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Lost in the Dismal Swamp: Interstate Class Actions, False Federalism and the Dormant Commerce Clause

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“The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.”

INTRODUCTION

“No taxation without representation.” This paradigmatic mantra of the American Revolution constitutes an important foundational premise of the dormant Commerce Clause. While it is most often associated with its anti-protectionist function, prohibiting protectionist state regulations that discriminate against out-of-state commerce, I posit that the Clause serves an important (and often overlooked) ancillary...
function. It protects the polity of each State from regulatory intrusions by sister States — policies which it had no hand in creating. This *sovereign-capacity function* implicitly underlies the so-called “*per se* rule of invalidity.” As the Supreme Court explained in *Brown-Forman Distillers*, when a State’s law “directly regulates” extraterritorial commerce, the Court has “generally struck down the statute without further inquiry.” The Commerce Clause’s sovereign-capacity function protects “the autonomy of the individual States within their respective spheres” by dictating that “[n]o state has the authority to tell other polities what laws they must enact or how affairs must be conducted.”

Nowhere is the specter of “direct regulation” more prevalent than in the arena of class-action litigation. Commentators have noted many decisions where courts have certified multi-state (and often nationwide) class actions under the consumer-protection law of a single state. Concern over the propensity of state courts to certify such classes prompted Congress to enact the Class Action Fairness Act (hereinafter “CAFA”). The

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5 E.g., Edwards v. California, 314 U.S. 160, 174 (1941) (“[N]on-residents who are the real victims of the statute are deprived of the opportunity to exert political pressure upon the [State] legislature in order to obtain a change in policy”); Western Union Tele. Co. v. Pendleton, 122 U.S. 347, 355 (1887) (“All laws are co-extensive and only co-extensive with the political jurisdiction of the law-making power”); SPGCC, LLC v. Blumenthal, 505 F.3d 183, 196 (2d Cir. 2007) (“Consumer protection matters are typically left to the control of the states precisely so that different states can apply different regulatory standards based on what is locally appropriate.”); Hyatt Corp. v. Hyatt Legal Services, 610 F. Supp. 381, 385 (N.D. Ill. 1985) (“Imposing Illinois’ anti-dilution law upon . . . states that have chosen not to pass such a law . . . seems anathema to our federal system”); Arizona Corp. Comm’n v. Media Prod., Inc., 763 P.2d 527, 533 (Ariz. App. 1988) (allowing Arizona to regulate extraterritorial securities offerings would give the State “an effective veto over offerings and sales approved” by other States).


7 Id. at 579. *Accord* Healy v. Beer Inst., 491 U.S. 324, 336-37 (1989). The so-called *per se* rule of invalidity has been subject to considerable criticism. See e.g., Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. Pa. L. Rev. 855, 919-34 (2002) [hereinafter *Extraterritoriality and Political Heterogeneity*] (arguing that the rule should be limited to protectionist statutes).

8 Healy, 491 U.S. at 336.

9 National Solid Wastes Mgmt. Ass’n v. Meyer, 165 F.3d 1151, 1153 (7th Cir. 1999).

Act dramatically expanded federal court diversity-of-citizenship jurisdiction to include most multi-state class actions, allowing removal of the vast majority of such suits to federal court.\textsuperscript{12} As CAFA’s proponents explained in the statute’s Senate Report, certification of nationwide classes under a single State’s law “undermin[es] basic federalism principles” by “invit[ing] one state court to dictate to 49 others what their laws should be on a particular issue.”\textsuperscript{13} The Report labeled the certification of such actions “false federalism,” a term coined by former Clinton-era solicitor general Walter Dellinger.\textsuperscript{14} The Report asserted that these decisions violate the Constitution because “a system that allows state court judges to dictate national policy . . . is contrary to the intent of the Framers when they crafted our system of federalism.”\textsuperscript{15}

CAFA’s proponents offered several examples of “false federalism” — State appellate opinions affirming the certification of multi-state classes under a single state’s law.\textsuperscript{16} They suggested that these decisions violated the due process rights of the defendants recognized by the Supreme Court’s seminal decision, \textit{Phillips Petroleum Co. v. Shutts}.\textsuperscript{17} They claimed that CAFA will end such abuses by allowing removal of class actions implicating interstate commerce to federal courts. Federal judges, the authors claimed, are more “respectful” of due-process limitations than their state counterparts.\textsuperscript{18} CAFA’s sponsors misdiagnosed the problem.

The Senate Report’s assessment suffers from two fundamental misconceptions.

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\item \textsuperscript{12} See 28 U.S.C. § 1332(d). Subject to limited exceptions, CAFA excused the application of the complete diversity rule, allowing removal if diversity existed between \textit{any} class member (named or unnamed) and \textit{any} defendant. \textit{Id.}
\item \textsuperscript{13} S. Rep. No. 109-14 at 24 (2005).
\item \textsuperscript{14} \textit{Id.}
\item \textsuperscript{15} \textit{Id.}
\item \textsuperscript{16} \textit{Id.} at 24-26.
\item \textsuperscript{17} 472 U.S. 797 (1985).
\item \textsuperscript{18} S. Rep. No. 109-14 at 37 (2005).
\end{itemize}
First, each of the decisions it offered as examples of “false federalism” actually complied with the due-process requirements identified in Shutts. Shutts adopted a view advanced by a plurality of the Court in Allstate Ins. Co. v. Hague. This approach dictates that for a State’s law to be applied to a multi-state class action, the Due Process Clause requires only that the State must have “a ‘significant contact or significant aggregation of contacts’ to the claims asserted by each member of the plaintiff class, contacts ‘creating state interests,’ in order to ensure that the choice of [that State’s] law is not arbitrary or unfair.”

In all of the decisions discussed in the Senate Report, the courts certified the classes under the law of the corporate defendant’s home state. It is well settled that the presence of a corporation’s “principal place of business” in a State alone “creates significant contacts to the State” such that application of its law to all transactions involving the defendant is “not arbitrary or unfair.”

Hague-Shutts did not erect a bulwark to protect state sovereignty as the Senate Report suggests. To the contrary, it imposed only “modest restrictions” on state courts. Hague-Shutts largely cast due-process regulation over the appropriate rule of law to be applied in multi-state class actions into the realm of choice-of-law — a field that Dean Prosser famously described as “a dismal swamp, filled with quaking quagmires, and

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23 Northwest Airlines, 111 F.3d at 1394 (the presence of party’s corporate headquarters in a jurisdiction standing alone constitutes a sufficient contact under the Due Process Clause for the jurisdiction’s law to be applied to all claims involving the party) (quoting Shutts, 472 U.S. at 821-22).
24 Shutts, 472 U.S. at 818 (citing Hague, 449 U.S. at 312-13).
inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.”

Second, CAFA provides no substantive choice-of-law provisions. The statute is simply “a narrowly tailored expansion of federal diversity jurisdiction.” The Erie doctrine dictates that federal courts hearing cases by virtue of CAFA’s enhanced diversity jurisdiction are obliged to follow the choice of law rules of the States where they reside — the very same conflict rules that led to the “judicial usurpation” CAFA sought to quell. Predictably, CAFA’s passage did not end “false federalism.” Many federal courts adjudicating cases removed under CAFA have found that state conflicts rules required certification of nationwide classes under a single State’s law.

25 Prosser, supra note 1 at 971 (emphasis added).
26 See David Marcus, Erie, The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction, 48 WM. & MARY L. REV. 1247, 1302-03 (2007) (arguing that because CAFA is a purely procedural statute, federal courts must apply the same controversial state choice-of-law rules that yielded multi-state class actions).
29 Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941) (holding that under the Erie doctrine, federal district courts must apply the choice-of-law rules of the state in which they sit). The choice-of-law problem is further exacerbated by the fact that the Supreme Court has held that Shutts’ prohibition against applying a State’s law to transactions lacking sufficient contacts with the forum is only applicable when a competing State’s courts have expressly held that its laws materially differ from the forum’s. Sun Oil Co. v. Wortman, 486 U.S. 717, 730-31 (1988). Thus, if the forum is faced with a novel question — or one not yet resolved by the competing State’s courts — the forum is free to apply its own law. Id.
31 See Washington Mut. Bank v. Superior Court, 15 P.3d 1071, 1080-81 (Cal. 2001) (holding that California’s choice-law rules require the application of the State’s law to all claims in a nationwide class action against a California-based corporation, regardless of the residency of the individual class members or where their claims arose).
In my view, CAFA’s proponents erroneously attributed their federalism arguments to the wrong constitutional provision. The dormant Commerce Clause, not due process, is offended by “false federalism.” The Supreme Court has historically applied the dormant Commerce Clause to state legislative action. In light of the “modest” due-process limitations imposed by *Hague-Shutts*, many commentators speculated that the minimum “contact or aggregation of contacts” test constituted the outer limit of constitutional limitations on the choice-of-law field. The Court fundamentally altered this landscape with its landmark decision in *BMW of North America, Inc. v. Gore*.

*Gore* involved an Alabama action under the state’s consumer-fraud statute alleging that the defendant auto distributor fraudulently failed to disclose the fact that the car it sold to the plaintiff had been partially repainted after being damaged in transit. Prior to the suit, BMW adopted a nationwide policy requiring disclosure in such cases only if the repair cost exceeded three percent of the car’s suggested retail price. This policy complied with the laws of several States. Nonetheless, the trial court found that

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33 Some lower courts had previously applied the doctrine to judicial action. See e.g., *Hyatt Corp. v. Hyatt Legal Services*, 610 F. Supp. 381, 383-85 (N.D. Ill. 1985) (holding that the dormant Commerce Clause precluded a nationwide injunction under Illinois’ Anti-Dilution statute).


35 See Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1062 (“State legislatures appear to be subject to some prohibition against enacting laws with an extraterritorial reach” while “state courts enjoy great apparent latitude to apply the law of their choosing to geographically far-flung disputes.”).


37 *Id.* at 563 n.1.

38 *Id.* at 563-64.

39 *Id.* at 565.
it violated Alabama’s consumer-fraud law.\textsuperscript{40} The jury awarded $4,000 in actual damages and $4 million in punitive damages.\textsuperscript{41} On appeal, the Alabama Supreme Court affirmed the award, finding that the punitive judgment was intended to induce BMW to change its nationwide policy to conform to Alabama law.\textsuperscript{42} Citing its dormant Commerce Clause jurisprudence, the Supreme Court reversed the judgment because Alabama’s “power to impose burdens on the interstate market for automobiles is . . . constrained by the need to respect the interests of other States . . ..”\textsuperscript{43}

\textit{Gore} rejected the notion that the Commerce Clause applied only to the political branches of State government. “The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.”\textsuperscript{44} Thus, “State power may be exercised as much by a jury’s application of a state rule of law in a civil lawsuit as by a statute.”\textsuperscript{45} Applying this principle, \textit{Gore} found that the Alabama court’s order constituted impermissible extraterritorial regulation. Alabama’s consumer-protection regime was just one of “a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States.”\textsuperscript{46} While Alabama possessed the constitutional authority to regulate BMW’s intrastate conduct, it lacked the authority to “impose its own

\begin{itemize}
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{41} \textit{Id.}
\item \textsuperscript{42} \textit{Id. at 572.}
\item \textsuperscript{43} \textit{Id. at 571} (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194-96 (1824); Healy v. Beer Inst., 491 U.S. 324, 335-336, 105 (1989) and Edgar v. MITE Corp., 457 U.S. 624, 643 (1982)). \textit{Gore}’s reliance upon the dormant Commerce Clause is further demonstrated by the fact that the Court expressly premised its holding on its Commerce-Clause jurisprudence. \textit{Healy}, 491 U.S. 324; \textit{Edgar}, 457 U.S. 624 and \textit{Gibbons}, 22 U.S. 1. Other courts have found that \textit{Gore} expressly referenced the dormant Commerce Clause: “[I]n \textit{BMW of North America, Inc. v. Gore}, the Supreme Court noted that a statute or regulation is not necessary for asserting a dormant Commerce Clause claim: ‘State power may be exercised as much by a jury’s [or judge’s] application of a state rule of law in a civil lawsuit as by a statute.’” \textit{Ileto v. Glock Inc.}, 349 F.3d 1191, 1217 (9th Cir. 2003) (alterations in original) (quoting \textit{Gore}, 517 U.S. at 572 n.17).
\item \textsuperscript{44} \textit{Gore}, 517 U.S at 573 n.17 (quoting New York Times v. Sullivan, 376 U. S. 254, 265 (1964)).
\item \textsuperscript{45} \textit{Gore}, 517 U.S at 573 n.17.
\item \textsuperscript{46} \textit{Id. at 569-70.}
\end{itemize}
policy choice on neighboring States” though punitive damages or otherwise.\textsuperscript{47}

Gore’s apparent thesis — that a State’s use of punitive damages to coerce a defendant to conform its nationwide conduct to the State’s chosen policy constitutes impermissible extraterritorial regulation — strikes at the very heart of the so-called “false federalism” problem. If a State cannot \textit{indirectly} regulate extraterritorial conduct through the imposition of punitive damages, how can it do so through the \textit{direct} application of its law in a nationwide class action?

In this Article, I challenge CAFA’s conception that federal-court respect for Hague-Shutts’ due-process limitations provides the antidote to “false federalism.” I argue that the dormant Commerce Clause, not due process, provides the Constitution’s principal bulwark against intrusion upon State sovereignty by sister States.

In Part I, I explore the evolution of dormant Commerce Clause jurisprudence. I assert that in addition to its familiar anti-protectionist function, the Clause also serves a sovereign-capacity function, protecting “the autonomy of the individual States within their respective spheres”\textsuperscript{48} by dictating that “[n]o state has the authority to tell other polities what laws they must enact or how affairs must be conducted.”\textsuperscript{49}

In Part II, I examine how the problem of “false federalism” prompted Congress to enact CAFA. Congress premised CAFA on the belief that “false federalism” stemmed from the failure of State jurists to adhere to “constitutionally required . . . due process and other fairness protections” recognized by the Supreme Court in Shutts.\textsuperscript{50}

In Part III, I examine the Court’s holding in Shutts and its predecessor, Allstate

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\item \textsuperscript{47} Id. at 570-71.
\item \textsuperscript{48} Healy, 491 U.S. at 336.
\item \textsuperscript{49} National Solid Wastes Mgmt. Ass’n v. Meyer, 165 F.3d 1151, 1153 (7th Cir. 1999).
\item \textsuperscript{50} S. Rep. No. 109-14 at 87 (2005).
\end{itemize}
**Ins. Co. v. Hague.** Hague-Shutts requires that to certify a multi-state class under its law, a State “must have a ‘significant contact or significant aggregation of contacts’ to the claims asserted by each member of the plaintiff class, contacts ‘creating state interests,’ in order to ensure that the choice of [the State’s] law is not arbitrary or unfair.”

CAFA’s Senate Report highlighted four state appellate court decisions which it characterized as emblematic of the “false federalism” problem. It asserted that these decisions stemmed from a failure to comply with Hague-Shutts’ due-process limitations. In *all* of these decisions the state courts certified the classes under the law of the corporate defendant’s home state. It is well settled that the presence of a corporation’s “principal place of business” in a State alone “creates significant contacts to the state.”

In Part IV, I examine *BMW of North America, Inc. v. Gore.* Gore recognized that a state court cannot impose punitive damages upon a defendant to coerce it to conform its conduct in other States to the forum’s law. Citing the Commerce Clause’s sovereign-capacity jurisprudence, Gore concluded that “one State’s power to impose burdens on the interstate market for automobiles” is “constrained by the need to respect

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53 *Id.*


the interests of other States.” I argue that *Gore* is the first, and to date the only, Supreme Court decision to adequately respond to the “false federalism” problem because it applied the dormant Commerce Clause, not due process.

In Part V, I explore the relationship between the Due Process and dormant Commerce Clauses. Although the two Clauses frequently “overlap,” they “impose distinct limits” on State action. Due process’s touchstone is “fairness for individual litigants.” The Clause’s central inquiry focuses upon whether a litigant had sufficient “contacts” with a State affording her “fair warning” such that she encounters “no element of unfair surprise” at the prospect of being subjected to that State’s law. Conversely, the dormant Commerce Clause is “informed not so much by concerns about fairness for individual litigants” but rather “the autonomy of the individual States within their respective spheres.” I argue that the Clauses impose separate and distinct limits on State action — both legislative and judicial. I posit that courts have historically overlooked the Commerce Clause in adjudicating choice-of-law problems because the Clause is not concerned with fairness to the individual litigants in the action, but the sovereign interests of State polities, who are not generally parties to private-law disputes.

In Part VI, I address the familiar axiom of conflicts law that no choice-of-law issue exists unless there is a “true conflict” between the laws of the affected jurisdictions. I posit that the Constitution presents no impediment to the certification of multi-state

59 Id. at 307 (emphasis added).
60 Id.
61 Id.
63 Quill, 504 U.S. at 312 (emphasis added).
class actions governed by federal law or state law that is truly identical. But I assert that
the Constitution bans the certification of classes under state consumer-protection laws.
While all such statutes generically render “unfair” commercial practices unlawful, they
prescribe a myriad of different remedies for such conduct. “[T]he variation in policies of
punishment, even where the conduct is unlawful in all states, amounts to an important
distinction in policy.” 65 In my view, the imposition of Alaska’s policy of more lenient
punishment 66 upon a commercial transaction in consumer-friendly California 67 offends
the latter’s sovereignty.

Finally, in Part VII, I address the argument, made by many conflicts scholars, that
States possess the constitutional authority to regulate the extraterritorial conduct of
corporations headquartered within their borders. In my view, this argument fails because
it ignores the well-established tenet that “[c]onsumer protection matters are typically left
to the control of the states precisely so that different states can apply different regulatory
standards based on what is locally appropriate.” 68 Maine possesses a sovereign interest in
regulating consumer transactions within her borders — even if the defendant is a Texas-
based corporation.

I. THE DORMANT COMMERCE CLAUSE PROTECTS THE AUTONOMY OF
INDIVIDUAL STATES BY BARRING SISTER STATES FROM DIRECTLY
REGULATING COMMERCIAL ACTIVITY BEYOND THEIR BORDERS

Article I, section 8, clause 3 of the Constitution empowers Congress “[t]o regulate
Commerce with foreign Nations, and among the several States, and with the Indian

65 White v. Ford Motor Co., 312 F.3d 998, 1017 (9th Cir. 2002).
66 Id. (noting that Alaska has adopted an innovation-friendly legal regime).
enact very “pro-consumer laws”).
68 SPGGC, LLC v. Blumenthal, 505 F.3d 183, 196 (2d Cir. 2007) (emphasis added).
Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.

The Clause, in Justice Stone’s phrasing, ‘by its own force’ prohibits certain state actions that interfere with interstate commerce.

Justice Black coined this “negative sweep” the “dormant Commerce Clause.” Courts and commentators often express great confusion about what type of State action triggers dormant Commerce Clause scrutiny and what standard of review is required. In my view, dormant Commerce Clause jurisprudence is far more straightforward than often depicted.

**A. The Dormant Commerce Clauses Serves Three Distinct Constitutional Functions**

I posit that the dormant Commerce Clause serves three distinct constitutional functions. Consistent with these functions, three categories of regulations fall within the Clause’s ambit, triggering two separate standards of scrutiny. First, the Clause “prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” This is the Clause’s

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69 U.S. CONST. ART. I, § 8, Cl. 3.
72 Quill, 504 U.S. at 309 (quoting Gibbons, 22 U.S. at 9 (Johnson, J., concurring)).
74 See Peter C. Felmy, Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism, 55 ME. L. REV. 467, 482 (2003) (asserting that “a review of circuit court opinions reveals that judges are not certain” what standard of review to applying in dormant Commerce Clause cases).
75 “The Supreme Court has outlined a two-tiered approach to analyzing state economic regulations under the Commerce Clause.” National Collegiate Athletic Ass’n v. Miller, 10 F.3d 633, 638 (9th Cir. 1993).
most familiar function. As the Supreme Court explained,

[i]f one state, in order to promote the economic welfare of her [own industries] may guard against competition with [out-of-state competitors], the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation. 77

I refer to this as the Clause’s anti-protectionist function.

Second, the Clause protects “the autonomy of the individual States within their respective spheres” by “preclud[ing] the application of a state statute to commerce that takes place wholly outside the State’s borders, whether or not the commerce has effects within the State . . . .” 78 The Clause dictates that “[n]o state has the authority to tell other polities what laws they must enact or how affairs must be conducted.” 79 I refer to this as the Clause’s sovereign-capacity function.

Third, the Clause prohibits State regulation that “unduly burdens . . . commerce in matters where [national] uniformity is . . . essential for the functioning of commerce.” 80 These are matters which are amenable to a single regulatory authority “the regulation of which is committed to Congress and denied to the States by the commerce clause.” 81 I refer to this as the Clause’s anti-obstructionist function.

State regulation that impedes national uniformity is often said to constitute “incidental regulation of interstate commerce” because it leads regulated actors to alter their nationwide conduct to conform to the law of a particular State. 82 The Supreme

77 Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935). As Justice Cardozo explained, “[t]he Constitution . . . 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.” Id. at 523.
79 National Solid Wastes Mgmt. Ass’n v. Meyer, 165 F.3d 1151, 1153 (7th Cir. 1999).
Court’s decision in *Southern Pacific Co. v. Arizona*\(^{83}\) is perhaps the most famous example. In that case, the Court struck down an Arizona law limiting freight trains to seventy cars\(^{84}\) because the law impaired the “uniformity of efficient railroad operation” by requiring “interstate trains of a length lawful in other states to be broken up” at Arizona’s borders.\(^{85}\) Intrastate regulation such as Arizona’s is said to “incidentally regulat[e]”\(^{86}\) extraterritorial conduct because it leads railroads to shorten their trains to seventy cars in neighboring States to avoid *breaking them up* at Arizona’s border.\(^{87}\)

Precedent indicates that State regulation implicating the Commerce Clause’s first two functions — the *anti-protectionist* and *sovereign-capacity functions* — must be subjected to a “virtually *per se* rule of invalidity.”\(^{88}\) As the Supreme Court explained, “[w]hen a state statute [either] *directly* regulates or discriminates against interstate commerce . . . we have generally struck down the statute without further inquiry.”\(^{89}\)

\(^{83}\) 325 U.S. 761 (1945).
\(^{84}\) Id. at 763.
\(^{85}\) Id. at 773.
\(^{86}\) Edgar, 457 U.S. at 640.
\(^{87}\) *Southern Pac.*, 325 U.S. at 773. *Morgan v. Virginia*, 328 U.S. 373, 377 (1946) illustrates this concept. There, the pre-*Brown* Court struck down a Virginia law requiring that passengers on interstate busses passing through the State be segregated by race. *Id.* at 381. The Court concluded that the statute incidentally regulated conduct outside Virginia’s borders because carriers segregated passengers on all busses traveling through Virginia to avoid having to stop at the border to reseat passengers. *Id.*
\(^{88}\) Northwest Cent. Pipeline Corp. v. State Corp. Comm’n, 489 U.S. 493, 523 (1989) (citing Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 579 (1986)). “While the virtually *per se* rule of invalidity entails application of the strictest scrutiny, . . . it does not necessarily result in the invalidation of facially discriminatory State legislation, for what may appear to be a discriminatory provision in the constitutionally prohibited sense — that is, a protectionist enactment — may on closer analysis not be so. Thus, even a statute that erects an absolute barrier to the movement of goods across state lines will be upheld if the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism, or to put a finer point on it, if the State law advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 596 (1997). To date, the Supreme Court has found only one discriminatory regulation to satisfy this rigid standard. In *Maine v. Taylor*, 477 U.S. 131 (1987), the Court found that a Maine law prohibiting fishermen from using live baitfish obtained out of state satisfied the strict-scrutiny standard because invasive species of baitfish threatened serious damages to Maine’s fragile ecosystem. *Id.* at 147-48.
Conversely, the Court recognized in *Pike v. Bruce Church, Inc.*,\(^{90}\) that disputes falling within the ambit of the Clause’s *anti-obstructionist function* must be subjected to a balancing test. In such cases “[w]here [a State] statute regulates even-handedly 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.”\(^{91}\)

The *Southern Pacific* Court applied this balancing test. Arizona’s legislature enacted the challenged train-limit law “as a safety measure to reduce the number of accidents attributed to the operation of trains . . . .”\(^{92}\) Based on the trial court’s finding that “reduction of the length of trains . . . tends to increase the number of accidents because of the increase in the number of trains,” the *Southern Pacific* Court held that “the total effect of the law as a safety measure in reducing accidents . . . is so slight . . . as not to outweigh the national interest in keeping interstate commerce free from interference which seriously impede it . . . .”\(^{93}\)

This balancing test is required because the anti-obstructionist function stands in tension with the sovereign-capacity function.\(^{94}\) Ordinarily, “there is a residuum of power

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\(^{90}\) 397 U.S. 137, 142 (1970).

\(^{91}\) *Id.* at 142 (emphasis added).

\(^{92}\) *Southern Pac.*, 325 U.S. at 764 (cited by *Pike*, 397 U.S. at 142).

\(^{93}\) *Southern Pac.*, 325 U.S. at 775-76 (cited by *Pike*, 397 U.S. at 142).

\(^{94}\) The class of commercial activities amenable to a single regulatory authority is quite narrow and the features that separate such activities from the multitude of regulable activities “lacks in precision.” *Morgan v. Virginia*, 328 U.S. 373, 377 (1946). During the era surrounding its decision in *Lochner v. New York*, 198 U.S. 45 (1905), the Supreme Court invoked the *anti-obstructionist function* liberally in a number of questionable cases, preserving a *laissez-faire* approach to certain industries. See e.g., *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 284-85 (1921) (holding that Kentucky could not impose its own law on a contract for the sale of wheat “made and to be performed in Kentucky” because “the transaction was in interstate commerce”); *Leisy v. Hardin*, 135 U.S. 100, 110 (1890) (striking down an Iowa law prohibiting the sale of alcoholic beverages because such beverages are “subjects of exchange barter and traffic in which a right of traffic exists” and thus “a State in the absence of legislation on the part of Congress” cannot prohibit “their importation from abroad or from a sister State”). In my view, the respect for each State’s authority to regulate primary conduct within her borders dictates that the cases requiring
in [each] state to make laws governing matters of local concern which nevertheless in
some measure affect interstate commerce or even, to some extent, [incidentally] regulate
it." 95 Respect for the sovereign-capacity of States dictates that the Constitution generally
“permits . . . incidental regulation” 96 while “direct” extraterritorial regulation is
prohibited virtually per se. 97 Only in very rare instances — where “incidental”
interference with national uniformity would impose burdens “clearly excessive . . . to the
putative local benefits” — does the State’s sovereign capacity bow to the federal need for
uniformity. 98

B. The Commerce Clause Bars Direct Regulation of Extraterritorial
Commerce

Judicial and scholarly attention on the dormant Commerce Clause
overwhelmingly focuses upon its anti-protectionist function. Despite this fixation with
the Clause’s prohibition against balkanization, Supreme Court precedent unambiguously
recognizes that it equally prohibits direct extraterritorial regulation. The genesis of this
principle lies in the Court’s statement, per Justice Cardozo, in Baldwin v. G.A.F. Seelig,
Inc., 99 that one State “has no power to project its legislation into” another State “by

national uniformity are exceedingly narrow. The most obvious contemporary example of a medium where
national uniformity is required is the Internet. See American Booksellers Found. v. Dean, 342 F.3d 96,
102-04 (2d Cir. 2003) (striking down non-discriminatory State statute proscribing individuals in other
States from engaging in certain prohibited conduct on the Internet); American Library Ass’n v. Pataki, 969
95 Southern Pac., 325 U.S. at 767 (emphasis added).
98 Because this need to balance State and federal interests is not present in cases where a State attempts to
discriminate against out-of-state commerce, or directly regulate activity beyond her borders, such cases are
subject to a “virtually per se rule of invalidity.” Northwest Cent. Pipeline Corp. v. State Corp. Comm’n,
U.S. 573, 579 (1986)).
regulating the price to be paid in that State for [a commodity] acquired there.”\textsuperscript{100} While the Baldwin Court ultimately premised its decision on the protectionist nature of the statute at issue, the Court later adopted Cardozo’s dicta in three landmark opinions decided in the last thirty years — \textit{Edgar v. MITE Corp.},\textsuperscript{101} \textit{Brown-Forman Distillers Corp. v. New York State Liquor Authority}\textsuperscript{102} and \textit{Healy v. Beer Institute}.\textsuperscript{103}

These decisions posit that the Commerce Clause bars each State from regulating conduct beyond her borders. As the \textit{Healy} Court noted, the Clause “precludes the application of a state statute to commerce that takes place wholly outside the State’s borders, whether or not the commerce has effects within the State . . . .”\textsuperscript{104} When a State’s law “directly regulates” extraterritorial commerce, the Court has “generally struck down the statute without further inquiry.”\textsuperscript{105} This restriction is necessary to protect “the autonomy of the individual States within their respective spheres.”\textsuperscript{106}

I discuss the \textit{Edgar}, \textit{Brown-Forman} and \textit{Healy} decisions in detail below.

1. \textit{Edgar v. MITE Corp.}

In \textit{Edgar v. MITE Corp.},\textsuperscript{107} the Court addressed the constitutionality of an Illinois statute designed to restrict hostile corporate takeovers.\textsuperscript{108} The statute required that notice of any takeover offer for the shares of a “target company” must be given to Illinois’

\begin{flushright}
\textsuperscript{100} \textit{Id.} at 520.
\textsuperscript{101} 457 U.S. 624 (1982).
\textsuperscript{102} 476 U.S. 573 (1986).
\textsuperscript{103} 491 U.S. 324 (1989).
\textsuperscript{104} \textit{Id.} at 336.
\textsuperscript{105} \textit{Brown-Forman}, 476 U.S. at 579.
\textsuperscript{106} \textit{Healy}, 491 U.S. at 336.
\textsuperscript{107} 457 U.S. 624 (1982).
\textsuperscript{108} \textit{Id.} at 624.
\end{flushright}
Secretary of State and to the company twenty days before the offer became effective.\textsuperscript{109}

The statute defined “target company” as

a corporation or other issuer of securities of which shareholders located in Illinois own[ed] 10\% of the class of equity securities subject to the offer, or for which any two of the following conditions [were] met: the corporation ha[d] its principal executive office in Illinois, [wa]s organized under the laws of Illinois, or ha[d] at least 10\% of its stated capital and paid-in surplus represented within the State.\textsuperscript{110}

In 1979, MITE initiated a tender offer for all shares of the Chicago Rivet & Machine Co., a publicly held Illinois corporation.\textsuperscript{111} MITE did not comply with Illinois’ anti-takeover statute, but instead filed suit seeking to enjoin it.\textsuperscript{112} The Court struck down the Illinois law. A four-Justice plurality concluded that the Act violated the Commerce Clause’s sovereign-capacity function.

\textit{Edgar’s} plurality noted that the “Court has upheld the authority of States to enact ‘blue-sky’ laws against Commerce Clause challenges on several occasions.”\textsuperscript{113} But “Illinois’ Act differ[ed] substantially from state blue-sky laws in that it directly regulate[d] transactions which t[ook] place across state lines, even if wholly outside the State of Illinois.”\textsuperscript{114} The Court noted that the tender offeror was “a Delaware corporation with principal offices in Connecticut.”\textsuperscript{115} Thus, it was “apparent that the Illinois statute . . . ha[d] a sweeping extraterritorial effect.”\textsuperscript{116}

\textit{Edgar} concluded that this attempt to regulate transactions “across state lines”

\begin{footnotes}
\item[109] \textit{Id.} at 627.
\item[110] \textit{Id.} at 626.
\item[111] \textit{Id.} at 627.
\item[112] \textit{Id.} at 628.
\item[113] \textit{Id.} at 641.
\item[114] \textit{Id.}
\item[115] \textit{Id.} at 641-42.
\item[116] \textit{Id.} at 642.
\end{footnotes}
contravened the Commerce Clause’s sovereign-capacity function.\textsuperscript{117} “The Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.”\textsuperscript{118} This is so because “[t]he limits on a State’s power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, ‘any attempt directly to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State’s power.’”\textsuperscript{119}

Striking down the statute, \textit{Edgar} carefully distinguished Illinois’ statute from legitimate corporate-governance regulation under the internal affairs doctrine. The doctrine is “a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation’s \textit{internal} affairs — matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders — because otherwise a corporation could be faced with conflicting demands.”\textsuperscript{120} Such matters are constitutionally governed by the corporation’s state of incorporation. This is so because “[c]orporations . . . are creatures of \textit{state} law” thus the state of incorporation’s law is the very “font” of its powers and determines its internal organization.\textsuperscript{121}

The doctrine did not save the Illinois statute from MITE’s facial challenge because the Act “applie[d] to corporations that [we]re not incorporated in Illinois” and thus fell outside the State’s regulatory authority.\textsuperscript{122} “Illinois has no interest in regulating

\begin{itemize}
\item \textsuperscript{117} \textit{Id.} at 641.
\item \textsuperscript{118} \textit{Id.} at 642.
\item \textsuperscript{119} \textit{Id.} (quoting \textit{Shaffer v. Heitner}, 433 U.S. 186, 197 (1977)).
\item \textsuperscript{120} \textit{Edgar}, 457 U.S. at 645 (emphasis added).
\item \textsuperscript{121} \textit{Kamen v. Kemper Financial Servs.}, 500 U.S. 90, 98 (1991) (emphasis added).
\item \textsuperscript{122} \textit{Edgar}, 457 U.S. at 645.
\end{itemize}
the internal affairs of foreign corporations.” Accordingly, *Edgar* struck down Illinois’ statute as an impermissible attempt to regulate extraterritorial conduct in violation of the Commerce Clause.

2. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*

A majority of the Court adopted the *Edgar* plurality’s interpretation in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*. There, the Court assessed the constitutionality of New York’s Alcoholic Beverage Control Law. New York required alcoholic-beverage distributors to file a monthly price schedule with the State Liquor Agency specifying the prices at which they would sell their products to wholesalers for that month. The challenged statute dictated that distributors must affirm to the State that those prices were “no higher than the lowest prices that the distiller [would] charge wholesalers anywhere else in the United States” for the particular month in which the affirmation was made.

New York’s statute could not be challenged as protectionist. It conferred no advantages to New York distributors over their out-of-state competitors. The parties “did not dispute that New York’s affirmation law regulate[d] all distillers . . .

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123 Id. at 645-46. The Court distinguished *Edgar* in *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987). *CTS* assessed the constitutionality of an Indiana statute conditioning the “acquisition of control of a corporation” “incorporated in Indiana” “on the approval of a majority of the pre-existing disinterested shareholders.” *Id.* at 72-74. Because the Indiana statute applied only to corporations incorporated under Indiana law, it did not regulate any extraterritorial conduct. As a “mere creature” of Indiana’s law, the State had the authority to regulate its internal affairs. *Id.* at 89-90. The State was only regulating voting rights of corporations “it ha[d] created” by its own law. *Id.* “No principle of corporation law and practice if more firmly established than a State’s authority to regulate domestic corporations, including the authority to define the voting rights of shareholders.” *Id.* As *Edgar* recognized, an attempt by any other State to regulate the internal affairs of Indiana-chartered corporations would itself violate Indiana’s sovereignty. *Edgar*, 457 U.S. at 642-43.
125 *Id.* at 573.
126 *Id.*
“evenhandedly” and the State enacted it for a “legitimate” — i.e., non-discriminatory — purpose: “to assure the lowest possible prices for its residents.” Nonetheless, the petitioner-distributor argued that New York’s law violated the dormant Commerce Clause because it “effectively regulates the price at which liquor [wa]s sold in other States” by “ma[king] it illegal for a distiller to reduce its price in other States during the period that [a] posted New York price [wa]s in effect.” The Court agreed.

_Brown-Forman_ expanded upon Edgar’s extraterritoriality prohibition, applying the _per se_ rule of invalidity.

When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.

Applying this rule, the Court concluded that New York’s “evenhanded” statute constituted extraterritorial regulation. “Once a distiller has posted prices in New York, it is not free to change its prices elsewhere in the United States during the relevant month.” By “[f]orcing a merchant to seek regulatory approval in” in New York “before undertaking a transaction” in another State “New York has ‘[projected] its legislation’ into other States and directly regulated commerce therein” in violation of the Commerce Clause. Thus, the Court struck down the Act “without further inquiry.”

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127 _Id._ at 579 (emphasis added). This “evenhanded” regulation was subject to the _per se_ rule of invalidity rather than _Pike_’s balancing test because it directly regulated extraterritorial commerce — it did not do so indirectly by simply imposing non-uniform state requirements within the State. _Id._

128 _Id._

129 _Id._ at 578.

130 _Id._ at 579.

131 _Id._

132 _Id._ at 582 (citing Edgar v. MITE Corp., 457 U.S. 624, 642 (1982) (plurality)).

133 _Brown-Forman_, 476 U.S. at 582 (citing _Edgar_, 457 U.S. at 642).


135 _Brown-Forman_, 476 U.S. at 579.
3. **Healy v. Beer Institute**

In *Healy v. Beer Institute*\(^{136}\) the Court confronted a Connecticut statute similar to that stricken in *Brown-Forman*. The statute required “out-of-state shippers of beer to affirm that their posted prices for products sold to Connecticut wholesalers [were] . . . no higher than the prices at which those products [were] sold in the bordering States of Massachusetts, New York, and Rhode Island.”\(^{137}\)

Unlike New York’s ABC law, “nothing in [the Connecticut statute] prohibit[ed] out-of-state shippers from changing their out-of-state prices after the affirmed Connecticut price [wa]s posted.”\(^{138}\) Nonetheless, the Court concluded that the statute had the “practical effect” of regulating extraterritorial commerce\(^{139}\) because it “purposeful[ly] interact[ed] with border-state regulatory schemes.”\(^{140}\) As the Court explained,

> Massachusetts requires brewers to post their prices on the first day of the month to become effective on the first day of the following month . . . . Five days later, however, those same brewers, in order to sell beer in Connecticut, must affirm that their Connecticut prices for the following month will be no higher than the lowest price that they are charging in any border State. Accordingly, on January 1, when a brewer posts his February prices for Massachusetts, that brewer must take account of the prices he hopes to charge in Connecticut during the month of March.\(^{141}\)

The Court concluded that this “interaction” with Massachusetts’ law, effectively “locked [the brewer] into his Massachusetts price for the entire month of February” thereby “prospectively preclud[ing] the alteration of out-of-state prices after the moment of affirmation.”\(^{142}\) The Court concluded that by “t[ying] pricing to the regulatory


\(^{137}\) *Id.* at 326.

\(^{138}\) *Id.* at 329.

\(^{139}\) *Id.* at 337-38.

\(^{140}\) *Id.* at 330. *Accord id.* at 338.

\(^{141}\) *Id.* at 337-38.

\(^{142}\) *Id.* at 338.
schemes of the border states . . . the Connecticut statute ha[d] the extraterritorial effect, condemned in Brown-Forman, of preventing brewers from undertaking competitive pricing in Massachusetts based on prevailing market conditions.”

The Court found that such direct extraterritorial regulation violated the Commerce Clause’s sovereign-capacity function. The Court held that this prohibition stems from “the Constitution’s special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres.”

The Healy Court reaffirmed the extraterritorial views suggested by the Edgar plurality and adopted by a majority of the Court in Brown-Forman.

Taken together, our cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following propositions: First, the “Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State . . . .” Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature.

These prohibitions dictated that Connecticut’s statute constituted unconstitutional extraterritorial regulation. “This kind of potential regional . . . regulation of the pricing mechanism for goods is reserved by the Commerce Clause to the Federal Government and may not be accomplished piecemeal through the extraterritorial reach of individual state statutes.”

Healy also struck down Connecticut’s statute as a violation of the Clause’s anti-

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143 Id.
144 Id. at 335-36.
145 Id. at 336 (quoting Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982) (plurality)).
146 Healy, 491 U.S. at 340.
protectionist function. Unlike the New York law at issue in *Brown-Forman* — which applied “evenhandedly” to all distributors regardless of where they did business — the Connecticut affirmation statute applie[d] solely to interstate brewers or shippers of beer, that is, either Connecticut brewers who s[old] both in Connecticut and in at least one border State or out-of-state shippers who s[old] both in Connecticut and in at least one border State.” Thus, unlike New York’s “evenhanded” statute, the Connecticut Act “discriminate[d] against interstate commerce” by “establish[ing] a substantial disincentive for companies doing business in Connecticut to engage in interstate commerce, essentially penalizing Connecticut brewers if they s[ought] border-state markets and out-of-state shippers if they cho[se] to sell both in Connecticut and in a border State.” Accordingly, the Court noted that the Connecticut statute independently violated both the Commerce Clause’s sovereign-capacity and anti-protectionist functions.

C. The Supreme Court’s Sovereign-Capacity Jurisprudence Cannot Be Dismissed As “Dicta”

Despite the unambiguous pronouncements of *Edgar, Brown-Forman* and *Healy*, many scholars argue that the anti-protectionist function is, in fact, the only legitimate Commerce Clause function formally recognized by the Supreme Court. They argue that

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149 *Brown-Forman*, 476 U.S. at 579.
150 *Healy*, 491 U.S. at 340-41. The discriminatory statute was likely motivated by a concern that “Connecticut residents living in border areas frequently crossed state lines to purchase beer at lower prices” — which naturally disadvantaged Connecticut retailers and deprived Connecticut of tax revenue. *Id.* at 326. The fact that the statute targeted sellers “in the bordering States of Massachusetts, New York, and Rhode Island” further suggests such concerns. *Id.* at 324. Conversely, there is no evidence that the New York statute stricken in *Brown-Forman*, which applied to distributors in all States, was motivated by a desire to create a competitive advantage for New York businesses. Rather, the litigants all conceded that New York enacted the law for a “legitimate” — i.e., non-discriminatory — purpose: “to assure the lowest possible prices for its residents.” *Brown-Forman*, 476 U.S. at 579 (emphasis added).
the Clause should be read only to prevent the “rivalries and reprisals” that inevitably occur when States erect customs barriers to interstate commerce.\(^{151}\)

Professor Mark Rosen argues that “[t]he Dormant Commerce Clause jurisprudence that speaks of a near \textit{per se} prohibition of extraterritoriality . . . should be understood as applying only to protectionist state statutes . . . .”\(^{152}\) Professor Rosen acknowledges that “several of the extraterritorial cases admittedly have deployed language that is not limited to protectionist statutes,” but he asserts that “all but one of the Supreme Court cases that have struck down state regulations on the basis of extraterritoriality have concerned statutes that are readily characterized as protectionist.”\(^{153}\) According to Professor Rosen, \textit{Edgar v. MITE Corp.} — decided by a mere plurality\(^{154}\) — constitutes the “singular exception” to this paradigm.\(^{155}\) Professors Jack Goldsmith and Alan Sykes likewise assert that the Supreme Court’s references to a sovereign-capacity function in its Commerce Clause jurisprudence should be dismissed as mere “dicta.”\(^{156}\)

While I acknowledge that many academicians find the Commerce Clause’s extraterritoriality prohibition improvident, the oft-repeated assertion that it is mere “dicta” baffles me.\(^{157}\) \textit{Edgar} indeed was decided only by a plurality, but its rationale was


\(^{152}\) Rosen, \textit{Extraterritoriality and Political Heterogeneity}, supra note 8 at 923.

\(^{153}\) \textit{Id.} at 925.


\(^{155}\) Rosen, \textit{Extraterritoriality and Political Heterogeneity}, supra note 8 at 925.


\(^{157}\) See also Mark D. Rosen, \textit{Respondent: “Hard” or “Soft” Pluralism?: Positive, Normative, and Institutional Considerations of States’ Extraterritorial Powers}, 51 St. Louis U.L.J. 713, 718 (2007) [hereinafter \textit{Pluralism}] (“states have extensive presumptive powers to regulate their citizens’ out-of-state activities under contemporary Due Process doctrine, and . . . this conclusion is not undermined by dicta in some Dormant Commerce Clause cases that speak about limitations on state extraterritorial powers”); See also Richard H. Fallon, \textit{If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World}, St. Louis U.L.J. 611, 638 (“In condemning extraterritorial regulation as impermissible under the Dormant
adopted by a majority of the Court in both Brown-Forman and Healy.\textsuperscript{158} Healy premised its holding on dual grounds, finding the statute at issue unconstitutional \textit{both} because it was discriminatory\textsuperscript{159} and because it had “the practical effect of regulating commerce occurring wholly outside th[e] State’s borders . . . .”\textsuperscript{160} This does not render the Court’s extraterritorial-effects holding dicta. “Where a decision rests on two or more grounds, none can be relegated to the category of \textit{obiter dictum}.”\textsuperscript{161}

But the obtuse claim that the Court’s extraterritoriality jurisprudence is “dicta” most obviously ignores Brown-Forman. There, the Court plainly struck down the challenged New York statute for no other reason than it directly regulated conduct outside New York’s borders. New York’s law could not be regarded as protectionist. The Court expressly concluded that it conferred no advantages to New York distributors over their out-of-state competitors. The parties “d[id] not dispute that New York’s affirmation law regulate[d] all distillers . . . evenhandedly” and the State enacted it for a “\textit{legitimate}” — \textit{i.e.}, non-discriminatory — purpose: “to assure the lowest possible prices for its residents.”\textsuperscript{162} The Court held that the statute must be “struck down . . . without further inquiry”\textsuperscript{163} for \textit{one} reason alone — because it “regulate[d] out-of-state transactions in violation of the Commerce Clause.”\textsuperscript{164} This was not dicta.\textsuperscript{165}

\textsuperscript{159} Healy, 491 U.S. at 340.
\textsuperscript{160} Id. at 332.
\textsuperscript{162} Brown-Forman, 476 U.S. at 579 (emphasis added).
\textsuperscript{163} Id.
\textsuperscript{164} Id. at 582.
\textsuperscript{165} Perhaps the most confounding aspect of the desire of so many in the academy to denounce the Supreme Court’s sovereign-capacity precedent as mere “dicta” is the fact that in its myopic fixation on the Supreme Court, the academy has ignored a generation of unbroken federal appellate and district court precedent uniformly applying the \textit{“per se rule of invalidity”} to state efforts to engage in non-discriminatory regulation.
Moreover, state *protectionism* and state *paternalism* are, to my mind, distinguished by a constitutionally indistinguishable line. As the Fourth Circuit observed, finding that the Commerce Clause barred the application of a non-discriminatory North Carolina statute to affairs in South Carolina,

extraterritorial laws disrupt our national economic union just as surely as [protectionist ones] . . . . The compliance costs that such laws impose undermine the Commerce Clause’s objective of a national common market . . . . These costs should not be minimized [merely because the statute is not protectionist] because one extraterritorial burden can easily lead to another. When one state reaches into another state’s affairs or blocks its goods, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.166


166 *Carolina Trucks*, 492 F.3d at 490 (citations omitted).
open the door to the very “rivalries and reprisals”¹⁶⁷ between States that existed under the Articles of Confederation.¹⁶⁸ This is the very state of affairs the Framers designed the Constitution of 1789 to quell.¹⁶⁹

**D. The Sovereign-Capacity Function Preserves Each State’s “Residuary and Inviolable Sovereignty” By Preventing Sister States From Preemption Local Laws**

Even if the Court’s sovereign-capacity jurisprudence could be dismissed as “dicta,” I disagree with the assessment that it is improvident. On the contrary, the sovereign-capacity principle demonstrates fidelity to the central thesis of American federalism. As Justice Brandeis noted, “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁷⁰ This autonomy stems from the “residuary and inviolable sovereignty” retained by the States.¹⁷¹

To maintain this sovereign prerogative, “[i]t is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper

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¹⁶⁷ *Id.*
¹⁶⁸ “Under the Articles of Confederation, States were free to and apparently did enact protectionist measures that inhibited trade among the States. The delegates to the Constitutional Convention unanimously agreed that this was contrary to the common interest and that Congress should have authority to regulate interstate commerce. They evidently thought that an effective interstate economy is in the common interest and that, due to the parochial perspective of individual States, States cannot be relied upon to further that end.” Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J. L. & PUB. POL’Y 247, 266 n.83 (1997).
¹⁶⁹ *Id.*
¹⁷¹ Northern Ins. Co. v. Chatham County, 547 U.S. 189, 194 (2006). For this reason, the Commerce Clause’s anti-obstructionist function is narrowly limited. “[T]here is a residuum of power in the state to make laws governing matters of local concern, which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.” Southern Pac. Co. v. Arizona, 325 U.S. 761, 76 (1945).
sphere of authority.” Jurists have long recognized that preservation of this principle requires careful confinement of the exercise of federal authority to its constitutionally enumerated powers. This sentiment served as a mantra of the so-called “federalism revolution” of the 1990s. This “revolution” focused on “vertical federalism” — the distribution of sovereign powers between the State and federal governments. But in my view a vibrant “horizontal federalism” jurisprudence — protecting State polities from regulatory intrusions by sister States by preserving “the autonomy of the individual States within their respective spheres” — comprises an equally important component to defending this “residuary and inviolable” State sovereignty. This sovereignty principle is violated when the policy choice of one State — be it legislative, administrative or judicial — is imposed upon her sister States. “In this Nation each sovereign governs only with the consent of the governed.” Thus, “a system that allows” individual States “to dictate national policy . . . is contrary to the intent of the Framers when they crafted our system of federalism.”

The Court’s opinion in Nevada v. Hall illustrates this principle. Hall involved a wrongful-death action brought by a California plaintiff against the State of Nevada. A Nevada employee who had entered California on state business caused a traffic accident, killing the plaintiff’s decedent. Nevada law strictly limited the State’s financial

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176 Id. (emphasis added).
181 Id. at 411-12.
liability in negligence actions brought against it.\textsuperscript{182} Conversely, California law dictated that State actors enjoyed no greater protection from judgments that ordinary litigants.\textsuperscript{183} California’s Supreme Court affirmed a judgment against Nevada that exceeded the liability limits of Nevada law.\textsuperscript{184}

The Supreme Court affirmed the judgment of the California court, concluding that Nevada — by metaphorically entering the State of California in the guise of its agent — subjected itself to California’s full sovereign jurisdiction. In short, while Nevada was a guest in California’s proverbial house, it had to live by California’s rules. “[I]f a federal court were to hold by inference from the structure of our Constitution and nothing else, that California is not free in this case to enforce its policy of full compensation, that holding would constitute [a] real intrusion on the sovereignty of the States — and the power of the people — in our Union.”\textsuperscript{185} This principle embodies the revolutionary slogan decrying “taxation without representation.”\textsuperscript{186}

In this Nation each sovereign governs only with the consent of the governed. The people of Nevada have consented to a system in which their State is subject only to limited liability in tort. But the people of California, who have had no voice in Nevada’s decision, have adopted a different system. Each of these decisions is entitled to our respect.\textsuperscript{187}

This sentiment is equally applicable to the imposition of state consumer-

\textsuperscript{182} Id. at 412-13.  
\textsuperscript{183} Id.  
\textsuperscript{184} Id. at 412.  
\textsuperscript{185} Id. at 426-27.  
\textsuperscript{186} MAYHEW, supra note 2, reprinted in 1 PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1776 at 204.  
\textsuperscript{187} HALL, 440 U.S. at 426. Of course, state-court judges are not accountable to the polity in the same way as the political branches of government. This does not mean that State common-law rules lack legitimacy. State legislatures possess the power to legislatively alter common-law rules with which they disagree. Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Comm’n, 462 U.S. 669, 686 (1983). Legitimacy is lacking, however, when common-law rules are applied extraterritorially upon a polity that is “deprived of the opportunity to exert political pressure upon the [State] legislature in order to obtain a change in policy.” Edwards v. California, 314 U.S. 160, 174 (1941).
protection laws. Such laws vary substantially, imposing a myriad of “different . . . substantive elements, including differing requirements of privity, demand, scienter and reliance.”\textsuperscript{188} Such regulation is a quintessential function of State sovereignty.\textsuperscript{189}

Criticizing the Supreme Court’s sovereign-capacity jurisprudence, Professors Goldsmith and Sykes assert that “regulatory uniformity is often undesirable” because a State’s “[p]revailing attitudes . . . may depend on the religious and cultural backgrounds of the local citizenry” and “geographic factors may directly affect the value of regulation.”\textsuperscript{190} I agree. “Consumer protection matters are typically left to the control of the states precisely so that different states can apply different regulatory standards based on what is locally appropriate.”\textsuperscript{191} The imposition of one State’s consumer-protection statute upon sales made in another State violates this principle. “No state has the authority to tell other polities what laws they must enact or how affairs must be conducted outside its borders.”\textsuperscript{192}

\textbf{E. The Dormant Commerce Clause Became the Principle Buttress Against Intrusions Upon State Sovereignty By Sister States Through the Process of Constitutional “Liquidation”}

Some commentators have registered consternation at the Supreme Court’s choice of the Commerce Clause as the principle locus of the Constitution’s horizontal-federalism

\textsuperscript{189} SPGCC, LLC v. Blumenthal, 505 F.3d 183, 196 (2d Cir. 2007).
\textsuperscript{190} Goldsmith & Sykes, supra note 156 at 796. I believe Professors Goldsmith and Sykes have conflated the Commerce Clause’s anti-obstructionist function, which limits a State’s authority to regulate intrastate conduct, with its sovereign-capacity function, which bars States from regulating extraterritorial conduct. See supra Part I-A (explaining the dormant Commerce Clause’s three functions).
\textsuperscript{191} SPGCC, 505 F.3d at 196 (emphasis added).
\textsuperscript{192} National Solid Wastes Mgmt. Ass’n v. Meyer, 165 F.3d 1151,1153 (7th Cir. 1999).
protections. Many argue the Due Process and Full Faith and Credit Clauses are more natural repositories for such protections. But, as I will explain in Part III, infra, the Court’s decisions have virtually emasculated any state-sovereignty protections embodied in those provisions. They impose only the most “modest restrictions” on the application of a State’s law to extraterritorial conduct.

As James Madison famously observed, the Constitution in its infancy was enigmatic — an “obscure and equivocal” document whose ultimate meaning would be “liquidated and ascertained” once put into practice. This “liquidation” process was accomplished largely through judicial precedent. From the time of John Marshall, the Court recognized the Commerce Clause’s so-called negative implication as the States’ chief doctrinal defense against the “rivalries and reprisals” that inevitably result from protectionism and legislative intrusion by other States.

Conversely, the Court has recognized the touchstone of the Due Process and Full Faith and Credit Clauses to be “fairness for individual litigants.” In the horizontal-federalism context, this only requires that the application of a particular State’s law to extraterritorial conduct results in “no element of unfair surprise” to the regulated parties; that is that they would “have anticipated” that the chosen law “might apply” to their

193 Donald H. Regan, Siamese Essays: (I): CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation, 85 Mich. L. Rev. 1865, 1885 (1987) (arguing that “the extraterritoriality principle is not to be located in any particular clause” but rather “is one of those foundational principles of our federalism which we infer from the structure of the Constitution as a whole”).
194 See Alex Ellenberg, Due Process Limitations on Extraterritorial Tort Legislation, 92 Cornell L. Rev. 549, 555 (2007) (“while the dormant Commerce Clause and the Full Faith and Credit Clause are relevant to the scope of legislative jurisdiction, the Due Process Clause most completely defines its boundaries”).
dispute.\textsuperscript{200} The Court has found that neither due process nor the Full Faith and Credit Clause afford any recognition of the sovereign rights of \textit{States} to see their own laws apply to affairs within their borders.

Presented with a blank slate, I would endorse interpretation of the Full Faith and Credit Clause as the repository of States’ sovereign-capacity rights vis-à-vis other States. But I do not have the luxury of interpreting from a blank slate. Rewriting 186 years of judicial precedent to transpose the constitutional buttress against “rivalries and reprisals” from the Commerce Clause to other more intuitive constitutional provisions would simply undermine the principle of \textit{stare decisis}. The Constitution is not simply “an inert blueprint,”\textsuperscript{201} but rather rests upon “an edifice of judicial opinions” which “forms a kind of ‘common law’ that . . . facilitates predictions about what courts will do in particular cases.”\textsuperscript{202} Undermining the stability of that edifice would bring more harm than good.

II. Certification of Multi-State Class Actions Under the Law of a Single State Offends Principles of State Sovereignty

The extraterritorial regulations condemned by \textit{Edgar}, \textit{Brown-Forman} and \textit{Healy} all involved state \textit{legislative} action. But extraterritorial regulation can equally be accomplished by state \textit{judicial} action. State paternalism has been particularly pernicious in multi-state consumer class action litigation.

When a court — whether state or federal — certifies a class action involving class members in multiple states under \textit{one State’s} consumer-protection law, the court threatens to impose one State’s policy beyond her borders. “[E]ach state has its own

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\begin{itemize}
    \item \textsuperscript{200} \textit{Hague}, 449 U.S. at 318 n.24.
    \item \textsuperscript{201} \textit{TRIBE, supra} note 197 at 9.
    \item \textsuperscript{202} \textit{Id.} at 11.
\end{itemize}
\end{tiny}
Consumer Protection Law.”\textsuperscript{203} These statutes create “a patchwork of rules representing the diverse policy judgments of lawmakers in fifty States.”\textsuperscript{204} “The state laws on these claims present different . . . substantive elements, including differing requirements of privity, demand, scienter and reliance.”\textsuperscript{205} Such variations in policy constitute an integral part of our federal system. “Consumer protection matters are typically left to the control of the states precisely so that different states can apply different regulatory standards based on what is locally appropriate.”\textsuperscript{206} Notwithstanding such concerns, courts have frequently certified multi-state, and often nationwide, classes under a single state’s consumer-protection statute.\textsuperscript{207} Concerns that such judicial paternalism interfered with the authority of States to regulate consumer transactions within their borders prompted Congress to enact the Class Action Fairness Act.

As CAFA’s proponents explained in the statute’s Senate Report, the Act sought to quell “the trend toward ‘nationwide’ class actions,” because such suits “invite one state court to dictate to 49 others what their laws should be on a particular issue, thereby undermining basic federalism principles.”\textsuperscript{208} “[M]any state courts freely issue rulings in class actions cases that have nationwide ramifications, sometimes overturning well-established laws and policies of other jurisdictions.”\textsuperscript{209}

“A principal purpose of [CAFA] is to correct what former acting Solicitor General Walter Dellinger . . . labeled a wave of ‘false federalism.’ . . . [T]he problem is that ‘many state courts faced with interstate class actions have undertaken to dictate the

\textsuperscript{205} Kaczmarek, 186 F.R.D. at 312.
\textsuperscript{206} SPGCC, LLC v. Blumenthal, 505 F.3d 183, 196 (2d Cir. 2007) (emphasis in original).
\textsuperscript{208} Id. at 26.
\textsuperscript{209} Id. at 5.
substantive laws of other states by applying their own laws to other states, resulting in a breach of federalism principles.”

Such “judicial usurpation” of State sovereignty “flies in the face of basic federalism principles by embracing the view that other states should abide by a deciding court’s law whenever it decides that its own laws are preferable to other states’ contrary policy choices.”

“Clearly a system that allows state court judges to dictate national policy . . . from the local courthouse steps is contrary to the intent of the Framers when they crafted our system of federalism.”

CAFA was heavily premised upon the ad hominem assertion that “state judges are less careful than their federal court counterparts” with respect to the observation of the constitutional rights of class-action litigants. CAFA’s sponsors argued that authorizing removal of multi-state class actions would quell “false federalism” because state jurists had widely failed to observe “constitutionally required . . . due process and other fairness protections” recognized by the Supreme Court’s landmark opinion Phillips Petroleum Co. v. Shutts.

In particular, they charged that state jurists widely ignored Shutts’ mandate that the State whose law is applied to the action “must have a significant relationship to the claims asserted by each member of the plaintiff class.” They asserted that federal courts would not engage in such abuses because federal courts have “consistently heeded the Supreme Court’s admonition” that due process requires that

210 Id. at 57.
211 Id. at 28.
212 Id. at 26.
213 Id. at 15. I am very troubled by the fact that Congress apparently regards State jurists as unqualified to adjudicate the due-process rights of corporations facing civil class actions, but is hostile to federal-court habeas corpus review of death-penalty rulings against individuals made by the same State courts. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (limiting the circumstances under which habeas petitioner may collaterally attack a state-court conviction in federal court).
“States should not apply their own laws to matters with which they have no significant contact.”

CAFA did not empower federal courts to enact federal choice-of-law rules. Rather, it left federal courts to apply State conflicts rules. It must be noted that if Congress wished to, it could use its own affirmative power to regulate interstate commerce to authorize courts (either state or federal) to create conflicts rules to govern interstate commercial actions. In effect, Congress could authorize the imposition of one State’s law beyond her borders. The Commerce Clause’s affirmative grant of power “do[es] not limit the authority of Congress to regulate commerce among the several States as it sees fit.” Thus, “[i]f Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to [dormant] Commerce Clause challenge.”

But Congress premised CAFA solely upon its power to endow federal courts with “diversity” jurisdiction — jurisdiction over cases and controversies involving citizens from different States. Prior to CAFA’s enactment, “plaintiffs’ counsel frequently and purposely evade[d] federal jurisdiction by adding named plaintiffs or defendants simply based on their state of citizenship in order to defeat complete diversity.” CAFA ended this practice by authorizing federal courts to exercise diversity jurisdiction over “state-law-based class actions in which diversity is ‘minimal’ (one plaintiff’s diversity from one

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216 Id. at 89 (quoting Shutts, 472 U.S. at 821-22).
218 Western & So. Life Insur., 451 U.S. at 652-53.
219 S. Rep. No. 109-14 at 8-9 (2005); see also U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power” of federal courts “shall extend to all Cases . . . between Citizens of different States”).
defendant suffices), and the ‘matter in controversy’ is an aggregate amount in excess of $5,000,000.”

CAFA did not empower federal courts to impose their own choice-of-law rules upon the States. The statute “did not change substantive law — it is, in effect, a procedural provision only.” It is simply “a narrowly tailored expansion of federal diversity jurisdiction.”

Because CAFA merely expanded diversity jurisdiction, the *Erie* doctrine dictates that a federal court deciding cases removed to it under the statute “must apply the choice-of-law rules of the State in which it sits.” Thus, CAFA’s efficacy at quelling “false federalism” ultimately turns upon the bite of the underlying federal constitutional limitations upon the choice-of-law field that the Act’s sponsors accuse state jurists of ignoring.

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223 *Id.* at 29 (emphasis added). CAFA expanded diversity jurisdiction to class actions where “any member of a class of plaintiffs is a citizen of a State different from any defendant.” 28 U.S.C. § 1332(d)(2)(A). Addressing the complete-diversity requirement ordinarily applied to such actions, CAFA’s sponsors noted “that the complete diversity and minimal amount-in-controversy requirements are political decisions not mandated by the Constitution.” S. Rep. No. 109-14 at 10 (2005). This is quite correct.

In *Strawbridge v. Curtiss*, [3 U.S. (Cranch) 267 (1806),] [the Supreme] Court held that the diversity of citizenship statute required “complete diversity”: where co-citizens appeared on both sides of a dispute, jurisdiction was lost. But Chief Justice Marshall there purported to construe only “The words of the act of congress,” not the Constitution itself. And in a variety of contexts [the Supreme] Court and the lower courts have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens.

224 *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).
226 *See* Marcus, *supra* note 26 at 1302-03 (arguing that because CAFA is a purely procedural statute, federal courts must apply the same controversial state choice-of-law rules that yielded multi-state class actions).
III. THE DUE PROCESS CLAUSE’S LIMITATIONS ARTICULATED BY THE SUPREME COURT DO NOT PREVENT “FALSE FEDERALISM”

A. The Due Process Clause’s Limitations Upon State Choice-of-Law Rules Are Premised Upon Fairness to Individual Litigants, Not Respect for State Sovereignty

The due-process limitations CAFA’s sponsors charged state jurists with “ignor[ing]”\(^{227}\) stem from the Supreme Court’s decisions in *Allstate Ins. Co. v. Hague*\(^ {228}\) and *Phillips Petroleum Co. v. Shutts*.\(^ {229}\) These decisions enunciated the limitations imposed upon State choice-of-law by the Due Process and Full Faith and Credit Clauses.

1. *Allstate Ins. Co. v. Hague*

*Hague* involved a wrongful-death action brought by the widow of Ralph Hague, a Wisconsin resident employed for fifteen years in a Minnesota factory located just across the state line from his Wisconsin home.\(^ {230}\) Hague died when a motorist rear-ended the motorcycle on which he rode.\(^ {231}\) The accident occurred on a Wisconsin road and the driver of the other vehicle was also a Wisconsin resident.\(^ {232}\) The driver responsible for the accident did not carry any automobile insurance.\(^ {233}\) But Allstate Insurance Company insured Hague against losses incurred in accidents with uninsured motorists.\(^ {234}\) Hague’s policy limited this coverage to $15,000 for each of the three vehicles he owned.\(^ {235}\)

After the accident, Hague’s widow moved to Minnesota.\(^ {236}\) There she filed a

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230 *Hague*, 449 U.S. at 305.
231 *Id.*
232 *Id.*
233 *Id.*
234 *Id.*
235 *Id.*
236 *Id.*
declaratory-relief action against Allstate in state court seeking an order that “the uninsured-motorist coverage on each of her late husband’s three automobiles could be ‘stacked’ to provide total coverage of $45,000.”\textsuperscript{237} Minnesota law permitted “stacking”; Wisconsin law did not.\textsuperscript{238} The Minnesota trial court applied Minnesota law and ruled in Mrs. Hague’s favor.\textsuperscript{239} Minnesota’s Supreme Court affirmed the application of Minnesota law. Applying a choice-of-law methodology advocated by Professor Robert Leflar, the Minnesota Supreme Court “examined the conflict-of-laws issue in terms of (1) predictability of result, (2) maintenance of interstate order, (3) simplification of the judicial task, (4) advancement of the forum’s governmental interests, and (5) application of the better rule of law.”\textsuperscript{240} The court noted “that the Minnesota contacts might not be, ‘in themselves, sufficient to mandate application of [Minnesota] law’ . . . under the first four factors.”\textsuperscript{241} Nonetheless, the court concluded that Minnesota law should apply because, in its view, Minnesota’s approach was “the better rule of law.”\textsuperscript{242} Allstate successfully petitioned for certiorari review before the United States Supreme Court, arguing that the application of Minnesota law violated the Due Process and Full Faith and Credit Clauses.

Writing for a plurality of the Court, Justice Brennan averred that “[i]t is not for this Court to say whether the choice-of-law analysis suggested by Professor Leflar is to be preferred or whether we would make the same choice-of-law decision if sitting as the Minnesota Supreme Court.”\textsuperscript{243} This was so, Brennan asserted, because “a set of facts

\begin{flushleft}
\textsuperscript{237} \textit{Id.} \\
\textsuperscript{238} \textit{Id.} at 306. \\
\textsuperscript{239} \textit{Id.} \\
\textsuperscript{240} \textit{Id.} \\
\textsuperscript{241} \textit{Id.} \\
\textsuperscript{242} \textit{Id.} (emphasis added). \\
\textsuperscript{243} \textit{Id.} at 307. \\
\end{flushleft}
giving rise to a lawsuit . . . may justify, in constitutional terms, application of the law of more than one jurisdiction.”

Thus, the Court’s “sole function” was to ascertain whether the choice made by the Minnesota Supreme Court “exceeded federal constitutional limitations” imposed by “the Due Process Clause” and “the Full Faith and Credit Clause.”

The *Hague* plurality borrowed from the personal-jurisdiction standard dictated by *International Shoe Co. v. Washington,* asserting that in deciding such questions “under the Due Process Clause” and “the Full Faith and Credit Clause” the Court has “examined the contacts of the State whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation.” These Clauses focus on the protection of individual litigants, ensuring “that the choice of law is neither arbitrary nor fundamentally unfair.” To meet this standard, the litigants must be subjected to “no element of unfair surprise.” Sufficient contact must exist with the chosen jurisdiction’s law such that the litigants would “have anticipated” that its law might apply. Thus, “for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”

Applying these “modest restrictions,” *Hague’s* plurality concluded that three

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244 *Id.*
245 *Id.* at 307-08.
246 326 U.S. 310 (1945).
247 *Hague*, 449 U.S. at 308 (emphasis added).
248 *Id.*
249 *Id.* at 318 n.24.
250 *Id.*
251 *Id.* at 312-13.
contacts existed between Minnesota and the parties and the accident which, “[i]n the aggregate,” rendered the choice of Minnesota law constitutionally permissible.

First, Mr. Hague worked for a Minnesota employer for fifteen years preceding his death. “While employment status may implicate a state interest less substantial than does residency status, that interest is nevertheless important. The State of employment has police power responsibilities towards the nonresident employee that are analogous, if somewhat less profound, than towards residents.”

Second, the plurality noted that “Allstate was at all times present and doing business in Minnesota.” This contact both put Allstate on notice “that the state courts might apply forum law to litigation in which the company [wa]s involved” and “gave Minnesota an interest in regulating the company’s insurance obligations insofar as they affected both a Minnesota resident and . . . and a longstanding member of Minnesota’s work force.”

Finally, the plurality noted that at the time the case was litigated, Mrs. Hague was a Minnesota resident. While “a post-occurrence change of residence to the forum State” would be “insufficient in and of itself to confer power on the forum State to choose its law,” such a change is “not . . . irrelevant.” Mrs. Hague’s “residence . . . constitute[d] a Minnesota contact which g[ave] Minnesota an interest in [her] recovery, an interest” in seeing that “resident accident victims” receive full compensation “to keep

253 Hague, 449 U.S. at 313.
254 Id. at 313-14.
255 Id. at 318.
256 Id.
257 The plurality noted that there was “no suggestion that Mrs. Hague moved to Minnesota in anticipation of th[e] litigation or for the purpose of finding a legal climate especially hospitable to her claim.” Id. at 319.
258 Id.
them off welfare rolls and able to meet financial obligations."²⁵⁹

_Hague_ concluded that taken together Minnesota’s three contacts constituted “a significant aggregation of contacts with the parties and the occurrence, creating state interests, such that application of its law was neither arbitrary nor fundamentally unfair” and thus “did not violate the Due Process Clause or the Full Faith and Credit Clause.”²⁶⁰

2. _Phillips Petroleum Co. v. Shutts_

A majority of the Court adopted the _Hague_ plurality’s standard in _Phillips Petroleum Co. v. Shutts_.²⁶¹ _Shutts_ stemmed from a nationwide class action filed in Kansas state court on behalf of 28,000 land owners who leased lands to Phillips Petroleum for the extraction of natural gas.²⁶² The class representatives asserted that Phillips, which was incorporated in Delaware and headquartered in Oklahoma, had wrongfully failed to pay the class members interest on royalty payments in violation of state law.²⁶³ The class members resided in all fifty states, the District of Columbia and several foreign countries.²⁶⁴ The trial court certified the nationwide class under Kansas law and ultimately entered judgment against Phillips. Kansas’ Supreme Court affirmed the judgment.²⁶⁵ The United States Supreme Court granted certiorari and reversed.

²⁵⁹ _Id_.
²⁶⁰ _Id_. at 320.
²⁶² _Id_. at 799.
²⁶³ _Id_.
²⁶⁴ _Id_.
²⁶⁵ _Id_. at 820. The state court premised its approval of the application of Kansas law on the assertion that “because it was adjudicating a nationwide class action, it had much greater latitude in applying its own law to the transactions in question than might otherwise be the case.” _Id_. The _Shutts_ Court dismissed this reasoning.

We think that this is something of a “bootstrap” argument. The Kansas class-action statute, like those of most other jurisdictions, requires that there be “common issues of law or fact.” But while a State may, for the reasons we have previously stated, assume jurisdiction over the claims of plaintiffs whose principal
Adopting the approach advocated by *Hague’s* plurality, the *Shutts* Court concluded that in order to certify the entire class under Kansas law, “Kansas must have a ‘significant contact or significant aggregation of contacts’ to the claims asserted by each member of the plaintiff class, contacts ‘creating state interests,’ in order to ensure that the choice of Kansas law is not arbitrary or unfair.”

The Court concluded that Kansas possessed the requisite contacts with respect to claims brought on behalf of Kansas domiciliaries. But sufficient “contacts” did not exist between Kansas and the out-of-state class members to satisfy the prohibition against “unfair surprise.” “There is no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control.” For “sufficient contact” to exist, the litigants must “have anticipated” that the State’s law might apply to their transaction. Phillips was not incorporated in Kansas, nor was that State its principal place of business. Thus, the requirements of the Due Process and Full Faith and Credit Clauses articulated by *Hague* were not satisfied.

Contacts are with other States, it may not use this assumption of jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law. It may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a “common question of law.”

Id. at 821. The Court asserted that this “bootstrap” theory conflated the due process personal-jurisdiction limitations with those applicable to choice-of-law.

The issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of the constitutional limitations on choice of law; the latter calculus is not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum.

*Id.*

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267 *Shutts*, 472 U.S. at 823.
269 *Shutts*, 472 U.S. at 822.
271 *Shutts*, 472 U.S. at 799.
The Court concluded its decision by reiterating Hague’s view that these Clauses imposed only “modest restrictions” upon state conflicts law.\textsuperscript{272} “We make no effort to determine for ourselves which law must apply to the various transactions involved in this lawsuit, and we reaffirm our observation in [Hague] that in many situations a state court may be free to apply one of several choices of law.”\textsuperscript{273}

B. The State Court Decisions Identified By CAFA’s Senate Report As Paradigmatic Examples of “False Federalism” All Satisfied Hague-Shutts’ Choice-of-Law Limitations

CAFA’s supporters largely premised their claim that state courts have routinely “ignore[d]” Hague-Shutts’ due-process requirements\textsuperscript{274} on four state appellate court decisions affirming the certification of nationwide classes\textsuperscript{275} — Avery v. State Farm Mut. Auto. Ins. Co.,\textsuperscript{276} Clark v. Tap Pharm. Prod., Inc.,\textsuperscript{277} Peterson v. BASF Corp.\textsuperscript{278} and Ysbrand v. Diamler Chrysler Corp.\textsuperscript{279} The Senate Report describes these decisions as paradigmatic examples of “false federalism.”\textsuperscript{280}

In Avery, Illinois’ Court of Appeals affirmed a trial court’s certification of a

\textsuperscript{272} Id. at 818 (citing Hague, 449 U.S. at 312-13).
\textsuperscript{273} Shutts, 472 U.S. at 823.
\textsuperscript{275} Id. at 26-28.
\textsuperscript{277} 798 N.E.2d 123 (Ill. App. Ct. 2003).
\textsuperscript{278} 657 N.W.2d 853 (Minn. App. 2003).
\textsuperscript{279} 81 P.3d 618 (Okla. 2003).
\textsuperscript{280} S. Rep. No. 109-14 at 28 (2005). CAFA’s Senate Report also noted the Illinois Court of Appeals’ decision in PJ’s Concrete Pumping Serv. v. Nextel W. Corp., 803 N.E.2d 1020 (Ill. Ct. App. 2004), which “affirmed the certification of a class consisting of Illinois residents and residents of 16 other states” in an action in which “plaintiffs alleged the defendant telecommunications company had collected, on behalf of municipalities, taxes from customers located in unincorporated areas in violation of the Illinois consumer protection law.” S. Rep. No. 109-14 at 27 (2005). But the Report neglected to note that PJ’s Concrete specifically noted “that the laws of 17 states are potentially implicated” and concluded that this was “not necessarily problematic” because the trial court could “divide the class into subclasses” based on the appropriate state law applicable in each of the seventeen states. PJ’s Concrete, 803 N.E.2d at 1030 (emphasis added).
nationwide class action against an Illinois-based insurance company under Illinois’ consumer-protection statute. The action alleged that the defendant-insurer breached its promise “to pay for [automobile] replacement parts of like kind and quality that would restore [damaged vehicles to their] pre-loss condition” by “uniformly specifying inferior non-original equipment manufacturer (non-OEM) parts when they were available and cheaper than original equipment parts made by the automobile manufacturer.”

In Clark, “another Illinois appellate court affirmed the certification of a nationwide class of consumers alleging violations of the same Illinois [consumer protection] law [as Avery] with no regard for the laws of the other states involved.” The Clark plaintiff representative alleged that the defendants, Illinois-based pharmaceutical companies, engaged in a scheme to overcharge Medicare for the prescription drug Lupron, creating “an improper kickback for [the prescribing] physician” thereby “increas[ing] their . . . profits and market share.”

In Peterson, a Minnesota appellate court “affirmed a nationwide class action, applying the laws of a single state” — New Jersey — “to transactions that occurred in many different jurisdictions” — “and virtually none of which occurred in [New Jersey].” The plaintiffs brought the action on behalf of farmers who purchased certain herbicides from the New Jersey-based BASF Corporation under New Jersey’s consumer-protection statute. The suit alleged “that BASF had defrauded thousands of American

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282 Avery, 746 N.E.2d at 1247.
farmers by marketing its herbicide as two separate products . . . for different uses at different prices through a system of deceit.”

Finally, in *Ysbrand*, Oklahoma’s Supreme Court “affirmed the certification of a nationwide [breach of warranty and consumer fraud] class action, applying the laws of a single state” — Michigan — “to transactions that occurred in all fifty states.” The complaint alleged that the defendant, the Michigan-based automaker Daimler-Chrysler, breached applicable warranties and Michigan’s consumer-protection statutes. The plaintiffs asserted that Chrysler installed “overly aggressive” airbags in its vehicles and that it “failed to warn purchasers that this defect ha[d] the potential to kill or seriously injure a child or small adult seated in the front passenger seat.”

I agree that each of the cited cases constitute quintessential examples of “false federalism.” Each case involved adhesive consumer transactions occurring in multiple States. And in each, the state court preempted the consumer-protection statutes of States where the sales occurred, choosing the policy of a single State to govern all transactions. In so doing, the courts ignored the fact that the chosen State’s law was just one of “a patchwork of rules representing the diverse policy judgments of lawmakers in fifty States.” The problem with the Senate Report’s assertion is that in each of these cases, the chosen law did not trespass upon any of *Hague-Shutts’* “modest restrictions.”

As noted above, *Hague-Shutts* dictates only that in order to certify an entire class under the law of a particular State, that State “must have a ‘significant contact or

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287 Id.
290 Id.
significant aggregation of contacts’ to the claims asserted by each member of the plaintiff class, contacts ‘creating state interests,’ in order to ensure that the [application of the chosen State’s] law is not arbitrary or unfair.”

293 Each of the state-court decisions condemned by CAFA’s Senate Report involved claims “filed against a company . . . headquarter[ed]” in the State whose law was chosen and challenged consumer practices that were “designed, established, and initiated” from the defendant’s “corporate headquarters” in that State. 294 It is well settled that the presence of a corporation’s “principal place of business” in a State alone “creat[es] significant contacts to the state” satisfying Hague-Shutts’ requirements. 295

In each of these cases the corporate defendants confronted “no element of unfair surprise” because each plainly should “have anticipated” that the law of its home State might apply to its transactions. 296 Nonetheless, in my view, each of these decisions constitutes an affront to the sovereign capacity of the other States in which these consumer transactions occurred. Maine’s interest in applying her own consumer-protection regime to adhesive consumer sales made within her borders should trump

296 Hague, 449 U.S. at 318 n.24.
those of other States regardless of the defendant’s principal place of business. Maine voters have no say in the enactment of Illinois’ law or the appointment of Illinois’ judges. The preemption of Maine’s law in such actions violates a fundamental foundational principle of the Republic: “In this Nation each sovereign governs only with the consent of the governed.”

CAFA’s sponsors erred in concluding that simple compliance with Hague-Shutts’ due-process standards would “end the ‘false federalism’ game.”

C. Hague-Shutts Does Not Prevent “False Federalism”

Hague-Shutts surrendered most meaningful constitutional oversight over choice-of-law determinations under the Due Process and Full Faith and Credit Clauses to state judiciaries. The decisions freed state courts to craft whatever choice-of-law rules they wished, so long as the jurisdiction whose law is chosen possessed sufficient contacts with each party such that “there is no element of unfair surprise.” Constitutionally speaking, the wisdom of the state court’s choice of law is irrelevant so long as Hague-Shutts’ “modest” fair-warning requirement is satisfied. The Court expressly acknowledged “that a set of facts giving rise to a lawsuit . . . may justify, in constitutional terms, application of the law of more than one jurisdiction.” Thus, “the forum State may have to select one law from among the laws of several jurisdictions having some contact with the controversy.”

While the wisdom of the state-court opinions in Avery, Clark, Peterson and

Ysbrand is in doubt, each of these decisions applied the law of the defendant-corporation’s principal place of business. The presence of a corporation’s “principal place of business” in a State alone “creates[s] significant contacts to the state.”

As Hague observed, “[i]t is not for this Court to say whether . . . we would make the same choice-of-law decision if sitting as the [State] supreme court.” Rather, the Court’s “sole function is to determine whether the [state court’s] choice . . . exceeded federal constitutional limitations” imposed by “the Due Process Clause” and “the Full Faith and Credit Clause.” None of the decisions cited in the Senate Report exceeded those limitations. Notwithstanding this fact, CAFA’s sponsors regarded federal diversity jurisdiction as a panacea to the “false federalism” problem. “[S]ome state court judges are less careful than their federal court counterparts about . . . protect[ing] the due process rights of both unnamed class members and defendants. In contrast, federal courts generally . . . pay closer attention to the [due process] requirements for certifying a matter for class treatment.” CAFA’s sponsors argued that this greater federal-court respect for due process “confirms that the passage of [CAFA] will end the ‘false federalism’ game that is occurring in the state court class action arena.”

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305 Id. at 307-08.
307 Id. at 59. In support of this contention, the Senate Report asserted that precedent demonstrated that federal-court respect for Hague-Shutts’ due-process limitations guaranteed that CAFA’s passage would end false federalism. “The bottom line is that over the past ten years, the federal court system has not produced any final decisions — not even one — applying the law of a single state to all claims in a nationwide or multi-state class action.” Id. This assertion is misleading in two respects. First, the lack of federal precedent affirming the certification of multi-state class actions was not instructive because prior to CAFA’s enactment “few class actions [found] their way into federal court.” Id. at 12. Second, the Senate Report referred only to “final decisions.” District court decisions certifying such classes are ordinarily only reviewable after trial on the merits. Vallario v. Vandehey, 554 F.3d 1259, 1262-63 (10th Cir. 2009) (noting
This assertion presupposes that federal courts deciding cases under CAFA’s expanded diversity jurisdiction will manipulate state choice-of-law rules to avoid the paternalistic outcomes the state courts intended those rules to yield. In short, CAFA’s supporters premised the Act on the theory that federal courts are better equipped to apply state choice-of-law rules than the very state courts that created them. This premise cannot be reconciled with Erie’s commandment that when adjudicating matters governed by state law “the voice adopted by the State as its own . . . whether it be of its Legislature or of its Supreme Court . . . should utter the last word.”

under a single State’s consumer-protection law. Thus, despite CAFA’s proponents’ confident claims to the contrary, the Act has not ended “false federalism.” This is so because simple adherence to Hague-Shutts’ due-process requirements cannot quell “false federalism.” Hague-Shutts simply banished horizontal federalism (at least for due process and full faith and credit purposes) to the realm of state choice-of-law jurisprudence.

D. State Conflicts Law Has Devolved Into a “Dismal Swamp”

“The realm of the conflict of laws is,” as Dean Prosser famously quipped, “a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.” From the very genesis of the common law until the mid-twentieth century the choice-of-law rules governing civil-fraud actions closely mirrored their criminal-law counterparts. Courts universally subscribed to the lex loci doctrine, which provided that “the law of the state where the wrong occurred” governed such actions. This rule dictated “that sales of products” in a particular State “must conform to [that State’s] consumer-protection laws.” This approach was, in my view, consistent with the principles of federalism. “Consumer protection matters are typically left to the control of the states precisely so that different states can apply different regulatory standards based on what is locally appropriate.”

309 See authorities cited in note 307, supra.
311 Prosser, supra note 1 at 971.
312 LEA BRILMAYER, CONFLICT OF LAWS 17 (4th ed. 1995).
313 In re Bridgestone/Firestone Tires Prods. Liab. Litig., 288 F.3d 1012, 1018 (7th Cir. 2002).
314 SPGGC, LLC v. Blumenthal, 505 F.3d 183, 196 (2d Cir. 2007) (emphasis added).
In the early twentieth century, however, courts began to abandon the *lex loci* test in favor of “flexible balancing” approaches.\(^{315}\) Today, States employ a myriad of choice-of-law methodologies — the “most significant relationship” test, “interest analysis,” “comparative impairment” — to name a few.\(^ {316}\) These approaches task judges with determining which law to apply to a dispute by assigning “weight” to the relative “contacts” different jurisdictions possess to a particular cause of action.\(^{317}\) These methodologies have yielded “an inherently indeterminate and manipulable doctrine”\(^ {318}\) which in a great many cases may be used to rationalize whatever law the judge feels inclined to apply.\(^ {319}\) In fact, Minnesota’s choice-of-law rule openly allows judges to consider which jurisdiction has “the better rule of law” when determining the applicable body of law.\(^ {320}\)

As a result, choice of law has devolved into “the law’s psychiatric ward” — “a place of odd fixations and schizophrenic visions.”\(^ {321}\) As Dean Prosser observed, “[t]he ordinary court, or lawyer, is quite lost when engulfed and entangled in it.”\(^ {322}\) If, as Justice Scalia argued, “the Rule of Law” is a “law of rules,”\(^ {323}\) modern choice-of-law doctrine has descended headlong into nihilism.

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\(^{317}\) *Id.*

\(^{318}\) Campbell by Campbell v. Apfel, 177 F.3d 890, 893 n.3 (9th Cir. 1999).


\(^{322}\) Prosser, *supra* note 1 at 971.

IV.  BMW v. Gore Demonstrates That the Dormant Commerce Clause’s Sovereign-Capacity Function Applies to State Legislative and Judicial Actions Alike

Courts have traditionally looked only to Hague-Shutts’ due-process proscriptions when considering the constitutional limitations upon state conflicts law. The Edgar-Healy sovereign-capacity principle has generally only been applied to state legislative action. To date, only one Supreme Court decision, BMW of North America, Inc. v. Gore, has applied the dormant Commerce Clause to state judicial action.

A. Gore’s Extraterritoriality Limitations Arise From the Dormant Commerce Clause

In 1983, BMW of North America, Inc., the American distributor of the German automaker BMW “adopted a nationwide policy that cars which were damaged in the course of transportation to dealers would be repaired and sold as new, without advising dealers that any repairs had been made, if the repair costs did not exceed three percent of the suggested retail price.” BMW of North America was incorporated in Delaware and its principal place of business was New Jersey.

In 1990, Dr. Ira Gore purchased a new BMW from a dealer in Birmingham, Alabama. Unbeknownst to Dr. Gore, “prior to the car’s transport to the dealer, the car had been painted at the distributor’s vehicle preparation center at a cost of $601.37,

324 See Florey, supra note 35 at 1062 (“State legislatures appear to be subject to some prohibition against enacting laws with an extraterritorial reach” while “state courts enjoy great apparent latitude to apply the law of their choosing to geographically far-flung disputes.”).
327 Gore, 517 U.S. at 562.
which was about 1.5 percent of the car’s suggested retail price.”\textsuperscript{328} When Gore learned his car had been repainted, he brought an action against the distributor in Alabama state court alleging violations of Alabama’s consumer-fraud statute.\textsuperscript{329}

“The jury returned a verdict finding [the distributor] liable for compensatory damages of $4,000.”\textsuperscript{330} Gore presented “evidence that since 1983 BMW had sold 983 refinished cars as new . . . without disclosing that the cars had been repainted at cost of $300 per vehicle.”\textsuperscript{331} Only fourteen of these vehicles were sold in Alabama.\textsuperscript{332} Based on these metrics, the jury awarded Gore punitive damages of $4,000,000.\textsuperscript{333} The jury “computed the amount of punitive damages by multiplying Dr. Gore’s compensatory damages by the number of similar sales in other jurisdictions.”\textsuperscript{334}

Alabama’s Supreme Court remitted the punitive-damages award to $2,000,000, concluding that the jury made a computational error.\textsuperscript{335} But the court otherwise affirmed the award as a means to punish BMW for violating Alabama’s consumer-fraud law with respect to vehicle sales made outside Alabama.\textsuperscript{336} The court was not moved by the fact that BMW’s “nondisclosure policy was consistent with the laws of roughly 25 States” in which the sales took place.\textsuperscript{337} The state court’s decision achieved its desired effect.

“BMW promptly instituted a nationwide policy of full disclosure of all repairs, no matter how minor.”\textsuperscript{338} The United States Supreme Court granted certiorari to consider, among

\begin{itemize}
\item \textsuperscript{328} Id. at 564.
\item \textsuperscript{329} Id. at 563-64.
\item \textsuperscript{330} Id. at 565.
\item \textsuperscript{331} Id. at 564.
\item \textsuperscript{332} Id.
\item \textsuperscript{333} Id. at 565.
\item \textsuperscript{334} Id. at 567.
\item \textsuperscript{335} Id.
\item \textsuperscript{336} Id. at 565-67.
\item \textsuperscript{337} Id. at 565.
\item \textsuperscript{338} Id. at 566.
\end{itemize}
other things, whether Alabama’s coercion of BMW to comply with the State’s own law when transacting with consumers in other States unconstitutionally “infring[ed] upon the policy choices of other States.”

The Gore Court reversed, finding, in CAFA’s parlance, that the state court’s judgment constituted a quintessential act of false federalism. But instead of following the well-traveled road laid by Hague and Shutts, Gore broke new ground, applying the Edgar-Healy prohibition against direct regulation of extraterritorial conduct to state judicial action

Gore began by noting that Alabama possessed the plenary authority to regulate consumer transactions within her own borders. “No one doubts that a State may protect its citizens by prohibiting deceptive trade practices by requiring automobile distributors to disclose presale repairs that affect the value of a new car. But the States need not, and in fact do not, provide such protection in a uniform manner.”

The States have enacted “a patchwork of rules representing the diverse policy judgments of lawmakers in fifty States.” Each polity’s policy choice is entitled to respect.

The diverse array of approaches by the States “demonstrates that reasonable people may disagree about the value of a full disclosure requirement.” “But while [the Court did] not doubt that Congress has ample authority to enact such a policy for the

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339 Id. at 572. The Gore Court rested its holding on two separate grounds. In addition to its extraterritoriality holding, the Court also concluded that the jury’s award of punitive damages was constitutionally excessive in violation of the Due Process Clause. Id. at 574-75. Gore “identified three ‘guideposts’ for determining whether a punitive damages award is excessive: 1) the degree of reprehensibility; 2) the disparity between the harm or potential harm and the punitive damages award; and 3) the difference between the remedy and the civil penalties authorized or imposed in comparable cases.” DiSorbo v. Hoy, 343 F.3d 172, 186 (2d Cir. 2003) (quoting Gore, 517 U.S. at 574-75).
340 Gore, 517 U.S. at 569.
341 Id. at 570.
343 Gore, 517 U.S. at 570.
entire Nation” pursuant to its “power over interstate commerce, . . . it is clear that no single State could do so, or even impose it own policy choice on neighboring States.”

Citing *Gibbons v. Ogden*, the genesis of the dormant Commerce Clause doctrine, the *Gore* Court noted that “one State’s power to impose burdens on the interstate market for automobiles is not only subordinate to the federal power over interstate commerce . . ., but is also constrained by the need to respect the interests of other States.”

Citing *Healy* and *Edgar* — the principle decisions recognizing that “the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders” — the *Gore* Court specifically invoked the sovereign-capacity function’s central mantra: “the Constitution has a ‘special concern . . . with the autonomy of the individual States within their respective spheres.’”

*Gore* concluded that these dormant Commerce Clause precedents dictate “that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors’ lawful conduct in other States.” Thus, “by attempting to alter BMW’s nationwide policy, Alabama . . . infringing on the policy choices of other States.” “Alabama may insist that BMW adhere to a particular disclosure policy in that State,” but “Alabama does not have the power . . . to punish BMW for conduct that

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344 *Id.* at 571.
345 22 U.S. (9 Wheat.) 1 (1824).
350 *Id.* at 642-43; *Healy*, 491 U.S at 336.
351 *Gore*, 517 U.S. at 571 (emphasis added) (quoting *Healy*, 491 U.S. at 335-36).
352 *Gore*, 517 U.S. at 572.
353 *Id.*
was lawful where it occurred.”\textsuperscript{354}

Tacitly recognizing the fact that the Court had never before applied the \textit{Edgar-Healy} prohibition against direct regulation of extraterritorial activity to State \textit{judicial} action, \textit{Gore} noted that “‘[t]he test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.’”\textsuperscript{355} “State power may be exercised as much by a jury’s application of a state rule of law in a civil lawsuit as by a statute.”\textsuperscript{356} As the Ninth Circuit later noted it is equally true that “State power may be exercised as much by a . . . judge’s . . . application of a state rule of law in a civil lawsuit as by a statute.”\textsuperscript{357} \textit{Edgar} likewise recognized that a State’s exercises of judicial and legislative power are subject to similar limitations. “The limits on a State’s power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, ‘any attempt directly to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State’s power.’”\textsuperscript{358} Thus, “in \textit{BMW of North America, Inc. v. Gore}, the Supreme Court noted that a statute or regulation is not necessary for asserting a dormant Commerce Clause claim” because the \textit{Edgar-Healy} extraterritoriality prohibition applies to State legislative and judicial action alike.\textsuperscript{359}

\textit{Gore} did not cite \textit{Hague, Shutts} or any due process or Full Faith and Credit Clause precedents in reaching its conclusion. While \textit{Hague-Shutts} protects the rights of individual litigants, as I explained above, I believe those decisions fall far short of

\begin{itemize}
\item \textsuperscript{354} \textit{Id.} at 572-73 (emphasis added).
\item \textsuperscript{355} \textit{Id.} at 573 n.17 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 265, (1964)).
\item \textsuperscript{356} \textit{Gore}, 517 U.S. at 573 n.17.
\item \textsuperscript{357} \textit{Ileto} v. Glock Inc., 349 F.3d 1191, 1217 (9th Cir. 2003) (emphasis added) (quoting \textit{Gore}, 517 U.S. at 572 n.17.)
\item \textsuperscript{358} \textit{Edgar} v. MITE Corp., 457 U.S. 624, 643 (1982) (plurality) (quoting \textit{Shaffer} v. Heitners, 433 U.S. 186, 197 (1977)).
\item \textsuperscript{359} \textit{Ileto}, 349 F.3d at 1217 (quoting \textit{Gore}, 517 U.S. at 572 n.17).
\end{itemize}
protecting the **sovereign interests of State polities**. *Gore* is the first — and to date the only — Supreme Court decision to adequately confront the “false federalism” problem.

**B. State Farm v. Campbell’s Extraterritoriality Holding Arises From the Due Process Clause**

In 2003, the Court confronted the “false federalism” problem for the second time in *State Farm Mutual Automobile Insurance Co. v. Campbell*.\(^{360}\) *Campbell* threw *Gore*’s constitutional locus into doubt. While *Gore* focused on the Court’s dormant Commerce Clause precedents, *Campbell* relied upon the Due Process Clause and, to a lesser degree, the Full Faith and Credit Clause. The *Campbell* Court struck down a Utah court’s $145 million punitive damages award against State Farm because the award was intended to “punish . . . the perceived deficiencies of State Farm’s operations throughout the country,” not merely in Utah.\(^{361}\)

In contrast with *Gore*, the *Campbell* Court conspicuously made no reference to interstate commerce and cited no dormant Commerce Clause precedents. Instead, *Campbell* premised its holding, albeit enigmatically, upon *Hague-Shutts*. Citing pinpoint *Shutts*’ admonition that “the Due Process Clause” and “the Full Faith and Credit Clause . . . invalidate[] the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction,”\(^{362}\) *Campbell* concluded that pursuant to *Shutts*,

\(^{360}\) 538 U.S. 408 (2003).

\(^{361}\) *Id.* at 420.

any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction.\textsuperscript{363}

State Farm was both incorporated and had its principal place of business in Illinois.\textsuperscript{364} Thus, Utah lacked the requisite contacts to apply its own law to transactions between State Farm and non-Utah consumers.\textsuperscript{365}

\textit{Campbell} was less than forthright in explaining the constitutional locus of its prohibition against extraterritorial application of state law. Nonetheless, the authority upon which the majority premised the decision demonstrates that \textit{Campbell}’s extraterritoriality ruling rests upon \textit{Hague-Shutts’} contacts-based due-process approach.

\textbf{C. The Campbell Court Premised Its Decision On the Due Process Clause Because Congress Exempted State Regulation of Insurance From Dormant Commerce Clause Scrutiny

Many commentators contend that \textit{Campbell}’s apparent shift to \textit{Hague-Shutts’} due-process rationale evidences a retreat from \textit{Gore}’s doctrinal focus on the Commerce Clause.\textsuperscript{366} This is not so. The Court simply could not have applied \textit{Gore}’s Commerce

\begin{footnotes}
\begin{footnote}[	extsuperscript{363}]
\textit{Campbell}, 538 U.S. 408, 421-22 (2003) (citing \textit{Shutts}, 472 U.S. at 821-22). \textit{Campbell} also cited \textit{New York Life Ins. Co. v. Head}, 234 U.S. 149 (1914) and \textit{Huntington v. Attrill}, 146 U.S. 657 (1892). \textit{Campbell}, 538 U.S. at 421. \textit{Head} is a \textit{Lochner}-era decision, premised upon “the right of freedom of contract” — a fact not mentioned by the \textit{Campbell} Court — which concluded that “a State may not consistently with the due process clause . . . extend its authority beyond its legitimate jurisdiction . . . by way of the wrongful exertion of judicial power . . . .” \textit{Head}, 234 U.S. at 162. \textit{Huntington v. Attrill} cited the Full Faith and Credit Clause for the proposition that “[[l]aws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States.” \textit{Huntington}, 146 U.S. at 669.
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See Catherine M. Sharkey, \textit{Punitive Damages as Societal Damages}, 113 YALE L.J. 347, 431 (2003) (arguing that the \textit{Campbell} Court’s reliance on \textit{Shutts} “reveal[s] the core of its extraterritorial concern to be (once again) the need for procedural protections inherent in Rule 23 as well as choice-of-law concerns”). \textit{See also} Florey, supra note 35 at 1062 (arguing that \textit{Gore} and \textit{Campbell} “suggest that a more general extraterritoriality prohibition lurks somewhere in the Constitution, having nothing to do with the dormant
\end{footnotes}
Clause rationale in *Campbell*. The dormant Commerce Clause is inapplicable to the interstate regulation of insurance. The Commerce Clause’s affirmative grant of power “do[es] not limit the authority of Congress to regulate commerce among the several States as it sees fit.” 367 Rather, Congress may confer “upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.” 368 Thus, “[i]f Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to [dormant] Commerce Clause challenge.” 369 Congress has done so with respect to insurance. “Congress removed all [dormant] Commerce Clause limitations on the authority of the States to regulate . . . the business of insurance when it passed the McCarran-Ferguson Act . . . .” 370

**D. Alabama’s Attempt to Regulate Extraterritorially in Gore Violated Both the Due Process and Dormant Commerce Clauses**

As I will explain in detail in the following Part, the Supreme Court has recognized that the dormant Commerce and Due Process Clauses “reflect different constitutional concerns.” 371 Nonetheless, the two Clauses often “overlap” and “are not always sharply separable.” 372 Thus, a particular State regulatory action can violate one or both of the Clauses. While *Gore* premised its ruling on the Court’s dormant Commerce Clause

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372 *Id.* at 305-06 (quoting International Harvester Co. v. Department of Treasury, 322 U.S. 340, 353 (1944) (Rutledge, J., concurring in part and dissenting in part)).
precedents, I submit that Alabama’s attempt to regulate extraterritorially likewise violated Hague-Shutts’ due process limitations.

In both Gore and Campbell, the trial courts premised their awards of punitive damages on injuries incurred by “hypothetical” additional victims of the defendant’s unlawful conduct.\(^{373}\) Specifically, in Gore, Alabama’s punitive-damages judgment sought to punish BMW for the sale of non-conforming vehicles to 1,000 other customers in several States.\(^{374}\) BMW only sold fourteen of the vehicles in Alabama.\(^{375}\) Hague-Shutts’ due-process standard dictates that in order for a State’s law to be applied to absent class members in a multi-state class action, the State “must have a ‘significant contact or significant aggregation of contacts’ to the claims asserted by each member of the plaintiff class, contacts ‘creating state interests,’ in order to ensure that the choice of [the State’s] law is not arbitrary or unfair.”\(^ {376}\)

Campbell extended this prohibition to the imposition of punitive damages aimed at redressing the claims of “hypothetical” non-party victims of the defendant’s unlawful conduct.\(^ {377}\) "Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual

\(^{373}\) State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003). Accord BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 564 (1996) (“To support his claim for punitive damages, Dr. Gore introduced evidence that since 1983 BMW had sold 983 refinshed cars as new, including 14 in Alabama, without disclosing that the cars had been repainted before sale at a cost of more than $300 per vehicle. Using the actual damage estimate of $ 4,000 per vehicle, Dr. Gore argued that a punitive award of $4 million would provide an appropriate penalty for selling approximately 1,000 cars for more than they were worth.”). The Supreme Court later held that the Due Process Clause prohibits the imposition of punitive damages “base[d] in [any] part upon [the jury’s] desire to punish the defendant for harming persons who are not before the court (e.g., victims whom the parties do not represent).” Philip Morris USA v. Williams, 549 U.S. 346, 349 (2007).

\(^{374}\) Gore, 517 U.S. at 564.

\(^{375}\) Id.


\(^{377}\) Campbell, 538 U.S. at 423.
case, would need to apply the laws of their relevant jurisdiction.” 378 For the courts in Gore and Campbell to impose punitive damages against a defendant to reciprocate injuries inflicted by the defendant against non-parties, the State “must have a ‘significant contact or significant aggregation of contacts’” with respect to the “hypothetical” claim 379 of each non-party victim “‘creating state interests,’ in order to ensure that the application of [the State’s] law [to the conduct in question] is not arbitrary or unfair.” 380

BMW of North America was incorporated in Delaware and its principal place of business was New Jersey. 381 Thus, in Gore (like Shutts) Alabama lacked the requisite contacts with respect to the 986 vehicle sales made outside of Alabama. Accordingly, the imposition of damages with respect to these sales violated BMW’s due-process rights because Alabama lacked any “significant contact or significant aggregation of contacts” with respect to these sales “creating state interests” ensuring that the application of Alabama’s law was “not arbitrary or unfair.” 382

When the forum State applies its law to extraterritorial transactions involving a corporate defendant headquartered in another jurisdiction (as was the case in Gore), the due process and dormant Commerce Clause prohibitions “overlap.” 383 In contrast, if BMW was headquartered in Alabama, the application of Alabama law to its transactions in other States would raise no due process concerns, 384 but would violate the dormant

378 Id. at 421-22 (emphasis added) (citing Shutts, 472 U.S. at 821-22).
379 Campbell, 538 U.S. at 423.
382 Shutts, 472 U.S. at 821-22 (quoting Hague, 449 U.S. at 312-13).
384 The presence of a corporation’s “principal place of business” in a State alone “creat[es] significant contacts to the state” satisfying Hague-Shutts. E.g., Cap Gemini Ernst & Young, U.S., L.L.C. v. Nackel,
As I noted above, the Court could not have decided *Campbell* upon the dormant Commerce Clause grounds it utilized in *Gore* because “Congress removed all [dormant] Commerce Clause limitations on the authority of the States to regulate . . . the business of insurance . . . .” As in *Gore*, however, Utah’s paternalistic attempt to stand in judgment of State Farm’s extraterritorial activities violated *Hague-Shutts’* due-process limitations because Utah lacked the requisite contacts to apply its law to an Illinois-based company’s conduct in other States. In this respect, *Campbell* broke no new ground because the Court confronted State judicial action, *Hague-Shutts’* traditional ambit. But, in my view, *Gore* marked a seismic shift in “false federalism” jurisprudence. *Hague-Shutts’* “unfair surprise” prohibition seemingly offered the Court the path of least resistance.

Yet, the *Gore* Court premised its extraterritoriality analysis upon *Edgar* and *Healy*, concluding that Alabama’s attempt to use its judicial power to regulate conduct in other States violated the Commerce Clause because its “power to impose burdens on the interstate market for automobiles” is both “subordinate to the federal power over interstate commerce” and “constrained by the need to respect the interests of other

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388 Indeed, *Gore*’s better-known prohibition against saddling tortfeasors with “grossly excessive” punishments was itself premised upon due process. *Gore*, 517 U.S. at 562 (“The Due Process Clause . . . prohibits a State from imposing a ‘grossly excessive’ punishment on a tortfeasor.”).
States.” Gore’s extraterritoriality condemnation was not animated by due process “concerns about fairness for the individual defendant” — BMW — but rather by concerns about fairness to the polities of Alabama’s sister States, “structural concerns about the effects of state regulation on the national economy” and “with the autonomy of the individual States within their respective spheres.”

V. THE DORMANT COMMERCE AND DUE PROCESS CLAUSES IMPOSE DISTINCT LIMITATIONS UPON CHOICE-OF-LAW ANIMATED BY DIFFERENT CONSTITUTIONAL CONCERNS AND POLICIES

Some commentators posit that the discontinuity between Hague-Shutts’ “modest restrictions” and the rigid prohibitions of Brown-Forman’s per se rule of invalidity demonstrate that the Constitution subjects state legislative action to a higher degree of scrutiny than state judicial action. This is not so. The Supreme Court has never concluded that the dormant Commerce Clause’s sovereign-capacity function is inapplicable to state judicial action. With the exception of Gore, the modern Supreme Court has only considered the limitations imposed by the Due Process Clause and Full Faith and Credit Clause on State judicial action. The Due Process and dormant Commerce Clauses impose distinctly different limitations upon the States.

389 Id. at 571 (citing Gibbons, 22 U.S.at194-96 (1824); Healy, 491 U.S. at 335-36).
391 Gore, 517 U.S. at 571-72 (quoting Healy, 491 U.S. at 335-36).
394 See Florey, supra note 35 at 1062 (“State legislatures appear to be subject to some prohibition against enacting laws with an extraterritorial reach” while “state courts enjoy great apparent latitude to apply the law of their choosing to geographically far-flung disputes.”).
A. Different Constitutional Concerns and Policies Animate the Dormant Commerce and Due Process Clauses

As I previously noted, the locus of Hague-Shutts’ choice-of-law limitations is the Fourteenth Amendment’s Due Process Clause, not the dormant Commerce Clause. As the Supreme Court explained in Quill Corp. v. North Dakota,\footnote{504 U.S. 298 (1992).} “the Due Process Clause and the [dormant] Commerce Clause are analytically distinct.”\footnote{Id. at 305.}

Quill addressed the constitutionality of a North Dakota use tax levied against an Illinois-based mail-order retailer. The retailer had no offices, warehouses, or employees in North Dakota.\footnote{Id. at 301.} But it actively solicited business in North Dakota through catalogs and made $1,000,000 in annual sales to 3,000 customers in the State.\footnote{Id.} North Dakota sought to tax the retailer for goods purchased for use within the State.\footnote{Id.} North Dakota’s Supreme Court sanctioned the tax, finding that the retailer’s “‘economic presence’ in North Dakota depended on services and benefits provided by the State and therefore generated ‘a constitutionally sufficient nexus to justify imposition of the purely administrative duty of collecting and remitting the use tax.’”\footnote{Id. at 304.}

The United States Supreme Court granted certiorari and reversed. Quill found that the state court erred in testing the statute solely against the proscriptions of the Due Process Clause. The Court explained that both the Due Process Clause and the dormant Commerce Clause limit the State’s power to tax out-of-state entities. Both Clauses require a “substantial nexus” between the regulated party and the regulating State.\footnote{Id. at 302 n.1.}

Quill expressly adopted an argument advanced by Justice Rutledge a half century earlier.

\footnotesize{\begin{itemize}
\item \footnote{504 U.S. 298 (1992).}
\item \footnote{Id. at 305.}
\item \footnote{Id. at 301.}
\item \footnote{Id.}
\item \footnote{Id.}
\item \footnote{Id. at 304.}
\item \footnote{Id. at 302 n.1.}
\end{itemize}}
“[A]lthough” the Due Process and dormant Commerce Clauses “cannot always be separated,” Rutledge argued that the two Clauses are “separate and distinct, not intermingled ones.”\(^402\) Quill expanded upon this principle. “Although the two [Clauses] are closely related” and often “overlap” they “impose distinct limits” on State action.\(^403\) “The two constitutional requirements differ fundamentally, in several ways” and “reflect different constitutional concerns.”\(^404\)

Due process’s touchstone is “fairness for individual litigants.”\(^405\) The Clause’s central inquiry focuses upon whether a litigant had sufficient “contacts” with a State affording her “fair warning” that she might be subject to that State’s law.\(^406\) Thus, the due process restrictions upon a State’s power to tax an out-of-state entity closely resemble the due process limitations on the exercise of personal jurisdiction recognized in *International Shoe Co. v. Washington*.\(^407\) When assessing the constitutionality of the application of a State’s law under the Due Process Clause, the Court has framed “the relevant inquiry as whether a defendant had *minimum contacts* with the jurisdiction such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”\(^408\)

These very same considerations animate *Hague-Shutts’* choice-of-law limitations. Again borrowing from *International Shoe*, the “touchstone” of the *Hague-Shutts* test

\(^402\) *Id.* at 306 (quoting International Harvester Co. v. Department of Treasury, 322 U.S. 340, 353 (1944) (Rutledge, J., concurring in part and dissenting in part)).

\(^403\) *Quill*, 504 U.S. at 305.

\(^404\) *Id.*

\(^405\) *Id.* at 313.

\(^406\) *Id.* at 307-08 (emphasis added).

\(^407\) 326 U.S. 310 (1945) (emphasis added).

\(^408\) *Quill*, 504 U.S. at 307-08 (emphasis added). While similar, the prerequisite due process “contacts” for personal jurisdiction are separate and distinct from the due-process required “contacts” for the imposition of a State’s law against a particular party. “The issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of the constitutional limitations on choice of law . . . .” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985).
likewise focuses on whether the individual litigants had sufficient “contacts” with the State so that “there is no element of unfair surprise” and that they would “have anticipated” that the chosen law “might apply” to their dispute.\(^{409}\) Thus, “for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”\(^{410}\)

*Quill* recognized that the dormant Commerce Clause’s animating principles “differ fundamentally” from due process.\(^{411}\) The dormant Commerce Clause is “informed not so much by concerns about fairness for individual litigants as by structural concerns about the effects of state regulation on the national economy.”\(^{412}\) Thus, the Commerce Clause’s limitation upon a State’s power to tax “is not, like due process’ ‘minimum contacts’ requirement a proxy for notice, but rather a means for limiting state burdens on interstate commerce.”\(^{413}\) Just as *Quill*’s due process’ analysis closely resembled *Hague-Shutts*’ notice requirements, *Quill*’s dormant Commerce Clause exposition echoed the animating principles of the *Edgar-Brown-Forman* prohibition against extraterritorial regulation. As *Edgar* noted, the dormant Commerce Clause precludes state regulation that “directly interferes with or burdens [interstate] commerce.”\(^{414}\)

Applying the Clauses’ “separate and distinct” prohibitions,\(^{415}\) *Quill* found that

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\(^{410}\) *Shutts*, 472 U.S. at 818 (emphasis added) (quoting *Hague*, 449 U.S. at 312-13).

\(^{411}\) *Quill*, 504 U.S. at 305.

\(^{412}\) *Id*. at 312.

\(^{413}\) *Id*. at 313 (emphasis added).


\(^{415}\) *Quill*, 504 U.S. at 306 (quoting *International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 353 (1944) (Rutledge, J., concurring in part and dissenting in part)).
“the magnitude of [the retailer’s] contacts [wa]s more than sufficient for due process purposes.”

Nonetheless, the Court struck down the State court’s ruling because the tax unduly burdened interstate commerce.

On its face, North Dakota law imposes a collection duty on every vendor who advertises in the State three times in a single year . . . . [A] corporation whose telephone sales force made three calls into the State . . . would be subject to the collection duty . . . . [Such taxation impermissibly burdens interstate commerce because] similar obligations might be imposed by the Nation’s 6,000-plus taxing jurisdictions. \[417\]

Quill limited its analysis to the taxation of goods in interstate commerce.

Nonetheless, I submit that Quill’s analysis also governs the imposition of a State’s substantive law upon a regulated party. This assertion admittedly begs the question: does Edgar-Brown-Forman’s prohibition against extraterritorial regulation apply to state judicial action? Gore answered this in the affirmative.

Citing Healy’s admonition that the dormant Commerce Clause protects “the autonomy of the individual States within their respective spheres,” Gore struck down the Alabama’s Supreme Court’s decision as an attempt to project its policy into other States. \[418\] Such regulation of extraterritorial commerce violated the Constitution because Alabama’s “power to impose burdens on the interstate market for automobiles is not only subordinate to the federal power over interstate commerce . . . but is also constrained by the need to respect the interests of other States.”\[419\] The fact that Alabama’s regulatory conduct emanated from its Judiciary rather than its Legislative branch made no

\[416\] Quill, 504 U.S. at 308.
\[417\] Id. at 313 n.6.
\[419\] Gore, 517 U.S. at 571 (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194-196 (1824); Healy, 491 U.S. at 335-36; Edgar v. MITE Corp., 457 U.S. 624, 643 (1982)).
difference. “State power,” the majority concluded, “may be exercised as much by a jury’s application of a state rule of law in a civil lawsuit as by a statute.”\(^{420}\) Thus, “‘[t]he test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.’”\(^{421}\)

B. State Sovereign Interests Are Usually Unrepresented in Private-Law Litigation

I suspect that the source of the discontinuity between the divergent approaches employed in *Hague-Shutts* and *Edgar-Brown-Forman* dwells in the brackish waters dividing public and private law. Cases implicating the dormant Commerce Clause’s sovereign-capacity function arise almost universally in public-law disputes. The paradigmatic sovereign-capacity function case involves a declaratory-judgment action brought by a regulated actor in State A challenging regulatory action by State B upon its activities in State A. In such cases the constitutional issues are well framed because the regulating State actor is a party in the case. For example, in *Brown-Forman*, a Kentucky beverages distributor\(^{422}\) challenged regulations imposed by New York’s State Liquor Authority upon the distributor’s activities in Kentucky (and other States).\(^{423}\) Thus, the state-sovereignty implications were evident: a regulated-party was seeking to enjoin a State-party from exceeding constitutional boundaries.\(^{424}\)

Conversely, cases implicating *Hague-Shutts’* choice-of-law limitations by definition almost universally arise in private-law disputes. In such cases a *private-

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\(^{420}\) *Gore*, 517 U.S. at 573 n.17.

\(^{421}\) *Id.* (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 265, (1964)).


\(^{424}\) *Id.*
plaintiff asks a court to apply State A’s laws to a private-defendant’s commercial transactions in State B. *Hague-Shutts*, of course, dictates that the Due Process Clause requires reasonable contacts between the defendant and State A before its laws may be applied such that the defendant encounters “no element of unfair surprise” at the prospect of being subject to that State’s law.\(^{425}\) Thus, viewed from the standpoint of due process, which focuses on “fairness for individual litigants,”\(^{426}\) no apparent constitutional issue is raised. As previously discussed, the contemporary class-action approach often yields application of the defendant’s home-state’s laws to its extraterritorial conduct.\(^{427}\) Viewed from the standpoint of the individual litigants, the application of State A’s law is completely “fair.” A corporate defendant plainly cannot claim “unfair surprise”\(^{428}\) at the prospect of being subjected to its own State’s law.

The problem is that the “injured party” from a constitutional standpoint is not the defendant but State B — or more precisely the polity of State B — who has no voice in the promulgation of the law being applied within the State’s borders. The Commerce Clause dictates that “[a]ll laws are co-extensive and only co-extensive with the political jurisdiction of the law-making power.”\(^{429}\) This is so because the polities of other States “are deprived of the opportunity to exert political pressure upon the [State] legislature in order to obtain a change in policy.”\(^{430}\) This is a fundamental tenet of federalism.\(^{431}\)


\(^{427}\) *Ysbrand v. Diamler Chrysler Corp.*, 81 P.3d 618, 621 (Okla. 2003); *Peterson v. BASF Corp.*, 657 N.W.2d 853, 860 (Minn. App. 2003).

\(^{428}\) *Hague*, 449 U.S. at 318 n.24.


The Constitution guarantees each State “a Republican form of Government.” Implicit in this promise is the premise that no State’s polity may be subjected to laws that it had no voice in creating — either through its elected representatives in its State capital or in Washington, D.C. This means that primary conduct occurring within a State must be governed by law — be it statutory, regulatory, or common law — enacted either by the governing authority of that State (including its courts) or Congress acting within the scope of its enumerated powers. In my view, the dormant Commerce Clause jurisprudence expresses this value more clearly than any other constitutional cannon.

“No state has the authority to tell other polities what laws they must enact or how affairs must be conducted outside its borders.” Yet, as the previously addressed examples of “false federalism” illustrate, courts have frequently certified multi-state class actions under a single State’s law despite these principles. CAFA has not stopped this practice. This is so because Hague-Shutts’ “modest” due-process restrictions do nothing to protect the sovereign interests of State polities when a court certifies a class action under the law of the defendant’s home state.

VI. DIVERGENT STATE POLICY CHOICES CONCERNING THE SCOPE OF PUNISHMENT Dictate THAT A STATE CANNOT PUNISH EXTRATERRITORIAL CONDUCT Under ITS OWN LAWS EVEN WHEN THE APPLICABLE CONDUCT ALSO VIOLATES THE LAW OF THE STATE WHERE THE TRANSACTION OCCURRED

A familiar axiom of conflicts law recognizes that “in the choice-of-law analysis . . . the threshold question . . . is whether there is, in fact, a true conflict

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433 National Solid Waste Mgmt. Ass’n v. Meyer, 165 F.3d 1151, 1153 (7th Cir. 1999).
434 See authorities cited in note 307, supra.
between” the laws of the different jurisdictions possessing an interest in the event or transaction.\textsuperscript{436} If the applicable laws of all the jurisdictions are truly identical, no State’s sovereign capacity is compromised.\textsuperscript{437} To that end, there is no constitutional impediment to the certification of multi-state class actions under federal law. In my view, the bulk of Article II of the Uniform Commercial Code is similarly amenable to multi-state certification (with the exception of Louisiana) as most (but not all) provisions are identical. But one must be careful not to carry this principle too far.

All consumer-protection laws possess the generic “goal of deterring unfair business practices.”\textsuperscript{438} But as \textit{Gore} demonstrated “unfair” is hardly amenable to a single definition. More importantly, even when particular conduct is regarded as unlawful in all States, application of a single State’s law to the activity in multiple States usually violates the Commerce Clause because the mode and measure of punishment varies dramatically from one State to another and is an important aspect of State policy.

The Ninth Circuit’s decision in \textit{White v. Ford Motor Co.}\textsuperscript{439} illustrates this principle. In \textit{White}, a Nevada jury found Ford liable for distributing, and failing to recall, defective parking brakes.\textsuperscript{440} The jury imposed a significant punitive-damages award that, as in \textit{Gore}, sought to punish Ford for its nationwide conduct.\textsuperscript{441} The federal district court trying the case found \textit{Gore} inapplicable because Ford’s conduct, unlike BMW’s, was illegal (and considered reprehensible) in all jurisdictions.\textsuperscript{442} Nonetheless, the Ninth Circuit reversed the verdict because “the variation in policies of punishment, even where

\textsuperscript{437} Id.
\textsuperscript{438} In re Tobacco II Cases, 207 P.3d 20, 29 (Cal. 2009).
\textsuperscript{439} 312 F.3d 998 (9th Cir. 2002).
\textsuperscript{440} Id. at 1002-03.
\textsuperscript{441} Id.
\textsuperscript{442} Id. at 1014.
the conduct is unlawful in all states, amounts to an important distinction in policy.” As the court explained,

Nevada has no ceiling on punitive damages . . . . [B]ecause the jury vindicated the rights of all Ford pickup truck drivers everywhere, Nevada . . . effectively imposed $70 million in punitive damages in part to protect Alaskans, among others, from failure to warn of defects in pickup trucks. But Alaska has quite a different policy on punishment by means of punitive damages: its legislature imposed a ceiling, probably $7 million in this case, with fifty cents on the dollar payable to the Alaska state treasury.

The court found that the nationwide imposition of Nevada’s penal policy would violate 

Gore’s prohibition against extraterritorial regulation.

By imposing ten times what Alaska would allow . . . Nevada has created very different incentives from Alaska . . . . A manufacturer of an innovative but untried product . . . faces much more risk selling it in Nevada than in Alaska . . . . Even though both states treat distribution of defectively designed products and failure to warn of dangerous defects as tortious, the difference in how they penalize the tortious conduct expresses significantly different policy choices.

Nevada’s apparent preemption of Alaskan law intruded upon Alaskan sovereignty. “The Nevada legislature has chosen an arguably more safety-oriented approach, the Alaska legislature a less risk-averse approach friendlier to innovation.”

The sovereignty of both States makes both these approaches worthy of judicial respect.

\[443\] Id. at 1017-18.
\[444\] Id.
\[445\] Id. at 1018.
\[446\] Id.
VII. The Regulation of Commercial Transactions Is a Quintessential State Sovereign Function

A. The Presence of a Corporation’s Headquarters in a State Does Not Empower That State to Regulate the Corporation’s Conduct in Other States

Many courts and commentators contend that application of a defendant’s home state’s law to its extraterritorial transactions does not implicate the Commerce Clause’s sovereign-capacity function.\(^448\) For example, Illinois’ Court of Appeals asserted in Avery v. State Farm Mutual Automobile Insurance Co.\(^449\) — one of the decisions condemned by CAFA’s Senate Report as an example of “false federalism”\(^450\) — that “Illinois has a legitimate interest in applying its law to” an “action against a company chartered and headquartered in Illinois” to ensure that the company “compl[ies] with [Illinois’] consumer-protection laws while serving Illinois and out-of-state consumers” even with regard to transactions conducted in other States.\(^451\)

The Avery court premised its decision upon what I refer to as the origination theory. The theory’s central tenet is that a defendant’s home state has a special “interest” in preventing its territory from serving as the base of operations for conduct that it considers fraudulent or otherwise violative of its public policy.\(^452\) The factual nexus for such extraterritorial regulation is premised upon the theory that the offending conduct

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\(^448\) Kirsten H. Engel, The Dormant Commerce Clause Threat to Market-Based Environmental Regulation: The Case of Electricity Deregulation, 26 Ecology L.Q. 243, 291 (1999) (arguing that “a state does have a legitimate interest in preventing extraterritorial harms caused by actions originating within its territory”); Rosen, Pluralism, supra note 157 at 718 (arguing that ‘states have extensive presumptive powers to regulate their citizens’ out-of-state activities under contemporary Due Process doctrine, and that this conclusion is not undermined by dicta in some Dormant Commerce Clause cases that speak about limitations on state extraterritorial powers’).


\(^452\) Avery, 746 N.E.3d at 1254-55.
“originates” in the home state. For example, Avery asserted that the defendant-insurer allegedly issued deceptive representations that “were designed, established, and initiated from State Farm’s corporate headquarters in Bloomington Illinois, and dictated and disseminated to State Farm employees nationwide.” Pursuant to this logic, claims that a corporation engaged in “false advertising” or “unfair business practices” will more often than not be governed by the law of its principal place of business, since a corporation’s nationwide advertising strategies are usually (although certainly not always) “designed, established, and initiated from [its] corporate headquarters . . . .”

This theory rests on the metaphor that every corporation, like every animal, possesses a single “nerve center” from which all decisions emanate. Corporate apparatuses in other States — plants, stores, satellite offices — are seen as mere appendages that simply respond to commands issued by the corporation’s brain. Thus, when the State in which the corporation is headquartered applies its consumer-protection statute to representations made by the corporation in other States, the State is not regulating extraterritorially, because it is merely regulating the metaphorical nerve impulses emanating from the corporate “brain” before they cross state lines. In my view, this theory suffers from two fatal infirmities.

The first defect in this argument is that it necessarily runs both ways. Recall that

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453 Id. at 1255.
454 Id.
455 The Supreme Court recently held that for diversity-of-citizenship purposes, a corporation’s principal place of business is its “nerve center” which is ordinarily is its headquarters. Hertz Corp. v. Friend, 130 S. Ct. 1181, 1193 (2009). The Court adopted this approach to “promote greater predictability” in the ascertainment of whether a case may be removed to federal court. Id. But the Court noted that the “nerve center” metaphor does not accurately fit the operation of many corporations. “For example, . . . the bulk of a company’s business activities visible to the public [may] take place in New Jersey, while its top officers direct those activities just across the river in New York . . . .” Id. at 1194.
the defendant-distributor in *Gore* was headquartered in New Jersey.\textsuperscript{456} Suppose that prior to the *Gore* suit, a court in another state had certified a nationwide class action against the distributor under New Jersey law and concluded that New Jersey law dictated that car sellers must only disclose repair costs exceeding *two percent* of a vehicle’s suggested retail price. The cost of repairs to Dr. Gore’s vehicle was only “about 1.5 percent of the car’s suggested retail price.”\textsuperscript{457} As the Alabama Supreme Court ruled in *Gore* itself, Alabama law requires “full disclosure” of all repairs.\textsuperscript{458} The prior court’s ruling in the nationwide class action would preclude Alabama from applying its own consumer-protection law to Dr. Gore’s purchase because the class-action judgment would be *res judicata*.\textsuperscript{459}

Taken to its logical conclusion, the origination theory would necessarily frustrate the sovereign-capacity of states wishing to impose more consumer-friendly standards than the defendant’s home State. Such a result plainly conflicts with the well-established tenet that “[c]onsumer protection matters are typically left to the control of the states precisely so that different states *can* apply different regulatory standards based on what is *locally appropriate*.\textsuperscript{460} Acceptance of the origination theory would also likely lead to a race to the bottom — driving many corporations to move their headquarters to States with the least consumer protections.

The second problem with the “corporate brain” metaphor is that in an important sense it is not, in fact, a metaphor at all. Suppose that two friends in Utah use their very non-metaphorical brains to devise a plan to travel to Nevada for a weekend of gambling.

\begin{itemize}
\item \textsuperscript{456} Cullen v. BMW of N. Am., Inc., 531 F. Supp. 555, 557 (D.N.J. 1982).
\item \textsuperscript{457} BMW of N. Am. v. Gore, 517 U.S. 559, 564 (1996).
\item \textsuperscript{458} *Id.* at 570 (emphasis added).
\item \textsuperscript{459} Federated Dep’t Stores v. Moitie, 452 U.S. 394, 395-400 (1981).
\item \textsuperscript{460} SPGGC, LLC v. Blumenthal, 505 F.3d 183, 196 (2d Cir. 2007) (emphasis added).
\end{itemize}
Gambling is very much against the law in Utah. In such a case, their plan to gamble “originated” in Utah. Does this mean that Utah state police can arrest them at the border on the theory they “designed, established, and initiated” their plan to gamble while in Utah? Can a Utah-based travel company be prosecuted for leading tour groups to Nevada casinos? Surely the company “designed, established, and initiated” a plan with its Utah-based corporate “brain” to facilitate gambling, albeit in Nevada.

Some commentators argue that States actually possess the constitutional authority to regulate their citizens’ extraterritorial conduct. Professor Donald Regan has argued that each State possesses the authority to make “personal law” regulating the conduct of her citizens wherever they travel. “Why should we not think of a state as having an interest in its citizens which justifies regulation of their conduct wherever they may be?” Professor Rosen echoes this theme, arguing that “States have presumptive extraterritorial power to criminally and civilly regulate their citizens’ out-of-state conduct.”

The concept of “personal law” is, in my view, completely unworkable in the transitory world of the twenty-first century. Suppose a twenty-one year old Wyoming woman relocates to Nevada to attend college but returns to Wyoming during summer recesses. Can Wyoming prosecute her for gambling in Nevada? At what point does Wyoming’s regulatory hold on her cease? Can New Mexico prosecute an Albuquerque-
born Navy serviceman for smoking medicinal marijuana while stationed in San Diego?

Fortunately, the Commerce Clause bars States from imposing “personal law” on their citizens. The Clause empowers Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”\textsuperscript{465} The authority to regulate foreign commerce includes the plenary power to impose “personal” federal law on United States citizens when they travel abroad.\textsuperscript{466} For example, Congress has enacted laws prohibiting United States citizens from traveling overseas to bribe foreign officials\textsuperscript{467} or sexually abuse children.\textsuperscript{468} The very thesis of the dormant Commerce Clause is that the Commerce Clause contains a “self executing”\textsuperscript{469} “negative command.”\textsuperscript{470} By “bestow[ing] Congress with plenary powers” the Clause inversely “deprives in like degree the states’ authority to regulate the activities” it empowers Congress to regulate.\textsuperscript{471} As the plenary powers granted to Congress include the authority to promulgate “personal law” governing the extraterritorial conduct of citizens,\textsuperscript{472} the Clause’s “negative implication” logically must divest the States of the power to regulate their own citizens’ extraterritorial conduct.\textsuperscript{473}

In my view, a corporation making marketing choices should be expected to conform its conduct to the specific requirements of each State in which it actually

\begin{footnotesize}
\textsuperscript{465} U.S. CONST. ART. I, § 8, Cl. 3.
\textsuperscript{466} E.g., United States v. Clark, 435 F.3d 1100, 1115-16 (9th Cir. 2006).
\textsuperscript{468} Clark, 435 F.3d at 1115-16.
\textsuperscript{469} South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 88 (1984).
\textsuperscript{472} E.g., Clark, 435 F.3d at 1115-16.
\textsuperscript{473} Some might argue that the Commerce Clause’s “positive” and “negative” sweeps are not inversely proportional to one another. The Supreme Court has held that Congress is empowered to regulate intrastate commercial “activities that substantially affect interstate commerce.” Gonzales v. Raich, 545 U.S. 1, 43 (2005). The Clause’s “negative” aspect plainly does not divest States of the power to regulate such activities absent Congressional action. But the Commerce Clause alone does not empower Congress to regulate these activities. “This power derives from the conjunction of the Commerce Clause and the Necessary and Proper Clause.” Id. at 44 (emphasis added).
\end{footnotesize}
markets its wares — regardless of where its corporate headquarters might be. As Gore observed, State legislatures and courts have enacted a diverse “patchwork” of consumer-protection regimes “representing the diverse policy judgments of lawmakers in 50 States.”474 If California were to require cigarette manufacturers to print a conspicuous skull and crossbones on their magazine advertisements (which I think would be a good idea), a tobacco company headquartered in California should be empowered to label ads distributed in other States pursuant to local law. California should not be empowered to punish the company for marketing its products under different labels in other States on the mere pretext that the decision was “made in California.”

Utah citizens likewise may gamble in Nevada even if they made the decision to do so in Utah. Pennsylvania residents visiting Montana may drive at Montana’s excessive posted speeds that their own State government would likely regard as reckless — even if the ability to engage in such driving constituted their very purpose for making the trip.475 To hold otherwise would violate a central feature of federalism embodied in the Commerce Clause: “a State may not impose . . . sanctions on violators of its laws with the intent of changing [their] lawful conduct in other States.”476

_Hague-Shutts_, of course, protects none of these liberties. Utah has “significant contacts” with her citizens where ever they travel.477 Nonetheless, while the _origination_
theory is consistent with Hague-Shutts’ due-process proscriptions, the Supreme Court has never concluded that the presence of a company’s headquarters in a State trumped the Commerce Clause’s prohibition against extraterritorial regulation. In fact, faced with just such a scenario in Western Union Telegraphic Co. v. Pendleton — long before Hague or Shutts came to bar — the Court held that judicial application of a home-state’s rule of law to a corporation’s extra-territorial conduct violated the dormant Commerce Clause.

Pendleton involved an Indiana state-court judgment against an Indiana-based telegraph company. The plaintiff sent a message from the company’s office in Shelbyville, Indiana to Ottumwa, Iowa. Indiana law required that telegraph companies “with a line of wires wholly or partially” in the State must personally deliver messages received to recipients residing “within one mile of the telegraphic station or within the city or town in which such station is.” Despite the fact that the recipient of the plaintiff’s message lived within one mile of the Ottumwa, Iowa station, the defendant failed to personally deliver the message as Indiana law required. The Indiana Supreme Court affirmed the trial court’s judgment for the plaintiffs. The United States Supreme Court reversed. Notwithstanding the fact that the defendant was incorporated and headquartered in Indiana and the message at issue originated in Indiana, the Court found that the state court’s extraterritorial application of Indiana law violated the Commerce Clause.

The Pendleton Court premised its holding on the sovereign-capacity rationale

\[\text{122 U.S. 347 (1887).} \]
\[\text{Id. at 347.} \]
\[\text{Id.} \]
\[\text{Id.} \]
\[\text{Id.} \]
\[\text{Id.} \]
\[\text{Id.} \]
reiterated by *Gore* nearly a century later.  As such, “[D]ifferent state legislatures might differ in their enactments as to modes of delivery and enforce such rules by penalties for their violation.”

If the States were empowered to regulate such activities beyond their borders “conflicting legislation would inevitably follow with reference to telegraphic communications between citizens of different states.”

*Pendleton*, now long forgotten in the annals of the United State Reports, is seemingly undermined by the Court’s more recent pronouncements in *Hague* and *Shutts*. Indiana’s application of its own law was plainly consistent with these later decisions’ due-process-based proscriptions. Indiana had the requisite “significant contact or significant aggregation of contacts” with the transaction. The defendant’s principal

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485 *Id.* at 358. Some scholars construe *Pendleton* to be an example of the dormant Commerce Clause’s *anti-obstructionist function* — which prohibits State regulation that “unduly burdens . . . commerce in matters where [national] uniformity is . . . essential for the functioning of commerce” (*Morgan v. Virginia*, 328 U.S. 373, 377 (1946)) — not the *sovereign-capacity function*. See Norman R. Williams, *The Commerce Clause and the Myth of Dual Federalism*, 54 UCLA L. REV. 1847, 1871 n.104 (2007) (asserting that *Pendleton* involved a type of “commerce over which Congress’s commerce power was” deemed “exclusive”). This is not so. The *anti-obstructionist function’s* ambit is restricted to matters amenable to a single regulatory authority “the regulation of which is committed to Congress and denied to the States by the commerce clause.” *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925). *Pendleton* did not hold that the defendant-corporation could not be subjected to Indiana law because the regulation of telegraph lines is “denied to the States . . . .” *Id.* Rather, the Court concluded that “[w]hatever authority [Indiana] may possess over the transmission and delivery of messages by telegraph companies within her limits, it does not extend to the delivery of messages in other states.” *Pendleton*, 122 U.S. at 358.

486 *Id.* at 358.

487 *Id.* at 358. *Pendleton* confronted the judicial application of a statute rather than a rule of common law. But this is of no import. As the *Erie* Court explained, State statutory and common law, are one and the same for constitutional purposes. “The common law so far as it is enforced in a State . . . is . . . the law of that State existing by the authority of that State . . . .” *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (alterations in original). As such, the “only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word.” *Id.* *Erie* rejected the notion that a “transcendental” body of common law existed independent of state law. The court concluded that the authority to promulgate common law was a function of a State’s authority to govern and was coterminous with state sovereignty. *Id.*

place of business was in Indiana and the message originated in Indiana.\textsuperscript{490} The defendant could not claim application of the law of its home state violated it rights under the Due Process Clause. It plainly was subjected to “no element of unfair surprise” at the prospect of being subject to Indiana law.\textsuperscript{491} But Hague and Shutts did not consider the application of the dormant Commerce Clause.

Prior to 1996, Pendleton’s vitality remained in doubt. Gore resolved this doubt by reaffirming Pendleton’s thesis: “one State’s power to impose burdens on the interstate market for automobiles is . . . constrained by the need to respect the interests of other States.”\textsuperscript{492} Similarly, Pendleton recognized that Indiana’s power to regulate “the transmission and delivery of messages by telegraph companies within her limits . . . does not extend to the delivery of messages in other states.”\textsuperscript{493} If this were not so, one could not venture beyond the borders of her home State without facing the potential Catch-22 of simultaneously conforming her conduct to the “conflicting legislation” of two different jurisdictions.\textsuperscript{494} “Conflict and confusion would only follow [a State’s] attempted exercise of such a power. We are clear that it does not exist in any state.”\textsuperscript{495} This remains equally true today.

\textsuperscript{490} Pendleton, 122 U.S. at 348, 352.
\textsuperscript{493} Pendleton, 122 U.S. at 358.
\textsuperscript{494} Id. The Catch-22 situation potentially results because both the traveler’s home state and the state where she ventured would possess “significant contacts” with respect to her conduct and could apply their law to that conduct consistent with Hague-Shutts. This is one of the reasons why conflicts law has been categorized as “schizophrenic.” Dane, supra note 321 at 220, quoted in Shreve, supra note 321 at 1007.
\textsuperscript{495} Pendleton, 122 U.S. at 359.
B. The States’ Sovereign Capacity to Regulate Domestic Consumer Transactions Precludes the Courts of One State From Projecting a Second State’s Consumer-Protection Laws Into a Third State

CAFA’s sponsors portrayed “false federalism” as a symptom of judicial paternalism — State jurists’ preference for their own State’s laws over those of sister States. But this is not always the case. In some of the most blatant examples of “false federalism” state courts certified nationwide class actions under the law of a second state. For example, in *Ysbrand v. Daimler Chrysler Corp.*, Oklahoma’s Supreme Court affirmed the certification of a nationwide class action under Michigan’s consumer-protection laws. Similarly, in *Peterson v. BASF Corp.*, Minnesota’s Court of Appeals affirmed the certification of a nationwide class action under New Jersey’s consumer-protection statute.

To some, the fact that a court’s application of a single state’s consumer-protection law to a nationwide class is not motivated by a paternalistic preference for its own State’s law might be seen to alleviate the affront to the affected States’ sovereign capacities. In my view, it makes no difference whether a court applies its own State’s law to nationwide transactions, or that of a second State (or if a federal court sitting in diversity does so). The Commerce Clause’s sovereign-capacity function protects “the autonomy of the individual States within their respective spheres.”

*Peterson* adjudicated the claims of farmers in numerous States who purchased herbicide from the defendant under New Jersey’s consumer-protection statute.

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500 *Peterson*, 657 N.W.2d at 860.
“[V]irtually none” of the sales occurred in New Jersey. 501 “Consumer protection matters are typically left to the control of the states precisely so that different states can apply different regulatory standards based on what is locally appropriate.” 502 This is so because each State retains a large measure of “residuary sovereignty.” 503 “No state has the authority to tell other polities what laws they must enact or how affairs must be conducted.” 504 The States have enacted “a patchwork” of consumer-protection statutes “representing the diverse policy judgments of lawmakers in 50 States.” 505 These laws impose a myriad of “different . . . substantive elements, including differing requirements of privity, demand, scienter and reliance.” 506

Kansas possesses a sovereign interest in seeing that her own “policy judgments” — not New Jersey’s — are applied to the sale of herbicide to Kansas farmers. Peterson’s preemption of Kansas law with that of New Jersey breached Kansas’ sovereignty. The fact that a Minnesota court facilitated this intrusion in no way mitigates the offense. Nor does CAFA provide the antidote. If a federal court applying Minnesota’s choice-of-law rules mimicked Peterson, Kansas’ sovereign interests — along with those of forty eight other States — would be equally violated.

CONCLUSION

“The Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the

502 SPGGC, LLC v. Blumenthal, 505 F.3d 183, 196 (2d Cir. 2007).
504 National Solid Wastes Mgmt. Ass’n v. Meyer, 165 F.3d 1151, 1153 (7th Cir. 1999).
commerce has effects within the State.” Thus, when a state’s law “directly regulates” extraterritorial commerce, the Court has “generally struck down the statute without further inquiry.” This sovereign-capacity function protects “the autonomy of the individual States within their respective spheres” by dictating that “[n]o state has the authority to tell other polities what laws they must enact or how affairs must be conducted.”

These limitations are necessary to ensure that the law governing conduct within a State is made “with the consent of the governed.” While “the people” of one State may “have consented to a [particular regulatory] system,” “the people of sister States” who have chosen to “adopt[ ] a different system” should not be subjected to the former’s regulatory policy because they “ha[d] no voice in [that] decision.” Rather, as the Supreme Court has recognized, each State’s choice “is entitled to . . . respect.”

The certification of multi-state class actions under one State’s law contravenes this premise by “invit[ing] one state court to dictate to 49 others what their laws should be on a particular issue, thereby undermining basic federalism principles.” “Consumer protection matters are typically left to the control of the states precisely so that different states can apply different regulatory standards based on what is locally appropriate.”

I recognize that my view conflicts with the orthodox conception of the dormant

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509 Healy, 491 U.S. at 336.
510 National Solid Wastes Mgmt. Ass’n v. Meyer, 165 F.3d 1151, 1153 (7th Cir. 1999).
512 Id.
513 Id.
515 SPGGC, LLC v. Blumenthal, 505 F.3d 183, 196 (2d Cir. 2007).
Commerce Clause as a limitation upon state legislative power. *Erie* likewise challenged the dominant orthodoxy of its day. I submit that if the Constitution truly preserves for each State a “residuary and inviolable sovereignty” a buttress must exist that resists encroachment upon that sovereignty by sister States — regardless of which branch of a State government has committed the trespass. “[I]n *BMW of North America v. Gore*, the Supreme Court noted that a statute or regulation is not necessary for asserting a dormant Commerce Clause claim [because] ‘State power may be exercised as much by a . . . judge’s . . . application of a state rule of law in a civil lawsuit as by a statute.’”

The extraterritorial application of State law ultimately imposes that law on polities that are “deprived of the opportunity to exert political pressure upon the [State] legislature in order to obtain a change in policy.” Revulsion to such a *status quo* constituted the unifying principle of the American Revolution. The Commerce Clause’s *sovereign-capacity function* dictates that jurists cannot banish horizontal federalism to the “dismal swamp” of conflicts law.

517 Ileto v. Glock Inc., 349 F.3d 1191, 1217 (9th Cir. 2003) (emphasis added) (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572 n.17 (1996)).
519 Prosser, *supra* note 1 at 971.