

NOTE

IS THERE A DORMANT EXTRATERRITORIALITY PRINCIPLE?: COMMERCE CLAUSE LIMITS ON STATE ANTITRUST LAWS

*Michael J. Ruttinger**

*State antitrust laws ordinarily supplement federal law by providing a cause of action for anticompetitive activity that occurs in the state. Some states, however, have construed their antitrust regimes to reach conduct that occurs outside the state's boundaries. Such regulation raises significant federalism and Commerce Clause concerns by creating possible extraterritorial liability for conduct with virtually no in-state effect. This Note examines two Commerce Clause standards that may limit the degree to which state antitrust laws may exercise extraterritorial force—the “dormant” or “negative” Commerce Clause and the so-called “Extraterritorial Principle.” Unfortunately, the dormant Commerce Clause test, as articulated in *Pike v. Bruce Church, Inc.*, is an overly malleable and ineffective limit. In contrast, the Extraterritoriality Principle is a powerful *per se* restraint; however, the Supreme Court has not provided clear guidance for when to apply the rule. Accordingly, this Note advocates an “Inconsistency Principle” as the best way to understand the Court’s concern with extraterritorial regulation. State antitrust laws should not have extraterritorial force when they would impose inconsistent legal obligations on the out-of-state defendant.*

TABLE OF CONTENTS

INTRODUCTION	546
I. THE MODERN “DORMANT” COMMERCE CLAUSE	
BALANCING TEST	550
A. <i>Development of Modern “Dormant” Commerce Clause Doctrine</i>	551
B. <i>The Pike Test Fails to Effectively Restrain Extraterritorially Enforced State Antitrust Laws</i>	553
II. THE “EXTRATERRITORIALITY PRINCIPLE”	555
A. <i>Development of the Extraterritoriality Principle</i>	556
B. <i>The Extraterritoriality Principle Fails to Effectively Restrain State Antitrust Laws</i>	560

* J.D. candidate, May 2008.

III. THE "INCONSISTENCY PRINCIPLE" AS A RESTRAINT ON STATE ANTITRUST LAWS.....	563
CONCLUSION.....	566

INTRODUCTION

Antitrust law provides broad remedies for many kinds of anticompetitive conduct, and plaintiffs frequently turn to federal antitrust statutes to attack obstacles to fair competition. Federal law, however, has never been the sole source of relief. Prior to the adoption of the Sherman Antitrust Act in 1890,¹ state laws offered the exclusive remedy for restraints on trade. Even now neither state nor federal regimes operate wholly independent of each other.² Rather, the laws supplement one another as part of a two-tier enforcement scheme in which the federal laws are meant to complement, not replace, state laws.³ This scheme generally works well, allowing plaintiffs to reach broad, interstate monopolies under federal law while using the laws of their home state to address in-state price-fixing.

The beginnings of a dangerous trend have emerged among state courts in recent years, threatening to destabilize the long and harmonious relationship between federal and state antitrust regimes. Judges are increasingly willing to ascribe extraterritorial reach to state antitrust laws,⁴ permitting plaintiffs who would otherwise sue out-of-state corporations under the Sherman Act to forum shop and reach these defendants within the comfort of a more favorable state forum. Although state laws often reach *some* out-of-state activity,⁵ these claims become problematic and raise alarming federalism and Commerce Clause concerns when they create extraterritorial liability for conduct that occurred predominantly out-of-state and had very little, if any, in-state effect. For instance, the Harmar Bottling Company recently sued the Coca-Cola Company alleging monopolistic practices.⁶ Although the suit could have been brought as a Sherman Act action, Harmar instead relied on the Texas Free Enterprise and Antitrust Act of 1983 to claim damages for anticompetitive conduct negotiated and implemented in

1. Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2000).

2. Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375, 375 (1983).

3. 21 CONG. REC. 2456–57 (1890). Senator Sherman described the act's purpose as "*supplement[ing] the enforcement of the established rules of the common and statute law by the courts of the several States in dealing with combinations that affect injuriously the industrial liberty of the citizens of these States. It is to arm the Federal courts within the limits of their constitutional power that they may co-operate with the State courts . . .*" *Id.* at 2457 (emphasis added).

4. California and Texas courts stand out for having interpreted their antitrust laws to have broad out-of-state reach. *See, e.g.*, *RLH Indus, Inc. v. SBC Commc'ns, Inc.*, 35 Cal. Rptr. 3d 469, 478–81 (Ct. App. 2005); *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671 (Tex. 2006).

5. Given the interwoven nature of interstate commerce, it is rare for any transaction to have absolutely no out-of-state effect. Even relatively discrete transactions impose aggregate effects on interstate commerce. *See Wickard v. Filburn*, 317 U.S. 111 (1942).

6. *Harmar*, 218 S.W.3d 671.

three states *other than* Texas.⁷ Moreover, applying Texas law in a Texas forum to conduct occurring in four different states was not the most disturbing aspect of the case; the challenged agreements between soft drink bottlers and retailers, which governed the advertising, display, and sale of products, were *legal* under the antitrust laws of the three other states.⁸

The *Harmar* decision is not an aberration; it is one of the more salient examples of a trend broadening state antitrust jurisdiction. Although the Texas Supreme Court overturned the jury's \$15.6 million dollar verdict,⁹ other courts continue to expand the reach and potency of their states' statutes. For instance, the California Supreme Court has refused to reconsider at least one case applying the state's Cartwright Antitrust Act to allegedly anti-competitive conduct involving no in-state defendants or alleged in-state activity.¹⁰ The Court of Appeals in *RLH Industries, Inc. v. SBC Communications, Inc.* held that the act could apply to wholly out-of-state conduct.¹¹ The plaintiffs in *RLH* alleged that SBC impermissibly required its clients to use SBC-provided high voltage equipment of the same kind produced and marketed by RLH, thus diminishing its ability to sell the product. Like the court in *Harmar*, the *RLH* court failed to recognize that SBC's conduct was legal in those other states. Unlike *Harmar*, however, the *RLH* decision demonstrated an even more worrisome side effect of extraterritorially applied antitrust laws because the arrangements in these other states were *mandated* by SBC's filed tariffs, each operating with the force of law. Accordingly, anything short of the very conduct RLH complained of would have exposed SBC to liability for violating its tariffs in each state.¹²

Harmar and *RLH* are two examples of a problem that has the potential to spiral out of control if more states apply their powerful antitrust remedies to transactions already governed by another state's laws. Professor Hovenkamp has observed that this danger is particularly high in the case

7. *Id.* at 680.

8. MICHAEL S. GREVE, INTERSTATE COMITY: CHEERS FOR TEXAS 3-4, 15 n.2 (2007), available at http://www.fed-soc.org/doclib/20070330_InterstateComity.pdf.

9. *Harmar*, 218 S.W.3d 671. Despite the opportunity, the Texas Supreme Court did not address the need for a Commerce Clause solution to extraterritorial enforcement. Rather, the court rejected the trend towards extraterritorial enforcement and held that the statute did not afford a cause of action for out-of-state conduct. *Id.* at 683 ("The TFEAA does not, in clear language, afford a cause of action for injury outside the state, and we will not imply one.").

10. *RLH Indus., Inc. v. SBC Commc'ns, Inc.*, 35 Cal. Rptr. 3d 469, 479 (Ct. App. 2005) ("The weight of this authority leads us to reject SBC's contention the commerce clause prevents California antitrust and unfair competition law from reaching its allegedly anticompetitive HVP policies in other states . . .").

11. *Id.* at 480-81. The court agreed that the Commerce Clause may limit how far a state may reach to apply its own antitrust laws, but it did not determine whether the application of the Cartwright Act in the instant case reached too far. Rather than disagreeing with the Commerce Clause as an appropriate limit on extraterritorial enforcement, this Note disapproves of the standard that the *RLH* court would have used in such an analysis.

12. *Id.* (observing that the tariffs may create a conflict between California law and the law in each state in which SBC has a filed tariff).

of indirect-purchaser remedies provided by many antitrust statutes.¹³ These laws are state-created remedies that undermine the Supreme Court's decision in *Illinois Brick Co. v. Illinois*, which held that only the "direct purchaser," often a middleman or retailer, could sue a product manufacturer for a price-fixing arrangement.¹⁴ Many states responded to the ruling by enacting their own indirect-purchaser laws, which give individual consumers a cause of action that they lack under federal law.¹⁵ Aggressive extraterritorial application of these remedies could cause major downstream problems because their application on a national scale may cause defendants to unfairly pay treble damages on multiple occasions for the same price-fixing transaction.¹⁶ Moreover, while federal law at least permits these defendants to have their case tried in federal court, defendants sued under extraterritorially enforced laws can be reached in the courts of a state in which they have no business presence, limited only by the enacting state's ability to obtain personal jurisdiction.¹⁷

The Constitution has historically enforced territorial limits on the states and prohibited states from exporting their laws across state lines.¹⁸ The Commerce Clause context is unique, however, because territorial limits have retained their vitality.¹⁹ Thus, although states may apply their own antitrust regimes to out-of-state conduct, the alleged violation must have "a sufficient effect within the state."²⁰ As a result, the Commerce Clause theoretically precludes any state from enforcing its law extraterritorially where the allegedly unlawful conduct had no in-state effect or where enforcement would impede "the free flow of trade between States."²¹

13. Hovenkamp, *supra* note 2, at 432.

14. 431 U.S. 720, 729 (1977).

15. *See* Hovenkamp, *supra* note 2, at 432.

16. *Id.* To remedy this problem, Professor Hovenkamp argues that extraterritorial application of state antitrust laws "ought to be limited to those instances when the state court has specific personal jurisdiction over the defendant or when the cause of action arises out of the defendant's activities within the forum state." *Id.* The solution offered in this Note seeks to resolve the same problem as Hovenkamp's article, although it challenges his apparent assumption that the Court has foreclosed a "dormant" Commerce Clause challenge from succeeding on this question.

17. *Id.* Laws such as California's Cartwright Act, which is applied to the full extent of its constitutional power and yet "contravene[s] federal policy by giving indirect purchasers a cause of action for damages," create particularly important extraterritoriality problems. *Id.* at 401.

18. *See, e.g.*, *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 427 (1947) ("From the Commerce Clause itself, there comes, also, an abridgment of the state's power to tax within its territorial limits. This has arisen from long-continued judicial interpretation that, without congressional action, the words themselves of the Commerce Clause forbid undue interferences by the states with interstate commerce . . ."); *Pennoy v. Neff*, 95 U.S. 714, 720 (1877) ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established.").

19. Strict territorial limits in many other areas have fallen away. For example, personal jurisdiction is no longer limited by state borders. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (expanding the strict concept of personal jurisdiction in *Pennoy* by applying a "minimum contacts" test).

20. Hovenkamp, *supra* note 2, at 382.

21. *Freeman v. Hewitt*, 329 U.S. 249, 252 (1946).

Behind the Court's deceptively simple antagonism towards extraterritorial legislation lurk two arcane doctrines used interchangeably despite a very real potential to contradict each other. The first, and older, of these rules is located in the "dormant" Commerce Clause and uses an ill-defined balancing test to assess statutes that regulate "even-handedly," and as such impose incidental burdens on interstate commerce.²² This deferential standard, well-known as the *Pike* balancing test, invalidates a statute only when the burden imposed is "clearly excessive" compared to the regulating state's interests.²³ In stark contrast, the second rule—also described as part of the dormant Commerce Clause²⁴—provides a bright-line alternative. This so-called "Extraterritoriality Principle" embodies the simple proposition that states may not legislate extraterritorially;²⁵ it establishes a per se bar against state laws regulating commerce occurring "wholly outside of the State's borders."²⁶ A problem immediately becomes obvious. By forcing two doctrines that take opposite approaches to analyzing the validity of a law into the rubric of the dormant Commerce Clause,²⁷ courts "subject[] state initiatives that reach beyond a state's borders to a constitutional doctrine that rests on an unstable legal foundation."²⁸

The *Pike* balancing test and the Extraterritoriality Principle are distinct standards that create an apparently intractable conflict when they overlap, yet the Supreme Court has provided no meaningful guidance on when each standard applies.²⁹ Accordingly, judges cannot discern which rule to apply to statutes that are facially neutral, regulate evenhandedly, but incidentally create liability for out-of-state conduct. To the extent the Court has addressed

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

23. *Id.* The balancing approach is controversial and heavily criticized by the Court's conservative members. *See, e.g., Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897 (1987) (Scalia, J., concurring) ("I would . . . abandon the 'balancing' approach to these negative Commerce Clause cases . . . and leave essentially legislative judgments to the Congress.").

24. Peter C. Felmlly, Comment, *Beyond the Reach of the States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 467, 505 (2003) ("Marrying the extraterritoriality principle to an already besieged dormant Commerce Clause . . . expands an ailing body of jurisprudence . . .").

25. Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1874–75 (1987).

26. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (plurality opinion)).

27. Commentators such as Professor Regan underscore the problem of describing both standards as part the same doctrine, observing that courts are not even settled on whether the Extraterritoriality Principle *should* be a dormant Commerce clause issue. Regan, *supra* note 25, at 1884–85 ("In dormant commerce clause cases, courts and commentators write as if the extraterritoriality principle were grounded in the commerce clause. In conflicts cases, courts assign the extraterritoriality principle to the due process clause or the full faith and credit clause indifferently" (footnote omitted)).

28. Felmlly, *supra* note 24, at 505.

29. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) ("We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach.").

such situations—in *CTS Corp. v. Dynamics Corp. of America*,³⁰ for instance—its opinions have only contributed to the doctrinal confusion. The *CTS* Court examined an Indiana antitakeover law that protected in-state companies from out-of-state control by requiring outside buyers to receive approval from a majority of shareholders before obtaining voting rights.³¹ Although the *CTS* Court upheld the statute, it remained unclear about which test applied. Instead, the Court added yet another condition to the mix, observing that the Commerce Clause prohibits laws that “adversely affect interstate commerce by subjecting activities to inconsistent regulations.”³² At least one commentator suggests that the holding added a condition to the Extraterritoriality Principle, requiring that extraterritorial enforcement must create an as yet undefined “inconsistency” to violate the Commerce Clause.³³ Nevertheless, one can just as easily imagine the court upholding the law by balancing the state’s interest in protecting local shareholders against the burden on out-of-state commerce.

This Note advocates the adoption of an “Inconsistency Principle” as an alternative to the *Pike* test and the Extraterritoriality Principle, both of which have failed as restraints on extraterritorial antitrust enforcement. Under the Inconsistency Principle, extraterritorial application of a state’s antitrust law would be subject to a rule of per se invalidity when it imposes an inconsistent legal obligation on conduct by forcing the regulated party to break the law of one state in order to follow the law of another. Part I examines the development of the balancing standard used in *Pike v. Bruce Church* and observes that the doctrine apparently applies to extraterritorially applied state antitrust laws, although this Note criticizes such an approach as untenable. Similarly, Part II explores the Extraterritoriality Principle as an alternative limit and concludes that the rule is both too ambiguous and too broad, frustrating the goal of a “two-tiered” federal and state antitrust regime. Finally, Part III contends that adoption of the Inconsistency Principle would adequately explain the court’s heretofore unexplained concern with “inconsistent” regulations and resolve the problems caused by extraterritorial antitrust enforcement without resulting in a conflict between the *Pike* balancing test and the Extraterritoriality Principle.

I. THE MODERN “DORMANT” COMMERCE CLAUSE BALANCING TEST

Courts assessing the validity of extraterritorially enforced state laws have shown an inclination to apply the permissive *Pike* balancing test, even where the complained of conduct occurs predominantly or wholly out-of-

30. 481 U.S. 69 (1987).

31. *CTS*, 481 U.S. at 71–75.

32. *Id.* at 88.

33. Regan, *supra* note 25, at 1875 (suggesting that the concern with inconsistent regulations may be a concern with extraterritoriality).

state.³⁴ Indeed, *Pike* remains good law and judges widely apply the test to determine the validity of state regulations affecting interstate commerce.³⁵ Accordingly, this Part seeks to explain the continued vitality of the *Pike* balancing test and why courts apply it as a limit on antitrust enforcement despite heavy criticism. Section I.A follows the development of the modern dormant Commerce Clause doctrine, culminating in the *Pike* test. Section I.B concludes that while courts have held that the balancing test is an appropriate restriction on state antitrust laws, it remains overly vague and far too malleable to serve as an effective restraint.

A. Development of Modern “Dormant” Commerce Clause Doctrine

The dormant Commerce Clause permits states to regulate some commerce beyond their boundaries, so long as those regulations do not conflict with federal law.³⁶ The Court thus recognized a right for states to regulate in areas deemed “local and not national,” in which Congress had not enacted legislation, and which did not require a uniform rule.³⁷ As the concept developed, the distinction between national and local interests created problems for the Court, which established no clear way to distinguish between the interests. Moreover, a “local-national” test did not consider the purpose or effect of a regulation.³⁸ Thus in the early twentieth century, the Court adopted a “direct-indirect” distinction designed to prohibit state regulations that directly burdened or impeded the flow of interstate commerce.³⁹ Yet still more problems arose, in part because the direct-indirect scheme

34. See, e.g., *Partee v. San Diego Chargers Football Co.*, 668 P.2d 674, 688–89 (Cal. 1983) (applying the *Pike* balancing test); *RLH Indus., Inc. v. SBC Commc’ns, Inc.*, 35 Cal. Rptr. 3d 469, 480–81 (Ct. App. 2005) (rejecting SBC’s argument that extraterritorial enforcement violates the Commerce Clause while expressing no opinion on “potentially relevant issues not yet litigated, including a rigorous *Pike* analysis”).

35. See, e.g., *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 492 (4th Cir. 2007) (determining a broad reading of “sale” in the Dealers Act to be impermissible under the dormant Commerce Clause balancing test); *Weismueller v. Kosubucki*, 492 F. Supp. 2d 1036, 1039 (W.D. Wis. 2007) (“Since the Wisconsin Supreme Court rule has only incidental effects on interstate commerce the *Pike* balancing test applies.”).

36. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209–10 (1824) (suggesting that the states may enact laws regulating commerce so long as those laws do not contradict or interfere with federal laws).

37. *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319 (1851). The Court determined that while some subjects require national attention and must be governed by federal law, others are of a particularly local concern and require diverse treatments. In *Cooley*, the Court determined that local necessities of navigation warranted more local treatment and thus were proper subjects of state regulation.

38. Felmy, *supra* note 24, at 473.

39. E.g., *U.S. Glue Co. v. Town of Oak Creek*, 247 U.S. 321, 326 (1918) (“It is settled that a State may not directly burden interstate commerce, either by taxation or otherwise. But a tax that only indirectly affects the profits or returns from such commerce is not within the rule.”); *Spector Motor Serv., Inc. v. O’Connor*, 181 F.2d 150, 154–55 (2d Cir. 1950) (“The other test, that a tax which directly burdens interstate commerce is invalid, while one which indirectly burdens such commerce can be supported, furnished the criterion for decisions in this field for many years.”), *rev’d*, 340 U.S. 602 (1951).

“led to unpredictable and somewhat arbitrary decisions”⁴⁰ that failed to garner the support of the full Court.⁴¹

In response to the shortcomings of its early dormant Commerce Clause jurisprudence, in the 1940s the Court purportedly simplified its previous formula by describing the test as an all-inclusive balancing inquiry,⁴² which the modern Court has developed into a nondiscrimination rule.⁴³ Now, “[t]he hallmark of the modern dormant Commerce Clause jurisprudence is the Court’s use of different levels of scrutiny,” ranging from a per se prohibition on discriminatory statutes to a balancing approach according legislative deference for evenhanded ones.⁴⁴ The first standard—the per se rule of invalidity—targets state regulations that discriminate between the economic interests of states and serve a protectionist purpose.⁴⁵ Courts impose a similarly strict standard on statutes discriminating in purpose or effect.⁴⁶

Yet even laws that do not discriminate on their face, but instead regulate evenhandedly, may violate the Commerce Clause. Courts subject such laws to the highly deferential *Pike* test.⁴⁷ *Pike* and its progeny stand for the proposition that even though a statute is facially neutral, a balancing of the interests approach will determine whether a court should invalidate the law. In *Pike*, the Court invalidated an Arizona statute that prohibited the shipment in interstate commerce of cantaloupes grown in-state unless the cantaloupe growers shipped them in containers identifying the cantaloupes as Arizona-grown. Bruce Church sued to prohibit enforcement of the statute because it sent its cantaloupes to be processed in a California plant, which was the nearest processing facility.⁴⁸ In response, the Court formulated a test for such “evenhanded” statutes with only “incidental” burdens on interstate

40. Felmlly, *supra* note 24, at 474.

41. *Di Santo v. Pennsylvania*, 273 U.S. 34, 44 (1927) (Stone, J., dissenting) (“[T]he traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value. In thus making use of the expressions, ‘direct’ and ‘indirect interference’ with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached.”).

42. *See S. Pac. Co. v. Arizona*, 325 U.S. 761, 770–71 (1945) (“[T]he matters for ultimate determination here are the nature and extent of the burden . . . and . . . the relative weights of the state and national interests involved . . .”).

43. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578–79 (1986).

44. Felmlly, *supra* note 24, at 476–77; *accord Brown-Forman*, 476 U.S. at 578–79 (“When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests . . . we have generally struck down the statute When . . . a statute has only indirect effects . . . and regulates evenhandedly, we have examined whether the State’s interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.”).

45. *E.g.*, *City of Phila. v. New Jersey*, 437 U.S. 617, 624 (1978) (striking down a law prohibiting the importation of waste into New Jersey).

46. *E.g.*, *Brown-Forman*, 476 U.S. at 579 (noting that the Court will generally strike down discriminatory regulations “without further inquiry”).

47. *See* 397 U.S. 137, 142 (1970).

48. *Pike*, 397 U.S. at 139.

commerce. This test required that courts uphold such statutes “*unless* the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”⁴⁹ If the state articulates a “legitimate local purpose” for the regulation, then the court must inquire into the “degree” of the burden and weigh it against the nature of the local interest and whether “it could be promoted as well with a lesser impact.”⁵⁰

B. *The Pike Test Fails to Effectively Restrain Extraterritorially Enforced State Antitrust Laws*

The *Pike* test is an ineffective limit on facially neutral legislation. Objections to the test range from opposition to courts making legislative value judgments⁵¹ to claims that the standard is too malleable and leads to inconsistent judgments.⁵² Moreover, lower courts have had significant trouble determining whether this balancing test applies to all evenhanded statutes or merely those that have a significant discriminatory effect on interstate commerce.⁵³ Such problems have fueled critics of the test, such as Justice Thomas, who has argued that “[p]recedent as unworkable as our negative Commerce Clause jurisprudence has become is simply not entitled to the weight of *stare decisis*.”⁵⁴

The *Pike* test’s shortcomings are not peculiar to antitrust law, but the problem is especially significant in this context. The balancing test remains widely used by lower courts, which have applied it as the appropriate framework for analyzing claims brought under state antitrust laws.⁵⁵ After

49. *Id.* at 142 (emphasis added).

50. *Id.*

51. *E.g.*, *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring) (arguing that courts are ill-suited to balance benefits and burdens and should rarely take this approach).

52. *E.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 619 (1997) (Thomas, J., dissenting) (“[O]ur open-ended balancing tests in this area have allowed . . . different results based merely ‘on differing assessments of the force of competing analogies.’”).

53. *Compare* *Grant’s Dairy-Me., LLC v. Comm’r of Me. Dep’t of Agric., Food & Rural Res.*, 232 F.3d 8, 24 (1st Cir. 2000) (holding that an evenhanded statute does not trigger the *Pike* balance when plaintiff did not illustrate a substantial burden), *and* *Automated Salvage Transp., Inc. v. Wheelabrator Env’tl. Sys., Inc.*, 155 F.3d 59, 75 (2d Cir. 1998) (stating that a regulation must have a disparate impact between the in-state and out-of-state interests to be invalid under *Pike*), *with* *E. Ky. Res. v. Fiscal Ct.*, 127 F.3d 532, 544 (6th Cir. 1997) (“Even though we do not find that the challenged provisions directly burden interstate commerce or discriminate against out-of-state interests, we must nevertheless determine whether their potential benefits outweigh the burdens that they place on interstate commerce.”).

54. *Camps Newfound/Owatonna*, 520 U.S. at 636 (Thomas, J., dissenting).

55. *Heath Consultants, Inc. v. Precision Instruments, Inc.*, 527 N.W.2d 596, 607 (Neb. 1995) (“State courts upholding the application of state antitrust law as applied to interstate commerce have reviewed the issue with regard to the test promulgated by the U.S. Supreme Court in *Pike v. Bruce Church, Inc.*”); *see also* *Flood v. Kuhn*, 443 F.2d 264, 267 (2d Cir. 1971) (“[W]here the nature of an enterprise is such that differing state regulation . . . requires the enterprise to comply with the strictest standard of several states in order to continue an interstate business extending over many states, the extra-territorial effect which the application of a particular state law would exact constitutes, absent a strong state interest, an impermissible burden on interstate commerce.”), *aff’d*, 407 U.S.

all, state antitrust laws are “evenhanded” regulations; they do not discriminate between in-state or out-of-state parties.⁵⁶ This poses substantial problems where a court applies a state’s antitrust regulation to conduct occurring wholly out-of-state because *Pike* requires a court to balance a regulating state’s interest in giving its antitrust laws extraterritorial reach—a calculation that no court has provided guidance for—against the already difficult to determine burden on interstate commerce. Likewise, courts cannot quantify the burden on the other side of the ledger; judges have no way to determine the weight of the burden on interstate commerce imposed by subjecting out-of-state corporations to more restrictive regulations. Indeed, characterizing the exposure to extraterritorial civil liability as an “incidental burden” on interstate commerce understates its magnitude, especially if liability can be imposed for conduct that was legal, or even mandatory, in the company’s main place of business.⁵⁷

Courts applying the *Pike* balancing test to state antitrust laws exhibit great confusion over how to characterize the problem with extraterritorial regulation. For instance, the California Supreme Court invalidated one extraterritorial application of its Cartwright Antitrust Act by resurrecting the old national–local distinction and concluding that the burden of inconsistent regulation is excessive because certain topics require national uniformity.⁵⁸ This seems to be the right result, but the court’s analysis is confusing because it claimed to apply the *Pike* test, then nevertheless discussed the old national–local test and expressed an undefined concern with inconsistent regulation. The focus on “inconsistent” laws is especially troubling because, although the Court has expressed an antagonism toward inconsistent regulations,⁵⁹ the primary concern of its jurisprudence in that area is discrimination among the states.⁶⁰

258 (1972); *Partee v. San Diego Chargers Football Co.*, 668 P.2d 674, 689 (Cal. 1983) (“[S]tates may regulate interstate activity unless . . . [the] regulation of the activity imposes an undue burden upon or discriminates against interstate commerce.”); *United Nuclear Corp. v. Gen. Atomic Co.*, 629 P.2d 231, 270 (N.M. 1980) (employing the *Pike* standard to determine the constitutionality of applying New Mexico’s state antitrust laws to interstate commerce).

56. See *Partee*, 668 P.2d at 695 (“With respect to the requirement that the state law regulate ‘even-handedly,’ it is the rule that the burden to show discrimination rests on the party challenging the state regulation. . . . Clearly, this state’s antitrust law is nondiscriminating.”). Commentators, too, have considered whether the *Pike* test limits the extraterritorial enforcement of antitrust laws. Malcolm R. Pfunder, *Constitutional Limitations on State Antitrust Enforcement*, 58 ANTITRUST L.J. 207, 213 (1989) (“The most interesting and difficult issue, in my view, is whether and when a state antitrust enforcement action might flunk the “balancing test” under the Dormant Commerce Clause. It is conceivable that *application* of state antitrust law to an interstate transaction or activity might constitute a direct regulation of commerce . . .”).

57. See *RLH Indus., Inc. v. SBC Commc’ns, Inc.*, 35 Cal. Rptr. 3d 469, 480 (Ct. App. 2005).

58. *Partee*, 668 P.2d at 677 (“The burden on interstate commerce will ordinarily be found unreasonable where the state regulation . . . governs ‘those phases of the national commerce which, because of the need of national uniformity, demand their regulation . . . be prescribed by a single authority.’” (quoting *S. Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945))).

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

60. *Id.* at 87 (“The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce.”).

Despite this confusion, the Court's purported concern with inconsistent regulations is significant because it implies that there is a limit on extraterritorial enforcement that does *not* rely on a balancing test. For instance, Professor Regan, in his much-cited article analyzing the Court's opinion in *CTS Corp. v. Dynamics Corp. of America*, suggests that the Court's concern with inconsistent regulation is actually a substitute for a worry about extraterritorial legislation.⁶¹ Under such a reading, the Court has posited yet another Commerce Clause limit: a *per se* prohibition on regulations affecting out-of-state commerce.⁶² This rule, unlike the balancing approach, creates a less malleable and more transparent rule of *per se* invalidity.

II. THE "EXTRATERRITORIALITY PRINCIPLE"

The Extraterritoriality Principle provides a second potential limit—a *per se* prohibition—on the application of a state's antitrust laws to conduct occurring predominantly out-of-state. Unlike the malleable *Pike* test, however, the Extraterritoriality Principle is susceptible to criticism as too *strong* a remedy. Accordingly, this Part addresses the development of the Extraterritoriality Principle and observes that while it seems to restrict the out-of-state application of state antitrust laws,⁶³ the principle is a poorly defined and potentially overly restrictive limitation. An unqualified embrace of the Extraterritoriality Principle requires accepting a standard that is both highly troublesome for lower courts to apply⁶⁴ and threatens the policy of a two-tiered regime of antitrust laws. This leads to not just inconsistent application, but to uncertainty over where the principle is even located within the Constitution.⁶⁵ Section II.A will explore the emergence of the Extraterritoriality Principle, with a focus on the line of Supreme Court decisions that progressively reveal the Court's chief concern to be laws that, when given extraterritorial force, require out-of-state companies to comply with statutes conflicting with the laws of their home states. Section II.B then explores the shortcomings of the Extraterritoriality Principle, especially the Court's

61. Regan, *supra* note 25, at 1869. Professor Regan attributes some of the confusion to courts and commentators that characterize the concern with extraterritorial legislation as a Commerce Clause problem or a worry about inconsistent regulations. *Id.* (“[I]t is misleading to suggest . . . that extraterritoriality is a commerce clause issue; and it could be disastrously misleading to refer to the extraterritoriality issue with the language of “inconsistent regulations.””).

62. *See Healy v. Beer Inst.*, 491 U.S. 324, 336–37 (1989) (“[T]he ‘Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State’ . . .” (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (omission in original))).

63. *See id.*

64. This principle is difficult for lower courts to apply because, among other things, the Court has not yet offered a workable explanation of the principle's elements or a standard of review. Felmy, *supra* note 24, at 491.

65. Regan, *supra* note 25, at 1884–85 (“The truth . . . is that the extraterritoriality principle is not to be located in any particular clause.) . . . [W]e hardly know how to begin thinking about what the principle entails in any but the easiest cases.”). Professor Regan suggests that the Extraterritoriality Principle fits best as one of the “foundational principles of our federalism” inferred from the Constitution's structure. *Id.* at 1885.

inability to articulate a coherent definition of an “inconsistent” regulation or to address when conduct occurs wholly out-of-state.

A. *Development of the Extraterritoriality Principle*

A history of the Extraterritoriality Principle’s development reveals that the rule is a potentially powerful limit on state laws interfering with interstate commerce, yet remains an ineffective limit because the Court has failed to define the type of regulations prohibited by the principle. Accordingly, this Section traces the development of the Court’s extraterritoriality jurisprudence and observes that the rule, if adequately defined, would be a very strong, *per se* limit on many state regulations. Nevertheless, this Section concludes that the rule has not fulfilled its potential because courts have not explained when conduct occurs “wholly outside” a state or when regulations are “inconsistent.”

The Extraterritoriality Principle emerged as a prohibition on statutes regulating out-of-state transactions, with the goal of mitigating the regulatory chaos created by state “affirmation laws” and “anti-takeover laws,” which began to proliferate in the 1980s.⁶⁶ As early as 1982, a plurality of the Court invalidated an Illinois law requiring registration of corporate tender offers because it had “sweeping extraterritorial effect” and “could be applied to regulate a tender offer which would not affect a single Illinois shareholder.”⁶⁷ Two years later, the Court struck down a New York price affirmation law that required distillers to sell liquor in-state at prices no higher than the lowest prices in other states.⁶⁸ The majority reasoned that the law imposed a direct restraint on commerce because it had the effect of forcing distilleries to abandon promotions in other states, thus compelling those other states to alter their regulatory regimes.⁶⁹

In *CTS Corp. v. Dynamics Corp. of America*, the Court clarified its concern with extraterritorial legislation by observing that the Commerce Clause prohibits laws that “adversely affect interstate commerce by subjecting activities to inconsistent regulations,”⁷⁰ thus requiring other states to alter their regulatory regimes. At issue was the validity of an Indiana law designed to protect shareholders by providing that an out-of-state entity that bought a

66. Felmlly, *supra* note 24, at 485. “Affirmation laws” require distributors to sell certain products in-state at the same price as they do out-of-state, and in doing so, effectively fix the prices that a distributor can charge in out-of-state markets. *Id.* Antitakeover statutes, on the other hand, “protect local corporations from hostile tender offers made by companies seeking to take control of the local ‘target’ corporation.” *Id.* According to the Healy court, in 1989, twenty states had price affirmation statutes with potential extraterritorial effects. *Healy*, 491 U.S. at 334 n.10.

67. *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982). In effect, this case began the use of the dormant Commerce Clause “as a vehicle to invalidate state regulation thought to overstep its bounds.” Felmlly, *supra* note 24, at 486 n.151.

68. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 575 (1986).

69. *Id.* at 583–84. The Court described the extraterritorial reach of the statute, to the extent it interfered with out-of-state regulatory regimes, as the “most important issue” in the case. *Id.* at 581.

70. 481 U.S. 69, 88 (1987).

substantial share of an Indiana corporation would not receive voting rights until the purchase could be approved by a majority of shareholders.⁷¹ The Court upheld the Indiana law, but not before suggesting that the Court would apply a rule of per se invalidity—not a balancing test—to laws that effectively legislate out-of-state conduct by requiring commerce in other states to conform to in-state standards.⁷²

The unfortunate shortcoming of *CTS Corp.* is that the Court failed to define an “inconsistent regulation,”⁷³ and thus declined to give content to a factor that would have provided a standard for when extraterritorial legislation might violate the Extraterritoriality Principle. The only explanation came from Justice Powell who, writing for the majority, indicated that the line between permissible and invalid legislation may be that a state may regulate extraterritorially if the regulation also affects a substantial number of in-state residents.⁷⁴ That explanation sheds little light, however, on the Court’s meaning of “inconsistent.” Indeed, the Court itself seemed confused, citing *Cooley v. Board of Wardens*,⁷⁵ an older case that relied on a distinction between national and local topics to identify areas where states may regulate commerce.⁷⁶

The *CTS* Court’s failure to define “inconsistent regulations” further muddles the already unclear waters of the dormant Commerce Clause jurisprudence because several different scenarios may raise worries over “inconsistent regulations.” Professor Regan, discussing the *CTS* ruling, identifies at least three constitutional problems, including a worry about extraterritorial regulation, which courts may discuss in terms of inconsistent regulations.⁷⁷ The most troubling situation may be that judges could read *CTS* to prohibit conduct that should raise few, if any, constitutional problems. For instance, the ordinary usage of “inconsistent regulation” would

71. *CTS*, 481 U.S. at 72–75.

72. Regan, *supra* note 25, at 1867. Indeed, Justice Powell explicitly rejected the use of a balancing test. *CTS*, 481 U.S. at 92 (“We are not inclined ‘to second-guess the empirical judgments of lawmakers concerning the utility of legislation.’” (quoting *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 679 (1987) (Brennan, J., concurring))).

73. The Court merely noted that the law did not create inconsistent regulations and observed that every state has general corporate statutes regulating transactions. *CTS*, 481 U.S. at 89–90. Justice Powell gave examples of legitimate restrictions such as supermajority voting provisions, restrictions on payment of dividends, and “staggered board” provisions. *Id.* at 90.

74. *Id.* at 93. Justice Powell observed that the Indiana Act applied to “substantial number[s]” of Indiana shareholders and that even out-of-state application “will affect a substantial number of Indiana residents.” *Id.*

75. 53 U.S. (12 How.) 299 (1851). The Court provided no explanation for how a distinction between topics of national and local concern related at all to one state passing legislation that would be “inconsistent” with the laws of another state.

76. *Cooley*, 53 U.S. (12 How.) at 319 (“Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.”).

77. Regan, *supra* note 25, at 1884 (“[T]here are at least three genuine constitutional problems which can reasonably be discussed in terms of avoiding inconsistent regulation by states—two dormant commerce clause problems (in the areas of taxation and transportation) and one pseudo-dormant commerce clause problem (extraterritoriality).”).

permit a court to apply the *CTS* holding to a Minnesota law forbidding the sale of milk in plastic, nonreturnable containers although North Dakota permits the sale of milk in plastic jugs. The Minnesota law, however, poses no constitutional problems.⁷⁸ Like the antitakeover statute at issue in *CTS*, the Minnesota law creates nonuniformity, but not an inconsistent burden.⁷⁹

In *Healy v. Beer Institute*,⁸⁰ the Court attempted its most comprehensive articulation of the rule against extraterritorial legislation to date, cobbling together principles from several of its previous extraterritoriality decisions and attempting to fit them within a Commerce Clause framework. The Court addressed the constitutionality of a Connecticut price affirmation statute requiring brewers outside Connecticut to charge prices in Connecticut no higher than those in other states.⁸¹ Invalidating the statute, the *Healy* Court summarized that its extraterritoriality cases stand for the following:

First, the “Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders” The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. . . . [T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States [S]pecifically, the Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another.⁸²

The *Healy* majority reasoned that the Connecticut law not only controlled commercial activity outside the state’s borders, but also might influence other states to create competing regulatory regimes which could lead to price gridlock on a regional—or conceivably national—scale.⁸³

78. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).

79. Professor Regan suggests that the *CTS* Court’s concern is with “inconsistent regulation” governing a single transaction:

[O]ne of the reasons we want to prohibit extraterritorial legislation is to prevent an actor from finding herself subject to inconsistent regulations governing one and the same transaction. (Notice that a Minnesota law governing milk sales in Minnesota and a North Dakota law governing milk sales in North Dakota will never govern the same transaction, though they may both affect some milk distributor’s packaging behavior in Wisconsin.)

Regan, *supra* note 25, at 1882. Nevertheless, Professor Regan does not believe that extraterritoriality is a Commerce Clause problem. *Id.* at 1873 (“In my opinion, extraterritoriality is not a dormant commerce clause problem. That is why I can concede that there is an extraterritoriality issue in *CTS* and yet claim that the only dormant commerce clause issue is protectionist purpose.”). Nor does he advance “one and the same transaction” as the basis of an actual rule against extraterritorial regulation. Whereas Regan proceeds to argue that we understand neither the constitutional underpinnings nor a general theory of the Extraterritoriality Principle, *id.* at 1885, this Note persists in exploring whether a clearer definition of “inconsistent regulation” may facilitate a Commerce Clause solution to extraterritoriality problems.

80. 491 U.S. 324 (1989).

81. *Healy*, 491 U.S. at 326.

82. *Id.* at 336–37 (citations omitted).

83. *Id.* at 337–38.

Although Chief Justice Rehnquist argued in dissent that a regulation should not be per se invalid so long as a party has a free choice over whether to enter into a transaction,⁸⁴ the majority's holding—taken along with the entire line of decisions developing the Extraterritoriality Principle—created a doctrine that has been observed to strike down state regulations extending beyond the borders of the enacting state using a per se rule of invalidity.⁸⁵

Regrettably, the *Healy* Court's attempt to clarify its extraterritoriality cases did nothing to answer questions about the meaning of "inconsistent" and raised new concerns over when regulations control conduct "wholly outside" a state. The majority left unanswered most of the questions left over from the *CTS* decision; indeed, the Court's summary notably does not even include the word "inconsistent." Aspects of *Healy*, however, suggest that the doctrine remains concerned with imposing inconsistent legal burdens. Indeed, the prohibition on regulations forcing merchants "to seek regulatory approval in one State before undertaking a *transaction* in another"⁸⁶ appears on its face to support Professor Regan's definition of inconsistent regulations as those affecting the "same transaction."⁸⁷ Of equal concern is the Court's revival of a "direct-indirect" distinction⁸⁸—a relic of its older Commerce Clause jurisprudence⁸⁹—and its insistence that the rule applies only to conduct occurring "wholly outside" a state.⁹⁰ The Court offered no satisfying line to distinguish conduct "wholly outside" a state's borders from conduct "mostly" or "predominantly" outside.⁹¹ Thus, read literally, the rule does not prevent state laws from creating conflicting regulatory obligations unless there is absolutely no in-state involvement.

The Extraterritoriality Principle seems intuitively simple, yet courts struggle to apply the principle consistently, much less to define the scope of conduct it applies to. Thus, although the rule is a per se prohibition that prohibits *all* extraterritorial regulation of a certain type, we still do not know

84. *Id.* at 347.

85. Felmlly, *supra* note 24, at 490.

86. *Healy*, 491 U.S. at 337 (emphasis added).

87. Regan, *supra* note 25, at 1882.

88. *Healy*, 491 U.S. at 336–37. ("[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority . . .").

89. *See, e.g.*, U.S. *Glue Co. v. Town of Oak Creek*, 247 U.S. 321, 326 (1918) ("It is settled that a State may not *directly* burden interstate commerce, either by taxation or otherwise. But a tax that only *indirectly* affects the profits or returns from such commerce is not within the rule." (emphasis added)).

90. *Healy*, 491 U.S. at 336.

91. The usefulness of a rigid in-state/out-of-state distinction seems particularly small considering the current interdependence of state economies and the permeability of state borders. It seems untenable that this distinction could survive at a time when strict territorial limitations on due process have vanished, *see Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945), and personal consumption of wheat has aggregate affects on interstate commerce, *see Wickard v. Filburn*, 317 U.S. 111 (1942).

what that type of prohibited regulation is.⁹² Accordingly, the rule remains a powerful tool to restrain extraterritorial legislation, but a tool which most courts remain confused over when to use and what to use it for.

B. *The Extraterritoriality Principle Fails to Effectively
Restrain State Antitrust Laws*

The Extraterritoriality Principle has the potential to restrain the extraterritorial enforcement of many state laws, but the rule's shortcomings make it too potentially broad and too poorly defined to effectively restrain the out-of-state enforcement of state antitrust laws. This Section examines the Extraterritoriality Principle's shortcomings as a potential limit on state antitrust laws and concludes that the Court's failure to define "inconsistent regulations" makes the rule ambiguous and overinclusive. Moreover, the rule's potentially sweeping breadth would threaten to undermine the balance between federal and state antitrust regulation.

The Extraterritoriality Principle at first appears to be a powerful tool with a great capacity to restrain the out-of-state application of state antitrust laws. Courts already apply the rule to invalidate price affirmation and anti-takeover statutes⁹³ that, like a state's antitrust laws, proscribe certain commercial behavior and particularly, like affirmation laws, restrict corporations' pricing decisions. The rule's application in those scenarios suggests that it might also effectively restrain state antitrust laws.⁹⁴ Faced with a situation in which a transaction occurs in state Alpha, but is potentially subject to both the antitrust laws of state Alpha *and* the extraterritorially applied law of state Bravo, the principle would appear to invalidate the application of state Bravo's law to the extent it would brand as illegal a transaction that is lawful under the law of state Alpha.

Application of the Extraterritoriality Principle to state antitrust laws may lead to starkly different results than the *Pike* test, despite the Supreme Court's assertion that both originate in the dormant Commerce Clause.⁹⁵ While an evenhanded regulation will ordinarily survive the lesser scrutiny of the balancing test, such a law is *per se* invalid when it comes within the reach of the Extraterritoriality Principle.⁹⁶ This phenomenon occurs because

92. The very existence of the *Pike* balancing test indicates that *some* laws and regulations will be subject to a balancing of interests and not a *per se* rule. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

93. *E.g.*, *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986).

94. One commentator has suggested that decisions like *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), in which the Court struck down an Illinois antitakeover statute as a "direct restraint on interstate commerce," *id.* at 642, may affect potential limits on the application of state antitrust laws. *See* David W. Lamb, *Avoiding Impotence: Rethinking the Standards for Applying State Antitrust Laws to Interstate Commerce*, 54 VAND. L. REV. 1705, 1747 n.295 (2001). Interestingly, the Court also observed that even were the law not a direct restraint on commerce, it could still be invalidated as an indirect restraint under the *Pike* test. *Edgar*, 457 U.S. at 643. Here, it seems, the Court may pick and choose its weapons from its dormant Commerce Clause doctrine jurisprudence. *See id.*

95. *Brown-Forman*, 476 U.S. at 579.

96. Felmlly, *supra* note 24, at 484.

the Court has instructed judges to apply the Extraterritoriality Principle when a state's regulation has the "practical effect" of controlling conduct beyond the state's boundaries.⁹⁷ State antitrust laws, when construed to have extraterritorial effect, are just such evenhanded regulations posing restrictions on commerce outside the state's boundaries. As such, they are excellent candidates to fall under the principle.

The ambiguities of the Extraterritoriality Principle, however, make the rule both over- and underinclusive, and thus no more significantly useful a limit than the *Pike* test. The Court has failed to define "inconsistent" laws or explain when commerce is "wholly outside" a state.⁹⁸ While commentators suggest that an inconsistent regulation is one that subjects a transaction to incompatible obligations,⁹⁹ this rule could be overinclusive by invalidating numerous state laws that affect, but do not necessarily control, interstate transactions.¹⁰⁰ For instance, the extraterritorial regulation of state Alpha might require that all products of a certain type must be sold with a specific label, and would thus require a manufacturer of that product in state Bravo to change its labeling in order to make sales in Alpha. This is the kind of burden that would ordinarily be subject to the *Pike* test,¹⁰¹ but a confused court might reason that state Bravo does not require that labeling and deem the regulation "inconsistent." Moreover, the *Healy* court's explanation that the principle applies to conduct "wholly outside" the state¹⁰² unduly limits its application. Thus the principle would be incapable of invalidating the application of state Bravo's law that condemned conduct made *mandatory* by the law of state Alpha, even though the tiniest fraction of the transaction occurred in state Bravo. Without clarifying these two premises of the rule, judges will continue to apply the rule in a guesswork manner, thus creating "unpredictable legal standards and inconsistent decisions."¹⁰³

97. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).

98. Felmly, *supra* note 24, at 491.

99. *E.g.*, Regan, *supra* note 25, at 1882.

100. *See Connecticut ex rel. Blumenthal v. Crotty*, 180 F. Supp. 2d 392 (N.D.N.Y. 2001) (striking down an emergency regulation restricting lobstering on Commerce Clause grounds). Mr. Felmly asserts that this regulation did not compel any extraterritorial compliance but only affected businesses once they made a choice to enter a transaction in New York. Felmly, *supra* note 24, at 497 n.247. Although the regulation certainly affected interstate commerce, it did not control the transactions of out-of-state businesses: their choice to do business in New York was voluntary. *Id.*

101. The requirements are evenhanded and apply to all manufacturers regardless of their place of business, so that any burdens on commerce would be purely incidental. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

102. *Healy*, 491 U.S. at 336.

103. Felmly, *supra* note 24, at 492. For example, the Seventh Circuit, affirming a district court's invalidation of a Wisconsin law governing milk prices on grounds that it was extraterritorial legislation governing conduct in Illinois, rejected the claim that numerous contacts with the Illinois-based plaintiff meant that some sales contracts were formed inside Wisconsin. *Dean Foods Co. v. Brancel*, 187 F.3d 609, 619 (7th Cir. 1999). *But cf. Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 825 (3rd Cir. 1994) (reasoning that contract matters involving multiple states involve "difficult choice-of-law question[s]" and that by coming to an agreement, the parties agreed to have the law apply to their situation and impliedly gave the law extraterritorial force).

The Court's reluctance to define an "inconsistent" regulation is especially problematic in the antitrust context because, although *some* extraterritorial antitrust regulation is likely prohibited, courts cannot determine when regulations cross the line. After all, state laws may be in tension without creating a direct conflict,¹⁰⁴ and the principle offers no discernible test for when laws become "inconsistent." Seizing on the lack of clear boundaries, at least one court has suggested that these limits may not exist at all.¹⁰⁵ Nevertheless, surely *some* conduct is too attenuated from the interest of the state legislature to be within the reach of its laws. One commentator has thus suggested that court decisions striking down price affirmation and antitakeover laws like *Edgar v. MITE*,¹⁰⁶ in which the Court struck down an Illinois antitakeover statute as a "direct restraint on interstate commerce," maintain hope for the principle's use as a limit on the application of state antitrust laws.¹⁰⁷

Adopting the Extraterritoriality Principle as a limit on the reach of state antitrust laws may also undermine the policy of maintaining a two-tiered approach to antitrust regulation involving both federal and state laws.¹⁰⁸ Federal and state antitrust laws have existed harmoniously for over a century, with state laws creating an important supplemental forum for plaintiffs to seek redress for anticompetitive conduct.¹⁰⁹ Aggressive extraterritorial application of state laws threatens that balance, but a broad reading of the Extraterritoriality Principle may not restore equilibrium. Implementing a *per se* rule against any extraterritorial legislation could enable judges to apply the rule more consistently, but at the cost of tipping the balance too heavily in the other direction, in favor of federal dominance. That result would remove many of the benefits that Congress created by allowing state laws to supplement federal laws, such as permitting plaintiffs who have standing under state law to avail themselves of more flexible state procedures.¹¹⁰

104. State Alpha's regulatory regime might, for instance, impose requirements that are different from the regulations of state Bravo but do not necessarily conflict with the law of state Alpha. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), offers an example. The Court held that the Indiana antitakeover statute was not an "inconsistent" regulation, *id.* at 89, but that it nevertheless created an extra obstacle to buying a stake in an Indiana corporation that the out-of-state purchaser would not have faced if it sought to buy a share of a company in its home state, *id.* at 93–94.

105. *Flood v. Kuhn*, 443 F.2d 264, 267 (2d Cir. 1971) ("Our difficulty lies in determining to what extent, if at all, the states are precluded from antitrust regulation of interstate commerce."), *aff'd on other grounds*, 407 U.S. 258 (1972).

106. *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982). The Court has also used the Extraterritoriality Principle to strike down laws affecting pricing arrangements. *E.g.*, *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986).

107. *See Lamb*, *supra* note 94, at 1747 n.295.

108. 21 CONG. REC. 2457 (1890) ("If the combination is confined to a State the State should apply the remedy; if it is interstate and controls any production in many States, Congress must apply the remedy:").

109. Hovenkamp, *supra* note 2, at 375.

110. *Id.*

The dormant Commerce Clause permits states to apply their own anti-trust laws to reach *some* out-of-state conduct,¹¹¹ but the Court has never adequately clarified when extraterritorial regulation goes beyond the Commerce Clause's limits. For instance, the *Healy* majority clarified that states may not apply their laws to conduct "wholly outside" the state,¹¹² and the *CTS* Court indicated that judges will sometimes invalidate extraterritorial regulation if it is "inconsistent" with the second state's regulatory regime.¹¹³ Unfortunately, the Court has not defined either standard in a way that judges can meaningfully apply.¹¹⁴ The lack of clarity leaves judges with the unenviable task of determining whether to apply the permissive *Pike* test or the powerful Extraterritoriality Principle. The former is too nuanced and cannot be consistently applied by the lower courts, but the latter may be too strong a medicine, creating a total bar on extraterritorial regulation and undermining the purpose of having both federal *and* state antitrust laws.

III. THE "INCONSISTENCY PRINCIPLE" AS A RESTRAINT ON STATE ANTITRUST LAWS

This Note proposes a new rule, the Inconsistency Principle, as an alternative limit on the extraterritorial enforcement of state antitrust laws. Under the Inconsistency Principle, courts should invalidate any regulation that creates an "inconsistent legal obligation." A regulation will create inconsistent obligations when it requires a party to choose between following the rules of its home state or of the regulating state, so that a choice to follow one state's law will require breaking the law in another state. This is a narrow rule that would apply to only a small amount of extraterritorial regulation,¹¹⁵ but would effectively restrain state antitrust laws by imposing a clear and easily applied per se prohibition. At the same time, because the Inconsistency Principle would invalidate only the most onerous extraterritorial regulation, it would leave ample room for state antitrust laws to function as they traditionally have—in harmony with the federal antitrust regime.

111. *Id.* at 431 ("The commerce clause of the United States Constitution is not a substantial barrier to the application of a state's antitrust law to activities occurring outside the state.").

112. *Healy v. Beer Inst.*, 491 U.S. 324, 336–37 (1989).

113. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87–88 (1987).

114. At least one commentator has suggested that the confusion can be alleviated by the requirement that states only pursue claims against those whom they already have personal jurisdiction over. Hovenkamp, *supra* note 2, at 432 ("As a matter of policy, extraterritorial application of state antitrust law ought to be limited to those instances when the state court has specific personal jurisdiction over the defendant or when the cause of action arises out of the defendant's activities within the forum state."). This solution is unsatisfying because the Court has made clear that extraterritoriality is a Commerce Clause problem and it is the Commerce Clause standards, both the permissive *Pike* test and the Extraterritoriality Principle, that are flawed. *See Healy*, 491 U.S. at 336–37.

115. Many extraterritorial regulations will not create inconsistent legal obligations. For instance, the Indiana regulation in *CTS Corp.*, 481 U.S. 69, had extraterritorial effects, but it did not require an out-of-state purchaser to break the laws of its home state in order to comply with the Indiana statute.

The “Inconsistency Principle” would be a dormant Commerce Clause rule and fit within the Court’s extraterritoriality jurisprudence, but is distinct from both the *Pike* test and the Extraterritoriality Principle. Unlike the *Pike* test, the Inconsistency Principle would provide a straightforward, unambiguous analysis that does not require any balancing. A regulation’s validity would not depend on whether it creates “clearly excessive” burdens;¹¹⁶ a law would be invalid if it creates an inconsistent legal obligation, forcing the regulated party to choose between following the law of one state or another. Moreover, the Inconsistency Principle would be distinct from the Extraterritoriality Principle because it provides a clear, narrow definition of “inconsistent”—a term that the Court has failed to define over the course of its extraterritoriality jurisprudence¹¹⁷—and dispenses with the requirement that, to apply, conduct must occur “wholly outside” the state.¹¹⁸ The Inconsistency Principle would thus prevent the worst mischief caused by extraterritorially applied laws in a way that is neither overinclusive, like the Extraterritoriality Principle, nor overly malleable, like the *Pike* test.

The Inconsistency Principle would provide a straightforward approach to the largest problems created by extraterritorial antitrust laws. Imagine two states, Alpha and Bravo. Alpha construes its antitrust law broadly and its courts will give the statute extraterritorial effect. Meanwhile, Bravo’s public utilities commission gives its filed utility tariffs the full force of law and will prosecute any departure from the conditions of service that are on file. Suppose that Bravo’s public utility commission requires that a certain uniform type of device must be used on all high-voltage lines and, as the only feasible way of complying, the utility issues a condition of service that it will be the sole provider of these devices. Meanwhile, a manufacturer of these same devices in Alpha wishes to market its product in Bravo, but has its efforts frustrated by this tariff. Under Alpha’s antitrust laws, that manufacturer can then sue the utility in Bravo, alleging a tying arrangement. The utility thus finds itself with the dilemma of either violating the law of Alpha by adhering to the tariff provision, or violating Bravo’s law by opening its market to the device manufacturer. The utility is subject to two inconsistent legal obligations and, no matter what choice it makes, it will break the law of one of the states.¹¹⁹ In this situation, the Inconsistency Principle would invalidate the application of Alpha’s antitrust law.

The above example illustrates why the Inconsistency Principle would respond to the problem of extraterritorially enforced antitrust laws more efficiently than the *Pike* balancing test. Courts *could* invalidate the application of Alpha’s laws under the dormant Commerce Clause balancing test, but that result is not assured. A court applying the *Pike* test must inquire whether applying the law of Alpha creates a burden on interstate commerce

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

117. *Felmlly*, *supra* note 24, at 491.

118. *Healy*, 491 U.S. at 336.

119. This is one of the theories advanced by the defense in *RLH Industries, Inc. v. SBC Communications, Inc.*, 35 Cal. Rptr. 3d 469, 481 (Ct. App. 2005).

that is “clearly excessive” compared to Bravo’s interest in regulating its public utilities.¹²⁰ The outcome of the *Pike* test thus depends on a judge weighing the judicial equivalent of apples to oranges because courts provide no guidance on how to characterize either interest, much less compare their weights. In contrast, the Inconsistency Principle would not be susceptible to such arbitrary results because it invokes a per se prohibition against laws like Alpha’s, which created an inconsistent legal obligation by forcing the utility to choose whether to follow the law of Alpha or of Bravo.

The Inconsistency Principle would be superior to the Extraterritoriality Principle as a solution to the problem of extraterritorial antitrust regulation. A judge could apply the line of extraterritoriality cases to hold that Alpha’s enforcement of its own antitrust laws in Bravo is per se invalid,¹²¹ but to do so he would have to discern whether it involved conduct that subjects commerce to “inconsistent regulations”¹²² or regulated commerce “wholly outside” the state.¹²³ The Extraterritoriality Principle provides a powerful solution if both conditions are met, but the Court has not provided adequate definitions to determine when a regulation is inconsistent. As a result, a judge has no guidance to determine whether Alpha’s regulation creates “inconsistent” regulations and may thus refuse to apply the Extraterritoriality Principle in this and similar circumstances.¹²⁴ Moreover, the Extraterritoriality Principle might not apply at all if the utility in Bravo had subsidiaries or did some business in Alpha because the commerce might no longer be “wholly outside” the state. In contrast, courts could easily apply the Inconsistency Principle to the situation because it would provide a specific definition of “inconsistent” and dispense with the “wholly outside” requirement. In effect, the rule would apply the “strong medicine” of the Extraterritoriality Principle to a focused, well-defined category of impermissible regulation.

The Inconsistency Principle is intentionally narrow in order to prevent interference with the two-tiered antitrust regime.¹²⁵ Its goal would be to protect the equilibrium between federal and state laws against the threat of extraterritorially applied state regulations, not to shift the balance in favor of federal law. Nevertheless, recognizing that state antitrust laws are invalid when they place inconsistent legal burdens on out-of-state defendants prevents the most dangerous harm threatened by extraterritorial antitrust laws.

120. *Pike*, 397 U.S. at 142.

121. *Healy*, 491 U.S. at 336–37.

122. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87–88 (1987).

123. *Healy*, 491 U.S. at 336.

124. *See RLH Indus.*, 35 Cal. Rptr. 3d at 478–79 (refusing to apply *Healy* where the facts alleged by SBC were essentially identical to this hypothetical).

125. This rule could be criticized as underinclusive to the extent that it permits much extraterritorial legislation, only invalidating those that create inconsistent legal obligations. This shortcoming, if it holds any merit, is intentional. Both federal and state governments are tasked with antitrust regulation, *see* 21 CONG. REC. 2456–57 (1890), and this rule seeks to preserve the roles of each.

It would answer the worries of commentators who fear that a trend towards extraterritorial application will create havoc by exposing parties to inconsistent burdens and remedies, or punish them for conduct that is legal in their home state.¹²⁶

CONCLUSION

The Court's dormant Commerce Clause jurisprudence is far too murky and confused to handle a problem as potentially threatening as the aggressive extraterritorial application of state antitrust laws. The lack of clear lines between the doctrine's current rules makes it possible to apply either the oft-maligned *Pike* test or the sweeping Extraterritoriality Principle.¹²⁷ This confusion exacerbates the problem because application of either rule can lead to contradictory results, and is especially dangerous where one standard is so malleable as to permit almost any out-of-state effect while the other is so powerful as to potentially forbid every out-of-state effect. Such a situation begs for clarity.

The Inconsistency Principle offers the virtues of both limits while avoiding their greatest vices. By invalidating extraterritorially applied laws only when they require regulated parties to choose which state's laws to follow, the Inconsistency Principle would still permit a great deal of extraterritorial legislation and would maintain the two-tiered federal and state regimes contemplated by Congress. Additionally, by limiting the rule to only a narrow category of extraterritorial legislation, this rule would not be as overinclusive as the Extraterritoriality Principle. The end result by no means resolves the convoluted intersection of the dormant Commerce Clause and extraterritoriality cases, but it does ameliorate an increasingly troubling problem.

126. See GREVE, *supra* note 8, at 5 (“[T]he danger [is] that one state might punish defendants for conduct that may have been entirely lawful in other states”); Hovenkamp, *supra* note 2, at 432 (“Aggressive application of state antitrust law on a nationwide scale can play havoc with the two-tier, federal-state antitrust enforcement scheme . . .”).

127. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) (“We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Burce Church* balancing approach.”).