

The Case for a Commerce Clause Challenge to State Antitrust Laws Banning Minimum Resale Price Maintenance

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Inconsistent state antitrust regulation of minimum resale price maintenance raises serious questions under the dormant Commerce Clause for those manufacturers that resell products through resellers competing in interstate markets. Specifically, the laws of a handful of states within the United States purport to prohibit minimum resale price maintenance (“RPM”) and thus conflict with the substantive treatment of minimum RPM under the antitrust laws of other states.¹ This conflict arose in the wake of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, a 2007 decision in which the United States Supreme Court held that under the Sherman Act minimum RPM should be evaluated under a rule of reason, thereby overruling its near-century old rule that such practices were per se unlawful.² Most states generally construe state antitrust laws in a manner consistent with the Sherman Act pursuant to harmonization statutes and thus have, or are predicted to follow *Leegin*.³ But that is not the case in all

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1. Minimum resale price maintenance refers to a manufacturer's (or upstream supplier's) practice of dictating the minimum price at which its resellers may resell its products.

2. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

3. See, e.g., CONN. GEN. STAT. § 35-44b (2011) (“It is the intent of the General Assembly that in construing [Connecticut Antitrust Act] the courts of this state shall be guided by interpretations given by the federal courts to federal antitrust statutes.”); DEL. CODE ANN. tit. 6, § 2113 (2011) (Delaware Antitrust Act “shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes.”); NEV. REV. STAT. § 598A.050 (2011) (Nevada Unfair Trade Practices Act “shall be construed in harmony with prevailing judicial interpretations of the federal antitrust statutes.”); N.J. REV. STAT. § 56:9-18 (West 2011) (New Jersey Antitrust Act “shall be construed in

jurisdictions. For example, in response to *Leegin*, Maryland enacted new legislation reinstating the per se rule in that state,⁴ and New York and California instituted enforcement actions asserting that such practices remain per se unlawful under preexisting laws in their respective states.⁵ The rules in these states (“the Per Se States”) thus conflict with the approach taken in other states (“the *Leegin* States”) to construe their antitrust laws in a manner consistent with the new federal standard.

This conflict of state laws has led some manufacturers distributing products through independent resellers in both Per Se and *Leegin* States to forego minimum resale price programs entirely—even though under most circumstances such programs would be lawful in the *Leegin* States, which far outnumber the Per Se States. As one antitrust enforcer observed, “[t]he combined effects of state antitrust statutes treating RPM as a per se offense, aggressive state [attorney general] enforcement efforts, and the potential for additional *Leegin* state repealers has meant that manufacturers that

harmony with ruling judicial interpretations of comparable federal antitrust statutes and to effectuate, insofar as practicable, a uniformity in the laws of those states which enact it.”); UTAH CODE ANN. § 76–10–926 (West 2011) (“The Legislature intends that the courts, in construing [Utah Antitrust Act], will be guided by interpretations given by the federal courts to comparable federal antitrust statutes and by other state courts to comparable state antitrust statutes.”); VA. CODE ANN. § 59.1-9.17 (West 2011) (Virginia Antitrust Act “shall be applied and construed to effectuate its general purposes in harmony with judicial interpretation of comparable federal statutory provisions”). See generally Michael A. Lindsay, *Overview of State RPM*, THE ANTITRUST SOURCE (Apr. 2011).

4. See MD. CODE ANN., COM. LAW § 11-204(b) (West 2011).

5. News Release, State of California (Jan. 14, 2011), available at ag.ca.gov/newsalerts/print_release.php?id=2028 (announcing consent judgment with Bioelements, Inc. under California state law, which stopped Bioelements from prohibiting its retailers from discounting online); Verified Petition, *New York v. Tempur-Pedic Int’l, Inc.*, No. 400837/10 (Sup. Ct. N.Y. County filed Mar. 29, 2010) (alleging minimum RPM per se unlawful under New York General Business Law § 369-a), *subsequent disposition*, 916 N.Y.S.2d 900, 2011 N.Y. Slip Op. 21019 (Sup. Ct. Jan. 14, 2011) (holding minimum RPM agreements were unenforceable but not per se illegal under New York law), appeal pending; Complaint, *California v. Dermaquest, Inc.*, No. RG 10497526 (Super. Ct. Alameda Cnty. Feb. 5, 2010) (alleging per se violations of Cartwright Act and Unfair Competition Law). Compare *Worldhomecenter.com, Inc. v. Franke Consumer Prods., Inc.*, 2011 WL 2565284, at *4–*5 (S.D.N.Y. June 22, 2011) (holding minimum RPM unenforceable but not per se unlawful under New York Business Law §369-a) and *Worldhomecenter.com, Inc. v. KWC Am., Inc.*, 2011 WL 4352390, at *4 (S.D.N.Y. Sept. 15, 2011) (refusing to reach whether New York state court would treat RPM as per se unlawful under state antitrust law when complaint was insufficient to state a claim).

distribute on a national scale have far less freedom to institute RPM policies than the *Leegin* decision would suggest.”⁶

In the United States, it is not uncommon for a reseller’s territory to straddle state lines, or for the reseller’s geographic market to spill into neighboring states when outlets are located close to state lines or where, despite greater distances, customers can travel among competing outlets for selection, service and price. And when goods are sold on the internet, “geography . . . is a virtually meaningless construct.”⁷ As courts have recognized, an internet seller competes in every market in which customers have access to the internet.⁸ Thus, competitive strategies that impose lawful RPM programs on resellers in the *Leegin* States are not feasible when the manufacturer’s distribution network includes resellers in *Leegin* and Per Se States and where resale markets cut across the inconsistent jurisdictions. For example, prohibiting a dealer in Northern Virginia from selling a product below \$100 pursuant to a lawful RPM program, but allowing competing dealers in nearby Bethesda, Maryland (where RPM is per se unlawful) to sell at any price would appear unworkable because of the competitive dynamics of the interstate market.

This Essay explores, from the perspective of an antitrust practitioner, current standards under the dormant Commerce Clause and advocates a legal framework to test the constitutionality of the RPM laws of the Per Se States as applied to manufacturers that distribute products through resellers in interstate markets. This Essay does not question the right of states generally to enact laws that are more restrictive than the federal antitrust laws.⁹ Nor does it question that the RPM laws in the Per Se States may arguably benefit local consumers with lower prices. But, it does question the constitutionality of the laws of the Per Se States to the extent they control conduct wholly outside the regulating state, effectively nullifying the more flexible laws of *Leegin* States. Part I sets out the general framework under the dormant Commerce Clause and focuses on the extraterritoriality doctrine as the basis for challenge. Part II examines the apparent effects of the RPM laws of the Per Se States on interstate markets and firms, and considers whether, if proven,

6. FTC Commissioner J. Thomas Rosch, *quoted in* FTC: WATCH, No. 774, Nov. 22, 2010, at 2-3.

7. *Am. Library Ass’n v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997).

8. *See, e.g., Nat’l Ass’n of College Bookstores, Inc. v. Cambridge Univ. Press*, 990 F. Supp. 245 (S.D.N.Y. 1997).

9. *See California v. ARC Am. Corp.*, 490 U.S. 93, 105 (1989).

they are cognizable for purposes of an extraterritorial challenge. Part III identifies arguments that may be leveled at an extraterritorial challenge. Part IV evaluates select issues in connection with an alternative attack under the dormant Commerce Clause's general balancing test. The Essay ends with a short conclusion.

The premise that the RPM program which a manufacturer may otherwise adopt would be lawful in the *Leegin* States is key to a possible constitutional challenge. RPM in a *Leegin* State would be tested under the rule of reason, a fact-based analysis which would examine the effects of the program in a market as a whole. In the wake of *Leegin*, rule of reason challenges to minimum RPM have failed on various grounds, including failure to define the relevant market, failure to demonstrate market power, or failure to allege the requisite anticompetitive effects.¹⁰ Thus, the premise that an RPM program could survive a rule of reason challenge is not an outlier. Nor should the fact-based nature of that analysis serve as a reason to dismiss the constitutional argument as applied to manufacturers unable to take competitive advantage of lawful RPM programs because of the out-of-state effects of the RPM laws of the Per Se States.¹¹

I. Current Standards under the Dormant Commerce Clause and Extraterritoriality Doctrine

The Commerce Clause empowers Congress “[t]o regulate Commerce . . . among the several States.”¹² The “principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, . . . has as its corollary that the states are not separable economic units.”¹³ While the Commerce Clause does not “expressly restrain ‘the several States’ in any way, [the Supreme Court has] sensed a negative implication in the

10. See *Jacobs v. Tempur-Pedic Int’l, Inc.*, 626 F.3d 1327 (11th Cir. 2010); *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412 (5th Cir. 2010); *Spahr v. Leegin Creative Leather Prods., Inc.*, 2008 WL 3914461 (E.D. Tenn. Aug. 20, 2008).

11. See *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 444 (2008) (factual assumptions can be evaluated in as-applied challenge). This Essay posits a dormant Commerce Clause challenge as applied to certain manufacturers. It should not be construed to rule out further or different challenges as applied to this group or others.

12. U.S. CONST. art. I, § 8, cl. 3.

13. *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 98–99 (1994) (citing *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537–38 (1949)).

provision since the early days.”¹⁴ The Supreme Court has adopted a general two-tier analysis under the “negative” or “dormant” aspect of the Commerce Clause, its most recent iteration simply stated in *Department of Revenue of Kentucky v. Davis*:¹⁵

We ask whether a challenged law discriminates against interstate commerce. A discriminatory law is “virtually *per se* invalid,” and will survive only if it “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” Absent discrimination for the forbidden purpose, however, the law “will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.”¹⁶

In the latter case, when state laws “regulate even-handedly,” the legal standard is generally a balancing test:

If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden [on interstate commerce] that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities [hereinafter, “*Pike* balancing test”].¹⁷

14. *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337 (2008) (citations omitted); *see* *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (“[W]e have long interpreted the Commerce Clause as an implicit restraint on state authority”); *Or. Waste Sys.*, 511 U.S. at 98 (“the Clause has long been understood to have a ‘negative’ aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce”); *Healy v. Beer Inst.*, 491 U.S. 324, 326 n.1 (1989) (“This Court long has recognized that this affirmative grant of authority to Congress also encompasses an implicit or ‘dormant’ limitation on the authority of the States to enact legislation affecting interstate commerce.”); *H.P. Hood & Sons*, 336 U.S. at 534–35 (“The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state. . . . [I]t does not say what the states may or may not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the states. Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution.”). Justice Scalia has criticized the dormant Commerce Clause as “an unjustified judicial invention, not to be expanded beyond its existing domain.” *United Haulers Ass’n*, 550 U.S. at 348 (Scalia, J., concurring in part) (citation omitted); *see also id.* at 349 (Thomas, J., concurring in judgment) (asserting that the dormant Commerce Clause “has no basis in the Constitution and has proved unworkable in practice”).

15. *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008).

16. *Id.* at 338–39 (citations omitted).

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

In articulating the general standard applicable in dormant Commerce Clause cases, the *Davis* Court described the type of state laws deemed “virtually per se invalid” as those that discriminate against interstate commerce.¹⁸

Within the strands of dormant Commerce Clause jurisprudence, however, is a line of Supreme Court cases finding state laws per se invalid without more when they regulate conduct occurring wholly outside the state’s borders and even in circumstances when the laws apply evenhandedly to in-state and out-of-state firms.¹⁹ This so-called extraterritoriality doctrine does not fit neatly within the traditional two-pronged dormant Commerce Clause standard. Nonetheless, nearly every federal circuit court has recognized the doctrine,²⁰ and it is the focus of this Essay.

The Supreme Court gave shape to the extraterritorial doctrine in two cases from the 1980s, *Brown-Forman Distillers Corp. v. New York State Liquor Authority*²¹ and *Healy v. Beer Institute*.²² They both bear on the issues presented by the RPM laws of the Per Se States. In *Brown-Forman Distillers*, the Court considered a challenge to a New York law that required liquor distillers that sold to wholesalers in New York to sell at a price no higher than the lowest price charged by the distiller to wholesalers anywhere else in the United States.²³ Distillers were required to file in-state price schedules before the twenty-fifth day of each month, with prices to become effective on the first day of the second following month.²⁴ Brown-Forman sold several liquor brands in New York and other states, and generally offered

18. Discrimination in this context generally means “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Or. Waste Sys.*, 511 U.S. at 99.

19. *Healy*, 491 U.S. at 336 (state law invalid where practical effect of law is to control conduct beyond its borders); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579, 584–85 (1986) (state that projects its law into other states and directly regulates out-of-state commerce is invalid on its face; law at issue applied equally to in-state and out-of-state distillers); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) (individual state has no power to project its legislation into another state by regulating price paid for products acquired there); see *PhRMA v. Walsh*, 538 U.S. 644, 669 (2003) (reaffirming “classic observation” in *Baldwin*).

20. See *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 645–46 (6th Cir. 2010) (citing cases); *In re Nat’l Century Fin. Enters., Inc.*, 755 F. Supp. 2d 857, 878 (S.D. Ohio 2010) (citing cases); see also *infra* note 45 and accompanying text.

21. *Brown-Forman Distillers*, 476 U.S. 573.

22. *Healy*, 491 U.S. 324.

23. *Brown-Forman Distillers*, 476 U.S. at 575.

24. *Id.*

wholesalers certain promotional allowances, which were paid as credits against amounts due from the wholesaler.²⁵ The State Liquor Authority determined that the Alcoholic Beverage Control (“ABC”) Law prohibited the payment of such allowances to New York wholesalers and also found that, for purposes of the New York law, payment of allowances to wholesalers lawful in other states lowered the effective price of Brown-Forman brands outside New York in violation of New York law.²⁶ The Authority instituted license revocation proceedings, and Brown-Forman sought review of the Authority’s ruling in state courts and eventually before the United States Supreme Court. The issue before the Supreme Court was whether the ABC Law, on its face, violated the Commerce Clause.²⁷ There was no dispute that the law regulated evenhandedly or that the state’s interest in assuring the lowest prices for consumers was legitimate.²⁸

The Court framed its analysis under the two-tier approach, but as to the first tier, stated: “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.”²⁹ Brown-Forman argued, and the Court agreed, that the low-price affirmation provision fell “within that category of direct regulations of interstate commerce.”³⁰

While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess. Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States. . . . The mere fact that the effects of New York’s ABC Law are triggered only by sales of liquor within the State of New York

25. *Id.* at 576.

26. *Id.* at 577.

27. *Id.* at 578. *Brown-Forman* involved a facial challenge to New York’s affirmation statute. But that does not serve as a limiting principle for extraterritorial challenges. See *PhRMA v. District of Columbia*, 406 F. Supp. 2d 56, 67 (D.D.C. 2005) (successful as-applied challenge to extraterritorial reach of D.C. pricing law). Indeed, “[f]acial challenges are disfavored.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008).

28. *Brown-Forman Distillers*, 476 U.S. at 579.

29. *Id.* (emphasis added).

30. *Id.* at 579–80.

therefore does not validate the law if it regulates the out-of-state transactions of distillers who sell in-state.³¹

The Court then concluded that the New York law violated the Commerce Clause:

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. Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce. While New York may regulate the sale of liquor within its borders, and may seek low prices for its residents, it may not “project its legislation into [other States] by regulating the price to be paid” for liquor in those States. That the ABC law is addressed only to sales of liquor in New York is irrelevant if the “practical effect” of the law is to control liquor prices in other States.³²

Likewise, in *Healy*,³³ the Court reviewed a Connecticut statute that “require[d] out-of-state shippers of beer to affirm that their posted prices for products sold to Connecticut wholesalers [were], as of the moment of posting, no higher than the prices at which those products [were] sold in the bordering States of Massachusetts, New York and Rhode Island.”³⁴ In considering whether the Connecticut statute violated the Commerce Clause, the Court summarized the “propositions” that would guide its analysis of the extraterritorial effects of state economic regulation:

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, and, specifically, a State may not adopt *legislation that has the practical effect* of establishing “a scale of prices for use in other states.” 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. The critical inquiry is whether *the practical effect of the regulation* is to control conduct beyond the boundaries of the State. Third, the *practical effect of the statute*

31. *Id.* at 580 (citations omitted).

32. *Id.* at 582–83 (citations and footnote omitted).

33. *Healy*, 491 U.S. 324 (1989).

34. *Id.* at 326.

must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.³⁵

With those principles in mind, the Court held that the statute had the “undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State,” and the “practical effect . . . in conjunction with the many other beer-pricing and affirmation laws that have been or might be enacted throughout the country, . . . [of creating] just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude.”³⁶ The Court found that Connecticut’s affirmation statute “require[d] out-of-state shippers to forgo the implementation of competitive-pricing schemes in out-of-state markets because those pricing decisions are imported by statute into the Connecticut market regardless of local competitive conditions.”³⁷ The Court then cautioned that enactment of similar laws by a “significant group of States” could lead to “potential regional and even national regulation of the pricing mechanism for goods . . . reserved by the Commerce Clause to the Federal Government” and which “may not be accomplished piecemeal through the extraterritorial reach of individual state statutes.”³⁸ Judge Easterbrook, writing for the Seventh Circuit in *K-S Pharmacies, Inc. v. American Home Products Corp.*,³⁹ summarized the teachings of *Brown-Forman* and *Healy*:

Any statute of the form “charge in this state the same price you charge outside it” carries the implied command: “Charge outside this state the same price you charge inside it.” This

35. *Id.* at 336–37 (citations omitted and emphasis added).

36. *Id.* at 337. For example, the Court observed that Massachusetts, whose beer statute did not tie in-state prices to out-of-state prices, required brewers to post prices on the first day of the month to become effective on the first day of the following month. *Id.* at 338. Five days later those same brewers would be required to affirm that Connecticut prices for the next following month would be no higher than the lowest price in any border state. *Id.* So, on January 1st, the brewer in setting wholesale prices in Massachusetts must take into account the price he hopes to charge in Connecticut in March. *Id.*

37. *Id.* at 339.

38. *Id.* at 340.

39. *K-S Pharmacies, Inc. v. Am. Home Prods. Corp.*, 962 F.2d 728 (7th Cir. 1992).

latter, implied (but inseparable) command, the Court held, is a forbidden attempt to exercise extraterritorial power.⁴⁰

Since *Brown-Forman* and *Healy*, application of extraterritoriality principles has led courts to conclude that a state cannot “[enact] legislation that has the practical effect of exporting that state’s domestic policies”⁴¹ or “necessarily require out-of-state commerce to be conducted according to in-state terms.”⁴² But, as noted above, extraterritoriality principles do not fit squarely within the traditional two-step analysis whose core concern is economic protectionism. Indeed, the First Circuit in *IMS Health Inc. v. Mills*⁴³ recently questioned the role of extraterritoriality in modern Commerce Clause cases, though it eventually conceded the doctrine’s viability despite its inapplicability in that case.⁴⁴

Nonetheless, most circuits considering extraterritorial challenges continue to endorse the general principle that state laws regulating conduct occurring wholly outside their borders are invalid.⁴⁵ Furthermore, courts typically do not analyze a claim of extraterritorial regulation under the traditional two-tier test, but frame the analysis as a separate third ground.⁴⁶ While recognizing the

40. *Id.* at 730.

41. *Am. Library Ass’n v. Pataki*, 969 F. Supp. 160, 174 (S.D.N.Y. 1997).

42. *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995).

43. *IMS Health Inc. v. Mills*, 616 F.3d 7 (1st Cir. 2010), *abrogated on other grounds*, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011).

44. *Id.* at 29 n.27.

45. *See, e.g.*, *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 645–46 (6th Cir. 2010) (citing cases); *see also* *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 665 (7th Cir. 2010) (nondiscriminatory local regulations invalidated without balancing when states “actually attempt to regulate activities in other states”); *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1307 (10th Cir. 2008) (statute invalid per se if it has “practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question”); *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 489 (4th Cir. 2007) (“The principle that state laws may not generally operate extraterritorially is one of constitutional magnitude.”); *Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 11 (1st Cir. 2007) (“relatedly” to general prohibition against discrimination, Commerce Clause prohibits state legislation “purporting to regulate commerce that occurs wholly beyond a state’s borders”); *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 168 (2d Cir. 2005) (state law may be invalid if it has practical effect of extraterritorial control); *Cotto Waxo*, 46 F.3d at 793 (extraterritoriality “invalidates a state statute when the statute requires people or businesses to conduct their out-of-state commerce in a certain way”); *NCAA v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993) (direct regulation of interstate commerce is a per se violation).

46. *See, e.g.*, *Int’l Dairy Foods*, 622 F.3d at 645–46 (citing cases); *Midwest Title Loans*, 593 F.3d at 665; *Quik Payday*, 549 F.3d at 1307; *Grand River Enters. Six Nations*, 425 F.3d at 168; *Cotto Waxo*, 46 F.3d at 793.

distinct concerns of extraterritoriality, as discussed below, appellate courts have not endorsed a uniform approach to extraterritorial regulation, and commentators have been critical of the uncertain reach of the doctrine.⁴⁷ The minimum RPM laws of the Per Se States apply equally to all manufacturers selling through resellers to customers in the regulating State, and do not on their face implicate extraterritorial concerns. But that does not preclude challenge. These laws remain subject to extraterritoriality principles as well as the general *Pike* balancing test.⁴⁸

The fact that a conflict among state RPM laws was tolerated in the past under Congress' now-repealed Miller-Tydings and McGuire Acts does not diminish the grounds for the Commerce Clause challenge suggested in this Essay.⁴⁹ Stated simply, from 1937 until their repeal in 1975, the Miller-Tydings and McGuire Acts allowed states to choose whether to adopt laws permitting RPM in certain circumstances (so-called "fair trade" laws) or to retain their prohibition against the practice. Congress' enactment of these enabling laws and its delegation to the states of certain authority over interstate commerce accounted for the failure of Commerce Clause challenges during that period.⁵⁰ Further, as manufacturers sought to

47. See *IMS Health*, 616 F.3d at 29; see also Michael J. Ruttinger, Note, *Is There a Dormant Extraterritoriality Principle?: Commerce Clause Limits on State Antitrust Laws*, 106 MICH. L. REV. 545 (2007); Peter C. Felmlly, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 467 (2003); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785 (2001).

48. *Midwest Title Loans*, 593 F.3d at 665; see *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 64 n.18 (2d Cir. 2010) (same); see also *SPGGC, LLC v. Blumenthal*, 505 F.3d 183 (2d Cir. 2007) (analyzing extraterritorial effects as basis for per se invalidity and as "form of excessive burden" under *Pike*); *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 50 (2d Cir. 2007) (state regulation of commercial activity occurring wholly outside state is a circumstance "in which evenhanded regulation imposes incidental burden on interstate commerce").

49. Specifically, Congress enacted the Miller-Tydings Act in 1937, which exempted certain RPM agreements from application of the Sherman Act if state law permitted them. In 1952, it passed the McGuire Act, which permitted states to extend the so-called "fair trade" laws to "nonsigners" (e.g., retailers with notice of but with whom the manufacturer had no RPM agreement) and provided that enforcement against nonsigners would not constitute a burden on interstate commerce. In 1975, thirty-six states had fair trade laws. See *Corning Glass Works v. FTC*, 509 F.2d 293, 295-96 (7th Cir. 1975).

50. For example, shortly after passage of the McGuire Act, a manufacturer based in California sued to enforce New Jersey's fair trade law against a national retail chain with an outlet in New Jersey with which it had no resale price agreement. *Lionel Corp. v. Grayson-Robinson Stores, Inc.*, 104 A.2d 304, 307-08 (N.J.), *appeal dismissed for want of substantial federal question*, 348 U.S. 859 (1954). The discounter alleged *inter alia* that enforcement of fair trade laws violated the Commerce Clause. Rejecting the claim as

enforce fair trade laws against discounters in “free trade” states who sold to customers in fair-trade states, the issue became not whether, as a matter of the Commerce Clause, the law of a particular state could apply to sales outside the regulating state, but was instead a matter of construing state law in light of the federal enabling laws. For example, in *General Electric Co. v. Masters Mail Order Co.*,⁵¹ a mail order discount house located in the District of Columbia (which had no fair trade law) sold GE appliances for less than fair-trade prices to consumers in New York, a fair trade state. The Second Circuit construed the McGuire Act’s exemption to apply only to resales *in* jurisdictions that had adopted fair trade policies.⁵² It then held passage of title controlled the place of resale, which as to defendant occurred in the District thereby permitting the discounted sales.⁵³

[General Electric] protests that our reading of the [McGuire Act] will allow the District of Columbia to impose its policies on economic activities in New York. But the opposite construction will simply allow New York to dominate the economic activities of the District of Columbia (and other like free trade areas). Since Congress has left the regulation of this part of interstate commerce to the option of the individual

“without merit,” the court held the McGuire Act was a “declaration of consent by Congress that the ‘nonsigner’ provisions of otherwise valid state ‘fair trade’ statutes shall operate on commodities traveling in interstate commerce.” *Id.* at 307. Likewise, in *General Electric Co. v. Masters, Inc.*, 120 N.E.2d 802 (N.Y.), *appeal dismissed*, 348 U.S. 892 (1954), plaintiff challenged the McGuire Act as an improper delegation of authority over interstate commerce. Rejecting that claim, the New York court held: “Congress has undoubted power to redefine the distribution of power over interstate commerce. It may . . . permit the states to regulate the commerce in a manner which would otherwise not be permissible.” *Id.* at 805 (citations omitted); *see* *Schwegmann Bros. Giant Super Mkts. v. Eli Lilly & Co.*, 205 F.2d 788, 793 (5th Cir. 1953) (in response to Commerce Clause challenge to McGuire Act, holding “power of Congress is so plenary that it may exercise that power by permitting the states to regulate phases of interstate commerce” and “even when the subject would be a direct burden on commerce, the state may act when Congress has specifically granted permission for the exercise of state power”) (citing *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 424 (1946)); *see also* Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1480–85 (2007) (Congress can delegate to states authority to enact laws that may unduly burden interstate commerce and otherwise violate dormant Commerce Clause).

51. *General Electric Co. v. Masters Mail Order Co.*, 244 F.2d 681 (2d Cir.), *cert. denied*, 355 U.S. 824 (1957).

52. The McGuire Act provided in pertinent part that the lawfulness of RPM depended on the law of the jurisdiction “in which such resale is to be made, or to which the commodity is to be transported for such resale.” McGuire Act, Pub. L. No. 542, 66 Stat. 631 (1952) (repealed 1975).

53. *General Electric Co.*, 244 F.2d at 685.

states, it is inevitable that when a single transaction affects states with conflicting policies one state or the other must see its policies slighted. We have no clearer guide in choosing the dominant state than the language of the statute itself.⁵⁴

With congressional repeal of the Miller-Tydings and McGuire Acts,⁵⁵ however, the failure of Commerce Clause challenges in the era of “fair trade” laws is *sui generis* and provides no basis today to defeat a challenge to post-*Leegin* inconsistencies in state RPM regulation.⁵⁶

II. The Practical Effect of the RPM Laws of the Per Se States as Applied to Certain Manufacturers Controls Conduct Occurring Wholly Outside the Regulating State

This Essay argues that the *inevitability* of the practical effects of the RPM laws of the Per Se States in interstate markets—to control the manufacturer’s resale pricing strategies in transactions wholly outside the Per Se State and to nullify the antitrust policy choices of *Leegin* States—if proven, should be sufficient to support a constitutional challenge.

A. The Per Se States Face Inherent Limitations in Regulating Outside their Borders

Since the 1980s, federal courts have repeatedly recognized extraterritoriality doctrine as a discrete strand of Commerce Clause law. There is no question that states face an inherent limitation on

54. *Id.* at 684; *see* Bissell Carpet Sweeper Co. v. Masters Mail Order Co., 240 F.2d 684, 689 (4th Cir. 1957) (“The purpose of the Federal statute was served by this grant of authority to the States to pass fair trade statutes and make violations of price agreements unfair competition, and hence it follows that controversies as to the rights of sellers and buyers under these statutes must be resolved by reference to the State statutes themselves.”); Note, *Recent Cases: Fair-Trade Acts*, 71 HARV. L. REV. 374, 374 (1957) (“A congressional preference for legislation which merely removed federal antitrust and commerce-clause objections to resale-price maintenance programs but left fair-trade enforcement to the states was largely responsible for the failure [to define which state law applied to deliveries of products from free-trade to fair-trade states.]”); *cf.* *Corning Glass Works*, 509 F.2d at 300, 302 (as between sales from wholesalers in free trade states to retailers in fair trade states, construing “when lawful” provision of McGuire Act to apply to law of state in which wholesaler’s resale occurred, not state in which retailer resided; “[n]o State need fear any encroachment on its internal affairs by neighboring States pursuing a different policy”) (citations omitted).

55. *See* Consumer Goods Pricing Act, Pub. L. No. 94-145, 89 Stat. 801 (1975).

56. *See* Yakima Valley Mem’l Hosp. v. Wash. State Dep’t of Health, 654 F.3d 919, 934 (9th Cir. 2011) (“A statute that Congress snuffed out of existence by repeal leaves no residual clear statement of authorization” to states to regulate in manner alleged to violate dormant commerce clause).

their ability to regulate conduct wholly outside their borders. Courts do not hesitate to strike a state law that *by its terms* regulates such conduct.⁵⁷ Most successful challenges to state laws as extraterritorial regulation fall in this category.

Where possible, courts will thus construe state laws to avoid application of their terms to conduct wholly outside the state's boundaries. For example, in *Carolina Trucks & Equipment, Inc. v. Volvo Trucks of North America, Inc.*,⁵⁸ the Fourth Circuit considered whether South Carolina's motor vehicle dealer law barred sales in Georgia to South Carolina residents. The Fourth Circuit construed the provision at issue not to apply to sales to South Carolina residents outside South Carolina, and thus "avoid[ed] constitutional problems inherent in a broader interpretation of South Carolina law."⁵⁹ The court explained:

The principle that state laws may not generally operate extraterritorially is one of constitutional magnitude. One state may not "project its legislation" into another, as the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders." . . . The compliance costs that such laws impose undermine the Commerce Clause's objective of a "national common market."⁶⁰

Likewise, in *Morley-Murphy Co. v. Zenith Electronics Corp.*,⁶¹ the Seventh Circuit addressed whether under the Wisconsin Fair Dealership Law ("WFDL") the defendant, Zenith Electronics, could choose not to renew its distributorship agreement with Morley-

57. See *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652 (7th Cir. 1995) (conditioning access to Wisconsin landfills on out-of-town communities adopting Wisconsin-mandated recycling program regulated conduct wholly outside Wisconsin and thus invalid); *Experience Hendrix, LLC v. Hendrixlicensing.com, Ltd.*, 766 F. Supp. 2d 1122, 1143 n.24 (W.D. Wash. 2011) (Washington Personality Rights Act, seeking to govern transaction wholly outside state, amounted to "improper exportation of state law" in violation of extraterritorial doctrine); *In re Nat'l Century Fin. Enters., Inc.*, 755 F. Supp. 2d 857, 887-88 (S.D. Ohio 2010) (application of Ohio Securities Act to transactions outside Ohio was extraterritorial application in violation of Commerce Clause); *Connecticut v. Cahill*, 180 F. Supp. 2d 392, 400 (N.D.N.Y. 2001) (New York regulation conditioning access to certain New York lobstering waters on applicants surrendering right to lobster in waters of any other state violated Commerce Clause).

58. *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484 (4th Cir. 2007).

59. *Id.* at 489.

60. *Id.* at 489-90 (citations omitted).

61. *Morley-Murphy Co. v. Zenith Elecs. Corp.*, 142 F.3d 373 (7th Cir. 1998) (Wood, J.).

Murphy, whose territory included Wisconsin, part of Michigan, Iowa, Minnesota, and North and South Dakota. In remanding the WFDL claim, the Seventh Circuit considered whether an award of lost profits under the WFDL could include lost profits from Morley-Murphy's Iowa and Minnesota locations.⁶² Zenith argued that such an award would represent an improper extraterritorial application of the WFDL. Like the Fourth Circuit in *Carolina Trucks*, the Seventh Circuit avoided the Commerce Clause issue by finding that the Wisconsin Supreme Court would construe the WFDL not to apply to the distributor's sales in Minnesota and Iowa, noting that extraterritorial application of the Act would "at the very least raise significant questions" under the Commerce Clause.⁶³ In that regard, it reasoned:

It is obviously up to Wisconsin to decide whether it wants a franchise protection law. . . . Wisconsin would gain certain benefits from the protection of Wisconsin dealers, and the costs would largely be passed on to Wisconsin consumers. It is much more difficult to see why Wisconsin is entitled to insist that other states adhere to the same economic policy it has chosen. Suppose, for example, that the Iowa legislature decided it wanted to attract new business to the state, and it enacted a dealership law stating that dealership terminations either had to be for "good cause" or, if not supported by good cause, the effective date of any termination had to be two years after the supplier gave notice of its intent to terminate. The Iowa legislature might think that such a law balanced legitimate franchisee or dealer interests against manufacturer or supplier interests in a better way than the more absolute Wisconsin approach. However, if a Wisconsin distributor has been serving the Iowa market, what is the grantor to do if it wishes to close shop in Iowa (assuming that good cause cannot be shown?) *If Wisconsin law applies extraterritorially, Iowa public policy will be thwarted* because the Wisconsin distributor cannot be phased out over the two-year period that Iowa has chosen. *In fact, any state that has chosen a policy more laissez faire than Wisconsin's would have its choices stymied, because the state that has chosen more regulation could always trump its deregulated neighbor.*⁶⁴

62. *Id.* at 378.

63. *Id.* at 379, 380.

64. *Id.* at 379 (emphasis added); see *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 669 (7th Cir. 2010) (Indiana consumer credit code's application to Illinois lender under facts presented was improper extraterritorial regulation); *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 658 (7th Cir. 1995) (invalidating Wisconsin statute, which conditioned use of Wisconsin landfills by non-Wisconsin waste generators on out-of-state

The rule that a Per Se State cannot overtly extend the terms of its RPM laws to transactions occurring wholly outside its borders is well-established. But that rule does not resolve the problem presented by those laws, which do not *by their terms* regulate beyond a state's borders. However, the fundamental "no-direct-regulation" principle has led to an important corollary: state laws, even if intended to apply only to local transactions, cannot *in practical effect* control conduct wholly beyond state borders.

B. The RPM Laws of the Per Se States Give Rise to Cognizable Extraterritorial Effects

For the reasons explained below, the "practical effect" of the RPM laws of the Per Se States is of constitutional consequence. Admittedly, some espouse the view that the extraterritoriality prohibition is limited to situations in which a state is "formally asserting legal authority outside its borders," leaving no apparent room for effects short of express regulation.⁶⁵ The courts provide scant guidance on the standard that should apply when state regulation does not expressly regulate conduct outside the regulating state, but, instead, is alleged to produce improper out-of-state effects. Application of the extraterritoriality doctrine in individual cases, however, suggests that when state regulation does not *require* the out-of-state conduct at issue, out-of-state effects may not trigger constitutional concern. But, when extraterritorial application of the statute to out-of-state conduct is *inevitable*, if not express, it properly presents a constitutional question.⁶⁶ Recent cases permit a useful comparison between the apparent out-of-state effects of the RPM laws of the Per Se States, and those which courts have rejected as not raising constitutional concern.

communities adhering to Wisconsin recycling standards, because it "essentially controls the conduct of those engaged in commerce occurring wholly outside the State of Wisconsin and therefore directly regulates interstate commerce").

65. See Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1521 (2007).

66. *PhRMA v. Walsh*, 538 U.S. 644, 669 (2003) (state statute can directly regulate out-of-state prices "by its express terms or by its inevitable effect"); *PhRMA v. District of Columbia*, 406 F. Supp. 2d 56, 71 n.15 (D.D.C. 2005) (D.C. pricing law unconstitutional where its "inevitable effect . . . is to regulate the price of out-of-state transactions"); see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1078 (3d ed. 2000) (stating "general proposition": "If a state law has the inevitable consequence of actually regulating (and not merely affecting) conduct outside the state, it runs afoul of" dormant Commerce Clause).

I. Inconvenience to Out-of-State Firms Because of State Regulation May Not Raise Constitutional Concern

Out-of-state effects in the form of inconvenience to an out-of-state firm in complying with different state regimes have been held not to amount to improper extraterritorial regulation. For example, in *Eby-Brown Co. v. Wisconsin Department of Agriculture*,⁶⁷ plaintiff tobacco wholesaler's "only argument" in support of its Commerce Clause challenge to Wisconsin's Unfair Sales Act was that it "affected the way in which it does business as a national chain of stores."⁶⁸ The Seventh Circuit rejected the claim, simply stating the "fact that doing business in Wisconsin has become more difficult for Eby-Brown does not mean that the Act violates the principles of interstate commerce."⁶⁹ Likewise, state regulation alleged to cause a firm to choose to change uniform national labeling to meet requirements in a particular state was upheld when the terms of the statute did not require that choice.⁷⁰ On the other hand, a labeling law that requires a unique mark in the regulating State has been challenged as extraterritorial regulation because it, in effect, requires the use of different labels in other states. The district court rejected this claim in *American Beverage Association v. Snyder*, and it is now on interlocutory appeal to the Sixth Circuit.⁷¹

Courts have also rejected claims that state restrictions on internet resellers controlled conduct wholly outside the regulating state when such resellers had the tools to comply with the statute in connection

67. *Eby-Brown Co. v. Wis. Dep't of Agric.*, 295 F.3d 749 (7th Cir. 2002).

68. *Id.* at 756–57.

69. *Id.* at 757 (emphasis added).

70. See, e.g., *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628 (6th Cir. 2010); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001). For example, in *National Electronic Manufacturers Association*, the Second Circuit rejected a Commerce Clause challenge to a Vermont law that required lamp manufacturers of mercury-containing products to label their products as to mercury content and manner of disposal. The Association claimed that "[g]iven the manufacturing and distribution systems used by its members, . . . if its members continue selling in Vermont, they would also be forced as a practical matter to label lamps sold in every other state." *Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 110. The Second Circuit rejected the argument because the statute did not "inescapably" require broader labeling. *Id.* It observed, instead: "To the extent the statute may be said to 'require' labels on lamps sold outside Vermont, then, it is only because the manufacturers are unwilling to modify their production and distribution systems to differentiate between Vermont-bound and non-Vermont-bound lamps." *Id.* (emphasis added).

71. *Am. Beverage Ass'n v. Snyder*, No. 1:11-CV-195, 2011 WL 2182080, at *9–13 (W.D. Mich. May 31, 2011), *subsequent proceeding*, No. 1:11-CV-195, 2011 WL 2960190 (W.D. Mich. July 20, 2011) (granting request for interlocutory appeal on "difficult issue of first impression").

with in-state transactions.⁷² For example, in *National Federation of the Blind v. Target Corp.*,⁷³ plaintiffs alleged that Target.com was inaccessible to the blind in violation of certain federal and state laws. Target claimed that applying state laws to its national internet website amounted to extraterritorial regulation. The court rejected the claim:

Defendant's argument—that if this court applies the Unruh Act and the Disabled Persons Acts to Target.com, the practical effect will be to force it to modify its website for all customers nationwide—is not sustainable. This assumes that Target would decline to design a separate California site, and instead simply modify its Target.com site for consumers nationwide. *Healy* lends no support to defendant's argument, since *Healy* does not address whether a statute violates the commerce clause when a defendant can comply with a statute in such a way as to avoid extraterritorial application. The commerce clause is not necessarily implicated since Target could choose to make a California-specific website.

Indeed, even if Target chooses to change its entire website in order to comply with California law, this does not mean that California is regulating out-of-state conduct. Courts have held that when a defendant chooses to manufacture one product for a nationwide market, rather than target its products to comply with state laws, defendant's choice does not implicate the commerce clause.⁷⁴

Notably, one commenter has observed that application of Maryland's statutory repeal of *Leegin* to the business of internet resellers operating outside Maryland amounts to improper extraterritorial regulation because "it forces manufacturers to take into account the Maryland law when deciding whether or not to use RPM in states where the practice might be found lawful."⁷⁵ She argued that, for out-of-state internet resellers, maintaining two prices on the reseller's website—one applicable to customers in the Per Se

72. See, e.g., *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 196 (2d Cir. 2007) (plaintiff could modify terms of gift cards sold via the internet to consumers in regulating state); see *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1308–09 (10th Cir. 2008) (internet lender failed to explain "how it would be burdensome to it to simply inquire of the customer in which state he is located").

73. *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006).

74. *Id.* at 961.

75. Katherine M. Brockmeyer, Note, *State Regulation of Resale Price Maintenance on the Internet: The Constitutional Problems with the 2009 Amendment to the Maryland Antitrust Act*, 67 WASH. & LEE L. REV. 1111, 1113–14 (2010).

States and one applicable to customers in *Leegin* States—is “unworkable.”⁷⁶ In the end, whether manufacturers can avoid liability as to their resellers’ internet sales into Per Se States by requiring resellers to maintain dual store fronts with differential pricing based on the location of the customer is an issue of fact and may depend in large part on the resources and sophistication of resellers in a particular industry, and the pace and cost of technology.⁷⁷ Given the apparent trend among courts to reject extraterritorial claims when out-of-state firms can reasonably comply with state law for inbound sales without any required out-of-state spillover, the issue is important.

As a counterweight to arguments that possible compliance moots the constitutional issue, in *PhRMA v. District of Columbia*,⁷⁸ the district court confronted a challenge to a District of Columbia drug-pricing law as applied to out-of-state manufacturers selling to retailers in the District through out-of-state wholesalers. Limiting its decision to the metes and bounds of the as-applied challenge, the court held that the District’s pricing law regulated the out-of-state pricing of manufacturers to their out-of-state wholesalers and was thus per se invalid under extraterritoriality principles without regard to the wholesalers’ subsequent in-bound sales.⁷⁹

In any event, the problem with the RPM laws of the Per Se States is broader than the risks for the manufacturer vis-à-vis resellers situated outside the Per Se States but which sell nationwide. The constitutional impediment arises more broadly from the interstate nature of resale markets, which, in most instances, include competing resellers from both Per Se and *Leegin* States. The manufacturer’s inability to limit the resale prices of resellers (whether online or brick and mortar) in the Per Se States permits discounting in interstate markets that cause minimum RPM programs for the manufacturer’s other resellers in those same markets to be unsustainable.⁸⁰ Unlike

76. *Id.* at 1136.

77. See Emily Steel and Julia Angwin, *On the Web’s Cutting Edge, Anonymity in Name Only*, WALL ST. J., Aug. 4, 2010, at A1.

78. *PhRMA v. District of Columbia*, 406 F. Supp. 2d 56 (D.D.C. 2005).

79. *Id.* at 67–71.

80. The commenter contends that manufacturers need not be concerned with the Maryland RPM law when adopting resale price programs for bricks and mortar outlets, whether located in Per Se States or in *Leegin* States. See Brockmeyer, *supra* note 75, at 1143. The premise of this Essay is to the contrary. In particular, bricks and mortar dealers, whether located in the Per Se State or in a *Leegin* State, do not necessarily compete only in local, in-state markets. Further, bricks and mortar outlets regularly

the options allegedly available to Target.com in *National Federation*, a manufacturer that distributes products through resellers that compete in interstate markets cannot choose whether, on the one hand, to adopt a uniform policy as a matter of convenience to avoid liability in the Per Se States or, on the other, to adopt a dual approach which takes into account specific states' RPM laws. Competitive dynamics preclude different price rules for different resellers competing in the same economic market.

2. *Cross-Border Price Competition Without More May Not Trigger Constitutional Concern*

In *K-S Pharmacies, Inc. v. American Home Products Corp.*,⁸¹ the Seventh Circuit gave short shrift to the argument that cross-border price competition without more was sufficient to invalidate a Wisconsin statute that required sellers to offer drugs to Wisconsin purchasers at the prices offered to their most favored purchasers. Plaintiff argued that the Wisconsin law “has some extraterritorial effects because a price set in Milwaukee must be used in Superior; and the price in Superior will be used just across the border in Duluth, Minnesota, which is part of the same market.”⁸² The Seventh Circuit termed it a “recycled argument” rejected by the Supreme Court in a footnote in *Exxon Corp. v. Governor of Maryland*.⁸³ Judge Easterbrook observed that the *Exxon* appellants had argued that the Maryland law prohibiting price discrimination “regulated beyond its boundaries” because of the “possibility that they may have to extend *voluntary* allowances into neighboring States in order to avoid liability under the Robinson-Patman Act.”⁸⁴ The Supreme Court responded: “this alleged extra-territorial effect arises from the Robinson-Patman Act, not the Maryland statute.”⁸⁵

Unlike *Exxon*, the out-of-state price impact of the RPM laws of the Per Se States is not driven by the Robinson-Patman Act. Instead, the out-of-state price impact appears to be the inevitable result of the Per Se States' regulation of resale price strategies of participants in

compete with internet resellers which leads to geographic markets with interstate or national dimension.

81. *K-S Pharmacies, Inc. v. Am. Home Prods. Corp.*, 962 F.2d 728 (7th Cir. 1992).

82. *Id.* at 731.

83. *Id.* at 731–32 (citing *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978)).

84. *Id.* at 731 (quoting *Exxon*, 437 U.S. at 133 n.28) (emphasis added).

85. *Id.*

interstate markets where price dynamics preclude different resale price programs for competing resellers and where Per Se RPM regulation as to some resellers in that market controls the manufacturer's resale pricing strategies as to all resellers in that market, including those outside the Per Se State.

3. *The Inevitable Effect of the RPM Laws of the Per Se States Controls Resale Price Strategies Wholly Outside the Per Se States*

In *Brown-Forman* and *Healy*, the challenged regulation expressly linked pricing in the regulating state to the distillers' pricing in separate and discrete out-of-state markets. Furthermore, in *Brown-Forman*, a distiller that complied with the laws of New York risked violating the laws of other states. Unlike the price regulations struck down in *Brown-Forman* and *Healy*, the extraterritorial effect of the RPM laws of the Per Se States is not the result of the *express* regulation of interdependent prices.

The RPM laws of the Per Se States affect a manufacturer's out-of-state pricing strategies not by constructing an artificial bridge between two unrelated markets as in *Brown-Forman* and *Healy*, but by regulating resale pricing strategies for resellers in a Per Se State that compete in the *same* market with resellers in *Leegin* States. Per Se State laws can prevent a manufacturer from adopting competitive RPM strategies in neighboring *Leegin* States because, as a practical matter, it cannot set resale prices for some but not all resellers in the same economic market. The *inevitability* of regulating out-of-state pricing conduct in that situation—with the Per Se States' more restrictive policy choices trumping those of *Leegin* States—should be sufficient to establish improper extraterritorial control.

The Ninth Circuit's decision in *NCAA v. Miller*⁸⁶ illustrates the point. In that case, the Ninth Circuit struck down as a per se violation of the Commerce Clause a Nevada statute requiring any national collegiate athletic association to provide certain procedural protections to employees and students of Nevada institutions accused of a rule infraction, many of which were not provided in the NCAA's enforcement program.⁸⁷ In the court's view, if the NCAA wanted to avoid liability in Nevada and achieve its twin goal of uniform enforcement, it would need to apply Nevada's procedures in all states.⁸⁸ On that basis the court held the statute "exceed[ed] the

86. *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993).

87. *Id.* at 637.

88. *Id.* at 639.

inherent limits” of Nevada’s authority.⁸⁹ Here, as in *NCAA*, to avoid liability in the Per Se States and to maintain uniformity in those economic markets that include both *Leegin* and Per Se States, the manufacturer must adhere to the stricter rules of the Per Se States. “The mere fact that the effects of [the laws of the Per Se States] are triggered only by sales . . . within [their borders] . . . does not validate the law if it regulates the out-of-state transactions of [manufacturers] who sell in-state.”⁹⁰

C. The RPM Laws of the Per Se States Require Manufacturers to Forego Competitive Advantages Outside the Per Se States

Both *Brown-Forman* and *Healy* invalidated price affirmation laws in part because they led firms to forfeit competitive advantages in the form of price responses in out-of-state markets. Per Se State price regulation not only affects the bare terms of a manufacturer’s resale price policies but also may adversely impact its competitiveness outside the Per Se States.

Manufacturers of premium branded products, in particular, often compete not only on price but also on non-price aspects of their products such as quality or innovation, and rely on their resellers to provide personal attention and high-quality facilities in which to display products and educate customers. Accordingly, such a firm may seek to differentiate itself as a high-value, high-service brand as opposed to other lower-priced, low-service brands.⁹¹ Minimum RPM programs can produce procompetitive benefits by, for example, encouraging compliant resellers to invest in pre- or post-sale services or promotional activities that serve to enhance demand for the manufacturer’s product and increase interbrand competition.⁹² But, when customers can choose among resale outlets in a geographic market that includes both Per Se and *Leegin* States, the demand-enhancing activities of resellers subject to a lawful RPM program in a *Leegin* State may simply benefit resellers in the Per Se States who remain free to undercut the resale prices of those in the *Leegin* States. In those circumstances, manufacturers may conclude that

89. *Id.* The Ninth Circuit in *Miller* also invalidated the Nevada statute because of “potential interaction or conflict” with similar laws in other states. *Id.*

90. See *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 580 (1986).

91. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007).

92. Benjamin Klein, *Competitive Resale Price Maintenance in the Absence of Free Riding*, 76 ANTITRUST L.J. 431 (2009).

implementation of an RPM program that applies to some but not all outlets in the same market would be impracticable, and thus “surrender whatever competitive advantages [it] may possess” by implementing such programs in *Leegin* States.⁹³

The Third Circuit in *Cloverland-Green Spring Dairies, Inc. v. Pennsylvania Milk Marketing Board*⁹⁴ asserted that when a plaintiff challenges a facially neutral statute on that basis, “a nexus between the advantage that has been neutralized and the firm’s out-of-state status is necessary.”⁹⁵ Unlike a cost advantage due to specific out-of-state operations, a competitive business strategy (such as pursuit of a minimum RPM policy to support demand-enhancing activities) does not have a physical “locus” that generates economic efficiencies allocable to its out-of-state origin. *Healy* and *Brown-Forman* construed the competitive advantage believed to have been lost as the ability of firms to price in response to out-of-state market conditions (without regard to the affirmation laws of the regulating states). That principle should apply to bolster a finding of extraterritorial regulation if the laws of the Per Se States require firms, in practical effect, to abandon competitive out-of-state resale pricing strategies.

93. *Brown-Forman Distillers*, 476 U.S. at 580. The *Leegin* Court recognized the ability of discounters to shift sales from high-service retailers and substantially undermine a manufacturer’s competitive position:

A single manufacturer’s use of vertical price restraints tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer’s position as against rival manufacturers. . . .

Absent vertical price restraints, the retail services that enhance interbrand competition might be underprovided. . . . Consumers might learn, for example, about the benefits of a manufacturer’s product from a retailer that invests in fine showrooms, offers product demonstrations, or hires and trains knowledgeable employees. . . . If the consumer can then buy the product from a retailer that discounts because it has not spent capital providing services or developing a quality reputation, the high-service retailer will lose sales to the discounter, forcing it to cut back its services to a level lower than consumers would otherwise prefer. Minimum resale price maintenance alleviates the problem because it prevents the discounter from undercutting the service provider.

Leegin, 551 U.S. at 890-91. Resale price maintenance may also increase interbrand competition by facilitating market entry for new firms and brands. *Id.* at 891.

94. *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 462 F.3d 249, 272 (3d Cir. 2006).

95. *Id.* at 265.

III. Arguments Against an Extraterritorial Challenge to Per Se RPM Laws

The principal arguments against an extraterritoriality challenge are: first, that the dormant Commerce Clause should be narrowly construed; next, that states may enact laws that address in-state harms involving their citizens; and, finally, that a manufacturer has tools to implement dual resale pricing strategies to address inconsistencies between the Per Se and *Leegin* States. The basis for those arguments and reasons why they should fail are set out below.

A. Opponents Would Argue for a Narrow Construction of the Dormant Commerce Clause

There is no debate that courts have recognized a basis for challenging state law on extraterritorial grounds. But opponents would likely urge a retraction of the scope of the dormant Commerce Clause. First, opponents may argue that a court should reject extraterritoriality and limit the dormant Commerce Clause to its basic tenet—economic protectionism. The failure of the Supreme Court, most recently in *Department of Revenue*, to acknowledge the extraterritorial strand of *Brown-Forman* and *Healy* in the general framework for dormant Commerce Clause analysis is a putative silence that opponents may use to marginalize a challenge under extraterritorial principles.

Alternatively, accepting extraterritoriality as a viable theory, opponents may argue, first, that extraterritoriality only applies when the statute by its terms regulates out-of-state conduct, addressed above;⁹⁶ and second, it should be limited to the problem of inconsistent state regulation.⁹⁷ As to the latter, the Supreme Court in

96. See *supra* notes 49, 58, 59 & accompanying text.

97. See Michael J. Ruttiger, Note, *Is There a Dormant Extraterritoriality Principle?: Commerce Clause Limits on State Antitrust Laws*, 106 MICH. L. REV. 545 (2007). In considering how best to assess the extraterritorial application of state antitrust laws, the commenter in this Note argued that both the extraterritoriality doctrine and the *Pike* balancing test should be replaced with a narrowly defined “Inconsistency Principle.” *Id.* at 550. He described the two doctrines as “distinct standards that create an apparently intractable conflict” such that courts “cannot discern which rule to apply to statutes that are facially neutral, regulate evenhandedly, but incidentally create liability for out-of-state conduct.” *Id.* at 549. The apparent conflict between extraterritoriality and the *Pike* balancing test seems overstated. Facts that raise extraterritoriality concerns may also trigger a *Pike* balancing test, but not all state regulation tested under *Pike* triggers extraterritorial concerns. To the larger point, while some differences among the circuits have emerged, the appellate courts applying extraterritoriality principles and the *Pike* balancing test over the past decade do not exhibit inaptness or confusion such that these

*CTS Corp. v. Dynamics Corp. of America*⁹⁸ suggested twin objects of the dormant Commerce Clause: invalidation of statutes that (i) discriminate against interstate commerce or (ii) may subject interstate commerce to inconsistent regulation.⁹⁹ The Court cited *Brown-Forman* (but not *Healy*) for the latter proposition, but did not expand on the “inconsistency” that would trigger concern. A narrow view of inconsistent regulation would require evidence showing that a person subject to the laws of A and B would necessarily violate the laws of A by complying with the laws of B—the perceived problem in *Brown-Forman*. Such conflicts clearly raise extraterritorial problems, but with few exceptions courts addressing extraterritorial regulation claims have not limited application of the extraterritoriality doctrine to that instance. In other words, direct regulatory conflict appears a sufficient, but not necessary, condition for demonstrating extraterritorial regulation.¹⁰⁰ Moreover, the Seventh Circuit in *Midwest Title Loans* flatly rejected a narrow construction of inconsistent regulation:

“Generally speaking,” the Supreme Court said in *Healy*, “the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.” True, a couple of cases in other circuits suggest that the only relevant inconsistency is placing a firm under “inconsistent obligations.” *PhRMA v. Concannon*, 249 F.3d 55, 82–83 (1st Cir. 2011); see also *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 826 (3d Cir. 1994). And that is not the situation here; *Midwest* can comply with Indiana’s consumer credit code without (so far as appears) violating the law of Illinois or

standards should be thrown out in favor of a narrowly construed “inconsistent regulation” rule. See, e.g., *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 35 (1st Cir. 2005) (setting out inquiry under dormant Commerce Clause based on nature of law at issue).

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

99. *Id.* at 87–89.

100. See, e.g., *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 63–68 (2d Cir. 2010) (inconsistent regulation “might” be sufficient evidence of extraterritorial regulation, but not ruling out whether other evidence based on statutes’ use of national market share may “in turn affect[] interstate pricing decisions”; claim failed for lack of proof); *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 647–48 (6th Cir. 2010) (state labeling law not invalid under extraterritorial principles when law had no bearing on labeling of milk in other states, compliance did not risk violation of other state laws, and no evidence that it impeded interstate flow of milk); cf. *NEMA v. Sorrell*, 272 F.3d 104, 112 (2d Cir. 2001) (precisely what “scope of conflict” is “required to state a dormant Commerce Clause claim is somewhat unclear”).

any other state. But we took a broader view of inconsistent state policies in the *Morley-Murphy* case and we must do so in this one. Suppose Illinois thinks title loans a good thing . . . or at least, . . . thinks they shouldn't be restricted in the way that Indiana thinks they should be. To allow Indiana to apply its law against title loans when its residents transact in a different state that has a different law would be arbitrarily to exalt the public policy of one state over that of another.¹⁰¹

State antitrust laws are not immune from challenge on the ground of inconsistency, and the fact that compliance with the laws of the Per Se States does not cause a manufacturer to violate the laws of *Leegin* States is not necessarily fatal. While no single approach to "inconsistency" has yet to emerge, *Midwest Title* provides a useful template in articulating the concerns presented by inconsistent RPM regulation in interstate markets.¹⁰²

B. The Per Se States Can Protect Against Local Harms, But the Argument is Not an Absolute Shield

Another likely argument against an extraterritorial challenge is that the per se RPM laws simply focus on a perceived local harm. The First Circuit's recent approach in *IMS Health Inc. v. Mills*¹⁰³ illustrates that point. There, the court considered a challenge to a Maine statute that prohibited certain entities (such as pharmacies and prescription drug information intermediaries) from using or transferring prescriber information for marketing purposes when the prescriber had opted to protect the confidentiality of her prescribing data.¹⁰⁴ The statute was aimed at "pharmaceutical manufacturers' use of the data to send their pharmaceutical sales representatives to personally market particular drugs to particular prescribers, a practice known as 'detailing.'"¹⁰⁵ The plaintiffs were "middlemen" that acquired prescriber data from pharmacies and insurers, and aggregated and sold them to pharmaceutical manufacturers. The

101. *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 667–68 (7th Cir. 2010) (citations omitted).

102. See also *Morley-Murphy Co. v. Zenith Elecs. Corp.*, 142 F.3d 373, 379 (7th Cir. 1998) (extraterritoriality to prevent "state that has chosen more regulation [from] trump[ing] its deregulated neighbor").

103. *IMS Health Inc. v. Mills*, 616 F.3d 7 (1st Cir. 2010), *abrogated on other grounds*, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011).

104. *Id.* at 12–13.

105. *Id.* at 14.

First Circuit rejected plaintiffs' Commerce Clause challenge to the Maine statute:

The Supreme Court's current dormant Commerce Clause jurisprudence is concerned with preventing economic protectionism and inconsistent regulation, not with enforcing geographical limits on states' exercise of their police power that necessarily regulate commerce. Even under the extraterritoriality branch of the dormant Commerce Clause, the Supreme Court has not barred states from regulating any commercial transactions beyond their borders that involve their own citizens and create in-state harms.¹⁰⁶

The First Circuit described plaintiffs' extraterritoriality claim as advocating "an infrequently applied strand" or "dormant branch" of dormant Commerce Clause jurisprudence.¹⁰⁷ Nonetheless, the First Circuit recognized that "[l]imitations on states' regulation of extraterritorial commerce have been justified because 'one State's power to impose burdens on the interstate market . . . is also constrained by the need to respect the interests of other States,'"¹⁰⁸ but rejected the claim since the Maine law simply protected data of consumers within the state.¹⁰⁹

A segregable local aim such as that in *IMS Health* may not shield the RPM laws of the Per Se States. Because of the interstate nature of resale markets, proponents may be unable to show, for example, that California RPM laws only regulate prices to consumers within California.

C. Dual Pricing Strategies Are Not An Alternative that Eliminates Constitutional Questions

Proponents of the rules of the Per Se States may contend that manufacturers could comply with inconsistent state price regimes by adopting a *Colgate* policy in the Per Se States, while enforcing bona fide minimum RPM agreements outside the Per Se States, with the result that common resale prices could prevail in geographic markets across state lines. This dual approach to resale pricing—*Colgate* in the Per Se States and minimum RPM in others—arguably avoids the constitutional issue. *Colgate* policies generally permit the

106. *Id.* at 25.

107. *Id.* at 29 & n.27.

108. *Id.* at 30 (citing *BMW of N. Am. v. Gore*, 517 U.S. 559, 571 (1996)).

109. *Id.* at 31 n.33.

manufacturer to announce (but not agree on) the resale prices at which its products should be resold and refuse to deal with resellers that fail to adhere to its policy.¹¹⁰ *Colgate* rights are quite narrow, with a unilateral refusal to deal (usually in the form of immediate suspension or termination of sales) viewed as the sole prudent remedy. Given a manufacturer's limited recourse against resellers that choose not to comply, such policies may simply be ignored by key resellers not facing a realistic threat of termination. Moreover, given the fine legal distinctions for antitrust purposes between unilateral action and "agreement," the terms of a unilateral price policy may be construed as RPM or viewed as such by state enforcers or a jury.¹¹¹ Thus, experience suggests that selective use of a *Colgate* policy to apply only in Per Se States is a half-measure, if practicable at all, and unlikely to stem the extraterritorial effects of the RPM rules in the Per Se States.

IV. Testing Extraterritorial Regulation Under a General Balancing Test

State antitrust laws may be subject to constitutional review¹¹² and one alternative to a challenge under extraterritoriality principles is to test the RPM laws of the Per Se States under a *Pike* balancing test.

[W]here the nature of an enterprise is such that differing state regulation, although not conflicting, requires the enterprise to comply with the strictest standard of several states in order to continue an interstate business extending over many states, the extraterritorial effect which the application of a particular state law would exact constitutes, absent a strong state interest, an impermissible burden on interstate commerce.¹¹³

110. See *United States v. Colgate & Co.*, 250 U.S. 300 (1919); ABA SECTION OF ANTITRUST LAW, ANTITRUST HANDBOOK FOR FRANCHISE AND DISTRIBUTION PRACTITIONERS 58–60 (2008).

111. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 903 (2007); see also Memorandum of Law in Support of Respondent's Motion to Dismiss, *New York v. Tempur-Pedic Int'l, Inc.*, No. 400837/10 (N.Y. Sup. Ct. May 12, 2010) (arguing *inter alia* in response to RPM claim, adoption of *Colgate* policy and absence of agreement).

112. See *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 993 (9th Cir. 2000) (observing *Exxon* Court "upheld the right of states to apply their competition statute unless the lack of uniformity would impede the flow of goods").

113. *Flood v. Kuhn*, 443 F.2d 264, 267 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972); see also *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 64 n.18 (2d Cir. 2010) (court may analyze extraterritorial claim as disproportionate burden under balancing test or, separately, as "question of regulatory jurisdiction"); *SPGGC, LLC v. Blumenthal*, 505 F.3d 183 (2d Cir. 2007) (same); *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 50 (2d Cir. 2007)

The general balancing test requires a showing of: (i) putative local benefits; (ii) the burden placed by the statute on interstate commerce; and (iii) whether the burden is “clearly excessive” as compared to the benefits.¹¹⁴ The plaintiff may be required to show that a challenged state law “impose[s] a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce,”¹¹⁵ and adversely impacts the relevant market as a whole.¹¹⁶ Aside from the general framework, the specific factors that apply when a claim of extraterritorial regulation is tested under *Pike* are not clear, although some courts have held that extraterritorial regulation is a disproportionate burden under *Pike*.¹¹⁷ A close assessment of the *Pike* balancing test is outside the scope of this Essay. But, it is useful in rounding out this Essay to place the RPM laws of the Per Se States in antitrust context, and note that aspect of the balancing test that considers “the nature of the local interest involved, and . . . whether it could be promoted as well with a lesser impact on interstate activities.”¹¹⁸

Advocates for per se prohibitions against minimum RPM argue that such practices harm consumers through higher prices, and that a per se ban advances consumer interests. The Supreme Court in *Leegin*, however, recognized that higher prices without more are not anticompetitive¹¹⁹ and may, instead, reflect legitimate benefits supporting the higher price point. Proponents for the per se rule argue, however, that there is a lack of empirical evidence to substantiate the benefits of minimum resale pricing. But that observation applies equally to the argument that banning minimum RPM always benefits consumers.

A nuanced rule of reason is a less restrictive option and alleviates the constitutional burdens presented by the status quo. The rule of reason is a flexible tool, and “capable of distinguish[ing] between

(state regulation of commercial activity occurring wholly outside state is “circumstance” in which evenhanded regulation imposes incidental burden on interstate commerce).

114. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); see, e.g., *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 312 (1st Cir. 2005).

115. *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 109 (2d Cir. 2001); see *Town of Southold*, 477 F.3d at 47 (plaintiff bears burden to demonstrate disparate impact on interstate commerce).

116. *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794–95 (8th Cir. 1995).

117. See *supra* note 108 and accompanying text.

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

119. *Leegin*, 551 U.S. at 895 (advocates of per se rule “mistaken in relying on pricing effects absent a further showing of anticompetitive conduct”).

restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumers' best interest."¹²⁰ There is no lack of proposals to structure a rule of reason to meet those objectives, including from state antitrust enforcers themselves.¹²¹

Conclusion

The issues presented in this Essay are not hypothetical. Construction of a few legacy laws coupled with enactment of *Leegin* "repealers" in one or more states threatens to continue to foster an environment in which "national regulation of the pricing mechanism for goods" will be impermissibly accomplished "piecemeal" by the Per Se States.¹²² In the end, whether a manufacturer can successfully limit application of the RPM laws of the Per Se States on Commerce Clause grounds will depend on the facts and economics of the manufacturer's distribution system, the markets in which its resellers compete, and the out-of-state effects of Per Se regulation. To bring a claim based on extraterritoriality principles, plaintiffs must be prepared, *inter alia*, to demonstrate conduct "wholly outside" the Per Se States and show "why the force exerted by the [RPM laws of the Per Se States], with respect to out-of-state conduct, can fairly be described as 'control.'"¹²³ Where the facts show that a manufacturer's resellers compete in interstate markets and Per Se State regulation of resale pricing strategies for resellers in the Per Se States has, in practical effect, required the manufacturer to forego otherwise lawful RPM programs in *Leegin* States and to adhere instead to the standards prescribed by the Per Se States in transactions wholly outside the Per Se State, a court may find improper extraterritorial regulation.

120. *Id.* at 886.

121. See Amended States' Comments Urging Denial of Nine West's Petition, *In re* Nine West Group Inc., Dkt. No. C-3937 (F.T.C. Jan. 17, 2008) (proposing truncated rule of reason approach to RPM).

122. See *Healy v. Beer Inst.*, 491 U.S. 324, 340 (1989).

123. *Wine & Spirit Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 15 (1st Cir. 2007); see also *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 41 (1st Cir. 2005) (failing to prove that effect of Maine regulation was to "transform Maine prices into national . . . prices"); *Am. Express Travel Related Servs. Co. v. Sidamon-Eristoff*, 2010 U.S. Dist. LEXIS 120153, at *155-56 (D.N.J. Nov. 13, 2010) (failing to show how effects of state regulation "might be projected into other states").