

THE BEGINNING OF AN ECONOMIC CIVIL WAR: THE UNCONSTITUTIONALITY OF STATE-IMPLEMENTED TRAVEL BANS

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ABSTRACT

States inevitably take different political positions on various issues and implement laws based on those views. However, the Constitution does not give states license to economically sanction states with different ideologies in an effort to coerce those states to change their laws. In this era of heightened political division, it is unsurprising that a number of states have implemented travel bans that prevent the use of state funds in states that have passed laws supporting alternative political ideologies. Interstate economic warfare is certainly not a phenomenon that the Framers of the Constitution envisioned. Applying long-standing Supreme Court jurisprudence, this Article argues that state-implemented travel bans are unconstitutional because they violate the dormant commerce clause and cannot be shielded by the Tenth Amendment. As the Court has unanimously explained, the Constitution “was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.” Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

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INTRODUCTION

New York was the first state to issue an executive order banning state-funded travel to other states due to their discriminatory laws relating to sexual orientation, gender identity, and gender expression.¹ More specifically, New York has banned state-funded travel to Indiana, North Carolina, and Mississippi due to their discriminatory laws targeting lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) individuals.² California was the first state to enact a statute (“California’s Travel Ban”) banning its employees, the nation’s largest state-employed workforce,³ from using state funds to travel to eleven states—Alabama, Kansas, Kentucky, Mississippi, North Carolina, South Dakota, Tennessee, and Texas—that have discriminatory laws relating to sexual orientation, gender identity, and gender expression.⁴ Several other states and territories—Connecticut,⁵

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- 1 See N.Y. COMP. CODES R. & REGS. tit. 9, § 8.144 (2015) (prohibiting state-funded or state-sponsored travel to Indiana).
 - 2 See *id.*; see also *id.* § 8.155 (2016) (prohibiting state-funded or state-sponsored travel to North Carolina); *id.* § 8.156 (2016) (prohibiting state-funded or state-sponsored travel to Mississippi).
 - 3 See Rebecca Beitsch, *Supposedly Symbolic, State Travel Bans Have Real Bite*, REUTERS (Aug. 15, 2017, 10:57 AM), <https://www.reuters.com/article/stateline/stateline-supposedly-symbolic-state-travel-bans-have-real-bite-idUSL2N1L10VX> (discussing recent state employee travel bans to states that, in their view, discriminate against lesbian, gay, bisexual, and transgender individuals).
 - 4 See CAL. GOV’T CODE § 11139.8 (West 2017) (banning state-funded or state-sponsored travel to any state that discriminates “on the basis of sexual orientation, gender identity, or gender expression”). Although California prevents its “employees, officers, or members” from using state-funds to travel to the Banned States, this Article simply refers to them as “employees.” This would include, for example, students that are enrolled at the University of California and California State University. See *id.* (emphasis added) (“A state agency, department, board, authority, or commission, including an agency, department, board, authority, or commission of the University of California, the Board of Regents of the University of California, or the California State University, and the Legislature shall not . . . [r]equire any of its *employees, officers, or members* to travel to a state that, after June 26, 2015, has enacted a law that voids or repeals, or has the effect of voiding or repealing, existing state or local protections against discrimination on the basis of sexual orientation, gender identity, or gender expression or has enacted a law that authorizes or requires discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression, including any law that creates an exemption to antidiscrimination laws in order to permit discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression.”).
 - 5 See Conn. Exec. Order No. 52, (Mar. 31, 2016), available at <https://portal.ct.gov/-/media/066B46D7631145CBA35FCE3BBB2685A8.pdf> (banning state-funded travel to North Carolina).

Minnesota,⁶ Vermont,⁷ Washington,⁸ and the District of Columbia⁹—also demonstrated disapproval of discriminatory laws relating to sexual orientation, gender identity, and gender expression, and thus implemented similar travel bans through executive action.¹⁰

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- 6 See *Governor Bans Nonessential Travel to North Carolina*, MPR NEWS (Apr. 2, 2016, 11:45 AM), <https://www.mprnews.org/story/2016/04/02/governor-bans-nonessential-travel-to-north-carolina> (summarizing Minnesota Governor Mark Dayton’s letter to all state employees banning all nonessential state-funded travel to North Carolina); see also Chris Johnson, *Minnesota to Keep N.C. Travel Ban as Other States Demur*, WASH. BLADE (Apr. 5, 2017, 5:19 PM), <https://www.washingtonblade.com/2017/04/05/minnesota-keep-n-c-travel-ban-states-demur/> (explaining that “Minnesota has become the first state to announce it will retain its travel ban to North Carolina”).
- 7 See Press Release, Governor Shumlin Bans Official State Travel to North Carolina (Mar. 30, 2016), available at <https://vtdigger.org/2016/03/30/gov-shumlin-bans-official-state-travel-to-north-carolina/> (quoting a memorandum from Vermont Secretary of Administration Justin Johnson to the Vermont Executive Cabinet (on file with author) that stated: “Until further notice, the Governor has banned official state travel to North Carolina. This is in response to the recent passage of a law in that state that overturns anti-discrimination protections for [LGBTQ] individuals. The ban is in effect until further notice and applies to all travel requests from this date forward. If you feel you have extraordinary circumstances that require an exemption, please appeal directly to me”).
- 8 See Press Release, Inslee Signs New Travel Ban to North Carolina (Apr. 14, 2017), available at <https://www.governor.wa.gov/news-media/inslee-signs-new-travel-ban-north-carolina> (stating that Washington Governor Jay Inslee issued a memorandum to state agencies prohibiting state-funded travel to North Carolina).
- 9 See Ban on Travel to the State of North Carolina, Mayor’s Order No. 2016-040 (Mar. 31, 2016), available at <https://mayor.dc.gov/sites/default/files/dc/sites/mayoromb/publication/attachments/2016-040%20Ban%20on%20Travel%20to%20the%20State%20of%20North%20Carolina.pdf> (“To ensure a constant voice in policy and practice in the District of Columbia in favor of equal treatment for members of the LGBTQ communities, no officer or employee of the District of Columbia is authorized to approve any official travel to North Carolina until such time that the Public Facilities Privacy & Security Act is permanently enjoined, repealed or amended to allow local jurisdictions to enact laws protecting the LGBTQ communities from discrimination and to enact laws allowing persons to use restrooms that correspond to their gender identity.”); see also Lou Chibbaro Jr., *Bowser Bans D.C. Gov’t Travel to North Carolina*, WASH. BLADE (Apr. 1, 2016, 3:51 PM), <https://www.washingtonblade.com/2016/04/01/bowser-bans-d-c-govt-travel-to-north-carolina/> (reporting Mayor Bowser’s travel ban).
- 10 See STATE OF CAL. ASSEMBLY COMM. ON JUDICIARY, ANALYSIS OF ASSEMBLY BILL 687-1887 (Cal. Mar. 12, 2016), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1887# (“Although [California] is not aware of legislation in other states that has bans on state-funded travel, a number of states and localities have, by executive order, taken such steps. For example, shortly after Governor Pence signed the Indiana law, the Governors of Connecticut, New York, and Washington banned state-funded for travel to Indiana by executive order. Similarly, at about the same time, the mayors of San Francisco and Seattle banned city-funded travel to Indiana.”); see also STATE OF CAL. ASSEMBLY COMM. ON ACCOUNTABILITY & ADMIN. REVIEW, ANALYSIS OF ASSEMBLY BILL 687-1887 (Cal. Apr. 11, 2016), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1887# (“North Carolina and Mississippi enacted discriminatory laws relating to sexual orientation, gender identity, and gender expression. In response, other states have banned non-essential travel to North Carolina and Mississippi via gubernatorial or administrative, rather than legislative, action.”).

A state-implemented travel ban refers to one state's prohibition of its employees from traveling to another state using state funds. Such bans could occur if one state opposes a policy adopted by another state. There are serious constitutional issues¹¹ that arise when a state implements—or sponsors—a ban on travel to other states with differing political views.¹²

State-implemented travel bans have proven to be effective. For example, New York's travel bans, coupled with other state-implemented travel bans and private boycotts, forced Indiana and North Carolina to amend or repeal existing discriminatory legislation.¹³ Otherwise, if state-implemented travel bans were proven to be ineffective, it would be illogical for other states and territories, like California, Connecticut, Minnesota, Vermont, Washington, and the District of Columbia, to initiate their own travel bans.¹⁴ These travel bans resulted in the cancellation of several conventions, events, and hotel bookings, costing states millions of dollars.¹⁵

This Article argues that state-implemented travel bans, irrespective of their policy goals, are unconstitutional and create a grave danger to individual states' democracies. Although the majority of state-implemented travel bans today are implemented to effect positive change—detering discriminatory laws relating to sexual orientation, gender identity, and gender expression—this does not mean that these bans would always be used justly. This Article condemns discrimination at any level, and against any

¹¹ Although this Article will only focus on the Commerce Clause and the Tenth Amendment, there may be challenges to state-implemented travel bans on other constitutional grounds, such as the unenumerated rights of travel under the Ninth and Fourteenth Amendments, the Equal Protection Clause of the Fourteenth Amendment, and the Privileges and Immunities Clause of Article IV.

¹² State-implemented travel bans differ from private travel bans. For example, the National Collegiate Athletic Association, American Airlines, International Business Machines, Biogen, and PayPal Holdings, are private companies that have boycotted or implemented private travel bans against North Carolina due to its discriminatory laws. *See Major Businesses Stand Against North Carolina Law That Bans Anti-Discrimination Measures*, CHICAGO TRIBUNE (Mar. 24, 2016, 5:23 PM), <http://www.chicagotribune.com/news/nationworld/ct-north-carolina-anti-discrimination-law-20160324-story.html> (detailing the responses of several private organizations to the North Carolina law). Further, this Article only discusses states severing economic ties with other states, not other countries. *Cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (holding that a Massachusetts law barring state actors from purchasing goods or services from companies doing business in Burma is unconstitutional under the Supremacy Clause); *see also Odebrecht Constr., Inc. v. Sec'y of Fla. Dep't of Transp.*, 715 F.3d 1268 (11th Cir. 2013) (holding a Florida statute prohibiting the state from awarding public contracts in excess of one million dollars to companies conducting business operations in Cuba to be unconstitutional because it conflicted with federal law and undermined the President's discretionary authority).

¹³ Discussed *infra* in Part II.A.

¹⁴ *See supra* text accompanying notes 4–9.

¹⁵ *See* Beitsch, *supra* note 3.

person or group, but state-implemented travel bans are not the only way to deter discriminatory laws relating to sexual orientation, gender identity, and gender expression.

The Fourteenth Amendment was once used by Congress to deter racial discrimination by private actors.¹⁶ However, the United States Supreme Court¹⁷ held—and later reaffirmed—that Congress may not use the Fourteenth Amendment to regulate private conduct, as the Fourteenth Amendment expressly states “No state shall . . .”¹⁸ But that did not mean that the Fourteenth Amendment was the *only* way to deter racial discrimination by private actors, as the Court later held that the Commerce Clause may be used to prevent private actors from discriminating on the basis of race.¹⁹ A comparable legal mechanism could be established to prevent discrimination on the basis of sexual orientation, gender identity, and gender expression. Although not state action, private organizations—like the National Basketball Association, National Collegiate Athletic Association, American Airlines, International Business Machines, Biogen, and PayPal Holdings—have boycotted states with discriminatory laws relating to sexual orientation, gender identity, and gender expression, without violating the Constitution.²⁰

16 See *The Civil Rights Cases*, 109 U.S. 3, 9 (1883) (holding that the Fourteenth Amendment cannot be used by Congress to regulate private activity or bar discrimination by private individuals). The Civil Rights Act of 1875 provided: “all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.”

17 This Article refers to the United States Supreme Court as the “Court.” All other courts located within the United States will be specified according to their designation.

18 See *The Civil Rights Cases*, 109 U.S. at 11–12 (“Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect.”); see also *United States v. Morrison*, 529 U.S. 598 (2000) (re-affirming the *Civil Rights Cases*).

19 See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (holding that Congress may validly regulate private activity under the Commerce Clause); see also *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding that Congress may bar discrimination by privately owned restaurants because there is sufficient basis to conclude that such discrimination burdens interstate commerce).

20 See Beitsch, *supra* note 3; see also *Major Businesses Stand Against North Carolina Law That Bans Anti-Discrimination Measures*, CHICAGO TRIBUNE (Mar. 24, 2016, 5:23 PM), <http://www.chicagotribune.com/news/nationworld/ct-north-carolina-anti-discrimination-law-20160324-story.html>.

If state-implemented travel bans are permitted, nothing will stop states from enacting travel bans for a whole host of other reasons. This is best evidenced by a Tennessee assembly bill condemning California's Travel Ban, while ironically enacting its own travel ban against California simply because California banned travel to Tennessee first.²¹ A senator from Tennessee even opined that "California has potentially opened what could become an economic civil war between the states."²² The Tennessee assembly bill is a perfect example of how states can issue travel bans against one another for *any* reason of their choosing. For example, states that do not practice capital punishment could enact travel bans against states that have the death penalty until such penalty is repealed. States that have set the age of consent at eighteen years could issue travel bans to states where the age of consent is sixteen or seventeen until those states raise the age of consent to eighteen. States that permit recreational and medical use of marijuana could issue travel bans to states that ban marijuana until those states adopt similar liberal policies. Non-sanctuary states could issue travel bans to sanctuary states until those states begin enforcing federal immigration laws. In other words, travel bans, if successful, could be used as a cudgel to coerce other states to enact policies that they otherwise would not. The Court, however, has emphasized that a state may not penalize "conduct that was lawful where it occurred and that had no impact on [the state] or its residents. Nor may [a state] impose sanctions . . . in order to deter conduct that is lawful in other jurisdictions."²³

As the above examples illustrate, it is inevitable that states will disagree on politics and it is equally undeniable that states depend on each other for economic growth and stability. The Court has consistently recognized that "one of the happy incidents of the federal system [is] that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."²⁴ Furthermore, the Court has also consistently emphasized that—under the

²¹ See S.J. Res. 110-111 (Tenn. 2017), <http://www.capitol.tn.gov/Bills/110/Bill/SJR0111.pdf>.

²² See Beitsch, *supra* note 3.

²³ *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572–73 (1996) (footnote omitted).

²⁴ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015) ("This Court has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems.'") (citing *Oregon v. Ice*, 555 U.S. 160, 171 (2009)); *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.").

dormant commerce clause of the Constitution—states may not enact legislation that affects interstate commerce.²⁵

State-implemented travel bans create a serious threat to our nation's Constitution and individual states' democracies. Although the Court—pursuant to the dormant commerce clause—has held that states may *not* enact legislation that affects interstate commerce, the entire purpose of a state-implemented travel ban is to impede the free flow of interstate commerce until a political agenda is achieved. Moreover, if a state issues a travel ban in hopes of changing another state's policies—and the issuing state is successful—then the targeted state's residents are deprived of a government that represents the will of the populace, thereby divorcing the local government from the needs of local interests.²⁶

If the Court considers constitutional challenges to state-implemented travel bans, it would be a question of first impression. To that end, this Article focuses on the Court's dormant commerce clause jurisprudence to argue that state-implemented travel bans violate the Constitution, and that the Tenth Amendment does not permit them. Part I discusses why some states have enacted travel bans and the reach of those bans. Part II discusses what the dormant commerce clause is and how it affects state-implemented travel bans. Part III discusses the exceptions to the dormant commerce clause and how state-implemented travel bans do not fit squarely within any of them. Part IV discusses the Tenth Amendment and how it does not permit state-implemented travel bans. Finally, this Article concludes by asserting that all state-implemented travel bans against states with differing political views are unconstitutional.

²⁵ See *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.”) (emphasis added).

²⁶ There may be an Article IV, Section 4 concern as each state is required to have a republican form of government, but this argument is outside the scope of this Article. See U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government”); see also *New York v. United States*, 505 U.S. 144, 185 (1992) (“The States thereby retain the ability to set their legislative agendas; state government officials remain accountable to the local electorate.”).

I. EXISTING STATE-IMPLEMENTED TRAVEL BANS

A. *New York's Travel Bans*

On March 31, 2015, New York's Governor issued Executive Order 144, banning state-funded travel to Indiana.²⁷ Specifically, Executive Order 144 requires:

[a]ll agencies, departments, boards, authorities and commissions to review all requests for state funded or state sponsored travel to the state of Indiana so long as there is law in effect there that creates the grounds for discrimination against [lesbian, gay, bisexual, transgender, and queer (“LGBTQ”)] citizens . . . [and] [t]o bar any such publically [sic] funded or publically [sic] sponsored travel to such location, unless such travel is necessary for the enforcement of New York State law, to meet prior contractual obligations, or for the protection of public health, welfare, and safety.²⁸

New York's Governor issued Executive Order 144 in response to 2015 Indiana Senate Bill No. 101 (“SB101”), which essentially permitted private businesses to discriminate against LGBTQ individuals based on sincerely held religious beliefs.²⁹ SB101 was signed into law by then-Governor Mike Pence.³⁰ Other states—such as Connecticut, Vermont, and Washington—enacted similar travel bans forbidding state-funded travel to Indiana.³¹ New York's travel ban, coupled with other state-implemented travel bans and private boycotts, cost Indiana an estimated \$60 million.³² Severe public disapproval and threats of additional boycotts forced then-Governor Mike

²⁷ N.Y. COMP. CODES R. & REGS. tit. 9, § 8.144 (2015).

²⁸ *Id.*

²⁹ S.B. 119-101, Reg. Sess. (Ind. 2015). A detailed discussion of the Religious Freedom Restoration Act, and its potential impact on businesses, is presented *infra* Part II.B.

³⁰ See Jeremy Diamond, *Indiana's Religious Freedom Law: What You Need to Know*, CNN POLITICS (Mar. 29, 2015, 4:24 PM), <https://www.cnn.com/2015/03/27/politics/indiana-religious-freedom-explainer/index.html> (describing the religious freedom bill in Indiana).

³¹ See Daniel Reynolds, *Governors of Connecticut, New York, and Washington Ban Travel to Indiana*, ADVOCATE (Mar. 31, 2015, 3:09 PM), <https://www.advocate.com/politics/politicians/2015/03/31/governors-connecticut-new-york-and-washington-ban-travel-indiana> (noting that governors of some states are “sending a strong message to Indiana and other states that pass [anti-LGBTQ] legislation” through their travel bans); Press Release, *supra* note 7 (discussing how Vermont Governor Peter Shumlin banned official travel to Indiana after it passed a state law promoting LGBTQ discrimination).

³² Neal Broverman, *Indiana Took \$60 Million Hit After Passing Antigay Law*, ADVOCATE (Jan. 26, 2016, 12:57 PM), <https://www.advocate.com/religion/2016/1/26/indiana-took-60-million-hit-after-passing-antigay-law>.

Pence and the Indiana legislature to amend SB101 within just one week of its issuance.³³

On March 28, 2016, New York’s Governor issued Executive Order 155, which banned state-funded travel to North Carolina.³⁴ Executive Order 155—similar to Executive Order 144—required:

[a]ll agencies, departments, boards, authorities and commissions to review all requests for state funded or state sponsored travel to the state of North Carolina so long as there is law in effect there that creates the grounds for discrimination against [LGBTQ] citizens; and [t]o bar any such publicly funded or publicly sponsored travel to [North Carolina], unless such travel is necessary for the enforcement of New York State law, to meet prior contractual obligations, or for the protection of public health, welfare, and safety.³⁵

New York initiated its travel ban against North Carolina because of the Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 3, commonly known as House Bill 2 (“HB2”). HB2 required, in pertinent part, that “every multiple occupancy bathroom or changing facility . . . be designated for and only used by persons based on their biological sex[,] . . . which is stated on a person’s birth certificate.”³⁶

Several states and territories—California, Connecticut, Minnesota, Vermont, Washington, and the District of Columbia—joined New York and banned state-funded travel to North Carolina.³⁷ Private organizations also demonstrated disapproval by boycotting several events in North Carolina.³⁸

³³ Diamond, *supra* note 30; *see also* Beitsch, *supra* note 3 (discussing Indiana’s Religious Freedom Restoration Act).

³⁴ *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 8.155 (2016) (prohibiting state-funded or state-sponsored travel to North Carolina).

³⁵ *Id.*

³⁶ Carcano v. Cooper, 350 F. Supp. 3d 388, 399 (M.D.N.C. 2018).

³⁷ *See supra* text accompanying notes 4–9; *see also* Abbie Bennett, *HB2 Replacement Not Enough for New York Governor to Lift Travel Ban to NC*, NEWS & OBSERVER (May 3, 2017, 7:07 PM), <https://www.newsobserver.com/news/politics-government/state-politics/article148488199.html> (noting the New York Governor’s re-affirmation of his state’s ban on taxpayer-funded travel to North Carolina); Evan Grossman, *More States Must Join New York in Taking Stand Against Discrimination, With Laws That Are Impacting College Sports*, N.Y. DAILY NEWS (Jan. 4, 2018, 3:28 PM), <http://www.nydailynews.com/sports/college/states-join-ny-stand-discrimination-article-1.3737939> (arguing that more than six states need to take actions in response to the anti-LGBTQ laws enacted); Ginger O’Donnell, *Several States Restrict Travel to Those with Anti-LGBTQ Laws*, INSIGHT INTO DIVERSITY (Feb. 12, 2018), <http://www.insightintodiversity.com/several-states-restrict-travel-to-those-with-anti-lgbtq-laws/> (stating that as of January 2017, California prohibited travel to eight states including North Carolina).

³⁸ *See Major Businesses Stand Against North Carolina Law That Bans Anti-Discrimination Measures*, CHICAGO TRIBUNE (Mar. 24, 2016, 5:23 PM), <http://www.chicagotribune.com/news/nationworld/ct-north-carolina-anti-discrimination-law-20160324-story.html> (discussing disapproval of the bill by

State-funded travel bans, coupled with private boycotts, led North Carolina to repeal HB2 and adopt 2017 N.C. Sess. Laws 4 (“HB142”). Even after the adoption of HB142, New York did not lift its travel ban.³⁹

On April 6, 2016, New York issued Executive Order 156, prohibiting state-funded travel to Mississippi.⁴⁰ The language of the executive order mirrored the language of Executive Orders 144 and 155 by requiring:

[a]ll agencies, departments, boards, authorities and commissions to review all requests for state funded or state sponsored travel to the state of Mississippi so long as there is law in effect there that permits and enshrines discrimination against [LGBTQ] citizens and unmarried individuals; and [t]o bar any such publicly funded or publicly sponsored travel to such location, unless such travel is necessary for the enforcement of New York State law, to meet prior contractual obligations, or for the protection of public health, welfare, and safety.⁴¹

New York’s Governor issued Executive Order 156 in response to Mississippi House Bill No. 1523, which essentially permitted businesses to refuse service to individuals due to their sexual orientation or gender identity.⁴² Several states—including Minnesota, Vermont, and Washington—

private organizations); *see also* Beitsch, *supra* note 3 (noting the economic hardship North Carolina faced).

³⁹ *See* Beitsch, *supra* note 3; Bennett, *supra* note 37; Jon Campbell, *Cuomo’s Travel Ban Keeps SUNY Swimmers From Staying in North Carolina*, DEMOCRAT & CHRON. (Mar. 7, 2019, 6:42 PM), <https://www.democratandchronicle.com/story/news/politics/albany/2019/03/07/cuomos-travel-ban-keeps-suny-swimmers-staying-north-carolina/3090812002/>.

⁴⁰ *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 8.156 (2016).

⁴¹ *Id.*

⁴² *Id.*; *see* H.B. 2016-1523, Reg. Sess. (Miss. 2016) (codified at MISS. CODE ANN. § 11-62-1 to -19 (2016)). In pertinent part, 2016 Mississippi House Bill No. 1523 section 3 provides:

- (1) The state government shall not take any discriminatory action against a religious organization wholly or partially on the basis that such organization:
 - (a) Solemnizes or declines to solemnize any marriage, or provides or declines to provide services, accommodations, facilities, goods or privileges for a purpose related to the solemnization, formation, celebration or recognition of any marriage, based upon or in a manner consistent with a sincerely held religious belief or moral conviction . . .
 - (b) Makes any employment-related decision including, but not limited to, the decision whether or not to hire, terminate or discipline an individual whose conduct or religious beliefs are inconsistent with those of the religious organization . . .
 - (c) Makes any decision concerning the sale, rental, occupancy of, or terms and conditions of occupying a dwelling or other housing under its control, based upon or in a manner consistent with a sincerely held religious belief or moral conviction
- (2) The state government shall not take any discriminatory action against a religious organization that advertises, provides or facilitates adoption or foster care, wholly or partially on the basis that such organization has provided or declined to provide any adoption or foster care service, or related service, based upon or in a manner consistent with a sincerely held religious belief or moral conviction
- (6) The state government shall not take any discriminatory action against a person wholly or partially on the basis that the person establishes sex-specific standards or

demonstrated similar disapproval and joined New York by banning state-funded travel to Mississippi.⁴³

Thirteen individuals and two organizations even sued Mississippi in the United States District Court for the Southern District of Mississippi, arguing that HB 1523 was unconstitutional because it violated the First Amendment's Establishment Clause and the Fourteenth Amendment's Equal Protection Clause.⁴⁴ The District Court enjoined Mississippi from enacting or enforcing HB 1523.⁴⁵ The United States Court of Appeals for the Fifth Circuit reversed.⁴⁶ The United States Supreme Court denied certiorari.⁴⁷

Executive Orders 155 and 156 are still in effect and still impact individuals. Last year, students in a New York public university could not travel to North Carolina using state funds, pursuant to Executive Order 155, to compete in a National Collegiate Athletic Association competition.⁴⁸ Those students were placed at a competitive disadvantage as they had to fly into and stay in a neighboring state to participate in the competition.⁴⁹ As a result, the students traveled approximately one hundred miles—from Roanoke, Virginia to Greensboro, North Carolina—to participate in the competition.⁵⁰ This is just one recent example of how New York is causing economic harm to North Carolina at the expense of New York's residents.

policies concerning employee or student dress or grooming, or concerning access to restrooms, spas, baths, showers, dressing rooms, locker rooms, or other intimate facilities or settings, based upon or in a manner consistent with a sincerely held religious belief or moral conviction

- (7) The state government shall not take any discriminatory action against a state employee wholly or partially on the basis that such employee lawfully speaks or engages in expressive conduct based upon or in a manner consistent with a sincerely held religious belief or moral conviction
- (8) (a) Any person employed or acting on behalf of the state government who has authority to authorize or license marriages, including, but not limited to, clerks, registers of deeds or their deputies, may seek recusal from authorizing or licensing lawful marriages based upon or in a manner consistent with a sincerely held religious belief or moral conviction
 (b) Any person employed or acting on behalf of the state government who has authority to perform or solemnize marriages, including, but not limited to, judges, magistrates, justices of the peace or their deputies, may seek recusal from performing or solemnizing lawful marriages based upon or in a manner consistent with a sincerely held religious belief or moral conviction

⁴³ Grossman, *supra* note 37.

⁴⁴ Barber v. Bryant, 193 F. Supp. 3d 677, 687–88 (S.D. Miss. 2016).

⁴⁵ *Id.* at 724.

⁴⁶ Barber v. Bryant, 860 F.3d 345, 358 (5th Cir. 2017).

⁴⁷ Barber v. Bryant, 138 S. Ct. 652 (2018).

⁴⁸ See Campbell, *supra* note 39.

⁴⁹ See *id.*

⁵⁰ Barbara O'Brien, *North Carolina Bathroom Bill Becomes Issue for SUNY Swimmers*, BUFFALO NEWS (Mar. 7, 2019), <https://buffalonews.com/2019/03/07/north-carolina-bathroom-bill-becomes-issue-for-suny-swimmers/>.

B. California's Travel Ban

Effective January 1, 2017, California forbids state agencies, departments, boards, authorities, or commissions from: (1) requiring employees to travel to a state that has enacted laws that discriminate on the basis of “sexual orientation, gender identity, or gender expression” or (2) approving a request for state-funded or state-sponsored travel to another state that has enacted laws that discriminate on the basis of “sexual orientation, gender identity, or gender expression.”⁵¹ As previously explained, unlike New York’s travel bans, California’s Travel Ban was enacted pursuant to a statute: California Government Code Section 11139.8. California’s Travel Ban is similar to New York’s travel bans, except it has a much broader geographic reach as it is not only limited to Indiana, North Carolina, and Mississippi.

California’s Travel Ban requires the California Attorney General to provide a list of states that have laws⁵² that discriminate on the basis of “sexual orientation, gender identity, or gender expression.”⁵³ Currently, the list consists of eleven states: Alabama, Iowa, Kansas, Kentucky, Mississippi, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, and Texas (the “Banned States”).⁵⁴ However, this list is subject to change.

⁵¹ CAL. GOV'T CODE § 11139.8 (West 2017).

⁵² Some examples of discriminatory laws have included:

1. Alabama: Alabama’s Governor, Kay Ivey, signed a bill allowing adoption agencies in Alabama to follow faith-based policies, such as not placing children with gay couples. ALA. CODE § 26-10D-1 to -7 (2017).
2. Georgia: Georgia wanted to give religious organizations the option to deny services to LGBTQ members; however, Georgia’s Governor, Nathan Deal, vetoed the bill because of statewide opposition. *See* H.B. 153-757, 2d Reg. Sess. (Ga. 2016).
3. Indiana: Indiana’s former Governor, Mike Pence, signed Indiana’s Religious Freedom Restoration Act, which would “potentially allow businesses to refuse service to any persons on the basis of sexual orientation, if to do so would offend the religious scruples of the individual or business.” S.B. 119-101, Reg. Sess. (Ind. 2015).
4. Mississippi: Mississippi’s Governor, Phil Bryant, signed the “Protecting Freedom of Conscience from Government Discrimination Act,” which protects businesses and religious groups if they deny services like counseling, wedding planning, or adoption support, to LGBTQ individuals. *See* MISS. CODE ANN. § 11-62-1 to -19 (2017).
5. South Dakota: South Dakota’s senate bill sought “protections to faith-based or religious child-placement agencies,” which will inevitably discriminate against LGBTQ individuals. S.B. 92-149 (S.D. 2017).
6. Texas: Texas’s Governor signed a house bill that allowed foster care agencies to deny adoptions and services to children and parents based on “sincerely held religious beliefs.” Like South Dakota’s senate bill, this essentially allows Texas’s agencies to discriminate against children in foster care and potentially disqualify LGBTQ families from the state’s foster and adoption system. H.B. 85-3859, Reg. Sess. (Tex. 2017) (codified as TEX. HUMAN RES. CODE ANN. § 45.001– .010).

⁵³ CAL. GOV'T CODE § 11139.8 (West 2017).

⁵⁴ CAL. DEP'T OF JUSTICE, OFFICE OF ATT'Y GEN., PROHIBITION ON STATE-FUNDED AND STATE-SPONSORED TRAVEL TO STATES WITH DISCRIMINATORY LAWS (ASSEMBLY BILL NO. 1887), <https://oag.ca.gov/ab1887> (last visited Dec. 30, 2019).

Like New York’s travel bans⁵⁵—as well as those of other states—California’s Travel Ban has several exceptions, some of which allow state employees to travel to the Banned States in order to litigate a case, meet contractual obligations incurred before January 1, 2017, or protect the public health, welfare, or safety of California.⁵⁶ California’s Travel Ban does not cite to any federal statute authorizing the ban;⁵⁷ however, the legislative history does cite to the Supreme Court case upholding marriage equality for LGBTQ individuals, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).⁵⁸

As previously explained, California’s Travel Ban was passed because of state laws that discriminate against LGBTQ individuals. These discriminatory laws were predominantly passed due to the Court’s recent jurisprudence on religious freedom. The Court has long held that states must accommodate a person’s free exercise of religion, unless a state has a compelling interest for not doing so.⁵⁹ However, in *Employment Division, Department of Human Resources of Oregon v. Smith*,⁶⁰ the Court abandoned the compelling state interest test and instead held that the Free Exercise Clause may not be used to challenge neutral laws of general applicability.⁶¹ The United States Congress responded to the Court’s holding in *Smith* by enacting the Religious Freedom Restoration Act (“RFRA”).⁶² Under the RFRA,

55 See N.Y. COMP. CODES R. & REGS. tit. 9, § 8.144 (2016) (“[U]nless such travel is necessary for the enforcement of New York State law, to meet prior contractual obligations, or for the protection of public health, welfare, and safety.”); *Id.* § 8.155 (“[U]nless such travel is necessary for the enforcement of New York State law, to meet prior contractual obligations, or for the protection of public health, welfare, and safety.”); *Id.* § 8.156 (“[U]nless such travel is necessary for the enforcement of New York State law, to meet prior contractual obligations, or for the protection of public health, welfare, and safety”).

56 CAL. GOV’T CODE § 11139.8 (West 2017).

57 This information would support the arguments in Part III.A, *infra*, but is also worth mentioning here, in order to provide context for California’s Travel Ban.

58 See generally CAL. GOV’T CODE § 11139.8; STATE OF CAL. ASSEMBLY COMM. ON JUDICIARY, ANALYSIS OF ASSEMBLY BILL 687-1887 (Cal. Apr. 1, 2016), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1887#.

59 See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 406–09 (1963) (using the “compelling state interest” test to consider whether a state agency could require an employee to work on his or her Sabbath as a condition of obtaining unemployment benefits); see also *Wisconsin v. Yoder*, 406 U.S. 205, 221–29 (1972) (considering whether a state could require the Amish to unwillingly send their children to school beyond the eighth grade under a similar standard to the compelling state interest test).

60 494 U.S. 872 (1990).

61 *Id.* at 879–80, 885–88.

62 See 42 U.S.C. § 2000bb-1 (2012):

- (a) . . . Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)
- (b) . . . Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—

Congress essentially overruled *Smith* by returning to the compelling state interest test.⁶³ However, the Court, in *City of Boerne v. Flores*, held that the RFRA does not apply to the states.⁶⁴ After the Court's holding in *City of Boerne*, several individual states enacted their own versions of the RFRA.⁶⁵ Some states that enacted their own versions of the RFRA⁶⁶ began discriminating against LGBTQ individuals on religious grounds.⁶⁷ In response to such discriminatory laws, California enacted its travel ban.

Based on the legislative history, the rationale for California's Travel Ban seems to be twofold: (1) "to prevent the use of state funds to benefit a state that does not adequately protect the civil rights of certain classes of people" and (2) "to prevent a state agency from compelling an employee to travel to an environment in which he or she may feel uncomfortable."⁶⁸ The legislative history acknowledges that state-funded travel affects businesses in the Banned States because it financially benefits hotels, restaurants, taxicab

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- (1) is in furtherance of a compelling governmental interest; and
 (2) is the least restrictive means of furthering that compelling governmental interest.
- (c) . . . A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

⁶³ See *id.* Thus, the "restoration" in the RFRA title might refer to the *restoration* of the "compelling state interest" test that was developed in *Sherbert v. Verner* and used in *Wisconsin v. Yoder*.

⁶⁴ 521 U.S. 507, 533–36 (1997).

⁶⁵ See STATE OF CAL. ASSEMBLY COMM. ON JUDICIARY, ANALYSIS OF ASSEMBLY BILL 687-1887 (Cal. Mar. 12, 2016), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1887# ("According to the National Conference of State Legislatures . . . website, as of late 2015, twenty-one states had enacted some form of . . . RFRA legislation.").

⁶⁶ The constitutionality of these bills and statutes is outside the scope of this Article. For the purpose of discussion, this Article assumes their validity. Interestingly, some writers argue that California's Travel Ban is unconstitutional because it discriminates against Christian-majority states. See, e.g., Cheryl K. Chumley, Opinion, *California's Travel Ban -- Targeted at Christians?*, WASH. TIMES, June 23, 2017, <http://www.washingtontimes.com/news/2017/jun/23/californias-travel-ban-targeted-christians/> (describing California's Travel Ban as "religious discrimination" and "unconstitutional").

⁶⁷ Some argue that the Court's decision in *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014), which permitted a for-profit business to deny contraceptive coverage on religious grounds, may have paved the way for discriminatory laws. See generally Linda Greenhouse, Opinion, *Reading Hobby Lobby in Context*, N.Y. TIMES, July 9, 2014, <https://www.nytimes.com/2014/07/10/opinion/linda-greenhouse-reading-hobby-lobby-in-context.html> (discussing the implications of the *Hobby Lobby* decision); Terrence McCoy, *How Hobby Lobby Paved the Way for Indiana's 'Religious Freedom' Bill*, WASH. POST (Mar. 27, 2015, 4:40 AM), https://www.washingtonpost.com/news/morning-mix/wp/2015/03/27/indianas-religious-freedom-bill-and-the-ghost-of-hobby-lobby/?utm_term=.08da94a5ae1d (noting the connection between the *Hobby Lobby* decision and the Indiana bill).

⁶⁸ See STATE OF CAL. ASSEMBLY COMM. ON JUDICIARY, ANALYSIS OF ASSEMBLY BILL 687-1887 (Cal. Apr. 1, 2016), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1887#.

companies, and airlines.⁶⁹ The legislative history also explains that the Banned States collect tax revenue associated with those transactions.⁷⁰

Shortly after California's Travel Ban was implemented, several states responded negatively to it.⁷¹ California's Travel Ban remains in effect today, and its consequences are real, even for public universities in California. For example, California State University, Fresno received \$400,000 from Mississippi to play a football game there in 2015 and received \$1.4 million to play another game in Alabama.⁷² San Jose State University, a university owned by California, received \$3.1 million to play two games in Alabama.⁷³ Due to California's Travel Ban, these arrangements may not be possible in the future unless California public universities arranged to fund travel to these states privately.

II. THE DORMANT COMMERCE CLAUSE'S MEANING AND APPLICABILITY TO STATE-IMPLEMENTED TRAVEL BANS

A. *The Dormant Commerce Clause and the Principle Against Extraterritoriality*

The Constitution grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁷⁴

[A] central concern of the Framers that was an immediate reason for calling the Constitutional Convention [was] the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.⁷⁵

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See Patrick McGreevy, *Texas Responds to California's LGBT Travel Ban, Saying Golden State Firms 'Fleeing Over Taxation and Regulation,'* L.A. TIMES (June 23, 2017, 3:30 PM), <https://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-201706-htmlstory.html#texas-responds-to-california-lgbt-travel-ban-saying-golden-state-firms-fleeing-over-taxation-and-regulation> (showing examples of criticism from Kentucky: “It is fascinating that the very same West Coast liberals who rail against the President’s executive order, that protects our nation from foreign terrorists, have now contrived their own travel ban aimed at punishing states who don’t fall in lockstep with their far-left political ideology[;]” and Texas: “California may be able to stop their state employees, but they can’t stop all the businesses that are fleeing over taxation and regulation and relocating to Texas.”).

⁷² Grossman, *supra* note 37.

⁷³ *Id.*

⁷⁴ U.S. CONST. art. I, § 8, cl. 3.

⁷⁵ *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979) (citing *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533–34 (1949)).

Although the Commerce Clause only addresses the power given to Congress,⁷⁶ the Court has long recognized that the Commerce Clause also limits⁷⁷ states from enacting statutes that simply *affect* interstate commerce.⁷⁸ This limit on state power to legislate is generally referred to as the dormant commerce clause.⁷⁹ The rationale for the dormant commerce clause was to:

serve the Commerce Clause's purpose of preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.⁸⁰

Furthermore, the dormant commerce clause is “driven by concern about economic protectionism” and is designed to prevent state “regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”⁸¹ In addition, other rationales from unrelated Court holdings could easily apply to the dormant commerce clause, as Dean Erwin Chemerinsky has explained: residents from other states should not be harmed by statutes crafted by legislatures that do not represent them.⁸²

⁷⁶ See *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534–35 (1949) (“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. While the Constitution vests in Congress the power to regulate commerce among the states, it 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.”); see also *Hughes*, 441 U.S. at 326 n.2 (1979) (quoting *Du Mond*, 336 U.S. at 534–35).

⁷⁷ See, e.g., *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995) (holding that the dormant commerce clause prohibits certain state regulations, “even when Congress has failed to legislate on the subject”) (citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992)); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980) (“[T]he Court long has recognized that [the Commerce Clause] also limits the power of the States to erect barriers against interstate trade.”); *S. Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945) (“[E]ver since *Gibbons v. Ogden*, [22 U.S. (9 Wheat.) 1 (1824)], the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.”) (footnote omitted).

⁷⁸ See *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.”) (emphasis added); see also *Hughes*, 441 U.S. at 326; *Du Mond*, 336 U.S. at 534–535.

⁷⁹ See, e.g., *Healy*, 491 U.S. 324.

⁸⁰ *Okla. Tax Comm'n*, 514 U.S. at 179–80.

⁸¹ *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008) (quotations omitted).

⁸² This inference could be drawn by examining *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 435–36 (1819). There, the Court held a Maryland-implemented tax on the Bank of the United States was unconstitutional, in part because it was a tax that would affect out-of-state residents, lacking political representation in Maryland. In addition, the Court explained a similar inference in *S.C. Highway Dep't. v. Barmwell Bros.*: “Underlying the stated rule has been the thought, often expressed in

Applying these rationales to state-implemented travel bans, it would almost always be the case that the majority of residents from states that are negatively impacted by a travel ban did not have meaningful political representation in the state where the ban was implemented. If those residents did have meaningful political representation, it is very unlikely that they would be supportive of a ban that would negatively impact their own state's economy.

Embedded in the dormant commerce clause lies the principle against extraterritoriality.⁸³ Under this principle, state and local laws that have the extraterritorial effect of regulating “commerce occurring wholly outside the boundaries of a State” are a clear violation of the dormant commerce clause and thus are generally struck down “without further inquiry.”⁸⁴ This rule is premised on the principles of state sovereignty: “[t]he principles guiding this assessment . . . reflect the Constitution’s special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres.”⁸⁵ The Court further expounded this point in *BMW of North America, Inc. v. Gore*: “one State’s power to impose burdens on the interstate market for automobiles is not only subordinate to the federal power over interstate commerce but is also constrained by the need to respect the interests of other States.”⁸⁶

To demonstrate how the principle against extraterritoriality has been applied by the Court, consider *Edgar v. MITE Corporation*⁸⁷ and *Brown-Foreman Distillers Corporation v. New York State Liquor Authority*.⁸⁸ In *Edgar*, the Court found that an Illinois statute violated the dormant commerce clause because it required the Illinois Secretary of State to approve any takeovers where:

[the target company’s] shareholders located in Illinois own 10% of the class of equity securities subject to the offer, or for which any two of the following three conditions are met: the corporation has its principal executive office in

judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.” 303 U.S. 177, 184 n.2 (1938); see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 465 (6th ed. 2019).

⁸³ *Healy*, 491 U.S. at 336.

⁸⁴ *Id.* at 336, 337 n.14 (quoting *Brown-Foreman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)).

⁸⁵ *Id.* at 335–36 (footnotes omitted).

⁸⁶ 517 U.S. 559, 571 (1996) (internal citations omitted).

⁸⁷ 457 U.S. 624 (1982).

⁸⁸ 476 U.S. 573 (1986).

Illinois, is organized under the laws of Illinois, or has at least 10% of its stated capital and paid-in surplus represented within the State.⁸⁹

The United States Court of Appeals for the Fourth Circuit recently summarized the possible effects of the Illinois statute: “the [Illinois statute] granted the Illinois Secretary of State the ability to intervene in transactions between an out-of-state acquiring company and out-of-state shareholders of the target company when neither the acquiring company nor the target company’s *shareholders* had connections to Illinois.”⁹⁰ The Court—emphasizing the statute’s “sweeping extraterritorial effect”—reasoned that if Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled.⁹¹

In *Brown-Foreman*, the Court, relying on *Edgar*’s principles, held that a New York statute that “require[d] every liquor distiller or producer that sells liquor to wholesalers within the State to sell at a price that is no higher than the lowest price the distiller charges wholesalers anywhere else in the United States” violated the dormant commerce clause.⁹² The Court reasoned that the statute had the “practical effect of . . . control[ing] liquor prices in other States.”⁹³ Further, the Court explained that: “[w]hile 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.”⁹⁴

Edgar and *Brown-Foreman* both stand for the proposition that a state may not seek to regulate commercial activity outside of its borders, i.e., the prohibition of extraterritoriality. If we apply this proposition to state-implemented travel bans, such bans do precisely that: attempt to regulate economic or commercial activity outside states’ own borders to achieve a desired result. To bring this into context, consider California’s Travel Ban.⁹⁵ Just as Illinois may have wanted to protect target companies with ties to Illinois from unfair takeovers, and just as New York may have wanted to protect its consumers from inflation of liquor prices, California may have wanted to protect its employees from discrimination in the Banned States.

⁸⁹ *Edgar v. MITE Corp.*, 457 U.S. 624, 627, 641–43 (1982).

⁹⁰ *Ass’n for Accessible Meds. v. Frosh*, 887 F.3d 664, 668 (4th Cir. 2018) (emphasis added), *cert. denied*, 139 S. Ct. 1168 (2019).

⁹¹ *Edgar*, 457 U.S. at 642.

⁹² *Brown-Foreman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 575, 582 (1986).

⁹³ *Id.* at 583 (internal quotation marks omitted).

⁹⁴ *Id.* at 582–83 (internal quotation marks and brackets omitted).

⁹⁵ See CAL. GOV’T CODE § 11139.8 (West 2017).

However, by protecting their companies, consumers, and employees, all three states ended up regulating commerce outside of their state: Illinois regulated the sale of stock outside its state, New York regulated the price of liquor outside its state, and California is seeking to regulate commercial activity outside its state. California sought to regulate commercial activity outside its state by boycotting goods and services in the Banned States, hoping to coerce those states to adopt a political agenda consistent with California's.⁹⁶ The best way California could do this is by precluding California employees from traveling to the Banned States, thereby preventing its employees from spending money on goods and services there.⁹⁷ Absent California's Travel Ban, California employees would be able to use California funds in the Banned States to purchase goods and services (like food, beverages, hotel rooms, and taxicabs).

Any state-implemented travel ban, regardless of its stated purpose, would most likely affect⁹⁸ interstate commerce because state-funded travel bans (or

⁹⁶ See STATE OF CAL. ASSEMBLY COMM. ON JUDICIARY, ANALYSIS OF ASSEMBLY BILL 687-1887 (Cal. Mar. 12, 2016), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1887# (“Is preventing travel to other states, and the accompanying interactions with the residents of those states, the best way to encourage those states to change their laws?”).

⁹⁷ See STATE OF CAL. ASSEMBLY COMM. ON JUDICIARY, ANALYSIS OF ASSEMBLY BILL 687-1887 (Cal. Apr. 1, 2016), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1887# (“If the premise of this bill is that state funds should not be spent in states that discriminate against [LGBTQ] persons, why would California ban state-funded travel but still spend a presumably much greater amount on procuring goods from that same state? If the purpose of the bill is truly to have a meaningful economic compact . . . State-funded travel benefits hotels, restaurants, taxicab companies, and airlines more than it benefits the state, with the state reaping only the tax revenues associated with those activities. So both large and small expenditures affect the businesses operating within those states, and only secondarily affect the state governments by the tax revenue that the business activities create.”); STATE OF CAL. ASSEMBLY COMM. ON JUDICIARY, ANALYSIS OF ASSEMBLY BILL 687-1887 (Cal. Mar. 12, 2016), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1887# (“Is preventing travel to other states, and the accompanying interactions with the residents of those states, the best way to encourage those states to change their laws?”); see also Jennifer L. Dauer, *Political Boycotts: Protected by the Political Action Exception to Antitrust Liability or Illegal Per Se?*, 28 U.C. DAVIS L. REV. 1273, 1284 (1995) (“Boycotts always or almost always unreasonably restrain competition. Therefore, courts have found boycotts to be *per se* illegal under antitrust statutes.”) (emphasis added).

⁹⁸ See *supra* text accompanying note 78. But see *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (stating that Congress, under the Commerce Clause, has broad authority to regulate: (1) “the use of the channels of interstate commerce,” (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities,” and (3) “those activities having a substantial relation to interstate commerce . . . [including] those activities that substantially affect interstate commerce”). Regarding the third category (activities that substantially affect interstate commerce), the Court admitted that “case law ha[d] not been clear whether an activity must ‘affect’ or ‘substantially affect’ interstate commerce in order to be within Congress’ power to regulate it under the Commerce Clause.” *Id.* at 559. However, in *Lopez* the Court clarified that activities must *substantially* affect interstate commerce in

boycotts)⁹⁹ must cause some sort of negative economic impact to be successful.¹⁰⁰ Without such impact, the ban will not be effective, especially if the purpose of the ban is to coerce a political change in another state. Applying this reasoning to California's Travel Ban, it is clear that the statute affects interstate commerce because it was designed to chill interstate travel, negatively impacting the Banned States' economies and businesses.¹⁰¹ This inference is supported by the legislative history of California's Travel Ban.¹⁰² There, California's Department of General Services found that there were more than 10,000 instances of out-of-state travel in 2015 alone.¹⁰³ This shows that California carefully designed its statute to respond to a known economic impact. While, theoretically, it is possible that very little of that

order for Congress to regulate those activities. *Id.* The distinction between *Lopez* and *Healy*, *supra* note 25, is that *Lopez* focuses on Congress's authority to regulate interstate commerce, whereas *Healy* focuses on the limitations on states to refrain from regulating interstate commerce. In the former context, the Constitution permits Congress to legislate when a certain activity "substantially affects" interstate commerce; however, in the latter context, the Constitution prevents states from enacting statutes that merely "affect" interstate commerce. Compare *Lopez*, 514 U.S. at 559 with *Healy*, 491 U.S. at 326 n.1. Thus, this Article will apply the test articulated in *Healy* and will not confuse it with the test articulated in *Lopez*. Furthermore, even if *Lopez* were the applicable test for the dormant commerce clause, the analysis of this Article would not change because state-implemented travel bans are intended to substantially affect interstate commerce, or they would not be effective.

⁹⁹ A boycott and a state-implemented travel ban are functionally interchangeable because both are designed to achieve a "social or economic isolation." See *infra* text accompanying note 100 (defining boycott).

¹⁰⁰ *Boycott*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("An action designed to achieve the social or economic isolation of an adversary, esp. by the concerted refusal to do business with it.").

¹⁰¹ See STATE OF CAL. ASSEMBLY COMM. ON JUDICIARY, ANALYSIS OF ASSEMBLY BILL 687-1887 (Cal. Apr. 1, 2016), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1887# ("State-funded travel benefits hotels, restaurants, taxicab companies, and airlines more than it benefits the state, with the state reaping only the tax revenues associated with those activities. Thus, both large and small expenditures affect the businesses operating within those states, and only secondarily affect the state governments by the tax revenue that the business activities create."); see also STATE OF CAL. ASSEMBLY COMM. ON JUDICIARY, ANALYSIS OF ASSEMBLY BILL 687-1887 (Cal. Mar. 12, 2016), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1887# ("Is preventing travel to other states, and the accompanying interactions with the residents of those states, the best way to encourage those states to change their laws?").

¹⁰² See generally STATE OF CAL. ASSEMBLY COMM. ON JUDICIARY, ANALYSIS OF ASSEMBLY BILL 687-1887 (Cal. Apr. 1, 2016), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1887#.

¹⁰³ See STATE OF CAL. ASSEMBLY COMM. ON JUDICIARY, ANALYSIS OF ASSEMBLY BILL 687-1887 (Cal. Apr. 1, 2016), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1887# ("According to a preliminary response from the Department of General Services (DGS), however, many agencies, especially in the executive branch, occasionally send employees to other states. For example, according to DGS, there were over 10,000 'out-of-state person trips' in 2015.").

out-of-state travel was to the Banned States, or that 2015 saw an unusually high amount of travel, there is no evidence to support either claim.

In short, Illinois, New York, and California's laws all have one thing in common: each state is in some way influencing commerce in another state. However, compared to Illinois's law in *Edgar* and New York's law in *Brown-Foreman*, California's law is much more extreme because, not only has California imposed an impediment to some forms of interstate commerce, it is banning them entirely (as opposed to *restricting* like Illinois and New York did). To further illustrate that California's Travel Ban fits neatly into the principle against extraterritoriality, consider *Air Transport Association of America v. City & County of San Francisco*.¹⁰⁴

In *Air Transport*, the United States District Court for the Northern District of California found parts of a city ordinance that prevented the City of San Francisco from contracting with companies whose employee benefit plans discriminated between employees with spouses and employees with domestic partners (among other groups) violated the principle against extraterritoriality.¹⁰⁵ In relevant part, the ordinance's nondiscrimination requirements applied to "any of a contractor's operations elsewhere in the United States."¹⁰⁶ Applying the standards from *Brown-Foreman*, the District Court found that a company that signs a contract with the City of San Francisco, "cannot provide discriminatory benefit packages to its employees anywhere in the United States without facing penalties imposed by the City [of San Francisco]. In other words, the City effectively regulates certain extraterritorial practices of City contractors."¹⁰⁷ The District Court found that the extraterritorial portion of the ordinance—regulating "any of a contractor's operations elsewhere in the United States"—violated the dormant commerce clause.¹⁰⁸ Although the City of San Francisco appealed other parts of the District Court's ruling to the United States Court of Appeals for the Ninth Circuit, it did not appeal the District Court's extraterritoriality ruling.¹⁰⁹ Applying the District Court's analysis in *Air Transport* to state-implemented travel bans, the result is the same: state-implemented travel bans regulate commercial conduct in other states by

¹⁰⁴ *Air Transp. Ass'n of Am. v. City & Cty. of S.F.*, 992 F. Supp. 1149 (N.D. Cal. 1998).

¹⁰⁵ *Id.* at 1162–64.

¹⁰⁶ *Id.* at 1157.

¹⁰⁷ *Id.* at 1162.

¹⁰⁸ *Id.* at 1157, 1162–64.

¹⁰⁹ *Air Transp. Ass'n of Am. v. City & Cty. of S.F.*, 266 F.3d 1064, 1069 (9th Cir. 2001).

precluding individuals from purchasing goods and services there until those states change their laws.

B. The Test for Invalidating State Statutes Under the Dormant Commerce Clause

Although the Court's current jurisprudence is clear that the dormant commerce clause is triggered when states enact statutes that affect¹¹⁰ interstate commerce, the Court did not always have the same test for *invalidating* state statutes that affect interstate commerce.¹¹¹ The modern approach for analyzing the dormant commerce clause—best explained in *Southern Pacific Co. v. Arizona*—is a balancing test, where the burdens on interstate commerce may not be greater than the benefits to a state.¹¹² The Court explained that the weight of the balancing depends on whether a state statute is facially discriminatory or facially neutral.¹¹³ The difference between a facially neutral state statute and facially discriminatory state statute is discussed below.

1. Defining Facially Neutral State Statutes

Facially neutral state statutes treat their residents and other states' residents alike (in other words, they regulate evenhandedly), although they may still affect interstate commerce.¹¹⁴ Facially neutral state statutes only violate the dormant commerce clause if "the burdens they impose on interstate trade are 'clearly excessive in relation to the putative local benefits.'"¹¹⁵ This balancing test is illustrated well by *Hunt v. Washington*

¹¹⁰ See *supra* text accompanying note 78 and note 98.

¹¹¹ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 471 (6th ed. 2019)

¹¹² 325 U.S. 761, 783–84 (1945).

¹¹³ *City of Phila. v. New Jersey*, 437 U.S. 617, 623–24 (1978); see also *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 331 (2007) ("To determine whether a law violates the dormant Commerce Clause, the Court first asks whether it discriminates on its face against interstate commerce.").

¹¹⁴ *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 98–99 (1994).

¹¹⁵ *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). However, some Supreme Court justices argue that when a state statute is facially neutral, courts should not even apply a balancing test; instead, courts should simply uphold it. See, e.g., *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (citations omitted) ("This process is ordinarily called 'balancing,' but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy Weighing the governmental interests of a State against the needs of interstate commerce is, by contrast, a task squarely within the responsibility of Congress, and 'ill-suited to the judicial function.' I would therefore abandon the 'balancing' approach to these [dormant commerce clause cases] . . . and leave essentially legislative judgements to the Congress."). Scholars have also considered similar views. See, e.g., Donald H.

State Apple Advertising Commission.¹¹⁶

In *Hunt*, the Court struck down a North Carolina statute—N.C. Gen. Stat. § 106-189.1 (1973)—requiring all apples sold or shipped into North Carolina to be “no grade other than the applicable [U.S.D.A.] grade or standard.”¹¹⁷ Pursuant to North Carolina’s statute, “[s]tate grades were expressly prohibited.”¹¹⁸ Although North Carolina’s statute was facially neutral (because it applied to all apples sold in the state, regardless of where the apples were grown or shipped from),¹¹⁹ the statute had a discriminatory effect on the sale of Washington state apples because Washington—the nation’s largest producer of apples—used a different and more stringent grading system than the U.S.D.A.¹²⁰ The Court acknowledged that North Carolina’s statute was facially neutral, but still held that North Carolina’s statute was unduly burdensome to interstate commerce, and more specifically to the sale of Washington apples.¹²¹

Unlike North Carolina’s statute in *Hunt*, state-implemented travel bans cannot be facially neutral because they must articulate which states specifically are being banned. Even if a state-implemented travel ban were applied to every other state, it would still not be facially neutral because businesses in forty-nine states would be treated differently than in-state businesses. Accordingly, California’s Travel Ban is not facially neutral

Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986) (stating that “[d]espite what the Court has said, it has not been balancing”); Robert A. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885 (1985) (noting that although the Court has articulated a balancing test, the Court “actually is following a very different line of analysis”); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 (1979) (arguing that the revival of the notion of substantive due process in relation to the commerce clause is “crucial in light of the fact that the Court has already unknowingly introduced efficiency concerns into its analysis under inappropriate labels that obscure the meaning of what it has done”).

¹¹⁶ 432 U.S. 333 (1977).

¹¹⁷ *Id.* at 335, 354.

¹¹⁸ *Id.* at 337.

¹¹⁹ *Id.* at 352.

¹²⁰ *Id.* at 336.

¹²¹ *Id.* at 350–52 (providing three reasons why North Carolina’s statute was unduly burdensome: (1) “the statute’s consequence of raising the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected;” (2) “the statute has the effect of stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system;” and (3) “by prohibiting Washington growers and dealers from marketing apples under their State’s grades, the statute has a leveling effect which insidiously operates to the advantage of local apple producers.”).

because the California Attorney General has listed eleven states on its travel ban website.¹²²

2. *Defining Facially Discriminatory State Statutes*

State statutes that expressly draw a distinction between residents within their jurisdiction and residents outside their jurisdiction are facially discriminatory.¹²³ To illustrate, consider *Hughes v. Oklahoma*¹²⁴ and *Maine v. Taylor*.¹²⁵

In *Hughes*, the Court held that an Oklahoma statute prohibiting the transportation of Oklahoma minnows outside state lines was facially discriminatory and thus “repugnant to the Commerce Clause.”¹²⁶ There, Oklahoma, in order to preserve minnows within its borders, implemented title 29, section 4-115(B) of the Oklahoma Statutes: “[no] person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state.”¹²⁷ The Court first explained that the statute was subject to a Commerce Clause challenge because it involved exporting natural resources.¹²⁸ The Court then explained that the statute was facially discriminatory because it “forbids the transportation of natural minnows out of the State for purposes of sale, and thus ‘overtly blocks the flow of interstate commerce at [the] State’s borders.’”¹²⁹ The Court was not convinced by Oklahoma’s reasoning for enacting its statute: “maintaining the ecological balance in state waters by avoiding the removal of inordinate numbers of minnows.”¹³⁰ The Court explained:

Far from choosing the least discriminatory alternative, Oklahoma has chosen to “conserve” its minnows in the way that most overtly discriminates against interstate commerce. The State places no limits on the numbers of minnows that can be taken by licensed minnow dealers; nor does it limit in any way how these minnows may be disposed of within the State. Yet it forbids the transportation of any commercially significant number of natural minnows out of the State for sale. Section 4-115(B) is certainly not a “last ditch” attempt at conservation after nondiscriminatory alternatives have proved unfeasible. It is rather a choice of the most discriminatory means

¹²² See *supra* text accompanying note 54.

¹²³ *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 270 (1984).

¹²⁴ 441 U.S. 322 (1979).

¹²⁵ 477 U.S. 131 (1986).

¹²⁶ *Hughes v. Oklahoma*, 441 U.S. 332, 336–38 (1979).

¹²⁷ *Id.* at 323.

¹²⁸ *Id.* at 335.

¹²⁹ *Id.* at 336–37.

¹³⁰ *Id.* at 337.

even though nondiscriminatory alternatives would seem likely to fulfill the State's purported legitimate local purpose more effectively.¹³¹

Thus, the Court struck down Oklahoma's statute.¹³²

In *Taylor*, the Court held that a Maine statute banning the importation of live baitfish into its state was facially discriminatory, but—unlike *Hughes*—was constitutional.¹³³ There, the State of Maine, fearing that live baitfish would carry parasites that would harm its unique aquatic ecology,¹³⁴ enacted title 12, section 7613 of the Maine Revised Statutes: “[a] person is guilty of importing live bait if he imports into this State any live fish, including smelts, which are commonly used for bait fishing in inland waters.”¹³⁵ The Court first explained that the statute was subject to a Commerce Clause challenge because it “restricts interstate trade.”¹³⁶ The Court then explained that the statute was facially discriminatory because, “in the most direct manner possible,” Maine was blocking all inward shipments of live baitfish from every other state, at Maine's border.¹³⁷

Like the state laws in *Hughes* and *Taylor*, state-implemented travel bans are facially discriminatory because a state cannot possibly have a travel ban against other states without first indicating which states are included in the ban. Applying this reasoning to New York's and California's travel bans, those bans identify specific states that New York and California employees are not permitted to travel to using state funds, thus California and New York are facially discriminating against out-of-state interests.¹³⁸

Facially discriminatory state statutes, like the ones in *Hughes* and *Taylor*, are generally unconstitutional because they are repugnant to the dormant commerce clause.¹³⁹ However, facially discriminatory state statutes may nevertheless be upheld if: (1) Congress authorized them, (2) they serve a state's legitimate local purpose, or (3) the state is acting as a market participant. These three exceptions are discussed in Part III, below.

¹³¹ *Id.* at 337–38 (footnotes omitted).

¹³² *Id.* at 338.

¹³³ *Maine v. Taylor*, 477 U.S. 131, 137–38, 140 (1986).

¹³⁴ *Id.* at 133.

¹³⁵ *Id.* at 132 n.1.

¹³⁶ *Id.* at 137.

¹³⁷ *Id.*

¹³⁸ For a list of the states to which California has explicitly banned state-funded travel, see *supra* text accompanying note 54. For a list of the states to which New York has explicitly banned state-funded travel, see *supra* text accompanying note 2.

¹³⁹ See *Granholt v. Heald*, 544 U.S. 460, 476 (2005) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)) (“State laws that discriminate against interstate commerce face ‘a virtually *per se* rule of invalidity.’”).

III. EXCEPTIONS TO FACIALLY DISCRIMINATORY STATE STATUTES

A. Congressional Authorization

Congress has the authority to redefine the distribution of power over interstate commerce.¹⁴⁰ “Congress may ‘redefine the distribution of power over interstate commerce’ by ‘permit[ing] the states to regulate the commerce in a manner which would otherwise not be permissible.’”¹⁴¹ However, if Congress allows individual states to enact laws that regulate interstate commerce, such authorization must be “unmistakably clear.”¹⁴²

By examining California’s Travel Ban and its legislative history, it is clear that the statute does not have congressional authorization because neither the statute, nor the legislative history, cite to any federal authorization.¹⁴³ The only cited federal authority is a brief discussion of *Obergefell v. Hodges*,¹⁴⁴ a Supreme Court case upholding marriage equality for LGBTQ individuals. In *Obergefell*, the Court did not interpret a federal statute in a way that would authorize these travel bans. There is no indication that Congress even considered the issue, and consequently it is unlikely that the Court would have opined such an authorization would be proper.¹⁴⁵ Although California—along with the many other states that implemented similar travel bans—believes that it is a “national leader on behalf of LGBTQ communities,” and that “action must be taken to recognize that discriminatory laws are unacceptable anywhere in the nation,”¹⁴⁶ Congress did not grant California the authority to prohibit other states from discriminating against LGBTQ individuals. Nor did Congress grant such authority to Connecticut, Minnesota, New York, Vermont, Washington, or the District of Columbia. Like California, all other states and territories that enacted similar travel bans do not cite any sort of congressional authorization.

¹⁴⁰ *S. Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945).

¹⁴¹ *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87–88 (1984) (quoting *S. Pac. Co.*, 325 U.S. at 769).

¹⁴² *South-Central Timber*, 467 U.S. at 91.

¹⁴³ CAL. GOV’T CODE § 11139.8 (West 2017); STATE OF CAL. ASSEMBLY COMM. ON JUDICIARY, ANALYSIS OF ASSEMBLY BILL 687-1887 (Cal. Apr. 1, 2016), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1887#.

¹⁴⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

¹⁴⁵ *See generally id.*

¹⁴⁶ STATE OF CAL. S. JUDICIARY COMM., ANALYSIS OF ASSEMBLY BILL 687-1887 (Cal. June 27, 2016), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1887#.

Realistically, it is very unlikely that Congress will delegate federal anti-discrimination laws to any given state—or a group of specified states. It is equally unlikely that Congress will authorize states to enact legislation in an attempt to cut economic ties with one another because of differing political views. Thus, there is no, and likely will never be, congressional authorization to enact state-implemented travel bans.

B. *Legitimate Local Purpose*

“The limitation imposed by the Commerce Clause on state regulatory power ‘is by no means absolute,’ and ‘the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected.’”¹⁴⁷

Facially discriminatory state statutes may be upheld if: (1) a state demonstrates that the regulation serves a “legitimate local purpose” and (2) the local purpose could not be achieved by other available nondiscriminatory means.¹⁴⁸ “At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.”¹⁴⁹

Recall *Maine v. Taylor*, from Part II.B.2, where the Court held that Maine’s baitfish statute was facially discriminatory.¹⁵⁰ There, Robert J. Taylor operated a bait business in the state of Maine.¹⁵¹ Although Maine statutorily prohibited the importation of live baitfish, Taylor entered into an agreement to have 158,000 live baitfish delivered to him from another state.¹⁵² Maine indicted Taylor for violating its statute.¹⁵³ Taylor moved to dismiss the indictment, arguing that Maine’s statute unconstitutionally burdened interstate commerce.¹⁵⁴

The Court first affirmed the District Court’s finding that Maine’s statute served a legitimate local purpose because it protected Maine’s fragile aquatic ecology.¹⁵⁵ The Court also affirmed the District Court’s finding that there

¹⁴⁷ *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (internal quotation marks omitted) (quoting *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980)).

¹⁴⁸ *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

¹⁴⁹ *Id.* at 337.

¹⁵⁰ *Taylor*, 477 U.S. at 138.

¹⁵¹ *Id.* at 132.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 133.

¹⁵⁵ *Id.* at 142–43, 151–52; *see also id.* at 140–41 (“[L]ive baitfish imported into [Maine] posed two significant threats to Maine’s unique and fragile fisheries. First, Maine’s population of wild fish—

were no available nondiscriminatory means to protect Maine's fragile aquatic ecology because "testing procedures for baitfish parasites had not yet been devised[, and even] if procedures of this sort could be effective, . . . their development probably would take a considerable amount of time."¹⁵⁶ For these reasons, the Court concluded that Maine had a legitimate local purpose to protect its fragile aquatic ecology and there were no other nondiscriminatory means to serve that purpose.¹⁵⁷

Because it is very likely that state-implemented travel bans are facially discriminatory,¹⁵⁸ they must comport with the test articulated in *Maine v. Taylor* to fit neatly in the "legitimate local purpose" exception. State-implemented travel bans do not satisfy the *Taylor* test because prohibiting interstate commerce for essentially punitive reasons does not in any way serve a legitimate local purpose. To illustrate, consider applying California's Travel Ban to the *Taylor* test. This Article intentionally relies heavily on the *Taylor* test when assessing state-implemented travel bans because *Maine v. Taylor* was "one of the rare cases where discrimination against out-of-staters was allowed" and where "out-of-staters were denied access to a state's market."¹⁵⁹

The legislative history of California's Travel Ban provides two reasons for enacting the statute: (1) "to prevent the use of state funds to benefit a state that does not adequately protect the civil rights of certain classes of people" and (2) "to prevent a state agency from compelling an employee to travel to an environment in which he or she may feel uncomfortable."¹⁶⁰ New York's executive orders shared the same two concerns, albeit articulated slightly differently.¹⁶¹ By way of example, for the North Carolina travel ban, New

including its own indigenous golden shiners—would be placed at risk by three types of parasites prevalent in out-of-state baitfish, but not common to wild fish in Maine. Second, nonnative species inadvertently included in shipments of live baitfish could disturb Maine's aquatic ecology to an unpredictable extent by competing with native fish for food or habitat, by preying on native species, or by disrupting the environment in more subtle ways." (citations and footnotes omitted).

¹⁵⁶ *Id.* at 143 (citation omitted).

¹⁵⁷ *Id.* at 151–52.

¹⁵⁸ See *supra* Part II.B.2.

¹⁵⁹ See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 472 (5th ed. 2015).

¹⁶⁰ STATE OF CAL. ASSEMBLY COMM. ON JUDICIARY, ANALYSIS OF ASSEMBLY BILL 687-1887 (Cal. Apr. 1, 2016), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1887#.

¹⁶¹ See N.Y. COMP. CODES R. & REGS. tit. 9, § 8.144 (2015) (providing two, among other, reasons for enacting the Indiana travel ban: (1) "protecting New York State from inadvertently financing discrimination against [LGBTQ] people is a compelling state sanctioned government interest" and (2) "protecting the civil rights and liberties of lesbian, gay, bi-sexual, and transgender [LGBTQ]

York Executive Order 155 articulated similar concerns as California: (1) “protecting New York State from inadvertently financing discrimination against protected classes, including sexual orientation and gender identity, is a compelling state sanctioned government interest” and (2) “ensuring that persons are free from discrimination based on sexual orientation and gender identity is a compelling state sanctioned government interest.”¹⁶² This Article solely examines California’s Travel Ban under the *Taylor* test as California’s Travel Ban—being a statute as opposed to an executive order—contains extensive legislative history. Because California articulated two main reasons for enacting its statute, below are two separate discussions applying the *Taylor* test to each.

1. California’s First Reason for Enacting its Statute

The primary reason¹⁶³ for enacting California’s Travel Ban was “to prevent the use of state funds to benefit a state that does not adequately

persons is a compelling state sanctioned government interest”); *id.* § 8.155 (providing two, among other, reasons for enacting the North Carolina travel ban: (1) “protecting New York State from inadvertently financing discrimination against protected classes, including sexual orientation and gender identity, is a compelling state sanctioned government interest” and (2) “ensuring that persons are free from discrimination based on sexual orientation and gender identity is a compelling state sanctioned government interest”); *id.* § 8.156 (providing two, among other, reasons for enacting the Mississippi travel ban: (1) “protecting New York State from inadvertently financing discrimination against [LGBTQ] persons is a compelling state sanctioned government interest” and (2) “in a free society the equal rights of all citizens, including [LGBTQ] citizens, must be protected and cherished”).

¹⁶² See *id.* § 8.155 (prohibiting state-funded or state-sponsored travel to North Carolina).

¹⁶³ The reason why the first justification is referred to as the primary reason is because the California statute’s preamble fails to mention how the statute would protect LGBTQ employees in other states; instead, it focuses on how to financially harm other states with different civil rights laws. See CAL. GOV’T CODE § 11139.8 (West 2017) (“The Legislature finds and declares all of the following: (1) California is a leader in protecting civil rights and preventing discrimination. (2) California’s robust nondiscrimination laws include protections on the basis of sexual orientation, gender identity, and gender expression, among other characteristics. (3) Religious freedom is a cornerstone of law and public policy in the United States, and the Legislature strongly supports and affirms this important freedom. (4) The exercise of religious freedom should not be a justification for discrimination. (5) California must take action to avoid supporting or financing discrimination against lesbian, gay, bisexual, and transgender people.”). Furthermore, several assembly bills explain that: “AB 1887 will send a strong message to states with laws that discriminate on the basis of sexual orientation, gender identity, or gender expression that such laws are not acceptable to the State of California. By banning state-funded travel to such states, it sends a signal that we do not tolerate discrimination in our state and beyond our borders.” STATE OF CAL. S. COMM. ON GOVERNMENTAL ORG., ANALYSIS OF ASSEMBLY BILL 687-1887 (Cal. June 13, 2016), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1887#; see also STATE OF CAL. ASSEMBLY COMM. ON JUDICIARY, ANALYSIS OF ASSEMBLY BILL 687-1887 (Cal. Mar. 12, 2016), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1887#

protect the civil rights of certain classes of people.”¹⁶⁴ Applying the first part of the *Taylor* test, there does not seem to be a legitimate local purpose because punishing other states for not “adequately” protecting their residents’ civil rights only benefits individuals physically located within the Banned States’ jurisdictions, not within California’s. Although it may be true that California employees who travel to the Banned States may benefit from anti-discrimination laws in those states, there is *always* the possibility for California residents to travel to other states. That does not render what happens within those states a matter of legitimate local concern to California. Otherwise, the mere existence of interstate travel could legitimize practically any legislation targeting another state. Thus, coercing other states to change their civil rights laws,¹⁶⁵ or any other political reform, does not serve a legitimate local purpose.

To the contrary, the mechanism by which California—as well as Connecticut, Minnesota, New York, Vermont, Washington, and the District of Columbia—enacted its travel ban, banning state-funded travel to specified states, may actually cause greater harm to LGBTQ individuals and LGBTQ-owned businesses located within the Banned States. For example, if an LGBTQ individual and activist owns several restaurants located in a liberal city in a conservative state and if California cancels an event located near those restaurants, then that individual may lose business support from individuals flying in from California. This is best evidenced by an exchange between the Mayor of Louisville, Kentucky and California’s Attorney General. The Mayor of Louisville sought an exemption for Louisville—a city that supports inclusiveness—from California’s Attorney General.¹⁶⁶ California’s Attorney General declined, explaining that California’s Travel Ban did not permit any exceptions to cities within the Banned States.¹⁶⁷

(“California, a leader in preventing discrimination against the [LGBTQ] community, should not support [discrimination in] such states. California’s . . . Civil Rights Act prohibits all businesses establishments ‘of any kind whatsoever’ from discriminating on the basis of sexual orientation, gender identity, and gender expression. Given the values expressed in California law, the author and sponsors believe it would be inappropriate to allow state funds to support states with discriminatory laws that are contrary to those codified values.”). Tellingly, neither the assembly bills nor the statute extensively discusses the second reason for California’s Travel Ban.

¹⁶⁴ STATE OF CAL. ASSEMBLY COMM. ON JUDICIARY, ANALYSIS OF ASSEMBLY BILL 687-1887 (Cal. Apr. 1, 2016), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1887#.

¹⁶⁵ *See id.* (“North Carolina adopted a law that effectively overturned local ordinances prohibiting discrimination on the basis of gender identity and gender expression. . . . Indiana amended its law in response to such business pressure.”).

¹⁶⁶ *See* Beitsch, *supra* note 3.

¹⁶⁷ *Id.*

Furthermore, some critics of California's Travel Ban even argue that inflicting California's beliefs on conservative states does nothing more than exacerbate political divisions rather than protect LGBTQ interests.¹⁶⁸ Notwithstanding these concerns, the first part of the *Taylor* test is not satisfied—if anything, the opposite is achieved as argued by California's Travel Ban's critics. Thus, it is unnecessary to discuss the second part of the *Taylor* test.

2. *California's Second Reason for Enacting its Statute*

The second reason why California enacted its statute was “to prevent a state agency from compelling an employee to travel to an environment in which he or she may feel uncomfortable.”¹⁶⁹ Applying the first part of the *Taylor* test, there does seem to be a legitimate local purpose: ensuring California employees feel safe and comfortable during their employment by the State of California. However, California fails the second part of the *Taylor* test.

To satisfy the second part of the *Taylor* test, California must show that there are no other available nondiscriminatory alternatives to achieve its local purpose. California—as well as Connecticut, Minnesota, New York, Vermont, Washington, and the District of Columbia—would most likely fail the second part of the *Taylor* test because California could protect its employees without facially discriminating against other states. For example, California could easily adopt a policy where state employees have the *choice*, without any penalties, to travel to states that discriminate against LGBTQ individuals (the “Proposed Policy”). If California adopts the Proposed Policy, California would protect its legitimate local concerns in the least discriminatory way possible because rather than discriminating against specified states, California could simply make travel to them optional at the discretion of each employee. The Proposed Policy would certainly not be unreasonably burdensome to California as the Court in *Taylor* explained that: “[a] State must make reasonable efforts to avoid restraining the free flow of commerce across its borders, but it is not required to develop new and unproven means of protection at an uncertain cost.”¹⁷⁰ Moreover, giving employees the choice to travel will cost California a negligible amount

¹⁶⁸ See O'Donnell, *supra* note 37.

¹⁶⁹ See STATE OF CAL. ASSEMBLY COMM. ON JUDICIARY, ANALYSIS OF ASSEMBLY BILL 687-1887 (Cal. Apr. 1, 2016), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1887#.

¹⁷⁰ See *Maine v. Taylor*, 477 U.S. 131, 147 (1986).

of money, if any, because all that California would have to do is provide a disclaimer to its employees stating that travel to the Banned States is completely optional.

Perhaps California could argue that giving LGBTQ employees the choice is not a practical alternative because it would give some employees an unfair advantage over others. Consequently, the unfair advantage could compel LGBTQ employees to travel to states that discriminate against them. Thus, California might argue that its statute is the least discriminatory way of achieving its local purpose of protecting its employees. However, this argument would not carry much weight under *Taylor*.

In *Taylor*, the District Court struggled to determine whether a nondiscriminatory alternative was available. Maine argued that “there was no satisfactory way to inspect shipments of live baitfish for parasites or commingled species . . . [because] the small size of baitfish and the large quantities in which they are shipped made inspection for commingled species ‘a physical *impossibility*.’”¹⁷¹ Thus, Maine argued that there were no available alternative means to serve Maine’s local concerns.¹⁷² Although Taylor conceded that no scientific technique existed for inspecting live baitfish,¹⁷³ Taylor speculated that experts could *easily* develop one.¹⁷⁴ However, the possibility of developing inspection techniques was not Taylor’s central argument; instead, his central argument was that Maine’s statute was pointless because live baitfish did not pose a significant threat to Maine’s aquatic ecology.¹⁷⁵

The Court rejected Taylor’s arguments and explained that the “‘abstract possibility,’ of developing acceptable testing procedures, particularly when

¹⁷¹ *Id.* at 141 (emphasis added).

¹⁷² *Id.* at 146.

¹⁷³ *Id.* at 142, 147.

¹⁷⁴ *Id.* at 147. However, Taylor failed to provide estimates of the time and expense that would be involved with the development of the testing procedures. *Id.*

¹⁷⁵ *See id.* at 142 (“[Taylor] testified that none of the three parasites discussed by the prosecution witnesses posed any significant threat to fish in the wild, and that sampling techniques had not been developed for baitfish precisely because there was no need for them. He further testified that professional baitfish farmers raise their fish in ponds that have been freshly drained to ensure that no other species is inadvertently collected.”). *See also id.* at 146 (“Two prosecution witnesses testified to the lack of [scientifically accepted techniques exist for the sampling and inspection of live baitfish], and [Taylor’s] expert conceded the point, although [Taylor] disagreed about the need for such tests.”).

there is no assurance as to their effectiveness, does not make those procedures an ‘[a]vailabl[e] . . . nondiscriminatory alternativ[e].’¹⁷⁶

Unlike Taylor, an individual who might challenge California’s Travel Ban will not have to face the same hurdle as he or she could point to an available nondiscriminatory alternative that is something more than an “abstract possibility,” i.e., the Proposed Policy. In other words, instead of arguing that California’s Travel Ban is pointless, an individual challenging California’s Travel Ban could persuasively argue that a nondiscriminatory alternative exists: giving California employees the choice to travel.

In response, California could argue that the Proposed Policy is precisely what the Court meant when it stated that the “abstract possibility” of other alternatives, with “no assurance as to their effectiveness,”¹⁷⁷ does not establish an available nondiscriminatory alternative. In response to this counter, one could argue that California has not¹⁷⁸ provided any basis in its legislative history explaining how or why its statute would *effectively* prevent its employees from being discriminated against—neither has Connecticut, Minnesota, New York, Vermont, Washington, nor the District of Columbia. In fact, California did not even cite to one instance where one of its employees was discriminated against in any of the Banned States. Furthermore, California did not provide statistics demonstrating how many of its employees are LGBTQ or how many of those LGBTQ employees have traveled to Banned States using California funds. Thus, because California’s actual harm is so uncertain, pointing to alternatives that are equally effective may not be possible. This uncertainty could be blamed entirely on California because it failed to explain what would be effective to prevent out-of-state discrimination and California, unlike Maine, did not face similar unknown circumstances.

¹⁷⁶ See *id.* at 147 (citations omitted) (“More importantly, we agree with the District Court that the ‘abstract possibility,’ of developing acceptable testing procedures, particularly when there is no assurance as to their effectiveness, does not make those procedures an ‘[a]vailabl[e] . . . nondiscriminatory alternativ[e]’ for purposes of the Commerce Clause. A State must make reasonable efforts to avoid restraining the free flow of commerce across its borders, but it is not required to develop new and unproven means of protection at an uncertain cost. Appellee, of course, is free to work on his own or in conjunction with other bait dealers to develop scientifically acceptable sampling and inspection procedures for [baitfish]; if and when such procedures are developed, Maine no longer may be able to justify its import ban. The State need not join in those efforts, however, and it need not pretend they already have succeeded.”).

¹⁷⁷ *Id.*

¹⁷⁸ Perhaps if California were sued over this statute, it would provide more information about its employees and how its statute would protect them.

One of Maine's successful arguments was that "nonnative species inadvertently included in shipments of live baitfish could disturb Maine's aquatic ecology to an unpredictable extent by competing with native fish for food or habitat, by preying on native species, or by disrupting the environment in more subtle ways."¹⁷⁹ Thus, Maine was concerned with the *uncertainty* of what live baitfish could do to its fragile aquatic ecology.¹⁸⁰ California does not face similar unknown circumstances.

Maine's statute was reasonable under the circumstances because Maine was confronted with a so-called black swan risk.¹⁸¹ A black swan risk is a metaphor that describes a rare or hard-to-predict event that causes catastrophic consequences.¹⁸² Because Maine's statute was addressing unknown circumstances that could result in catastrophic consequences, Maine's proactive approach was appropriate. On the other hand, because California could research, report, and respond to instances of out-of-state discrimination, a reactive approach may be appropriate. Unlike Maine, California will not be faced with a catastrophic phenomenon if one of its employees faces discrimination in the Banned States. Thus, California's interests are not commensurate with Maine's interests because the former has the luxury of responding reactively, while the latter did not, and the same could be said of Connecticut, Minnesota, New York, Vermont, Washington, and the District of Columbia.

Finally, *Taylor* is clear that when a state statute facially discriminates, the burden is on the state to demonstrate that its interest cannot be achieved absent the discrimination.¹⁸³ This would be a very difficult thing for

¹⁷⁹ *Taylor*, 477 U.S. at 141.

¹⁸⁰ *See id.* at 148 ("[W]e agree with the District Court that Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible.").

¹⁸¹ Although the Court does not explicitly state that Maine was subject to a black swan risk, the facts suggest that Maine's statute was addressing such a risk.

¹⁸² *See* NASSIM NICHOLAS TALEB, *THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE* (2d ed. 2010).

¹⁸³ *Taylor*, 477 U.S. at 138 ("[O]nce a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means."). *See, e.g.,* *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 957 (1982) ("The State therefore bears the initial burden of demonstrating a close fit between the reciprocity requirement and its asserted local purpose."); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 353 (1977) ("When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951) ("Our

California to do because, after reviewing its legislative history, the whole point of the statute was to economically harm the Banned States,¹⁸⁴ and California was just using its employees as a medium to achieve that goal.¹⁸⁵ Perhaps that is why the legislative history does not cite statistics reporting how many LGBTQ employees work for the state or how many instances of discrimination those employees faced in the Banned States. Interestingly, the legislative history does cite statistics concerning the economic impact interstate travel has on other states.¹⁸⁶ Thus, for the foregoing reasons, it is also unlikely that the second stated purpose of California's Travel Ban would withstand scrutiny under the *Taylor* test.

C. Market Participant

If a state or city acts as a market participant, rather than a market regulator, then the dormant commerce clause does not apply.¹⁸⁷ “Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.”¹⁸⁸

In *White v. Massachusetts Council of Construction Employers, Inc.*, the Court held that an executive order of the Mayor of Boston requiring all construction projects funded by the city to employ at least 50% city residents did not

issue then is whether the discrimination inherent in the Madison ordinance can be justified in view of the character of the local interests and the available methods of protecting them.”).

¹⁸⁴ See *supra* text accompanying note 163. However, it could also be argued that California's Travel Ban is a symbolic action, intended to signal that California does not want discriminatory laws passed in other states. Although the Court may be sympathetic to California, it is very unlikely that the symbolic message would trump the Court's dormant commerce clause jurisprudence.

¹⁸⁵ See STATE OF CAL. S. COMM. ON GOVERNMENTAL ORG., ANALYSIS OF ASSEMBLY BILL 687-1887 (Cal. June 13, 2016), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1887# (stating, under the “purpose of the bill,” that “[the legislation] will send a strong message to states with laws that discriminate on the basis of sexual orientation, gender identity, or gender expression that such laws are not acceptable to the State of California. By banning state-funded travel to such states, it sends a signal that we do not tolerate discrimination in our state and beyond our borders.”).

¹⁸⁶ See STATE OF CAL. ASSEMBLY COMM. ON JUDICIARY, ANALYSIS OF ASSEMBLY BILL 687-1887 (Cal. Apr. 1, 2016), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1887# (“According to a preliminary response form the Department of General Services (DGS), however, many agencies, especially in the executive branch, occasionally send employees to other states. For example, according to DGS, there were over 10,000 ‘out-of-state persons trips’ in 2015. . . . If the premise of this bill is that state funds should not be spent in states that discriminate against [LGBTQ] persons, why would California ban state-funded travel but still spend a presumably much greater amount on procuring goods from that same state?”).

¹⁸⁷ *White v. Mass. Council of Constr. Emp'rs, Inc.*, 460 U.S. 204, 207 (1983).

¹⁸⁸ *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976).

violate the dormant commerce clause.¹⁸⁹ There, Boston's Mayor required all construction projects, funded wholly or in part by city funds or city administered funds, to be performed by "a work force consisting of at least half bona fide residents of Boston."¹⁹⁰ The Supreme Judicial Court of Massachusetts found that the executive order swept too broadly because it had a significant impact on out-of-state workers.¹⁹¹ However, the Court reversed and upheld the executive order, finding that the order did not have a significant impact on out-of-state workers and did not create more of a burden than necessary to achieve its objectives.¹⁹² However, the Court did limit what states can do, such that they cannot "impose restrictions that reach beyond the immediate parties with which the government transacts business."¹⁹³ The Court further explained that "the mayor's executive order covers a discrete, identifiable class of economic activity in which the city is a major participant. Everyone affected by the order is, in a substantial if informal sense, 'working for the city.'"¹⁹⁴ For those reasons, the Court held that the Mayor's executive order did not violate the dormant commerce clause.¹⁹⁵

In *South-Central Timber Development, Inc. v. Wunnicke*, the Court held that an Alaska statute violated the dormant commerce clause and that the market participant exception did not apply to it.¹⁹⁶ There, the Alaska Department of Natural Resources published a notice that it would sell timber.¹⁹⁷ However, as a condition of buying the timber, a successful bidder must partially process the timber in Alaska before shipping it out of the state.¹⁹⁸ This requirement only applied to state-owned timber.¹⁹⁹ The rationale for this requirement was to "protect existing industries, provide for the establishment of new industries, derive revenue from all timber resources, and manage the State's forests on a sustained yield basis."²⁰⁰ Petitioner, South-Central Timber Development, Inc. ("South-Central"), an Alaska corporation, was in the business of purchasing timber and selling

¹⁸⁹ *White*, 460 U.S. at 214.

¹⁹⁰ *Id.* at 205–06 (emphasis omitted).

¹⁹¹ *Id.* at 209–10.

¹⁹² *Id.* at 214.

¹⁹³ *Id.* at 211 n.7.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 214.

¹⁹⁶ *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 84, 101 (1984).

¹⁹⁷ *Id.* at 84.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 84–85.

²⁰⁰ *Id.* at 85 (internal quotations omitted).

unprocessed logs, primarily to Japan.²⁰¹ South-Central did not operate a mill to process logs in Alaska.²⁰² South-Central sued, arguing that the requirement of processing timber in Alaska before shipping it out of the state violated the dormant commerce clause.²⁰³ The Court agreed with South-Central and held, “[t]he limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further.”²⁰⁴ The Court further explained, “[a] State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.”²⁰⁵ For the foregoing reasons, the Court held that Alaska’s requirement for processing timber in its state violated the dormant commerce clause.²⁰⁶

At times, the distinction between a market participant and market regulator is a difficult one to draw.²⁰⁷ In *White*, the Court explained:

there are some limits on a state or local government’s ability to impose restrictions that reach beyond the immediate parties with which the government transacts business. We find it unnecessary in this case to define those limits with precision, except to say that we think the Commerce Clause does not require the city to stop at the boundary of formal privity of contract.²⁰⁸

States and territories, like California, Connecticut, Minnesota, New York, Vermont, Washington, and the District of Columbia, could make a strong argument that they are participating in the market for travel, allowing them—as a market participant—to restrict certain state-funded travel. However, applying *White* and *Wunnicke*, state-implemented travel bans are not saved by the market participant exception because they “impose restrictions that reach” beyond the issuing state by banning commercial transactions in the targeted state(s). To be sure, the whole point of state-implemented travel bans is to “impose restrictions that reach” the targeted state(s).

To put this point into context, consider California’s Travel Ban. California’s Travel Ban most likely “impose[s] restrictions that reach”

²⁰¹ *Id.* at 85–86.

²⁰² *Id.*

²⁰³ *Id.* at 86.

²⁰⁴ *Id.* at 97.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 100–01.

²⁰⁷ *Id.* at 93.

²⁰⁸ 460 U.S. 204, 211 n.7 (1983) (citation omitted).

beyond California because its goal is to restrict the exchange of goods and services (hotel rooms, restaurants, taxicabs, and the like) in the Banned States, in hopes that they will change their laws.²⁰⁹ In addition, the consequences imposed by California's Travel Ban affect out-of-state businesses because those businesses would most likely lose profits due to the ban. Because the California Travel Ban impacts the Banned States' businesses, it imposes burdens on markets that California is not a part of (like hotels or taxicab services). Even if California is in the market for travel, that does not automatically mean that it is also in the market for hotels and taxicab services of the Banned States. The Court identified a similar issue in *Wunnicke*:

At the heart of the dispute in this case is disagreement over the definition of the market. Alaska contends that it is participating in the processed timber market, although it acknowledges that it participates in no way in the actual processing. South-Central argues, on the other hand, that although the State may be a participant in the timber market, it is using its leverage in that market to exert a regulatory effect in the processing market, in which it is not a participant. We agree with the latter position.²¹⁰

Recall *Air Transport*,²¹¹ discussed *supra* Part II.A, where the District Court found parts of a city ordinance that prevented the City of San Francisco from contracting with companies who discriminated between employees with spouses and employees with domestic partners (among other groups) violated the extraterritoriality doctrine. There, the District Court also found that part of the city ordinance “reaches too far to be shielded by the market participant exception.”²¹² The District Court highlighted that the relevant language of the ordinance—“any of [their] operations elsewhere within the United States”²¹³—“create[s] a regulatory effect on the contractors' out-of-State activities. The Ordinance, therefore, has a substantial regulatory effect outside of the particular market in which the City [of San Francisco] participates.”²¹⁴ Thus, the District Court held that the market participant exception did not apply.²¹⁵

Applying the District Court's reasoning in *Air Transport* to state-implemented travel bans, the same could be said for state-implemented travel

²⁰⁹ See STATE OF CAL. S. JUDICIARY COMM., ANALYSIS OF ASSEMBLY BILL 687-1887 (Cal. June 27, 2016), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1887#.

²¹⁰ *Wunnicke*, 467 U.S. at 98.

²¹¹ 992 F. Supp. 1149 (N.D. Cal. 1998).

²¹² *Id.* at 1163.

²¹³ *Id.* at 1157.

²¹⁴ *Id.* at 1163 (internal quotation marks and brackets omitted).

²¹⁵ *Id.* at 1164.

bans as they are precisely directed outside the market of the issuing state. Stated differently, the entire purpose of state-implemented travel bans is to reach and harm a market in another state hoping that the impacted state will change its laws. For the foregoing reasons, it is unlikely that any state could easily rely on the market participant doctrine to defend state-implemented travel bans.

IV. THE TENTH AMENDMENT

Some might argue that states, like New York and California, may enact state-implemented travel bans under the Tenth Amendment. To be more exact, such critics could argue that states like New York and California may choose how to spend their own money under the Tenth Amendment. This potential argument carries no weight under the Court's recent Tenth Amendment jurisprudence.

The Tenth Amendment reads, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”²¹⁶ The interpretation of the Tenth Amendment has not been consistent by the Court.²¹⁷ The Court has had two different views of the meaning of the Tenth Amendment.²¹⁸ The first view is that “the Tenth Amendment is not a separate constraint on Congress, but rather is simply a reminder that Congress only may legislate if it has authority under the Constitution.”²¹⁹ The second view is that the “Tenth Amendment reserves a zone of activity to the states for their exclusive control, and federal laws intruding into this zone should be declared unconstitutional by the courts.”²²⁰ The Court has shifted back and forth between these two approaches over the past two hundred years.²²¹ In the

²¹⁶ U.S. CONST. amend. X.

²¹⁷ See CHEMERINSKY, *supra* note 159, at 326.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 326–27.

²²¹ *Id.* at 327 (footnote omitted) (“[I]n the nineteenth century, the Court took the former position and held that a federal law was constitutional so long as Congress was acting within the scope of its authority. In the first third of the twentieth century until 1937, the Court adopted the latter view and found that the Tenth Amendment reserved to the states control over production and federal laws attempting to regulate production were unconstitutional. From 1937 until the 1990s, the Court shifted back to the former approach. In fact, during this period, there was only one case where a federal law was found to violate the Tenth Amendment [*Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by* *García v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)] and this case was later expressly overruled. In the 1990s, however, the Court resurrected the Tenth Amendment as a limit on congressional power.”).

nineteenth century, following the first view, the Court viewed the Tenth Amendment “simply as a reminder that Congress must have authority under the Constitution in order to legislate, not as a judicially enforceable limit on the legislative power.”²²² However, in the late nineteenth century up through 1937, the Court’ followed the second view, and instead found the Tenth Amendment “reserves a zone of activities to the states for their exclusive control.”²²³ Under this “zone of activities” approach, the Court in *Hammer v. Dagenhart* found child labor was reserved “purely [to] state authority.”²²⁴ From 1937 until the early 1990s, the Court, shifting back to the first view, found that the Tenth Amendment was “simply . . . a reminder that Congress may legislate only if there is authority in the constitution.”²²⁵ In fact, during this time, the Court expressly overruled *Hammer v. Dagenhart*.²²⁶ Between 1937 and the early 1990s, the Court struck down one law as a violation of the Tenth Amendment, but a few years later expressly overruled that opinion.²²⁷

The Court’s current interpretation of the Tenth Amendment is consistent with the second view—that the “Tenth Amendment is a key protection of states’ rights” and any federal law that intrudes on such rights is unconstitutional.²²⁸ More recently, the Court issued three prominent opinions discussing the scope of the Tenth Amendment: *New York v. United States*,²²⁹ *Printz v. United States*,²³⁰ and *Reno v. Condon*.²³¹ This Article intentionally does not discuss *National Federation of Independent Business v. Sebelius*, as that case is simply an *application* of already well-founded principles of *New York v. United States* and *Printz*.²³²

²²² *Id.* at 330.

²²³ *Id.* at 331.

²²⁴ 247 U.S. 251, 276–77 (1918).

²²⁵ CHEMERINSKY, *supra* note 159, at 332.

²²⁶ *United States v. Darby*, 312 U.S. 100, 116–17 (1941).

²²⁷ *See Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

²²⁸ CHEMERINSKY, *supra* note 159, at 326–27.

²²⁹ 505 U.S. 144 (1992).

²³⁰ 521 U.S. 898 (1997).

²³¹ 528 U.S. 141 (2000).

²³² *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (upholding the approach of interpreting the Tenth Amendment as a safeguard against the intrusion of states’ rights by federal governmental regulation).

A. New York v. United States

In *New York v. United States*, the Court found parts of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (“Radioactive Waste Policy”) unconstitutional as violative of the Tenth Amendment.²³³ The Radioactive Waste Policy was enacted by Congress to regulate the disposal of low-level radioactive waste “most safely and efficiently . . . on a regional basis.”²³⁴ In order to accomplish this, the Radioactive Waste Policy provided three different methods to encourage states to regulate the disposal of radioactive waste within their borders.²³⁵ The Court held that the first two methods—monetary incentives and access incentives—were not problematic as Congress had authority under the Commerce Clause and Spending Clause to regulate the disposal of low-level radioactive waste.²³⁶ However, the Court held that the third method—the “Take Title Provision”—was unconstitutional as it violated the Tenth Amendment.²³⁷ The third method reads:

[i]f a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste . . . , [the State], upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon . . . as the generator or owner notifies the State that the waste is available for shipment.²³⁸

The Court found the Take Title Provision problematic because a state must either: (1) accept ownership of low-level radioactive waste and be liable for all damages associated with the ownership of such waste or (2) “implement legislation enacted by Congress.”²³⁹ Stated differently, under the Take Title Provision, “[n]o matter which path the State chooses, it must follow the direction of Congress.”²⁴⁰ The Court explained that “Congress may not simply ‘commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”²⁴¹ Further, the Court emphasized that the “Constitution . . .

²³³ 505 U.S. 144, 149 (1992).

²³⁴ *Id.* at 151 (internal quotations omitted).

²³⁵ *Id.* at 152.

²³⁶ *Id.* at 173–74.

²³⁷ *Id.* at 176.

²³⁸ *Id.* at 153–54 (quoting 42 U.S.C. § 2021e(d)(2)(C)).

²³⁹ *Id.* at 175–76.

²⁴⁰ *Id.* at 177.

²⁴¹ *Id.* at 161 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)).

‘leaves to the several States a residuary and inviolable sovereignty,’ reserved explicitly to the States by the Tenth Amendment. Whatever the outer limits of that sovereignty may be, one thing is clear: [t]he Federal Government may not compel the States to enact or administer a federal regulatory program.”²⁴² Thus, the Take Title Provision was an unconstitutional intrusion on states’ reserved powers under the Tenth Amendment.²⁴³

B. *Printz v. United States*

In *Printz v. United States*, the Court found the Brady Handgun Violence Prevention Act (“Brady Act”) violated the Tenth Amendment.²⁴⁴ The Brady Act essentially forced state law enforcement to perform background checks on potential handgun purchases.²⁴⁵ Emphasizing the Court’s holding in *New York v. United States*, the Court explained:

Congress cannot compel the States to enact or enforce a federal regulatory program. . . . Congress cannot circumvent that prohibition by conscripting the States’ officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.²⁴⁶

Thus, for the reasons outlined above, the Court held that the Brady Act violated the Tenth Amendment as it forced states to carry out federal policy: performing background checks on handgun purchases.²⁴⁷

C. *Reno v. Condon*

In *Reno v. Condon*, the Court found the Driver’s Privacy Protection Act of 1994 (“Driver’s Privacy Act”) constitutional as it did not violate the Tenth Amendment.²⁴⁸ The Driver’s Privacy Act essentially forbade state motor vehicle departments (“DMVs”) from selling personal information (name, address, telephone number, vehicle description, et cetera) of drivers and automobile owners to individuals and businesses unless the state DMVs obtained affirmative consent from drivers and automobile owners.²⁴⁹ “California Senator Barbara Boxer introduced the bill after an actress in Los

²⁴² *Id.* at 188 (internal citations omitted).

²⁴³ *Id.*

²⁴⁴ *Printz v. United States*, 521 U.S. 898, 935 (1997).

²⁴⁵ *Id.* at 902.

²⁴⁶ *Id.* at 935.

²⁴⁷ *Id.*

²⁴⁸ *Reno v. Condon*, 528 U.S. 141, 151 (2000).

²⁴⁹ *Id.* at 143–45

Angeles, Rebecca Schaeffer, was stalked and murdered by a man who obtained her home address from the California Department of Motor Vehicles.”²⁵⁰ South Carolina filed suit alleging that the Driver’s Privacy Act violated the Tenth and Eleventh Amendments.²⁵¹

The Court first held that Congress had authority to enact the Driver’s Privacy Act under the Commerce Clause of the Constitution.²⁵² However, the Court explained that simply having authorization under the Commerce Clause does not “conclusively resolve the constitutionality of the [Driver’s Privacy Act].”²⁵³ The Court emphasized this point by explaining: “[i]n *New York* and *Printz*, we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment.”²⁵⁴ After the Court explained that Congress has authority to enact the Driver’s Privacy Act, the Court held that it was plainly distinguishable from the federal statutes in *New York* and *Printz*.²⁵⁵ The Court held that unlike the statutes in *New York* and *Printz*, the Driver’s Privacy Act “does not require [states] to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.”²⁵⁶ Thus, the Court concluded that the Driver’s Privacy Act “is consistent with the constitutional principles enunciated in *New York* and *Printz*.”²⁵⁷

New York, *Printz*, and *Condon* constitute the Court’s most recent interpretation of the Tenth Amendment. After carefully analyzing these cases, it is clear that the federal government can only infringe on the Tenth Amendment if it has authority to legislate on a particular matter *and* if such legislation mandates the states to do something. Thus, the converse of that rule is as follows: as long as the federal government has authority to legislate a particular law and as long as the law does not force the states to do something, then the Tenth Amendment is not violated. Applying this logic, state-implemented travel bans are not protected by the Tenth Amendment.

The dormant commerce clause by its nature is a prohibition against states taking certain actions. The Court has repeatedly held that the dormant

²⁵⁰ See CHEMERINSKY, *supra* note 159, at 339.

²⁵¹ *Condon*, 528 U.S. at 147.

²⁵² *Id.* at 148.

²⁵³ *Id.* at 149.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 151.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

commerce clause is a valid doctrine pursuant to the Commerce Clause. Thus, since Congress, in a sense, has authority to prevent states from enacting legislation affecting interstate commerce and because Congress is not forcing the states, under the dormant commerce clause, to *affirmatively* do something, the Tenth Amendment is not violated under *New York, Printz*, or *Condon*. In fact, under the Court's current interpretation of the Tenth Amendment, if the dormant commerce clause were codified by Congress, it would be almost interchangeable with the factual scenario of *Condon*. However, if Congress enacted legislation forcing southern states to purchase exclusively from New York and California because Congress believes they have strong anti-discriminatory laws, the same issues in *New York* and *Printz* may be present as Congress would be forcing a state to affirmatively do something, rather than prohibiting it from doing something.

This interpretation is consistent with the plain language of the Tenth Amendment coupled with the Court's dormant commerce clause jurisprudence: the Tenth Amendment clearly states that powers that are not given to the federal government are reserved to the states. Because Article I, Section 8, Clause 3 of the Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," the power to regulate commerce is not a power that is reserved to the states. Thus, by entering the Union, the states sacrificed some of their rights that they might have had under the Articles of Confederation,²⁵⁸ and one of the rights they sacrificed was the ability to legislate on matters that affect²⁵⁹ interstate commerce. For the foregoing reasons, an argument grounded in the Tenth Amendment will not shield state-implemented travel bans.

CONCLUSION

It is paramount that state legislatures respect our nation's Constitution as well as duly enacted laws in other states. State-implemented travel bans do neither. Thus, they are unconstitutional.

²⁵⁸ See *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979) (citing *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533–34 (1949)) (noting that the Commerce Clause "reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation:").

²⁵⁹ See *supra* text accompanying note 98.

The Court's dormant commerce clause jurisprudence has consistently held that states may not enact statutes that affect interstate commerce.²⁶⁰ If a state implements a travel ban against other states, influenced by political disagreement, the issuing state's travel ban would be contrary to the dormant commerce clause because commerce would inevitably be affected in the targeted states. In fact, that is precisely what state-implemented travel bans are designed to do—affect commercial transactions in the targeted states in hopes that the targeted states will change their policies.

As extensively discussed in this Article, none of the dormant commerce clause exceptions neatly apply to state-implemented travel bans because: Congress did not give any state the authority to enact travel bans against other states, state-implemented travel bans do not satisfy the *Taylor* test, and the market participant exception is inapplicable.

The Court's current Tenth Amendment jurisprudence does not authorize state-implemented travel bans either because Congress has plenary authority to prevent state statutes affecting interstate commerce pursuant to the Commerce Clause. Furthermore, Congress is not coercing states to do something. Instead, Congress is preventing states from doing something, which has never been found to be violative of the Tenth Amendment. It is extremely unlikely that the Tenth Amendment was designed for states to use their funds to financially punish other states with different political beliefs. Thus, state-implemented travel bans would most likely be deemed unconstitutional under the dormant commerce clause, and the Tenth Amendment does not save them.

²⁶⁰ See *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.” (emphasis added)).