

# 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.”*<sup>1</sup>

## INTRODUCTION

“No taxation without representation.” This paradigmatic mantra of the American Revolution constitutes an important foundational premise of the dormant Commerce Clause.<sup>2</sup> Although the Clause is most often associated with its *anti-protectionist function* of prohibiting

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<sup>1</sup> William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953). As a child of the 1980s, I have always associated Dean Prosser's "dismal swamp" with the "fire swamp" from *THE PRINCESS BRIDE* (MGM 1987). I will try not to take personally the obvious parallel between the "eccentric professors" that inhabit Prosser's swamp and the film's Rodents of Unusual Size. See *id.*

<sup>2</sup> Although the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, expressly affords Congress only the affirmative power to regulate interstate commerce, the Supreme Court has long recognized that the Clause has a "dormant" or "negative" sweep. *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992). "The Clause, in Justice Stone's phrasing, 'by its own force' prohibits certain state actions that interfere with interstate commerce." *Id.* (quoting *S.C. State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 185 (1938)).

protectionist state regulations that discriminate against out-of-state commerce,<sup>3</sup> 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 regarding policies that they had no hand in creating.<sup>4</sup> This *sovereign-capacity function* implicitly underlies the so-called per se rule of invalidity.<sup>5</sup> As the Supreme Court explained in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,<sup>6</sup> when a state's law "directly regulates" extraterritorial commerce, the Court has "generally struck down the statute without further inquiry."<sup>7</sup> The Commerce Clause's sovereign-capacity function protects "the autonomy of the individual States within their respective spheres"<sup>8</sup> by dictating that "[n]o state has the authority to tell other polities what laws they must enact or how affairs must be conducted."<sup>9</sup>

Nowhere is the specter of interstate direct regulation<sup>10</sup> more prevalent than in the arena of class action litigation. Commentators have noted many decisions where courts have certified multistate (and often nationwide) class actions under the consumer protection law of a single state.<sup>11</sup> Lawmakers' concerns over the propensity of state

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<sup>3</sup> *E.g.*, *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) ("The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.").

<sup>4</sup> *E.g.*, *Edwards v. California*, 314 U.S. 160, 174 (1941) (citing *Barnwell Bros., Inc.*, 303 U.S. at 185 n.2) ("[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."); *W. Union Tel. 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."); *SPGGC, 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 Servs.*, 610 F. Supp. 381, 385 (N.D. Ill. 1985) ("Imposing Illinois's anti-dilution law upon . . . states that have chosen not to pass such a law . . . seems anathema to our federal system."); *Ariz. Corp. Comm'n v. Media Prods., Inc.*, 763 P.2d 527, 533 (Ariz. Ct. App. 1988) (noting that allowing Arizona to regulate extraterritorial securities offerings would give the state "an effective veto over offerings and sales approved" by other states).

<sup>5</sup> *E.g.*, *Granholm v. Heald*, 544 U.S. 460, 476 (2005).

<sup>6</sup> *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986).

<sup>7</sup> *Id.* at 579; *accord* *Healy v. Beer Inst.*, 491 U.S. 324, 336–37 (1989). The 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) (arguing that the rule should be limited to protectionist statutes).

<sup>8</sup> *Healy*, 491 U.S. at 336.

<sup>9</sup> *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 165 F.3d 1151, 1153 (7th Cir. 1999).

<sup>10</sup> *Brown-Forman*, 476 U.S. at 579.

<sup>11</sup> S. REP. NO. 109-14, at 24–26 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 24–26.

courts to certify such classes prompted Congress to enact the Class Action Fairness Act of 2005 (“CAFA”).<sup>12</sup> CAFA dramatically expanded federal-court diversity-of-citizenship jurisdiction to include most multistate class actions, allowing removal of the vast majority of such suits to federal court.<sup>13</sup> 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 “in-vit[ing] one state court to dictate to 49 others what their laws should be on a particular issue.”<sup>14</sup> The Report labeled the certification of such actions “false federalism,” a term coined by former Clinton-era Solicitor General Walter Dellinger.<sup>15</sup> 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.”<sup>16</sup>

CAFA’s proponents offered several examples of false federalism—state appellate opinions affirming the certification of nationwide classes under a single state’s law.<sup>17</sup> They suggested that these decisions violated the due process rights of the defendants,<sup>18</sup> as recognized by the Supreme Court’s seminal decision in *Phillips Petroleum Co. v. Shutts*.<sup>19</sup> They claimed that CAFA would end such abuses by allowing removal of class actions implicating interstate commerce to federal courts.<sup>20</sup> Federal judges, the authors claimed, are more “respectful” of due process limitations than their state counterparts.<sup>21</sup> CAFA’s sponsors misdiagnosed the problem.

The Senate Report’s assessment suffers from two fundamental misconceptions. 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 Insurance Co. v. Hague*.<sup>22</sup> This approach dictates

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<sup>12</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1332(d), 1453(b) (2006)).

<sup>13</sup> See 28 U.S.C. § 1332(d). Subject to limited exceptions, CAFA excuses the application of the complete diversity rule, allowing removal if diversity exists between *any* class member (named or unnamed) and *any* defendant. *Id.*

<sup>14</sup> S. REP. NO. 109-14, at 24, reprinted in 2005 U.S.C.C.A.N. at 24.

<sup>15</sup> *Id.* at 26 & n.117, reprinted in 2005 U.S.C.C.A.N. at 26 & n.117.

<sup>16</sup> *Id.* at 24, reprinted in 2005 U.S.C.C.A.N. at 24.

<sup>17</sup> *Id.* at 24–26, reprinted in 2005 U.S.C.C.A.N. at 24–26.

<sup>18</sup> See *id.* at 63, reprinted in 2005 U.S.C.C.A.N. at 58–59.

<sup>19</sup> *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797 (1985).

<sup>20</sup> S. REP. NO. 109-14, at 27, reprinted in 2005 U.S.C.C.A.N. at 27.

<sup>21</sup> *Id.* at 37, reprinted in 2005 U.S.C.C.A.N. at 35.

<sup>22</sup> *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

that for a state's law to be applied to a multistate class action, the Due Process Clause requires *only* that the state 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."<sup>23</sup> In *all* of the decisions discussed in the Senate Report, the courts certified the classes under the law of the corporate defendants' home state.<sup>24</sup> 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"<sup>25</sup> such that application of its law to all transactions involving the defendant is "neither arbitrary nor fundamentally unfair."<sup>26</sup>

*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.<sup>27</sup> *Hague-Shutts* largely casts due process regulation over the appropriate rule of law to be applied in multistate 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 inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon."<sup>28</sup>

Second, CAFA provides no substantive choice of law provisions.<sup>29</sup> The statute is simply "a narrowly-tailored expansion of fed-

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<sup>23</sup> *Shutts*, 472 U.S. at 821–22 (quoting *Hague*, 449 U.S. at 313 (plurality opinion)).

<sup>24</sup> See *Clark v. TAP Pharm. Prods., Inc.*, 798 N.E.2d 123, 126, 135 (Ill. App. Ct. 2003) (affirming certification of a nationwide class action against an Illinois-based corporation under Illinois law); *Avery v. State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242, 1247, 1257 (Ill. App. Ct. 2001) (same), *aff'd in part, rev'd in part*, 835 N.E.2d 801 (Ill. 2005); *Peterson v. BASF Corp.*, 657 N.W.2d 853, 860 (Minn. Ct. App. 2003) (affirming the certification of a New Jersey-based corporation under New Jersey law), *aff'd*, 675 N.W.2d 57 (Minn. 2004), *vacated*, 544 U.S. 1012 (2005); *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618, 621 (Okla. 2003) (affirming in part the certification of a nationwide class action against a Michigan-based corporation under Michigan law).

<sup>25</sup> *Cap Gemini Ernst & Young, U.S., L.L.C. v. Nackel*, 346 F.3d 360, 366 (2d Cir. 2003) (emphasis added); *accord, e.g., Nw. Airlines, Inc. v. Astraea Aviation Servs.*, 111 F.3d 1386, 1394 (8th Cir. 1997); *Mazza v. Am. Honda Motor Co.*, 254 F.R.D. 610, 620 (C.D. Cal. 2008).

<sup>26</sup> *Nw. Airlines, Inc.*, 111 F.3d at 1394 (quoting *Hague*, 449 U.S. at 313) (stating that the presence of a party's corporate headquarters in a jurisdiction standing alone constitutes sufficient contacts under the Due Process Clause for the jurisdiction's law to be applied to all claims involving the party).

<sup>27</sup> *Shutts*, 472 U.S. at 818 (citing *Hague*, 449 U.S. at 312–13).

<sup>28</sup> Prosser, *supra* note 1, at 971 (emphasis added).

<sup>29</sup> 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 state choice of law rules that yielded multistate class actions).

eral diversity jurisdiction.”<sup>30</sup> The doctrine set forth in *Erie Railroad Co. v. Tompkins*<sup>31</sup> 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<sup>32</sup>—the very same conflict rules that led to the “judicial usurpation”<sup>33</sup> that CAFA sought to quell.<sup>34</sup> Predictably, CAFA’s passage did not end false federalism. Many federal courts adjudicating cases that were removed under CAFA have found that state conflicts rules require certification of nationwide classes under a single state’s law.<sup>35</sup>

In my view, CAFA’s proponents 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

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<sup>30</sup> S. REP. NO. 109-14, at 27 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 27.

<sup>31</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>32</sup> *Klaxon Co. v. Stentor Elec. 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 *Shuts*’s 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 that of the forum’s. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730–31 (1988). If the forum is faced with a novel question—or one not yet resolved by the competing state’s courts—the forum is thus free to apply its own law. See *id.*

<sup>33</sup> S. REP. NO. 109-14, at 26, reprinted in 2005 U.S.C.C.A.N. at 26.

<sup>34</sup> See, e.g., *Wash. Mut. Bank v. Superior Court*, 15 P.3d 1071, 1080–81 (Cal. 2001) (holding that California’s choice of 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).

<sup>35</sup> See, e.g., *Masters v. DIRECTV, Inc.*, Nos. 08-55825, 08-55830, 2009 WL 4885132, at \*1 (9th Cir. Nov. 19, 2009) (applying California common law policy against class action waivers to nationwide consumer law claims); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 375–80 (N.D. Cal. 2010) (certifying a nationwide class under a California consumer protection statute); *Estrella v. Freedom Fin. Network, LLC*, No. C 09-03156 SI, 2010 WL 2231790, at \*9–13 (N.D. Cal. June 2, 2010) (same); *In re Mercedes-Benz Tele Aid Contract Litig.*, 267 F.R.D. 113, 119–23, 162–63 (D.N.J. 2010) (certifying a nationwide class under a New Jersey consumer protection statute); *Keilholtz v. Lennox Hearth Prods., Inc.*, 268 F.R.D. 330, 339–43 (N.D. Cal. 2010) (certifying a nationwide class under a California consumer protection statute); *Menagerie Prods. v. Citysearch*, No. CV 08-4263 CAS (FMO), 2009 WL 3770668, at \*15 (C.D. Cal. Nov. 9, 2009) (same); *Mazza v. Am. Honda Motor Co.*, 254 F.R.D. 610, 620–24 (C.D. Cal. 2008) (same); *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 589 (C.D. Cal. 2008) (same); *Elias v. Ungar’s Food Prods., Inc.*, 252 F.R.D. 233, 240 (D.N.J. 2008) (certifying a nationwide class under a New Jersey consumer protection statute); *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 549–50 (W.D. Wash. 2008) (certifying a nationwide class under a Washington consumer protection statute); *Fresco v. Auto Data Direct, Inc.*, No. 03-61063-CIV, 2007 WL 2330895, at \*2–4 (S.D. Fla. May 14, 2007) (certifying a nationwide class under a Florida consumer protection statute); *In re St. Jude Med., Inc.*, No. MDL 01-1396 (JRT/FLN), 2006 WL 2943154, at \*1, \*7 (D. Minn. Oct. 13, 2006) (certifying a nationwide class under a Minnesota consumer protection statute), *rev’d, remanded*, 522 F.3d 836 (8th Cir. 2008).

legislative action.<sup>36</sup> In light of the “modest” due process limitations imposed by *Hague-Shutts*,<sup>37</sup> many commentators speculated that the minimum “contact or aggregation of contacts” test constituted the outer limit of constitutional restrictions on the choice of law field.<sup>38</sup> The Court fundamentally altered this landscape with its landmark decision in *BMW of North America, Inc. v. Gore*.<sup>39</sup>

*Gore* involved an Alabama lawsuit 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.<sup>40</sup> 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.<sup>41</sup> This policy complied with the laws of several states.<sup>42</sup> Nonetheless, the trial court found that it violated Alabama’s consumer fraud law.<sup>43</sup> On appeal, the Alabama Supreme Court affirmed a \$2 million punitive damages award,<sup>44</sup> finding that the punitive judgment was intended to induce BMW to change its nationwide policy to conform to Alabama’s consumer protection law.<sup>45</sup> Citing its dormant Commerce Clause jurisprudence, the United States 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.”<sup>46</sup>

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<sup>36</sup> Some lower courts had previously applied the doctrine to judicial action. *See, e.g.*, *Hyatt Corp. v. Hyatt Legal Servs.*, 610 F. Supp. 381, 383–85 (N.D. Ill. 1985) (holding that the dormant Commerce Clause precluded a nationwide injunction under the Illinois Anti-Dilution Act).

<sup>37</sup> *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818 (1985) (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981) (plurality opinion)).

<sup>38</sup> *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 (2009) (“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.”).

<sup>39</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

<sup>40</sup> *Id.* at 563 & n.1.

<sup>41</sup> *Id.* at 563–64.

<sup>42</sup> *Id.* at 565.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 566–67.

<sup>46</sup> *Id.* at 571–72 (citing *Healy v. Beer Inst.*, 491 U.S. 324, 335–36 (1989); *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194–96 (1824)). *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. *See id.* Other courts have found that *Gore* expressly referenced the dormant Commerce Clause:

[I]n *BMW of North America v. Gore*, the Supreme Court noted that a statute or

*Gore* rejected the notion that the dormant 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.”<sup>47</sup> Thus, “[s]tate 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.”<sup>48</sup> Applying this principle, *Gore* found that the Alabama court’s order constituted impermissible extraterritorial regulation.<sup>49</sup> Alabama’s consumer protection regime was just one of “a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States.”<sup>50</sup> Although Alabama possessed the constitutional authority to regulate BMW’s intrastate conduct, it lacked the authority to “impose its own policy choice on neighboring States” through punitive damages or otherwise.<sup>51</sup>

*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.<sup>52</sup> If a state cannot *indirectly* regulate extraterritorial conduct through the imposition of punitive damages, how can it do so through the *direct* application of its law in a nationwide class action?

This Article challenges CAFA’s conception that federal court respect for *Hague-Shutts*’s 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.

Part I explores 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”<sup>53</sup> by dictating that “[n]o state has the authority to tell other

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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.”

*Ileto v. Glock Inc.*, 349 F.3d 1191, 1217 (9th Cir. 2003) (second alteration in original) (quoting *Gore*, 517 U.S. at 572 n.17).

<sup>47</sup> *Gore*, 517 U.S. at 572 n.17 (internal quotation marks omitted).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 572–73.

<sup>50</sup> *Id.* at 570.

<sup>51</sup> *Id.* at 570–71.

<sup>52</sup> *Id.* at 572–73.

<sup>53</sup> *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).

polities what laws they must enact or how affairs must be conducted.”<sup>54</sup>

Part II examines 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*.<sup>55</sup>

Part III examines the Court’s holding in *Shutts* and its predecessor, *Allstate Insurance Co. v. Hague*.<sup>56</sup> *Hague-Shutts* requires that, to certify a multistate 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.”<sup>57</sup> CAFA’s Senate Report highlighted four state appellate court decisions that it characterized as emblematic of the false federalism problem.<sup>58</sup> It suggested that these decisions stemmed from a failure to comply with *Hague-Shutts*’s due process limitations.<sup>59</sup> In *all* of these decisions, the state courts certified the classes under the law of the corporate defendant’s home state.<sup>60</sup> 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.”<sup>61</sup>

Part IV examines *BMW of North America, Inc. v. Gore*.<sup>62</sup> *Gore* recognized that a state court cannot impose punitive damages upon a defendant to coerce him to conform his conduct in other states to the

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<sup>54</sup> Nat’l Solid Wastes Mgmt. Ass’n v. Meyer, 165 F.3d 1151, 1153 (7th Cir. 1999).

<sup>55</sup> S. REP. NO. 109-14, at 94 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 86 (emphasis added).

<sup>56</sup> *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1982).

<sup>57</sup> *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 821–22 (1985) (quoting *Hague*, 449 U.S. at 312–13 (plurality opinion)).

<sup>58</sup> S. REP. NO. 109-14, at 24–26, *reprinted in* 2005 U.S.C.C.A.N. at 24–26.

<sup>59</sup> *See id.*, *reprinted in* 2005 U.S.C.C.A.N. at 24–26.

<sup>60</sup> *Clark v. TAP Pharm. Prods., Inc.*, 798 N.E.2d 123, 131 (Ill. App. Ct. 2003) (affirming certification of nationwide class action against an Illinois-based corporation under Illinois law); *Avery v. State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242, 1254 (Ill. App. Ct. 2001) (same), *aff’d in part, rev’d in part*, 835 N.E.2d 801 (Ill. 2005); *Peterson v. BASF Corp.*, 657 N.W.2d 853, 873 (Minn. Ct. App. 2003) (affirming certification of New Jersey-based corporation under New Jersey law), *aff’d*, 675 N.W.2d 57 (Minn. 2004), *vacated*, 544 U.S. 1012 (2005); *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618, 626 (Okla. 2003) (affirming in part certification of nationwide class action against Michigan-based corporation under Michigan law).

<sup>61</sup> *Cap Gemini Ernst & Young, U.S., L.L.C. v. Nackel*, 346 F.3d 360, 366 (2d Cir. 2003) (emphasis added) (internal quotation marks omitted); *accord, e.g.*, *Nw. Airlines, Inc. v. Astraea Aviation Servs., Inc.*, 111 F.3d 1386, 1394 (8th Cir. 1997); *Mazza v. Am. Honda Motor Co.*, 254 F.R.D. 610, 620 (C.D. Cal. 2008).

<sup>62</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).



forum's law.<sup>63</sup> 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 the interests of other States."<sup>64</sup> 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.

Part V explores the relationship between the Due Process and dormant Commerce Clauses. Although the two Clauses frequently "overlap," they "[im]pose distinct limits" on state action.<sup>65</sup> Due process's touchstone is "fairness for the *individual defendant*."<sup>66</sup> The Clause's central inquiry focuses on whether a litigant had sufficient "contacts"<sup>67</sup> with a state so as to afford her "fair warning,"<sup>68</sup> and to ensure that she encounters "no element of unfair surprise" at the prospect of being subjected to that state's law.<sup>69</sup> Conversely, the dormant Commerce Clause is "informed not so much by concerns about fairness for the individual defendant,"<sup>70</sup> but rather by "the autonomy of the *individual States* within their respective spheres."<sup>71</sup> 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 about fairness to the *individual litigants* in the action, but about the sovereign interests of *state polities*, which are not generally parties to private law disputes.

Part VI, addresses 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 multistate class actions when they are governed by federal or state law that is truly identical among affected jurisdictions. But I assert that the Constitution bans the certification of classes under state consumer protection laws. Although all such statutes generically render "unfair" commercial prac-

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<sup>63</sup> *Id.* at 572.

<sup>64</sup> *Id.* at 571 (citing *Healy v. Beer Inst.*, 491 U.S. 324, 335–36 (1989); *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion)).

<sup>65</sup> *Quill Corp. v. North Dakota*, 504 U.S. 298, 305 (1992).

<sup>66</sup> *Id.* at 312 (emphasis added).

<sup>67</sup> *Id.* at 307.

<sup>68</sup> *Id.* at 308 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)) (internal quotation marks omitted).

<sup>69</sup> *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 318 n.24 (1981) (plurality opinion).

<sup>70</sup> *Quill Corp.*, 504 U.S. at 312.

<sup>71</sup> *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (emphasis added).

tices unlawful, they prescribe myriad 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.”<sup>72</sup> In my view, the imposition of Alaska’s probusiness policy’s more lenient punishment<sup>73</sup> upon a commercial transaction in consumer-friendly California<sup>74</sup> offends the latter’s sovereignty (and vice versa).

Finally, Part VII addresses the argument made by many conflicts scholars that states possess the constitutional authority to regulate the *extraterritorial* conduct of corporations headquartered within their borders. 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.”<sup>75</sup> Maine possesses a sovereign interest in regulating consumer transactions within its 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 Tribes.”<sup>76</sup> “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.”<sup>77</sup> “The Clause, in Justice Stone’s phrasing, ‘by its own force’ prohibits certain state actions that interfere with interstate commerce.”<sup>78</sup> Justice Black

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<sup>72</sup> *White v. Ford Motor Co.*, 312 F.3d 998, 1017 (9th Cir. 2002).

<sup>73</sup> *Id.* (noting that Alaska has adopted an innovation-friendly legal regime).

<sup>74</sup> *Wershba v. Apple Computer, Inc.*, 107 Cal. Rptr. 2d 220, 235 (Ct. App.) (noting that California has opted to enact very “pro-consumer laws”), *vacated* 110 Cal. Rptr. 2d, 145 (Ct. App. 2001).

<sup>75</sup> *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 196 (2d Cir. 2007) (second emphasis added).

<sup>76</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>77</sup> *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984).

<sup>78</sup> *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992) (quoting *S.C. State Highway Dep’t v. Barnwell Bros., Inc.*, 303 U.S. 177, 185 (1938)).

coined this “negative sweep”<sup>79</sup> the “*dormant* Commerce Clause.”<sup>80</sup> 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.<sup>81</sup> In my view, dormant Commerce Clause jurisprudence is far more straightforward than often depicted.

A. *The Dormant Commerce Clause 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.<sup>82</sup> First, the Clause “prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”<sup>83</sup> This is the Clause’s 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 them 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.”<sup>84</sup> 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 of the State’s borders, whether or not the commerce has effects within the State.”<sup>85</sup> The Clause dictates that “[n]o state has the authority to tell other polities what laws they must enact or how affairs must be

<sup>79</sup> *Id.* (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231–32, 239 (Johnson, J., concurring)).

<sup>80</sup> *Hill v. Florida*, 325 U.S. 538, 547 (1945) (emphasis added).

<sup>81</sup> See Peter C. Felmlly, Comment, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 467, 483 (2003) (asserting that “a review of circuit court opinions reveals that judges are not certain” what standard of review to apply in dormant Commerce Clause cases).

<sup>82</sup> *Nat’l Collegiate Athletic Ass’n v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993) (“The Supreme Court has outlined a two-tiered approach to analyzing state economic regulations under the Commerce Clause.”).

<sup>83</sup> *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988).

<sup>84</sup> *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.

<sup>85</sup> *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).

conducted.”<sup>86</sup> 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.”<sup>87</sup> 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.”<sup>88</sup> 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.<sup>89</sup> The Supreme Court’s decision in *Southern Pacific Co. v. Arizona*<sup>90</sup> is perhaps the most famous example of such. In that case, the Court struck down an Arizona statute limiting freight trains to seventy cars<sup>91</sup> 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.<sup>92</sup> Intrastate regulation such as Arizona’s is said to *incidentally* regulate<sup>93</sup> 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.<sup>94</sup>

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.”<sup>95</sup> As the Supreme Court explained, “[w]hen a state

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<sup>86</sup> Nat’l Solid Wastes Mgmt. Ass’n v. Meyer, 165 F.3d 1151, 1153 (7th Cir. 1999).

<sup>87</sup> Morgan v. Virginia, 328 U.S. 373, 377 (1946).

<sup>88</sup> Shafer v. Farmers Grain Co., 268 U.S. 189, 199 (1925).

<sup>89</sup> Edgar v. MITE Corp., 457 U.S. 624, 640 (1982) (plurality opinion).

<sup>90</sup> S. Pac. Co. v. Arizona, 325 U.S. 761 (1945).

<sup>91</sup> *Id.* at 763.

<sup>92</sup> *Id.* at 773.

<sup>93</sup> *Edgar*, 457 U.S. at 640.

<sup>94</sup> *Id.* *Morgan v. Virginia*, 328 U.S. 373 (1946), illustrates this concept. There, the pre-*Brown* Court struck down a Virginia statute requiring that passengers on interstate buses passing through the state be segregated by race. *Id.* at 381, 386. The Court concluded that the law 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.* at 386.

<sup>95</sup> *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n*, 489 U.S. 493, 523 (1989) (citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 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

statute [either] *directly* regulates or discriminates against interstate commerce . . . we have generally struck down the statute without further inquiry.”<sup>96</sup> Conversely, the Court recognized in *Pike v. Bruce Church, Inc.*,<sup>97</sup> that regulations falling within the ambit of the Clause’s anti-obstructionist function must be subjected to a balancing test.<sup>98</sup> 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.”<sup>99</sup>

This balancing test is required because the anti-obstructionist function stands in tension with the sovereign-capacity function.<sup>100</sup> Or-

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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, 597 (1997) (Scalia, J., dissenting) (internal quotation marks and citations omitted). To date, the Supreme Court has found only one discriminatory regulation that satisfies this rigid standard. In *Maine v. Taylor*, 477 U.S. 131 (1986), 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 damage to Maine’s fragile ecosystem. *Id.* at 147–48.

<sup>96</sup> *Brown-Forman Distillers*, 476 U.S. at 579 (emphasis added).

<sup>97</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

<sup>98</sup> *Id.* at 142.

<sup>99</sup> *Id.* (emphasis added). 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.” *S. Pac. Co. v. Arizona*, 325 U.S. 761, 764 (1945). 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.” *Id.* at 775–77.

<sup>100</sup> 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, striking down state regulations and thereby preserving a *laissez faire* status quo with respect to certain industries. *See, e.g.*, *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 292–93 (1921) (holding that Kentucky could not impose its own law on a contract for the sale of wheat “made in Kentucky and . . . to be performed there” 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,” 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

dinarily, “there is a residuum of power 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.”<sup>101</sup> Respect for the sovereign-capacity of states dictates that the Constitution generally permits *incidental* regulation<sup>102</sup> while *direct* extraterritorial regulation is prohibited virtually per se.<sup>103</sup> 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.<sup>104</sup>

*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.*,<sup>105</sup> that one state “has no power to project its legislation into” another state “by regulating the price to be paid in that state for [a commodity] acquired there.”<sup>106</sup> Although the *Baldwin* Court ultimately premised its decision on the protectionist nature of the statute at issue,<sup>107</sup> the Court later adopted Justice Cardozo’s dicta in three landmark opinions decided in the last thirty years: *Edgar v.*

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conduct within her borders dictates that the cases requiring national uniformity are exceedingly narrow. The most obvious contemporary example of a medium where national uniformity is required is the Internet. See *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003) (striking down a nondiscriminatory state statute proscribing individuals in other states from engaging in certain prohibited conduct on the Internet); *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 181 (S.D.N.Y. 1997) (same).

<sup>101</sup> *S. Pac. Co.*, 325 U.S. at 767 (emphasis added).

<sup>102</sup> *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982) (plurality opinion).

<sup>103</sup> *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

<sup>104</sup> *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n*, 489 U.S. 493, 525–26 (1989) (internal quotation marks omitted). 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 the virtually per se rule of invalidity. *Id.* at 523.

<sup>105</sup> *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511 (1935).

<sup>106</sup> *Id.* at 521.

<sup>107</sup> See *id.* at 522.

*MITE Corp.*,<sup>108</sup> *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,<sup>109</sup> and *Healy v. Beer Institute*.<sup>110</sup>

These decisions, which I refer to collectively as the *Edgar* trilogy, posit that the Commerce Clause bars each state from regulating conduct beyond her borders. As the *Healy* Court noted, the 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.”<sup>111</sup> When a state’s law “directly regulates” extraterritorial commerce, the Court has “generally struck down the statute without further inquiry.”<sup>112</sup> This restriction is necessary to protect “the autonomy of the individual States within their respective spheres.”<sup>113</sup> The next Subsection discusses the *Edgar*, *Brown-Forman*, and *Healy* decisions in detail.

### 1. *Edgar v. MITE Corp.*

In *Edgar v. MITE Corp.*, the Court addressed the constitutionality of an Illinois statute designed to restrict hostile corporate takeovers.<sup>114</sup> The statute required that notice of any takeover offer for the shares of a “target company” be given to Illinois’s Secretary of State and to the company twenty days before the offer became effective.<sup>115</sup> The statute defined “target company” as

a corporation or other issuer of securities of which shareholders located in Illinois own 10% of the class of equity securities subject to the offer, or for which any two of the following three conditions are met: the corporation has its principal executive office in Illinois, is organized under the laws of Illinois, or has at least 10% of its stated capital and paid-in surplus represented within the State.<sup>116</sup>

In 1979, MITE initiated a tender offer for all shares of the Chicago Rivet & Machine Co., a publicly held Illinois corporation.<sup>117</sup> MITE did not comply with Illinois’s anti-takeover statute, but instead filed suit seeking to enjoin the Illinois Secretary of State from enforcing

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<sup>108</sup> *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

<sup>109</sup> *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986).

<sup>110</sup> *Healy v. Beer Inst.*, 491 U.S. 324 (1989).

<sup>111</sup> *Id.* at 336 (internal quotation marks omitted).

<sup>112</sup> *Brown-Forman*, 476 U.S. at 579.

<sup>113</sup> *Healy*, 491 U.S. at 336.

<sup>114</sup> *Edgar v. MITE Corp.*, 457 U.S. 624, 624 (1982).

<sup>115</sup> *Id.* at 626–27.

<sup>116</sup> *Id.* at 627.

<sup>117</sup> *Id.*

ing the statute.<sup>118</sup> The Court struck down the Illinois law.<sup>119</sup> A four-Justice plurality concluded that the Act violated the Commerce Clause's sovereign-capacity function.<sup>120</sup>

*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."<sup>121</sup> But the "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."<sup>122</sup> The plurality noted that the tender offeror was "a Delaware corporation with principal offices in Connecticut."<sup>123</sup> It was thus "apparent that the Illinois statute . . . ha[d] a sweeping extraterritorial effect."<sup>124</sup>

The plurality concluded that this attempt to regulate transactions across state lines contravened the Commerce Clause's sovereign-capacity function.<sup>125</sup> "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."<sup>126</sup> "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.'"<sup>127</sup>

In striking down the statute, *Edgar's* majority carefully distinguished Illinois's statute from legitimate corporate governance regulation under the internal affairs doctrine.<sup>128</sup> The doctrine is "a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's *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."<sup>129</sup> Such matters are constitutionally governed by the corporation's state of incorporation. This

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118 *Id.* at 628.

119 *Id.* at 646.

120 *Id.* at 643, 646.

121 *Id.* at 641 (plurality opinion).

122 *Id.*

123 *Id.* at 642.

124 *Id.*

125 *Id.* at 641–43.

126 *Id.* at 642–43.

127 *Id.* at 643 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977)).

128 *Id.* at 645 (majority opinion).

129 *Id.* (emphasis added).



is so because, as the Court articulated in a later case, “[c]orporations . . . are creatures of *state* law,” and thus the state of incorporation’s law is the very “font” of its powers and determines its internal organization.<sup>130</sup>

The doctrine did not save the Illinois statute from MITE’s facial challenge<sup>131</sup> because the Act applied to corporations that were not incorporated in Illinois and thus fell outside the State’s regulatory authority.<sup>132</sup> “Illinois has no interest in regulating the internal affairs of foreign corporations.”<sup>133</sup> Accordingly, *Edgar* struck down the Illinois statute as an impermissible attempt to regulate extraterritorial conduct in violation of the Commerce Clause.<sup>134</sup>

## 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*.<sup>135</sup> There, the Court assessed the constitutionality of New York’s Alcoholic Beverage Control Law.<sup>136</sup> 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.<sup>137</sup> The challenged statute dictated that distributors must affirm to the state that those prices

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<sup>130</sup> *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 98–99 (1991) (emphasis added) (internal quotation marks omitted).

<sup>131</sup> *See Edgar*, 457 U.S. at 645–46. In my view, Illinois’s statute could have withstood an as-applied challenge because the target company was incorporated in Illinois. *Id.* at 627.

<sup>132</sup> *Id.* at 645.

<sup>133</sup> *Id.* at 645–46. The Court distinguished *Edgar* in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987). *CTS Corp.* 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, *id.* at 89 (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819)) (internal quotation marks omitted), the corporation was subject to the state’s authority to regulate the corporation’s internal affairs. *Id.* at 89–90. The state was only regulating voting rights of corporations “it ha[d] created” by its own law. *Id.* at 89. “No principle of corporation law and practice is 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. *See Edgar*, 457 U.S. at 642–43 (plurality opinion).

<sup>134</sup> *Edgar*, 457 U.S. at 646.

<sup>135</sup> *See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582 (1986).

<sup>136</sup> *Id.* at 575.

<sup>137</sup> *Id.*

were “no higher than the lowest price the distiller [would] charge[] wholesalers anywhere else in the United States” for the particular month in which the affirmation was made.<sup>138</sup>

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 “d[id] not dispute that New York’s affirmation law regulate[d] all distillers . . . evenhandedly” and that the state enacted it for a “legitimate,” i.e., nondiscriminatory, purpose: “to assure the lowest possible prices for its residents.”<sup>139</sup> Nonetheless, the petitioner distributor argued that New York’s law violated the dormant Commerce Clause because it “effectively regulate[d] 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.”<sup>140</sup> The Court agreed.<sup>141</sup>

*Brown-Forman* expanded *Edgar*’s extraterritoriality prohibition, applying the per se rule of invalidity.<sup>142</sup> “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.”<sup>143</sup>

Applying this rule, the Court concluded that New York’s evenhanded<sup>144</sup> statute constituted extraterritorial regulation.<sup>145</sup> “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.”<sup>146</sup> By “[f]orcing a merchant to seek regulatory approval in” New York before transacting in another state,<sup>147</sup> “New York has ‘project[ed] its legislation’ into other States, and directly regulated commerce

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 579. This “evenhanded” regulation was subject to the per se rule of invalidity rather than the *Pike* balancing test because it *directly* regulated extraterritorial commerce—it did not do so *indirectly* by simply imposing nonuniform state requirements within the state. *Id.*

<sup>140</sup> *Id.* at 579–80.

<sup>141</sup> *Id.* at 582.

<sup>142</sup> Prior to *Brown-Forman*, the per se rule of invalidity had only been applied to protectionist statutes. See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (“[W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.”).

<sup>143</sup> *Brown-Forman*, 476 U.S. at 579.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 582–84.

<sup>146</sup> *Id.* at 582.

<sup>147</sup> *Id.* (citing *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality opinion)).

therein” in violation of the Commerce Clause.<sup>148</sup> The Court thus struck down the Act “without further inquiry.”<sup>149</sup>

### 3. Healy v. Beer Institute

In *Healy v. Beer Institute*, the Court confronted a Connecticut statute similar to that struck down in *Brown-Forman*.<sup>150</sup> 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.”<sup>151</sup>

Unlike New York’s alcoholic beverage control laws, “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.”<sup>152</sup> Nonetheless, the Court concluded that the statute had the practical effect of regulating extraterritorial commerce<sup>153</sup> because it “purposeful[ly] interact[ed] with border-state regulatory schemes.”<sup>154</sup> 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 price he hopes to charge in Connecticut during the month of March.<sup>155</sup>

The Court concluded that this interaction with Massachusetts’s 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.”<sup>156</sup> The Court concluded that by “t[ying] pricing to the regulatory schemes of the border states . . . the Connecticut statute ha[d] the

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<sup>148</sup> *Id.* at 584 (alterations in original) (quoting *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 521 (1935)).

<sup>149</sup> *Id.* at 579.

<sup>150</sup> See *Healy v. Beer Inst.*, 491 U.S. 324, 326 (1989).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 329.

<sup>153</sup> *Id.* at 337.

<sup>154</sup> *Id.* at 330 (internal quotation marks omitted).

<sup>155</sup> *Id.* at 338.

<sup>156</sup> *Id.* (internal quotation marks omitted).

extraterritorial effect condemned in *Brown-Forman* of preventing brewers from undertaking competitive pricing in Massachusetts based on prevailing market conditions.”<sup>157</sup>

The Court found that such direct extraterritorial regulation violated the Commerce Clause’s sovereign-capacity function.<sup>158</sup> 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.”<sup>159</sup>

*Healy* 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.<sup>160</sup>

These prohibitions dictated that Connecticut’s statute was an 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.”<sup>161</sup>

*Healy* also struck down Connecticut’s statute as a violation of the Clause’s anti-protectionist function.<sup>162</sup> Unlike the New York law at issue in *Brown-Forman*—which applied evenhandedly to all distributors regardless of where they did business<sup>163</sup>—“the Connecticut affir-

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<sup>157</sup> *Id.*

<sup>158</sup> *See id.* at 340.

<sup>159</sup> *Id.* at 335–36 (footnote omitted).

<sup>160</sup> *Id.* at 336 (citations omitted) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (plurality opinion)).

<sup>161</sup> *Id.* at 340.

<sup>162</sup> *See id.* at 341.

<sup>163</sup> *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

mation 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.”<sup>164</sup> Thus, unlike New York’s statute,<sup>165</sup> the Connecticut Act “discriminate[d] against interstate commerce”<sup>166</sup> 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.”<sup>167</sup> Accordingly, the Court noted that the Connecticut statute independently violated *both* the Commerce Clause’s *sovereign-capacity* and *anti-protectionist functions*.<sup>168</sup>

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

Despite the *Edgar* trilogy’s unambiguous pronouncements, many scholars argue that the anti-protectionist function is, in fact, the only legitimate dormant Commerce Clause function formally recognized by the Supreme Court.<sup>169</sup> They argue that the Clause should be read only to prevent the “rivalries and reprisals” that inevitably occur when states erect customs barriers to interstate commerce.<sup>170</sup>

Professor Mark Rosen argues that “[t]he Dormant Commerce Clause jurisprudence that speaks of a near per se prohibition of extraterritoriality . . . should be understood as applying only to protectionist state statutes . . . .”<sup>171</sup> Professor Rosen acknowledges that “several of the extraterritorial cases admittedly have deployed language that is

<sup>164</sup> *Healy*, 491 U.S. at 341.

<sup>165</sup> *Brown-Forman*, 476 U.S. at 579.

<sup>166</sup> *Healy*, 491 U.S. at 340.

<sup>167</sup> *Id.* at 341. 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.* Conversely, there is no evidence that the New York statute struck down 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., *nondiscriminatory*—purpose: “to assure the lowest possible prices for its residents.” *Brown-Forman*, 476 U.S. at 579 (emphasis added).

<sup>168</sup> *Healy*, 491 U.S. at 342–43.

<sup>169</sup> See *infra* notes 171–76 and accompanying text.

<sup>170</sup> *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 522 (1935).

<sup>171</sup> Rosen, *supra* note 7, at 923.

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.”<sup>172</sup> According to Professor Rosen, *Edgar v. MITE Corp.*—decided by a mere plurality<sup>173</sup>—constitutes the “singular exception” to this paradigm.<sup>174</sup> Professors Jack Goldsmith and Alan Sykes likewise assert that the *Edgar* trilogy’s references to a sovereign-capacity function should be dismissed as mere “dicta.”<sup>175</sup>

Although I acknowledge that many scholars find the Commerce Clause’s extraterritoriality prohibition improvident, the oft-repeated assertion that it is mere “dicta” baffles me.<sup>176</sup> *Edgar* indeed was decided only by a plurality, but its rationale was adopted by a majority of the Court in both *Brown-Forman*<sup>177</sup> and *Healy*.<sup>178</sup> *Healy* premised its holding on dual grounds, finding the statute at issue unconstitutional both because it was discriminatory<sup>179</sup> and because it had “the ‘practical effect’ of regulating commerce occurring wholly outside th[e] State’s borders.”<sup>180</sup> This does not render the Court’s extraterritorial-effects holding dicta. “[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*.”<sup>181</sup>

But the 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 rea-

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<sup>172</sup> *Id.* at 925.

<sup>173</sup> *Edgar v. MITE Corp.*, 457 U.S. 624, 626 (1982).

<sup>174</sup> Rosen, *supra* note 7, at 925.

<sup>175</sup> Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 789–90, 806 (2001).

<sup>176</sup> See Mark D. Rosen, Respondents, “Hard” or “Soft” Pluralism?: Positive, Normative, and Institutional Considerations of States’ Extraterritorial Powers, 51 ST. LOUIS U. L.J. 713, 718 (2007) (“[S]tates 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.”); Allen Rostron, *The Supreme Court, the Gun Industry, and the Misguided Revival of Strict Territorial Limits on the Reach of State Law*, 2003 MICH. ST. L. REV. 115, 130, 134–35 (asserting that the *Edgar* trilogy’s extraterritoriality prohibitions constitute dicta); see also Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 638 (2007) (“In condemning extraterritorial regulation as impermissible under the Dormant Commerce Clause, the Supreme Court has typically spoken in contexts involving what it calls economic protectionism . . .”).

<sup>177</sup> *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578–79, 582 (1986).

<sup>178</sup> *Healy v. Beer Inst.*, 491 U.S. 324, 335–36 (1989).

<sup>179</sup> *Id.* at 340.

<sup>180</sup> *Id.* at 332.

<sup>181</sup> *Woods v. Interstate Realty Co.*, 337 U.S. 535, 536 (1949) (emphasis added).

son than because it directly regulated conduct outside New York's borders.<sup>182</sup> 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.<sup>183</sup> The parties "d[id] not dispute that New York's affirmation law regulate[d] all distillers . . . evenhandedly" and the State enacted it for a "legitimate," i.e., nondiscriminatory, purpose: "to assure the lowest possible prices for its residents."<sup>184</sup> The Court held that the statute must be "struck down . . . without further inquiry"<sup>185</sup> for one reason alone, because it "regulate[d] out-of-state transactions in violation of the Commerce Clause."<sup>186</sup> This was not dicta.<sup>187</sup> As Judge Friendly noted—countering similar assertions that *Erie's* constitutional pronouncements were dicta—"a court's stated and, on its view, necessary

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<sup>182</sup> *Brown-Forman*, 476 U.S. at 582.

<sup>183</sup> *Id.* at 579.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 582.

<sup>187</sup> 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 per se rule of invalidity to state efforts to engage in nondiscriminatory regulation of extraterritorial commerce. *E.g.*, *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 489–92 (4th Cir. 2007) (interpreting a nondiscriminatory South Carolina automobile-dealership law only to apply within the state because extraterritorial application would violate the dormant Commerce Clause); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 102–04 (2d Cir. 2003) (striking down a nondiscriminatory Vermont statute prohibiting individuals in other states from engaging in certain conduct on the Internet); *Dean Foods Co. v. Brancel*, 187 F.3d 609, 615–18, 620 (7th Cir. 1999) (striking down a nondiscriminatory Wisconsin milk-pricing regulation that regulated conduct outside of Wisconsin); *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 165 F.3d 1151, 1153 (7th Cir. 1999) (striking down a nondiscriminatory Wisconsin statute requiring communities in other states to adopt mandatory recycling policies); *Morley-Murphy Co. v. Zenith Elecs. Corp.*, 142 F.3d 373, 379–80 (7th Cir. 1998) (barring extraterritorial application of a nondiscriminatory Wisconsin statute regulating the relationship between manufacturers and their dealers); *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 638–40 (9th Cir. 1993) (striking down a nondiscriminatory Nevada statute directly regulating the activities of the National Collegiate Athletic Association outside of Nevada); *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 843–45 (1st Cir. 1988) (finding a nondiscriminatory Massachusetts antitakeover statute inapplicable to corporations not incorporated in Massachusetts); *Am. Library Ass'n v. Pataki*, 969 F. Supp. 160, 175–80 (S.D.N.Y. 1997) (striking down a nondiscriminatory New York criminal statute prohibiting individuals in other states from engaging in certain conduct on the Internet); *Medigen of Ky., Inc. v. Pub. Serv. Comm'n*, 787 F. Supp. 590, 596–600 (S.D.W. Va. 1991) (striking down a nondiscriminatory West Virginia statute regulating the handling of medical waste outside West Virginia); *Old Coach Dev. Corp., Inc. v. Tanzman*, 692 F. Supp. 424, 429–34 (D.N.J. 1988) (barring jurisdiction of the New Jersey Real Estate Commission over advertisements for Pennsylvania property), *aff'd*, 881 F.2d 1227 (3d Cir. 1989).

basis for deciding does not become dictum because a critic would have decided on another basis.”<sup>188</sup>

Moreover, state *protectionism* and state *paternalism* are, to my mind, distinguished by a constitutionally indistinguishable line. As the Fourth Circuit observed, finding that the dormant Commerce Clause barred the application of a nondiscriminatory 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.<sup>189</sup>

In short, both a state’s protectionist attempt to discriminate against out-of-state competition and its paternalistic attempt to impose its judgment on sister states equally open the door to the very “rivalries and reprisals”<sup>190</sup> between states that existed under the Articles of Confederation.<sup>191</sup> This is the very state of affairs the Framers sought to quell when they designed the Constitution.<sup>192</sup>

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<sup>188</sup> Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 385–86 (1964).

<sup>189</sup> *Carolina Trucks*, 492 F.3d at 490 (internal quotation marks and citations omitted).

<sup>190</sup> *Id.*

<sup>191</sup> See Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL’Y 247, 266 n.83 (1997).

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.

*Id.*

<sup>192</sup> *Id.*



D. *The Sovereign-Capacity Function Preserves Each State's "Residuary and Inviolable Sovereignty" by Preventing Sister States from Preempting 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."<sup>193</sup> This autonomy stems from the "residuary and inviolable sovereignty" retained by the states.<sup>194</sup>

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 sphere of authority."<sup>195</sup> Jurists have long recognized that preservation of this principle requires careful confinement of the exercise of federal authority to its constitutionally enumerated powers.<sup>196</sup> This sentiment served as a mantra for the so-called federalism revolution of the 1990s.<sup>197</sup> This "revolution" focused on "*vertical federalism*"—the distribution of sovereign powers between the state and federal governments.<sup>198</sup> But in my view, a vibrant "*horizontal federalism*" jurisprudence—protecting state polities from regulatory intrusions by sister states<sup>199</sup> by preserving "the autonomy of the individual States within their respective spheres"<sup>200</sup>—comprises an equally important component to defending this "residuary and inviolable"<sup>201</sup> state sovereignty. This sovereignty principle is violated when the policy choice of one state—be it legislative, administrative or judicial—is imposed upon its sister states.<sup>202</sup> "In this Nation

<sup>193</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>194</sup> *N. Ins. Co. of N.Y. v. Chatham Cnty.*, 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." *S. Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945).

<sup>195</sup> *Printz v. United States*, 521 U.S. 898, 928 (1997).

<sup>196</sup> *See, e.g., Alden v. Maine*, 527 U.S. 706, 713–15 (1999).

<sup>197</sup> Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 7 (2001).

<sup>198</sup> *Jones v. State*, 745 A.2d 856, 866–67 (Del. 1999) (emphasis added).

<sup>199</sup> *Id.* (emphasis added).

<sup>200</sup> *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).

<sup>201</sup> *N. Ins. Co. v. Chatham Cnty.*, 547 U.S. 189, 194 (2006) (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)).

<sup>202</sup> In my view, a regulatory intrusion by a sister state constitutes a more serious violation

each sovereign governs only with the consent of the governed.”<sup>203</sup> 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.”<sup>204</sup>

The Court’s opinion in *Nevada v. Hall*<sup>205</sup> illustrates this principle. *Hall* involved a tort action brought by California plaintiffs against the state of Nevada.<sup>206</sup> A Nevada employee who had entered California on state business caused a traffic accident, causing severe injuries to the plaintiffs.<sup>207</sup> Nevada law strictly limited the state’s financial liability in negligence actions brought against it.<sup>208</sup> Conversely, California law dictated that state actors enjoyed no greater protection from judgments than ordinary litigants.<sup>209</sup> California’s Supreme Court affirmed a judgment against Nevada that exceeded the liability limits of Nevada law.<sup>210</sup>

The United States 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.<sup>211</sup> 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.<sup>212</sup>

This principle embodies the revolutionary slogan decrying “taxation without representation.”

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 lia-

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than a federal incursion because the offended polity is represented in Congress, but lacks *any* representation in the offending state’s government.

<sup>203</sup> *Nevada v. Hall*, 440 U.S. 410, 426 (1979).

<sup>204</sup> S. REP. NO. 109-14, at 24 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 24.

<sup>205</sup> *Nevada v. Hall*, 440 U.S. 410 (1979).

<sup>206</sup> *Id.* at 411.

<sup>207</sup> *Id.* at 411–12.

<sup>208</sup> *Id.* at 412 & n.2.

<sup>209</sup> *See id.* at 412 & n.1.

<sup>210</sup> *Id.* at 413–14.

<sup>211</sup> *See id.* at 426–27.

<sup>212</sup> *Id.*

bility 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 equally entitled to our respect.<sup>213</sup>

This sentiment is equally applicable to the imposition of state consumer protection laws. Such laws vary substantially, imposing myriad “different . . . substantive elements, including differing requirements of privity, demand, scienter and reliance.”<sup>214</sup> Such regulation is a quintessential function of state sovereignty.<sup>215</sup>

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.”<sup>216</sup> 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*.”<sup>217</sup> The imposition of one state's consumer protection statute upon sales made in a sister state violates this principle. As the Seventh Circuit explained, “[n]o state has the authority to tell other polities what laws they must enact or how affairs must be conducted outside its borders.”<sup>218</sup>

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<sup>213</sup> *Id.* 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. *Cf.* *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 686 (1983) (Rehnquist, J., dissenting) (noting that Congress has the power to overrule decisions of the Supreme Court). 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).

<sup>214</sup> *Kaczmarek v. IBM Corp.*, 186 F.R.D. 307, 312 (S.D.N.Y. 1999).

<sup>215</sup> *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 196 (2d Cir. 2007).

<sup>216</sup> Goldsmith & Sykes, *supra* note 175, at 796. I believe Professors Goldsmith and Sykes may have conflated the dormant Commerce Clause's anti-obstructionist function, which limits a state's authority to regulate *intrastate* conduct by imposing nonuniform regulations which lead regulated actors to alter their out-of-state conduct, with its sovereign-capacity function, which bars states from *directly* regulating *extraterritorial* conduct. *See supra* Part I.A (explaining the dormant Commerce Clause's three functions). I wholly agree with Professors Goldsmith and Sykes's view that state sovereignty strictly limits the use of the Clause's anti-obstructionist function to strike down nonuniform local regulation.

<sup>217</sup> *SPGGC*, 505 F.3d at 196 (second emphasis added).

<sup>218</sup> *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 165 F.3d 1151, 1153 (7th Cir. 1999).

*E. The Dormant Commerce Clause Became the Principal 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 protections.<sup>219</sup> Many argue that the Due Process and Full Faith and Credit Clauses are more natural repositories for such protections.<sup>220</sup> But, as explained 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.<sup>221</sup>

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.<sup>222</sup> This "liquidation" process was accomplished in large part through judicial precedent.<sup>223</sup> 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.<sup>224</sup>

Conversely, the Court has recognized the touchstone of the Due Process and Full Faith and Credit Clauses to be "fairness for individual defendants."<sup>225</sup> In the horizontal-federalism context, this only requires that the application of a particular state's law to extraterritorial

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<sup>219</sup> *E.g.*, 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").

<sup>220</sup> *See, e.g.*, Alex Ellenberg, *Due Process Limitations on Extraterritorial Tort Legislation*, 92 CORNELL L. REV. 549, 555 (2007) ("[W]hile 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."); Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133, 1153 (2010) (arguing that "the Full Faith and Credit Clause is the more natural source for limitations on state extraterritorial powers").

<sup>221</sup> *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818 (1985) (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981) (plurality opinion)).

<sup>222</sup> THE FEDERALIST NO. 37, at 269 (James Madison) (Benjamin Fletcher Wright ed., 1961).

<sup>223</sup> LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 10–11 (2008).

<sup>224</sup> *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 522 (1935); *accord* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194–96 (1824).

<sup>225</sup> *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992).

conduct results in “no element of unfair surprise” to the regulated parties; i.e., that they would “have anticipated” that the chosen law “might apply” to their dispute.<sup>226</sup> The Court has found that neither due process nor the Full Faith and Credit Clause afford any recognition of the sovereign rights of *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 187 years of judicial precedent to transpose the constitutional buttress against “rivalries and reprisals”<sup>227</sup> from the Commerce Clause to other more intuitive constitutional provisions would simply undermine the principle of *stare decisis*. The Constitution is not simply “an inert blueprint,”<sup>228</sup> 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.”<sup>229</sup> Undermining the stability of that edifice would bring more harm than good.

## II. CERTIFICATION OF MULTISTATE CLASS ACTIONS UNDER THE LAW OF A SINGLE STATE OFFENDS PRINCIPLES OF STATE SOVEREIGNTY

The extraterritorial regulations condemned by the *Edgar* trilogy all involved state *legislative* action. But extraterritorial regulation can equally be accomplished by state *judicial* action. State paternalism has been particularly pernicious in multistate class action litigation.

When a court—whether state or federal—certifies a class action involving class members in multiple states under *one state’s* consumer protection law, the court threatens to impose one state’s policy beyond its borders. Every state has enacted its own distinct consumer protection statute.<sup>230</sup> These laws create “a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States.”<sup>231</sup> “The state laws on these claims present different . . . substantive elements, including differing requirements of privity, demand, scienter and reliance.”<sup>232</sup> Such variations in policy constitute an integral part

<sup>226</sup> *Hague*, 449 U.S. at 318 n.24.

<sup>227</sup> *Baldwin*, 294 U.S. at 522.

<sup>228</sup> TRIBE, *supra* note 223, at 9.

<sup>229</sup> *Id.* at 11.

<sup>230</sup> See *Kaczmarek v. IBM Corp.*, 186 F.R.D. 307, 312 (S.D.N.Y. 1999).

<sup>231</sup> *BMW of N. Am. v. Gore*, 517 U.S. 559, 570 (1996).

<sup>232</sup> *Kaczmarek*, 186 F.R.D. at 312.

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.”<sup>233</sup> Notwithstanding such concerns, courts have frequently certified multi-state, and often nationwide, classes under a single state’s consumer protection statute.<sup>234</sup> Concerns that such judicial paternalism interfered with the authority of states to regulate consumer transactions within their borders prompted Congress to enact CAFA.<sup>235</sup>

As CAFA’s proponents explained in the statute’s Senate Report, CAFA 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.”<sup>236</sup> Such rulings “have nationwide ramifications, sometimes overturning well-established laws and policies of other jurisdictions.”<sup>237</sup> Former acting Solicitor General Walter Dellinger labeled this practice “false federalism.”<sup>238</sup> CAFA’s proponents argued that 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.”<sup>239</sup>

CAFA was premised upon the largely ad hominem assertion that “state court judges are less careful than their federal court counterparts” with respect to the observation of the constitutional rights of class action litigants.<sup>240</sup> CAFA’s sponsors argued that authorizing removal of multistate class actions would quell false federalism<sup>241</sup> because state jurists had widely failed to observe “constitutionally

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<sup>233</sup> SPGGC, LLC v. Blumenthal, 505 F.3d 183, 196 (2d Cir. 2007).

<sup>234</sup> S. REP. NO. 109-14, at 24–25 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 24–25.

<sup>235</sup> *Id.* at 24, 26, *reprinted in* 2005 U.S.C.C.A.N. at 24, 26.

<sup>236</sup> *Id.* at 24, *reprinted in* 2005 U.S.C.C.A.N. at 24.

<sup>237</sup> *Id.* at 4, *reprinted in* 2005 U.S.C.C.A.N. at 6.

<sup>238</sup> *Id.* at 26 & n.117, *reprinted in* 2005 U.S.C.C.A.N. at 26 & n.117.

<sup>239</sup> *Id.* at 26, *reprinted in* 2005 U.S.C.C.A.N. at 26. The Senate Report asserts that “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.” *Id.* at 24, *reprinted in* 2005 U.S.C.C.A.N. at 24.

<sup>240</sup> *Id.* at 14, *reprinted in* 2005 U.S.C.C.A.N. at 14. 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 (codified as amended in scattered sections of the U.S. Code) (limiting the circumstances under which habeas petitioners may collaterally attack a state-court conviction in federal court).

<sup>241</sup> *See* S. REP. NO. 109-14, at 14, 26, *reprinted in* 2005 U.S.C.C.A.N. at 14–15, 26.

required . . . *due process* and other fairness protections” recognized by the Supreme Court’s landmark opinion *Phillips Petroleum Co. v. Shutts*.<sup>242</sup> *Shutts* mandated 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.”<sup>243</sup> CAFA’s proponents 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 “States should not apply their own laws to matters with which they have no significant contact.”<sup>244</sup>

CAFA did not empower federal courts to enact *federal* choice of law rules. Rather, it left federal courts to apply *state* conflicts rules.<sup>245</sup> It must be noted that if Congress wishes 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.<sup>246</sup> In effect, Congress could authorize the imposition of one state’s law beyond its borders. The dormant Commerce Clause “do[es] not limit . . . the authority of *Congress* to regulate commerce among the several States as it sees fit.”<sup>247</sup> 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.”<sup>248</sup>

But Congress premised CAFA upon its power to endow federal courts with diversity jurisdiction—jurisdiction over cases and controversies involving citizens from different states.<sup>249</sup> 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.”<sup>250</sup> CAFA ended this practice by authorizing federal courts to

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<sup>242</sup> See *id.* at 94, reprinted in 2005 U.S.C.C.A.N. at 86 (emphasis added) (citing *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797 (1985)) (discussing minority’s opinion that the sponsors’ concerns are unfounded because *Shutts* requires state courts to provide these protections).

<sup>243</sup> *Id.*, reprinted in 2005 U.S.C.C.A.N. at 86.

<sup>244</sup> *Id.* at 63, reprinted in 2005 U.S.C.C.A.N. at 58 (citing *Shutts*, 472 U.S. at 821–22).

<sup>245</sup> *Id.* at 61, reprinted in 2005 U.S.C.C.A.N. at 57.

<sup>246</sup> See *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652–53 (1981).

<sup>247</sup> *Id.* at 652 (1981); accord *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 61 (2003) (noting that the price of milk in most states is regulated by federal marketing orders).

<sup>248</sup> *W. & S. Life Ins.*, 451 U.S. at 652–53.

<sup>249</sup> S. REP. NO. 109-14, at 7–9, reprinted in 2005 U.S.C.C.A.N. at 8–10; 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 . . .”).

<sup>250</sup> S. REP. NO. 109-14, at 10, reprinted in 2005 U.S.C.C.A.N. at 11.

exercise diversity jurisdiction over “state-law-based class actions in which diversity is *minimal* (one plaintiff’s diversity from one defendant suffices), and the matter in controversy is an aggregate amount in excess of \$5,000,000.”<sup>251</sup> CAFA did not empower federal courts to impose their own choice of law rules upon the states. The statute “d[id] not change substantive law—it is, in effect, a procedural provision only.”<sup>252</sup> It is simply “a narrowly-tailored expansion of federal diversity jurisdiction.”<sup>253</sup>

Because CAFA merely expanded diversity jurisdiction, the *Erie* doctrine<sup>254</sup> dictates that a federal court deciding cases that were removed under the statute “must apply the choice-of-law rules of the State in which it sits.”<sup>255</sup> CAFA’s efficacy at quelling false federalism thus 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.<sup>256</sup>

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<sup>251</sup> Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 594 n.12 (2005) (Ginsburg, J., dissenting) (emphasis added) (internal quotation marks omitted).

<sup>252</sup> S. REP. NO. 109-14, at 61, reprinted in 2005 U.S.C.C.A.N. at 57.

<sup>253</sup> *Id.* at 27, reprinted in 2005 U.S.C.C.A.N. at 27. 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) (2006). 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 9, reprinted in 2005 U.S.C.C.A.N. at 10. 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.

State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530–31 (1967) (citations omitted).

<sup>254</sup> See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>255</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 243 n.8 (1981) (citing *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941)).

<sup>256</sup> See Marcus, *supra* note 29, at 1302–03 (arguing that because CAFA is a purely procedural statute, federal courts must apply the same state choice of law rules that yielded multistate class actions).



### III. THE DUE PROCESS CLAUSE DOES 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 ignoring<sup>257</sup> stem from the Supreme Court's decisions in *Allstate Insurance Co. v. Hague* and *Phillips Petroleum Co. v. Shutts*. These decisions enunciated the limitations imposed upon state choice of law by the Due Process and Full Faith and Credit Clauses.

##### 1. *Allstate Insurance 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.<sup>258</sup> Mr. Hague died when a motorist rear-ended the motorcycle on which he rode.<sup>259</sup> The accident occurred on a Wisconsin road and the driver of the other vehicle was also a Wisconsin resident.<sup>260</sup> The driver responsible for the accident did not carry any automobile insurance.<sup>261</sup> But Allstate Insurance Company insured Mr. Hague against losses incurred in accidents with uninsured motorists.<sup>262</sup> Mr. Hague's policy limited this coverage to \$15,000 for each of the three vehicles he owned.<sup>263</sup>

After the accident, Mr. Hague's widow moved to Minnesota.<sup>264</sup> There she filed a 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."<sup>265</sup> Minnesota law permitted stacking; Wisconsin law did not.<sup>266</sup> The Minnesota trial court applied Minnesota law and ruled in Mrs. Hague's favor.<sup>267</sup> Minnesota's Supreme Court

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<sup>257</sup> See S. REP. NO. 109-14, at 14, 94, *reprinted in* 2005 U.S.C.C.A.N. at 14-15, 86.

<sup>258</sup> *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 305 (1981) (plurality opinion).

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 306.

<sup>267</sup> *Id.*

affirmed the application of Minnesota law.<sup>268</sup> 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.”<sup>269</sup> The court noted “that the Minnesota contacts might not be, in themselves, sufficient to mandate application of [Minnesota] law . . . under the first four factors.”<sup>270</sup> Nonetheless, the court concluded that Minnesota law should apply because, in its view, Minnesota’s approach was “*the better rule of law*.”<sup>271</sup> 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.<sup>272</sup>

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.”<sup>273</sup> This was so because “a set of facts giving rise to a lawsuit . . . may justify, in constitutional terms, application of the law of more than one jurisdiction.”<sup>274</sup> The Court’s “sole function” was thus 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.<sup>275</sup>

The *Hague* plurality borrowed from the personal jurisdiction standard dictated by *International Shoe Co. v. Washington*,<sup>276</sup> 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.”<sup>277</sup> These Clauses focus on the protection of individual litigants, ensuring “that the choice of law is neither arbitrary nor fundamentally unfair.”<sup>278</sup> To meet this

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<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 306–07 (alteration in original) (internal quotation marks omitted).

<sup>271</sup> *Id.* at 307 (emphasis added).

<sup>272</sup> *See id.* at 304.

<sup>273</sup> *Id.* at 307.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 307–08.

<sup>276</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

<sup>277</sup> *Hague*, 449 U.S. at 308 (emphasis added).

<sup>278</sup> *Id.*

standard, the litigants must be subjected to “no element of unfair surprise.”<sup>279</sup> Sufficient *contact* must exist with the chosen jurisdiction’s law such that the litigants would “have anticipated” that its law might apply.<sup>280</sup> 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.”<sup>281</sup>

Applying these “modest restrictions,”<sup>282</sup> *Hague*’s plurality concluded that three contacts existed between Minnesota, the parties, and the accident, which, “[i]n the aggregate,” rendered the choice of Minnesota law constitutionally permissible.<sup>283</sup>

First, Mr. Hague worked for a Minnesota employer for fifteen years preceding his death.<sup>284</sup> “While employment status may implicate a state interest less substantial than does resident 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.”<sup>285</sup>

Second, the plurality noted that “Allstate was at all times present and doing business in Minnesota.”<sup>286</sup> 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 . . . a longstanding member of Minnesota’s work force.”<sup>287</sup>

Finally, the plurality noted that at the time the case was litigated, Mrs. Hague was a Minnesota resident.<sup>288</sup> Although “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.”<sup>289</sup> Mrs. Hague’s residence “consti-

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<sup>279</sup> *Id.* at 318 n.24.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 312–13.

<sup>282</sup> *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818 (1985) (citing *Hague*, 449 U.S. at 312–13).

<sup>283</sup> *Hague*, 449 U.S. at 313.

<sup>284</sup> *Id.* at 313–14.

<sup>285</sup> *Id.* at 314.

<sup>286</sup> *Id.* at 317.

<sup>287</sup> *Id.* at 317–18.

<sup>288</sup> *Id.* at 319. 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.*

<sup>289</sup> *Id.*

tute[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 them off welfare rolls and able to meet financial obligations.”<sup>290</sup>

*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.<sup>291</sup>

## 2. Phillips Petroleum Co. v. Shutts

A majority of the Court adopted the *Hague* plurality’s standard in *Phillips Petroleum Co. v. Shutts*.<sup>292</sup> *Shutts* stemmed from a nationwide class action filed in Kansas state court on behalf of 28,000 land owners who leased land to Phillips Petroleum for the extraction of natural gas.<sup>293</sup> 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.<sup>294</sup> The class members resided in “all 50 states, the District of Columbia, and several foreign countries.”<sup>295</sup> The trial court certified the nationwide class under Kansas law and ultimately entered judgment against Phillips.<sup>296</sup> Kansas’s Supreme Court affirmed the judgment.<sup>297</sup>

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<sup>290</sup> *Id.* (internal quotation marks omitted).

<sup>291</sup> *Id.* at 320 (footnote omitted).

<sup>292</sup> *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 821–22 (1985).

<sup>293</sup> *Id.* at 799.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* 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.* at 820. 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 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 United States Supreme Court granted certiorari and reversed.<sup>298</sup>

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."<sup>299</sup>

The Court concluded that Kansas possessed the requisite contacts with respect to claims brought on behalf of Kansas domiciliaries.<sup>300</sup> But sufficient contacts did not exist between Kansas and the out-of-state class members to satisfy the prohibition against "unfair surprise."<sup>301</sup> "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."<sup>302</sup> As *Hague* explained, for sufficient contact to exist, the litigants must "have anticipated" that the state's law might apply to their transaction.<sup>303</sup> Phillips was not incorporated in Kansas, nor was its principal place of business located there.<sup>304</sup> The requirements of the Due Process and Full Faith and Credit Clauses articulated by *Hague* were thus not satisfied.

The Court concluded its decision by reiterating *Hague*'s view that these Clauses imposed only "modest restrictions" upon state conflicts law.<sup>305</sup> "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."<sup>306</sup>

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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.*

<sup>298</sup> *Id.* at 823.

<sup>299</sup> *Id.* at 821–22 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981) (plurality opinion)).

<sup>300</sup> *Id.* at 823.

<sup>301</sup> *Hague*, 449 U.S. at 318 n.24.

<sup>302</sup> *Shutts*, 472 U.S. at 822.

<sup>303</sup> *Hague*, 449 U.S. at 318 n.24; accord *Shutts*, 472 U.S. at 822.

<sup>304</sup> *Shutts*, 472 U.S. at 799.

<sup>305</sup> *Id.* at 818 (citing *Hague*, 449 U.S. at 312–13).

<sup>306</sup> *Id.* at 823.

B. *The State Court Decisions Identified by CAFA's Senate Report as Paradigmatic Examples of False Federalism All Satisfied Hague-Shutts's Choice of Law Limitations*

CAFA's supporters largely premised their claim that state courts have routinely ignored *Hague-Shutts's* due process requirements<sup>307</sup> on four state appellate court decisions affirming the certification of nationwide classes<sup>308</sup>—*Avery v. State Farm Mutual Automobile Insurance Co.*,<sup>309</sup> *Clark v. Tap Pharmaceutical Products, Inc.*,<sup>310</sup> *Peterson v. BASF Corp.*,<sup>311</sup> and *Ysbrand v. DiamlerChrysler Corp.*<sup>312</sup> The Senate Report describes these decisions as paradigmatic examples of “false federalism.”<sup>313</sup>

In *Avery*, the Illinois Court of Appeals affirmed a trial court's certification of a nationwide class action against an Illinois-based insurance company under Illinois's consumer protection statute.<sup>314</sup> 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 (OEM).”<sup>315</sup>

<sup>307</sup> See S. REP. NO. 109-14, at 14, 94 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 14–15, 86.

<sup>308</sup> *Id.* at 25, reprinted in 2005 U.S.C.C.A.N. at 25.

<sup>309</sup> *Avery v. State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242 (Ill. App. Ct. 2001), *aff'd in part, rev'd in part*, 835 N.E.2d 801 (Ill. 2005).

<sup>310</sup> *Clark v. Tap Pharm. Prods., Inc.*, 798 N.E.2d 123 (Ill. App. Ct. 2003).

<sup>311</sup> *Peterson v. BASF Corp.*, 657 N.W.2d 853 (Minn. Ct. App. 2003), *aff'd*, 675 N.W.2d 57 (Minn. 2004), *vacated*, 544 U.S. 1012 (2005).

<sup>312</sup> *Ysbrand v. DiamlerCrysler*, 81 P.3d 618 (Okla. 2003).

<sup>313</sup> See S. REP. NO. 109-14, at 25, reprinted in 2005 U.S.C.C.A.N. at 25. CAFA's Senate Report also noted the Illinois Court of Appeals' decision in *PJ's Concrete Pumping Service, Inc. v. Nextel West 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 25, reprinted in 2005 U.S.C.C.A.N. at 25. But the Report neglected to note that *PJ's Concrete* specifically observed “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).

<sup>314</sup> *Avery*, 746 N.E.2d at 1257. The Illinois Supreme Court later reversed the appellate court's decision in *Avery*, concluding that certification—although not inconsistent with *Shutts's* due process limitations—was not permissible under Illinois's consumer protection statute. *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 855 (Ill. 2005).

<sup>315</sup> *Avery*, 746 N.E.2d at 1247 (internal quotation marks omitted).

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.”<sup>316</sup> The plaintiff representative in *Clark* 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.”<sup>317</sup>

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].”<sup>318</sup> 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.<sup>319</sup> The suit alleged “that BASF had defrauded thousands of American farmers by marketing its herbicide as two separate products . . . for different uses at different prices through a system of deceit.”<sup>320</sup>

Finally, in *Ysbrand*, the Supreme Court of Oklahoma “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 50 states.”<sup>321</sup> The complaint alleged that the defendant, the Michigan-based automaker DaimlerChrysler, breached applicable warranties and Michigan’s consumer protection statutes.<sup>322</sup> 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.”<sup>323</sup>

Each of the cited decisions constitutes a quintessential example 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,

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<sup>316</sup> S. REP. NO. 109-14, at 25, *reprinted in* 2005 U.S.C.C.A.N. at 25.

<sup>317</sup> *Clark v. Tap Pharm. Prods., Inc.*, 798 N.E.2d 123, 126 (Ill. App. Ct. 2003).

<sup>318</sup> S. REP. NO. 109-14, at 25, *reprinted in* 2005 U.S.C.C.A.N. at 25.

<sup>319</sup> *Peterson v. BASF Corp.*, 657 N.W.2d 853, 860 (Minn. Ct. App. 2003), *aff’d*, 675 N.W.2d 57 (Minn. 2004), *vacated*, 544 U.S. 1012 (2005).

<sup>320</sup> *Id.* (internal quotation marks omitted).

<sup>321</sup> S. REP. NO. 109-14, at 25, *reprinted in* 2005 U.S.C.C.A.N. at 25.

<sup>322</sup> *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618, 621 (Okla. 2003).

<sup>323</sup> *Id.*

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 50 States."<sup>324</sup> 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's* "modest restrictions."<sup>325</sup>

As noted above, *Hague-Shutts* dictates only that, to certify an entire class under the law of a particular state, that 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 [application of the chosen state's] law is not arbitrary or unfair."<sup>326</sup> Each of the state court decisions condemned by CAFA's Senate Report involved claims filed against a company headquartered 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.<sup>327</sup> 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, satisfying *Hague-Shutts's* requirements.<sup>328</sup>

In each of these cases the corporate defendants confronted "no element of unfair surprise" because each plainly should have antici-

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<sup>324</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 570 (1996).

<sup>325</sup> *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818 (1985) (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981) (plurality opinion)).

<sup>326</sup> *Id.* at 821–22 (quoting *Hague*, 449 U.S. at 312–13); *accord Hague*, 449 U.S. at 308.

<sup>327</sup> *Avery v. State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242, 1255 (Ill. App. Ct. 2001), *aff'd in part, rev'd in part*, 835 N.E.2d 801 (Ill. 2005); *accord Clark v. Tap Pharm. Prods., Inc.*, 798 N.E.2d 123, 129–30 (Ill. App. Ct. 2003) ("The defendants' deceptive practices involving the fraudulent inflation of the cost of Lupron were designed, established, and initiated from the defendants' marketing and sales agents located at the defendants' corporate headquarters in Illinois and were designed to be uniformly relied upon by Medicare and its beneficiaries nationwide when they overpaid for Lupron."); *Peterson v. BASF Corp.*, 657 N.W.2d 853, 860, 875 (Minn. Ct. App. 2003) (finding that "New Jersey[s] Consumer Fraud Act" applied to class members who bought herbicide "from New Jersey-based BASF corporation"), *aff'd*, 675 N.W.2d 57 (Minn. 2004), *vacated*, 544 U.S. 1012 (2005); *Ysbrand*, 81 P.3d at 626 (noting that "Michigan's interest in the conduct of its manufacturer . . . is great").

<sup>328</sup> *Cap Gemini Ernst & Young, U.S., L.L.C. v. Nackel*, 346 F.3d 360, 366 (2d Cir. 2003) (internal quotation marks omitted); *accord, e.g., Nw. Airlines, Inc. v. Astraeva Aviation Servs., Inc.*, 111 F.3d 1386, 1394 (8th Cir. 1997); *Mazza v. Am. Honda Motor Co.*, 254 F.R.D. 610, 620 (C.D. Cal. 2008); *Kelly v. Ford Motor Co.*, 933 F. Supp. 465, 469 (E.D. Pa. 1996); *In re Disaster*, 750 F. Supp. 793, 802 (E.D. Mich. 1989). "Significant contacts" likewise exist in a company's state of incorporation. *Mooney v. Allianz Life Ins. Co. of N. Am.*, 244 F.R.D. 531, 535 (D. Minn. 2007) ("Minnesota has a substantial interest in policing the conduct of its corporations so as to prevent the corporate form from becoming a shield for unfair business dealing." (internal quotation marks omitted)); *accord Kelly*, 933 F. Supp. at 469 (stating that "a corporate defendant" has "critical contacts" both with its "state of incorporation and its principal place of business").



pated that the law of its *home state* might apply to its transactions.<sup>329</sup> 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 those of other states regardless of the defendant's principal place of business. Maine voters have no say in the enactment of Illinois's law or the appointment of Illinois's judges. The preemption of Maine's law in such actions violates a foundational principle of the Republic: "In this Nation each sovereign governs only with the consent of the governed."<sup>330</sup> CAFA's sponsors erred in concluding that simple compliance with *Hague-Shutts*'s due process standards would "end the 'false federalism' game."<sup>331</sup>

### 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. As these decisions observed, the Court's sole function was to determine whether the state court's choice of law "exceeded federal constitutional limitations" imposed by the Due Process Clause and the Full Faith and Credit Clause.<sup>332</sup> Although the *wisdom* of the state court opinions in *Avery*, *Clark*, *Peterson*, and *Ysbrand* is in doubt, none of these decisions exceeded any of *Hague-Shutts*'s constitutional limitations. Notwithstanding this fact, CAFA's sponsors regarded federal diversity jurisdiction as a panacea to the false federalism problem.<sup>333</sup> The Senate Report asserted that "federal courts generally . . . pay closer attention to the [due process] requirements for certifying a matter for class treatment" than do their state court counterparts.<sup>334</sup> 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."<sup>335</sup>

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<sup>329</sup> *Hague*, 449 U.S. at 318 n.24.

<sup>330</sup> *Nevada v. Hall*, 440 U.S. 410, 426 (1979).

<sup>331</sup> S. REP. NO. 109-14, at 64 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 59.

<sup>332</sup> *Hague*, 449 U.S. at 307-08; *accord Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 823 (1985).

<sup>333</sup> *See* S. REP. NO. 109-14, at 15, *reprinted in* 2005 U.S.C.C.A.N. at 15-16.

<sup>334</sup> *Id.*, *reprinted in* 2005 U.S.C.C.A.N. at 14.

<sup>335</sup> *Id.* at 64, *reprinted in* 2005 U.S.C.C.A.N. at 59. In support of this contention, the Senate Report asserted that precedent demonstrated that federal-court respect for *Hague-Shutts*'s due process limitations guaranteed that CAFA's passage would end false federalism. *Id.* "The bottom line is that over the past ten years, the federal court system has not produced any final

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."<sup>336</sup>

Post-CAFA caselaw demonstrates the fallacy of the reasoning underlying the Act. Although federal courts have not certified classes with the gusto exercised by some state jurists, numerous federal courts adjudicating cases removed under CAFA have found that adherence to state conflicts rules required certification of nationwide classes under a single state's consumer protection law.<sup>337</sup> Despite CAFA's proponents' confident claims to the contrary,<sup>338</sup> the Act has thus not ended false federalism. This is so because simple adherence to *Hague-Shutts's* 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.

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decisions—not even one—applying the law of a single state to all claims in a nationwide or multistate class action." *Id.* This assertion is misleading in two respects. First, the lack of federal precedent affirming the certification of multistate class actions was not instructive because prior to CAFA's enactment "few class actions f[ound] their way into federal court." *Id.* at 10 n.29, *reprinted in* 2005 U.S.C.C.A.N. at 11 n.29. Second, the Senate Report referred only to "final decisions." *Id.* at 64, *reprinted in* 2005 U.S.C.C.A.N. at 59. 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 that the federal policy against interlocutory appeals applies to class action certification decisions). Given the small number of class actions in federal courts prior to CAFA, exceedingly few district court decisions certifying classes would have ever reached appellate review because nationwide class certification "put[s] considerable pressure on the defendant to settle, even when the plaintiffs [sic] probability of success on the merits is slight." S. REP. NO. 109-14, at 21 n.86, *reprinted in* 2005 U.S.C.C.A.N. at 21 n.86 (quoting *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999)). Following CAFA's passage, numerous federal courts adjudicating cases removed under the Act found that adherence to state conflicts rules required certification of nationwide classes under a single state's law. *See* cases cited *supra* note 35.

<sup>336</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (alteration in original) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 535 (1928) (Holmes, J., dissenting)).

<sup>337</sup> *See* cases cited *supra* note 35.

<sup>338</sup> S. REP. NO. 109-14, at 61–62, 64, *reprinted in* 2005 U.S.C.C.A.N. at 57–58, 59–60.

D. *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.”<sup>339</sup> From the very genesis of the common law until the 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.<sup>340</sup> This rule dictated that sales of products *in a particular state* “must conform to [that state’s] consumer protection laws.”<sup>341</sup>

In the early twentieth century, however, courts began to abandon the *lex loci* test in favor of “flexible balancing” approaches.<sup>342</sup> Today, states employ myriad choice of law methodologies: the “most significant relationship” test, “interest analysis,” and “comparative impairment,” to name a few.<sup>343</sup> 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.<sup>344</sup> These methodologies have yielded “an inherently indeterminate and manipulable doctrine,”<sup>345</sup> which, in a great many cases, may be used to rationalize whatever law the judge feels inclined to apply.<sup>346</sup>

As a result, choice of law has devolved into “the law’s psychiatric ward”—“a place of odd fixations and schizophrenic visions.”<sup>347</sup> As

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<sup>339</sup> Prosser, *supra* note 1, at 971.

<sup>340</sup> LEA BRILMAYER, *CONFLICT OF LAWS* 17 (4th ed. 1995).

<sup>341</sup> *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002). 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*.” *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 196 (2d Cir. 2007) (second emphasis added).

<sup>342</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 708–09 (2004).

<sup>343</sup> See generally Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041 (1987) (discussing various choice of law methodologies).

<sup>344</sup> *Id.*

<sup>345</sup> *Campbell v. Apfel*, 177 F.3d 890, 893 n.3 (9th Cir. 1999).

<sup>346</sup> See Dirk H. Bliesener, *Fairness and Choice of Law: A Critique of the Political Rights-Based Approach to the Conflict of Laws*, 42 AM. J. COMP. L. 687, 688 (1994). 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. *Milkovich v. Saari*, 203 N.W.2d 408, 412 (Minn. 1973) (emphasis added). This consideration proved dispositive in *Hague*. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 306–07 (1981) (plurality opinion).

<sup>347</sup> Perry Dane, *Conflict of Laws*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL

Dean Prosser observed, “[t]he ordinary court, or lawyer, is quite lost when engulfed and entangled in it.”<sup>348</sup> If, as Justice Scalia argued, “the *Rule of Law*” is a “law of *rules*,”<sup>349</sup> modern choice of law doctrine has descended headlong into nihilism.

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*’s due process proscriptions when considering the constitutional limitations upon state conflicts law. The *Edgar* trilogy’s sovereign-capacity principle has generally only been applied to state *legislative* action.<sup>350</sup> To date, only one modern Supreme Court decision, *BMW of North America, Inc. v. Gore*,<sup>351</sup> 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.”<sup>352</sup> BMW of North America was incorporated in Delaware, and its principal place of business was New Jersey.<sup>353</sup>

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THEORY 220 (Dennis Patterson ed., 1996); see also Gene Shreve, *After the Revolution*, 52 AM. J. COMP. L. 1003, 1007 (2004) (book review) (quoting Dane, *supra*, at 220).

<sup>348</sup> Prosser, *supra* note 1, at 971.

<sup>349</sup> Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989).

<sup>350</sup> See Florey, *supra* note 38, 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 . . .”).

<sup>351</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

<sup>352</sup> *Id.* at 563–64.

<sup>353</sup> *Cullen v. BMW of N. Am., Inc.*, 531 F. Supp. 555, 557 (E.D.N.Y.) (“[BMW of North America, Inc.] . . . the exclusive importer and distributor in the United States of passenger cars, parts and products manufactured by [Bavarian Motor Works,]” is a “Delaware corporation,” and “has its principal place of business at Montvale, New Jersey.” (internal quotation marks omitted)), *rev’d*, 691 F.2d 1097 (2d Cir. 1982).

In 1990, Dr. Ira Gore purchased a new BMW from a dealer in Birmingham, Alabama.<sup>354</sup> 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, which was "about 1.5 percent of the car's suggested retail price."<sup>355</sup> When Dr. 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.<sup>356</sup>

"The jury returned a verdict finding BMW liable for compensatory damages of \$4,000."<sup>357</sup> Dr. Gore presented "evidence that since 1983 BMW had sold 983 refinished cars as new . . . without disclosing that the cars had been repainted before sale at a cost of more than \$300 per vehicle."<sup>358</sup> Only fourteen of these vehicles were sold in Alabama.<sup>359</sup> Based on these metrics, the jury awarded Dr. Gore punitive damages of \$4,000,000.<sup>360</sup> The jury "computed the amount of punitive damages by multiplying Dr. Gore's compensatory damages by the number of similar sales in other jurisdictions."<sup>361</sup>

Alabama's Supreme Court remitted the punitive damages award to \$2,000,000.<sup>362</sup> But the court affirmed the award as a means to punish BMW for violating Alabama's consumer fraud law with respect to vehicle sales made outside Alabama.<sup>363</sup> 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.<sup>364</sup> 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."<sup>365</sup> The United States Supreme Court granted certiorari to consider, among 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] on the policy choices of other States."<sup>366</sup>

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<sup>354</sup> *Gore*, 517 U.S. at 563.

<sup>355</sup> *Id.* at 564.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* at 565.

<sup>358</sup> *Id.* at 564.

<sup>359</sup> *Id.*

<sup>360</sup> *Id.* at 565.

<sup>361</sup> *Id.* at 567.

<sup>362</sup> *Id.*

<sup>363</sup> *Id.* at 565–67.

<sup>364</sup> *Id.* at 565.

<sup>365</sup> *Id.* at 566.

<sup>366</sup> *Id.* at 572. The *Gore* Court rested its holding on two separate grounds. In addition to

The *Gore* Court reversed, finding, in CAFA's parlance, that the state court's judgment constituted a quintessential act of false federalism.<sup>367</sup> But instead of following the well-traveled road laid by *Hague* and *Shutts*, *Gore* broke new ground, applying the *Edgar* trilogy's prohibition against direct regulation of extraterritorial conduct to state *judicial* action.<sup>368</sup>

*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 and 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."<sup>369</sup> The states have enacted "a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States."<sup>370</sup> Each polity's policy choice is entitled to respect.<sup>371</sup>

This diverse array of approaches "demonstrates that reasonable people may disagree about the value of a full disclosure requirement."<sup>372</sup> "But while . . . Congress has ample authority to enact such a policy for the entire Nation" pursuant to its power over interstate commerce, "it is clear that no single State could do so, or even impose its own policy choice on neighboring States."<sup>373</sup> Citing *Gibbons v. Ogden*,<sup>374</sup> the genesis of the dormant Commerce Clause doctrine,<sup>375</sup> 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."<sup>376</sup> Citing *Healy* and *Ed-*

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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. *See 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) (citing *Gore*, 517 U.S. at 574–75).

<sup>367</sup> *See Gore*, 517 U.S. at 572–74.

<sup>368</sup> *See id.* at 571.

<sup>369</sup> *Id.* at 569–70.

<sup>370</sup> *Id.* at 570.

<sup>371</sup> *Id.* at 570–71; *accord Nevada v. Hall*, 440 U.S. 410, 426–27 (1979).

<sup>372</sup> *Gore*, 517 U.S. at 570.

<sup>373</sup> *Id.* at 571.

<sup>374</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

<sup>375</sup> *See Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992) (noting that the dormant Commerce Clause doctrine originated with *Gibbons v. Ogden*).

<sup>376</sup> *Gore*, 517 U.S. at 571 (citation omitted) (citing *Gibbons*, 22 U.S. (9 Wheat.) at 194–96).

gar, the principal decisions recognizing that “[t]he Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders[.]”<sup>377</sup> the *Gore* Court specifically noted the sovereign-capacity function’s central mantra: “the Constitution has a ‘special concern . . . with the autonomy of the individual States within their respective spheres.’”<sup>378</sup>

*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.”<sup>379</sup> “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 was lawful where it occurred.”<sup>380</sup>

Tacitly recognizing the fact that the Court had never before applied the *Edgar* trilogy’s prohibition against direct regulation of extraterritorial activity to state *judicial* action, *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.”<sup>381</sup> This is so because “[s]tate 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.”<sup>382</sup> As the Ninth Circuit later noted it is equally true that “[s]tate 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.”<sup>383</sup> *Edgar* likewise recognized that a state’s exercise of judicial and legislative power is 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.’”<sup>384</sup> Thus, “a statute or regulation is not necessary for asserting a dormant Commerce Clause claim” be-

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<sup>377</sup> *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality opinion); *see also Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (quoting *Edgar*, 457 U.S. at 642).

<sup>378</sup> *Gore*, 517 U.S. at 571–72 (quoting *Healy*, 491 U.S. at 335–36).

<sup>379</sup> *Id.*

<sup>380</sup> *Id.* at 572–73 (emphasis added).

<sup>381</sup> *Id.* at 572 n.17 (internal quotation marks omitted).

<sup>382</sup> *Id.*

<sup>383</sup> *Ileto v. Glock Inc.*, 349 F.3d 1191, 1217 (9th Cir. 2003) (emphasis added) (quoting *Gore*, 517 U.S. at 572 n.17).

<sup>384</sup> *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977)).

cause the *Edgar* trilogy's extraterritoriality prohibition applies to state legislative and judicial action alike.<sup>385</sup>

*Gore* did not cite *Hague*, *Shutts*, or any due process or Full Faith and Credit Clause precedents in reaching its conclusion. Although *Hague-Shutts* protects the rights of individual litigants, as explained above, I believe those decisions fall far short of 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*.<sup>386</sup> *Campbell* threw *Gore*'s constitutional locus into doubt. Although *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.<sup>387</sup>

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*.<sup>388</sup> Citing the pages of the *Shutts* decision that recognized that the Due Process Clause invalidates the choice of law of a state lacking a "significant contact or significant aggregation of contacts . . . creating state interests" with the parties and the transaction,<sup>389</sup> *Campbell* concluded that, "[a]ny 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."<sup>390</sup> State Farm was both incorporated and had its principal place

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<sup>385</sup> *Ileto*, 349 F.3d at 1217 (citing *Gore*, 517 U.S. at 572 n.17).

<sup>386</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

<sup>387</sup> *Id.* at 420.

<sup>388</sup> *See id.* at 421–22.

<sup>389</sup> *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 821–22 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (plurality opinion)).

<sup>390</sup> *Campbell*, 538 U.S. at 421–22 (citing *Shutts*, 472 U.S. at 821–22). *Campbell* also cited *New York Life Insurance Co. v. Head*, 234 U.S. 149, 161 (1914), and *Huntington v. Atrill*, 146



of business in Illinois.<sup>391</sup> Utah thus lacked the requisite contacts to apply its own law to transactions between State Farm and non-Utah consumers.<sup>392</sup>

*Campbell* was less than forthright in identifying the constitutional locus of its prohibition against extraterritorial application of state law. Nonetheless, the authority upon which the majority premised the decision strongly suggests that *Campbell*'s extraterritoriality ruling rests upon *Hague-Shutts*'s contacts-based due process approach.

C. *The Campbell Court Premised Its Decision upon the Due Process Clause Because Congress Exempted State Regulation of Insurance from Dormant Commerce Clause Scrutiny*

Some commentators contend that *Campbell*'s apparent shift to *Hague-Shutts*'s due process rationale evidences a retreat from *Gore*'s doctrinal focus on the Commerce Clause.<sup>393</sup> This is not so. The Court simply could not have applied *Gore*'s Commerce Clause rationale in *Campbell*. The dormant Commerce Clause is inapplicable to the interstate regulation of insurance.<sup>394</sup> The dormant Commerce Clause "do[es] not . . . limit the authority of Congress to regulate commerce among the several States as it sees fit."<sup>395</sup> Congress may confer "upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy."<sup>396</sup> Thus, "[i]f Congress ordains that the States may freely regulate an aspect of interstate commerce, any

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U.S. 657, 669 (1892). *Campbell*, 538 U.S. at 421. *Head* is a *Lochner*-era decision premised upon the right of freedom of contract—a fact not mentioned by the *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." *Head*, 234 U.S. at 162. *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." *Huntington*, 146 U.S. at 669.

<sup>391</sup> *Pastor v. State Farm Mut. Auto. Ins. Co.*, 487 F.3d 1042, 1047–48 (7th Cir. 2007).

<sup>392</sup> *See Shutts*, 472 U.S. at 821–22.

<sup>393</sup> *See* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 *YALE L.J.* 347, 431 (2003) (arguing that the *Campbell* Court's reliance on *Shutts* "reveals 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"); *see also* Florey, *supra* note 38, at 1062 (arguing that "*Gore* and *Campbell* suggest that a more general extraterritoriality prohibition lurks somewhere in the Constitution, having nothing to do with the dormant Commerce Clause or *Hague*'s 'aggregation of contacts' test, and potentially applying to the activities of courts as well as legislatures").

<sup>394</sup> *See W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 653 (1981).

<sup>395</sup> *Id.* at 652 (emphasis omitted); *accord Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 61 (2003).

<sup>396</sup> *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980).

action taken by a State within the scope of the congressional authorization is rendered invulnerable to [dormant] Commerce Clause challenge.”<sup>397</sup> 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 . . . .”<sup>398</sup>

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

As explained in detail in the following Part, the Supreme Court has recognized that the dormant Commerce and Due Process Clauses “reflect different constitutional concerns.”<sup>399</sup> Nonetheless, the two Clauses often “overlap” and “are not always sharply separable.”<sup>400</sup> A particular state regulatory action thus can violate *one* or *both* of the Clauses. Although *Gore* premised its ruling on the Court’s dormant Commerce Clause precedents,<sup>401</sup> I submit that Alabama’s attempt to regulate extraterritorially likewise violated *Hague-Shutts*’s 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.<sup>402</sup> Specifically, in *Gore*, Alabama’s punitive damages judgment sought to punish BMW for the sale of nonconforming vehicles to 982 other customers.<sup>403</sup> BMW only sold fourteen of the vehicles in Alabama.<sup>404</sup> *Hague-*

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<sup>397</sup> *W. & S. Life Ins. Co.*, 451 U.S. at 652–53.

<sup>398</sup> *Id.*; accord *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 452 (1962).

<sup>399</sup> *Quill Corp. v. North Dakota*, 504 U.S. 298, 305 (1992).

<sup>400</sup> *Id.* (quoting *Int’l Harvester Co. v. Dep’t of Treasury*, 322 U.S. 340, 353 (1944) (Rutledge, J., concurring in part and dissenting in part)).

<sup>401</sup> See *supra* Part IV.A.

<sup>402</sup> *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 refinished 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) (emphasis omitted).

<sup>403</sup> *Gore*, 517 U.S. at 564.

<sup>404</sup> *Id.*

*Shutts*'s due process standard dictates that in order for a state's law to be applied to absent class members in a multistate 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."<sup>405</sup>

*Campbell* extended this prohibition to the imposition of punitive damages aimed at redressing the claims of "hypothetical" nonparty victims of the defendant's unlawful conduct.<sup>406</sup> "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.*"<sup>407</sup> For the courts in *Gore* and *Campbell* to impose punitive damages against a defendant to reciprocate injuries inflicted by the defendant against nonparties, the state "must have a 'significant contact or significant aggregation of contacts'"<sup>408</sup> with respect to the "hypothetical" claim<sup>409</sup> of *each nonparty 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."<sup>410</sup>

BMW of North America was incorporated in Delaware and its principal place of business was New Jersey.<sup>411</sup> In *Gore* (like *Shutts*), Alabama thus lacked the requisite contacts with respect to the 969 vehicle sales made outside of Alabama.<sup>412</sup> 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."<sup>413</sup>

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<sup>405</sup> Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 821–22 (1985) (emphasis added) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981) (plurality opinion)).

<sup>406</sup> *Campbell*, 538 U.S. at 423.

<sup>407</sup> *Id.* at 421–22 (emphasis added) (citing *Shutts*, 472 U.S. at 821–22).

<sup>408</sup> *Shutts*, 472 U.S. at 821–22 (quoting *Hague*, 449 U.S. at 313).

<sup>409</sup> *Campbell*, 538 U.S. at 423.

<sup>410</sup> *Shutts*, 472 U.S. at 821–22 (quoting *Hague*, 449 U.S. at 313).

<sup>411</sup> Cullen v. BMW of N. Am., Inc., 531 F. Supp. 555, 557 (E.D.N.Y.) ("[BMW of North America, Inc.] . . . the exclusive importer and distributor in the United States of passenger cars, parts and products manufactured by [Bavarian Motor Works,] is a "Delaware corporation," and "has its principal place of business at Montvale, New Jersey." (internal quotation marks omitted)), *rev'd*, 691 F.2d 1097 (2d Cir. 1982).

<sup>412</sup> B.M.W. of N. Am., Inc. v. Gore, 517 U.S. 559, 572–73 (1996).

<sup>413</sup> *Shutts*, 472 U.S. at 821–22 (quoting *Hague*, 449 U.S. at 313).

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 Clauses' prohibitions overlap.<sup>414</sup> By contrast, if BMW were headquartered in Alabama, the application of Alabama law to its transactions in other states would raise no due process concerns,<sup>415</sup> but would violate the dormant Commerce Clause.<sup>416</sup>

As 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."<sup>417</sup> As in *Gore*, however, Utah's paternalistic attempt to stand in judgment of State Farm's extraterritorial activities violated *Hague-Shutts*'s 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;<sup>418</sup> *Hague-Shutts*'s traditional ambit.<sup>419</sup> But, in my view, *Gore* marked a seismic shift in false federalism jurisprudence. *Hague-Shutts*'s "unfair surprise" prohibition<sup>420</sup> seemingly offered the Court the path of least resistance.<sup>421</sup>

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

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<sup>414</sup> *Quill Corp. v. North Dakota*, 504 U.S. 298, 305 (1992) (quoting *Int'l Harvester Co. v. Dep't of Treasury*, 322 U.S. 340, 353 (1944) (Rutledge, J., concurring in part and dissenting in part)).

<sup>415</sup> The presence of a corporation's "principal place of business" in a state alone "creat[es] significant contacts to the state" so as to satisfy *Hague-Shutts*. *Cap Gemini Ernst & Young, U.S., L.L.C. v. Nackel*, 346 F.3d 360, 366 (2d Cir. 2003); *see also* *Nw. Airlines, Inc. v. Astraeva Aviation Servs., Inc.*, 111 F.3d 1386, 1394 (8th Cir. 1997); *Mazza v. Am. Honda Motor Co.*, 254 F.R.D. 610, 620 (C.D. Cal. 2008); *Kelly v. Ford Motor Co.*, 933 F. Supp. 465, 469 (E.D. Pa. 1996); *In re Disaster*, 750 F. Supp. 793, 802 (E.D. Mich. 1989).

<sup>416</sup> *Gore*, 517 U.S. at 571–72 (citing *Healy v. Beer Inst.*, 491 U.S. 324, 335–36 (1989); *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194–96 (1824)).

<sup>417</sup> *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 653 (1981); *accord* *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 452 (1962).

<sup>418</sup> *See* *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 420–22 (2003).

<sup>419</sup> *See* *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 305–06 (1981) (plurality opinion).

<sup>420</sup> *Hague*, 449 U.S. at 318 n.24.

<sup>421</sup> *Gore*'s better-known prohibition against saddling tortfeasors with "grossly excessive" punishments was premised upon due process. *Gore*, 517 U.S. at 562 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 454 (1993)) ("The Due Process Clause . . . prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor.").

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 States.”<sup>422</sup> *Gore*’s extraterritoriality condemnation was not animated by due process “concerns about fairness for the individual defendant,” but rather by concerns about fairness to the politics of Alabama’s sister states, “structural concerns about the effects of state regulation on the national economy,”<sup>423</sup> and a desire to protect “the autonomy of the individual States within their respective spheres.”<sup>424</sup>

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*’s “modest restrictions”<sup>425</sup> and the rigid prohibitions of *Brown-Forman*’s per se rule of invalidity<sup>426</sup> demonstrates that the Constitution subjects state *legislative* action to a higher degree of scrutiny than state *judicial* action.<sup>427</sup> 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.

A. *Different Constitutional Concerns and Policies Animate the Dormant Commerce and Due Process Clauses*

As previously noted, the locus of *Hague-Shutts*’s choice of law limitations is the Fourteenth Amendment’s Due Process Clause, not the dormant Commerce Clause.<sup>428</sup> As the Supreme Court explained

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<sup>422</sup> *Id.* at 571–72 (citing *Healy v. Beer Inst.*, 491 U.S. 324, 335–336 (1989); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194–96 (1824)).

<sup>423</sup> *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992).

<sup>424</sup> *Gore*, 517 U.S. at 571–72 (quoting *Healy*, 491 U.S. at 335–36).

<sup>425</sup> *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818 (1985) (citing *Hague*, 449 U.S. at 312).

<sup>426</sup> *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

<sup>427</sup> *See Florey*, *supra* note 38, 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.”).

<sup>428</sup> *See supra* Part III.A.

in *Quill Corp. v. North Dakota*,<sup>429</sup> “the Due Process Clause and the [dormant] Commerce Clause are analytically distinct.”<sup>430</sup>

*Quill* addressed the constitutionality of a North Dakota use tax levied against an Illinois-based mail-order retailer.<sup>431</sup> The retailer had no offices, warehouses, or employees in North Dakota.<sup>432</sup> But it actively solicited business in North Dakota through catalogs and made \$1,000,000 in annual sales to 3000 customers in the state.<sup>433</sup> North Dakota sought to tax the retailer for goods purchased for use within the state.<sup>434</sup> 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.’”<sup>435</sup>

The United States Supreme Court granted certiorari and reversed.<sup>436</sup> The *Quill* Court found that the state court erred in testing the statute solely against the proscriptions of the Due Process Clause.<sup>437</sup> 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.<sup>438</sup> Both Clauses require a significant connection between the regulated party and the regulating state.<sup>439</sup> *Quill* expressly adopted an argument advanced by Justice Rutledge a half century earlier. “[A]lthough the [Due Process and dormant Commerce Clauses] cannot always be separated,” Justice Rutledge argued that the limitations imposed by the two Clauses are “separate and distinct, not intermingled ones.”<sup>440</sup> *Quill* expanded upon this principle. “Although the two [Clauses] are closely related” and often overlap, they “impose distinct limits” on state action.<sup>441</sup> “The two constitutional requirements

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<sup>429</sup> *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

<sup>430</sup> *Id.* at 305.

<sup>431</sup> *Id.* at 301–02.

<sup>432</sup> *Id.* at 302–03.

<sup>433</sup> *Id.* at 302.

<sup>434</sup> *Id.*

<sup>435</sup> *Id.* at 304 (quoting *State v. Quill Corp.*, 470 N.W.2d 203, 219 (N.D. 1991)).

<sup>436</sup> *Id.* at 301–02.

<sup>437</sup> *Id.* at 312–13.

<sup>438</sup> *Id.* at 305–06, 312–13.

<sup>439</sup> *Id.* at 313 (discussing the “substantial nexus” requirement of the Commerce Clause and the “minimum contacts” requirement of the Due Process Clause).

<sup>440</sup> *Id.* at 306 (quoting *Int’l Harvester Co. v. Dep’t of Treasury*, 322 U.S. 340, 353 (1944) (Rutledge, J., concurring in part and dissenting in part)).

<sup>441</sup> *Id.* at 305.

differ fundamentally, in several ways,” and “reflect different constitutional concerns.”<sup>442</sup>

Due process’s touchstone is “fairness for the individual defendant.”<sup>443</sup> 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.<sup>444</sup> The due process restrictions upon a state’s power to tax an out-of-state entity thus closely resemble the due process limitations on the exercise of personal jurisdiction recognized in *International Shoe Co. v. Washington*. 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.”<sup>445</sup>

These very same considerations animate *Hague-Shutts*’s choice of law limitations. Again borrowing from *International Shoe*, the “touchstone” of the *Hague-Shutts* test likewise focuses on whether the individual litigants had sufficient *contacts* with the state so that “[t]here is no element of unfair surprise” and that they would “have anticipated that [the chosen law] might apply” to their dispute.<sup>446</sup> 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.”<sup>447</sup>

*Quill* recognized that the dormant Commerce Clause’s animating principles differ fundamentally from due process.<sup>448</sup> The dormant Commerce Clause is “informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy.”<sup>449</sup> Thus, the

<sup>442</sup> *Id.*

<sup>443</sup> *Id.* at 312.

<sup>444</sup> *Id.* at 307–08.

<sup>445</sup> *Quill Corp.*, 504 U.S. at 307–08 (emphasis added) (internal quotation marks omitted). Although 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 Petrol. Co. v. Shutts*, 472 U.S. 797, 821 (1985).

<sup>446</sup> *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 318 n.24 (1981) (plurality opinion) (emphasis added).

<sup>447</sup> *Shutts*, 472 U.S. at 818 (emphasis added) (quoting *Hague*, 449 U.S. at 312–13).

<sup>448</sup> *Quill Corp.*, 504 U.S. at 305.

<sup>449</sup> *Id.* at 312.

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."<sup>450</sup> Just as *Quill's* due process analysis closely resembled *Hague-Shutts's* notice requirements, *Quill's* dormant Commerce Clause exposition echoed the animating principles of the *Edgar* trilogy's prohibition against extraterritorial regulation.<sup>451</sup> As *Edgar* noted, the dormant Commerce Clause precludes state regulation that "directly interferes with or burdens [interstate] commerce."<sup>452</sup>

Applying the Clauses' "separate and distinct" prohibitions,<sup>453</sup> *Quill* found that "the magnitude of [the retailer's] contacts [wa]s more than sufficient for due process purposes."<sup>454</sup> Nonetheless, the Court reversed the state court's ruling because the tax unduly burdened interstate commerce. The Court noted that

[o]n 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.<sup>455</sup>

*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 raises the question: does the *Edgar* trilogy's prohibition against extraterritorial regulation apply to state *judicial* action? *Gore* answered this in the affirmative.<sup>456</sup>

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 Supreme Court's decision as an attempt to project its policy into other states.<sup>457</sup> Such regulation of

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<sup>450</sup> *Id.* at 313.

<sup>451</sup> See, e.g., David S. Welkowitz, *Preemption, Extraterritoriality, and the Problem of State Antidilution Laws*, 67 TUL. L. REV. 1, 40-43 (1992) (discussing a link between extraterritoriality concerns and *Quill's* dormant Commerce Clause analysis).

<sup>452</sup> *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality opinion) (alteration in original) (quoting *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925)).

<sup>453</sup> *Quill Corp.*, 504 U.S. at 306 (quoting *Int'l Harvester Co. v. Dep't of Treasury*, 322 U.S. 340, 353 (1944) (Rutledge, J., concurring in part and dissenting in part)).

<sup>454</sup> *Id.* at 308.

<sup>455</sup> *Id.* at 313 n.6.

<sup>456</sup> See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571-72 (1996).

<sup>457</sup> *Id.* at 571 (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989)).



extraterritorial commerce violated the Constitution 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."<sup>458</sup> The fact that Alabama's regulatory conduct emanated from its *judicial*, rather than its *legislative*, branch made no difference. "State power," *Gore* 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."<sup>459</sup>

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

I suspect that the source of the discontinuity between the seemingly divergent approaches employed by *Hague-Shutts* and the *Edgar* trilogy 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<sup>460</sup> challenged regulations imposed by *New York's* State Liquor Authority upon the distributor's activities in *Kentucky* (and other states).<sup>461</sup> The state-sovereignty implications were thus evident: a regulated party was seeking to enjoin a state party from exceeding constitutional boundaries.<sup>462</sup>

Conversely, cases implicating *Hague-Shutts's* choice of law limitations, by definition, almost universally arise in private law disputes. In such cases, a *private* plaintiff asks a court to apply State *B's* laws to a *private* defendant's commercial transactions in State *A*. *Hague-Shutts*, of course, dictates that the Due Process Clause requires reasonable contacts between the defendant and State *B* 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.<sup>463</sup> Viewed from the standpoint of due process, which focuses on "fairness for the

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<sup>458</sup> *Id.* (citing *Healy*, 491 U.S. at 335–36; *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194–96 (1824)).

<sup>459</sup> *Id.* at 572 n.17.

<sup>460</sup> *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 221 (1992) (noting that *Brown-Forman* is based in Kentucky).

<sup>461</sup> *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582–83 (1986).

<sup>462</sup> *Id.*

<sup>463</sup> *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 318 n.24 (1981) (plurality opinion).

*individual defendant*,”<sup>464</sup> no apparent constitutional issue is thus raised. As previously discussed, the contemporary class-action approach typically yields application of the defendant’s home-state’s laws to its extraterritorial conduct.<sup>465</sup> Viewed from the standpoint of a corporate defendant headquartered in State *B*, the application of State *B*’s law is completely fair. The defendant plainly cannot claim “unfair surprise”<sup>466</sup> 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 *A*—or more precisely *the polity of State A*—which has no voice in promulgating the law being applied within the state’s borders. The Commerce Clause “precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders”<sup>467</sup> because such extraterritorial regulation “exceeds the inherent limits of the enacting State’s authority.”<sup>468</sup> 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.”<sup>469</sup> This is a fundamental tenet of federalism.<sup>470</sup>

The Constitution embraces 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.<sup>471</sup> 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 judge-made common law) or Congress acting within the scope of its enumerated powers. The dormant Commerce Clause jurisprudence expresses this value more clearly than any other constitutional canon. As the Seventh Circuit explained, “[n]o state has the authority to tell other polities what laws they must enact or how affairs must be conducted outside its borders.”<sup>472</sup> Yet, as the previously addressed examples of

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<sup>464</sup> *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) (emphasis added).

<sup>465</sup> See, e.g., *Peterson v. BASF Corp.*, 657 N.W.2d 853, 860 (Minn. Ct. App. 2003), *aff’d*, 675 N.W.2d 57 (Minn. 2004), *vacated*, 544 U.S. 1012 (2005); *Ysbrand v. DiamlerChrysler Corp.*, 81 P.3d 618, 624–25 (Okla. 2003).

<sup>466</sup> *Hague*, 449 U.S. at 318 n.24.

<sup>467</sup> *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (plurality opinion)).

<sup>468</sup> *Id.*

<sup>469</sup> *Edwards v. California*, 314 U.S. 160, 174 (1941).

<sup>470</sup> See *Nevada v. Hall*, 440 U.S. 410, 426 (1979).

<sup>471</sup> See *id.*

<sup>472</sup> *Nat’l Solid Wastes Mgmt. Ass’n v. Meyer*, 165 F.3d 1151, 1153 (7th Cir. 1999).

false federalism illustrate, courts have frequently certified multistate class actions under a single state's law despite these principles. CAFA has not stopped this practice.<sup>473</sup> This is so because *Hague-Shutts's* "modest" due process restrictions<sup>474</sup> 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

It is a familiar axiom of conflicts law that "in the choice-of-law analysis . . . the threshold question . . . is whether there is in fact a true conflict between" the laws of the different jurisdictions possessing an interest in the event or transaction.<sup>475</sup> If the applicable laws of all the jurisdictions are truly identical, no state's sovereign capacity is compromised.<sup>476</sup> To that end, there is no constitutional impediment to the certification of multistate class actions under federal law. The bulk of Article II of the Uniform Commercial Code<sup>477</sup> is similarly amenable to multistate 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."<sup>478</sup> But as *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 vary dramatically from one state to another and is an important aspect of state policy.

The Ninth Circuit's decision in *White v. Ford Motor Co.*<sup>479</sup> illustrates this principle. In *White*, a Nevada jury found Ford liable for distributing, and failing to recall, defective parking brakes.<sup>480</sup> The jury

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<sup>473</sup> See cases cited *supra* note 35.

<sup>474</sup> *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818 (1985).

<sup>475</sup> *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct.*, 482 U.S. 522, 555 (1987).

<sup>476</sup> See *id.* at 555–56.

<sup>477</sup> U.C.C. § 2 (2010).

<sup>478</sup> *In re Tobacco II Cases*, 207 P.3d 20, 29 (Cal. 2009).

<sup>479</sup> *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002).

<sup>480</sup> *Id.* at 1002–05.

imposed a significant punitive damages award that, as in *Gore*, sought to punish Ford for its nationwide conduct.<sup>481</sup> The federal district court trying the case found *Gore* inapplicable because Ford's conduct, unlike BMW's, was illegal (and considered reprehensible) in all jurisdictions.<sup>482</sup> Nonetheless, the Ninth Circuit reversed the verdict because "the variation in policies of punishment, even where the conduct is unlawful in all states, amounts to an important distinction in policy."<sup>483</sup> 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.<sup>484</sup>

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.<sup>485</sup>

Nevada's apparent preemption of Alaska law intruded upon Alaska's sovereignty. "The Nevada legislature has chosen an arguably more safety-oriented approach, the Alaska legislature a less risk-averse approach friendlier to innovation."<sup>486</sup> The sovereignty of both states makes both of these approaches worthy of judicial respect.<sup>487</sup>

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<sup>481</sup> *Id.* at 1015–16.

<sup>482</sup> *Id.*

<sup>483</sup> *Id.* at 1017, 1020.

<sup>484</sup> *Id.* at 1017 (footnote omitted).

<sup>485</sup> *Id.* at 1017–18.

<sup>486</sup> *Id.* at 1018.

<sup>487</sup> *See id.*; *Nevada v. Hall*, 440 U.S. 410, 426 (1979).

## 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 the law of a defendant's home state to the defendant's extraterritorial transactions does not implicate the Commerce Clause's sovereign-capacity function.<sup>488</sup> For example, the Illinois Court of Appeals asserted in *Avery v. State Farm Mutual Automobile Insurance Co.*<sup>489</sup>—one of the decisions condemned by CAFA's Senate Report as an example of false federalism<sup>490</sup>—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's] consumer-protection laws while serving Illinois and out-of-state consumers,” even with regard to transactions conducted in other states.<sup>491</sup>

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 violative of its public policy.<sup>492</sup> The factual nexus for such extraterritorial regulation is premised upon the theory that the offending conduct “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.”<sup>493</sup> Pursuant to this logic, claims

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<sup>488</sup> 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, *supra* note 176, 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”).

<sup>489</sup> *Avery v. State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242 (Ill. Ct. App. 2001), *aff'd in part, rev'd in part*, 835 N.E.2d 801 (Ill. 2005).

<sup>490</sup> S. REP. NO. 109-14, at 24–25 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 24–25.

<sup>491</sup> *Avery*, 746 N.E.3d at 1255. It should be noted that the dormant Commerce Clause would be inapplicable in *Avery* because Congress expressly authorized the states to extraterritorially regulate the insurance industry. *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 653 (1981); *accord* *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 452 (1962).

<sup>492</sup> *Avery*, 746 N.E.2d at 1254–55.

<sup>493</sup> *Id.* at 1255.

that a corporation engaged in false advertising or unfair business practices may more often than not be governed by the law of its principal place of business, as a corporation's nationwide advertising strategies are frequently (although certainly not always) "designed, established, and initiated from [its] corporate headquarters."<sup>494</sup>

This theory rests on the metaphor that every corporation, like every animal, possesses a single "nerve center" from which all decisions emanate.<sup>495</sup> 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. When the state in which the corporation is headquartered applies its consumer protection statute to sales made by the corporation in other states, the state is thus 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 the defendant distributor in *Gore* was headquartered in New Jersey.<sup>496</sup> 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."<sup>497</sup> As the Alabama Supreme Court ruled in *Gore* itself, Alabama law requires "*full disclosure*" of *all* repairs.<sup>498</sup> The prior court's nationwide application of New Jersey law would have precluded Alabama from applying its *own* consumer protection law to

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<sup>494</sup> *Id.*

<sup>495</sup> 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 its headquarters. *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (2010). 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.

<sup>496</sup> See *Cullen v. BMW of N. Am., Inc.*, 531 F. Supp. 555, 557 (E.D.N.Y.), *rev'd*, 691 F.2d 1097 (2d Cir. 1982).

<sup>497</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 564 (1996) (emphasis added).

<sup>498</sup> See *id.* at 570 (emphasis added).

Dr. Gore's purchase because the class action judgment would have implicated *res judicata*.<sup>499</sup>

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*."<sup>500</sup> Acceptance of the origination theory also might well 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 nonmetaphorical brains to devise a plan to travel to Nevada for a weekend of gambling. Gambling is very much against the law in Utah.<sup>501</sup> 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 that they "designed, established, and initiated"<sup>502</sup> 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"<sup>503</sup> 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.<sup>504</sup> "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?"<sup>505</sup> Professor Rosen echoes this theme, argu-

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<sup>499</sup> See *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

<sup>500</sup> *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 196 (2d Cir. 2007) (second emphasis added).

<sup>501</sup> UTAH CODE ANN. §§ 32A-4a-401(8)(a), 63C-11-301(4)(d)(i) (LexisNexis Supp. 2010).

<sup>502</sup> *Avery v. State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242, 1255 (Ill. App. Ct. 2001), *aff'd in part, rev'd in part*, 835 N.E.2d 801 (Ill. 2005).

<sup>503</sup> *Id.*

<sup>504</sup> Regan, *supra* note 219, at 1908–09. I suspect acceptance of this view would open the door to the prosecution of travel agents in forty-nine states for aiding and abetting gambling in Nevada.

<sup>505</sup> *Id.* at 1908 (emphasis omitted).

ing that “[s]tates have presumptive extraterritorial power to *criminally* and *civily* regulate their citizens’ out-of-state conduct.”<sup>506</sup>

The concept of “personal law” is 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.”<sup>507</sup> The authority to regulate foreign commerce includes the plenary power to impose “personal” federal law on United States citizens when they travel abroad.<sup>508</sup> For example, Congress has enacted laws prohibiting United States citizens from traveling overseas to bribe foreign officials<sup>509</sup> or sexually abuse children.<sup>510</sup> The very thesis of the dormant Commerce Clause is that the Commerce Clause contains a “self executing”<sup>511</sup> “negative command.”<sup>512</sup> By “bestow[ing] Congress with exclusive plenary powers” the Clause inversely “deprives *in like degree* the states’ authority to regulate these activities” it empowers Congress to regulate.<sup>513</sup> As the plenary powers granted to Congress include the authority to promulgate “personal law” governing the extraterritorial conduct of citizens,<sup>514</sup> the Clause’s “negative implication” logically must divest the states of the power to regulate their own citizens’ extraterritorial conduct.<sup>515</sup>

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<sup>506</sup> Rosen, *supra* note 176, at 720 (emphasis added). Professor Rosen cites international law to support his argument. *Id.* at 720–21. International law is irrelevant to the issue of the power of individual states vis-à-vis other states because the dormant Commerce Clause divested states of the power they previously possessed to regulate their citizens’ extraterritorial conduct, just as it divested them of their power to impose tariffs, which they likewise previously possessed under international law.

<sup>507</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>508</sup> See, e.g., *United States v. Clark*, 435 F.3d 1100, 1115–16 (9th Cir. 2006).

<sup>509</sup> *W. S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp., Int'l*, 493 U.S. 400, 401–02 (1990).

<sup>510</sup> *Clark*, 435 F.3d at 1116.

<sup>511</sup> *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 88 (1984).

<sup>512</sup> *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005).

<sup>513</sup> *Kickapoo Tribe v. Kansas*, 818 F. Supp. 1423, 1431 (D. Kan. 1993) (emphasis added).

<sup>514</sup> See, e.g., *Clark*, 435 F.3d at 1115–16.

<sup>515</sup> 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 em-



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 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.”<sup>516</sup> 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.”<sup>517</sup>

Utah citizens likewise may gamble in Nevada even if their decision to do so was made in Utah. Pennsylvania residents visiting Montana may drive at Montana’s excessive posted speed limits—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.<sup>518</sup> To hold otherwise would violate a central tenet 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.”<sup>519</sup>

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powered 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.* (emphasis added).

<sup>516</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 569–70 (1996).

<sup>517</sup> Similarly, a North Carolina–based tobacco company’s advertisements in California must comply with such a law, even if its home state does not require such explicit warnings.

<sup>518</sup> Professor Regan does agree that a state’s power to impose “personal law” on its citizens’ extraterritorial conduct would not include the power to preempt local automobile speed limits because such regulation “would interfere too directly with [each state’s] scheme for the convenience and safety of traffic on its highways.” Regan, *supra* note 219, at 1908–09. He offers no explanation why Pennsylvania’s imposition of liability upon one of its residents for driving at speeds it regards as excessive in Montana “would interfere too directly” with the latter’s sovereignty, but Pennsylvania’s prosecution of a Pennsylvania citizen for gambling in Nevada would not “interfere too directly” with Nevada’s sovereignty.

<sup>519</sup> *Gore*, 517 U.S. at 572.

*Hague-Shutts*, of course, protects none of these liberties. Utah has “significant contacts” with her citizens wherever they travel.<sup>520</sup> Nonetheless, while the origination theory is consistent with *Hague-Shutts*’s due process proscriptions, the Supreme Court has never concluded that the presence of a company’s headquarters in a state trumps the *Commerce Clause*’s prohibition against extraterritorial regulation. In fact, faced with just such a scenario in *Western Union Telegraphic Co. v. Pendleton*<sup>521</sup>—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 extraterritorial conduct violated the dormant Commerce Clause.<sup>522</sup>

*Pendleton* involved an Indiana state court judgment against an Indiana-based telegraph company.<sup>523</sup> The plaintiff sent a message from the company’s office in Shelbyville, Indiana, to Ottumwa, Iowa.<sup>524</sup> Indiana law required that telegraph companies “with a line of wires wholly or partly” in the state 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” located.<sup>525</sup> 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.<sup>526</sup> The Indiana Supreme Court affirmed the trial court’s judgment for the plaintiffs.<sup>527</sup> The United States Supreme Court reversed.<sup>528</sup> Notwithstanding the fact that the defendant was incorporated and headquartered in Indiana and that the message at issue *originated* in Indiana, the Court found that the state court’s extraterritorial application of Indiana law violated the Commerce Clause.<sup>529</sup>

The *Pendleton* Court premised its holding on the sovereign-capacity rationale reiterated by *Gore* nearly a century later.<sup>530</sup>

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<sup>520</sup> See, e.g., *Conlin v. Hutcheon*, 560 F. Supp. 934, 936 (D. Colo. 1983) (finding that Colorado possessed “significant contact” in the action because the defendant was a Colorado citizen).

<sup>521</sup> *W. Union Tel. Co. v. Pendleton*, 122 U.S. 347 (1887).

<sup>522</sup> *Id.* at 359.

<sup>523</sup> *Id.* at 348.

<sup>524</sup> *Id.*

<sup>525</sup> *Id.* (internal quotation marks omitted).

<sup>526</sup> *Id.* at 348–49.

<sup>527</sup> *Id.* at 350.

<sup>528</sup> *Id.* at 359.

<sup>529</sup> *Id.* at 358–59.

<sup>530</sup> *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

“[D]ifferent state legislatures might differ in their enactments as to modes of delivery and enforce such rules by penalties for their violation.”<sup>531</sup> As such, “[w]hatever authority the state may possess over the . . . delivery of messages . . . within her limits, it does not extend to the delivery of messages in other states.”<sup>532</sup> 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.”<sup>533</sup>

*Pendleton*, now long forgotten in the annals of the United States 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.<sup>534</sup> The defendant’s principal place of business was in Indiana, it was incorporated in Indiana, and the message originated in Indiana.<sup>535</sup> The defendant could not claim that application of the law of its home state violated its rights under the Due Process Clause. It plainly was subjected to “no element of unfair surprise” at the prospect of being subject to

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commerce.” *Morgan v. Virginia*, 328 U.S. 373, 377 (1946), rather than of its *sovereign-capacity function*. See Norman R. Williams, *The Commerce Clause and the Myth of Dual Federalism*, 54 UCLA L. REV. 1847, 1870 (2007) (asserting that *Pendleton* involved a type of “commerce over which Congress’s commerce power was 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.

<sup>531</sup> *Pendleton*, 122 U.S. at 353; accord *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 570 (1996) (noting that Alabama’s consumer protection regime was just one of “a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States”).

<sup>532</sup> *Pendleton*, 122 U.S. at 358.

<sup>533</sup> *Id.* *Pendleton* confronted the judicial application of a statute rather than a rule of common law. See *id.* at 347–48. But this is of no import. As the *Erie* Court explained, state statutory and common law are one and the same for constitutional purposes. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938). “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 . . .” *Id.* 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.* (alteration in original). *Erie* rejected the notion that a “transcendental” body of common law existed independent of state law. *Id.* 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.*

<sup>534</sup> *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818 (1985).

<sup>535</sup> *Pendleton*, 122 U.S. at 348, 352.

Indiana law.<sup>536</sup> 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: "Alabama may insist" on a "particular disclosure policy in that State," but "Alabama does not have the power . . . to punish [a defendant] for conduct that was lawful where it occurred . . . ." <sup>537</sup> 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."<sup>538</sup> 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.<sup>539</sup> "Conflict and confusion would only follow [a state's] attempted exercise of such a power."<sup>540</sup> This remains equally true today.

*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.<sup>541</sup> 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 *another* state. For example, in *Ysbrand v. DaimlerChrysler Corp.*, Oklahoma's Supreme Court affirmed the certification of a nationwide class action under Michigan's consumer protection laws.<sup>542</sup> Similarly, in *Peterson v. BASF Corp.*,

<sup>536</sup> Allstate Ins. Co. v. Hague, 449 U.S. 302, 318 n.24 (1981) (plurality opinion).

<sup>537</sup> BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572–73 (1996).

<sup>538</sup> *Pendleton*, 122 U.S. at 358.

<sup>539</sup> *Id.* The catch-22 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." Shreve, *supra* note 347, at 1007 (quoting Dane, *supra* note 347, at 209).

<sup>540</sup> *Pendleton*, 122 U.S. at 359.

<sup>541</sup> See, e.g., S. REP. NO. 109-14, at 25 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 25 (criticizing two Illinois appellate courts for certifying nationwide classes under "Illinois law with no regard for the laws of the other states involved").

<sup>542</sup> See *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618, 621, 626 (Okla. 2003).

*Minnesota's* Court of Appeals affirmed the certification of a nationwide class action under *New Jersey's* consumer protection statute.<sup>543</sup>

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."<sup>544</sup>

*Peterson* adjudicated the claims of farmers in numerous states who purchased herbicide from the defendant under New Jersey's consumer protection statute.<sup>545</sup> "[V]irtually none" of the sales occurred in New Jersey.<sup>546</sup> Kansas possessed a sovereign interest in seeing that *her own* policy judgments, not New Jersey's, were applied to the sale of herbicide to Kansas farmers. *Peterson's* preemption of Kansas law with that of New Jersey violated Kansas's 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's sovereign interests—along with those of forty-eight other states—would be equally violated.

#### CONCLUSION

"[T]he Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State . . . ."<sup>547</sup> When a state's law "directly regulates" extraterritorial commerce, the Court has thus "generally struck down the statute without further inquiry."<sup>548</sup> This sovereign-capacity function protects "the autonomy of the individual States within their respective spheres"<sup>549</sup> by dictating

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<sup>543</sup> *Peterson v. BASF Corp.*, 657 N.W.2d 853, 860 (Minn. Ct. App. 2003), *aff'd*, 675 N.W.2d 57 (Minn. 2004), *vacated*, 544 U.S. 1012 (2005).

<sup>544</sup> *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).

<sup>545</sup> *Peterson*, 657 N.W.2d at 860.

<sup>546</sup> S. REP. NO. 109-14, at 25, *reprinted in* 2005 U.S.C.C.A.N. at 25.

<sup>547</sup> *Healy*, 491 U.S. at 336 (second alteration in original) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (plurality opinion)).

<sup>548</sup> *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *accord Healy*, 491 U.S. at 336–37; *Edgar*, 457 U.S. at 642–43.

<sup>549</sup> *Healy*, 491 U.S. at 336.

that “[n]o state has the authority to tell other polities what laws they must enact or how affairs must be conducted.”<sup>550</sup>

These limitations are necessary to ensure that the law governing conduct within a state is made “with the consent of the governed.”<sup>551</sup> Although 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.”<sup>552</sup> The certification of nationwide 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.”<sup>553</sup>

I recognize that my view conflicts with the orthodox conception of the dormant Commerce Clause as a limitation exclusively 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”<sup>554</sup> a buttress must exist that resists encroachment upon that sovereignty by sister states—regardless of which branch of a state government committed the trespass. “[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.”<sup>555</sup>

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.”<sup>556</sup> 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.<sup>557</sup>

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<sup>550</sup> Nat’l Solid Wastes Mgmt. Ass’n v. Meyer, 165 F.3d 1151, 1153 (7th Cir. 1999).

<sup>551</sup> Nevada v. Hall, 440 U.S. 410, 426 (1979).

<sup>552</sup> *Id.*

<sup>553</sup> S. REP. NO. 109-14, at 24 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 24.

<sup>554</sup> N. Ins. Co. of N.Y. v. Chatham Cnty., 547 U.S. 189, 194 (2006) (internal quotation marks omitted).

<sup>555</sup> *Ileto v. Glock Inc.*, 349 F.3d 1191, 1217 (9th Cir. 2003) (internal quotation marks omitted).

<sup>556</sup> Edwards v. California, 314 U.S. 160, 174 (1941).

<sup>557</sup> Prosser, *supra* note 1, at 971.