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MARKET COMPETITION AS A CONSTITUTIONAL VIRTUE: A DEFENSE OF *LOCHNER* AND A REVITALIZED DORMANT COMMERCE CLAUSE

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Abstract

A common proposition in constitutional law, often embraced on both sides of the political spectrum, is that major political decisions should be left to legislatures because courts have neither the competence nor knowledge to

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resolve these issues. This article takes an alternative view: on questions of both individual rights and structural federalism, the correct choices can be made by courts so long as they are attendant to the need to protect competitive institutions from monopolization efforts by governments and private parties alike. Under this framework, courts must first identify the deviation from the competitive ideal, whether wrought by legislation, regulation, taxation, or administrative order, and then require the government to justify the challenged action, typically by showing how it advances some legitimate government interest. To be sure, there are always some cases at the margins where the balance is best left to a trier of fact. Nonetheless, in the many cases discussed here, the legislative or regulatory deviations from the competitive equilibrium are patent and the public justifications minimal at best, leaving courts in an ideal position to strike down the law.

These insights offer the basis for my critique of any effort to dial down judicial oversight under the dormant Commerce Clause. The explicit antidiscrimination principle that courts use in such cases solves some easy cases, but the norm is underinclusive because it ignores the disparate impacts of otherwise facially neutral laws. The well-known and much mooted Pike *balancing test helps pick up the slack, but its effectiveness will be blunted if it is applied only to "price affirmation" cases that tie sales outside the defendant state to changes in local prices. A broader conception that covers the full range of taxes and regulation is needed to plug the gap, and, if done with an eye to preserving competitive equilibria, will not be subject to systematic oversight. The conservative views on disparate impact cases are misapplied in these situations, for the balancing tests used in these cases are widely applied in virtually every area of law, including constitutional protection of individual rights in property, religion, and speech cases, antitrust, employment discrimination, and elsewhere.*

INTRODUCTION: A HIGH STAKES GAME

In their current contribution to the *New York University Journal of Law and Liberty*, Professor Robin Feldman and Mr. Gideon Schor offer a detailed and penetrating critique of the current shape of the

Supreme Court's dormant Commerce Clause jurisprudence.[1] Their analysis proceeds in two parts. Its opening reference to *Lochner* is meant to consciously link what they see as the Court's flawed dormant Commerce Clause jurisprudence to the much-reviled decision in *Lochner v. New York*,[2] which met its demise during the glory days of the Supreme Court's 1937 constitutional revolution.[3] In Feldman and Schor's view, the dormant Commerce Clause, by imposing restrictions on the state power to legislate for the benefit of its people, represents in a different context a modern resurrection of the dreaded judicial trespass against state legislative power found in *Lochner*. Our authors conclude that the Supreme Court now has the opportunity to snuff out these intrusive developments in *National Pork Producers Council v. Ross*,[4] and thus to reaffirm the post New Deal synthesis to "unshackle," to use Stephen Gardbaum's evocative phrase, states from a dangerous and extraneous limitation of their ability to regulate for the public good.[5]

In dealing with these arguments, I start from premises that are, in critical ways, antithetical to those of Feldman and Schor. I also believe in the close connection between *Lochner* and the dormant Commerce Clause. But that connection runs in the opposite direction. The reason that the dormant Commerce Clause is basically sound doctrinally is because *Lochner* was also basically sound. The two doctrines thus rise, rather than fall, together.

To see why this is the case, it is critical to understand both sides of *Lochner*—the statutes that were sustained as well as the statutes

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[1] Robin Feldman & Gideon Schor, *Lochner Revenant: The Dormant Commerce Clause & Extraterritoriality*, 16 N.Y.U. J. L. & LIBERTY 209 (2022).

[2] 198 U.S. 45 (1905).

[3] *See, e.g.*, United States v. Darby Lumber Co., 312 U.S. 100 (1941).

[4] 6 F.4th 1021 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 1413 (2022).

[5] Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 565 (1997).

that were struck down. Both Professors Feldman and Schor, relying on Stephen Gardbaum, do a serious disservice to the justices of the *Lochner* era by insisting that the Supreme Court struck down many dozens of state-police power statutes with a "free hand."[6] In fact, the decisions of the *Lochner* period are best understood as an energetic effort by the Supreme Court to follow the principles of the Classical Liberal Constitution,[7] which allows for reasonable regulation of monopoly power, but simultaneously resists state or federal efforts to impose anticompetitive regulations on economic activity which systematically diminish overall social welfare.

The traditional concern with the dormant Commerce Clause is cut from the same cloth. Within a federal system, it is essential to preserve both entry and exit rights between the states so commerce can maximize gains from trade across the entire country. In dealing with these issues, the earlier Court was right to attack the protectionist attitudes that insulated local commerce from out-of-state competition. In many cases, that effort was undertaken by the explicit use of a nondiscrimination principle that struck down regulations putting foreign competitors at a disadvantage against domestic competitors. But the use of this overt rule is underinclusive insofar as it is surely possible for states to use facially neutral statutes to achieve their protectionist goals. So, some disparate impact test, most notably associated with *Pike v. Bruce Church, Inc.*,[8] was necessary.

Unfortunately, the Ninth Circuit decision in *National Pork* pays too little attention to the second portion of the doctrine. Thus, it poses a serious menace to the consistent operation of national markets by allowing state regulation to exert an extraterritorial effect that is harmful when done by any one state, but utterly disastrous when done by multiple states, each seeking to impose its own brand of

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[6] Feldman & Schor, supra note 1, at 209; *see also* Gardbaum, *supra* note 5.

[7] *See generally* RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT (2014).

[8] 397 U.S. 137 (1970).

imperialism on the other states, at the same time. There is always lurking in the wings of Congress the drive to introduce a uniform standard that will get rid of these clashing voices. But the empirical reality is that Congress will rarely venture into these waters, which is why, as a functional matter, the dormant Commerce Clause continues to exert its enormous influence through its judicial enforcement.

To better examine these issues, I shall proceed as follows. In Section I, I shall turn to the *Lochner* side of the equation and explain why it represents an intelligent accommodation between independent forces and government intervention. In Section II, I shall explain how that same line of argument explains why the dormant Commerce Clause should receive a far more robust interpretation that Feldman and Schor allow to it. In Section III, I shall apply these principles to *National Pork*. A brief conclusion follows.

I. THE *LOCHNER* SYNTHESIS

The usual critiques of the *Lochner* era start with the proposition that it involved striking down of hundreds of state laws. But it is a mistake to assume that there was no discernible pattern to these decisions. Professor Gardbaum writes:

> During the *Lochner* era, over two hundred state statutes regulating "local" economic activity were declared unconstitutional under the Due Process Clause by the Supreme Court alone, mainly in the areas of labor legislation, regulation of prices, and restrictions on entry into businesses.[9]

However, a common thread runs through all these decisions: each one of them strikes down state legislation that is overtly anticompetitive. Moreover, Gardbaum's one-sided narrative overlooks

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[9] Gardbaum, *supra* note 5, at 494.

the fact that the Court routinely *upheld* statutes that could justified as means to control force, fraud, and monopoly power. The ultimate question in *Lochner*, therefore, was whether the challenged government action was a proper health regulation or an improper restriction on entry into business. *Lochner* struck down a New York statute that prohibited certain classes of bakers from working more than ten hours a day and more than sixty hours a week.[10] The decision was contested on two different grounds. First, Justice John Marshall Harlan in his dissent insisted that this legislation could be justified as a police power measure protecting health and justified this rationale after exhaustive analysis of past practices both in the United States and Europe.[11] Second and far more notorious is the lone Holmes dissent, which made just this passing reference to the possible health justifications for the statute—"A reasonable man might think it a proper measure on the score of health"[12]—without bothering to ask why that might be the case.

But Holmes's far more fundamental challenge to *Lochner* lies in this manifesto:

> [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.[13]

This proposition is as wrongheaded as it is elegant. The United States Constitution *does* embody a particular theory. It is surely *not* the strong version of *laissez faire* that only allows for voluntary transactions, since the Constitution makes explicit the powers of taxation and eminent domain, two forced exchanges justified for the net gains they achieve when high transaction costs block voluntary transactions. Yet by the same token, the Constitution contains zero

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[10] Lochner v. New York, 198 U.S. 45, 64-65 (1905).
[11] *Id.* at 66–74 (Harlan, J., dissenting).
[12] *Id.* at 76 (Holmes, J., dissenting).
[13] *Id.* at 75 (Holmes, J., dissenting).

endorsement of some "organic relationship of the citizen to the State." That notion is all too reminiscent of Roussean notions of the "general will,"[14] which quickly can degenerate into a system of communism or socialism where private property is now the enemy and not the source of constitutional protection. Instead, explicit protections given to contractual relationships, freedom of religion and speech, and the procedural imperatives of due process of law seek both to encourage market institutions and to create a role for limited and effective government.[15] *Laissez faire* does not quite describe the basic theory because it underplays the role of forced exchanges that are an essential part of the classical liberal theory.

Nor can we ignore that the overall system of separation of powers and checks and balances reflects a classically liberal suspicion about excess concentration of government power. At the time of the Founding, guaranteeing a republican form of government was a safeguard against not only monarchy but also against popular democracy that decided everything by simple majority vote. And so were included the indirect selection of Senators, the creation of electoral colleges in each of the several states, the division between legislative and executive and judicial branches, the initial uneasiness about the creation of independent administrative agencies, and the doctrine of enumerated federal powers.[16] The list goes on. We can debate endlessly the scope of these provisions, but we cannot twist them to make a constitution inspired by the likes of Locke, Montesquieu, and Hume read like one drafted by the likes of Karl Marx or even Woodrow Wilson.

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[14] *See* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 29 (H.J. Tozer trans., Wordsworth eds., 1998) (1762).

[15] *See* EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION, *supra* note 7, at 4.

[16] *See* THE FEDERALIST NO. 10 (James Madison).

The depth of Holmes's intellectual confusion is captured by his next sentence which seeks to explain why *laissez faire* ought to be displaced:

> It [a constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[17]

The polarization of opinion in the United States is now greater than it has ever been in recent memory.[18] This sorry fact means that the correct way to deal with fundamentally different views is *not* to turn everything over to the legislature, but to carve out areas of individual rights where the collective has nothing to say, which is of course the entire purpose of a system of individual rights. The state therefore invokes public force—a different matter from public opinion—only on those matters pertaining to basic individual protections, where there is more likely to be some agreement of the importance of government action.[19] This is a powerful corollary that stems from the recognition of the need to constrain state monopoly power.

It is therefore only mildly ironic that a hopelessly confused Justice Harry Blackmun, writing in *Roe v. Wade*,[20] cites this precise passage for the opposite conclusion—namely, the use of constitutional doctrine to secure the right to an abortion from political intrigues and pressure. The history here is troubled by the efforts to distinguish *Roe*

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[17] *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

[18] *See, e.g.*, *The Disunited States: American States Are Now Petri Dishes of Polarization*, THE ECONOMIST (September 3, 2022) [https://perma.cc/VZ8M-JWLD].

[19] For discussion of the difference, see Richard A. Epstein, *The Harm Principle and How It Grew*, 45 U. TORONTO L.J. 359 (1995).

[20] 410. U.S. 113, 117 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022). The point was not missed by Justice Rehnquist in his dissent. *See* 410 U.S. at 174 (Rehnquist, J., dissenting).

from *Lochner,* which should require an analysis of whether *Lochner's* account of the police powers, as they "relate to the safety, health, morals and general welfare of the public,"[21] carries over to *Roe*. In *Lochner*, the police power argument failed because the hour restriction was shown to be some combination of a paternal and anti-competitive regulation. But the health interest of the unborn child fits far better into the health and safety portions of *Lochner's* account of the police power.[22] Yet any mention of police powers, which were so dominant in the nineteenth century jurisprudence, disappeared beneath the waves in *Roe* without so much as a decent burial,[23] precisely because the *Roe* court did not want to acknowledge that protecting the life of an unborn baby is at root a matter of health and not monopoly protection.

The position taken in *Roe* is an intellectual disaster because it rejects any general framework by which to analyze the police power question, which was not read so broadly in *Lochner* as to eviscerate all basic constitutional rights. Hence, Justice Rufus Peckham was alert to the risk that the broad definition of the police power would not be tolerated, notwithstanding the existence of "border" cases that had to exclude at least some form of regulation.[24] But Peckham got the balance right by giving due respect to the other substantive provisions enacted along with the maximum hour provision:

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[21] *Lochner*, 198 U.S. at 53.

[22] *See id.*

[23] For my effort to examine that question, see Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159 (1973).

[24] *Lochner*, 198 U.S. at 56 ("It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be.").

> § 111. *Drainage and plumbing of buildings and rooms occupied by bakeries*.
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> § 112. *Requirements as to rooms, furniture, utensils, and manufactured products*.
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> § 113. *Wash rooms and closets; sleeping places*.
>
> § 114. *Inspection of bakeries*.
>
> § 115. *Notice requiring alterations*[25]

The provision on sleeping quarters is instructive. It reads:

> No person shall sleep in a room occupied as a bake room. Sleeping places for the persons employed in the bakery shall be separate from the rooms where flour or meal food products are manufactured or stored. If the sleeping places are on the same floor where such products are manufactured, stored, or sold, the factory inspector may inspect and order them put in a proper sanitary condition.[26]

If *Lochner* has been as hell-bent on protecting *laissez-faire* as Holmes conceived, all these provisions would have to be struck down as interferences with freedom of contract. But Peckham let them all pass muster without so much as a peep, because these were clear health and safety measures. It is also critical to understand why the law addressed sleeping quarters at all. Historical research shows that the non-union bakers worked a single shift in which they prepared the bread at night and packaged it for sale in the morning. In the interim they slept on the job, so that, in a world in which not all hours were created equal, the combined time for their labors exceeded 10 hours.[27] Peckham, himself a New Yorker, probably knew

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[25] *Id.* at 46 n.†.
[26] *Id.*
[27] DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 24-25 (2011).

this information, and it supplies the tool to figure out which side of the health/competition side of the line it falls—the anticompetitive side, which means that he is correct.

The cases subsequent to *Lochner* proceed in two varieties—those that follow *Lochner* invalidating labor statutes and those that do not. The two cases that strike down both federal and state attempts to introduce a system of collective bargaining into labor relations were *Adair v. United States*[28] and *Coppage v. Kansas*.[29] Each of these dispatched the statutes in question with relative ease. In *Adair*, Justice Harlan reversed field from *Lochner* because a federal labor statute presented no health issues;[30] in *Coppage*, Justice Mahlon Pitney, one of the giants of the law, used the same basic framework to achieve the same result in the state law context.[31] Both decisions protected labor markets from the monopoly power of unions, and thus did huge amounts to propel economic growth during the so-called *Lochner* era—say, 1870 to 1940—during which the overall improvement in human welfare was greater than at any other time before or afterwards.[32]

To make, therefore, a balanced assessment of the *Lochner* period, it is also critical to note the types of legislation that the Supreme Court *sustained*. As noted, all the health measures in the 10-hour statute were sustained. The Federal Employer's Liability Act, dealing with railroad safety, was sustained in 1912 even though it eliminated

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[28] 208 U.S. 161 (1908).

[29] 236 U.S. 1 (1915) (containing a brilliant exposition of why voluntary markets yield both social improvements *and* greater differentials in wealth).

[30] *Adair*, 208 U.S. at 179-80.

[31] *Coppage*, 236 U.S. at 26.

[32] *See* ROBERT J. GORDON, THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR (2016). Part I is entitled: 1870-1940—THE GREAT INVENTIONS CREATE A REVOLUTION INSIDE AND OUTSIDE THE HOME. Note the perfect overlap with the now discredited *Lochner* era.

the defenses of contributory negligence and assumption of risk.[33] Justice Pitney, who wrote *Coppage*, sustained a workman's compensation statute against constitutional challenge in *New York Central Railroad Co. v. White*.[34] Similarly, height limitations for buildings were sustained under the police power in *Welch v. Swazey*[35] in an opinion by none other than Justice Peckham.[36] In similar fashion, the Court sustained statutes that were intended to protect common pool assets from premature dissipation by private actors.[37]

The same occurred with respect to both the Sherman Act of 1890 and then the Clayton Antitrust Act of 1914, both of which were not even subject to serious constitutional challenge since they were correct means to control various monopolies.[38] And the same was done with respect to rate regulation, which was subject to protections against confiscatory rates.[39] Antifraud statutes were routinely sustained,[40] including the New York's aggressive Martin Act in *New*

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[33] Second Employers' Liability Act Cases, 223 U.S. 1, 1912 U.S. LEXIS 2212 (1912). Here, the Court sustained departures from the common law:

> Under the power to regulate relations of employers and employees while engaged in interstate commerce, Congress may establish new rules of law in place of common law rules, including those in regard to fellow servants, assumption of risk, contributory negligence, and right of action by personal representatives for death caused by wrongful neglect of another.

Id. at *12-13 (syllabus).

[34] 243 U.S. 188 (1917).

[35] 214 U.S. 91 (1909).

[36] *Id.* at 105 (invoking the police power and citing *Lochner*).

[37] Ohio Oil Co v. Indiana, 177 U.S. 190 (1900); Geer v. Connecticut, 161 US. 519 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979). Neither case disputed the ability to regulate common pool assets.

[38] *See, e.g.*, Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899) (Peckham, J.); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) (Peckham, J.).

[39] *See, e.g.*, Chi., Minneapolis, & St. Paul Ry. v. Minnesota, 134 U.S. 418 (1890); Smyth v. Ames, 169 U.S. 466 (1898). For discussion, see Richard A. Epstein, *The History of Public Utility Regulation in the United States Supreme Court: Of Reasonable and Nondiscriminatory Rates*, 38 J. SUP. CT. HIST. 345 (2013).

[40] *See* Hall v. Geiger-Jones Co., 242 U.S. 539, 550 (1917). The Court reasoned:

York v. Federated Radio Corporation,[41] which invoked a very broad definition of fraud.[42] So were statutes that called for the reorganization or liquidation of insolvent of bankrupt corporations.[43] In other words, there was no general free-for-all but a rather consistent effort to address health, safety, force, fraud, and monopoly by legislation. And protective legislation that only applied to women—which would, for what it is worth, be regarded today as per se unconstitutional as an illicit form of sex discrimination under the Equal Protection Clause—was sustained in *Muller v. Oregon*.[44]

This earlier synthesis may not be perfect, but it is far better than the amorphous police power rules that allow the government to routinely override voluntary contracts on the ground of inequality of

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> The name that is given to the law indicates the evil at which it is aimed; that is, to use the language of a cited case, "speculative schemes which have no more basis than so many feet of blue sky"; or, as stated by counsel in another case, "to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines, and other like fraudulent exploitations."

Id. Blue sky laws were also sustained in Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559 (1917) (upholding South Dakota's blue sky law); Merrick v. N.W. Halsey & Co., 242 U.S. 568 (1917) (upholding Michigan's blue sky law). For general comment, *see* Ambrose V. McCall, *Comments on the Martin Act*, 3 BROOK. L. REV. 190, 193 (1933).

[41] 154 N.E. 655, 657 (N.Y. 1926).

[42] The court offered the following definition:

> The words "fraud" and "fraudulent practice" in this connection, should therefore be given a wide meaning, so as to include all acts, although not originating in any actual evil design or contrivance to perpetrate fraud or injury upon others, which do by their tendency to deceive or mislead the purchasing public come within the purpose of the law.

Id. at 657.

[43] Noble State Bank v. Haskell, 219 U.S. 104 (1911).

[44] 208 U.S. 412 (1908). This case is complete with the famous Brandeis brief, which in my view was highly inept, consisting solely of unanalyzed quotations from a variety of sociological sources from the United States and Europe. For my critique, *see* Richard A. Epstein, *The Trouble with Progressives*, FORBES (Feb. 9, 2010) [https://perma.cc/5DBH-T8E5].

bargaining power. Feldman and Schor celebrate decisions like *West Coast Hotel Co. v. Parrish*[45] and *NLRB v. Jones & Laughlin Steel Corp*.[46] To this list could be added *United States v. Darby*,[47] which upheld the Fair Labor Standards Act against a commerce clause challenge. I have written extensively elsewhere about the damaging nature of these decisions, and I will not reproduce those arguments here.[48] Nonetheless, it is important at the very least to note that the decisions that marked the demise of the classical liberal solution were all put into place to organize industry-wide cartels that in a saner world would all count as per se violations of the Sherman Act. The New Deal Machine churned out cartel arrangement after cartel arrangement, not only in labor law but also in agriculture, airlines, and ground transportation and much more.[49]

One illustration suffices to demonstrate this high-stakes transformation from the classical liberal to the progressive model. *Nebbia v. New York*[50] involved a New York statute that set the minimum price for a quart of milk at nine cents. Nebbia was criminally prosecuted when he sold two quarts of milk and a five-cent loaf of bread for 18 cents. As at least some portion of that consideration had to go the bread, it followed that Nebbia had violated the law, whose

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[45] 300 U.S. 379 (1937).

[46] 301 U.S. 1 (1937).

[47] 312 U.S. 100 (1941).

[48] *See* Richard A. Epstein, *Contractual Solutions for Employment Law Problems*, 38 HARV. J.L. & PUB. POL'Y. 789 (2015); Richard A. Epstein, *Labor Unions: Saviors or Scourges?*, 41 CAP. U.L. REV. 1 (2013); Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Legislation*, 92 YALE L.J. 1357 (1983); *see also* Lee Ohanian, *New Deal Policies and the Persistence of the Great Depression: A General Equilibrium Analysis*, 112 J. POL. ECON. 779 (2004).

[49] For my critiques, see Richard A. Epstein, *The Progressive's Deadly Embrace of Cartels: A Close Look at Labor and Agricultural Markets 1890-1940*, *in* THE PROGRESSIVES' CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN AMERICAN STATES 339 (S. Skowronek, S. Engle & B. Ackerman eds., 2016); Richard A. Epstein, *The Cartelization of Commerce*, 22 HARV. J.L. & PUB. POL'Y. 209 (1998).

[50] 291 U.S. 502 (1934).

constitutionality he immediately challenged. The government defended its decision on the ground that the law allowed price regulation of firms that were "affected with a public interest."[51] The traditional notion of the public interest was closely tied with the effort to constrain monopoly profits through regulation in order to get market behaviors closer to the competitive ideal.[52] This notion explains how difficult it was to chart the course for rate of return regulation for common carriers and public utilities. But the situation was turned on its head in *Nebbia*[53] which predictably led to a reduction in the supply of milk for the most vulnerable of urban dwellers.[54]

At this point, a single contrast summarizes the difference between the so-called *Lochner* era and the progressive era that followed: The former allowed for judicial intervention to prevent the aggregation and use of monopoly power; the latter was agnostic on the proper grounds of regulation, allowing the government first to promote and then to condemn monopoly institutions. The choice between these two positions should not be hard to make. The entire premise of the antitrust law is competition yes, monopoly no. The sole justification is the higher level of social welfare under the former than under the latter.[55] The strength of the earlier model is dead on matters of individual rights, but it lives on, however imperfectly, in

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[51] *Id.* at 531.

[52] For my discussion, see Richard A. Epstein, *In Defense of the "Old" Public Health: The Legal Framework for the Regulation of Public Health*, 69 BROOK. L. REV. 1421 (2004). For a judicial account of the traditional view, see Chas. Wolff Packing Co. v. Ct. of Indus. Rels., 262 U.S. 522 (1923) (striking down a coercive system of Kansas Industrial Courts); David A. Schwarz, *Compelled Consent:* Wolff Packing *and the Constitutionality of Compulsory Arbitration*, 12 N.Y.U. J.L. & LIBERTY 14 (2018).

[53] *Nebbia*, 291 U.S. at 531–32.

[54] For references on these effects, *see* Epstein, *In Defense of "Old" Public Health*, *supra* note 52, at 1437 n.53.

[55] *See* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a consumer welfare prescription.") (citing ROBERT H. BORK, THE ANTITRUST PARADOX 66 (1978) (internal quotations omitted)).

the dormant Commerce Clause cases that treat the maintenance of a competitive economy as the *summum bonum* in this area of law. The point was stated eloquently by Justice Robert Jackson in *H.P. Hood & Sons, Inc. v. Du Mond*:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.[56]

The general implication here is clear: whatever the fate of the competitive ideal in the context of the constitutional protection of individual rights to property and contract, that doctrine received a second life in connection with the dormant Commerce Clause. The mission of Feldman and Schor is to bring the same forces that undermined the *Lochner* synthesis in its traditional domain to constrain the operation of that doctrine over interstate commerce.[57] My position is the exact opposite. The competitive ideal should be kept strong in this area even though it has been fatally compromised elsewhere. It is to that issue that I now turn.

II. THE DORMANT COMMERCE CLAUSE

A. THE BASIC CHALLENGE

As Feldman and Schor copiously document, the dormant Commerce Clause is often viewed as a constitutional stepchild that finds

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[56] H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949). The irony here is that Jackson also wrote Wickard v. Filburn, 317 U.S. 111 (1942), which led to the cartelization of commerce by the federal government. Balkanization of a nation was seen as a great peril. Cartelization was seen as a desirable end.

[57] *See* Feldman & Schor, *supra* note 1, at 209 (article's abstract).

little support from the original text, and conservative justices like Scalia and Thomas have expressed deep dissatisfaction with the doctrine.[58] Nonetheless, the Court has repeatedly recognized this document so that at present the only question is how it should be interpreted, and not whether it should be eliminated.[59] Thus when the Commerce Clause states that "Congress shall have the power to . . . regulate commerce . . . among the several states,"[60] of its own force, so that wholly without any explicit legislation, it bans certain kinds of state action. But of what sort? Some clues are apparent from two related clauses. Article IV, Section 2 states that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[61] Similarly, the Import-Export Clause in Article I, Section 2, Clause 2 provides:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's [sic] inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.[62]

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[58] For the copious references on this point, see Feldman & Schor supra note 1, at 216 n.4, 217-18 nn.5-10. For my basic agreement with this assessment of its pedigree, see RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT, ch. 15 (2014). For a defense of the contrary position, see Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DEN. L. REV. 255 (2017).

[59] Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2460–61 (2019) ("[T]he proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law. . . . In light of this history and our established case law, we reiterate that the Commerce Clause by its own force restricts state protectionism.").

[60] U.S. CONST. art. I, § 8, cl. 3.

[61] *Id.* art. IV, § 2.

[62] *Id.* art. I, § 10, cl. 2.

Both clauses point to the design for Congress to create a common economic market throughout the United that would foster the kind of competitive union envisioned by Justice Jackson in *HP Hood v. Du Mond*, as they seek to give room for the state exercise of its own police power.[63] The proposition here is hardly novel, for it rests on the powerful per se rules against overt forms of price fixing and territorial division. For example, the law of rate regulation works at its best when it limits the monopoly returns of common carriers. Thus, the social welfare case for the dormant Commerce Clause rests on the indisputable assumption that it was used from its adoption to attack various kinds of government regulation that distorted the operation of competitive markets by some misguided combination of subsidies and penalties.

This general approach recognizes that imposing constitutional constraints on the states necessarily limits their general police power, so some balancing tests are necessary to determine how best to minimize these distortions without constraining the ability of the states to discharge their basic police power functions. At this point, the basic logic is to proceed by increments. First, try to pick out the easy cases where the negative impact on interstate commerce is large but the compromise with the police power is small. Then, go to the next stage to deal with cases in which it is harder to detect the attacks on competition, and easier to think of state justifications. In this second tier, some lower positive rate of return for constitutional intervention is not the same as no rate of return at all. But it is the case that the burden of proof switches from the state to the individual litigant. This intuition can be made operative by drawing a sharp distinction between those statutes that contain *explicit* barriers to competitive activities and those that impose *implicit* barriers to commerce.

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[63] For an early discussion of the tension, see *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 439-440 (1827).

The analytical framework here should prove familiar to anyone who deals with the employment discrimination laws under Title VII to the 1964 Civil Rights Act.[64] Ideally, the disparate *treatment* approach under Title VII catches the obvious forms of discrimination.[65] The disparate impact test becomes an important complement to the disparate treatment provisions, for it allows the law to pick up facially neutral statutes that were passed with either a discriminatory intent or with a discriminatory effect.[66] The use of this double-barreled treatment is fraught with the usual problems of dealing, simultaneously, with under- and over-enforcement of any basic contractual, statutory, or constitutional norm. The disparate treatment test offers a more reliable standard, but in practice it is likely to prove under-inclusive. More concretely, that test cannot apply in those contexts in which there is no significant amount of local competition, for now there are no local parties that can be counted on to resist the regulation.

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[64] For my general analysis, see generally RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992).

[65] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973):

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. Note that this test deviates from the 1964 Act because it only uses disparate treatment for racial minorities instead of for all persons, as would be required under a color-blind standard.

[66] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.").

To demonstrate how the dormant Commerce Clause framework works, consider the following example. In 1978, the Supreme Court in *Exxon Corporation v. Governor of Maryland*[67] upheld a Maryland statute that forbade any producer or refiner of petroleum products from operating a retail station within the state, and the statute further required them to extend their "voluntary allowances," e.g., all collateral benefit given to these independent stations.[68] The ostensible justification for this extension was that the independent stations within the state did not receive adequate supplies from the major oil companies in the aftermath of a price control system that had caused systematic shortages in 1973. The first best solution was of course to remove the price controls to allow forces of supply and demand to reequilibrate. But after decisions like *Nebbia*, a lawsuit of that sort was a lost cause,[69] so this one-sided statute was passed in its place. The statute, of course, would survive the short-term price control systems. It is obvious to see why local stations, without any opposition, would push hard to force this result, without any showing of how it advanced any efficiencies and in the face of evidence from the refiners of the efficiencies of their system.[70] What was left therefore was a disparate impact case, since "the Maryland statute does not discriminate against interstate goods, nor does it favor local producers and refiners."[71] But this was an easy case in the opposite direction. As Justice Blackmun wrote: "The effect is to protect in-state retail service station dealers from the competition of the out-of-state businesses. This protectionist discrimination is not justified by any legitimate state interest that cannot be vindicated by more evenhanded regulation."[72]

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[67] 437 U.S. 117 (1978).

[68] *Id.* at 119–20.

[69] Indeed, the due process claim was quickly bounced under the rational basis case. *Id.* at 124. *See also* Ferguson v. Skrupa, 372 U.S. 726 (1963).

[70] *Exxon*, 437 U.S. at 123.

[71] *Id.* at 125.

[72] *Id.* at 135 (Blackmun, J., concurring).

It should be apparent that there is need for a more inclusive disparate impact test which would easily produce the right result here. To be sure, care must, in difficult cases, be taken not to sweep too many state legislative schemes into constitutional limbo by creating too many false positives. Given these twin concerns, therefore, it is always necessary to tweak both the treatment and impact tests in order to minimize the sum of type I and type II errors. In my view, the entire enterprise of Title VII is misplaced in competitive markets because it imposes market rigidities that prevent all workers, especially including minority workers in outside groups, from offering their services at lower wages in order to gain a foothold in any market. But for the dormant Commerce Clause, both the explicit and implicit modes of proof are rightly on the table because they both serve the commendable objective of preserving a competitive market.

In dealing with dormant Commerce Clause cases, Feldman and Schor offer a three-part typology that I think is neither historically accurate nor doctrinally sound. The first branch of the typology is represented by *Philadelphia v. New Jersey*,[73] which covers cases of explicit discrimination, in which "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[74] The second branch is represented by *Pike v. Bruce Church, Inc*.[75] and its progeny, which cover cases of implicit discrimination by facially neutral rules. To these two categories Feldman and Schor add a third, which they entitle "Doctrine Creep," based on an analysis of three distinct cases:

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[73] 437 U.S. 617 (1978).

[74] Feldman & Schor, *supra* note 1, at 229 (citing United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007) (cleaned up)); *see also* General Motors Corp. v. Tracy, 519 U.S. 278, 298 n.12 (1997) (to "discriminate" is to "impose disparate treatment on similarly situated in-state and out-of-state interests").

[75] 397 U.S. 137 (1970).

Baldwin v. G.A.F. Seelig, Inc.,[76] *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,[77] and *Healy v. Beer Institute, Inc*.[78]

Surely something is amiss here. *Baldwin,* decided in 1935, comes up early in the cycle of dormant commerce cases. It is unanimous. Its opinion is utterly unadventurous because it attacks the specific language of this statute. Their designation of the entire last "creeping" category is in my view a mistake which does not advance the analysis. Instead, *Baldwin* is best understood as a case of explicit discrimination and should be included in the first category. Likewise, *Brown-Forman* should be discussed as forms of implicit discrimination covered by *Pike*. Since each of these cases are over thirty years old, they do not represent any breaking trend in Supreme Court case law, and properly analyzed they do not pose any great peril to federalism. The same cannot be said of the fourth case, *National Pork*, which should be analyzed as an implied dormant Commerce Clause case, albeit one that may well represent a dangerous expansion of extraterritorial power that the dormant Commerce Clause jurisprudence should reject. I discuss that idea in the final section of this paper.

B. EXPLICIT DISCRIMINATION

The first case of explicit discrimination discussed by Feldman and Schor is *Philadelphia v. New Jersey*, in which foreign corporations that wished to dispose of waste outside their own state boundaries were subject to explicit restrictions that were not imposed on local sources. In dealing with this issue, the Court concluded:

> [W]here simple economic protectionism is affected by state legislation, a virtually *per se* rule of invalidity has been erected. . . . The crucial inquiry, therefore, must be directed

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[76] 294 U.S. 511 (1935).
[77] 476 U.S. 573 (1986).
[78] 491 U.S. 324 (1989).

> to determining whether [the statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.[79]

In my view, any case that deals with the transportation of waste raises additional complications that are not found with the sale of goods.[80]

There is, however, no need to address that important detour here, for there are plenty of cases where the explicit distinction is made in the sale of goods, as in *Welton v. State of Missouri*,[81] where the Court struck down a licensing requirement on sellers of sewing machines manufactured outside the state of Missouri that was not imposed on instate parties. The Court held that the tax on the sellers was tantamount to a tax on the goods themselves, and thus struck it down.[82] The logic here is rock solid. The distinction between state and out of state sellers is explicit, and it is hard to see any reason, safety or otherwise, that requires a differential standard, thus justifying the per se rule.

One of the cases that was cited favorably in *Philadelphia* was *Baldwin v. G.A.F. Seelig, Inc.*, where New York, under its Milk Control Act, determined that "there shall be no sale within the state of milk bought outside unless the price paid to the producers was one that would be lawful upon a like transaction within the state."[83] The rule in effect required the outsiders to raise their prices to meet that of the

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[79] Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (internal citations omitted).

[80] For discussion, see Richard A. Epstein, *Waste & the Dormant Commerce Clause*, 3 GREEN BAG 29 (1999).

[81] 91 U.S. 275 (1875). This decision rested on the earlier decision in Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827).

[82] *Welton*, 91 U.S. at 283.

[83] Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 519 (1935).

insiders. In an effort to justify that decision, New York relied on *Nebbia* for the proposition that more than the suppression of competition was at stake:

> Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.[84]

The case has clear *Lochner*-like tones because it insists that it is possible to draw an intelligible line between health and safety issues on the one side and economic protectionism on the other. It is a bit awkward, perhaps, to treat *Baldwin* as a discrimination case, although the case contains two references to that term.[85] But the better way to think about this case is to note that both cases involved explicit and overt efforts to subvert competition, albeit through different mechanisms. Discrimination between local and out-of-state

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[84] *Id.* at 523.
[85] *Id.* at 526.

sellers is a deviation from the competitive ideal. So is a rule that demands parity by insisting that all milk be sold at the same price, albeit the price set by New York dairy farmers and not by the market itself. That high price acts as a barrier on entry that works to the cartelization of the market. And so, once again, apart from naked protectionism there is no way to justify the case.

It should, therefore, be of no surprise that the *Baldwin* was a unanimous decision which showed no trace of the deep liberal versus conservative split that surrounds *Wickard* but is absent in *Hood.* It is also worthy of note that this decision arises very early in the cycle, coming down forty-four years before *Philadelphia*. Yet *Philadelphia* cites the case six times with approval, including one reference where *Baldwin* is in fact cited in *H.P. Hood* as if there is no discontinuity between the cases. [86]

C. IMPLICIT DISCRIMINATION

1. *PIKE*, WITHOUT ITS PROGENY

As noted earlier, there are other ways than explicit discrimination to disfavor out-of-state parties, even with facially neutral legislation. The seminal case in this connection is *Pike*. There, an Arizona official insisted that all crated cantaloupes grown in Arizona be packed inside that state, even though it was far cheaper (and just as safe) for a particular grower, given its location, to pack cantaloupes at a nearer California location.[87] Clearly, as presented, the case did not involve any form of discrimination against out of state producers since they were not even involved in the case.[88] Nor was it the case that most growers inside the state would be forced to turn to a less

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[86] *See* Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

[87] Pike v. Bruce Church, Inc., 397 U.S. 137, 139–40 (1970).

[88] One possible way to bring this case within the formula is to assume that the California processor brought a suit for being excluded under the Arizona law, at which point it might claim that it was the object of discrimination.

efficient ordinance. But all that last point proves is that the statute impacts some, but not all, producers, which is no reason not to block this transaction when it turns out that both the California packer on the one side, and Pike's customers, both in-state and out-of-state, were prejudiced by the regulation.

Thus, this case is distinct from those in the previous category in that it relies solely on inferences from nonexplicit behaviors. Nonetheless, Justice Stewart articulated a test that seems to identify the subclass of cases to which the dormant commerce rule should apply:

> [W]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.[89]

The first sentence in this brief passage makes it clear that the application of the dormant Commerce Clause will not cover every form of local regulation. So, the word "evenhandedly" refers to the discrimination issue, and the phrase "incidental effects"—always tricky words—ensures that no oversight is needed when the effects of the state legislation are both minor and are in no sense intended by the local official to overburden interstate activity. But here we are not dealing with general legislation, which might at most be subject to a difficult as-applied challenge. Instead, *Pike* involves a decision by a single administrator, who well knew or should have known that neither of those conditions held, and thus was caught by the last phrase in the decision. At no point was there any effort to circumvent safety and inspection laws, for it was no part of the case that the California safeguards on this health and safety were somehow inferior to those in place in Arizona.

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[89] *Pike*, 397 U.S. at 142.

Indeed, just as with the formulation of the police power under *Lochner*, the dormant Commerce Clause is subject to a key limitation for bona fide health threats from importing a foreign species of wildlife capable of causing damage to local flora and fauna. Thus, in *Maine v. Tayler*,[90] a state law prohibited the importation of live bait fish because "the ban legitimately protects the State's fisheries from parasites and nonnative species that might be included in shipments of live baitfish."[91] Justice Blackburn upheld the statute after concluding that the less intrusive method—inspection of bait shipments—was a" physical impossibility" due to the volume of shipments and the small size of the parasites. [92] Accordingly, he concluded that the state was not under a burden to develop new techniques for inspection—without any timetable.[93] But the Court did hold that the situation would change if these techniques were in fact developed.[94] As with *Lochner*, the health and safety issues were not casually thrown aside. The applicable law required that the "strictest scrutiny" be applied. But in this case, the elaborate evidentiary proceedings of the district court satisfied that standard.[95]

2. THE PRICE AFFIRMATION CASES

The other two *Pike*-like cases that Feldman and Schor refer to are in my view equally innocuous. In the 1986 case of *Brown-Forman*, the Court considered whether New York State, as part of its comprehensive regulation of the liquor industry, could impose on all liquor sales (domestic and foreign) a requirement that:

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[90] 477 U.S. 131 (1986).
[91] *Id.* at 133.
[92] *Id.* at 141.
[93] *Id.* at 147.
[94] *Id.*
[95] *Id*. at 145-46.

> [T]he bottle and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor will be sold by such [distiller] to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores.[96]

The provision was enforced by requiring each distiller to file a notice with the state by the 25th of the prior month to demonstrate that the scheduled prices that would be in effect for the next month were no higher than the prices charged for the same cases or bottles anywhere else in the United States. This system necessarily introduced a massive level of nationwide, month-by-month price rigidity, because in the month that the price controls remained in effect in New York, the distiller was unable to lower the prices that it charged outside the state without first getting approval from the New York Authority. The net effect was that prices elsewhere were kept artificially high to the disadvantage of the consumers in those states. The anticompetitive effect did not in this case depend therefore on any discrimination between domestic and foreign producers. If anything, this "price affirmation" strategy created a situation in which the laws of one state, New York, constrained the prices set in other states. This short provision could not survive antitrust scrutiny as a novel kind of tie-in arrangement under any kind of rule-of-reason standard, because New York did not, and could not, present any efficiency justification for the arrangement.[97] It is hard to see why this decision is wrong when it meets the consumer-welfare standard of the antitrust laws, which operates as the external check that prevents the undue

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[96] Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 576 (1986).

[97] The leading case is Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984). For discussion, see, e.g., Christian Ahlborn et al., *The Antitrust Economics of Tying: A Farewell to Per Se Illegality*, 49 ANTITRUST BULLETIN 287 (2004). The earlier *per se* attitude is closely associated with Northern Pac. Ry. Co. v. U.S., 356 U.S. 1 (1958).

expansion of the law. Rather, the troubling question is whether New York should be allowed to set minimum prices for in-state sales, an inquiry that is foreclosed by *Nebbia*.

So why then are Feldman and Schor upset about the decision? Their answer is that the decision marks an unheralded change in the law:

> [F]or modern cases that predated (or ignored) Brown-Forman, the question was not whether the state law at issue regulated interstate commerce at all, but rather whether it did so discriminatorily or evenhandedly. In Brown-Forman, however, the Court held that the first branch is violated if the state law discriminates against or directly regulates interstate commerce[.][98]

The correct reaction to that point is a giant "so-what?" Even if there is no discrimination against foreign corporations, the New York rule does have a direct effect on every other state. It takes little imagination for some other state to decide to use some inconsistent price fixing device to determine sales during the relevant month, so that the proliferation of inconsistent state standards could roil the market. Think therefore of multiple states with multiple systems. If each state controls its own in-state purchases, there are no overlaps, but if each seeks to restrain the prices elsewhere there are legions of such conflicts. Apart from their general federalism concern, Feldman and Schor identify no efficiency advanced by the rule. Indeed, their closing remark is that the Court in *Brown-Furman* had an alternative way to strike down the law, which was to show that "[w]hile regulating all *distillers* evenhandedly, the state law did not regulate all *consumers* evenhandedly." [99] Yet Justice Marshall, as shown in the sentence quoted above from Feldman and Schor, *was* concerned with

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[98] Feldman & Schor, *supra* note 1, at 241 (emphasis in original).
[99] *Id.* at 243 (footnote omitted).

efficiency.[100] I can see no dangerous growth potential from *Brown-Forman*, which usefully cuts back one form of state regulatory mischief.

The subsequent decision *in Healy v. Beer Institute, Inc*[101] should be treated as a sensible footnote to *Brown-Forman*. According to Justice Blackmun, "[t]he State of Connecticut requires out-of-state shippers of beer to affirm that their posted prices for products sold to Connecticut wholesalers are, as of the moment of posting, no higher than the prices at which those products are sold in the bordering States of Massachusetts, New York, and Rhode Island."[102] That statute[103] thus covered bordering states where it was easy for Connecticut residents to cross state lines to buy liquor (or gasoline etc.).[104] It also allowed distillers to lower sales prices below the list price during the month they were posted, but if they did so, they were required to lower Connecticut prices as well.[105] There is thus an extra degree of freedom under this statute. Even though the uniform minimum still applied, unlike the situation in *Brown-Forman*, the prices in all the relevant states could shift within the period, so long as the parity across states survived.

The ultimate issue can thus be reduced to this question: is it sufficient to let the Connecticut scheme challenged in *Healy* pass muster solely because it is less offensive than the New York scheme in *Brown-Forman*? To that question the answer should be a resounding no. Some negative effects persist, and it is still not possible to identify a single efficiency advantage to the statute. Hence, the scheme should

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[100] *Brown-Forman*, 476 U.S. at 579 ("Appellant does not dispute that New York's affirmation law regulates all distillers of intoxicating liquors evenhandedly . . . .").

[101] 491 U.S. 324 (1989).

[102] *Id.* at 326.

[103] CONN. GEN. STAT. § 30-63c(b) (1989) (repealed 1991).

[104] *Healy*, 491 U.S. at 336-40.

[105] *Id.*

be struck down, without worrying about any subsequent harms that the case may have caused of which are there are none.

3. *WALSH* AND ITS PROGENY

This standard, moreover, is subject to principled limitations. In *Pharmaceutical Research and Manufacturers of America v. Walsh*,[106] Maine enacted a law intended to curb the increase in prescription prices by a carrot-and-stick operation. Thus, a state official would first seek to persuade all drug sellers within the state to offer rebates to the state, providing a source of money the state could use to pay rebates to its poorer citizens. If the companies did not comply, then only by receiving prior authorization would the state allow them to sell certain of their products within the state. I regard this as an ugly form of coercion, for the simple reason that there is no health rationale advanced for why those prior authorizations are required. The case therefore falls into the category of "give me your money or your life," when no discernible reason is offered to explain why the state should be able to put the drug companies to the choice. After all, the subsidy angle could always be satisfied out of general revenues, without the danger of a special targeted tax.[107] But the decline in protection for economic liberties in *Nebbia* carries over to this somewhat different context, so that the threat of coercion may be allowed even though the pharmaceutical companies had violated no laws during the establishment of Maine's new system. At this point, the Maine scheme will not be caught by either *Brown-Forman* or *Healy*:

> Petitioner [PhRMA] argues that the reasoning in [*Baldwin* and *Healy*] applies to what it characterizes as Maine's regulation of

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[106] 538 U.S. 644 (2003).

[107] For my longer treatment of this coercion issue, see RICHARD A. EPSTEIN, BARGAINING WITH THE STATE ch. 4 (1993) (Coercion, Force, and Consent).

> the terms of transactions that occur elsewhere. But, as the Court of Appeals correctly stated, unlike price control or price affirmation statutes, "the Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price. Similarly, Maine is not tying the price of its in-state products to out-of-state prices." 249 F.3d, at 81–82 (footnote omitted). The rule that was applied in *Baldwin* and *Healy* accordingly is not applicable to this case.[108]

As Feldman and Schor point out, the extraterritoriality principle that has been kept in place in these price affirmation cases has also played a role in cases outside of that area. Their approach to this topic starts with the caption that the "Lower Federal Courts Have Run Roughshod over *Walsh*"[109] "by striking down indisputably nondiscriminatory statutes that regulate health and safety."[110] There is no doubt that the subsequent cases that have addressed implied preemption have not confined themselves to the price affirmation line of cases. But, as noted above, there is good reason to go beyond those limits. The basic balancing test in *Pike* did not mention the price affirmation cases. Nor did it place any specific limitation on the classes of case that could be caught.[111] Price affirmation cases show the way in which various tie-in arrangements can inhibit competitive markets. But it is equally common and equally dangerous that other forms of taxation and regulation can impose differential pressures on different portions of the market, and these skews may well create economic distortions every bit as large as those by the price affirmation cases.

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[108] *Walsh*, 538 U.S. at 669 (quoting Pharm. Rsch. and Mfrs. of Am. v. Concannon, 249 F.3d 66, 81-82 (1st Cir. 2001)).

[109] Feldman & Schor, *supra* note 1, at 264.

[110] *Id.*

[111] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

In making this claim, it is critical to recognize that *Pike* did not aim to declare war on any and all distortions that in principle might inefficiently shift relative prices between two goods. Throughout the law there are *de minimis* tests which insist that courts and legislatures ignore tiny distortions that are both frequent on the one hand and difficult to correct on the other. Perhaps the leading example within the tort law is the "live and let live" principle in nuisance law that puts reciprocal low-level nuisances (talking in the backyard, operating power tools, playing games, and the like) into one big basket where each particular invasion is assumed to cancel out its foil.[112] The point here is that ignoring the losses from reciprocal nuisances such as these allows greater gains to be achieved. Given the general scope of the rule, such gains are likely to be shared by the total population affected by the activities. It is only when a given distortion becomes larger that some specific action is taken, and even then, such action might often be contextual: it is, for instance, standard practice to allow extensive street or apartment repairs on weekday working hours, but not on weekends and night.[113] It follows, as is the case with all balancing tests, that some cases may be close to the line, which is why either jury determinations or discretionary decisions by a trial judge may be necessary. But the inquiry whether a given nuisance is of a kind warranting action cannot be shoved under the rug, as Feldman and Schor try to do, by claiming that the broader language in *Healy* is grievously off base because it applies to various forms of regulation.

The proof of the pudding is in the eating. In their essay, Feldman and Schor do not attempt any detailed analysis of the appellate cases that have gone beyond the price affirmation cases, but they content

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[112] For the famous articulation of the rule, *see* Bamford v. Turnley, (1862) 122 Eng. Rep. 27, 32–33, defended in Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 74–79, 82–90 (1979).

[113] For instance, in California, see CAL. CIV. CODE § 1954(b) (West 2019).

themselves with cryptic condemnations of them which are said to reveal the ominous nature of these judicial undertakings. Their list of wayward cases includes cases that invalidate statutes pertaining to bottle label laws,[114] e-cigarettes,[115] carbon dioxide emissions,[116] ads depicting sex with minors,[117] spoofing laws,[118] online auctions,[119] and the online publication of state legislators' home addresses.[120] There is always a deep danger in resorting to string citations, and that danger is amply borne out here. Space does not permit a close examination of each of these cases, but even an examination of the most salient does not reveal any pattern of systematic overreach by these lower federal courts.

For instance, in *American Beverage Association v. Snyder*,[121] the challenged statutes required various beverage manufacturers to add to their container labels sold in Michigan a "symbol, mark, or other distinguishing characteristic that is placed . . . by a manufacturer to allow a reverse vending machine to determine if that container is a returnable container . . . ."[122] The law was challenged for its extraterritorial effect because it forced association members to "change the way they source and deliver product both in Michigan and in the other states in which they operate . . . [by isolating] the Michigan-specific product in separate Michigan-specific manufacturing and distribution locations or in segregated areas of multi-state manufacturing and distribution facilities,"[123] requiring "more warehouse

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[114] American Beverage Ass'n v. Snyder, 735 F.3d 362, 376 (6th Cir. 2013).

[115] Legato Vapors, LLC v. Cook, 847 F.3d 825 (7th Cir. 2017).

[116] North Dakota v. Heydinger, 825 F.3d 912 (8th Cir. 2014).

[117] Backpage.com, LLC v. Cooper, 939 F. Supp. 2d 805 (M.D. Tenn. 2013); Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262 (W.D. Wash. 2012).

[118] Spoofcard, LLC v. Burgum, 499 F. Supp. 3d 647 (D.N.D. 2020).

[119] McLemore v. Gumucio, No. 3:19-cv-00530, 2019 WL 3305131 (M.D. Tenn. July 23, 2019).

[120] Publius v. Boyer-Vine, 237 F. Supp. 3d 997 (E.D. Cal. 2017).

[121] 735 F.3d 362 (6th Cir. 2013).

[122] MICH. COMP. LAWS § 445.572a(10) (2008).

[123] 735 F.3d at 368.

space to separate inventory and eliminates flexibility in the supply chain."[124] This law applied to in-state and out-of-state parties alike, and thus did not discriminate against interstate commerce. It was needed to protect the state from having to pay return fees on bottles that were sold out of state, which is a legitimate anti-fraud interest. The key question is now to balance the two interests.

The Sixth Circuit got off to a rocky start when it insisted that the *Pike* test did not apply because it only reached those cases "when a state regulation is neither extraterritorial nor discriminatory in effect."[125] In the accompanying text it explained why the *Pike* balancing approach did not apply: "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."[126] But, as Feldman and Schor note,[127] it is wholly incorrect to say that finding some "impermissible" extraterritorial effect is sufficient to invalidate the local statute. The basic mistake is that the *Pike* test rightly has no natural limits in seeking out implicit forms of competitive imbalance by regulation or taxation. The good news is that the Sixth Circuit did not mean what it said, because it then applied the balancing test it formally disclaimed by chastising Michigan for failing "to explore other alternative measures that could combat the State's redemption problem,"[128] including limiting the number of bottles that any entity could redeem at one time, or demanding that the redeeming party supply a receipt indicating proof of purchase, or a strict enforcement against retailer fraud, on the assumption that they act as illegal aggregators of the bottle returns. It then concluded by noting that "the

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[124] *Id.*
[125] *Id.* at 376 n.7.
[126] *Id.* at 376.
[127] Feldman & Schor, *supra* note 1, at 255 n.141.
[128] *American Beverage Ass'n*, 735 F.3d at 375.

nine other states that have instituted bottle deposit laws seemed to have adopted regulations without imposing any criminal or civil penalties on in-state or out-of-state manufacturers and distributors."[129] This discourse does not yield a clear answer, which is why the case was remanded for further consideration on the justification issue that the case supposedly did not raise.

The confusion in the case only deepens because Judge Sutton in his brief concurrence first announces that he agrees with the court's opinion in full,[130] only to disagree with it in full thereafter. His major point is that balancing tests are to him something of anathema:

> For the judge who thinks little of *Pike* balancing and little of the judicial capacity to weigh apples-and-oranges interests neutrally, it is difficult to see the justification for preserving a "practical effect" extraterritoriality inquiry. And for the judge who wants to preserve *Pike* balancing, it is difficult to see what *additional* purpose is served by imposing the extraterritoriality inquiry as well. In the absence of a clear purpose or meaning, extraterritoriality provides a "roving license for federal courts to determine what activities are appropriate for state and local government to undertake.[131]

Sadly, the argument sweeps too broadly, because *if* balancing tests are out of sync here, they cannot be used to compare apples and oranges in free speech cases that balance free speech against a fair trial, against national security, against incitement to riot, against fraudulent advertisement, or against anything else. Nonetheless, Judge Sutton is not the only distinguished individual to miss out on the point, for Justice Scalia once wrote that:

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[129] *Id.* at 375.

[130] *Id.* at 377 (Sutton, J., concurring).

[131] *Id.* at 380 (Sutton, J., concurring) (emphasis in original) (quoting United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 343 (2007)).

> A final defect of our Synthetic Commerce Clause cases is their incompatibility with the judicial role. The doctrine does not call upon us to perform a conventional judicial function, like interpreting a legal text, discerning a legal tradition, or even applying a stable body of precedents. It instead requires us to balance the needs of commerce against the needs of state governments. That is a task for legislators, not judges. . . . [I]t is only fitting that the Imaginary Commerce Clause would lead to imaginary benefits.[132]

The scheme involved in the above case was one, which as Justice Alito described as follows:

> Maryland taxes the income its residents earn both within and outside the State, as well as the income that nonresidents earn from sources within Maryland. But unlike most other States, Maryland does not offer its residents a full credit against the income taxes that they pay to other States. The effect of this scheme is that some of the income earned by Maryland residents outside the State is taxed twice. Maryland's scheme creates an incentive for taxpayers to opt for intrastate rather than interstate economic activity.[133]

So described, the case is an easy one, for a system of double taxation does cause the economic distortion that the dormant Commerce Clause is intended to correct. The error here does not come from any subtle disparate impact, but from overt treatment that is easy to correct by requiring Maryland to back off its system of double taxation. Justice Scalia, unfortunately, carried over his general skepticism

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[132] Comptroller of Treasury of Maryland v. Wynne, 575 U.S. 542, 576–77 (2015) (Scalia, J., dissenting) (quoted with approval in Feldman & Schor, *supra* note 1, at 220 n.16).

[133] *Id*. at 545 (majority opinion).

about constitutional law from the early debate that we had on this subject back in 1984, where I supported an interventionist result in *Moorman Manufacturing Co. v. Bair*.[134] In *Bair*, the Supreme Court held that Iowa did not violate any extraterritoriality component of the due process clause when it shifted the system whereby it apportioned income of a national corporation to activities done within the state. Previously, Iowa had followed the national rule that apportioned income based on sales within the state, real estate within the state, and payroll within the state, which gave reliable indication of the state's tax base. But Iowa then shifted to using solely the sale formula to determine the level of taxation for each firm.[135] The opinion of Justice Stevens noted that there was some instability in all tax formulas, and he claimed the due process clause did not prefer one imperfect tax over another.[136] But the decisive answer should be that this deviation should not be allowed from a stable multistate solution to a regime in which each state, armed with private information, can engage in opportunistic behavior that undermines the national market. Top marks go to Justice Lewis Powell for grasping the *Pike* connection and its application to federal taxation law.[137] The distortions are serious, even if difficult to quantify, but the remedies are easy to administer.

A similar error was made by then-Judge Gorsuch in *Energy & Environmental Legal Institute v. Epel*[138] who first referred to *Comptroller of Treasury of Maryland v. Wynne* and then voiced the same deep skepticism about the balancing tests in *Pike*:

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[134] 437 U.S. 267 (1978); *see* Antonin Scalia, *Economic Affairs as Human Affairs*, 4 CATO J. 703 (1985); Richard A. Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, 4 CATO J. 711 (1985).

[135] 437 U.S. at 270 n.3 and accompanying text.

[136] *See id.* at 273.

[137] *Id.* at 289, 295 (Powell, J., dissenting).

[138] 793 F.3d 1169 (10th Cir. 2015).

> There the Court read the Commerce Clause as allowing judges to strike down state laws burdening interstate commerce when they find insufficient offsetting local benefits. By any reckoning, that's a pretty grand, even "ineffable," all-things-considered sort of test, one requiring judges (to attempt) to compare wholly incommensurable goods for wholly different populations (measuring the burdens on out-of-staters against the benefits to in-staters).[139]

But there is no reason for this skepticism about the balancing test which in this instance is easy to apply. At issue in *Epel* was whether an out-of-state producer of fossil fuels could oppose, on dormant Commerce Clause grounds, a Colorado renewable energy mandate which required that all electricity generators, in-state and out-of-state, garner at least 20 percent of their energy from renewable sources.[140] That statute necessarily required all Coloradans to pay more for energy from all in-state and out-of-state producers of renewable fuels. Their case is a dead loser even under the general rules of the dormant Commerce Clause. First, there is no explicit discrimination. Second, under all the variations of the *Pike* test there is no hidden impact that distorts the relative advantage between in-state and out-of-state producers or consumers. There is no question here of burdens from inconsistent regulations; there are no special requirements on how to conduct the business; there is no sneaky tax advantage. Think of this case as a competition between two rival firms. If one decided to switch from natural gas to wind energy, the natural gas company could not protest the shift. The same principle, that the harm is *damnum absque iniuria*—harm without legal injury—that covers the private law disputes covers these extraterritorial cases as well. Then-Judge Gorsuch made this point as well when he said of

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[139] *Id.* at 1171.
[140] *Id.* at 1170.

this mandate that it "just doesn't share any of the three essential characteristics that mark those cases: it isn't a price control statute, it doesn't link prices paid in Colorado with those paid out of state, and it does not discriminate against out-of-staters."[141] But it really matters when eminent justices and judges get the right results sometimes, with the wrong theory. Properly analyzed, *Wynne* and *Epel* support the application of the generalized *Pike* test that looks for distortions from a competitive equilibrium from any form of taxation or regulation. Then-Judge Gorsuch noted that the use of the generalized *Pike* balancing test was much like the rule of reason in antitrust case, as indeed it was, given that both settings require looking at tradeoffs between efficiencies and monopoly restraints.[142] He was also right to note that in some instances, the uniformities are strong enough to allow for the application of a per se rule, as in many cases of explicit discrimination.[143] But it is wrong to think that the dormant Commerce Clause is incurably defective because it calls for remedial balance in many cases.

To put the point more broadly, the defenses allowed here do not require some diffuse examination of the "practical effects" that Justices Scalia, Gorsuch, and Judge Sutton wish to ignore. Clearly, the use of balancing tests is ubiquitous, so that the per se condemnation of the practice should fail. What is needed is a demonstration that this particular balancing test is incorrect because it makes the wrong trade-offs. Antifraud provisions are legitimate ends, and overbreadth in their application is a legitimate concern under any means-ends analysis of the police power. Even believers in simple rules like me have to accept that in choosing judicial remedies the risks of over- and under-inclusion are an essential part of the judicial business. The secret is to execute well, not lament. It is certainly not to retreat into

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[141] *Id.* at 1173.
[142] *Id.* at 1172.
[143] *Id.*

a shell that says only the safe but underinclusive test of nondiscrimination sets the outer limits for the dormant Commerce Clause.

The second (and last) case to which I shall turn in some depth is *Legato Vapors, LLC v. Cook*,[144] which involves a scheme similar to California's in *National Pork.* The Indiana Vapor Pens and E-Liquid Act regulated the manufacture and distribution of vapor pens and the liquids used in so-called e-cigarettes.[145] The Act imposed explicit limitations on out-of-state manufacturing operations, which extended to the design and operation of out-of-state production facilities. Covered issues included requirements for sinks, cleaning products, and contracts with outside security firms, reaching both specific terms and hiring practice, all going in extraordinary detail.[146] The Seventh Circuit did not doubt that Indiana had ample resources to regulate instate activity in an evenhanded fashion that let it:

> [R]egulate in-state commerce in vapor pens, e-liquids, and e-cigarettes to protect the health and safety of its residents. For example, the Act's prohibitions on sales to minors, its requirements for child-proof packaging, ingredient labeling, and purity, and requirements for in-state production facilities pose no inherent constitutional problems. Indiana may not, however, try to

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[144] 847 F.3d 825 (7th Cir. 2017).

[145] IND. CODE §§ 7.1-7-1-1 to -6-6 (2017).

[146] The Act:

> [R]equires the manufacturer to enter a service agreement with a security firm that is valid for five years after the date of permit application. Ind. Code §§ 7.1-7-4-1(d)(2)(B), (d)(3). The security firm must meet stringent certification standards and provide 24-hour video monitoring and high-security key systems. § 7.1-7-4-6(b)(12)-(13). The Act also dictates details for the construction, design, and operation of the manufacturing facility, including requiring a "clean room" for mixing and bottling that adheres to requirements of the Indiana Commercial Kitchen Code.

Legato Vapors, 847 F.3d at 828 (quoting IND. CODE §§ 7.1-7-4-1(d)(1), 7.1-7-2-4(3)).

> achieve those health and safety goals by directly regulating out-of-state factories and commercial transactions. As applied to out-of-state manufacturers, the challenged provisions of the Act violate the dormant Commerce Clause prohibition against extraterritorial legislation.[147]

What more need be said, given that *Legato* is in line with the other extended *Pike* cases? The Indiana statute had an explicit extraterritorial reach, so the question is whether it could be saved by noting that the state imposes like restrictions on local manufacturers, and the answer is that it could not. The court's analysis duly relies on the "directly regulates" language from *Healy*,[148] and it pointed out that "[i]t poses the clear risk of multiple and inconsistent regulations that would unduly burden interstate commerce."[149] After all, the home state could require direct provision of security regulation in a different form, as could each of forty-nine other states. The combined impact is an implicit tax, which is not justified for health and safety in Indiana, given that all its other regulations pass muster without difficulty.

So, once again the issue should turn to justification, and here *Legato* takes the view that the state never once sought to meet the standards set out in *Maine v. Taylor*, which indicates that the ban on extraterritorial laws is "virtually" a *per se* rule, but not a total one.[150] Feldman and Schor take the odd position that *Legato* misfires because "the Supreme Court's holdings explicitly provide for the defense with respect to the anti-discrimination rule, [in *Maine v. Taylor*,] but conspicuously fail to provide for it with respect to the extraterritoriality principle."[151] But analytically the objection makes no sense at all. The whole logic of *Pike* balancing makes health and safety justifications

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[147] *Id.* at 827.
[148] *Id.* at 830.
[149] *Id.* at 837.
[150] *Id.* at 834 n.1.
[151] Feldman & Schor, *supra* note 1, at 255 n.141.

as critical in the one case as it is in the other, just as the Seventh Circuit stated.[152] Indeed, Feldman and Schor should welcome that result because it cuts down on the perceived abuses that attend the direct regulation prong of the dormant Commerce Clause by disciplining the way in which the "practical effects" applied, just as it does in *American Beverage Association.*

At this point we can complete the cycle. The modern tendency, as noted by Judge Frank Easterbrook, is to adapt the rational basis test from the economic liberty cases to cover dormant Commerce Clause cases:

> If the balancing approach of Pike supplied the standard applicable to all laws affecting commerce—that is, to all state and local laws addressing a subject that Congress could regulate, if it chose—then judicial review of statutory wisdom after the fashion of Lochner would be the norm. Not so, because Pike is not universally applicable.[153]

The demise of *Lochner* in the one area is said to ease the way for the extension of that demise to another. But if this analysis has shown anything, it is that taking seriously both the need to preserve a competitive equilibrium in the one space is as important as it is the other, and that mission can only be accomplished if we use sound principles of analysis in both areas. The instinctive skepticism of too many "judicial restraint" justices eats away at the fabric of constitutional law in both domains.

The stage is now set for a closer look at *National Pork*, which also deals with an aggressive effort of California to project its vision of animal rights on a national scale. All the pieces alluded to above come together to bear on this legislation. The economic distortions of

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[152] *Legato Vapors*, 847 F.3d at 833-34.

[153] National Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124, 1131 (7th. Cir. 1995) (emphasis in original).

the California scheme are apparent, so the only question is whether the justification is sufficiently clear as in *Legato* that the Court can decide as a matter of law on the record, or whether, as in *American Beverage Association*, there are contested facts that require some review at the trial level to see whether the remedy is needed or overbroad.

III. *NATIONAL PORK* AND ITS PROGENY

The basic set-up in *National Pork* shows California's aggressive stance with respect to animal safety.[154] A popular referendum in 2018 set strict conditions for the care of pigs in captivity.[155] The new law was neutral on its face insofar as the new restrictions applied to all pigs raised inside California or outside the state, so there was no explicit form of discrimination, even though 99.8 percent of the pork production consumed in California comes from out-of-state sources,[156] and California only produces 0.1 percent of the national production of hogs and pigs.[157] But conversely, the total of pork consumed in the state constitutes 13 percent of the national production.[158] Thus, at the very least, the nondiscrimination requirement does not provide the outsiders with any protection because it is easy for California to sacrifice a miniscule domestic production in search of a wider social goal, which is why the expanded balancing tests *a la Pike* are needed. The substantive requirements of the new statute were stricter than those anywhere else:

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[154] Many of the arguments in this section were develop earlier in Richard A. Epstein, *High Court to Referee California Food Fight*, HOOVER INST.: DEFINING IDEAS (April 5, 2022) [https://perma.cc/85HC-NPYN].

[155] For the state code that Proposition 12 amended, see CAL. HEALTH & SAFETY CODE §§ 25990-25993 (West 2021).

[156] Jennifer Shike, *Economist Predicts Pork Shortage to Hit California January 1*, FARM JOURNAL (June 25, 2021) [https://perma.cc/9KCQ-5435].

[157] CAL. DEP'T OF FOOD & AGRIC., CAL. AGRIC. STATS. REV. 2020-21, at 14 (2021).

[158] Brief for Petitioners at 3, Nat'l Pork Producers Council v. Ross, No. 21-468, 2022 WL 3284512 (U.S. 2022).

> [F]armers provide each sow with 24 square feet of usable floor space and largely prohibits the use of individual stalls, even during the critical period between weaning and confirmation of pregnancy, when sows recover from the stress of giving birth, are bred, and then wait for the embryos to attach themselves to the uterine wall.[159]

Given the complicated processes for raising pork, it was contended by the plaintiffs (but disputed by defendants)[160] that the only way in which out-of-state producers would be able to continue selling in California under the law was to produce their entire output in conformity with the California rules,[161] which the industry estimated will raise the cost of production by at least 9.2 percent, not only in California but everywhere else.[162] There is, moreover, an underlying question as to whether the rules put into place under the California statute do in fact advance the health conditions of the animals, and, even if they do not, whether all the measures required under the statute are necessary to achieve that end.[163]

In dealing with this issue, Judge Sandra Ikuta of the Ninth Circuit read the earlier precedents to allow the statute to pass muster, relying in large measure on the skeptical framework that either required proof of explicit discrimination or a violation of the narrow

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[159] Reply Brief for Appellants at 9-10, Nat'l Pork Producers Council v. Ross, 6 F.4th 1021 (9th Cir. 2021) (No. 20-55631).

[160] Brief for State Respondents at 42–43, Nat'l Pork Producers Council v. Ross, No. 21-468, 2022 WL 3284512 (U.S. 2022) (alleging that it is possible to segregate pigs that make pork products for California from others).

[161] Reply Brief for Appellants at 35, Nat'l Pork Producers Council v. Ross, 6 F.4th 1021 (9th Cir. 2021) (No. 20-55631).

[162] Reply Brief for Appellants at 10, Nat'l Pork Producers Council v. Ross, 6 F.4th 1021 (9th Cir. 2021) (No. 20-55631).

[163] *See* Reply Brief for Appellants at 40–42, Nat'l Pork Producers Council v. Ross, 6 F.4th 1021 (9th Cir. 2021) (No. 20-55631).

version of the *Pike* test.[164] Judge Ikuta paid little attention to *Pike*, but focused instead on the recent Supreme Court decision in *South Dakota v. Wayfair, Inc.*,[165] which held, contrary to past practice, that the South Dakota legislature was within its rights to pass a law that require all out-of-state sellers to collect and remit sales tax, "*as if* the seller had a physical presence within the state."[166] The harder question is why *Wayfair* should matter at all. It involved no overreaching territorial boundaries: no one doubted that South Dakota could impose a use tax on its own citizens, so the task of conscripting foreign sellers to collect that tax for them did not impose on outsiders any burden that they could avoid if the state had better enforcement mechanisms against its own citizens.[167] Indeed, the collection of sales taxes from sellers is so common elsewhere that it could hardly be attacked there,[168] given that the plaintiffs in *Wayfair* made no allegation that the statute in question raised prices or caused dislocations to any third parties. In fact, the Court reasoned, eliminating the tax would be unfair to competitors with a physical presence in the state who had to pay the tax.[169]

The health issues in *National Pork* are far more substantial. In her opinion, Judge Ikuta relied heavily on *Association De Eleveurs de Canards et D'ois Du Quebec v. Harris*,[170] which addressed California's ban on the sale of products that are the result of force-feeding birds to enlarge their livers beyond normal size. The dormant Commerce Clause claim foundered on the view that the statute applied equally to domestic and foreign foie gras, even though it was targeted only

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[164] Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1028–1033 (9th Cir. 2021).

[165] 138 S. Ct. 2080 (2018).

[166] *Id.* at 2089 (emphasis added) (quoting S.B. 106, 2016 Leg. Assembly, 91st Sess. (S.D. 2016)).

[167] *Id.* at 2092.

[168] *Id.* at 2096 (noting that sales taxes are, for many states, "an indispensable source for raising revenue" and "are essential to create and secure the active market they supply with goods and services").

[169] *Id.*

[170] 729 F.3d 937 (9th Cir. 2013).

at out of state interests. Under the *Exxon* test, the lack of domestic production counted for naught, as was the case with any speculative claim based on balkanization, since no other state law was in tension with the local law.[171]

The inability to create a prima facie case meant that that the Ninth Circuit paid little attention to the supposed health justifications offered for the ban. These were not based on any claim that eating foie gras prepared in this fashion imperiled the health of its consumers, but rather rested solely on the State interest in "preventing animal cruelty in California" by outlawing the sale of such products in California, even if raised elsewhere.[172] The court also noted that "[p]laintiffs give us no reason to doubt that the State believed that the sales ban in California may discourage the consumption of products produced by force feeding birds and prevent complicity in a practice that it deemed cruel to animals."[173] So, in the end, *National Pork* followed *Eleveurs* on a two-pronged attack. There was no prima facie violation of either the nondiscrimination rule or the *Pike* test.

The question now is whether this will stand up in the Supreme Court. Here, the sheer magnitude of the pork market makes some dislocation large. But it is an open question of just how large the market might be. The dispute is reminiscent of that in *American Beverage Association*, where the scope of the market was smaller,[174] but at least some of the requirements were more intrusive.[175] Much will turn on

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[171] *See id.* at 951.

[172] *Id.* at 952 (footnote omitted).

[173] *Id.*

[174] American Beverage Ass'n v. Snyder, 735 F.3d 362, 366–67 (6th Cir. 2013) (describing the Michigan law imposing restrictions on beverage containers).

[175] *Id.* at 368 (noting that the Michigan law "requires interstate beverage manufacturers, on pain of criminal penalty, to produce, distribute, and sell designated beverages in unique-to-Michigan containers, and prohibits the sale of those same packaged beverages in all (or almost all) other States in the Country").

whether it is possible to segment the production across states, potentially requiring a remand, at least on the view taken here.

But there is no reason to think that the industry quantification of loss has to be taken at face value, for that is question of fact on which evidence can be taken. Thus, one estimate of the economic consequences differs dramatically from the industry figures. Professors Richard Sexton and Daniel Sumner have offered calculations that insist that hog prices in California will rise by about eight percent, but will remain steady outside of the California.[176] On this (contestable) version, segregation of the breeding pigs whose offspring are bound for California is now a credible option, so that the higher costs are passed back into the state where these products are consumed, which necessarily alters the *Pike* balance but does not for that reason render the test unusable. And, of course, the industry is entitled to offer testimony to defend its original position.

Nor is it that these economic calculations are the only elements that have to be taken into account under this prong. There is also the question of inconsistency: under *Eleveurs* must there be an actual conflict to trigger concern or is a potential inquiry sufficient? In my view, it would be unwise to require anything more than what is present here—every other state in the Union will have to let California inspectors onto its territory, an element that was not relevant in *Eleveurs* but surely salient here. Given that significant fact, the burdens are surely enough to raise the prospect that the California taxes will alter relative prices elsewhere in ways that depart from a competitive equilibrium.

So, the case turns on justifications for the restrictions, of which California offered two in its ballot measure. The first was that "the proposed restrictions would mitigate potential risks of food-borne illnesses and eliminate products from the California marketplace that

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[176] Richard Sexton & Daniel Sumner, *California's Animal Welfare Law Caused Hysteria on Both Sides – Here Are The Real Impacts*, THE HILL (Aug. 20, 2021) [https://perma.cc/D3YZ-5ALB].

the proponents viewed as immoral—while also advising voters that the measure would increase the price of pork in California."[177]

This first claim is exceedingly weak. The importation from outside California has presented no health issues from pork consumption for years, and there is little reason to think that this claim makes any sense when everyone agrees that California can achieve its own health objectives by inspecting if it chooses all pork products after they enter California. It is not just the case that lesser restrictions could in principle achieve this health objective. It is manifestly the case that the regulations already in place, both at plants before shipment and on the goods after their receipt, have in practiced achieved all desired health objectives.[178] On this score, California seeks the kind of overkill that is inconsistent with any balancing test.

The immorality claim raises trickier issues. The lopsided referendum vote in California does not establish that all Californians accept the view. There are many people who voted against the referendum, and many people who did not participate in the vote at all.[179] The notice of increased cost of pork products gives no numerical estimate, and would in any event, might not trouble, and might even please, those who do not eat pork at all. That judgment, moreover, turns California into an outlier by adopting a position taken in no other state. And its assertions have not been tested by evidence that takes the contrary position that the putative benefits to the hogs are as large as they say.

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[177] Brief for the State Respondents at 1, Nat'l Pork Producers Council v. Ross, No. 21-468, 2022 WL 3284512 (U.S. 2022).

[178] Brief for Appellants at 72, Nat'l Pork Producers Council v. Ross, 6 F.4th 1021 (9th Cir. 2021) (No. 20-55631).

[179] CALIFORNIA SEC'Y OF STATE, STATEMENT OF VOTE, NOV. 6, 2018, GENERAL ELECTION 5, 16 [https://perma.cc/CF7K-VY54] (showing that thirty-five percent of registered voters did not participate in the election for which Proposition 12 was on the ballot; and that thirty-seven percent of those who did participate voted against the proposition).

There is, moreover, serious reason to doubt that this is a health issue at all, at least within the standard constitutional position. The kinds of health interests that passed muster in the *Lochner* era—worker safety, combatting fraud, antitrust, to take a few explained above—were serious matters, where just about everyone continues to agree on the importance of the ends and is persuaded about the legitimacy of the means. But in this case, it is only the offense taken about practices done elsewhere that is said to trigger the analysis. In any sensible balancing scheme, the attenuated weight of that health interest reduces its significance in any balancing test based on the *Pike* model, for it opens up the gate for other dubious health claims. The minimum price rules in *Nebbia* were ostensibly justified on health grounds that were rightly dismissed as feigned or trivial in *Baldwin*. They are of no greater weight here.

The dangers go further. Using this broad definition of so-called health interests could bring many states in direct conflict with each other. The newest generation of Californians think that it is oppressive to the health of workers to live in right-to-work states, which allow workers to opt out of unions.[180] The system is also regarded as immoral and inhumane. So, California could then pass a law that says it will not accept any goods from a state that does not pass a right-to-work law, or, more narrowly, from any unionized firm, some of whose workers have opted out of the system. But that issue is controversial and individuals who live in right-to-work states regard those laws as essential forms of protection against union abuse and domination. They point to a wealth of statistics that indicate right-to-work states do a better job in attracting new firms and luring in new workers.[181] So, they pass statutes that say that a tax of X

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[180] For my views, see Richard A. Epstein, *The Misconceived Modern Attack on Right to Work Laws*, 2017 U. CHI. LEGAL F. 95 (2018).

[181] *See, e.g.*, Kevin Bressler, *Data: Jobs Continue to Flow from Pro-Union States Like Illinois to Right-to-Work States*, THE CENTER SQUARE (Sept. 11, 2022)

percent will be imposed on any goods shipped from non-right-to-work states. When faced with this issue, California blinked in its brief and took a will-see attitude on the question.[182] But there is no time to wait, and no reason to think that these statutes should be sustained, given the massive distortion that they create in goods and services. The issue could go further. States could pass laws that impose special taxes on any financial or business firm that adopts the ESG—environment, social and governmental—reforms, which are taxes that appear neutral on their face, but which are in fact destructive of the national market in goods and services. That should not happen.

CONCLUSION

The issues raised in *National Pork* may well look dry and technical, but the stakes in this case are enormous. At issue is the proper interpretation of the dormant Commerce Clause. In my view that clause has a powerful purpose, which is to protect competitive national markets from state pressures that seek to undermine it for provincial reasons. The attacks on competition can come in many forms. They can come from explicit rules that disfavor out-of-state parties. But they can also come from an endless variety of regulations and taxes that seek to achieve those same ends by oblique means. The interpretation of the dormant Commerce Clause has to keep up with the endless threats posed by local politics. It cannot, of course, be read to prevent every form of regulation because in practice it has negative effects on out of state firms. Instead, what is needed is a balancing test that asks whether the local justifications for health, safety and monopoly control dominate the anticompetitive effect.

[https://perma.cc/BD94-Y54A] (citing research findings that "[r]ight-to-work (RTW) states have added 1.3 million jobs since 2020, while non-RTW states lost 1.1 million jobs").

[182] Brief for the State Respondents at 26-27, Nat'l Pork Producers Council v. Ross, No. 21-468, 2022 WL 3284512 (U.S. 2022).

That test is available. The decision in *Pike* set out a framework that was applied in a simple case where a local Arizona administrator wanted to make sure that an Arizona firm did not use a more convenient shipping facility located nearby in California. The case was easy because the restraint on trade was obvious and there was no legitimate justification for this exercise of state power. *Pike* is the easy case, but it is not the only case. There are countless efforts by governments at all levels to circumvent a sensible competitive scheme, just as there are countless efforts by private parties to circumvent sensible rules of taxation and regulation. We cannot give up the chase on these activities by announcing in advance that all balancing tests are solely within the province of the legislature. In fact, from time immemorial, the technique has played a critical role in fashioning constitutional doctrine that deals with both structural reforms and individual rights. Whether we are dealing with *Lochner*-like claims on maximum hour laws, special taxes on foreign corporations, or bottle return policies matters not one whit. What is necessary is to have a uniform framework that can address these issues.

The claims that such systems are achievable does not rest on abstract claims that they are possible. It rests on observable claims that these techniques of judicial review have indeed worked. To see why, go back to the many cases discussed here, and ask as a matter of first principle whether any successful dormant Commerce Clause claim has had anticompetitive effects. They do the same thing with the health justifications that were both admitted and denied under the *Lochner* regime. I think that the error rate is very low. It therefore behooves even conservative justices and judges to face that reality. And that includes Scalia, Thomas, Gorsuch, Easterbrook, and Ikuta, all of whom should recognize once and for all that the clarion cry of judicial restraint should fall on deaf ears, and that the application of the rational basis test anywhere in constitutional law is a fatal mistake that has to be resisted at all costs. The Supreme Court should flex its intellectual muscles and reverse *National Pork* as the first step in the restoration of a vigorous dormant Commerce Clause to its rightful place in the constitutional firmament.