NOTE

LOCATING EXTRATERRITORIALITY: *ASSOCIATION FOR ACCESSIBLE MEDICINES* AND THE REACH OF STATE POWER

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ABSTRACT

The extraterritoriality doctrine—one of three limits on state power derived from the Commerce Clause—is infrequently used and often misunderstood. Its rule is simple: a state may not project its power beyond its physical borders. Its justifications, however, have become muddled over the years, and through its doctrinal incoherence, the straightforward rule has been distorted to serve ends that do not match its prohibitions. This lack of fit has serious consequences for the states that seek to protect their citizens' health, wealth, and morals and—consequently—the legitimacy of the doctrine.

The Fourth Circuit's recent decision in Association for Accessible Medicines ("AAM") *brought these tensions to the fore, pitting the doctrine against a state statute that sought to regulate out-of-state manufacturers to protect the state's citizens from price spikes in pharmaceutical drugs sold in the state. In striking down the statute, the Fourth Circuit drew from broader dormant commerce clause jurisprudence and emphasized the need to ensure the natural function of the national marketplace. In doing so, it placed commerce over comity and guided the doctrine towards the goalpost of unfettered access to a uniform economy.*

This Note approaches AAM *through a different lens and argues for a reorientation of the extraterritoriality doctrine towards its traditional justification: preservation of state sovereignty vis-à-vis other states. In doing so, it weaves together constitutional history, the common law, and international law to present a vision of the extraterritoriality doctrine that rests comfortably on a long line of precedent and jurisprudential thought construing the contours of sovereign power. Viewed against this backdrop, the doctrine gains much needed coherence by aligning its prohibitions along the horizontal distribution*

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of power in the U.S. federal system. This Note argues that the question AAM *presented was not whether the state impermissibly burdened interstate commerce but instead whether Maryland acted outside of the scope of its inherent sovereign power. While answering in the affirmative, this Note presents a framework for future regulation derived from the extraterritoriality doctrine's sovereignty function and argues for the doctrine's continued validity.*

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INTRODUCTION

The extraterritoriality doctrine—a constitutional rule aptly called "the most dormant" and "the least understood of the Court's three strands of dormant commerce clause jurisprudence"[1]—prohibits a state from regulating conduct "occurring wholly outside that State's borders."[2] While the rote iteration of this facially neutral doctrine initially appears simplistic, what lies beneath its surface is all but clear. As the doctrine has shifted between judges and scholars, it has morphed to fit each individual's perceptions of federalism and national economics. In the hands of one set of dissenting judges and scholars, the extraterritoriality doctrine lacks historical justification, has "no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application."[3] In another set of hands, the precise opposite is claimed: the extraterritoriality doctrine is so rooted in our constitutional history and traditions that it is now "a relic of the old world with no useful role to play in the new."[4]

[1] *See* Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1172 (10th Cir. 2015) (Gorsuch, J.). The other two strands of the dormant commerce clause are a *per se* prohibition on facially discriminatory laws and a balancing approach that looks to determine whether the "burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). This Note, instead, focuses on the third, less understood strand: the extraterritoriality doctrine. Additionally, the use of the term "negative" over "dormant" typically corresponds with the judge's or justice's view of the doctrine. "Negative" usually denotes hostility to the doctrine, and it is used to emphasize that dormant commerce clause jurisprudence is said to carry a "negative" implication restricting state power. *See, e.g.*, Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 262 (1987) (Scalia, J., concurring in part and dissenting in part). Despite Justice Scalia's absence on the Court today, Justice Gorsuch likely carries the same beliefs about the extraterritoriality doctrine, as suggested by *Epel*. *See Epel*, 793 F.3d at 1171 (Gorsuch, J.) (describing dormant commerce clause jurisprudence as "judicial free trade policy" used by judges "to strike down laws that, in their judgement, unduly interfere with interstate commerce").

[2] Healy v. Beer Inst., 491 U.S. 324, 332 (1989).

[3] *See* Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 683 (2003) (Thomas, J., concurring in the judgment) (quoting Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting)).

[4] *See, e.g.*, Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 377-78 (6th Cir. 2013) (Sutton, J., concurring) ("To the founding generation, it was an article of common faith that 'no state or nation can, by its laws, directly affect, or bind property out of its own territory, or bind persons not resident therein.'" (quoting JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS 21 (1834))). To these judges and scholars, extraterritoriality only maintained its doctrinal coherence when the Supreme Court drew concrete lines between federal and state power, which neither level of government could transgress. However, as "the lines between the separate spheres blurred, in part because the nature of commerce changed, in part because the Supreme Court's interpretation of the Commerce Clause changed," the doctrine, in these scholars' view, now only makes sense as applied to "discriminat[ion] against out-of-state entities in favor of in-state ones." *Id.* at 378.

In this latter group's view, the complexities of modern economics require a divestiture of a doctrine that continually frustrates the well-meaning intentions of states to protect their citizens from market failures.[5] And still another group—those who faithfully apply the Supreme Court's precedent as it currently stands—takes few steps to defend its constitutionality on normative grounds and instead rely on the force of precedent and on passing references to national economic policy to ground its application.[6] In these opinions, the various strands of the dormant commerce clause blend together into an apparently seamless whole, each supported by the same historical and political justifications.[7]

This Note, contrary to these three prior positions, joins in a different vision of the extraterritoriality doctrine, one that is rooted in the history and tradition of U.S. federalism and one that insists on its continued relevance. Its vision reorients the doctrine as a limit designed to promote competition between the states and, consequently, as a means of ensuring a uniform federal rule to enforce the conception of states as laboratories of democracy.[8] In doing so, it emphasizes that this policy is unique to the extraterritoriality doctrine and should drive the case law and its application.[9]

Among the disputes regarding its validity, however, lies a less prominent and yet just as crucial debate over the scope of the doctrine. As it stands, the doctrine lies dormant, waiting for precise—yet seemingly random—moments to reach out and cut off state legislative initiatives in their infancy. And in recent years, it has proven quite successful at doing so, striking down statutes governing exclusive labeling for bottle redemption,[10] loans,[11] pornography,[12] regulations on competition,[13] and, most importantly for this Note, pharmaceutical drug

[5] *Id.* at 379.

[6] *See, e.g.*, Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 669, 674 (4th Cir. 2018) ("Although we sympathize with the consumers affected by the prescription drug manufacturers' conduct and with Maryland's efforts to curtail prescription drug price gouging, we are constrained to apply the dormant commerce clause to the Act."), *cert. denied*, 139 S. Ct. 1168 (2019); *Epel*, 793 F.3d at 1172.

[7] *See, e.g.*, Jeffrey M. Schmitt, *Constitutional Limitations on Extraterritorial State Power: State Regulation, Choice of Law, and Slavery*, 83 MISS. L.J. 59, 109-10 (2014) [hereinafter Schmitt, *Constitutional Limitations on Extraterritorial State Power*] (arguing for view of extraterritoriality doctrine that carefully delineates between horizontal and vertical federalism and recognizing differing intentions between dormant commerce clause doctrines).

[8] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[9] This Note joins in and adds to a broad literature that has delved into the policy underpinnings of the extraterritoriality doctrine. *See, e.g.*, 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, 508-10 (2003).

[10] *Am. Beverage*, 735 F.3d at 376.

[11] Midwest Title Loans, Inc. v. Mills, 593 F.3d 660, 668-69 (7th Cir. 2010).

[12] Am. Booksellers Found. v. Dean, 342 F.3d 96, 102-03, 105 (2d Cir. 2003).

[13] *See In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 612-13 (7th Cir. 1997).

pricing regulations.[14] Against a backdrop of concerns regarding both the doctrine's validity and its scope, the prevalent jurisprudential method of merely alluding to those policies supporting the broader concerns of the dormant commerce clause—namely, a cohesive national economy and preventing discriminatory state policies—is of cold comfort to a state that has staked its legislative scheme on protecting its citizens from *all* manufacturers whose actions directly trigger negative consequences *in their state* even if the targeted upstream conduct occurs outside of the state.[15] In these cases the extraterritoriality doctrine strains to hold together its coherence—and for good reason. These state statutes do not discriminate against out-of-state manufacturers, and the state has intentionally wedded the regulated actions that take place outside of the state to a final determinative action *within* the state.

These boundaries were tested in a recent Fourth Circuit decision, *Association for Accessible Medicines v. Frosh*[16] ("*AAM*"). Faced with soaring drug prices due to a market that thrived on closed distribution chains, Maryland acted to prohibit pharmaceutical manufacturers, both inside and outside of the state, from raising the prices of their prescription drugs by more than fifty percent in a single year. In striking down the statute, the Fourth Circuit majority found determinative that most sales of pharmaceuticals occur through distribution chains involving numerous distinct entities, such as manufacturers, distributors, and pharmacies. Because the initial transactions between manufacturers and distributors typically occurred outside of Maryland, the statute "directly regulate[d] transactions that t[ook] place *outside Maryland*."[17] Rather than providing a robust defense for the doctrine, the majority balked and defended their ultimate holding on the grounds that they were "constrained to apply the dormant commerce clause to the Act."[18] The dissent, for its part, lambasted the majority for enforcing a vision of the extraterritoriality doctrine that had nothing to do with economic protectionism and questioned "the constitutional rationale underlying the doctrine, in light of new and expanded modes of interstate

[14] Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 669 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1168 (2019). *But see generally* Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003) (upholding Maine statute providing regulations on drug pricing where state regulated only with reference to in-state actions).

[15] A decision that emphasizes the remaining avenues states have to take actions within the state—for example, by targeting in-state retailers rather than out-of-state manufacturers—does not come without its own social or political costs. *See Ass'n for Accessible Meds.*, 887 F.3d at 674. States have targeted out-of-state manufacturers instead of in-state retailers due to the price-setting ability of out-of-state manufacturers in closed distribution systems. *See, e.g.*, Adam R. Houston, Reed F. Beall & Amir Attaran, *Upstream Solutions for Price-Gouging on Critical Generic Medicines*, J. PHARMACEUTICAL POL'Y & PRAC., May 2, 2016, at 1, 1 ("[C]ompanies acquire the marketing and manufacturing rights for off-patent, critical medicines with a single source (so a *de facto* monopoly) and raise prices astronomically.").

[16] 887 F.3d 664 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1168 (2019).

[17] *Id.* at 674.

[18] *Id.*

commerce."[19] This Note concludes that each opinion cast the extraterritoriality doctrine into a role it simply was not designed to play.

Precisely because of the current lack of jurisprudential fit between the extraterritoriality doctrine's rule and its purported objectives, this Note deploys *AAM* as a case study on which to build a comprehensive and coherent framework for the doctrine. Importantly, *AAM* shows that, contrary to predictions of its demise,[20] the extraterritoriality doctrine is still serves an important role in limiting and protecting state sovereignty. Nevertheless, as *AAM*'s exclusive reliance on national economics demonstrates, the doctrine is still largely misunderstood.[21] Interweaving Supreme Court precedent, constitutional tradition, and history, this Note carves out a new position outside of the extremes presented by both the majority and the dissenting positions, one that roots the doctrine in its traditional concern: the inherent limits of state sovereignty. In doing so, it provides a roadmap for states, such as Maryland, to regulate out-of-state conduct that is nevertheless not *wholly* outside of the state and uses criminal conspiracy law as a model for state action.[22] In short, a state properly regulates an entity located outside of a state if that entity entered into a transaction or series of actions out of state with the intention of violating the regulating state's laws, even if the entity never directly carried out any action within the state. Under any meaningful conception of state sovereignty, such a construction is necessary to prevent a state from becoming a shelter for activities whose final effects will be felt in another state.[23] This Note engages with *AAM* precisely because it is a

[19] *Id.* at 681.

[20] *See* Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 996-98 (2013); *see also* Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 378 (6th Cir. 2013) (Sutton, J., concurring).

[21] *Ass'n for Accessible Meds.*, 887 F.3d at 672; *see also* Felmly, *supra* note 9, at 491 ("Conspicuously absent from the decisions implicating the extraterritoriality principle is a discussion of what constitutes an 'inconsistent regulation' and when a statute has effects occurring 'wholly outside' the borders of the state."); Jeffrey M. Schmitt, *Making Sense of Extraterritoriality: Why California's Progressive Global Warming and Animal Welfare Legislation Does Not Violate the Dormant Commerce Clause*, 39 HARV. ENVTL. L. REV. 423, 424 (2015) [hereinafter Schmitt, *Making Sense of Extraterritoriality*]. *But see* Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 MARQ. L. REV. 497, 524 (2016) (finding that circuit courts generally apply doctrine without difficulty).

[22] *See* Strassheim v. Daily, 221 U.S. 280, 285 (1911).

[23] While international law's notions of the extraterritoriality doctrine are not identical to dormant commerce clause extraterritoriality, international law's notions are informative because they set out a common-law understanding of the limits and scope of comity between sovereign states. *See* Ford v. United States, 273 U.S. 593, 622-24 (1927) (finding that United States could try defendant who committed majority of criminal acts outside of United States).

difficult case: one in which an individual's access to life-saving medicine hangs in the balance.[24]

This analysis begins with the baseline recognition that U.S. federalism coordinates sovereign power across two distinct planes. First, the Constitution distributes power vertically between the federal government and state governments, and second, it distributes power horizontally, delineating the boundaries of sovereignty amongst the states.[25] The complex, organic interplay between these axes of power promotes the development of state governments finely tuned to address local conditions and of a federal government oriented towards addressing national problems.[26] While the vertical distribution of power is typically policed by the political process or by the judicial system, the common-law notion of comity—the mutual respect of one state for another in our tightly knit union—traditionally sustains the horizontal distribution of power.[27] Modern political polarization, however, has placed increasing strain on these traditional relationships as partisan politics within states threatens to spill over their borders to regulate conduct in other states.[28]

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[24] *See infra* notes 276-85 and accompanying text (discussing market for generic pharmaceuticals).

[25] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985); *see also* Schmitt, *Constitutional Limitations on Extraterritorial State Power*, *supra* note 7, at 110.

[26] *See* Healy v. Beer Inst., 491 U.S. 324, 335-36 (1989).

[27] *See* Schmitt, *Constitutional Limitations on Extraterritorial State Power*, *supra* note 7, at 73. While political safeguards do exist between states, those tools are not always bound to succeed. Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 61-62 (2014). And, of course, comity is not exclusive to the relationship between states. Instead, comity has served to regulate conduct across U.S. federalism along both axes of power—that is, both among states and between states and the federal government. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 44 (1971) (recognizing "notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways"). The Supreme Court, however, has deployed numerous tools outside of the traditional notions of comity to protect the relationship between the states and the federal government, leaving extraterritoriality as one of the few protections for states vis-à-vis other states. *See, e.g.*, Printz v. United States, 521 U.S. 898, 919-24 (1997) (refining rule prohibiting "conscription" of state resources for federal projects under Tenth Amendment).

[28] *See, e.g.*, Vikram David Amar, *Federalism Friction in the First Year of the Trump Presidency*, 45 HASTINGS CONST. L.Q. 401, 401-02 (2018); Chad DeVeaux, *One Toke Too Far: The Demise of the Dormant Commerce Clause's Extraterritoriality Doctrine Threatens the Marijuana-Legalization Experiment*, 58 B.C. L. REV. 953, 959 (2017) [hereinafter DeVeaux, *One Toke Too Far*] (discussing potential red state responses to blue state marijuana legalization schemes); Gerken & Holtzblatt, *supra* note 27, at 106-07 (detailing disputes between red and blue states). *But see* Steve Chapman, Red State, Blue State—Does It Really Matter? Americans Don't Know What They Want, CHI. TRIB., Sept. 8, 2019, at C18 ("Here is the paradox of our politics: The public doesn't like paying for liberal programs but doesn't

At the horizontal level, states are experimenting with approaches to global warming policy, marijuana decriminalization and legalization, pharmaceutical regulation, and more.[29] In a recent push, states—following in the path of Maryland—have passed legislation targeting pharmaceutical manufacturers to improve transparency of pricing, to limit price gouging, and to implement rebate programs.[30] Of course, for progressive states enacting these policies, the optimal distribution of power would allow them to compel other states to follow their lead. It is precisely this impulse that constitutional doctrine attempts to constrain.[31] The manner in which conflicts between states are resolved will shape more than the mere division of power; a clear demarcation of each state's jurisdiction permits states to experiment with legislative policy without fear of judicial intervention.[32] In turn, differences in state regulatory and statutory schemes give citizens greater flexibility to choose a state to live in that conforms to their personal values and economic desires.[33] How the extraterritoriality doctrine applies in cases like *AAM* will shape the ways in which states regulate these areas moving forward. The ultimate answer will determine whether, and to what extent, the states remain "*equally* free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be."[34]

Accordingly, Part I of this Note will trace the jurisprudential contours of the extraterritoriality doctrine and provide a historical perspective on its critiques. In doing so, Part I will develop the policy underpinnings of the extraterritoriality doctrine and emphasize that sovereignty, not interstate commerce, provides the most coherent explanation of the holdings in the Supreme Court's extraterritoriality decisions. Part II delves into constitutional history, the common law, and early jurisprudence to rebut claims that the doctrine lacks historical justification. It also responds to critiques that the doctrine lacks

want to scrap them. Democrats are better at catering to the public preference for a strong safety net than at making it affordable. Republicans may slow the expansion of government, but they are rarely able to reverse it.").

[29] *See, e.g.*, David Abel, *State May Shift Climate Change Funds: Baker Wants to Spend More on Blunting the Effects of Warming*, BOS. GLOB, Feb. 28, 2019, at A1; Robert Pear, *As States Rush to Curb Prescription Costs, Drug Companies Fight Back*, N.Y. TIMES, Aug. 19, 2018, at A22; Thomas Huelskoetter, *State Policies to Address Prescription Drug Prices*, CTR. FOR AM. PROGRESS (May 31, 2018, 9:00 AM), https://www.americanprogress.org/issues/healthcare/reports/2018/05/31/451170/state-policies-address-prescription-drug-prices/ [https://perma.cc/Z28E-PTM8].

[30] Pear, *supra* note 29.

[31] *See* Schmitt, *Constitutional Limitations on Extraterritorial State Power*, *supra* note 7, at 110.

[32] *See* Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 314 (1987).

[33] DeVeaux, *One Toke Too Far*, *supra* note 28, at 955; *see also, e.g.*, Chapman, *supra* note 28 (noting emigration from Illinois in response to state fiscal policy).

[34] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985) (emphasis added).

relevance in a modern globalized market. With this constitutional framework in place, Part III engages the decision in *AAM* to define the scope of the extraterritoriality doctrine and to argue for an interpretation of the doctrine that captures those instances where an individual intentionally directs their actions to the regulating state, even if the offending individual is not physically located in that state.

I. THE JURISPRUDENTIAL DEVELOPMENT OF THE EXTRATERRITORIALITY DOCTRINE

The extraterritoriality doctrine is "another pocket of federal jurisprudence characterized by a long and evolving history of almost common-law-like judicial decisionmaking."[35] Because a process of common-law reasoning from one case to the next has defined the doctrine, its scope and intended objectives have been obscured in pages of decisions, concurrences, and dissents. The Supreme Court's recent reluctance to define a precise scope for the extraterritoriality doctrine, while deciding a slew of other dormant commerce clause cases, has left lower courts floundering for a stable ground on which to base their holdings and has further confused the doctrine.[36] With a broad body of literature on the other strands of the dormant commerce clause but only a narrow inquiry into the extraterritoriality doctrine in the modern age, the policy objectives of the dormant commerce clause have understandably collapsed into one another.

AAM best demonstrates the current muddiness of the extraterritoriality doctrine. The decision intertwined the justifications for the other two dormant commerce clause doctrines into a singular dormant commerce clause jurisprudence,[37] one based on protecting Congress's ability to regulate interstate commerce. Both the majority and the dissent relied on a view that the doctrine is predominantly intended to prevent states from regulating wholly out-of-state conduct within an *interstate* stream of commerce.[38] In the majority's view, the extraterritoriality doctrine is intended to proscribe those actions that "unlawfully burden[] interstate commerce,"[39] and the Maryland drug price control statute burdened interstate commerce because it "ha[d] the potential to subject prescription drug manufacturers to conflicting state requirements."[40] The majority's focus, then, turned on whether the statute upended the "*natural*

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

[36] *See, e.g.*, IMS Health Inc. v. Mills, 616 F.3d 7, 29 n.27 (1st Cir. 2010), *vacated on other grounds sub nom.* IMS Health, Inc. v. Schneider, 564 U.S. 1051 (2011) (mem.).

[37] *See supra* note 1 (discussing dormant commerce clause's other restraints on state power).

[38] Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 668 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1168 (2019); *id.* at 680 (Wynn, J., dissenting).

[39] *Id.* at 668 (majority opinion).

[40] *Id.* at 673.

function of the interstate market."[41] The dissent, for its part, took a narrower view of what constitutes a "burden on interstate commerce" by homing in on whether the state statute evinces a protectionist impulse.[42] Finding nothing other than a valid exercise of state police powers to protect their *citizens* rather than their *businesses*, the dissent would have held that the statute passed constitutional muster.[43]

The opinions in *AAM* sharpened the extraterritoriality doctrine into a narrow—and policy-driven—inquiry into whether the state statute impermissibly burdens interstate commerce. The majority's proposition is straightforward: those regulated actions that occur outside of the borders of the state are *per se* interstate commerce, and the state has therefore directly placed an impermissible burden on interstate commerce when it seeks to regulate them. Judge Wynn's dissenting proposition parallels this inquiry but would be significantly more permissive: track the stream of commerce from its beginning to its end, and if the state regulates an action within the stream of commerce that ends in the state and does so in an even-handed manner, then the state regulates interstate commerce. However, the regulation is a permissible exercise of state power in that it addresses conduct that is not *wholly* outside of the state.[44] Each view places commerce over comity. Their collective view is one that—admittedly—comports with language in relevant case law, yet their arguments miss crucial nuances in those cases. This Part will delve into the relevant case law to tease out several strands of justifications for the extraterritoriality doctrine to illuminate the background of *AAM*.[45]

Wherever you trace its beginnings, the extraterritoriality doctrine came into being in its own right relatively late in U.S. jurisprudence. In the first case purportedly applying its tenets, *Baldwin v. G.A.F. Seelig, Inc.*,[46] the Supreme Court struck down a New York statute intended to protect New York state dairy

[41] *Id.* at 673 (emphasis added) (quoting McBurney v. Young, 569 U.S. 221, 235 (2013)). Notably, the *McBurney* case was an application of the *Pike* balancing test and was intended to determine whether Virginia had impermissibly burdened interstate commerce when it granted a right to its citizens—but not to citizens of other states—to access state records; thus, it was decidedly not an application of the extraterritoriality doctrine. *McBurney*, 569 U.S. at 235-36. This slippage between the broader dormant commerce clause jurisprudence and the extraterritoriality doctrine is a consistent mistake that risks conflating doctrines that serve distinct ends. DeVeaux, *One Toke Too Far*, *supra* note 28, at 975.

[42] *Ass'n for Accessible Meds.*, 887 F.3d at 670; *id.* at 680-81 (Wynn, J., dissenting).

[43] *Id.* at 683-84.

[44] *Id.*

[45] Professor DeVeaux engaged in a similar inquiry and broke down the concerns underlying the extraterritoriality doctrine into three broad categories: (1) anti-protectionist function, (2) sovereign-capacity function, and (3) anti-obstructionist function. DeVeaux, *One Toke Too Far*, *supra* note 28, at 961. This Part is influenced by DeVeaux's article, but it diverges insofar as it focuses on the particular language of the cases and their applicability to decisions like *AAM*.

[46] 294 U.S. 511 (1935).

producers by requiring a retailer to pay a minimum price to a milk producer before conducting business in the state.[47] In deciding the case, the Court famously wrote, "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there," and, thus, the extraterritoriality doctrine became part of dormant commerce clause jurisprudence.[48]

In reaching this broad statement, *Baldwin* teased out three distinct theories for the constitutional source of its rule: (1) a general prohibition on state power to "set a barrier to traffic between one state and another";[49] (2) an express prohibition on the power of states to place imposts and duties; (3) and the Commerce Clause, which was intended to control "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation."[50] Since *Baldwin*, a string of Supreme Court cases have struck down state laws on alcohol pricing,[51] regulations of tender offers for shares of out-of-state corporations,[52] and damage awards in state court cases that punished the defendant for out-of-state conduct.[53] In the modern era, the extraterritoriality doctrine has remained largely dormant, and the most recent Supreme Court case to hear a challenge stemming from the doctrine upheld the law.[54] Throughout these cases, however, the Court has declined to develop a consistent theme justifying the application of the doctrine. At each step, different policy rationales have either come to the fore or faded into the background, creating a tapestry of cases that often clash.[55] From *Baldwin*, two predominant bases for the extraterritoriality doctrine have developed: (1) protection of the sovereignty of the states and (2) protection of interstate commerce from protectionist impulses. Along these two strands, a dissenting contingent has argued that the extraterritoriality doctrine should be abandoned or narrowly construed to require evidence of an actual effect on interstate commerce. This Part takes each of these conceptualizations in turn, demonstrates how they have evolved over the course of the jurisprudence, contextualizes them within the broader line of case law,

[47] *Id.* at 519.

[48] *Id.* at 521.

[49] *Id.*

[50] *Id.* at 522 (quoting Seelig v. Baldwin, 7 F. Supp. 776, 780 (S.D.N.Y. 1934)).

[51] Healy v. Beer Inst., 491 U.S. 324, 332 (1989); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 575 (1986).

[52] Edgar v. MITE Corp., 457 U.S. 624, 642 (1982) (plurality opinion). *But see* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 93 (1987).

[53] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572-73 (1996).

[54] *See* Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669-70 (2003).

[55] One need only peruse the literature to see that this lack of a coherent policy extends well into the scholarly realm as well. *Compare* Denning, *supra* note 20, at 996 (arguing that core of extraterritoriality doctrine is interstate commerce), *with* Schmitt, *Constitutional Limitations on Extraterritorial State Power*, *supra* note 7, at 60 (arguing that core of extraterritoriality doctrine is sovereignty).

and argues that the sovereignty-of-the-states approach is the only potential policy that can provide a thread that ties together the various cases.

A. *The Extraterritoriality Doctrine as Protector of State Sovereignty*

One of the principal objectives of the extraterritoriality doctrine is to ensure that states act within the bounds of their territorial power. In this view, the extraterritoriality doctrine is solely concerned with whether the challenged state statute impermissibly restricts lawful conduct occurring in other states. At bottom, this vision of the extraterritoriality doctrine asks whether the state exceeded its inherent authority to regulate and ties this determination initially to the state's territorial borders.[56] Numerous cases support precisely this conclusion. However, this Section will focus on three unique applications: regulations on corporate governance, price affirmation statutes, and exercise of judicial power to punish actions taken outside of the boundaries of the state. First, in *Edgar v. MITE Corp.*,[57] a plurality of the Supreme Court tightly intertwined the extraterritoriality doctrine with broader dormant commerce clause jurisprudence, yet the opinion nevertheless left room to carve out a distinct application for the extraterritoriality doctrine *even if* the state action did not directly apply to interstate commerce. In *MITE*, Illinois had passed a statute that regulated tender offers made to Illinois-based shareholders. The statute required an acquirer of a "target corporation" to register with the Secretary of State prior to launching its tender offer without regard to the target corporation's state of incorporation.[58] Without making explicit reference to *Baldwin*, the plurality set out a vision of the extraterritoriality doctrine that would preclude the state from interfering with purely *intrastate* commerce of another state.

In the plurality's view, the extraterritoriality doctrine prohibited state statutes whose regulations extended beyond the state's borders "whether or not the

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[56] *BMW of N. Am., Inc.*, 517 U.S. at 572-73 (holding in case about disclosures on used cars that "Alabama *does not have the power*, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents" (emphasis added)); *cf.* Bigelow v. Virginia, 421 U.S. 809, 824-25 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State. It may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave. But it may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State.").

[57] 457 U.S. 624, 627 (1982).

[58] *Id.* The statute defined a "target corporation" as

> a corporation or other issuer of securities of which shareholders located in Illinois own 10% of the class of equity securities subject to the offer, or for which any two of the following three conditions are met: the corporation has its principal executive office in Illinois, is organized under the laws of Illinois, or has at least 10% of its stated capital and paid-in surplus represented within the State.

Id.

commerce has effects within the state."[59] While the plurality pinned its ruling to "commerce," its concerns were far more precise, and it drew an analogy between jurisdictional limitations on state courts and constitutional limitations on state legislative power.[60] In doing so, the plurality placed its emphasis on "the *inherent* limits of the State's power."[61] Inherence is the key language in this opinion. While the broader dormant commerce clause jurisprudence relies on a negative implication stemming from the grant of regulatory power over interstate commerce to Congress,[62] the extraterritoriality doctrine in *MITE* focused on the nature of sovereignty itself—a sovereignty bounded by its physical borders, not necessarily by negative dictates emanating from ambiguous constitutional phraseology.[63] While the Court grounded its decision on the fact that the regulated transactions "would themselves be interstate commerce,"[64] its rationale is consistent with an extraterritoriality doctrine that acts to protect state sovereignty rather than merely interstate commerce.[65] Properly viewed, the problem in *MITE* centered on the location of the target corporation. The statute did not differentiate between those corporations that existed in Illinois and those outside of the state; it therefore directly applied to acquisitions of out-of-state corporations.[66] This focus on location, rather than on economics, drives the extraterritoriality doctrine.

The problem in *MITE* was once again taken up in *CTS Corp. v. Dynamics Corp. of America*.[67] *CTS* concerned a revision to Indiana corporate law that required every acquirer of a controlling share in an Indiana corporation to receive a majority vote of all disinterested shareholders prior to exercising the voting rights of their newly acquired stock.[68] While noting that "[t]he principal objects of dormant Commerce Clause scrutiny are statutes that discriminate

[59] *Id.* at 642-43.

[60] *Id.*

[61] *Id.* at 643 (emphasis added) (quoting Shaffer v. Heitner, 433 U.S. 186, 197 (1977)).

[62] *See* Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 259-62 (1987) (Scalia, J., concurring in part and dissenting in part).

[63] *But see* Chad DeVeaux, *Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause*, 79 GEO. WASH. L. REV. 995, 1058 (2011) [hereinafter DeVeaux, *Lost in the Dismal Swamp*] (arguing that extraterritoriality requires reading negative implication into Commerce Clause).

[64] *MITE*, 457 U.S. at 642.

[65] Some scholars, for instance, view cases like *MITE* to stand for the proposition that the proper policy undergirding the extraterritoriality doctrine is a focus on preventing hostility between the states. *See, e.g.*, Martin, *supra* note 21, at 523. Importantly, this Note departs from this literature and claims that too strong of a focus on hostility allows an expansive vision of what the state can do in order to protect its legitimate interests. *See id.* A focus on inherent state power gives a common-law root to the doctrine and clearer test for courts to apply. *See infra* Part II.

[66] *See* Schmitt, *Making Sense of Extraterritoriality*, *supra* note 21, at 430.

[67] 481 U.S. 69 (1987).

[68] *Id.* at 73-74.

against interstate commerce"[69] and statutes that "adversely affect interstate commerce by subjecting activities to inconsistent regulations,"[70] the Court resoundingly rejected both of those applications because the statute was neither discriminatory nor likely to generate inconsistent regulations.[71] The Court then went on to uphold the statute by reasoning that the corporation is a creature of the state in which it is incorporated.[72] With this frame in mind, it became clear that a statute altering the corporate governance structure of the state's own corporations did not, in effect nor otherwise, project the state's laws beyond its boundaries even if individual shareholders were scattered across the country.[73] In explaining the plurality's holding in *MITE*, the Court construed it as invalidating corporate laws only insofar as the statute at issue governed both out-of-state and in-state corporations.[74] Importantly, *CTS* sought to ensure that the state of incorporation—the state with presumably the greatest interest in regulating the structure of the corporation—retained the principal role in crafting legislation governing acquisitions of those corporations.[75] Notably, although the transactions in *CTS* were just as undoubtedly interstate commerce as those in *MITE*, the linchpin of the decision was again based on locality as a proxy for proper sovereign conduct.

Second, the conclusions of the *MITE* plurality and of the *CTS* majority were then adopted and applied to invalidate price affirmation statutes. These statutes required a seller to affirm that the price at which they were selling in the state was the same or lower than their price in other states.[76] A careful reading of these cases reveals that the cases drew a fine line in defining the types of actions that the extraterritoriality doctrine governs. As the Court made clear, a state action is impermissible if it "regulates commerce *in other States*,"[77] not necessarily if it regulates commerce *between* states. This is so because the action "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."[78]

[69] *Id.* at 87.

[70] *Id.* at 88.

[71] *Id.* at 87-89.

[72] *Id.* at 89 ("No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders.").

[73] *Id.* at 89-90.

[74] *Id.*

[75] 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, 1881, 1887 (1987) (arguing that core holding of *CTS* is that "territoriality is presupposed as the relevant criterion of legislative jurisdiction").

[76] *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 580 (1986).

[77] *Id.* (emphasis added).

[78] Healy v. Beer Inst., 491 U.S. 324, 336 (1989) (emphasis added).

The Court found that the impermissible projection of power outside of the state can happen through various means. Price affirmation statutes risked creating multiple conflicting state regulatory regimes that interlock with one another to prevent the manufacturer from effectively marketing its products within another state.[79] In other words, the statutes, if widely adopted, would require a seller of alcohol in all fifty states to charge the same price in every state despite potential market differences in each.

Third, in *BMW of North America, Inc. v. Gore*,[80] the Supreme Court applied the extraterritoriality doctrine to a unique circumstance: a punitive damage award that accounted for actions that the defendant had taken *outside of* the regulating state.[81] The Court began its inquiry by noting several explicit policies. The extraterritoriality doctrine was intended to promote "diversity" between the states on policy and legislation grounds on which "reasonable people may disagree."[82] As evidenced by the vast number of approaches states had taken toward regulating the issue presented—what constitutes a required disclosure for a used car—the United States had developed "a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States."[83] This diverse patchwork, in the view of the Court, was a unique good produced by U.S. federalism, and it would be threatened should one state be able to punish, according to its own dictates, the conduct across all of those states.[84] The Court ultimately held that the "principles of state sovereignty and comity" prohibited the state from regulating out-of-state conduct.[85] In doing so, the Court relied on a long line of cases that developed the rule that "[l]aws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States."[86] *BMW* thus reinforces extraterritoriality's jurisprudential pivot from commerce to sovereignty, and it emphasizes the inherent limits on state power.[87]

While there remains debate over whether the proper focus for extraterritoriality purposes centers on the state's exceeding of its power or on the invasion of another state's sovereignty,[88] the extraterritoriality doctrine finds its clearest root when its outcome turns on the question of state sovereignty instead of the natural functioning of interstate markets. As is rightly noted

[79] *Brown-Forman*, 476 U.S. at 583 (noting concerns that proliferation of state laws will mean "a seller will be subjected to inconsistent obligation in different States").

[80] 517 U.S. 559 (1996).

[81] *Id.* at 568-70.

[82] *Id.*

[83] *Id.* at 569-71.

[84] *Id.*

[85] *Id.* at 572.

[86] Huntington v. Attrill, 146 U.S. 657, 669 (1892), *quoted in BMW*, 517 U.S. at 571 n.16.

[87] *See* DeVeaux, *One Toke Too Far*, *supra* note 28, at 975.

[88] Schmitt, *Making Sense of Extraterritoriality*, *supra* note 21, at 453.

throughout many dissents and concurrences,[89] a mere effect on commerce is insufficient to generate sovereignty issues. Instead, comity and sovereignty—which may at times intersect with a conception of the national economy—are those basic policies that underlie the Supreme Court's jurisprudence.

B. *The Extraterritoriality Doctrine as Protector of Interstate Commerce*

The second and currently predominate view of the extraterritoriality doctrine is that—properly cabined—the doctrine prohibits only those instances where the state acts to directly regulate interstate commerce and has little concern with those instances where the state acts to regulate intrastate commerce.[90] This position gains implicit persuasive force because a consistent theme throughout the case law is an insistence on interstate commerce as a means of grounding the doctrine.[91] For those judges and scholars that insist on a negative connection to interstate commerce before the extraterritoriality doctrine may be applied, there is a simple persuasive force in reiterating that the doctrine's textual hook is the Commerce Clause.[92]

At times, dissents drive out these arguments to criticize the majority for applying the extraterritoriality doctrine where there is no clear impact on interstate commerce.[93] Together these opinions pull from language in cases emphasizing that the extraterritoriality doctrine "reflect[s] the Constitution's special concern . . . with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce."[94] This focus, however, is misguided because it cuts short the full exposition of the policy: the extraterritoriality doctrine is also concerned "with the autonomy of the individual States within their respective spheres."[95] In response, these opinions overcome this hurdle by emphasizing the points of the Supreme Court jurisprudence that develop a comprehensive explanation of how the state regulation would interact with interstate economics as a result of the extraterritorial application.[96] For instance, in Chief Justice Rehnquist's dissent

[89] *See, e.g.*, Healy v. Beer Inst., 491 U.S. 324, 345 (1989) (Scalia, J., concurring in part and dissenting in part) (arguing that focus on economic effects "is not only unnecessary but also questionable, resting as it does upon the mere economic reality that the challenged law will require sellers" to consider other states' laws).

[90] *See, e.g.*, Felmly, *supra* note 9, at 511-12.

[91] *See* Denning, *supra* note 20, at 996.

[92] *But see infra* Part II (discussing other potential constitutional homes for extraterritoriality doctrine).

[93] *See, e.g.*, Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 592 (1986) (Stevens, J., dissenting) (arguing that there must be "ample evidence" to prove actual interference with interstate commerce).

[94] *Healy*, 491 U.S. at 335-36.

[95] *Id.* at 336.

[96] *See, e.g.*, *id.* at 339-40.

in *Healy v. Beer Institute*,[97] he emphasized that the state "does not seek to erect any sort of tariff barrier . . . and the State simply wishes its inhabitants to be treated as favorably as those of neighboring States."[98] In his view, properly cabined, the extraterritoriality doctrine restricts *only* those actions that meaningfully constrain interstate commerce rather than those that provide a putative benefit to the state's citizens.[99]

In a short opinion in *Pharmaceutical Manufacturers of America v. Walsh*,[100] the Supreme Court arguably adopted this narrow construction. In *Walsh*, the Court appeared to limit the extraterritoriality doctrine to "price control or price affirmation statutes" and determined that the extraterritoriality doctrine was not applicable to a case about the terms on which pharmacies could do business in a Maine medical rebate program.[101] Although brief, the opinion pinpointed the relevant harm for the extraterritoriality doctrine's inquiry as the "harm to interstate commerce" and characterized the problem as whether there was "impermissible extraterritorial regulation," presumably alluding to the possibility of *permissible* extraterritorial regulation.[102]

The *Walsh* decision, however, should not be overread; it did not overrule a long line of case law that held the three categories of statutes discussed above to be impermissible. Further, a broad reading of *Walsh* fails to capture the complexities underlying decisions like *CTS* and *MITE*, where the Court placed the focus on the location of the regulated entity and not on the fact that the shareholders were presumably in multiple different states.[103] Those statutes undoubtedly affected interstate commerce in a serious way—they were, after all, regulations on tender offers—but the Court grounded the extraterritoriality doctrine on the limits of state power to regulate as opposed to negative implications derived from the Commerce Clause.[104] This is precisely the point on which both opinions in *AAM* erred: both placed an extreme emphasis on *Walsh* that makes commerce the overriding concern—instead of sovereignty—when determining whether the extraterritoriality doctrine applied to the present case.[105]

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[97] 491 U.S. 324 (1989).

[98] *Id.* at 346-47 (Rehnquist, C.J., dissenting).

[99] *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 77 (1987).

[100] 538 U.S. 644 (2003).

[101] *Id.* at 669.

[102] *Id.* at 668-69.

[103] Schmitt, *Making Sense of Extraterritoriality*, *supra* note 21, at 430-31.

[104] *See CTS Corp.*, 481 U.S. at 88-89.

[105] The majority, while acknowledging that it could find that the extraterritoriality doctrine "applies *exclusively* to 'price control or price affirmation statutes,'" determined that the principle object of the extraterritoriality doctrine was interstate commerce and that the statute nevertheless impinged on that commerce. Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 667, 670 (4th Cir. 2018) (quoting Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003)), *cert. denied*, 139 S. Ct. 1168 (2019). Despite its statement that *Walsh* did not

C. *The Extraterritoriality Doctrine as Impermissible Judge-Made Law*

A critique of the extraterritoriality doctrine as impermissible judge-made law has gained ground over recent years, resulting in the statement in *Walsh* that the extraterritoriality doctrine is simply "[t]he rule that was applied in *Baldwin* and *Healy*."[106] The roots of this view of the extraterritoriality doctrine are difficult to untangle in part because the dissenting and concurring judges and justices lodge their critiques of the extraterritorialtiy doctrine within an objection to broader dormant commerce clause jurisprudence.

For example, in his concurrence to *Walsh*, Justice Scalia argued for the abrogation of the extraterritoriality doctrine as a separate line of dormant commerce clause inquiry. In his view, the dormant commerce clause only permits judicial review to determine if the statute is facially discriminatory against interstate commerce.[107] Justice Scalia supported his position by citing to his concurring opinion in another case that applied a balancing test to determine if an in-state regulation on milk improperly affected interstate commerce.[108] In that concurrence, he argued that "[t]he historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce."[109] In his view, the dormant commerce clause, writ large, is only properly applied in two narrow circumstances: "(1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional."[110] Importantly, Justice Scalia did not specifically address the underlying policies of the extraterritoriality doctrine in either of his opinions.

Alongside Justice Scalia, Justice Thomas—in a separate concurrence in *Walsh*—argued that the extraterritoriality doctrine lacks support in the text and history of the Constitution. In doing so, he referenced another of his dissents in a case pertaining to a Maine statute providing a tax exemption to Maine

narrow the extraterritoriality doctrine, the majority, perhaps in an attempt to fit the decision within *Walsh*'s framework, strained to reframe the Maryland statute as a price control statute. *Id.* at 672-73. The dissent, however, would constrain the extraterritoriality doctrine exclusively to those cases enumerated in *Walsh*. *Id.* at 681 (Wynn, J., dissenting) (questioning "the continuing vitality of the extraterritoriality doctrine" after *Walsh*).

[106] *Walsh*, 538 U.S. at 668-69; *see also* Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1174-75 (10th Cir. 2015) (construing *Walsh* to narrow extraterritoriality doctrine to include only "price control or price affirmation statutes").

[107] *See Walsh*, 538 U.S. at 674 (Scalia, J., concurring in the judgment).

[108] *See id.* at 675 (citing West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 209-10 (1994) (Scalia, J., concurring in the judgment)).

[109] *West Lynn Creamery, Inc.*, 512 U.S. at 209 (Scalia, J., concurring in the judgment) (quoting Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 263 (1987) (Scalia, J., concurring in part and dissenting in part)).

[110] *Id.* at 210.

corporations.[111] Like Justice Scalia's analysis, this concurrence took aim at the entire dormant commerce clause and argued for "the need to abandon that failed jurisprudence" because the dormant commerce clause "has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application."[112]

While these critiques have proved persuasive in practice (as evidenced by the *Walsh* Court's apparent narrowing of the scope of the doctrine), each concurrence or dissent that Justice Scalia and Justice Thomas cite in *Walsh* pertains to an application of the dormant commerce clause where the state is clearly—absent some negative implication from the Commerce Clause found somewhere other than the extraterritoriality doctrine—acting within the scope of its inherent sovereign powers.[113] In those cases, each state undoubtedly acted "with reference to its own jurisdiction,"[114] yet the Court nevertheless approached the problem as a question of whether the state statute was an impermissible burden on interstate commerce.[115] Whatever the historical justification for those classes of dormant commerce clause rulings, it is clear that extraterritoriality should be addressed in its own right because it focuses on state sovereignty instead of national economics. The next Part of this Note, nevertheless, takes up the carefully detailed historical challenge of these two concurrences to provide a historical and textual account of the extraterritoriality doctrine.

II. EXTRATERRITORIALITY'S ROOTS IN TEXT AND CONSTITUTIONAL HISTORY

Against this jurisprudential backdrop, the traditional description of the extraterritorality doctrine is clear: a state cannot regulate conduct that occurs wholly outside of the borders of the state.[116] However, from this short statement of a facially simple doctrine, many of the nuanced historical justifications for the doctrine have since been lost or folded into the broader justification for dormant commerce clause jurisprudence.[117] The result of the conflation between

[111] *Walsh*, 538 U.S. at 683 (Thomas, J., concurring in the judgment) (citing Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting)).

[112] *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 610 (Thomas, J., dissenting). Justice Thomas refers to the dormant commerce clause as the "negative" commerce clause in his opinions; for a discussion of the critical distinction between the two wordings, see *supra* note 1.

[113] *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 598-99 (1996) (Scalia, J., dissenting).

[114] *See* Bonaparte v. Tax Court, 104 U.S. 592, 594 (1882).

[115] *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 568, 583; *West Lynn Creamery*, 512 U.S. at 188-92, 201-02.

[116] *See* Healy v. Beer Inst., 491 U.S. 324, 336 (1989).

[117] This is made most clear in the *AAM* decision. There, the majority made explicit reference to the "natural function" of the interstate market and seemed largely concerned with

the extraterritoriality doctrine and other dormant commerce clause jurisprudence is an inconsistent patchwork of understandings about what the doctrine stands for and what, precisely, the doctrine prohibits.[118] Returning to the historical roots of the doctrine, even if not determinative in a modern interpretation of the doctrine, can act as a guide for future implementation of the doctrine by providing guideposts by which to judge new and evolving market dynamics.[119]

In order to resolve the historical debate over the extraterritoriality doctrine, scholars and judges have argued for placing the doctrine in the Privileges and Immunities Clause,[120] the Full Faith and Credit Clause,[121] the Tenth Amendment,[122] or the Due Process Clause[123] or for inferring it from the structure of the Constitution.[124] While these debates may be of scholarly interest, it is

the ability of interstate commerce to function. *See* Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 673 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1168 (2019); *see also Healy*, 491 U.S. at 347 (Rehnquist, C.J., dissenting) (arguing that only purpose of dormant commerce clause is to prevent erection of "tariff wall[s]"). Despite this contention, the primary purpose of the extraterritoriality doctrine is to maintain the autonomy of states. *See Healy*, 491 U.S. at 335-36 (majority opinion); *supra* Section I.A.

[118] *See* Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1171 (10th Cir. 2015) (combining justifications for dormant commerce clause and extraterritoriality doctrine and determining that each is invalid).

[119] *See* Schmitt, *Constitutional Limitations on Extraterritorial State Power*, *supra* note 7, at 60.

[120] *But see* Regan, *supra* note 75, at 1889 (raising possibility of locating extraterritoriality doctrine in Privileges and Immunities Clause but ultimately rejecting such approach).

[121] *See* DeVeaux, *Lost in the Dismal Swamp*, *supra* note 63, at 1023; Regan, *supra* note 75, at 1895 (arguing that Full Faith and Credit Clause is only applicable to choice-of-law variation on extraterritoriality doctrine because the clause only regulates whether state must recognize another state's law, not whether state may project its laws). The Full Faith and Credit Clause does have some implicit appeal and case law supporting its application; nevertheless, the contours of such an application have yet to be fully defined. *See, e.g.*, N.Y. Life Ins. v. Head, 234 U.S. 149, 161 (1914) (invalidating statute that would project a state law "beyond the jurisdiction of that State and in the [other state] and there destroy freedom of contract" because such a statute would "throw[] down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority" and rooting this holding in "the foundation of the full faith and credit clause and the many rulings which have given effect to that clause").

[122] Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 864 (2002).

[123] *See* Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 268 (2017). *But see* Midwest Title Loans, Inc. v. Mills, 593 F.3d 660, 668 (7th Cir. 2010) ("The concerns behind the due process and commerce clauses are different. The former protects persons from unreasonable burdens imposed by government, including extraterritorial regulation that is disproportionate to the governmental interest. The latter protects interstate commerce from being impeded by extraterritorial regulation." (citation omitted)); Felmly, *supra* note 9, at 508.

[124] *See* Regan, *supra* note 75, at 1885.

unclear what the benefit of finding the proper constitutional home for the extraterritoriality doctrine would be.[125] Instead, a clear explanation of the rule would seem to do much the same in alleviating the current judicial confusion over the doctrine. Nevertheless, the most cogent explanation of the rule is that it does not stem from any specific clause in the Constitution; the extraterritoriality doctrine, instead, emanates from the nature of state sovereignty.[126]

The basic historical premise of this Note is that the common-law norm of mutual respect for sovereignty[127] calcified from a mere presumption and tradition against regulations of extraterritorial conduct into a semi-rigid rule that prohibits states from legislating without a narrowly construed reference to their own territory.[128] With this in mind, the importance should be placed not on what the Constitution *says* but on what it does *not* say. If extraterritoriality stems from the inherent nature of state sovereignty and the Constitution makes readily apparent that states are coequal sovereigns, then state extraterritorial regulations are only permissible to the extent that the Constitution authorizes them.[129] Regardless of the constitutional view, the extraterritoriality doctrine has historical support, and this Part will outline the historical backdrop against

[125] *See* DeVeaux, *Lost in the Dismal Swamp*, *supra* note 63, at 1023 ("Rewriting 187 years of judicial precedent to transpose the constitutional buttress against 'rivalries and reprisals' from the Commerce Clause to other more intuitive constitutional provisions would simply undermine the principle of stare decisis." (footnote omitted) (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935))).

[126] *See infra* Section II.C (discussing "Law of Nations" approach to extraterritoriality doctrine); *see also* Martin, *supra* note 21, at 521-22; *cf.* William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389, 1401-29 (2020) (collecting data on states and presumptions against extraterritorial interpretation of state statutes).

[127] *See* WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2136 (2018) (noting that presumption against extraterritorial application of statutes in international law has "deep roots" that trace back to "the medieval maxim *Statuta suo clauduntur territorio, nec ultra territorium disponunt*," meaning statutes are confined to their own territory and do not govern outside their territorial limits (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 43, at 268 (2012))); *see also* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."), *abrogation recognized by* W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S 400, 406-08 (1990).

[128] This proposition should not be overstated. Comity does not require a state to treat another state *more favorably* than individuals or entities within their own state. Instead, comity ensures that states stay within their respective inherent bounds. *See* Bonaparte v. Tax Court, 104 U.S. 592, 595 (1882) (holding that where state attempts to enter markets outside of its own borders, "it is compelled to go into the market as a borrower" because "States are left free to extend the comity which is sought, or not, as they please").

[129] *See* Regan, *supra* note 75, at 1885 (arguing that extraterritoriality "is one of those foundational principles of our federalism which we infer from the structure of the Constitution as a whole").

which the doctrine developed. Accordingly, this Part will rely on the text of the Constitution, the convention debates, the Law of Nations as originally understood and as it has evolved, and early cases governing the attempted extension of southern slavery laws into northern states. It will then address the degree to which this history remains pertinent given the modern globalized economy.

A. *Constitutional Text Does Not Deny the Extraterritoriality Doctrine*

The textual argument against the extraterritoriality doctrine is deceptively simple and proceeds as follows: The Commerce Clause is merely an affirmative grant of power permitting Congress to regulate commerce among the states.[130] In this grant of power, the Framers failed to include any wording that could possibly be construed as limiting the power of the state to take regulatory action.[131] Therefore, the textualist argument maintains that the dormant commerce clause, writ large, is an invalid judicial construct that amounts to "a sort of judicial free trade policy" because it infers from the text a structure that cannot be sustained by the limited language of the Commerce Clause.[132] As no other clause of the Constitution provides grounds for imposing an extraterritoriality doctrine on the states, the doctrine must be abrogated.

While this argument is persuasive in its simplicity, it lacks nuance and historical grounding as applied to the extraterritoriality doctrine. Many areas of our constitutional jurisprudence stem from inferences about the structure of the Constitution and federalism,[133] and the Constitution generally lacks exacting specificity on how the powers between the federal and state governments are to be distributed—one need only look to the debates over the meaning of "commerce" in the Commerce Clause and the proper interpretation of the Tenth Amendment.[134] In fact, early on in U.S. jurisprudence, it was legitimate—if controversial—to argue that the Commerce Clause was an *absolute* conveyance

[130] U.S. CONST. art. I, § 8, cl. 3 (providing that Congress has power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); *see also* Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 263 (1987) (Scalia, J., concurring in part and dissenting in part); Brief of Legal Scholars as *Amici Curiae* in Support of Petitioners at 10, Frosh v. Ass'n for Accessible Meds., 139 S. Ct. 1168 (2019) (No. 18-546) (arguing against extraterritoriality doctrine through general critiques of dormant commerce clause).

[131] *See Tyler Pipe*, 483 U.S. at 262 (Scalia, J., concurring in part and dissenting in part); Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1173 (10th Cir. 2015).

[132] *Epel*, 793 F.3d at 1171; *see also* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2100-01 (2018) (Gorsuch, J., concurring) (arguing that dormant commerce clause is a "misbranded product[] of federalism").

[133] *See, e.g.*, Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1498-99 (2019) (arguing against "ahistorical literalism" because "[t]here are many . . . constitutional doctrines that are not spelled out in the Constitution but are nevertheless implicit in its structure and supported by historical practice").

[134] Rosen, *supra* note 122, at 864-66.

of power to the federal government to regulate interstate commerce, and states could *only* regulate locally constrained commerce.[135] This is not to say that such a position is correct; on the contrary, it establishes that the interpretation of an ambiguous text requires a careful parsing of constitutional history and of the factual circumstances surrounding a particular clause. More importantly, the principal deficit of this textual criticism is that it is developed as an argument against the entire dormant commerce clause jurisprudence rather than the particular justifications and history of the extraterritoriality doctrine. While, admittedly, the cases do make reference to a common policy underlying all of the dormant commerce clause jurisprudence—the protection of a national economy and prevention of economic protectionism—the primary driver of the extraterritoriality doctrine is a desire to prevent inconsistent regulation that is the product of overlapping and contradictory regulatory regimes that occur when states are permitted to reach into another state to regulate conduct.[136] This history makes clear that the extraterritoriality doctrine is not grounded in an assumption that certain powers were reserved for Congress; it prohibits action by both state and federal governments. For instance, a state could not prohibit the presence of guns on a school campus in another state, regardless of how many of its citizens attended that school, and the federal government under current Commerce Clause jurisprudence could not regulate the presence of guns either.[137]

With this background in place, it is clear that the extraterritoriality doctrine stems from the basic proposition that the states gave up one specific and narrow aspect of their sovereignty: the ability to override the common-law presumption against extraterritorial application of their statutes. This position is meaningful because it changes what interpreters search for in the text.[138] While it may be difficult to infer a negation of state power from the Commerce Clause, it is much easier to read the clause as solidifying a previously existing common-law norm that states may regulate only within their borders.[139] This position does not

[135] *See* Smith v. Turner (The Passenger Cases), 48 U.S. (7 How.) 283, 403 (1849); *see also* Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 319 (1852) (discussing first congressional statute adopting state law at federal level as evidence of early understanding that Commerce Clause negates some state power to regulate commerce).

[136] *See supra* Part I; *see also* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 583-84 (1986); Schmitt, *Making Sense of Extraterritoriality*, *supra* note 21, at 426.

[137] *See* Regan, *supra* note 75, at 1900 (arguing against permitting states to regulate production in other states despite the externalities of that production). *See generally* United States v. Lopez, 514 U.S. 549 (1995) (ruling federal law banning possession of firearms in school zones exceeded congressional authority under the Commerce Clause).

[138] *See* Regan, *supra* note 75, at 1895.

[139] *See id.*; *see also Passenger Cases*, 48 U.S. (7 How.) at 394 ("[T]he States cannot be held to have parted with any of the attributes of sovereignty which are not plainly vested in the Federal government and inhibited to the States, either expressly or *by necessary implication*." (emphasis added)); THE FEDERALIST NO. 32 (Alexander Hamilton); *cf.* SCALIA

stretch the constitutional text. It simply requires recognizing what the Supreme Court has already made explicit: "When a State enters the Union, it surrenders certain sovereign prerogatives," specifically the ability to override the internal policy and statutory objectives of another state.[140] The Commerce Clause, for its part, is an explicit recognition of the states' interconnectedness and their equality at the national level.[141] Within this framework, an extraterritorial application of a state's laws "not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."[142]

This focus on federal constitutional structure rather than a cramped reading of constitutional text is prevalent in constitutional doctrines regulating horizontal federalism. Recently, in an opinion authored by Justice Thomas, *Franchise Tax Board of California v. Hyatt*,[143] the Supreme Court held that states are required to recognize and enforce the sovereign immunity of another state in their own courts, even though no specific constitutional provision requires them to do so and sovereign countries under international law have traditionally been permitted to disregard such immunity.[144] In doing so, the Court emphasized that the adoption of "the Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns,"[145] and the Court resoundingly rejected "ahistorical literalism" as applied to state sovereign immunity and the text of the Constitution.[146] As a consequence, the Court recognized that the adoption of the Constitution solidified certain notions of comity, turning them into rules that states were required to follow.[147] Within this framework, the extraterritoriality doctrine should not be constrained to a literal reading of the Constitution's text; instead, history guides the inquiry into the contours of state sovereignty and,

& GARNER, *supra* note 127, at 268-72 (discussing extraterritoriality doctrine as applied to statutory interpretation).

[140] *See* Massachusetts v. EPA, 549 U.S. 497, 519 (2007).

[141] *See* THE FEDERALIST NO. 22 (Alexander Hamilton) ("The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy."); Regan, *supra* note 75, at 1891.

[142] Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).

[143] 139 S. Ct. 1485 (2019).

[144] *Id.* at 1499.

[145] *Id.* at 1497.

[146] *Id.* at 1498.

[147] For instance, the Court recognized that, under international law, one country was free to disregard the assertion of sovereign immunity by another country, but it reasoned that the Constitution embodied a host of restrictions that together indicate that the Constitution intended to enforce equality between the states, rather than allow states to submit to the good will of one another. *Id.* at 1497-98.

consequently, the boundaries of the doctrine's prohibitons.[148] In other words, when it comes to the limits of state sovereignty, the text is the beginning—not the end—of the historical inquiry.

The early understanding of state sovereignty under the Constitution was that state power ran across an equal playing field.[149] Two important points stem from this understanding. First, the states are sovereigns vis-à-vis one another, and sovereignty is defined as a lack of dependence upon another entity.[150] Second, a state's sovereignty implies a right to govern *itself*.[151] Together, these twin propositions establish that a state would lose the sovereignty preserved by the Constitution should another state be able to regulate the conduct occurring within its state or to disregard another state's sovereignty.[152] Without this core understanding of sovereignty, a state could not, for instance, attempt to reduce pharmaceutical prices within its own state if another state, where the manufacturer is based, could regulate to increase the prices for the purpose of enriching the manufacturer and collecting larger tax revenues.[153] Absent the extraterritoriality doctrine, states would be dependent upon the good will of other states to implement their preferred policies. All together, these propositions show that nothing in the Constitution divorced states from their core sovereignty in relation to one another. Instead, the Constitution solidified their sovereignty and required other states to respect it.

B. *Convention Debates Support the Extraterritoriality Doctrine*

Searching for the original understanding of the extraterritoriality doctrine is fraught with the complexities of the time in which the Constitution developed. This difficulty principally arises as a result of the founding-era tradition in civil disputes of applying a shared common law, rather than the laws of one state, to a matter.[154] The convention debates, insofar as they relate to the extraterritoriality doctrine, centered on one particular practice at the time of the

[148] *See infra* Sections II.B, II.C (discussing these antecedents).

[149] 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 65 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter DEBATES] ("Whatever may be the internal organization of the government of any state, if it has the sole power of governing itself, and is not dependent upon any foreign state, it is called a *sovereign state*; that is, it is a state having the same rights, privileges, and powers, as other independent states.").

[150] *Id.* States, of course, are dependent upon the federal government in some respects for their authority. Hence, the Supreme Court has frequently termed the states' power as "quasi-sovereign." *See, e.g.*, Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907).

[151] 1 DEBATES, *supra* note 149, at 65.

[152] *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572 (1996).

[153] *See* DeVeaux, *One Toke Too Far*, *supra* note 28, at 959.

[154] *See* Clyde Spillenger, *Risk Regulation, Extraterritoriality, and Domicile: The Constitutionalization of American Choice of Law, 1850-1940*, 62 UCLA L. REV. 1240, 1243 (2015).

founding on which the states vehemently disagreed: slavery.[155] In this context, northern and southern states struggled to define the boundaries of state sovereignty and power, and northern state courts ultimately resisted the imposition of slavery beyond the borders of southern states.[156] To develop the extraterritoriality doctrine, this Section looks to these particular statements and to general statements on the nature of federalism under the Constitution. Together, this history shows that the founding generation believed that the Constitution imposed limits on the ability of one state to control lawful conduct within another.

During the Massachusetts Convention, William Heath explained that, under the new Constitution, "[e]ach state is sovereign and independent to a certain degree, and the states have a right, and they will regulate *their own internal affairs* as to themselves appears proper."[157] Further, he conceded that Massachusetts did not have it in its "power to do any thing for or against those who are in slavery in the Southern States. . . . [T]o this we have no right to *compel* them."[158] For those in the Massachusetts Convention, where slavery had been abolished by the time of the convention, its members "detest[ed] every idea of slavery" and believed that "it [was] generally detested by the people of [Massachusetts]," yet they recognized that joining the Union stripped the state of some sovereignty that it might otherwise have—the ability to override the presumption against extraterritorial legislation—while nevertheless leaving the state room to resist Southern attempts at encroachment.[159]

Similarly, James Madison in the Virginia Convention emphasized that "[a]t present, if any slave elopes to any of those states where slaves are free, he becomes emancipated by their laws; for the laws of the states are uncharitable to one another in this respect."[160] In uttering this remark, Madison, while endorsing the Fugitive Slave Clause, recognized the limits of state sovereignty

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[155] *See infra* Section II.D; *see also* Schmitt, *Constitutional Limitations on Extraterritorial State Power*, *supra* note 7, at 60-61 (arguing that debates over reach of southern slavery law "reveal the importance of the concept of state sovereignty to extraterritoriality under the antebellum constitution, a concept that helps to explain the Court's modern doctrines").

[156] By the time of the Constitutional Convention, several states had abolished slavery: for example, Pennsylvania (1780) and Massachusetts (1783). J. Gordon Hylton, *Before There Were "Red" and "Blue" States, There Were "Free" States and "Slave" States*, MARQ. U. L. SCH. FAC. BLOG (Dec. 20, 2012), https://law.marquette.edu/facultyblog/2012/12/before-there-were-red-and-blue-states-there-were-free-states-and-slave-states/ [https://perma.cc/3K33-H6FP]. In 1777, Vermont became the first colony to abolish slavery. *Vermont 1777: Early Steps Against Slavery*, NAT'L MUSEUM AFR. AM. HIST. & CULTURE: OUR AM. STORY, https://nmaahc.si.edu/blog-post/vermont-1777-early-steps-against-slavery [https://perma.cc/YP83-3Y8J] (last visited Aug. 19, 2020).

[157] 2 DEBATES, *supra* note 149, at 115 (statement of Mr. Heath) (emphasis added).

[158] *Id.* (emphasis added).

[159] *Id.*

[160] 3 *id.* at 453 (statement of Mr. Madison); *see also* Schmitt, *Constitutional Limitations on Extraterritorial State Power*, *supra* note 7, at 75-76.

generally: Virginia could not project its laws beyond its borders absent some constitutional authorization to the contrary. Heath's and Madison's concerns ultimately proved prescient. Shortly after the founding, "Southerners began to argue that northern states should be forced to apply southern law regarding slavery, while Northerners replied that slave law had no effect outside of the southern states."[161] It was precisely Heath's and Madison's conception of state sovereignty that northern states deployed to block southern states' attempts to advance slavery through judicial means.[162]

Two additional general points were raised in the conventions that support the modern conception of the extraterritoriality doctrine. First, in New York, Melacton Smith argued that the states were constrained to regulating at the local level.[163] Second, James Wilson, in the Pennsylvania Convention, argued that sovereignty resided in U.S. citizens as encompassed in the preamble's "the People."[164] From this core, the people "can distribute one portion of power to the more contracted circle, called *state governments*; they can also furnish another proportion to the government of the United States."[165] If this is the proper understanding of the function of power under our constitutional federalism, then a sovereign can only exercise power to the extent granted by its people.[166] In this view, a state cannot reach into another state to regulate the actions of an individual who has no relation to it, unless there is some evidence that the individual has consented to that action. This is so because the people could not grant the state such power over individuals who did not submit to that state.[167] Together, these statements show that the founders not only were intimately concerned about extraterritorial legislation but also had a specific understanding about the limits of state sovereignty under the Constitution.

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[161] Schmitt, *Constitutional Limitations on Extraterritorial State Power*, *supra* note 7, at 71.

[162] *See infra* Section II.D.

[163] 2 DEBATES, *supra* note 149, at 332 ("The *state governments* are necessary for certain local purposes; the *general government* for national purposes. The latter ought to rest on the former, not only in its form, but in its operations.").

[164] *Id.* at 443.

[165] *Id.* at 444. This view also accords with early case law on the interpretation of the meaning of "the people" in the Constitution. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 324-25 (1816) ("The constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions, for the powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them . . . .").

[166] *Id.* at 324-25; THE FEDERALIST NO. 51 (James Madison).

[167] This analysis heeds close to the rationale for the Due Process Clause, and, while it "may not be identical or coterminous . . . there are significant parallels." South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2093 (2018). *But see* Martin, *supra* note 21, at 525 (arguing that Due Process and extraterritoriality doctrines serve different objectives).

C. *The Law of Nations Provides a Roadmap for Extraterritoriality*

The Framers and early interpreters of the Constitution were particularly concerned with maintaining state and local control over governance, and they leaned on the common law and historical interpretation of the nature of state sovereignty to buttress their goals.[168] These principles arose in three discussions: sovereignty, choice of law, and early state attempts to regulate beyond their borders. At the outset, two notions of comity should be disentangled. The first is a general recognition that states may act only with reference to their own jurisdiction; to do otherwise implies that another state's laws are subordinate to the regulating state and denies respect for that other jurisdiction. The second is significantly more malleable, and it encompasses the voluntary application of another state's law to a state's own jurisdiction where notions of equity call for such an application. The extraterritoriality doctrine rigidly applies the first notion, but the second notion is left generally to the states and is—to a certain degree—bound by the Full Faith and Credit Clause and the Privileges and Immunities Clause.[169]

Sovereignty, as Justice Story conceived of it, comes with basic principles untouched by the Constitution. In Justice Story's view, "the laws of one country can have *no intrinsic force* . . . except within the territorial limits and jurisdiction of that country. They can bind only its own subjects, and others who are within its jurisdictional limits; and the latter only while they remain therein."[170] For Justice Story, this tenet arose not from constitutional law but "from the equality and independence of nations. For it is an essential attribute of every sovereignty, that it has no admitted superior, and that it gives the supreme law within its own dominions on all subjects appertaining to its sovereignty."[171] In a constitutional

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[168] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS 9-10 (Melville M. Bigelow ed., 8th ed. 1883) ("To no part of the world is it of more interest and importance than to the United States, since the union of a national government with already that of twenty-six distinct states, and in some respects independent states, necessarily creates very complicated private relations and rights between the citizens of those states, which call for the constant administration of extra-municipal principles.").

[169] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818-19 (1985) (providing that states may apply any state's law so long as there is significant contact with that state in underlying dispute); Zobel v. Williams, 457 U.S. 55, 73-75 (1982) (O'Connor, J., concurring in the judgment); Bonaparte v. Tax Court, 104 U.S. 592, 594-95 (1882) (refusing to permit state to project its laws outside of its borders but recognizing another state may, through comity, apply same regulation within its own borders).

[170] STORY, *supra* note 168, at 8 (emphasis added).

[171] *Id.* at 9. To the extent that states are permitted to regulate other states' internal affairs, it is only when the Full Faith and Credit Clause or notions of comity permit such a conclusion. For early marriage cases recognizing that a state could not nullify a marriage that was proper under another state's law under common law notions of comity, see Putnam v. Putnam, 25 Mass. (8 Pick.) 433, 434-35 (1829) (recognizing marriage in another state despite laws against

system where the equality of states is emphasized, to permit one state to regulate the internal affairs of another would undermine the basis of equality between the states by requiring one state to submit to another before enacting its own regulatory objectives.[172] While international law's principles of comity were somewhat flexible across both conceptions, the principles safeguarding sovereignty gained increased force in the United States because a Union comprised of diverse states "necessarily [comes with] very complicated private relations and rights between the citizens of those states, which call for the constant administration of extra-municipal principles."[173] In Justice Story's view, the nature of a union of independent states requires a rule that constricts state power within the bounds of comity.

International case law on choice of law generally recognizes a similar notion.[174] While these cases pertain to the second version of comity, the voluntary application of another state's laws, they nevertheless give definition

such marriage in regulating state); Decouche v. Savetier, 3 Johns. Ch. 190, 197 (N.Y. Ch. 1817) (recognizing that marriage law of another state was binding). For an early state case recognizing another state's legitimacy law, see Scott v. Key, 11 La. Ann. 232, 237 (1856).

[172] STORY, *supra* note 168, at 22; *see also* 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA 176 (Jonathan Elliot ed., 1891) (statement of Mr. Patterson) ("A confederacy supposes sovereignty in the members composing it, and sovereignty supposes equality."); *id.* at 250 (statement of Mr. Williamson) (arguing that Constitution "parted with equal proportions of sovereignty" and that states, therefore, "remain equally sovereign"); STORY, *supra*, at 168 ("[N]o nation is under any obligation to give effect to the laws of any other nation which are prejudicial to itself or to its own citizens . . . .").

[173] STORY, *supra* note 168, at 9-10. This sentiment was also echoed in a letter by George Washington. *See* 1 DEBATES, *supra* note 149, at 305-06 ("It is obviously impracticable, in the federal government of these states, to secure all rights of independent sovereignty to each . . . . In all our deliberations on this subject, we kept steadily in our view, that which appears to us the greatest interest of every true American,—the consolidation of the Union,—in which is involved our prosperity . . . . [T]hus the Constitution which we now present is the result of a spirit of amity, and of that mutual deference and concession which the peculiarity of our political situation rendered indispensable.").

[174] STORY, *supra* note 168, at 115, 170, 840. However, foreign laws were not always recognized through comity. The prime example at the time of the founding was that slaves brought from the Americas into other countries were frequently freed in those other countries. *See, e.g.*, Somerset v. Stewart (1772) 98 Eng. Rep. 499, 501; Lofft 1, 4 ("As soon as a slave enters England he becomes free. . . . The right of the master depends on the condition of slavery (such as it is) in America. If the slave be brought hither, it has nothing left to depend on but a supposed contract of the slave to return; which yet the law of England cannot permit."); Knight v. Wedderburn (1778) 8 Fac. Dec. 5, Mor. 14545, 14546-47 (Scot.) (rejecting argument that Jamaica's law "ought to be enforced beyond its territory" by reasoning that "the state of slavery is not recognized by the laws of this kingdom, and is inconsistent with the principles thereof: That the regulations in Jamaica, concerning slaves, do not extend to this kingdom" and that "the municipal law of the colonies has no authority in this country").

to the contours of sovereignty.[175] The ability of a sovereign to choose which law to apply indicates the extent to which the state is bound by the legislative decisions of another. In other words, to *choose* a law to apply, the state must first determine that it is not *required* to follow another state's law. This case law makes clear that a state, with regard to actions within its own jurisdiction, may voluntarily choose to apply another state's laws, but no other state may require it to do so.

At the time of the founding, foreign countries frequently recognized and applied each other's laws, not on the basis that the law had intrinsic force in the country but on two distinct bases: comity and sovereignty. In the first view, a court applies another country's law to maintain peace between countries and, further, to ensure reciprocal application of the country's own laws.[176] In the second view, a court applies another country's law in order to define the regulating country's *own* law by probing the intent of the parties in the particular civil dispute.[177] Nevertheless, it was elemental to the founding generation that no state could pass laws that "bind the whole world," and that sovereign states retained the power to refuse to enforce those laws that had exterritorial applicability without reference to an action taken within the regulating state or, alternatively, to constrain their interpretation of the law to ensure that the law did not have an extraterritorial effect.[178] This practice is informative. A state, in

[175] *See* Schmitt, *Constitutional Limitations on Extraterritorial State Power*, *supra* note 7, at 64 (recognizing that choice of law and extraterritoriality overlap but the difference between them can be explained as "the difference between holding a state statute to be unconstitutional and forcing a state court to apply the law of another sovereign").

[176] *Id.* at 32-35; *see also* Pearsall v. Dwight, 2 Mass. (1 Tyng) 84, 89 (1806) (noting that state would recognize enforcement of contracts under law of other states unless there was "any inconvenience" given to citizens of state or "consideration of the contract" was "immoral"); Desesbats v. Berquier, 1 Binn. 336, 344-45 (Pa. 1808) (recognizing that foreign law is enforced when relevant to prevent "mischievous consequences, not only to foreigners who have property here, but to our own citizens who may have property abroad[, for] we must expect that other nations will pay no greater regard to us, than we pay to them"); Godard v. Gray [1870] 6 QB 139 at 147-48 (Eng.) (finding that nothing requires countries to accept judgments rendered in other countries within their own territories but holding it applicable as matter of common law).

[177] *See* Warrender v. Warrender (1835) 6 Eng. Rep. 1239, 1254; 2 Cl. & Fin. 488, 529-30 (appeal taken from Scot.).

[178] *See* Schibsby v. Westenholz [1870] 6 QB 155 at 160 (Eng.); *see also Chubb Ins Co of Austl Ltd v Moore* [2013] NSWCA ¶¶ 145-147 (Austl.) (limiting statute to prevent extraterritorial application); Hape v. The Queen, [2007] 2 S.C.R. 292, 293-94 (Can.) ("[Canada's] ability to pass extraterritorial legislation is informed by the binding customary principles of territorial sovereign equality and non-intervention, by the comity of nations, and by the limits of international law to the extent that they are not incompatible with domestic law. . . . Canadian law . . . cannot be enforced in another state's territory without the other state's consent.").

refusing to apply another state's law, implicitly recognizes that the regulating state lacks the power to compel it to do so.

It is from this common-law core that the extraterritoriality doctrine developed and was integrated into Commerce Clause jurisprudence.[179] Early Supreme Court cases give some credence to the use of the Commerce Clause for the basis of the extraterritoriality doctrine. In these cases, the Commerce Clause stood for the proposition that a state "may regulate its own *internal traffic*, according to its own judgment," while the Commerce Clause granted the federal government the capacity to regulate the *external traffic*.[180] The Court viewed the Commerce Clause as a prohibition on the ability of states to directly regulate external commerce without reference to local consequences.[181] While early courts did not expound on a specific textual hook for the doctrine, they prohibited a state from regulating outside of the boundaries of its jurisdiction because those laws violated the coequality of states and the inherent limits to a sovereign's power.[182] It is from these early cases that the modern extraterritoriality doctrine evolved into a succinct rule: "[a] State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."[183] This extraterritorial rule was more rigorous than the statutory presumption against extraterritoriality at the international level, where substantial effects within a jurisdiction might permit a state to regulate extraterritorial conduct.[184]

Importantly, however, the extraterritorial rule was not absolute and gave way to exceptions on occasion. For example, when an individual in one country entered into a contract for the purpose of violating another country's laws, the offended country was free to disregard the contract, punish the offenders, or regulate the transaction, regardless of the legality of the contract in the country in which it was formed.[185] However, for this exception to attach, the state was required to demonstrate that the regulated individuals intended for the contract to be a violation of the laws of another country.[186] In this latter category, comity attained a different tint: a state was permitted to extend its reach beyond its

[179] *See* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935).

[180] Thurlow v. Massachusetts (The License Cases), 46 U.S. (5 How.) 504, 574 (1847) (emphasis added); *see also* Smith v. Turner (The Passenger Cases), 48 U.S. (7 How.) 283, 400 (1849) (plurality opinion) ("All commercial action within the limits of a State, *and which does not extend to any other State or foreign country*, is exclusively under State regulation." (emphasis added)).

[181] *The License Cases*, 46 U.S. (5 How.) at 574.

[182] *See* Bonaparte v. Tax Court, 104 U.S. 592, 594 (1882).

[183] Bigelow v. Virginia, 421 U.S. 809, 824 (1975); *see also* N.Y. Life Ins. v. Head, 234 U.S. 149, 161 (1914); Huntington v. Attrill, 146 U.S. 657, 669 (1892).

[184] SCALIA & GARNER, *supra* note 127, at § 43.

[185] *See* Armstrong v. Toler, 24 U.S. (11 Wheat.) 258, 260 (1826); STORY, *supra* note 168, at 331-32.

[186] *See Armstrong*, 24 U.S. (11 Wheat.) at 271; STORY, *supra* note 168, at 334-36.

borders and enforce its laws where comity would otherwise militate against such an application. Together, the original understanding of sovereignty, the long tradition of comity, and the early application of those principles in the United States provide the pillars on which the extraterritoriality doctrine was based.

D. *Antebellum Resistance to Slavery Grounds Extraterritoriality*

State courts early in U.S. jurisprudence were confronted with a continuing problem: enslavers who brought their enslaved people voluntarily to a state that had affirmatively denied the practice.[187] These debates over slavery "both revealed and shaped the prevailing understanding of constitutional limitations on extraterritorial state power."[188] The political context that gave rise to these debates cannot be understated. In the pre-Civil War era, a divided federal government—with abolitionist states controlling the legislature but pro-slavery presidents blocking legislative encroachments—made few, if any, moves against the institution.[189] Left in this limbo, traveling southerners sought to use the Constitution as a means of enforcing the South's slavery laws in the North. The resulting cases indicate that the focus of extraterritoriality is not on the equal treatment of *laws* but on the equal treatment of *sovereigns*. In specific terms, the courts determined that a state could not force another state to accept its laws, as the southerners in these cases attempted to argue.[190] The slavery cases raised the question of whether a southern state could imbue its own citizens with inalienable rights that other states were required to recognize.[191] Two cases are representative of the antebellum analysis.

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[187] *See Ex parte* Simmons, 22 F. Cas. 151, 151-52 (C.C.E.D. Pa. 1823) (No. 12,863) (releasing slave voluntarily brought to Pennsylvania); Jackson v. Bulloch, 12 Conn. 38, 40-41 (1837) (freeing slave held in Connecticut because "an inhabitant of a sister state, can have no other or higher claims than an inhabitant of a foreign state or nation with whom we are in amity. . . . [T]he states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects, the states are necessarily foreign to each other; their constitutions and forms of government being, although republican, altogether different, as are their laws and constitutions."); *see also* Saul v. His Creditors, 5 Mart. (n.s.) 665, 679 (La. 1827) ("By the laws of this country, slavery is permitted, and the rights of the master can be enforced. Suppose the individual subject to it is carried to England or Massachusetts;—would their courts sustain the argument that his state or condition was fixed by the laws of his domicil of origin? We know, they would not.").

[188] Schmitt, *Constitutional Limitations on Extraterritorial State Power*, *supra* note 7, at 63.

[189] Hylton, *supra* note 156 (noting that "neither the House nor the Senate would support the South's position" but that "the South was much more successful in controlling the executive and judicial branches of the government").

[190] Schmitt, *Constitutional Limitations on Extraterritorial State Power*, *supra* note 7, at 63.

[191] *Id.* at 65. Although conflict of laws and extraterritoriality are closely related doctrines, they are fundamentally distinct because

In *Commonwealth v. Aves*,[192] Thomas Aves, a man from Louisiana, brought an enslaved girl into Massachusetts for a short duration while he was conducting business in the state.[193] A resident of Boston filed a habeas corpus petition to free Aves's claimed slave, Med.[194] In approaching the decision, the Supreme Judicial Court first recognized that the Constitution permitted a state to decide whether to allow or prohibit slavery within its borders.[195] In other words, the Constitution did nothing to divest Massachusetts of its sovereign prerogative to craft the law to apply within its own jurisdiction. Second, the court recognized that upon entering the state, the southern law permitting the continued enslavement of the girl could no longer be enforced unless comity or the Constitution compelled Massachusetts to respect the law.[196]

The court determined that slavery was against the laws of Massachusetts, and, therefore, notions of comity did not permit slavery to extend from the southern state into Massachusetts.[197] The court reasoned that if it found that a strict notion of statutory comity bound its decision, it would be permitting southern states to bring slavery into free states, thereby extending slavery across the country and rendering null Massachusetts's statute prohibiting the practice.[198] If Aves's constitutional theory was correct, the Constitution would have adopted such a stringent conception of comity that it would undermine state sovereignty, permitting one state to dictate the rules in all others. The court, instead, rested its decision on the long-standing recognition that states were free to implement their chosen law *only* within their territorial boundaries. Thus, "the several States, in all matters of local and domestic jurisdiction are sovereign, and independent of each other, and regulate their own policy by their own laws."[199] In disregarding the claimed constraints of southern law, the court explicitly

> [u]nder our federal system, a state ordinarily may apply its law to a legal dispute in its court system, regardless of where the dispute arose, because a state court is generally under no obligation to apply and enforce the laws of another sovereign state. A state, however, may not enact legislation that directly regulates conduct that occurs wholly outside that state's borders, because the sovereign power of each state does not reach beyond its territory.

Id.; *see also* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 534-38 (1857) (McLean, J., dissenting) (arguing that Court improperly determined that southern states could imbue their citizens with rights that traveled into territories), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

[192] 35 Mass. (18 Pick.) 193 (1836).

[193] *Id.* at 216.

[194] *Id.* at 206.

[195] *Id.*

[196] *Id.* at 217 ("[A]s a general rule, all persons coming within the limits of a state, become subject to all its municipal laws, civil and criminal, and entitled to the privileges which those laws confer . . . .").

[197] *Id.* at 217-18.

[198] *Id.*

[199] *Id.* at 218.

rejected Aves's argument that the northern states were bound to apply southern states' laws. In doing so, the court in effect, if not in substance, applied the extraterritoriality doctrine to Louisiana's slavery laws and permitted itself to apply the law of its choosing: its own.[200]

In justifying this finding, the court looked to the power of the states prior to the adoption of the Constitution and found that they were sovereign and independent.[201] The court then turned to the Fugitive Slave Clause and found that the clause was a recognition of the extraterritoriality principle flowing from the Constitution:

> Under these circumstances the [fugitive slave] clause . . . was agreed on and introduced into the constitution; and . . . as it was intended to secure future peace and harmony, and to fix as precisely as language could do it, *the limit to which the rights of one party should be exercised within the territory of the other*, it is to be presumed that they selected terms intended to express their exact and their whole meaning; and it would be a departure from the purpose and spirit of the compact to put any other construction upon it, than that to be derived from the plain and natural import of the language used.[202]

The court thus used the text of the Constitution to find that the Fugitive Slave Clause would be redundant if a slave state could simply project its slave laws into free states to enforce the property rights of its citizens.[203]

The issue was once again taken up in *Lemmon v. People*,[204] where a Virginian citizen traveled through New York on a boat headed towards Texas with the people she enslaved.[205] The New York Court of Appeals, in holding that the enslaved people were free due to New York's abolishment of slavery, found that a state is sovereign within its own jurisdiction and can "determine by its laws the condition of all persons who may at any time be within its jurisdiction."[206] The court further found that nothing in the Constitutional Convention nor early history of the country supported the conclusion that a state could legitimately project its slave laws outside of its borders.[207] Additionally, nothing in that history divorced the state from its powers to broadly regulate its internal affairs,

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[200] The reasoning in *Aves* neatly parallels the holdings in similar international law cases predating the founding. *See, e.g.*, Somerset v. Stewart (1772) 98 Eng. Rep. 499, 501; Lofft 1, 3.

[201] *Aves*, 35 Mass. (18 Pick.) at 218.

[202] *Id.* at 221 (emphasis added).

[203] *Id.*

[204] 20 N.Y. 562 (1860).

[205] *Id.* at 600-01.

[206] *Id.* at 602.

[207] *Id.* at 604 ("It was assumed by the authors of the Constitution, that the fact of a Federative Union would not of itself create a duty on the part of the States which should abolish slavery to respect the rights of the owners of slaves escaping thence from the States where it continued to exist.").

and it determined that Virginia's slavery laws could not be enforced in New York, no matter the duration of the visit.[208] These cases together forcefully compel the conclusion that the text, history, and intention of the Constitution was to limit the ability of states to seize upon comity to implement their chosen policy in other states, and they point towards the proper conclusion—that the extraterritoriality doctrine is rooted deep in U.S. jurisprudence.

E. *Extraterritoriality Maintains Its Fit in Modern Economics*

For some judges and commentators, the problem with the extraterritoriality doctrine does not lie in its historical justifications. On the contrary, they readily concede that "[t]o the founding generation, it was an article of common faith that 'no state or nation can, by its laws, directly affect, or bind property out of its own territory, or bind persons not resident therein.'"[209] Instead, in their view, the extraterritoriality doctrine's failings arise when it is applied to the modern reality of complex distribution-chain economics. In this new economic environment, the extraterritoriality doctrine has been relegated to "the old world with no useful role to play in the new."[210] Some—such as Judge Wynn, dissenting in *AAM*—compare the use of the doctrine to rulings from the *Lochner* era because, in their view, the doctrine prevents states from regulating serious issues through a court's perception of proper national economics.[211] This becomes even clearer in the area of pharmaceutical regulation; the use of complex distribution chains involving manufacturers, distributors, pharmacy benefits managers, employers, insurance companies, doctors, pharmacies, and, eventually, patients creates much opportunity for state regulations to have extraterritorial effects that the Framers and founding generation simply did not envision.[212]

While distribution chains have certainly become more complex, and the pharmaceutical industry is no exception, complexity makes the extraterritoriality doctrine *more* important, not less.[213] As distribution chains integrate more of the

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[208] *Id.* at 608.

[209] Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 377 (6th Cir. 2013) (Sutton, J., concurring) (quoting STORY, *supra* note 4, at § 20).

[210] *Id.* at 378; *see also* Am. Booksellers Found. v. Dean, 342 F.3d 96, 103 (2d Cir. 2003) ("Because the internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate internet activity without 'project[ing] its legislation into other States.'" (alteration in original) (quoting Healy v. Beer Inst., 491 US. 324, 334 (1989))); Felmly, *supra* note 9, at 511-12.

[211] *See* Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 692 (4th Cir. 2018) (Wynn, J., dissenting), *cert. denied*, 139 S. Ct. 1168 (2019); Sam Kalen, *Dormancy Versus Innovation: A Next Generation Dormant Commerce Clause*, 65 OKLA. L. REV. 381, 417, 420 (2013).

[212] *See, e.g.*, *Ass'n for Accessible Meds.*, 887 F.3d at 692 (Wynn, J., dissenting).

[213] *Am. Booksellers*, 342 F.3d at 103; *see also* Rocky Mountain Farmers Union v. Corey, 913 F.3d 940, 952 (9th Cir. 2019) (arguing that extraterritoriality doctrine preserves "central aspect of the state sovereignty protected by the Constitution").

nation into a single market, a state's ability to constrain conduct occurring wholly outside of the state grows, and its justifications for doing so appear to be more compelling—but so too do the risks to state sovereignty.[214] It is at this stage that it becomes imperative to understand what the extraterritoriality doctrine does and does not do.

The extraterritoriality doctrine is narrowly concerned with two circumstances: states that use in-state sales or conduct as a hook to regulate out-of-state behavior and states that attempt to directly regulate the behavior of out-of-state individuals.[215] In these circumstances, the risk of inconsistent regulations arises, and the inherent limits of sovereignty are exceeded. It is this risk that has remained consistent through the passing of time.[216] The same concern that animated Justice Story—that states would be able to regulate every other state, and, in turn, that no state would be able to regulate itself—still holds true today.[217] In a time of robust experimentation at the state level,[218] a clear conceptualization of the extraterritoriality doctrine is crucial to ensure the continued vitality of those legislative programs.

Contrary to the views of its critics, the extraterritoriality doctrine does not prevent all state regulations of out-of-state conduct. Under the extraterritoriality doctrine, a state may regulate locally, and those local regulations may permissibly have effects outside of the state without raising any constitutional issues so long as the regulations do not use in-state sales as a hook to regulate out-of-state conduct, such as with price affirmation statutes.[219] The state is therefore free to regulate the business that manufacturers, distributors, and retailers do *within* the state.[220] Those businesses, then, are free to decide whether they will continue to do business in the state given the costs of the regulation.[221] Every in-state regulation will inevitably have some upstream effects;[222] a

[214] *See Am. Booksellers*, 342 F.3d at 103-04; James E. Gaylord, Note, *State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie*, 52 VAND. L. REV. 1095, 1097 (1999) (arguing that "[c]yberspace imbues state regulation with tremendous potential for extraterritorial effect").

[215] *Rocky Mountain Farmers Union*, 913 F.3d at 952; *see also* DeVeaux, *One Toke Too Far*, *supra* note 28, at 978-79. *But see* Rosen, *supra* note 122, at 887 (arguing that states should be permitted to regulate their citizens' out-of-state behavior).

[216] *See Ass'n for Accessible Meds.*, 887 F.3d at 673 ("Because the Act targets wholesale rather than retail pricing, an analogous restriction imposed by a state other than Maryland has the potential to subject prescription drug manufacturers to conflicting state requirements.").

[217] STORY, *supra* note 168, at 22.

[218] *See supra* notes 28-30 and accompanying text (discussing recent state regulations).

[219] *Rocky Mountain Farmers*, 913 F.3d at 952-53; SPGGC, LLC v. Blumenthal, 505 F.3d 183, 194 (2d Cir. 2007); Schmitt, *Making Sense of Extraterritoriality*, *supra* note 21, at 425-26.

[220] *See generally* Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003).

[221] *See* Felmly, *supra* note 9, at 507-08.

[222] *See* Healy v. Beer Inst., 491 U.S. 324, 344 (1989) (Scalia, J., concurring in part and concurring in the judgment).

regulation on the retail price of a good will necessarily influence the negotiations between the retailer, the manufacturer, and the distributor when they decide to do business in the state. This, however, is permissible under the extraterritoriality doctrine because it is intimately tied to an action within the state: the sale.

While it may be attractive to conceptualize extraterritoriality debates as nothing other than an unnecessary and formalistic restriction on a state's valid attempt to implement its preferred policy,[223] "the People" referred to in the Constitution's preamble stands for the proposition that only those exercises of authority stemming from the power that the people have delegated to their government are legitimate.[224] Today, the doctrine is even more necessary as a preventative measure against red and blue states using their state laws to interfere with another state's chosen policy.[225] To use a modern example, the extraterritoriality doctrine preserves the ability of states to experiment through policies such as the legalization and decriminalization of marijuana.[226] Without the extraterritoriality doctrine, a state opposed to such regulatory innovations would be able to reach into another state with its own regulations to put an end to the industry.

The extraterritoriality doctrine is also a useful tool to ensure that a person is subjected only to those laws that they, through their representatives, had a hand in crafting or that they willingly submitted themselves to through their conduct in or towards the regulating state.[227] Further, it clarifies which state's laws are governing at any given moment. A citizen or company can be assured that if its conduct is lawful in the state where it occurs, no other state may permissibly regulate that conduct.[228] A robust and clear extraterritoriality doctrine allows citizens to make informed decisions about where in the United States they would

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[223] Regan, *supra* note 75, at 1878; Schmitt, *Constitutional Limitations on Extraterritorial State Power*, *supra* note 7, at 111.

[224] *See supra* notes 164-67 and accompanying text (discussing meaning of phrase "the People").

[225] DeVeaux, *One Toke Too Far*, *supra* note 28, at 959 (raising question of "[w]hat prevents Nebraska from regulating Colorado marijuana transactions affecting a substantial number of Nebraska residents" if extraterritoriality doctrine is overruled and concluding that extraterritoriality doctrine is necessary to prevent such state intrusion into another state's policy).

[226] *Id.* at 978-79.

[227] DeVeaux, *Lost in the Dismal Swamp*, *supra* note 63, at 1052 ("The Constitution embraces the premise that no state's polity may be subjected to laws that it had no voice in creating—either through its elected representatives in its state capital or in Washington, D.C. This means that primary conduct occurring within a state must be governed by law—be it statutory, regulatory, or common law—enacted either by the governing authority of that state (including judge-made common law) or Congress acting within the scope of its enumerated powers." (footnote omitted)).

[228] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572-73 (1996).

like to live, according to their health, pocketbooks, or moral values.[229] The demise of the doctrine would require states to submit to one another for prior authorization of their regulations. These concerns withstand the passage of time.

III. DEFINING THE REACH OF STATE SOVEREIGNTY: *AAM* AS A CASE STUDY

With the extraterritoriality doctrine properly grounded in both policy and history, the underlying dispute in *AAM* can be properly addressed within a framework that respects a state's exclusive jurisdiction within its territorial bounds. This Part proceeds in two steps. First, this Part develops a framework for the extraterritoriality doctrine that carefully adheres to the history and policies underlying the doctrine. Second, this Part turns to the facts that underlie the dispute in *AAM*, applies the framework to this particular dispute, and argues that—while the majority reached the correct holding—it erred in its application of the extraterritoriality doctrine's tenets.

A. *A Framework for Extraterritorial Analysis*

Before delving into the merits of the Fourth Circuit's analysis, a framework for interpretation rooted in the policy objectives of the doctrine and its history is needed given the inconsistent application and explanation of the doctrine to date. Based on the background in the previous Parts, the extraterritoriality analysis of the Maryland statute at the center of *AAM* should proceed in three steps. First, a court should inquire into whether the state statute regulates with reference to its own jurisdiction—i.e., whether it directly regulates conduct "wholly" outside of the state.[230] Second, if the statute does not, a court should determine whether the state is impermissibly using in-state sales as a means of regulating out-of-state conduct. Third, and finally, the court should look to historical and traditional notions of comity to ascertain whether the state statute is one of those rare instances where a state was traditionally permitted to regulate outside of the state. Together, these three steps ensure a comprehensive framework that permits a flexible approach to extraterritoriality problems without the uncertainty that accompanies a balancing framework.

1. A State Must Regulate with Reference to Its Own Jurisdiction

At the first step, the court should determine if the state statute plausibly implicates conduct wholly outside of the regulating state.[231] Reaching a conclusion on such an application may be difficult in some cases; however, the lodestar for analysis is whether the state acts with "reference to its own

[229] DeVeaux, *One Toke Too Far*, *supra* note 28, at 955.

[230] Healy v. Beer Inst., 491 U.S. 324, 332-34 (1989).

[231] *See* Freedom Holdings Inc. v. Spitzer, 357 F.3d 205, 216 n.11 (2d Cir. 2004) ("[Extraterritoriality] may also be analyzed independently—i.e., without reference to clear discrimination or disparate burdens—as a question of regulatory jurisdiction rather than one of regulatory discrimination.").

jurisdiction."[232] The classic formula used to explain the basic application of the extraterritoriality doctrine in this context goes as follows: "State *A* cannot use its antitrust law to make a seller in State *B* charge a lower price to a buyer in *C*."[233] However, State *A* may use its antitrust law to regulate transactions in *A* to ensure buyers in *A* enjoy lower prices. Nevertheless, this example does not really tell us much about determining when a regulation projects wholly outside of the state. Instead, it gives us the big picture view, relying on the physical borders of the state to define the scope of proper state action.

Under current doctrine, appeals courts have struggled to define "wholly outside of the borders" and have relied on a mixture of precedent and a common-sense understanding of the practicalities of commerce to determine the scope of the doctrine on a case-by-case basis.[234] One recent trend has been to distinguish between "downstream" and "upstream" transactions.[235] Using this approach, a state may regulate any point-of-sale transactions that occur *within* the state but may not regulate the upstream activities of distributors and manufacturers that occur *outside* of the state.[236]

Recently, in *South Dakota v. Wayfair, Inc.*,[237] tacitly a traditional dormant commerce clause case, the Court provided a framework akin to the extraterritoriality doctrine and permitted the taxation of internet commerce

[232] Bonaparte v. Tax Court, 104 U.S. 592, 594 (1882).

[233] *In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 613 (7th Cir. 1997).

[234] *See* Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 681 (4th Cir. 2018) (Wynn, J., dissenting) (arguing that "this Court's decisions applying that jurisprudence do not support equating a single 'transaction' with 'commerce'" in support of law regulating manufacturer's prices), *cert denied* 139 S. Ct. 1168 (2019); IMS Health Inc. v. Mills, 616 F.3d 7, 43 (1st Cir. 2010) (Lipez, J., concurring) (finding that regulations on data collected from Maine for purpose of selling elsewhere was "almost entirely out of state," but "the *commerce* it controls is not 'wholly outside [Maine's] boundaries' . . . [because] Maine's aim is to regulate on a matter of public welfare only within Maine" (first alteration in original) (quoting *Healy*, 491 U.S. at 336)), *vacated on other grounds sub nom.* IMS Health, Inc. v. Schneider, 564 U.S. 1051 (2011) (mem.); Quik Payday, Inc. v. Stork, 549 F.3d 1302, 1308 (10th Cir. 2008) (deciding that Kansas law regarding payday loans did not run afoul of the dormant commerce clause because "[e]ven if the Kansas resident applied for the loan on a computer in Missouri, other aspects of the transaction are very likely to be in Kansas," and therefore "the transaction would not be *wholly extraterritorial*" (emphasis added)); S. Union Co. v. Mo. Pub. Serv. Comm'n, 289 F.3d 503, 508 (8th Cir. 2002) (upholding statute that regulated stock transactions in public utilities in Missouri despite fact that many happen in other states because of historical importance of regulations on public utilities to state policy).

[235] Rocky Mountain Farmers Union v. Corey, 913 F.3d 940, 952 (9th Cir. 2019); SPGGC, LLC v. Blumenthal, 505 F.3d 183, 194 (2d Cir. 2007); Freedom Holdings Inc. v. Spitzer, 357 F.3d 205, 220 (2d Cir. 2004).

[236] *SPGGC*, 505 F.3d at 194.

[237] 138 S. Ct. 2080 (2018).

where an item was purchased online and delivered to the regulating state.[238] In doing so, the Court recognized a "nexus" rule that provides guidance for determining when a state is regulating entirely outside of the state's borders.[239] *Wayfair* held that a state may regulate such a sale if there is a "substantial nexus" to the state; it, however, narrowly defined "substantial nexus": "'It has long been settled' that the sale of goods or services 'has a sufficient nexus to the State *in which the sale is consummated* to be treated as a local transaction taxable by that State.'"[240] The *Wayfair* Court held that there is a substantial nexus when an online sale is made to a consumer located in the state, and that the state acts within the scope of its sovereign powers when it collects taxes from the out-of-state business, even though the business may have had no connection to the state other than the consummation of that sale.[241]

Wayfair, thus, is in perfect accord with current extraterritoriality doctrine. *CTS* and *MITE* both stand for the proposition that a state may regulate actions literally occurring outside of their borders *if* there is a substantial nexus to the state to justify that exercise of state power.[242] In those cases, the state was permitted to regulate out-of-state conduct—the transaction between an acquirer and an out-of-state shareholder—because a substantial nexus, in the words of the *Wayfair* Court, existed: the corporation was incorporated in the regulating state.[243] The regulations governed a commodity in the state—the shares—and the state could regulate the means by which the property was transferred because of the commodity's presence in the state.[244]

Wayfair also fits earlier circuit court decisions into a consistent doctrine. For instance, Kansas may validly regulate online payday loans to Kansas consumers, even if the Kansas citizen entered into the contract from their work computer in Kansas City, Missouri because the address of the consumer is included in the loan, creating a substantial nexus to the state through the endpoint of the transaction.[245] Thus, "wholly" is meaningful because it indicates that not every single action taken within the formation of a transaction need occur within the state for the state to properly regulate.[246] It is only necessary that there be some tie to the state that makes it clear that a core facet of the transaction will occur within the borders of the state.[247]

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[238] *Id.* at 2092.

[239] *Id.*

[240] *Id.* (emphasis added) (quoting Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 184 (1995)).

[241] *Id.*

[242] CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 93 (1987); Edgar v. MITE Corp., 457 U.S. 624, 641 (1982).

[243] *See CTS*, 481 U.S. at 82; *MITE*, 457 U.S. at 627.

[244] *CTS*, 481 U.S. at 82.

[245] Quik Payday, Inc. v. Stork, 549 F.3d 1302, 1308 (10th Cir. 2008).

[246] *Id.*

[247] *Id.*

Another example will prove illustrative of the problem as it arose in *AAM*. A Maryland citizen may travel to Pennsylvania to purchase prescription drugs and request that they be delivered to his door in Maryland. In that instance, Maryland is free to regulate or to prohibit the transaction absent other constitutional limitations.[248] Even though the citizen is in Pennsylvania, and the action is legal in Pennsylvania, Maryland may regulate those transactions in which Maryland is explicitly flagged as the end destination in a transaction because its sovereign power is invoked through the transaction.[249] Maryland has the ability to exclude products for sale in the state (assuming the prohibition is nondiscriminatory), and citizens and out-of-state sellers cannot evade those laws by crossing the state line and contracting for delivery.[250]

A thornier problem arises, however, when a citizen enters another state, purchases a good that is banned in their home state, and returns to the original state on their own volition with that good. In this instance, the extraterritoriality doctrine allows the state to regulate the citizen because their actions brought the prohibited substance into the state. The state, however, may not regulate the business that sold the banned substance to the citizen merely by virtue of the sale because no substantial nexus can be shown between the seller's actions and the regulating state other than post-sale consumer activity that the business could not control.[251] Together, these data points across the cases show that while there is some flexibility in the term "wholly," it is one that is tightly tied to the state's inherent regulatory power.

2. The State May Not Use In-State Conduct as a Means to Directly Regulate Out-of-State Conduct

At the second step, if the state does regulate with reference to its own jurisdiction, proper respect for the sovereignty of the states requires that the court determine if the state is using in-state conduct as a hook to regulate conduct occurring outside of the state.[252] In other words, this inquiry looks to determine

[248] *See* Delamater v. South Dakota, 205 U.S. 93, 99 (1907) (recognizing that South Dakota was free to prohibit solicitation for sales of alcohol in state, just as it was free to prohibit sale of alcohol); Schmitt, *Making Sense of Extraterritoriality*, *supra* note 21, at 435.

[249] Schmitt, *Making Sense of Extraterritoriality*, *supra* note 21, at 435.

[250] *Id.* at 450 (arguing that only products "produced, transported, and consumed out-of-state" are sufficiently removed to warrant application of extraterritoriality doctrine).

[251] *Compare* DeVeaux, *One Toke Too Far*, *supra* note 28, at 986-87 (arguing against state interest in regulating citizen conduct out of state), *with* Felmly, *supra* note 9, at 510-12 (arguing for permitting states to regulate citizen conduct out of state).

[252] *See, e.g.*, Schmitt, *Making Sense of Extraterritoriality*, *supra* note 21, at 426 (arguing for standard of inescapability at this stage). A requirement of inescapable conflict with another state's laws narrows the range in which a state is said to have exclusive control over conduct. It is only when the statute is such that an individual is forced to comply with two potentially conflicting statutes that concerns arise. *See id.*; *see also* Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133, 1148-50 (2010) (arguing for concurrent power structures over exclusive ones).

if the state is attempting to avoid the implications of the extraterritoriality doctrine through indirect channels. This does not mean that a state may not permissibly regulate in-state if its legislation would have an out-of-state effect. The question is, instead, whether the regulation or statute mandates that the regulated entity take some action outside of the state as a condition for sale within the state. The distinction between the two is clear. A state may mandate that products for sale in the state meet certain specifications; it may not, however, as a condition of doing business in the state, require that the manufacturer meet those specifications everywhere. This distinction is meaningful because it leaves the manufacturer with the choice to comply.

The extraterritoriality doctrine's intended purpose of preventing inconsistent regulations should guide whether the state has impermissibly used in-state actions to regulate out-of-state conduct.[253] In considering the risk of inconsistency, a state law that prohibits the delivery of a product into a state unless the transaction follows certain regulations is unlikely to raise much risk of inconsistency. Should the seller not wish to abide by the state law, it simply need not deliver to the state. Alternatively, the seller may choose to comply only in the regulating state and continue its normal practice elsewhere.

As an example, imagine State *A* passes a law requiring any drugs made for sale or delivered to *A* to have a certain marking on the package indicating the carcinogens in the product; State *B*, on the other hand, prohibits any manufacturers in the state from labeling their products in such a manner. Here, these laws are in tension because a manufacturer in *B* cannot produce a product that it can sell in *A*, but the laws are not inescapably inconsistent under the extraterritoriality doctrine.[254] Contrary to this example, assume *A*'s statute actually requires that a unique label be used in the state, and, further, not in any other states. This statute raises the risk of inconsistent regulation because multiple iterations of such a law would lock up a state's ability to regulate.[255] If *B* likewise requires that the exact same label be used in its state and *no other state*, a company is artificially forced by these states to choose between *A* and *B*, given the inconsistent regulations of the company's out-of-state activities. The seller may also be found liable in one of the states if a labeled product happens to end up for sale in another state through no fault of the

[253] Schmitt, *Making Sense of Extraterritoriality*, *supra* note 21, at 425.

[254] *Id.*; *see also* Rocky Mountain Farmers Union v. Corey, 913 F.3d 940, 951-53 (9th Cir. 2019).

[255] *See* Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 375 (6th Cir. 2013) (holding that Michigan statute prohibiting sale of bottles in other states displaying Michigan redemption mark violates extraterritoriality doctrine); *see also* Schmitt, *Making Sense of Extraterritoriality*, *supra* note 21, at 435 ("The key, however, is to ask whether the state has an interest in the out-of-state conduct that is being regulated rather than simply asking whether the state has a sufficient interest in applying its regulatory scheme.").

manufacturer.[256] Further, assuming that only *A*'s law is in place, the state has improperly controlled the conduct of the manufacturer in states where it would otherwise be legal regardless of whether it results in inconsistent regulation.[257] This undermines a core principle of the extraterritoriality doctrine because it regulates conduct in a state where that state's legislature has determined that the conduct should be permissible or at least has not yet regulated the field.[258] With this in mind, the "substantial nexus" test allowing the regulation of companies doing business through online deliveries with the state as a final destination makes sense.[259] The rule does not link in-state sales to out-of-state conduct; it regulates those products that regulated individual delivers to the state directly.[260] The rule also does not project outside of the state; it is attached to a sale of a good whose final destination is in the regulating state.

3. Courts Should Look to Traditional and Historical Notions of Comity

The third step of the analysis is only implicated if the state fails at the second step but succeeds at the first. Properly framed, the inquiry at this third step turns on whether historical and traditional notions of comity would permit such a regulation. As Part II demonstrated, the history behind the founding turned a presumption of comity into a rigid rule, which was intended to ensure the coequality of the states. In this frame, the narrow question at this third step is whether the regulation is necessary for coequality and for effective sovereignty.[261] While some authority indicates that comity would absolutely prohibit a regulation of conduct outside of the state even if there was a tight connection to the state,[262] comity as encapsulated in the extraterritoriality doctrine has never been so rigid as to be incapable of giving way in appropriate circumstances, but these claims are few and far between.

One traditional exception to the rule of comity provides that states may regulate those "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it . . . if the State should succeed in getting

[256] Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 673-74 (4th Cir. 2018), *cert denied* 139 S. Ct. 1168 (2019). *But see id.* at 690-91 (Wynn, J., dissenting) (concluding that indemnification contracts resolve risk to manufacturers from pills ending up for sale in other locations).

[257] *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572 (1996); *see also* Schmitt, *Making Sense of Extraterritoriality*, *supra* note 21, at 448.

[258] *See* DeVeaux, *Lost in the Dismal Swamp*, *supra* note 63, at 1052.

[259] Schmitt, *Making Sense of Extraterritoriality*, *supra* note 21, at 435.

[260] *Id.*

[261] *See BMW*, 517 U.S. at 572.

[262] Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.").

[the cause of the harm] within its power."[263] For example, an individual may have never set foot in the state where the law was violated nor have done anything meaningful in the state, but they worked closely with another individual who, in turn, violated the state's laws.[264] This exception is deeply rooted in U.S. extraterritoriality jurisprudence. Early constitutional interpretation recognized that sovereignty would mean little if an individual in one state could use their position in the state to work through third parties to profit off of the violation of another state's laws—to allow such action would make the states shelters from liability.[265] The doctrine extends into civil law as well as criminal; a state need not give validity to a contract formed with the intent of violating its laws, regardless of the validity of the contract in the state of formation.[266] Further, this notion was consistently applied to actions in the realm of international relations.[267] The exception does not infringe on the valid police powers of the state where the conspiracy is hatched.[268] The "home" state is unlikely to have any interest in passing or enforcing a statute to regulate contracts that have the intent of defrauding or violating the laws of *other* states. On the contrary, the home state likely has counterincentives: a violation of the

[263] *See* Strassheim v. Daily, 221 U.S. 280, 285 (1911) (holding individual liable even though he committed fraudulent acts in state other than one punishing him for crime); *see also* People v. Betts, 103 P.3d 883, 887 (Cal. 2005); State v. Palermo, 579 P.2d 718, 720 (Kan. 1978); State v. Dudley, 581 S.E.2d 171, 181 (S.C. Ct. App. 2003). *But see* Commonwealth v. Armstrong, 897 N.E.2d 105, 110 (Mass. Ct. App. 2008) ("We do not read *Strassheim* as making the effects doctrine so broad as to empower a State to exercise jurisdiction where all acts in furtherance of the crime and all offense elements of the crime are committed wholly outside the borders of the State."). While some cases indicate that the state's reach with regard to criminal law is longer than its reach to regulate commerce, this distinction attaches to regulations on a state's own citizens outside of the state's borders and does not implicate a regulation that applies to nonresidents of a state. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 835 (1975).

[264] *Strassheim*, 221 U.S. at 285; *Betts*, 103 P.3d at 887.

[265] *See, e.g.*, Delamater v. South Dakota, 205 U.S. 93, 101 (1907) ("[I]t follows that the regulation by South Dakota of the business carried on within its borders of soliciting proposals to purchase intoxicating liquors, even though such liquors were situated in other States, cannot be held to be repugnant to the commerce clause of the Constitution . . . ."); STORY, *supra* note 168, at 331.

[266] STORY, *supra* note 168, at 331-32.

[267] Armstrong v. Toler, 24 U.S. (11 Wheat.) 258, 271 (1826) ("It is laid down with great clearness, that if the importation was the result of a scheme between the plaintiff and defendant, or if the plaintiff had any interest in the goods, or if they were consigned to him with his privity, that he might protect and defend them for the owner, a bond or promise given to repay any advances made in pursuance of such understanding or agreement, would be utterly void.").

[268] *See Delamater*, 205 U.S. at 99.

laws of other states may ensure larger profits for in-state corporations and, in turn, a larger tax base.[269]

Because this exception to the traditional rule of comity allows the state to regulate transactions occurring outside of the borders of the state, the state should bear a high burden for showing that the out-of-state individual used the contract for the purpose of violating the laws of the state.[270] The state must demonstrate that the out-of-state individual was an active participant in the scheme and not simply a passive seller who did not have control or input in where the purchaser would go with the product after the transaction.[271]

B. *The Extraterritoriality Doctrine's Applicability to Maryland's Anti-Price Gouging Statute*

With this framework in place, the challenge to Maryland's statute in the *AAM* case may be properly analyzed. This Section proceeds by first outlining the relevant factual problem Maryland's statute presented and the reasoning of the Fourth Circuit in striking down the law. It then applies the above framework to these particular circumstances and determines that, while neither opinion in *AAM* correctly construed the extraterritoriality doctrine, the Maryland statute as interpreted by the Fourth Circuit impermissibly extended Maryland's laws beyond its borders.

1. Anti-Price Gouging and the Fourth Circuit's Application

In 2018, an association composed of pharmaceutical manufacturers—conveniently styling themselves the "Association for Accessible Medicines"—challenged Maryland's pharmaceutical price gouging statute on extraterritoriality grounds.[272] Maryland's statute was intended to address a

[269] A state where alcohol is permitted for sale, for instance, has no incentive to prevent solicitation of alcohol sales in another state and, in any event, is incapable of regulating that behavior under the extraterritoriality doctrine. *See id.*

[270] STORY, *supra* note 168, at 334; *see also* State v. Dudley, 581 S.E.2d 171, 181 (S.C. Ct. App. 2003).

[271] This analysis thus requires a tight connection between the regulating state and the mental state of the defendant, and it would not go so far as to suggest that any action with substantial effects within a jurisdiction is sufficient to give a state regulatory authority. *See* Allen Rostron, *The Supreme Court, the Gun Industry, and the Misguided Revival of Strict Territorial Limits on the Reach of State Law*, 2003 L. REV. MICH. ST. U. DET. C.L. 15, 120-21, 124-25, 176 (arguing "substantial effects" within jurisdiction give states authority to regulate). An approach that homes in on the defendant's mental state rather than the degree to which their conduct affects a state is the most consistent with current case law. *See, e.g.*, Young v. Masci, 289 U.S. 253, 258 (1933) (finding that New York law was properly applied where New Jersey defendant "gave permission to drive his car to New York" to a friend because "he subjected himself to the legal consequences imposed by that State upon [the friend]'s negligent driving as fully as if he had stood in the relation of master to servant").

[272] Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 669 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1168 (2019).

unique and recurring theme in the generic drug market. Specifically, in response to market failure-driven price spikes, Maryland passed its statute to prohibit a manufacturer or distributor from price gouging.[273] The statute defined price gouging as an "unconscionable increase" as defined by the State Attorney General.[274] The Attorney General, however, would only be informed of a price increase if the result of a price bump in the market would equate to more than a fifty-percent increase over a one-year period.[275]

The issue that Maryland attempted to solve with this statute was considerable. For example, the average person in the United States in 2016 generated a record high of $9,892 in healthcare costs—more than twice the average for global spending on healthcare—and the estimates for the years 2017 and 2018 indicate a trend towards greater spending.[276] Of these annual expenses, consumers spent $1,162 on average for their pharmaceutical drugs.[277] Further, a full sixty percent of people in the United States currently take some form of prescription drug.[278] Ninety percent of those drugs are generic, meaning a drug that is unprotected by patent law.[279]

Market failures in the generic drug market fueled these price changes. Generic drug manufacturers follow a three-step process to spike their prices. First, they acquire approval for the drug in a market with few existing competitors.[280] Second, they target the relevant market through a distribution system designed to limit competitor access to the drug, reducing supply-side competition.[281] Third, they develop the drug for a select and miniscule group of individuals with rare and debilitating diseases, ensuring that the patient's demand for the drug is inelastic—i.e., their need for the drug is so pronounced that a price increase is unlikely to cause them to stop purchasing.[282] Together, these dynamics allow generic pharmaceutical companies to exercise monopoly pricing power and to increase prices drastically.[283] These market dynamics are not merely hypothetical. At the time that Maryland passed the statute, twenty-two percent

[273] *Id.* at 666-67.

[274] *Id.* at 666 (quoting MD. CODE ANN. HEALTH-GEN. § 2-801(c) (LexisNexis 2020)).

[275] *Id.* at 666-67.

[276] ORG. FOR ECON. CO-OPERATION AND DEV., HEALTH AT A GLANCE 2017: OECD INDICATORS 133 (2017), https://read.oecd-ilibrary.org/social-issues-migration-health/health-at-a-glance-2017_health_glance-2017-en#page5 [https://perma.cc/7QAD-GJB5].

[277] *Id.* at 187.

[278] Brief of *Amici Curiae* National Health Law Program et al. in Support of Petitioners at 3, Frosh v. Ass'n for Accessible Meds., 139 S. Ct. 1168 (2019) (No. 18-546) (citing U.S. SENATE SPECIAL COMM. ON AGING, SUDDEN PRICE SPIKES IN OFF-PATENT PRESCRIPTION DRUGS 12 (2016)).

[279] *Id.* at 4.

[280] *Ass'n for Accessible Meds.*, 887 F.3d at 676 (Wynn, J., dissenting).

[281] *Id.*

[282] *Id.*

[283] *Id.*

of generic drugs "had at least one extraordinary price increase of 100 percent or more between the first quarter of 2010 and the first quarter of 2015."[284] It was against this backdrop that Maryland took action to regulate the actions of manufacturers outside of the state.[285]

In turn, the Fourth Circuit agreed with the Association for Accessible Medicines and held that the law violated the extraterritoriality doctrine because it targeted transactions occurring wholly outside of the state—namely, those transactions between an out-of-state manufacturer and an out-of-state distributor.[286] While the statute included language that would only trigger its prohibitions if the drug was eventually made for sale in the state, the court concluded that a nexus to an action *within* the state was not sufficient to justify the exertion of power *outside* of the state.[287] In doing so, the court characterized the statute as an "upstream" regulation targeting manufacturers, as opposed to a "downstream" regulation targeting retailers, such as pharmacies.[288]

The *AAM* majority first justified its conclusion on the basis that the statute was a "price control" statute along the lines of *Baldwin*, because it altered the prices charged in transactions outside of the state.[289] Second, the court went on to assert that the statute raised the risk of inconsistent regulation because it targeted wholesale rather than retail pricing. It reasoned that "if multiple states enacted this type of legislation, then a manufacturer may consummate a transaction in a state where the transaction is fully permissible, yet still be subject to an enforcement action in another state (such as Maryland) wholly unrelated to the transaction."[290] Finally, the court concluded that the statute infringed on the "natural function" of the pharmaceutical market and would force corporations to enter into costly separate transactions for each state in order to comply with a patchwork of different pricing laws.[291]

In dissent, Judge Wynn argued that Maryland possessed the requisite police powers to take action to protect its citizens from the actions of out-of-state manufacturers.[292] Judge Wynn opined that the only justifications for the

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[284] Brief of *Amici Curiae* National Health Law Program et al., *supra* note 278, at 11.

[285] *But see* Mario B. Davis, Comment, *Wrong Price, Wrong Prescription: Why Maryland's Generic Drug Law Was Not Enough to Effect Change in Rising Prescription Drug Prices*, 49 U. BALT. L.F. 102, 127-28 (2019) (arguing that Maryland statute would have been ineffective).

[286] *Ass'n for Accessible Meds.*, 887 F.3d at 670-71.

[287] *Id.*

[288] *Id.*

[289] *Id.* at 672. This analysis is strained, however, because the statute did not require the manufacturers to affirm their prices, to set their prices at a particular level, or to set a maximum level as the statutes in previous cases so required.

[290] *Id.* at 673.

[291] *Id.*

[292] *Id.* at 675 (Wynn, J., dissenting). *But see* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935) (arguing against permitting police powers exception to extraterritoriality doctrine because it "would be to eat up the rule under the guise of an exception").

extraterritoriality doctrine are "economic protectionism, discrimination against interstate commerce, and State regulation of a stream of transactions that never cross through the State's borders."[293] According to this view, a "single transaction" should not be equated with "commerce," and the state should be free to regulate any entity involved in any facet of commerce insofar as some action along the stream of commerce is taken within the borders of the regulating state.[294] Finally, the dissent would constrain the doctrine to (1) price control statutes, (2) price affirmation statutes, and (3) directly discriminatory statutes, none of which implicated the statute in *AAM*.[295]

2. The Extraterritoriality Doctrine's Applicability to the Maryland Statute

Under a framework consistent with the extraterritoriality doctrine's history and policy, both the majority opinion and the dissenting opinion missed the mark—the former for applying a too-rigid vision of the extraterritoriality doctrine, and the latter for applying a framework too permissive to state regulations.[296] In applying the three-step framework from above, the challenged statute in *AAM* presents a difficult question but ultimately violates the extraterritoriality doctrine.

The first step of the extraterritoriality analysis is easily met: Maryland tied its regulation to an in-state transaction, the sale of a drug in the state.[297] The statute, however, stumbles on the second step: Maryland's statute regulated the initial sale between the manufacturer of a pharmaceutical drug and a distributor.[298] Frequently, those entities exist out-of-state.[299] Maryland's statute therefore directly attempted to use an in-state sale as a hook to regulate activity occurring outside of the state. Herein lies the critical distinction between *AAM* and *Walsh*. In *Walsh*, the state of Maine regulated those companies doing business *in the*

[293] *Ass'n for Accessible Meds.*, 887 F.3d at 684 (Wynn, J., dissenting). It is unclear where this requirement comes from—it is not directly supported by any of the previous cases. Further, it is difficult to square with commentary later in the dissent that argues that commerce should be broadly construed. *Id.* at 682 (Wynn, J., dissenting). In the modern age, with complex distributions chains and internet commerce, it could be fair to claim that almost every sale goes "through" the borders of a state at some point in its movement towards a final destination. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2094 (2018) (allowing states to tax internet commerce); *see also* Gaylord, *supra* note 214, at 1097 ("Cyberspace imbues state regulation with tremendous potential for extraterritorial effect . . . ."). It is harder still to ascertain how this resolves the concern in *Brown-Forman* with regard to the risks of inconsistent regulation—several states in the chain of commerce could all pass contradictory laws that shut down commerce. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 583-584 (1986).

[294] *Ass'n for Accessible Meds.*, 887 F.3d at 682 (Wynn, J., dissenting).

[295] *Id.* at 686.

[296] *Cf. id.* at 666 (majority opinion).

[297] *Id.* at 671.

[298] *Id.*

[299] *Id.*

state even though the businesses were physically located *outside of the state*.[300] The statute in *Walsh*, therefore, created a sufficient nexus to justify regulation—a nexus that Maryland was not able to demonstrate.[301] While Maryland's failure to draw such a nexus presumptively dooms the statute under the extraterritoriality doctrine, ending the analysis here, as the majority did, places a policy of protecting interstate commerce over ensuring and enforcing comity between states.

Judge Wynn's response to the majority, however, goes too far. His interpretation would allow the state to regulate anyone involved in the eventual production of the pill in the state.[302] Under Wynn's theory, the state could properly regulate the companies who sold the ingredients necessary to produce the drug to the manufacturer despite those suppliers having an even more tenuous connection to the regulating state than the manufacturers.[303] It could even conceivably allow the state where the manufacturer is based to regulate the price that the manufacturer charges downstream as that price would undoubtedly have effects upstream on the state.[304] This approach would effectively overrule *Baldwin* and would permit states to use in-state sales as a hook to regulate out-of-state conduct by using a single transaction in the state as the basis to restructure the entire distribution chain for a product that may span numerous states, each presumably possessing independent regulatory objectives.[305]

Instead, the court should have proceeded to question whether coequality and comity permit the state to regulate the conduct of out-of-state manufacturers and distributors in the pharmaceutical market. This third step thus turns on whether the state's statute fits within one of the historical or traditional exceptions to the rule that a state may not project its laws beyond its borders.[306] The state statute could potentially fit into one of those categories because it constrains itself to an in-state sale where there is admittedly a large state interest in addressing a pressing drug-pricing problem caused by out-of-state individuals.[307] However, Maryland failed to tie the out-of-state conduct sufficiently close to its in-state nexus to justify the application of the conspiracy exception. The failure to have

[300] Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669-70 (2003).

[301] *See id.*

[302] *Ass'n for Accessible Meds.*, 887 F.3d at 679 (Wynn, J., dissenting).

[303] *Cf.* Mark P. Gergen, *Territoriality and the Perils of Formalism*, 86 MICH. L. REV. 1735, 1736 (1988).

[304] *See id.* This is not merely hypothetical. States, using their antitrust laws, have regulated in-state manufacturers' attempts to control retail pricing outside of the state. Barbara O. Bruckmann, *The Case for a Commerce Clause Challenge to State Antitrust Laws Banning Minimum Resale Price Maintenance*, 39 HASTINGS CONST. L.Q. 391, 411 (2012) (arguing that retail price maintenance runs afoul of extraterritoriality doctrine).

[305] Schmitt, *Making Sense of Extraterritoriality*, *supra* note 21, at 425-26.

[306] *Id.* at 435.

[307] *See supra* notes 276-85 and accompanying text (discussing pricing in pharmaceutical industry).

such a nexus means that out-of-state manufacturers could potentially unwittingly submit themselves to regulation if a pill, through no fault of their own, happened to end up for sale in the regulating state due to the actions of third parties.[308] This raises one tenet of the extraterritoriality doctrine: ensuring that those out of state have some voice or option in the laws that govern them and preventing a state from intruding on the internal policies of another state.[309] In other words, the state statute must present itself, not as a regulation on anyone who produced a pill that ends up for sale in the state but as a statute governing those who knowingly introduce their drugs into the state's pharmaceutical system.

As presented, the state has two options: either regulate the in-state transactions or provide liability for those who knowingly introduce the drug into the Maryland pharmaceutical system. Under the first approach, the state would be able to shape the conduct of upstream manufacturers by regulating the price and conduct of downstream retailers.[310] Under the second approach, the state may regulate out-of-state action sufficiently tied to an in-state action. Given the nature of the pharmaceutical market, this burden is not particularly onerous: those manufacturers outside of the state that the state sought to target rely heavily on a closed distribution system in which they have full control of the generic drug to prevent copying.[311]

While the application of these three steps results in the same ultimate conclusion as the majority opinion in *AAM*, it accomplishes several important objectives along the way. First, it grounds the doctrine in a policy that makes sense: maintaining the coequality of the fifty states of the United States. Second, it gives the doctrine a textual and historical home that rises above the current historical squabbles covering the broader dormant commerce clause. Third, it provides a clear roadmap for state action and permits states to act in order to protect their interests.[312] Each of these objectives can only effectively be

[308] Professor Mark Gergen poses a useful hypothetical on the "stream of commerce" point. Suppose a state bans the sale of cigarettes and, to enforce the statute, makes it punishable by death if you produce a cigarette that somehow ends up for sale in the state. Professor Gergen argues that to allow this type of statute would be to effectively allow one state to ban cigarettes across the nation because no manufacturer would risk the death penalty to sell cigarettes. The statute, therefore, improperly regulates out-of-state conduct through the imposition of a low floor for the mental state required for punishment. *See* Gergen, *supra* note 303, at 1737.

[309] DeVeaux, *Lost in the Dismal Swamp*, *supra* note 63, at 1052.

[310] *See* Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris, 729 F.3d 937, 949 (9th Cir. 2013).

[311] *See supra* notes 276-85 and accompanying text (discussing pricing and market dynamics in pharmaceutical industry).

[312] Moreover, it gives judges the ability to tailor the extraterritoriality doctrine to innovative state attempts at regulating conduct that has proven vexatious. *See, e.g.*, United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 343 (2007) ("The dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition."); Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 36

addressed within a framework that is attentive to the needs of the states in a federal system that relies on them to be laboratories of democracy.[313]

CONCLUSION

The extraterritoriality doctrine has been infrequently used, frequently misunderstood, and commonly misapplied. Two distinct jurisprudential camps have attacked the doctrine in contradicting and conflicting ways. One argues that the doctrine lacks roots in U.S. history and constitutional text. The other claims that the doctrine is *too* rooted in history for it to have any applicability to the current economic times. This Note agrees with the latter's contention of the historical backdrop of the doctrine, yet carves out a place for the extraterritoriality doctrine in an era where states vehemently disagree on a wide range of policy and making horizontal demarcations of power evermore necessary.

The extraterritoriality doctrine, more than any other doctrine, is grounded in maintaining diversity of policy across the states. Ours is a two-part federalism, divided both horizontally and vertically, and the extraterritoriality doctrine facilitates the horizontal distribution and exercise of sovereign power. The doctrine is still vital, rooted in our history, our current economics, and our future prosperity. It is important, nonetheless, to heed the original justification for the doctrine, for without it "each [state] could legislate for all, and none for itself; and that all might establish rules which none were bound to obey."[314] States are far from powerless in the face of the extraterritoriality doctrine. Quite to the contrary, it is the well from which their power flows. States may leverage their local tools to have out-of-state effects, punish those who intentionally flout their laws, and regulate out-of-state individuals who take action in the state. Time will test these tools, and the extraterritoriality doctrine will protect states from intrusion by other states, leaving them free to implement the policy that their citizens choose for the common weal.[315]

(1980) ("In the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." (quoting Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 440 (1978))); Felmly, *supra* note 9, at 469 ("In light of the considerable federalism concerns involved with striking down state legislation, it is imperative that the courts and the legal community understand the implications of such a methodology.").

[313] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[314] STORY, *supra* note 168, at 22.

[315] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985).