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Making Sense of Extraterritoriality: Why California's Progressive Global Warming and Animal Welfare Legislation does not Violate the Dormant Commerce Clause

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MAKING SENSE OF EXTRATERRITORIALITY: WHY CALIFORNIA’S PROGRESSIVE GLOBAL WARMING AND ANIMAL WELFARE LEGISLATION DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE

*Jeffrey M. Schmitt**

The dormant Commerce Clause’s extraterritoriality doctrine has long baffled courts and legal scholars. Rather than attempt to make sense of the doctrine, most scholars have instead argued that it should be abandoned as unnecessary and unworkable. Such scholarship, however, is of little use to the lower courts struggling with extraterritoriality issues. The federal courts in California, for example, have recently been forced to rule on challenges to California’s landmark carbon emissions and animal welfare legislation. Plaintiffs in these cases argue that California is regulating extraterritorially by telling ethanol producers and farmers in other states how to run their businesses. In these cases, the litigants and federal courts have struggled to formulate a coherent account of the doctrine, thus throwing California’s progressive legislation into doubt.

This Article proposes a new test based on existing lower court precedent to clarify the extraterritoriality doctrine. Under this proposal, a state’s regulation of in-state conduct would violate the extraterritoriality principle only when it: (1) inescapably has the practical effect of regulating conduct beyond the state’s borders; and (2) such regulated extraterritorial conduct lacks a corresponding in-state interest. Not only is this test supported by existing precedent, but it would also best serve the policy justification for the extraterritoriality doctrine by properly allocating state power in our federal system. Applying this proposed test to California’s legislation would provide a clear and coherent way to uphold California’s attempt to reduce the carbon emissions caused by Californians and to eliminate California’s role in cruelty to farm animals.

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INTRODUCTION

Under the dormant Commerce Clause’s extraterritoriality doctrine, a state law cannot have the “practical effect” of regulating conduct that “takes place

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wholly outside of the State's borders."¹ This doctrine is intuitively appealing, as one state should not be able to legislate for the rest of the country. And yet, because of the interconnected nature of the modern economy, most state regulations have some extraterritorial effects.² Without clear guidance from the Supreme Court, the lower courts have struggled to find a principled way to limit the doctrine, resulting in confusing and seemingly inconsistent decisions.³

Legal scholars have done little to help clarify the situation. Rather than attempting to make sense of the current doctrine, most scholars have instead focused their energy on arguing that extraterritoriality should not be a constitutional limit on state power.⁴ These proposals, however, are of little use to the courts and litigants currently struggling with extraterritoriality issues. Like it or

¹ *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982); *see also, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572–73 (1996); *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582–83 (1986).

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

³ *See, e.g., Eric M. Berman, P.C. v. City of New York*, 895 F. Supp. 2d 453, 478 (E.D.N.Y. 2012) (“Ultimately, as the Supreme Court has acknowledged, there is no sharply drawn line separating laws which impermissibly regulate extraterritorial commerce from those which do not.”); Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133, 1154 (2010) (“[C]onstitutional doctrine to this day does not clearly tell us to what extent states may regulate people and things outside their borders.”); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1112 (2009) (asserting that “the current doctrine lacks coherence, clear boundaries, and ease of application”); Daniel Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 899 (2008) (asserting that “the ban on extraterritoriality is logically incoherent”); Michael J. Ruttinger, *Is There a Dormant Extraterritoriality Principle? Commerce Clause Limits on State Antitrust Laws*, 106 MICH. L. REV. 545, 559 (2007) (asserting that “courts struggle to apply the principle consistently, much less to define the scope of conduct it applies to”); Peter C. Felmly, *Beyond the Reach of the States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 467, 492 (2003) (“Essentially, the lower federal courts, following the lead of the Supreme Court, have utilized the extraterritoriality principle without comprehending exactly what the principle is and without any clear understanding of how to define it.”). In a foundational article on extraterritoriality, Donald H. Regan summarizes the doctrine as follows: “For the most part, states may not legislate extraterritorially, whatever exactly that means.” 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, 1896 (1987).

⁴ Jack L. Goldsmith and Alan O. Sykes, for example, “submit that the appropriate statement of the extraterritoriality concern is that states may not impose burdens on out-of-state actors that outweigh the in-state benefits.” Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 804 (2001); *see also* Farber, *supra* note 3, at 899 (advocating use of a balancing test). Moreover, Mark D. Rosen contends extraterritoriality should only be a concern with protectionist state laws. *See* Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 922 (2002). In a concurring opinion in *American Beverage Ass’n v. Snyder*, 735 F.3d 362, 378 (6th Cir. 2013) (Sutton, J., concurring), Judge Sutton argued that the doctrine should be completely abandoned because it “is a relic of the old world with no useful role to play in the new.” *See also* Alexandra B. Klass & Elizabeth Henley, *Energy Policy, Extraterritoriality, and the Dormant Commerce Clause*, 5 SAN DIEGO J. CLIMATE & ENERGY L. 127, 129 (2014) (arguing that the extraterritoriality doctrine should be abandoned or significantly limited in most circumstances); Sam Kalen, *Dormancy Versus Innovation: A Next Generation Dormant Commerce Clause*, 65 OKLA. L. REV. 381, 421–23 (2013) (same); Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 992–95 (2013) (arguing that lower courts have narrowly interpreted the Court’s extraterritoriality precedent, “significantly” limiting its continued vitality);

not, the extraterritoriality principle is firmly embedded in the Supreme Court's precedent. Although academics are free to say that binding precedent should be ignored, lower courts are not. Using California's progressive carbon emissions and animal welfare legislation as examples, this Article contributes to the literature on extraterritoriality by highlighting the doctrinal confusion and proposing a coherent way to define the prohibition on extraterritorial legislation based on existing precedent.

In its global warming legislation, California regulates in-state ethanol sales based on the manner in which the ethanol was produced and distributed in other states.⁵ Out-of-state producers have challenged this law, claiming that California's legislation has the practical effect of regulating extraterritorially.⁶ California's more recent animal welfare legislation, which prohibits the sale of eggs produced by chickens kept in tiny "battery cages," raises analogous extraterritoriality issues by essentially requiring out-of-state farmers to comply with California law.⁷ Although a sharply divided U.S. Court of Appeals for the Ninth Circuit has upheld California's global warming legislation,⁸ the courts have yet to rule on the state's animal welfare legislation. Because the courts have yet to reach a consensus on the proper approach to extraterritoriality, the constitutionality of this law remains in doubt.

This Article proposes a new doctrinal test that has the potential to provide clarity and consistency to the courts' extraterritoriality jurisprudence. Under this proposal, which is derived from existing precedent, a state regulation of in-state conduct violates the extraterritoriality principle only when the regulation: (1) lacks a corresponding in-state interest; and (2) *inescapably* has the practical effect of regulating conduct beyond the state's borders. A court applying this test to California's progressive legislation would likely find that both statutes are constitutional. Although California's legislation regulates the out-of-state production of ethanol and eggs bound for the California market, California arguably has a corresponding interest in the production of such goods. This is because, regardless of where the goods are produced, California arguably has an interest in making sure that its citizens do not participate in animal cruelty or unnecessarily add to global warming. And, although out-of-state egg and ethanol producers may choose to change their operations with respect to products sold in other states—transactions in which California has no interest—nothing in California's laws requires them to do so, meaning that such effects are not "inescapable." If accepted, this Article's doctrinal proposal would both serve basic principles of federalism and allow states to enact meaningful economic regulation in our interconnected national economy. The proposed test would serve the basic purpose of the doctrine by preventing one state from regulating the rest of the country. Under this Article's proposal, a state generally could not

Florey, *supra* note 3, at 1090 ("The extraterritoriality prohibition . . . is so sweeping that most commentators have assumed that these cases cannot mean what they appear to say.").

⁵ See *infra* notes 91–94 and accompanying text.

⁶ See *infra* note 100 and accompanying text.

⁷ See *infra* notes 146–48 and accompanying text.

⁸ See *infra* text accompanying notes 114–15.

use in-state sales as a hook to regulate the same company's unrelated out-of-state sales. Moreover, because it would only prohibit extraterritorial effects in which the regulating state has no interest, the doctrine would preserve room for states to pass legislation to address local problems.

The plaintiffs challenging California's legislation, however, argue that a state should not be able to regulate products based on the manner in which they were produced in other states.⁹ Under this competing test, which this author shall call the "manner of production test," California's legislation is unconstitutional because, although the regulated eggs and ethanol are identical once they cross California's borders, they are treated differently based on how they were produced in other states. According to the plaintiffs, the manner of production test best serves federalism by preserving the sovereignty of other states to regulate their own production processes.¹⁰

California's legislation, however, illustrates why this Article's doctrinal proposal better serves underlying federalism values. In its legislation, California has exercised its sovereignty, or political power, to regulate the sale of goods within its borders for the benefit of its residents. Specifically, California is limiting its citizens' contributions to global warming and protecting its citizens from the moral harm of purchasing the products of animal cruelty. Moreover, despite arguments to the contrary,¹¹ these laws in no way undermine the sovereign power of other states. California's legislation simply does not, indeed cannot, interfere with another state's power to enact or enforce its own legislation on these subjects.

California's regulations instead conflict with another fundamental principle of "our federalism"—the principle that the states are equal units of the federal system.¹² When California discourages the sale of fuel or eggs only because California disapproves of the production methods used in other states, it does not give equal respect to those other states' laws. Rather than take political power from, say, Missouri, California has instead labeled Missouri law as cruel, inhumane, or otherwise unfit for Californians. While this Article's proposal would preserve California's sovereignty, the manner of production test therefore would instead sacrifice state sovereignty to ensure that California is treating the law of other states equally.

The constitutionality of California's statutes therefore turns on a conflict between two principles of federalism: state sovereignty and the equality of state law. Once these values are put into focus, the proper outcome becomes clear. While state sovereignty is a bedrock principle of constitutional law, the goal of giving equal respect to the laws of the several states has traditionally been seen as aspirational rather than legally enforceable.¹³ A deep analysis of the theoretic-

⁹ See *infra* text accompanying note 110.

¹⁰ See *infra* notes 198–201 and accompanying text.

¹¹ See generally Brief of Amici Curiae Law Professors in Support of Rocky Mountain Farmers Union Appellees, *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013) (Nos. 12-15131, 12-15135), 2012 WL 3594433 [hereinafter Brief of Amici Curiae Law Professors].

¹² See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013).

¹³ See *infra* notes 198–201, 203–19 and accompanying text.

cal underpinnings of the extraterritoriality doctrine thus supports this Article's doctrinal proposal, which gives states wide latitude to exercise their sovereign power to regulate in-state conduct. California should be permitted to use its sovereign power to prevent its citizens from contributing to global warming and participating in animal cruelty, even if doing so shows a lack of respect for the equality of the laws of other states.

This Article proceeds in three Parts. Part I provides an outline of the extraterritoriality doctrine and proposes a doctrinal synthesis of existing precedent. Part II uses California's global warming and animal rights legislation as examples to illustrate the need for doctrinal clarity and the policy issues at stake. Finally, Part III analyzes the constitutional values at stake and argues that state sovereignty supports this Article's doctrinal proposal and upholding California's legislation.

I. MAKING SENSE OF THE EXTRATERRITORIALITY DOCTRINE

Although the Commerce Clause of the Constitution does not expressly limit state power, the Supreme Court has long held that it does so by implication.¹⁴ According to the Court, "the 'negative' or 'dormant' aspect of the Commerce Clause prohibits States from 'advanc[ing] their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state.'"¹⁵ The doctrine is designed to "create an area of trade free from interference by the States,"¹⁶ and therefore "avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."¹⁷ At its core, the dormant Commerce Clause is based on the assumption that "the peoples of the several states must sink or swim together."¹⁸

Ordinarily, to determine if a state law violates the dormant Commerce Clause, a court must decide whether the law discriminates against out-of-state commerce.¹⁹ Discriminatory laws are presumptively unconstitutional and can be upheld only if "justified by a valid factor unrelated to economic protectionism."²⁰ Nondiscriminatory laws are unconstitutional if the "burden imposed on such commerce is clearly excessive in relation to the putative local benefits."²¹

¹⁴ See, e.g., *Cooley v. Bd. of Wardens ex rel. Soc'y for Relief of Distressed Pilots*, 53 U.S. 299, 318–19 (1852).

¹⁵ *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 359 (1992) (alteration in original) (quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949)).

¹⁶ *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) (quoting *Freeman v. Hewit*, 329 U.S. 249, 252 (1946)).

¹⁷ *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979).

¹⁸ *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

¹⁹ *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

²⁰ *Fort Gratiot*, 504 U.S. at 359.

²¹ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Regardless of whether the law discriminates against out-of-state commerce, the dormant Commerce Clause also contains a blanket prohibition on all extraterritorial state legislation. Under this rule, a state cannot regulate conduct that “takes place wholly outside of the State’s borders,” even if the state has an interest in doing so.²² In other words, a state may not “project its legislation into [other States],”²³ or “‘directly’ attempt to assert extraterritorial jurisdiction over persons or property.”²⁴ Michigan, for example, cannot tell an out-of-state seller how to label products sold in Indiana.²⁵

The Supreme Court, however, has never clearly explained how the dormant Commerce Clause’s ban on extraterritorial legislation applies when a state directly regulates only in-state conduct, but such regulation has out-of-state effects. For example, what if, instead of directly regulating sales in Indiana, Michigan prohibited an out-of-state company from selling products in Michigan unless it changed its labeling practices in Indiana? Because most state laws have some effects beyond their borders, the extraterritoriality doctrine does not bar all regulations of in-state conduct that have extraterritorial effects. Although the Supreme Court has held that a state can violate the extraterritoriality principle through the regulation of in-state conduct, it has provided no clear limiting principle to determine when the extraterritoriality doctrine is implicated.

The Supreme Court gave its broadest formulation of the extraterritoriality doctrine in *Healy v. Beer Institute*.²⁶ In *Healy*, a Connecticut law required any out-of-state company that sold beer to Connecticut wholesalers to affirm to the state that it was not offering lower prices in any neighboring state for the next month.²⁷ The Court held that the Connecticut price affirmation law was unconstitutional because it had “the *undeniable* effect of controlling commercial activity occurring wholly outside the boundary of the State.”²⁸ The Court explained that “[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.”²⁹

Focusing on the Court’s “practical effect” language, *Healy* appears to announce a robust extraterritoriality principle. In fact, litigants in other cases have challenged a range of state laws by arguing that a state’s legislation cannot have

²² *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982); *see also, e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572–73 (1996); *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 93 (1987); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582–83 (1986). Although the extraterritoriality doctrine originally arose in the context of the Due Process Clause, *see Denning, supra* note 4, at 981, it is now firmly rooted in the dormant Commerce Clause.

²³ *Brown-Forman*, 476 U.S. at 583 (alteration in original) (quoting *Baldwin*, 294 U.S. at 521).

²⁴ *Edgar*, 457 U.S. at 624 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977)).

²⁵ *See Am. Beverage Ass’n v. Snyder*, 700 F.3d 796, 810 (6th Cir. 2012).

²⁶ 491 U.S. at 324; *see Denning, supra* note 4, at 988.

²⁷ *Healy*, 491 U.S. at 326–27.

²⁸ *Id.* at 337 (emphasis added).

²⁹ *Id.* at 336.

any practical effects beyond its borders.³⁰ Although the lower courts have consistently rejected such an expansive interpretation of extraterritoriality,³¹ they have not agreed on any uniform principles to limit extraterritoriality's reach.³²

This Article proposes two new limitations on the extraterritoriality doctrine that could help bring clarity and uniformity to this confusing area of law. By synthesizing the common reasoning and holdings of various cases, this Article proposes the following doctrine: A state regulation may have the practical effect of regulating out-of-state conduct only if: (1) the state has a corresponding interest in the out-of-state conduct that is being regulated; and (2) the regulation is not inescapable.³³ Although no court has ever explicitly endorsed this doctrinal proposal, it is arguably consistent with federal precedent.

The first proposed principle, which this author shall call the "corresponding interest principle," is derived from the Supreme Court's decision in *CTS Corp. v. Dynamics Corp.*,³⁴ an opinion that pre-dated *Healy* and did not even mention the term "extraterritoriality." The Court in *CTS* upheld an Indiana statute that required approval from a majority of the preexisting shareholders before a change in control of certain Indiana corporations.³⁵ The law applied only to corporations chartered in Indiana that had specified levels of shares or shareholders within the state and that opted into the statute's protection.³⁶

The plaintiffs argued that the law was unconstitutional because it would require state approval even when both the entity acquiring the company and the preexisting shareholders were residents of another state.³⁷ The Court, however, upheld the law, reasoning that it did not discriminate against out-of-state entities³⁸ and posed no risk of inconsistent regulations since it governed only Indiana corporations.³⁹

Although the Court in *CTS* did not explicitly invoke the extraterritoriality doctrine, it upheld a state law that had practical effects beyond its borders. In a decision discussing *CTS*'s relationship to the extraterritoriality doctrine, the U.S. Court of Appeals for the Seventh Circuit stated that the Supreme Court upheld the Indiana statute because any burden it placed on extraterritorial conduct was accompanied by a "corresponding and significant protection for a legitimate interest of local residents."⁴⁰ Under this reasoning, the Indiana stat-

³⁰ See, e.g., *Alliant Energy Corp. v. Bie*, 336 F.3d 545, 546 (7th Cir. 2003) ("Appellants claim that such precedent mandates the *per se* invalidation of every state regulation that has any extraterritorial effect whatsoever." (emphasis in original)).

³¹ See, e.g., *id.* ("This principle is not established by the cases they cite and is contradicted by other authority.").

³² See *supra* note 3.

³³ Of course, a state also may not directly regulate wholly extraterritorial conduct. See *supra* notes 22–25 and accompanying text.

³⁴ 481 U.S. 69 (1987).

³⁵ *Id.* at 69.

³⁶ *Id.*

³⁷ *Id.* at 88, 93.

³⁸ *Id.* at 70.

³⁹ *Id.* at 71.

⁴⁰ *Alliant Energy Corp. v. Bie*, 336 F.3d 545, 549 (7th Cir. 2003).

ute was valid because it applied only to Indiana corporations, and the State had a legitimate interest in regulating its own corporations. In other words, the extraterritorial conduct being regulated—the acquisition of the Indiana corporation—itself had a sufficient relationship to the regulating state.

The corresponding interest principle can be used to distinguish *CTS* from *Edgar v. MITE Corp.*,⁴¹ another Supreme Court case from the 1980s regarding corporate governance. *Edgar* struck down an Illinois law that essentially required state approval before a takeover of any corporation in which at least ten percent of the outstanding shares were owned by Illinois residents.⁴² Unlike *CTS*, the Illinois law in *Edgar* therefore applied to a tender offer for an out-of-state corporation, even when the offer occurred through the use of interstate commerce and the corporation was majority owned by out-of-state entities.⁴³ The Court held that the statute was unconstitutional because it had “a sweeping extraterritorial effect.”⁴⁴ As the Seventh Circuit explained when distinguishing *CTS* from *Edgar*, the Illinois law at issue in *Edgar* ran afoul of the extraterritoriality doctrine because Illinois had no interest that corresponded to the extraterritorial conduct being regulated (the wholly out-of-state takeover of an out-of-state corporation).⁴⁵

While the corresponding interest principle helps to make sense of the Supreme Court’s precedent, the second proposed principle, which this author shall call the “inescapable practical effects principle,” helps to explain how the lower courts have upheld a number of regulations that have practical effects beyond their borders, including state labeling laws.⁴⁶ In *National Electric Manufacturers Ass’n v. Sorrell*,⁴⁷ for example, the U.S. Court of Appeals for the Second Circuit upheld a Vermont law requiring that some products sold in Vermont, including fluorescent light bulbs, be labeled as containing mercury.⁴⁸ Citing *Healy*, the plaintiff light bulb manufacturers argued that the law would have the “practical effect” of forcing them to attach the Vermont label to light bulbs sold throughout the country due to their national distribution process.⁴⁹ The Second Circuit, however, held that the plaintiff’s “extraterritoriality contention fails because the statute does not *inescapably* require manufacturers to label all lamps wherever distributed.”⁵⁰ The court explained: “To avoid the statute’s alleged impact on other states, lamp manufacturers could arrange their production and distribution processes to produce labeled lamps solely for the Vermont

⁴¹ 457 U.S. 624 (1982).

⁴² *Id.* at 646. The Illinois law had other possible triggering events as well. *See id.* at 624.

⁴³ *Id.* at 642.

⁴⁴ *Id.*

⁴⁵ *See Alliant Energy*, 336 F.3d at 549.

⁴⁶ *See, e.g., Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 647–48 (6th Cir. 2010); *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 111–12 (2d Cir. 2001); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995).

⁴⁷ 272 F.3d 104.

⁴⁸ *Id.* at 107. The Vermont law further required the products to be recycled or disposed of as hazardous waste. *Id.*

⁴⁹ *Id.* at 110.

⁵⁰ *Id.* (emphasis added).

market and then pass much of the increased costs along to Vermont consumers in the form of higher prices.”⁵¹

The Second Circuit’s decision in *Sorrell* can be explained in terms of this Article’s two proposed principles. Although the Vermont law may have had practical effects on light bulbs bound for out-of-state markets, such effects were not inescapable because the law did not require the plaintiffs to change their labeling practices with respect to sales in other states. The only extraterritorial conduct that was inescapably regulated by Vermont, therefore, was the production of light bulbs bound for the Vermont market. And Vermont had a corresponding interest in regulating the production of products bound for Vermont. By contrast, the price affirmation law at issue in *Healy* had the inescapable effect of regulating out-of-state conduct in which Connecticut had no interest—a sale from an out-of-state beer supplier to an out-of-state buyer.⁵² Unlike the Connecticut law in *Healy*, the Vermont law did not inescapably regulate the out-of-state production of light bulbs bound for an out-of-state market.

This Article’s doctrinal proposal similarly helps to explain other lower court decisions. The U.S. Court of Appeals for the Sixth Circuit, in *International Dairy Foods Ass’n v. Boggs*,⁵³ upheld an Ohio law prohibiting dairy processors from making certain claims and requiring them to include disclaimers on milk labels. The court explained that “the Ohio Rule’s labeling requirements have no direct effect on the Processors’ out-of-state labeling conduct. That is to say, how the Processors label their products in Ohio has no bearing on how they are required to label their products in other states (or vice versa).”⁵⁴ In other words, the Ohio law inescapably regulated only the labeling of milk bound for Ohio, and Ohio had a corresponding interest in the labelling of such milk.

Moreover, in *Cotto Waxo Co. v. Williams*,⁵⁵ the U.S. Court of Appeals for the Eighth Circuit upheld a Minnesota law that banned the in-state sale of petroleum-sweeping compounds against a challenge that it had the effect of regulating wholly out-of-state sales between the manufacturer and the distributor of the compound.⁵⁶ In a statement that captures the inescapable effects rule, the court stated that “a statute has extraterritorial reach when it necessarily requires out-of-state commerce to be conducted according to in-state terms.”⁵⁷ The court continued: “Clearly, the Act has affected Cotto Waxo’s participation in inter-

⁵¹ *Id.*

⁵² The only way for the supplier in *Healy* to escape the extraterritorial reach of the Connecticut law was to stop selling in Connecticut, and the court in *Healy* held that a state may not force a party to alter its wholly out-of-state conduct as a condition on its in-state sales. *Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989) (“[T]he Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another.”).

⁵³ 622 F.3d 628 (6th Cir. 2010).

⁵⁴ *Id.* at 647.

⁵⁵ 46 F.3d 790 (8th Cir. 1995).

⁵⁶ *Id.* at 793, 794–95.

⁵⁷ *Id.* at 794.

state commerce.”⁵⁸ The court nevertheless upheld the statute, likely because Minnesota had a corresponding interest in the plaintiff’s sales of items bound for Minnesota.⁵⁹

The Supreme Court’s most recent extraterritoriality case, *Pharmaceutical Research & Manufacturers of America v. Walsh*,⁶⁰ can also be explained in terms of this Article’s proposed doctrinal test. In *Walsh*, Maine required drug companies to enter into rebate agreements with the state for drugs sold to Maine Medicaid patients. Under these rebate agreements, the drug companies paid a percentage of the revenue generated from sales in Maine to the state.⁶¹ This money was in turn given to pharmacies that agreed to sell the drugs at a discount to Maine residents.⁶² If a drug company did not agree to give the rebates, Maine subjected its drugs to a time-consuming and costly pre-approval process before its drugs could be prescribed to Maine Medicaid patients.⁶³ Because the out-of-state drug company plaintiffs in *Walsh* did not sell their products directly into Maine, but instead sold only to out-of-state wholesalers, they argued that the Maine plan had the practical effect of regulating extraterritorial conduct, i.e., the wholly out-of-state transaction between the drug company and the wholesaler.⁶⁴

The Court in *Walsh* rejected the plaintiff’s argument with the following language, which was taken from the U.S. Court of Appeals for the First Circuit’s opinion below:

[T]he Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its *inevitable effect*. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price. Similarly, Maine is not tying the price of its in-state products to out-of-state prices.⁶⁵

Although the Court’s discussion was brief, the First Circuit’s decision in *Walsh*, which the Supreme Court relied upon heavily in its decision, provides further insight. Below in *Walsh*, the First Circuit explained that the Maine law does not directly regulate extraterritorially because the “regulation only applies to in-state activities,” i.e., the purchase of drugs in Maine, the negotiation of

⁵⁸ *Id.*

⁵⁹ *Id.*; see also, e.g., *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 192–95 (2d Cir. 2007) (rejecting the argument that a state regulation of prepaid gift cards regulated extraterritorially because the law did not “by its terms or its effects, directly regulate sales of gift cards in other states”); *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 221 (2d Cir. 2004) (“While the out-of-state wholesale prices of cigarettes may be affected by the Contraband Statutes, therefore, out-of-state actors such as appellants remain free to conduct commerce on their own terms, without either scrutiny or control by New York State.”).

⁶⁰ 538 U.S. 644, 670 (2003).

⁶¹ *Id.*; see also Brandon P. Denning, *The Maine Rx Prescription Drug Plan and the Dormant Commerce Clause Doctrine: The Case of the Missing Link[age]*, 29 AM. J.L. & MED. 7, 9 (2003).

⁶² *Id.* at 10.

⁶³ *Id.*

⁶⁴ *Walsh*, 538 U.S. at 669–70.

⁶⁵ *Id.* (emphasis added) (quoting *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 81–82 (1st Cir. 2001)).

the rebate between Maine and the drug company, and the possible preauthorization required if the drug company did not agree to a rebate.⁶⁶ Although the First Circuit conceded that the regulation could have a practical effect on the profitability of the drug companies' out-of-state transactions with wholesalers, the court found any such out-of-state effects were distinguishable from those at issue in *Healy*.⁶⁷ In *Healy*, the First Circuit explained, the Connecticut statute had the effect of regulating the price of beer sold by out-of-state companies to out-of-state consumers.⁶⁸ By contrast, the First Circuit explained, although the Maine law at issue in *Walsh* influences out-of-state transactions between a manufacturer and a wholesaler, those out-of-state transactions only concern products bound for the Maine market.⁶⁹

The reasoning used by the Supreme Court and First Circuit is fully consistent with this Article's proposed doctrine.⁷⁰ Maine did not condition in-state sales on the companies changing their out-of-state practices with respect to goods bound for out-of-state markets. Maine's legislation therefore had the inescapable effect of regulating only the sale of drugs bound for the Maine market. Moreover, Maine had a corresponding and significant interest in these transactions. In fact, the corresponding interest and inescapable effect principles make *Walsh* an easy case.

This Article's proposed doctrine not only provides a way to understand why courts have upheld state legislation that has significant extraterritorial effects, but it could also help to explain why the lower courts have struck down a number of statutes on extraterritoriality grounds in recent years. In *American Beverage Ass'n v. Snyder*,⁷¹ for example, the Sixth Circuit struck down a Michigan law that required the sellers of beverage containers to place a certain mark on all containers sold in Michigan and prohibited containers containing such markings from being sold in other states.⁷² The court held that the Michigan statute had an impermissible extraterritorial effect because it both dictated what the container manufacturers could sell in other states and essentially forced other states to comply with its regulations.

Although not discussed by the Sixth Circuit, the Michigan law violated the doctrinal proposal discussed above. Unlike the labelling law in *Sorrell*, which did not dictate how light bulbs must be labeled in other states, the Michigan law had the inescapable effect of prohibiting out-of-state companies from selling containers with the Michigan mark to out-of-state consumers. Moreover, just as Connecticut had no interest in regulating wholly out-of-state beer sales in *Healy*, Michigan arguably had no corresponding interest in regulating out-of-

⁶⁶ *Concannon*, 249 F.3d at 82.

⁶⁷ *Id.* at 82–83.

⁶⁸ *Id.* at 81–82. The First Circuit made similar arguments with respect to *Brown-Forman* and *See-lig*. See *id.*

⁶⁹ *Id.*

⁷⁰ Of course, neither court explicitly endorsed the doctrinal test advanced here.

⁷¹ 700 F.3d 796 (6th Cir. 2012).

⁷² *Id.* at 801–02. The mark could be used in “other states that have laws substantially similar” to Michigan's. *Id.* at 801.

state container sales to out-of-state consumers. The Michigan law therefore violated the extraterritoriality doctrine.

This Article's proposed doctrine also explains why the Seventh Circuit struck down a Wisconsin waste disposal law on extraterritoriality grounds in *National Solid Wastes Management Ass'n v. Meyer*.⁷³ The court explained that "Wisconsin's solid waste legislation condition[ed] the use of Wisconsin landfills by non-Wisconsin waste generators on their home communities' adoption and enforcement of Wisconsin recycling standards."⁷⁴ Again, this legislation inescapably regulated conduct in other states because out-of-state communities were forced to choose between either following the Wisconsin law or being banned from the Wisconsin market. Moreover, Wisconsin had no corresponding interest in the regulated conduct because "all persons in that non-Wisconsin community must adhere to the Wisconsin standards whether or not they dump their waste in Wisconsin."⁷⁵

Most recently, the U.S. District Court for the District of Minnesota struck down Minnesota's Next Generation Energy Act in *North Dakota v. Heydinger*.⁷⁶ This statute established standards regarding the use and generation of energy with the goal of reducing carbon emissions.⁷⁷ The court held that the statute was unconstitutional because it had the practical effect of "requir[ing] out-of-state entities to seek regulatory approval in Minnesota before undertaking transactions in other states."⁷⁸ The court explained that:

[T]he transmission of electricity . . . does not recognize state boundaries. Therefore, when a non-Minnesota entity injects electricity into the grid to satisfy its obligations to a non-Minnesota member, it cannot ensure that the electricity will not travel to and be removed in—in other words, be imported to and contribute to statewide power sector carbon dioxide emissions in—Minnesota.⁷⁹

As a result, out-of-state entities were inescapably forced to comply with Minnesota law before generating and transmitting power to other states. Moreover, although the court did not address the corresponding interest limitation, Minnesota had no interest in these transactions between out-of-state energy companies and consumers in other states.

To summarize, the extraterritoriality doctrine prohibits states from directly regulating extraterritorially and from regulating in-state conduct in a way that has the practical effect of regulating conduct that occurs wholly outside of its borders. A broad interpretation of this doctrine, however, would open most state economic legislation to constitutional attack. The lower courts have there-

⁷³ 63 F.3d 652 (7th Cir. 1995). The U.S. Court of Appeals for the Tenth Circuit struck down a portion of a similar law in *Hardage v. Atkins*, 619 F.2d 871, 873–74 (10th Cir. 1980).

⁷⁴ *Meyer*, 63 F.3d at 658.

⁷⁵ *Id.*

⁷⁶ 15 F. Supp. 3d 891, 919 (D. Minn. 2014).

⁷⁷ *Id.* at 897–98.

⁷⁸ *Id.* at 916.

⁷⁹ *Id.* at 917.

fore consistently applied the doctrine only when the regulation of in-state conduct has the inescapable practical effect of regulating extraterritorial conduct in which the state has no corresponding interest.⁸⁰

Although this interpretation, if accepted by the courts, would bring much-needed clarity to the extraterritoriality doctrine, it admittedly would not provide a clear answer in every case. Determining whether a state has a “corresponding interest” in the extraterritorial conduct being regulated could be especially difficult. 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.⁸¹ Courts have found, for example, that a state has a sufficient interest to regulate the out-of-state labelling of goods bound for in-state consumers.⁸² This is because a state has an obvious interest in making sure that its citizens are aware of the dangers of the products they purchase in-state. Other situations, however, are less clear. For example, does a state have a sufficient interest to regulate the in-state sale of goods produced by out-of-state companies that fail to pay a living wage? Here, the state’s interest—preventing its citizens from participating in the exploitation of out-of-state workers—may be too attenuated.⁸³ Even if this Article’s doctrinal proposal would not provide a clear answer in such cases, however, its acceptance would be a marked improvement over the current situation, in which courts and litigants continue to struggle over how to limit *Healy*’s broad practical effects language.

⁸⁰ As discussed *infra* Part II, however, litigants commonly argue for a more expansive interpretation of the extraterritoriality doctrine, and the federal courts have occasionally been receptive to such arguments. See *infra* notes 98–107 and accompanying text.

⁸¹ This, among other things, distinguishes the extraterritoriality inquiry from the standard dormant Commerce Clause test, which compares the state’s interest in the regulation to the burden on interstate commerce. See *supra* notes 19–21 and accompanying text.

⁸² See *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 111 (2d Cir. 2014); *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 648 (6th Cir. 2013). The corresponding interest rule could be seen as similar to the minimum contacts test for personal jurisdiction. Just as a defendant has minimum contacts when it “purposely avails” itself of the forum by, among other things, targeting its conduct at the forum, a state has a sufficient interest to regulate conduct that is being directed at the state. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984); *Calder v. Jones*, 465 U.S. 783, 789–90 (1984) (describing the minimum contacts test for personal jurisdiction). It is safe to say, however, that the corresponding interest rule bears little resemblance to the dormant Commerce Clause’s “nexus” requirement for state taxes. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), the Court held that a state tax violates the dormant Commerce Clause if it is applied to an activity that lacks a “substantial nexus” to the taxing state. The Court later explained in *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992), that, for a company to have a substantial nexus to a state, and thus be subject to its use taxes, the company must have a physical presence within the state. Cases decided under the extraterritoriality doctrine, however, have found a sufficient interest even when the regulated entity did not have a physical presence within the state. See, e.g., *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003).

⁸³ See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935) (arguing that commerce would be “burdened unduly” if a state were to “condition importation upon proof of a satisfactory wage scale in factory or shop”).

II. EXTRATERRITORIALITY AND CALIFORNIA'S PROGRESSIVE GLOBAL WARMING AND ANIMAL RIGHTS LEGISLATION

California's recent legislation on carbon emissions and farm animal welfare illustrates the need for doctrinal clarity and highlights the values at stake. This Part provides a concrete factual setting for extraterritoriality by summarizing the statutes, analyzing the litigation over their constitutionality, and applying this Article's doctrinal proposal.

A. California's Global Warming Solutions Act

Despite widespread agreement over the dire effects of global warming, federal law has done little in recent years to curb carbon emissions or encourage renewable fuels.⁸⁴ Moreover, because of crippling partisan gridlock and widespread Republican opposition, Congress is unlikely to aggressively respond to the threat of global warming any time soon.⁸⁵ Any meaningful reform will likely therefore need to bypass Congress.⁸⁶

California led the way in responding to climate change with its Global Warming Solutions Act of 2006, which requires California to reduce its greenhouse gas emissions to 1990 levels by 2020.⁸⁷ When signing California's legislation, Governor Arnold Schwarzenegger declared: "California will not wait for our federal government to take strong action on global warming."⁸⁸ California's legislature similarly found that "[n]ational and international actions are necessary to fully address the issue of global warming. However, action taken by California to reduce emissions of greenhouse gases will have far-reaching effects by encouraging other states, the federal government, and other countries to act."⁸⁹ The legislature further explained that "[g]lobal warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of California. The potential adverse impacts of global warming include the exacerbation of air quality problems, a reduction in . . . the Sierra snowpack, [and] a rise in sea levels."⁹⁰

The California Global Warming Solutions Act delegated authority to the California Air Resources Board ("CARB") to create regulations to, among

⁸⁴ Daniel K. Lee & Timothy P. Duane, *Putting the Dormant Commerce Clause Back to Sleep: Adapting the Doctrine to Support State Renewable Portfolio Standards*, 43 ENVTL. L. 295, 297 (2013).

⁸⁵ See, e.g., *id.*

⁸⁶ In addition to state action, President Obama has recently announced sweeping action under the authority of the Clean Air Act, which was passed in 1970. See Coral Davenport, *Obama Builds Environmental Legacy with 1970 Law*, N.Y. TIMES (Nov. 26, 2014), <http://perma.cc/L59N-EYWV>. While this executive action is significant, it is inherently limited by the bounds of prior legislation and could be reversed by the next President.

⁸⁷ *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1079 (9th Cir. 2013).

⁸⁸ Erwin Chemerinsky et al., *California, Climate Change, and the Constitution*, 37 ENVTL. L. REP. (ENVTL. LAW INST.) 10,653, 10,654–55 (Sept. 2007) (quoting Governor Schwarzenegger).

⁸⁹ CAL. HEALTH & SAFETY CODE § 38501(d) (West 2015).

⁹⁰ *Id.* § 38501(a).

other things, reduce emissions associated with the transportation sector.⁹¹ CARB's implementing regulations create a Low Carbon Fuel Standard ("LCFS"), which assigns a carbon intensity to transportation fuel sold in the state based on the emissions generated over the fuel's lifecycle, including production, distribution, and ultimate use.⁹² Using the LCFS, CARB mandates that no entity selling transportation fuels in California can exceed a specified average annual carbon intensity rating.⁹³ If any company is unable to meet the requirement, it may purchase a credit from an entity that has an average carbon intensity rating that is below the required average. California's LCFS therefore places economic incentives on companies that sell transportation fuels in California to minimize carbon emissions during production and distribution, even when such fuels are produced in other states.⁹⁴

The LCFS analyzes the lifecycle of transportation fuels rather than exclusively looking at emissions produced during consumption because doing so is necessary to ensure that California reduces its carbon footprint.⁹⁵ California imports much of its energy, and thus if only in-state emissions are taken into account, any improvements in California could be offset by increased pollution in other states.⁹⁶ Moreover, a focus only on emissions in California would ignore the benefits of fuels such as ethanol, which reduce carbon during the production process.⁹⁷ The reduction of emissions caused by fuel consumption in California therefore requires consideration of extraterritorial conduct.

In *Rocky Mountain Farmers Union v. Goldstene*,⁹⁸ a group of companies involved in the production and distribution of ethanol filed suit in federal court against California's LCFS, arguing that it violated the dormant Commerce Clause's extraterritoriality doctrine.⁹⁹ Relying on an expansive interpretation of *Healy*, the plaintiffs argued that the California law "controls conduct that occurs wholly outside of California" because it has the practical effect of regulating, "among other things, deforestation in South America, how Midwest farmers use their land, and how ethanol plants in the Midwest produce animal nutrients."¹⁰⁰ Rather than attempt to refute the argument that the law would have practical effects on out-of-state conduct, California argued such effects

⁹¹ See *id.* § 38562(a); see also *Rocky Mountain v. Corey*, 730 F.3d at 1079.

⁹² *Rocky Mountain v. Corey*, 730 F.3d at 1081.

⁹³ CAL. CODE REGS. tit. 17, §§ 95480.1(a), 95482(b) (2015); see *Rocky Mountain v. Corey*, 730 F.3d at 1080.

⁹⁴ See CAL. CODE REGS. tit. 17, §§ 95480–90 (2015).

⁹⁵ *Rocky Mountain v. Corey*, 730 F.3d at 1081.

⁹⁶ See Chemerinsky et al., *supra* note 88, at 10,655.

⁹⁷ *Rocky Mountain v. Corey*, 730 F.3d at 1081. Although the use of ethanol pollutes at rates similar to fossil fuels, overall emissions are much lower because ethanol production requires the growth of crops such as corn that take carbon from the atmosphere.

⁹⁸ 843 F. Supp. 2d 1071 (E.D. Cal. 2011).

⁹⁹ *Id.* at 1078. Plaintiffs challenged the law on other grounds as well. They argued that it was preempted by the Clean Air Act and violated the dormant Commerce Clause by discriminating against interstate commerce and by failing the balancing test articulated in *Pike*. *Id.*

¹⁰⁰ *Id.* at 1090–91; see also Plaintiff's Memorandum in Support of Motion for Summary Judgment at 11, *Rocky Mountain v. Goldstene*, 843 F. Supp. 2d 1071 (No. 09-CV-02234), 2010 WL 5882459, at *11.

were not constitutionally significant because they were at most “indirect.”¹⁰¹ The State essentially argued that, because it directly regulated ethanol sales only in California, it could not violate the extraterritoriality doctrine.¹⁰² The State, however, did not provide the court with a clear explanation as to how its argument was consistent with the broad language found in *Healy*, a case that had also involved a statute which technically applied only to in-state sales.

The district court held that California’s LCFS violated the extraterritoriality doctrine.¹⁰³ The court correctly noted that the State’s “arguments improperly focus[ed] on whether or not the LCFS directly regulates the out-of-state entities.”¹⁰⁴ The court then quoted *Healy*’s broad formulation of the practical effects test and found that “the ‘practical effect’ of the regulation would be to control” the plaintiffs’ out-of-state conduct.¹⁰⁵ Continuing to quote *Healy*, the court further explained that, “in penalizing these practices to ‘incentiv[ize] regulated parties to change’ their conduct (including conduct occurring wholly outside of the state), [California] impermissibly attempt[ed] to ‘control conduct beyond the boundary of the state.’”¹⁰⁶ According to the court, California had extended its “police power beyond its jurisdictional bounds.”¹⁰⁷ The district court, however, provided no suggestion of how to limit the reach of *Healy*’s practical effects test. If taken literally, the court’s reasoning would therefore appear to justify striking down any statute that influenced conduct beyond its borders, a result that cannot possibly square with existing practices and precedent.

In their briefing before the Ninth Circuit, the parties did little to clear up the doctrinal confusion surrounding extraterritoriality. Instead, plaintiffs again primarily relied on a broad interpretation of *Healy*’s practical effects test.¹⁰⁸ In the alternative, plaintiffs advanced a new approach to extraterritoriality, which this author shall call the “manner of production test.” Under this test, while a state regulation may incidentally have some effects beyond its borders, “where goods in interstate commerce are identical, and will have exactly the same impacts within the state, a state may not penalize or ban their sale because of how

¹⁰¹ *Rocky Mountain v. Goldstene*, 843 F. Supp. 2d at 1091; see also Defendant’s Memorandum of Points & Authorities in Opposition to RMFU’S Motion for Summary Judgment at 14, *Rocky Mountain v. Goldstene*, 843 F. Supp. 2d 1071 (No. 09-CV-02234), 2010 WL 5882464, at *14 [hereinafter Defendant’s Memorandum of Points & Authorities] (emphasis added) (asserting that plaintiffs’ extraterritoriality argument “boils down to essentially one question: does the LCFS directly regulate commerce wholly outside of California by including lifecycle greenhouse gas emissions in its calculation of CI values?”).

¹⁰² The State explained that entities with high carbon intensities were not required to change their out-of-state practices; instead, they could simply pay for carbon credits on the state’s exchange. See Defendant’s Memorandum of Points & Authorities, *supra* note 101, at 14–17.

¹⁰³ *Rocky Mountain v. Goldstene*, 843 F. Supp. 2d. at 1091.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)).

¹⁰⁷ *Id.* at 1092 (quoting *C & A Carbone, Inc. v. Town of Clarksville*, 511 U.S. 383, 393 (1994)).

¹⁰⁸ Brief of Rocky Mountain Farmers Union Appellees at 54, *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013) (Nos. 12-15131, 12-15135), 2012 WL 3342559, at *54 (“Plaintiffs thus need show no more than that the practical effect of the LCFS is to control out-of-state activity.”).

they were made elsewhere.”¹⁰⁹ In other words, plaintiffs argued that, because all ethanol is the same once it reaches California, the State should not be able to treat it differently based on the manner in which it was produced out-of-state.¹¹⁰ For the first time on appeal, plaintiffs thus finally proposed a principle to limit *Healy*’s practical effects test.

In its brief before the Ninth Circuit, however, California convincingly argued that plaintiffs’ expansive interpretation of *Healy* was unworkable and that the manner of production test was invented from whole cloth.¹¹¹ The State then cited a number of circuit court cases to show that a state law is not invalid simply because it creates economic incentives for out-of-state actors to change their conduct.¹¹² Relying on *Walsh*, California essentially argued that the “practical effects” language from *Healy* was no longer good law.¹¹³

In *Rocky Mountain Farmers Union v. Corey*,¹¹⁴ the Ninth Circuit reversed the district court and held that California’s LCFS did not violate the extraterritoriality doctrine. Citing *Walsh*, the court held: “States may not mandate compliance with their preferred policies in wholly out-of-state transactions, but they are free to regulate commerce and contracts within their boundaries with the goal of influencing the out-of-state choices of market participants.”¹¹⁵ The court found that, because “[t]he Fuel Standard regulates only the California market,”¹¹⁶ it could not violate the extraterritoriality doctrine. Moreover, the court rejected the manner of production test by stating: “Plaintiffs point to no extraterritoriality cases where differences in the physical structure of a product was a prerequisite to regulation.”¹¹⁷

From a policy standpoint, the Ninth Circuit explained that the LCFS should be upheld because the legislature determined that a regulation that influences out-of-state conduct was necessary for California to decrease its contribution to global warming.¹¹⁸ The court explained that, while California “cannot peacefully impose its own regulatory standards on another jurisdiction,” the State “may regulate with reference to local harms, structuring its internal markets to set incentives for firms to produce less harmful products for sale in California.”¹¹⁹ In other words, the court found that California’s law was constitutional because it was a legitimate exercise of California’s police powers for the benefit of its citizens.

¹⁰⁹ *Id.* at 55.

¹¹⁰ *Id.*

¹¹¹ Appellant’s Reply Brief at 5–9, *Rocky Mountain v. Corey*, 730 F.3d 1070 (Nos. 12-15131, 12-15135), 2012 WL 4061545, at *5–9.

¹¹² *See id.* at 6–14.

¹¹³ *Id.* at 6 (“In its most recent extraterritoriality decision, the Court suggested that this doctrine may be limited to price control laws.”).

¹¹⁴ 730 F.3d at 1107.

¹¹⁵ *Id.* at 1103.

¹¹⁶ *Id.* at 1101.

¹¹⁷ *Id.* at 1104.

¹¹⁸ *Id.* at 1106.

¹¹⁹ *Id.* at 1104.

Although the court's policy analysis has merit, the Ninth Circuit's attempt to clarify the doctrinal ambiguity in extraterritoriality is not entirely convincing. By giving a state free rein to regulate in-state transactions, the majority's test would seemingly allow California to use similar regulations to force any company that sold ethanol in California to comply with its standards for sales throughout the country. Conceivably, California could also condition in-state sales on giving out-of-state workers union rights, free health care, or a certain minimum wage, even when such workers exclusively produced goods bound for non-California markets. This Article's corresponding interest requirement, however, would police against such regulations. Moreover, the Connecticut price affirmation law at issue in *Healy* would arguably survive the Ninth Circuit's test, since it technically applied only to sales in Connecticut. In short, *Rocky Mountain* seems to eviscerate the extraterritoriality doctrine, arguably in contravention of binding Supreme Court precedent such as *Healy*.

Recognizing this, Judge Milan D. Smith, joined by five other Ninth Circuit judges, vigorously argued in dissent from a denial of en banc review that the LCFS violates the extraterritoriality doctrine.¹²⁰ Citing *Healy*, Judge Smith contended:

It is no answer to assert, as the majority does, that the Fuel Standard merely provides "incentives" that might influence out-of-state conduct. By penalizing certain out-of-state practices, California's regulations control out-of-state conduct just as surely as a mandate would, particularly in view of California's economic clout. Thus, whether California's scheme is characterized as providing "incentives" or establishing "mandates," it has the practical effect of regulating interstate commerce. And, under the dormant Commerce Clause, "[t]he critical inquiry is whether the *practical effect* of the regulation is to control conduct beyond the boundaries of the State."¹²¹

The dissent, however, seems to commit the opposite error—like the plaintiffs, it advocated for an implausibly expansive interpretation of *Healy*'s practical effects test that would have the potential to invalidate most state economic regulation.

The litigation over California's LCFS demonstrates the desperate need for clarity in the extraterritoriality doctrine. Strongly supported by language from the Supreme Court, the plaintiffs advanced an argument that would logically invalidate any state regulation that affects out-of-state conduct. The State, however, defended its legislation by citing precedent suggesting that states have free rein to regulate conduct in other states, so long as they do not do so directly. Faced with this conflicting precedent, the federal judges not only were

¹²⁰ *Rocky Mountain Farmers Union v. Corey*, 740 F.3d 507, 512 (9th Cir. 2014) (Smith, J., dissenting from denial of rehearing en banc). A sixth judge, Judge Murguía, joined the dissent in part. See *id.*

¹²¹ *Id.* at 518 (citation omitted) (quoting *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989)).

unable to agree on the proper outcome, but they also could not agree on a plausible approach to guide future decisions.

This lack of doctrinal clarity is not merely an academic matter. Although the Supreme Court denied certiorari in *Rocky Mountain*,¹²² a number of other states are passing legislation similar to California's Global Warming Solutions Act.¹²³ Other courts will confront this issue again, and the Supreme Court could intervene once the landscape of state legislation is more settled. Moreover, as the next section details, these same extraterritoriality issues are arising in other contexts as well.

B. California's Farm Animal Welfare Legislation

California's recent farm animal welfare legislation, and the resulting litigation, closely parallels the battle over California's Global Warming Solutions Act. As with carbon emissions, Congress has done little to address the issue of farm animal welfare. Although federal law protects companion animals,¹²⁴ animals used in experiments,¹²⁵ and some wild animals,¹²⁶ it affords virtually no protection to farm animals prior to slaughter.¹²⁷ Until relatively recently, state law also typically provided virtually no protections for farm animals.¹²⁸ Moreover, the agricultural industry has been reluctant to regulate itself, as the market places incentives on farms to produce the cheapest possible products, with little or no regard to animal welfare.¹²⁹

¹²² *Rocky Mountain Farmers Union v. Corey*, 134 S. Ct. 2875 (2014) (mem.).

¹²³ Minnesota's Next Generation Energy Act, for example, is discussed *supra* notes 76–79 and accompanying text.

¹²⁴ Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (2012).

¹²⁵ *Id.*

¹²⁶ See, e.g., Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (2012); Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2012).

¹²⁷ Only two federal statutes apply to farm animals: the Humane Methods of Livestock Slaughter Act, 7 U.S.C. §§ 1901–1907 (2012), and the Twenty-Eight Hour Act, 49 U.S.C. § 80502 (2012). Each statute is extremely limited in scope. The Humane Methods of Livestock Slaughter Act regulates only the ultimate act of slaughter and does not apply to poultry. 7 U.S.C. § 1902. Moreover, the Twenty-Eight Hour Act regulates only the length of time livestock can be confined during travel. 49 U.S.C. § 80502(a). Even these limited federal regulations are notoriously under-enforced. See Samantha Mortlock, *Standing on New Ground: Underenforcement of Animal Protection Laws Causes Competitive Injury to Complying Entities*, 32 Vt. L. Rev. 273, 273–77 (2007). The Humane Society and the United Egg Producers have agreed to push for a new federal law governing the size of cages for egg-laying hens that would eliminate the use of battery cages. See JOEL L. GREEN & TADLOCK COWAN, CONG. RESEARCH SERV., R42534, TABLE EGG PRODUCTION AND HEN WELFARE: AGREEMENT AND LEGISLATIVE PROPOSALS 1 (2014). This legislation, however, has been blocked in large part due to opposition from other agricultural interests that are worried such a bill could set a precedent for future federal animal welfare standards. *Id.* at 15.

¹²⁸ In most states, animal cruelty statutes do not apply to agricultural animals, and, where such laws do apply, the term “cruelty” is typically defined to reflect rather than change agricultural practices. See Colin Kreuziger, *Dismembering the Meat Industry Piece by Piece: The Value of Federalism to Farm Animals*, 23 LAW & INEQ. 363, 374–76 (2005).

¹²⁹ See Sean P. Sullivan, *Empowering Market Regulation of Agricultural Animal Welfare Through Product Labeling*, 19 ANIMAL L. 391, 404–05, 418–19 (2013); Jeff Leslie & Cass Sunstein, *Animal Rights Without Controversy*, 70 LAW & CONTEMP. PROBS. 117, 118 (2007). Although most Americans oppose common practices such as small gestation crates for pregnant sows and the

Over the last decade, a number of states have filled this void by prohibiting some of the most extreme and controversial practices of livestock confinement. Arizona, California, Colorado, Florida, Maine, Michigan, Ohio, Oregon, and Rhode Island have each passed legislation phasing out the use of gestation crates for pregnant pigs.¹³⁰ A gestation crate is a metal stall placed over a concrete floor that is only slightly larger than the sow.¹³¹ Breeding sows are typically placed in gestation crates for the entirety of their four-month pregnancies.¹³² Because breeding sows are generally impregnated less than a month after their last birthing, the sows spend the majority of their lives in these small crates.¹³³ Many of the same states that ban gestation crates for breeding sows also prohibit the use of veal crates, which are stalls used to house young beef calves.¹³⁴ Like gestation crates, veal crates are only slightly larger than the animal, making it virtually impossible for the calf to move.¹³⁵

California and Michigan have also passed laws regulating the size of cages used to house egg-laying chickens.¹³⁶ In the absence of such legislation, most of these birds are housed in what is known as a “battery cage,” a barren wire cage that typically holds five to ten birds and provides each bird with an amount of space equivalent to a standard sheet of notebook paper.¹³⁷ California, for example, banned each of these practices through a ballot initiative passed in 2008. Now codified as the Prevention of Farm Animal Cruelty Act, it dictates that calves raised for veal, pregnant pigs, and egg-laying chickens must be raised in a manner that allows the animals to lie down, stand up, fully extend their limbs, and turn around freely.¹³⁸ The Act became effective in 2015.

California has also banned the practice of force-feeding birds, a technique that is used in the production of foie gras, a delicacy made from an engorged

intense confinement of egg-producing chickens, consumers have largely failed to use their purchasing power to create incentives for farms to change. See Sullivan, *supra*, at 406; Leslie & Sunstein, *supra*, at 119; David J. Wolfson & Marian Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 205, 225 (Cass Sunstein & Martha Nussbaum eds., Oxford Univ. Press 2000). This is not necessarily because consumers are unwilling to pay for animal welfare; instead, the market is unable to function efficiently because consumers have imperfect knowledge. Sullivan, *supra*, at 422. Not only are most consumers ignorant of modern farming practices, but even when they do have such information, they are largely unable to use their purchasing power to express their preferences. *Id.* at 416. Although food packaging occasionally contains information regarding the treatment of livestock, consumers generally do not understand or trust this labeling information. *Id.* at 410.

¹³⁰ ARIZ. REV. STAT. ANN. § 13-2910.07 (2006); CAL. HEALTH & SAFETY CODE §§ 25990-94 (West 2015); COLO. REV. STAT. ANN. §§ 35-50.5-101-103 (West 2015); FLA. CONST. art. X, § 21; ME. REV. STAT. tit. 7, § 4020 (2015); MICH. COMP. LAWS § 287.746 (2015); OHIO ADMIN. CODE 901:12-8 (2014); OR. REV. STAT. § 600.150 (2015); R.I. GEN. LAWS § 4-1.1-3 (2014).

¹³¹ See Wolfson & Sullivan, *supra* note 129, at 218.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Arizona, Colorado, California, Maine, Michigan, Ohio, and Rhode Island have all taken measures to phase out the use of veal crates. See statutes cited *supra* note 130.

¹³⁵ Wolfson & Sullivan, *supra* note 129, at 218-19.

¹³⁶ See GREEN & COWAN, *supra* note 127, at 23-25.

¹³⁷ *Id.* at 7.

¹³⁸ CAL. HEALTH & SAFETY CODE §§ 25990-94 (West 2015).

duck or goose liver.¹³⁹ During this process, the bird is force-fed through a metal tube inserted into its throat.¹⁴⁰ The California foie gras law was passed in 2004 and became effective in 2012.¹⁴¹

Most states, however, have not enacted such animal welfare legislation. In fact, the largest producers of pork, veal, and eggs are notably absent from the list of states passing livestock protection laws. The three largest producers of pork, for example, are Iowa, Minnesota, and Illinois,¹⁴² and the three largest producers of eggs are Iowa, Ohio, and Indiana.¹⁴³ California is the only state that both is a leading national producer of farm animal products and has passed animal protection laws regulating the conditions in which such animals are raised.¹⁴⁴ Because the markets for most animal products are national, most products sold in stores throughout the country are from animals that were subjected to intense confinement. As a result, although California's Prevention of Farm Animal Cruelty Act may stop inhumane practices on California farms, it has little effect on the manner in which most of the animals consumed by Californians are raised.

Because of this inherent limitation on in-state regulations, California also enacted two laws banning, not just the use of inhumane practices in California, but also the in-state *sale* of any products derived from such practices. In 2005, California passed a law prohibiting the sale of foie gras in the state. Specifically, it provides: "A product may not be sold in California if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size."¹⁴⁵ This law took effect in 2012. Moreover, in 2010, California passed AB 1437, which requires that all eggs sold in the state comply with the requirements of the Prevention of Farm Animal Cruelty Act.¹⁴⁶ In other words, each egg sold in California must be from a hen that was raised in a manner that allowed the hen to lie down, stand up, fully extend its limbs, and turn around

¹³⁹ *Id.* §§ 25980–84.

¹⁴⁰ *See Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 937, 942 (9th Cir. 2013).

¹⁴¹ In January 2015, however, a federal district court held that the law is preempted by the federal Poultry Products Inspection Act, 21 U.S.C. §§ 451–70 (2012), and the court therefore enjoined its enforcement. *See Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, No. 2:12-cv-5735-SVW-RZ, 2015 WL 191375, at *10 (C.D. Cal. Jan 7, 2015). As of the time of this writing, the district court's order was being reviewed on appeal.

¹⁴² *Pork Facts*, NAT'L PORK PRODUCERS COUNCIL, <http://perma.cc/QJ44-6Z35>.

¹⁴³ *About the U.S. Egg Industry*, AM. EGG BD., <http://perma.cc/3YUT-8UQ4>; NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., CHICKENS AND EGGS 8–11 (2015), <http://perma.cc/VLM4-VUTP>. Although Ohio passed regulations banning the use of gestation crates by 2025, it does not regulate the size of cages for egg-laying hens. *See GREEN & COWAN, supra* note 127, at 23–24 (listing only legislation in California and Michigan); *State Legislation*, FARM SANCTUARY, <http://perma.cc/MJD2-WC47>.

¹⁴⁴ California is ranked sixth in the nation in egg production, with approximately 14,669,000 egg-laying hens. *About the U.S. Egg Industry, supra* note 143.

¹⁴⁵ CAL. HEALTH & SAFETY CODE § 25982 (West 2015).

¹⁴⁶ Cal. Assem. Bill No. 1437 (2009–2010 Reg. Sess.); CAL. HEALTH & SAFETY CODE § 25996.

freely.¹⁴⁷ Failure to comply with the statute is a misdemeanor punishable by a fine of \$1,000, a jail term not to exceed 180 days, or both.¹⁴⁸

Although a state unquestionably has the power to regulate the conditions in which livestock are raised in-state, California's more aggressive prohibitions on the sale of foie gras and eggs laid by hens raised in battery cages have been challenged in federal court. The plaintiffs in each case argue, among other things, that the legislation violates the dormant Commerce Clause by regulating extraterritorial conduct.¹⁴⁹ Essentially, the plaintiffs contend that California cannot tell farmers in other states how to raise their livestock.

The day after California's ban on the sale of foie gras came into effect, a California restaurant and two out-of-state companies that raise ducks used to produce foie gras filed a federal lawsuit seeking to enjoin enforcement of the law.¹⁵⁰ After the district court denied the foie gras companies' motion for a preliminary injunction, they filed an interlocutory appeal to the Ninth Circuit.¹⁵¹

In their brief to the Ninth Circuit, the foie gras companies argued that California's ban on the sale of foie gras violated the extraterritoriality doctrine because "the practical effect—and perhaps the very purpose—of section 25982 is to project California's preferred agricultural practices on farmers outside the state."¹⁵² According to the foie gras companies, "[i]f section 25982 were to survive this constitutional challenge, it would open the floodgates to economic Balkanization, with every state welcome to start banning imports of USDA-approved products and commodities that were not produced using that state's preferred practices."¹⁵³ Like the ethanol companies in *Rocky Mountain*, the foie gras companies argued that, while California can ban the sale of products due to concerns about how those products will affect Californians, it cannot ban a healthy product because of how that product was created in another state.¹⁵⁴

The Ninth Circuit, however, rejected the foie gras companies' argument and held that California's ban on the sale of foie gras did not violate the extraterritoriality doctrine.¹⁵⁵ The court found that California's statute did not have the purpose of targeting out-of-state conduct; instead, the law was designed to

¹⁴⁷ CAL. HEALTH & SAFETY CODE §§ 25990–96.

¹⁴⁸ *Id.* § 25997.

¹⁴⁹ See *Missouri v. Harris*, No. 2:14-cv-00341-KJM-KJN, 2014 WL 4961473, at *2, *8 n.5 (E.D. Cal. Oct. 2, 2014); *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 937, 949 (9th Cir. 2013). Plaintiffs in *Missouri v. Harris* also contended that the California legislation is preempted by federal law, see 2014 WL 4961473, at *3–4, and in *Ass'n des Éleveurs*, plaintiffs argued that the legislation violates the dormant Commerce Clause by discriminating against out-of-state business, see 729 F.3d at 947. These arguments are outside the scope of this Article.

¹⁵⁰ *Ass'n des Éleveurs*, 729 F.3d at 942.

¹⁵¹ *Id.* at 943.

¹⁵² Appellant's Opening Brief at 20, *Ass'n des Éleveurs*, 729 F.3d 937 (No. 12-56822), 2012 WL 5915406, at *20.

¹⁵³ *Id.*

¹⁵⁴ Similarly, the foie gras companies argued that the law imposed a burden on the poultry market without any corresponding local benefit because "not a single duck or goose in California is protected by applying section 25982 to . . . ducks and geese born, raised, and slaughtered entirely outside the state." *Id.* at *22.

¹⁵⁵ See *Ass'n des Éleveurs*, 729 F.3d at 949–50. The court also held that the statute was nondiscriminatory and was not preempted. *Id.* at 948.

prevent the production or purchase of foie gras in California.¹⁵⁶ The court explained: “the State believed that the sales ban in California may discourage the consumption of products produced by force feeding birds and prevent complicity in a practice that it deemed cruel to animals.”¹⁵⁷ Moreover, the court held that the plaintiffs had not shown that the law would have the practical effect of regulating out-of-state conduct: Because the plaintiffs could simply sell foie gras in other states, California’s law did not have the effect of dictating requirements for the national market.¹⁵⁸ The Supreme Court denied the foie gras companies’ petition for certiorari on October 14, 2014.¹⁵⁹

Litigation over California’s egg law parallels the foie gras case. In February 2014, the State of Missouri filed a lawsuit in the U.S. District Court for the Eastern District of California to enjoin the enforcement of California’s egg law.¹⁶⁰ In this case, styled *Missouri v. Harris*,¹⁶¹ Missouri argued that California’s egg law violates the dormant Commerce Clause by, among other things, regulating extraterritorial conduct.¹⁶² The complaint explained:

As the second largest exporter of shell eggs to California, Missouri farmers face a difficult choice regarding AB1437. Either they can incur massive capital improvement costs to build larger habitats for some or all of Missouri’s seven million egg-laying hens, or they can walk away from the state whose consumers bought *one third* of all eggs produced in Missouri last year.¹⁶³

The complaint further asserted that, because of fluctuating regional demand “most Missouri egg farmers will choose either to bring their entire operations into compliance with AB1437 so that they always have enough supply to meet California demand, or else simply leave the California marketplace.”¹⁶⁴ Nebraska, Alabama, Kentucky, Oklahoma, and Iowa joined the suit.¹⁶⁵ *Missouri* was pressed as a test case, because many in the agricultural sector are concerned that a victory with respect to poultry could lead to similar measures with respect to gestation and veal crates.¹⁶⁶

Like in the ethanol and foie gras litigation, the parties in *Missouri* advanced drastically different interpretations of the extraterritoriality doctrine. In its motion to dismiss, California relied on *Rocky Mountain* to argue that the State may regulate the sale of eggs within its borders “with the goal of influ-

¹⁵⁶ *Id.* at 949.

¹⁵⁷ *Id.* at 952.

¹⁵⁸ *Id.* at 950.

¹⁵⁹ *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Harris*, 135 S. Ct. 398 (2014) (mem.).

¹⁶⁰ Complaint at 2, *Missouri v. Harris*, 2014 WL 4961473 (E.D. Cal. Oct. 2, 2014) (No. 2:14-cv-00341-KJM-KJN), 2014 WL 840950.

¹⁶¹ No. 2:14-cv-00341-KJM-KJN, 2014 WL 4961473 (E.D. Cal. Oct. 2, 2014).

¹⁶² Complaint, *supra* note 160, at 4.

¹⁶³ *Id.* at 3.

¹⁶⁴ *Id.* at 15.

¹⁶⁵ See First Amended Complaint at 2, *Missouri*, 2014 WL 4961473 (No. 2:14-cv-00341-KJM-KJN), 2014 WL 1245038.

¹⁶⁶ See Lorelei Laird, *California’s Ban on Standard-Caged Birds Poses a Chicken-Egg Problem*, ABA JOURNAL (June 1, 2014), <http://perma.cc/36QC-MWHX>.

encing the out-of-state choice of market participants.”¹⁶⁷ Moreover, the Association of California Egg Farmers, which intervened in the case, argued that the case is indistinguishable from the Ninth Circuit’s opinion upholding the ban on foie gras.¹⁶⁸ Just as the foie gras law did not require the companies to stop force feeding birds, “[n]othing prevents out-of-state producers from using their preferred hen cages and selling eggs in other states.”¹⁶⁹ The Association further asserted: “To the extent AB 1437 and § 1350 have an indirect economic effect on out-of-state egg producers, that is of no constitutional significance.”¹⁷⁰

Missouri, however, relied on cases like *Healy* to argue that the court must look to the practical effect of the statute to determine if it regulates extraterritorially.¹⁷¹ Applying this rule, Missouri contended that, “[a]s a practical matter, AB1437 regulates commerce occurring entirely outside of California by forcing egg farmers in Plaintiff States to change their production methods to comply with California law.”¹⁷²

As this litigation demonstrates, the lack of doctrinal clarity allows the parties to give the court drastically different interpretations of the extraterritoriality doctrine. Relying on one line of authority, California essentially asserted that it is not violating the doctrine because it is only directly regulating in-state egg sales. Missouri, however, relied on conflicting authority to argue that the law is unconstitutional because its practical effect is to force Missourians to change their agricultural practices. Although California’s position is perhaps better supported by Ninth Circuit precedent like *Rocky Mountain*, the dissenting opinions in the denial of en banc review suggest that certain panels may not be interested in extending *Rocky Mountain*’s holding. Extraterritoriality’s doctrinal incoherence therefore makes this litigation confusing and unpredictable.

The district court, however, recently dismissed *Harris* on standing grounds without reaching the merits of Missouri’s extraterritoriality claim.¹⁷³ This dismissal, of course, does not resolve the underlying issue. Missouri has appealed the ruling,¹⁷⁴ and private egg farmers would undoubtedly have standing to challenge California’s law and thus may file a separate suit in the future. California’s law therefore remains vulnerable to attack under existing doctrine,

¹⁶⁷ Motion to Dismiss First Amended Complaint at 13, *Missouri*, 2014 WL 4961473 (No. 2:14-cv-00341-KJM-KJN), 2014 WL 1651868 (quoting *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1103 (9th Cir. 2013)) (internal quotation marks omitted).

¹⁶⁸ Memorandum of Law in Support of (Proposed) Motion to Dismiss or for Judgment on the Pleadings of Proposed Defendant-Intervenor Assoc. of California Egg Farmers at 1, *Missouri*, 2014 WL 4961473 (No. 2:14-cv-00341-KJM-KJN), 2014 WL 2142170.

¹⁶⁹ *Id.* at 10.

¹⁷⁰ *Id.* at 11.

¹⁷¹ Plaintiffs’ Amended Combined Opposition to Defendants’ Motion to Dismiss and Proposed Defendant-Intervenor HSUS’s Proposed Motion to Dismiss, Proposed Defendant-Intervenor ACEF’s Proposed Motion for Judgment on the Pleadings at 30, *Missouri*, 2014 WL 4961473 (No. 2:14-cv-00341-KJM-KJN), 2014 WL 2745030, at *30.

¹⁷² *Id.*

¹⁷³ *Missouri*, 2014 WL 4961473, at *17. The court reasoned that Missouri and the other states that joined the suit lacked standing because they brought suit on behalf of a discrete group of egg farmers rather than the well-being of their residents in general. *Id.* at *11.

¹⁷⁴ Notice of Appeal and Representation Statement, *Missouri*, 2014 WL 4961473 (No. 2:14-cv-00341-KJM-KJN), ECF No. 104.

creating uncertainty in the egg industry. Moreover, the constitutionality of any similar legislation being considered in other states or covering other animals also remains in doubt.

C. Applying This Article's Doctrinal Test

This Article's interpretation of the extraterritoriality doctrine would provide a consistent and coherent approach to cases like *Rocky Mountain* and *Harris*.¹⁷⁵ Like the labelling cases, California's legislation only has the inescapable effect of regulating products bound for the California market.¹⁷⁶ Just as the Second Circuit suggested that the manufacturers in *Sorrell* could operate separate facilities for Connecticut-compliant light bulbs,¹⁷⁷ farmers can keep chickens laying eggs bound for California in separate cages and ethanol companies theoretically could operate separate facilities for ethanol bound for California markets. As the Second Circuit explained in *Sorrell*,¹⁷⁸ any increased cost resulting from such inefficiency theoretically could be passed on to California consumers.¹⁷⁹ If passing the cost on is not possible, the out-of-state companies could simply decide to stop selling in California.¹⁸⁰

Although California's legislation does have the inescapable effect of regulating the production of goods bound for California, the state likely has a corresponding interest in the manner in which such products are made. As detailed above, the LCFS targets the lifecycle of ethanol because any policy that ignores out-of-state pollution would be wholly ineffective at reducing the emissions caused by Californians.¹⁸¹ And, as the California legislature explained when it passed the Global Warming Solutions Act, the State has a vital interest in re-

¹⁷⁵ The case would also be easy to resolve if the legislation were found to discriminate against out-of-state commerce. As noted above, discriminatory legislation is subject to a strong presumption of unconstitutionality. See *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 359 (1992).

¹⁷⁶ See cases cited *supra* notes 46–54 and accompanying text.

¹⁷⁷ *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 111 (2d Cir. 2001); see also *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 647 (6th Cir. 2010).

¹⁷⁸ 272 F.3d at 110.

¹⁷⁹ Although Missouri alleged that it would be prohibitively expensive to have separate production lines for California products (and the same would no doubt be true for ethanol producers), the court in *Sorrell* rejected similar arguments. *Id.* at 110–11. The extraterritoriality principle concerns the allocation of power in our federal system, and therefore the important point is that California has not used its power actually to regulate the out-of-state production process.

¹⁸⁰ The court in *Sorrell* explained:

But in every such case, a decision to abandon the state's market rests entirely with individual manufacturers based on the opportunity cost of capital, their individual production costs, and what the demand in the state will bear. Because none of these variables is controlled by the state in this case, we cannot say that the choice to stay or leave has been made for manufacturers by the state legislature, as the Commerce Clause would prohibit.

Id. at 111.

¹⁸¹ See *supra* text accompanying notes 95–96. *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794–95 (8th Cir. 1990), discussed *supra* Part I, supports the proposition that a state's interest in environmental protection is sufficient to justify extraterritorial regulation.

ducing carbon emissions to spur others into action and protect the environment.¹⁸² Similarly, because most of the eggs sold in California were produced in other states, targeting out-of-state production is needed to provide healthy eggs and prevent Californians from consuming the products of animal cruelty.¹⁸³ California's legislation therefore likely has the inescapable effect of regulating only out-of-state conduct in which California has a corresponding interest.

III. CONSTITUTIONAL THEORY AND EXTRATERRITORIALITY

So far, this Article has discussed doctrine, precedent, and ongoing litigation while giving short shrift to underlying issues of policy and constitutional theory. This Part more fully explores these issues while arguing that this Article's proposed extraterritoriality test is superior to the competing interpretations advanced in the California litigation.

A. *The Need for a Limited Extraterritoriality Doctrine*

Although scholars and jurists have questioned the need for a separate extraterritoriality doctrine,¹⁸⁴ it is an important part of our federal system. The Supreme Court has explained that the doctrine is based on the fundamental principle that "[n]o state can legislate except with reference to its own jurisdiction."¹⁸⁵ Accordingly, "[t]he limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, 'any attempt "directly" to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.'"¹⁸⁶ The extraterritoriality doctrine therefore "reflect[s] the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres."¹⁸⁷ In other words, extraterritoriality helps preserve federalism by ensuring that the states do not exceed their sphere of sovereign power. The courts should not

¹⁸² See *supra* note 89 and accompanying text.

¹⁸³ Cf. *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 648 (6th Cir. 2010) (upholding Ohio labeling requirements for the safety of milk).

¹⁸⁴ See *supra* note 3.

¹⁸⁵ *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881).

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

¹⁸⁷ *Healy v. Beer Inst.*, 491 U.S. 324, 335–36 (1989). Similarly, the Court in *BMW* stated: "We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996) (emphasis added). Although the Court has based limitations on punitive damages in the Due Process Clause rather than the dormant Commerce Clause, see *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003), the Court's limitations on punitive damages are based in the same fundamental federalism concerns. See Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L. REV. 1, 13–30 (2004).

abandon such a fundamental doctrine merely because they have had trouble defining it, as some scholars contend.¹⁸⁸

Once extraterritoriality is recognized as a means of protecting state sovereignty, a broad conception of the doctrine also becomes untenable. A strong interpretation of *Healy's* "practical effects" test, as advocated by the plaintiffs in the California litigation, would prohibit the states from passing legislation that has consequences beyond its borders. However, "[t]he modern reality is that the States frequently regulate activities that occur entirely within one State but that have effects in many."¹⁸⁹ As a result, an expansive interpretation of the *Healy* test would invalidate too much state legislation. This is problematic, not just because expansive interpretation would dramatically alter the status quo, but also because it would undermine state sovereignty by prohibiting states from passing legislation to address serious in-state issues. If "the State governments [are to] remain, and constitute a most important part of our system," as Justice Marshall asserted in *Gibbons v. Ogden*,¹⁹⁰ the states must have the power to regulate in-state conduct even when such regulations have out-of-state effects.

The narrow interpretation of extraterritoriality endorsed by California and the Ninth Circuit, however, is similarly problematic. If a state is completely free to indirectly regulate out-of-state conduct so long as it only directly regulates an in-state transaction, one state will be able to regulate much of the country. California could, for example, require any company that does business in California to certify that all of its animals, no matter where they are sold, were raised in California-compliant conditions. Further, California could require that companies doing business in California, for example, give their workers union rights, a certain minimum wage, or free health care throughout their global operations, even with respect to goods that are not sold in California. Such actions, however, seem to violate the Constitution's implicit command that "[n]o state can legislate except with reference to its own jurisdiction."¹⁹¹ A narrow interpretation of the extraterritoriality doctrine would therefore render it unable to fulfill its intended purpose of ensuring that a state does not exceed its sphere of sovereign authority.

This Article's proposed doctrine avoids these problems. To summarize, this Article contends that the extraterritoriality doctrine should apply only when the state directly regulates out-of-state conduct or the state regulates in-state conduct in such a way that it has the inescapable practical effect of regulating out-of-state conduct in which the state has no corresponding interest. Unlike the expansive test advanced by the plaintiffs in the California litigation, this Article's approach would allow states to pass meaningful legislation to address in-

¹⁸⁸ See Chad DeVeaux, *Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause*, 79 GEO. WASH. L. REV. 995, 1016 (2011) (noting that "many scholars find the Commerce Clause's extraterritoriality prohibition improvident," but arguing that the doctrine serves the necessary purpose of protecting state sovereignty).

¹⁸⁹ *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 379 (6th Cir. 2013) (Sutton, J., concurring).

¹⁹⁰ 22 U.S. 1, 199 (1824).

¹⁹¹ *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881).

state concerns. For example, California could pass laws governing the wages of in-state workers, the condition of livestock in California, and emissions in California. Although such laws would likely have “practical effects” in other states, they would not inescapably force out-of-state actors to change their conduct.

This Article’s proposed doctrine also provides a meaningful way in which to limit state power. Unlike California’s narrow interpretation, the proposed doctrine would prevent a state from imposing its regulations on goods or services produced, transported, and consumed out-of-state. For example, while California could effectively regulate products on a Missouri farm bound for California, it could not condition California sales on the Missouri farmer following the same regulations for his products sold to consumers in Florida. Limiting state power in such a manner would fit with the extraterritoriality doctrine’s role in preserving state sovereignty within our federal system. Whereas the plaintiffs’ expansive interpretation of the practical effects test would essentially take away the states’ power to pass meaningful economic legislation, the state interest requirement would not undermine state sovereignty. And, although our federalism depends on a state having the power to regulate for the protection of its residents, federalism does not contemplate that one state will regulate for the benefit of other states.¹⁹² In fact, the proposed doctrine would further state sovereignty by preventing states from exercising power beyond their proper spheres of authority.

*B. Why This Article’s Proposed Doctrine Is Superior
to the Manner of Production Test*

Although the plaintiffs in the California litigation primarily argued that any state law with extraterritorial practical effects was unconstitutional, they also presented a more limited test in the alternative. The plaintiffs in *Rocky Mountain* argued on appeal that “where goods in interstate commerce are identical, and will have exactly the same impacts within the state, a state may not penalize or ban their sale because of how they were made elsewhere.”¹⁹³ Similar arguments could be used in the foie gras and egg litigation. Under this “manner of production test,” although California can regulate a product for the purpose of ensuring it is safe and healthy for Californians, the state cannot regulate a product based only on the manner in which it was produced in another state. For example, while California can regulate the handling and packaging of eggs sold in California to prevent salmonella, California cannot regulate the size of the hens’ cages because, when the eggs are imported into California, they are indistinguishable from eggs laid by chickens with larger cages.¹⁹⁴

¹⁹² See *Edgar v. MITE*, 457 U.S. 624, 643 (1982).

¹⁹³ Brief of Rocky Mountain Farmers Union Appellees, *supra* note 108, at 55.

¹⁹⁴ Although California argues that eggs produced through the use of battery cages are less healthy, the plaintiffs argue this is a pretextual justification for the law. See Plaintiff’s Opposition to Defendants’ Motion to Dismiss and Proposed Defendant-Intervenor HSUS’s Proposed Motion

An amicus brief in the *Rocky Mountain* case filed by a group of law professors more fully developed the theoretical justification for this alternative approach to extraterritoriality.¹⁹⁵ The professors began by establishing that, “under our federal system, the states are coequal sovereigns, and no state may exercise authority over another.”¹⁹⁶ In other words, “the sovereignty of each State implies a limitation on the sovereignty of all of its sister States.”¹⁹⁷

California infringes on the sovereignty of its sister states, the professors asserted, because the LCFS seeks to regulate out-of-state conduct when such conduct has no “effect on the properties of the ethanol ultimately imported into and used in California.”¹⁹⁸ According to the law professors, California cannot control out-of-state conduct to solve a national problem that “visit[s] an undifferentiated, general injury on the nation as a whole.”¹⁹⁹ The professors contended that California can seek to influence out-of-state conduct only when such conduct causes specific and identifiable in-state harm.²⁰⁰ For example, California presumably could ban a new form of fuel that caused excessive pollution to control smog in Los Angeles; however, the State cannot regulate the out-of-state production of ethanol to address global warming. Regardless of how the ethanol was produced, ethanol use in California will cause the same level of pollution, and thus the production method causes no specific or identifiable harm in California. According to the law professors, the LCFS infringes on the sovereignty of other states by essentially regulating the production of ethanol in those states to address a global problem as opposed to a problem that is unique to California.²⁰¹ The Ninth Circuit ultimately rejected the manner of production test, however, because it lacked precedential support.²⁰²

More significantly, the policy interest motivating the plaintiffs and the amici law professors—state sovereignty—is better protected by this Article’s proposal than by the manner of production test. Black’s Law Dictionary defines “state sovereignty” as “supreme political authority” or the “right of a state to self-government.”²⁰³ As the Supreme Court explained in *Printz v. United States*:²⁰⁴ “Although the States surrendered many of their powers to the new

to Dismiss at 21, *Missouri v. Harris*, 2014 WL 4961473 (E.D. Cal. 2014) (No. 2:14-cv-00341-KJM-KJN), 2014 WL 2142174. For the sake of argument, this Article assumes that eggs produced from battery cages are identical to eggs from larger cages.

¹⁹⁵ See generally Brief of Amici Curiae Law Professors, *supra* note 11.

¹⁹⁶ *Id.* at 2.

¹⁹⁷ *Id.* at 13 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980)).

¹⁹⁸ *Id.* at 12. In *Rocky Mountain*, the plaintiffs similarly argued that the LCFS should be struck down because “ethanol is ‘fungible,’ with the same physical and chemical properties, no matter how or where it is produced.” Brief of Rocky Mountain Farmers Union Appellees, *supra* note 108, at 66.

¹⁹⁹ Brief of Amici Curiae Law Professors, *supra* note 11, at 14.

²⁰⁰ *Id.* at 14–15.

²⁰¹ *Id.*

²⁰² *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1104 (9th Cir. 2013) (“Plaintiffs point to no extraterritoriality cases where differences in the physical structure of a product was a prerequisite to regulation.”). In contrast, this Article’s proposal is strongly supported by precedent from the Supreme Court and a number of circuit courts.

²⁰³ BLACK’S LAW DICTIONARY 1631 (10th ed. 2014).

²⁰⁴ 521 U.S. 898 (1997).

Federal Government, they retained a residuary and inviolable sovereignty.”²⁰⁵ Subject to the powers granted to the federal government, the Constitution therefore recognizes the “States as independent political entities” in all other respects.²⁰⁶ The sovereign power of the states, often referred to as the “police power,” is a general power to legislate for the health, welfare, and morals of its citizens, and is restricted only by the limitations provided in the Constitution.²⁰⁷

The law professors’ argument depends on a view of state sovereignty that is both too narrow and too broad. With respect to California, their argument relies on a narrow view of state power to regulate in-state conduct. According to the professors, California sought to reduce out-of-state emissions related to ethanol production and distribution “solely because those practices visit an undifferentiated, general injury on the nation as a whole and California is part of the nation.”²⁰⁸ This is a rather uncharitable characterization of California’s actions. California is not simply regulating random out-of-state conduct to solve a global problem. Instead, California is regulating in-state sales to reduce the emissions associated with in-state consumption.²⁰⁹ As explained above, if California does not account for the lifecycle of the fuel used by Californians, its regulations will be ineffective at reducing the emissions associated with in-state use.²¹⁰ The LCFS is thus an exercise of California’s sovereign power to reduce the harmful consequences of purely in-state fuel usage. Seemingly lost from the professors’ argument is that ruling against the LCFS would limit the sovereign power of California to address the harm caused by its citizens’ in-state actions.

Similarly, if California lacks the power to ban the sale of eggs from chickens raised in battery cages, California will lose the power to protect the morals of its citizens. California imports nearly half of its eggs from other states.²¹¹ A ban only on the in-state use of battery cages would therefore be ineffective at preventing California’s residents from eating eggs from chickens raised in battery cages and thus participating in animal cruelty. The only way California can protect the morals of its citizens by ending complicity with animal cruelty is to pass legislation like the egg law. If such a law is found unconstitutional, California’s sovereign power will be diminished.

While the law professors’ amicus brief fails to fully account for California’s sovereign power, it inflates the extent to which legislation like the LCFS or the egg law interferes with the sovereignty of other states. Quite simply, this legislation does not limit any other states’ ability to use their political power to regulate internal affairs. Ohio, for example, remains perfectly free to pass regulations governing ethanol and egg production without any legal requirement to abide by California’s legislation. From the perspective of ensuring a proper al-

²⁰⁵ *Id.* at 918–19 (quoting THE FEDERALIST NO. 39 (James Madison)).

²⁰⁶ *Id.* at 919.

²⁰⁷ See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012).

²⁰⁸ Brief of Amici Curiae Law Professors, *supra* note 11, at 14.

²⁰⁹ See *supra* notes 87–97 and accompanying text.

²¹⁰ See *supra* text accompanying notes 95–96.

²¹¹ See First Amended Complaint, *supra* note 165, at 10 (asserting that California produces about five billion eggs per year and imports about four billion eggs from other states).

location of state sovereignty in our federal system, the courts therefore should focus on whether California has exceeded its sovereign authority rather than whether the sovereign power of other states has been invaded. For the reasons discussed above, California has not done so because it has regulated in-state sales to regulate out-of-state conduct only when necessary to achieve a legitimate in-state purpose.

The real problem raised by the plaintiffs and the amicus law professors therefore is not that California has reduced the political power of other states, but instead that California is not treating the laws of other states with equal respect. When California bans the in-state sale of eggs produced in Missouri because the use of battery cages is cruel rather than because the eggs are inferior, California is not limiting the police power of Missouri. Instead, California is refusing to give equal respect to the laws of Missouri by essentially proclaiming that Missouri law is unfit for Californians. The amici law professors' argument is therefore served by the policy of state equality rather than state sovereignty. In fact, by limiting California's political power to address local harms, the amici law professor's argument undermines California sovereignty to further the value of state equality. While this Article's doctrinal proposal maximizes state sovereignty at the expense of giving equal respect to laws of other states, the manner of production doctrine would limit state sovereignty in favor of equality.

When these two values conflict, the courts have consistently favored state sovereignty over giving equal force to the laws of other states. The greatest division between the states in U.S. history—the conflict over slavery—presented this very same issue.²¹² In *Lemmon v. People*,²¹³ a Virginia slave owner, Johnathan Lemmon, temporarily travelled through New York with his eight slaves while in route to Louisiana.²¹⁴ When local residents discovered that the Lemmons were holding slaves in the city, they filed a petition for a writ of habeas corpus, seeking to have the court declare that the Lemmons had no legal right to hold slaves while on New York soil.²¹⁵ Throughout the resulting litigation, southerners argued that, because traditional choice of law principles required application of Virginia law since that was the state of domicile, New York had to recognize the habeas petitioners as slaves.

The New York Court of Appeals, however, held that the Lemmons' slaves were entitled to their freedom.²¹⁶ The court explained that “[t]he question [presented] is one affecting the State [of New York] in her sovereignty. As a sovereign State she may determine and regulate the status or social and civil

²¹² See Jeffrey Schmitt, *Constitutional Limitations on Extraterritorial State Power: State Regulation, Choice of Law, and Slavery*, 83 Miss. L.J. 59, 90 (2014).

²¹³ 20 N.Y. 562 (1860).

²¹⁴ At this time, the fastest and most convenient route was to travel by ship from Virginia to New York, and then from steamship to Louisiana. Schmitt, *supra* note 212, at 80. See also REPORT OF THE LEMMON SLAVE CASE: CONTAINING POINTS AND ARGUMENTS OF COUNSEL ON BOTH SIDES, AND OPINIONS OF ALL THE JUSTICES (N.Y.C., Horace Greely & Co. 1860) [hereinafter REPORT OF THE LEMMON SLAVE CASE].

²¹⁵ REPORT OF THE LEMMON SLAVE CASE, *supra* note 214.

²¹⁶ *Lemmon*, 20 N.Y. at 632.

condition of her citizens, and every description of persons within her territory."²¹⁷ The court continued:

The relation [of slavery] exists, if at all, under the laws of Virginia, and it is not claimed that there is any paramount obligation resting on this State to recognize and administer the laws of Virginia within her territory, if they be contrary or repugnant to her policy or prejudicial to her interests.²¹⁸

New York therefore exercised its sovereign power to reject the application of Virginia law, even though the law of the slaves' domicile would normally control, simply because New York disagreed with Virginia law. In response, one southern editor complained that "[f]rom the sublime elevation of her moral supremacy, New York looks down upon Virginia with horror and contempt."²¹⁹

The conflict between state equality and state sovereignty in the *Lemmon* case parallels the conflict in the California litigation. Like the plaintiffs in the California cases, southerners argued that a state could not reject the law of another state simply because of moral disagreement with it. The New York court, however, rejected this argument because it found that state sovereignty carried with it the power to reject the legal and moral force of Virginia's law within New York's borders. California similarly has the sovereign power to say that Missouri standards are not good enough for Californians.

The modern analog to *Lemmon* is the public policy doctrine in choice of law. When a case has connections to multiple states, choice of law analysis determines which state's law shall govern the dispute. Under the public policy doctrine, "the law of another state need not be recognized if it too deeply offends forum standards."²²⁰ The public policy doctrine has been used to reject otherwise applicable out-of-state law on subjects ranging from marriage law to caps on tort damages.²²¹ In each situation, the forum is exercising its sovereign power to reject the law of another state simply because of disagreement with the content of the law, just as California is rejecting the legitimacy of Missouri's farming practices.

Justice Joseph Story gave the constitutional basis for the public policy doctrine and cases like *Lemmon* nearly two hundred years ago in his seminal *Commentaries on the Conflict of Laws*.²²² Justice Story explained that a state's laws

can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country. . . . Whatever extra-territorial force they are to have, is the result, not of any original power to

²¹⁷ *Id.* at 616.

²¹⁸ *Id.* at 628.

²¹⁹ *Retaliation*, THE SOUTH, reprinted in THE NATIONAL ERA, Dec. 24, 1857.

²²⁰ Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1972 (1997).

²²¹ *Id.* at 1973.

²²² See generally JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (Boston, Hilliard, Gray, & Co. 1834).

extend them abroad, but of that respect, which from motives of public policy other nations are disposed to yield to them.²²³

He further stated: “It is an essential attribute of every sovereignty, that it has no admitted superior, and that it gives the supreme law within its own domains on all subjects appertaining to its sovereignty.”²²⁴ California’s sovereignty therefore implies that it has no obligation to give equal respect to the law of Missouri. California is free to regulate in-state transactions to protect the health, welfare, and morals of Californians, even if that means California is not respecting Missouri’s policy choices. Put differently, Missouri has no power to tell California what animal welfare or environmental standards should be acceptable for Californian consumers. State sovereignty includes the power to enact legislation that rejects the policy choices made by other states.

This Article’s proposal best serves the value of state sovereignty. To protect the health, welfare, and morals of its residents, a state sometimes needs to exercise its sovereign power to treat goods differently based only on the manner in which they were produced. California, for example, must treat ethanol and eggs sold in-state differently based on the manner in which they were produced to address California’s role in serious issues that have huge consequences for state residents. Specifically, California should be able to use its sovereign power to protect the “health and welfare”²²⁵ of its citizens by reducing the amount of pollution Californians produce. Moreover, California should have the power to legislate for the “morals” of its citizens by ensuring that they do not participate in animal cruelty.²²⁶ In doing so, California is exercising its sovereignty for the protection of its own citizens and thus is not disrupting the allocation of power in our federal system.

CONCLUSION

The principle that one state cannot legislate for the country is a foundational part of our federalism. And yet, the doctrinal embodiment of this principle is hopelessly confusing, incoherent, and subject to manipulation. Precedent can be mounted to support the position that any extraterritorial effect, however small, is unconstitutional or, alternatively, that extraterritorial effects are irrelevant so long as a state is directly regulating only in-state conduct. The litigation

²²³ *Id.* § 7. The public policy doctrine also meets the Court’s modern requirement announced in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 319 (1981).

²²⁴ STORY, *supra* note 222, § 8; *see also, e.g.*, *Dearing v. Bank of Charleston*, 5 Ga. 497, 511 (1848) (“By the comity of States, the laws of each State are respected in foreign States, unless they are prejudicial to their national rights, or to the rights of their subjects. But not, if they are so prejudicial. The independence of every State requires that all other States should concede to it, the right of protecting its own citizens and their rights, and of enforcing obedience to their own laws.”)

²²⁵ *See, e.g.*, *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (“It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.”).

²²⁶ *Id.*

over California's progressive global warming and animal rights legislation illustrates that these conflicting positions are currently being used by litigants and accepted in federal courts. Doctrinal clarity is desperately needed.

An acceptable interpretation of the extraterritoriality doctrine, however, has eluded the courts. The extreme positions advanced in the California litigation, if followed consistently, would have the effect of either crippling all state economic regulation or eviscerating the extraterritoriality doctrine. As a result, underlying policy concerns, rather than the doctrine, best explain most extraterritoriality decisions. Looking at the outcomes in a number of lower court cases, this Article synthesizes the decisions into the following doctrinal proposal: a state regulation of in-state conduct is unconstitutional only when it has the inescapable effect of regulating extraterritorial conduct in which the state has no corresponding interest.

This doctrinal proposal best serves the policy justification for the extraterritoriality doctrine. The doctrine is based on the need to ensure a proper allocation of sovereign power in our federal system. Completely abandoning the doctrine, as many scholars have suggested, would threaten to allow one state to exceed its proper sphere of authority by regulating conduct for a purpose other than the health, welfare, and morals of its citizens. Conversely, an expansive interpretation that would invalidate any state law that has effects in another state would undermine federalism by eviscerating the states' ability to enact meaningful economic legislation.

This Article's proposed interpretation of the extraterritoriality doctrine is also superior to the manner of production test advanced by the plaintiffs in the California litigation. Importantly, unlike that test, this Article's proposal is supported by existing precedent. It also furthers state sovereignty by allowing states to exercise their power to regulate local conduct, even when the regulation is based on out-of-state conduct. As California's global warming and egg laws demonstrate, a state must sometimes regulate based on the manner of production to protect the health, welfare, and morals of its citizens. Although this legislation arguably fails to give equal respect to the laws of other states, state sovereignty includes the power to disagree with the policy choices of other states. California should be permitted to take serious action to reduce its contribution to global warming and cruelty to animals.