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# Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem

Brannon P. Denning\*

## INTRODUCTION

Among the various branches of the dormant Commerce Clause doctrine (DCCD)—the judge-made rules grounded in the Constitution’s grant of power over interstate commerce to Congress—is that which prohibits “extraterritorial” state legislation. As recently as 1989, the Supreme Court held that the DCCD “precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.”<sup>1</sup>

That broad articulation of the principle, however, represented extraterritoriality’s high tide. The Court has since retreated; in 2003, it seemed to limit the extraterritoriality principle dramatically, rejecting arguments that a Maine prescription-drug subsidy program actually attempted to fix prices outside the state.<sup>2</sup> At this point, the extraterritoriality principle looks to be quite moribund.

As Donald Regan noted during extraterritoriality’s heyday, “[W]e do not understand the extraterritoriality principle . . . nearly as well as we should.”<sup>3</sup> While Regan believed it *was* a constitutional principle, he rejected the notion that extraterritoriality had anything to do with the DCCD.<sup>4</sup> The Court apparently agreed.

This Article, then, is an autopsy of sorts. Assuming, as I do, that extraterritoriality—at least the strong form articulated by the Court

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1. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (plurality opinion) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (plurality opinion)). For articles on extraterritoriality generally, see Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785 (2001); 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 (1987); Peter C. Felmly, Comment, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 467 (2003).

2. *Pharm. Research & Mfrs. Ass’n v. Walsh*, 538 U.S. 644 (2003).

3. Regan, *supra* note 1, at 1884.

4. *Id.* at 1888 (arguing that early cases demonstrate that “the extraterritoriality principle does not flow from the dormant commerce clause”).

in the 1980s—is dead, and unlikely to be revived by the current Court, its passing offers an opportunity to examine the lifecycle of constitutional doctrine, from birth to death.<sup>5</sup> Kermit Roosevelt has argued that doctrine and doctrinal rules can suffer from “calcification” that causes courts to alter those rules or discard them altogether.<sup>6</sup> Close study may reveal information about what, exactly, the Court sought through the doctrine’s development and enforcement and why the Court ultimately abandoned it.

In Part I, I describe extraterritoriality’s early emergence. In its early form, extraterritoriality was not exclusively yoked to the DCCD. The Due Process Clause of the Fourteenth Amendment was also cited as a source of the extraterritoriality doctrine, as were less clause-bound structural principles. Beginning in the early twentieth century, however, the doctrine became closely linked with the DCCD; it emerged as a robust branch of the DCCD in the 1980s. This association is described in Part II. Extraterritoriality’s decline is detailed in Part III. In Part IV, I return to the question of what “killed” extraterritoriality. I conclude that extraterritoriality’s demise was likely overdetermined. Factors contributing to the doctrine’s demise include what Kermit Roosevelt calls a “loss of fit” between the doctrine and the purposes of the DCCD generally, as well as the doctrine’s calcification; the lack of a limiting principle that would prevent it from curtailing legitimate state regulatory power; the Court’s decision to locate limits on punitive damage awards in the Due Process Clause after flirting with the notion that those limits grew out of DCCD extraterritoriality; and the Court’s apparent shift away from robust enforcement of the DCCD generally to limitation of the doctrine. In Part V, I consider the impact of extraterritoriality’s demise on a related doctrine: the Court’s periodic invalidation of state laws that presented the problem of “inconsistent state regulations.” A brief conclusion follows.

## I. THE EARLY HISTORY OF EXTRATERRITORIALITY

The concern with “territoriality”—ensuring that a state did not exceed its legitimate legislative jurisdiction—was long a concern of

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5. I accept as descriptively accurate Mitchell Berman’s “two-outputs thesis” that the Supreme Court, when it interprets the Constitution, first establishes “constitutional operative propositions”—what the Constitution requires or prohibits—by interpreting the document, then operationalizes those propositions by crafting “decision rules” that it then applies to facts to produce judgments. See generally Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004). I will employ Professor Berman’s terminology throughout this Article.

6. Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1693 (2005).

public international law.<sup>7</sup> By the early twentieth century, it assumed domestic importance in conflicts-of-laws disputes as well.<sup>8</sup> Courts assumed that “regulation of extraterritorial conduct was . . . illegitimate”<sup>9</sup> and devised various tests to resolve conflicts between legal regimes of different states.<sup>10</sup> Initially, however, the constitutional bases for the extraterritoriality principle were the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, not the DCCD.<sup>11</sup> Extraterritoriality as a DCCD problem can be traced to the Court’s 1852 decision in *Cooley v. Board of Wardens*.<sup>12</sup>

In *Cooley*, Justice Curtis attempted to resolve the stalemate that had developed on the Court among those who thought the Commerce Clause had some independent preemptive effects on state legislation and those who believed that state regulations of interstate commerce were preempted only when they conflicted with an affirmative act of Congress.<sup>13</sup> Curtis’s gambit was to ignore the question of whether the Commerce Clause conferred exclusive power in favor of focusing on the *subject* of regulation. In his formulation, those subjects that were national in nature and required a single, uniform rule were beyond the regulatory power of states. On the other hand, states were competent to regulate “local” subjects that could tolerate myriad regulatory schemes.<sup>14</sup>

7. Austin Parrish, *The Effects Test: Extraterritoriality’s Fifth Business*, 61 VAND. L. REV. 1455, 1463–64 (2008) (terming *territoriality* a “defining feature” of public international law). See also Willis Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1979).

8. See generally WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS §§ 94–95 (3d ed. 2002).

9. Parrish, *supra* note 7, at 1465; *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) (“No State can legislate except with reference to its own jurisdiction.”).

10. Originating with Joseph Story and continuing to influence the work of Joseph Beal and the First Restatement, Conflict of Laws, was the “vested rights” theory “based on the idea that at the moment a cause of action arises, rights vest according to the law of the place where the crucial event occurred.” RICHMAN & REYNOLDS, *supra* note 8, § 56. This strict territorial approach has been displaced by the Second Restatement’s “general principle that the law of the state with the ‘most significant relationship’ to a transaction should control.” *Id.* Another influential approach, pioneered by Brainerd Currie, “argued that the choice-of-law process should focus on the policies behind state substantive law rules; whether a rule should be applied should depend upon whether the policy underlying that rule would be advanced by its application.” *Id.*

11. *Id.* at § 94 (“Historically, the most important provisions in [choice-of-law disputes] have been the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article Four.”).

12. 53 U.S. 299 (1852).

13. See generally 5 CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836–64, at 357–95 (1974).

14. *Cooley*, 53 U.S. at 319.

But Curtis provided no criteria by which one could determine whether the subject of legislation was national or local, so the Court devised another set of decision rules. State laws regulating interstate commerce directly were invalidated, while those regulating commerce only indirectly were permitted.<sup>15</sup> The terms *direct* and *indirect* roughly corresponded to *Cooley's national* and *local* subjects, respectively. Extraterritorial regulations and taxes were regarded as impermissible direct regulations of interstate commerce and struck down.

In *Western Union Telegraph Company v. Brown*,<sup>16</sup> for example, the Court invalidated a South Carolina state court award arising out of a statutory cause of action for mental anguish imposed on a telegraph company for failure to deliver a telegram in Washington, D.C. While the Court seemed to hold that the judgment was a violation of the defendant's due process rights, it added that

the act also is objectionable in its . . . attempt to regulate commerce among the states. That is . . . it attempts to determine the conduct required of the telegraph company in transmitting a message from one state to another or to this District by determining the consequences of not pursuing such conduct . . . .<sup>17</sup>

For support, the Court cited *Western Union Telegraph Company v. Pendleton*,<sup>18</sup> in which the Court invalidated the application of an Indiana law requiring telegrams to be delivered in the order received to a telegram transmitted from Indiana to Iowa. “[T]he attempted regulation by Indiana of the mode in which messages sent by telegraphic companies doing business within her limits shall be delivered in other states,” the Court wrote, “is an impediment to the freedom of that form of interstate commerce, which is . . . beyond the power of Indiana to interpose . . . .”<sup>19</sup>

Bernard Gavit, author of an early treatise on the Commerce Clause, complained that such cases ought to be decided under the Due Process Clause. “A rule of law which purports to affect conduct outside of the state is void, and in truth no rule. . . . It is beyond the

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15. The Court's cases during this period are surveyed by Barry Cushman's excellent article, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089 (2000). See also Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 437–40 (2008) (discussing the direct–indirect test).

16. 234 U.S. 542 (1914).

17. *Id.* at 547.

18. 122 U.S. 347 (1887).

19. *Id.* at 358.

power of a state to so impose its authority beyond its own limits.<sup>20</sup> In those cases, “the decision should be made . . . under the Fourteenth Amendment and not under the Commerce Clause,” he argued.<sup>21</sup> He went on to write, “It can well be argued . . . that it is no rule, and therefore no regulation. The Commerce Clause ought never to be reached.”<sup>22</sup>

Indeed, until the Court decided *Quill Corporation v. North Dakota*,<sup>23</sup> the Court relied on both the Due Process and Commerce Clauses to limit states’ ability to exercise taxing jurisdiction over nonresidents. In many cases, the decisions did not clearly distinguish between the two clauses.<sup>24</sup> The theory was that under the Due Process Clause the state lacked sufficient minimum contacts with certain taxpayers to compel them to pay taxes. As for the Commerce Clause, the early understanding was that interstate commerce *qua* interstate commerce was immune from state taxation because to tax interstate commerce was to directly regulate it.<sup>25</sup>

Concerns lingered about the ability of states to regulate interstate commerce beyond their borders, namely, exposing commerce to conflicting regulatory regimes, perhaps enabling a state to set a de facto national standard by legislating more strictly than its neighbors and incentivizing interstate commercial actors to comply with the strictest standard. The *Pendleton* Court, for example, observed that the purpose of the Commerce Clause was “to secure, with reference to its subjects, uniform regulations, where such uniformity is practicable, against conflicting state legislation.”<sup>26</sup> It noted that “[s]uch conflicting legislation would inevitably follow with reference to telegraphic communications between citizens of

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20. BERNARD C. GAVIT, *THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION* 185 (AMS Press 1970) (1930).

21. *Id.*

22. *Id.*

23. 504 U.S. 298 (1992).

24. *See, e.g.*, *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue*, 386 U.S. 753 (1967) (holding that both the Commerce Clause and the Due Process Clause prevent the state from exercising taxing jurisdiction over a mail-order house with no physical presence in the state); GAVIT, *supra* note 20, at 372 (“There seems to be no difference in result whether a property tax is tested by the Fourteenth Amendment or by the Commerce Clause.”).

25. 1 JEROME HELLERSTEIN, WALTER HELLERSTEIN & JOHN A. SWAIN, *STATE TAXATION* ¶ 4.03[1] (3d ed. 1998 & 2012 Supp.) (noting that the Court formerly embraced the view that “direct taxes on interstate commerce violated the Commerce Clause” and that the prohibition on “direct taxes” included a ban on taxing goods in transit in interstate commerce).

26. *W. Union Tel. Co. v. Pendleton*, 122 U.S. 347, 358 (1887).

different states, if each state was vested with power to control them beyond its own limits.”<sup>27</sup>

Despite its gradual replacement by both the antidiscrimination principle and by the balancing of benefits and burdens for nondiscriminatory, nontax regulations,<sup>28</sup> the direct–indirect test proved surprisingly durable, lasting into the 1930s. It was clear by then that the Court regarded extraterritorial regulation as a quintessential “direct” burden on interstate commerce. In *Baldwin v. G.A.F. Seelig, Inc.*,<sup>29</sup> Justice Cardozo, for a unanimous Court, struck down a New York statute that banned the in-state sale of out-of-state milk unless the price paid for the imported milk was equal to New York’s minimum price. “New York,” Cardozo wrote, “has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there.”<sup>30</sup> Cardozo concluded that the prohibition was the functional equivalent of regulating prices in other states.<sup>31</sup> And that, he added, was precisely the sort of “direct[] burden . . . of interstate business” that the Commerce Clause prohibited states from imposing.<sup>32</sup>

A half-century later, for about a decade, the Supreme Court built on Justice Cardozo’s statement in *Baldwin*, articulating a rather sweeping extraterritoriality principle with far-reaching implications. Those cases demonstrate the Court’s continued concern with conflicting regulatory regimes and impermissible extraterritorial projections of state power.

## II. DORMANT COMMERCE CLAUSE EXTRATERRITORIALITY COMES OF AGE<sup>33</sup>

In the previous Part, I argued that in the nineteenth and early twentieth centuries, the Court sought to cabin states’ legislative, taxing, and judicial jurisdiction. While many of these limits were located in the Due Process Clause, the Commerce Clause played a role, too. In many cases, moreover, courts took no particular care to carefully distinguish which clause was doing what work. Describing

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27. *Id.*

28. This evolution is described in Denning, *supra* note 15, at 443–48.

29. 294 U.S. 511 (1935).

30. *Id.* at 521.

31. *Id.*

32. *Id.* at 522.

33. Parts II and III draw from BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 6.08[E] (2d ed. 2013).

nineteenth century judges, Michael Greve once quipped that while the judges were formalists, they were not clause-bound formalists.<sup>34</sup>

By the 1980s, the Due Process Clause ceased to operate as much of a restraint on states' exercises of either personal jurisdiction<sup>35</sup> or legislative jurisdiction in choice-of-law cases.<sup>36</sup> In 1992, the Court would hold that "minimum contacts" sufficed to create a proper nexus between a taxpayer and a taxing state.<sup>37</sup> During that same time, moreover, the Court abandoned its previous holding that direct taxation of interstate commerce was a violation of the Commerce Clause.<sup>38</sup> In 1977, the Court decided the seminal *Complete Auto Transit, Inc. v. Brady*,<sup>39</sup> in which it announced a four-part test for state and local taxes.<sup>40</sup> Two of *Complete Auto*'s factors—*substantial nexus* and *apportionment*—directly addressed concerns about extraterritorial exercises of taxing jurisdiction and the dangers of multiple taxation.

34. Personal communication with the author. See also DAN T. COENEN, CONSTITUTIONAL LAW: THE COMMERCE CLAUSE 272 n.55 (2004) ("The relationship between due-process and dormant Commerce Clause requirements with regard to state regulatory programs is not well-developed.").

35. See, e.g., *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (holding that due process is satisfied for exercising jurisdiction over nonresident defendants if the defendant has "certain minimum contacts with [the jurisdiction] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" (citations omitted)).

36. See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981) (holding that to apply its law a "[s]tate must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair"); see also *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988) (applying *Hague*); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (applying *Hague*). The trilogy is discussed in RICHMAN & REYNOLDS, *supra* note 8, § 97, at 301–10. The authors conclude that "*Allstate* shows that not much is needed to satisfy the Court, at least as long as there is some 'real' connection with the litigation." *Id.* at 309.

37. *Quill Corp. v. North Dakota*, 504 U.S. 298, 304 (1992) (overruling in part *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967)). The Court declined, however, to overrule that portion of *National Bellas Hess* holding that the Commerce Clause required a physical presence to satisfy the Clause's "substantial nexus" requirement, at least for the collection and remittance of sales taxes. *Quill*, 504 U.S. at 314; COENEN, *supra* note 34, at 272 n.55 ("In at least some state tax cases . . . the so-called nexus limitation developed under the dormant Commerce Clause has been given a longer reach than the extraterritoriality restriction imposed by the Due Process Clause.").

38. See *Freeman v. Hewitt*, 329 U.S. 249 (1946).

39. 430 U.S. 274 (1977).

40. Under the now-canonical test, state and local taxes on interstate commerce are valid if (1) there is a substantial nexus between the taxpayer and the taxing state; (2) the tax is apportioned; (3) the tax is nondiscriminatory; and (4) the tax is fairly related to benefits provided the taxpayer. *Id.* at 277–78.

Were it not for a series of cases in the 1980s, then, what I will hereafter term *DCCD extraterritoriality* would likely have “come to [an] arid end[]”<sup>41</sup> as had many other decision rules in this area. This line of cases revived the concept, at least temporarily, until the Court essentially abandoned it in 2003.

#### A. *Edgar v. MITE Corporation*

In 1982, the Court invalidated an Illinois antitakeover statute in *Edgar v. MITE Corporation*<sup>42</sup> that required registration of takeover offers of corporations in which Illinois citizens owned more than 10% of the shares; or in which two of the following conditions obtained: (1) the target corporation’s principal place of business was located in Illinois; (2) it was organized under the laws of Illinois; or (3) 10% of its capital was located in the state.<sup>43</sup> Following registration, the Illinois Secretary of State had 20 days during which he could hold a hearing to evaluate the offer’s fairness. A hearing was mandatory if requested by a majority of the firm’s outside directors or by Illinois citizens owning 10% of the class of securities subject to the takeover.<sup>44</sup> While the Court declined to find the Illinois law preempted by federal law,<sup>45</sup> it gave alternative reasons why the act violated the DCCD.

In a plurality opinion, Justice Byron White argued that by regulating transactions occurring outside of its borders, the Illinois Act had impermissible extraterritorial effects. “The Illinois Act,” White noted, “directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois.”<sup>46</sup> He continued, “It is therefore apparent that the Illinois statute is a direct restraint on interstate commerce and that it has a sweeping extraterritorial effect. Furthermore, if Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled.”<sup>47</sup>

By contrast, an Indiana antitakeover statute regulating only entities incorporated in Indiana was upheld five years later in *CTS Corporation v. Dynamics Corporation of America*.<sup>48</sup> The Indiana

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41. ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* 100–01 (1957).

42. 457 U.S. 624 (1982).

43. *Id.* at 627.

44. *Id.*

45. *Id.* at 631–40.

46. *Id.* at 641.

47. *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality opinion).

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

statute conditioned “acquisition of control of a corporation on approval of a majority of the pre-existing disinterested shareholders.”<sup>49</sup> Reaffirming the connection between extraterritoriality and inconsistent state regulation, the Court cited prior cases for the proposition that the Court had applied the DCCD to invalidate “statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations” but added that was not the case here.<sup>50</sup> “So long as each State regulates voting rights only in the corporations it has created,” the Court wrote, “each corporation will be subject to the law of only one State.”<sup>51</sup> Justice White, dissenting, echoed his plurality opinion in *MITE Corporation*, complaining that the Indiana Act “directly regulat[ed] the purchase and sale of shares of stock in interstate commerce” and was therefore unconstitutional.<sup>52</sup>

### B. The Price Affirmation Cases

Around the same time, the Court invalidated two “price affirmation” statutes that required wholesalers of alcoholic beverages to file price schedules with state regulators and sell their products in other states no cheaper than the prices declared on the schedules.<sup>53</sup> The Court found both laws to have impermissible extraterritorial effects.

In the first case, *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, the distiller had run afoul of New York’s price affirmation statute by offering cash “promotional allowances” to its wholesalers nationwide.<sup>54</sup> New York wholesalers, however, could not legally accept those allowances under state law, so regulators charged that the “effective price” of New York liquor was higher than that in other states where the payments were permitted.<sup>55</sup> Justice Marshall wrote that while a state can “seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess.”<sup>56</sup> The Court focused its inquiry “on whether New York’s

49. *Id.* at 73–74 (footnote omitted).

50. *Id.* at 88.

51. *Id.* at 89; *see also id.* at 93 (“We agree that Indiana has no interest in protecting nonresident shareholders of nonresident corporations. But this Act applies only to corporations incorporated in Indiana.”).

52. *Id.* at 99 (White, J., dissenting).

53. *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989) (divided court) (invalidating Connecticut price affirmation statute for beer); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986) (divided court) (invalidating New York price affirmation statute for liquor).

54. *Brown-Forman*, 476 U.S. at 578.

55. *Id.* at 576–77.

56. *Id.* at 580.

affirmation law regulates commerce in other States.”<sup>57</sup> It concluded that it did, adding that “[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce”<sup>58</sup> and was prohibited by the DCCD.

Extraterritoriality hit its high water mark three years later in *Healy v. The Beer Institute*, in which the Court struck down a Connecticut price affirmation statute that applied to beer sales in Massachusetts, New York, and Rhode Island.<sup>59</sup> The Court declared that *Brown-Forman* reaffirmed and elaborated “our established view that a state law that has the ‘practical effect’ of regulating commerce occurring wholly outside that State’s borders is invalid under the Commerce Clause.”<sup>60</sup> Justice Blackmun synthesized the Court’s extraterritoriality cases, concluding that

[t]aken together, our cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following propositions: First, the “Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State,” and, specifically, a State may not adopt legislation that has the practical effect of establishing “a scale of prices for use in other states.” Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent

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57. *Id.* That conclusion followed the Court’s discussion of the *Baldwin* case. *Id.*

58. *Id.* at 582. In addition, the Court continued to link extraterritoriality and exposure to inconsistent regulations. *Id.* at 583 (noting that the “proliferation of state affirmation laws . . . has greatly multiplied the likelihood that a seller will be subjected to inconsistent obligations in different States”).

59. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 326 (1989) (plurality opinion).

60. *Id.* at 332.

legislation arising from the projection of one state regulatory regime into the jurisdiction of another State. And, specifically, the Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another.<sup>61</sup>

Justice Blackmun concluded that the Connecticut statute was “indistinguishable” from the New York statute invalidated in *Brown-Forman* and struck it down.<sup>62</sup> Extraterritoriality seemed to stall after *Healy*, though in 1996 the Court again invoked the principle as part of *BMW v. Gore*'s<sup>63</sup> limit on the ability of states to impose punitive damages for conduct occurring outside the state.

### C. *BMW v. Gore: Extraterritoriality's Indian Summer*

When a Birmingham, Alabama, doctor discovered that his new BMW had been damaged, repaired, and repainted prior to sale as “new,” he sued, claiming that nondisclosure of the presale damage constituted fraud.<sup>64</sup> A state court jury agreed, awarding the plaintiff \$4,000 in compensatory damages and \$4 million in punitive damages. The measure of the punitive damages was the total number of cars repaired, repainted, and sold as new around the country multiplied by \$4,000—the reduction in the car's value caused by the repainting.<sup>65</sup> The Alabama Supreme Court later reduced the punitive damage award to \$2 million.<sup>66</sup>

Before concluding that even the reduced award violated the Due Process Clause,<sup>67</sup> however, the United States Supreme Court noted that the jury computed the award based on conduct occurring in other states, including states in which the conduct would not have been illegal.<sup>68</sup> The laws concerning deceptive trade practices were, the Court observed, “a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States.”<sup>69</sup> Reasonable legislators could—and did—disagree about the level of disclosure required in situations like the one at issue. But, absent a national standard issued from Congress, each state was entitled to define

61. *Id.* at 335–37 (alterations in original) (citations omitted).

62. *Id.* at 339. Alternatively, Justice Blackmun found that the law was discriminatory because only wholesalers that engaged in interstate commerce needed to file the price schedule with the state. *Id.* at 340.

63. *BMW of N. Am. v. Gore*, 517 U.S. 559, 563 (1996).

64. *Id.*

65. *Id.* at 564.

66. *Id.* at 567.

67. *Id.* at 574–86.

68. *Id.* at 568–74.

69. *Id.* at 570.

fraud for itself. “[N]o single State could . . . impose its own policy choice on neighboring States.”<sup>70</sup> Citing *Healy* and *MITE*, the Court concluded that “principles of state sovereignty and comity [dictate] that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors’ lawful conduct in other States.”<sup>71</sup>

Was *BMW v. Gore* an extraterritoriality case with DCCD implications? Professor Tribe thought so. In the third edition of his treatise, he cited the case as “underscor[ing]” the “sweep of the principle” announced in *Healy*.<sup>72</sup> *Gore* did not mark a rebirth of DCCD extraterritoriality, however. In 2003, the Court retreated from *Healy*’s broad pronouncements and largely restricted earlier cases to their facts. In that same term, moreover, the Court abandoned *Gore*’s suggestion that the DCCD was the source of constitutional limits on punitive damages and instead identified the Due Process Clause as the sole source of those limits.<sup>73</sup>

### III. THE DEATH OF A DOCTRINE

The retrenchment occurred in *Pharmaceutical Research and Manufacturers of America v. Walsh*.<sup>74</sup> Maine passed a series of laws intended to bring down the price of prescription drugs. Part of the plan required drug manufacturers (none of which were located in Maine) to enter into rebate agreements with the state. Under these agreements, the manufacturers would rebate money to the state for drugs dispensed through its Medicaid program in exchange for avoiding a costly “preauthorization” process before drugs would be prescribed to state Medicaid patients. That money would then subsidize the sale of discount drugs to Maine citizens through a new state program (the “Maine Rx Plan”).<sup>75</sup>

The petitioners claimed that the “voluntary” rebate agreements had an impermissible extraterritorial effect. First, citing the holdings of *Healy*, et al., that states may not regulate transactions occurring in other states, the petitioners argued that “Maine mandates payments

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70. *Id.* at 571.

71. *Id.* at 572 (footnote omitted).

72. 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1078 n.21 (3d ed. 2000).

73. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). See also *infra* notes 134–39 and accompanying text.

74. 538 U.S. 644 (2003).

75. *Id.* at 653–54. For a more detailed description of the Maine Rx program, see Brannon P. Denning, *The Maine Rx Prescription Drug Plan and the Dormant Commerce Clause Doctrine: The Case of the Missing Link[age]*, 29 *AM. J.L. & MED.* 7, 9–10 (2003).

from manufacturers whose only transactions leading to the pharmacy counter are with wholesalers. To the extent that those sales occur outside Maine—and virtually all manufacturers’ sales do—Maine cannot mandate the Maine Rx payments consistent with the Commerce Clause.”<sup>76</sup> Second, the petitioners analogized the rebate to a sales tax and argued that it could not survive application of the Court’s *Complete Auto* test.

At a minimum, the Maine Rx program would fail the first of the *Complete Auto* elements. The Maine Rx rebate “taxes” drug manufacturers when third parties sell the manufacturers’ products in Maine. While Maine clearly has the authority to tax in-state retail pharmaceutical sales, and may tax either the individual purchasers or the Maine-based pharmacies that sell drugs manufactured by PhRMA’s members, it may not require out-of-state manufacturers who are strangers to the in-state retail transactions to bear the costs of this activity. Thus, if Maine purports to tax the only “activity with a substantial nexus to the taxing state” (*i.e.*, the retail sales), it may not impose this liability on out-of-state entities that are not involved in or responsible for that in-state activity.

Alternatively, if Maine purports to be taxing the “activity” of manufacturers—namely, wholesale sales—the Maine Rx rebate requirement even more obviously fails *Complete Auto*’s nexus requirement. Maine may not require out-of-state manufacturers to pay sales taxes on out-of-state wholesale transactions that have no relationship to the state of Maine.<sup>77</sup>

The Court—in the portion of its opinion addressing the DCCD challenge—unanimously disagreed:

[U]nlike price control or price affirmation statutes, “the Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price. Similarly, Maine is not tying the price of its in-state products to out-of-state prices.”<sup>78</sup>

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76. Brief for Petitioners at 28, *Pharm. Research & Mfrs. of Am. v. Concannon*, 538 U.S. 644 (2003) (No. 01-188), 2002 WL 31120844.

77. *Id.* at 32.

78. *Walsh*, 538 U.S. at 669.

The Court did not mention *Healy*'s statement that the "critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."<sup>79</sup> No mention whatever was made of *MITE* and its concern about the "direct" regulation of out-of-state conduct.

In the years since *Walsh*, lower courts have generally restricted extraterritoriality along the lines suggested by the Court's narrow reading of its previous cases. Generally speaking, lower courts tend to invalidate statutes (1) when there are *Brown-Forman*- or *Healy*-like price controls linking prices in the regulating jurisdiction to those charged elsewhere;<sup>80</sup> (2) where it is clear that a statute seeks to enable State A to control activities occurring in State B, or to use *Baldwin*'s phrase, where State A is "projecting" its legislation into State B,<sup>81</sup>

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79. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (plurality opinion).

80. *See, e.g.*, *Pharm. Research & Mfrs. of Am. v. District of Columbia*, 406 F. Supp. 2d 56, 67–71 (D.D.C. 2005) (striking down a D.C. statute making it unlawful for drug manufacturers "to sell or supply for sale or impose minimum resale requirements for a patented prescription drug that results in the prescription drug being sold in the District for an excessive price" and which provides that a prima facie case for excessiveness could be made out where the wholesale price of a drug sold in D.C. was 30% higher than comparable price of drug sold in the United Kingdom, Germany, Canada, or Australia and holding that the ordinance had an impermissible extraterritorial effect). *But see* *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 41 (1st Cir. 2005) (rejecting arguments that Maine statute barring automobile manufacturers from recouping costs associated with other law requiring retail-rate reimbursements to dealers for repairs made under warranty from in-state automobile dealers had impermissible extraterritorial effects in noting that "the Alliance has not provided any other, more reliable proof of the price-tying allegedly associated with the recoupment bar").

81. *See, e.g.*, *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 668–69 (7th Cir. 2010) (opinion by Judge Posner invalidating state application of consumer credit code to out-of-state car title lender making loans to state's citizens); *Experience Hendrix, LLC v. Hendrixlicensing.com, Ltd.*, 766 F. Supp. 2d 1122, 1142 (W.D. Wash. 2011) (holding that state right of publicity statute that regulated "a variety of transactions occurring 'wholly outside' Washington's borders" violated the extraterritoriality principle); *In re Nat'l Century Fin. Enters., Inc., Inv. Litig.*, 755 F. Supp. 2d 857, 887 (S.D. Ohio 2010) (holding that application of state blue sky laws to transaction occurring wholly outside the state violated the extraterritoriality prong of the dormant Commerce Clause doctrine); *cf.* *Knoll Pharm. Co. v. Sherman*, 57 F. Supp. 2d 615, 622–24 (E.D. Ill. 1999) (striking down Illinois law prohibiting the advertisement, within the state, of an FDA-approved weight-loss drug and holding that compliance with the advertising ban was not possible without the cessation of the national advertising campaign). *But see* *S. Union Co. v. Mo. Pub. Serv. Comm'n*, 289 F.3d 503, 507 (8th Cir. 2002) (rejecting the claim that the law requiring administrative approval for stock purchases of other utility companies, regardless of whether they operated in the state, violated the extraterritoriality principle).

and (3) in certain cases dealing with early state regulation of the Internet.<sup>82</sup>

By contrast, lower courts have rejected extraterritoriality arguments brought by manufacturers whose products must be labeled in a particular way before being sold in a state, even if compliance with the state law would require changes in their out-of-state manufacturing processes.<sup>83</sup> Similarly, it is not impermissible extraterritorial legislation to require out-of-state sellers to comply with state law when vending their products in the regulating state.<sup>84</sup> And in a variety of other circumstances the courts have made clear that extraterritoriality is not an all-purpose deregulatory tool allowing interstate companies to escape the reach of state legislators and regulators where they do business, even though compliance causes effects that are felt beyond the regulating jurisdiction.<sup>85</sup>

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82. *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 102–04 (2d Cir. 2003) (striking down Vermont’s statute governing sexually explicit content on the Internet and concluding that the statute constituted impermissible extraterritorial regulation); *Se. Booksellers Ass’n v. McMaster*, 371 F. Supp. 2d 773, 786, 787 (D.S.C. 2005) (invalidating the South Carolina statute prohibiting dissemination of material “harmful to minors” over the Internet because the act “regulat[es] commerce occurring wholly outside of South Carolina” (citation omitted)); *Ctr. for Democracy & Tech. v. Pappert*, 337 F. Supp. 2d 606, 662 (E.D. Pa. 2004) (striking down the state law requiring Internet service providers to remove or disable access to child pornography either stored on or available through its service and noting that the Act “has the practical effect of exporting Pennsylvania’s domestic policies” (citation omitted)). *But see Simmons v. State*, 944 So. 2d 317, 329–35 (Fla. 2006) (upholding a conviction under state statutes prohibiting electronic mail transmission of material that is harmful to one known to be a minor living in the state and luring or enticing a child through electronic means against a dormant Commerce Clause challenge in holding that the transmission statute did not regulate extraterritorially); *Goldsmith & Sykes*, *supra* note 1 (criticizing the use of extraterritoriality to invalidate state Internet regulations).

83. *See, e.g., Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 647 (6th Cir. 2010) (rejecting an extraterritoriality challenge to a state regulation curbing allegedly misleading labeling of dairy products with regard to nonuse of antibiotics or growth hormones); *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 110 (2d Cir. 2001) (holding that plaintiff’s “extraterritoriality contention fails because the statute does not inescapably require manufacturers to label all lamps wherever distributed”).

84. *See, e.g., SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 192–95 (2d Cir. 2007) (rejecting the argument that the Connecticut law regulating prepaid, stored value gift cards regulated extraterritorially) (“SPGGC fails to allege any facts tending to show . . . how the effects of the Gift Card Law might be projected into other states. . . . [T]he Gift Card Law does not, by its terms or its effects, directly regulate sales of gift cards in other states.”).

85. *See, e.g., Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1309 (10th Cir. 2008) (rejecting the argument that the application of the state consumer credit code to an Internet payday lender violated the extraterritoriality principle); *Wine &*

Courts will also supply a saving construction to prevent a state statute from having impermissible extraterritorial effects.<sup>86</sup>

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*Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 14–15 (1st Cir. 2007) (rejecting a DCCD attack on state liquor laws prohibiting liquor franchises and franchise-type business activities by liquor licensees in holding that the statutes did not regulate extraterritorially); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310–312 (1st Cir. 2005) (holding that the Maine act requiring pharmacy benefit managers to act as fiduciaries for their clients and imposing specific duties on them, including disclosure of conflicts and of financial arrangements with pharmaceutical manufacturers, did not have impermissible extraterritorial effects in holding that the act did not attempt to control out-of-state activities); *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 221 (2d Cir. 2004) (rejecting cigarette importers' arguments that the New York contraband statute operated with impermissible extraterritorial effects); *Gravquick A/S v. Trimble Navigation Int'l Ltd.*, 323 F.3d 1219, 1223–25 (9th Cir. 2003) (holding that the state statute protecting equipment dealers did not operate with impermissible extraterritorial reach with respect to the contract between the parties that supported the California choice of law and noting that the statute “only applies to this case because the parties chose to be governed by California law”); *Bostain v. Food Express, Inc.*, 153 P.3d 846, 854–56 (Wash. 2007) (en banc) (rejecting a dormant Commerce Clause challenge to the state minimum wage act as applied to an interstate trucker who worked part of his hours outside the state); *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 921–922 (Cal. 2006) (concluding that the application of California privacy law in a conflict-of-law case involving conduct occurring in Georgia and California would not violate the dormant Commerce Clause) (“[A]pplication of the California law here at issue would affect only a business’s undisclosed recording of telephone conversations with clients or consumers in California and would not compel any action or conduct of the business with regard to conversations with non-California clients or consumers.”).

86. *See, e.g., Star Scientific, Inc. v. Beales*, 278 F.3d 339, 356 (4th Cir. 2002) (upholding state legislation implementing a nationwide tobacco settlement requiring tobacco companies not party to the settlement to escrow certain monies based on number of in-state sales and rejecting the extraterritoriality claim because “Virginia’s qualifying statute . . . rather than aiming at or reacting to commerce outside of Virginia, specifically limits its applicability to the sale of cigarettes ‘within the Commonwealth’” (citations omitted)); *Morley-Murphy Co. v. Zenith Elecs. Corp.*, 142 F.3d 373, 378–381 (7th Cir. 1998) (applying such a saving construction to the Wisconsin Fair Dealership Law); *Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814, 819 (8th Cir. 2001) (construing the Missouri statute prohibiting price discrimination in the buying of livestock to sales of livestock in Missouri only); *S.K.I. Beer Corp. v. Baltika Brewery*, 443 F. Supp. 2d 313, 319–20 (E.D.N.Y. 2006) (refusing to apply the New York law regarding brewer–wholesaler relationships to a contract for the sale of beer that took place outside the state and noting that a contrary interpretation would present extraterritoriality problems); *Union Underwear Co., Inc. v. Barnhart*, 50 S.W.3d 188, 193 (Ky. 2001) (holding that Kentucky’s Civil Rights Act did not apply to an employer whose headquarters were in Kentucky, when the acts giving rise to the lawsuit occurred in another state) (“Imposing the policy choice by the Commonwealth on the employment practices of our sister states should be done with great prudence

## IV. WHAT KILLED EXTRATERRITORIALITY?

In the space of a decade and a half, extraterritoriality went from being a potentially robust limit on the power of states to extend their regulatory reach into other states to a narrow limit on the power to regulate prices in other jurisdictions. While it is not unusual for the Court to announce a potentially sweeping decision or doctrine only to retreat from its implications,<sup>87</sup> it is a rare enough event that it furnishes an occasion for reflection. So, the question arises: What killed extraterritoriality or, at least, limited it significantly?

In this Part, I will argue that at least four factors contributed to the doctrine's demise. First, extraterritoriality as constitutional doctrine suffered from what Kermit Roosevelt has termed *calcification*. Second, the doctrine—especially as recharacterized in *Healy*—lacked a limiting principle, a fact demonstrated by early litigation over state regulation of the Internet. Concerns over extraterritoriality's sweep also surfaced during the short-lived litigation initiated by state and local governments over gun manufacturers' distribution practices. Third, when the Court clarified that the constitutional locus for its limits on state punitive damage awards was the Due Process Clause, it deprived DCCD extraterritoriality of a potential new role. Finally, the Court has tended to limit, rather than expand, the DCCD generally in the years since *Healy*, making the prospects for a revival of extraterritoriality in a broad form rather dim. Because any one of these would likely have been sufficient to limit the doctrine, the Court's abandonment of DCCD extraterritoriality could be said to have been overdetermined.

## A. "Constitutional Calcification"

Kermit Roosevelt has argued that what he terms "constitutional calcification" can infect constitutional decision rules and warp constitutional doctrine in harmful ways.<sup>88</sup> In this Section, I argue that DCCD extraterritoriality suffered from both "loss of fit" and "calcification," to employ Roosevelt's terms. Both undoubtedly led the Court to limit the doctrine, perhaps as a prelude to ultimately abandoning it.

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and caution out of respect for the sovereignty of other states, and to avoid running afoul of the Commerce Clause of the United States Constitution.").

87. Compare *Goldberg v. Kelly*, 397 U.S. 254 (1970), with *Mathews v. Eldridge*, 424 U.S. 319 (1976).

88. Roosevelt, *supra* note 6, at 1652.

*1. Loss of Fit*

Roosevelt wrote that sometimes “decision rules that made sense when adopted may lose their fit,” in which case “the Court will find it necessary to change the decision rules.”<sup>89</sup> For example, the Court used to employ a rational basis test in scrutinizing gender-based classifications.<sup>90</sup> By the 1970s, attitudes towards the legitimacy of gender-based classifications had changed, and the Court found it necessary first to apply a more rigorous type of rational basis scrutiny, then to replace it altogether with the more searching intermediate scrutiny.<sup>91</sup>

Extraterritoriality suffered from a similar loss of fit. Recall that the doctrine grew out of the Court’s attempt to sort permissible from impermissible state regulations of interstate commerce by upholding “indirect” regulations of interstate commerce and invalidating “direct” regulations of it. Extraterritorial regulations of interstate commerce were regarded as paradigmatically direct regulations, exceeding the legislative jurisdiction of states.

But the Court no longer—and has not for some time—enforces the DCCD using those decision rules. The key concept is now whether a state or local law is discriminatory, not whether it directly regulates commerce. Concerns that states have exceeded their proper legislative jurisdiction *are* constitutional matters but ones that, as Donald Regan suggested in his essay on the subject, are “not . . . dormant commerce clause problem[s].”<sup>92</sup> There are clues in *MITE* and *Healy* that the Court itself recognized this, for in each the Court furnished an alternative ground for its holding that employed the Court’s contemporary DCCD decision rules.

The portion of *MITE* discussing extraterritoriality garnered only a plurality, in contrast to the portion of Justice White’s opinion that concluded the Illinois Act failed *Pike* balancing.<sup>93</sup> The Act deprived shareholders of the opportunity to proffer their shares at a premium and the Court concluded that these costs were “clearly excessive” when compared with Illinois’ asserted interests in regulating resident shareholders and regulating the internal affairs of Illinois corporations.<sup>94</sup>

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89. *Id.* at 1686–87.

90. *See, e.g.*, *Goesaert v. Cleary*, 335 U.S. 464, 465 (1948); Roosevelt, *supra* note 6, at 1687.

91. Roosevelt, *supra* note 6, at 1688.

92. Regan, *supra* note 1, at 1873.

93. *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion) (“The Illinois Act is also unconstitutional under the test of *Pike v. Bruce Church, Inc.* . . .”).

94. *Id.* at 640, 644–46 (citations omitted).

In *Healy*, as well, Justice Blackmun's opinion held that the Connecticut price affirmation statute discriminated against interstate commerce on its face, in addition to having an impermissible extraterritorial effect.<sup>95</sup> "By its plain terms," he wrote:

[T]he Connecticut affirmation statute applies solely to interstate brewers or shippers of beer, that is, either Connecticut brewers who sell both in Connecticut and in at least one border State or out-of-state shippers who sell both in Connecticut and in at least one border State. Under the statute, a manufacturer or shipper of beer is free to charge wholesalers within Connecticut whatever price it might choose so long as that manufacturer or shipper does not sell its beer in a border State. This discriminatory treatment establishes a substantial disincentive for companies doing business in Connecticut to engage in interstate commerce, essentially penalizing Connecticut brewers if they seek border-state markets and out-of-state shippers if they choose to sell both in Connecticut and in a border State.<sup>96</sup>

Alternative grounds for the same constitutional claim would be unnecessary had extraterritoriality been seamlessly integrated into the Court's existing two-tier DCCD standard of review.<sup>97</sup>

## 2. Calcification

Roosevelt termed the more serious doctrinal defect, "calcification."<sup>98</sup> This occurs when "decision rules [are] mistaken for

95. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 340 (1989) (plurality opinion).

96. *Id.* at 341.

97. As noted above, *see supra* notes 25–41 and accompanying text, there was a loss of fit not only *within* the DCCD—between extraterritoriality and the contemporary doctrine's focus on discrimination and protectionism—but also a loss of fit *across* other doctrines as well. *Healy* imposed greater limits on extraterritorial state power under the DCCD at the same time that the Court was relaxing restrictions on state power to regulate cross-border conduct in related doctrines. Under the Due Process Clause, for example, the Court had concluded that "minimum contacts" sufficed for states to exercise personal jurisdiction over nonresidents. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Similarly, the Court concluded that a state need only demonstrate sufficient contacts that create "state interests, such that choice of its law is neither arbitrary nor fundamentally unfair" in conflicts of law cases. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981). Likewise, the Court had, by the mid-1970s, concluded that interstate commerce could be taxed as long as the taxing state had a sufficient "nexus" with the taxpayer, the taxes did not discriminate, the taxes were apportioned, and the taxes were related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 277–78 (1977).

98. Roosevelt, *supra* note 6, at 1693.

constitutional operative propositions.”<sup>99</sup> Consequences of calcification include “ill-advised doctrinal reform, attempts to bind nonjudicial actors to decision rules rather than operative propositions, and an undoing of the benefits of decision rules.”<sup>100</sup> Justice Blackmun’s broad reformulation of DCCD extraterritoriality in *Healy* suggests the principle was well on its way to calcification had the Court not circumscribed the doctrine in *Walsh*.

It is important to remember that DCCD extraterritoriality was itself a doctrinal subset of the direct–indirect decision rule that *itself* was an attempt to implement *another set* of decision rules—namely, *Cooley*’s distinction between national and local subjects. But the Commerce Clause does not restrict states to the regulation of local subjects or limit their power to indirect regulation of interstate commerce. Nor does it expressly mandate territorial exercises of state regulatory power. These were merely decision rules intended to implement an inchoate sense that the Clause placed *some* judicially enforceable limits on state power to regulate interstate commerce.

If, as I have argued elsewhere,<sup>101</sup> the constitutional operative proposition the DCCD is meant to implement is that states cannot regulate interstate commerce in ways that endanger the national political union the Constitution established, then it is not clear that extraterritoriality decision rules are especially helpful or useful in implementing that constitutional principle. Or at least the friction generated by extraterritorial regulations of commerce does not seem as potentially disruptive as the retaliatory cycles that discrimination produces. Further, as the Court seems to have concluded in its punitive damages jurisprudence,<sup>102</sup> the Due Process Clause is the more appropriate constitutional source for general limits on extraterritorial regulation.<sup>103</sup>

### *B. Lack of a Limiting Principle: Two Case Studies*

A second problem with DCCD extraterritoriality, at least with *Healy*’s sweeping restatement of the doctrine, was its lack of a

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99. *Id.*

100. *Id.*

101. Denning, *supra* note 15, at 484–85.

102. *See infra* notes 134–139 and accompanying text.

103. *See* Felmly, *supra* note 1, at 508 (“[T]he similarities between the ability of a state to assert jurisdiction over and pass legislation concerning individuals beyond its borders have thus raised the question of whether the extraterritoriality principle should be located within the Due Process Clause of the Fourteenth Amendment.” (citation omitted)). Professor Regan famously concluded that while extraterritoriality lacked a clear textual basis it was a *structural* principle inherent in the federal system established by the Constitution. Regan, *supra* note 1, at 1887.

limiting principle. Had the Court pressed *Healy* to its limits, DCCD extraterritoriality could have become a significant restriction on state regulatory power.

Justice Scalia's *Healy* concurrence raised this concern.<sup>104</sup> Labeling the extraterritoriality principle "both dubious and unnecessary to decide the present cases,"<sup>105</sup> Justice Scalia concurred on the ground that the price affirmation act was discriminatory. "I would refrain," he wrote, "from applying the more expansive analysis which finds the law unconstitutional because it regulates or controls beer pricing in the surrounding States. . . . The difficulty with this is that innumerable valid state laws affect pricing decisions in other States—even so rudimentary a law as a maximum price regulation."<sup>106</sup> He added: "I do not think our Commerce Clause jurisprudence should degenerate into disputes over degree of economic effect."<sup>107</sup>

Between *Healy* and *Walsh*, the rise of the Internet (and state attempts to regulate it) and municipal lawsuits against gun manufacturers pointed up the consequences of enforcing *Healy*'s sweeping version of extraterritoriality, causing scholars to question its origins and application.

### 1. Internet Regulation

Academics like Glenn Reynolds raised early questions about the ability of states, consistent with the DCCD, to regulate online activity.<sup>108</sup> On cue, a New York federal district court stymied an attempt by the state to punish dissemination of pornography and other material deemed harmful to minors over the Internet.<sup>109</sup> Citing cases from *Baldwin* to *BMW*, the Court concluded that the act had impermissible extraterritorial sweep and enjoined its enforcement. "The nature of the Internet," the court wrote,

makes it impossible to restrict the effects of the New York Act to conduct occurring within New York. An Internet user may not intend that a message be accessible to New Yorkers, but lacks the ability to prevent New Yorkers from visiting a

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104. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 344 (1989) (Scalia, J., concurring).

105. *Id.* at 345.

106. *Id.*

107. *Id.*

108. Glenn Harlan Reynolds, *Virtual Reality and "Virtual Welters": A Note on the Commerce Clause Implications of Regulating Cyberporn*, 82 VA. L. REV. 535 (1996).

109. *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 163 (S.D.N.Y. 1997).

particular Website . . . . Thus, conduct that may be legal in the state in which the user acts can subject the user to prosecution in New York and thus subordinate the user's home state's policy—perhaps favoring freedom of expression over a more protective stance—to New York's local concerns. New York has deliberately imposed its legislation on the Internet and, by doing so, projected its law into other states whose citizens use the Net. This encroachment upon the authority which the Constitution specifically confers upon the federal government and upon the sovereignty of New York's sister states is per se violative of the Commerce Clause.<sup>110</sup>

Subsequent articles argued that the DCCD extraterritoriality posed real problems for state regulation of the Internet.<sup>111</sup> The *American Library Association* case emboldened plaintiffs to challenge other regulations, like those regulating the sending unsolicited email messages (spam).<sup>112</sup>

But in an influential *Yale Law Journal* article published in 2001, Jack Goldsmith and Alan Sykes threw cold water on the efforts to apply broad DCCD extraterritoriality to state Internet regulation. Their article was a powerful critique of the principle, as well.

*Healy's* extraterritoriality principle, they argued, was “clearly too broad. Scores of state laws validly apply to and regulate commercial conduct that produces harmful local effects.”<sup>113</sup> The *American Library Association* court's logic “would condemn an extraordinary array of state laws as applied to cross-border activity that no one heretofore viewed as problematic.”<sup>114</sup> They pointed out that “a state regulation of cross-border harms” with impacts “on out-of-state actors cannot by itself be the touchstone for illegality” under DCCD extraterritoriality.<sup>115</sup> “State regulations are routinely upheld

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110. *Id.* at 177.

111. *See, e.g.*, Dan Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1127–32 (1996); Kenneth D. Bassinger, Note, *Dormant Commerce Clause Limits on State Regulation of the Internet: The Transportation Analogy*, 32 GA. L. REV. 889 (1998) (concluding that the likelihood of inconsistent and conflicting state regulations counseled in favor of exclusive federal Internet regulation). *But see* James E. Gaylord, Note, *State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie*, 52 VAND. L. REV. 1095 (1999) (arguing against the application of extraterritoriality to state Internet regulation).

112. *See* Goldsmith & Sykes, *supra* note 1, at 793–94 (describing early challenges to state antis spam laws).

113. *Id.* at 790.

114. *Id.* at 823.

115. *Id.* at 803.

despite what is obviously a significant impact on outside actors.”<sup>116</sup> By way of illustration, they noted that “[m]ultistate firms often face [costs keeping up with multiple regulatory regimes] with respect to varying state tax laws, libel laws, securities requirements, charitable registration requirements, franchise laws, tort laws, and much more.”<sup>117</sup>

Moreover, they argued that extraterritoriality was a poor fit with the DCCD’s main focus: restricting protectionism among states. “The protectionist concern,” they noted, “is *not* generally implicated by the Internet pornography and spam cases,” which applied evenhandedly.<sup>118</sup> “Instead, the Internet cases implicate a . . . problem presented by state regulation of cross-border externalities.”<sup>119</sup> Better, they concluded, that the burdens associated with crossborder regulation of externalities be examined by balancing the burdens with the local benefits—ordinary *Pike* balancing, in other words.<sup>120</sup>

## 2. Municipal Gun Litigation

About the same time courts were applying DCCD extraterritoriality to state Internet regulations, state and municipal governments were suing gun manufacturers for engaging in allegedly tortious marketing and distribution practices.<sup>121</sup> The manufacturers objected, claiming that the remedies sought, including injunctive relief mandating changes in nationwide marketing and distribution of their products, would have impermissible extraterritorial effects.<sup>122</sup> Success was decidedly mixed. One court dismissed a suit on extraterritoriality grounds, but the dismissal did not survive appeal.<sup>123</sup> Some courts, though,

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116. *Id.*

117. *Id.* at 804.

118. *Id.* at 798. *See also* Felmlly, *supra* note 1, at 507 (observing that “the extraterritoriality principle is not concerned with discrimination, protectionism, or with the process of state legislation”); *supra* text accompanying notes 89–97.

119. Goldsmith & Sykes, *supra* note 1, at 798.

120. *Id.* at 806.

121. *See generally* Timothy D. Lytton, *Introduction: An Overview of Suits Against the Gun Industry*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL & MASS TORT 1* (Timothy D. Lytton ed., paperback ed. 2006).

122. I, too, argued that the suits were vulnerable to an extraterritoriality challenge. Brannon P. Denning, *Gun Litigation and the Constitution*, in *SUING THE GUN INDUSTRY*, *supra* note 121, at 315, 339.

123. *See City of Gary ex rel. King v. Smith & Wesson Corp.*, No. 45D05-005-CT-243, 2001 WL 333111, at \*6 (Ind. Super. Ct. Jan. 11, 2001) (“Defendants suggest that the City’s lawsuit, in violation of the Commerce Clause, seeks to

seemed to skirt the issue, either holding that the suits did not constitute “regulation” implicating the DCCD at all,<sup>124</sup> or that the DCCD’s protections were not triggered by common law tort suits.<sup>125</sup> The efforts to avoid application of the DCCD suggested the judges were worried the doctrine might have some kind of bite.

The passage of the Protection of Lawful Commerce in Arms Act preempted many of the state and municipal claims against gun manufacturers,<sup>126</sup> but scholars like Allen Rostron nevertheless worried about the implications of a robust DCCD extraterritoriality for a variety of state regulatory regimes.<sup>127</sup> DCCD extraterritoriality, he argued, was out of step with the retreat from a strict territoriality

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regulate the lawful conduct of the defendants outside Gary’s borders, in their production, distribution and sales practices. As such, the City’s proposed claim and relief inevitably have an unconstitutional and extraterritorial effect.”), *rev’d*, 801 N.E.2d 1222, 1236–37 (Ind. 2003). *But see* City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136 (Ohio 2002) (rejecting the argument that a municipal tort suit against a gun manufacturer seeking injunctive relief to force changes in marketing and distribution of firearms did not constitute impermissible extraterritorial regulation). *See also* New York v. Beretta U.S.A. Corp., 315 F. Supp. 2d 256, 285–86 (E.D.N.Y. 2004).

124. *See, e.g.*, *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1216–17 (9th Cir. 2003); *District of Columbia v. Beretta, U.S.A. Corp.*, 872 A.2d 633, 656–58 (D.C. Ct. App. 2005) (upholding the D.C. ordinance imposing strict liability in tort for manufacturers of “machine guns” or “assault weapons” for injuries arising out of discharge of weapons within the District in holding that no extraterritorial regulation exists where the only “regulation” is the possible imposition of tort damages).

125. *Camden Cnty. Bd. of Chosen Freeholders v. Beretta*, 123 F. Supp. 2d 245, 254–55 (D.N.J. 2000) (dismissing county complaint against gun manufacturers for negligent marketing and distribution of handguns and expressing skepticism that such suits might implicate the dormant Commerce Clause doctrine) (“The Court finds that plaintiff’s claims in this case would almost certainly have a negative effect upon interstate commerce, but also that there would undoubtedly be strong local benefits involved if the county succeeded in stemming the tide of gun violence within its borders.”).

126. 15 U.S.C. §§ 7901–7903 (2006). *See generally* *Ileto*, 565 F.3d at 1140–41 (upholding PLCAA against, *inter alia*, claims that Act exceeded Congress’s commerce power); Jenny Jiang, *Regulating Litigation Under the Protection of Lawful Commerce in Arms Act: Economic Activity or Regulatory Nullity?*, 70 ALB. L. REV. 537 (2007); Alden Crow, Comment, *Shooting Blanks: The Ineffectiveness of the Protection of Lawful Commerce in Arms Act*, 59 S.M.U. L. REV. 1813 (2006); R. Clay Larkin, Note, *The “Protection of Lawful Commerce in Arms Act”: Immunity for the Firearms Industry Is a (Constitutional) Bullseye*, 95 KY. L.J. 187 (2006–2007).

127. Allen Rostron, *The Supreme Court, the Gun Industry, and the Misguided Revival of Strict Territorial Limits on the Reach of State Law*, 2003 MICH. ST. L. REV. 115, 151–56.

that had occurred in all other areas of American law.<sup>128</sup> Cases like *Healy* revived that restrictive model without offering clear guidelines for its application.<sup>129</sup>

Rostron cautioned that the extraterritoriality arguments proffered by gun manufacturers were “extreme” and that, “if accepted and applied beyond the context of the gun litigation, would truly return the limits on state authority to where they stood a century ago.”<sup>130</sup> He continued:

In the end, there are no limitations that narrow the gun companies’ argument and preclude it from applying equally to all of the many cases in which courts adjudicate state-law claims based on a defendant’s commercial conduct that occurs wholly outside the state. Taken to its logical conclusion, their argument applies even to a simple common-law tort claim for damages brought by a private individual against an out-of-state manufacturer of a product that caused an injury.<sup>131</sup>

Such extreme results, as he saw them, led Rostron to invite “the Supreme Court [to] expressly disavow the statements in [*MITE*] and *Healy*, which interpreted the Constitution as forbidding the application of a state’s commerce statutes to conduct that takes place wholly outside of the state’s borders but has effects within the state.”<sup>132</sup> As I have argued, this is precisely what the Court did in *Walsh*.<sup>133</sup>

### C. The Due Process Clause and Punitive Damages

Despite the tantalizing hints in *BMW v. Gore* that the DCCD extraterritoriality operated to limit a state’s ability to impose punitive damages on defendants for out-of-state conduct,<sup>134</sup> the Court’s next punitive damages case dropped all references to *Healy* and the Commerce Clause, locating the limits in the Due Process Clause of the Fourteenth Amendment. In *State Farm Mutual*

128. *Id.* at 127 (“The strict territorial approach to the reach of state law appeared to be dead as the last decades of the twentieth century began.”).

129. *Id.* at 134 (observing that the Court’s decisions “provided no clear statement of . . . a distinction [between economic regulation and other forms of state law] or any explanation about how exactly to determine what sorts of state law should be subject to the strict territorial rule” (citation omitted)); *id.* at 140 (“The Supreme Court’s decisions have charted no clear path for other courts to follow.”).

130. *Id.* at 151.

131. *Id.* at 156.

132. *Id.* at 172 (citation omitted).

133. See *supra* notes 74–86 and accompanying text.

134. See *supra* notes 64–73 and accompanying text.

*Automobile Insurance Company v. Campbell*<sup>135</sup>—decided the same term as *Walsh*—Justice Kennedy declared that “[t]he *Due Process Clause* of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.”<sup>136</sup> While the Court noted that “[a] State cannot punish a defendant for conduct that may have been lawful where it occurred” and that “as a general rule . . . a State [has no] legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction,”<sup>137</sup> the cases cited relied on the Fourteenth Amendment or the Full Faith and Credit Clause, not the Commerce Clause.

Four years later, in *Phillip Morris, U.S.A. v. Williams*,<sup>138</sup> the Court held that “the Constitution’s *Due Process Clause* forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or . . . injury that it inflicts upon those who are, essentially, strangers to the litigation.”<sup>139</sup> In a listing of cases supporting the proposition, *BMW* is clearly included with others that root this principle in the *Due Process Clause*.

The Court’s pivot to the *Due Process Clause* in punitive damage cases, along with its and other courts’ disinclination to embrace broad sweep for DCCD extraterritoriality, left it stranded—a doctrinal oxbow lake. The Court’s changing attitude about the DCCD, moreover, leaves prospects for an extraterritoriality revival rather bleak.

#### *D. The Court’s Second Thoughts About the DCCD*

The abandonment of DCCD extraterritoriality is of a piece with a more general retreat from the DCCD by the Supreme Court. In 2003, when *Walsh* was decided, Justice Thomas announced his intention never again to vote to invalidate a state law challenged under the DCCD.<sup>140</sup> Even Justice Scalia, a trenchant critic of the

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135. 538 U.S. 408 (2003).

136. *Id.* at 416 (emphasis added) (citation omitted).

137. *Id.* at 421. The Court also appealed to the “basic principle of federalism . . . that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.” *Id.* at 422 (citation omitted).

138. 549 U.S. 346 (2007).

139. *Id.* at 353.

140. *Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59, 68 (2003) (Thomas, J., dissenting) (objecting to majority conclusion that milk pricing statute was subject to DCCD review). *See also Pharm. Research & Mfrs. Ass’n v. Walsh*, 538 U.S. 644, 683 (2003) (Thomas, J., concurring) (approving majority’s decision to reject DCCD claim against Maine drug price control plan and quoting *Hillside Dairy*

DCCD, does not quite go that far. He at least is willing on *stare decisis* grounds to invalidate discriminatory laws or cases that are indistinguishable from others the Court has decided. But Justice Scalia has long argued that the Court ought never to engage in the balancing of costs and benefits of nondiscriminatory laws.<sup>141</sup>

Justice Scalia's campaign against the DCCD may be winning some converts on the Court besides Justice Thomas. In 2007, for example, the Court created a then-unknown exception to the DCCD's antidiscrimination principle for discrimination in favor of public entities.<sup>142</sup> The next term it applied that newly minted exception to a state law offering preferential tax treatment to income derived from bonds issued by the taxing state or its subdivisions.<sup>143</sup> In the course of the latter case, Justice Souter, who authored the opinion, called into question the continued viability of *Pike* balancing, where nondiscriminatory laws burdening commerce have those burdens weighed against the putative local benefits of those laws.<sup>144</sup> Since 2000, in fact, the Court has invalidated only one state law under the DCCD: a law permitting the direct sale of locally produced wine to consumers.<sup>145</sup> Under the Roberts Court, only Justices Kennedy and Alito seem willing to enforce the DCCD wholeheartedly.<sup>146</sup>

This judicial hostility—or indifference—to the DCCD's established prongs, antidiscrimination and *Pike* balancing, strongly suggest little appetite for reviving a branch of the DCCD that in broad form had sweeping effects. While the Roberts Court is not inclined to overruling prior cases outright,<sup>147</sup> it is fair to conclude in

dissent). *See also generally* Brannon P. Denning, Justice Thomas and the Dormant Commerce Clause: Anatomy of a Doctrinal Divorce (July 22, 2012) (unpublished work) (on file with author).

141. *See, e.g.*, *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (arguing that balancing interests is not possible because the interests balanced are incommensurate: "It is more like judging whether a particular line is longer than a particular rock is heavy.").

142. *United Haulers Ass'n, Inc v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007).

143. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 361–62 (2008). For a critique of the exception, see Norman R. Williams & Brannon P. Denning, *The "New Protectionism" and the American Common Market*, 85 NOTRE DAME L. REV. 247 (2009).

144. *Davis*, 553 U.S. at 338–39.

145. *Granholm v. Heald*, 544 U.S. 460 (2005).

146. *See, e.g.*, *Davis*, 553 U.S. at 362 (Kennedy, J., dissenting); *United Haulers*, 550 U.S. at 356 (Alito, J., dissenting).

147. *See* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1 (2010).

light of *Walsh* and subsequent events, that DCCD extraterritoriality is, for all intents and purposes, dead.

#### V. ON “INCONSISTENT STATE REGULATIONS”

Recall that one justification for continuing to enforce DCCD extraterritoriality was that if state law was not cabined, interstate actors would be subject to a skein of inconsistent, possibly conflicting, regulatory regimes.<sup>148</sup> A related fear was that one state might establish a rule that was more strict than any other state’s rule and that an interstate actor might comply with the strict rule, thus permitting a single state to establish a de facto national standard.<sup>149</sup> Undoubtedly, the Court has, in the past, held unconstitutional state laws that imposed what the Court saw as conflicting and inconsistent regulations.<sup>150</sup>

The question arises, then: What does the death of DCCD extraterritoriality mean for these related “inconsistent state regulations” cases? The answer has to be, I think, that nondiscriminatory, but burdensome and perhaps conflicting, laws should be evaluated under *Pike* balancing, with the evidence of conflicting regulatory regimes used to prove that a law or laws are burdensome. Professor Regan put it well when he wrote that “[t]he commercial enterprise that chooses to operate in more than one state must simply be prepared to conform its various local operations to more than one set of laws. The Constitution

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148. See *supra* notes 26–32 and accompanying text.

149. *So. Pac. Co. v. Arizona*, 325 U.S. 761, 773, 795 (1945) (invalidating state train length law and noting that the alternative to breaking up trains at state borders “is for the carrier to conform to the lowest train limit restriction of any of the states through which its trains pass, whose laws thus control the carriers’ operations both within and without the regulating state”).

150. See, e.g., *Bibb v. Navajo Trucking Freight Lines, Inc.*, 359 U.S. 520 (1959) (invalidating a law requiring the use of contoured mudguards on trucks when many other states required use of straight mudguards); *Morgan v. Virginia*, 328 U.S. 373, 386 (1946) (holding the state law requiring segregation of interstate bus passengers unconstitutional). In *Morgan v. Virginia*, the Court wrote:

As no state law can reach beyond its own border nor bar transportation of passengers across its boundaries, diverse seating requirements for the races in interstate journeys result. As there is no federal act dealing with the separation of races in interstate transportation, we must decide the validity of this Virginia statute on the challenge that it interferes with commerce, as a matter of balance between the exercise of the local police power and the need for national uniformity in the regulations for interstate travel.

*Morgan*, 328 U.S. at 386.

does not give an enterprise any special privileges just because it happens to operate across state lines.”<sup>151</sup>

Professors Goldsmith and Sykes agreed: “States are allowed to make their own regulatory judgments about scores of issues. The mere fact that states may promulgate different substantive regulations of the same activity cannot possibly be the touchstone for illegality under the dormant Commerce Clause.”<sup>152</sup> They too urged analysis of those cases under *Pike* balancing to guard against the possibility that the “compliance costs” imposed by “nonuniform state regulations” are “so severe that they counsel against permitting the states to regulate a particular subject matter”<sup>153</sup> or because the “regulatory benefits . . . were illusory while the costs of complying with the local regulation were severe.”<sup>154</sup>

#### CONCLUSION

Charles Fried has observed that the Court’s constitutional doctrine often follows a common law model, whereby

particularistic decisions, moved by the force of urgent specifics, may for a time exert their influence in a case-by-case accretion of precedents in similar circumstances, but their influence cannot forever be exerted in this sideways fashion. Eventually they either run out, or, if potent, they invite courts to move to higher levels of abstraction, where more general propositions are announced, and it is these that begin to take over some of the work of deciding cases.<sup>155</sup>

DCCD extraterritoriality, it seems, was a doctrine potent enough to move to that higher level of abstraction. It then stalled once the Justices realized (1) that the doctrine was a poor fit with the larger

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151. Regan, *supra* note 1, at 1881 (footnote omitted). To the extent that the Court is doing something in *Bibb* other than balancing, Professor Regan argues that “if [a per se rule against inconsistent state regulations] is alive and well, it is also limited to transportation cases.” *Id.* at 1883. While he earlier argued that the Court should not balance in what he termed *movement-of-goods* cases, he conceded that balancing might be appropriate in transportation cases. “Transportation cases,” he explained, “unlike movement-of-goods cases, involve a constitutionally significant interest that arguably will not be adequately protected without judicial balancing. The interest in question is the national interest in an efficient transportation and communications network,” which is important “to the whole project of political union.” *Id.* (citation omitted).

152. Goldsmith & Sykes, *supra* note 1, at 806.

153. *Id.* at 806–07.

154. *Id.* at 807.

155. CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 189 (2004).

DCCD, which focused on discrimination and protectionism rather than whether a state law “directly” regulated interstate commerce; and (2) the implications of taking the new rule seriously, as illustrated by lower courts using it to thwart state regulation of the Internet and litigants claiming that common tort remedies were subject to its strictures. The Court’s decision to ground its punitive damages decisions on due process principles and the general retreat from the DCCD also contributed to extraterritoriality’s demise and make prospects for its future revival unlikely.

As one who firmly believes in the utility of studying doctrinal development and application in general,<sup>156</sup> extraterritoriality’s demise holds some larger lessons about the life cycle of decision rules. First, decision rules are tools that aid the Court in rendering judgments. Simply saying that the Constitution requires states to provide all persons “equal protection of the laws” does not get one very far down the road when deciding whether a state can prevent opticians from making glasses without a prescription from an optometrist or ophthalmologist<sup>157</sup> or whether a state may extend preferences in higher education admissions to certain underrepresented racial groups.<sup>158</sup> But decision rules have to be altered when the Court’s understanding of the constitutional principles they implement change, lest doctrine succumb to Roosevelt’s “calcification.” Once the Court had shifted from its focus on direct versus indirect regulations to discrimination, extraterritoriality no longer made any sense *as a dormant Commerce Clause decision rule*.<sup>159</sup> Yet it persisted, leading to no small confusion in the courts as to DCCD extraterritoriality’s scope.

On the other hand, the problem is largely self-correcting. The Court can alter, amend, or even abandon decision rules when they outlive their usefulness or become attenuated from the constitutional principle they were created to serve. Perhaps, then, the more important contribution of essays like this one is to encourage judges and the Justices to approach the decision rules they create with more

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156. See Brannon P. Denning, *The New Doctrinalism in Constitutional Scholarship and District of Columbia v. Heller*, 75 TENN. L. REV. 789, 793–96 (2008) (making the case for careful study of the doctrine and decision rules produced by courts, especially the U.S. Supreme Court); see also Brannon P. Denning & Michael B. Kent, Jr., *Anti-evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. 1773, 1815–33 (tying “anti-evasion doctrines” to the benefits of studying doctrine more generally).

157. *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955).

158. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

159. As to whether it should be regarded as a structural principle of federalism or a due process problem, I express no opinion. Likewise, I bracket the question whether the Court has become too lenient in permitting states to exercise judicial and legislative jurisdiction in a variety of circumstances.

intentionality in hopes of facilitating the creation of useful rules and the communication of those rules to policy makers and lower court judges. More importantly, the Court should not hesitate to prune the rules that have lost vitality and whose existence confuses and complicates doctrine to the detriment of constitutional law more generally.