The New Landscape of State Extraterritoriality

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When is it permissible for the law of one state to have legal consequences in another? In the past, the Supreme Court has, in a variety of contexts, given diverse answers to this question, drawing on a wide array of constitutional provisions. In some ways, this lack of precise boundaries on state power makes sense; in an interconnected country, allowing state law to have some sort of extraterritorial effect is, in many contexts, virtually inevitable. Given this reality, rigidly confining state regulation solely to what happens within state borders would be both significantly disruptive and harmful to legitimate state interests.

Two recent developments, however, threaten the delicate equilibrium that has evolved in this area. First, the nature of states' efforts to extend their territorial reach has, in recent years, been shifting in a way that may prove to spawn more conflict, as increasingly polarized states pass laws that—in contrast to past overextensions of state power, which were often motivated by favoritism toward state residents—focus instead on advancing ideology. Second, two recent cases—National Pork Producers Council v. Ross *and* Mallory v. Norfolk Southern Railway Co.—*have had the unintended consequence of removing some of the guardrails that have restrained state overreaching. Although the Court in both cases showed awareness of this problem, it has yet to propose a comprehensive fix. This Article discusses this situation, ultimately concluding that the dormant Commerce Clause balancing test first applied in* Pike v. Bruce Church, Inc. *is likely, for lack of a better alternative, to have a disproportionate role in resolving extraterritoriality conflicts, and proposing ways in which the* Pike *framework might be adapted to better address such issues.*

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Introduction

When is it permissible for the law of one state to have legal consequences in another? In the past, the Supreme Court has, in a variety of contexts, given diverse answers to this question, drawing on a wide array of constitutional provisions. The Due Process Clause, for example, prohibits states from imposing punitive damages for defendants' lawful activities in other states[1] but imposes only minimal restraints on attaching civil liability to equivalent conduct.[2] The dormant Commerce Clause once appeared to encompass broad restrictions on any state regulation posing the risk of

1. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572–73 (1996).

2. *See* Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 871 (2002) (noting that, for example, "states frequently have the power to exercise legislative jurisdiction over persons whose out-of-state activities undermine legitimate state interests").

"subjecting activities to inconsistent regulations" by different states,[3] although the Supreme Court never gave wide effect to this rule.[4] The Privileges and Immunities Clause,[5] the Full Faith and Credit Clause,[6] and structural principles of federalism[7] have at one point or another all appeared to play a role in limning the boundaries of states' proper territorial authority, while at other times they have been largely forgotten.[8]

In some ways, it seems natural that the Supreme Court has never attended consistently to the extraterritoriality question. In an interconnected country, allowing state law to have some sort of extraterritorial effect is, in many contexts, not only permissible but virtually inevitable. Indeed, many extraterritorial applications of state law pass almost unnoticed, from the often-remarked-upon influence of Delaware law in corporate matters[9] to the tendency of courts to apply forum law to out-of-state conduct in many circumstances.[10] As the Supreme Court recently noted, "In our interconnected national marketplace, many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior."[11] Given this reality, rigidly—or even not so rigidly—confining state regulation solely to what happens within state borders would be both significantly disruptive and harmful to legitimate state interests. As it is, the Court has seemed, until

3. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 88–89 (1987).

4. *See* Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003) (suggesting that dormant Commerce Clause extraterritoriality concerns are limited to situations involving price-affirmation statutes). *But cf.* Dawinder Sidhu, *Interstate Commerce × Due Process*, 106 IOWA L. REV. 1801, 1825–28 (2021) (explaining that some lower courts have applied the doctrine more widely).

5. Rosen, *supra* note 2, at 896.

6. *See* 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, 1075–77 (2009) (discussing the Court's application of the Full Faith and Credit Clause to extraterritoriality concerns).

7. *See* 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, 1895 (1987) (arguing that any "extraterritoriality principle" should not be derived "by pointing to any specific clause of the Constitution, but by a structural inference from our system as a whole").

8. *See, e.g.*, Rosen, *supra* note 2, at 892, 894–95 (noting that *Bigelow v. Virginia*, 421 U.S. 809 (1975), a case that suggested a state could not infringe its residents' right to travel, has been heavily modified or limited by subsequent cases); Florey, *supra* note 6, at 1080 (describing the decline of the Full Faith and Credit Clause as a limit on state courts' application of forum law to out-of-state events).

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

10. Florey, *supra* note 6, at 1091–92.

11. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1156 (2023); *see also* Sidhu, *supra* note 4, at 1824 (observing that "modern economic conditions have enabled merchants to . . . navigate [various regulatory systems] successfully," such as by designing software to assess sales tax according to the laws of a customer's state).

recently, to be able to muddle along, drawing on one constitutional provision here, another there, to address what it presumably considers the most egregious aspects of state overreaching. Some commentators have praised this fragile balance, noting that traditional extraterritoriality concerns are less acute in an interconnected world that operates increasingly in virtual space.[12]

Recent developments, however, threaten this equilibrium. To begin with, the nature of states' efforts to extend their territorial reach has, in recent years, been shifting in a way that may prove to spawn more conflict. In the past, concerns about extraterritoriality have often been rooted in fears that states will favor their own citizens or, in some cases, sympathetic litigants in their own courts.[13] States, for example, have sought to secure for their citizens competitive prices on liquor,[14] to deter out-of-state corporations from behaving badly toward state residents,[15] and to apply legal rules that ensure resident plaintiffs receive the fullest possible recovery.[16] In consequence, the Court—for all other constitutional provisions it has here and there suggested might be relevant to this topic—has often focused on the dormant Commerce Clause, with its roots in combatting in-state protectionism,[17] or the Due Process Clause, with its protections for defendants from arbitrary results,[18] in reining in states' territorial overreach.

Concerns about protectionism, to be sure, continue to arise. In the judicial realm, state courts sometimes apply forum law in service of what one

12. *See, e.g.*, Sidhu, *supra* note 4, at 1822–25 (discussing arguments that "territorial limits—which are the touchstone of the extraterritoriality doctrine—are undeniably less meaningful" in the modern national economy).

13. Donald H. Regan, for example, observed decades ago that in the "central area" of dormant Commerce Clause doctrine, "the Court has been concerned exclusively with preventing states from engaging in purposeful economic protectionism." Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092 (1986). Under Regan's definition, a statute is protectionist if it "was adopted for the purpose of improving the competitive position of local (in-state) economic actors [against out-of-state rivals], just because they are local" and is "analogous in form to the traditional instruments of protectionism—the tariff, the quota, or the outright embargo." *Id.* at 1094–95.

14. *See, e.g.*, Brown-Forman Distillers Corp v. N.Y. State Liquor Auth., 476 U.S. 573, 575–76 (1986) (discussing a New York law that required distillers to sell liquor at a price no higher than their price in any other state).

15. *E.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996).

16. *See, e.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302, 305–06 (1981) (plurality opinion) (discussing a Minnesota law that allowed stacking of car insurance coverage to maximize insurance payouts).

17. *See, e.g.*, *Brown-Forman*, 476 U.S. at 580–82 (holding that New York's liquor-pricing law "regulate[d] out-of-state transactions in violation of the Commerce Clause").

18. *See BMW*, 517 U.S. at 568 (noting that grossly excessive damages "enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment"); *Hague*, 449 U.S. at 308 (plurality opinion) (indicating that the Due Process Clause protects against choice of law that is "arbitrary [or] fundamentally unfair"); *cf. id.* at 320–22 (Stevens, J., concurring in the judgment) (arguing that the interests protected by the Full Faith and Credit Clause are distinct from due process issues and criticizing the majority for eliding this distinction).

commentator has described as "parochial" interests,[19] and dormant Commerce Clause cases involving outright discrimination against out-of-state industries continue to be litigated.[20] In recent years, however, the most heated debates about the extraterritorial scope of state law have generally not hinged on states' efforts to secure economic advantages for their citizens. Rather, current controversies tend to revolve around state laws that convey no financial benefit on state residents—in fact, they sometimes do the opposite[21]—but instead express, safeguard, or seek to extend certain deeply held principles of public policy.

Take, for example, developments in the post-*Dobbs*[22] era. Conservative legislators who have hastened to pass abortion restrictions in the wake of the Court's ruling in *Dobbs v. Jackson Women's Health Organization* have not limited their focus to the in-state provision of abortions. In many cases, they have passed (or attempted to pass) legislation that is either ambiguous as to its territorial scope or that directly targets those who seek or assist others in obtaining abortions out of state.[23] On other social and political issues, state statutes have employed various tools in an effort to change the nationwide conduct of corporations or funds. Many states, for example, have weighed in on the issue of how state pension funds may be invested, with some states forbidding investment in entities that consider so-called ESG (environmental, social, and governance) factors and other states requiring it.[24] Likewise, at issue in the recent case *National Pork Producers Council v. Ross*[25] was a California ballot initiative requiring that producers of eggs, veal,

19. *See* Roger Michalski, *Fractional Sovereignty*, 13 UC IRVINE L. REV. 683, 732–33 (2023) (observing that "[w]ith depressing regularity in conflicts cases, all theory, inconvenient facts, public policy, and rhetoric to the side, courts apply forum law"). *But see* Symeon C. Symeonides, *Choice of Law in the American Courts in 2020: Thirty-Fourth Annual Survey*, 69 AM. J. COMPAR. L. 177, 185 (2021) (arguing that, while state courts have a slight preference for forum law, the tendency can be overstated).

20. In *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019), for example, the Court invalidated a Tennessee requirement that all people or businesses reside in the state for two years before applying for a retail liquor license. *Id.* at 2456–57. The Court found that the requirement "blatantly favors the State's residents and has little relationship to public health and safety." *Id.* at 2457.

21. *See, e.g.*, Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1162 (2023) (plurality opinion) (noting that to the extent California's humane animal-treatment standards would lead to higher pork prices, those costs would be borne by the California public that enacted the measure).

22. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

23. *See* Katherine Florey, Dobbs *and the Civil Dimension of Extraterritorial Abortion Regulation*, 98 N.Y.U. L. REV. 485, 497–99 (2023) (describing instances of existing or proposed laws allowing for civil liability for out-of-state conduct).

24. Leah Malone, Emily Holland & Carolyn Houston, *ESG Battlegrounds: How the States Are Shaping the Regulatory Landscape in the U.S.*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 11, 2023), https://corpgov.law.harvard.edu/2023/03/11/esg-battlegrounds-how-the-states-are-shaping-the-regulatory-landscape-in-the-u-s/ [https://perma.cc/4TDC-LJVY].

25. 143 S. Ct. 1142 (2023).

and pork maintain certain humane treatment standards as a condition of selling products within the state.[26] The measure could certainly not be said to favor state residents in any traditional sense; indeed, any economic effect it had would likely result in higher—not lower—prices for California consumers.[27] Yet Proposition 12 did advance what the Court described as Californians' "moral and health interests" in being able to buy meat from animals—whether located in or out of California—kept under more humane conditions.[28] In such situations, rather than looking out for the economic interests of their citizens, states are increasingly concerned with advancing those citizens' values as broadly as possible, which often means attempting to affect behavior outside state borders.

Yet even as such extraterritorial temptations may be on the rise, the Supreme Court in *National Pork* and another recent case, *Mallory v. Norfolk Southern Railway Co.*,[29] removed some of the restraints that have served, at least to some degree, to rein in state overreach.[30] In *National Pork*, the Court unanimously rejected a broad reading of the somewhat-obscure strand of dormant Commerce Clause doctrine centered on extraterritoriality.[31] To be sure, this was a more than reasonable approach, given the just and abundant criticism these cases have received,[32] but it also represented a move away from some of the Court's rare efforts to speak directly to the problem of state territorial overextension.

Meanwhile, in *Mallory*, the Court held that a state may validly require corporations to consent to general personal jurisdiction in their courts as a condition of doing business in that state.[33] Although on its face the decision had nothing to do with extraterritoriality, several Justices recognized that adjudicating disputes involving out-of-state events—the situation that

26. *Id.* at 1150.

27. *Id.* at 1162–63 (plurality opinion).

28. *Id.* at 1160.

29. 143 S. Ct. 2028 (2023).

30. A state can effectively regulate extraterritorially in two ways—first, by enacting a law that explicitly or in practical effect reaches out-of-state conduct, and second, by applying its own law in litigation to govern events that occurred outside the state. *See* Florey, *supra* note 6, at 1058, 1068 (discussing the differences between legislative and choice-of-law extraterritorial regulation). Although these scenarios differ in important respects, they share the common idea that a given state's law ends up applying to conduct outside the state's usual territorial sphere of concern.

31. *See Nat'l Pork*, 143 S. Ct. at 1155–56 (adopting a narrow view of *Healy v. Beer Institute*, 491 U.S. 324 (1989) and similar cases); *id.* at 1164 n.4 (plurality opinion) (rejecting the dissents' characterization of the controlling portions of Justice Gorsuch's opinion as "fractured" and noting that the Court was united in "unanimously disavow[ing an] 'almost *per se*' rule against laws with extraterritorial effects").

32. *See, e.g.*, Sidhu, *supra* note 4, at 1825–26 (describing the doctrine as "incoheren[t]" and "unsound"); Florey, *supra* note 6, at 1090 (noting numerous lines of criticism from various scholars).

33. 143 S. Ct. at 2032.

Mallory itself presented[34]—gives states an opportunity to extend their power, perhaps to a troublesome extent. The Court, for example, noted the "federalism implications of one State's assertion of jurisdiction over the corporate residents of another," even while concluding that the Due Process Clause did not speak specifically to the issue.[35] Concurring in part, Justice Alito observed that in the personal jurisdiction context specifically, "our due process decisions . . . have often invoked respect for federalism as a factor in their analyses."[36] The four dissenting Justices[37] went further, finding that the Due Process Clause directly protected federalism interests and opining that "Pennsylvania's effort to assert general jurisdiction over every company doing business within its borders infringes on the sovereignty of its sister States" in an "'exorbitant' and 'grasping'" manner.[38] A significant extension of general jurisdiction, *Mallory* thus may create more situations where states are tempted to apply their law broadly to out-of-state conduct.

These new extraterritorial pressures would seem to call for a more coherent and unified approach to the patchwork of doctrines that have heretofore characterized the Supreme Court's extraterritoriality jurisprudence. And in *National Pork* and *Mallory*, at least some members of the Court have appeared to worry that the decisions would open the door to state regulation with broad territorial impact. Concurring in part in *National Pork*, Chief Justice Roberts expressed concerns about the "sweeping extraterritorial effects" of the California initiative at issue.[39] Likewise, in another partial concurrence, Justice Alito in *Mallory* observed that "[w]e have long recognized that the Constitution restricts a State's power to reach out and regulate conduct that has little if any connection with the State's legitimate interests," a principle that "is not confined to any one clause or section, but is expressed in the very nature of the federal system."[40]

Yet even as various Justices express anxiety about state law that extends too broadly, the Court sheds remarkably little light on which doctrines, if any, should step in to promote restraint. In *National Pork*'s varied opinions, different Justices suggested a host of alternative provisions relevant to the

34. In *Mallory*, the plaintiff's suit, brought in Pennsylvania court, was predicated on exposure to carcinogens in Virginia and Ohio. *Id.* at 2033.

35. *Id.* at 2043 (plurality opinion).

36. *Id.* at 2050 (Alito, J., concurring in part and concurring in the judgment).

37. Justice Barrett's dissenting opinion was joined by Chief Justice Roberts and Justices Kagan and Kavanaugh. *Id.* at 2055 (Barrett, J., dissenting).

38. *Id.* at 2058 (quoting Daimler AG v. Bauman, 571 U.S. 117, 121–22, 138–39 (2014)).

39. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1170 (2023) (Roberts, C.J., concurring in part and dissenting in part). Chief Justice Roberts also noted that the pork industry is sufficiently "interconnected" that the California standards "effectively require[e] compliance by farmers who do not even wish to ship their product into California." *Id.* at 1170–71.

40. 143 S. Ct. at 2049 (Alito, J., concurring in part and concurring in the judgment).

question of state laws' acceptable territorial reach, including the *Pike*[41] strand of the dormant Commerce Clause,[42] the Import–Export Clause,[43] the Fifth and Fourteenth Amendment Due Process Clauses,[44] the Privileges and Immunities Clause,[45] and the Full Faith and Credit Clause.[46] For many reasons, this long list engenders more puzzlement than illumination. Some of these provisions, such as the Import–Export Clause, have never before been applied in the interstate context at all.[47] Others, like the Full Faith and Credit Clause, have lost most of their force in recent years.[48] With the exception of *Pike*, none of them has been applied to the scenario at issue in *National Pork*—a duly enacted state law that is alleged to have effects on out-of-state activities that exceed the proper scope of the state's territorial power.[49]

In short, developments both before the Court (the narrowing or abandonment of doctrines that served, however clumsily or imperfectly, to restrain states' extraterritorial reach) and outside it (states' increasing focus on advancing public values rather than mere economic protectionism) appear to be converging in a way that heightens uncertainty and the potential for conflict. Taking this situation as its starting point, this Article attempts to delineate the problem and to suggest directions future doctrine could take to address it.

This Article proceeds in four Parts. Part I discusses the changing landscape of legislation with extraterritorial effects. Part II outlines the way in which *National Pork* and *Mallory* have removed some of the restraints that previously operated to prevent states from exceeding their proper territorial

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

42. *See Nat'l Pork*, 143 S. Ct. at 1166 (Sotomayor, J., concurring in part) (explaining that in some circumstances, *Pike* claims may be viable even if they do not "allege discrimination or a burden on an artery of commerce").

43. *Id.* at 1153 (majority opinion); *see also id.* at 1175 (Kavanaugh, J., concurring in part and dissenting in part) (suggesting that the interpretation of the Import–Export Clause as only applying to imports from foreign countries "may be mistaken as a matter of constitutional text and history").

44. *Id.* at 1156 (majority opinion).

45. *Id.* at 1153; *id.* at 1175 (Kavanaugh, J., concurring in part and dissenting in part).

46. *Id.* at 1156 (majority opinion); *id.* at 1175–76 (Kavanaugh, J., concurring in part and dissenting in part).

47. Justice Thomas, however, has long argued for an expanded interpretation of this provision. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 621 (1997) (Thomas, J., dissenting) (arguing that while "[t]o the 20th-century reader, the [Import–Export] Clause appears only to prohibit States from levying certain kinds of taxes on goods imported from or exported to *foreign* nations," a "strong argument can be made" that the Framers intended otherwise).

48. *See* Florey, *supra* note 6, at 1077, 1080–81 (discussing the Court's modern choice-of-law jurisprudence and concluding that under these precedents, states have near-limitless power to "apply their law to disputes over which they have jurisdiction" without constitutional constraints).

49. Previous cases addressing this situation have relied either on *Pike* or on a broader extraterritoriality principle that the Court has suggested is also attached to the dormant Commerce Clause. *See* Florey, *supra* note 6, at 1085–86 (discussing how the dormant Commerce Clause came to encompass extraterritoriality concerns).

bounds. Part III explains why the solutions the Court has proposed may be inappropriate or inadequate to address this problem. Finally, in Part IV the Article suggests that, perhaps somewhat ironically given its historical focus on economic issues, the dormant Commerce Clause's *Pike* balancing test will likely continue to play a central role in defining the outer bounds of states' ability to project beliefs and values extraterritorially. The Article closes by reflecting on the pros and cons of this development and suggesting some ways *Pike* analysis might be refined to fit this new landscape.

I. The New Face of State Extraterritoriality

The sort of extraterritoriality issues that arise may be changing as states increasingly enact legislation designed to reflect and advance ideological beliefs about which the country is increasingly polarized. This Part explores this phenomenon in general. It then discusses three areas in which this trend has begun to manifest itself: abortion, gender-affirming care, and other healthcare issues; pro- and anti-ESG policies; and product standards designed to advance state values. Finally, it discusses why these sorts of laws may create new types of extraterritoriality conflicts.

A. States' Turn Toward Value-Advancing Legislation

It is a commonplace to observe that the United States has become more politically polarized in recent years and, further, that a confluence of political, social, and legal factors has made this polarization particularly manifest in state legislatures. Forces driving these developments include increased candidate engagement with activists,[50] threats to voting rights,[51] partisan gerrymandering,[52] and changing campaign finance regulation that has increased the influence of wealthy donors.[53] As a result, campaign strategy has turned its attention from the undecided voter to the "engaged public," members of a party's base who are often more extreme than the party's mainstream but who vote consistently and persuade others to vote.[54]

As such sometimes-extreme polarization has gained ground, Naomi Cahn and June Carbone argue, "policy differences between the states have

50. *See* Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 299 (2011) (identifying closed primary election systems as a contributor to "more polarized partisan officeholders" because of the dominance of "ideologically committed and hardcore party activists").

51. Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1369–70 (2015).

52. Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379, 1381 (2020).

53. Michael S. Kang, *The Brave New World of Party Campaign Finance Law*, 101 CORNELL L. REV. 531, 536 (2016).

54. *See* Pildes, *supra* note 50, at 279–80 ("The engaged public, those who contribute to and work on campaigns, and those to whom officeholders are most likely to respond, constitutes a substantial portion of the electorate.").

increased."[55] Further, they note, the "New Federalism" has given states opportunities to make law on a greater variety of issues,[56] a trend to which the Supreme Court's opinion in *Dobbs v. Jackson Women's Health Organization* contributed by opening the door to previously foreclosed state restriction of abortion.[57] As issues like abortion "become a marker of political identity,"[58] both polarization and the influence of activist groups have caused legislatures to pass more intensely ideological legislation.[59]

These trends have implications for state extraterritoriality and the law that governs it. To begin with, extreme polarization may make clashes between states more likely. In part, this is because polarization, which exists to some extent on both the left and the right,[60] tends to increase *differences* between states on legal rules.[61] As a matter of both logic and historical experience, the more regulatory variation from state to state exists, the more occasions there are for clashes between jurisdictions.[62] And statutes passed by highly ideological legislators of opposite stripes in different states are likely, for obvious reasons, to diverge significantly from each other.

A related point is that polarization may not only drive legislatures to pass more extreme legislation but also increase their zeal for a fight. As legislators enact their own deeply held beliefs (or those of the activists and donors who support them) into law, it may be particularly galling as states of a different political stripe pass laws intended to achieve the opposite outcomes. This may particularly be true when laws of left-leaning states influence events in right-leaning ones and vice versa, such as when an abortion-restrictive state's residents obtain abortions by traveling to permissive jurisdictions or when a doctor in an abortion-permissive state must worry about liability when providing abortion care to a resident of a restrictive state. The abortion question alone has brought about a seemingly unprecedented flurry of laws and proposals focused on influencing events in states with opposing policies.[63]

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55. Naomi Cahn & June Carbone, *Supporting Families in a Post-*Dobbs *World: Politics and the Winner-Take-All Economy*, 101 N.C. L. REV. 1549, 1575 (2023).

56. *Id.*

57. *Id.* at 1552.

58. *Id.* at 1580.

59. *Id.* at 1580–81.

60. *See* Pildes, *supra* note 50, at 286 (illustrating polarizing partisan behavior by both Republicans and Democrats).

61. *See* Cahn & Carbone, *supra* note 55, at 1576 (observing that "states are moving apart on high profile issues such as abortion").

62. *See* Katherine Florey, *Resituating Territoriality*, 27 GEO. MASON L. REV. 141, 155–56 (2019) (pointing out that in the twentieth century there were fewer clashes between jurisdictions because there was less divergence between state laws).

63. *See* David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 22–24 (2023) (describing ways in which abortion-restrictive states may try to undermine the laws of abortion-permissive states).

In significant part, historical concern about extraterritoriality was bound up with concerns about favoritism toward state residents or industries.[64] But while the age-old tendency of states to prefer state residents will surely continue, a different set of extraterritoriality concerns has begun to arise—one that is primarily rooted in ideological clashes between states rather than economic protectionism. The following subparts describe some of these growing conflicts.

B. Examples of Developing Conflicts

In several areas, state legislative activity has stepped up on subjects that are likely to lead to conflicting interstate standards and questions about how far one state's authority can validly reach. The following sections describe three of the areas where states have been particularly active: legislation about abortion and healthcare, legislation about the use of ESG factors in investment decisions, and mandates involving products or product labeling.

1. Abortion and Other Contentious Healthcare Issues—Following the Supreme Court's decision in *Dobbs*, numerous states have raced to pass legislation either to secure or to restrict the right to obtain an abortion. As commentators have noted, many of these measures have extraterritorial dimensions.[65] Abortion restrictions can target out-of-state conduct in multiple ways, including by imposing civil or criminal liability on out-of-state abortion providers who treat residents of restrictive states, making out-of-state travel to obtain an abortion illegal, and creating aiding and abetting liability for those who help residents leave the state to have an abortion.[66]

Some recently passed abortion measures seem to anticipate possible application to out-of-state events. Texas's notorious Senate Bill 8, for example, seeks to deter abortion providers by establishing a $10,000 bounty

64. *See* Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 378 (6th Cir. 2013) (Sutton, J., concurring) (arguing that while at one point, "it made sense to think of extraterritoriality as a relevant proxy for interstate-commerce violations," that point is now past and that many current extraterritoriality issues have nothing to do with favoritism). Favoritism is likely to be a particular concern in litigation, where state courts may apply forum law broadly to the advantage of local residents.

65. *See, e.g.*, Jensen Lillquist, *Comity & Federalism in Extraterritorial Abortion Regulation*, MICH. J. GENDER & L. (forthcoming 2024) (manuscript at 15), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4346269 [https://perma.cc/2R7C-PNKW] (observing that abortion-restrictive states "float various proposals to prevent or limit abortions in permissive states, while permissive states have passed 'shield' laws to limit the effectiveness of restrictive states' extraterritorial regulation"); Cohen et al., *supra* note 63, at 24 (noting proposals made by politicians in Missouri and Texas to restrict out-of-state abortions); Florey, *supra* note 23, at 497 (discussing Texas legislation that "contains no geographical restrictions on who may sue," the citizenship of a defendant, or where the aiding and abetting of an abortion occurred).

66. Tom Lininger, *Abortion, the Underground Railroad, and Evidentiary Privilege*, 80 WASH. & LEE L. REV. 663, 680–81, 685–86, 691–92 (2023).

that private individuals may collect by suing anyone who provides or assists in an abortion after a fetal heartbeat is detected.[67] Key parts of the statute are not geographically specific,[68] leading one journalist to speculate that "[i]t is within the realm of possibility that a Wisconsinite could sue a Californian for abetting a Texan's abortion."[69] Idaho and Oklahoma have enacted similar laws, and fifteen additional bills that follow the same private-enforcement model have been introduced in thirteen states.[70]

Another class of abortion legislation focuses directly on extraterritorial events. Legislators in Missouri have debated laws that would make it illegal to assist a minor in crossing state lines to obtain an abortion.[71] A National Right to Life Committee memo has proposed model laws imposing criminal penalties for "abortion trafficking" of a minor.[72] Numerous states have expanded telemedicine restrictions in an effort to suppress a common means by which people seek abortion across state lines.[73] Meanwhile, several abortion-supportive states have passed laws aiming to protect citizens who aid nonresidents in obtaining abortions.[74] Vermont recently went still further, creating a cause of action—seemingly directed at out-of-state as well as

67. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.204(a) (prohibiting physicians from knowingly performing an abortion after a fetal heartbeat is detected); *id.* § 171.208 (providing that "[a]ny person, other than [a state] officer or employee . . . may bring a civil action" with "statutory damages . . . not less than $10,000 for each abortion that the defendant performed" or "aided or abetted").

68. *See* Florey, *supra* note 23, at 497 (describing the extraterritorial nature and implications of the statute).

69. Maggie Astor, *Here's What the Texas Abortion Law Says*, N.Y. TIMES (Sept. 9, 2021), https://www.nytimes.com/article/abortion-law-texas.html [https://perma.cc/YGA9-CZC9].

70. CTR. FOR REPROD. RTS., 2022 STATE LEGISLATIVE WRAP-UP 11 (2022), https://reproductiverights.org/wp-content/uploads/2022/12/2022_StateLegWrapUp_DIGITAL.pdf [https://perma.cc/MH5B-4FYG]; *see also* Kate Zernike, Mitch Smith & Luke Vander Ploeg, *Oklahoma Legislature Passes Bill Banning Almost All Abortions*, N.Y. TIMES (June 25, 2022), https://www.nytimes.com/2022/05/19/us/oklahoma-ban-abortions.html [https://perma.cc/GTH8-D6M7] (discussing passage of an Oklahoma law that "allows private individuals to sue abortion providers and anyone who 'aids or abets' an abortion," and noting that the Oklahoma law is modeled on Texas's law).

71. *See* Cohen et al., *supra* note 63, at 5 (discussing two Missouri bills, the first of which proposed applying abortion restrictions to "out-of-state abortions performed on Missouri citizens" and the second of which would have "imposed civil liability" on those who helped Missourians obtain out-of-state abortions).

72. *See* Memorandum from James Bopp, Jr., Nat'l Right to Life Comm. Gen. Couns., to Nat'l Right to Life Comm. 7 (June 15, 2022), https://s3.documentcloud.org/documents/22075433/nrlc-model-legislation.pdf [https://perma.cc/X8VX-FFWN] ("recommend[ing]" that "abortion trafficking of a minor" be made a "Level 3 Felony").

73. *See* CTR. FOR REPROD. RTS., *supra* note 70, at 13 (listing seventeen states that enacted bans on telemedicine abortion in 2022).

74. Cohen et al., *supra* note 63, at 5.

Vermont residents—for tortious interference with "legally protected health care activity," including abortion and gender-affirming care.[75]

Abortion is not the only medical-care issue that divides people and states. Writing three decades ago, Lea Brilmayer observed that, like abortion, voluntary euthanasia is an issue "on which state law intersects with deeply held moral convictions, and on which state laws vary"—raising "the question . . . whether people's home states can regulate their activities when they are temporarily present in a place where those activities are legal."[76] The current polarized climate has created additional examples, including access to gender-affirming care for minors. Such care was once generally available, but as of summer 2023, at least twenty states had restricted it in some way, in some cases with "new laws that imply or sometimes directly accuse [families] of child abuse for supporting their kids in getting health care."[77] In turn, many families who cannot leave their home state have turned to "finding out-of-state medical care they say allows their children to thrive."[78] States supportive of gender-affirming care have responded with their own laws attempting to safeguard such treatment; the Vermont healthcare access bill mentioned above aims to protect gender-affirming care as well as abortion.[79]

Commentators have noted that such laws on various hot-button social issues have significant potential to spark clashes over the territorial reach of state authority. Noah Smith-Drelich, for example, predicts that "[g]iven the increasing moral disagreement from state to state on prominent issues like abortion, gender-affirming care, conversion therapy, and physician-assisted suicide, states appear primed to test the limits of their extraterritorial legislation, including via restrictions on travel."[80]

Where states pass clashing laws on social issues affecting individuals, most commentary has focused on the constitutionality of restrictive states' efforts to limit travel to more permissive ones.[81] There are other ways, however, in which states' efforts to take a stance on contentious social issues

75. VT. STAT. ANN. Tit. 12, § 7302(c) (West 2023); *see also id.* tit. 1, § 150 (defining "[l]egally protected health care activity" to include "gender-affirming healthcare services" and "reproductive health care services"). Because the provision is paired with one pronouncing any "public act or record of a foreign jurisdiction" interfering with protected health care to be against Vermont public policy, *id.* § 7302(b), it appears directed at nonresidents as well as Vermont residents.

76. Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873, 873–74 (1993).

77. Arleigh Rodgers & Michael Goldberg, *New State Laws Force Families with Trans Kids to Seek Gender-Affirming Care Elsewhere*, PBS NEWSHOUR (July 10, 2023, 2:27 PM), https://www.pbs.org/newshour/nation/new-state-laws-force-families-with-trans-kids-to-seek-gender-affirming-care-elsewhere [https://perma.cc/6XRK-FLTJ].

78. *Id.*

79. *See supra* note 75 and accompanying text.

80. Noah Smith-Drelich, *Travel Rights in a Culture War*, 101 TEXAS L. REV. ONLINE 21, 32 (2022).

81. *See infra* note 369 and accompanying text.

may lead to questions about such laws' extraterritorial effects. For example, many companies have announced that they will pay for employees who live in abortion-restrictive states to travel to obtain the procedure elsewhere.[82] Some anti-abortion legislators, however, have proposed bans on this practice as a condition of doing business in abortion-restrictive states.[83] It is conceivable as well that employers could be sued or even criminally prosecuted for assisting employees in obtaining out-of-state abortions.[84] Conflicting incentives, bans, or mandates could create considerable confusion and legal risk for corporations operating at a national level.[85]

2. ESG Battles—Increasingly, states have taken opposite positions—apparently rooted in political conviction rather than efforts to maximize return—about how state fiduciaries and fund managers may invest. A growing number of investment firms and investment funds determine which companies will be included in their funds using environmental, social, and governance (ESG) evaluations,[86] which take into account environmental factors such as waste management, environmental compliance, and efficiency; social considerations such as diversity, philanthropy, and labor practices; and corporate governance elements such as board effectiveness.[87]

As interest in ESG has grown, different states have adopted ESG legislation with opposite mandates. Several states require state pensions to invest exclusively in firms or funds that do not use ESG evaluations, while a smaller number of states restrict permissible investments to entities that *do*

82. Daniel Wiessner, *Legal Clashes Await U.S. Companies Covering Workers' Abortion Costs*, REUTERS (June 27, 2022, 3:08 PM), https://www.reuters.com/world/us/legal-clashes-await-us-companies-covering-workers-abortion-costs-2022-06-26/ [https://perma.cc/Z685-V7CN].

83. *See id.* (describing a bill introduced by Texas legislators "that would bar companies from doing business in Texas if they pay for residents of the state to receive abortions elsewhere").

84. *See id.* (noting that Texas legislators have threatened "swift and decisive action" against employers for their abortion-travel-reimbursement policies).

85. *See id.* ("It is likely only a matter of time before companies face lawsuits from states or anti-abortion campaigners claiming that abortion-related payments violate state bans on facilitating or aiding and abetting abortions . . . ."); Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1174 (2023) (Kavanaugh, J., concurring in part and dissenting in part) (suggesting that states might "shutter their markets to goods produced in a way that offends their moral or policy preferences" to "effectively force other States to regulate in accordance with" those preferences).

86. *See* Lindsay Delevingne, Anna Gründler, Sean Kane & Tim Koller, *The ESG Premium: New Perspectives on Value and Performance*, MCKINSEY SUSTAINABILITY (Feb. 12, 2020), https://www.mckinsey.com/capabilities/sustainability/our-insights/the-esg-premium-new-perspectives-on-value-and-performance [https://perma.cc/TP4U-G32Q] (describing the growing number of "[e]xecutives and investment professionals" that "commonly take ESG issues into consideration when making strategic and operational decisions").

87. A. Kocmanová & M. Dočekalová, *Construction of the Economic Indicators of Performance in Relation to Environmental, Social and Corporate Governance (ESG) Factors*, ACTA UNIVERSITATIS AGRICULTURAE ET SILVICULTURAE MENDELIANAE BRUNENSIS [ACTA UNIV. AGRIC. SILVIC. MENDELIANAE BRUN.] (Czech), Aug. 7, 2013, at 195, 195–96.

use such evaluations.[88] Some anti-ESG legislation sweeps even more broadly, prohibiting investing with firms or funds that boycott certain industries, primarily fossil fuel and guns.[89] Texas has perhaps the nation's most comprehensive anti-ESG legislation, specifically prohibiting state fiduciaries from investing with 348 different investment firms and funds.[90]

By contrast, pro-ESG laws require that state fiduciaries invest with firms or funds that incorporate ESG evaluations.[91] Illinois and Maryland, for example, have passed laws requiring that state funds develop investment policies using ESG factors and considering the impact of climate change.[92] Maine has passed a law requiring state funds to divest from the fossil fuel industry.[93]

At the moment, anti-ESG measures, which are currently more prevalent than pro-ESG requirements,[94] appear to have had modest impact on the behavior of corporations or funds. A study of the effects of Texas's sweeping anti-ESG legislation found that the banned funds suffered few if any negative consequences from the loss of Texas pension funds, and the funds themselves experienced no significant increase or decrease in capital or return.[95] Where anti-ESG bans target index funds, as is the case with nearly half the banned funds in Texas,[96] such bans may be particularly unavailing, given that corporations experience minimal individual effect when a state pension fund invests or fails to invest with a fund they are a part of. In Texas, for example, companies in the named prohibited index funds include the likes of Microsoft, Alphabet (Google), Apple, Mastercard, Comcast, Adobe, Amazon, Verizon, Tesla, Nike, T-Mobile, and Visa[97] for which any effect is likely to be trivial compared to their overall scale of operations.

Nonetheless, the task of balancing conflicting state regulations with investor and stakeholder preferences can be a complex one with the potential for broader effects. A recent article argues that anti-ESG measures create

88. Malone et al., *supra* note 24; *see also* Dru Stevenson, *The Gun Industry and the New Anti-Boycott Laws*, FLA. L. REV. (forthcoming) (manuscript at 2–3, 7–8), https://ssrn.com/abstract=4300410 [https://perma.cc/S392-JCU3] (discussing states' ESG laws as they relate to the gun industry).

89. Malone et al., *supra* note 24.

90. Shivaram Rajgopal, Anup Srivastava & Rong Zhao, Do Political Anti-ESG Sanctions Have Any Economic Substance? The Case of Texas Law Mandating Divestment from ESG Asset Management Companies 4 (Mar. 3, 2023) (unpublished manuscript), https://ssrn.com/abstract=4386268 [https://perma.cc/PUT9-VYLT].

91. *See* Malone et al., *supra* note 24 (providing examples of state laws that enforce ESG requirements).

92. *Id.*

93. *Id.*

94. *Id.*

95. Rajgopal et al., *supra* note 90, at 18–19.

96. *Id.* at 16.

97. *Id.* tbl. 4.

"significant legal, operational, reputational, political and financial concerns for funds, asset managers and companies" that rely on ESG, "threatening state contracts and the removal of state funds from investment portfolios."[98] If states continue, as they have been doing, to "step[] up their lawmaking" on this issue,[99] the problem could potentially grow more serious.

3. Product Standards—In a number of other areas, states have adopted laws that, like California's Proposition 12, seek to regulate products to advance health, environmental, or ethical goals. Seven other states have laws similar to—although less sweeping than—Proposition 12, the aim of which is to increase animal welfare by restricting the sale of goods from producers who do not follow state standards of humane treatment.[100] That the Court has now upheld California's law in *National Pork* will likely encourage additional states to follow California's lead.[101] It seems possible as well that states may try to extend the Proposition 12 model—that is, specifying how a good must be produced in order to be sold within a state—to areas beyond animal welfare. In *National Pork*, for example, Justice Kavanaugh raised the specter that states might "prohibit[] the sale of goods produced by workers paid less than $20 per hour."[102] This is not a wholly implausible suggestion. Lawyers representing employees in wage and hour litigation already see *National Pork* as a "win for workers" because it restricts the degree to which employers can challenge states' pro-worker legislation using extraterritoriality/dormant Commerce Clause arguments.[103]

States have also been active in regulating product description and labeling, sometimes to serve broader ideological goals. Several states, for

98. Malone et al., *supra* note 24; *see also* Brooke Goodlett, Deanna Reitman, Noah Schottenstein & Victoria McGuire, *The "Anti-ESG" Movement: Balancing Conflicting Stakeholder Concerns and Inconsistent Regulatory Regimes*, DLA PIPER (Feb. 21, 2023), https://www.dlapiper.com/en-us/insights/publications/2023/02/the-anti-esg-movement-balancing-conflicting-stakeholder-concerns-and-inconsistent-regulatory-regimes [https://perma.cc/W6UU-WWQC] (detailing the conflicting stakeholder interests and legal regimes that "[c]ompanies developing sustainability initiatives must balance").

99. Malone et al., *supra* note 24.

100. Kenny Torella, *California Has the Country's Strongest Animal Welfare Law. Now It Just Needs to Be Enforced.*, VOX (June 3, 2023, 7:00 AM), https://www.vox.com/future-perfect/23745935/proposition-12-pigs-pork-california-eggs-veal-hens [https://perma.cc/3Z2R-6C28].

101. *See* Justin Marceau & Doug Kysar, *The Supreme Court's Ruling on Prop 12 Is a Win Against Factory Farming. But the Pigs' Lives Will Still Suck.*, VOX (May 12, 2023, 2:45 PM), https://www.vox.com/future-perfect/23721488/prop-12-scotus-pork-pigs-factory-farming-california-bacon [https://perma.cc/89G2-438T] (noting that a similar Massachusetts proposed law is likely to move forward following *National Pork*).

102. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1174 (2023) (Kavanaugh, J., concurring in part and dissenting in part).

103. Max Kutner, *High Court's* Pork Producers *Ruling Could Shape Wage Cases*, LAW360 (May 25, 2023, 6:29 PM), https://www.law360.com/employment-authority/articles/1681252/high-court-s-pork-producers-ruling-could-shape-wage-cases [https://perma.cc/D3P2-3QR8].

example, have tried to prohibit vegan or vegetarian substitutes for meat and dairy products from being labeled with terms like "plant-based meat" or "milk."[104] This impulse, at least one commentator has argued, stems less from a specific policy goal than from a desire to protect values that many people associate with animal foods, such as "'the good old days' and tradition."[105] Other states have required "warning labels or ingredient listings which go above and beyond national standards"—a practice that has "affected labeling of products ranging from soda to cell phones and typically involve[s] inconsistent mandates from state to state."[106]

Even pre–*National Pork*, many state laws setting product standards survived legal challenges founded on extraterritoriality arguments. Courts sustained, for example, a Vermont statute mandating labeling of some mercury-containing products[107] and an Ohio rule seeking to prevent mislabeling of dairy products containing artificial hormones.[108] Laws addressed to pricing and production rather than labeling have had a more mixed record. Although the Tenth Circuit, for example, sustained a Colorado law requiring electricity generators to use energy from renewable sources,[109] courts struck down on extraterritoriality grounds a Maryland restriction on pharmaceutical price gouging[110] and part of a Minnesota law limiting utilities' ability to import energy generated by coal.[111] Because both cases relied on precedent undermined by *National Pork*,[112] it seems possible that in the wake of the decision, states will try again to craft legislation to achieve similar or possibly even more ambitious goals. Although occasionally such laws might be vulnerable to being challenged as protectionist, others—like measures intended to fight climate change—are clearly efforts to fight what legislators see as a societal problem, not simply attempts to benefit the voters of a particular state. As a result, they are likely to raise distinct extraterritoriality issues.

104. Iselin Gambert, *I Want You to Panic: Leveraging the Rhetoric of Fear and Rage for the Future of Food*, J. FOOD L. & POL'Y, Fall 2021, at 41, 65–66.

105. *Id.* at 56.

106. Stephanie (Malchine) Neitzel, Comment, *One Size Fits All: A Federal Approach to Accurate Labeling of Consumer Products*, 23 J. HEALTH CARE L. & POL'Y 87, 99 (2020).

107. Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 107–08 (2d Cir. 2001).

108. Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 634, 648 (6th Cir. 2010).

109. Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1170–71 (10th Cir. 2015).

110. Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 666 (4th Cir. 2018).

111. *See* North Dakota v. Heydinger, 825 F.3d 912, 913–14 (8th Cir. 2016) (holding that a ban on importing energy that would increase statewide carbon dioxide admissions violated the dormant Commerce Clause).

112. *See Frosh*, 887 F.3d at 667 (relying on *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), and *Healy v. Beer Institute*, 491 U.S. 324 (1989), in its discussion of Supreme Court extraterritoriality doctrine); *Heydinger*, 825 F.3d at 919 (same); *infra* section II(A)(2).

C. Effects on Extraterritoriality Issues

Likely to a greater extent than traditional protectionism, efforts to enshrine state values may tend to push states toward geographically expanding the reach of their laws into other jurisdictions. This is true for two reasons. First, value-driven laws may need to influence what happens in neighboring states to be effective. Second, advocates of such laws may be motivated by moral values and political beliefs that are not confined to their home jurisdiction. The resulting extraterritorial friction may pose particular problems for corporations or other entities that operate across multiple states.

First, consider the issue of making law meaningful and effective. In contrast to economically protectionist measures—which may serve their intended purpose fairly well even if they are somewhat porous—the efficacy of value-protective laws depends to a much greater degree on consistent enforcement that interstate dissensus may threaten. A given state's limits on abortion, for example, will undoubtedly have significant effect even if abortions are easily obtainable outside state borders. Clearly, however, many residents with adequate money and time will be able to take advantage of the ability to travel, and ready availability of out-of-state abortions will thus undermine the law's purposes. At the other end of the ideological spectrum, the effectiveness of laws like California's Proposition 12 also hinges on developments in other states. Given that most pork in California is imported,[113] if Californians want to purchase pork from humanely kept pigs, they need pig farmers in other states to abide by the treatment standards California has enacted.

In both cases, because such measures may reflect strong moral and ideological beliefs on the part of those who enacted them, lawmakers may find particularly unacceptable a situation where widespread evasion can occur. A Californian supporter of Proposition 12 who believes that current agricultural practices are scandalously inhumane is unlikely to limit that concern to animals within California's borders. An evangelical Christian who finds abortion to be a profound moral wrong will probably be unsatisfied with a statewide ban on the practice if citizens can easily circumvent it by traveling elsewhere. To effectuate laws and to advance the often deeply held principles that undergird them, the public in one state (or at least its more activist members) may demand action that arguably reaches into other states' territorial spheres.

These problems, to be sure, are not altogether new. In an important article on horizontal federalism, Allen Erbsen enumerates various scenarios

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

likely to result in interstate friction,[114] several of which are particularly relevant to situations in which state values clash. Perhaps the most relevant are the problems of havens—which generally occur when either a "permissive state . . . become[s] a magnet for citizens of relatively restrictive states"[115] or a "permissive majority of states provide[s] a haven for refugees from a restrictive outlier"[116]—and exclusions, when states set restrictive standards whose "practical effect is to force actors with a nationwide presence to comply . . . in order to do business in any state."[117] Yet in many areas, the existence of interstate effects such as the haven phenomenon need not always cause conflict; legislators may tacitly sanction or at least accept the availability of a good or service in another jurisdiction as long as their own state remains free of it. In the realm of tribal gaming, for example, many states have allowed tribal lands to become "islands of gaming permissiveness in an ocean of gaming intolerance."[118] Differing state policies on cannabis legalization may be unfolding in a similar way, with a growing national consensus in favor of toleration resulting in less interstate friction over the issue than some predicted.[119]

By contrast, the more legislation reflects intense beliefs on the part of the public, the more controversial its evasion is likely to be. Indeed, as appears to be already occurring with abortion, states may actively court tension with other states that have opposite policies. Value-laden legislation, therefore, raises the stakes and in some cases potentially invites conflict with other states, in order both to fully achieve its purposes and to express the depth of the enacting state's commitment to the underlying principle. All of this has the potential to create a new kind of extraterritoriality issue, one that may be particularly likely to result in conflict rather than quiet toleration.

II. The Supreme Court's Unintentional Removal of Extraterritoriality Guardrails

In two recent cases—*National Pork Producers Council v. Ross* and *Mallory v. Norfolk Southern Railway Co.*—the Court reworked, respectively, dormant Commerce Clause extraterritoriality and personal jurisdiction

114. *See* Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 514–28 (2008) (identifying scenarios including dominion (one state seeking directly to invade the territory of another), havens (states with the most permissive laws), exclusions (more restrictive standards that may create problems for nationwide operations), favoritism toward local interests, externalities and free-riding, rogue behavior (such as ignoring another state's judgment), excessive competition (such as "races to the bottom"), and overreaching (such as excessive extensions of civil jurisdiction)).

115. *Id.* at 516.

116. *Id.* at 518.

117. *Id.* at 520.

118. Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 294 (2003–2004).

119. *See* Florey, *supra* note 23, at 540.

doctrine in a way that seems likely to lead to more friction over state overreach. This does not appear to be a deliberate effect; indeed, several members of the Court expressed concerns over both decisions' potential to undermine the federalist balance.[120] The Court's driving motivations were elsewhere: in *National Pork*, it rejected a strand of dormant Commerce Clause doctrine that had long been derided as incoherent,[121] while in *Mallory* it affirmed a century-old precedent in a presumed effort to maintain stability and continuity in the notoriously muddled field of general personal jurisdiction.[122] Nonetheless, both decisions in many ways further complicate the already-vexed extraterritoriality landscape. The following subparts explore each decision in turn, discussing the ways in which each changed existing law in a manner that may enable broader territorial assertions of state power.

A. National Pork, Pike, *and the (Likely) End of Dormant Commerce Clause Extraterritoriality Doctrine*

To put *National Pork*'s result into context, the following subpart considers the history of the extraterritoriality strand of dormant Commerce Clause doctrine and then goes on to discuss how the Court has scaled it back. It then considers how the opinion may affect the related balancing test of *Pike v. Bruce Church, Inc.*, a test that is not explicitly about extraterritoriality but touches on relevant issues.

1. The History of Extraterritoriality and the Dormant Commerce Clause—Courts have long inferred from the Constitution's grant of power to Congress "[t]o regulate Commerce . . . among the several States,"[123] that "state laws that interfere with interstate commerce" may be constitutionally suspect, a principle known as the dormant Commerce Clause.[124] While the perceived function of the dormant Commerce Clause has shifted over the years, the Court's primary concern for the past several decades has been almost entirely with "preventing states from engaging in purposeful economic protectionism."[125]

The idea that the dormant Commerce Clause might also have something to say about extraterritoriality dates from the early twentieth century but was not well developed until the 1980s. The first case to touch on the issue,

120. *See infra* subpart III(A).

121. *See infra* section II(A)(2).

122. *See infra* subpart II(B).

123. U.S. CONST. art. I, § 8.

124. Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877, 1878 (2011).

125. Regan, *supra* note 13, at 1092–94.

Baldwin v. G.A.F. Seelig, Inc.,[126] concerned a New York statute that barred sales of milk produced outside the state unless the price paid by the dealer to the producer was as high as that guaranteed by New York law for in-state milk purchases.[127] In finding this rule to be invalid under the Commerce Clause, the Court considered the issue of extraterritorial reach, concluding that "New York has no power to project its legislation into [another state] by regulating the price to be paid in that state for milk acquired there."[128]

The Court devoted little attention, however, to this branch of dormant Commerce Clause doctrine until several decades later, when in the 1980s it decided a series of cases reviving and seemingly expanding the principles on which *Baldwin* had rested. The first of these, *Edgar v. MITE Corp.*,[129] dealt with a situation significantly different from that in *Baldwin*—and, indeed, failed to mention *Baldwin* at all. *Edgar* concerned a challenge to an Illinois statute under which the secretary of state could hold a hearing to assess the fairness of a tender offer and, depending on the outcome, might be required to deny registration to it.[130] This procedure applied whenever the tender offer targeted a corporation that had 10% of its shares owned by shareholders located in Illinois or two of the following: had its principal office in Illinois, was organized under Illinois law, or had at least 10% of its stated capital within the state.[131] The Court found the law to be invalid under a more conventional application of the dormant Commerce Clause, the *Pike* balancing test,[132] which will be discussed in a later section of this Article.[133] A plurality, however, also raised concerns about the Illinois scheme's territorial scope, observing that it "directly regulate[d] transactions which take place across state lines, even if wholly outside the State of Illinois."[134] Noting the law's potentially "sweeping extraterritorial effect," Justice White's plurality opinion raised the concern that other states might pass similar laws, with a resultant "stifl[ing]" effect on "interstate commerce in securities transactions generated by tender offers."[135] In light of such issues, the opinion concluded that the dormant Commerce Clause restricts states from regulating commerce "that takes place wholly outside of the State's borders," even if it has in-state effects."[136]

126. 294 U.S. 511 (1935).
127. *Id.* at 519.
128. *Id.* at 521.
129. 457 U.S. 624 (1982).
130. *Id.* at 627.
131. *Id.*
132. *Id.* at 643.
133. *See infra* section II(A)(3).
134. *Edgar*, 457 U.S. at 641 (plurality opinion).
135. *Id.* at 642.
136. *Id.* at 642–43.

The Court quickly followed up *Edgar* with three cases sounding similar themes. In *CTS Corp. v. Dynamics Corp. of America*,[137] the Court held that a narrower Indiana statute regulating tender offers did not violate the Commerce Clause, but it nonetheless reiterated the concerns of *Edgar*'s plurality, observing that in some cases the Commerce Clause precludes states from enacting laws that "may adversely affect interstate commerce by subjecting activities to inconsistent regulations."[138] Two other cases in the series, by contrast, dealt with scenarios more closely resembling that in *Baldwin*—so-called price-affirmation statutes that required liquor sellers, as a condition of doing business in the state, to file a schedule of prices and affirm that such prices were not higher than those offered elsewhere.[139] The first of these cases, *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,[140] involved a sweeping price-affirmation statute applying to all liquor sellers and barring them from selling goods more cheaply anywhere in the United States.[141] Relying on both *Baldwin*[142] and *Edgar*,[143] the Court invalidated the scheme, reasoning that, because posting prices in New York restricted a seller from changing prices elsewhere in that month, the seller would be "[f]orc[ed] . . . to seek regulatory approval in one State before undertaking a transaction in another," a situation the Court described as "directly regulat[ing] interstate commerce."[144]

The second price-affirmation case, *Healy v. Beer Institute*,[145] concerned a somewhat more narrowly drawn Connecticut scheme (applying only to beer sellers and requiring price-affirmation only as to neighboring states),[146] although one whose effects the Court ultimately found "essentially indistinguishable" from those at issue in *Brown-Forman*.[147] As in *Brown-*

137. 481 U.S. 69 (1987).

138. *Id.* at 88–89.

139. *See* Florey, *supra* note 6, at 1086 (describing the similar scenarios in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), and *Healy v. Beer Institute*, 491 U.S. 324 (1989)).

140. 476 U.S. 573 (1986).

141. *Id.* at 576.

142. *See id.* at 580 ("While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess." (first citing Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 528 (1935); and then citing Schwegmann Bros. Giant Super Mkts. V. La. Milk Comm'n, 365 F. Supp. 1144 (M.D. La. 1973), *aff'd*, 416 U.S. 922 (1974) (mem.))).

143. *See id.* at 582 ("Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce." (first citing Edgar v. MITE Corp., 457 U.S. 624, 642 (1982) (plurality opinion); and then citing *Baldwin*, 294 U.S. at 522)).

144. *Id.* (first citing *Edgar*, 457 U.S. at 642 (plurality opinion); and then citing *Baldwin*, 294 U.S. at 522).

145. 491 U.S. 324 (1989).

146. *Id.* at 326.

147. *Id.* at 339.

Forman, the Court found that the statute violated the Commerce Clause.[148] Despite the similarity of the cases, however, the Court went much further in *Healy*, suggesting that the Constitution—possibly, though not necessarily exclusively, by means of the Commerce Clause—placed significant restrictions on extraterritorial state regulation in general.[149] The Court first outlined the rationale for such restrictions, noting that the Constitution reflected a "special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres."[150] In consequence, the Court concluded, state regulation with extraterritorial effects was governed by three "propositions."[151] First, the Court, quoting *Edgar*, asserted that the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[152] Second, the Court stated, a statute is invalid, even if the legislature intended a more limited scope, if the "practical effect of the regulation is to control conduct beyond the boundaries of the State."[153] Third, an inquiry into a statute's validity must consider its effects on the "legitimate regulatory regimes of other States and what effect would arise if . . . many or every[] State adopted similar legislation"; the Commerce Clause, the Court stated, "protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."[154]

If these principles from *Healy* were to be taken literally, the validity of a considerable amount of state legislation could be thrown into doubt. As numerous commentators have pointed out, a given state's law often has the effect of "control[ling] conduct"[155] outside that state's borders or creating inconsistencies with the legal rules of another state.[156] A strict reading of

148. *See id.* at 337 (describing the statute as "just the kind of . . . economic regulation that the Commerce Clause was meant to preclude").

149. *See id.* at 336 (discussing both the Commerce Clause and "inherent limits of . . . State[] authority").

150. *Id.* at 335–36 (footnote omitted).

151. *Id.* at 336.

152. *Id.* (quoting Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982) (plurality opinion)).

153. *Id.* at 336.

154. *Id.* at 336–37.

155. *Id.* at 336.

156. *See, e.g.*, Metzger, *supra* note 9, at 1521 (noting that the projection of state law outside state borders happens "all the time"); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 804 (2001) (citing "tax laws, libel laws, securities requirements, charitable registration requirements, franchise laws, tort laws, and much more" as among the state laws that may have extraterritorial effect). The Court quoted this latter passage in *National Pork*. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1156 (2023) (quoting Goldsmith & Sykes, *supra*, at 804); *see also* Florey, *supra* note 6, at 1081 (noting that choice-of-

Healy could cause further chaos if it were to be applied, as litigants have occasionally succeeded in convincing courts to do,[157] not just to state statutes but also to state courts' decisions to apply forum law to out-of-state conduct or events—a practice that courts engage in fairly frequently.[158] As a result, in the years following *Healy*, commentators were largely unified in the belief that the sweeping language of *Healy* and some of its predecessors should not be taken at face value.[159]

In the early 2000s, the Court in *Pharmaceutical Research & Manufacturers of America v. Walsh*[160] took a step toward narrowing the doctrine, suggesting, although in a somewhat oblique fashion, that at least the *Healy* side of this line of cases might be limited to the price-affirmation context. Considering the constitutionality of a Maine program that required pharmaceutical manufacturers to enter into rebate deals with the state or face certain negative consequences,[161] the Court responded briefly to the challengers' efforts to raise extraterritoriality arguments, explaining that "Maine is not tying the price of its in-state products to out-of-state prices" and thus, "[t]he rule that was applied in *Baldwin* and *Healy* accordingly is not applicable to this case."[162] This statement was taken by some courts[163]

law decisions by state courts frequently result in the application of state law to out-of-state conduct or events).

157. *See* Florey, *supra* note 6, at 1104–08 (detailing scenarios in which courts have considered principles from *Edgar* and *Healy* in the context of judicial decision-making).

158. *See, e.g.*, John F. Coyle, William S. Dodge & Aaron D. Simowitz, *Choice of Law in the American Courts in 2021: Thirty-Fifth Annual Survey*, 70 AM. J. COMPAR. L. 318, 322, 325–27 (2022) (discussing cases in which a Minnesota court applied Minnesota law to events occurring in Iowa, the Eleventh Circuit applied Florida law to a cause of action arising in Alaska, and an Arkansas court applied Arkansas law to an accident that occurred in Texas). Although most courts have rebuffed the suggestion that *Healy* should apply to choice-of-law decisions, it would not be much of a logical leap to do so. Both direct legislation and a court's choice-of-law decision, after all, can result in the application of one state's law to out-of-state conduct. *See* Florey, *supra* note 6, at 1115–16 (noting that many of the concerns of the *Edgar–Healy* line of cases also apply in the choice-of-law context).

159. *See, e.g.*, Florey, *supra* note 6, at 1090 ("The extraterritoriality prohibition articulated in *Edgar* and *Healy* is so sweeping that most commentators have assumed that these cases cannot mean what they appear to say." (citing Goldsmith & Sykes, *supra* note 156, at 806)).

160. 538 U.S. 644 (2003).

161. *Id.* at 654. The rebates were to be used to enable pharmacies to provide discounted products to certain Maine residents. *Id.* Manufacturers who failed to negotiate a rebate would, first, have their identities made available to the public and, in some cases, would be subject to prior authorization requirements for their products. *Id.*

162. *Id.* at 669.

163. *See, e.g.*, Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1172, 1175 (10th Cir. 2015) (suggesting—in an opinion by then-Judge Gorsuch—that *Healy* and similar cases are primarily concerned with price-affirmation statutes that had the effect of raising prices for out-of-state residents).

and commentators[164] as limiting the extraterritoriality principle articulated in *Healy* to price-affirmation and price-control statutes, and it is clearly a strong suggestion that the principle has limited applicability outside this context. At the same time, it did not explicitly foreclose any wider sweep for *Healy*. Many lower courts continued to apply *Healy* in a variety of cases,[165] and *Healy* analysis maintained some support among a minority of commentators.[166]

2. National Pork*: Turning Further Away from* Healy—In *National Pork*, the Court took more explicit aim at *Healy*. The case arose out of a challenge to California's Proposition 12, a ballot initiative that required compliance with standards for humane animal treatment for all pork, veal, and eggs sold in California.[167] Two pork industry organizations challenged, on two dormant Commerce Clause grounds, the standards requiring that breeding pigs be confined in spaces large enough to allow a range of movement.[168] Conceding that, at least in theory, the California rules "impose[] the same burdens on in-state pork producers [as] on out-of-state ones"[169] and that the straightforward dormant Commerce Clause antidiscrimination principle thus did not apply,[170] the challengers nonetheless argued that Proposition 12 was invalid under, as the Court described it, "what they call the 'extraterritoriality doctrine,'"[171] as well as under the *Pike* balancing test.[172] In particular, the petitioners argued that the *Healy* cases created "an 'almost *per se*' rule against state laws with 'extraterritorial effects,'"[173] relying on the language in *Healy* disapproving of state legislation that has the "practical effect" of regulating commerce "occurring wholly outside the boundaries of [the] State."[174]

164. *E.g.*, Florey, *supra* note 23, at 507; Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 992–93 (2013); *see also* Richard H. Fallon, Jr., *If* Roe *Were Overruled: Abortion and the Constitution in a Post-*Roe *World*, 51 ST. LOUIS U. L.J. 611, 638 (2007) (expressing uncertainty whether the Court would adhere to a narrow or more expansive view of the *Healy* extraterritoriality principle).

165. Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 MARQ. L. REV. 497, 505–06, 508–11, 513 (2016).

166. *See id.* at 524–25 (arguing that *Healy*-type extraterritoriality analysis serves valuable functions even though some courts have misapplied it).

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

168. *Id.*

169. *Id.* at 1153. The two organizations argued that, because most pork in California is imported rather than produced in the state, burdens would—at least at first—be felt most acutely by producers outside the state. *Id.* at 1151–52.

170. *Id.* at 1153.

171. *Id.* at 1153–54.

172. *Id.* at 1157.

173. *Id.* at 1155.

174. *Id.* (alteration in original); Healy v. Beer Inst., 491 U.S. 324, 336 (1989).

Cautioning that "[t]he language of an opinion is not always to be parsed as though we were dealing with language of a statute,"[175] the Court rejected this view, stressing that "our opinions dispose of discrete cases and controversies and they must be read with a careful eye to context."[176] In the case of price-affirmation statutes, the relevant context was that *Brown-Forman* and *Healy* involved the "*specific* impermissible 'extraterritorial effect'" of "prevent[ing out-of-state firms] from undertaking competitive pricing" or "depriv[ing] businesses and consumers in other States of 'whatever competitive advantages they may possess.'"[177] In turn, these effects raised the "familiar [dormant Commerce Clause] concern with preventing purposeful discrimination against out-of-state economic interests."[178] Alluding to its reasoning in *Walsh*, the Court reaffirmed the idea that the *Healy* rule exclusively "address[es]" statutes imposing price-control or price-affirmation schemes.[179] The Court further cautioned against the effects of overreading *Healy*, suggesting that its widespread application could lead to "strange places," given that "[i]n our interconnected national marketplace, many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior."[180]

This analysis extends and solidifies the understanding of the *Healy* cases as near-exclusively relevant to the particular scenario of price-affirmation and price-control statutes, suggesting (however implausibly given *Healy*'s broad language) that *Healy*'s extraterritoriality concerns are limited to that context. The Court stopped one step short of totally foreclosing the application of *Healy* to other situations,[181] describing the *Healy* rule as "addressing" the price-affirmation context rather than strictly limited to it,[182] but its intention to sideline *Healy* seems unmistakable. The Court thus went further in cabining *Healy* than it had in *Walsh*, presumably discouraging lower courts from applying the test in the variety of contexts that some had in the past.[183]

3. National Pork *and* Pike*: More Confusion?*—In contrast to its swift disposal of the petitioners' *Healy* arguments, the Court took more seriously

175. *Id.* (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979)).

176. *Id.*

177. *Id.* (quoting *Healy*, 491 U.S. at 338–39 (quoting Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 580 (1986))).

178. *Id.* at 1154.

179. *Id.* at 1155 (quoting Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003)).

180. *Id.* at 1156.

181. *See id.* at 1156–57 ("The antidiscrimination principle found in our dormant Commerce Clause cases may well represent one more effort to mediate competing claims of sovereign authority under our horizontal separation of powers.").

182. *Id.* at 1155.

183. *See supra* note 165.

their challenge under the *Pike v. Bruce Church, Inc.* balancing test, an area of doctrine that fits more closely than cases like *Edgar* and *Healy* under the dormant Commerce Clause umbrella.[184] Under *Pike*, a state statute that is nominally "even-handed" toward out-of-state businesses may nonetheless run afoul of the dormant Commerce Clause if it imposes significant burdens on interstate commerce that are "clearly excessive in relation to the putative local benefits."[185] Although *Pike* is not explicitly a test of whether state regulation is impermissibly extraterritorial, it is easy to discern its relevance to that situation: a state law with significant extraterritorial application is likely to burden interstate commerce to some degree.[186] Indeed, some earlier cases that recognized a specific extraterritoriality principle, including *Brown-Forman* and *CTS Corp.*, also alluded to *Pike*.[187] In *Edgar*, the *Pike* rationale was the only one to command a majority.[188]

In *National Pork*, however, the Court as a whole seemed inclined to rein in applications of *Pike* that are about extraterritoriality per se, as opposed to extraterritorial effects that are a byproduct of efforts to discriminate against out-of-state commerce. Observing that *Pike* cases do not significantly "depart from the antidiscrimination rule that lies at the core of our dormant Commerce Clause jurisprudence," the Court suggested that the reason for *Pike*'s focus on the real-world costs that a statute creates is that "a law's practical effects may also disclose the presence of a discriminatory purpose."[189] In concurrence, Justice Sotomayor described her understanding that the Court was not "shut[ting] the door" on "*Pike* claims that do not allege

184. Some have suggested that *Edgar* and *Healy* derive from constitutional sources other than the Commerce Clause. *See, e.g.*, Florey, *supra* note 6, at 1081–82 ("The Court has frequently invoked a second extraterritoriality principle—possibly rooted in the dormant Commerce Clause, but possibly also in broader structural principles of federalism—to invalidate state legislation purporting to regulate out-of-state conduct.").

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

186. In his partial concurrence in *National Pork*, Chief Justice Roberts acknowledged the connection, noting that "[w]e have found . . . sweeping extraterritorial effects, even if not considered as a *per se* invalidation, to be pertinent in applying *Pike*." *Nat'l Pork*, 143 S. Ct. at 1170 (Roberts, C.J., concurring in part and dissenting in part).

187. *Healy* does not mention *Pike*. The *Brown-Forman* Court cited *Pike* but did not rely on it, presumably because it found that the price-affirmation statute at issue directly rather than indirectly regulated state commerce. *See* Brown-Forman Distillers Corp v. N.Y. State Liquor Auth., 476 U.S. 573, 579, 582–83 (1986) (declining to apply *Pike* balancing because the challenged law "regulate[d] out-of-state transactions in violation of the Commerce Clause"). In *CTS Corp.*, the lower court had relied on *Pike*, but the Court found that "nothing in the [Indiana statute at issue] imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors." CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 77, 88 (1987).

188. *See* Edgar v. MITE Corp., 457 U.S. 624, 643–44 (1982) (holding the challenged Illinois statute unconstitutional under *Pike* with majority support).

189. *Nat'l Pork*, 143 S. Ct. at 1157.

discrimination or a burden on an artery of commerce," but she cautioned that such claims are "further from *Pike*'s core."[190]

On other *Pike* matters, the Court in *National Pork* showed notable division, as illustrated by a five-paragraph summary in the case's syllabus setting forth the Justices' varying positions[191] and a lengthy section in Justice Kavanaugh's concurrence attempting to puzzle out which portions of the main opinion are operative.[192] However the various opinions are parsed, no Justice appeared to totally foreclose the use of *Pike* even for state laws that are not facially discriminatory.[193] Nonetheless, these Justices showed no clear consensus about how *Pike* is to be applied. Three Justices—Thomas, Gorsuch, and Barrett[194]—expressed hesitation about weighing mostly intangible noneconomic benefits, such as the morality and health concerns of the California voters who enacted Proposition 12, against more definable economic harm to out-of-state producers. In a portion of the opinion in which he spoke for only three Justices,[195] Justice Gorsuch described such an inquiry as one "no court is equipped to undertake."[196] As he noted, "some out-of-state producers who choose to comply with Proposition 12 may incur new costs," but "the law serves moral and health interests of some (disputable) magnitude for in-state residents."[197] For Justice Gorsuch, "[these] competing goods are incommensurable."[198]

By contrast, an overlapping minority of Justices appeared to demonstrate a wish to limit *Pike* by different means, focusing on the

190. *Id.* at 1166 (Sotomayor, J., concurring in part). This characterization is part of Justice Sotomayor's efforts to explain what the Court has and has not done.

191. *Id.* at 1144 (syllabus).

192. *See id.* at 1172 (Kavanaugh, J., concurring in part and dissenting in part) (explaining that Parts IV–B and IV–D of Justice Gorsuch's opinion are not controlling precedent, but Part IV–C is).

193. Justices Thomas, Sotomayor, Kagan, Gorsuch, and Barrett all signed on to the portion of the main opinion affirming that the Court has "left the 'courtroom door open' to [*Pike*] challenges premised on 'even nondiscriminatory burdens,'" though suggesting that such challenges are rarely successful. *Id.* at 1158 (majority opinion) (quoting Dep't of Revenue v. Davis, 553 U.S. 328, 353 (2008)). The remaining four Justices all joined Chief Justice Roberts's partial concurrence, in which he quotes similar language. *See id.* at 1168 (Roberts, C.J., concurring in part and dissenting in part) (noting that "we generally leave the courtroom door open to plaintiffs invoking the rule in *Pike*, that even nondiscriminatory burdens on commerce may be struck down on a showing that those burdens clearly outweigh the benefits of a state or local practice" (quoting *Davis*, 553 U.S. at 353)).

194. *See id.* at 1144 (syllabus) (noting that these three Justices joined Part IV–B of Justice Gorsuch's opinion).

195. *See id.* at 1166 (Sotomayor, J., concurring in part) (noting that Justice Gorsuch's opinion lacks a majority on this point and stating her own view that "courts generally are able to weigh disparate burdens and benefits against each other, and . . . they are called on to do so in other areas of the law with some frequency").

196. *Id.* at 1160 (plurality opinion).

197. *Id.*

198. *Id.*; *see also id.* at 1167 (Barrett, J., concurring in part) (finding that "California's interest in eliminating allegedly inhumane products from its markets cannot be weighed on a scale opposite dollars and cents").

threshold showing of burdens on interstate commerce a challenger must demonstrate before a court can proceed to balancing at all. A separate part of Justice Gorsuch's opinion (also not joined by a majority of Justices)[199] detailed what is, in his view, petitioners' failure to meet *Pike*'s first step as a separate rationale for the decision. Justice Gorsuch offered two main reasons why this step was not met. First, he argued, the California law did not burden interstate commerce as a whole so much as favor certain out-of-state producers (those who can and do comply with the restrictions) over others (those who, for whatever reason, do not adopt the California-sanctioned practices).[200] Second, any increased costs would primarily fall on consumers within California,[201] and "no one thinks that costs . . . borne by in-state consumers thanks to a law they adopted counts as a cognizable harm under our dormant Commerce Clause precedents."[202] In a brief concurring opinion, Justice Sotomayor, joined by Justice Kagan, appeared to endorse this reasoning, finding that petitioners failed to meet the "threshold requirement" of alleging a substantial burden on interstate commerce "that plaintiffs must satisfy before courts need even engage in *Pike*'s balancing and tailoring analyses."[203]

Four Justices, by contrast, found the initial *Pike* requirement to be satisfied and would have remanded to permit the trial court to engage in a balancing of costs and benefits.[204] Chief Justice Roberts's partial concurrence, joined by three other Justices, appeared significantly more receptive to extraterritoriality-focused *Pike* claims. Noting that the pork industry is sufficiently interconnected that "producers will be 'forced to comply' with Proposition 12, 'even though some or even most of the cuts from a hog are sold in other States,'"[205] Chief Justice Roberts argued that Proposition 12 went beyond garden-variety "cross-border effects" to "broad impact requiring, in this case, compliance even by producers who do not wish

199. *Id.* at 1144 (syllabus) (noting that Justices Thomas, Sotomayor, and Kagan joined Part IV–C of Justice Gorsuch's opinion).

200. *Id.* at 1162 (plurality opinion) (noting that while "*some* out-of-state firms may face difficulty complying (or may choose not to comply) with Proposition 12," it is nonetheless the case that "*other* out-of-state competitors seeking to enhance their own profits may choose to modify their existing operations or create new ones to fill the void").

201. *Id.* at 1163 (noting that the petitioners have failed to "allege facts plausibly suggesting that out-of-state consumers indifferent to pork production methods will have to pick up the tab").

202. *Id.* at 1162.

203. *Id.* at 1166 (Sotomayor, J., concurring in part).

204. *Id.* at 1172 (Roberts, C.J., concurring in part and dissenting in part). A fifth Justice, Justice Barrett, agreed that Proposition 12 imposed a significant burden on interstate commerce but argued that balancing such burdens against intangible benefits was beyond judicial competence. *Id.* at 1167 (Barrett, J., concurring in part).

205. *Id.* at 1170 (Roberts, C.J., concurring in part and dissenting in part) (quoting Petition for Writ of Certiorari app. G at 213a, 239a, *Nat'l Pork*, 143 S. Ct. 1142 (No. 21-468)).

to sell in the regulated market"[206]—a scenario burdensome enough to cross *Pike*'s initial threshold. Thus, in Chief Justice Roberts's view, while neither *Healy* nor *Pike* prohibits legislation with extraterritorial effects per se, *Pike* can nonetheless come into play when a law has a significant out-of-state impact not outweighed by its in-state benefits.[207]

With four Justices appearing to endorse a robust application of *Pike* and five Justices hewing more toward some version of moderation—though not all of the same type or predicated on the same rationale—it is difficult to determine how or whether *Pike*'s application might change in future. For the moment, however, as will be discussed in a later subpart,[208] it appears that *Pike* may still have some life left as a vehicle for litigating issues of state legislation's extraterritorial effects.

B. Mallory *and Indirect Extraterritorial Effects*

In contrast to *National Pork*, which the Court had decided just a few weeks before, *Mallory v. Norfolk Southern Railway Co.* had nothing to do with the dormant Commerce Clause per se and did not grapple directly with extraterritoriality doctrine. Rather, the Court was called upon to decide whether a state could, consistent with the Due Process Clause, require corporations to submit to general personal jurisdiction—that is, jurisdiction over any matter with no necessary connection between the state and the dispute—as a condition of doing business in the state.[209] Although in the early twentieth century, states had commonly relied on this form of personal jurisdiction[210] and the Court had upheld it,[211] it fell into disfavor as *International Shoe Co. v. Washington*[212] opened up additional possibilities for haling corporations into court.[213] Indeed, many commentators had thought it to be superseded by the advent of the *International Shoe*

206. *Id.* at 1171.

207. *Id.*

208. *See infra* subpart IV(A).

209. *See* Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2032 (2023) (explaining that the case concerns whether such "consent[] to appear in [state] courts as a condition of registering to do business in the [state]" is constitutionally valid).

210. *See id.* at 2033–35 (plurality opinion) (describing the history of registration-based personal jurisdiction).

211. *See* Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 95 (1917) (holding that the statute at issue "hardly leaves a constitutional question open").

212. 326 U.S. 310 (1945).

213. *See* Megan M. La Belle, *Personal Jurisdiction and the Fairness Factor(s)*, 72 EMORY L.J. 781, 824 (2023) (noting that after "the early 1900s, the question of corporate registration statutes and personal jurisdiction lay largely dormant for the next century").

framework[214] and, more recently, by the restrictions on general personal jurisdiction the Court had recognized in several recent cases.[215]

In recent years, however, the increased difficulty of obtaining general jurisdiction under a traditional minimum contacts theory motivated plaintiffs to argue for new bases on which courts could assert authority over out-of-state corporations.[216] Plaintiffs' options had been severely limited following the Court's previous decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*[217] and *Daimler AG v. Bauman*[218]—which in nearly all cases restricted general jurisdiction over corporations to one or two states[219]—and *Bristol-Myers Squibb Co. v. Superior Court*[220]—which moved to the harder-to-establish general-jurisdiction category some scenarios that had previously been analyzed under specific-jurisdiction standards.[221] Reacting to these developments, plaintiffs resuscitated the old idea of consent by registration, with mixed results in lower courts.[222]

In *Mallory*, the Court took up the question whether registration-based personal jurisdiction comported with the Due Process Clause, and concluded 5–4 that it did,[223] relying in large measure on the Court's endorsement of such

214. *See, e.g.*, Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1346–47 (2015) (observing that, in the post–*International Shoe* era, "[m]ost [commentators] are in agreement that jurisdiction based on registration to do business violates the Due Process Clause" (footnote omitted)); Scott Dodson, *Jurisdiction in the Trump Era*, 87 FORDHAM L. REV. 73, 84 (2018) (noting that "many state courts and lower federal courts have held that [registration] statutes do not confer personal jurisdiction").

215. *See* Jonathan Remy Nash, *The Rules and Standards of Personal Jurisdiction*, 72 ALA. L. REV. 465, 492–93 (2020) (arguing that the Court's recent cases established de facto rules that "[g]eneral jurisdiction over a corporation is proper in the jurisdiction where the corporation is incorporated and the jurisdiction where the corporation maintains its principal place of business" while being "almost never appropriate in other jurisdictions").

216. *See* La Belle, *supra* note 213, at 824 (noting that after decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and *Daimler AG v. Bauman*, 571 U.S. 117 (2014), "litigants looked for other options and ultimately turned to consent jurisdiction under state corporate registration statutes").

217. 564 U.S. 915 (2011).

218. 571 U.S. 117 (2014).

219. *See* Nash, *supra* note 215, at 492–93 (explaining that general jurisdiction over a corporation is "almost never appropriate" in jurisdictions other than "the jurisdiction where the corporation is incorporated and the jurisdiction where the corporation maintains its principal place of business").

220. 137 S. Ct. 1773 (2017).

221. *See id.* at 1781 (rejecting California's approach to specific jurisdiction, under which "the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims," as a "loose and spurious form of general jurisdiction").

222. *See* La Belle, *supra* note 213, at 825–28 (detailing decisions in state courts concerning jurisdictional consent).

223. Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2030 (2023) (syllabus); *see also id.* at 2032 (majority opinion) (rejecting arguments that the Due Process Clause bars registration-based

statutes prior to *International Shoe*.[224] The Court refused to overrule the central pre–*International Shoe* case, *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*,[225] that found registration statutes to be valid.[226] In a portion of the opinion in which he spoke only for a plurality, Justice Gorsuch reasoned that *International Shoe* merely "stake[s] out an *additional* road to jurisdiction over out-of-state corporations" and should not be read as casting doubt on previously accepted practices.[227]

Mallory should be a welcome development for plaintiffs, helping ensure that they will not be forced to sue in potentially inconvenient jurisdictions where defendants enjoy home-state advantage.[228] But *Mallory* also has extraterritoriality implications.[229] *Mallory* clarifies that, as is the case with tag jurisdiction for individuals,[230] corporations can constitutionally be sued in jurisdictions to which they have only a minimal connection. Further, given that all states have corporate-registration statutes of some sort,[231] cases founded on general jurisdiction—where the dispute itself is unrelated to the forum—are likely to proliferate. This certainly does not guarantee that state law will be given extraterritorial effect; in many cases, state courts are capable of exercising restraint and good judgment when it comes to applying

personal jurisdiction). Portions of Justice Gorsuch's opinion were joined by only three other Justices. *Id.* at 2030 (syllabus).

224. *See id.* at 2039 (plurality opinion) (concluding that *International Shoe* "stake[d] out an *additional* road to jurisdiction over out-of-state corporations").

225. 243 U.S. 93 (1917).

226. *Mallory*, 143 S. Ct. at 2044 (plurality opinion).

227. *Id.* at 2039.

228. *See* La Belle, *supra* note 213, at 824 (mentioning that these obstacles have posed problems for plaintiffs following the Court's limitation of general jurisdiction).

229. Prior to *Goodyear*, courts found that general jurisdiction over a corporation was present only where that defendant had "continuous and systematic" connections to the state, albeit potentially unrelated to the dispute at hand. La Belle, *supra* note 213, at 810–11. *Goodyear* and subsequent cases raised that standard, permitting general jurisdiction to be asserted only where the defendant was "essentially at home"—generally interpreted to mean only the state where it was headquartered or incorporated—except in rare situations. Nash, *supra* note 215, at 492–93; Daimler AG v. Bauman, 571 U.S. 117, 139 n.19 (2014). Although neither standard required that the dispute itself arise in or be connected to the forum—after all, the very definition of general jurisdiction is that it does not need to be—it did ensure that the court would be exercising jurisdiction over a corporation conducting substantial activities in the state and after *Goodyear*, over one that was some form of state citizen.

230. *See* Katherine Florey, *What Personal Jurisdiction Doctrine Does—and What It Should Do*, 43 FLA. ST. U. L. REV. 1201, 1240 (2016) (noting that tag jurisdiction may create scenarios where the dispute has little connection to the forum).

231. *See* Monestier, *supra* note 214, at 1363–66 (explaining that "[e]very state has a registration statute that requires corporations doing business in the state to register with the state and appoint an agent for service of process" (footnote omitted), although the precise content of such statutes varies, and only Pennsylvania's "actually purports to directly address the jurisdictional consequences of registering to do business").

choice-of-law principles.[232] Nonetheless, it multiplies occasions where state courts might be tempted to test the boundaries of the extraterritorial reach of state law.[233]

A subtler way in which *Mallory* may cause uncertainty is by reviving debates about whether personal jurisdiction doctrine has any role whatsoever to play in allocating spheres of influence among states. For many years, the Court has delivered muddled and contradictory messages on this question. In *World-Wide Volkswagen Corp. v. Woodson*,[234] the Court appeared to indicate clearly that personal jurisdiction served two "related, but distinguishable, functions"—protecting defendants from an unfair forum choice and "ensur[ing] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[235] Yet just two years later in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,[236] the Court seemed to disavow this view entirely, stating that limits on personal jurisdiction "represent[] a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."[237] As a result, the Court concluded that the requirement of personal jurisdiction was an individual, waivable right.[238] The Court's clashing pronouncements set off a "lively debate" among scholars about the role, if any, of state sovereignty in personal jurisdiction doctrine.[239] Later cases further confused the issue, with the plurality opinion in *J. McIntyre Machinery, Ltd. v. Nicastro*[240] awkwardly seeking to yoke *World-Wide Volkswagen*'s two rationales together,[241] while the Court in *Bristol-Myers Squibb Co. v. Superior Court*, more clearly foregrounding federalism concerns, observed that the Due Process Clause also protects a "federalism

232. *See* Florey, *supra* note 23, at 501 ("Sometimes, to be sure, courts choose restraint in interpreting state statutes' geographical reach.").

233. *See* Florey, *supra* note 230, at 1241 (observing that the minimum contacts standard serves a screening function—making it presumptively fairer to apply forum law—and "helps to avert [the] risk that . . . plaintiffs will use lawsuits to extend a particular state's law beyond its proper bounds by suing in a court that is likely to apply that law"). This safety mechanism does not exist when personal jurisdiction is not founded on minimum contacts. *See id.* (describing the minimum contacts standard as "more stringent" than possible alternatives).

234. 444 U.S. 286 (1980).

235. *Id.* at 291–92.

236. 456 U.S. 694 (1982).

237. *Id.* at 702.

238. *Id.* at 703.

239. *See, e.g.*, Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1706–07 (2011) ("[I]t remains unclear whether consideration of state sovereignty concerns or interests plays any independent role in determining the boundaries of state court jurisdiction.").

240. 564 U.S. 873 (2011).

241. *Id.* at 877 (plurality opinion) (describing the individual right protected by the Due Process Clause as the "right not to be coerced except by lawful judicial power"—a bound that extraterritorial assertions of state power, it might be argued, could exceed).

interest" that "may be decisive" even where "the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State."[242]

Several Justices in *Mallory* contributed their own additions to the pastiche of dicta, plurality opinions, and mixed messages that the Court has produced on this point. In a part of the principal opinion that commanded the votes of only four Justices, Justice Gorsuch clearly reaffirmed the *Insurance Corp. of Ireland* view, emphasizing that "personal jurisdiction is a *personal* defense that may be waived or forfeited."[243] In partial concurrence, Justice Alito raised questions about the constitutionality of Pennsylvania's statute under constitutional provisions other than the Due Process Clause while acceding to the plurality's view that Norfolk Southern had waived any due process rights it might have had.[244] By contrast, four dissenting Justices described the registration statute as a "power grab" by Pennsylvania and opined that "[t]he Due Process Clause protects more than the rights of defendants—it also protects interstate federalism."[245]

This Article will go on to discuss the Justices' concerns and suggestions in more depth, but it is worth noting for the moment that five Justices (the plurality joining Justice Gorsuch's opinion on this point, plus Justice Alito) appear to share the view that whatever restraints on the projection of state power exist, they are not, at any rate, located in personal jurisdiction doctrine. In turn, this would seem to reduce personal jurisdiction's role in keeping difficult extraterritoriality questions out of state courts.[246]

III. Extraterritoriality Concerns and Alternatives

In both *National Pork* and *Mallory*, the Court shows awareness that each result may have the unintended effect of allowing states more freedom to regulate outside their borders. Indeed, some Justices, concurring and dissenting, affirmatively sound the alarm about territorial overreaching, in some cases suggesting constitutional provisions or doctrines besides those at issue that might be suitable for the job of restraining state extraterritorial

242. Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1780 (2017); *see also* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1025 (2021) (explaining that, in personal jurisdiction analysis, "this Court has considered alongside defendants' interests those of the States in relation to each other").

243. Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2043 (2023) (plurality opinion) (citing *Ins. Corp. of Ir.*, 456 U.S. at 704–05).

244. *See id.* at 2047 (Alito, J., concurring in part and concurring in the judgment) (arguing that consent-based jurisdiction "may violate fundamental principles that are protected by one or more constitutional provisions," even if it does not violate the Due Process Clause).

245. *Id.* at 2058–59 (Barrett, J., dissenting).

246. *See* Florey, *supra* note 230, at 1241 (noting that when personal jurisdiction is based on minimum contacts, state courts have fewer occasions to overreach in application of state law).

power.[247] Yet despite the many proposals introduced by various Justices, it is by no means clear that any of the mentioned doctrines are particularly suited to the task of filling the extraterritoriality void that these two opinions leave. The following subparts explore these suggestions and discuss why they are poorly adapted or inadequate to tackle the questions of state extraterritorial power that are likely to arise in a bitterly partisan time.

A. National Pork, Mallory, *and a Flurry of Proposed Alternatives*

Even as the Court in *National Pork* adopted a restrictive interpretation of *Healy* and (at least for some Justices) *Pike*, it seemed troubled by the prospect of a legal landscape in which few or no explicit bounds exist on the territorial scope of the conduct states can regulate. In rejecting a broad view of *Healy*, the Court noted that "we do not mean to trivialize the role territory and sovereign boundaries play in our federal system" and further stressed that courts have a place in "referee[ing] disputes about where one State's authority ends and another's begins."[248] The Court enumerated at least three doctrines that, it suggested, might speak to this issue. First, it suggested that the *Edgar* plurality opinion should be decoupled from the *Brown-Forman* and *Healy* cases it appeared to inspire, linking those cases with *Baldwin* instead.[249] *Edgar*, the Court opined, may not have "posed a dormant Commerce Clause question as much as one testing the territorial limits of state authority under the Constitution's horizontal separation of powers."[250] The Court thus appeared to entertain the idea that limits on extraterritoriality might derive from constitutional structure rather than any particular provision. Having suggested as much, however, the Court went on to mention two potential sources of restrictions on state regulation that do have a specific constitutional pedigree[251]: the limits that the Due Process Clause places on state efforts to impose punitive damages for out-of-state conduct[252] and the

247. *See infra* subpart III(A).

248. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1156 (2023).

249. *See id.* at 1154 (concluding that "*Brown-Forman* and *Healy* differed from *Baldwin* only in that they involved price-affirmation, rather than price-fixing, statutes").

250. *Id.* at 1157 n.1. The Court cited Donald Regan, who concluded in an influential article that "the extraterritoriality principle is not to be located in any particular clause" but rather is "one of those foundational principles of our federalism which we infer from the structure of the Constitution as a whole." Regan, *supra* note 7, at 1885.

251. *See Nat'l Pork*, 143 S. Ct. at 1156 (noting that, in addition to whatever structural limits exist on the extraterritorial projection of state power, the Court has relied "as well" on "a number of the Constitution's express provisions" (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985))). In a different context, the main opinion also mentioned the Privileges and Immunities and Import–Export Clauses, suggesting that they might be alternative sources of the antidiscrimination principle currently associated with the Due Process Clause. *Id.* at 1153.

252. *Cf. id.* (citing a passage of *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572 (1996), that held that punitive damages "must be supported by the State's interest in protecting its own consumers and its own economy" to be constitutional).

boundaries on the application of a given state's law in the choice-of-law process, which recent case law has located equally in the Due Process Clause and the Full Faith and Credit Clause.[253]

In partial concurrence, Justice Kavanaugh went still further, throwing out several constitutional possibilities for testing the bounds of Proposition 12–style economic regulation, including "not only . . . the Commerce Clause, but also . . . the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause."[254] Although Justice Kavanaugh appeared to at least acquiesce in the majority's disposition of the dormant Commerce Clause issue,[255] he nonetheless indicated concerns about the California law's geographical reach, describing it as "in effect regulat[ing] pig farming and pork production *throughout the United States*."[256] Appearing to sympathize with the petitioners, he elaborated upon arguments out-of-state actors affected by Proposition 12–like legislation might make in the future, while nominally "express[ing] no view" on whether such arguments would succeed.[257] Despite the prior understanding of the Import–Export Clause as limited to foreign products,[258] Justice Kavanaugh suggested that the Clause might raise "serious questions" in the scenario where "one State conditions sale of a good on the use of preferred farming, manufacturing, or production practices in another State."[259] Further, he argued, the Privileges and Immunities Clause might also raise "significant questions" about "one State's efforts to effectively regulate farming, manufacturing, or production in other States."[260] Justice Kavanaugh's invocation of the Privileges and Immunities Clause perhaps reinforces his musings in his *Dobbs v. Jackson Women's Health Organization* concurrence, in which he suggested that the "constitutional right to interstate travel"—often thought to derive at least in part from the Privileges and Immunities Clause[261]—might prevent a state from "bar[ring] a resident of that State from

253. *See id.* ("This Court has invoked as well a number of the Constitution's express provisions—including 'the Due Process Clause and the Full Faith and Credit Clause.'" (quoting *Shutts*, 472 U.S. at 818)).

254. *Id.* at 1172 (Kavanaugh, J., concurring in part and dissenting in part).

255. Justice Kavanaugh's partial concurrence characterizes the controlling opinion without comment as rejecting the *Pike* challenge as "insufficiently pled." *Id.* at 1175. Oddly, the concurrence does not mention the *Edgar–Healy* line of cases at all.

256. *Id.* at 1173.

257. *Id.* at 1175.

258. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 624–25 (1997) (Thomas, J., dissenting) (acknowledging this understanding of the Import–Export Clause as the standard interpretation while advocating for a departure from it).

259. *Nat'l Pork*, 143 S. Ct. at 1175 (Kavanaugh, J., concurring in part and dissenting in part).

260. *Id.*

261. *See* Cohen et al., *supra* note 63, at 25, 35 (explaining that commentators have seen the right to travel as rooted in the Privileges and Immunities Clause as well as the Due Process Clauses of the Fifth and Fourteenth Amendments).

traveling to another State to obtain an abortion."[262] Finally, Justice Kavanaugh cited the Full Faith and Credit Clause, arguing that in some cases it might be relevant to a "State's effort to regulate farming, manufacturing, and production practices in another State (in a manner different from how that other State's laws regulate those practices)."[263] The following subpart will consider all of these suggestions in more depth.

One issue that may have been on some Justices' minds in raising these multiple alternative brakes on state power is the extraterritorial application of abortion regulation, an issue that has received significant media[264] and scholarly[265] attention since the Court's decision in *Dobbs*. Nodding to the abortion issue, Justice Kavanaugh raised the issue of what might happen if a state prohibited "'the retail sale of goods from producers that do not pay for employees' birth control or abortions' (or alternatively, that do pay for employees' birth control or abortions)."[266] More broadly, Kavanaugh's concurrence expressed concerns about a "new era" in which "States shutter their markets to goods produced in a way that offends their moral or policy preferences[,] . . . effectively forc[ing] other States to regulate in accordance with those idiosyncratic . . . demands."[267]

Although the set of opinions in *Mallory* devoted less attention to the problem, several Justices raised issues of states' territorial reach (or overreach) in that case as well. As previously discussed, a bare majority of Justices rejected the *World-Wide Volkswagen* view that personal jurisdiction doctrine serves to mediate between spheres of state authority, as opposed to simply providing fairness protections for the defendant.[268] Justice Alito, however, while appearing to endorse that position, nonetheless suggested that it was "not the end of the story."[269] Rather, he proclaimed, "the

262. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

263. *Nat'l Pork*, 143 S. Ct. at 1175–76 (Kavanaugh, J., concurring in part and dissenting in part).

264. *E.g.*, Rachel M. Cohen, *The Coming Legal Battles of Post-*Roe *America*, VOX (June 27, 2022, 7:30 AM), https://www.vox.com/2022/6/27/23183835/roe-wade-abortion-pregnant-criminalize [https://perma.cc/6XCG-L73S].

265. *See, e.g.*, Cohen et al., *supra* note 63, at 22–23, 25–26 (considering the constitutional provisions often pointed to as protecting interstate travel in the abortion context); Lillquist, *supra* note 65, at 18–20 (discussing jurisdictional requirements and states' ability to hear cases regarding out-of-state abortions); Florey, *supra* note 23, at 501–02 (discussing states' abilities to apply their own law to out-of-state events).

266. *Nat'l Pork*, 143 S. Ct. at 1174 (Kavanaugh, J., concurring in part and dissenting in part) (quoting Brief of Indiana et al., as Amici Curiae in Support of Petitioners at 33, *Nat'l Pork*, 143 S. Ct. 1142 (No. 21-468)).

267. *Id.*

268. *See supra* subpart II(B).

269. Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2049 (2023) (Alito, J., concurring in part and concurring in the judgment).

Constitution restricts a State's power to reach out and regulate conduct that has little if any connection with the State's legitimate interests."[270] He suggested that "this principle . . . is not confined to any one clause or section" but is rather part of "the very nature of the federal system that the Constitution created."[271] Recognizing that the Due Process Clause had become a "refuge of sorts" for this sort of nonprocedural concern, he suggested that federalism interests "fall more naturally within the scope of the Commerce Clause,"[272] arguing that a statute such as Pennsylvania's could be challenged as a *Pike*-style undue burden on interstate commerce or perhaps even as outright discrimination against other jurisdictions.[273] The four dissenting Justices raised even more pointed concerns about state judicial overreach, finding the "consent" on which the majority rested its decision to be spurious[274] and referring to the registration statute as "Pennsylvania's power grab."[275] This group of Justices, however, appeared to believe that the Due Process Clause could continue to exercise the dual functionality the Court endorsed in *World-Wide Volkswagen*, noting that even though "the Clause protects, first and foremost, an individual right," Pennsylvania's decision to create a "blanket rule that ignores the territorial boundaries on its power" meant that under the Due Process Clause, at least in this situation, "federalism interests are implicated too."[276]

B. Specific Alternatives

The list of alternative possibilities proposed by various Justices for restraining extraterritorial regulation is a long one. It includes structural-federalism principles, the Full Faith and Credit Clause, the Due Process Clause as it has been applied in the punitive damages context, the Privileges and Immunities Clause, and the Import–Export Clause. This subpart first discusses specific ways in which *National Pork* and *Mallory* may help to bring about new scenarios of state overreaching. It then goes on to briefly consider the Justices' proposed extraterritoriality frameworks in turn, concluding that none is particularly well adapted in its current form to the sort of conflicts that are likely to arise today.

1. Extraterritoriality Scenarios—As discussed in Part I, increasing partisanship has led to a flurry of legislation and proposed legislation with a

270. *Id.*

271. *Id.*

272. *Id.* at 2050–51.

273. *Id.* at 2053.

274. *See id.* at 2055 (Barrett, J., dissenting) (describing the "consent" at issue as "manufacture[d]").

275. *Id.* at 2059.

276. *Id.* at 2058.

primary purpose of expressing and advancing a position on often-divisive issues. As states with opposite political orientations pass laws pointing in different directions, two situations raising extraterritoriality concerns are likely to arise more frequently—the first involving conflicting standards, the second interstate travel.

To begin with, courts are likely to see various permutations of the *National Pork* scenario, in which product standards or requirements in a particular state have significant practical impact on companies' national behavior, either because the state in question is, like California, large enough to exert strong national influence or because a company is caught between conflicting state standards (such as requirements to pay or not pay for abortions).[277] Such cases would raise many questions unanswered by *National Pork*. To begin with, it is not even clear that *National Pork* is the last word on the constitutionality of California's Proposition 12 itself, given Justice Kavanaugh's invitation to challenges on other grounds.[278] But even if we assume that a law like California's is acceptable, bolder legislation would raise new line-drawing problems, and clashing mandates would raise other sorts of issues. What if, for example, a state decided to forbid the sale of certain products in order to advance ends less closely related to the production process than animal-treatment standards, as with the paying-for-abortions example? What if numerous states passed Proposition 12–type laws that set contradictory standards for how pigs should be kept? And so forth.

The second context in which extraterritoriality issues are likely to arise is the much-discussed scenario in which someone leaves their home state, where a good or service—such as gender-affirming care for their child—is banned, to obtain it in a state where it is not. This situation raises multiple questions about the law applicable to the different actors involved. Can the parent who transports their child across state lines be punished or found liable? Can the provider? What about someone who funded the trip or otherwise facilitated it? Would civil liability raise different issues from criminal prosecution in answering any of these questions? In the travel-for-abortion context, commentators have suggested multiple constitutional provisions that might apply in this scenario but reached few firm conclusions.[279]

A notable aspect of the second scenario is that, in contrast to the first, it is likely to raise questions about choice of law in the context of individual

277. *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1174 (2023) (Kavanaugh, J., concurring in part and dissenting in part) (discussing the possible implications of upholding "California's novel and far-reaching regulation").

278. *See id.* at 1172 (suggesting that Proposition 12 may be unconstitutional on grounds other than the dormant Commerce Clause).

279. *See* Florey, *supra* note 23, at 486 n.5 (surveying scholarship on this point).

litigation. In the first scenario, that is, the group to which the law would be applicable—say, producers who want to sell goods in California—would be relatively clear, and dissatisfied members of that constituency would likely initiate litigation to challenge it on constitutional grounds. In the second, however, the issue would likely arise most often in an individual court case. If a plaintiff tried to bring a claim in Texas court under Texas's "bounty-hunter" abortion law against a provider who performed an abortion in California, for example, the court would have to decide whether Texas or California law governed the case. The answer to that question is primarily a function of the choice-of-law rules the court applies, which vary substantially from state to state.[280] Further, as a following section will discuss, few constitutional restrictions exist on which law a state court may choose to apply, giving a Texas court considerable freedom to apply Texas law in such a situation, at least if not forbidden by some constitutional principle outside the choice-of-law realm.[281]

By vastly expanding general jurisdiction, at least in states that choose to take advantage of the ruling by passing Pennsylvania-style registration statutes or aggressively construing their current one, *Mallory* may compound the problem of state courts applying their own law to distant conduct. This is because general jurisdiction obviates the need for any connection between the forum and the dispute, removing one barrier to state courts applying their law to far-flung events.[282] At the same time, it also multiplies forum-shopping opportunities by expanding the number of states in which a plaintiff can bring suit, making it easier for plaintiffs to seek out a court that is likely to apply favorable law.[283]

Both of these scenarios seem to be on the Supreme Court's radar,[284] and it seems likely that various Justices had them in mind in suggesting ways to tamp down extraterritorial regulation in *National Pork* and *Mallory*'s wake. The following sections, therefore, discuss the Justices' proposals in terms of how well-adapted they are to both situations. In thinking about this question, it is worth noting that the two scenarios have many features in common. Both, for example, involve the fundamental question of the extent to which a regulation in one state may affect what goods and services are available in another. Indeed, it is possible to imagine a combination of the two scenarios,

280. *Id.* at 502.

281. *See infra* section III(B)(3).

282. *See* Florey, *supra* note 230, at 1240–42 (arguing that the existence of minimum contacts between the defendant and the forum helps to prevent borderline applications of forum law).

283. *See* Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2049 (2023) (Alito, J., concurring in part and concurring in the judgment) (suggesting that registration-based personal jurisdiction creates opportunities for forum shopping).

284. *See, e.g.*, *id.* (noting concerns about plaintiff forum shopping under registration-based jurisdiction); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring) (raising questions about the reach of abortion restrictions on out-of-state travel).

as with the example of a state deciding to ban the sale of goods produced by a company that pays for out-of-state abortions. For that reason, ideally any extraterritoriality principle would have something to say about both.

2. Edgar *and Structural Federalism*—Some commentators have long argued that, in the words of Donald H. Regan, extraterritoriality limits should not be seen as "located in any particular [constitutional] clause" but resting instead on "those foundational principles of our federalism which we infer from the structure of the Constitution as a whole."[285] Although the extraterritoriality limits that the Court articulated in *Brown-Forman* and *Healy* nominally derived from the dormant Commerce Clause, to some extent they appeared to draw from such broader principles as well. *Healy*, for example, spoke of "inherent limits of [an] enacting State's authority" as well as the Commerce Clause more specifically.[286]

In *National Pork*, the Court appeared to put strict boundaries around *Brown-Forman* and *Healy*, confining them to the price-affirmation setting and presumably nullifying these broader dicta.[287] At the same time, however, the Court did not close the door on the structural-federalism theory entirely. Rather, in a long footnote, it suggested that *Edgar v. MITE Corp.* sets forth a still-viable extraterritoriality principle different from that articulated in *Healy* and the other cases in the extraterritoriality-by-way-of-dormant-Commerce-Clause line to which *Edgar* had appeared to belong.[288]

In doing so, the Court made two observations. First, it quoted and added emphasis to the *Edgar* Court's recognition that the Illinois anti-takeover statute in question in that case "*directly* regulate[d] transactions which [took] place . . . wholly outside the State."[289] This focus on *direct* regulation

285. Regan, *supra* note 7, at 1885; *see also* Florey, *supra* note 6, at 1060 (explaining that although the "[extraterritoriality] principle may be rooted in the dormant Commerce Clause . . . it may be better understood" to stem from "general structural principles of horizontal federalism").

286. Healy v. Beer Inst., 491 U.S. 324, 336–37 (1989).

287. *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1154–55 (2023) (holding that *Brown-Forman* and *Healy* are limited to price-control and price-affirmation statutes).

288. *Edgar*, in fact, contained two potential rationales—the *Pike* argument, which commanded a majority of the Court, and one focused more strictly on extraterritoriality as such, to which only a plurality of Justices subscribed. *See* Edgar v. MITE Corp., 457 U.S. 624, 643 (1982) (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)) (noting that the challenged act was unconstitutional under the *Pike* balancing test); *id.* (plurality opinion) (considering the challenged act invalid because it "purport[ed] to regulate directly . . . commerce wholly outside the State"). The Court in *National Pork* to some extent revitalizes both the *Pike* and extraterritoriality elements of *Edgar*, to which two concurrences additionally refer. *See Nat'l Pork*, 143 S. Ct. at 1166 (Sotomayor, J., concurring in part) (suggesting that *Pike* continues to apply to some nondiscriminatory burdens on interstate commerce); *id.* at 1168 (Roberts, C.J., concurring in part and dissenting in part) (same). This discussion considers only *Edgar*'s extraterritoriality aspect; the Court's treatment of *Pike* will be covered in a later section.

289. *Nat'l Pork*, 143 S. Ct. at 1157 n.1 (alterations in original) (quoting *Edgar*, 457 U.S. at 641 (plurality opinion)).

distinguishes *Edgar* from a Proposition 12–type situation and arguably even from the price-affirmation statutes in *Brown-Forman* and *Healy*, which had the "practical effect" of regulating out-of-state commerce but did not explicitly purport to do so.[290] Second, the Court noted that "[s]ome have questioned whether the state law at issue in *Edgar* posed a dormant Commerce Clause question as much as one testing the territorial limits of state authority under the Constitution's horizontal separation of powers," citing not only Professor Donald H. Regan's article on the subject but also the Court's own statement in *Shelby County v. Holder*[291] that "all States enjoy equal sovereignty."[292]

National Pork's footnote, then, seems to confirm the speculation of scholars that extraterritoriality restrictions may be rooted in the constitutional structure rather than a specific clause. This acknowledgement by the Court might seem to open the door to extraterritoriality challenges that revive the Court's concerns from the 1980s, only this time exclusively through the lens of the *Edgar* plurality rather than *Brown-Forman* and *Healy*.

Despite this, however, it is doubtful that *National Pork* advances the structural-federalism view to any greater extent than the Court's tossed-off musings on the subject in the past. The problem remains the same as the one commentators have identified with *Healy*—in an area where precision and guidance are needed to ward off free-form judicial balancing, the structural-federalism view remains unacceptably vague.[293] Indeed, Regan, a strong proponent of the structural-federalism view, conceded it offered no firm standards and concluded that "[i]n the end, some hard cases must simply be decided by judicial intuitions concerning the spirit of the Constitution."[294]

In that respect, the idea of an extraterritoriality principle unmoored to a specific constitutional provision seems even more unworkable in our textualist times than it did when originally proposed.[295] If, for example,

290. In *Brown-Forman*, for example, a distiller wanted to offer wholesalers in other states a promotion that was forbidden by New York law, yet New York's price-affirmation statute forbade it from offering deals that were unavailable in New York, effectively barring the distiller from offering the promotion anywhere. Brown-Forman Distillers Corp v. N.Y. State Liquor Auth., 476 U.S. 573, 576–78 (1986). Despite the possibility that this might be distinguishable from the statute at issue in *Edgar*, the Court in *Brown-Forman* itself did regard this as sufficiently "direct" regulation to trigger the extraterritoriality restriction. *Id.* at 582.

291. 570 U.S. 529 (2013).

292. *Nat'l Pork*, 143 S. Ct. at 1157 n.1 (citing Regan, *supra* note 7, at 1875–80, 1897–902; *Shelby County*, 570 U.S. at 535).

293. *See, e.g.*, Sidhu, *supra* note 4, at 1825 (critiquing dormant Commerce Clause extraterritoriality as "incapable of precise definition or principled application").

294. Regan, *supra* note 7, at 1879.

295. *See* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L.J. 1437, 1443 (2022) ("[T]extualism is, in large part, the Court's *lingua franca*."); *Nat'l Pork*, 143 S. Ct. at 1157 n.1 (seeming to take a narrow view of *Edgar*'s scope by emphasizing that the law it

Justice Barrett believes that it is beyond judicial competence to weigh intangible costs and benefits even through the relatively structured framework of *Pike* balancing,[296] her reasoning would seem to apply with far stronger force to an application of "judicial intuitions" to high-stakes conflicts between states. Further, apart from the question whether such an ill-defined principle would be palatable to the Justices, it simply does not seem very useful in helping judges resolve any of the extraterritoriality situations that are likely to arise. When does a state's imposition of conditions for the sale of goods go too far? Under what circumstances may a court attach liability to conduct legal in another state? It is not clear what structural federalism, without more definition, would add to the resolution of these issues.

As a result, it seems that the structural-federalism angle opens up two possibilities, neither of which seems particularly helpful. First, the Court could conclude that, as Regan suggested, there exists a constitutional extraterritoriality principle unmoored to specific text and requiring judicial judgment and balancing, a view that would be subject to all the objections described above. An alternative, however, is that any structural extraterritoriality principle might be narrowly circumscribed, applying only to situations in which a state directly and explicitly attempts to regulate conduct occurring elsewhere. The *National Pork* Court indicated a possible sympathy with this latter interpretation by stressing that the statute at issue in *Edgar* "'*directly* regulate[d] transactions which [took] place . . . wholly outside the State' and involved individuals 'having no connection with'" the state.[297] If this is how *Edgar* is to be understood, it is perhaps a welcome check on extreme state overreach. At the same time, it has limited relevance to more commonplace and nuanced clashes between states.

3. The Full Faith and Credit Clause—The Court's allusion to the Full Faith and Credit Clause as a source of extraterritoriality restrictions in *National Pork*,[298] elaborated upon by Justice Kavanaugh in partial concurrence,[299] was surprising given that the Court has in recent decades appeared to mostly retire the provision from the extraterritoriality arena. The Full Faith and Credit Clause states simply that "Full Faith and Credit shall be

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invalidated "'*directly* regulate[d] out-of-state transactions . . .' and involved individuals 'having *no* connection'" to the State (first alteration in original) (second emphasis added) (quoting Edgar v. MITE Corp., 457 U.S. 624, 641–43 (1982) (plurality opinion)).

296. *See Nat'l Pork*, 143 S. Ct. at 1166–67 (Barrett, J., concurring in part) (agreeing with Justice Gorsuch that "the benefits and burdens of Proposition 12 are incommensurable").

297. *Id.* at 1157 n.1 (majority opinion) (alterations in original) (quoting *Edgar*, 457 U.S. at 641–43 (plurality opinion)).

298. *Id.* at 1156 (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985)).

299. *See id.* at 1175–76 (Kavanaugh, J., concurring in part and dissenting in part) (noting that state laws like Proposition 12 may implicate the Full Faith and Credit Clause).

given in each State to the public Acts, Records, and judicial Proceedings of every other State."[300] Today, its primary function is to require state courts to recognize sister-state judgments,[301] but in the past it additionally served to limit the reach of state law in some circumstances. In contrast to the dormant Commerce Clause line of extraterritoriality cases, which have been applied near-exclusively to challenges to particular state statutes,[302] the Full Faith and Credit Clause has generally been invoked to invalidate a state court's application of forum law to an individual dispute in court.[303]

The Court first suggested in the early 1900s that the Full Faith and Credit Clause might pose some limits on the law that state courts could apply to the disputes before them,[304] but it significantly expanded and clarified this principle in a series of cases decided in the mid-twentieth century.[305] In *Bradford Electric Light Co. v. Clapper*,[306] for example, the New Hampshire–based representative of a Vermont lineman killed on the job in New Hampshire sued the lineman's Vermont employer in New Hampshire court.[307] Notwithstanding that the accident had occurred in New Hampshire, the Court held that the Full Faith and Credit Clause required the New Hampshire court to apply a Vermont workers' compensation act, which barred covered employees from filing tort actions for workplace injuries, in contrast to New Hampshire law, which allowed the worker to elect a tort remedy.[308] The Court reasoned that it was "clearly . . . the purpose of the

300. U.S. CONST. art. IV, § 1.

301. Florey, *supra* note 23, at 522.

302. With a handful of exceptions, courts have mostly rejected litigants' occasional suggestions that cases such as *Healy* should be understood as setting limits on choice of law. *See* Florey, *supra* note 6, at 1104–05 (noting that only "a handful of courts have read such cases to prohibit the application of state law by courts to wholly out-of-state conduct").

303. Because this line of cases focuses on whether the law applied by the court is sufficiently connected to the dispute to justify its use, it could in theory also serve to invalidate a court's choice of nonforum law as well. In practice, however, the application of forum law is the typical area in which courts have been tempted to overreach. *See* Regan, *supra* note 7, at 1893 (describing the Full Faith and Credit Clause as "implicitly forbid[ding] application of forum law" in some circumstances); Florey, *supra* note 23, at 516 (noting state courts' tendency to be at least somewhat "biased toward forum law").

304. *See* Clyde Spillenger, *Risk Regulation, Extraterritoriality, and Domicile: The Constitutionalization of American Choice of Law, 1850–1940*, 62 UCLA L. REV. 1240, 1250 (2015) ("The notion that the Full Faith and Credit Clause or any other federal constitutional provision might limit the power of state courts to apply the forum's municipal rules of decision . . . is an innovation of the early twentieth century.").

305. *See, e.g.*, Pac. Emps. Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 500 (1939) (noting that in some circumstances, the Full Faith and Credit Clause compels one state "to enforce the laws of the other"); Alaska Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 547–48 (1935) (noting that in some cases, "the statute of a state may sometimes override the conflicting statute of another, both at home and abroad").

306. 286 U.S. 145 (1932).

307. *Id.* at 150–51.

308. *Id.* at 153–54, 163.

Vermont Act to preclude any recovery by proceedings brought in another state for injuries received in the course of a Vermont employment."[309]

Later cases elaborated upon the role the Full Faith and Credit Clause should play but also imposed some limits on its reach. In *Alaska Packers Ass'n v. Industrial Accident Commission*,[310] the Court permitted the application of California law to a dispute over workers' compensation where an employee and California employer had entered into a contract in California, even though the work in question was to be performed in Alaska.[311] The Court noted that full faith and credit might require the application of a law other than the forum state's if, as between "the conflicting interests involved[,] those of the foreign state are superior to those of the forum" but also noted that that "not every statute of another state will override a conflicting statute of the forum by virtue of the full faith and credit clause."[312]

At times, the Court's imposition of limits on state choice-of-law decisions relied not on the Full Faith and Credit Clause but on the Due Process Clause, particularly in cases that dealt with a choice-of-law question involving the law of a foreign country,[313] to which the Full Faith and Credit Clause would be inapplicable.[314] In *Home Insurance Co. v. Dick*,[315] for example, the Court found that a Texas court was required to apply the law of Mexico to an insurance dispute where the policy in question had been issued in Mexico by a Mexican company to cover Mexico-based risks.[316] Some domestic cases, however, also suggested that the Due Process Clause played a distinct role—for example, limiting states' power to impose liability for out-of-state injuries where to do so would be "so arbitrary or unreasonable as to amount to a denial of due process."[317] Nonetheless, the distinction between

309. *Id.* at 153.

310. 294 U.S. 532 (1935).

311. *Id.* at 537–38, 550.

312. *Id.* at 548.

313. *See, e.g.*, Home Ins. Co. v. Dick, 281 U.S. 397, 408 (1930) (applying due process principles in a dispute involving Mexican law).

314. *See id.* at 410–11 (noting that the challenge to the lower court's application of Texas rather than Mexico law rested on the Due Process Clause rather than the Full Faith and Credit Clause); Allstate Ins. Co. v. Hague, 449 U.S. 302, 321 n.4 (1981) (Stevens, J., concurring in the judgment) (explaining why the Court might have relied on different clauses in past cases).

315. 281 U.S. 397 (1930).

316. *Id.* at 403, 408. The insured was also residing in Mexico at the time of contracting, although his permanent home was in Texas. *Id.* at 403–04.

317. *Alaska Packers*, 294 U.S. at 541–42.

challenges under the Due Process Clause versus the Full Faith and Credit Clause remained unclear.[318]

In 1981, the Court announced the modern view of the Full Faith and Credit Clause in *Allstate Insurance Co. v. Hague*,[319] in which it both significantly lowered standards for the application of forum law and made clear that the Full Faith and Credit and Due Process Clause tests were a single inquiry.[320] A plurality of the Court adopted a new test, later endorsed by the full Court,[321] under which, for a given state's law to properly apply, that state must have a "significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction."[322] Despite the Court's use of the word "significant," however, this test creates an extremely low bar in most cases. In *Hague* itself, which involved a dispute about whether insurance policies on multiple vehicles could be "stacked," the Court found that—despite the fact that the dispute arose out of an accident in Wisconsin involving two Wisconsin residents—Minnesota law could be applied based on three contacts: the plaintiff, the widow of the accident victim, had moved to Minnesota following the incident; the defendant insurance company did business in Minnesota as part of its nationwide operations; and the victim himself had worked in Minnesota, although he was not commuting there at the time of the accident.[323] Although the *Hague* test has been applied somewhat more stringently in the class action context,[324] many scholars see it as marking the start of an anything-goes era for choice of law in litigation.[325]

318. *See Hague*, 449 U.S. at 321 n.4, 322 n.6 (Stevens, J., concurring in the judgment) (noting that "no clear analytical distinction between the two constitutional provisions [i.e., the Due Process and Full Faith and Credit Clauses] has emerged" in prior case law and that "[e]ven when the Court has explicitly considered both provisions in a single case, the requirements of the Due Process and Full Faith and Credit Clauses have been measured by essentially the same standard").

319. 449 U.S. 302 (1981).

320. *See id.* at 322 n.6 (Stevens, J., concurring in the judgment) (noting that the distinction between the two tests had previously been uncertain).

321. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821–22 (1985) (quoting *Hague*, 449 U.S. at 312–13) (invoking the *Hague* rule to hold the application of Kansas law unconstitutional in that case).

322. *Hague*, 449 U.S. at 308 (plurality opinion).

323. *Id.* at 305, 313–14, 317–19.

324. *See Shutts*, 472 U.S. at 814–15, 821–22 (finding that Kansas could not constitutionally apply Kansas law to a class action royalty dispute regarding oil-and-gas leases where almost all of the leases and royalty holders were located outside the state). *But see* Florey, *supra* note 6, at 1079–80 (finding that, in individual lawsuits, the Court has "failed to follow through" on *Shutts*'s suggestion that the *Hague* test might be applied more strictly).

325. *See, e.g.*, Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 258 (1992) (describing the Supreme Court as having "withdraw[n]" from the task of assessing the constitutionality of choice-of-law decisions, creating a "vacuum" in the area).

Concurring in *Hague*, Justice Stevens put forth an alternative view, writing at length about what he saw as the continuing wisdom of separating Due Process and Full Faith and Credit inquiries. In Justice Stevens's view, the Due Process Clause should protect individual interests in fairness, restraining a court from applying a jurisdiction's law where it was "totally arbitrary or if it were fundamentally unfair to either litigant."[326] By contrast, the Full Faith and Credit Clause addressed federalism concerns, coming into play when a state's choice-of-law decision "threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State."[327] But although this approach could have maintained the Full Faith and Credit's relevance to extraterritoriality issues, Justice Stevens found no takers for his proposal.[328]

A few years later, a majority of the Court both endorsed the *Hague* test and applied it a bit more stringently, holding in *Phillips Petroleum Co. v. Shutts*[329] that a Kansas court could not apply forum law in a class action about the interest on delayed royalties to oil-and-gas leaseholders where the overwhelming majority of both the leases and the residencies of the class members were outside Kansas.[330] *Shutts*'s more exacting application of *Hague*, however, has mostly been seen as limited to the class action context. Lending support to this view, the Court followed up *Shutts* with *Sun Oil Co. v. Wortman*,[331] in which the Justices signaled their desire to stay out of routine state choice-of-law decisions. The Court noted that "it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another" and forcefully rejected the suggestion that it engage in "the enterprise of constitutionalizing choice-of-law rules."[332]

It seems quite uncertain, as a result, how the Full Faith and Credit Clause might apply in current disputes about the extraterritorial application of state power. To begin with, to the extent it addresses territorial overreach at all, the Full Faith and Credit Clause has been applied only in the context of state choice-of-law decisions in litigation.[333] To be sure, choice of law has the potential—arguably underappreciated—to raise extraterritoriality

326. *Hague*, 449 U.S. at 326 (Stevens, J., concurring in the judgment).

327. *Id.* at 323.

328. Justice Stevens continued to press this view in a partial concurrence, which no other Justice joined, in *Shutts*, 472 U.S. at 836–37 (Stevens, J., concurring in part and dissenting in part).

329. 472 U.S. 797 (1985).

330. *Id.* at 814–15, 821–22.

331. 486 U.S. 717 (1988).

332. *Id.* at 727–28.

333. *See* Regan, *supra* note 7, at 1893–95 (observing that the Full Faith and Credit Clause presupposes limits on state legislative jurisdiction but does not set them, making the Clause relevant to choice of law but not preexisting limits on state authority).

issues,[334] and *Mallory* may make clashes between competing state laws and policies still more likely.[335] At the same time, the Clause would seem to have limited relevance to many situations, such as *National Pork* itself, that present a facial challenge to the validity of a state statute.

A second problem is that the *Hague* test is such a minimal standard that, in practice, it hardly restrains state courts' choice-of-law decisions at all. Were a Texas court to apply Texas law in a suit against a California abortion provider, for example, *Hague* would seem to be easily satisfied; the fact that an abortion was performed on a Texas citizen, for example, might alone be enough to justify applying Texas law to the case.[336] That the Full Faith and Credit Clause plays no independent role even within this forgiving framework further makes its current function all the more difficult to define.

Of course, there is nothing to stop the Court from revising, overruling, or extending *Hague*. Justice Stevens's vision for the distinct role the Full Faith and Credit Clause could play, while bearing little relationship to the way the Court has treated the issue in practice, remains persuasively argued and is an idea the Court could potentially revisit. At the same time, the Court's subsequent statements in *Sun Oil* point up some of the difficulties with tightening the *Hague* choice-of-law standard.[337] State court choice-of-law decisions, including those that result in the application of forum law to out-of-state conduct, are routine and unobjectionable in many cases. For example, if a Texan were to travel to California to make a contract, it would ring few constitutional alarm bells if a Texas court were to apply Texas law on the question whether the statute of frauds applies.[338] Constant Supreme Court supervision of such decisions would be both unworkable and undesirable. While this does not mean there is no room for the Court to tighten the *Hague* standard, the Court would have to strike a delicate balance in doing so.

Because the Full Faith and Credit Clause is the constitutional provision that seems to speak most directly to the question of how to navigate the

334. *See* Florey, *supra* note 6, at 1059 (arguing that "both the application of forum law by state courts and the enactment of legislation by state legislatures are simply two aspects of states' legislative jurisdiction—that is, the power to dictate the substantive legal rules that apply to a given situation").

335. *See supra* subpart II(B).

336. *See* Rosen, *supra* note 2, at 871 (noting that, under the *Hague–Shutts* standard, "citizenship on its own virtually suffices to give the Home State sufficient interest to regulate its citizens' out-of-state activities").

337. *See Sun Oil*, 486 U.S. at 727–28 (rejecting the prospect of "constitutionalizing choice-of-law rules").

338. For example, in *Lilienthal v. Kaufman*, 395 P.2d 543 (Or. 1964) (en banc), an Oregon resident entered into a contract with a Californian in California; the court applied Oregon law to find that the contract was invalid, even though it would probably have been valid under California law. *Id.* at 543–44, 549.

boundaries between states' respective territorial spheres, at first glance there is a basic logic to relying on it as the central basis for drawing such limits. At the same time, however, its function was never clearly defined in the first place, and in the wake of *Hague*, the Clause seems fairly superfluous in this context. Any future application of the Clause to extraterritoriality problems would seem to require a wholescale, from-the-ground-up re-envisioning of the Clause's function, a project that there is no indication the Court is prepared to undertake.

4. The Due Process Clause, Again—The Fourteenth Amendment Due Process Clause serves multiple functions; it sets boundaries on personal jurisdiction as well as underpinning the *Hague* standard side by side with the Full Faith and Credit Clause. In a separate line of cases, however, the Due Process Clause has served in a different way to restrain courts from giving state law extraterritorial effect. Two cases, *BMW of North America, Inc. v. Gore*[339] and *State Farm Mutual Automobile Insurance Co. v. Campbell*,[340] hold that the Due Process Clause limits state court awards of punitive damages for out-of-state conduct, especially conduct that was lawful where it took place.[341] Although this principle applies only in the rather narrow context of determining excessiveness of punitive damages, some commentators have seen these cases as embodying a broader extraterritoriality principle, and some litigants have—with fairly little success—pressed this interpretation.[342]

BMW spelled out three criteria for determining when a punitive damages award is in line with the Due Process Clause: the reprehensibility of the defendant's conduct, the ratio of punitive to compensatory damages, and congruity with civil and criminal sanctions for the same activities.[343] The Court also suggested, however, that an antecedent step to applying this test was to establish that the punitive damages in question had not been awarded for out-of-state conduct.[344] In the case at hand, a lower court in Alabama had awarded punitive damages in part for BMW's failures to make disclosures in

339. 517 U.S. 559 (1996).

340. 538 U.S. 408 (2003).

341. *See BMW*, 517 U.S. at 572–73 ("Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents."); *State Farm*, 538 U.S. at 422 ("A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.").

342. *See* Florey, *supra* note 6, at 1097–98 ("A number of litigants have seized on these inconsistencies and ambiguities to test the outer limits of the extraterritoriality doctrine.").

343. BMW, 517 U.S. at 574–75.

344. *See id.* at 572–74 ("The award must be analyzed in the light of the same conduct, with consideration given only to the interests of Alabama consumers, rather than those of the entire Nation.").

other states that were required under Alabama law but not under the law of other states.[345] The Court agreed with the Alabama Supreme Court that this was improper, explaining that the "scope of the interest in punishment and deterrence that an Alabama court may appropriately consider" should be "properly limited" to Alabama conduct and the "interests of Alabama consumers, rather than those of the entire Nation."[346]

Although the decision as a whole was grounded in the Due Process Clause, the Court suggested that this particular stricture on punishing legal out-of-state conduct might derive from multiple sources, including conventional dormant Commerce Clause doctrine, the extraterritoriality concerns described in *Healy*, and general "principles of state sovereignty and comity."[347] These principles, the Court found, meant that Alabama courts lacked "the *power* . . . to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents."[348]

The Court went still further in *State Farm*, in which it upbraided a Utah court for taking into account "the perceived deficiencies of State Farm's operations throughout the country" in weighing the reprehensibility prong of the three-part test described above.[349] The Court added to its grab bag of doctrinal justifications by invoking *Shutts*, the class action choice-of-law case in which the whole Court first adopted the "significant contact or aggregation of contacts" test first articulated in *Hague*. Citing *Shutts*, the Court noted, a bit mysteriously, that if the Utah court wanted to punish State Farm for harm to people outside of Utah, "[a]ny proper adjudication . . . would require [those out-of-state parties'] inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction."[350] This is a rather cryptic statement given that courts routinely hold that parties are governed by a law other than that of their home state, and the Court has not—in *Shutts* or otherwise—found constitutional problems with this practice as such. Nonetheless, some suggested that *State Farm* might be read to impose restraints on state courts' choice-of-law decisions outside the punitive damages context.[351]

345. *See id.* at 564–65, 569–70 (noting that the jury awarded punitive damages by applying Alabama's fraud statute to BMW's nationwide nondisclosure policy, even though disclosure obligations for car dealerships varied widely by state).

346. *Id.* at 574.

347. *Id.* at 571–72.

348. *Id.* at 573 (emphasis added).

349. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 420 (2003).

350. *Id.* at 421–22 (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821–22 (1985)).

351. *See, e.g.*, Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 431–32 (2003) (suggesting that lower courts may "push" the Supreme Court toward treating compensatory and punitive damages similarly from an extraterritoriality perspective).

While this idea was intriguing, a later case, *Philip Morris USA v. Williams*,[352] dampened the speculation. There, the Court suggested that the real problem in *State Farm* was not the choice of Utah law but that the jury had based an award of punitive damages "upon its desire to punish the defendant for harming persons who are not before the court (e.g., victims whom the parties do not represent)."[353] Although the degree and nature of the harm to such parties could not be litigated in their absence, the Court nonetheless found that the defendant's *conduct* toward such parties could be taken into account in assessing reprehensibility.[354]

Other statements in *State Farm* that sound sweeping may also have more limited application in context. Seeming to put forth a general anti-extraterritoriality principle, the Court announced that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred" and, further, that "as a general rule, . . . a State [does not] have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction."[355] Notably, however, both statements are limited to acts of punishment; neither suggests that a state may not regulate conduct in a way that affects out-of-state defendants or that state courts can no longer (as they do all the time) impose liability under the law of one state for conduct that took place in another.[356]

In the aftermath of *State Farm*, some commentators suggested that the Court might explicitly connect its reasoning to state choice of law more broadly, particularly in class actions,[357] and some litigants also urged this

352. 549 U.S. 346 (2007).

353. *Id.* at 349 (emphasis omitted).

354. *See id.* at 355 ("Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible . . . .").

355. *State Farm*, 538 U.S. at 421.

356. The Court's warnings that punitive damages should not be imposed for conduct lawful where it occurred does suggest a territoriality-grounded view of law. Yet when conduct occurring in one state has effects in another, particularly when those effects were intended or at least foreseeable, it is common for courts to impose liability under the law of the place where the consequences were felt, even if the law of the place where the conduct occurred would not render the defendant liable. In a well-known example, the California Supreme Court in *Bernhard v. Harrah's Club*, 546 P.2d 719 (Cal. 1976) (en banc), *superseded by statute*, CAL. CIV. CODE § 1714(b) (West 2023), *and* CAL. BUS. & PROF. CODE § 25602(c) (West 2023), *as recognized in* Ennabe v. Manosa, 319 P.3d 201 (Cal. 2014), applied California's dram-shop act to a Nevada tavern owner for continuing to serve alcohol to an intoxicated patron who then caused predictable harm in California. *Id.* at 720, 725–26. Nevada law would not have imposed civil liability under the circumstances, although the court believed (apparently erroneously) that such conduct was criminally prohibited in Nevada. *Id.* at 725.

357. For example, in the immediate wake of *State Farm*, Catherine M. Sharkey suggested that "lower federal courts may increasingly push the Court toward reconciling its principles of extraterritoriality in the punitive damages and class action spheres" and that "lower federal courts

reading.[358] Nonetheless, the Court so far has not taken up the suggestion; the *BMW–State Farm* framework remains the standard test applied by lower courts, but the Court has neither explained it further nor expanded its reach.[359]

Apart from the Court's seeming lack of interest, another obstacle to applying *BMW* or *State Farm* in other contexts is that the Due Process Clause already has a defined place in setting the outer bounds of the choice-of-law decisions that courts can make, and in that context, it appears to impose a standard identical to that of the Full Faith and Credit Clause—that is, the weak "aggregation of contacts" test announced in *Hague*.[360] Given that the *Hague* standard speaks directly to how the Due Process Clause bounds the reach of state law outside the punitive damages context—indeed, the Court referenced it in *State Farm*[361]—the argument that *BMW* and *State Farm* should be read to establish a different standard seems difficult to maintain, especially after years of silence by the Court. Thus, despite a few cryptic hints of greater significance, *BMW* and *State Farm* end mostly where they started, invoking the Due Process Clause for the limited purpose of restricting the circumstances in which punitive damages may be imposed. Although both cases undeniably evince a concern with extraterritorial regulation, they ultimately provide little insight into how the Due Process Clause might relate to the problem outside that narrow context.

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are beginning to enunciate rationales that resonate with that of the extraterritorial limitation for punitive damages." Sharkey, *supra* note 351, at 431–32, 432 n.330. As an example, she cited *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 333 F.3d 763 (7th Cir. 2003), *abrogated by* Smith v. Bayer Corp., 564 U.S. 299 (2011), in which the court assumed that allowing states to apply their individual choice-of-law rules to multiple lawsuits would be preferable to having a class action governed by "nationally homogenized law." Sharkey, *supra* note 351, at 432 n.330 (quoting *Bridgestone*, 333 F.3d at 766); *see also* Chad DeVeaux, *Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause*, 79 GEO. WASH. L. REV. 995, 1043 (2011) (suggesting that the *State Farm* Court's citation to *Shutts* "suggests that [its] extraterritoriality ruling rests upon *Hague-Shutts*'s contacts-based due process approach"); Denning, *supra* note 164, at 990 (noting that *BMW* was thought to have dormant Commerce Clause implications, although the Court quickly retreated from that idea).

358. *See* Florey, *supra* note 6, at 1098, 1100 & n.227 (discussing efforts by litigants to raise issues from *BMW* and *State Farm* issues in other contexts).

359. *See* Laura J. Hines & N. William Hines, *Constitutional Constraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma*, 66 HASTINGS L.J. 1257, 1271 (2015) (arguing that *BMW* and *State Farm* remain the "primary repositories of information about why the Court created a new constitutional regime for reviewing punitive damages awards" and that the Court has not further clarified the issue).

360. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 & n.10 (1981) (plurality opinion) (clarifying that the test applied under the Due Process Clause is identical to that under the Full Faith and Credit Clause).

361. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421–22 (2003) ("Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction." (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821–22 (1985))).

5. The Right to Travel/Privileges and Immunities Clause—The Privileges and Immunities Clause provides simply that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[362] The Clause was initially interpreted to be concerned with "removing unfair disabilities from outsiders, especially those burdening one's ability to conduct trade or make a living upon crossing into a new state."[363] While case law has modified and refined the inquiry, courts have continued to see preventing discrimination against nonresidents as the Clause's core focus. Problematically for those urging a wider role for the Privileges and Immunities Clause, it has been understood to protect only people, not corporations,[364] and to prohibit discrimination only against out-of-state residents, not in-state.[365]

Among other strands of modern Privileges and Immunities doctrine is the right to travel, which has been linked not only to the Privileges and Immunities Clause but also to other sources that may protect different aspects of the right.[366] For decades—in a discussion initially sparked by speculation that the Court might someday overturn *Roe v. Wade*,[367] as it now has[368]—scholars have carried on a lively debate about what exactly the right to travel does and does not protect.[369] Perhaps because the issue has been so closely

362. U.S. CONST. art. IV, § 2.

363. Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 MINN. L. REV. 384, 389 (2003).

364. *See* W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 656 (1981) (holding that "the Privileges and Immunities Clause is inapplicable to corporations" (citing Hemphill v. Orloff, 277 U.S. 537, 548–50 (1928))).

365. Smith-Drelich, *supra* note 80, at 27–28.

366. *See id.* at 25 (offering extraterritoriality as a "related but distinct thread" with additional protections from the Dormant Commerce Clause and fundamental rights). Smith-Drelich argues that the right to travel encompasses (1) a fundamental "right to free movement both interstate and intrastate"; (2) a right, protected by the dormant Commerce Clause, to be free of "burdens on interstate travel [that] also burden interstate commerce"; and (3) for interstate travelers, protection from discriminatory state regulation of travel under the Privileges and Immunities Clause. *Id.* at 26–28.

367. 410 U.S. 113 (1973), overruled by Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

368. *See* Florey, *supra* note 23, at 486 (introducing the longtime scholarly question of whether states can criminalize out-of-state abortions—even prior to the Court overruling *Roe*).

369. *See, e.g.*, Mark D. Rosen, *"Hard" or "Soft" Pluralism?: Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers*, 51 ST. LOUIS U. L.J. 713, 714 (2007) (concluding that states "generally do have the power to regulate their citizens' out-of-state activities"); Fallon, *supra* note 164, at 627 (noting that if *Roe* were overruled, "at least some states" might try "to stop their citizens from traveling out of state to procure abortions of fetuses conceived within their territory"); Rosen, *supra* note 2, at 856–58 (suggesting that states can regulate out-of-state conduct); C. Steven Bradford, *What Happens if* Roe *Is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87, 170 (1993) (theorizing that "a state probably could not constitutionally apply its criminal abortion law" to conduct in other states because doing so

tied to abortion, much discussion of the role the right to travel might play in extraterritoriality issues has had a relatively narrow focus, homing in on the question whether a state may prohibit its residents from traveling to a different jurisdiction to engage in conduct legal there but illegal in their home state. The case law relevant to this question is limited,[370] and commentators have taken divergent positions—some scholars argue that the right to travel, perhaps along with other constitutional provisions, precludes such a ban,[371] while others believe that, under widely accepted principles of legislative jurisdiction, states may regulate their citizens' conduct even when they are traveling elsewhere.[372] Other commentators have taken intermediate positions or argued that the law is simply unclear.[373]

Justice Kavanaugh recently signaled his interest in the Privileges and Immunities Clause as a source of extraterritoriality restrictions, not only in *National Pork*[374] but also in *Dobbs*, in which Justice Kavanaugh's concurring opinion expressed his belief that the "constitutional right to interstate travel" (presumably referring to aspects of the right protected by the Privileges and Immunities Clause, although Justice Kavanaugh did not specify) would prohibit a state from "bar[ring] a resident of that State from traveling to another State to obtain an abortion."[375] Although Justice Kavanaugh's *Dobbs*

would "probably violate the Commerce Clause and possibly the Sixth Amendment"); Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 452, 462 (1992) (concluding that "[t]he tradition of American federalism stands squarely against efforts by states to punish their citizens for conduct that is protected in the sister state where it occurs," notwithstanding that "national uniformity" on abortion policy is unlikely).

370. In the abortion context, the dispute has often revolved almost wholly around *Bigelow v. Virginia*, 421 U.S. 809 (1975), which invalidated a Virginia statute making it a misdemeanor to "encourage or prompt the procuring of an abortion." *Id.* at 811. Although the case was decided on First Amendment grounds, the Court also suggested that Virginia lacked power to "prevent its residents from traveling [out of state] to obtain [abortion] services or, as the State conceded, prosecute them for going there." *Id.* at 824 (citation omitted). Scholarly reactions have ranged from regarding this passage as "dispositive" in establishing that states may not regulate residents' out-of-state activities, *e.g.*, Kreimer, *supra* note 369, at 460, to "dictum from a Court that no longer exists" that "it is hard to believe that the modern Court would follow," *e.g.*, Bradford, *supra* note 369, at 164–65.

371. *See, e.g.*, Kreimer, *supra* note 369, at 459–60 (concluding that a ban is likely unconstitutional under *Bigelow* and other precedents).

372. *See* Cohen et al., *supra* note 63, at 34 (arguing that scholars fall into three camps, some believing that "extraterritorial application of abortion law would violate various provisions of the Constitution," some who think it would be constitutional, and still others who "believe that it would raise complicated and unanswered issues of constitutional law").

373. *See supra* note 372.

374. *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1172 (2023) (Kavanaugh, J., concurring in part and dissenting in part) (arguing that "state economic regulations like California's Proposition 12 may raise questions" under various constitutional provisions, including the Privileges and Immunities Clause).

375. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

statement has sparked much interest and discussion, it is a fairly offhand statement made in a solo concurrence. It is unclear if other members of the Court share his view; indeed, Justice Alito has signaled his belief that case law precludes the Court from construing the Privileges and Immunities Clause broadly.[376]

Even if the larger Court were to embrace Justice Kavanaugh's view of the right to travel, it would appear to be far too limited to speak to many key extraterritoriality questions. It is doubtful, for example, whether the right has any role to play in a *National Pork*–type situation.

To be fair, however, because the relationship between the right to travel and the Privileges and Immunities Clause is not straightforward, two other possibilities exist: The right to travel might confer more expansive protections rooted in other constitutional provisions, and/or the Privileges and Immunities Clause might confer anti-extraterritoriality safeguards beyond the right to travel. For example, in a recent article, Noah Smith-Drelich argues that the right to travel is protected in three ways: by the Privileges and Immunities Clause, as a fundamental right, and by the dormant Commerce Clause, in combination creating a "robust set of protections."[377] Likewise, some scholars have argued that the Privileges and Immunities Clause might be a more logical source for the antidiscrimination principle currently tethered to the dormant Commerce Clause.[378]

Yet these arguments for a broader view of either the right to travel or the Privileges and Immunities Clause may be less helpful than they appear. Even a broad view of the right to travel would seem incontestably relevant to the problem of abortion travel (and similar scenarios) only insofar as it is bound up with the dormant Commerce Clause.[379] A more expansive understanding of the Privileges and Immunities Clause may also be of little help, given its established restriction to discrimination against out-of-state individuals. Moreover, the Court has not shown much interest in relocating the concerns of the dormant Commerce Clause to a different constitutional

376. *See* Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2051 n.4 (2023) (Alito, J., concurring in part and concurring in the judgment) (observing that while "[i]n the past, the Court recognized that . . . the Privileges and Immunities Clause might restrict state regulations that interfere with the national economy" (citation omitted), under more recent, though "entrenched," case law, the Court has adopted "restrictive interpretations").

377. Smith-Drelich, *supra* note 80, at 26–28.

378. *See, e.g.*, Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 446–47 (1982) (arguing that the plain meaning of the Privileges and Immunities Clause makes it more appropriate than the "silence[]" of the Commerce Clause for "protecting process").

379. That is, abortion travel restrictions do not restrict anyone's movement per se; they simply purport to regulate state citizens even when they are outside state lines. Although scholars have argued that such restrictions "suppress" state travel sufficiently to implicate the right to travel, for example Smith-Drelich, *supra* note 80, at 28, others disagree. *See, e.g.*, Rosen, *supra* note 2, at 914 (arguing that the limited dimensions of the right to travel, as it has been set forth by the Court, cannot support such an interpretation).

provision, such as the Privileges and Immunities Clause.[380] And even if the Court were to conclude that it is the Privileges and Immunities Clause rather than the Commerce Clause that enshrines interstate antidiscrimination principles, it is unclear how it would make a difference to the substance of those principles themselves.[381]

In short, the only extraterritoriality problem to which the right to travel appears at all well matched is the question of whether a state may bar an individual from crossing state lines to obtain some good or service illegal in their home state. And on that question, despite reams of scholarly speculation, there exists no clear answer, in part because even that question seems somewhat distant from the right's core. As a result, the right to travel simply provides little illumination on more general extraterritoriality questions.

6. The Import–Export Clause—A final possibility, the Import–Export Clause, can be dispensed with briefly. The Import–Export Clause prohibits states from "lay[ing] any Imposts or Duties on Imports or Exports" except with congressional consent.[382] More than a century and a half ago, the Court accepted the view that "goods imported from one State into another are [not] within the prohibition to the States to levy taxes on imports."[383] Although over the years critics have at times questioned the textual and historical foundation for this interpretation,[384] and Justice Thomas forcefully criticized it in a well-known dissent,[385] it remains unequivocally the law.[386]

Justice Thomas presumably continues to hold his position that the Import–Export Clause applies to interstate as well as foreign commerce, and *National Pork* suggests that Justice Kavanaugh may also be sympathetic to

380. *See* Brannon P. Denning, *Justice Thomas, the Import-Export Clause, and* Camps Newfound/Owatonna v. Harrison, 70 U. COLO. L. REV. 155, 156–57 (1999) (arguing that, while the dormant Commerce Clause is "[a]lmost universally reviled by academics and Justices on the Supreme Court as without solid foundation in text or intent, and altogether lacking a coherent application, it nevertheless endures and continues to be employed by the Court" (footnotes omitted) and may even be "gaining . . . strength").

381. *See* Denning, *supra* note 363, at 413 (quoting Dan Farber as saying, of this potential substitution, "Why bother finding a textual hook if you're going to hang the same clothes on it anyway?").

382. U.S. CONST. art. I, § 10, cl. 2.

383. Woodruff v. Parham, 75 U.S. (8 Wall.) 123, 139 (1869).

384. *See, e.g.*, Denning, *supra* note 380, at 213 (noting that the available historical evidence "create[s] a presumption . . . that the terms used in the Import-Export Clause were not used exclusively in reference to foreign commerce").

385. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 635 (1997) (Thomas, J., dissenting) ("In short, there is little in the *Woodruff* opinion to sustain its holding . . . .").

386. *See* James M. McGoldrick, Jr., *Why Does Justice Thomas Hate the Commerce Clause?*, 65 LOY. L. REV. 329, 387 (2019) ("[S]ince *Woodruff v. Parham* in 1869, [the Import–Export Clause] has been limited to foreign trade, not interstate commerce.").

this view.[387] But no other current Justice has expressed support for this interpretation, and Justice Alito appeared to dismiss it in *Mallory*.[388] It seems fairly safe to say that whatever respect for precedent or institutional inertia that has kept the Court from re-examining the Clause's scope since 1869 will probably continue into the near future.

Even were the Court to abruptly change course on the Import–Export Clause, however, it is hard to see what the Clause would add to extraterritoriality doctrine. To begin with, the Clause is narrow in scope; to rely on it in lieu of the dormant Commerce Clause or other doctrines would be to "turn[] a blind eye to blatant discrimination against interstate commerce that does not take the form of an impost or a duty."[389] The Clause, for example, does not prohibit taxation, and even "discriminatory taxes" might fail to qualify as an impost or a duty.[390] Finally, the Clause seems to have little to say to the sort of extraterritorial conflicts that this Article has argued are becoming more prevalent—projections of state power that are motivated not by favoritism towards residents but by a desire to affirm and assert voters' values. Although it is not inconceivable that this impulse could in rare cases take the form of an impost or duty—Justice Kavanaugh seems to suggest, for example, that Proposition 12 could be so characterized,[391] although that seems highly debatable in light of the Clause's narrow focus—it seems highly unlikely that this would be the case as a general rule. Given this backdrop, the Clause is unlikely to be a fruitful source of general extraterritoriality restrictions.

IV. The Way Forward

The preceding Part argued that, despite Justices' multiple invocations of particular constitutional provisions that might serve as a basis for challenging state legislative or judicial action on extraterritoriality grounds, all proposed candidates are too amorphous, weak, or narrowly confined to do the job. At the same time, it remains the case that the Court's rulings in

387. *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1175 (2023) (Kavanaugh, J., concurring in part and dissenting in part) (arguing that "[p]roperly interpreted," the Import–Export Clause may also bar burdensome "taxes and duties on imports from other States—not just on imports from foreign countries").

388. *See* Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2051 n.4 (2023) (Alito, J., concurring in part and concurring in the judgment) (describing the prevailing interpretation, correct or not, as "entrenched" and proclaiming that "we must look elsewhere" to find a basis for rejecting state restrictions on interstate commerce).

389. Denning, *supra* note 380, at 220.

390. *See id.* at 221 (noting that the Clause "*could* be interpreted to prohibit state measures that accomplish the same ends as the prohibited imposts or duties").

391. *See Nat'l Pork*, 143 S. Ct. at 1175 (Kavanaugh, J., concurring in part and dissenting in part) ("[I]f one State conditions sale of a good on the use of preferred farming, manufacturing, or production practices in another State where the good was grown or made, serious questions may arise under the Import-Export Clause.").

National Pork and *Mallory* may have the indirect effect of fueling extraterritoriality conflicts.[392] From a pragmatic standpoint, therefore, it seems likely to be the case that many clashes over allegedly extraterritorial regulation will invoke the *Pike* balancing test—the one piece of extraterritoriality infrastructure that at least five Justices appear willing to preserve,[393] that is potentially adaptable to a variety of situations, and that some Justices have suggested may have broader application. Although *Pike* balancing is a flawed vehicle and one that derives from the often-maligned dormant Commerce Clause, it also has some advantages, including its ability to be applied in a variety of contexts and to accommodate competing state interests. The following subparts discuss why courts may turn towards *Pike*, enumerate some of the advantages and disadvantages of such a move, and suggest ways in which *Pike* balancing could be refined to better handle the range of extraterritoriality questions courts may encounter.

A. The Ups and Downs of Pike

In general, the dormant Commerce Clause is concerned with discrimination against out-of-state goods or producers—a situation distinct from extraterritorial overreaching per se. Despite that limited role, the Clause is the "perennial object of judicial and academic brickbats" contesting its historical and textual legitimacy.[394] Even those less hostile to the dormant Commerce Clause in general have tended to advocate for a restrictive interpretation that would limit its use to rooting out state protectionism. Donald H. Regan has argued, for example, that in the bulk of dormant Commerce Clause cases, "the Court is concerned and should be concerned only with preventing purposeful protectionism."[395] Cautioning that an overbroad use of the dormant Commerce Clause could "condemn an extraordinary array of state laws as applied to cross-border activity that no one heretofore viewed as problematic,"[396] Jack L. Goldsmith and Alan O. Sykes have stressed that "the central purpose of the dormant Commerce

392. *See supra* Part II.

393. The dormant Commerce Clause's more basic prohibition of state regulation that explicitly discriminates against interstate commerce might also occasionally come into play in extraterritoriality disputes. The sorts of legislation discussed in this Article, however, would rarely involve such overt discrimination. *See, e.g.*, *Nat'l Pork*, 143 S. Ct. at 1153 (noting that the challengers conceded Proposition 12's nondiscriminatory nature).

394. Denning, *supra* note 363, at 384–85. *But see* Friedman & Deacon, *supra* note 124, at 1882 (arguing that "there is a surprising logic and clear legitimacy to today's dormant commerce doctrine"). Recently, Justice Alito forcefully defended the role of the dormant Commerce Clause, arguing that it "vindicates a fundamental aim of the Constitution: fostering the creation of a national economy and avoiding . . . every-State-for-itself practices." *See* Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2051 (2023) (Alito, J., concurring in part and concurring in the judgment).

395. Regan, *supra* note 13, at 1093.

396. Goldsmith & Sykes, *supra* note 156, at 823.

Clause is to prevent . . . protectionism, and the primary judicial tool for effectuating this purpose is a prohibition on state regulations that discriminate against out-of-state actors."[397]

Nonetheless, the Court at times has suggested in two lines of cases that the dormant Commerce Clause might sweep more broadly. One of these is the *Brown-Forman–Healy* series that the Court has now more or less disposed of after *National Pork*.[398] The other is the rule first articulated in *Pike v. Bruce Church, Inc.*, a case invalidating an Arizona requirement that exported cantaloupes had to be packaged in-state.[399] *Pike* provides that where a statute "regulates even-handedly to effectuate a legitimate local public interest" with only "incidental" effects on interstate commerce, it is valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[400] Over time, *Pike* has been influential in numerous Supreme Court decisions,[401] including some, like *CTS Corp.* and *Edgar*, that also raised extraterritoriality issues.[402]

Pike, like other strands of dormant Commerce Clause doctrine, has also come in for its share of criticism.[403] In addition, it has sparked controversy about exactly what type of analysis it mandates. Many commentators[404]—and at times the Court[405]—have stressed that *Pike* should be viewed as wholly of a piece with the general antiprotectionist concern that characterizes dormant Commerce Clause analysis. Under this view, *Pike* is just an extension of the antidiscrimination principle to cases in which discrimination is evident only in a law's "practical effects,"[406] in contrast to the view that it

397. *Id.* at 797.

398. *See supra* section II(A)(2).

399. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 138, 146 (1970) (affirming a permanent injunction that prevented Arizona from enforcing the statute against the appellant produce company).

400. *Id.* at 142 (citing Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960)).

401. *See* David S. Day, *Revisiting* Pike*: The Origins of the Nondiscrimination Tier of the Dormant Commerce Clause Doctrine*, 27 HAMLINE L. REV. 45, 47–48 (2004) (describing *Pike* as a "doctrinal icon" and noting that approximately seventeen Supreme Court decisions "ha[d] relied on, or at least addressed [its] substance" by the early 2000s).

402. *See supra* section II(A)(1).

403. *See* Denning, *supra* note 164, at 1005–06 (describing recent "judicial hostility—or indifference" to both the antidiscrimination and *Pike* strands of the dormant Commerce Clause).

404. *See, e.g.*, Regan, *supra* note 13, at 1092 ("In the central area of dormant commerce clause jurisprudence, . . . (*Pike v. Bruce Church, Inc.* may be taken as paradigmatic), the Court has been concerned exclusively with preventing states from engaging in purposeful economic protectionism." (footnote omitted)).

405. *See, e.g.*, Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1158 (2023) (noting "the congruity between our core dormant Commerce Clause precedents and the *Pike* line" (citing Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298 n.12 (1997))).

406. *See id.* at 1157 (contrasting such incidentally discriminatory laws with those that are facially discriminatory).

also occasionally encompasses state actions not motivated by protectionism.[407]

In *National Pork*, the Justices seemed inclined toward a narrow view of *Pike*, dividing only on whether *Pike* never or merely *almost* never should be applied outside the antidiscrimination context. Expressing skepticism about "retool[ing] *Pike* for a much more ambitious project,"[408] the Court noted that *Pike*'s main function is to "'"smoke out" . . . hidden' protectionism"[409] and to provide "another way to test for purposeful discrimination against out-of-state economic interests."[410] Yet the Court did not entirely rule out the application of *Pike* to "genuinely nondiscriminatory" state laws,[411] even while regarding this use as "not . . . auspicious" and "well outside *Pike*'s heartland."[412]

Some Justices, moreover, appear to have a more expansive view of *Pike*'s uses and purposes. In a partial concurrence joined by three other Justices, Chief Justice Roberts counted heads on the issue, finding support in the opinion from six Justices for the proposition that "*Pike* extends beyond laws either concerning discrimination or governing interstate transportation" and suggesting that a substantial burden on interstate commerce alone justifies a *Pike* analysis.[413]

To be sure, Chief Justice Roberts's view focused on commerce; whether applied to discriminatory or nondiscriminatory legislation, he argues that the dormant Commerce Clause's central role is to ensure "free private trade in the national marketplace."[414] Some scholars, however, have gone further, arguing that the dormant Commerce Clause has a role in protecting states' regulatory autonomy as well. Writing before the Court issued its *National Pork* decision, Michael S. Knoll and Ruth Mason argued that "[a]lthough the dormant Commerce Clause does not completely ban regulatory spillovers, limits are important to maintain the independence and autonomy of each

407. *See supra* note 193 and accompanying text.

408. *Nat'l Pork*, 143 S. Ct. at 1159 (plurality opinion).

409. *Id.* at 143 S. Ct. at 1158 (majority opinion) (quoting RICHARD H. FALLON JR., THE DYNAMIC CONSTITUTION 311 (2d ed. 2013)).

410. *Id.* at 1159 (plurality opinion).

411. *Id.* at 1158 (majority opinion).

412. *Id.* at 1159.

413. *See id.* at 1167–68 (Roberts, C.J., concurring in part and dissenting in part) (arguing that because the petitioners "plausibly alleged a substantial burden against interstate commerce," the case should be remanded "to decide whether petitioners have stated a claim under *Pike*"). Justice Kavanaugh also stressed that despite the "fractured decision," six Justices wish to "affirmatively retain the longstanding *Pike* balancing test." *Id.* at 1172 (Kavanaugh, J., concurring in part and dissenting in part).

414. *Id.* at 1167–68 (Roberts, C.J., concurring in part and dissenting in part).

state."[415] They noted that a particular concern is "incursion by larger states that can leverage access to their markets to . . . infringe on" the regulatory autonomy of smaller states within their own borders.[416] They further argued that, within the broad umbrella of *Pike* balancing, this concern is particularly present where the case involves a "*mismatch burden*," where "the asymmetric burden [a regulation] imposes on interstate commerce would disappear if all states adopted the same regulation," as opposed to a "*single-state burden*," where the "burden [on interstate commerce] would still exist if all states adopted that same regulation."[417] In their view, *Pik*e falls into the latter category; the former includes both *Bibb v. Navajo Freight Lines, Inc.*,[418] in which the Court invalidated an Illinois mandate that trucks use a different mudflap design than other states required,[419] as well as *National Pork* itself.[420] While a similar analytical structure applies to both sorts of cases,[421] mismatch burden scenarios, in their view, "raise additional horizontal federalism issues that single-state cases do not."[422]

This view of the Commerce Clause as, in part, a protection against infringement of other states' regulatory spheres finds some support from Justice Alito in a perhaps surprising context[423]—the assertion of personal jurisdiction by states against corporations that have purportedly consented to it through registration statutes. Concurring in part in *Mallory*, Justice Alito argued that the Court has "long recognized that the Constitution restricts a State's power to reach out and regulate conduct that has little if any connection with the State's legitimate interests"[424] and that such concerns, rather than being addressed by the Due Process Clause that has traditionally governed personal jurisdiction questions, "fall more naturally within the

415. Michael S. Knoll & Ruth Mason, National Pork *Is a* Bibb *Case, Not a* Pike *Case*, 91 GEO. WASH. L. REV. ARGUENDO 1, 3 (2022); *see also id.* (noting that, in the authors' view, *National Pork* itself "implicates" state independence and state autonomy).

416. *Id.*

417. *Id.* at 3–4.

418. 359 U.S. 520 (1959).

419. *Id.* at 523, 530.

420. Knoll & Mason, *supra* note 415, at 6.

421. *See id.* at 5 (noting that "[t]he Court conducts balancing analysis—which it usually describes as *Pike* balancing—in both single-state and mismatch cases").

422. *Id.* at 6.

423. Justice Alito, however, is not the first to suggest that the dormant Commerce Clause should be seen as a limit on personal jurisdiction. *See* Todd Davis Peterson, *Categorical Confusion in Personal Jurisdiction Law*, 76 WASH. & LEE L. REV. 655, 694 (2019) (observing that scholars have proposed basing "territorial contacts requirements" on the dormant Commerce Clause). Some scholars have also suggested that the Privileges and Immunities Clause or the Full Faith and Credit Clause might play a role in this area. Allen Erbsen, *Personal Jurisdiction's Moment of Opportunity: A Reform Blueprint for Originalists and Nonoriginalists*, 75 FLA. L. REV. 415, 471 (2023).

424. Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2049 (2023) (Alito, J., concurring in part and concurring in the judgment).

scope of the [dormant] Commerce Clause."[425] Applying this principle, Justice Alito suggested that a state's broad assertion of personal jurisdiction over corporations, even if not discriminatory, might create the burdens on interstate commerce that would trigger *Pike* balancing.[426]

B. Pike*'s Future in the Extraterritoriality Realm*

The Court's efforts to grapple with issues of extraterritoriality via the dormant Commerce Clause have not, in the past, been especially successful. In particular, the Court's abrupt veer toward impossibly strict anti-extraterritoriality standards in *Brown-Forman* and *Healy*, followed by its apparent repudiation of those standards, did little to illuminate the issue and confused lower courts for decades.

At the same time, as the preceding subparts have argued, *Pike* may be the last doctrine standing that attempts to address the extraterritoriality issue in a manner that is reasonably comprehensive and grounded in articulable justifications.[427] Although the Justices' casting around for various alternatives in *National Pork* presumably indicates dissatisfaction with *Pike* as an option[428]—and a handful appear ready to abandon *Pike* entirely in this context[429]—the alternatives they have proposed suffer from even more serious problems. Further, some Justices have also advertised their continued commitment to *Pike*.[430] As a result, more or less by process of elimination, *Pike* is likely to play a greater role in extraterritoriality-based challenges.

To be sure, this may seem an odd statement given *Pike*'s origins in the mundane context of protectionist cantaloupe-packaging requirements. Yet *Pike* analysis has qualities that make it surprisingly adaptable to current extraterritoriality problems. To begin with, even much ideologically driven legislation is at root a regulation of commerce of some sort—what medical services are available, what employers may and may not pay for, how funds should invest, how commodities should be produced and labeled. In some ways, therefore, the dormant Commerce Clause is a natural fit for some extraterritoriality scenarios that are likely to arise, perhaps more so than other

425. *Id.* at 2051.

426. *See id.* at 2053 (opining that Pennsylvania's broad assertion of jurisdiction-by-registration may "discriminate[] against out-of-state companies" and, at a minimum, "imposes a 'significant burden' on interstate commerce" (quoting Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 893 (1988))).

427. For simplicity's sake, this Article refers to all *Pike*-derived cases as part of this group, although Knoll and Mason's point that *Pike*- and *Bibb*-style cases are meaningfully distinguishable is well taken. *See supra* notes 415–22 and accompanying text.

428. *See supra* subpart III(A).

429. *See supra* section II(A)(3).

430. *See supra* section II(A)(3).

proposed alternatives.[431] Under this view, the Clause protects both individuals and other states from territorially overreaching regulation.

Although it is perhaps not the most commonly expressed view of the Commerce Clause's purpose,[432] the notion that the Clause has functions beyond ensuring a harmonious national marketplace is not a new one. Some scholars, for example, have suggested that the dormant Commerce Clause, particularly in *Pike* balancing guise, could be a source of limits on personal jurisdiction.[433] The Court itself has recognized, albeit in a somewhat different context, that the Clause protects individuals, holding in *Dennis v. Higgins*[434] that a dormant Commerce Clause claim was cognizable under 42 U.S.C. § 1983.[435] In so holding, the Court rejected the argument that the Clause "was not designed to benefit individuals, but rather was designed to promote national economic and political union,"[436] finding instead that it confers a "'right' to engage in interstate trade free from restrictive state regulation."[437] Elsewhere, the Court has compared the dormant Commerce Clause to the Full Faith and Credit Clause, indicating that both serve in similar ways as "nationally unifying force[s]."[438] And commentators have likewise suggested that the Clause may serve to restrain states from encroaching on both individuals' free choice and other states' regulatory spheres of influence. James M. McGoldrick Jr., for example, has argued that, by "leveling the

431. Consider, for example, the right to travel, which is often cited as a potential brake on states' efforts to restrict residents from obtaining out-of-state abortions. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring) (concluding that states may not bar residents from traveling to another state to obtain an abortion given "the constitutional right to interstate travel"). The question whether a state can prospectively prohibit or retrospectively attach consequences to travel to another state for the purpose of, for example, receiving an abortion or gender-affirming care falls some distance from the core protections of the right to travel. *See* Rosen, *supra* note 2, at 913–14, 919 (arguing that the constitutional right to travel is limited and does not bar states from regulating the out-of-state conduct of their citizens). Rather, it is a question of that person's rights to purchase and receive services on equal terms with residents of other states. Further, this issue arises not because of the actions of the traveler's destination state but because of the actions of their home state; indeed, residents of the destination state are, if anything, negatively affected by being unable to deal with restrictive-state travelers on the same terms as others. *See* Smith-Drelich, *supra* note 80, at 28 (arguing that restrictions on seeking medical care in another state clearly violate the dormant Commerce Clause, though suggesting that they may implicate the right to free movement as well).

432. A perhaps more traditional view of dormant Commerce Clause analysis is that it ensures that "the peoples of the several states must sink or swim together," because "prosperity and salvation are in union and not division." Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

433. *See, e.g.*, John F. Preis, *The Dormant Commerce Clause as a Limit on Personal Jurisdiction*, 102 IOWA L. REV. 121, 154 (2016) (arguing that registration-based personal jurisdiction "produce[s] no discernible benefits for a state" and should accordingly be held unconstitutional under the dormant Commerce Clause).

434. 498 U.S. 439 (1991).

435. *Id.* at 440.

436. *Id.* at 449.

437. *Id.* at 448.

438. Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943).

national playing field for primarily economic interest[s]," the dormant Commerce Clause is, in some circumstances, "protective of state and individual rights."[439] Ilya Somin has raised the Clause in the specific context of abortion travel, reasoning that "[t]raveling to get an abortion is pretty obviously interstate commerce," and thus, "a ban on traveling out of state to engage in a specific type of economic transaction is a pretty obvious violation of the [dormant Commerce Clause]."[440]

In many ways, *Pike* balancing is also particularly suitable for addressing the sort of interstate clashes this Article has described. In contrast to, say, the near-meaningless *Hague* standard, it is flexible without being completely formless. In addition, *Pike* balancing sets a fairly high threshold for a successful challenge even when a law creates a substantial burden on interstate commerce; judges—wary of the perils of trying to compare hard-to-quantify burdens and benefits—"tend to approve state laws that burden commerce as long as the law plausibly advances any legitimate state interest, even if the interest is slight," as John F. Preis has put it.[441] Preis nonetheless argues that the test still has some force: "While courts are largely unable to measure the size of a state benefit, they are able to see where a benefit is utterly absent."[442]

None of this to say that *Pike* is a perfect framework for tackling extraterritoriality questions. To begin with, it may be too easily applied in a way that is simply hostile to state regulation in general rather than extraterritorial regulation per se. Justice Alito's invocation of the Commerce Clause in *Mallory*, for example, displays some discomfort with forceful state regulation of corporations in general, regardless of whether it raises concerns about the inappropriately extraterritorial projection of state power. Justice Alito (no doubt accurately) characterizes as forum shopping Mallory's decision to sue in a Pennsylvania court "reputed to be . . . favorable to tort plaintiffs" as a nonresident with a non-Pennsylvania injury.[443] Later, however, Justice Alito extends the argument by contending that a widespread adoption of *Mallory*-type statutes will make it difficult for corporations to "manage the patchwork of liability regimes, damages caps, and local rules in

439. McGoldrick, *supra* note 386, at 396.

440. Ilya Somin, *Can States Ban Residents from Getting Abortions in Other States, if* Roe v. Wade *Is Overturned?*, REASON: VOLOKH CONSPIRACY (May 10, 2022, 5:08 PM), https://reason.com/volokh/2022/05/10/can-states-ban-residents-from-getting-abortions-in-other-states-if-roe-v-wade-is-overturned/ [https://perma.cc/7Y56-Q4K3]; *see also* Smith-Drelich, *supra* note 80, at 28 (making a similar argument that restricting interstate travel undertaken to engage in out-of-state conduct is unconstitutional, even if the restricted conduct is noncommercial).

441. Preis, *supra* note 433, at 145.

442. *Id.*; *see also id.* at 145 n.133 (collecting cases).

443. Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2049 (2023) (Alito, J., concurring in part and concurring in the judgment).

each State" with potentially "devastating" impact for smaller companies.[444] This argument, however, conflates true extraterritoriality burdens—in other words, being subjected to one state's substantive law for actions that are insufficiently connected to it—with merely procedural ones, such as the need to master local rules, illustrating a danger that the dormant Commerce Clause could be used to challenge any legal situation unfavorable to corporate defendants.[445]

In *National Pork*, Justice Kavanaugh similarly extols the "$20 billion-plus [pork] industry that generates hundreds of thousands of American jobs and serves millions of American consumers," while suggesting that California's standards "depart significantly from common agricultural practices" and may lead to "higher pork prices nationwide" as well as "lower wages and reduced benefits (or layoffs) for . . . American workers."[446] Largely irrelevant to the question whether California has overreached its territorial sphere of influence, this editorializing suggests a simpler disagreement with California's regulatory decisions and indicates how *Pike* analysis could be applied in a one-sidedly pro-corporate direction, allowing corporations to rely on the vague standard of "undue burden" to challenge state regulation intended to achieve legitimate goals.

Even apart from the pro-corporate bias that may creep into *Pike* analysis, there is reason to be wary of applying any sort of balancing test in this politically charged context, particularly one that requires Justices to assign their own weights to various interests that may not be especially commensurable. The hesitation that various Justices have expressed about balancing intangible costs and benefits,[447] most recently by Justice Barrett in *National Pork*,[448] is thus a reasonable and welcome one.

These pitfalls, however, may not entirely outweigh *Pike*'s advantages. And, as this Article has attempted to show, *Pike* analysis may, as a practical matter, come to dominate the analysis of extraterritoriality questions. For that reason, not just whether but *how Pike* is applied is an important question. The

444. *Id.* at 2054. This analysis also inaccurately conflates forum choice with choice of law. While choosing a plaintiff-favorable Pennsylvania forum may make it more likely that a plaintiff will win because of procedural or jury-composition advantages, it does mean that Pennsylvania law will necessarily govern the case.

445. Justice Alito argued that Pennsylvania's assertion of jurisdiction in *Mallory* might be seen as outright discriminatory, but "at the very least" it significantly burdened interstate commerce, justifying *Pike* balancing. *Id.* at 2053.

446. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1173–74 (2023) (Kavanaugh, J., concurring in part and dissenting in part).

447. *See* Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment) (arguing that, in a *Pike* analysis, "the interests on both sides are incommensurate" and any balancing is a "legislative judgment[]").

448. *See Nat'l Pork*, 143 S. Ct. at 1167 (Barrett, J., concurring in part) ("California's interest in eliminating allegedly inhumane products from its markets cannot be weighed on a scale opposite dollars and cents . . . .").

following subpart briefly suggests considerations that courts might take into account to conceivably maximize *Pike*'s strengths while reducing its potential harms.

C. Adapting Pike

As this Article has argued, *Pike* balancing—for all its flaws as well as its virtues—has the potential to emerge as a wide-ranging framework for addressing a variety of extraterritoriality questions. While a full account of how *Pike* balancing could be adapted to fulfill this task is beyond the scope of this Article, this subpart suggests in broad outline how judges could apply it in a way that is sensitive to its potential pitfalls and that allows it to address a variety of issues and contexts.

Balancing, of course, is at *Pike*'s heart—indeed, it is generally called the "*Pike* balancing test."[449] Yet the difficulty of balancing intangible costs and benefits is likely to become ever more acute as courts deal increasingly with charged ideological issues. To avoid excessive judicial intervention with state regulation, therefore, courts applying *Pike* should think of it as a tool to address only relatively egregious cases of state overreaching. The required burden on interstate commerce to trigger *Pike* should be high, while the threshold for finding that an offsetting state benefit exists should be low. Such a view of *Pike* would make the test forgiving but not meaningless. For example, for purely symbolic action, such as banning the consideration of ESG in investing, benefits beyond psychic ones might be challenging to establish to a court's satisfaction.[450] To be sure, there will be difficult cases, like *National Pork* itself. But as long as the Court recognizes that states should be free to set standards that differ from each other, and that a company that does business in multiple states "must simply be prepared to conform its various local operations to more than one set of laws,"[451] *Pike* balancing

449. *E.g.*, *id.* at 1172 (Kavanaugh, J., concurring in part and dissenting in part).

450. *See* Malone et al., *supra* note 24 (suggesting that anti-ESG legislation simply imposes extra costs on many funds and that many states have added carve-outs to their anti-ESG measures as a result).

451. Regan, *supra* note 7, at 1881. As an example, Regan discusses *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981)—an unsuccessful challenge to a law disallowing the sale in Minnesota of milk in nonreusable plastic containers. Regan, *supra* note 7, at 1880. He notes that the Minnesota rule could be seen as creating an inconsistency "between Minnesota, on the one hand, and states that permitted plastic nonreturnable containers, on the other." *Id.* at 1880–81. While acknowledging that if two states have different standards, "that may complicate the life of a distributor who wants to market milk in both states," Regan nonetheless argues that "this sort of inconsistency in regulation is not generally speaking a constitutional problem at all." *Id.* at 1881. Under this view, the California law at issue in *National Pork* would also seem to raise few concerns. *See* Goldsmith & Sykes, *supra* note 156, at 790 (noting that the Commerce Clause "does not . . . mandate state-law uniformity; despite the dormant Commerce Clause, firms that operate in interstate commerce often face different regulations in different states").

could help smoke out ideologically posturing legislation with harmful effects without becoming simply a blunt anti-regulatory instrument.

Pike balancing should also be adapted to address the variety of situations in which extraterritoriality issues are likely to arise. An important one is the place of extraterritoriality limits in litigation, where the currently applicable *Hague* test does little to constrain state power.[452] Historically, the relevance of the dormant Commerce Clause in the litigation context has been unclear, though it has been argued that the Clause might affect litigation in two ways. First, the Clause could apply, as commentators have suggested before and Justice Alito mused about in *Mallory*, to unusually burdensome assertions of personal jurisdiction.[453] Second, as an alternative or supplement to the fairly toothless *Hague* framework, it could apply to limit choice-of-law decisions that inappropriately extend forum law to distant events.[454] Although both these functions seem to be reasonable uses of *Pike*, the way in which they would work in practice would have to be fleshed out.

It would also need to be determined whether *Pike* has a broader function in providing a grounding for personal jurisdiction. *Mallory* represents the latest move in the Court's long-time seesawing about whether personal jurisdiction, in addition to protecting individual defendants, serves the function of dividing power among the states. Although the very persistence of the idea that personal jurisdiction is an instrument of federalism suggests that it has some force, it is nonetheless—as Justice Alito observed in *Mallory*—seemingly hard to square with the idea that personal jurisdiction is a waivable defense rooted in the Due Process Clause.[455]

One way of resolving this conflict might be to recognize separate limits on personal jurisdiction rooted in the dormant Commerce Clause.[456] This move, however, would complicate an increasingly incoherent personal jurisdiction landscape and may be unnecessary. The idea that personal jurisdiction is linked with federalism in large part seems to stem from the idea that the forum state determines the law that will be applied. After all, it is difficult to see why federalism would be implicated when a defendant is sued in a state that is merely inconvenient. Rather, courts' real concern seems

452. *See supra* section III(B)(3).

453. *See* Preis, *supra* note 433, at 154 (arguing that "courts should hold that [registration-based jurisdiction] violate[s] the Dormant Commerce Clause"); Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2053 (2023) (Alito, J., concurring in part and concurring in the judgment) ("[T]here is a good prospect that Pennsylvania's assertion of jurisdiction here . . . violates the Commerce Clause.").

454. *See* Florey, *supra* note 6, at 1113–15, 1117 (arguing that the *Hague* analytical framework for choice of law should be unified to some extent with the *Edgar* analytical framework for overreaching state legislation).

455. *See Mallory*, 143 S. Ct. at 2050–51 (Alito, J., concurring in part and concurring in the judgment) (describing the waivability of personal jurisdiction as a "significant obstacle" to a federalism-based view of personal jurisdiction under the Due Process Clause).

456. *See supra* notes 423–26 and accompanying text.

to be that state courts, having obtained jurisdiction over a defendant, will apply their substantive law in a way that encroaches on the prerogatives of other states.[457] This anxiety would seem to be particularly justified in class actions, the arena in which the *Hague* standard is applied more strictly.[458] Therefore, rather than adding another factor to already multifaceted personal jurisdiction analysis, it might make more sense to consider *Pike* issues at the choice-of-law stage, and to do so only in a scenario where a court applies forum law in a way that significantly burdens interstate commerce. The function of the Due Process Clause would then be more clearly delineated as solely a limit on assertions of jurisdiction and choice-of-law decisions that are unfair or burdensome to a litigant.[459]

Finally, *Pike* analysis could and should attempt to stitch together to some extent the various constitutional provisions that speak to the extraterritoriality issue, including, in particular, the Privileges and Immunities and Full Faith and Credit Clauses. Especially if *Pike* is to move into new contexts—such as a limit on choice-of-law decisions—it makes sense to apply it in a manner informed by the concerns that have previously dominated that area. In particular, some cases might raise the sorts of concerns that were previously part of Full Faith and Credit Clause analysis. For example, a situation in which a state deliberately seeks to regulate conduct in other states, encroaching on those states' territorial prerogatives, might be seen as creating a greater burden on interstate commerce than a law like California's Proposition 12, where the effect is only indirect and contingent on exogenous factors—such as California's large size giving it especially strong market influence.[460] Likewise, a law or court decision might discourage interstate movement without directly violating the right to travel; such a statute or holding could nonetheless receive more searching scrutiny under *Pike*.[461] Allowing *Pike* to be informed by other parts of the Constitution

457. *See, e.g.*, Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1780–81 (2017) (noting that federalism concerns are implicated in a personal jurisdiction case when a state has "little legitimate interest in the claims in question").

458. *See* Florey, *supra* note 6, at 1079 (noting that, in the class action context, the Court has been "willing to give the *Hague* test some bite").

459. It has been argued that choice-of-law principles almost always direct courts to apply forum law to procedural matters, that what is "procedural" may be construed broadly in this context, and that states have significant differences in procedures that allow plaintiffs to forum shop for procedural advantages. Preis, *supra* note 433, at 148–49. While this can certainly be a problem for defendants that should perhaps be considered in due process-based personal jurisdiction analysis, it is difficult to see how it causes federalism problems per se.

460. For example, as Justice Gorsuch's opinion noted in *National Pork*, it would make little sense to allow small states greater scope in regulation simply because of their less significant impact on national markets. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1164 (2023) (plurality opinion).

461. *See* Smith-Drelich, *supra* note 80, at 28 (suggesting that such restrictions implicate both the Commerce Clause and the right to free movement).

that speak to extraterritoriality might provide more structure to the balancing process while at the same time avoiding the confusion and incoherence of having multiple constitutional provisions directly govern different aspects of the extraterritoriality problem.

Conclusion

As interstate conflicts increasingly involve ideologically opposed mandates, the nature of extraterritoriality issues may be changing in ways that make them thornier to resolve. Meanwhile, the recent *National Pork* and *Mallory* decisions scaled back some of the manifold doctrines that have functioned to restrain excessively extraterritorial regulation. The Supreme Court seems aware of this problem, throwing out a number of suggestions about how other constitutional doctrines could offer an alternative to the *Healy*-style analysis it mostly rejected in *National Pork*. Yet none of these are capacious and well-defined enough to apply to the broad range of extraterritoriality issues that courts may encounter. In the end, the only tool courts may have to address these questions may be a somewhat under-the-radar one: *Pike* balancing under the dormant Commerce Clause doctrine.

There is some irony—and also some danger—in turning to *Pike* balancing at a time when interstate conflicts are becoming less about raw economic competition than about policy and values. At the same time, given the void left by the end of *Healy* in *National Pork* and the expansion of state jurisdiction effected by *Mallory*, it seems almost inevitable that, for better or worse, *Pike* will take on a more central role. By recognizing this and applying *Pike* balancing with nuance, context, and sensitivity to state regulatory choices, courts may be able to bring a degree of both continuity and clarity to the analysis of difficult extraterritoriality questions.