DORMANT COMMERCE CLAUSE — EXTRATERRITORIALITY DOCTRINE — SIXTH CIRCUIT INVALIDATES MICHIGAN STATUTE REQUIRING BOTTLE MANUFACTURERS TO USE UNIQUE MARK ON ALL BOTTLES SOLD WITHIN MICHIGAN. — *American Beverage Ass'n v. Snyder*, 700 F.3d 796 (6th Cir. 2012).

The Commerce Clause provides Congress with the power "[t]o regulate Commerce with foreign Nations, and among the several States."[1] The federal courts have long interpreted this positive grant of authority to Congress to include a restrictive element known as the dormant commerce clause, which is "a self-executing limitation on the power of the States to enact laws imposing substantial burdens on [interstate] commerce."[2] Under the extraterritoriality doctrine of the dormant commerce clause, state laws that directly regulate "commerce that takes place wholly outside of the State's borders" are invalid per se, "whether or not the commerce has effects within the State."[3] Recently, in *American Beverage Ass'n v. Snyder*,[4] the Sixth Circuit held that a Michigan law requiring bottle manufacturers to place a unique mark on containers sold within Michigan and making it illegal to sell bottles with that mark in other states was unconstitutional under the extraterritoriality doctrine because it directly regulated commerce occurring outside of Michigan.[5] This decision, which struck down a state law without considering its local benefit or extraterritorial burden, illustrates that the federal judiciary should abandon its formalistic extraterritoriality doctrine in favor of a more flexible approach. Thus, extraterritoriality's per se rule of invalidity should be replaced with the balancing test that the Supreme Court established in *Pike v. Bruce Church, Inc.*[6] This test is already used to evaluate state laws that affect interstate commerce, and would ensure that *harmful* extraterritorial laws are struck down, without unnecessarily invalidating beneficial, unburdensome laws.

In 1976, Michigan passed the Michigan Container Act,[7] which requires consumers to pay a ten-cent deposit on any beverage container purchased within Michigan. The Act also allows consumers to redeem their deposit by returning the empty containers to a retailer who sells that type of container or to a reverse vending machine.[8] After this system was in place for several years, Michigan realized that it had an

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[1] U.S. CONST. art. I, § 8, cl. 3.

[2] S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984).

[3] Healy v. Beer Inst., 491 U.S. 324, 336 (1989) (quoting Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982)) (internal quotation mark omitted).

[4] 700 F.3d 796 (6th Cir. 2012).

[5] *See id.* at 810.

[6] 397 U.S. 137 (1970).

[7] MICH. COMP. LAWS ANN. §§ 445.571–.576 (West 2011 & Supp. 2012).

[8] *See id.* §§ 445.571, .572(1)–(3).

overredemption problem: individuals were redeeming out-of-state bottles on which no deposit had been paid to Michigan, costing the state between $15.6 and $30.0 million annually.[9]

In December 2008, the Michigan legislature addressed this problem by passing the Unique-Mark Amendment,[10] which required manufacturers who sold their containers in Michigan to place a "symbol, mark, or other distinguishing characteristic" on the container that demonstrates it is "unique to [Michigan], or used only in [Michigan] and 1 or more other states that have laws substantially similar to this act."[11] Violation of this requirement was a misdemeanor, punishable by imprisonment of up to 180 days and/or a fine of up to $2000.[12]

On February 25, 2011, the American Beverage Association[13] brought suit in federal court, claiming that the unique-mark requirement violated the Commerce Clause of the U.S. Constitution by discriminating against interstate commerce, regulating extraterritorially, and unduly burdening interstate commerce.[14] The federal district court in Michigan granted partial summary judgment in favor of the state.[15] Judge Quist concluded that the unique-mark requirement did not discriminate against interstate commerce[16] and did not violate the extraterritoriality doctrine because it was too unlike the statutes that the Supreme Court had invalidated under that doctrine.[17] However, applying the balance test established by the Supreme Court in *Pike*, he refused to grant summary judgment on the plaintiff's third claim, concluding that there were still factual disputes concerning the regulation's burden on interstate commerce and the magnitude of its local benefit.[18]

The Sixth Circuit affirmed much of the district court's ruling but reversed the extraterritoriality determination. Writing for a unani-

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[9] *See Am. Beverage*, 700 F.3d at 801.

[10] MICH. COMP. LAWS ANN. § 445.572a (West 2011).

[11] *Id.* § 445.572a(10). Michigan stated that the category of "states that have laws substantially similar" includes all ten states that have bottle deposit–redemption laws. Am. Beverage Ass'n v. Snyder, 793 F. Supp. 2d 1022, 1026 (W.D. Mich. 2011).

[12] MICH. COMP. LAWS ANN. § 445.572a(11).

[13] The Association comprises the "producers, marketers, distributors, and bottlers of virtually every non-alcoholic beverage sold in the United States." *Am. Beverage*, 793 F. Supp. 2d at 1025.

[14] *Am. Beverage*, 700 F.3d at 802; *Am. Beverage*, 793 F. Supp. 2d at 1027.

[15] *Am. Beverage*, 793 F. Supp. 2d at 1039.

[16] *Id.* at 1029–33.

[17] *Id.* at 1035–37. The Supreme Court has only used extraterritoriality to invalidate price-affirmation statutes, which require a vendor to post its price in the regulating state and not charge a lower price in other states. *See, e.g.*, Healy v. Beer Inst., 491 U.S. 324, 336–40 (1989) (striking down a Connecticut price-affirmation law due to its extraterritorial effect of regulating beer prices in other states); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582–83 (1986) (striking down a New York law on similar grounds).

[18] *Am. Beverage*, 793 F. Supp. 2d at 1037–39. Under *Pike*, the reviewing court will uphold the law unless its burdens on interstate commerce are "clearly excessive" relative to its local benefits. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

mous panel, Judge Clay[19] agreed that the unique-mark requirement did not discriminate against interstate commerce, but held that the regulation had an impermissible extraterritorial impact.[20] The court stated that the key inquiry in an extraterritoriality analysis is "whether the 'practical effect of the regulation is to control conduct beyond the boundaries of the State.'"[21] The court further noted that not all labeling requirements are impermissibly extraterritorial, as those that impose obligations only *within* the regulating state do not directly regulate out-of-state conduct.[22] However, Judge Clay determined that the labeling requirements that have been upheld by the Supreme Court were distinguishable from the labeling requirement at issue because Michigan's law required beverage manufacturers to include a *unique* label that could not be used elsewhere, and therefore the statute *directly* regulated sales occurring in other states.[23] Indeed, "Michigan's unique-mark requirement not only require[d] beverage companies to package a product unique to Michigan but also allow[ed] Michigan to dictate where the product [could] be sold."[24] The court held that this regulation of commerce occurring wholly outside of Michigan ran afoul of the extraterritoriality doctrine, and therefore struck it down.[25]

Judge Rice concurred. Judge Rice first pointed out that Michigan's labeling requirement would create "havoc" if other states passed similar laws because bottle manufacturers could not use Michigan's unique mark nationwide.[26] He then explained that, if a law is extraterritorial, it is automatically invalid; there is no inquiry into whether it serves a legitimate local purpose.[27]

Judge Sutton also concurred, "writ[ing] separately to express skepticism about the extraterritoriality doctrine."[28] He noted that the Commerce Clause no longer provides a bright-line rule keeping the states and the national government in their "separate spheres of authority," as states now frequently regulate matters affecting interstate commerce, and as the federal government frequently regulates local activities.[29] Instead, the "key point" of the modern dormant commerce

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[19] Judge Clay was joined by Judge Sutton and District Judge Rice.

[20] *Am. Beverage*, 700 F.3d at 810.

[21] *Id.* at 807 (quoting *Healy*, 491 U.S. at 336).

[22] *See id.* at 808. In *International Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 646–48 (6th Cir. 2010), the Sixth Circuit upheld an Ohio law that regulated the claims that dairy processors could make on labels on products sold within Ohio because it had no "direct" effect on those processors' out-of-state labeling requirements.

[23] *Am. Beverage*, 700 F.3d at 808–09.

[24] *Id.* at 810.

[25] *Id.*

[26] *See id.* at 816 (Rice, J., concurring).

[27] *Id.*

[28] *Id.* at 810 (Sutton, J., concurring).

[29] *Id.* at 811–12.

clause is to "prevent States from discriminating against out-of-state entities."[30] However, he argued, the extraterritoriality doctrine "has nothing to do with favoritism" because it invalidates nondiscriminatory, unburdensome state laws.[31] Because both "the original function of the extraterritoriality doctrine . . . [and] its meaning" have been "lost to time," and because extraterritoriality's practical-effects inquiry "shares many of the same traits and pitfalls as *Pike* balancing," Judge Sutton argued that extraterritoriality should be eliminated as a freestanding Commerce Clause prohibition.[32] Returning to the case at bar, Judge Sutton concluded that the Michigan unique-labeling requirement imposed only a "minuscule" burden on interstate commerce and served a "vital state interest," yet extraterritoriality perversely required the court to strike it down.[33]

The result that the court had to reach in *American Beverage* shows that the extraterritoriality doctrine is an overly formalistic test that invalidates state laws that neither are discriminatory nor impose a substantial burden on interstate commerce. Judge Sutton's discomfort with the doctrine is well founded, as extraterritoriality no longer has a place within the contemporary dormant commerce clause framework. Therefore, the Supreme Court should abandon the extraterritoriality doctrine, leaving in its place the already employed *Pike* balancing test.

Under the extraterritoriality doctrine as applied by the Sixth Circuit in *American Beverage*, a state law that directly regulates conduct occurring wholly outside of that state's territory is automatically invalid;[34] the court does not consider whether the law favors in-state over out-of-state interests, nor does it balance the regulation's burden on interstate commerce against the local benefits that it produces.[35] However, the function of the Commerce Clause has changed over time, and the extraterritoriality doctrine no longer furthers the dormant commerce clause's purpose. Under pre–New Deal notions of federalism, the federal and state governments operated in distinct spheres. Accordingly, the function of the dormant commerce clause was to ensure that the states did not pass regulations that affected interstate commerce[36] — extraterritorial statutes were, by definition, invalid. However, as Judge Sutton pointed out, the Supreme Court has since recognized a "*concurrent*" jurisdiction over interstate commerce between the

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[30] *Id.* at 812.

[31] *Id.*

[32] *Id.* at 812–13; *see id.* at 812–14.

[33] *Id.* at 815.

[34] *Id.* at 812.

[35] *See* Abigail B. Pancoast, Comment, *A Test Case for Re-Evaluation of the Dormant Commerce Clause: The Maine Rx Program*, 4 U. PA. J. CONST. L. 184, 194 (2001).

[36] *See* Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 257–58.

states and the federal government and has upheld many state regulations that significantly affect interstate commerce.[37] The Court has effectively transformed the dormant commerce clause from a strict prohibition against state laws affecting interstate commerce into a "more modest antidiscrimination principle."[38] Now, the "crucial inquiry" in evaluating a state law under the dormant commerce clause is "determining whether [it] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."[39]

As *American Beverage* shows, the extraterritoriality doctrine does not directly address either protectionism or burdens on interstate commerce. The Sixth Circuit invalidated Michigan's unique-mark requirement, even though it "neither discriminate[d] against out-of-state interests nor disproportionately burden[ed] interstate commerce," solely because of the location of the conduct that it *directly* regulated, and even though that conduct had significant effects within Michigan.[40] Concerns about state overreach may make drawing such a formalistic distinction tempting. However, such a per se rule is "steeped in formality but shallow in reason,"[41] and "not only generates a risk that valid state initiatives will be swept away by the judiciary, but also increases the possibility that arbitrary decisions will result."[42] The Sixth Circuit struck down Michigan's unique-mark requirement without considering its benefits or burdens, thus showing that the risk of overintrusive invalidation is real.

Given its detachment from the modern dormant commerce clause, the formalistic extraterritoriality doctrine should be abandoned, and nondiscriminatory extraterritorial regulations such as the Michigan

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[37] *Id.* at 259; *see also, e.g.*, Perez v. United States, 402 U.S. 146 (1971) (upholding the federal government's authority to regulate local loan sharking that does not cross state lines); Cities Serv. Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179 (1950) (upholding a state's authority to fix the price of natural gas drilled and purchased within its borders even though ninety percent of the product is sold outside of the state).

[38] Young, *supra* note 36, at 259; *see also* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 520–21 (1997) (stating that the Supreme Court's jurisprudence shifted during the New Deal and, at least from 1938 until 1945, the only limitation that the dormant commerce clause placed on state regulatory authority "was the duty of nondiscrimination against out-of-state goods," *id.* at 521).

[39] City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); *see also* Pancoast, *supra* note 35, at 207.

[40] *Am. Beverage*, 700 F.3d at 812 (Sutton, J., concurring); *see also* Pancoast, *supra* note 35, at 207 ("[I]nvalidation of [nonprotectionist, extraterritorial] laws serves no dormant Commerce Clause purpose.").

[41] Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 563 (2008).

[42] Peter C. Felmly, Comment, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 467, 510 (2003); *see also* Mark P. Gergen, Correspondence, *Territoriality and the Perils of Formalism*, 86 MICH. L. REV. 1735, 1738–39 (1988).

unique-labeling requirement should be evaluated under the *Pike* balancing test.[43] Under this test, a state law that is not discriminatory but has extraterritorial effects would be struck down only if it imposed an excessive burden on interstate commerce relative to its local benefits.[44] Importantly, such a balancing test would ensure that courts decide cases "on the basis of the factors actually relevant to how we want them decided,"[45] instead of on territorial grounds that are not directly related to the concerns embodied by the dormant commerce clause. And territorial considerations would not be completely lost[46] — most notably, *Pike* balancing would ensure that states regulate conduct that has substantial effects on other states only if they can show that the regulation in question produces equal or greater local benefits.

Applying *Pike* balancing to Michigan's unique-labeling requirement demonstrates the benefits of this more flexible approach. The burden of this law fell on bottle manufacturers, who would have had to shut down production at their factories for "multiple minutes" whenever they wanted to switch from producing other-state bottles to unique-to-Michigan bottles,[47] and who would have suffered from a decrease in the liquidity of their inventory.[48] Michigan's major benefit from the law was the prevention of "fraudulent redemption and the resulting theft of deposit funds,"[49] which cost Michigan up to $30 million annually.[50] Under *Pike* balancing, a court would compare these benefits and burdens,[51] perhaps considering the fact that beverage manu-

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[43] *See* Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 923 (2002) (arguing that the "near per se prohibition of extraterritoriality" should apply "only to protectionist state statutes"). This argument does not suggest that Judge Sutton's stated discomfort with the *Pike* balancing test, *see Am. Beverage*, 700 F.3d at 813 (Sutton, J., concurring), is misplaced. However, without an overhaul of the dormant commerce clause, *Pike* balancing would still apply to laws no longer invalidated under extraterritoriality. A more drastic alternative would be to abandon the dormant commerce clause altogether. *See* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 349 (2007) (Thomas, J., concurring in the judgment) (advocating such an abandonment).

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

[45] Gergen, *supra* note 42, at 1742.

[46] Judge Sutton noted that the Constitution incorporates limits related to state territorial boundaries in the Due Process, Extradition, and Full Faith and Credit Clauses, as well as in the Sixth Amendment. *Am. Beverage*, 700 F.3d at 814 (Sutton, J., concurring).

[47] Reply Brief of Appellant American Beverage Ass'n at 28–29, *Am. Beverage*, 700 F.3d 796 (No. 11-2097).

[48] *See* Brief of Appellant American Beverage Ass'n at 59, *Am. Beverage*, 700 F.3d 796 (No. 11-2097).

[49] Brief for Michigan Defendants-Appellees at 38, *Am. Beverage*, 700 F.3d 796 (No. 11-2097). Revenue generation is a "cognizable benefit" under *Pike*. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 346 (2007) (plurality opinion).

[50] *Am. Beverage*, 700 F.3d at 801.

[51] Advocacy of this proposal is not meant to imply that such an evaluation would be easy, *see* Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment) (arguing that *Pike* forces courts to ask "whether a particular line is longer than a par-

facturers frequently produce geographically unique bottles for sales promotions and can pass any increase in cost along to Michigan consumers.[52] It is not clear whether Judge Sutton is correct that the law imposes only a "minuscule" burden on commerce while serving a "vital" state interest,[53] as these issues were not litigated. However, extraterritoriality barred these factors from consideration in favor of focusing on the locus of the conduct regulated. Extraterritoriality doctrine thus forces courts to decide cases without considering the most relevant factors — those that determine the law's effect on commerce. Furthermore, as Judge Sutton noted, Michigan could have imposed requirements on manufacturers that were significantly more burdensome but that would not have been automatically invalid — for example by requiring the bottlers to put large "Made for Sale in Michigan" labels on products to be sold in Michigan.[54] As a result, extraterritoriality may strike down narrowly tailored, less burdensome state attempts to address their social problems, while allowing more disruptive regulations to survive.

Extraterritoriality's supporters would reply that a bright-line rule is necessary to protect out-of-state entities from being exploited by states where they have no political voice.[55] Because many laws with extraterritorial effect will be discriminatory, and are therefore already subject to heightened scrutiny,[56] such concerns are unfounded. Additionally, *American Beverage* shows that the extraterritoriality doctrine pays no heed to whether the regulated actors are involved in the political process; the members of the American Beverage Association "actively participated in Michigan's legislative process" leading up to the passage of the unique-mark amendment.[57] Furthermore, those who believe that the extraterritoriality doctrine is the only way of avoiding a patchwork of state regulations that will cause chaos in interstate commerce[58] too quickly dismiss the fact that, under modern preemption

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ticular rock is heavy"), only that it is necessary in order to ensure that cases are decided based on the factors that actually determine a law's effects on commerce, instead of on purely territorial grounds.

52 Brief for Michigan Defendants-Appellees, *supra* note 49, at 43–44; *cf.* Pike v. Bruce Church, Inc., 397 U.S. 137, 143–46 (1970) (balancing Arizona's interest in protecting the reputation of in-state cantaloupe growers against the cost imposed by a regulation that required cantaloupe producers to package their cantaloupes in Arizona, and determining that the burden outweighed the benefit).

53 *Am. Beverage*, 700 F.3d at 815 (Sutton, J., concurring).

54 *Id.*

55 *See, e.g.*, Robert A. Schapiro, *Monophonic Preemption*, 102 NW. U. L. REV. 811, 833 (2008) ("When state laws have extraterritorial effects, they undermine democratic principles. A state is imposing its will on people who are not represented in the state political process."); Chad DeVeaux, *Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause*, 79 GEO. WASH. L. REV. 995, 996 (2011).

56 *See, e.g.*, Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986).

57 Brief for Michigan Defendants-Appellees, *supra* note 49, at 15.

58 *See, e.g.*, Healy v. Beer Inst., 491 U.S. 324, 336–37 (1989).

jurisprudence, Congress is the proper body to determine when such a patchwork is unworkable — not the judiciary.[59] If the Constitution or Congress has not restricted the states in a given area, it is presumptively appropriate for states to regulate that arena;[60] until Congress makes such a statement about beverage containers, states should have the freedom to experiment with their own marking requirements.[61]

Whether the Michigan unique-labeling requirement would have survived a *Pike* balancing test is unclear. What is clear is that the mechanical application of a territorial principle inhibits state experimentation with laws that attempt to solve their social and economic problems, without forcing courts to consider the laws' actual effects on interstate commerce. The Michigan legislature had previously attempted to solve the overredemption problem and considered many additional potential solutions before deciding that a unique-mark requirement was the best approach;[62] yet the Sixth Circuit struck down the law without any consideration of its actual effect on commerce. Such judicial interference with state experimentation should not be undertaken lightly.[63] The goal of the dormant commerce clause is to prevent states from discriminating against or unduly burdening interstate commerce; abandoning the formalistic extraterritoriality doctrine in favor of a more flexible test that actually considers the law's effects on interstate commerce would better serve this goal. Doing so would allow courts to invalidate laws that improperly interfere with interstate commerce, while simultaneously giving state legislatures substantial deference to address the problems that their populations face in an ever-changing national and global economy.

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[59] *See* Pancoast, *supra* note 35, at 221–22; *see also* Young, *supra* note 36, at 280 (arguing that taking preemptive authority away from Congress, where the states have representation, "amounts to a significant threat to state autonomy").

[60] *See, e.g.*, Altria Grp., Inc. v. Good, 129 S. Ct. 538, 543 (2008); *see also* U.S. CONST. art. I, § 10 (listing powers prohibited to the states). It is important to realize that states are always making their own, conflicting regulatory judgments: "There is nothing unusual about nonuniform regulations in our federal system. . . . The mere fact that states may promulgate different substantive regulations of the same activity cannot possibly be the touchstone for illegality under the dormant Commerce Clause." Jack L. Goldsmith & Alan O. Sykes, Essay, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 806 (2001).

[61] Professor Robert Schapiro resolves the arguments in favor of and against extraterritoriality neatly, arguing that while "[d]emocratic legitimacy is central, . . . the means for guaranteeing it are not judicial invalidation of state laws with extraterritorial effects, but rather the democratic process by which Congress chooses to allow or invalidate such laws." Schapiro, *supra* note 55, at 836.

[62] *See* Brief for Michigan Defendants-Appellees, *supra* note 49, at 38–39.

[63] See Pancoast, *supra* note 35, at 185 ("[J]udicial invalidation of non-protectionist state laws that serve important social ends . . . [is] particularly harmful because (1) states do not have the political voice to make sure that such invalidation is reversed when called for; and (2) invalidation of such laws [robs] the states of their role as social policy innovators . . . .").