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Missouri and Indiana Lay an Egg: Why the Latest Attempt at Invalidating State Factory Farm Regulations Must Fail

*Louis Cholden-Brown**

At the end of 2017, two original jurisdiction cases addressing the authority of states to regulate the treatment of farm animals were filed at the Supreme Court.¹ Overlapping, but not identical, groups of thirteen States challenged California and Massachusetts laws banning the sale of eggs, as well as pork and veal in Massachusetts, raised in conditions deemed cruel by the defendant States as violative of the Commerce Clause.

These dual challenges, which raise unique questions of original jurisdiction and standing with which this Article does not concern itself, are but the latest in a series of cases seeking to restrict state and local regulation of animal welfare.² As with prior attempts, the litigants misconstrue the current thrust of dormant Commerce Clause jurisprudence and the legitimacy of state action to limit its complicity in the spread of disease and moral degradation. Contrary to their invitation, given the broad ambit of the police power and the ill-suitedness of the judiciary to weigh competing local interests and out-of-state burdens, in the absence of discriminatory intent, existing regulatory conflict or inescapable effects on prices or practices, the Court is compelled to uphold such statutes.

This Article begins in Part I by addressing the current conception of the dormant Commerce Clause and its retrenchment, before discussing prior federal litigation concerning subnational laws governing animal food products deemed cruel locally and their

* Senior Advisor, New York City 2019 Charter Revision Commission. I am indebted to the many colleagues who first alerted me to these statutes and collaborated in the early phases of the research that became this Article as well as my vegetarian family who were a constant source of support despite never understanding why I was writing about “meat.” The views expressed represent mine alone and are not attributable to any institution or organization with which I am previously or presently affiliated.

¹ Motion For Leave To File Bill Of Complaint, *Missouri v. California*, No. 22O148 (U.S. Dec. 4, 2017); Motion For Leave To File A Bill Of Complaint, *Indiana v. Massachusetts*, No. 22O149 (U.S. Dec. 11, 2017).

² See Ernesto Hernández-López, *Sustainable Food and the Constitution*, 50 ARIZ. ST. L.J. 549, 550 (2018).

universal finding of no dormant Commerce Clause conflict in Part II. Parts III and IV in turn chart the passage of the California and Massachusetts statutes respectively, as well as the dormant Commerce Clause arguments presently before the Court. Part V briefly reflects upon the argument advanced by the federal government in response to Calls for the Views of the Solicitor General (CSVGs) in the two cases. Part VI closes by implicating why, when faced with nondiscriminatory laws such as these predicated on legitimate, albeit unquantifiable, local interests, the Court should decline to engage in benefits balancing and uphold the ordinances as rationally related to territorial interests.

I. DORMANT ELEMENTS OF THE DORMANT COMMERCE CLAUSE

The Commerce Clause authorizes Congress “[t]o regulate Commerce with foreign Nations, and among the several States”³ In addition, courts have “long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute.”⁴ This implicit restraint is often referred to as the dormant, or negative, Commerce Clause.⁵ The “fundamental objective” of the dormant Commerce Clause is to protect the national market from “preferential advantages conferred by a State upon its residents or resident competitors.”⁶ Therefore, a statute “*motivated* by simple economic protectionism” that “discriminates *on its face* against interstate commerce” is “subject to a virtually *per se* rule of invalidity which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose.”⁷ In this dormant Commerce Clause context, discrimination “simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”⁸ However, the Supreme Court “never has articulated clear criteria for deciding when proof of a discriminatory purpose and/or effect is sufficient

³ U.S. CONST. art. I, § 8, cl. 3.

⁴ *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (internal citation omitted).

⁵ *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997).

⁶ *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208 (2d Cir. 2003) (quoting *Tracy*, 519 U.S. at 299) (internal quotation omitted).

⁷ *United Haulers Ass’n*, 550 U.S. at 338–39 (emphasis added) (internal citations and quotation omitted). This *per se* rule is motivated by a belief that “when ‘the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.’” *Id.* at 345 (quoting *S. Pac. Co. v. Ariz. ex rel. Sullivan*, 325 U.S. 761, 767–68 n.2 (1945)). The “abstract possibility” of the existence of less discriminatory means is insufficient to render a statute unconstitutional as the state “is not required to develop new and unproven means of protection” *Maine v. Taylor*, 477 U.S. 131, 147 (1986) (internal citations and quotation omitted).

⁸ *Or. Waste Sys. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994).

for a state or local law to be discriminatory.”⁹ “Indeed, the cases in this area seem quite inconsistent”¹⁰ and Justice Scalia has observed “once one gets beyond facial discrimination our negative-Commerce-Clause jurisprudence becomes (and long has been) a quagmire.”¹¹ The Supreme Court has considered and rejected the argument that a “statute is discriminatory because it will apply most often to out-of-state entities” in a market comprised of more out-of-state than in-state participants.¹² As early as thirty years ago, some argued a “court should strike down a state law if and only if it finds by a preponderance of the evidence that protectionist purpose on the part of the legislators contributed substantially to the adoption of the law or any feature of the law,”¹³ and in recent years, the “zone of presumptive illegality”¹⁴ has narrowed to only preclude intentional protectionism.¹⁵

⁹ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 444–45 (4th ed. 2011).

¹⁰ *Id.* at 445.

¹¹ *W. Lynn Creamery v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., concurring) (internal quotation omitted). Justice Scalia was a prolific critic of the dormant Commerce Clause at large. *See, e.g.*, *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1808 (2015) (Scalia, J., dissenting) (“The fundamental problem with our negative Commerce Clause cases is that the Constitution does not contain a negative Commerce Clause.”). As are Justices Thomas and Gorsuch. *See, e.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 614–17 (1997) (Thomas, J., dissenting); *see also* *Direct Mktg. Ass’n v. Brohl*, 814 F.3d 1129, 1148 (10th Cir. 2016) (Gorsuch, J., concurring) (“[T]he whole field in which we are asked to operate today—dormant [C]ommerce [C]lausa doctrine—might be said to be an artifact of judicial precedent.”).

¹² *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987).

¹³ Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1148 (1986).

¹⁴ Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 277 (2017).

¹⁵ *See, e.g.*, *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (“The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism” because these are the “laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent”); *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (“Discriminatory laws motivated by ‘simple economic protectionism’ are subject to a ‘virtually *per se* rule of invalidity” (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978))). It should be noted that arguably *City of Philadelphia* stands for a different principle. *See City of Philadelphia*, 437 U.S. at 624 (“[W]here simple economic protectionism is *effected* by state legislation, a virtually *per se* rule of invalidity has been erected.”) (emphasis added); *see also* *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988) (holding that the dormant Commerce Clause “prohibits economic protectionism—that is, regulatory measures *designed to benefit* in-state economic interests by burdening out-of-state competitors”) (emphasis added); *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008) (plurality opinion) (“The modern law of what has come to be called the dormant Commerce Clause is driven by concern about ‘economic protectionism that is, regulatory measures *designed to benefit* in-state economic interests by burdening out-of-state competitors.”) (emphasis added) (internal citation omitted).

By contrast, in what has become known as the *Pike*¹⁶ balancing test, when a statute “regulates even-handedly to effectuate a legitimate local public interest” with only incidental effects on interstate commerce, “it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”¹⁷ A putative benefit need not be explicitly stated in the challenged legislation to be legitimate,¹⁸ and neither its wisdom nor effectiveness, nor whether the benefits “actually come into being” are of any consideration.¹⁹

Absent “discriminating against articles of commerce coming from outside the State,” “the States retain authority under their general police powers to regulate matters of ‘legitimate local concern,’ even though interstate commerce may be affected.”²⁰ States possess a “right to impose even burdensome regulations in the interest of local health and safety” so long as the regulations are not attempts to “advance their own commercial interests.”²¹ The authority to regulate for the public health, safety, morals or welfare is broad,²² and the power “to prescribe regulations which shall prevent the production within its borders of impure foods” is well established.²³ “[A]rticles as would spread disease and pestilence” are not within the protection of the Commerce Clause regardless of such regulations incidentally affecting interstate commerce, “when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the state.”²⁴ The welfare of all animals, not merely those bound for consumption,

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

17 *Id.*

18 *Dean Milk Co. v. City of Madison*, 340 U.S. 348, 354 (1951).

19 *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 313 (1st Cir. 2005).

20 *Lewis v. BT Inv. Managers*, 447 U.S. 27, 36 (1980) (internal citation omitted).

21 *H. P. Hood & Sons v. Du Mond*, 336 U.S. 525, 535 (1949).

22 *See, e.g.*, ILL. CONST. art. VII, § 6(a) (West, Westlaw through Sept. 2018) (granting cities in Illinois “the power to regulate for the protection of the public health, safety, morals and welfare”); TUCSON CODE ch. VII § 1(32) (Supp. 2016) (granting mayor and council authority to “adopt and enforce by ordinance all such measures . . . expedient or necessary for the promotion and protection of the health, comfort, safety, life, welfare and property of the inhabitants of the city, the preservation of peace and good order, the promotion of public morals”); *see also* *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.”); *Cresenzi Bird Imps. v. New York*, 658 F. Supp. 1441, 1447 (S.D.N.Y. 1987) (recognizing the state’s “interest in cleansing its markets of commerce which the Legislature finds to be unethical”); Robert J. Delahunty & Antonio F. Perez, *Moral Communities or a Market State: The Supreme Court’s Vision of the Police Power in the Age of Globalization*, 42 HOUS. L. REV. 637, 676 (2005) (“The States’ authority to pursue specifically moral objectives is deeply rooted in the American constitutional tradition. Indeed, it is one of the fundamental features of our federalism.”).

23 *Sligh v. Kirkwood*, 237 U.S. 52, 59 (1915).

24 *Id.* at 59–60.

is commonly understood to be within that power²⁵ and, in one series of examples, federal courts have uniformly found the regulation of animal welfare standards for animals for sale as pets do not conflict with the dormant Commerce Clause.²⁶

Despite its name, “incidental burdens” are any “burdens on interstate commerce that exceed the burdens on intrastate commerce.”²⁷ The Commerce Clause “protects the interstate market, not particular interstate firms”²⁸ and individual losses or businesses restructuring suffered by particular firms do not constitute sufficient burden. Stated otherwise, “the statute, at a minimum, must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on

²⁵ See 3B C.J.S. *Animals* § 198 (2018) (“Statutory provisions prohibiting cruelty to animals are sustainable as a valid exercise of the police power.”) (footnote omitted); *Cavel Int’l v. Madigan*, 500 F.3d 551, 557 (7th Cir. 2007) (holding that “[s]tates have a legitimate interest in prolonging the lives of animals that their population happens to like” and that “a state is permitted, within reason, to express disgust at what people do with the dead”); *DeHart v. Town of Austin*, 39 F.3d 718, 722 (7th Cir. 1994) (“The regulation of animals has long been recognized as part of the historic police power of the States.”); *Planned Parenthood of Ind. & Ky. v. Comm’r of Ind. State Dep’t of Health*, No. 17-3163, 2018 WL 3655854, at *5 (7th Cir. June 25, 2018) (Easterbrook, J., dissenting) (“[A]nimal welfare affects human welfare. Many people feel disgust, humiliation, or shame when animals or their remains are poorly treated.”).

²⁶ *Park Pet Shop v. City of Chicago*, 872 F.3d 495, 504 (7th Cir. 2017); *N.Y. Pet Welfare Ass’n v. City of New York*, 850 F.3d 79, 92 (2d Cir. 2017) (“[T]here is no need to consider the . . . *Pike* balancing test. Because the Sourcing Law imposes no incidental burdens on interstate commerce, it cannot impose any that are clearly excessive in relation to its local benefits, and therefore survives scrutiny under the dormant Commerce Clause.”); *Mo. Pet Breeders Ass’n v. County of Cook*, 119 F. Supp. 3d 865, 875–76 (N.D. Ill. 2015); *Puppies ’N Love v. City of Phoenix*, 116 F. Supp. 3d 971, 996 (D. Ariz. 2015) (“The Ordinance is not an act of economic protectionism. It is a legitimate attempt to curb the problems associated with the inhumane treatment of animals and local dog homelessness and euthanasia. Plaintiffs’ claim that the Ordinance violates the dormant Commerce Clause fails as a matter of law.”); *Perfect Puppy v. City of E. Providence*, 98 F. Supp. 3d 408, 415–18 (D.R.I. 2015). *Contra Six Kingdoms Enters. v. City of El Paso*, No. EP-10-CV-485-KC, 2011 WL 65864, at *8 (W.D. Tex. Jan. 10, 2011) (“By limiting the price of puppies to an amount that sellers of puppies from distant states cannot meet, the ordinance plainly has a discriminatory impact upon out-of-state interests.”).

²⁷ *N.Y. State Trawlers Ass’n v. Jorling*, 16 F.3d 1303, 1308 (2d Cir. 1994) (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471–72 (1981)); see also *Automated Salvage Transp. v. Wheelabrator Env’tl. Sys.*, 155 F.3d 59, 75 (2d Cir. 1998) (“Where a regulation does not have this disparate impact on interstate commerce, then ‘we must conclude that . . . [it] has not imposed any “incidental burdens” on interstate commerce that “are clearly excessive in relation to the putative local benefits.”’ Thus, the minimum showing required to succeed in a Commerce Clause challenge to a state regulation is that it have a disparate impact on interstate commerce. The fact that it may otherwise affect commerce is not sufficient.”); *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1015 (9th Cir. 1994) (explaining that “incidental burdens” on interstate commerce include disruption of interstate travel and shipping due to lack of uniformity in state laws, impacts on commerce beyond the borders of the state, or burdens that fall more heavily on out-of-state interests).

²⁸ *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978) (“[T]he Commerce Clause [does not] protect[] the particular structure or methods of operation in a retail market.”).

intrastate commerce”²⁹ such as to make the statute “unreasonable or irrational.”³⁰ If no such unequal burden is shown, a reviewing court need not proceed further.³¹ Unless a plaintiff demonstrates that the statute imposes some burden on interstate commerce that is different from the burden imposed on intrastate commerce, courts should refrain entirely from weighing a statute’s costs and benefits.³²

The competency or propriety of courts undertaking these inquiries has been much maligned. The Fourth Circuit has criticized the *Pike* balancing test as “often too soggy to properly cabin the judicial inquiry or effectively prevent the district court from assuming a super-legislative role;”³³ while on the Tenth Circuit, then-Judge Gorsuch called *Pike* “a pretty grand, even ‘ineffable,’ all-things-considered sort of test, one requiring judges (to attempt) to compare wholly incommensurable goods for wholly

29 National Elec. Mfrs. Ass’n v. Sorrell, 272 F.3d 104, 109 (2d Cir. 2001); *see also Park Pet Shop*, 872 F.3d at 502 (“*Pike* balancing is triggered *only* when the challenged law *discriminates* against interstate commerce in practical application.”) (emphasis in original).

30 Alaska Airlines v. City of Long Beach, 951 F.2d 977, 983 (9th Cir. 1991). A statute is “unreasonable or irrational . . . where the asserted benefits of the statute are in fact illusory or relate to goals that evidence an impermissible favoritism of in-state industry over out-of-state industry.” *Id.* *See also* Hunt v. Wash. State Apple Advert. Comm’n, 432 U.S. 333, 353 (1977); Wash. State Apple Advert. Comm’n v. Holshouser, 408 F. Supp. 857, 861 (E.D.N.C. 1976).

31 *Sorrell*, 272 F.3d at 109. “*Pike* balancing is triggered *only* when the challenged law *discriminates* against interstate commerce in practical application. *Pike* is not the default standard of review for any state or local law that affects interstate commerce.” *Park Pet Shop*, 872 F.3d at 502. “[U]nless the challenged law discriminates against interstate commerce in practical effect, the dormant Commerce Clause does not come into play and *Pike* balancing does not apply.” *Id.* *See also* Nat’l Paint & Coatings Ass’n v. City of Chicago, 45 F.3d 1124, 1130 (7th Cir. 1995) (rejecting a default application of *Pike* and holding “the dormant [C]ommerce [C]lause does not replace the rational-basis inquiry with a ‘broader, all-weather, be-reasonable vision of the Constitution”).

32 *See* Dep’t of Revenue of Ky. v. Davis, 553 U.S. 328, 360 (2008) (Scalia, J., concurring) (“I would abandon the *Pike*-balancing enterprise altogether and leave these quintessentially legislative judgments with the branch to which the Constitution assigns them.”); *see also* United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 346 (2007) (noting that the *Pike* balancing test was “reserved” for laws that have incidental effects on interstate commerce, but finding “it unnecessary to decide whether the ordinances impose any incidental burden on interstate commerce because any arguable burden does not exceed the public benefits of the ordinances”); *Exxon Corp.*, 437 U.S. at 125–26 (“Plainly, the Maryland statute [prohibiting producer or refiner of petroleum products from operating retail service station within the State] does not discriminate against interstate goods, nor does it favor local producers and refiners. Since Maryland’s entire gasoline supply flows in interstate commerce and since there are no local producers or refiners, such claims of disparate treatment between interstate and local commerce would be meritless. . . . The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.”); *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 209 (2d Cir. 2003) (“This balancing test, however, does not invite courts to second-guess legislatures by estimating the probable costs and benefits of the statute, nor is it within the competency of courts to do so.”); *Nat’l Paint*, 45 F.3d at 1130 (finding that the dormant Commerce Clause does not “authorize a [court to undertake] a comprehensive review of the law’s benefits, free of any obligation to accept the legislature’s judgment”).

33 *Colon Health Ctrs. of Am. v. Hazel*, 733 F.3d 535, 546 (4th Cir. 2013).

different populations (measuring the burdens on out-of-staters against the benefits to in-staters).”³⁴ Justice Scalia explained this dilemma at greater length in *Davis*:

The burdens and the benefits are always incommensurate, and cannot be placed on the opposite balances of a scale without assigning a policy-based weight to each of them. It is a matter not of weighing apples against apples, but of deciding whether three apples are better than six tangerines. . . . [Y]ou cannot decide which interest “outweighs” the other without deciding which interest is more important to you.³⁵

There is “no clear line between these two strands of analysis” and several cases, including *Pike* itself, that have purported to apply the undue burden test “turned in whole or in part on the discriminatory character of the challenged state regulations.”³⁶ This has led some courts to “wonder just what work *Pike* does”³⁷ and several scholars suggest that the Supreme Court has “*sub silentio*” repudiated the balancing test by failing to invalidate any laws under it since 1982³⁸ and “burden review has decayed into minimal rational basis review at best.”³⁹

When a state “project[s] its legislation into” other jurisdictions⁴⁰ and “directly controls” conduct wholly beyond its borders, whether to punish, reward or otherwise influence, and irrespective of whether it is discriminatory or its extraterritorial reach was intended, the statute is *per se* invalid.⁴¹ Despite the doctrine often being premised on the possibility of inconsistent regulatory regimes if more than one state were to regulate in this space, the actual existence of a conflict

³⁴ Energy & Env’t Legal Inst. v. Epel, 793 F.3d 1169, 1171 (10th Cir. 2015).

³⁵ *Davis*, 553 U.S. at 360 (Scalia, J., concurring). Scalia, never at a loss for quips, has also compared this inquiry to “judging whether a particular line is longer than a particular rock is heavy.” *Bendix Autolite Corp. v. Midwesco Enters.* 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

³⁶ *General Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12 (1997).

³⁷ *Cavel Int’l v. Madigan*, 500 F.3d 551, 556 (7th Cir. 2007). Some courts, citing a footnote in *Tracy*, 519 U.S. at 298 n.12, have suggested that *Pike* is only violated when a “genuinely nondiscriminatory” state law “undermine[s] a compelling need for national uniformity in regulation.” See *LSP Transmission Holdings v. Lange*, No. CV 17-4490 (DWF/HB), 2018 WL 3075976, at *9 (D. Minn. June 21, 2018) (finding “[t]he Supreme Court [in this footnote] also noted the narrow application of the *Pike* test”); *Owner-Operator Indep. Drivers Ass’n v. Urbach*, 718 N.Y.S.2d 282, 285 (App. Div. 2000) (“[I]t is incumbent upon plaintiffs to identify some prohibited interference with interstate commerce under the *Pike* undue burden test to obviate the need to establish that their commercial interests have received disparate treatment from those of similarly situated intrastate operators.”). *But see* *Yamaha Motor Corp., U.S.A. v. Jim’s Motorcycle*, 401 F.3d 560, 572 (4th Cir. 2005).

³⁸ Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 493 (2008).

³⁹ Francis, *supra* note 14, at 277.

⁴⁰ *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 583 (1986) (quoting *Baldwin v. G.A.F. Seeling*, 294 U.S. 511, 521 (1935)).

⁴¹ *Healy v. Beer Inst.*, 491 U.S. 324, 336–37 (1994).

is not a prerequisite for its application.⁴² However, as changes to the global economy blur the line between intrastate and interstate transactions, the doctrine has atrophied.

Extraterritoriality's demise is in part attributable to its birth during an earlier phase of dormant Commerce Clause jurisprudence where the Court found a regulation of interstate commerce permissible based on whether it was a "direct" or "indirect" regulation;⁴³ the Court's furnishing of alternative grounds for its holding in *MITE* and *Healy* are a recognition of such by its members.⁴⁴ As the Court's conception of states' territories have grown more fluid in other areas of law, such as personal jurisdiction⁴⁵ and choice-of-law,⁴⁶ to reflect the increasingly interconnected world, some have called for it to do so here. Justice Gorsuch's 2015 decision, while still a judge of the Tenth Circuit, in *Energy and Environment Legal Institute v. Epel*,⁴⁷ labeled the extraterritoriality doctrine "the most dormant doctrine in dormant [C]ommerce [C]ause jurisprudence"⁴⁸ and no longer binding.⁴⁹ He suggested that rather than constituting "a distinct line" of dormant Commerce Clause jurisprudence, *Baldwin* and its progeny were examples of the anti-discrimination rule that was yet to solidify.⁵⁰ Similarly, Judge Sutton of the Sixth Circuit has

⁴² Barbara O. Bruckmann, *The Case for a Commerce Clause Challenge to State Antitrust Laws Banning Minimum Resale Price Maintenance*, 39 HASTINGS CONST. L.Q. 391, 415 (2012) ("[D]irect regulatory conflict appears a sufficient, but not necessary, condition for demonstrating extraterritorial regulation.").

⁴³ Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 996 (2013).

⁴⁴ *Healy*, 491 U.S. at 340 (striking down a statute because it "discriminate[d] against brewers . . . [who] engaged in interstate commerce"). In his *Healy* concurrence, Justice Scalia labeled the extraterritoriality doctrine "both dubious and unnecessary to decide the present cases." *Id.* at 345 (Scalia, J., concurring). *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (finding the statute was "a direct restraint on interstate commerce" that would have thoroughly stifled the ability of out-of-state corporations to make tender offers).

⁴⁵ *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945) (finding that personal jurisdiction can be established with a nexus-oriented approach).

⁴⁶ *See* Jeffrey M. Schmitt, *Making Sense of Extraterritoriality: Why California's Progressive Global Warming and Animal Welfare Legislation Does Not Violate the Dormant Commerce Clause*, 39 HARV. ENVTL. L. REV. 423, 454–55 (2015).

⁴⁷ *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169 (10th Cir. 2015).

⁴⁸ *Id.* at 1170. *See IMS Health Inc. v. Mills*, 616 F.3d 7, 29 n.27 (1st Cir. 2010) ("Extraterritoriality has been the dormant branch of the dormant Commerce Clause."). This outlook is also shared by scholars. *See, e.g.,* Denning, *supra* note 43, at 1006 ("[E]xtraterritoriality is, for all intents and purposes, dead.").

⁴⁹ *See Epel*, 793 F.3d at 1173–75. In *Epel*, the court stated:

[S]tate laws setting non-price standards for products sold in-state (standards concerning, for example, quality, labeling, health, or safety) may be amenable to scrutiny under the generally applicable *Pike* balancing test, or scrutinized for traces of discrimination under *Philadelphia*, but the Court has never suggested they trigger near-automatic condemnation under *Baldwin*.

Id. at 1173.

⁵⁰ *Id.* at 1173.

suggested that “[t]he extraterritoriality doctrine . . . is a relic of the old world with no useful role to play in the new,”⁵¹ whose elimination as a freestanding prohibition would not alter case outcomes.⁵² There presently exists a debate amongst the circuits regarding whether *Pharmaceutical Research & Manufacturers of America v. Walsh*,⁵³ where the Court referred to the doctrine not as “extraterritoriality” but rather “[t]he rule that was applied in *Baldwin* and *Healy*,”⁵⁴ limited its principle to price affirmation statutes.⁵⁵ Others have suggested 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.”⁵⁶

⁵¹ *Am. Beverage Ass’n v. Snyder*, 735 F.3d 362, 378 (6th Cir. 2013) (Sutton, J., concurring).

⁵² *Id.* at 380–81 (arguing that extraterritoriality was not essential to the holdings in *Healey*, *Brown-Forman*, *Edgar*, or *Baldwin*).

⁵³ *Pharm. Research & Mfr. of Am. v. Walsh*, 538 U.S. 644, 669 (2003).

⁵⁴ *Id.*

⁵⁵ *See Ass’n des Éleveurs de Canards et d’Oies du Québec v. Harris*, 729 F.3d 937, 951 (9th Cir. 2013) (“*Healy* and *Baldwin* are not applicable to a statute that does not dictate the price of a product and does not ‘t[ie] the price of its in-state products to out-of-state prices.’”) (internal citation omitted); *Chinatown Neighborhood Ass’n v. Harris*, 794 F.3d 1136, 1145–46 (9th Cir. 2015) (finding “even when state law has significant extraterritorial effects, it passes Commerce Clause muster when, as here, those effects result from the regulation of in-state conduct” and distinguishing *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015), as “invalidating a . . . statute that ‘facially regulates . . . wholly outside the State’s borders’”) (internal citation omitted); *IMS Health Inc. v. Mills*, 616 F.3d 7, 30 (1st Cir. 2010) (recognizing that the Supreme Court “has only struck down two related types of statutes on extraterritoriality grounds” which include “price affirmation statutes” and “statutes that ‘force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another’”) (internal citation omitted). *But see Ass’n for Accessible Meds. v. Frosh*, 887 F.3d 664, 670 (4th Cir. 2018) (“The Supreme Court’s statement does not suggest that ‘[t]he rule that was applied in *Baldwin* and *Healy*’ applies *exclusively* to ‘price control or price affirmation statutes.’ Instead, the Court’s statement emphasizes that the extraterritoriality principle is violated if the state law at issue ‘regulate[s] the price of any out-of-state transaction, either by its express terms or by its inevitable effect.’”) (internal citation omitted); *North Dakota v. Heydinger*, 825 F.3d 912, 920 (8th Cir. 2016) (finding “[t]he district court correctly noted the Supreme Court has never so limited the [extraterritoriality] doctrine [to price control], and indeed has applied it more broadly,” but declining to address claims that extraterritorial legislation should be analyzed under the *Pike* balancing test or deemed “per se invalid”). This debate predates *Walsh*. *See, e.g., Nat’l Solid Wastes Mgmt. Ass’n v. Meyer*, 63 F.3d 652, 659 (7th Cir. 1995) (“Although cases like *Healy* and *Brown-Forman Distillers Corp.* involved price affirmation statutes, the principles set forth in these decisions are not limited to that context.”).

⁵⁶ Schmitt, *supra* note 46, at 449; *see also N.Y. Pet Welfare Ass’n v. City of New York*, 850 F.3d 79, 91–92 (2d Cir. 2017) (“The Commerce Clause, however, does not void every law that causes behavior to change in other states. Rather, the measure of extraterritoriality is whether the Sourcing Law ‘inescapably require[s]’ breeders to operate on the City’s terms even when doing business elsewhere.” (internal citations omitted)); *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 111 (2d Cir. 2001) (“[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

II. NO COMMERCE IN ANIMAL CRUELTY

Litigation concerning foie gras bans in Chicago and California is illustrative of how the courts have addressed dormant Commerce Clause challenges to statutes governing the sale of food produced through animal cruelty.⁵⁷ On April 26, 2006, as part of the omnibus budget bill, the Chicago City Council enacted legislation prohibiting the sale of foie gras in “[a]ll food dispensing establishments.”⁵⁸ The preamble to the statute reiterated that under the Illinois constitution, the City “may exercise any power and perform any function relating to its government and affairs including protecting the health, safety and welfare of its citizens” and by “ensuring the ethical treatment of animals, who are the source of the food offered in our restaurants, the City of Chicago is able to continue to offer the best in dining experiences.”⁵⁹ Immediately after adoption, the Illinois Restaurant Association and Allen’s New American Cafe sued in state court.⁶⁰ They contended that:

[T]he Ordinance has nothing to do with health, safety, environmental issues or governmental revenue generation. Nor does it fit into traditional areas of state governmental interest in food regulation since there is no tradition in Illinois of banning, on morality and reputational grounds, food that has already been found safe on the federal level for human consumption.⁶¹

The district court found for Chicago and held that the law did not discriminate against interstate commerce in purpose or effect since it did “not force out-of-state foie gras producers or distributors to do anything.”⁶² The court found that “the dormant Commerce Clause

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.”; *cf. Walsh*, 538 U.S. at 669 (limiting extraterritoriality doctrine to instances where a statute “by its express terms or inevitable effect” regulates extraterritorially).

⁵⁷ See generally Kristin Cook, *The Inhumanity of Foie Gras Production—Perhaps California and Chicago Have the Right Idea*, 2 J. ANIMAL L. & ETHICS 263, 263, 269–72 (2007); Rafi Youatt, *Power, Pain, and the Interspecies Politics of Foie Gras*, 65 POL. RES. Q. 346, 346 (2011).

⁵⁸ CHICAGO, ILL., MUN. CODE §§ 7-39-001–005 (2006), *Amendment of Title 7, Chapter 39 of Muni. Code of Chicago by Addition of New Sections 001 and 005 Prohibiting Sale of Foie Gras by Food Establishments Before the Comm. on Health*, (Apr. 26, 2006) (repealed May 14, 2008).

⁵⁹ MARK CARP, *THE FOIE GRAS WARS: HOW A 5,000-YEAR-OLD DELICACY INSPIRED THE WORLD’S FIERCEST FOOD FIGHT* 127 (2009).

⁶⁰ After the plaintiffs amended their complaint to include a dormant Commerce Clause challenge, the city removed the case to federal court. See *Ill. Rest. Ass’n v. City of Chicago*, No. 06 C 7014, 2007 WL 541926, at *1 (N.D. Ill. Feb. 12, 2007).

⁶¹ *Plaintiffs’ Surreply Addressing New United States Supreme Court Decision*, at 3, *Ill. Rest. Ass’n v. City of Chicago*, 492 F. Supp. 2d 891 (N.D. Ill. 2007) (No. 06 C 7014), 2007 WL 1973283, at *3.

⁶² *Ill. Rest. Ass’n v. City of Chicago*, 492 F. Supp. 2d 891, 899 (N.D. Ill. 2007).

applies to [facially] nondiscriminatory laws only where the law has some sort of discriminatory effect or when judicial intervention is necessary to promote national uniformity and thereby prevent discrimination,”⁶³ or citing the words of the Seventh Circuit in *National Paint*,⁶⁴ “[n]o disparate treatment, no disparate impact, no problem under the dormant [C]ommerce [C]ause,”⁶⁵ and therefore the court was not required to apply *Pike*.⁶⁶ The existence of the *Pike* balancing test was not an excuse for the court to engage in “general-purpose balancing” and the court must look for “discrimination rather than for baleful effects.”⁶⁷ The court did acknowledge however that its decision was “in tension with other Supreme Court and Seventh Circuit cases which do not delve into the details of the dormant Commerce Clause.”⁶⁸ Feeling that the ordinance infringed on freedom of choice and made a national embarrassment of Chicago,⁶⁹ the Council repealed the law just over two years later on May 14, 2008,⁷⁰ while an appeal was pending before the Seventh Circuit.⁷¹ *Illinois Restaurant Association* found that the regulation of foie gras was not a subject requiring national uniformity and by treating in-state and interstate interests the same, the dormant Commerce Clause was not implicated and balancing was not warranted.⁷²

The California statute, while older in origin, remains the subject of litigation. In 2004, California adopted new provisions

⁶³ *Id.* at 905. The Court also noted that “*United Haulers . . .* is yet another case that recites the *Pike* standard in connection with a facially nondiscriminatory law but, in the same breath, looks to whether the law has any discriminatory effects.” *Id.* See also Francis, *supra* note 14, at 298 (“Analysis of whether a subject ‘requires’ a uniform national standard . . . often seems to be a euphemism for burden review, rooted in a practical economic assessment of the consequences of unilateral state regulation.”); Ass’n des Éleveurs de Canards et d’Oies du Québec v. Harris, 729 F.3d 937, 952 (9th Cir. 2013) (“[E]xamples of ‘courts finding uniformity necessary’ fall into the categories of ‘transportation’ or ‘professional sports league[s].’” (internal citation omitted)).

⁶⁴ *Nat’l Paint & Coatings Ass’n v. City of Chicago*, 45 F.3d 1124, 1132 (7th Cir. 1995).

⁶⁵ *Id.*

⁶⁶ See *id.*

⁶⁷ *Ill. Rest. Ass’n*, 492 F. Supp. 2d at 904 (quoting *Nat’l Paint*, 45 F.3d at 1131).

⁶⁸ *Id.* at 903–04 (referencing *Alliant Energy Corp., Or. Waste Sys., and Clover Leaf*).

⁶⁹ See Nick Fox, *Chicago Overturns Foie Gras Ban*, N.Y. TIMES: DINER’S J. (May 14, 2008), <http://dinersjournal.blogs.nytimes.com/2008/05/14/chicago-overturns-foie-gras-ban/> [<http://perma.cc/949N-TE7A>] (“[T]he ban has been a source of embarrassment for the city and the repeal comes as residents have accused officials of trying to micromanage people’s lives . . .”); see also Phil Vettel, *Hold the Jokes the Rest of Yours: Foie Gras Back on Menus*, CHI. TRIB. (May 18, 2008), http://articles.chicagotribune.com/2008-05-18/news/0805170435_1_foie-gras-terrific-chicagoans [<http://perma.cc/C6E9-JKBG>] (“Ald. Bernard Stone (50th) quickly recanted his support of the ban, saying, ‘Anybody who has traveled anywhere in this country knows that people are just laughing their heads off at us.’”).

⁷⁰ See CHICAGO, ILL., MUN. CODE §§ 7-39-001–005 (2006) (adopted Apr. 26, 2006), repealed by Chicago, Ill., Ordinance 2008-2041 (May 14, 2008).

⁷¹ See *Ill. Rest. Ass’n v. City of Chicago*, No. 06 C 7014, 2008 WL 8915042, at *1, (N.D. Ill. Aug. 7, 2008).

⁷² See *Ill. Rest. Ass’n v. City of Chicago*, 492 F. Supp. 2d 891, 905–06 (N.D. Ill. 2007).

of the California Health & Safety Code (sections 25981 and 25982) which prohibited the practice of force-feeding ducks or geese to produce foie gras, as well as the in-state sale of products made elsewhere from force-fed fowl.⁷³ On July 2, 2012, the day after the state law took effect, Association des Éleveurs de Canards et d'Oies du Québec (hereafter “Canadian Farmers”), a Canadian nonprofit which raises birds for foie gras, sued the state of California (*Association des Éleveurs I*). The Canadian Farmers 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.”⁷⁴ They contended 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.”⁷⁵ These claims were rejected as meritless by both the district court⁷⁶ and Ninth Circuit,⁷⁷ with the latter observing that “[p]laintiffs give us no reason to doubt that the State believed that the sales ban . . . may discourage the consumption of products produced by force feeding birds and prevent complicity in a practice that is deemed cruel to animals.”⁷⁸ The appellate court declined to conduct an analysis under *Pike* of whether the statute’s benefits were illusory because the plaintiffs had failed to demonstrate a significant burden on interstate commerce.⁷⁹ The law did not prohibit the sale of foie gras, merely the most profitable method of production and “the dormant Commerce Clause does not . . . guarantee [p]laintiffs their preferred method of operation.”⁸⁰ Plaintiffs also “failed to show that the foie

⁷³ See CAL. HEALTH & SAFETY CODE §§ 25981–25982 (West 2018).

⁷⁴ Appellants’ Opening Brief at 20, *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Harris*, No. 12-56822, 2012 WL 5915406, at *20 (9th Cir. Nov. 16, 2012).

⁷⁵ *Id.* at *22.

⁷⁶ *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Harris*, No. 2:12-CV-05735-SVW-RZ, 2012 WL 12842942, at *10 (C.D. Cal. Sept. 28, 2012) (“Preventing animal cruelty in California is clearly a legitimate state interest . . . and Plaintiffs have presented no evidence that Section 25982 is an ineffective means of advancing that goal. Plaintiffs have thus failed to raise a serious question that Section 25982’s burden on interstate commerce ‘clearly exceeds’ its local benefits.”).

⁷⁷ *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Harris*, 729 F.3d 937, 948–52 (9th Cir. 2013) (observing section 25982 is not discriminatory and does not directly regulate or substantially burden interstate commerce).

⁷⁸ *Id.* at 952 (citing *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 336 (5th Cir. 2007) (concluding that ban on slaughter and sale of horsemeat for human consumption may “increase the preservation of horses” by “removing the significant monetary incentives”).

⁷⁹ See *id.* at 951–52 (citing *Nat’l Ass’n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1155 (9th Cir. 2012)).

⁸⁰ *Id.* at 949 (citing *Nat’l Ass’n of Optometrists*, 682 F.3d at 1151).

gras market is inherently national or that it requires a uniform system of regulation”⁸¹ or any existing competing legislation indicating balkanization. The Supreme Court “has never invalidated a state or local law under the dormant Commerce Clause based upon mere speculation about the possibility of conflicting legislation.”⁸² The Supreme Court denied the foie gras companies’ petition for certiorari on October 14, 2014.⁸³ *Association des Éleveurs I* found the statute barred how, but not where, an item is produced, and therefore *Pike* balancing was unnecessary.

Indeed, not a single animal cruelty statute challenged on Commerce Clause grounds has been struck down on that basis. This includes bans on horsemeat for human consumption upheld by the Fifth and Seventh Circuits,⁸⁴ and the Ninth Circuit decision upholding California’s ban on the sale or distribution of shark fins.⁸⁵ This also includes two statutes arguably regulating production methods: A California ban on the slaughter of non-ambulatory animals challenged on dormant Commerce Clause grounds but

⁸¹ *Id.* at 952.

⁸² *Id.* at 951 (quoting *S.D. Myers, Inc. v. City of San Francisco*, 253 F.3d 461 (9th Cir. 2001)).

⁸³ See *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Harris*, 135 S. Ct. 398 (2014) *cert. denied*. Subsequently, the plaintiffs amended their complaint in the district court seeking declaratory relief asserting that section 25982 was preempted by the Poultry Products Inspection Act (PPIA). *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Harris*, 79 F. Supp. 3d 1136, 1139 (C.D. Cal. 2015). The district court found that the PPIA expressly preempted section 25982 and granted the motion for partial summary judgment while declining to reach any of the other arguments. See *id.* at 1147–48. The Ninth Circuit reversed and vacated in part, finding that the foie gras statute was not preempted by the PPIA expressly or under the doctrines of field or obstacle preemption, and remanded the proceedings. See *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Becerra*, 870 F.3d 1140, 1146, 1153 (9th Cir. 2017). On March 9, 2018, a petition for certiorari was docketed by the plaintiffs and a Call for the Views of the Solicitor General by the Court was issued on June 18, 2018 to which he responded on December 5, 2018 recommending denial. See *Petition for Writ of Certiorari, Ass’n des Éleveurs de Canards et d’Oies du Québec v. Becerra*, No. 17A793 (U.S. Mar. 9, 2018); see also *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Becerra*, 138 S. Ct. 2668 (2018) (mem.), Brief for United States as Amicus Curiae, *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Becerra*, No. 17A793.

⁸⁴ See *Empacadora de Carnes de Fresnillo, S.A. de C.V., v. Curry*, 476 F.3d 326, 335 (5th Cir. 2007); *Cavel Int’l v. Madigan*, 500 F.3d 551, 544–55 (7th Cir. 2007).

⁸⁵ See *Chinatown Neighborhood Ass’n v. Harris*, 794 F.3d 1136, 1147 (9th Cir. 2015). The court upheld a finding by the district court that “given that the Shark Fin Law is facially neutral, and treats all shark fins the same, regardless of their origin, plaintiffs have not shown (and cannot show) that the Shark Fin Law either regulates extraterritorially, or discriminates in favor of in-state interests.” *Chinatown Neighborhood Ass’n v. Brown*, No. C 12-3759 PJH, 2013 WL 60919, at *8 (N.D. Cal. Jan. 2, 2013). Finding that the animal cruelty and the health and conservation benefits of the law outweighed the insignificant commercial burden on interstate commerce, the court held in the absence of a significant burden, it would be inappropriate for them “to determine [its] constitutionality . . . based on our assessment of the benefits of th[e] law [] and the State’s wisdom in adopting [it],” or the availability of less-burdensome alternatives. *Chinatown Neighborhood Ass’n*, 794 F.3d at 1147 (citing *Nat’l Ass’n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1156–57 (9th Cir. 2012)). The Ninth Circuit further discounted the extraterritorial claims saying such effects only are violative when states attempt to fix prices beyond their borders. *Id.* at 1146.

ultimately struck down by the Court for Federal Meat Inspection Act (FMIA) preemption,⁸⁶ and a New York statute prohibiting the sale of wild birds not raised in captivity upheld by the Second Circuit.⁸⁷

III. PROPOSITION 2 AND AB 1437: CALIFORNIA EGGS ON THE STATES

After a voter-initiated initiative campaign, on November 4, 2008, California, by a margin of 63.5% to 36.5%,⁸⁸ passed Proposition 2 which required “calves raised for veal, egg-laying hens and pregnant pigs be confined only in ways that allow these animals to lie down, stand up, fully extend their limbs and turn around freely” by 2015.⁸⁹ In 2010, the California legislature enacted AB 1437 which banned the sale within the state of eggs from out-of-state farms unless those farmers subjected themselves to the same confinement standards.⁹⁰ In adopting the latter, the legislature, in their stated purpose, sought to “protect California consumers from the deleterious, health, safety, and welfare effects of the sale and consumption of eggs derived from egg-laying hens that are exposed to significant stress and many result in increased exposure to disease pathogens including salmonella.”⁹¹

Even before taking effect, Proposition 2 and AB 1437 spawned numerous lawsuits challenging the ordinances.⁹² In 2012, the first

⁸⁶ See *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 468 (2012).

⁸⁷ See *Cresenzi Bird Imps. v. New York*, 831 F.2d 410 (2d Cir. 1987) (affirming the opinion below). “New York has a legitimate interest in regulating its local market conditions which lead, in a short causal chain, to the unjustifiable and senseless suffering and death of thousands of captured wild birds.” *Cresenzi Bird Imps. v. New York*, 658 F. Supp. 1441, 1447 (S.D.N.Y. 1987) (internal citation omitted).

⁸⁸ *Votes For And Against November 4, 2008, State Ballot Measures*, CAL. BOARD OF ELECTIONS, http://elections.cdn.sos.ca.gov/sov/2008-general/7_votes_for_against.pdf [<http://perma.cc/MTD7-Z4Y3>]; see also Cal. Sec'y of State, *Prevention of Farm Animal Cruelty Act, in CALIFORNIA GENERAL ELECTION: OFFICIAL VOTER INFORMATION GUIDE 16* (2008), <http://vig.cdn.sos.ca.gov/2008/general/pdf-guide/vig-nov-2008-principal.pdf> [<http://perma.cc/ED6V-EKNK>].

⁸⁹ Attorney General, *Prop 2 Standards For Confining Farm Animals. Initiative Statute*, CAL. GENERAL ELECTION (Nov. 4, 2008), <http://vigarchive.sos.ca.gov/2008/general/title-sum/prop2-title-sum.htm> [<http://perma.cc/FZJ8-BA5W>]; see also Letter from Joe Ramsey to Toni Melton, Initiative Coordinator, Office of the Attorney Gen., Request for Title and Summary for Proposed Initiative (Aug. 9, 2007), http://ag.ca.gov/cms_pdfs/initiatives/2007-08-09_07-0041_Initiative.pdf [<http://perma.cc/D3C3-CNS7>].

⁹⁰ 2010 Cal. Stat. 51. On November 6, 2018, California voters approved Proposition 12 replacing the Proposition 2 size restrictions based on animal behavior with specific numbers of square feet and ban the sale of non-conforming veal and pork as of 2020. *California Election Results*, NEW YORK TIMES, Nov. 6, 2018, <https://www.nytimes.com/interactive/2018/11/06/us/elections/results-california-elections.html>; Letter from Cheri Shankar, to Ashley Johansson, Initiative Coordinator, Request For Title and Summary of Proposed Initiative (Aug. 29, 2017), https://www.oag.ca.gov/system/files/initiatives/pdfs/17-0026%20%28Animal%20Cruelty%29_0.pdf [<http://perma.cc/2FC7-2YUP>].

⁹¹ CAL. HEALTH & SAFETY CODE § 25995(e) (West 2018).

⁹² See, e.g., *JS West Milling Co. v. State*, No. 10-CECG-04225 (Cal. Super. Ct. Oct. 14, 2011) (dismissing on ripeness grounds the allegations that Proposition 2 was unconstitutionally

federal suit was brought by a California egg farmer, William Cramer, who challenged the Proposition 2 cage size requirement as unconstitutionally vague under the Fourteenth Amendment's Due Process Clause, because it did not identify satisfactory cage specifications,⁹³ and as violating the Commerce Clause by forcing the closure and relocation of California egg farmers which in turn would lead to increased consumer prices and disruption of the national corn feed market.⁹⁴ The district court dismissed the claims, finding that the law was not vague but rather established a clear test that “does not require the law enforcement officer to have the investigative acumen of Columbo”⁹⁵ and that Cramer’s “factual allegations are wholly insufficient to raise his [Commerce Clause] claim above the speculative level”⁹⁶ since, as the plaintiff acknowledged, “the prevention of animal cruelty is a legitimate state interest.”⁹⁷ After Cramer appealed, the Ninth Circuit, without hearing oral arguments, affirmed the motion to dismiss in a brief, unpublished February 2015 opinion which only addressed the void for vagueness claim and made no mention of the Commerce Clause.⁹⁸

In February 2014, Missouri filed suit,⁹⁹ alleging AB 1437 violated the Commerce and Supremacy Clauses of the United States Constitution and were further “expressly and implicitly preempted by the federal Egg Products Inspection Act” (EPIA).¹⁰⁰ The district court dismissed the suit for lack of standing in October 2014, finding it “patently clear” the plaintiffs were “bringing this action on behalf of a subset of each state’s egg farmers and their purported right to participate in the laws that govern them, not on behalf of each state’s population generally.”¹⁰¹ The Ninth Circuit affirmed the dismissal, finding that “[t]he complaint contain[ed] no

vague because it did not specify compliant cage dimensions); Ass’n of Calif. Egg Farms v. State, No. 12-CECG-03695-DSB, 2013 WL 9668707, at *4 (Cal. Super. Ct. Aug. 22, 2013) (finding that definition of confinement standards in terms of “animal behaviors rather than in square inches” did not make Proposition 2 facially vague). See also, Molly L. Wiltshire, *Of Eggs and Hens: Pro Bono Opportunities in the Area of Animal Law*, SCHIFF HARDIN (Jan. 1, 2017), <https://www.schiffhardin.com/insights/publications/2016/of-eggs-and-hens-pro-bono-opportunities-in-the-area-of-animal-law> [<http://perma.cc/T39C-JQTV>].

⁹³ Complaint for Declaratory and Injunctive Relief at 5, *Cramer v. Brown*, (No. CV 12 - 03130 JFW (JEMx)), 2012 WL 1230649 (C.D. Cal. Apr. 10, 2012).

⁹⁴ *Id.* at 6.

⁹⁵ *Cramer v. Brown*, No. CV123130JFWJEMX, 2012 WL 13059699, at *4 (C.D. Cal. Sept. 12, 2012).

⁹⁶ *Id.* at *5.

⁹⁷ *Id.* (“[T]he prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies.” (citing *United States v. Stevens*, 559 U.S. 460, 469 (2010))).

⁹⁸ See *Cramer v. Harris*, 591 F. App’x 634, 635 (9th Cir. 2015).

⁹⁹ See *Missouri v. Harris*, 58 F. Supp. 3d 1059, 1063 (E.D. Cal. 2014) (five other states—Alabama, Kentucky, Iowa, Oklahoma and Nebraska—subsequently joined the suit).

¹⁰⁰ *Id.* at 1065; 21 U.S.C. § 1031 (2018).

¹⁰¹ *Harris*, 58 F. Supp. 3d at 1078.

specific allegations about the statewide magnitude of [the alleged difficult choices engendered by the law] or the extent to which they affect[ed] more than just an ‘identifiable group of individual’ egg farmers”¹⁰² and “the unavoidable uncertainty of the alleged future changes in price ma[de] the alleged injury insufficient for Article III standing.”¹⁰³ A petition for certiorari was denied by the Supreme Court in May 2017.¹⁰⁴

In December 2017, the plaintiff States, with the exception of Kentucky, and joined by Arkansas, Indiana, Louisiana, Nevada, North Dakota, Oklahoma, Texas, Utah and Wisconsin, filed an original jurisdiction action with the Supreme Court.¹⁰⁵ The motion alleged AB 1437 was motivated by economic protectionism, relying at least in part on Governor Schwarzenegger’s signing statement: “[b]y ensuring that all eggs sold in California meet the requirements of Proposition 2, this bill is good for both California egg producers and animal welfare.”¹⁰⁶ The plaintiff States contend that AB 1437 “has not provided any significant health-and-safety benefits to Californians” or other persons and the “recited purpose was pretextual” with “no convincing scientific evidence” of correlation between salmonella incidence or stress levels and cage size or stocking density.¹⁰⁷ Rather, they asserted the statute “was designed to impose onerous restrictions on out-of-state egg producers to . . . eliminate any competitive disadvantage to California producers arising from California’s stifling regulatory environment.”¹⁰⁸ Under their reading, AB 1437 “did not affect the welfare of any animal in California” nor did it “regulate any activity within California” but rather “applies only to egg production occurring outside California, and its direct impact is exclusively extraterritorial to California.”¹⁰⁹ Relying on the record from the legislative deliberations,¹¹⁰ the plaintiff States asserted “[t]he sole

¹⁰² *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 652 (9th Cir. 2017), *cert. denied sub nom. Missouri ex rel. Hawley v. Becerra*, 137 S. Ct. 2188 (2017) (quoting *Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982)).

¹⁰³ *Id.* at 653.

¹⁰⁴ *See* *Hawley*, 137 S. Ct. at 2188.

¹⁰⁵ Motion For Leave To File Bill Of Complaint, *Missouri v. California*, No. 220148 (U.S. Dec. 4, 2017).

¹⁰⁶ LEG. OF CAL., ASSEMB. J., Reg. Sess., vol. 5, at 5961 (2009–2010).

¹⁰⁷ Motion For Leave To File Bill of Complaint, *supra* note 105, at 18.

¹⁰⁸ *Id.* at 19.

¹⁰⁹ *Id.* at 20. *See also* Brief of Ass’n. Des Éleveurs De Canards Et D’oies Du Québec, HVFG L.L.C., and Hot’s Rest. Grp., as *Amici Curiae* in Support of Plaintiffs at 8, *Indiana v. Massachusetts*, No. 220149 (“If any of the farm animals at issue in these cases feel any discomfort, they do so far beyond California’s borders — and thus far beyond the State’s legitimate legislative reach.”).

¹¹⁰ “The intent of this legislation is to level the playing field so that in-state producers are not disadvantaged.” Kevin De Leon, CAL. ASSEMB. COMM. ON APPROPRIATIONS, BILL ANALYSIS OF AB 1437, at 1 (May 13, 2009), http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_14011450/ab_1437_cfa_20090512_182647_asm_comm.html [<http://perma.cc/9UFY-BKB2>].

purpose and effect of AB 1437 was to regulate the conduct of egg producers outside California.”¹¹¹ Additionally, they contended “California affronts the sovereignty of Plaintiff States” by dispatching inspectors to farms within their borders.¹¹²

In its response papers, California noted that “[b]oth Proposition 2 and AB 1437 address activities occurring within California” and “AB 1437 applies uniformly (and only) to in-state sales, wherever the eggs may have been produced.”¹¹³ It distinguished AB 1437 from the price-control laws struck down in *Healey*, *Brown-Forman*, and *Baldwin* as “indifferent to how eggs sold in other States are produced or priced.”¹¹⁴ In response to the plaintiff States’ allegations about legislative intent to “level the playing field,” California argued that:

[T]he dormant Commerce Clause forbids States from adopting measures that *privilege* in-state companies at the expense of out-of-state ones. The Constitution does not require a State to confer preferential treatment on out-of-state entities that choose to sell their products within that State, or to exempt those entities from the same neutral rules that apply to in-state sellers.¹¹⁵

IV. THIRTEEN STATES HAVE A COW WHEN MASSACHUSETTS GOVERNS VEAL

On November 8, 2016, Massachusetts, at a public referendum by a margin of 77.7% to 22.3%,¹¹⁶ adopted “An Act to Prevent Cruelty to Farm Animals” which prohibited the sale in Massachusetts, after January 1, 2022, of certain eggs, veal, and pork based on the conditions in which the animals were confined.¹¹⁷ The stated primary purpose of the legislation was “to prevent animal cruelty by phasing out extreme methods of farm animal confinement which also threaten the health and safety of Massachusetts consumers, increase the risk of foodborne illness, and have negative fiscal impacts on the Commonwealth of Massachusetts.”¹¹⁸ In December 2017, Indiana, joined by Alabama, Arkansas, Louisiana, Missouri, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wisconsin filed

¹¹¹ Reply Brief of Plaintiff States at 5–6, *Missouri v. California*, No. 22O148 (U.S. Mar. 20, 2018).

¹¹² *Id.*

¹¹³ Brief in Opposition at 1, *Missouri v. California*, No. 22O148 (U.S. Mar. 5, 2018).

¹¹⁴ *Id.* at 23.

¹¹⁵ *Id.* at 24–25.

¹¹⁶ See *An Act to Prevent Cruelty to Animals*, VOTE SMART: FACTS MATTER, <https://votesmart.org/elections/ballot-measure/2184/an-act-to-prevent-cruelty-to-farm-animals#W6FtVehKg2w> [http://perma.cc/G883-HRS6].

¹¹⁷ *An Act to Prevent Cruelty to Farm Animals*, ch. 333 (Mass. 2016), <https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter333> [http://perma.cc/8PBF-LZR5].

¹¹⁸ *Id.*

suit before the Supreme Court.¹¹⁹ The plaintiff States sought to distinguish the justification of the “Animal Law” by reference to “the conditions of production simpliciter” from previously upheld laws concerning the quality of the products.¹²⁰ They contended that, “while *Pike* balancing is appropriate where states regulate interstate commerce as part of a legitimate attempt to protect the health and safety of citizens, it does not apply where a state is simply trying to export its preferred public policy to other states.”¹²¹ They asserted the law “constitutes economic protectionism and extraterritorial regulation” because “farmers in Plaintiff States must now submit to Massachusetts’s laws, as well as those of any state that adopts similar regulations, in order to have access to those states’ markets.”¹²² “[W]hile Massachusetts may legitimately protect its consumers from harmful foodstuffs produced elsewhere, it may not leverage access to its markets to regulate every station in the supply chain of agricultural commodities.”¹²³ The plaintiff states in the Massachusetts litigation argued that the regulations would force out-of-state farming operations to “alter their production methods with respect to commercial activities occurring wholly outside” Massachusetts and were “not directed at the quality of covered products but rather at the means or characteristics of production of such covered products.”¹²⁴

In its papers, Massachusetts countered that the plaintiff States’ dormant Commerce Clause claims were “foreclosed by centuries of precedent”¹²⁵ and the State’s legitimate interests in regulating its food supply outweighed any incidental burden on interstate commerce.¹²⁶ Attorney General Maura Healey asserted that Massachusetts was “plac[ing] no special ‘burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear”¹²⁷ and took particular note that the statute only governs sales where the buyer took physical possession within Massachusetts, allowing noncompliant food products, and animals

¹¹⁹ Motion For Leave To File A Bill Of Complaint, *Indiana v. Massachusetts*, No. 22O149 (U.S. Dec. 11, 2017).

¹²⁰ Reply in Support of Motion for Leave to File Bill of Complaint at 4–5, *Indiana v. Massachusetts*, No. 22O149 (U.S. Mar. 19, 2018).

¹²¹ *Id.* at 6.

¹²² Bill of Complaint at 13, *Indiana v. Massachusetts*, No. 22O149 (U.S. Dec. 11, 2017).

¹²³ Brief in Support of Motion for Leave to File Bill of Complaint at 6, *Indiana v. Massachusetts*, No. 22O149 (U.S. Dec. 11, 2017).

¹²⁴ Bill of Complaint, *supra* note 122, at 13.

¹²⁵ Brief in Opposition to Motion for Leave to File Complaint at 2, *Indiana v. Massachusetts*, No. 22O149 (U.S. Mar. 5, 2018).

¹²⁶ *Id.* at 27 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

¹²⁷ *Id.* at 28 (citing *Am. Trucking Ass’n v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 433 (2005)).

in cages noncompliant with the minimum-size requirements, to travel freely across its borders if bound for another state.¹²⁸

V. FEDS: CASES DON'T MEAT STANDARDS FOR GRANT

On April 16, 2018, the Supreme Court issued Calls for the Views of the Solicitor General (CVSGs) in both cases.¹²⁹ The Solicitor General responded on November 29th, recommending denial of the motions for leave.¹³⁰ While the majority of the filings focused on the inappropriateness of the cases for an exercise of original jurisdiction as no direct economic injury by the defendant states had been shown,¹³¹ the government also argued that the laws were not violative of the Dormant Commerce Clause.¹³² The statutes did not discriminate as they treated all products alike without any local preference,¹³³ and assessing the health and safety rationales under *Pike* or “whether the practical effect of the regulation is to control conduct beyond the boundaries of the state” would require resolution of complex factual issues best undertaken by the district courts.¹³⁴ Additionally, the Solicitor General argued that the EPIA did not preempt the California ordinance since the USDA egg-grading standards do not address confinement conditions.¹³⁵

Of note in their papers, the government declined to address the permissible scope of a cruelty rationale, suggested that even in the absence of discrimination a *Pike* analysis is necessary, and, possibility in a nod to Gorsuch,¹³⁶ called “extraterritoriality” not that name, but rather, as “*Baldwin* and its progeny,” which it characterized as “forbidding States from attempting to regulate the price of products sold in another State.”¹³⁷

VI. HATCHING CONCLUSIONS

The confinement statutes, which apply equally to in-state and out-of-state farmers, implicate neither of the concerns

¹²⁸ *Id.* at 28–29.

¹²⁹ *Missouri v. California*, 138 S. Ct. 1585 (2018) (mem.); *Indiana v. Massachusetts*, 138 S. Ct. 1585 (2018) (mem.).

¹³⁰ Brief for United States as Amicus Curiae, *Indiana v. Massachusetts*, No. 220149; Brief for United States as Amicus Curiae, *Missouri v. California*, No. 220148.

¹³¹ *See* Brief for United States as Amicus Curiae, *Missouri v. California*, No. 220148, at *8–18.

¹³² *Id.* at *20–22.

¹³³ *See id.* at *21.

¹³⁴ *See id.* at *21–22.

¹³⁵ *Id.* at *7.

¹³⁶ *See Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169 (10th Cir. 2015).

¹³⁷ *See supra* note 131, at *22.

animating modern Supreme Court dormant Commerce Clause jurisprudence: intentional economic protectionism or the imposition of undue burdens.¹³⁸ The California and Massachusetts legislatures and electorates respectively have made a policy determination that the animal welfare and related public health rationales for prohibiting the sale of products not satisfying their confinement standards outweigh any economic impacts or interests in those choices. These determinations of the public interest—that so confined animals are not suitable for consumption—have already been made and since neither statute inescapably requires any business to alter their practices and conduct business in other states in conformity with their regulations, or precludes any other state from regulating these products in a different manner, there is no justification nor need for the Court to assert its views over them.

The California and Massachusetts statutes share many attributes and therefore can be considered jointly for the purposes of repudiating the extraterritorial attacks on their validity. However, despite the lack of treatment by the Solicitor General, the unique adoption of AB 1437 sets California apart for the purposes of assessing the presence of discrimination. While AB 1437 does not favor California egg farmers, it does benefit them by placing out-of-state producers on equal footing. Some have asked “whether the dormant Commerce Clause requires discrimination against in-state producers”¹³⁹ and the plaintiff States’ argument would fault California for their political process—if they had passed AB 1437 without previously passing Prop. 2 it would not be susceptible to challenge as protectionist. Even though a benefit inures to in-state interests by the similar burdening of interstate commerce with regulations to which the former is already subject, the treatment is not differential and therefore ipso facto not discriminatory. AB 1437 does not refer specifically to out-of-state farms and so is a non-discriminatory statute, notwithstanding the pre- and ongoing existence of Prop. 2, which the legislature is unable to formally reconcile because of constitutional prohibitions.¹⁴⁰

Protectionist bans, even if partial, are “local measures for control and suppression of the problem [that] are in force [and] are

¹³⁸ *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018).

¹³⁹ David M. Driesen, *Must the States Discriminate Against Their Own Producers Under the Dormant Commerce Clause?*, 54 HOUS. L. REV. 1, 6 (2016). See also *Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 857 (9th Cir. 2002) (“To the extent that Proposition 4 has any discriminatory effect, it would be *in favor of* interstate commercial activities undertaken by out-of-state actors.”(emphasis in original)); *Reynolds v. Buchholzer*, 87 F.3d 827, 829–30 (6th Cir. 1996).

¹⁴⁰ See CAL. CONST. art II, § 10(c) (“The Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors . . .”).

generally comparable in their impact to the embargo on imports.”¹⁴¹ California “has a legitimate interest in guarding against imperfectly understood [health] risks, despite the possibility that they may ultimately prove to be negligible” and cannot be expected to “sit idly by and wait . . . until the scientific community agrees on what [] organisms are or are not dangerous before it acts to avoid such consequences.”¹⁴² Therefore, even if the Court were to conclude AB 1437—because of its structuring or the legislative record—was protectionist, it should recognize it as falling within the bounds of an acceptable exception because its effects are not discriminatory. In the absence of discriminatory effect or intent, the *Pike* analysis is inapplicable in these cases.¹⁴³ As the ordinances in question neither burden nor discriminate against interstate commerce, they receive rational basis review. The Court should be cognizant of its admonition in *United Haulers* to “not seek to reclaim [a *Lochner*-esque] ground for judicial supremacy under the banner of the dormant Commerce Clause” and reject the plaintiffs’ “invitations to rigorously scrutinize [this] legislation passed under the auspices of the police power.”¹⁴⁴ The Court must be mindful to not let the doctrine become “a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition” as “the contrary approach . . . would lead to unprecedented and unbounded interference by the courts with state and local government.”¹⁴⁵

In this diversified and international market, the clear majority of police power exercises are liable to implicate interstate commerce. However, in the absence of discrimination, the burden of statute borne of a legitimate public purpose “is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.”¹⁴⁶ If the ordinances seek to prevent cruelty to animals occurring in the course of trade, they cannot be said to lack a rational basis.¹⁴⁷ That AB 1437 “does not protect the welfare of any animal in California” is irrelevant; the belief by the state legislature that eliminating a portion of the market for so-confined eggs will lead to better treatment is legitimate

¹⁴¹ See Regan, *supra* note 13, at 1270.

¹⁴² *Maine v. Taylor*, 477 U.S. 131, 148 (1986) (discussing a Maine statute that prohibited the import of bait fishing).

¹⁴³ See *supra* notes 32–33 and accompanying text.

¹⁴⁴ *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 347 (2007).

¹⁴⁵ *Id.* at 343.

¹⁴⁶ *S.C. St. Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 189 (1938).

¹⁴⁷ See *Cavel Int’l. v. Madigan*, 500 F.3d 551, 559 (7th Cir. 2007).

purpose enough.¹⁴⁸ The California and Massachusetts statutes are “demonstrably justified by a valid factor unrelated to economic protectionism.”¹⁴⁹ It has been more than three decades¹⁵⁰ since the Court invalidated a statute under the “permissive” balancing test¹⁵¹ and should not start here, especially where the legitimate public interest, putative or otherwise, is of such great weight. The Solicitor General suggests that additional inquiry is necessary to properly perform *Pike*, but where statutes do not have a discriminatory effect, the *Pike* analysis is inapplicable;¹⁵² the confinement statutes do not regulate on the basis of location, do not favor in-state interests over out-of-state interests and neither burden nor discriminate against interstate commerce and therefore should only be reviewed under rational basis which they easily surpass. The dormant Commerce Clause is simply not implicated when the burdens of a regulation are borne equally by in-state and out-of-state interests.¹⁵³

Extraterritoriality, if applied even when the challenged statute does not implement protectionist discrimination, is wholly divorced from the purpose of the dormant Commerce Clause,¹⁵⁴ and, absent some limiting principle, poses a broad threat to a state’s authority to regulate conduct with direct effects within its bounds.¹⁵⁵ This over-inclusivity may indeed do damage to the principles animating the dormant Commerce Clause by striking down laws facilitating interstate commerce.¹⁵⁶ Unlike the pre-1989 laws struck down by the Court under the extraterritoriality doctrine, these laws do not, either by their terms or effect, directly regulate the sale of covered animal products in other states or prevent any other state from regulating the same production methods

¹⁴⁸ See Motion For Leave To File Bill of Complaint, *supra* note 105, at 20; see also *Empacadora De Carnes de Fresno v. Curry*, 476 F.3d 326, 335–37 (5th Cir. 2007).

¹⁴⁹ *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 47 (2d Cir. 2007) (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992)).

¹⁵⁰ See *Edgar v. MITE Corp.*, 457 U.S. 624, 643–46 (1982).

¹⁵¹ *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 347 (2007).

¹⁵² See *supra* note 32–33 and accompanying text.

¹⁵³ See *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978) (finding that the prohibition on operation of retail service stations did not create any barrier to interstate interests and therefore did not violate the dormant Commerce Clause).

¹⁵⁴ See *supra* note 58 and accompanying text.

¹⁵⁵ See *Energy & Env’t Legal Inst. v. Epel*, 793 F.3d 1169, 1175 (10th Cir. 2015) (“[I]f any state regulation that ‘control[s] . . . conduct’ out of state is *per se* unconstitutional, wouldn’t we have to strike down state health and safety regulations that require out-of-state manufacturers to alter their designs or labels?” (internal citation omitted)).

¹⁵⁶ See *Am. Beverage Ass’n v. Snyder*, 735 F.3d 362, 378 (6th Cir. 2013) (Sutton, J., concurring) (“Even a hypothetical state law that *facilitated* interstate commerce—say, an Ohio law that gave tax credits to automobile companies that keep open the production lines of their factories in Michigan and elsewhere—would be invalid if it had extraterritorial ‘practical effect[s].’” (quoting *Healy v. Beer Inst.*, 491 U.S. 326, 336 (1989))).

differently in their own jurisdiction. The simultaneous co-existence of the statutes challenged in these suits undermines any claim that each statute disrupts a national scheme. While evolving production standards may raise the specter of conflicting regimes, it is not a court's place to assume hypotheticals.¹⁵⁷ While the passage of price affirmation statutes in every state would result in "competing and interlocking local economic regulation,"¹⁵⁸ passage of confinement standards would result in national uniformity. To the extent one regime remains more restrictive than the others, it is up to each interstate market participant to determine for itself whether to comply with the most stringent and therefore continue to serve all states or narrow the jurisdictions in which they participate.¹⁵⁹ While out-of-state egg and hog farmers may choose to alter their production methods with regard to products for sale in other states—transactions in which California and Massachusetts have no interest—to avoid the costs of two distinct systems or spread the costs more broadly, nothing in either statute requires such meaning that such impacts are not "inescapable."¹⁶⁰

It is incumbent on the Court to "surrende[r] former views"¹⁶¹ of "heightened . . . *stare decisis* in the dormant Commerce Clause context"¹⁶² "to a better considered position"¹⁶³ and recognize the dormancy of the presently conceived dormant Commerce Clause tests. Only by narrowing them to more closely reflect the interconnected realities of the present global economy will they do justice to the competing goals of federalism: state sovereignty and the equality of state law.¹⁶⁴

¹⁵⁷ See Regan, *supra* note 13, at 1148.

¹⁵⁸ Healy v. Beer Inst., 491 U.S. 326, 336 (1989).

¹⁵⁹ See *S. Pac. Co. v. Arizona*, 325 U.S. 761, 773, 795 (1945) (invalidating state train length law and noting that the alternative to breaking up trains at state borders "is for the carrier to conform to the lowest train limit restriction of any of the states through which its trains pass, whose laws thus control the carriers' operations both within and without the regulating state"); Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1881 (1987) ("The commercial enterprise that chooses to operate in more than one state must simply be prepared to confirm its various local operations to more than one set of laws. The Constitution does not give an enterprise any special privileges just because it happens to operate across state lines.").

¹⁶⁰ See *supra* note 56 and accompanying text.

¹⁶¹ *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2100 (2018) (Thomas, J., concurring) (quoting *McGrath v. Kristensen*, 340 U.S. 162, 178 (1950) (Jackson, J., concurring)).

¹⁶² *Id.* at 2102 (Roberts, C.J., dissenting).

¹⁶³ *Id.* at 2100 (Thomas, J., concurring) (quoting *McGrath v. Kristensen*, 340 U.S. 162, 178 (1950) (Jackson, J., concurring)).

¹⁶⁴ See Schmitt, *supra* note 46, at 426.

