Material Regulation of Out-of-State Production Processes as Impermissible Extraterritorial Law

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A circuit split exists on whether the Supreme Court limited the Dormant Commerce Clause's extraterritoriality doctrine to price affirmation statutes in Pharmaceutical Research & Manufacturers of America v. Walsh. *This Comment argues that the Supreme Court has never drawn this limiting principle—in* Walsh *or otherwise—such that the Ninth Circuit incorrectly characterized* Walsh *in* National Pork Producers Council v. Ross*, and it should have held that the district court's dependence on this reading constituted clear error in* North American Meat Institute v. Becerra. *Through synthesis of canonical and recent case law, this Comment proposes a new test for determining impermissible extraterritorial regulation. Under the first prong, a law violates the extraterritoriality doctrine when it materially regulates out-of-state physical production processes to prevent out-of-state harm. The test uses a factor-based inquiry to determine whether a state law constitutes material (as opposed to incidental) regulation of out-of-state production activity. Under the second prong, a law that does not materially regulate out-of-state production should be upheld as per se permissible for purposes of extraterritoriality analysis in certain circumstances. Finally, this Comment applies the proposed test to Proposition 12, the law at issue in* Ross *and* Becerra*, and argues that it conforms with the extraterritoriality doctrine because it does not materially regulate the production processes of out-of-state farmers, and because it seeks to regulate out-of-state conduct only through a sales ban attaching restrictions to such production activity. Proposition 12 should survive extraterritoriality scrutiny on these grounds, not because it avoids price controls.*

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I. INTRODUCTION

California Proposition 12[1] has sparked backlash from the agribusiness industry that highlights a longstanding lack of clarity in Dormant Commerce Clause jurisprudence.[2] Effective January 2022,[3] the law requires California farmers to comply with the country's most animal-friendly space requirements for covered farm animals, including breeding pigs.[4] This affirmative regulation of in-state farmers has triggered little controversy. But, more controversially, the law also bans the in-state sale of non-

1 Cal. Health & Safety Code §§ 25990–25994.

2 *See* Richard Sexton & Daniel Sumner, *California's Animal Welfare Law Caused Hysteria on Both Sides—Here Are the Real Impacts*, THEHILL.COM (Aug. 20, 2021), https://perma.cc/8MFY-R39P.

3 *California Proposition 12, Farm Animal Confinement Initiative* (2018), BALLOTPEDIA, https://perma.cc/4PRK-XC3X (last visited October 15, 2022). On January 24, 2022, the Sacramento County Superior Court delayed enforcement of these restrictions as applied to whole pork meat sales for grocers and retailers until six months after the state enacts final regulations, but this delay did not apply to pork suppliers who have to comply with the restrictions. *Id.* California finalized its regulations this past September. *California Finalizes Prop 12 Regulations*, NAT'L L. REV. (Sept. 8, 2022), https://perma.cc/R8DF-C4YD.

4 *See* Kenny Torrella, *The Fight Over Cage-Free Eggs and Bacon in California, Explained*, VOX (Aug. 10, 2021), https://perma.cc/868K-K96A.

compliant animal products.[5] This means that hog farmers—99.9% of whom are located outside of California[6]—must raise their pigs pursuant to California's standards or forgo access to a market that consumes approximately 13% of U.S.-produced pork.[7]

The imbalance between California's pork production and consumption provides context for legal challenges to this "sales ban." A state law violates the extraterritoriality doctrine of the Dormant Commerce Clause when it has the "practical effect" of controlling conduct wholly outside of its jurisdiction.[8] Critics argue that the sales ban constitutes such impermissible regulation because it conditions access to California's market on out-of-state farmers' out-of-state compliance with California's policy judgements.[9] Given the lack of in-state farmers and the value of California's market, plaintiffs such as the National Pork Producers Council argue that California intends to—and effectively does—control how pigs are raised on farms hundreds of miles away.[10]

Unlike the regulation at issue in *National Pork Producers Council v. Ross*,[11] laws that violate the extraterritoriality doctrine are often "price affirmation" statutes. A price affirmation statute seeks to regulate conduct beyond the state's borders by tying prices paid in-state with those prices paid out-of-state.[12] Many of

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5 *Id.* Industry experts contend that the law lacks clarity, leaving room for a lot of "gray" to interpret when it comes to comporting with is regulations. *See* Jennifer Shike, *Deciphering the Gray Areas of Proposition 12*, FARMJOURNAL'S PORK (Oct. 4, 2021), https://perma.cc/JX9Z-T6ZY.

6 *See* Allysia Finley, *California Is Making Bacon More Expensive*, WALL ST. J. (Dec. 30, 2021), https://perma.cc/S42J-M24H; *Hog and Pig Farming A $22.5 Billion Industry, Up 25 Percent Since 2007*, NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC. (Oct. 12, 2018), https://perma.cc/4TT5-TNAW. Iowa, North Carolina, and Minnesota are the top three pork producers, accounting for 55% of sales in the United States. *Id.*

7 *See* Jen Sorenson, Letter to the Editor, *This Is Why California's Proposition 12 Is So Unfair to Pork Producers Nationwide*, L.A. TIMES (Aug. 12, 2021), https://perma.cc/7PW5-W9WN.

8 Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989) (emphasis added) (citing Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986)) ("The critical inquiry is whether the practical *effect* of the regulation is to control conduct beyond the boundaries of the State.").

9 *See* Petition for a Writ of Certiorari at *2–3, Nat'l Pork Producers Council v. Ross, 2021 WL 4480405 (U.S.).

10 *Id.*

11 6 F.4th 1021 (9th Cir. 2021), *cert. granted sub nom*. Nat'l Pork Producers v. Ross, 142 S. Ct. 1413 (2022). In a separate, earlier suit, the North American Meat Institute (NAMI) also challenged Proposition 12 in the Ninth Circuit, requesting a preliminary injunction on several grounds, including a nearly identical extraterritoriality argument. N. Am. Meat Inst. v. Becerra, 825 Fed. App'x 518 (9th Cir. 2020), *cert. denied sub nom.* N. Am. Meat Inst. v. Bonta, 141 S. Ct. 2842 (2021). The Ninth Circuit denied relief, and the Supreme Court declined NAMI's petition for certiorari. *Id.*

12 *See Healy*, 491 U.S. at 332–33.

the canonical extraterritoriality cases involve price affirmations. For example, in *Healy v. Beer Institute, Inc.*, a Connecticut law required distillers shipping beer into Connecticut to post prices at the beginning of each month and "affirm" that they would not sell beer at any lower prices to neighboring states during that month.[13]

A circuit split currently exists on whether the Supreme Court limited the extraterritoriality doctrine to price affirmations in *Pharmaceutical Research & Manufacturers of America v. Walsh*.[14] The Ninth Circuit has issued conflicting language about its own stance;[15] despite consistently characterizing *Walsh* as support for the price-affirmation theory,[16] it has inconsistently applied this narrow approach.[17] In fact, in *Ross*, the Ninth Circuit purported to both "adopt" price-affirmation theory and reject it[18] before finding that Proposition 12 survived extraterritoriality scrutiny even

13 *Id.* at 332–33.

14 538 U.S. 644, 669 (2003).

15 *See infra* Section II.B.

16 *Ross*, 6 F.4th at 1028 ("And indeed, the Supreme Court has . . . indicated that the extraterritoriality principle . . . should be interpreted narrowly as applying only to state laws that are 'price control or price affirmation statutes.'") (citing *Walsh*, 538 U.S. at 669); *Becerra*, 825 Fed. App'x at 520 (finding that the district court did not abuse its discretion in relying on *Walsh* to conclude that Proposition 12 did not regulate extraterritorial conduct because it did not price control); Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris, 729 F.3d 937, 951 (9th Cir. 2013) (holding the doctrine inapplicable to a California law that "does not tie prices for California liver products to out-of-state prices") (citing *Walsh*, 538 U.S. at 669).

17 *Compare Ross*, 6 F.4th at 1028, 1032 (applying a "broad[er]" understanding of the doctrine to determine whether Proposition 12 constitutes impermissible extraterritorial law) *and* Daniels Sharpsmart, Inc. v. Smith, 889 F.3d 608, 612–13, 615–16 (9th Cir. 2018) (finding a California law that required that companies sending medical waste for out-of-state disposal to use only facilities that met California's standards an impermissible extraterritorial regulation) *with Becerra*, 825 Fed. App'x at 520 (affirming district court's decision to uphold Proposition 12 under the doctrine solely because it did not price control) *and Harris*, 729 F.3d at 951 (same).

18 *Compare Ross*, 6 F.4th at 1028 ("We . . . have held that the extraterritoriality principle is 'not applicable to a statute that does not [price control].'") (citing *Harris*, 729 F.3d at 951) *with Ross,* 6 F.4th at 1028 ("[W]e have recognized a 'broad[er] understanding of the extraterritoriality principle' may apply outside this context.") (citing Ward v. United Airlines, Inc., 986 F.3d 1234, 1240–41 (9th Cir. 2021)).

under a "broader" understanding of the doctrine.[19] The Supreme Court granted certiorari in *Ross* on March 28, 2022.[20]

This Comment argues that the Supreme Court has never drawn this limiting principle, in *Walsh* or otherwise. Consequently, the Ninth Circuit incorrectly interpreted *Walsh* in *Ross* and should have held that dependence on this theory constituted clear error in *North American Meat Institute v. Becerra*.

Sections II, III, and IV of this Comment aim to resolve this circuit split. Section II provides an overview of Proposition 12 and the circuit split on price affirmation theory, including the Ninth Circuit's conflicting language on this issue. Section III presents an outline of the key principles of the Dormant Commerce Clause, including its extraterritoriality doctrine, and discusses them in the context of *Becerra*. Section IV argues that the Ninth Circuit's decision to limit the doctrine to price affirmation statutes is incorrect as a matter of law because it is based on an erroneous interpretation of the Supreme Court's decision in *Walsh*.[21] Section IV also proposes that both the language in Supreme Court cases involving price affirmation statutes and the circumstances under which the Supreme Court has applied the doctrine more broadly show that the Court has not endorsed the price affirmation approach. A review of other recent circuit court cases supplements this discussion.

Section V of this Comment provides a two-pronged test for determining impermissible extraterritorial regulation through synthesis of canonical and recent case law. Under the first prong, a state law violates the extraterritoriality doctrine when it materially regulates out-of-state physical production processes to prevent out-of-state harms. This prong uses a factor-based inquiry to determine whether a state law constitutes material (as opposed to incidental) regulation of out-of-state production processes. A positive finding of material regulation indicates that the state law has the effect of regulating out-of-state harm, as opposed to in-state harm, by controlling conduct wholly outside of its

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19 *Ross*, 6 F.4th 1028–32 (rejecting NPPC's argument that Proposition 12's "upstream effects" on out-of-state commerce violated the extraterritoriality principle because the law applies evenly to out-of-state and in-state producers; "merely impose[s] a higher cost on production, rather than affect interstate commerce"; and does not threaten the risk of inconsistent regulations as NPPC failed to show that Proposition 12 regulates an area that requires national uniformity).

20 6 F.4th 1021 (9th Cir. 2021), *cert. granted sub nom*. Nat'l Pork Producers v. Ross 142 S. Ct. 1413 (2022). Nine months earlier, the Supreme Court had denied NAMI's petition. N. Am. Meat Inst. v. Bonta, 141 S. Ct. 2854 (2021).

21 *See Walsh*, 538 U.S. at 669.

jurisdiction. This analysis measures the challenged law's *effect* on out-of-state production, rather than its *intention*, because the extraterritoriality doctrine operates without concern to a law's designed purpose.[22] As such, a law with a legitimate local purpose nevertheless violates the extraterritoriality doctrine if it materially regulates out-of-state production. Where a state law materially regulates out-of-state production, there is no need to proceed to the second prong because it should be enjoined on that basis alone.

That a state law fails to materially regulate out-of-state production, however, does not automatically save it from invalidation under the extraterritoriality doctrine. The test's second prong addresses this situation: when does a state law that fails to materially regulate out-of-state physical production activity constitute permissible regulation for extraterritoriality purposes? The second prong provides that the state law must affect out-of-state commerce only through a sales ban attaching restrictions to out-of-state production; a sales ban, like the one in Proposition 12, conditions the in-state sale of an import on out-of-state activity preceding the in-state sale. That is, under the second prong, a law that affects out-of-state conduct only through such a sales ban *must* materially regulate out-of-state production to violate the extraterritoriality doctrine.

In the final part of Section V, this Comment applies the proposed test to Proposition 12. It concludes that Proposition 12 survives scrutiny under the extraterritoriality doctrine because it does not materially regulate the production processes of out-of-state farmers based on the test's factor-based inquiry, and because it seeks to regulate out-of-state conduct only through a sales ban attaching restrictions to such production activity. Proposition 12 conforms to the Dormant Commerce Clause's principle against extraterritoriality on these grounds, not because it avoids price controls.

[22] *See, e.g.*, Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989) (emphasis added) (citing Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 579 (1986)) ("The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."); Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 376 (6th Cir. 2013) ("Having found that the statute has an impermissible extraterritorial effect, we have no need to consider whether the state had some legitimate local purpose or whether there is a reasonable nondiscriminatory alternative."); Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 646 (6th Cir. 2010) (stating that the *Pike* balancing test controls when a state regulation is neither extraterritorial nor discriminatory in effect).

II. Proposition 12 and the Price Affirmation Circuit Split

A. Proposition 12

Proposition 12 differs from existing California Health and Safety code[23] in two ways. First, it establishes minimum space requirements for covered farm animals in California based on square footage, while its precursor, Proposition 2 (the Farm Animal Confinement initiative, passed in 2008) established requirements based on animal movement and behavior.[24] More importantly, unlike its precursor, Proposition 12 also adds a sales ban in California of veal, eggs, and pork from animals not raised in compliance with its standards.[25] Upon full implementation, it will prohibit the confinement of sows in California in areas with less than 24 square feet of usable floor space per pig and the sale of pork in California from such animals.[26]

Trade groups representing out-of-state pork producers have initiated much of the litigation challenging Proposition 12. Currently, only four percent of pork produced in the United States meets the law's standards.[27] Narrow gestation crates confine most breeding pigs, and because sows usually produce multiple litters, they may be restricted for years.[28] Proposition 12 thus requires the vast majority of pork producers to reconstruct or build new infrastructure to continue supplying to California. This undertaking is an expensive and complicated transition that opponents claim will lead to pork shortages and eventually move through the supply chain to cost consumers in California and eventually

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23 Cal. Health & Safety Code §§ 25990–25994.

24 *California Proposition 2, Farm Animal Confinement Initiative (2008)*, BALLOTPEDIA, https://perma.cc/6MZD-SFP5 (last visited Feb. 8, 2022). Both laws were passed by ballot initiative, with voter approval percentages in the low sixties. *Id.*

25 *California Proposition 12, Farm Animal Confinement Initiative (2018)*, BALLOTPEDIA, https://perma.cc/4PRK-XC3X (last visited Feb. 8, 2022).

26 *Id.*

27 Finley, *supra* note 6. The National Pork Producers Council put this figure at one percent. *California Proposition 12*, NAT'L PORK PRODUCERS COUNCIL, https://perma.cc/BCF4-A9EC (last visited Feb. 8, 2022).

28 *See* Torrella, *supra* note 4. Animal welfare advocates consider gestation crates to be an inhuman practice that causes animals significant distress and compromises food safety. Dylan Matthews, *America's Largest Pork Producer Pledged to Make Its Meat More Humane. An Investigation Says It Didn't*, VOX (May 8, 2018), https://perma.cc/MU9U-HBA2. However, "the American Veterinary Medical Association and other organizations recognize that gestation stall . . . as appropriate for providing the well-being of sows during pregnancy." Marc Kaufman, *Largest Pork Processor to Phase Out Crates*, WASH. POST (Jan. 26, 2007), https://perma.cc/A9P5-LK3Q.

throughout the nation.[29] Even before the law went into effect, however, some experts countered that speculation regarding the cost shift to consumers outside of California was derived from "faulty economics."[30] And a number of pork producers had already reported being fully compliant[31] or even exceeding[32] Proposition 12's standards. To that extent, a study conducted by the Humane Society tracking the effects of Proposition 12's partial implementation[33] this past January shows that the pork panic may have been overstated:[34] 86% of stores had the same or more pork products on their shelves.[35]

B. Price Affirmation Theory: Circuit Split and the Ninth Circuit's Inconsistent Stance

Proposition 12, unlike many of the laws found to violate the extraterritoriality doctrine in canonical extraterritoriality cases, is not a price affirmation statute. A price affirmation statute seeks to regulate conduct beyond the state's borders by tying prices paid in-state with those prices paid out-of-state.[36] *Becerra's* extraterritoriality analysis stands for the notion that the doctrine applies only to price affirmations.

Courts disagree on whether the Supreme Court's decision in *Walsh*[37] drew this principle. The Tenth Circuit has held that

29 *See* Petition for a Writ of Certiorari at *17, Nat'l Pork Producers Council v. Ross, 2021 WL 4480405 (U.S.)

30 Sexton & Sumner, *supra* note 2 ("When these added costs are traced though the supply and demand relationships in the North American pork market, competitive pressures ensure almost no change in the price of hogs or pork sold outside California. Speculation about losses for consumers nationwide are based on faulty economics as are projection of major losses for the national hog industry. Within California, however, the average price of uncooked cuts of pork would rise by 7.7 percent or about $0.25/lb. — hardly the 60 percent increase some have predicted.").

31 *E.g.*, Press Release, Niman Ranch, Niman Ranch Reaffirms Compliance with California's Proposition 12 as Countdown to Implementation Continues (Aug 19, 2020), https://perma.cc/U89U-NBVB.

32 *E.g.*, Dubreton, Fully Compliant with the California Proposition 12 Requirements, DUBRETON (Oct 27, 2021), https://perma.cc/95RU-HNVR. Other producers like Hormel Foods have publicly pledged to meet California's standards and confirmed that doing so will not result in any "material loss." Hormel Foods Company Information About California Proposition 12, Hormel Foods, (Oct. 6, 2020), https://perma.cc/WAP5-3UWG.

33 *Supra* note 3.

34 Miranda Harrington, *How Much Are Californians Paying for Proposition 12? Consumers Investigate*, THE HUMANE LEAGUE (May 15, 2022), https://perma.cc/MC4Q-C3WA.

35 Given the variety of pork products, it could not accurately track the change in pork prices, but it notes that "[d]ata from the Department of Labor's Consumer Price Index (CPI) supports the idea that there were no significant price increases in meat . . . in the Los Angeles-Long Beach-Anaheim, CA area during the implementation of Prop 12." *Id.*

36 *See* Healy v. Beer Inst., Inc., 491 U.S. 324, 332–33 (1989).

37 Pharm. Rsch. & Mfrs of Am. v. Walsh, 538 U.S. 644, 669 (2003).

"link[ing] prices paid [in-state] with those paid out-of-state" is an essential characteristic of an invalid extraterritoriality law.[38] And the Sixth Circuit has, although inconsistently, noted that the Supreme Court has "applied the extraterritoriality doctrine only in the limited context of price-affirmation statutes."[39] In contrast, the Fourth Circuit has explicitly rejected circumscribing the extraterritoriality doctrine to price affirmation statutes.[40] So too did the Seventh Circuit in *National Solid Wastes Management Association v. Meyer*,[41] where the court invalidated a Wisconsin law that required companies disposing waste in the state to adopt its recycling standards.[42]

The Ninth Circuit has issued conflicting language about its own stance on price affirmation as it relates to the extraterritoriality. On the one hand, it has claimed that the doctrine applies only to price affirmation statutes in *Becerra*, some sections of *Ross*,[43] and its most recent extraterritoriality cases prior to *Becerra*. For instance, *Association des Eleveurs de Canards v. Harris*[44] declined to apply the doctrine because the state law at issue did not "impose any prices for duck liver products and [did] not tie prices for California liver products to out-of-state prices."[45] And in 2021, just prior to *Becerra*, *Ward v. United Airlines, Inc.*[46] demonstrated that the Ninth Circuit read the Supreme Court's decision in *Walsh* "as holding that the extraterritoriality principle derived from the *Healy* line of cases now applies only when state statutes have the practical effect of dictating the price of goods sold out-of-state or tying the price of in-state products to out-of-state prices."[47]

Yet *Ross*—decided just after *Becerra*—went on to argue, citing its decision in *Ward*, that the Ninth Circuit has "recognized

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

39 Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 373 (6th Cir. 2013).

40 Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 670 (4th Cir. 2018) (rejecting Maryland's argument that "[the Court has] limited the extraterritoriality principle only to price affirmation statutes").

41 63 F.3d 652 (7th Cir. 1995).

42 *Id.* at 660–61; *see also* Nat'l Solid Wastes Mgmt. Ass'n v. Meyer, 165 F.3d 1151, 1153 (7th Cir. 1999) (per curiam).

43 Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1028 (9th Cir. 2021) ("Under this narrow interpretation [extraterritoriality as limited to price affirmation laws], *Baldwin*, *Brown-Forman*, and *Healy* [canonical extraterritoriality cases containing impermissible, price affirmation state laws] do not support the Council's arguments.") *cert. granted sub nom.* Nat'l Pork Producers v. Ross, 142 S. Ct. 1413 (2022).

44 729 F.3d 937 (9th Cir. 2013).

45 *Id.* at 951.

46 986 F.3d 1234 (9th Cir. 2021).

47 *Id.* at 1240.

[that] a 'broad[er] understanding of the extraterritoriality principle' may apply outside this context."[48] But the *Ward* court did not recognize a broader understanding of the doctrine; rather, *Ward* simply noted that the law at issue would have been unconstitutional even if the extraterritoriality doctrine could apply more broadly.[49] That is, the Ninth Circuit still limited the doctrine to price affirmation statutes in *Ward*.[50]

Given the inconsistent jurisprudence both within and among circuits, this Comment argues that the price affirmation theory of extraterritoriality not only misreads the doctrine but is also clearly incorrect as a matter of law, such that the Ninth Circuit incorrectly characterized *Walsh* in *Ross* and should have held that dependence on this theory constituted clear error in *Becerra*.

III. DORMANT COMMERCE CLAUSE AND EXISTING EXTRATERRITORIALITY TESTS

The Dormant Commerce Clause derives from Congress's power to "regulate Commerce . . . among the several States."[51] Because the Commerce Clause affirmatively grants Congress regulatory power, it also has negative—or dormant—implications for what states cannot do in this area.[52] Indeed, "[f]rom early in its history, the Supreme Court has interpreted the Commerce Clause as [also] implicitly preempting state laws that regulate commerce in a manner that is disruptive to economic activities in the nation as a whole."[53] This constitutional doctrine is known as the Dormant Commerce Clause, and, in some form, it has been a feature of constitutional law for nearly two centuries.[54]

Two principles guide the Dormant Commerce Clause.[55] "First, state regulations may not discriminate against interstate

48 *Nat'l Pork Producers Council*, 6 F.4th at 1028 (quoting *Ward*, 986 F.3d at 1240–41).

49 *Ward*, 986 F.3d at 1240 ("But even under a broad understanding of the extraterritoriality principle, [plaintiff's] challenge lacks merit.").

50 *See id.*

51 U.S. CONST. art. I, § 8, cl. 3.

52 *See* Erwin Chemerinsky, Constitutional Law: Principles and Policies 430–31 (4th ed. 2011).

53 *Nat'l Pork Producers Council*, 6 F.4th at 1026 (citing South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2090 (2018)).

54 *See* Norman R. Williams, *Gibbons*, 79 N.Y.U. L. REV. 1398, 1398 (2004).

55 There are two established exceptions to the Dormant Commerce Clause. The first occurs when Congress has legislated on the matter so that the Dormant Commerce Clause is no longer "dormant." *See* W. & S. Life Ins. v. State Bd. of Equalization of Cal., 451 U.S. 648, 650, 654–55 (1981). In this situation, the analysis shifts to a preemption inquiry. Under the second "market participation exception," a state is exempted from the Dormant

commerce. Second, States may not impose undue burdens on interstate commerce."[56] Concerns about economic protectionism, or "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors,"[57] drive these principles.

Even if not discriminatory in this way, a law may also be found to violate the Dormant Commerce Clause when it has extraterritorial effects,[58] or when it has "the practical effect of regulating commerce occurring wholly outside of that state's borders."[59] This "practical effects" rule is the essential test of the extraterritoriality doctrine.[60] The doctrine aims to protect both state sovereignty and the free flow of interstate commerce without consideration as to the law's purpose, whether legitimate or invalid, i.e., whether or not the regulation is designed to benefit in-state economic interests.[61]

State or local laws that "discriminate" against out-of-state commerce must serve a legitimate government interest and advance that interest in the least restrictive means possible.[62] Laws can discriminate on their face, in effect, or in purpose.[63] Such discriminatory laws face "a virtually *per se* rule of invalidity"[64] because the doctrine requires courts to subject the means by which the State seeks to achieve its purported interest to strict scrutiny. To date, the Supreme Court has upheld only one discriminatory state law.[65] But equally rare is the Supreme Court finding that a

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Commerce Clause because it is participating in, rather than regulating, the market. *See* Wis. Dep't of Indus., Lab. & Hum. Rel. v. Gould Inc., 475 U.S. 282, 289 (1986). Neither circumstance applies to Proposition 12.

56 Williams, *supra* note 54, at 2091.

57 Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008) (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1988)).

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

59 Healy v. Beer Inst., Inc., 491 U.S. 324, 332–33 (1989).

60 The extraterritoriality doctrine originally emerged under the Full Faith and Credit clause under Article IV and Due Process clause of the Fourteenth Amendment before it was tied to the Dormant Commerce Clause. *See* Brandon Denning, *Extraterritoriality and the Dormant Commerce Clause Post-Mortem*, 73 LA. L. REV. 979, 980 (2013) (citing WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS §§ 94–95 (3d ed. 2002)).

61 *See* Denning, *supra* note 60, at 980.

62 *See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617, 628–29 (1978).

63 *Id.*

64 Granholm v. Heald, 544 U.S. 460, 476 (2005) (quoting *Philadelphia*, 437 U.S. at 624) (internal quotation marks omitted).

65 *See* Maine v. Taylor, 477 U.S. 131, 151 (1986) (upholding state ban on the import of baitfish as serving the legitimate purpose of preventing infection of native fish stock

law discriminates in purpose, in part because the plaintiff has a high burden to bear in proving discriminatory purpose; the Court must "assume that the objectives articulated by the legislature are actual purposes of the statute, unless examination of the circumstances forces [it] to conclude that they could not have been a goal of the legislation."[66]

Courts uphold nondiscriminatory laws that "regulat[e] evenhandedly to effectuate a legitimate local public interest . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[67] If the government advances a putative local benefit, courts apply the *Pike*[68] balancing test in an extremely deferential, though often inconsistent, manner. Because of its historically inconsistent application, many have criticized the test as inappropriate and impossible to manage.[69]

Pike held that an Arizona law requiring "cantaloupe producers to consolidate every stage of cantaloupe production within Arizona as a condition upon doing business across state lines" clearly excessive to the putative local benefit Arizona advanced—the promotion of in-state cantaloupe production.[70] On its face, Proposition 12 arguably advances a more substantial local benefit than *Pike*.[71] And it also places a relatively smaller burden on

where no less discriminatory means were available to distinguish infected baitfish from healthy ones).

66 Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463 n.7 (1981) (citation omitted) (internal quotation marks omitted) (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975)). NAMI, but not NPPC, argued in *Becerra* that Proposition 12 discriminated in both effect and in purpose. The Ninth Circuit found that Proposition 12 did not discriminate in effect because it treats in-state and out-of-state meat producers the same. And although NAMI claimed that Proposition 12 operated to benefit in-state producers on the backs of out-of-state producers, it failed to show that Proposition 12's legislative history evinced a protectionist purpose in contrast to its stated purpose of preventing animal cruelty and consumer health risks related to high-density animal confinement. N. Am. Meat Inst. v. Becerra, 420 F. Supp. 3d 1014, 1024 (C.D. Cal. 2019), *aff'd*, 825 F. App'x 518 (9th Cir. 2020); Cal. Health & Safety Code §§ 25990–25994. That pork production constitutes only a marginal fraction of California's economy also cuts against the law as constituting economic protectionism from a commonsense standpoint. Whether it nonetheless has the effect of regulating out-of-state harm as a violation of the extraterritoriality doctrine, however, will be discussed further below.

67 Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

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

69 *See, e.g.*, Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 456 (2008).

70 *Becerra*, 420 F. Supp. at 1034; see *Pike*, 397 U.S. at 139–40.

71 Generous debate exists over the science behind the increased spread of foodborne illnesses from close confinement of hogs. Opponents of Proposition 12 claim that "almost no sow farmers in the country satisfy Proposition 12's sow housing requirements, and most believe that those requirements would harm their animals, employees, and operations."

interstate commerce: while out-of-state producers may have to restructure their production processes at great cost to sell in California, it does not require those processes to be performed in California. NPPC alleged that Proposition 12 substantially burdened interstate commerce because producers who chose to comply would experience a "9.2 percent increase in production cost," which would be passed on to consumers, and, in the alternative, producers who chose not to comply "would lose business" in California.[72] Noting that the Supreme Court "has not provided a clear methodology for comparing in-state benefits and out-of-state burdens," the Ninth Circuit found that NPPC still did not meet its minimum burden of "plausibly alleg[ing] that [Proposition 12] place[d] a 'significant' burden on interstate commerce."[73] That is, "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another."[74]

NPPC's arguments as to the extraterritoriality doctrine speak to a different matter because, in this analysis, "unconstitutionality does not depend on the regulation's discriminating against out of staters."[75] If a statute has an impermissible extraterritorial effect, it is irrelevant whether the state has a legitimate local purpose.[76] The doctrine aims to preserve state sovereignty between states by prohibiting legislation that exceeds a jurisdiction's inherent limits and therefore risks offending its sister states; such offensive laws particularly concerned the founders because they could provoke retaliation that would threaten

Brief for Petitioners at 9, Nat'l Pork Producers Council v. Ross, 142 S. Ct. 1413 (2022) (No. 21-468). But at least some studies show that confining pigs in high-density facilities have dire consequences beyond animal suffering, such as risks to worker, food, and public health safety. *See, e.g.*, *Putting Meat on the Table: Industrial Farm Animal Production in America*, PEW (Apr. 29, 2008), https://perma.cc/9CXW-VAUP; McKiver v. Murphy-Brown, LLC, 980 F.3d 937, 979–84 (4th Cir. 2020) (Wilkinson, J., concurring) ("It is well-established that close confinement leads to the "increased risk of the spread of disease" between hogs.").

72 Nat'l Pork Producers Council v. Ross, 6 F.4th 1021 (9th Cir. 2021), *cert. granted sub nom.* Nat'l Pork Producers v. Ross, 142 S. Ct. 1413 (2022).

73 *Id.* at 1032 (quoting Rosenblatt v. City of Santa Monica, 940 F.3d 439, 452 (9th Cir. 2019)).

74 *Id.* at 1032–33 (quoting Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127 (1978)). Earlier in *Becerra*, the Ninth Circuit also rejected NAMI's similar substantial burden argument and distinguished Proposition 12 from *Pike* by noting that the former "precludes sales of meat products produced by a specified method, rather than imposing a burden on producers based on their geographical origin." N. Am. Meat Inst. v. Becerra, 825 F. App'x 518, 520 (9th Cir. 2020).

75 *See, e.g.*, *Becerra*, 825 F. App'x at 520.

76 *See supra* note 23.

the union's stability.[77] The doctrine also addresses the need to protect the free flow of interstate commerce from impermissible extraterritorial laws.[78]

Three principles circumscribe extraterritorial regulation. First, a state statute may not apply to commerce wholly outside the state even if "the commerce has effects within the State."[79] Second, "a statute that directly controls commerce occurring wholly outside the boundaries of a State . . . is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature."[80] Last, a statute "must be evaluated . . . by considering how [it] may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation."[81]

Many scholars have proposed tests on how to evaluate whether a state law violates the extraterritoriality doctrine, or has the "practical effect" of regulating commerce wholly outside of a state's borders.[82] Alternatively, some scholars have argued this exterritoriality analysis should be replaced with *Pike* when analyzing nondiscriminatory state regulations.[83] But this argument minimizes one of the core principles driving the doctrine: protection of state sovereignty. Others have posited that the

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77 *See* Shaffer v. Heitner, 433 U.S. 186, 197 (1977) ("[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.").

78 *See* Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982).

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

80 *Id.*

81 *Id.*

82 For example, Jeffrey M. Schmitt proposed that "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." 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. ENV'T. L. REV. 423, 425 (2015). But, as Schmitt notes, determining whether a state has a "corresponding in-state interest" in the extraterritorial activity it regulates presents difficulties. *Id.* More crucially, this test appears to assume that prevention of a state's "complicity" in out-of-state practices it finds harmful—such as restrictive confinement standards—can constitute a "corresponding in-state interest." *See* Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris, 729 F.3d 937, 952–53 (9th Cir. 2013). But the Supreme Court has rejected the prevention of complicity as beyond a state's "jurisdictional bounds" and thus insufficient to sustain regulation of conduct wholly outside of a state's jurisdiction. *See* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 515 (1935); *see also* C&A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 393 (1994). This Comment's proposed extraterritoriality test as discussed in Section V will return to this concept.

83 *See* Louis Cholden-Brown, *Missouri and Indiana Lay an Egg: Why the Latest Attempt at Invalidating State Factory Farm Regulations Must Fail*, 22 CHAP. L. REV. 161, 170 (2019).

extraterritoriality doctrine itself should be abandoned altogether,[84] if it isn't already an "abandoned nineteenth-century relic."[85] But the historical and theoretical underpinnings of the doctrine reflect fundamental federalism concerns which are woven into the Constitution.[86] Moreover, complete abandonment of the doctrine may allow states to regulate for purposes other than the health, welfare, and morals of their citizens, and therefore disrupt the proper division of sovereign power. On the other hand, adoption of an expansive interpretation of the doctrine in line with *Healy's* broad practical effects language would subject significant state economic regulation to constitutional attack.

Still others have argued that the doctrine's demise is largely overstated and that courts have no difficulty in applying extraterritoriality principles.[87] As far as my research shows, however, none of these tests focuses on whether a state law utilizes control of an out-of-state manufacturer's processing requirements as a proxy for regulating wholly out-of-state conduct or harm.

IV. THE PRICE-AFFIRMATION THEORY OF EXTRATERRITORIALITY IS INCORRECT AS A MATTER OF LAW

Despite its inconsistent application,[88] the Ninth Circuit has consistently characterized *Walsh* as standing for the notion that the extraterritoriality principle applies only to price affirmations[89] or statutes that seek to regulate conduct beyond a state's borders by linking in-state prices with out-of-state prices.[90] That is why *Becerra* affirmed the district court's finding that Proposition 12's failure to price control per se saved it from

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84 *See* Sam Francis Found. v. Christie's, Inc., 784 F.3d 1320, 1332–34 (9th Cir. 2015).

85 *See* Sam Kalen, *Dormancy Versus Innovation: A Next Generation Dormant Commerce Clause*, 65 OKLA. L. REV. 381, 421 (2013); Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1033 (9th Cir. 2021) ("While the [D]ormant Commerce Clause is not yet a dead letter, it is moving in that direction. Indeed some justices have criticized [its] jurisprudence as being 'unmoored from any constitutional text.'"), *cert. granted sub nom.* Nat'l Pork Producers v. Ross 142 S. Ct. 1413 (2022).

86 *See* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35 (1980) ("Although the [Dormant Commerce Clause] thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade."); *see also* Bonaparte v. Tax Ct., 104 U.S. 592, 594 (1881) ("No state can legislate except with reference to its own jurisdiction.").

87 Susan Lorde Martin, The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead, 100 MARQ. L. REV. 497, 500 (2016).

88 *See supra* Section II.B.

89 *Supra* note 17.

90 *See* Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989).

extraterritorial violation.[91] And it is the doctrinal basis *Ross* referred to in explaining why the Ninth Circuit has "adopt[ed]" the price-affirmation theory, before applying the extraterritoriality principle more broadly to address NPPC's contrary extraterritoriality view.[92] This Comment argues that the Supreme Court never drew a limiting principle in *Walsh* such that any circumscription of extraterritoriality to price affirmation theory is incorrect as a matter of law. *Walsh* aside, the Supreme Court has also declined to limit the extraterritoriality doctrine to price affirmation statutes in any of its cases involving such regulations.

A. The Supreme Court's Canonical Price Affirmation Cases Have Not Limited the Extraterritoriality Doctrine to Price Control

The Supreme Court has ruled on several canonical extraterritoriality cases involving price affirmation laws. In finding that price affirmations *per se* violate the doctrine, these cases provided some of the key principles underlying impermissible extraterritorial regulation: interference in other states' regulatory schemes, elimination of competition between states, and the potential creation of economic balkanization. But these cases did not hold that price controls constitute the only means by which a state law could violate the doctrine. Rather, these canonical price affirmation cases outlined fundamental principles driving impermissible extraterritorial law that later non-affirmation cases like *Walsh* have incorporated into their analyses.

For example, in invalidating New York's price regulation statute, *Baldwin v. G.A.F. Seelig, Inc.*[93] highlighted the core reasons for the extraterritoriality doctrine: to preserve state sovereignty and protect the free flow of interstate commerce.[94] "It is one

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[91] Even under a broader theory of extraterritoriality, the lower court opinion in *Becerra* found Proposition 12 permissible because its application was triggered by in-state sales. The Ninth Circuit supported similar reasoning in *Ross,* although it also addressed NPPC's other arguments. Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1029 (9th Cir. 2021), *cert. granted sub nom.* Nat'l Pork Producers v. Ross 142 S. Ct. 1413 (2022) ("Under our precedent, state laws that regulate only conduct in the state, including the sale of products in the state, do not have impermissible extraterritorial effects."). But using in-state sales as a dispositive factor in evaluating extraterritoriality has been repeatedly rejected by the Supreme Court. *See, e.g.*, *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.,* 476 U.S. 573, 583 (1986) ("That the ABC Law is addressed only to sales of liquor in New York is irrelevant if the 'practical effect' of the law is to control liquor prices in other States.").

[92] *See supra* note 20.

[93] 294 U.S. 511 (1935).

[94] *See id.* at 528

thing for a state to exact adherence by an importer to fitting standards of sanitation," the Court held, but "[i]t is a very different thing to establish a wage scale . . . for use in other states, and to bar the sale of the products, whether in the original packages or in others, unless the scale has been observed."[95] State laws conditioning in-state sales on "standards of sanitation" did not contravene the extraterritoriality doctrine's fundamental principles because they targeted in-state harms. But banning the sale of products based on a state's objection to insufficient wage standards for out-of-state employees did constitute the kind of law that might erect trade barriers and create hostility between states.[96] The Court struck down New York's price affirmation law on these grounds—not because extraterritoriality applied only to price control regulation.

In *Brown-Forman Distillers Corp. v. New York State Liquor Authority,*[97] a New York law required distillers selling alcoholic beverages within the state to comply with a monthly price schedule set by the State Liquor Authority and to affirm that they would not sell their products for lower prices in other states.[98] The Court found it irrelevant that only in-state sales triggered the invalidated New York law when "the 'practical effect' of the law [was] to control liquor prices in other States."[99] Citing *Baldwin*, the Court held that "New York may not 'project its legislation into [other States] by regulating the price to be paid' for liquor in those States."[100] Notably, that alcohol distillers who did not want to comply with New York's pricing scheme could simply refuse to sell to in-state consumers did not save the regulation from, in "practical effect," legislating in other jurisdictions.[101] It follows that Proposition 12's similar "out"—the sales ban applies only to sales *in* California—fails to automatically save it from extraterritoriality analysis.[102]

Healy involved a similar Connecticut statute that instructed sellers to post prices at the beginning of the month and forbade deviation from the posted prices during that month.[103] The Court

95 *Id.*
96 *See id.*
97 *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 575–576 (1986).
98 *See id.* at 576.
99 *Id.* at 583.
100 *Id.* at 582–83.
101 *Id.*
102 *See also infra* Section V.B.
103 *See* Healy v. Beer Inst., Inc., 491 U.S. 324, 324 (1989).

explained how the law impermissibly restricted sellers' ability to respond to local market conditions and offer discounts in border states.[104] Moreover, the Court emphasized that if a nontrivial number of states enacted similar affirmation statutes linking in-state prices to the lowest price in any state in the country, sellers would effectively have to charge the same price in every state. The creation of a regional or national pricing scheme through the "extraterritorial reach of individual state statutes" constituted the type of national regulation reserved to Congress.[105]

B. *Walsh* Did Not Limit the Extraterritoriality Doctrine to Price Affirmations

The Ninth Circuit has characterized *Walsh* as standing for the notion that the extraterritoriality principle applies only to price affirmations.[106] But this view incorrectly interprets *Walsh*.

Walsh concerned a Maine statute that required drug distributors to enter into rebate agreements with the state; failure to do so forced distributors to pass a prior authorization procedure before they could sell their products to Maine Medicaid recipients.[107] As presented to the First Circuit prior to the Supreme Court's hearing, the essence of the petitioner's extraterritoriality argument was that the law functioned as a price regulation statute because it had the effect of lowering profits made in out-of-state transactions with out-of-state distributors.[108]

As an initial matter, the First Circuit noted that the Maine law did not price control. But the First Circuit did not sustain the law simply because it was not a price regulation statute. This quality presented but one reason that the law did not have the practical effect of regulating wholly out-of-state commerce; Supreme Court precedent had shown that price affirmation statutes *per se* violated the extraterritoriality doctrine. That is, the First Circuit found that price affirmations constitute a subset of invalid laws, and the more "inapposite" a challenged statute is to affirmation statutes, the more likely it is not a violation.[109]

Having established that the Maine law did not price control, the First Circuit then discussed the remaining principles of the

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104 *See id.* at 339.
105 *Id.* at 340.
106 *Supra* note 17.
107 Pharm. Rsch. & Mfrs of Am. v. Walsh, 538 U.S. 644, 670 (2003).
108 *See id.* at 672.
109 *See* Pharm. Rsch. & Mfrs. of Am. v. Concannon, 249 F.3d 66, 81 (1st Cir. 2001), *aff'd sub nom. Walsh,* 538 U.S. 644 (2003).

doctrine as developed in prior Supreme Court cases.[110] The law did not have the practical effect of regulating wholly out-of-state conduct because it merely created the possibility of negatively impacting out-of-state profits, and doing so did not interfere with regulatory schemes[111] in other states or risk fragmentation of the national economy through erection of unreasonable barriers to commerce.[112] Indeed, the Supreme Court has emphasized that the purpose of the Dormant Commerce Clause is to ensure that "[r]ivalries among the States are . . . kept to a minimum, and a proliferation of trade zones is prevented."[113]

Thus, the First Circuit's analysis did not limit extraterritoriality analysis to a narrow reading of whether the law at issue regulated prices. Nor did the Court's affirmation of the First Circuit's decision in *Walsh* invalidate the First Circuit's use of these principles. As such, "the *principle*" that the Court cited to as inapplicable to *Walsh* referred to the (single) principle that price affirmations violate the extraterritoriality doctrine—not that extraterritoriality analysis applies exclusively to price affirmations, or that the doctrine's other principles remain irrelevant under different circumstances.

Walsh also did not overrule Supreme Court cases that have found non-price affirmation state laws to be impermissible extraterritorial regulations. For example, *Edgar v. MITE Corporation* involved an Illinois anti-takeover act that required registration of takeover offers of certain corporations, including those with principal places of business in Illinois and organized under Illinois law.[114] There, the Court created what would become the de facto test for impermissible extraterritorial regulation: "commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[115] In finding that the state law constituted impermissible extraterritorial regulation, the Court noted that a tender offer for securities of a publicly held corporation necessarily employed interstate facilities, such as the postal system, in communicating its offer, and, if accepted, would result in transactions occurring across state lines. Thus, these transactions themselves constituted interstate commerce. So, the

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110 *See id.* at 83.

111 *See also* Healy v. Beer Inst., Inc., 491 U.S. 324, 337 (1989) (noting the "the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude").

112 *See* Granholm v. Heald, 544 U.S. 460, 472 (2005).

113 *Id.* (quoting C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 390 (1994)).

114 *See* Edgar v. MITE Corp., 457 U.S. 624, 627 (1982).

115 *Id.* at 642–43.

Illinois law's "practical effect [was] to control [conduct] beyond the boundaries of the state."[116] The Court rooted its decision in the fact that "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."[117] It then compared the inherent limits of state power to those of state courts,[118] affirming that one of the essential functions of the extraterritoriality doctrine is to preserve each state's sovereignty from intrusion by other states.

Comparison of *Edgar* with *CTS Corp. v. Dynamics Corp. of America*,[119] decided five years later, fleshes out some key principles in the Court's extraterritoriality analysis. There, an Indiana law that applied only to corporations with a substantial number of in-state shareholders provided that the acquisition of control shares in a corporation would not include voting rights unless a majority of the pre-existing disinterested shareholders agreed.[120] To the extent that takeover offers constituted interstate commerce, so too did the acquisition of shares in a corporation. Yet, the Indiana regulation did not constitute impermissible regulation. Key to the Court's analysis was the fact that the Indiana law did not present a risk of inconsistent state regulation of corporations. "So long as each State regulates voting rights only in the corporations it has created," the Court wrote, "each corporation will be subject to the law of only one State."[121] The Court cited to *Edgar* for the principle that a statute constitutes extraterritorial regulation when it subjects activities, such as corporate governance, to inconsistent state regulations and therefore presents a risk to the free flow of interstate commerce.[122] The Court also seemed to distinguish the two laws based on the chief location of the regulated activity: whereas the invalid Illinois law applied to corporations even if they did not have any in-state shareholders, the permissible Indiana law applied only to corporations with a substantial number of in-state shareholders.[123]

116 *Id.* at 643 (quoting S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 775 (1945)).
117 *Id.* (quoting Shaffer v. Heitner, 433 U.S. 186, 197 (1977)).
118 *See id.* at 643.
119 481 U.S. 69 (1987).
120 *See id.* at 72.
121 *Id.* at 89.
122 *See id.* at 90.
123 *See id.*

C. Other Circuits Have Declined to Read *Walsh* as Limiting the Extraterritoriality Doctrine to Price Affirmations

Unlike the Ninth and Tenth Circuits, other circuits have rejected the claim that the Supreme Court confined the Dormant Commerce Clause's principle against extraterritoriality in *Walsh*. These cases further strengthen the argument that the Ninth Circuit incorrectly interpreted *Walsh's* ambiguous language.

For example, the Fourth Circuit in *Association for Accessible Medicines*[124] overruled a Maryland law that "did not establish a price schedule for prescription drugs, nor . . . aim[ed] to tie the prices charged for prescription drugs in Maryland to the prices at which those drugs are sold in other states.[125] In doing so, the court rejected *Walsh* as an indication of price affirmation theory: "Maryland's reading of [*Walsh's*] language, while adopted by two of our sister circuits, is too narrow."[126] The Eighth Circuit similarly denied Minnesota's claim that only price affirmation laws could violate the extraterritoriality doctrine in *North Dakota v. Heydinger*. [127] The court explicitly noted that "the Supreme Court has never so limited the [extraterritoriality] doctrine [to price regulations], and indeed has applied it more broadly."[128]

In contrast, the Tenth Circuit's decision in *Energy & Environment Legal Institute v. Epel* conforms with the Ninth Circuit's interpretation of *Walsh* as limiting the extraterritoriality principle to price affirmation statutes.[129] *Epel* involved a Colorado statute that required "electricity generators to ensure that 20% of the electricity they sell to Colorado consumers comes from renewable sources."[130] There, the Court declined to apply the extraterritoriality doctrine. It suggested that the doctrine applied exclusively to price affirmations because it read the Supreme Court's price affirmation cases as primarily concerned with preventing out-of-state discrimination as a burden on interstate commerce. But this interpretation discounts one of the chief reasons for the

124 887 F.3d 664 (4th Cir. 2018).

125 *See id.* at 672.

126 *Id.* at 670.

127 825 F.3d 912, 919 (8th Cir. 2016) ("This categorical approach to the Commerce Clause would be contrary to well-established Supreme Court jurisprudence.").

128 *Id.*

129 793 F.3d 1169, 1174–75 (10th Cir. 2015) ("[T]he Supreme Court has emphasized as we do that the [extraterritoriality principle] concerns only 'price control or price affirmation statutes' that involve 'tying the price of . . . in-state products to out-of-state prices.' . . . The Ninth Circuit has made the same point, too . . . .") (quoting *Walsh,* 538 U.S at 669 and *Harris*, 729 F.3d at 951)).

130 *Id.* at 1170.

doctrine—protecting state sovereignty—and essentially reads the entire doctrine as redundant or at least "no more than instantiations of the . . . anti-discrimination rule" under the Dormant Commerce Clause.[131]

V. PROPOSED EXTRATERRITORIALITY TEST: MATERIAL REGULATION OF OUT-OF-STATE PRODUCTION PROCESSES AS IMPERMISSIBLE EXTRATERRITORIAL LEGISLATION

Using the concept of production activities as wholly intrastate activities, this Comment argues that, under prong one of the proposed test, a law violates the extraterritoriality doctrine when it materially regulates the physical production processes of out-of-state manufacturers.

Because the absence of such material regulation does not automatically prevent a state law from being invalidated under the doctrine, the test's second prong aims to determine whether state laws that do *not* materially regulate out-of-state physical production processes should be upheld as permissible regulation. To that extent, the second prong provides that such a state law must affect out-of-state commerce only through a sales ban that attaches restrictions to out-of-state production processes by conditioning the in-state sale of an import to such production. Prong two, therefore, does not apply to state laws that regulate out-of-state conduct through other means, such as price affirmations—which are already held as *per se* impermissible.[132] Prong two simply proposes that where challenged state laws affect out-of-state conduct only through the requisite type of sales ban, courts have found that the laws must materially regulate such production. To that extent, the cases discussed in this section, unless explicitly otherwise noted for purposes of comparison, concern state laws that require scrutiny under the extraterritoriality doctrine because they contain sales bans conditioning the sale of in-state products

[131] *Id.* at 1173. Note, too, that prior to *Epel*, the Tenth Circuit struck down a non-price-affirmation law as a violation of the extraterritoriality doctrine. *See* Hardage v. Atkins, 619 F.2d 871, 872 (10th Cir. 1980). *Hardage* concerned an Oklahoma law that prohibited the import of waste into the state unless the jurisdiction in which it originated had enacted "substantially similar standards" for waste disposal as Oklahoma had. *Id.* The Court portrayed the law as a "threat of economic isolation," addressing the extraterritoriality doctrine's concern with preventing the risk of economic fragmentation. *Id.*

[132] *See*, *e.g.*, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) (overruling price affirmation statute); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986) (same); Healy v. Beer Inst., 491 U.S. 324 (1989) (same); see also Edgar v. MITE Corp., 457 U.S. 624 (1982) (striking down Illinois law that required shareholders, regardless of where they were located, who made tender offers to certain businesses organized under Illinois laws to register with the Illinois Secretary of State).

on compliance with regulations for out-of-state production processes.

Part A explains why material regulation of out-of-state physical production processes should be considered impermissible extraterritorial regulation in the first place. Part B argues that material regulation of out-of-state production can be triggered by "sales bans," or conditioning in-state sales on compliance with out-of-state production requirements. Part C further defines "material" regulation using a factor-based inquiry. Finally, Part D argues that Proposition 12 should be upheld not because it avoids price controls, but because its challenged provision is a sales ban that does not materially regulate its restrictions on out-of-state physical production processes.

A. Underpinnings of Material Regulation of Out-of-State Physical Production Processes as Impermissible Extraterritorial Law[133]

The notion of production activities as wholly intrastate activities stems from *Cooley v. Board of Wardens*,[134] the first case to ground the extraterritoriality doctrine in the Dormant Commerce Clause. *Cooley* involved two laws: an 1803 Pennsylvania regulation that required ships passing through the Philadelphia harbor to hire a "pilot" and a 1789 federal regulation permitting states to regulate guide services.[135] The plaintiff violated the state regulation when he entered the harbor without a pilot.[136] Ruling that the 1789 federal law gave states the right to regulate pilot services in a port, the Supreme Court found state regulation of such "local"—as opposed to "national"—matters permissible.[137]

The *Cooley* "Compromise" evaded a "political calamity" by avoiding direct hostility with states' rights advocates while allowing the Court to overrule some invalid state regulations.[138] Under the *Cooley* Compromise, states could not regulate "national" matters because such regulation burdened interstate commerce. In

133 *See* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1110–12 & nn.104–09 (2000). This section draws on Cushman's detailed article along with the other cited material.

134 53 U.S. 299 (1851).

135 *See id.*

136 *See id.* at 311–12, 321.

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

138 Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 579 (1987).

contrast, states could regulate "local" matters as long as their regulations affected interstate commerce only "indirectly."[139]

Courts employed these terms somewhat imprecisely, but roughly speaking, two types of laws had indirect effects on interstate commerce. First, regulation of local matters "over which Congress' jurisdiction was paramount but not exclusive,"[140] such as nondiscriminatory labeling and inspection statutes. And second, laws that did not regulate interstate commerce at all, or those that "might operate before interstate commerce had begun, or after it had ceased."[141] The latter category included regulations of production and manufacture, which were considered pre-interstate—or wholly intrastate—commerce activities.[142]

The Supreme Court has long considered these activities of production to be quintessential local conduct.[143] As such, courts have consistently interpreted state laws that regulate these activities within their own boundaries as having permissible, incidental effects on interstate commerce.[144] This Comment argues that it follows that state laws that materially or "directly" regulate these activities outside of their borders constitute wholly out-of-state, and thus impermissible, regulations.

Although this Comment uses principles from the *Cooley* Compromise, it also proposes a new, modified test because the Supreme Court eventually abandoned *Cooley*; while *Cooley* was instrumental in identifying production activities as fully local matters, it failed to articulate a way to clearly define national and local matters when it came to laws concerning other areas, especially as the nation evolved towards the modern supply chain economy.[145] And although the *Cooley* test eventually gave rise to the direct-indirect test—which examined whether a law's effect either "directly" or "indirectly" prohibited interstate commerce[146]—the direct-indirect analysis suffered similar limitations: it failed to distinguish between direct and indirect burdens in a meaningful way. As a result, the test often produced erratic,

139 Cushman, *supra* note 133, at 1110–12.

140 *Id.* at 1114.

141 *Id.* at 1116.

142 *See id.* at 1118–20.

143 *See id.*

144 *See id* at 1121 n.148. (citing Chassaniol v. City of Greenwood, 291 U.S. 584, 587 (1934) and Fed. Compress & Warehouse Co. v. McLean, 291 U.S. 17, 22 (1934)).

145 *See* Peter C. Felmly, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 467, 473 (2003).

146 *See, e.g.*, S. Ry. Co. v. King, 217 U.S. 524, 531–32 (1910).

conflicting rulings.[147] It was "too mechanical, too uncertain in its application, and too remote from actualities, to be of value."[148]

The Supreme Court has aimed to simplify the doctrine in the years since, but modern Dormant Commerce Clause jurisprudence has long been—and remains—"a quagmire."[149] Because America's growing interest in food traceability makes it likely that Dormant Commerce Clause litigation in the agribusiness industry will intensify, the Supreme Court's continued silence on how to clearly interpret the extraterritoriality doctrine does little to help clarify an already incoherent body of law.[150]

Thus, this Comment proposes a test that acknowledges the realities of the modern supply chain economy, one in which clearly slicing and dicing intra- and inter-state activities present greater challenges: a law violates the extraterritoriality doctrine when it materially regulates the physical production processes of out-of-state manufacturers to prevent out-of-state harms.

B. Conditioning the In-State Sale of Imported Products on Out-of-State Production Preceding the In-State Sale Does Not Preclude Finding Material Regulation of Out-of-State Processes

The second prong of this Comment's proposed test aims to determine whether state laws that do *not* materially regulate out-of-state physical production processes should be upheld as permissible regulation. As an initial matter, material regulation of out-of-state production can be triggered by "sales bans," or conditioning in-state sales on compliance with out-of-state requirements. Moreover, in cases where challenged state laws affected out-of-state commerce only through a sales ban attaching

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147 *Compare id.* at 532–33 (finding a state law regulating the speed of trains in cities an indirect burden on interstate commerce because of states' inherent power to regulate the area), *with* Seaboard Air Line Ry. v. Blackwell, 244 U.S. 310, 316 (1917) (overruling a state law mandating the number of times a train must stop during its crossing into the state because of its direct burden on interstate commerce).

148 Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1927) (Stone, J., dissenting). Justices Brandeis and Holmes joined Justice Stone in his dissent.

149 W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 210 (1994) (Scalia, J., concurring) (internal quotation marks omitted) (quoting Nw. States Portland Cement Co, v. Minnesota, 358 U.S. 450, 458 (1959)).

150 Thus far, the twelve other states that have enacted some form of animal confinement laws represent a relatively small portion of the agricultural industry for animal products. Nonetheless, the recent trend has motivated farmers to advocate for changes that would make it harder for states to regulate their businesses. *See* Jenn Fifield, *Farmers Push Back Against Animal Welfare Laws*, PEW (Nov. 29, 2016), https://perma.cc/YY2B-9QLN.

restrictions to out-of-state production processes, courts have found that the laws must materially regulate such production.

In *Southern Pacific Co.*, Arizona banned railroad trains with more than fourteen passenger- or seventy freight-cars from passing through the state. Even though only train operation within the state triggered the law, the Supreme Court ruled that the law violated the extraterritoriality doctrine because it required trains to break up and reassemble prior to and when leaving the state, thereby controlling conduct such as assembly processes prior to participation in interstate commerce.[151] Importantly, the Court held that such production regulation—which was not a price affirmation—differed from other state measures that did not "as substantially" affect production processes, such as "abolishing the car stove" or "requiring the locomotives to be supplied with electric headlights."[152] That is, because the state law regulated out-of-state conduct only through an import ban attaching restrictions to out-of-state production, it had to "substantially" (rather than incidentally) regulate such production. The Supreme Court issued a similar ruling in *Navajo Fright Lines, Inc.*[153] when it overruled an Illinois regulation that trucks using highways in Illinois must have "contour rear fender mudguards," as opposed to customary mudguards.[154] Following Supreme Court precedents like *Southern Pacific Co.* and *Navajo Freight Lines*, other decisions have confirmed that state laws forcing transporters to choose between abiding by state rules or avoiding the state entirely constitute wholly out-of-state regulation.[155]

Courts have also overruled regulations triggered solely by in-state sales of non-physical imports as, for example, the Eighth Circuit did in *North Dakota v. Heydinger*. There, a Minnesota statute prohibited the import of electricity from out-of-state providers that would contribute to an increase in statewide carbon dioxide emissions.[156] These providers funneled their electricity to

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151 *See* S. Pac. Co. v. Ariz. *ex rel.* Sullivan, 325 U.S. 761, 779 (1945); *see also* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 521 (1959).

152 *S. Pac. Co.*, 325 U.S. at 779.

153 359 U.S. 520 (1959).

154 *Id.* at 521.

155 *See*, *e.g.*, Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978).

156 North Dakota v. Heydinger, 825 F.3d 912, 919 (8th Cir. 2016) (citing W. Lynn Creamery, Inc. v. Healy, 512 U.S. 108, 201 (1994)). Federal law governs "the transmission of electric energy in interstate commerce," 16 U.S.C. § 824(b)(1), but states can still regulate matters they "traditionally regulated" in this area. *Heydinger*, 825 F.3d at 915. In invalidating this law, the Eighth Circuit also explicitly rejected Minnesota's claim that only price affirmation laws can violate the extraterritoriality doctrine. *Id.* at 919 ("This

consumers in several states, including Minnesota, through regional transmission grids. While plaintiffs could inject electricity into the grid in a way that comported with Minnesota's statute, it was impossible to ensure that the specific injection reached Minnesota consumers—rather than their consumers in other states—because there was no way to the separate electricity funneled to Minnesota consumers once it entered the transmission grid.[157] Although this law applied only to in-state sales, the Eighth Circuit found that it regulated wholly out-of-state conduct because it required providers to ensure that all of the electricity they funneled to the grid comported to Minnesota standards.[158] Thus, out-of-state providers had to conduct their out-of-state processes according to Minnesota's terms if they wanted continued access to Minnesota's market.[159] Of note, compliance with the Minnesota law required providers to "completely" disconnect any "[noncompliant] generation resource and [its] end-use customer . . . from each other physically."[160] Short of complete abstention from the Minnesota market, no change—however material—allowed noncompliant coal-fired generators to produce electricity without increasing carbon dioxide emissions. To that extent, the Minnesota law more than materially (rather than incidentally) regulated out-of-state production activity.[161]

It could be argued that the above cases all involved inherently interstate markets, i.e., it is impossible to slice and dice the production of electricity or interstate transportation as compared to meat production. But the argument also cuts the other way: if true, then it is even more appropriate that material regulation of non-inherently interstate production runs afoul of the extraterritoriality doctrine because such activities can be segmented into discrete—and thus solely *intra*state—components to which out-of-state regulation should not apply.

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categorical approach to the Commerce Clause would be contrary to well-established Supreme Court jurisprudence.").

157 *See Heydinger*, 825 F.3d at 920.

158 *See id.*

159 *See id.* For a similar case in the Seventh Circuit, *see* Ill. Com. Comm'n v. Fed. Energy Regul. Comm'n, 721 F.3d 764, 776 (7th Cir. 2013) ("Michigan cannot, without violating the commerce clause . . . discriminate against out-of-state renewable energy.").

160 *Heydinger*, 825 F.3d at 921.

161 *See infra* Section V.C. This speaks to an overwhelming finding of the third factor of the proposed materiality inquiry, whether the state law's requirements on the physical production processes that occur out of state are remarkably specific or extensive. *But see Heydinger*, 825 F.3d at 923 (Murphy, J., concurring) (rejecting the provisions as impermissibly extraterritorial but affirming the decision because of federal preemption).

Courts have also invalidated extraterritorial laws that impermissibly regulate out-of-state production activity for non-inherently interstate products.[162] Moreover, in *Carbone*, the Supreme Court referred to *Baldwin*—an extraterritoriality case involving a price affirmation—as standing for the principle that "states and localities may not attach restrictions to exports or imports to control commerce in other States."[163] Although the Court struck down the challenged municipal ordinance for discriminating against out-of-state commerce, the Court cited *Baldwin's* principle as one of the reasons why the waste disposal ordinance extended "the town's police power beyond its jurisdictional bounds."[164] This was true even though the ordinance regulated a product that did not involve an inherently interstate market. It follows that certain restrictions on imports and exports can have extraterritorial effects on out-of-state conduct even if such restrictions control non-inherently interstate production. The Court appeared to draw the line between permissible and impermissible import/export restrictions based on whether a challenged law prevents out-of-state harm, or in-state "complicity" in out-of-state practices in such harm.[165] That is, the prevention of out-of-state environmental harm—or in-state "complicity" in out-of-state practices causing out-of-state environmental harm—amounted to an extension of "the town's police power beyond its jurisdictional bounds."[166]

C. Defining "Material" (Thus Impermissible) Regulation of Out-of-State Production as Law That Targets Out-of-State Harm

Many circuits have permitted some regulations of out-of-state manufacturing processes, such as valid state labeling laws. As the Seventh Circuit in *Legato Vapors, LLC v. Cook*[167] noted, "the direct regulation of out-of-state facilities and services has effects that are not comparable to mere incidental effects of . . . a law regulating labels, such as those on light bulbs or milk." But

[162] *See infra* Section V.C.

[163] C&A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 393 (1994). *Carbone* concerned a municipal law that required any waste exported from the town to go through a specific in-town processor before its export; the law aimed to steer waste "away from out-of-town disposal sites that it might deem harmful to the environment. *Id.*

[164] *Id.*

[165] *See id.* (citing Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 511 (1935)) ("Nor may Clarkstown justify the flow control ordinance as a way to steer solid waste away from out-of-town disposal sites that it might deem harmful to the environment. To do so would extend the town's police power beyond its jurisdictional bounds.").

[166] *Id.*

[167] 847 F.3d 825 (7th Cir. 2017); *see infra* at 288.

the key is that such laws have merely incidental effects on production processes and thus have the valid effect of upholding product safety, an in-state harm, rather than preventing the state's "complicity" in an out-of-state harm. As such, they do not contravene the two core principles of the extraterritoriality doctrine, i.e., preserving state sovereignty and protecting the free flow of interstate commerce.[168]

This Comment's test uses a factor-based inquiry to determine whether a state law constitutes material regulation (as opposed to incidental regulation) of out-of-state production processes and therefore impermissible extraterritorial law. A positive finding of material regulation indicates that the state law has the *effect* of regulating out-of-state harm, as opposed to in-state harm. Note that this analysis measures the state law's consequences on out-of-state production, not its *intention*, because the extraterritoriality doctrine does not concern itself with a state law's designed purpose.[169] Therefore, under this factor-based inquiry, if the state law is found to constitute material, impermissible regulation of out-of-state production activities, then a legitimate local purpose does not save it from invalidating the extraterritoriality doctrine.

The materiality analysis involves examining three factors, as described below. No single factor alone is dispositive, nor do all three factors need to exist to find a state law materially regulates out-of-state production processes. Instead, a sliding scale should be applied; if one factor is particularly present, the other factors need not be as strong to demonstrate material regulation. The factors are: (a) whether compliance with the state law would force out-of-state producers to create a state-exclusive product, or at least one that can be sold only to a limited number of states; (b) if withdrawal from the state market as a result of the regulation would impact other states' access to the product, an inquiry distinct from the producer's decline in profit alone; and (c) whether the state law's requirements on the physical production processes that occur out of state are remarkably specific[170] or extensive. These factors target the extraterritoriality doctrine's dual goals of protecting state sovereignty and the free flow of interstate

168 This Comment's proposed test is distinct from Schmitt's "inescapable practical effects" test in that it does not extend a state's valid purpose of upholding protect safety to, for example, ensuring that its citizens do not participate in harm that occurs elsewhere, because the Supreme Court has ruled that prevention of "complicity" cannot sustain an otherwise impermissible extraterritorial regulation. *See supra* note 82.

169 *See supra* note 22.

170 This term is taken from the Seventh Circuit's holding in *Legato Vapors,* 847 F.3d at 835.

commerce without consideration as to the law's stated purpose.[171] They address the challenged regulation's impact on the free flow of interstate commerce by evaluating whether the law threatens inconsistent regulation that would interfere with interstate trade or impinge on other states' sovereign power.

A comparison of invalid state labeling regulations against valid labeling laws helps demonstrate how this factor-based inquiry works.

National Electrical Manufacturers Association v. Sorrell[172] involved an invalid Vermont law that banned the in-state sale of lightbulbs containing mercury unless manufacturers affixed warning labels to them. As for the first factor, whether compliance with the state law would force out-of-state producers to create a state-exclusive product, or at least one that could be sold only to a limited number of states, the court found that the labeling law did not require creation of a Vermont-only product because manufacturers could still sell these labeled lightbulbs to consumers in other states (even though the labels were not required in the other states).[173] The second factor, if withdrawal from the state market as a result of the regulation would impact other states' access to the product—a factor distinct from the producer's decline in profit alone—also weighed in favor of permissible regulation. Plaintiffs argued the Vermont law would harshly impact their profits because it would force them to alter their production and distribution systems between Vermont and elsewhere, an expensive process. And the court acknowledged that the cost of labeling lamps solely for Vermont consumers might be prohibitively costly, forcing manufacturers to be "compelled by economic necessity" to stop selling their products to the Vermont market.[174] Nonetheless, the Second Circuit did not find prohibitive expense alone as a sufficient reason to strike down the law as impermissible extraterritorial regulation. Holding it "axiomatic that the increased cost of complying with a regulation may drive up the sales price of the product," the court accordingly ruled that a company's choice to stay or exit a market was based on factors (such as cost of capital, production costs, and in-state demand) that rested with the company, not the state—at least in the case before it. Here, the challenged law even-handedly required

[171] *See* Denning, *supra* note 60, at 980.
[172] 272 F.3d 104 (2d Cir. 2001).
[173] *See id.* at 110–12.
[174] *Id.* at 111.

manufacturers both inside and outside Vermont to develop labels particular for Vermont consumers.[175]

More critically, the Second Circuit emphasized that if lamp manufacturers were to leave the Vermont market out of economic necessity, Vermont residents would bear the loss in utility of mercury-containing bulbs; consumers in other states would feel a marginal loss at most as withdrawal from the Vermont market would not inhibit lamp manufacturers from pursuing business in those states.[176] In contrast to the state restrictions on interstate transportation in *Raymond Motor Transp., Inc.*, *Navajo Freight Lines, Inc.*, and *S. Pac. Co.*,[177] which prevented transporters from conducting commerce in surrounding states if they did not follow the state laws because they simply could not pass through the legislating states to reach other territories, the Vermont labeling law did not affect lamp manufacturers' ability to conduct commerce with surrounding states.

The Second Circuit did not address the proposed test's third factor, which is whether the state law's requirements on out-of-state physical production processes are remarkably specific or extensive, although the court's discussion of a hypothetically prohibitive expense in altering production processes could be interpreted to indicate that the law required extensive changes. Still, the court held that the Vermont law did not constitute impermissible extraterritorial regulation.[178] This Comment's factor-based inquiry would reach a similar result, given the strong weight against material regulation of out-of-state production processes pursuant to analysis of the first two factors.

The Sixth Circuit took a similar approach when it upheld a state law in *International Dairy Foods Association v. Boggs*.[179] This case involved an Ohio law that prohibited dairy processors from selling milk products labeled as artificial-hormone-free to Ohio consumers.[180] Although the court's analysis did not discuss the first factor, it should be noted that the Ohio law would not have created a product that out-of-state producers could sell to very few states because other consumer-states did not require such disclaimers at the time.[181] Thus, the first factor weighs against material regulation of out-of-state production processes.

175 *See id.*
176 *See id.*
177 *See supra* notes 151–55.
178 *See Sorrell,* 272 F.3d at 111.
179 622 F.3d 628, 646 (6th Cir. 2010).
180 *See id.* at 632.
181 *See id.*

But the Sixth Circuit's decision did emphasize the second factor, whether withdrawal from the state market as a result of the regulation would impact other states' access to the product and therefore impede the flow of interstate commerce. Because the plaintiff-dairy processors included such disclaimers in their labels on milk products sold in other states, they put forth a similar argument to the lamp manufacturers in *National Electrical Manufacturers Association*: altering their production processes to change their labels to comport with Ohio's law would force them to create a nationwide-label at great expense "due to the complex national distribution channels through which milk products are delivered and the costs associated with altering their labels."[182] While the Second Circuit recognized that out-of-state manufacturers may choose to exit the Ohio market because of prohibitive expense, it similarly held that their withdrawal would not impede the free flow of milk products across state lines because failure to comply with the Ohio law did not prohibit dairy processors from continuing business in other states.[183] Thus, the second factor also weighs against material regulation of out-of-state production processes. Given the fact that the first two factors both weigh against material regulation, this Comment's test finds that Ohio's law is not an impermissible extraterritorial regulation, in line with the Second Circuit's holding.[184]

Not all labeling laws have been found to be permissible *per se*. *American Beverage Association v. Snyder*[185] is an example of an invalid state regulation for violation of the first factor, whether compliance with the state law would force out-of-state producers to create a state-exclusive product, or at least one that can only be sold to a limited number of states. *American Beverage Association* concerned a Michigan law that required producers of non-alcoholic beverages to possess a unique-to-Michigan recycling mark that could be used only in Michigan or other states that had "substantially similar" laws, where "substantially similar" was interpreted to include the 10 states that required consumers to pay a similar can, plastic bottle, or glass bottle deposit (refunded when recycled).[186] Notably, violation of the law—either by the beverage-seller or consumer-state—could result in up to six months'

182 *Id.* at 647.
183 *See id.* at 647.
184 *See id.* at 648–49.
185 735 F.3d 362 (6th Cir. 2013).
186 *See id.* at 366–67.

imprisonment and/or a $2,000 fine.[187] As a practical matter, the cash refund required that distributers clearly indicate the state's name and the container's refund value with a mark, "MI 10¢."[188]

Under this Comment's test, the first factor weighs toward material regulation of out-of-state production processes. Compliance with Michigan's law results in a product that can be used only in Michigan or a limited number of states. And because the Michigan law goes as far as imposing criminal sanctions on *other* states for failure to comport with its requirements, this first factor dispositively weighs towards impermissible extraterritorial regulation; Michigan in effect has forced other states to comply with its legislation in order for business to be conducted within their own boundaries.[189] Indeed, the Sixth Circuit invalidated the labeling requirement as impermissible extraterritorial regulation on this basis.[190] That Michigan conditioned the mark on in-state sales—meaning it did not require manufacturers to sell their products using this mark in other states—did not factor into the court's finding that the law regulated wholly out-of-state commerce.[191] Because manufacturers could not sell the uniquely-marked beverages in many other states, Michigan effectively projected its regulatory regime onto other jurisdictions and threatened the free flow of interstate traffic.[192]

Moreover, given that Michigan's law has been found to constitute material, impermissible regulation of out-of-state production activities, its legitimate local purpose does not save it from invalidation. So, it matters not that, like Proposition 12, the law had a local putative purpose on its face: to reduce bottle litter by encouraging the recycling of non-alcoholic beverage containers through a cash refund to consumers and distributors.[193]

Examination of *Legato Vapors, LLC v. Cook*[194] demonstrates how a robust showing of the third factor, whether the state law's requirements on the physical production processes that occur out of state are remarkably specific or extensive, can dispositively invalidate a state law. That is, a law can also constitute material,

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187 *See id.* at 367.

188 *Id.*

189 *See id.* at 367.

190 *See id.* at 375.

191 *See id.*

192 *See id.* at 376.

193 *See* MICH. COMP. LAWS § 445.571; *see also* JOHN STUTZ & CARRIE GILBERT, MICHIGAN BOTTLE BILL: A FINAL REPORT TO MICHIGAN GREAT LAKES PROTECTION FUND 2 (July 10, 2000), https://perma.cc/6C9Y-EZH9.

194 847 F.3d 825, 835 (7th Cir. 2017).

direct regulation of out-of-state production processes when it imposes requirements on an out-of-state producer's physical facilities to the extent that it runs the risk that regulated companies will be subject to conflicting regulations by different states.[195] A similar notion to the bar on the creation of state-exclusive products drives this concern: the extraterritoriality doctrine aims to prevent risks to the free flow of interstate commerce.

Legato involved an Indiana law that prohibited the in-state sale of vaping products unless the out-of-state facilities where they were produced complied with Indiana's conditions.[196] Its "clean room" provisions required that manufacturing facilities clean and sanitize equipment in "clean rooms" comporting with Indiana standards.[197] Indiana's standards then imposed detailed requirements ranging from 24-hour security surveillance of facilities, to the specific types of cleansers and utensils to be used, to the types of sinks to be installed.[198] The potential for inconsistent regulations posed by these "extraordinar[ily]" specific provisions was "obvious": "that one state might demand double-basin steel sinks and another demand single-basin porcelain sinks is just one example."[199] The Seventh Circuit in fact compared Indiana's clean room provisions for vaping manufacturers as "akin to an attempt . . . to regulate not just milk labeling but also the heating, cooling, ventilation, plumbing, and locks for out-of-state barns where the cows are milked."[200] As such, it was impermissible extraterritorial legislation.[201] In striking down the Indiana law, the Seventh Circuit in *Legato* emphasized that such specific requirements controlled out-of-state production processes for the invalid purpose of preventing out-of-state harms.[202] Of note, the Seventh Circuit found that there wasn't a "single appellate case permitting . . . *direct* regulation of out-of-state manufacturing processes and facilities" in the nearly two hundred years of precedent.[203]

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195 *See id.* at 835.

196 *See id.* at 829.

197 *Id.* at 835.

198 *See* 410 IND. ADMIN. CODE § 7-24-270.

199 *Legato Vapors*, 847 F.3d at 836.

200 *Id.* at 836.

201 *See id.*

202 *See id.* at 834 (distinguishing labeling laws from laws that regulate out-of-state production methods).

203 *Id.* (emphasis added).

D. Applied to *Ross*: Proposition 12 as *Permissible* Extraterritorial Regulation

Under the proposed test's factor-based materiality inquiry set forth above, Proposition 12 does not materially regulate out-of-state production processes and serves the valid purpose of upholding in-state product safety. Therefore, Proposition 12 does not necessarily violate the extraterritoriality doctrine under prong one. Proposition 12, moreover, affects out-of-state conduct only through a sales ban conditioned on out-of-state farmers' compliance with its animal confinement standards. It follows that, under prong two, Proposition 12 should be upheld as permissible law.

As an initial matter, the fact that the California law conditions the in-state sale of pork products on out-of-state production preceding the in-state sale does not preclude a finding of material, impermissible regulation. Material regulation of out-of-state production can be triggered by "sales bans" or by conditioning in-state sales on compliance with out-of-state production requirements;[204] the Supreme Court has held that in-state sales triggers do not necessarily constitute a bar to a finding of impermissible extraterritorial regulation.[205]

As for the first factor, Proposition 12—like other valid regulations of out-of-state production processes—does not require creation of a product that can only be sold in California or a limited number of other states. Raising breeding pigs pursuant to California's standards does not prohibit the sale of pork products from those pigs in other states. To that extent, compliance with Proposition 12 does not force out-of-state pork producers to create a state-exclusive product and therefore does not risk harming the flow of interstate traffic in the way that Michigan's unique-mark law in *American Beverage Association* did.[206] Because manufacturers could not sell the uniquely-marked beverages in the vast majority of other states, Michigan effectively projected its regulatory regime onto other jurisdictions and threatened the free flow of interstate traffic.[207] Proposition 12 does not have this effect.

The second factor examines whether withdrawal from the state market as a result of the regulation would impact other states' access to the product, a factor distinct from the producer's

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[204] *See supra* notes 151–55; 167–78.
[205] *See supra* notes 97–102 and accompanying text.
[206] *See* Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 362 (6th Cir. 2013).
[207] *See id.* at 376.

decline in profit alone. It is true that out-of-state pork producers must alter their production and distribution systems bound between California and elsewhere, and that modifications would be expensive. However, such costs can be passed onto in-state consumers; pork producers under Proposition 12 have the option of charging higher prices only to Californians without violating the statute, just as lamp manufacturers were free to do so towards Vermonters in *National Electric Manufacturers Association v. Sorrell*.[208] As the Ninth Circuit noted in *Ross* when it analyzed Proposition 12 under NPPC's broader theory of the doctrine, Proposition 12 does not impermissibly regulate extraterritorial conduct simply because some out-of-state producers will decide to incur increased production costs to continue to serve California.[209] Similarly—and most importantly—if pork producers were to leave the California market due to prohibitive costs, such withdrawal would not inhibit them from pursuing business in other states. Like the valid labeling laws of *National Electric Manufacturers Association* and *International Dairy Foods Association*, Proposition 12 does not have the effect of impeding pork producers' ability to conduct commerce with surrounding states.

The third factor analyzes whether the state law's requirements on the physical production processes that occur out of state are remarkably specific or extensive. Although Proposition 12 does require out-of-state pork producers to avoid specific animal-husbandry practices such as the confinement of sows in areas with less than 24 square feet of usable floor space per pig, it does not also dictate the "heating, cooling, ventilation, plumbing, and locks for out-of-state barns where the [pigs] are [raised]."[210] For Proposition 12 to be prohibitively specific, it would have to instruct farmers to allot, for example, exactly "30 feet" of usable floor space in the way that the Indiana Law in *Legato* required manufactures to use a specific brand of cleaning basin. Instead, Proposition 12 merely establishes a minimum threshold that

208 272 F.3d 104, 111 (2d Cir. 2001) ("[A]ny regulation may drive some or all producers or distributors from the regulating state. 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."). Some experts believe that the average price of pork in California would rise by "7 percent or about $0.25/lb — hardly the 60 percent increase some have predicted." Sexton & Sumner, *supra note* 2. Moreover, "[w]hen these added costs are traced though the supply and demand relationships in the North American pork market, competitive pressures ensure almost no change in the price of hogs or pork sold outside California." *Id.*

209 Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1019 (9th Cir. 2021), *cert. granted sub nom.* Nat'l Pork Producers v. Ross, 142 S. Ct. 1413 (2022).

210 *Id.* at 836.

targets the prevention of in-state food risks brought on by confinement more restrictive than the threshold. It follows that it does not raise the potential for inconsistent regulations that Indiana's "remarkably specific" cleaning provisions did.[211]

Finally, note that this Comment's test aims to determine whether the state law, in effect, regulates out-of-state harm without evaluating its intention. The reason for this narrower focus is that the extraterritoriality doctrine does not concern itself with a state law's designed purpose.[212] It is true that Proposition 12, like the valid laws in *National Electrical Manufacturers Ass'n v. Sorrell*[213] and *International Dairy Foods Association v. Boggs*,[214] has a local putative purpose on its face: to uphold food product safety that is shown to be threatened by "restrictive confinement practices."[215] But the fact that Proposition 12 does not constitute material, impermissible regulation of out-of-state production activities under this factor-based inquiry eliminates the need to analyze whether it has a legitimate local purpose—at least with respect to the extraterritoriality analysis.

In review, under the first prong of the proposed test, a law violates the extraterritoriality doctrine when it materially regulates the physical production processes of out-of-state manufacturers to prevent out-of-state harm. Under the second prong, a law that affects out-of-state conduct only through a sales ban attaching restrictions to out-of-state production must materially regulate such activity to violate the extraterritoriality doctrine. As such, Proposition 12 survives scrutiny under the extraterritoriality doctrine because it does not materially regulate out-of-state farmers' animal confinement measures under the test's factor-based inquiry, and because it seeks to regulate out-of-state conduct only through a sales ban attaching restrictions to such production activity. Proposition 12 conforms to the Dormant Commerce Clause's principle against extraterritoriality on these grounds, not because it avoids price controls.

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211 *See* Legato Vapors, LLC v. Cook, 847 F.3d 825, 836 (7th Cir. 2017).

212 *See supra* note 22.

213 272 F.3d 104 (2d Cir. 2001).

214 622 F.3d 628 (6th Cir. 2010).

215 Cal. Health & Safety Code § 2599X(2); *see also* Cal. Health & Safety Code §§ 25990–25994.