grown in another when each state had different labeling regimes. The rise of e-commerce has vastly expanded interstate provision of goods and services, increasing the incidence of multiple regulation and arguably also increasing the need for states to regulate out-of-state behavior. Consider spam emails.[42] A state seems to have a legitimate interest in regulating spam sent to recipient in its state, even if the origin of the spam was outside the state. Yet such a regulation would seem to

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

[35] Regan, *Essays*, *supra* note ___, at 1896.

[36] *See infra* Parts II.C (scholarly criticism) and IV.B (lower court analysis).

[37] Healy, 491 U.S. at 336 ("the critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State").

[38] Healy, 491 U.S. at 336 (quoting *Edgar*, 457 U.S. at 642-43 (plurality opinion)).

[39] X-ref

[40] Denning, Mortem, *supra* note ___.

[41] Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333 (1977) ("When … state legislation comes into conflict with the Commerce Clause's overriding requirement of a national "common market," we are confronted with the task of effecting an accommodation of the competing national and local interests.) (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

[42] Goldman and Sykes, *supra* note ___, at 793-94.

violate the *Healy* Court's description of extraterritoriality. Another type of extraterritoriality case involves a regulation that applies on a company-wide, national, or global basis, often to activity that has no specific location. For example, in *Moorman*, a state defined a method for apportioning a part of a company's *national* income to the state for tax purposes,[43] and in *CTS Corporation*,[44] a state applied its anti-corporate-takeover rule to companies incorporated in its jurisdiction, including to those with activities in more than one state. Rarely does a state explicitly regulate activity in another state's territory; instead, most of the cases involve regulatory spillovers, that is, situations in which a state's internal regulations impact behavior outside the state.[45] The term "extraterritoriality" derives from similar limits in international law,[46] but one thing upon which jurists and commentators agree is that federal states are subject to stringent extraterritoriality prohibitions than are independent countries.[47]

B. Extraterritoriality and Constitutional Federalism

Extraterritoriality can be described affirmatively or negatively. In the affirmative, it asks "whether a particular state is 'sovereign enough' to do whatever it is trying to do."[48] Rather than assigning specific powers to each state, the Constitution reserved powers not allocated to the federal government to the states *collectively*.[49] This aggregate reservation of power inevitably raises questions regarding the limits on each state's power when it acts alone. The structure of the Constitution, and the federal system it established, entitles the individual states to equality, and maintaining this equality requires the states to respect one another.[50] This, in turn, leads to the negative description of extraterritoriality. As the Supreme Court put it, "[p]rinciples of state sovereignty and comity forbid a State to enact policies for the entire Nation, or

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[43] Moorman Mfg. Co. v. Bair, 437 U.S. 267, 269 (1978).

[44] CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987).

[45] Erbsen, *supra* note ___, at 523-24.

[46] Lea Brilmayer & Charles Norchi, Federal Extraterritoriality and Fifth Amendment Due Process, 105 HARV. L. REV. 1217, 1218 n.3 (1992) (defining extraterritoriality as the application by a country of its own law to cases in which "at least one relevant event occurs in another nation"); William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071 (2015) (exploring the limits of federal legislative and adjudicative jurisdiction under international law).

[47] Regan, *Essays*, *supra* note ____ at ____; Dodge, *supra* note ___. See also discussion of *Hyatt infra* note 50.

[48] Erbsen, *supra* note ___, at 562 (discussing horizontal federalism generally, including extraterritoriality as one of many topics).

[49] Erbsen, supra note ___ at 508.

[50] Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485 (2019) (Thomas, J.) (holding that despite the absence of any express constitutional text, the Constitution requires states to respect each other's sovereign immunity).

to impose its own policy choice on neighboring States."[51] Put differently, the need to preserve each state's regulatory autonomy necessarily implies limits on the autonomy of the others, and a prohibition of extraterritorial regulation by states in a federation is thought to be a characteristic of all federations, not just the United States.[52]

In addition to the need to reserve a measure of regulatory autonomy to each state, the Supreme Court has offered other justifications for the prohibition on extraterritoriality. For example, state regulatory overreaching could cause other states to retaliate, thus undermining or even destabilizing the federation.[53] Likewise, one state's overbroad regulations could generate regulatory mismatches or conflicts with other states, thereby impeding interstate commerce and segmenting the national market, an idea to which this Article will return.[54] Occasionally, the Court also expresses concern about notice and fairness to regulated parties governed by overbroad regulations[55] or it expresses concern about the exclusion of out-of-state regulated parties from the in-state political process that led to adoption of the challenged regulation.[56]

Federations enforce limits on state regulatory overreach in various ways.[57] For instance, the law of personal jurisdiction describes some of these limits; a state court cannot adjudicate any case wants, even if its state has no contacts with the case or parties. Conflicts-of-law rules tackle another portion

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[51] *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 197 (1977) ("any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power"); Healy v. Beer Inst., 491 U.S. 324, 335-36 (1989) (referring to the Constitution's "special concern [for]… the autonomy of the individual States within their respective spheres"). Commentators have referred to extraterritoriality as a kind of "horizontal preemption." *See generally* Lea Brilmayer, *Interstate Preemption: The Right to Travel, The Right to Life, and the Right to Die*, 91 MICH. L. REV. 873 (1993).

[52] *See, e.g.*, Regan, *Essays*, *supra* note ___, at 1891; *id.* at ___ (arguing that rather than arising from the dormant Commerce Clause, extraterritoriality "is one of those foundational principles of our federalism which we infer from the structure of the Constitution as a whole").

[53] B.M.W of N. Am., Inc., v. Gore, 517 U.S. 559, 571 (1996) ("no single State could . . . impose its own policy choice on neighboring States") (citing Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881); Edgar v. MITE Corp., 457 U.S. 624, 643 (1982) (opinion of White, J.) (permitting extraterritoriality "would offend sister States") (quoting Shaffer v. Heitner, 433 U.S. 186, 197 (1977)); *See also* Brown-Forman Distiller Corp. v. New York State Liquor Authority, 476 U.S. 573, 586 (precluded law might otherwise "interfere with the ability of other States to exercise their own authority").

[54] *See, e.g.*, *Brown-Forman*, 476 U.S. at 583 (warning that extraterritorial regulation would lead to interstate sellers being "subjected to inconsistent obligations in different States").

[55] fairness

[56] Southern Pac. Co. v. State of Ariz. ex rel. Sullivan, 325 U.S. 761, 769 n.2 (1945) ("to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected").

[57] Erbsen, *supra* note _____ at 562

("horizontal fragmentation of sovereignty over U.S. territory raises a question about whether a particular state is 'sovereign enough' to do whatever it is trying to do").

of the problem of regulatory overlap. And uniform federal regulation can eliminate (by preemption) areas of law characterized by significant spillovers.[58] As a subdoctrine of the dormant Commerce Clause, judicial review of extraterritoriality covers cases where Congress has not promulgated uniform law. The role of the Supreme Court in extraterritoriality review is analogous to its role in reviewing burdens on interstate commerce under the dormant Commerce Clause. The states are free to regulate interstate commerce where Congress has not acted, but because Congress does not have the time to intervene in every case, where state regulation leads to discrimination against or imposition of undue burdens on interstate commerce, the Supreme Court occupies the role of protector of the federal structures erected by the Constitution.[59] Likewise via judicial review of potentially extraterritorial state regulations, the Supreme Court heads off potential interstate retaliation, safeguards federalism by deciding whether a state has exercised "too much" regulatory authority.[60] Resolving questions of state overreaching obviously cannot be left to the challenged state itself.[61]

Extraterritoriality also can be understood to vindicate states' federalism obligations to *residents of other states*. Although this is not a commonplace way of understanding extraterritoriality, in addition to the duties federal states owe each other, states owe duties to residents of other states. Most important for our purposes, are the duties not to harm and duties not to discriminate on the basis of state residence.[62] This obligation, in turn, may be understood to oblige states not to strip out-of-state residents of comparative advantages they possess—potentially including comparative advantages that arise from the regulatory regime of their home state[63]—or to regulate them in a way that violates notions of notice and fairness.

Because it safeguards our federalist structure, extraterritoriality should also be understood to promote federalism values. We prize federalism not for its own sake, but as an instrument for facilitating regulatory diversity, which

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[58] See generally Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010) (arguing that a function of federal regulation is to control spillovers)

[59] So. Pacific, 325 U.S. at 766 ("[t]he states may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress").

[60] Commentators often describe extraterritoriality as preventing states from regulating "too much" conduct. *See, e.g.*, Scott Fruehwald, The *Rehnquist Court and Horizontal Federalism: An Evaluation and A Proposal for Moderate Constitutional Constraints on Horizontal Federalism*, 81 DENV. U. L. REV. 289, ___ (2003); [others].

[61] *Cf.* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 23 (1963) (states should not be able to decide when their own law will prevail over that of other states).

[62] Erin Delaney & Ruth Mason, *Solidarity Federalism*, 98 NOTRE DAME L. REV. 617, 623-35.

[63] Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 351 (1977). (holding that North Carolina could not apply a regulation that would deprive out-of-state apple growers of the benefit of the "competitive and economic advantages" home state's high-quality inspection program).

in turn promotes normatively desirable outcomes, including regulatory diversity, efficiency, pluralism, accountability, experimentation, and preservation of liberty.[64] Our federal system not only anticipates regulatory competition among the states; it welcomes diversity. But there are limits.

C. Criticism of the Doctrine

The most devastating criticism of extraterritoriality is that nobody knows what it means.[65] For example, as a judge on the Tenth Circuit, Justice Gorsuch called extraterritoriality the "least understood" strand of dormant Commerce Clause jurisprudence."[66] Earlier, we cited Regan's acerbic definition of extraterritoriality, but he also attempted a serious one. Regan defined extraterritoriality as a principle that "forbids a state from acting on its own laws when it should not" while also forbidding a state from "insist[ing] that other states act on its laws, when there is no proper grounds for such insistence."[67] Regan readily acknowledged that this definition was unsatisfying.[68]

Commentators agree that the most commonly quoted Supreme Court descriptions of extraterritoriality are "clearly too broad."[69] For example, one of the Supreme Court's best-known statements on extraterritoriality is that "critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."[70] But such extraterritorial *effects* are ubiquitous. Jack Goldsmith and Alan Sykes rightly observed that a regulation cannot violate the dormant Commerce Clause *merely* because it affects commerce outside the regulating state because such interpretation would make nearly every regulation suspect.[71] 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. But such external effects should not prevent the first state from regulating wages within its territory. Not only do many regulations have *indirect* effects outside the regulating state, but many state regulations *directly and validly* target activity thar takes place

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

[65] Other objections include the argument that the dormant Commerce Clause is not the correct basis from which to extract the extraterritoriality principle. See Regan, *Essays*, *supra* note ___ at ___ (arguing that extraterritoriality is better understood as a principle of structural federalism, derived from no particular textual provision of the Constitution).

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

[67] Regan, *Essays*, *supra* note ____, at 1894.

[68] Regan, *Essays*, *supra* note ___, at 1896.

[69] Goldsmith & Sykes, *supra* note ___, at 790. *Id.* at 803 ("State regulations are routinely upheld despite what is obviously a significant impact on outside actors.").

[70] Healy v. Beer Institute, Inc., 491 U.S. 324, 336 (1989).

[71] Goldsmith & Sykes, *supra* note ___, at 790.

outside of the regulating state but has effects within it.[72] This observation mirror's Gillian Metzger's argument that "some extraterritoriality is not only inevitable, but appropriate" to a federal system.[73]

Many commentators have offered perspectives on how to cabin extraterritoriality. For example, arguing that "formalism is not all bad," Regan argued that to resolve extraterritoriality cases, courts should map commercial actions to a particular physical location and then recognize that state as *exclusively* entitled to regulate. Any other state's regulation would be extraterritorial. Focusing on "the location of the behavior… not… location of the… effects" would, in Regan's view, solve the problem of extraterritoriality's overbreadth.[74] But, as Katherine Florey pointed out, an obvious problem with Regan's approach is that would require a "unique territorial jurisdiction" to be "unambiguously assigned" to every single regulated person or act, a task that would seem to embroil courts in judicial legislation and raise serious risks of conflicting decisions by different courts.[75]

Lea Brilmayer made a subtler argument for territoriality.[76] Using as examples regulations characterized by sharp moral disagreements, such as abortion and the right to die, Brilmayer argued the federal system clearly points to a priority rule. Rather than assigning, as would Regan, every potential action to a single regulating state, Brilmayer observed that in 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.[77] Because the issue Brilmayer sought to understand was how to resolve conflicts between morals regulations promulgated by different states, the cases she considered involved natural persons. Thus, for example, one of her examples involved the clash between a state that sought to criminalize its residents' receipt of abortions outside the state and a state that permitted people in the state to receive abortions. In her view, the territorial state's regulation would prevail over the residence state's regulation.[78]

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[72] Goldsmith & Sykes, *supra* note ___, at [___] (providing modern examples involving the internet, such as regulation of spam sent to state residents by senders located in other states). *See also* Regan, *Essays*, *supra* note ___, at 1878 (making similar arguments about overbreadth).

[73] Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1521-2 (2007).

[74] Regan, *Essays*, *supra* note ___, at 1874. *Id*. at ___ ("Our core notion of the basis for jurisdiction is territorial").

[75] *See* Florey, supra note ___, at 1089. *See also* Mark P. Gergen, *Territoriality and the Perils of Formalism*, 86 MICH. L. REV 1735 (1988) (arguing that Regan's proposal would not restrain the states because "whatever ends a state might wish to accomplish by directly regulating foreign behavior usually can be met by indirect regulation").

[76] Brilmayer, supra note ___, at ___.

[77] Brilmayer, *supra* note ___, at ___.

[78] Brimayer supports this inference be reference to ordinary constitutional interpretive methods, such as language and structure. Cite her Duke lecture ___. *But see* Mark Gergen,

With certain corporate regulation, however, the difference in regulation on the basis of territory and on the basis of residence is less sharp, and it probably can't justify an absolute priority for territorial regulation. For example, most states recognize—some even in codify—the entitlement of the incorporation state to regulate a company's internal affairs, even when that company transacts business mostly (or even exclusively) in another state. States have essentially accepted a broadly applicable priority of residence over territorial regulation. This suggests that the issues play out differently in commercial regulation than morals regulation. Quoting the Court itself, Susan Lorde Martin suggested that the Supreme Court should only forbid a state from regulating activity that "takes place wholly outside of the State's borders."[79] In addition to ignoring the serious line-drawing problems that that approach—which simply repeats judicial dictum—has generated, the approach is also self-evidently overbroad because it would preclude *any* state from regulating on a company-wide basis. Thus, in addition to being impossible to meet, a standard that would forbid all cross-border regulatory spillovers is unnecessary to preserve fellow states' autonomy in a federation.[80]

Other commentators have offered methods for cabining extraterritoriality that do not rely on priority rules. For instance, Mark Rosen argued that, although the Supreme Court had applied it to cases not involving protectionism, the Court should limit per-se preclusion for extraterritoriality to protectionist regulations where there is need for national uniformity.[81] But Rosen offered little justification for such limits on extraterritoriality other than the placement of the doctrine in the dormant Commerce Clause and the fact that some protectionist regulations, namely those that are facially discriminatory, also get strict scrutiny.[82] While we are sympathetic with Rosen's desire to cabin a doctrine that can lead to per-se invalidity of state health and safety laws, Rosen's addition of a protectionism requirement to extraterritoriality arises from his conflation of extraterritoriality and burdens, a topic to which we will return.[83] For now, we note that because the dormant Commerce Clause already forbids both protectionism and mismatched

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Equality and the Conflict of Laws, 73 IOWA L. REV. 893 (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-bases) connections in conflicts-of-law).

[79] *Healy*, 491 U.S. at 336.

[80] *See* Goldsmith & Sykes, *supra* note ___, at 790–94 (giving examples—including the sending of spam or child pornography over the internet from other states—in which a state might legitimately seek to regulate out-of- state behavior based on its in-state effects).

[81] Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U.PA. L. REV. 855, 922-26 (2002).

[82] Rosen (2002), *supra* note 925.

[83] Rosen (2002), *supra* note ___, at 957 (describing the relevant regulations as ones that "give rise to inconsistent demands," such that they "require mutually inconsistent behaviors;" we would characterize such conflicts as mismatches and resolve them under the Court's balancing test for undue burdens).

regulation in areas requiring national uniformity,[84] Rosen's proposal would essentially eliminate extraterritoriality as a separate constitutional requirement.[85]

Susan Lorde Martin argued that acknowledging that extraterritoriality prevents "legislative balkanization" could help guide the Court's decisions.[86] The Court long has referred to regulatory diversity that segments the national market along state lines as "balkanization."[87] Examples of balkanizing regulations include the mudflap mismatch in *Bibb* or state-to-state diversity in regulations governing the lengths of trucks allowed on state highways.

Likewise, Peter Felmly argued that, rather than concerning protectionism, extraterritoriality concerns "limiting the *number* of state regulatory regimes to which an individual or corporate entity will be subjected."[88] Because the Supreme Court already handles balkanized and overlapping regulations under the undue-burdens doctrine of the dormant Commerce Clause, however, limiting extraterritoriality in the ways Martin and Felmly suggest would—like Rosen's proposal—eliminate the unique work performed by the extraterritoriality doctrine. Extraterritorial assertions of regulatory jurisdiction are not problematic merely because they generate risks of overlapping or inconsistent regulations. Rather they are also problematic for their own sake, even if no other state regulates in the area, because they invade other states' regulatory prerogatives.[89] A state may exercise its policy prerogatives by regulating or by *not regulating*, according to the will of its voters. Thus, just as vertical federalism limits the ability of states to soak up regulatory entitlement not exercised by Congress, horizontal federalism limits the ability of one state to soak up regulatory authority not exercised by other states.[90]

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[84] *See, e.g.*, So. Pacific, 325 U.S. at ___.

[85] Martin, *supra* note ___, at 501 ("under the doctrine…. Unconstitutionality does not depend on the regulation's discriminating against out-of-staters.").

[86] Martin, *supra* note ___, at ___.

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

[88] Felmly, *supra* note ____, at 507-08 (emphasis added). See also Michael J. Ruttinger, *Is There A Dormant Extraterritoriality Principle?: Commerce Clause Limits on State Antitrust Laws*, 106 Mich. L. Rev. 545 (2007) (arguing in the state anti-trust law context that the Supreme Court should strike laws a extraterritorial when they subject the defendant to inconsistent obligations). Like Felmly and Martin's proposals, Ruttinger's would subsume extraterritorial into burdens, eliminating it as an independent constitutional requirement.

[89] *See, e.g.*, Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 377 (6th Cir. 2013) (holding Michigan's extraterritoriality regulation to violate the dormant Commerce Clause even though no other state had similar regulation).

[90] *Cf.* Austin v. New Hampshire, 420 U.S. 656 (1975) (forbidding under the dormant Commerce Clause state soak-up taxes, namely an income tax assessed by a source state, but only to the extent it would be credited by the resident's home state). *See also* Rosen (2002), supra note ___, at ___ (discussing *Austin v. New Hampshire*).

Jack Goldberg and Alan Sykes took a more practical approach to simplifying and rationalizing dormant Commerce Clause doctrine.[91] They advocated for cost-benefit analysis to decide dormant Commerce Clause cases. When confronted with a regulation challenged for its extraterritorial effects, they argued that courts 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 former exceeded the latter.[92] Although it would give clear direction to courts and might advance welfare, it is unclear how any court would have the institutional authority to implement Goldsmith and Sykes's suggestion because it is divorced from federalism and in particular the Constitution's focus on allocation of power among the states. At least since *Lochner*, the Supreme Court has maintained that the Constitution does not justify Supreme Court justices in imposing their own economic conceptions of how to advance welfare as part of judicial review. Goldsmith and Sykes identify the right problem—that judicial statements of extraterritoriality are too broad. But their cost-benefits solution is divorced from structural federalism, free-trade, interstate harmony, or any of the other constitutional values that traditionally motivate dormant Commerce Clause doctrine. Thus, like the other approaches, Goldsmith and Sykes' approach also would eliminate extraterritoriality as a separate subdoctrine of the dormant Commerce Clause. Worse, their approach—do whatever maximizes welfare—would eliminate the need for any legal doctrine at all.[93]

III. OUR PROPOSALS

This Part responds to the critics by reframing the doctrine to distinguish three related, but conceptually distinct, subdoctrines of the dormant Commerce Clause, namely, nexus, extraterritoriality, and burdens. Next, we argue that a doctrinal tool developed to evaluate *fiscal* extraterritoriality—the internal consistency test—can and should be reformulated to evaluate *regulatory* extraterritoriality. We explain how the internal consistency test would both simplify legal analysis in extraterritoriality cases and properly position extraterritoriality to fulfill its unique role as a subdoctrine of the dormant Commerce Clause.

A. Untangling Doctrinal Strands

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[91] Goldsmith & Sykes, *supra* note ___, at ___.

[92] The Court should ask whether "the benefits to the regulating jurisdiction and its citizens exceed the losses to those outside the jurisdiction." Goldsmith & Sykes, *supra* note ___, at 802.

[93] Goldsmith and Sykes arrive at their suggestion by collapsing extraterritoriality and *Bibb* balancing, and then concluding that the way to resolve the aggregated issue was "to check whether state regulation makes things better or worse." Goldmith & Sykes, *supra* note ___, at 803.

This Subpart observes that courts and commentators have conflated three related, but distinct, subdoctrines of the dormant Commerce Clause: nexus, extraterritoriality, and burdens. Scholars have observed these overlaps. For example, Felmly remarked on the conceptual overlap of nexus and extraterritoriality, noting that the latter "has been compared with the ability of a state to assert jurisdiction over individuals outside its borders."[94] Similarly, Susan Lorde Martin observed that "it is easy to confuse" extraterritoriality with the "discrimination strand of the dormant Commerce Clause."[95] Writing separately, Donald Regan and Katherine Florey each observed confusion between extraterritoriality and burdens.[96] In our view, the area of worst confusion is the distinction between extraterritoriality and one particular type of burden analyzed under the dormant Commerce Clause, namely, regulatory mismatches.

The goal of this Subpart is to untangle the doctrinal threads. Although all three doctrines—nexus, burdens, and extraterritoriality—have overlapping normative justifications, including fairness, the need to safeguard federalism, and a desire to promote the smooth functioning of the national marketplace,[97] understanding the distinct roles of each of these subdoctrines and the relationships among them is crucial to untangling them and constitutes a major contribution of this Article.

A paradigmatic example of a legitimate assertion of nexus involves a state that regulates its own resident engaged in in-state activities with only in-state effects. By contrast, a state would lack nexus to regulate a nonresident's out-of-state activities that have no in-state effects. Violations of extraterritoriality occur when a state attempts to regulate on—for the lack of a better locution—too many nexuses. For instance, a state clearly has nexus to regulate goods sold into its territory, and it also clearly has nexus to regulate

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[94] *Cf.* Felmly, *supra* note ___, at 508 (noting that extraterritoriality "has been compared with the ability of a state to assert jurisdiction over individuals outside its borders"); Regan, Essays *supra* note ___, at ___ (extraterritoriality should be handled exclusively under other parts of the Constitution, including the Fourteenth Amendment's Due Process Clause and Full Faith and Credit, not under the dormant Commerce Clause).

[95] Martin, *supra* note ___, at 497.

[96] *See e.g.*, Regan, Essays, *supra* note ___, at 1875 (referring in particular to regulatory inconsistencies and Justice Powell's reasoning in *CTS*); Florey, *supra* note ___, at 1088 ("the Court has left ambiguous the relationship between concerns about inconsistent regulations and extraterritoriality more generally"). Not all courts conflate extraterritoriality and burdens. *See* Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628 (6th Cir. 2010) (distinguishing extraterritoriality from undue burdens balancing under *Pike*). Some commentators see virtues in uniting extraterritoriality and burdens. *See* Goldsmith & Sykes, *supra* note ___, at ___ (dormant Commerce Clause would be simpler id extraterritoriality were "fold[ed] in to the balancing framework"). Such folding-in would, of course, eviscerate the distinct role of extraterritoriality. Some commentators argue that descriptively, they are the same or redundant. Shanske, at ___ (extraterritoriality is redundant of Pike balancing).

[97] *See, e.g.*, Healy v. Beer Inst., 491 U.S. 324, 335-36 (1989) (referring to the Constitution's "special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres").

goods produced in its territory, but when it regulates on the basis of *both* nexuses simultaneously, it raises a question of extraterritoriality. It is the *breadth*, not the *basis*, of the assertion of regulatory jurisdiction that distinguishes extraterritoriality from nexus. Finally, regulatory mismatches occur when a state has nexus—and does not regulate extraterritorially—but the *content* of its regulation differs from that of other states, such that an interstate commercial actor may be subject to conflicting rules. The paradigm case is *Bibb v. Navajo Freight Lines*, in which two states regulated trucks traveling in their own territories, and one required straight mudflaps, but the other required curved mudflaps.[98] Both had nexus; neither assertion of regulatory jurisdiction was overbroad, but interstate truckers still experienced burdens that in-state truckers did not experience. Such cases involve extraterritorial *effects*; the mismatched regulatory content generates regulatory spillovers, and those spillovers constitute burdens on interstate commerce subject to challenge under the dormant Commerce Clause.

1. Distinguishing Nexus

Nexus is a requirement of due process, and, at least in tax cases, it is a separate requirement of the dormant Commerce Clause.[99] Due Process Clause nexus and dormant Commerce Clause nexus both concern the connection between the state and the regulated party, including whether the regulated person availed itself of the state's market, such that the state was justified in imposing tax (or regulation) on that person.[100] The Supreme Court has not stated clearly whether dormant Commerce Clause nexus is the same or different from due process nexus, although the Court in *Wayfair* suggested they are similar.[101] Like due process nexus, dormant Commerce Clause nexus is a permissive inquiry into the sufficiency of contacts between the state and the regulated party to justify prescriptive jurisdiction. The principal considerations in nexus cases are arbitrariness and fairness to regulated parties. Whether considered as part of the dormant Commerce Clause, the Due Process Clause, or both, nexus is the sine qua non of prescriptive jurisdiction: without it, a state cannot tax or regulate.

Courts and commentators are right to see conceptual overlaps between nexus and extraterritoriality, and some commentators have observed that the

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[98] Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).

[99] The main doctrinal test in tax cases, articulated in *Complete Auto*, consists of nexus, fair apportionment, nondiscrimination, and fair relation. *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1997)

[100] South Dakota v.Wayfair, 138 S.Ct. 2080, 2099 (2018) ("nexus is established when the taxpayer… avails itself of the substantial privilege of carrying on business' in that jurisdiction"); 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.");

[101] *See, e.g.*, Wayfair, 585 U.S. at 2093 (stating, in reference to nexus, "Due Process and Commerce Clause standards may not be identical or coterminous, but there are significant parallels"). For criticism, see Holderness, *supra* note ___.

two cannot cleanly be separated. For example, Katherine Florey argued that concepts of extraterritoriality embedded in conflicts-of-laws, due process, and the dormant Commerce Clause should be synthesized into a single doctrinal framework.[102] Taking a historical view, Brannon Denning emphasized that extraterritoriality began as a doctrine embedded in *both* the Due Process and dormant Commerce Clauses, but that by the 1980s, due process had receded.[103] Donald Regan rejected any such classification; he argued that extraterritoriality should be understood as a principle of structural federalism, derived from no particular textual provision of the Constitution.[104] This Article takes extraterritoriality as it comes to us in the modern era—as a subdoctrine of the dormant Commerce Clause—but neither our argument about how courts should distinguish it from strands of dormant Commerce Clause doctrine nor our argument about how to identify it depends on its placement in the dormant Commerce Clause; they would apply if it were an element of due process analysis.

Returning to the overlaps between nexus and extraterritoriality, we first address terminological overlaps. For instance, suppose a state expressly regulated the packaging of goods that were manufactured in another state for sale in a third state. The manufacturer lacks sufficient connection with the state to justify the state's assertion of regulatory authority over the person. We would say the state lacks nexus; it lacks prescriptive jurisdiction. But we might *also* describe the state's attempt to assert jurisdiction as extraterritorial. Use of the term "extraterritorial" to describe both cases in which the state *lacks* nexus as well as cases in which the state possesses nexus, but exercises it too broadly, makes it easier to conflate the two concepts.

There are also normative overlaps between nexus and extraterritoriality. For example, decisions finding lack of nexus are disempowering to the state involved, but typically implicit in a court's denial of nexus is the notion that one or more *other states* are more appropriate regulators because they are better connected to the regulated activity or person. Thus, 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. Another similarity is that both nexus and extraterritoriality operate as per-se rules; a state that lacks nexus or that regulates extraterritorially cannot justify its prescriptive regulation by citing policy goals.

We see extraterritoriality as an additional jurisdictional 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 and prescriptive

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[102] Florey, *supra* note ___, at 1060–64.

[103] *See, generally*, Denning, *Mortem*, *supra* note ___ at ___.

[104] Regan, *Essays*, *supra* note ___, at 1887 (arguing that, rather than being associated with any one clause, extraterritoriality "should be regarded as an inference from the structure of our system").

jurisdiction over—a person based on their presence, residence, and activities of many kinds. And, as we said, nexus is a permissive requirement. Extraterritoriality, in turn, involves cases in which a state regulates on the basis of *more than one permissible nexus*. A state is not free, in a federal system characterized by obligations to respect the regulatory entitlements of other states, to assert regulatory authority on *all* permissible nexuses simultaneously. Doing so would be overbroad, and it would invade the regulatory entitlements of other states. Thus, states that have nexus to regulate a person may still violate the principle of extraterritoriality.

2. Distinguishing Burdens

Just as nexus and extraterritoriality feature similar reasoning and are justified by similar normative goals, the extraterritoriality and burdens subdoctrines of the dormant Commerce Clause have many similarities. Most first-year law students learn that the dormant Commerce Clause forbids states from imposing two kinds of burdens on interstate commerce: facially discriminatory regulations and "undue" burdens.[105] Facially discriminatory rules—those that explicitly treat interstate commerce worse than in-state commerce—are easy to identify and overwhelmingly struck down. More difficult to identify and evaluate are facially neutral regulations that burden interstate commerce more than in-state commerce. Many such burdens cases involve claims of hidden protectionist motives, resulting in decisions in which the Court attempts to "smoke out" impermissible intent.[106] But some involve neither overt nor disguised protectionism, and instead raise issues of genuine policy differences between states that lead to regulatory mismatches. Consider a state that bans spam sent from anywhere to recipients in the state. Such a regulation, which applies to in-state and out-of-state senders, does not seem to be motivated by protectionism.[107] Likewise, California's animal welfare regulations discussed in the Introduction, which apply to both in-state and out-of-state eggs and pork, do not seem to be motivated by protectionism. Nevertheless, when different states have different regulations—one permits the sending of spam or the close confinement of animals, but the other doesn't—a regulatory mismatch occurs.

Such mismatches burden interstate commerce, and litigants and jurists often refer to mismatched regulations as having extraterritorial *effects*.[108] For example, a spammer residing in a state that permits the sending of spam

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[105] Tennessee Wine and Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2464 (2019)

[106] Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1132, 1229 (1986) (discussing judicial efforts to "smoke out" protectionist intent).

[107] Goldsmith & Sykes, *supra* note ___, at 798 (considering bans on internet pornography sent to or depicting children).

[108] X-ref Part IV.A.2.

nevertheless is barred from sending spam to recipients in a state that bans sending spam to its residents. Thus, the regulation of the recipient state affects the behavior of a person outside the state. Likewise, with products regulation—such as California's egg and pork regulations—when two states' product regulations differ, manufacturers must either formulate a single product to meet the more stringent of the two states' standards, or they must formulate two different products for the two different markets. In either case, the stricter state's regulation could be said to both impose costs on interstate commerce (a burden) and affect behavior outside its borders (an extraterritorial effect).

The Court's doctrinal approach to burdens involves balancing. When state laws display facial discrimination, their burdens almost always outweigh the state's interest, so facially discriminatory rules are "nearly *per se* invalid."[109] The Court evaluates most other burdens cases under *Pike* balancing, which weighs the state's interest in the regulation against the regulation's burden on interstate commerce, but is usually described as a search for disguised protectionism.[110] But mismatch cases receive more complex balancing.[111] In mismatch cases, the Supreme Court weighs the deviating state's interest in having a rule that differs from those of other states against two competing interests. The first competing interest is the burden in interstate commerce generated by regulatory mismatch, and the second is the spillover effect of the deviating regulation in the other states.[112] Thus, rather than primarily reflecting concerns about protectionism, mismatch cases concern overall limits on regulatory diversity that arise from obligations of horizontal federalism. Although our federal system facilitates and even encourages regulatory diversity, when such diversity burdens interstate commerce more than in-state commerce, the state must justify it.

By contrast, the prohibition of extraterritoriality functions as a per-se rule; a state that regulates extraterritorially exceeds the scope of its own power, and not even compelling policy reasons can justify it.[113] With burdens, it's a question of degree. Whether a state burdens interstate commerce "too much" is a question that the Court properly analyzes with a balancing test. The Court regards some types of regulations—such as facial discrimination—to automatically fail the balancing test.[114] But other regulations involve more complex balancing. That states can—at least occasionally—justify even facially discriminatory rules confirms burdens are subject to a balancing test, unlike extraterritoriality.

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[109] Oregon Waste Sys., Inc. v. Dep't of Env't Quality, 511 U.S. 93, 100 (1994) (a "virtually *per se* rule of invalidity provides the proper legal standard here").

[110] Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

[111] Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).

[112] *Bibb*, 359 U.S. at 529–30.

[113] Energy and Environment Legal Institute v. Epel, 793 F.3d 1169, 1172 (10th Cir. 2015).

[114] Even cases involving facial discrimination rules sometimes pass the balancing test because the state's reason for discrimination is sufficiently compelling. *See* Maine v. Taylor, 477 U.S. 131 (1986). By contrast, extraterritoriality is per-se invalid.

As with burdens, it is not terribly surprising that courts, litigants, and commentators conflate the extraterritorial *effects* they observe in mismatch cases with the principle of extraterritoriality.[115] The doctrine the Supreme Court has developed to analyze mismatch cases—*Bibb* balancing—considers many of the same normative issues as does extraterritoriality. For example, as part of the balancing analysis, the Supreme Court in *Bibb* cases considers whether the challenged state's deviating regulation interferes with other states' ability to regulate the same substantive area. Thus, in precluding an Arizona train-length rule that was stricter than the regulations of other states, the *Southern Pacific* Court reasoned that the "practical effect of [Arizona's] regulation is to control train operations beyond the boundaries of the state… because of the necessity of breaking up and reassembling long trains."[116] The Court went on to note that to avoid such border stops, the interstate carrier might "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."[117] Thus, the Arizona regulation had impacts outside of Arizona, in this case, the regulation displayed the California Effect, the tendency of stricter regulation to generate compliance effects outside of the regulating state's territory.

The *Southern Pacific* Court expressed a concern about how regulatory mismatches can spillover, thereby having "extraterritorial effects."[118] But the prohibition of extraterritoriality as a structural federalism limitation on state regulation can and should be distinguished from the extraterritorial *effects* arising out of mismatch burdens. A state that violates extraterritoriality lacks the power to apply that regulation, even if the regulation would not conflict with the regulation of any other state. Moreover, extraterritoriality is a characteristic of a single state's law considered alone, whereas the existence and intensity of mismatch burdens depends on the actual regulations adopted by other states. As a result, if other states change their regulations to match that of the deviating state, the extraterritorial *effect* of the challenged state's rule would disappear. Another way to see this is to consider the expected result of the *Southern Pacific* Court's preclusion of Arizona's stricter train-length rule. Preclusion in that case enabled other states, those with laxer limits, to essentially to impose their own regulatory wishes on Arizona; the Court's decision implicitly endorsed the Delaware Effect, the spillover of *laxer* rules. The decision did not actually eliminate extraterritorial *effects*. This is a characteristic of all mismatch cases—they essentially put courts to a *choice of extraterritorial effects*. Because private parties bring dormant Commerce

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[115] Many academics see the issues of extraterritoriality and interacting regulations as closely aligned. *See, e.g.*, Goldsmith & Sykes, *supra* note ___, at ___; Denning, *supra* note ___, at ___.

[119] *So. Pacific*, 325 U.S. at 775.

[117] *So. Pacific*, 325 U.S. at 773.

[118] *So. Pacific*, 325 U.S. at 774–75 (noting that "the Arizona limitation . . . controls the length of passenger trains all the way from Los Angeles to El Paso.").

Clause challenges, such challenges are always to stricter rules. Thus, preclusion in mismatch cases implicitly knocks out the stricter rule, facilitating the Delaware Effect, whereas sustaining mismatches against challenges upholds the stricter rule, facilitating the California Effect. Thus, it is hard to say as a general matter how courts should rule if they thought that federalism generally, and the dormant Commerce Clause in particular, demanded decisions that minimized extraterritorial effects.

A related point of distinction is that assessments of mismatch burdens are dynamic; they can change as regulations and the economy changes, but judgments about extraterritoriality are static. If an assertion of regulatory jurisdiction by a state violates extraterritoriality today, it does so independently of the actions of any other state, and it always will do so. Thus, in *Southern Pacific*, if other states had adopted Arizona's rule, the mismatch never would have developed, and Arizona's regulation would not have constituted an undue burden on interstate commerce. Likewise, if subsequent to the decision in the case, the states cooperated to impose the same limit that the Court precluded in *Southern Pacific*, the mismatch would disappear, and with it the dormant Commerce Clause mismatch violation. By contrast, no change in regulation by other states can cure another state's extraterritorial assertion of regulatory jurisdiction. When a court precludes a state's assertion of regulatory jurisdiction as extraterritorial, the state must narrow its assertion of jurisdiction, and nothing any other state does is relevant to any judgment about the legality of the new (or former) rule.

Extraterritoriality cases, then, do not admit of the same equivocation that characterizes mismatch cases, which involve balancing and weighing policy interests against burdens on interstate commerce. A state either regulates extraterritoriality and unconstitutionally, or it does not. Extraterritoriality—a single state's simultaneous use of too many nexuses—can coincide with actual regulatory mismatches in the real world, or not. Extraterritoriality increases the *risk* of regulatory mismatches. When states regulate too broadly, which is a problem of extraterritoriality, they are more likely to create conditions under which the same cross-border commercial actor is subject to the mismatched rules of more than one state, which is a problem of burdens. 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 of regulatory autonomy—for the prohibition of extraterritoriality. But it should not be seen as the principal justification for the prohibition of extraterritoriality. As our doctrinal analysis will show, the Supreme Court has not regarded actual overlaps in the content of regulations to be a necessary condition for a finding of extraterritoriality,[119] nor has it regarded actual regulatory overlaps as a sufficient condition for a finding of extraterritoriality.[120] Such decisions make sense on our account of

[119] *See* discussion of *Edgar*, infra ___.
[120] *See infra* Part IV.A.1 (discussing *Baldwin*, *Brown-Forman*, and *Healy*).

extraterritoriality; they do not make sense if extraterritoriality is merely a doctrine to prevent mismatches.

3. Keeping the Doctrines Straight

The descriptive and normative overlaps between nexus, extraterritoriality, and mismatch burdens have unsurprisingly led to significant doctrinal and conceptual confusion. For example, fairness, the central concern of nexus, plays a role in burdens cases, especially those involving facial or intentional discrimination.[121] And judicial reasoning in burdens cases highlights both the need to ensure a smoothly functioning national marketplace free of impediments to interstate commerce[122] and the need to prevent interstate retaliation.[123] More broadly, all three subdoctrines implicate "state sovereignty and comity,"[124] they all ask where one state's regulatory authority ends and another's begins. All implicitly involve allocation of power among the states. And all aim, at least in part, to prevent regulatory conflicts and overlaps that might lead to interstate conflicts or otherwise interfere with interstate commerce.

At the same time, however, each has a different central focus. Nexus is about connection; it seeks to ensure that the state regulates the *right person or activity*; it assures 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 it does not regulate more than its fair share of interstate commerce.[125] And the mismatch doctrine prevents states from regulating *too differently* from other states. Another way to put this is that nexus is principally about fairness to people; extraterritoriality is principally about fairness to sister states, and burdens is principally about fairness to interstate commerce.

In terms of decision order, nexus comes first. If a state lacks nexus, then it cannot apply any regulation. Nexus functions as an on-off switch; either the state has nexus to regulate someone or something, or it doesn't.[126] Because nexus is such a permissive inquiry, most dormant Commerce Clause cases do not raise serious nexus questions. Logically, the reviewing court should analyze claims about extraterritoriality next. The next Subpart proposes our formal test for extraterritoriality. Our proposal is based on the insight that whereas nexus concerns a *substantive* inquiry into the sufficiency of the

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[121] Fairness RA: can repeat cites from Part II.B. for these 3 notes {not sure what citations to add here}

[122] Marketplace

[123] retaliation

[124] *Cf.* BMW ___

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

[126] Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular").

connection between the state and the regulated party or activity, extraterritoriality concerns a *structural* inquiry into the scope of the state's exercise of prescriptive jurisdiction. Last, the reviewing court would consider burdens on interstate commerce, including any mismatch burdens. Unlike nexus or extraterritoriality, mismatch review attends not to the basis for the assertion of prescriptive jurisdiction, but rather to the substantive content of a state's regulation in light of the content of other states' regulations.

B. Internal Consistency as a Test for Extraterritoriality

The last Subpart articulated the differences among nexus, extraterritoriality, and mismatch burdens, with the expectation that clearly distinguishing the doctrines can help us better understand extraterritoriality's unique role. It also gave us a firm foundation for critical commentary of doctrine, which we provide in Part IV. This Subpart offers our normative proposal for identifying extraterritoriality as distinct from nexus or burdens.

This Subpart argues for a formal definition of extraterritoriality that precludes a state's simultaneous assertion of *internally inconsistent nexuses*. We take the term "internal consistency" directly from the Supreme Court, which developed it to evaluate the extraterritoriality of assertions of fiscal jurisdiction. Under the internal consistency test for taxes, the Court asks, If every state applied the challenged state's tax regime, would double or multiple taxation of interstate, but not in-state, commerce inevitably arise?[127] Modifying the test for regulations, an assertion of regulatory jurisdiction would be internally inconsistent if application by every state of the challenged state's regulatory basis—that is, its nexus—would lead inevitably to double or multiple regulation of interstate, but not in-state, commerce.

This Subpart introduces internal consistency as the Supreme Court has used it in tax cases, speculates as to why the tool has played a prominent role in tax—but not regulations—cases, explains how it would work in regulations cases, and explains why it is a normatively a good test for extraterritoriality.

1. Internal Consistency in Tax Cases

Since at least 1983 in *Container Corp. v. Franchise Tax Board*, the Supreme Court has used the internal consistency test to evaluate the breadth of state assertions of fiscal jurisdiction.[128] The Court developed the test to evaluate tax apportionment rules, which determine how states split up the income of multistate corporations for taxation. Corporations may be taxable on their business income by many states, and each state needs a way to figure out what portion of a multistate corporation's income it can tax. Under

[127] Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983).

[128] Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983) (defining internal consistency). *See also*, Comptroller of the Treasury of Md. v. Wynne, 575 U.S. 542, 550 (2015) (tracing the internal consistency test back further, to 1938).

Supreme Court precedents, an apportionment rule is constitutionally permissible if it is internally consistent, that is, if its adoption by every state would lead to the same income being taxed by *no more than one state*.[129] Typically, apportionment cases raise no question regarding the state's nexus to tax.[130] Instead, the question is whether a state that possesses nexus nevertheless taxes too broadly. Thus, the question raised in fiscal jurisdiction cases is directly analogous to that raised in prescriptive jurisdiction—extraterritoriality—cases. Specifically, if a particular state's assertion of fiscal jurisdiction is too broad, it may invade the tax entitlements of other states.

The Supreme Court sometimes expressly characterizes the internal consistency test as a test for *extraterritorial* assertions of fiscal jurisdiction.[131] But even when it does not, the Court makes clear that what is at stake in evaluating a state's tax apportionment rule is a concern about extraterritoriality. For example, the Supreme Court has said that a "failure 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."[132] And the Court has described the internal consistency test as a matter of "fairness," where it means fairness to other taxing states, not fairness to taxpayers.[133] The internal consistency test determines whether the state's tax rule is structurally overbroad.[134] If the same rule, when adopted by all the states, would lead inevitably to multiple taxation, that is a problem inherent—that is, internal—

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[129] *Container*, 463 U.S. at 169 (a state's apportionment rule is internally consistent when "if applied by every jurisdiction, it would result in no more than all of the unitary business's income being taxed"); Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 US 175, 185 (1995) ("internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear"); Goldberg v. Sweet, 488 U.S. 252, 261 (1989) ("To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result").

[130] *Jefferson Lines*, 514 U.S. at 184 ("the taxpayer does not deny Oklahoma's substantial nexus to the in-state portion of the bus service, but rather argues that nexus to the State is insufficient as to the portion of travel outside its borders"). *See also Container*, 463 U.S. at 166–67 (acknowledging nexus to tax); Goldberg, 488 U.S. at 260 (same); *Wynne*, 575 U.S. at 557 (same). Sometimes, nexus is at issue, but resolved in favor of the state, even when the tax is ultimately precluded as internally inconsistent. *See, e.g.*, Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue, 483 U.S. 232, 248–50 (1987) (same).

[131] *See* Container, 463 U.S. at 164 (applying internal consistency reasoning to a complaint that the Court described as alleging "extraterritorial values being taxed"). *Id.* (acknowledging that states cannot tax extraterritorial values, and noting that "arriving at precise territorial allocations of 'value' is often an elusive goal").

[132] *See, e.g.*, Jefferson Lines, 514 U.S. at 185 (emphasis added). *See also* Goldberg, 488 U.S. at 260–61; Wynne, 575 U.S. at 634–64 (citing to seven different internal consistency cases).

[133] Container Corp. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983); American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266, 269 (1987) (referring to "each state's authority to collect its fair share of revenues").

[134] Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 US 175, 185 (1995) ("the test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax").

to the rule itself; it does not depend on interactions or mismatches between the different rules of different states.[135] At the same time, the Supreme Court has observed in the tax area, as it has in the regulations area, that overbroad assertions of jurisdiction can lead to actual mismatches in the real world. For example, the Supreme Court noted that one justification for applying the internal consistency test as a limit on state assertions of fiscal jurisdiction is that, without it, one state's "act of overreaching" could result in "multiple taxation" if it "combines with the possibility that another State will claim its fair share of the value taxed."[136] As far as we know, the Supreme Court has only once knowingly accepted an internally inconsistent assertion of tax jurisdiction.[137]

Rather than preventing actual double taxation—which is the tax analog of a regulatory mismatch—the internal consistency test prevents overbroad assertions of fiscal jurisdiction by states, that is, violations of extraterritoriality. For example, in *Moorman Manufacturing Co. v. Bair*, the Supreme Court approved Iowa's apportionment formula, which allocated to Iowa for taxation a fraction of a multistate company's overall corporate income that was proportional to the company's sales in Iowa divided by its total sales.[138] At that time, all states used the three-factor "Massachusetts formula," so by using a different formula, Iowa created a mismatch, and therefore, a risk of double taxation. A multistate taxpayer challenged Iowa's rule under due process as "extraterritorial taxation" on the grounds that Iowa's formula reached "income not in fact earned within the borders of the taxing State."[139] Citing precedents considering other states' apportionment rules, the Supreme Court confirmed that due process did not require any state to "identify the precise geographical source of a corporation's profits" and instead could employ "a rough approximation."[140] Iowa's single-factor sales apportionment rule therefore did not violate due process. In so holding, the *Moorman* Court stressed that the apportionment method that the taxpayer sought—the Massachusetts formula—also constituted only a rough approximation of the source of a company's income.[141]

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[135] Comptroller of the Treasury of Maryland v. Wynne, 575 U.S. 542, 562–63 (2015) (distinguishing internally inconsistency from regulatory mismatches or "disparities").

[136] *Jefferson Lines*, 514 U.S. at 184.

[137] *See* American Trucking Assns., Inc. v. Michigan Pub. Serv. Comm'n, 545 U.S. 429, 437–38 (2005) (upholding an internally inconsistent flat tax on trucking). The *Wynne* Court tried to explain why the tax upheld in American Trucking was not internally inconsistent, but it did not do so in a satisfying manner. *Wynne*, 575 U.S. at 566–67.

[138] Moorman Mfg. Co. v. Bair, 437 U.S. 267, 270 (1978). As is typical, Iowa applied its apportionment formular to companies' income as calculated under federal corporate income tax rules, with minor adjustments. *Moorman*, at 269.

[139] *Moorman*, 437 U.S. at 272.

[140] *Moorman*, 437 U.S. at 273.

[141] *Moorman*, 437 U.S. at 273 ("Both will occasionally over-reflect or under-reflect income attributable to the taxing State. Yet despite this imprecision, the Court has refused to impose strict constitutional restraints on a State's selection of a particular formula")

Turning to whether the Iowa's apportionment formula—that is, the *basis* on which it asserted fiscal jurisdiction—violated the dormant Commerce Clause, the Court acknowledged that Iowa's use of a formula that differed from the Massachusetts formula could lead to double taxation.[142] The Court observed that the only way to prevent such overlaps would be to force all the states to use the same apportionment formula.[143] In the Court's view, the overlap could be eliminated by either of two approaches—Iowa could adopt the Massachusetts rule, or other states could adopt Iowa's rule. Either would ensure that the income of multistate corporations would not be subject to double taxation, but the Supreme Court was not prepared to declare that one rule ought to prevail over the other. In the Court's terms, it was not clear that Iowa "was necessarily at fault in a constitutional sense" for any actual double taxation arising in the real world from the Iowa's use of a different rule.[144] Thus, the Court used proto-internal=consistency reasoning to evaluate tax source rules—that is to evaluate nexus—in *Moorman*.

[Swap Moorman for Container]

Likewise, in *Jefferson Lines*, the Court upheld Oklahoma's sales tax rule that taxed the full price of bus tickets for trips that originated in the state and were sold there.[145] The bus company that challenged the tax argued that Oklahoma could not constitutionally tax any part of a bus ride that took place outside of Oklahoma.[146] But the Supreme Court acknowledged the internal consistency of Oklahoma's rule: if all states adopted it, no interstate trips would face double taxation.[147] In our terms, the state clearly had tax nexus over the ticket sales, and its assertion of tax jurisdiction was not extraterritorial because it was internally consistent. The *Jefferson Lines* Court readily acknowledged that Oklahoma's allocation rule could lead to actual double taxation if other states adopted different (but also internally consistent) rules.[148] Citing *Moorman*, the *Jefferson Lines* Court observed that "multiple taxation placed upon interstate commerce by such a confluence of taxes is not a structural evil that flows from either tax individually, but it is rather the 'accidental incident of interstate commerce being subject to two different

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[142] *Moorman*, 437 U.S. at 277 (referring to "some overlap").

[143] *Moorman*, 437 U.S. at 278 ("The only conceivable constitutional basis for invalidating the Iowa statute would be that the Commerce Clause prohibits any overlap in the computation of taxable income by the States.")

[144] *Moorman*, 437 U.S. at 277. In the Court's view, only Congress could impose a uniform tax source rule on the states. See id. at 280.

[145] Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995) (noting that Oklahoma only taxed tickets sold in the state for trips that also originated there). *See also* Goldberg v. Sweet, 488 U.S. 252 (1989) (upholding as internally consistent a tax on phone charges where the call originated or terminated in Illinois *and* was charged to an Illinois service address).

[146] *Jefferson Lines*, 514 U.S. at 178.

[147] *Jefferson Lines*, 514 U.S. at 185.

[148] *Jefferson Lines*, 514 U.S. at 192. An example would be a tax based on the destination of the bus.

taxing jurisdictions.'"[149] In our terms, the Court was describing the potential for mismatched nexus rules, which did not offend the Constitution.

Equally revealing are tax regimes that the Court precluded as internally *in*consistent. For example, in *American Trucking Association v. Scheiner*, the Court struck down an unportioned flat axle tax on trucks because imposition by every state of an identical tax would result in double taxation for interstate, but not in-state, trucks. [150] Likewise, in *Tyler Pipe*, the Court struck down a regime that applied a manufacturing tax and a separate wholesaling tax to taxpayers that engaged in either of those activities in the state, but under a "multiple activities exemption," the state exempted from the manufacturing tax those who already paid the wholesaling tax.[151] The tax was internally inconsistent because if all states adopted such a regime, then companies conducting all their activity in only one state would pay only the wholesaling tax, but companies that engaged in those activities in different states would pay both taxes.[152]

Our discussion of the tax cases demands a coda. In 2015 in *Wynne v. Maryland Comptroller*, the Supreme Court adopted an important and significant new justification for the internal consistency test, one that does *not* apply in regulation cases. Specifically, persuaded by arguments by commentators, the Supreme Court acknowledged internal consistency as a test for *protectionist* taxation, lending the test, in the Court's terms, additional "*economic* bona fides."[153] The reasons internal consistency works as a test for protectionism are subtle, and we need not review them here.[154] Because the dormant Commerce Clause independently prohibits protectionism and extraterritoriality, the justification for using internal consistency in tax cases is stronger than that in regulations cases—it is supported by two different normative justifications. The double usefulness of internal consistency in tax cases should not, however, distract us from perceiving the use for which the Supreme Court originally developed it, namely, to judge overbroad state assertions of jurisdiction.[155]

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[149] *Jefferson Lines*, 514 U.S. at 192.

[150] American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266 (1987).

[151] Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue, 483 U.S. 232 (1987).

[152] *Tyler Pipe*, 483 U.S. at 236-37.

[153] *Wynne*, 575 U.S. at 563 (emphasis added).

[154] We contributed to that work, and in acknowledging internal consistency as a test for protectionist taxation, the Supreme Court cited our amicus brief and scholarly work. *Wynne*, 575 U.S. at 562-68. *See, e.g.*, Michael S. Knoll & Ruth Mason, *The Economic Foundation of the Dormant Commerce Clause*, 103 VA. L. REV. 309 (2017) (telling the story of *Wynne*).

[155] *See, e.g.*, *Container*, 463 U.S. at 170 (distinguishing between two requirements under the dormant Commerce Clause: fairness of the apportionment formula, which it judged

2. *Why Don't We See Internal Consistency in Regulations Cases?*

If the internal consistency test is so useful for evaluating overbroad assertions of fiscal jurisdiction, one might wonder why the Court has not applied it across the board, to both regulation and tax cases, and why scholars have not previously suggested it. We have a few responses.

First, nineteenth-century courts insisted on exclusivity of regulatory jurisdiction, such that each event or behavior could be governed by the law of *at most* one state.[156] This view ultimately gave way to the modern idea of concurrent jurisdiction, which recognizes that multiple states have interests in regulating the same behavior.[157] Methods have been developed to mediate concurrent jurisdiction, including conflict-of-laws rules and certain federal statutes.[158] Notwithstanding the modern recognition of the permissibility of overlapping jurisdiction, one reason extraterritoriality doctrine is so confusing may be that the older cases are colored by a now-obsolete conception of *exclusive* prescriptive jurisdiction.

By contrast, the Supreme Court never conceived of *fiscal* jurisdiction as exclusive, at least for income taxes.[159] The Supreme Court's income tax cases involving extraterritoriality instead convey an acute awareness not only the *fact* of concurrence, but also the *permissibility* of concurrent tax jurisdiction by multiple states. This concurrence takes two forms. As with

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under internal consistency test, and nondiscrimination, which it judged separately.); *Id* at 170 ("Besides being fair, an apportionment formula must, under the Commerce Clause, also not result in discrimination against interstate or foreign commerce"); *Id*. at 171(citing *Moorman* for the proposition that "the anti-discrimination principle has not in practice required much in addition to the requirement of fair apportionment").

[156] Rosen, supra note ___, at 926-27. *See also* Brilmayer, *supra* note 22___, at 882___ ("at one point the Court had appeared to hold that concurrent jurisdiction was never appropriate").

[157] Rosen, supra note ___, at 926-27.

[158] Rosen, *supra* note ___ at 951-52.

[159] Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980), 445–446 (expressly recognizing non-exclusivity in income taxation); Moorman, 437 U.S. at 278 (concluding that the Constitution cannot be read to "prohibit[] any overlap in the computation of taxable income by the States.").

Shaffer v. Carter, 252 US 37, 52 (1920) ("just as a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may ... levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents from their property or business within the state, or their occupations carried on therein"); *Moorman*, 437 U.S. at 278 ("some risk of duplicative taxation exists whenever the States in which a corporation does business do not follow identical rules" and eliminating that risk would require "extensive judicial lawmaking"). This accords with the Supreme Court's due process jurisprudence which does not prohibit multiple taxation, Curry v. McCanless, 307 U.S. 357, 372–374 (1939).

By contrast, the Supreme Court recognized priority rules in property taxes and some other ad valorem taxes. *See, e.g.*, Standard Oil Co. v. Peck, 342 U.S. 382, 384–85 (1952) (ad valorem ship taxes); Japan Lines Ltd. v. Cty. of Los Angeles, 441 U.S. 434 (1979) (ad valorem ship taxes).

regulatory jurisdiction, which is said to rest on residence or territory,[160] tax jurisdiction rests on residence or source, where residence generally refers to domicile and source generally refers to the place where income is earned. As early as 1881, in *Bonaparte v. Tax Court*, the Supreme Court recognized that both residence and source states could concurrently assert tax jurisdiction.[161] Apportionment formula cases involve source-source overlaps, and as far as we know, there has never been a time when the Supreme Court failed to appreciate the potential (indeed, near inevitability) of such source-source income tax overlaps.

One reason the Court might have avoided the exclusivity trap in tax cases is that taxes are settled in money, and so a cross-border commercial actor never experiences mutually inconsistent *taxes* the way it might experience mutually inconsistent *regulations* (such as curved and straight mudflap mandates).[162] For the same reason, the availability of a simple mechanism to cure tax overlaps—namely, credits for other states taxes—likely helped the Supreme Court and litigators arrive at remedies for overbroad assertions of fiscal jurisdiction that did not involve picking an *exclusive* taxing state.[163]

Moreover, from at least the mid-nineteenth century, the Court expressly acknowledged that, among the states with nexus to tax, the Constitution grants none *priority* over the others.[164] This is really just a variation on the no-exclusivity point, but it emphasizes that because the Court did not see itself as entitled to recognize the superiority of the claim of territorial states over residential states, the Court needed, for lack of a better term, a *content-neutral method* to evaluate state assertions of fiscal jurisdiction for overbreadth. Whatever method the Court chose could not privilege territory (source) over residence.[165] The internal consistency test was thus the Supreme

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[160] Mark D. Rosen *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133, 1147 (2010) (citizenship and place).

[161] Bonaparte v. Appeal Tax Court of Balt., 104 U.S. 592, 595 (1881).

[162] *See, e.g.* Bibb, 359 U.S 520 (1959) (mudflaps).

[163] Wynne, 575 U.S. at ___

[164] Bonaparte v. Appeal Tax Court of Balt., 104 U.S. 592, 595 (1881) (recognizing that taxation or exemption of bonds by the issuing state did not impact the ability of the holder's residence state to tax). Non-tax scholars see Bonaparte as an early extraterritoriality case because it concludes that the source state's exemption cannot apply (extraterritorially) in the residence state. *See* Regan, *Essays*, *supra* note 12___, at 1887 (noting the "Court… cites no constitutional provision in support of its claim that states cannot legislate extraterritorially."). But the case is better understood as confirming the constitutionality of concurrent tax jurisdiction. For more recent confirmations of the lack of tax priority rules, see *Wynne*, 575 U.S., at 568 (answering a claim by the dissenters that the majority wrongly held that the residence state must "recede" in favor of the source state, "We establish no such rule of priority.").

[165] For example, *Goldberg v. Sweet* contains a discussion about how "the intangible movement of electronic impulses through computerized networks" means that income from telephone calls cannot be clearly attributed to a single state, and so states cannot be expected

Court's way to accommodate the special concerns of tax while at the same time vindicating federalism values, in particular, the need to assure that no one state taxed too much of interstate commerce. As differences between tax and regulations cases have fallen away—most importantly the notion that regulatory jurisdiction should be exclusive—the reasons for limiting internal consistency to tax cases likewise have receded.

Finally, we ascribe some blame to scholarly compartmentalization. Tax scholars study fiscal jurisdiction; procedure and constitutional law scholars study prescriptive jurisdiction. This division of intellectual labor has left major gaps. Non-tax scholars have either ignored,[166] or acknowledged but bracketed,[167] tax cases touching on extraterritoriality. Likewise, falling into the trap of "tax exceptionalism," tax scholars have also failed to make the connection between regulatory jurisdiction and tax jurisdiction.[168] A goal of this Article is to break down these artificial barriers.

3. The Multiple Uses of Internal Consistency

Internal consistency can be used to test *nexus* or to test the *content* of a regulation. If one applies internal consistency to nexus, it acts as a test of extraterritoriality. If, under hypothetical harmonization of a given nexus, a single person or commercial action would be subject to regulation by two or more states, *regardless of the content* of the regulation, then that nexus is overbroad and hence extraterritorial. For example, suppose a state demanded that companies incorporated in the state and those that have their principal office in the state meet certain capitalization requirements. Such a rule, if universalized, would subject companies that are incorporated in one state, but have their principal office in another, to the capitalization laws of two states simultaneously. Such an overbroad rule is extraterritorial. It is the breadth of the assertion of jurisdiction, not the specific content of the capitalization rule, that is the problem. Notice that it would not matter for this purpose if it was possible for the commercial actor to comply with the rules of both states simultaneously (for example, because both states had the same rule or because one state had a laxer rule). Instead, internal consistency represents a *structural*

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to, and are not obliged to trace them. *Goldberg*, 488 U.S. at 264-65. Helpful in the latter regard was the Court's acknowledgement that because the geographic source of income of a multistate company would be hard to trace to any one state, states could not be required to trace it geographically. *See, e.g., Container*, 463 U.S. at 189-92 (containing an extended discussion of the difficulties of breaking up a multistate corporation's income by state, likening it to "slicing a shadow.").

[166] Non-tax scholars typically limit their discussion to *Bonaparte v. Tax Court*, and similar cases establishing concurrence of source and residence or source-source tax jurisdiction [e.g., Florey. Regan cabins; see G&S].

[167] Regan *Essays*, *supra* note ___, at 1887-88.

[168] A recent paper laments the tendency of tax exceptionalism in the dormant Commerce Clause. *See generally* Adam Thimmesch, *A Unified Dormant Commerce Clause*, 92 TEMPLE L. REV. 331(2018).

limit on the reach of state law. Notice also that the regulatory overbreadth that arises from internally inconsistent nexus derives *solely* from the challenged state's choice of nexus, rather than from mismatches among the laws of different states.[169] Extraterritoriality in regulations cases, as in tax cases, leads directly to preclusion without the need for judicial balancing.[170]

But internal consistency also can be applied to the *content* of a regulation, rather than to its nexus. If one applies internal consistency to the content of a regulation, it acts as a test of the presence of a regulatory mismatch. If universalizing the *content* of the rule would eliminate the burden the plaintiff complains about, it means that the challenged regulation involves a regulatory mismatch. For example, in *Bibb*, the challenger complained that Illinois' curved-mudflap mandate burdened interstate commerce relative to in-state commerce because trucks traveling interstate from states with different rules had to stop at the border to change their mudflaps. The nexus upon which Illinois applied its rule was internally consistent: if each state applied its mudflap rule only to trucks in its territory, then no one truck would subject to the laws of the same state at the same time. Illinois' rule is not extraterritorial. Now apply internal consistency to the *content* of Illinois' rule. If all states required curved mudflaps (or all required straight ones), then the burden on interstate commerce would disappear. This tells us that *Bibb* involved a regulatory mismatch. And the Court evaluates such mismatches using balancing.

Not all asymmetrical burdens on interstate commerce disappear upon universalization. For example, a facially discriminatory rule—say one that allowed the in-state sale of minnows but forbade their export[171]—would not disappear upon hypothetical harmonization. Likewise, a regulation like the one at issue in *Pike v. Bruce Church*, which required farmers that grew cantaloupes in Arizona also to pack them there, would not disappear upon hypothetical harmonization.[172] If every state had Arizona's rule, then farmers would always have to pack their cantaloupes where they grew them, preventing multistate growers from taking advantage of economies of scale by packing fruit grown in more than one state at a single plant.

When a state's *nexus* fails the internal consistency test, it means that the state's assertion of jurisdiction is too broad; it is extraterritorial and unconstitutional. When the content of a state's rule fails the internal consistency test, it merely means that the Court is dealing with a burden that arises from mismatch, rather a burden that arises from the impact of a single-state's rule. The Court uses balancing to evaluate both types of burdens—

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[169] *Wynne*, 575 U.S. at 565 (referring to an internally inconsistent tax rule as "not simply the result of its interaction with the taxing schemes of other states").

[170] *See, e.g., Jefferson Lines*, 514 U.S. at 185 (internal inconsistency shows "as a matter of law" that the state seeks to tax more than its fair share).

[171] Hughes v. Oklahoma, 441 U.S. 322, 337 (1979).

[172] Pike v. Bruce Church, 397 U.S. 137, 138 (1970).

mismatch burdens and single-state burdens, but the precise manner of that balancing differs in the two cases.[173]

Although our central interest in this Article is extraterritoriality, not burdens, we have gone into some detail about applying the internal consistency test to the content (rather than nexus) of regulations cases for two reasons. First, exploring how internal consistency works when applied to the content of state regulations helps clarify and confirm our doctrinal reframing, which assigns a distinct role to nexus, extraterritoriality, and burdens. Second, as the next Part will show, although the Supreme Court has not officially adopted internal consistency as a test for extraterritoriality outside of the tax area, it does an awful lot of internal consistency reasoning, and we will need to distinguish when it applies the internal consistency test to nexus from when it applies internal consistency to regulatory content.

4. Normative Arguments for Extraterritoriality as Internal Inconsistency

The most authoritative reason to use the internal consistency test to evaluate extraterritoriality is that the Supreme Court already uses it that way in tax cases, and now that the Court has abandoned the notion of exclusivity of regulatory jurisdiction, there is no reason not to use it in regulations cases as well. Moreover, we will argue that, once we know to look for it, we can see internal consistency reasoning regulations cases evaluating claims of extraterritoriality.[174] This Section gives additional normative reasons for internal consistency as a test of extraterritoriality.

First, internal consistency would not draw courts into difficult questions regarding *which state* was the correct state to regulate a particular matter. Thus, unlike Donald Regan's reform of extraterritoriality, which would require a single most-appropriate state to be assigned as the exclusive regulator for everything, internal consistency as a test for extraterritoriality would not demand that the Court determine *where* in the nation a regulated activity takes place. As the national economy becomes more service-oriented and digital, activity will become less connected to a physical location. Thus, suggestions for resolving the ambiguities in extraterritoriality doctrine by assigning commercial acts to unique physical places will seem increasingly anachronistic. Moreover, internal consistency would not force the Supreme Court into a dichotomous choice between regulations promulgated on a territorial basis and those promulgated on a residence basis, nor would the Court have to conduct the sort of comparative-interests analysis that it has

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[173] *Compare Pike* [cite___] (weighing absolute regulatory burden against regulating state's interest) *with Bibb* [cite___] (weighing relative regulatory burden of mismatched rule against the competing interests of the two or more regulating states)

[174] X-ref.

shown so little appetite for in the choice-of-law area.[175] Likewise, unlike the welfarist reform advocated by Goldsmith and Sykes, internal consistency would not require courts to consider whether the challenged state's regulation was superior as a policy matter to similar regulations passed by other states. Instead, an internal-consistency approach to extraterritoriality keeps such policy decisions where they belong—with state legislatures subject to democratic accountability—rather than transferring them to an unaccountable court.

Second, internal consistency is content-neutral. It does not require the reviewing court to evaluate, or even have a view on, the underlying policy the state pursues via the challenged regulation. This is a virtue of the test because, despite its long pedigree, a small but persistent minority of the Supreme Court has questioned the appropriateness of dormant Commerce Clause review specifically because—at least in some cases—it calls on courts to make policy judgments about state's regulations. Although jurists typically have few objections to precluding *discriminatory* regulations,[176] much more controversy surrounds preclusion of facially neutral rules that arguably impose undue burdens on interstate commerce.[177] To the extent that courts can eliminate undue burden cases by identifying internal inconsistencies in their jurisdictional bases, courts can avoid undue-burden balancing.

Third, and closely related to the previous point, is the idea that because eliminating internally inconsistent exercises of regulatory jurisdiction should reduce actual regulatory conflicts in the real world, it should reduce mismatches. Reducing mismatches is important not only to directly facilitate interstate commerce, but also to reduce the number of cases in which courts have to use balancing.

Fourth, internal consistency as a formal test of extraterritoriality would channel states to choose a nexus that is meaningfully related to in-state effects. Consider a hypothetical that Justice Cardozo presented in *Baldwin v. Seelig*, in 1935.[178] He asked whether a state may insist that products sold in its territory

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[175] Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 257–58 (1992) (citing *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), as part of a discussion concluding that "the modern Supreme Court has all but abandoned the field" of constitutional review of state conflict-of-laws rules).

[176] Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1150 (10th Cir. 2016) (Gorsuch, J., concurring) ("And to the extent that there's anything that's uncontroversial about dormant commerce clause jurisprudence it may be this anti-discrimination principle).

[177] Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (likening balancing to "judging whether a particular line is longer than a particular rock is heavy"); United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 349 (2007) (Thomas, J., concurring in the judgment) (balancing invited judicial legislation).

[178] Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 524 (1935). Although usually regarded as an extraterritoriality case, later we will argue that *Baldwin* is better classified as a mismatched burdens case. X-ref.

be manufactured using labor that was paid the state's own minimum wage.[179] Fleshing out Cardozo's hypothetical, suppose California adopted a minimum wage of $20 per hour, higher than any other state. Suppose further that California applied the wage requirement to both goods *produced in California* and goods *sold in California*. If every state applied its minimum wage rule on the basis of production in the state and sales in the state, then all products sold in interstate commerce would be subject to the wage regulations of (at least) two different states, but goods produced and sold in a single state would be subject to only one set of regulations. Assertion of prescriptive jurisdiction on the basis of both nexuses—production and sale—is internally inconsistent. The problem with such internal inconsistency is not necessarily that it would be impossible for a single product to meet the minimum wage standards of both states simultaneously; if California has the highest wage, then to sell in California, out-of-state producers simply would have to pay workers $20 per hour. The problem arises because California has interfered with other states' sovereign prerogative to set *local* minimum wages. That is, California's wage regulation has spilled over into other states.

Regulatory spillovers are inevitable in a federation. But internal consistency as a test of extraterritoriality would limit them. Specifically, to survive the internal consistency test, California would have to *choose* whether to regulate wages by production *or* by sale. If the voters of California were determined to regulate wages for the production of goods *sold in California*, then to be internally consistent, they would have to forgo regulating the payment of minimum wages on *production in California*. Thus, the internal consistency test imposes a price on California for its spillover when it regulates based on sales into the state: California would have to forgo regulating wages based on *production in* California—to forgo regulating *local* wages. We would predict that, forced to choose between regulating wages on the basis of only one of sale or production, California would choose production because that nexus matters locally.

By constraining the *scope* (but not content) of state regulations, a requirement of internal consistency would encourage states to choose a nexus that would entitle them to regulate genuinely local activity. Or, put differently, the loss of authority to regulate local conduct would be a disincentive for states to select a nexus that has significant spillover effects for other states.

We emphasize that internal consistency does not protect interstate commerce from multiple regulations. If, contrary to our predictions, California chose to regulate wages on the basis of sale in California, and (as a requirement of extraterritoriality) it did not regulate local wages, its regulation would be internally consistent. Another state, however, could regulate on the basis of production, a nexus that is likewise internally consistent. Neither state, on our account would regulate extraterritorially, yet the interstate sales of goods in this example would be subject simultaneously to multiple regulations with

[179] *Baldwin*, 294 U.S. at 524.

different contents. Internal consistency as a test of extraterritoriality therefore does not eliminate the possibility of mismatches in the content of different states' regulations, and it does not eliminate regulatory spillovers. When such spillovers become a serious burden on interstate commerce, the Supreme Court analyzes them under its undue-burden doctrine. It would apply balancing to such cases, under which it would consider the burden on interstate commerce as well as California's and other states' relative interests in regulating.[180]

Fifth, our approach appropriately ensures that extraterritoriality judgments result from the reviewing court's consideration of only one state's law, rather than from the interaction of mismatches among the regulations of two or more states. Overbreadth in the assertion of regulatory jurisdiction is an attribution of a single state's law. A state the violates extraterritoriality violates fundamental principles of horizontal federalism by invading the reserved powers of sister states. Thus, it does not matter if, by doing so, the overreaching state does not create an actual regulatory conflict. The absence of conflict could arise because other states choose not to regulate or because the content of other states' regulations match that of the overreaching state. Self-restraint in the exercise of prescriptive jurisdiction is a state obligation that arises from membership in the federation; it is not contingent on other states' actions. No one state can soak up regulatory power left unused by other states.[181]

Sixth, and most important, internal consistency cabins state power in the right way—it serves the normative goal underlying the prohibition of extraterritoriality by limiting states' ability to invade sister states' regulatory prerogatives.[182] Thus, it promotes goals of state equality and autonomy that underlie the principle of extraterritoriality and federalism more generally.[183] Our account also provides a more focused, and thus more defensible, conception of extraterritoriality than those offered in the literature, and it does not collapse extraterritoriality into the other subdoctrines of the dormant Commerce Clause.[184] Thus, internal consistency maintains extraterritoriality's

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[180] *See, e.g.*, Bibb, 359 U.S. 520 (1959).

[181] *Cf.* Austin v. New Hampshire, 420 U.S. 656 (1975) (forbidding state soak-up taxes); Armco Inc. v. Hardesty, 467 U.S. 638, 638–39 (1984) (supporting application of the internal consistency test on the grounds that it examines a single state's law in isolation to that of the others, and "any other rule would mean that the constitutionality of West Virginia's tax laws would depend on the shifting complexities of the 49 other States' tax laws and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated").

[182] *See* Regan, *Essays*, *supra* note ___, at 1891 ("Other federal systems no doubt have comparable internal extraterritoriality principles."). See also discussion x-ref

[183] Healy v. Beer Institute, Inc., 491 U.S. 324, 336 (1989) (referring to the Constitution's special concern. . . with. . . the autonomy of the individual States within their respective spheres").

[184] *See, e.g.*, Regan, Essays, *supra* note ___, at 1874 (arguing that extraterritoriality should focus on "the location of the behavior the statute governs directly, and not the location of the statute's effects"). Because it does not depend on "locating" anything, the dormant

unique role within the dormant Commerce Clause and as a bulwark of federalism. Our approach is also narrower than the scope that Supreme Court dicta has suggested for extraterritoriality. Because internal consistency generates precise and predictable results, in addition to giving clear guidance to states and lower courts, it would also avoid the criticism that the concept of extraterritoriality is overbroad, or even unlimited.

* * *

Most of the time, our bright-line test for extraterritoriality will not fully resolve a dormant Commerce Clause case. Although regulations promulgated using an internally inconsistent nexus would be precluded, that a state uses an internally consistent nexus does not lead to automatic affirmance. Instead, the reviewing court would have to move on to consider whether the regulation constitutes a burden on interstate commerce. Although resolution of some burdens cases is trivial—for example, facially discriminatory regulations are nearly per-se invalid—facially neutral regulations can only be resolved with balancing. We neither approve of nor shrink from such balancing; [185] instead, we merely observe that it has long been the practice of the Supreme Court to apply balancing analysis in dormant Commerce Clause cases.[186] Although we cannot eliminate balancing, our doctrinal reframing and test for extraterritoriality significantly improves the clarity of the doctrine, as the next Part demonstrates.

IV. THE CASES IN LIGHT OF OUR PROPOSALS

We now examine the doctrine in light of our arguments, focusing on regulations cases, rather than tax cases, because that's where the confusion lies. Thanks to our doctrinal reframing, and to internal consistency as a test for extraterritoriality, we are in a position to clearly distinguish among nexus, extraterritoriality, and regulatory mismatches. Under our analysis, several Supreme Court cases have been misclassified as extraterritoriality cases, and they would be better classified as cases involving only extraterritorial effects. Another revelation of our doctrinal analysis is internal-consistency reasoning is already a mainstay of dormant Commerce Clause cases, including those dealing with regulations. Internal consistency reasoning appears not only in Supreme Court cases, but also in lower-court cases. Some of these lower cases

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Commerce Clause conception of extraterritoriality presented here is fit for the modern digital economy. We express no views on extraterritoriality as it may derive from other parts of the Constitution. [More on lit.]

[185] For criticism of balancing, see references cited *supra* note ___.

[186] *See* references *infra* Part ___ citing cases striking down the state's rule after balancing) and *infra* Part ___ (citing cases upholding the state's rule after balancing). {not sure if this is what you wanted, but these seem to be the infra cases that strike down and uphold state rules respectively, didn't see any notes grouping cases}

involved regulations that meet our narrow and formal definition of extraterritoriality; specifically, they were internally inconsistent. We conclude by discussing pending cases concerning regulations governing the gender composition of corporate boards, cruelty to animals, and abortion. Equipped with our clearer understanding of nexus, extraterritoriality, and burdens—especially the differences between them—we are in a much better position to understand what is at stake in those cases and how they ought to be resolved.

A. Supreme Court Cases

Commentators and jurists typically identify four Supreme Court cases that precluded regulations for extraterritoriality: *Baldwin*, *Brown-Forman*, *Healy*, and *Edgar*.[187] In this Subpart, we argue that the first three cases involved extraterritorial effects, not extraterritoriality. That is, those cases involved burdens arising from the content of the challenged state's regulation, not overbreadth in the state's assertion of jurisdiction. Moreover, we argue that the Supreme In our view, *Edgar* is the Supreme Court's only true dormant Commerce Clause extraterritoriality case.[188] Although *Edgar* raised a genuine issue of extraterritoriality, there were only four votes to preclude the regulation for extraterritoriality. Instead, a five-justice plurality of the Court ultimately precluded on a balancing analysis. In another case, *CTS*, a majority of the Court used internal consistency to uphold a state's regulation against a claim that it was extraterritoriality. In our view, the application of internal consistency in both of these cases was appropriate, and the Court's use of internal consistency reasoning in regulations cases lends support to our argument that the Court should expressly adopt internal consistency as a test for extraterritoriality.

This Subpart discusses all four cases, as well as some other Supreme Court cases often cited by scholars as involving extraterritoriality, but which actually involved extraterritorially effects. In the process, we show not only the previously unnoticed prevalence of internal-consistency reasoning in dormant Commerce Clause cases evaluating regulations, but also how our doctrinal reframing and bright-line rule for identifying extraterritoriality would clarify the doctrine.

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[187] Eager to narrow extraterritoriality doctrine, Circuit Courts have often ignored Edgar. *See, e.g.*, Epel, 793 F.3d 1169 (10th Cir. 2015) (citing *Baldwin*, *Brown-Forman*, and *Healy*, but not *Edgar* as extraterritoriality cases to make the point that extraterritoriality is limited to price cases); Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, ___ (9th Cir. 2021) *cert. granted*, 142 S.Ct. 1413 (2022).

[188] We narrow our focus to cases involving prescriptive regulatory jurisdiction. That means we do not consider tax cases or non-regulations cases, such as cases about damages. This excludes BMW of North America, Inc. v. Gore, 517 U.S. 559, 571 (1996), which, despite the views of some commentators, was not an extraterritoriality case because, as a case about excessive damages, it does not involve prescriptive jurisdiction.

1. Price-Affirmation Cases

Three Supreme Court price-affirmation cases—*Baldwin*, *Brown-Forman*, and *Healy*—are a major source of confusion about extraterritoriality. In our view, even though the price-affirmation cases have been understood as paradigm extraterritoriality cases, they involved only extraterritorial *effects* arising from the content of the regulations, not extraterritoriality arising from the jurisdiction basis employed by the state to apply the rule.[189] In each case, the challenged state used an internally *consistent* nexus, namely, sale into the state, to impose various price regulations. There is no question that a state has nexus to regulate solely on the basis of in-state sales, and there is nothing overbroad or extraterritorial about doing so. The real issue in those cases, then, was burden.

Decided in 1935, *Baldwin v. Seelig* involved a New York regulation that required milk dealers to affirm that the milk they sold in the state had been purchased for a minimum price set by statute.[190] The regulation applied to milk produced both in and outside the state that was re-sold to consumers in the state. Such a rule is internally consistent, at least assuming that New York did not try to regulate the prices of locally produced milk for sale to consumers out-of-state.[191] If all states applied their minimum price only to milk sold in their territory, regardless of where it was produced, then interstate milk sales would be subject to exactly one state's regulation, specifically, that of the consumer state. By contrast, if New York had also applied its rule to exports, the rule would have been internally inconsistent and extraterritorial.

A New York milk dealer who bought milk more cheaply in Vermont complained about New York's minimum price rule, and the Supreme Court precluded the regulation under the dormant Commerce Clause.[192] Commentators often categorize *Baldwin* as an extraterritoriality case, pointing to the Court's observation—which was not part of its rationale for the decision—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."[193] But

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[189] For example, even as he offered the price-affirmation cases as paradigm extraterritoriality cases, in *Epel*, then-Judge Gorsuch observed that *Healy* applied *Baldwin's* rule only as an alternative holding to an application of anti-discrimination doctrine"). Energy and Environment Legal Institute v. Epel, 793 F.3d 1169, 1172 (10th Cir. 2015). *See also id*. (noting that *Brown-Forman* used *Baldwin* as an authority for discrimination reasoning, not extraterritoriality reasoning).

[190] Baldwin v. GAF Seelig Inc., 294 US 511, 516 (1935) (requiring sellers to affirm that, if they bought milk out-of-state, that they had paid at least New York's minimum price)

[191] The case is not entirely clear on this point, but sellers were asked to agree that they would "'not . . . sell within New York State after it has come to rest within the State, milk or cream purchased from producers without the State at a price lower than that required to be paid producers for milk or cream produced within the State purchased under similar conditions?" *Baldwin*, 294 U.S. at 521, n.2.

[192] *Baldwin*, 294 U.S. at 527-28.

[193] *Baldwin*, 294 U.S. at 521. The Court made this remark before beginning its analysis of the regulation at issue.

the unanimous Court actually based its holding on its conclusion that the minimum-price regulation functioned as a "customs duty"[194] that "would neutralize the economic consequences of free trade among the states"[195] and "open[] the door to rivalries and reprisals" from Vermont.[196] On our account, this was the correct judicial approach because *Baldwin* is a burdens case. The challenged law was not extraterritorial, so the Court properly analyzed it as a facially neutral burden on interstate commerce arising from a single-state's law. Balancing in such cases (which we would today call *Pike* balancing) is often an exercise in smoking out protectionism, which the *Baldwin* Court readily found.[197]

Brown-Forman and *Healy* both involved alcohol price-affirmation statutes, which require alcoholic beverage sellers to announce the price at which they will sell alcohol in a state for a fixed duration of time, usually one month. Typically, these regulations forbid sellers from charging higher prices in the regulating state than they do in other states.[198] States passed these regulations to, for example, discourage residents from driving across the border to buy alcohol.[199] Before *Brown-Forman*, the Court issued its first reasoned opinion in a price-affirmation case in 1966 in *Joseph E. Seagram & Sons*.[200] In *Seagram*, the Court refused to preclude the challenged price-affirmation rule because its burden on interstate commerce was "conjectur[al]"[201] and the state had good reasons for regulating.[202]

After *Seagram*, a web of new price affirmation statutes soon constricted sellers' ability to set and change prices. In 1986, in *Brown-Forman Distillers Corp.*, a seller attempted to circumvent New York's affirmation rule by granting rebates to buyers outside the state. New York interpreted such discounts as a violation of its affirmation law. To remedy the violation, New York suggested that the seller could charge the net-of-rebate price in New York.[203] But changing the price in New York in this way would have caused the seller to violate affirmation laws in other states, because then the seller would be selling in New York at a lower price than in other states.[204] The seller challenged the regulation under the dormant Commerce Clause.

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[194] *Baldwin*, 294 U.S. at 521.

[195] *Baldwin*, 294 U.S. at 526.

[196] *Baldwin*, 294 U.S. at 522.

[197] *See Baldwin*, 294 U.S. at 521 (concluding the statute operated as a customs duty).

[198] *See, e.g.*, Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 39-40 (1966) (describing restrictions).

[199] *Healy*, 491 U.S. at 326.

[200] Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966). The Court has issued a summary affirmance in an another case. United States Brewers Ass'n Inc. v. Healy, 464 US 909 (1983).

[201] *Seagram*, 384 U.S. at 43.

[202] *Seagram*, 384 U.S. at 39 (noting that legislative studies supported New York's prior market had been subject to price discrimination and insufficient competition).

[203] The regulator suggested this solution because New York law forbade rebates on alcohol. Brown-Forman Distillers Corp. v. N.Y, State Liquor Auth., 476 U.S. 573, 578 (1986).

[204] *Brown-Forman*, 467 U.S. at 578.

In precluding the regulation, the *Brown-Forman* Supreme Court employed much of the language that has become most closely associated with the doctrine of extraterritoriality. Noting the regulation's "extraterritorial effects,"[205] the Court agreed that the statute was impermissible because it "regulate[d] out-of-state transactions in violation of the Commerce Clause"[206] and had the "practical effect"[207] of "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another."[208] The Court also confirmed that New York had improperly "project[ed] its legislation" into other states.[209] The Court distinguished *Seagram* by saying that although the extraterritorial effects of the price-affirmation rule in *Seagram* were conjectural, the effects of rule in *Brown-Forman* were clear.[210]

Given the doctrinal reframing and formal notion of extraterritoriality presented above, we would analyze *Brown-Forman* differently. On our account, *Brown-Forman* is a burdens cases, not an extraterritoriality case. New York applied its price-affirmation rule on the basis of an internally consistent nexus—if every state regulated prices based on sale in their territory, no interstate sale would be regulated by more than one state. It was the *content* of the rule, not is jurisdictional basis, that tied the price in New York to activity in other states. To some extent, the Court's reasoning reflected its recognition that mismatched price-affirmation regulations in different states generated an interstate commerce burden.[211] The Court observed that "the proliferation of state affirmation laws" following *Seagram* had "multiplied the likelihood that a seller will be subjected to inconsistent obligations in different States."[212] That describes a regulatory mismatch with spillover effects across states. Although the Brown-Forman Court seemed to recognize the mismatch, it ultimately rested its decision to preclude on extraterritoriality reasoning, and in doing so, it cited *Edgar*, a corporate-regulations cases involving extraterritoriality, rather than traditional burdens cases like *Pike* or *Bibb*

In 1989 in *Healy v. Beer Institute*, the Court once again referred to the "extraterritorial effects"[213] of price-affirmation rules. But elsewhere in the judgment, the Court treated the problem as one of mismatched content. It even applied the internal consistency test to the *content* of regulation—rather than to its nexus. The Court stated that 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

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[205] *Brown-Forman*, 467 U.S. at 581.
[206] *Brown-Forman*, 467 U.S. at 582.
[207] *Brown-Forman*, 467 U.S. at 583.
[208] *Brown-Forman*, 467 U.S. at 582.
[209] *Brown-Forman*, 467 U.S. at 584 (citing Baldwin, 294 U.S. 511 (1935))
[210] *Brown-Forman*, 467 U.S. at 581.
[211] *Brown-Forman*, 467 U.S. at 583.
[212] *Brown-Forman*, 467 U.S. at 583.
[213] *Healy*, 491 U.S. at 336 (emphasis added).

> 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[214]

Although the *Healy* Court did not spell out its internal-consistency analysis, it did conclude that "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, is to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude."[215]

Given our doctrinal reframing and our formal conception of extraterritoriality, we would categorize *Healy*, like *Brown-Forman*, as involving a mismatch burden. Recall that the distinguishing feature of a mismatch burden is that it arises from differences in the content of regulations of two or more states. In *Healy*, the burden arose from mismatched and contingent regulations that prevented companies from setting their prices independently for different states.[216] Consequently, the system of regulations "deprive[d] business and consumers in other states" of competitive advantages.[217] Like the *Brown-Forman* Court, however, the *Healy* Court failed to distinguish clearly between mismatch burdens and extraterritoriality. Indeed, *Healy* gives us one of the broad definitions of extraterritoriality that commentators have so often criticized. Citing *Baldwin*, *Brown-Forman*, and a corporate-regulation case called *CTS*, the *Healy* Court announced that

> 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

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[214] *Healy*, 491 U.S. at 336-37.

[215] *Healy*, 491 U.S. at 337.

[216] *See Healy*, 491 U.S. at 338-41 (discussing the recursive impacts of various states' affirmation regulations).

[217] *Healy*, at 491 U.S. at 339.

> the projection of one state regulatory regime into the jurisdiction of another State.[218]

This passage blends together three distinct ideas: the outcomes of *Baldwin* and *Brown-Forman*, extraterritoriality, and burdens arising from regulatory mismatches. It is no wonder then, that commentators and lower courts have had trouble deriving clear guidance from the price-affirmation cases. Adding to the confusion, in the next passage, the *Healy* Court treated the law as a burden, and it engaged in balancing analysis. For good measure, it even held that the regulation was facially discriminatory.[219] Interestingly, Chief Justice Rehnquist, and Justices Stevens and O'Connor perceived the majority to be engaging in balancing, but they dissented on the grounds that the state's regulatory interest justified the burden on interstate commerce.[220] Thus, the dissenters balanced, but their balancing analysis led them to a different outcome.

In our view, *Baldwin*, *Brown-Forman*, and *Healy* should have been analyzed as burdens cases, not extraterritoriality cases. The problem in those cases was with the content of the regulations, not their scope. In each case, the challenged state applied its regulation only to sales in the state, a permissible and appropriately narrow nexus. Because none of the challenged states used an overbroad assertion of regulatory jurisdiction, none regulated extraterritoriality. Instead, the burdens in those cases arose from the content of the regulations. In *Baldwin*, the Court judged the regulation as protectionist in intent; in passing it, the state sought to advantage in-state over out-of-state milk producers.[221] In *Brown-Forman* and *Healy*, the burden on interstate commerce arose due to differences in the content of different states' laws. Those laws formed a complex web of interacting regulations that restricted interstate commerce. The easiest way to see this is that the outcome in the alcohol cases changed as conditions on the ground changed and as more states added more and conflicting affirmation regulations.[222] The burden in *Seagram* did not rise to the level of constitutional infirmity, but as more states passed more and different regulations, the burdens grew. Dynamism in the outcome of cases as underlying market and regulatory conditions change is a characteristic of mismatch-burdens cases, but not extraterritorial cases. Outcomes in extraterritoriality cases are fixed; extraterritorial assertions of jurisdiction are per-se unconstitutional.

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[218] *Healy* at 336-37 (citations omitted)

[219] *Healy*, at 338 -341 (balancing). Id at 340-41 (discrimination).

[220] *Healy*, 491 U.S. at 347 (Rehnquist, C.J., dissenting) ("Connecticut's affirmation laws, [as] a response to a history of unusually high beer prices in that State, may be justifiable as a remedy for some market imperfection") (internal citations omitted).

[221] *Baldwin*, 294 U.S. at 521.

[222] *See, e.g.*, *Healy*, at 335 (noting the proliferation of statutes that fixed prices retrospective, prospectively, and contemporaneously)

Before moving on, we mention one final pricing case that has been prematurely described as the case that killed extraterritoriality.[223] *Pharmaceutical Research and Mfrs. of America v. Walsh*,[224] involved an attempt by Maine to extend to non-Medicaid recipients discounts that the state had negotiated with pharmaceutical companies for Medicaid recipients. Under the regulation, pharmaceutical companies that did not agree to participate in a program that would funnel prescription-drug rebates to non-Medicaid-participating Maine residents were subject to a pre-authorization procedure under which Maine would not allow automatic reimbursement of their drugs as part of Medicaid.[225] The main issue in the case concerned federal preemption, but the pharmaceutical companies argued that they were entitled to an injunction on dormant Commerce Clause grounds because the Maine program, in their view, "effectively regulates out-of-state commerce."[226] The pharmaceutical companies argued that Maine's rule would have spillover effects on prices outside the state. In two paragraphs of a 26-page opinion, the Supreme Court unanimously rejected the pharmaceutical companies' arguments about "extraterritorial regulation."[227] The 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."[228] From this passage, some lower courts have drawn the conclusion that the extraterritoriality principle applies *exclusively* to situations in which a state "regulates the price of any out-of-state transaction" or "ties the price of its in-state products to out-of-state price."[229] This overreads *Walsh*, which merely rejected the challengers' argument that they were entitled to an injunction because they satisfied one of the three alternative conceptions of extraterritoriality presented in Healy. The *Walsh* Court never said that the other two conceptions, which do not expressly involve prices, did not apply.

2. Corporate Cases

The 1980s featured challenges under the dormant Commerce Clause to a pair of corporate anti-takeover statutes. By contrast with the price-affirmation cases, which we have argued involved protectionism and burdens

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[223] Denning, *Post-Mortem*, *supra* note ___ at 990.

[224] 538 U.S. 644 (2003).

[225] *Walsh*, 538 U.S. at 654.

[226] *Walsh*, 538 U.S. at 650.

[227] *Walsh*, 538 U.S. at 669.

[228] *Walsh*, 538 U.S. at 669.

[229] Energy and Env't Legal Inst. v. Epel, 793 F.3d 1169, 1175 (10th Cir. 2015), *cert. denied*, 577 U.S. 1043 (2015); Nat'l Pork Producers v. Ross, 6 F.4th 1021 (9th Cir. 2021), *cert. granted*, 142 S.Ct. 1413 (2022); Denning, *Post-Mortem supra* note ____, at 992. Denning does not himself argue that Walsh narrows the doctrine this way; he argues instead that lower courts have seized on the Court's language in Walsh to themselves narrow the doctrine.

arising from mismatched content of various states' regulations, *Edgar v. MITE* involved extraterritoriality.[230] In *Edgar*, Illinois restricted[231] takeovers of companies in which Illinois residents held ten percent or more of the target's shares.[232] Such a nexus is internally inconsistent; if all states used the same nexus as Illinois, then the acquisition of a single target could be regulated simultaneously by up to ten different states. This is a problem with the breadth of Illinois' assertion of jurisdiction, not necessarily the statute's content. The statute's breadth is, in our view, extraterritorial and invalid under the dormant Commerce Clause. Interestingly, explicitly using internal consistency reasoning applied to Illinois' nexus, four justices in *Edgar* would have come to the same conclusion. Lamenting the "sweeping extraterritorial effect" of Illinois' regulation, these four justices 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."[233] These four justices specifically noted the federalism implications of such overreaching, observing that "extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power."[234] In our view, extraterritoriality analysis should precede burden analysis—if a state uses an overbroad nexus, then it lacks authority to apply the regulation, regardless of its content; extraterritoriality "exceeds the inherent limits of the States' power."[235] We, therefore, would have preferred the four-justice opinion to have been the opinion of the Court.

In fact, however, five justices favored resolving the case as a single-state burden under balancing analysis.[236] Here, the overbreadth of Illinois' regulation served as a major factor in Court's application of *Pike* balancing. First, the Court noted that "the most obvious burden" of the act was its "nationwide reach which purports to give Illinois the power to determine whether a tender offer may proceed anywhere."[237] The substance of the burden consisted in giving the "Illinois Secretary of State the power to block a nationwide tender offer."[238] Likewise, the overbreadth of Illinois' assertion of jurisdiction figured on the state-interest side of the balancing scale. In addition

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[230] Edgar v. MITE Corp., 457 U.S. 624 (1982).

[231] Those restrictions were significant and included granting the Illinois state secretary had the power to block offers deemed "inequitable." *Edgar*, 457 U.S. at 627.

[232] *Edgar*, 457 U.S. at 627.

[233] *Edgar*, 457 U.S. at 642 (reasoning joined by Chief Justice Burger, and Justices White, Stevens, and O'Connor).

[234] *Edgar*, 457 U.S. at 643 (quoting Shaffer v. Heitner, 433 U.S. 186, 197 (1977)).

[235] *Edgar*, 457 U.S. at 642-43.

[236] The Court thus analyzed the Illinois statute as a single-state burden, rather than as a mismatch burden; it thought that the absolute burden (rather than the burden relative to the regulations of other states) imposed by Illinois was too heavy to support its regulatory interest, which the Court held was nonexistent. *Edgar*, 457 U.S. at 643-47.

[237] *Edgar*, 457 U.S. at 642-43 (citing Pike and observing that Illinois has applied its regulation to the acquisition of a target company when only 27 percent of the shareholders of which resided in Illinois).

[238] *Edgar*, 457 U.S. at 643.

to its skepticism that the Illinois law helped Illinois shareholders, the Court observed that Illinois had "no legitimate interest in protecting nonresident shareholders."[239] Thus, the Court concluded that there was "nothing to be weighed in the balance to sustain the law."[240] Given these relative weights, the burden of the regulation outweighed "its putative local benefits,"[241] so the Court precluded it.

In *CTS Corporation*,[242] a case decided five years after *Edgar*, Indiana applied its anti-takeover regulation to companies incorporated in Indiana.[243] By contrast with *Edgar*, Indiana's assertion of jurisdiction in *CTS* was internally consistent. In analyzing Indiana's statute, a majority of the Court expressly applied the internal consistency test to Indiana's basis for asserting regulatory jurisdiction—to its nexus—just as four justices had done in *Edgar*. Specifically, the *CTS* Court observed 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. . . . Accordingly, we conclude that the Indiana Act does not create an impermissible risk of inconsistent regulation by different States.[244]

Having found no extraterritoriality and no discrimination, the Court went on to consider whether the regulation imposed an undue burden under *Pike*. As part of this burdens analysis, the Court concluded that Indiana had an interest in protecting all the shareholders—including nonresident shareholders—of companies created under its own law.[245] Moreover, although the Court acknowledged that the Indiana regulation would burden tender offers, many or even the majority of which were cross-border tender offers, it held that the state's "substantial"[246] regulatory interest justified the burden.

3. Distinguishing Mismatch Cases from Extraterritoriality Cases

Our analysis of the classic cases leading to preclusion on grounds of extraterritoriality (*Baldwin*, *Brown-Forman*, *Healy*, and *Edgar*) and the two cases that considered extraterritoriality but upheld the challenged regulation (*CTS* and *Walsh*) puts us in a good position to distinguish other cases that commentators sometimes find hard to distinguish from extraterritoriality cases.[247] These include cases dealing with interstate transportation and those

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[239] *Edgar*, 457 U.S. at 644.
[240] *Edgar*, 457 U.S. at 644.
[241] *Edgar*, 457 U.S. at 646.
[242] CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987).
[243] *CTS*, 481 U.S. at 72.
[244] *CTS*, 481 U.S. at 89.
[245] *CTS*, 481 U.S. at 93.
[246] *CTS*, 481 U.S. at 93.
[247] Cites ___

dealing with labels or other products standards. Although the Court did not decide any of these cases on extraterritoriality grounds, because they involve regulatory spillovers, they have often been discussed in articles about extraterritoriality.[248]

We begin with the transportation cases. In *Southern Pacific*, Arizona applied its strict train-length rule to trains operating in its territory. Such a nexus is internally consistent, if every state regulated trains only when in their territory, no single train would be regulated by two states simultaneously. At the same time, the regulation undoubtedly had extraterritorial effects, since any train entering Arizona would need to comply with Arizona's length limits before it entered the state. The issue in *Southern Pacific* was not that Arizona used an overbroad assertion of prescriptive jurisdiction. The issue was that the content of its regulation differed from that of other states, creating conflicting burdens on interstate train operators.[249] The majority even engaged in internal consistency reasoning, but consistently with the case involving mismatch burdens, the Court applied it to the content of the rule. The Court observed that "If one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation. The practical effect of such regulation is to control train operations beyond the boundaries of the state."[250] In our terms, the Court identified a mismatch burden that generated extraterritoriality effects. And, on our account, the Supreme Court treated the case appropriately, applying balancing, which takes into consideration not only burdens and state interests, but also federalism values, such as the need for national uniformity in regulation.[251] Likewise, we would say that the Court applied the correct analysis in other classic transportation cases, such as *Bibb v. Navajo Freight Lines*, which involved mismatched mudflap rules, and *Kassel v. Consolidated Freightways Corp.*, which involved mismatched truck-length rules. Such cases involve mismatch burdens—differences or conflicts in the *content* of multiple state's rules—not overbroad assertions of regulatory jurisdiction.[252] The Supreme Court balanced the state's interest in the mismatched regulation against other federalism values, such as the burden the mismatch imposed on interstate commerce. [253] While one can disagree with the

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[248] Cites ___

[249] The Court reviewed proposed length limits in various states, which would expose a single train traveling from Virginia to Michigan to several different length limitations. S. Pac. Co. v. Arizona, 325 U.S. 761773, n. 4 (1945).

[250] *So. Pacific*, 352 U.S. at 775.

[251] *See generally*, So. Pacific, 325 U.S at 783-84 (balancing the safety gains from Arizona's rule against the burden its deviating rule imposed on interstate commerce).

[252] On the contrary, in each, the state regulated only trucks in its own territory.

[253] *See* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 530 (1959) ("We deal not with absolutes but with questions of degree"); Kassel, 450 U.S. 662 (1981); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981). The Court does not always balance in

outcome of such balancing, it is important to recognize that such cases involve only extraterritorial effects, not extraterritoriality. Were the regulations extraterritorial, the Court preclude them without balancing.

Now for the packaging cases. Consider *Hunt v. Washington State Apple Advertising Commission*, the famous case in which North Carolina prohibited shipment or sale in its territory of apple containers that bore quality grading information other than the federal quality grades.[254] The legislation, which had been passed at the instigation of in-state apple growers,[255] appeared to be designed to strip Washington apple growers of the benefit of the expensive apple inspection and grading system implemented by Washington.[256] The Supreme Court did not explicitly consider extraterritoriality, even though the case involved extraterritorial effects; Washington growers would have to change their packaging. The *Hunt* Court, properly in our view, considered the impact of North Carolina's rule as a burden on interstate commerce, ultimately basing its decision to preclude on both discrimination and undue burden.[257] Likewise, in *Minnesota v. Clover Leaf Creamery*, in an effort to achieve environmental goals, Minnesota barred the sale of milk in its territory in plastic containers.[258] The state clearly possessed nexus. Moreover, its regulatory basis was internally consistent, and therefore, on our account, it was not extraterritorial. The regulation, however, had extraterritorial effects, because out-of-state dairies would have to switch to paper cartons.[259] The Supreme Court, properly in our view, applied balancing analysis to these extraterritorially effects, ultimately finding the burden on interstate commerce justified by Minnesota's environmental interest.[260] The Supreme Court has properly analyzed other selling-arrangements cases as burdens on interstate commerce.[261]

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mismatch cases, because sometimes the Court concludes that balancing is not appropriate to the judicial role, In such cases, the Court conducts rational basis review that typically leads to sustaining the mismatch. *See, e.g,* South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177, 190-92 (1938) (applying rational-basis review to a state's mismatched truck weight and width rules).

[254] Hunt v. Wash. State Apple Advertising Comm'n, 432 U.S. 333 (1977).

[255] *Hunt*, 432 U.S. at 352.

[256] *Hunt*, 432 U.S. at 352.

[257] *Hunt*, 432 U.S. at 353-54.

[258] *Clover Leaf*, 449 U.S. 456, 458 (1981).

[259] *Clover Leaf*, 449 U.S. at 473.

[260] *Clover Leaf*, 449 U.S. at 473.

[261] *See, e.g.,* Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978). In *Exxon*, a Maryland law that prohibited oil refiners from operating vertically integrated gas filling stations in the state, typically are internally inconsistent and therefore not extraterritorial. The regulation creates a mismatch with the regulations of other states, and so the Court properly evaluated it using balancing. *See generally id.*

4. Kicking the Can Over to Burdens

Our response to many Supreme Court involving claims about extraterritoriality has been to say that when analyzed properly, those cases actually involved claims about mismatch burdens, not extraterritoriality. Indeed, we argue that this is not only our view, but an accurate description of much of the doctrine. The upshot of our analysis of most of the claimed extraterritoriality cases, then, has been to conclude that they did not involve extraterritoriality at all, and that the Supreme Court should have analyzed them as burdens on interstate commerce. Distinguishing extraterritoriality from burdens may not seem to make much of a difference. For example, in the price-affirmation cases, had the Court evaluated the statutes as mismatch burdens, the Court may still have precluded the regulations. Thus, the ultimate outcomes of the cases may not have changed. Nevertheless, it is important to distinguish the doctrines for several reasons.

First, a state that promulgates a regulation on an internally inconsistent basis oversteps its own authority and trammels that of other states. For this reason, extraterritoriality operates as a per-se rule. If Courts mistake extraterritoriality for burdens, they may erroneously allow states to justify extraterritorial regulations for policy reasons. But such justification would undermine the federal structure defined by the Constitution, which reserves to each state a residuum of autonomy that the other states may not invade.

Judging by the cases just discussed, the mistake more often goes in the other direction, with the Court mistaking mere burdens for extraterritoriality. This error is also problematic because it strips the state of the opportunity to justify any burden it imposed on interstate commerce by reference to public policy reasons. In cases involving protectionism, justifications are typically unavailing. But in cases involving burdens on interstate commerce arising from mismatch rules, the state may be able to justify its rule.[262] Think of Minnesota's environmental justification for banning plastic jugs in *Clover Leaf*, or California's justification for adopting more stringent fuel standards than those applied by other states. If the Court were to mistake such mismatches for extraterritoriality, it would preclude the rules, hampering the states' constitutionally assured entitlement to engage in regulatory experiments and simply regulate differently from other states. Ultimately, an overbroad interpretation of extraterritoriality threatens the benefits we associate regulatory diversity including government efficiency,

[262] Indeed, if the Supreme Court follows the advice of Justice Thomas and abolishes balancing in dormant Commerce Clause cases, the state would not even have to justify mismatch burdens; such burdens would persist unless precluded by Congress. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 619 (1997) (Thomas, J., dissenting) (suggesting that such balancing "surely invites us, if not compels us, to function more as legislators than as judges.").

responsiveness, experimentation, and ultimately liberty[263] An overbroad interpretation of extraterritoriality threatens federalism itself.

It's true, of course, that extraterritoriality typically is not the end of the inquiry. The content of a regulation applied on an internally consistent nexus still must be analyzed to determine whether it imposes an undue burden on interstate commerce. Some burden inquiries are easy to resolve because they involve facial discrimination. In others, the state evinces sufficient protectionist intent that courts have relatively little trouble deciding them.[264] But some burdens cases either truly do not involve protectionism or they involve very well concealed protectionism.[265] Such cases often involve mismatches that arise from genuine policy differences among the states. Because our federal system prizes all of state regulatory diversity, state regulatory autonomy, and an efficient national marketplace free of border impediments, when faced with regulatory mismatches that generate burdens on interstate commerce, the Supreme Court typically has chosen to weigh those burdens in a balancing test. One may agree or disagree with this approach, but it significantly predates our proposal. Notice, however, that on our account, extraterritorial cases are per-se invalid, and so some cases no analyzed as burdens could avert the "morass"[266] of undue-burdens balancing.

An additional important difference involves dynamism and stare decisis. Whereas extraterritoriality is subject to per-se preclusion, mismatch burdens are subject to dynamic (and perhaps even repeated) review that depends closely on the facts on the ground. Thus, stare decisis should not attach too firmly in mismatch cases. For example, the changes in conditions—specifically in the regulatory environment—between *Seagram* and *Brown-Forman* would properly affect the mismatch-burdens analysis in each case. On the contrary, use by a state internally inconsistent nexuses will always be extraterritorial and unconstitutional, and so there should be no reason for a court to have to revisit a question about the scope of nexus. Thus, stare decisis should attach strongly to judgments about extraterritoriality.

B. Lower Court Cases

Lest we convince you that there are so few actual extraterritoriality cases that the doctrine does not matter at all, we briefly observe that circuit

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[263] *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (claiming that federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry").

[264] *See, e.g., Hunt*, 432 U.S. 333 (1977).

[265] Long after the Supreme Court decided Bibb, it was revealed that the makers of curved mudflaps had bribed at least some members of the Illinois legislature to mandate curved mudflaps. *Fender Guard Admits Writing Law*, CHI. DAILY TRIB., Feb. 9, 1957, at 7

[266] Cite ___

court cases sometimes feature internally inconsistent assertions of regulatory jurisdiction, and for the most part, circuit court judges have been able to recognize them as involving extraterritorial regulation, even if the courts do not use the internal consistency test. Interestingly, however, courts at least sometimes employ internal-consistency reasoning to analyze extraterritoriality. This should not be terribly surprising. After all, the Supreme Court arrived at internal consistency by intuition in the tax area, and it used it in both of the corporate law cases discussed above. And four justices in *Edgar*, would have adopted it as the rule for identifying extraterritoriality. So, it is not surprising that, when asking about the maximal scope of a state's power, a court might look to something like the Silver Rule, states should not do onto others what they would not have done unto themselves. Here, we select some interesting lower-court cases,[267] and we spend a little extra time on the Ninth Circuit, since so many pending cases arise out of California.

The Sixth Circuit's used internal-consistency reasoning in 2013 in *American Beverage Association v. Snyder*.[268] The case involved an extraterritoriality challenge to Michigan's bottle labeling rule. Michigan's rule required a certain label—MI 10ç—to be affixed to bottles sold in Michigan, but, Michigan also forbade the label from appearing on bottles sold in other states, unless those other states also redeemed bottle deposits. Michigan's goal with the statute was to avoid refunding bottle deposits on bottles upon which no deposit had been collected (for example, because they had been purchased out-of-state). Although not using the term internal consistency, the plaintiff beverage sellers advised the court to analyze the jurisdictional basis used by Michigan through an internal-consistency lens, arguing that if Michigan "'can both prescribe what [beverage] products can be sold in-state and outlaw the sale of that same [beverage] product in other States of the Union ... [then] it can do it for every other product [and] [s]o can every other State.'"[269] On our analysis, this was the right test applied to right thing, namely, to nexus. If every state, like Michigan, sought to regulate the labels of bottles on the basis of both sale in its territory and sale *outside* its territory, multiple regulation would result. Thus, the Michigan label law was unlike those analyzed in *Hunt* or *Clover Leaf* because the packaging requirements in the latter cases applied only when the product was sold in the state. Acknowledging the "hypothetical" nature of the inquiry, the Sixth Circuit nevertheless held that because Michigan's law was extraterritorial, it was per-se invalid, regardless of the strength of Michigan's policy justification.[270] Specifically, the Sixth Circuit,

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[267] We select cases that raise issues in an interesting or instructive way. We have not tried to be comprehensive.

[268] Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 377 (6th Cir. 2013).

[269] *Am. Beverage Ass'n*, 735 F.3d at 375 (quoting the party's brief).

[270] *Am. Beverage Ass'n*, 735 F.3d. at 376 (discussing various alternative methods by which Michigan could have achieved its regulatory goal, including by limiting the number of bottles redeemed by one person).

correctly in our view, identified that the problem with the Michigan statutes was not its content but its "reach".[271]

Another good illustration of internal-consistency-like analysis comes from a 1965 Illinois Supreme Court cases. *United Airlines v. Illinois* involved a challenge to an Illinois law empowering the state to approve or disapprove of an airline's issuance of securities.[272] The jurisdictional basis for the regulation was airline's operation of intrastate service. In striking down the Illinois law under the dormant Commerce Clause, the Illinois Supreme Court noted that there were seventeen states in which United Airlines offered flights that began and terminated in the same state. If all such states had a law similar to Illinois, then seventeen different states would have to approve the offering.[273] On our account, the Illinois Supreme Court properly applied the internal consistency test to the regulatory nexus employed by Illinois. As that nexus was internally inconsistent, the court rightly precluded it.

The Ninth Circuit's record on identifying extraterritoriality is mixed. In 2013, the Ninth Circuit failed to identify extraterritoriality in a California statute that applied on an internally inconsistent jurisdictional basis. Hoping to reduce cruelty to animals, California banned the sale in the state of foie gras that resulted from force-feeding ducks.[274] But, as the Canadian foie-gras producers who challenged the rule pointed out, California already had a regulation that banned the force-feeding of ducks within the state. Regulating the humane treatment of ducks on the basis of both sale and production is internally inconsistent, and, on our account, extraterritorial. The challengers alleged that the California law was extraterritorial under the dormant foreign Commerce Clause, specifically, the Canadians argued that because California already banned force-feeding ducks in California, the new regulation "aimed in only one direction: at out-of-state producers."[275] The Ninth Circuit rejected this argument, upholding the regulation because it did not have exclusively extraterritoriality effects.[276] Because the jurisdictional nexus employed by California was internally inconsistent, however, on our account it would be extraterritorial and invalid. Thus, in our view, *Eleveurs* was wrongly decided.

By contrast, when it evaluated a different internally inconsistent California rule in *Sam Francis Foundation v. Christies*, the Ninth Circuit sitting en banc found it extraterritorial and took the further step of severing the provision it thought most problematic.[277] Art dealers in New York acting as

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[271] *Am. Beverage Ass'n*, 735 F.3d. at 376. *Compare* National Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104 (2001) (upholding mercury labeling requirement that applied only to lamps sold in Vermont).

[272] 207 N.E.2d 433 (Ill. 1965).

[273] United Airlines, 207 N.E.2d at 525.

[274] Association des Eleveurs de Canards e.t d'Oies du Quebec v. Harris, 729 F.3d 937 (2013), *cert. denied* 574 U.S. 932 (2014).

[275] *Eleveurs*, 729 F.3d at 949.

[276] *Eleveurs*, 729 F.3d at 949 (noting that the second regulation has some in-state effects). Such analysis is part of a nexus inquiry, but not an extraterritoriality inquiry.

[277] Sam Francis Foundation v. Christies, Inc., 784 F.3d 1320 (2015).

agents for Californians in the sale of artwork challenged the application of California's Resale Royalty Act, which required five percent of the price of certain art resales to be paid to the original artist if the sale either took place in California or took place elsewhere but the seller was a California resident. Although California has nexus both with its residents and with sales in its territory, and therefore could regulate on either basis, propounding regulation on both bases simultaneously is internally inconsistent. Although not using the term internally inconsistent, the Ninth Circuit found the California regulation extraterritorial because it regulated wholly out-of-state conduct.[278] The Ninth Circuit took the additional step of severing the part of the statute that applied it to out-of-state sales by California residents.[279]

Notice that, under our account, the principle of extraterritoriality would force California to choose a single internally consistent basis for regulation, regulation or production for anti-animal cruelty, sale in the state or sale by California's for resale royalties. But our approach would force California to choose production *over sale* as the basis for forbidding animal cruelty, and nor would it require California to choose sales *in California* over sales *by Californians* for resale royalties. Such a choice would remain with the states.[280] Thus, even under an internal-consistency approach to extraterritoriality, California could still leverage its enormity, either as a consumer state or as a residence state. We therefore endorse the Ninth Circuit's reasoning in *Rocky Mountain Farmers Union*, which upheld California's strict fuel efficiency standards as applied to fuel sold in California, The challenge in that case was to the fact that, in calculating the carbon emissions of various fuels, California took into account the fuel's total carbon emissions, wherever emitted, and not just it emissions in California. The impact of this "well to wheel"[281] calculation undoubtedly spilled over into other states, but the California regulation was nevertheless internally consistent because it only applied to fuel *sold* in California.[282] Extraterritoriality thus merely encourages states to regulate on a jurisdiction basis that matters to state voters; it does not prescribe that basis. And it does not forbid—as no doctrine could—regulatory spillovers.[283]

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[278] *Christies*, 784 F.3d at 1324 (referring to the statute's "extraterritorial effects" and noting that it met Healy's standard "as an impermissible regulation of wholly out-of-state conduct").

[279] *Christies*, 784 F.3d. at 1325.

[280] In none of its extraterritoriality cases did the Supreme Court address severability.

[281] 730 F.3d 1070 (9th Cir. 2013).

[282] *Rocky Mountain*, 730 F.3d at 1106.

[283] We note that the fuel efficiency rule could be analyzed as a mismatch burden, since it is different from the regulations of other states, but given Clover Leaf, the Supreme Court would likely find that California's environmental interests justified the regulation.

We have not exhausted the lower-court cases considering issues of extraterritoriality,[284] but this Subpart provides a good sense of the issues. Our final observation is that genuine extraterritoriality cases—ones that involve challenges to the breadth of nexus, rather than the content of regulation—appear to be rare. We do not know whether to attribute the lack of extraterritoriality cases to state self-restraint or to some other cause. But the federal docket seems to reflect a ramping-up of cases challenging the jurisdictional basis for states' assertions of jurisdiction, rather than the content of state laws. Thus, it is becoming increasingly important to understand extraterritoriality. The next Subpart discusses some pending cases.

C. Pending Cases

To demonstrate the improved clarity from our approach, and to highlight the close connection between extraterritoriality and fundamental questions of federalism, we apply our approach to pending cases. We first consider the bread-and-butter of the dormant Commerce Clause, namely commercial regulation, but we also briefly address the regulation of abortion.

1. Women on Boards

California's "women on boards" diversity mandates apply to public companies with their "principal executive offices" in California, and they require companies to appoint women and other underrepresented groups to their board to avoid fines.[285] The California legislature's legal counsel advised the state to expect challenges to the regulation under the so-called internal-affairs doctrine, which directs states to defer to the state of incorporation on certain corporate regulations.[286] Ever since the Supreme Court in *CTS* held that Indiana did not violate extraterritoriality when it regulated on the basis of place of incorporation, lively debate has surrounded the question of whether the Court thereby made the internal-affairs doctrine a constitutional mandate.[287]

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[284] *See, e.g.*, Energy and Environment Legal Institute v. Epel, 793 F.3d 1169 (10th Cir. 2015) (rejecting the claim that a regulation that applied to energy use only in Colorado was extraterritorial); Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013) (rejecting a claim that fuel standards that applied only to fuel used in California was extraterritorial).

[285] *See, e.g.*, Cal. Corp. Code § 301.3(a).

[286] CAL. SEN. JUD. COMM., REPORT ON S.B. 826, Reg. Sess., at 11-13 (2018)] (also anticipating challenges under the Equal Protection Clause).

[287] *See, e.g.*, P. John Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1 (1985); Richard M. Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 CALIF. L. REV. 29 (1987); Janet Cooper Alexander, *Unlimited Shareholder Liability Through a Procedural Lens*, 106 HARV. L. REV. 387 (1992); Timothy P. Glynn, *Delaware's Vantagepoint: The Empire Strikes Back in the Post-Post-Enron Era*, 102 NW. U. L. REV. 91 (2008); Jack B. Jacobs, *The Reach of State Corporate Law Beyond State Borders: Reflections upon Federalism*, 84 N.Y.U.L. REV. 1149, 1161-64 (2009).

There is no question that California has nexus with companies that have their principal office in California. And the jurisdictional basis upon which California applies its board regulations is internally consistent. Under the relevant statute, a company can have only one principal executive office.[288] As such, if every state used principal office to govern board composition, each company's board would be regulated by exactly one state. California's nexus is internally consistent and not extraterritorial.

California's regulation may, however, create a mismatch burden if other states regulate using the same nexus, but different content, or if other states regulate using a different nexus and different content. Thus, for example, Delaware might seek to regulate board composition on the basis of place of incorporation.[289] In *CTS*, the Supreme Court that the state of incorporation could regulation of tender offers nationwide. On our account, that ruling made sense: place of incorporation is an internally consistent basis for promulgating corporate regulation, and the case involved no mismatch burden generated by the combination of Indiana's regulation of companies it chartered and any other state's rule. But place of incorporation is not the *only* internally consistent basis for regulating companies. Faced with a potential conflict between—in our hypothetical—California regulation applied on the basis of principal office and Delaware regulation (or absence of regulation[290]) applied on the basis of charter—the appropriate judicial approach would involve balancing to evaluate the mismatch.[291] As part of balancing analysis, the Court would consider the extent of the burden on interstate commerce as well as the relative regulatory interests of both California and Delaware.[292]

Decisions in mismatch cases can have profound impacts. For example, the Court could eliminate the mismatch by endorsing the incorporation state as the sole regulator. Regulation of at least some corporate affairs by the charter state is said to be efficient because the ease of incorporation means that

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[288] *See id*. (defining the term by reference to a form filed by the corporation with the SEC).

[289] On the other hand, a company incorporated in California with its principal headquarters in Delaware would be subject to neither state's board diversity regulation, raising regulatory arbitrage opportunities. Although such regulatory gaps represent an advantage available only to cross-border commerce, they do not violate the Constitution.

[290] Delaware at present has no regulation governing the identity of directors, which means that corporations could comply simultaneously with California and Delaware rules. Del. Code Ann. tit. 8, § 141 (2016). On our account, extraterritoriality protects the ability of states to choose not to regulate something as much as it protects their choice to affirmatively regulate.

[291] Some justices would eschew mismatch balancing; they would sustain the mismatched regulation and leave it to Congress to cure the burden with federal regulation.

[292] Other scholars have offered way to avoid the conflict by interpreting board composition to lie outside the scope of the internal-affairs doctrine. 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). But a conflict with the California rule would still arise if Delaware (or some other state) expressly applied its own board-composition rule on the basis of charter.

a company can pick its corporate law and essentially carry that law with it to other states. This portability of corporate law leads to regulatory competition that maximizes shareholder value.[293] Such competition—and its deregulatory impact—have been celebrated by many.[294] At the same time, however, deference to the chartering state has made it more difficult for non-incorporation states to regulate companies. Thus, such efficiency imposes democratic and social costs. Under a constitutionalized place-of-incorporation rule, residents of California would not be able to impose their preferences about board diversity (or other values) upon companies, even companies meaningfully connected to California. Indeed, California would be precluded from regulating companies that are more closely connected to California than they are to their state of incorporation. To preclude California's rule when promulgated on the basis of headquarters implicitly would empower Delaware to export its board regulation (of absence thereof) to companies with their principal office in California. By the same token, however, to affirm California's rule would empower California to export its board regulation to Delaware-incorporated companies. Thus, as we noted above, mismatch cases necessarily involve judicial endorsement of regulatory spillovers, of extraterritorial *effects*. Sustaining regulations despite their mismatch burdens leads to the California Effect, while precluding them leads to the Delaware effect.[295] Thus, merely citing a desire to avoid extraterritorial effects in such cases cannot support a specific outcome, since both preclusion and non-preclusion both lead to extraterritorial effects. Thus, it should not surprise us that some jurists conclude that only Congress, not courts, should cure regulatory mismatches.[296] In the view of these jurists, courts should sustain mismatches, pending nationally uniform federal legislation.

2. *Anti-Animal Cruelty*

The issue on appeal to the Supreme Court in *National Pork Producers Council v. Ross* is whether the Ninth Circuit erred in granting the state summary judgment in a challenge to its animal welfare regulation.[297] Because the nexus that California uses to apply that regulation is internally inconsistent, our answer is unequivocally yes. To reduce cruelty to animals, California passed—pursuant to a referendum—regulations requiring breeding hogs to be

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[293] *See generally* ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 47 (1993).

[294] *See, e.g., id.*

[295] This is because private parties bring dormant Commerce Clause cases, and they will tend to challenge stricter regulations. Thus, preclusion in mismatch cases tends to endorse the spillover of laxer laws into other states.

[296] See, e.g., *South Carolina State Highway Department v. Barnwell Bros., Inc.*, 303 U.S. 177 (1938) (refusing to preclude a mismatch because doing so would "force[] the states to conform to standards which Congress might, but has not adopted.")

[297] Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1025 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 1413 (2022).

kept in cages larger than those required in other states. Because California produces almost no pork, it is unlikely that that the regulation was motivated by a desire to confer special advantages on in-state farmers.[298] Instead, California argues that the reason for its regulation was to change the animal husbandry practices of hog farmers in other states. Out-of-state hog farmers challenged the regulation as extraterritorial and unduly burdensome under the dormant Commerce Clause. The Ninth Circuit affirmed the district court's dismissal of the case, holding that the plaintiffs could not prevail on their dormant Commerce Clause claims.

Asserting that the Supreme Court in *Walsh* "indicated that the extraterritoriality principle in *Baldwin*, *Brown-Forman*, and *Healy* should be interpreted narrowly as applying only to state laws that are 'price control or price affirmation statutes,'" the Ninth Circuit held that the California regulation was not extraterritorial. The problem with this reasoning is obvious, namely that ignores the Court's caselaw in non-price-affirmation cases, especially *Edgar*.[299] The problem with California's regulation, although none of the parties raised it, is that it seeks to simultaneously regulate on the basis of sale in California and production in California. Such a scope is internally inconsistent. It is overbroad and extraterritorial. This is not to say that California cannot regulate on the basis of production in the state *or* sale in the state. The extraterritoriality principle simply says that California may not regulate on both basis simultaneously, lest it invade the regulatory preogatives of other states.

So, what does this constraint mean? Assume for a moment that Caifronia's goal to regulate beyond its borders is a legitimate state interest. California may do so consistently with the extraterritoriality principle; it may regulate pork inbound for sale in California. Because almost all California pork is imported, the impact of such regulation will be felt mainly in other states. But imposing that that regulatory spillover comes at a cost, namely, California must forgo regulating hog farming within its own territory. California then could become a haven for the inhumane treatment of animals. This is the price that the extraterritoriality principle imposes on the regulatory spillover, and earlier we said that the extraterritoriality principle has a channeling effect; it induces states to regulate on a jurisdictional basis that is actually connected to local activity.

But extraterritoriality is not the sole test of constitutionality. Even if California uses an internally consistent jurisdictional basis to project its considerable regulatory influence outwards, it must not impose an undue burden on interstate commerce. The burden in this case arises from mismatch regulations—California's cage requirements are more onerous than those of North Carolina and other hog-producing states.[300] This mismatch creates a burden on interstate commerce that the Court could either eliminate by

[298] *National Pork*, at 1028.
[299] The Ninth Circuit did not mention *Edgar*,
[300] Twenty-five states joined an amicus brief for the Pork Council. Cite brief.

choosing a substantive rule or leave in place. If the court sustains the mismatch burden (for example because it determines that satisfying the ethical considerations of Californians outweigh the burden arising from the mismatch) then if hog farmers in North Carolina and other states want to sell their pork into California, they will have to change their hog husbandry practices to meet California standards. In the alternative, Congress could preempt California's outlier rule with a nationally uniform standard. Speculating about how the courts would resolve such a mismatch burden is hazardous, the outcome of balancing cases is hard to predict. One thing is clear, however, the Ninth Circuit should not have dismissed Pork Council's case. On the contrary, on our view, the basis on which California promulgated its rule is extraterritorial and unconstitutional.

3. Abortion

[Many of the questions concern criminal law, but the upshot of our analysis for civil law is that if a state wants to ban abortion (attach liability) to its residents, then it has to forgo regulating on the basis of territory. That means that, e.g., if Texas wants to attach civil liability to a Texan receiving a medication abortion out-of-state, then it has to permit non-Texans to receive medicine abortions in Texas. Put to the choice, Texas probably chooses to regulate on the basis of territory, leaving its residents free to seek commercial services in other states.] [301]

V. CONCLUSION

It is easy to accept that federalism imposes limits on states' entitlement to regulate too much. Vastly more difficult is describing the precise contours of any such limit. The challenge of this Article was to find a way of thinking about extraterritoriality that is not only simpler than what has come before, but also grounded in our Constitution's structural federalism. To be successful, a conception of extraterritoriality must both give clear direction to courts and be sensitive to differences between nexus, extraterritoriality, and burdens. It must also answer the critics, who rightly argue that because extraterritorial effects are ubiquitous in commercial regulation, judicial attempts to root them out are unprincipled, overbroad, and unduly restrain states.

This Article proposed a new framework for thinking about the differences among nexus, extraterritoriality, and burdens, and it argued that the test for fiscal extraterritoriality—the internal consistency test—should also

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[301] Although we arrive there by via a very different route, our conception of extraterritoriality is consonant in result with See Brilmayer (1993), supra note ___ (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 in favor of the territorial state).

become the test for regulatory extraterritoriality. Armed with these doctrinal and normative tools, we reexamined the extraterritoriality cases, and we found not only that regulations raising genuine issues of extraterritoriality are rare (though possibly on the rise in this time of fraught interstate relations possibly), but that the Supreme Court and lower courts already tend to use internal consistency reasoning to resolve them. Analyzing difficult pending extraterritoriality cases under our doctrinal and normative reframing reveals that our approach substantially simplifies judicial review by properly identifying the competing interests at stake in extraterritoriality cases.