Burdens of the Dead: Postmortem Right of Publicity Statutes and the Dormant Commerce Clause

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INTRODUCTION

On April 21, 2016, the legendary recording artist and composer Prince died suddenly at the age of 57.[1] In addition to shocking his fans, Prince's unexpected death threw his family into disarray; because he died without a will and without a spouse, children, or surviving parents, many of Prince's distant relatives reportedly scrambled to claim ownership over his estate.[2] In the complicated process of valuing Prince's estate, his family and Minnesota lawmakers realized that one of his most valuable assets was not protected under Minnesota law: his right of publicity.[3] The right of publicity, a person's right to control the commercial use of his or her likeness, is recognized in some form in thirty-eight states.[4] Approximately twenty-five of those states have laws protecting a person's right of publicity after death, known as the postmortem right of publicity.[5] When Prince died in 2016, however, Minnesota did not have a postmortem right of publicity statute. In response to his death, state lawmakers rushed to pass the Personal Rights in Names Can Endure ("PRINCE") Act, which would have expanded Minnesota's right of publicity laws and created a retroactive postmortem provision applicable to deceased celebrities like Prince.[6] Although the PRINCE Act was abandoned after backlash from professional sports

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1. Jon Pareles, *A Singular, Meticulous Master of Pop Music and Stagecraft*, N.Y. TIMES, Apr. 22, 2016, at A1.

2. Ben Sisario, *Prince Had No Will, Court Filing Reports*, N.Y. TIMES, Apr. 27, 2016, at C1; *Prince's Siblings to Inherit Singer's $200m Estate, Judge* Rules, GUARDIAN (UK) (May 19, 2017), https://perma.cc/5LHG-25CT; *see also Prince's Estate: Lawyers Tally Late Star's Assets, Debts Behind Closed Doors*, BILLBOARD (May 8, 2016), https://perma.cc/U2W6-MMK4 (discussing the difficulty posed by tallying Prince's assets and verifying the blood relationship between Prince and various half-siblings who came forward to claim ownership over his estate).

3. *See* Jennifer E. Rothman, *Prince's Death Sends Minnesota Legislature into Overdrive*, ROTHMAN'S ROADMAP TO RIGHT OF PUBLICITY (May 10, 2016, 9:00 AM), https://perma.cc/HJ55-5WA2 [hereinafter Rothman, RIGHT OF PUBLICITY ROADMAP] (noting the uncertain status of Minnesota's right of publicity law at the time of Prince's death).

4. *See* Rothman, *The Law*, RIGHT OF PUBLICITY ROADMAP, *supra* note 3, https://perma.cc/MZ3T-HH3F (last visited Sept. 27, 2018) (noting that the states that currently do not recognize the right of publicity either by statute or common law are Alaska, Colorado, Idaho, Kansas, Maine, Maryland, Mississippi, Montana, North Carolina, North Dakota, Vermont, and Wyoming).

5. *Id.*; *see also* Memorandum from Jennifer E. Rothman Opposing Assembly Bill A08155 (June 8, 2017), https://perma.cc/QVA4-P9QJ [hereinafter Rothman, Memorandum Opposing A08155] ("It is true that approximately 25 states currently offer post-mortem rights in some form (some only to deceased soldiers)").

6. H.F. 3994, 2016 H.R., 89th Sess. (Minn. 2016). Some commentators have noted that, ironically, the PRINCE Act arguably would have violated its own provisions by using Prince's name to promote the bill. *See, e.g.*, Mike Masnick, *Minnesota's Broad Publicity Rights Law, the PRINCE Act, So Broad that It May Violate Itself*, TECHDIRT (May 10, 2016, 8:30 AM), https://perma.cc/K64T-UTQ7.

and other entertainment groups, the very introduction of the bill shows the enduring power of celebrity and the desire to change the law to protect artists' legacies.[7]

The controversy following Prince's death also demonstrates the current uncertainty surrounding the postmortem right of publicity and the trend towards expanding right of publicity laws in many states. In the spring of 2017, for example, the New York State Legislature introduced a bill similar to the PRINCE Act that would have created a postmortem right of publicity in New York.[8] But going even further than the PRINCE Act, the proposed New York law contained a provision allowing any individual's estate to bring claims for violations of that individual's right of publicity in New York, regardless of whether the individual was domiciled in New York upon death.[9] In the spring of 2018, the New York State Legislature reintroduced the 2017 postmortem bill.[10] While the 2018 bill made some adjustments to the scope of the proposed postmortem right, it still allowed the estates of deceased individuals from *any* domicile to bring right of publicity claims in New York courts.[11]

Currently, Indiana, Washington, and Hawaii have similar "all comers" provisions in their postmortem right of publicity statutes, which allow the estates of individuals who were domiciled out of state upon death to bring right of publicity claims in those states.[12] These "all comers" provisions run counter to the traditional rule that the law of the state in which a person is domiciled at death controls whether they have a postmortem right of publicity.[13] Such expansive postmortem right of publicity statutes create an extreme imbalance in the scope of rights of publicity between different states and encourage the heirs of celebrities like Prince to flock to specific states in an attempt to commoditize their relatives' personas after death.

This Note argues that current state postmortem right of publicity statutes are unconstitutional under the dormant Commerce Clause. The dormant Commerce Clause doctrine is an implicit restriction within the Commerce Clause that prohibits states from regulating interstate commerce.[14] The current patchwork of state

7. Jacob Gershman, *Critics Pounce on Proposed PRINCE Act in Minnesota*, WALL ST. J. L. BLOG (May 16, 2016, 2:17 PM), https://perma.cc/2XNY-AT59.

8. N.Y. Assemb. B. No. A08155, 2017 Leg., 240th Sess. (N.Y. 2017); *see also* Jennifer E. Rothman, *The Right of Publicity: Privacy Reimagined for New York?*, 36 CARDOZO ARTS & ENT. L.J. 573, 574 (2018) (noting that the "proposed bill would leave New York without an express privacy law, and would upend over a century of established privacy law in the state").

9. N.Y. Assemb. B. No. A08155 § 50-g, 2017 Leg., 240th Sess. (N.Y. 2017) ("Every individual's right of publicity shall continue to exist for forty years after his or her death…regardless of whether the law of the domicile…of the individual…recognizes a similar…property right.").

10. N.Y. Assemb. B. No. A08155-B, 2018 Leg., 241st Sess. (N.Y. 2018) (as amended June 5, 2018); *see also* Rothman, *New York Right of Publicity Bill Resurrected Again*, RIGHT OF PUBLICITY ROADMAP (June 6, 2018, 12:45 PM), https://perma.cc/BYN3-AM6P**.**

11. N.Y. Assemb. B. No. A08155-B § 50.1, 2018 Leg., 241st Sess. (N.Y. 2018) (defining "[d]eceased individual" as "any individual…who has died").

12. Rothman, *The Law*, RIGHT OF PUBLICITY ROADMAP, *supra* note 3.

13. *See* THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 11:17 (2d ed. 2018) ("the nearly unanimous rule to determine the existence of a post-mortem right of publicity is to look to the law of the place of domicile at the time of death").

14. U.S. CONST. art. I, § 8, cl. 3; *see* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 5.3.1, 443–45 (5th ed. 2015) (summarizing dormant Commerce Clause doctrine).

postmortem right of publicity statutes violates the dormant Commerce Clause in two different ways.

First, postmortem right of publicity laws containing "all comers" provisions like those in Indiana, Washington, and the proposed bill in New York violate the dormant Commerce Clause because they can be applied extraterritorially to the estates of non-resident individuals. By allowing non-resident estates to bring right of publicity actions, these laws can be used to stifle commerce occurring wholly outside of the state—precisely the sort of burden the dormant Commerce Clause prohibits.[15]

Second, even those postmortem right of publicity laws that do not contain "all comers" provisions can violate the dormant Commerce Clause when applied to certain businesses operating without distinct geographic boundaries, such as websites. Courts have struck down state laws regulating website content in the past under the dormant Commerce Clause, reasoning that such laws create de facto national regulation and impose the policy preferences of one state on other states in which a particular website can be accessed.[16] The same principle can be applied to state postmortem right of publicity laws, which in effect require website operators using the likenesses of deceased individuals to tailor their business practices to the most expansive postmortem right of publicity provisions. In this way, state postmortem right of publicity statutes impose significant costs on Internet content providers by adding another group of right holders with which those content providers must negotiate. The desire to protect individuals from commercial exploitation after death—especially beloved celebrities like Prince—is understandable. The dormant Commerce Clause, however, prohibits one state from designing the means by which that protection is afforded across the entire country.[17]

This Note proposes that the only means of remedying the constitutional issue posed by the current patchwork of postmortem right of publicity statutes is through federal action. Congress must either create a federal right of publicity or explicitly authorize states to create their own right of publicity laws.

Part I traces the origination and evolution of state postmortem right of publicity laws over the past forty years, concluding with New York's recently proposed bill. Part II examines current dormant Commerce Clause jurisprudence and how the dormant Commerce Clause has been applied to invalidate extraterritorial state laws and regulations of the Internet. Using the recently proposed bill in New York as a case study, Part III shows that: (1) postmortem right of publicity laws with "all

15. *See* Healy v. Beer Inst., 491 U.S. 324, 337 (1989) ("[T]he 'Commerce Clause…precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'" (quoting Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982))).

16. *See, e.g.*, Am. Libr. Ass'n v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997) (striking down a state criminal law making it a crime to use a computer to disseminate obscene material to minors under the dormant Commerce Clause); Am. Booksellers Found. v. Dean, 342 F.3d 96 (2d Cir. 2003) (same); Am. Civ. Liberties Union v. Johnson, 194 F.3d 1149 (10th Cir. 1999) (same).

17. *See* Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 582 (1986) (explaining that the dormant Commerce Clause prohibits one state from "project[ing] its legislation" into other states and creating a de facto nationwide regulatory system based on one state's overly restrictive statute).

comers" provisions are facially unconstitutional under the dormant Commerce Clause; and (2) other postmortem right of publicity laws are unconstitutional as applied to Internet businesses. Part III then concludes by suggesting that congressional consideration of the right of publicity is necessary to alleviate dormant Commerce Clause violations created by current state right of publicity statutes.

I. THE POSTMORTEM RIGHT OF PUBLICITY

The history of the postmortem right of publicity traces the development of American celebrity itself.[18] As Americans became more enamored with stardom, the likenesses and personas of celebrities became one of their most valuable assets. Postmortem right of publicity laws first emerged in the early 1980s to protect the market for celebrity, and they have continually expanded ever since. This section traces that evolution.

A. DEVELOPMENT OF THE RIGHT OF PUBLICITY: FROM PRIVACY TO CELEBRITY

The right of publicity has its origins in the right of privacy, which was first proposed by Samuel Warren and Louis Brandeis in their seminal Harvard Law Review article *The Right to Privacy*.[19] Responding to what they perceived as inadequate protection of personal privacy against unwanted intrusion by the press, Warren and Brandeis conceived of the right of privacy as the right of individuals to control what kinds and how much of their expression is available to the public.[20] In 1902, the New York Court of Appeals became the first court to consider a right of privacy claim in *Roberson v. Rochester Folding Box Co.*[21] In *Roberson*, the plaintiff sued a flour mill for using her portrait on their products without her permission.[22] Finding that the flour mill did not libel the plaintiff, the Court of Appeals refused to recognize the plaintiff's novel right of privacy claim.[23] The New York State Legislature swiftly responded to the decision by enacting a statutory right of privacy in 1903, which prohibited the unauthorized use of a person's likeness "for the purposes of trade."[24] Thus began the pattern of state legislatures enacting laws to

18. *See* Mark Bartholomew, *A Right is Born: Celebrity, Property, and Postmodern Lawmaking*, 44 CONN. L. REV. 301, 301 (2011) (noting that the prevailing understanding of the right of publicity is that it developed in tandem with the growing commodification of celebrity in the U.S.).

19. Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 198–99 (1890); *see also* JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD (2018) [hereinafter ROTHMAN, THE RIGHT OF PUBLICITY]; Martin H. Redish & Kelsey B. Shust, *The Right of Publicity and the First Amendment in the Modern Age of Commercial Speech*, 56 WM. & MARY L. REV. 1443, 1451 (2015).

20. Warren & Brandeis, *supra* note 19, at 198–99.

21. ROTHMAN, THE RIGHT OF PUBLICITY, *supra* note 19, at 22–25. *See* Roberson v. Rochester Folding Box Co., 62 N.E. 442 (1902), *superseded by statute*, N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 1903).

22. *Roberson*, 64 N.E. at 442.

23. *Id.*

24. N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 1903) (amended 1921).

protect individuals' likenesses in response to what they perceived as unjust commercial exploitation. Early identity misappropriation claims remained moored to their privacy roots over the next four decades, and William Prosser set out the invasion of privacy tort in the Restatement (First) of Torts in 1939.[25]

The modern right of publicity was born in a decision written by Judge Jerome Frank in *Haelan Laboratories v. Topps Chewing Gum*.[26] In *Haelan*, a baseball player granted a chewing gum company the exclusive right to use his photograph, but a rival company later convinced the player to let them use his photograph as well.[27] In upholding the original gum company's claim against its rival for inducing a breach of contract, the Second Circuit coined the term "right of publicity" and held that the right existed independent of the right of privacy.[28] By recognizing the right of publicity as an independent property right divorced from any invasion of personal privacy, *Haelan* paved the way for a new market surrounding the commodification of one's likeness.[29] In 1972, California became the first state to enact a statute expressly protecting the right of publicity,[30] and in 1977, in *Zacchini v. Scripps-Howard*, the Supreme Court formally recognized the right of publicity as rooted in economic considerations separate from privacy.[31] In *Zacchini*, the Supreme Court severed the right of publicity from its privacy tort origins and analogized it to copyright and patent protection, thereby signaling to lower courts that the right of publicity should be treated as an independent property right.[32]

After the right of publicity became perceived as an independent property right, it was only a matter of time before courts considered whether the right of publicity was descendible after death like other property interests. In 1979, the California Supreme Court considered for the first time whether the right of publicity could live on after an individual's death in *Lugosi v. Universal Pictures*.[33] *Lugosi* considered whether the widow of Bela Lugosi, an actor famous for portraying Dracula in 1930, was entitled to profits made by Universal Studios in exploiting the "uniquely individual

25. Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1169 (2006); *see also* RESTATEMENT (FIRST) OF TORTS § 867 (1939).

26. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953).

27. *Id.* at 867.

28. *Id.* at 868.

29. *See* Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, 28 COMM. L. 14, 14 (2011) (describing the explosion in right of publicity laws and lawsuits following the *Haelan* decision); *see also* Joseph R. Grodin, Note, *The Right of Publicity: A Doctrinal Innovation*, 62 YALE L.J. 1123, 1127 (1953) (student Note published soon after the *Haelan* decision, recognizing that *Haelan* took an important step in clearly setting out the right of publicity as a doctrine concerned with economic, not privacy, interests).

30. CAL. CIV. CODE § 3344; *see* MCCARTHY, *supra* note 13, § 6:23 (describing the origins of California's right of publicity statute).

31. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977) ("Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. The same consideration underlies the patent and copyright laws long enforced by this Court.").

32. Vick & Jassy, *supra* note 29, at 15; ROTHMAN, THE RIGHT OF PUBLICITY, *supra* note 19, at 81.

33. 603 P.2d 425 (1979).

likeness and appearance of Bela Lugosi in the role of Count Dracula."[34] Lugosi's widow argued that because Lugosi had a protectable property interest in his individual likeness *separate* from Universal's copyright in the movie *Dracula*, that property interest passed to her upon Lugosi's death in 1956.[35] While the trial court initially ruled in her favor, the California Supreme Court rejected her claim, reasoning that creating a postmortem right of publicity would neither serve "society's interest in the free dissemination of ideas" nor would it incentivize individuals to commercialize their likenesses during their lifetimes.[36] Thus, the California Supreme Court held that "the right to exploit name and likeness is personal to the artist and must be exercised, if at all, by him during his lifetime."[37]

At the same time that the estate of Dracula fought over his right of publicity in California, the estate of "the King" fought over the use of his likeness in Tennessee.[38] When Elvis Presley died in 1977, he was one of the most identifiable celebrities in the world, and his heirs sought to protect his likeness from being used without his estate's permission.[39] Like in *Lugosi*, in *Memphis Development Foundation v. Factors Etc., Inc.*, the U.S. Court of Appeals for the Sixth Circuit held that the right of publicity did not survive an individual's death in Tennessee.[40] Similar to the court's reasoning in *Lugosi*, the Sixth Circuit reasoned that creating a postmortem right of publicity would not create any greater economic incentives for an individual to commercialize his or her likeness during life, and since the right of publicity had been severed from its dignitary and privacy roots, only the economic rationale could be used to justify any expansion of existing rights.[41] After several other courts also declined to grant the Presley estate a postmortem right of publicity, the Tennessee State Legislature leapt into action by passing Tennessee's Personal Rights Protection Act of 1984 ("PRPA"), known as the "Elvis law."[42] The PRPA prohibits the unauthorized commercial use of an individual's "name, photograph, or likeness in

34. *Id.* at 427.

35. *Id.*

36. *Id.* at 431.

37. *Id.*

38. *See Elvis Presley*, ROCK & ROLL HALL OF FAME (last visited Dec. 23, 2017) ("Elvis Presley is, quite simply, the king of Rock & Roll."), https://perma.cc/MX2G-VFNG.

39. *See* Brittany Adkins, *Crying Out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through a Uniform Right of Publicity Act*, 40 CUMB. L. REV. 499, 512–13 (2009) (describing how Elvis's death sparked litigation surrounding the existence of a postmortem right of publicity in Tennessee).

40. *See* Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 959 (1980).

41. *Id.* ("The desire to exploit fame for the commercial advantage of one's heirs is . . . a weak principle of motivation. It seems apparent that making the right of publicity inheritable would not significantly inspire the creative endeavors of individuals in our society.").

42. *See, e.g.*, Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 227, 239 (1999) ("[T]he Tennessee statute is affectionately referred to as 'Elvis law' which is very favorable to a plaintiff like Graceland."); *see also* Annie T. Christoff, *Long Live the King: The Influence of Elvis Presley on the Right of Publicity in Tennessee*, 41 U. MEM. L. REV. 667, 696 (2011) (noting that PRPA was also sponsored by the Presley estate).

any medium" for ten years after death, and like Minnesota's failed PRINCE Act, it demonstrates the power of local celebrities to move state legislatures to action.[43]

Less than a year after Tennessee enacted the PRPA, California passed its own postmortem right of publicity law, the Celebrities Rights Act of 1985, after significant lobbying by the Screen Actors Guild.[44] Similar to the PRPA, the California Celebrities Rights Act was recognized as a piece of legislation designed to overrule the *Lugosi* decision and support the estates of the many celebrities who died in California.[45] Over the next decade, other states passed even more expansive postmortem right of publicity statutes, with Oklahoma and Indiana even creating a duration of 100 years for their postmortem publicity rights.[46]

Mirroring the growth in states recognizing the postmortem right of publicity, courts also began interpreting the scope of the right of publicity more broadly, most notably the Ninth Circuit.[47] In *Midler v. Ford Motor Co.*, for example, the Ninth Circuit held that Bette Midler had a viable California common law right of publicity claim against Ford for impersonating her singing in an advertisement.[48] Six years later, in *White v. Samsung*, the Ninth Circuit upheld Vanna White's common law right of publicity claim against Samsung for using a robot that called to mind her image in a VCR commercial.[49] By the start of the new millennium, the right of publicity had therefore grown far beyond its roots in the right of privacy a century earlier. It represented a powerful tool for individuals and their estates to control and commercialize individuals' likenesses long after death. Furthermore, because celebrities' likenesses are in the highest demand, most of the litigation defining the scope of the right was driven by celebrity estates. In the early 2000s, however, only a minority of states recognized the postmortem right of publicity.[50] Thus, while powerful, the postmortem right of publicity was an unreliable tool, and some celebrities fell victim to the patchwork nature of state laws. The most notable of these celebrities, as discussed in the following section, was Marilyn Monroe.

43. *See* TENN. CODE ANN. § 47-25-1104 (2014); *see also* Adkins, *supra* note 39, at 513 (describing the scope of the PRPA).

44. *See* CAL. CIV. CODE § 990 (1985), *revised at* CAL. CIV. CODE § 3344.1 (1999); MCCARTHY, *supra* note 13, § 6:24.

45. MCCARTHY, *supra* note 13, § 6:24.

46. *See, e.g.*, TEX. PROP. CODE ANN. § 26.012(d) (West 2000); OKLA. STAT. tit. 12 §§ 1448–1449 (2010); IND. CODE § 32-36-1-8 (2002); *see also* Bartholomew, *supra* note 18, at 316–17 (describing the rapid growth of postmortem right-of-publicity statutes following Tennessee and California).

47. *See* Bartholomew, *supra* note 18, at 319 (describing the more expansive judicial attitude toward publicity rights starting in 1988).

48. *See* Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) ("To impersonate [Midler's] voice is to pirate her identity.").

49. *See* White v. Samsung Elec. Am., Inc., 971 F.2d 1395, 1399 (9th Cir. 1992).

50. *See* MCCARTHY, *supra* note 13, § 9:17 (surveying state postmortem right of publicity laws).

B. VARIATION IN THE POSTMORTEM RIGHT OF PUBLICITY AND RESULTING LITIGATION

Because most postmortem right of publicity statutes were passed either in reaction to the death of a local celebrity or after direct lobbying by the estate of an individual with a valuable right of publicity, each new statute contains minor variations that make national adherence costly and unpredictable.[51] As it stands today, there are four primary variations between different states' approach to the postmortem right of publicity. First, at least two states (New York and Wisconsin) have explicitly rejected the postmortem right of publicity altogether.[52] Second, the statutory term for the postmortem right of publicity varies significantly between different jurisdictions, from ten years in Tennessee to 100 years in Indiana and Oklahoma.[53] Third, each postmortem statute has a different scope of protection, including how many years it applies retroactively (if at all), whether the protection extends only to names and likenesses or whether it also covers gestures and an individual's overall "personality," and whether an individual needs a commercially valuable persona to receive protection.[54] For example, Washington's postmortem right of publicity period lasts ten years for ordinary individuals but is extended to seventy-five years for "personalities," defined as "any individual whose name, voice, signature, photograph, or likeness has commercial value."[55] Finally, three states (Indiana, Washington, and Hawaii) have taken the extraordinary step of expressly extending their postmortem right of publicity to the estates of *any* individuals, even if they were domiciled in other jurisdictions when they died.[56] While these "all comers" provisions still require some violation of an individual's right of publicity within the state, they have prompted litigation over whether they are constitutionally overbroad, though no court has definitively ruled on the issue.[57]

51. *See* Vick & Jassy, *supra* note 29, at 16 (explaining that some of the most expansive postmortem right of publicity statutes, like Indiana's, were authored by representatives for celebrity estates and suggesting that the state-by-state approach invites forum shopping).

52. MCCARTHY, *supra* note 13, § 9:18; *accord* Smith v. Long Island Jewish-Hillside Med. Ctr., 499 N.Y.S.3d 167, 168 (2d Dep't 1986) (holding that New York does not recognize a postmortem right of publicity); Hagen v. Dahmer, 1995 WL 822644, at *4 (E.D. Wis. Oct. 13, 1995) (holding that Wisconsin's right of publicity statute and common law right of publicity are limited to living persons).

53. *See* TENN. CODE ANN. § 47-25-1104 (2014); OKLA. STAT. tit. 12 §§ 1448–1449 (2010); IND. CODE § 32-36-1-8 (2002). *See also* Rothman, RIGHT OF PUBLICITY ROADMAP, *supra* note 3 (surveying postmortem right of publicity terms).

54. *See* Vick & Jassy, *supra* note 29, at 16 (describing the lack of uniformity among state right of publicity laws).

55. *See* WASH. REV. CODE ANN. §§ 63:60:020(8), 63:30:040 (2008).

56. *See* IND. CODE § 32-36-1-1(a) (2002) ("This chapter applies to an act or event that occurs within Indiana, regardless of a personality's domicile, residence, or citizenship."); WASH. REV. CODE. ANN. § 63:60:010 (2008) ("The property right does not expire upon the death of the individual or personality, regardless of whether the law of the domicile, residence, or citizenship of the individual or personality at the time of death or otherwise recognizes a similar or identical property right."); HAW. REV. STAT. § 482P-2 (2010) ("This chapter is intended to apply to all individuals and personalities, living and deceased, regardless of place of domicile or place of domicile at time of death.").

57. *See* Part I.C., *infra*.

All of these complicated variations in state law collided in a series of cases involving Marilyn Monroe's postmortem right of publicity. In 1994, the Indiana legislature enacted the broadest postmortem right of publicity statute up until that point after significant lobbying by CMG Worldwide, the company that controls Marilyn Monroe's estate.[58] The 1994 statute created an expansive scope of protection that extended 100 years after death and purported to apply to any individual, regardless of his or her domicile at death.[59]

In 2007, CMG attempted to capitalize on this broad "all comers" provision by bringing a claim under Indiana's postmortem right of publicity law even though Marilyn Monroe died in California and her estate was probated in New York.[60] CMG sued a merchandise company that made t-shirts bearing Monroe's image and the operators of a website offering the t-shirts for sale.[61] Even though neither the merchandise company nor the website operators were based in Indiana, CMG argued that the Indiana postmortem right of publicity statute should apply because one of the t-shirts was sold at a Target in Indianapolis and the website was accessible within Indiana.[62] In *Shaw Family Archives v. CMG Worldwide*, the court rejected CMG's claim, holding that neither New York, California, nor Indiana had a postmortem right of publicity at the time of Monroe's death in 1962, and therefore Monroe could not dispose of her right of publicity by will.[63] Because neither California nor Indiana's postmortem statutes applied retroactively in 2007, the *Shaw* court was able to decide the case on narrow grounds and avoid considering the constitutionality of Indiana's "all comers" provision.[64] The court also did not decide whether Monroe was a domiciliary of California or New York upon her death.[65] *Shaw* therefore answered few questions about the future of postmortem right of publicity and whether Monroe's estate was entitled to such a right.

In direct response to *Shaw*, the California legislature amended its postmortem statute in 2007 to apply retroactively to any individual domiciled in California upon his or her death.[66] This sweeping revision paved the way for CMG to bring a second lawsuit under California law in an attempt to vindicate Monroe's postmortem right of publicity. In *Milton H. Greene Archives, Inc. v. CMG Worldwide*, CMG claimed that the heirs of a photographer had violated Marilyn Monroe's postmortem right of publicity by distributing photographs of Monroe in California, arguing that the

58. *See* Vick & Jassy, *supra* note 29, at 16 (explaining that the CEO of CMG is recognized as the principle author of the 1994 statute).

59. *See* IND. CODE § 32-36-1-1(a) (1994); *see also* Adkins, *supra* note 39, at 518 (describing the Indiana statute as a novel and "sweeping" expansion).

60. *See* Shaw Fam. Archives Ltd. v. CMG Worldwide, Inc., 486 F. Supp. 2d 309, 314 (S.D.N.Y. 2007) (describing New York and California "the only possible domiciles of Ms. Monroe at the time of her death").

61. *Id.* at 313.

62. *Id.*

63. *Id.* at 314.

64. *Id.* at 314–15.

65. *Id.* at 315 ("[I]t is not necessary to resolve the question of domicile because neither New York nor California . . . permitted a testator to dispose by will of property she does now own at the time of her death.").

66. *See* CAL. CIV. CODE § 3344.1(b), (o)–(p) (West 2012); Adkins, *supra* note 39, at 509 n.56.

revised California postmortem statute applied retroactively to Monroe.[67] In 2012, the U.S. Court of Appeals for the Ninth Circuit disagreed, holding that the revised statute did not apply to Monroe because she was domiciled in New York, not California, when she died.[68] The court reasoned that CMG was estopped from arguing that Monroe died a domiciliary of California because Monroe's estate had previously represented that she died a domiciliary of New York in order to avoid California's substantial estate taxes.[69] Granting Monroe a postmortem right of publicity under California law, the court explained, would unfairly give Monroe's estate a "second advantage."[70]

Thus, even after two state legislatures passed postmortem statutes motivated by protecting Marilyn Monroe's postmortem right of publicity, her estate has thus far been unsuccessful in asserting that postmortem right because she died as a domiciliary of New York. In 2007, the New York state legislature proposed a postmortem right of publicity statute that would have made New York's law essentially identical to Indiana's, and which would have applied retroactively to Monroe.[71] However, after opposition from media organizations, among others, the bill was withdrawn.[72] The litigation over Monroe's estate is a key example of the broad impact of inconsistent postmortem right of publicity statutes between states. For companies seeking to make use of individuals' likenesses, it can be expensive and time consuming to determine whether and for how long an image or even name is protected. And for celebrities and other individuals seeking to protect their right of publicity after death, *Shaw* and *Greene* show that a simple error in establishing the wrong domicile can eliminate one's postmortem right of publicity altogether.

C. RECENT DEVELOPMENTS: JIMI HENDRIX, ALL COMERS, AND THE NEW YORK PROPOSAL

While the courts in *Shaw* and *Greene* avoided deciding whether Indiana's postmortem statute violated the dormant Commerce Clause, recent decisions have more directly addressed constitutional concerns with these laws. The most notable of these cases concerned the estate of Jimi Hendrix and Washington's postmortem right of publicity statute.[73]

Following the pattern of many other states that expanded their postmortem provisions to protect local celebrities, Washington amended its right of publicity

67. *See* Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc., 568 F. Supp. 2d 1152, 1155 (C.D. Cal. 2008).

68. *See* Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc., 692 F.3d 983, 1000 (9th Cir. 2012).

69. *Id.* at 987.

70. *Id.* at 999.

71. *See* S.B. 6005, 2007 Leg., 230th Sess. (N.Y. 2007); Assemb. B. 8836, 2007 Leg., 230th Sess. (N.Y. 2007).

72. *See* Bartholomew, *supra* note 18, at 363 (arguing that one of the main reasons the 2007 amendments failed was due to opposition by movie studios).

73. *See* Experience Hendrix, L.L.C. v. Hendrixlicensing.com, 766 F. Supp. 2d 1122 (W.D. Wash. 2011), *rev'd* 762 F.3d 829 [hereinafter *Hendrix I*]; Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd., 762 F.3d 829 (9th Cir. 2014) [hereinafter *Hendrix II*].

statute, the Washington Personality Rights Act ("WPRA"), in 2008 for the benefit of Jimi Hendrix.[74] In 2007, Hendrix's estate lost a Washington-based lawsuit over Hendrix's postmortem right of publicity because Hendrix was domiciled in New York when he died.[75] In response, the Washington legislature passed an "all comers" amendment to the WPRA modeled after Indiana's postmortem statute that extended the right to all individuals regardless of domicile upon death.[76] Unlike Indiana's original statute, however, the 2008 amendments applied retroactively and were specifically designed to grant a postmortem right of publicity to Jimi Hendrix.[77] Within a year after the amendments were passed, representatives of Hendrix's estate entered into a lawsuit that would test the constitutionality of Washington's new "all comers" provision.

In *Experience Hendrix L.L.C. v. Hendrixlicensing.com* ("*Hendrix I*"), Experience Hendrix, a licensing company that managed several Jimi Hendrix trademarks and operated websites on behalf the Hendrix estate, sued a merchandise distributor for trademark infringement.[78] Although Experience Hendrix's claims were rooted in the Lanham Act, not the WPRA, the U.S. District Court for the Western District of Washington determined that it had to rule on whether the amended WPRA applied to Hendrix's estate to decide the case.[79] The *Hendrix I* court held that the WPRA did not apply to Jimi Hendrix because the 2008 WPRA amendments were unconstitutional under the dormant Commerce Clause, the Due Process Clause, and the Full Faith and Credit Clause.[80] The court reasoned that because the 2008 amendments allowed the WPRA to apply to any deceased individual regardless of domicile, the law sought to govern transactions occurring wholly outside Washington state, such as right-of-publicity transfers via will or intestate succession.[81] This, the *Hendrix I* court held, was an unconstitutional extraterritorial application under the dormant Commerce Clause.[82]

74. *See* Robert Rossi, Note, *Jurisdictional Haze: Indiana and Washington's Unconstitutional Extensions of the Postmortem Right of Publicity*, 57 B.C. L. REV. 297, 319–20 (2016) (discussing the 2007 WPRA amendments); *see also* Aubrie Hicks, Note, *The Right to Publicity After Death: Postmortem Personality Rights in Washington in the Wake of* Experience Hendrix v. Hendrixlicensing.com, 36 SEATTLE U. L. REV. 275, 282 (same). Although Jimi Hendrix spent most of his musical career in New York, he grew up in Seattle, Washington, where he played his first instrument, an old one-string ukulele he found in the trash. *See* LEON HENDRIX & ADAM MITCHELL, JIMI HENDRIX: A BROTHER'S STORY 56–58 (2012).

75. *See* Experience Hendrix L.L.C. v. James Marshall Hendrix Foundation, 240 F. App'x 739, 740 (9th Cir. 2007).

76. *See* WASH. REV. CODE § 63.60.010 (amended 2008).

77. *See* Hicks, *supra* note 74, at 282.

78. *See Hendrix I*, 766 F. Supp. 2d, at 1127–28.

79. *Id.* at 1130 ("Because a ruling that Experience now possesses a post-mortem right of publicity associated with Jimi Hendrix would resolve most, if not all, of defendants' counterclaims in Experience's favor, the Court must first address whether the WPRA applies and, if so, whether the 2008 amendments to the statute are constitutional.").

80. *Id.* at 1141–43.

81. *Id.* at 1142.

82. *Id.* For a more detailed explanation of the extraterritoriality doctrine of the dormant Commerce Clause, *see infra* notes 131–47 and accompanying text.

On appeal ("*Hendrix II*"), the Ninth Circuit reversed the District Court's dormant Commerce Clause holding under the rationale that the case at issue involved only commerce taking place within Washington state.[83] In dicta, the *Hendrix II* court recognized that the 2008 amendments to the WPRA had troublingly broad potential applications.[84] However, because the record did not demonstrate any affected commerce outside the state of Washington, the court concluded that the case did "not implicate those possible broader applications of the WPRA."[85]

Thus, the court in *Hendrix II* avoided striking down the WPRA amendments under the dormant Commerce Clause because it was able to limit the controversy to specific transactions taking place only in Washington. Unlike the District Court, the Ninth Circuit took a very narrow view of the WPRA and refused to look at the potential extraterritorial effects of the law. *Hendrix II* ultimately left undecided the issue of whether "all comers" provisions like the one in the WPRA would be unconstitutional as applied to defendants operating businesses interstate or without distinct geographic boundaries. By leaving this dormant Commerce Clause question unanswered and upholding the WPRA, *Hendrix II* opened the door for other states to try their hands at similarly broad postmortem right of publicity statutes.[86]

On May 31, 2017, the New York State Assembly introduced a postmortem right of publicity bill that almost precisely mirrored the 2008 amendments to the WPRA.[87] This proposed bill, Assembly Bill No. A08155, was not the first time that New York tried to introduce a postmortem right of publicity.[88] The bill came closer than the previous proposed bills to passing, however, due to initial cooperation from media representatives like the MPAA.[89] Nevertheless, after intense opposition from organizations like the Electronic Frontier Foundation and the New York Civil Liberties Union, the New York State Legislature did not move forward with the original 2017 bill.[90] Instead, on June 6, 2018, the legislature introduced a revised version of the bill, Assembly Bill No. A08155-B.[91] Even though the 2018 bill slightly narrowed the scope of the 2017 bill, because New York does not currently

83. *Hendrix II*, 762 F.3d at 835 ("Under the narrow, non-speculative circumstances presented by this case, we disagree with the district court's ruling and accordingly reverse.").

84. *Id.* at 836 ("Washington's approach to post-mortem personality rights raises difficult questions regarding whether another state must recognize the broad personality rights that Washington provides.").

85. *Id.* at 836 n.4; *see also id.* at 837 ("Nor does the record suggest that the application of the WPRA to the limited, non-speculative controversy at issue here would otherwise impermissibly burden interstate commerce.").

86. *See* Rossi, *supra* note 74, at 322 (noting that the Ninth Circuit's decision could have dramatic ripple effects on other courts and legislatures across the country).

87. *See* Assemb. B. 8155-B, 2017 Leg., 240th Sess. (N.Y. 2017); *see also* Jennifer E. Rothman, *New York Once Again Floats Right of Publicity Law*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (June 7, 2017, 12:45 PM), https://perma.cc/RR6J-XXSM [hereinafter Rothman, *New York Postmortem Law*].

88. Rothman, *New York Postmortem Law*, *supra* note 87.

89. *Id.*

90. Jennifer E. Rothman, *New York Legislature Feels the Heat and Pulls Right of Publicity Bill*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (June 21, 2017, 9:15 PM); *see also* Rothman, Memorandum Opposing A08155, *supra* note 5; Electronic Frontier Foundation, Memorandum in Opposition to A08155, June 12, 2017, https://perma.cc/KE2E-MTJV..

91. *See* N.Y. State Assemb. B. No. A08155-B, 2018 Leg., 241st Sess. (N.Y. 2018).

have a postmortem right of publicity, the 2018 bill would have brought about a massive overhaul in New York right of publicity laws.[92]

In particular, the 2018 bill would have made four significant changes to New York's right of publicity, which raise similar constitutional concerns to those raised by the 2008 WPRA amendments in Washington. First, Assembly Bill A08155-B proposed a new postmortem right prohibiting unauthorized use of a deceased individual's "persona" (defined as an individual's "name, portrait or picture, voice, or signature") for advertising purposes or for the purposes of trade for forty years after death.[93] Second, the bill made an individual's right of publicity freely transferable and descendible via contract, testamentary document, or intestate succession during an individual's life or by his or her heirs.[94] Third, the proposed bill contained an "all comers" clause that would have made the law applicable to any deceased individual, regardless of that person's domicile upon death.[95] While the revised 2018 bill removed some language from the 2017 bill that expressly extended jurisdiction to all deceased persons regardless of domicile, the revised bill still lacked a New York domicile requirement, thereby creating a cause of action for deceased individuals from any jurisdiction.[96] Finally, the 2018 bill explicitly prohibited the unauthorized use of an individual's "digital replica" in a pornographic work.[97] This "digital replica" provision, new to the 2018 version of the bill, was meant to target so-called "deep fakes," videos in which the faces of celebrities and public figures are superimposed onto another's body using artificial intelligence.[98]

Like the 2017 bill before it, the New York State Legislature failed to pass the 2018 bill after facing renewed opposition from a coalition of media and civil rights groups.[99] With pressure from organizations like SAG-AFTRA to create a

92. *See* Rothman, Memorandum Opposing A08155B, *supra* note 5 (noting that Assembly Bill A08155 would upend over 100 years of New York case law regarding New York's "right of privacy" under New York Civil Rights Law §§ 50–51).

93. Assemb. B. 8155-B, 2018 Leg., 241st Sess. §§ 50.8, 50-f, 50-g (N.Y. 2018).

94. *Id.*, § 50-h(a)–(f).

95. *Id.*, § 50.1 (defining "Deceased individual" as "any individual . . . who has died").

96. *See* Shubha Ghosh, Letter in Opposition to Assembly Bill No. A08155-B, June 11, 2018, https://perma.cc/FFH7-5WYK (explaining that the bill allowed individuals representing the estates of individuals who had died anywhere in the world to bring lawsuits in NY); Electronic Frontier Foundation, Memorandum in Opposition to Assembly Bill 8155-B, June 8, 2018, https://perma.cc/FFH7-5WYK; Association of National Advertisers, Letter in Opposition to Assembly Bill No. A08155-B, June 8, 2018, https://www.rightofpublicityroadmap.com/sites/default/files/pdfs/association_of_national_advertisers_opp_a8155b.pdf (noting that the bill was not limited to New York domiciles and urging the legislature to add such a domicile requirement); Warner Brothers Entertainment Inc., Letter in Opposition to Assembly Bill No. A08155-B, June 7, 2018, https://perma.cc/RF7B-K93H (arguing that the lack of a domicile requirement in the 2018 bill "invites an overwhelming volume of unnecessary litigation that will overburden New York courts").

97. Assemb. B. 8155-B, § 51.4, 2018 Leg., 241st Sess. (N.Y. 2018).

98. Eriq Gardner, *Disney Comes Out Against New York's Proposal to Curb Pornographic "Deepfakes"*, HOLLYWOOD REPORTER (June 11, 2018, 4:01 PM), https://perma.cc/24RF-U9AZ.

99. Judy Bass, *New York Right of Publicity Bill Passage Drama Ends with No Action by State Senate*, ENTERTAINMENT, ARTS AND SPORTS LAW BLOG (June 25, 2018, 9:28 AM), https://perma.cc/A7EA-AGL5; Electronic Frontier Foundation, Memorandum in Opposition to A08155-B, *supra* note 96 (noting that the coalition in opposition to the bill "is so broad that it has brought together groups such as EFF and the MPAA, which hold opposing views on a wide range of other policy issues").

postmortem right of publicity for the many actors and other celebrities who have died in New York, however, a revised version of the bill will inevitably be introduced. If such a bill passes, and especially if it contains an "all comers" provision like the statutes in Indiana, Washington, and Hawaii, New York courts will have to contend with the broad, extraterritorial impact of a New York postmortem right of publicity. The Ninth Circuit was only able to avoid deciding whether the WPRA violated the dormant Commerce Clause because of the narrow intrastate transactions at issue in *Hendrix II*. It is only a matter of time before a case arises in which the controversy cannot be so carefully cabined.

II. THE DORMANT COMMERCE CLAUSE

Article I, Section 8 of the U.S. Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States."[100] Although this Commerce Clause does not explicitly limit the power of state legislatures, courts have long held that it implicitly limits the ability of states to regulate interstate commerce, often referred to as the "dormant Commerce Clause" doctrine.[101] Over time, the Supreme Court has created a two-tiered framework for determining whether state legislation violates the dormant Commerce Clause. "Tier-one" laws are state laws that evince a protectionist purpose or explicitly discriminate against out-of-state businesses. These laws are submitted to strict scrutiny and are often held to be per se unconstitutional.[102] "Tier-two" laws are those laws that are facially nondiscriminatory, but which indirectly burden interstate commerce. Tier-two laws are analyzed under a less scrutinizing balancing test that examines whether the burden on interstate commerce clearly exceeds the local benefits of the state law.[103] The Supreme Court has also identified a third category of state laws that violate the dormant Commerce Clause: laws that have the practical effect of regulating business conduct occurring wholly outside a state's borders.[104] These laws are deemed "extraterritorial" and are subjected to the same "tier-one" strict scrutiny as facially discriminatory laws.[105]

This section describes the current state of the dormant Commerce Clause and how courts use the doctrine to invalidate state legislation burdening interstate commerce. Part II.A. discusses the basic two-tier approach to the dormant Commerce Clause doctrine. Part II.B. examines the extraterritoriality doctrine and how courts have

100. U.S. CONST. art. I, § 8.

101. *See, e.g.*, Cooley v. Bd. of Wardens, 53 U.S. 299, 315–21 (1852)*; see also* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87 (1987) (explaining that for over a century, courts have interpreted the Commerce Clause as implicitly limiting state action); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1030 (3d ed. 2000) (describing the history of the dormant Commerce Clause doctrine).

102. *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 578–79 (1986) (describing the Supreme Court's two-tiered approach to the dormant Commerce Clause).

103. *Id.*

104. *See* Healy v. Beer Inst., 491 U.S. 324, 332 (1989) (discussing the development of the extraterritoriality doctrine under the dormant Commerce Clause framework); *see also* CHEMERINSKY, *supra* note 14, at 466–67 (same).

105. *See* TRIBE, *supra* note 101, at 1074.

struggled with incorporating it into the basic two-tier framework. Part II.C. looks at how courts have repeatedly invoked the extraterritoriality doctrine and the other two branches of dormant Commerce Clause jurisprudence to invalidate state laws regulating the Internet.

A. THE BASIC TWO-TIER FRAMEWORK: DISCRIMINATORY LAWS AND THE *PIKE* BALANCING TEST

The primary justification behind the modern dormant Commerce Clause doctrine is to prevent states from enacting protectionist legislation giving in-state businesses an unfair economic advantage over out-of-state businesses.[106] Though the doctrine has its critics,[107] it maintains an established place in Commerce Clause jurisprudence and is seen as fulfilling the Framers' desire to eliminate "economic Balkanization" among the states.[108] Consistent with that purpose, state laws that facially or purposefully discriminate against out-out-state economic interests—also known as "tier-one" laws—are subjected to the highest form of judicial scrutiny.[109] Facially discriminatory laws can only withstand strict scrutiny under the dormant Commerce Clause if there are no less discriminatory alternatives for achieving the same "purported legitimate local purpose."[110] Tier-one laws rarely withstand this strict scrutiny analysis; indeed, the Supreme Court has upheld such a law only once.[111] Thus, if a law facially discriminates against out-of-state economic interests, it is typically considered "virtually per se invalid under the Commerce Clause" even if it serves valid in-state interests.[112]

The clearest illustrations of "tier-one" state laws involve cases in which a law explicitly imposes economic restrictions on out-of-state businesses. In *Granholm v. Heald*, the Supreme Court held that a Michigan law allowing only in-state wineries to send wine to customers via mail was facially discriminatory and violated the dormant Commerce Clause.[113] Other times, the Supreme Court has invalidated laws designed to limit the access of state resources to out-of-state businesses. In *Hughes v. Oklahoma*, for example, the Supreme Court struck down an Oklahoma law prohibiting the transportation or shipping of minnows caught in Oklahoma for sale

106. *See* New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988) ("This 'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by out-of-state competitors.").

107. *See, e.g.*, Comptroller of the Treas. v. Wynne, 135 S. Ct. 1787, 1808 (2015) (Scalia, J., dissenting) (calling the dormant Commerce Clause "a judicial fraud" and "utterly illogical").

108. *Wynne*, 135 S. Ct. at 1794.

109. *Limbach*, 486 U.S. at 273.

110. *See* Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) ("At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.").

111. *See* Maine v. Taylor, 477 U.S. 131 (1986); Erwin Chemerinsky et al., *California, Climate Change, and the Constitution*, 25 ENVTL. F. July/Aug. 2007, 50, 54 (explaining that *Maine v. Taylor* involved the only "tier-one" law upheld by the Supreme Court).

112. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986).

113. Granholm v. Heald, 544 U.S. 460, 492–93 (2005).

outside the state.[114] The *Hughes* court recognized that even though Oklahoma had a valid interest in protecting its wildlife, the dormant Commerce Clause permitted Oklahoma to pursue that interest "only in ways consistent with the basic principle that 'our economic unit is the Nation.'"[115]

State laws that regulate evenhandedly and only have an indirect effect on interstate commerce—sometimes referred to as "tier-two" laws—are subject to a less searching balancing test codified in *Pike v. Bruce Church, Inc*.[116] Under the *Pike* balancing test, a facially neutral state law will be upheld unless its burden on interstate commerce is "clearly excessive in relation to the putative local benefits."[117] In applying this balancing test, courts consider, among other factors, whether the state law serves a legitimate state interest, whether any less burdensome regulatory alternatives exist, and whether the alleged benefits of the law outweigh the impact on interstate commerce.[118]

Although the *Pike* balancing test involves a highly subjective inquiry that makes predicting the outcome of a case difficult,[119] courts afford state legislatures substantial discretion under the *Pike* test, making it more likely that a tier-two law will survive judicial scrutiny than a tier-one law.[120] For example, in *CTS Corp. v. Dynamics Corp. of America*, the Supreme Court upheld a facially nondiscriminatory Indiana law under the *Pike* balancing test.[121] The law limited hostile takeovers of Indiana corporations by requiring a majority of disinterested shareholders to approve any transaction by which a purchaser obtained "control shares" in an Indiana corporation before that purchaser could obtain voting power in the corporation.[122] Dynamics, a non-Indiana corporation that had attempted a hostile takeover of CTS (an Indiana corporation), challenged the constitutionality of the Indiana anti-takeover statute, alleging that it violated the dormant Commerce Clause because it discriminated against out-of-state businesses that wanted to acquire Indiana corporations.[123] The Supreme Court first held that the Indiana law was not a facially discriminatory "tier one" law because "it ha[d] the same effects on tender offers whether or not the offeror is a domiciliary or resident of Indiana."[124] It then held that the anti-takeover law survived the *Pike* balancing test for two reasons. First, because the law only placed voting restrictions on tender offers for Indiana corporations, rather than prohibiting those tender offers outright, the burden on interstate commerce was minimal.[125] Second, this minimal burden was clearly outweighed by

114. *Hughes*, 441 U.S. at 337–38.
115. *Id.* at 339 (quoting H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537 (1949)).
116. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
117. *Id.* (citing Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960)).
118. *Id.* at 146; *see also* Chemerinsky et al., *supra* note 111, at 54–55.
119. *See, e.g.*, Bendix Autolite Corp. v. Midwesco Enters. Inc., 486 U.S. 888, 897 (Scalia, J., concurring) (noting that *Pike* balancing is like "judging whether a particular line is longer than a particular rock is heavy.").
120. *See* CHEMERINSKY, *supra* note 14, at 437 (explaining that most laws survive *Pike* balancing).
121. CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 94 (1987).
122. *Id.* at 73.
123. *Id.* at 77.
124. *Id.* at 87.
125. *Id.* at 93.

Indiana's strong, valid interest "in promoting stable relationships among parties involved in the corporations it charters."[126]

Despite the lesser scrutiny imposed on "tier-two" laws, the Supreme Court has invalidated some state legislation under the *Pike* balancing test when it has determined that those laws unduly encroach on interstate commerce. In *Pike* itself, the Supreme Court refused to apply an Arizona law requiring that cantaloupes grown in Arizona also be packed within the state before being sold.[127] The plaintiff in *Pike* was a harvesting company that grew cantaloupes in Arizona but owned packing and processing facilities thirty-one miles away in California.[128] Under the Arizona Fruit and Vegetable Standardization Act, it was prohibited from hauling its cantaloupes into California to pack them for nationwide distribution.[129] The plaintiff argued that the Arizona law imposed an unconstitutional burden on interstate commerce as applied to the plaintiff's shipping business. The Supreme Court agreed. The *Pike* court held that Arizona's "tenuous" interest in maintaining the quality and reputation of its local produce was outweighed by the heavy burden imposed on the plaintiff, who would have had to spend approximately $200,000 building a new packing plant within Arizona's borders.[130] Thus, in situations where a regulation imposes clearly excessive burdens on a business's interstate economic activities, it will be struck down even if it is motivated by benefitting local individuals or businesses.

B. THE EXTRATERRITORIALITY DOCTRINE

The extraterritoriality doctrine is a third, less understood, branch of dormant Commerce Clause jurisprudence.[131] Unlike the traditional dormant Commerce Clause framework, which focuses on economic protectionism, the extraterritoriality doctrine is primarily concerned with state laws that have practical repercussions beyond their state borders and which create costly inconsistency between different state legislative schemes.[132] The Supreme Court has held that the extraterritoriality doctrine dictates three principles: (1) the dormant Commerce Clause prohibits state statutes that apply to commerce occurring wholly outside the state's borders, whether or not the commerce has effects within the state; (2) a statute that has the practical effect of regulating commerce wholly outside the state is unconstitutional regardless of the legislature's intent in passing the statute; and (3) the practical effects of such

126. *Id.*

127. Pike v. Bruce Church, Inc., 397 U.S. 137, 138 (1970).

128. *Id.* at 138–39.

129. *Id.*

130. *Id.* at 145.

131. *See, e.g.*, Donald H. Regan, *Siamese Essays: (I)* CTS Corporation v. Dynamics Corporation of American *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1884 (1987) (explaining that the extraterritoriality doctrine is often misapplied); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1060 (2009) (same). *But see* Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 MARQ. L. REV. 497, 499 (2016) (arguing that courts have adequately defined a coherent extraterritoriality test under the dormant Commerce Clause).

132. Regan, *supra* note 131, at 1184–85.

statutes must be considered in relation to the regulatory schemes of other states and what the consequences would be if every State adopted similar legislation.[133]

If state statutes are found to regulate extraterritorially, courts submit the laws to the same strict scrutiny that they apply to facially discriminatory "tier-one" laws.[134] Like tier-one laws, extraterritorial laws rarely, if ever, survive constitutional scrutiny, and some courts have held that such laws are per se unconstitutional.[135] Courts are likely to find that legislation violates the extraterritoriality doctrine where two elements are present: (1) the statute has the practical effect of applying to economic activities wholly outside the state; and (2) the statute creates inconsistent regulatory burdens in comparison to other states.[136] Thus, the central concern animating the extraterritoriality doctrine is preventing one state from essentially creating a national regulatory scheme by enacting laws that have sweeping effects for businesses operating interstate.[137]

Courts have relied on the extraterritoriality doctrine to strike down legislation under the dormant Commerce Clause that otherwise does not facially discriminate against out-of-state economic interests and would survive the *Pike* balancing test. In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, the Supreme Court struck down a New York law that required liquor producers to charge no higher price to New York distributors than they had charged anywhere else in the United States in a particular month.[138] The court held that New York law did not expressly discriminate against out-of-state producers and that it served the strong state interest in ensuring the lowest prices for New York residents, which would weigh in favor of upholding the law under the *Pike* balancing test.[139] Thus, the law survived under both tiers of the traditional dormant Commerce Clause framework. However, the court still struck down the law under the dormant Commerce Clause because the price control had the practical effect of preventing liquor producers from lowering their prices anywhere else in the country below what they charged in New York in response to market conditions.[140] "While New York may regulate the sale of liquor within its borders," the court explained, "it may not 'project its legislation into [other States] by regulating the price to be paid' for liquor in those States."[141]

133. Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989).

134. *See* TRIBE, *supra* note 101, at 1074; *see also* Peter C. Felmly, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 467, 484 (2003).

135. *See* Alliance of Auto. Mfrs. v. Gwadosky, 430 F.3d 30, 35 (1st Cir. 2005) ("A state statute that purports to regulate commerce occurring wholly beyond the boundaries of the enacting state . . . is per se invalid."); Cotto Waxo Co. v. Williams, 46 F.3d 790, 793 (8th Cir. 1995) ("[A] state regulation is per se invalid when it has an extraterritorial reach"); SPGGC v. Blumenthal, 505 F.3d 183, 193 (2d Cir. 2007) (explaining that extraterritoriality is "a basis for per se invalidity"); *see also* Felmly, *supra* note 134, at 490–91 (noting that the Supreme Court has never upheld legislation after finding it is extraterritorial).

136. *See* TRIBE, *supra* note 101, at 1074.

137. *See* Martin, *supra* note 131, at 499.

138. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 584 (1986).

139. *Id.* at 579.

140. *Id.* at 582–83.

141. *Id.*

The court in *Brown-Forman* also supported its determination that the New York law had unconstitutional extraterritorial effects by pointing out that it would subject liquor producers to inconsistent obligations in different states.[142] While the existence of inconsistent obligations alone does not automatically render each state statute unconstitutional under the dormant Commerce Clause, if a new statute departs significantly from the practices of other states—thereby imposing costly regulatory burdens on interstate commerce—this can support a finding of extraterritoriality.[143] For example, in *NCAA v. Miller*, the U.S. Court of Appeals for the Ninth Circuit struck down a Nevada statute that required national collegiate athletic associations to provide additional due process protections in proceedings against Nevada universities.[144] The Ninth Circuit held that the Nevada statute at issue had unconstitutional extraterritorial effects on interstate commerce because it risked conflicting with similar laws in other states.[145] The court explained that "[t]he serious risk of inconsistent obligations wrought by the extraterritorial effect of the Statute demonstrates why it constitutes a per se violation of the Commerce Clause."[146]

The extraterritoriality doctrine therefore represents a potent third branch of the dormant Commerce Clause. It can be used to strike down expansive state legislation that, although facially neutral, and which might otherwise survive the *Pike* balancing test, still risks imposing significant burdens on interstate commerce. Although it is not as deeply rooted in economic protectionism as the other two strands of dormant Commerce Clause jurisprudence, the extraterritoriality doctrine is still designed to prevent the morass of burdensome and discriminatory state legislation that the Framers sought to eliminate.[147]

C. THE DORMANT COMMERCE CLAUSE AND THE INTERNET

The dormant Commerce Clause has especially important implications for state regulations that affect commerce occurring without distinct geographic borders, such as commerce over the Internet.[148] Two areas in particular have received attention

142. *Id.* at 583.

143. *See, e.g.*, Healy v. Beer Institute, Inc., 491 U.S. 324, 336-37 (1989) ("Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 88 (1987) ("This Court's recent Commerce Clause cases also have invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations."); Edgar v. MITE Corp., 457 U.S. 624, 642 (striking down an Illinois securities law in part because it could lead to inconsistent state regulatory burdens); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 523 (declaring unconstitutional an Illinois statute requiring the use of contour rear fender mudguards in part because straight mudguards were legal in 45 states and contour mudguards were illegal in one other state).

144. Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 640 (9th Cir. 1993).

145. *Id.* at 639.

146. *Id.* at 640.

147. *See* Comptroller of the Treas. v. Wynne, 135 S. Ct. 1787, 1794 (2015).

148. *See, e.g.*, Spencer Kass, *Regulation and the Internet*, 26 S.U. L. REV. 93, 105 (1998) (accurately predicting that courts would begin to invalidate Internet regulations under the dormant Commerce Clause); Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1123–34 (1996) (same); Bruce P. Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 YALE L.J. 1569, 1593–

from courts concerning the dormant Commerce Clause and the Internet. First, although the Supreme Court has never addressed the question, several lower courts have struck down Internet regulations under the extraterritoriality doctrine. Second, the Supreme Court has established certain rules with regard to how states can impose taxes on out-of-state businesses under the dormant Commerce Clause. Lower courts have extended this Supreme Court precedent to invalidate state taxes on e-commerce. This section will address each of these two doctrinal lines and how courts have struggled to adapt the dormant Commerce Clause to the digital age.

The pioneering case to rely on the extraterritoriality doctrine to strike down an Internet regulation was *American Libraries Association v. Pataki*.[149] In *American Libraries*, a group of organizations that used the Internet to distribute content challenged the constitutionality of a New York statute making it illegal to use a computer to disseminate obscene material to children.[150] The plaintiffs argued that the anti-obscenity statute violated the dormant Commerce Clause by regulating economic activity occurring wholly outside of New York.[151] Representatives for the state of New York disagreed, arguing that the statute targeted intrastate conduct.[152] The U.S. District Court for the Southern District of New York ruled in favor of the plaintiffs, holding that by regulating Internet communication, the New York statute had the *practical* effect of regulating interstate commerce.[153] The court explained that because "[t]he Internet is wholly insensitive to geographic distinctions[,]… no aspect of the Internet can feasibly be closed off to users from another state."[154] The court held that because of the lack of clear geographic boundaries on the Internet, the New York law violated the extraterritoriality doctrine of the dormant Commerce Clause by creating a de facto nationwide regulation for businesses operating over the Internet.[155] The court explained that the New York law also violated the extraterritoriality doctrine by threatening to create a patchwork of conflicting regulations nationwide.[156] The court explained that "certain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level," and the Internet represented one of those areas.[157] *American Libraries* therefore demonstrated how the two central concerns of the extraterritoriality doctrine, projecting legislation onto other states and creating inconsistent regulatory burdens, can be used to invalidate statutes affecting Internet commerce.

96 (1999) (same). *But see* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 787 (2001) (taking issue with the growing consensus in the early 2000s that the dormant Commerce Clause required invalidation of state Internet regulations).

149. Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997).
150. *Id.* at 163–64.
151. *Id.* 169–70.
152. *Id.*
153. *Id.* at 170.
154. *Id.* at 170–71.
155. *Id.* at 176.
156. *Id.* at 181.
157. *Id.*

The *American Libraries* court also held that even if the New York law was not a per se violation of the dormant Commerce Clause because of its extraterritorial effects, it also failed the *Pike* balancing test.[158] The court agreed that New York had a valid interest in protecting children against obscene material, but the statute at issue imposed an extreme burden on interstate commerce by censoring communication over the Internet. The court explained that "the chilling effect that [the Act] produces is bound to exceed the actual cases that are likely to be prosecuted, as Internet users will steer clear of the Act by significant margin."[159] In sum, this chilling effect had a significant enough impact on Internet businesses to outweigh any local benefits provided by the New York legislation, thus failing the *Pike* balancing test.[160]

In 2003, the Second Circuit built upon *American Libraries*' dormant Commerce Clause reasoning in *American Booksellers Foundation v. Dean*.[161] In *American Booksellers*, a group of website operators alleged that a Vermont statute similar to the one at issue in *American Libraries* violated the dormant Commerce Clause. Like the *American Libraries* court, the Second Circuit in *American Booksellers* held that the Vermont statute at issue ran afoul of the extraterritoriality doctrine.[162] The court recognized that the architecture of the Internet posed a significant challenge to states seeking to further their valid interest in eliminating the distribution of pornography to children. Because of the Internet's "boundary-less nature," the court explained, Internet commerce does not occur wholly outside of Vermont in the same literal sense as it does in other extraterritoriality cases.[163] Nevertheless, the Vermont law created inconsistent regulatory burdens for Internet businesses and had the practical effect of significantly inhibiting interstate commerce.[164] Thus, as applied to the defendants' websites, the Vermont law was a per se violation of the dormant Commerce Clause under the extraterritoriality doctrine.[165] *American Libraries* and *American Booksellers* are not the only two cases that invoke the extraterritoriality doctrine to strike down laws affecting the Internet.[166] But they are two of the clearest illustrations of how courts have applied the extraterritoriality doctrine in the digital age.

The second important realm in which the dormant Commerce Clause has been applied to the Internet is with regard to "Amazon laws." Amazon laws, referencing the Internet retailer, are state laws that attempt to impose taxes on sales over the

158. *Id.* at 177.
159. *Id.* at 179.
160. *Id.*
161. Am. Booksellers Found. v. Dean, 342 F.3d 96 (2d Cir. 2003).
162. *Id.* at 104.
163. *Id.* at 103.
164. *Id.* at 104.
165. *Id.*
166. *See, e.g.*, ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999) (striking down a New Mexico anti-obscenity statute similar to the laws at issue in *American Libraries* and *American Booksellers*); PSINet, Inc. v. Chapman, 362 F.3d 227 (4th Cir. 2004) (same); Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262 (W.D. Wash. 2012) (invalidating a Washington law prohibiting online advertisements depicting minors in commercial sex acts that would take place in Washington under the extraterritoriality doctrine and the *Pike* balancing test); Backpage.com, LLC v. Cooper, 939 F. Supp. 2d 805 (M.D. Tenn. 2013) (same).

Internet while still adhering to restrictions imposed by Supreme Court precedent and federal legislation.[167] The litigation surrounding these Amazon laws over the past decade in many ways mirrors the development of state postmortem right of publicity statutes, including their conflict with the dormant Commerce Clause.

In *National Bellas Hess, Inc. v. Department of Revenue of State of Illinois*, the Supreme Court held that the dormant Commerce Clause prohibited Illinois from requiring a mail order seller in Missouri to collect a "use tax" for merchandise sold and shipped into Illinois.[168] A "use tax" is analogous to a sales tax and is typically imposed on purchases made by a state's residents from out of state sellers.[169] In *Bellas*, the Supreme Court held that Illinois' use tax on remote mail order sellers discriminated against out of state businesses in violation of the dormant Commerce Clause.[170] "The very purpose of the Commerce Clause," the *Bellas* court explained, "was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control."[171]

In 1992, the Supreme Court revisited *Bellas* in *Quill Corp. v. North Dakota*.[172] In *Quill*, the court reaffirmed the holding from *Bellas* and held that in order for a state tax to survive dormant Commerce Clause scrutiny, it may only be imposed on business entities that have a physical presence in the state.[173] The *Quill* court reasoned that a physical presence was required under the dormant Commerce Clause to "protect interstate commerce from intolerable or even undesirable burdens" imposed by a quagmire of different state use tax regimes.[174]

Although neither *Bellas* nor *Quill* applied specifically to the Internet, Congress saw how the "physical presence" requirement of *Quill* could be used to shield Internet companies from discriminatory state use taxes. In 1998, Congress built upon the Supreme Court's holding in *Quill* by enacting the Internet Tax Freedom Act ("ITFA").[175] Congress's goal in enacting the ITFA was to avoid subjecting Internet businesses to burdensome tax regulations in all fifty states merely because they chose to sell their goods through an electronic medium. The ITFA Senate Committee Report explained that "[t]he benefits to be gained by the surge in electronic commerce could be stifled by the haphazard imposition of multiple and confusing State and local taxes that apply only to Internet related transactions and services."[176] While the ITFA did not prohibit states from imposing taxes *uniformly* on both

167. *See* ERIKA K. LUNDER & CAROL A. PETTIT, CONG. RESEARCH SERV., R42629, "AMAZON LAWS" AND TAXATION OF INTERNET SALES: CONSTITUTIONAL ANALYSIS 5 (2015).

168. *See* Nat'l Bellas Hess, Inc. v. Dep't of Rev. of St. of Ill., 386 U.S. 753, 759 (1967).

169. LUNDER & PETTIT, *supra* note 167, at 1.

170. *Bellas*, 386 U.S. at 760.

171. *Id.*

172. *See* Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

173. *Id.* at 317–18.

174. *Id.* at 318 (quoting Commonwealth Edison Co. v. Montana, 453 U.S. 609, 637 (1981)).

175. The ITFA was passed as part of the 1998 appropriations bill. *See* Internet Tax Freedom Act, Pub. L. No. 105-277, tit. 11–12 (1998). The ITFA was later made permanent as part of the omnibus Trade Facilitation and Trade Enforcement Act of 2016, Pub. L. No. 114-125, § 992(a) (2016).

176. S. REP. NO. 105-184, at 2 (1998) (discussing S. 442, the Internet Tax Freedom Act).

Internet and brick and mortar businesses—only "discriminatory" taxes levied against Internet companies—it still demonstrated Congress's intent to build upon the dormant Commerce Clause reasoning of *Quill* and minimize the minefield of different tax regimes specifically targeted at online retailers.[177]

The existence of *Quill* and the ITFA has not stopped states from attempting to tax Internet businesses, however. For example, in 2008, New York passed a so called "click-through nexus" statute designed to satisfy the requirements of *Quill* and the ITFA but still collect taxes from certain Internet businesses. The statute imposes a use tax on any businesses (including Internet businesses without brick and mortar stores in New York) that "solicit[] business" through "employees, independent contractors, agents or other representatives" in New York state.[178] Under the law, a use tax may be imposed on an Internet business even if that business's only contact with New York is entering into a referral agreement in which a New York based business simply posts a link to the non-New York business on its website.[179]

In 2012, Overstock and Amazon brought a lawsuit alleging that the New York tax was facially unconstitutional under the dormant Commerce Clause because violated the physical presence requirement of *Quill*.[180] They argued that the dormant Commerce Clause prohibited applying the use tax to Overstock and Amazon because they merely placed links for their websites on the websites of affiliates that had a physical presence in New York.[181] The New York Court of Appeals rejected the Internet retailers' claim, holding that when Internet businesses place links on the websites of New York based affiliates, they are engaging in "[a]ctive, in-state solicitation that produces a significant amount of revenue."[182] Thus, because the commercial activity of these businesses was done through other businesses with a physical presence in New York, the tax did not violate *Quill* or the dormant Commerce Clause.[183]

On June 21, 2018, the Supreme Court put an end to the *Quill* physical presence rule in *South Dakota v. Wayfair*.[184] But rather than bring clarity to the Court's dormant Commerce Clause jurisprudence, *Wayfair* arguably introduced even more uncertainty about how lower courts should analyze "Amazon laws" in the future. In *Wayfair*, the Supreme Court vacated the decision of the Supreme Court of South Dakota, which had applied the *Quill* physical presence rule to invalidate a South Dakota statute requiring out of state sellers (including Internet retailers without a brick and mortar store in South Dakota) to collect a use tax.[185] In his majority opinion, Justice Kennedy remarked that "[e]ach year, the physical presence rule

177. LUNDER & PETTIT, *supra* note 167, at 1 (explaining that the ITFA does not bar *all* use taxes on Internet businesses, only those "not imposed on similar transactions made through other means (such as traditional 'brick and mortar' stores).").

178. N.Y. Tax L. § 1101(b)(8)(i)(C)(I) (McKinney 2013).

179. *See* N.Y. Tax L. § 1101(b)(8)(vi) (McKinney 2013).

180. *See* Overstock.com, Inc. v. N.Y. St. Dep't of Tax'n & Fin., 987 N.E.2d 621, 623 (N.Y. 2013).

181. *Id.*

182. *Id.* at 626.

183. *Id.*

184. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099 (2018).

185. *Id.* at 2100.

becomes further removed from economic reality," and that this anachronism—among other factors relevant to stare decisis—justified expressly overruling *Quill*.[186] Despite overruling *Quill*'s physical presence rule, the Court in *Wayfair* gave no further guidance to lower courts that must grapple with dormant Commerce Clause challenges to similar "Amazon laws." At the end of his opinion, Justice Kennedy wrote, "The question remains whether some other principle in the Court's Commerce Clause doctrine might invalidate the Act."[187] It therefore remains to be seen whether more aggressive Internet tax laws than the South Dakota law at issue could be invalidated under other dormant Commerce Clause doctrines, such as the *Pike* balancing test.[188]

As demonstrated by the examples of state Internet laws struck down under the extraterritorial doctrine and the uncertainty of "Amazon laws" in the wake of *Wayfair*, the dormant Commerce Clause at the very least complicates states' efforts to regulate commerce over the Internet. Though there have been efforts by states to circumvent the limitations imposed by the dormant Commerce Clause, courts remain leery of states interfering with the Internet, which by its very nature crosses state lines and does not recognize geographic boundaries.[189] As the court explained in *American Libraries*, "certain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level."[190] As discussed in the following section, like state Internet regulations, state postmortem right of publicity statutes fall squarely within the category of laws that substantially burden interstate economic activity and should therefore be subjected to constitutional scrutiny. Furthermore, when those postmortem statutes are applied to Internet businesses, they are especially problematic and should be struck down under the dormant Commerce Clause.

III. THE POSTMORTEM RIGHT OF PUBLICITY MEETS THE DORMANT COMMERCE CLAUSE

Since the postmortem right of publicity first emerged in the early 1980s, courts, companies seeking to use the likenesses of deceased individuals, and the estates of those individuals have grappled with the complications arising from the postmortem right of publicity. Unlike a simple flat fee or tax, the postmortem right of publicity has developed into a powerful property right that the estates of deceased individuals

186. *Id.* at 2092.

187. *Id.* at 2099.

188. *Cf.* Michael Knoll, *The Implications of the Supreme Court's* Wayfair *Decision*, THE REGULATORY REVIEW (July 24, 2018), https://perma.cc/3MSX-YXBS (noting that *Wayfair* did not expressly address the rest of the dormant Commerce Clause analysis).

189. *See, e.g.*, Am. Libr. Ass'n v. Pataki, 969 F. Supp. 160, 170 (S.D.N.Y. 1997) ("The Internet is wholly insensitive to geographic distinctions. In almost every case, users of the Internet neither know nor care about the physical location of the Internet resources they access. Internet protocols were designed to ignore rather than document geographic location; while computers on the network do have 'addresses,' they are logical addresses on the network rather than geographic addresses in real space. The majority of Internet addresses contain no geographic clues and, even where an Internet address provides such a clue, it may be misleading.").

190. *Id.* at 181.

can use to completely halt unauthorized commercial activity.[191] As these postmortem statutes have proliferated, each state has developed its own right of publicity scheme, leading to inconsistencies nationwide that impose a significant burden on interstate commerce. This section argues that state postmortem right of publicity statutes in their current form violate the dormant Commerce Clause and that federal legislation is necessary to alleviate the issue. It uses the proposed 2018 New York postmortem right of publicity statute, Assembly Bill No. A08155-B, as a case study, illustrating how such a law could be challenged under the dormant Commerce Clause. Part III.A. demonstrates that postmortem statutes containing "all comers" provisions violate the dormant Commerce Clause under the extraterritoriality doctrine and the *Pike* balancing test. Part III.B. shows that any postmortem right of publicity statute violates the dormant Commerce Clause as applied to Internet commerce. Part III.C. argues that in order to rectify these constitutional violations, Congress must pass legislation either delegating authority to state legislatures or preempting current state postmortem right of publicity statutes.

A. "ALL COMERS" PROVISIONS ARE FACIALLY UNCONSTITUTIONAL

Assembly Bill No. A08155-B contains an "all comers" provision that not only grants a postmortem right of publicity for individuals who died in New York, but also to *any* individual, regardless of whether the state the individual died in recognized such a right upon death.[192] Even though the proposed bill requires unauthorized use of a deceased individual's likeness occurring inside New York in order for there to be a violation of the postmortem right of publicity, the bill's "all comers" provision would still violate the dormant Commerce Clause for two reasons. First, it would violate the extraterritoriality doctrine by having "the practical effect of…control[ling] conduct beyond the boundaries of the State" regardless of "whether or not the commerce has effects within the State."[193] Second, it would fail the *Pike* balancing test by imposing a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits."[194] Thus, even though the proposed New York bill does not expressly discriminate against out of state economic interests—which would subject it to "tier-one" strict scrutiny under the dormant Commerce Clause framework—it still is facially unconstitutional because of the "all comers" choice of law provision.[195]

191. *See, e.g.*, Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 694 F.2d 674 (11th Cir. 1983) (holding that a company making busts of Martin Luther King, Jr., to be used as funeral accessories, violated King's common law postmortem right of publicity under Georgia law, and enjoining the company from producing the products).

192. N.Y. Assemb. B. No. A08155-B § 50.1, 2018 Leg., 241st Sess. (N.Y. 2018) (defining "[d]eceased individual" as "any individual . . . who has died").

193. Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989) (citing Brown-Forman Distillers Corp. v. N.Y. St. Liquor Auth., 476 U.S. 573, 579 (1986)); *id.* at 336 (quoting Edgar v. Mite Corp., 457 U.S. 624, 643 (1982) (plurality opinion)).

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

195. *See supra* Part II.A.

By creating a new property right for deceased individuals who died outside of New York, the New York statute has the potential to control and inhibit commerce occurring wholly outside of New York. For example, take the case of a Minnesota manufacturer who wanted to create memorabilia depicting Prince.[196] Because Prince died in Minnesota and Minnesota does not currently recognize the postmortem right of publicity, the manufacturer ordinarily would not be subject to a postmortem right of publicity claim from Prince's estate. However, if New York law were to grant Prince such a right, the Minnesota manufacturer would now have to comply with New York law if it wanted to sell its products to a national distributor. Furthermore, if other states were to enact similar retroactive postmortem statutes, the manufacturer would have to contend with a minefield of jurisdictions in which it could potentially face liability or be subject to an injunction. Because the scope of each of these postmortem rights of publicity could be slightly different, the manufacturer's business operations would be burdened by having to navigate exactly which products bearing Prince's likeness it could sell. As the Supreme Court explained in *Healy v. Beer Institute*, the extraterritoriality doctrine is designed to prohibit precisely this type of "inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another state."[197] Thus, the proposed New York "all comers" postmortem statute—and others like it—violate the dormant Commerce Clause by having a stifling extraterritorial effect on commerce occurring in different states.

Furthermore, the New York statute's "all comers" provision creates an entire market for postmortem publicity rights that did not previously exist, which could affect commercial transactions occurring outside of New York. The proposed bill makes an individual's postmortem right of publicity freely transferable by contract, which would allow an individual's heirs to license that individual's right of publicity.[198] Some states have explicitly prohibited such transfers of the right of publicity, but the New York statute would essentially override those states' policy decisions in creating a new market for postmortem publicity rights.[199]

The extraterritorial effects of the proposed New York postmortem statute closely resemble the effects of the California Resale Royalty Act ("CRRA") at issue in *Sam Francis Found. v. Christies*.[200] *Sam Francis* considered a dormant Commerce Clause challenge to the CRRA, which required sellers of fine art to pay a five percent royalty to the artist who made the work if the seller resided in California or the sale

196. For the purposes of this hypothetical, assume that the manufacturer owned all valid trademarks and copyrights in the memorabilia.

197. Healy v. Beer Institute, Inc., 491 U.S. 324, 336–37 (1989).

198. *See* N.Y. Assemb. B. 8155 § 50-h, 2018 Leg., 240th Sess. (N.Y. 2018).

199. *See* Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 192 (2012) (noting that "[s]ome states have expressly prohibited transfers of the right of publicity").

200. Sam Francis Found. v. Christies, Inc., 784 F.3d 1320 (9th Cir. 2015) (en banc). The en banc decision by the 9th Circuit consolidated three different lawsuits all challenging the CRRA under the dormant Commerce Clause: Estate of Graham v. Sotheby's Inc., 860 F. Supp. 2d 1117 (C.D. Cal. 2012); Sam Francis Found. v. eBay Inc., No. 2:11–cv–08622–JHN–PLA, 2012 WL 12294395 (C.D. Cal. May 17, 2012); Sam Francis Found. v. Christies, Inc., 784 F.3d 1320 (9th Cir. 2015).

took place in California.[201] The Ninth Circuit held that the CRRA violated the extraterritoriality doctrine by applying to fine art sales occurring wholly outside of California and that the five percent royalty was therefore facially invalid under the dormant Commerce Clause.[202] The court reasoned that by the CRRA's plain language, it would apply to an art auction in New York and involve a royalty payment to an artist living in any state, so long as the seller was a California resident. Such an application was clearly prohibited under the extraterritoriality doctrine.[203]

While the proposed New York postmortem right of publicity statute only prohibits unauthorized commercial use of the postmortem right of publicity within New York, it would still have the effect of governing activity outside of New York like the CRRA. As illustrated above with the hypothetical Minnesota memorabilia manufacturer, the New York law would have the practical effect of cutting off a whole series of commercial transactions to national distributors that otherwise would be permissible. Much like how the CRRA imposed a fee on fine art sales occurring wholly outside of California between parties with few ties to California, Assembly Bill No. A08155-B would affect non-New York businesses contracting with non-New York individuals. This sort of projection of New York legislation onto other jurisdictions is precisely what the extraterritoriality doctrine prohibits.[204]

Even if the proposed New York bill's "all comers" provision does not violate the dormant Commerce Clause per se under the extraterritoriality doctrine, it fails the balancing formula set forth in *Pike v. Bruce Church*.[205] Far from establishing regulations to protect the health and wellbeing of New York residents, New York does not have a legitimate interest in creating a new postmortem right of publicity for *all* individuals regardless of domicile or even citizenship. The proposed New York law would allow individuals' estates with no prior contact with New York to bring lawsuits in the state based on a broad postmortem right of publicity that roughly half of the states do not endorse.[206] Regardless of the policy rationales behind the postmortem right of publicity, New York does not have a valid interest in extending such a right to individuals with no prior economic relationship with New York. Lacking such a legitimate interest, the burdens imposed on interstate commerce by "all comers" provisions clearly outweigh any local benefits and fail the *Pike* balancing test.

B. ALL POSTMORTEM STATUTES ARE UNCONSTITUTIONAL AS APPLIED TO INTERNET COMMERCE

Expansive postmortem right of publicity laws like New York's Assembly Bill A08155-B create a particularly great challenge for businesses operating over the

201. *Christies, Inc.*, 784 F.3d at 1322 (9th Cir. 2015).
202. *Id.* at 1325.
203. *Id.*
204. *See, e.g.*, Midwest Title Loans, Inc. v. Mills, 593 F.3d 660, 667–68 (7th Cir. 2010) (explaining that the extraterritoriality doctrine makes it unconstitutional to "exalt the public policy of one state over that of another").
205. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
206. *See* Rothman, Memorandum Opposing A08155, *supra* note 5, at 3.

Internet. As explained by the Second Circuit in *American Booksellers*, the "boundary-less" nature of the Internet makes it very difficult for businesses engaging in Internet commerce to adhere to conflicting state regulations.[207] As demonstrated by the years of litigation surrounding Marilyn Monroe's estate, states are currently sharply divided regarding the scope, term, and even existence of the postmortem right of publicity.[208] New York's proposed bill, then, would have the practical effect of stifling interstate commerce for companies engaged in economic activity over the Internet and would violate the dormant Commerce Clause. Like "all comers" choice-of-law provisions, as applied to Internet commerce, all postmortem right of publicity laws both violate the extraterritoriality doctrine and fail the *Pike* balancing test.

First, postmortem statutes violate the extraterritoriality doctrine as applied to Internet businesses because they have the practical effect of regulating interstate commerce. The primary advantage of Internet commerce is that businesses can establish one centralized web portal that applies uniformly across the Internet. Using the same hypothetical merchandise manufacturer as in Part III.A., *supra*, that manufacturer might choose to set up a website to sell its Prince memorabilia over the Internet. If a New York postmortem right of publicity law prohibited that manufacturer from selling Prince memorabilia to customers in New York state without the authorization of the Prince estate, it would effectively prohibit the manufacturer from operating its website altogether. As applied to even this basic form of Internet commerce, postmortem right of publicity laws would have the practical effect of inhibiting economic activity occurring in other states, therefore violating the extraterritoriality doctrine.

Because not all states recognize the postmortem right of publicity, postmortem statutes may also violate the extraterritoriality doctrine as applied to Internet businesses by subjecting them to inconsistent regulations.[209] As explained in Section II.C., *supra*, in *American Booksellers*, the Second Circuit struck down a Vermont Internet obscenity statute in part because it would have made it impractical for the plaintiffs to conform to differing state legislation simultaneously.[210] The court reasoned that the architecture of the Internet "imperatively demand[ed] a single uniform rule," with reference to the dissemination of obscene material to minors and that state legislation like Vermont's violated the dormant Commerce Clause.[211] The current patchwork nature of state postmortem right of publicity statutes mirrors the inconsistent obscenity statutes at issue in *American Booksellers*. Therefore, the same logic can be used to argue that state postmortem right of publicity laws run afoul of the extraterritoriality doctrine as applied to Internet commerce.

Second, even if postmortem right of publicity statutes like New York's proposed bill do not violate the extraterritoriality doctrine, they fail the *Pike* balancing test as

207. *See* Am. Booksellers Found. v. Dean, 342 F.3d 96, 103 (2d Cir. 2003).

208. *See supra* Part I.B.

209. *See, e.g.*, CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 88 (1987) ("This Court's recent Commerce Clause cases also have invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations.").

210. *See Am. Booksellers*, 342 F.3d at 104 (2003); *supra* Part II.C.

211. *Am. Booksellers*, 342 F.3d at 104 (quoting Cooley v. Bd. of Wardens, 53 U.S. 299, 319 (1851)).

applied to Internet businesses. As explained in Section II.C., *supra*, the Southern District of New York held in *American Libraries* that the Internet obscenity statute at issue failed the *Pike* balancing test in part because it produced a chilling effect on Internet communication, "as Internet users will steer clear of the Act by a significant margin."[212] This chilling effect had the practical result of creating burdens to Internet commerce that outweighed New York's local interest in preventing the dissemination of obscene material to minors.[213] Postmortem right of publicity statutes create a similar chilling effect when applied to Internet commerce. Assuming that states have a valid interest in extending the right of publicity after death for its own residents,[214] this interest is outweighed by the chilling effects such statutes have on Internet businesses. Even with proper First Amendment protections in place, businesses operating over the Internet may refrain from selling products or making advertisements that are lawful out of fear that they may run afoul of postmortem statutes. This is especially the case with postmortem rights of publicity, which can have terms lasting as long as 100 years after death.[215] Thus, all postmortem right of publicity statutes fail the *Pike* balancing test as applied to Internet businesses because they impose burdens on Internet commerce that are "clearly excessive in relation to the putative local benefits."[216]

Businesses recognize the excessive burdens that right of publicity laws can place on Internet commerce, and they are beginning to challenge the application of such laws on dormant Commerce Clause grounds. For example, in *Dobrowolski v. Intelius*, several website operators argued that their use of plaintiffs' likenesses in Internet advertisements should not be prohibited under the Illinois Right of Publicity Act (IRPA) because such an application would violate the dormant Commerce Clause.[217] Because the district court resolved the dispute on First Amendment grounds, it did not reach defendants' dormant Commerce Clause arguments.[218] Nevertheless, it is easy to see how applying the IRPA to websites on the grounds that they displayed advertisements using individuals' likenesses would impose a significant burden on interstate commerce. Allowing such right of publicity statutes to apply to Internet businesses without any ties to the state other than targeted advertisements would essentially force Internet businesses to comply with the most restrictive state right of publicity laws. This is especially true in the case of postmortem right of publicity laws, where certain states (like Indiana and Oklahoma)

212. Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 177 (1997).

213. *Id.*

214. *But see Hendrix I*, 766 F. Supp. 2d 1122, 1138 n.16 (2011) ("Any contention that Washington has an interest in curtailing infringements of a right of publicity misses the mark. An infringement cannot occur unless a right exists. Washington cannot claim an interest in artificially escalating the amount of infringement by creating illusory rights of publicity").

215. *See* TENN. CODE ANN. § 47-25-1104; OKLA. STAT. tit. 12 §§ 1448–1449 (2010); IND. CODE § 32-36-1-8 (2002). *See also* Rothman, RIGHT OF PUBLICITY ROADMAP, *supra* note 3 (surveying postmortem right of publicity terms).

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

217. Dobrowolski v. Intelius, No. 17 CV 1519, 2017 WL 3720170, at *9 (N.D. Ill. Aug. 29, 2017).

218. *Id.*

have such expansive postmortem terms that Internet businesses cannot afford to risk that deceased individuals might be retroactively covered.

Finally, postmortem right of publicity statutes like New York's proposed bill add an additional level of restriction on Internet businesses by granting plaintiffs the option of injunctive relief.[219] If the estates of deceased individuals in states with exceptionally broad postmortem statutes are able to restrain an Internet business's commercial use of their likenesses within that state, this effectively enjoins the Internet business's use of their likeness in all jurisdictions because of the decentralized, boundary-less architecture of the Internet.[220] Thus, such postmortem laws effectively allow one state to control the national right of publicity regime to which Internet businesses must adhere. This projection of one state's policy preferences upon business activities in other jurisdictions is exactly the type of overreaching legislation the dormant Commerce Clause forbids.[221]

C. FEDERAL LEGISLATION IS NECESSARY TO RECTIFY DORMANT COMMERCE CLAUSE VIOLATIONS

In order to solve the dormant Commerce Clause violations posed by current postmortem right of publicity statutes, Congress must consider the postmortem right of publicity. Even if courts were to strike down "all comers" provisions and apply the traditional rule that the law of an individual's domicile at death dictates one's postmortem right of publicity, there still exists the extraterritorial issues posed by applying these laws to Internet businesses. There are two means by which Congress could resolve these constitutional concerns with state postmortem right of publicity laws. First, it could pass a federal right of publicity statute with a definitive postmortem provision. Second, it could pass legislation authorizing current state right of publicity laws. Such legislation would signal to states that Congress has delegated its constitutional authority under the Commerce Clause and is content to allow states to legislate in the sphere of postmortem publicity rights.

The precise contours of a federal right of publicity statute are beyond the scope of this Note.[222] But in order for such a federal statute to sufficiently address the dormant Commerce Concerns with current state legislation, it would have to include at least four primary components with reference to the postmortem right of publicity. First,

219. *See* N.Y. Assemb. B. 8155 § 51.6, 2018 Leg., 240th Sess. (N.Y. 2018) (authorizing plaintiffs to enjoin unauthorized use of the postmortem right of publicity).

220. *See* David Post, *Supreme Court Takes Up Internet Sales Tax Conundrum*, VOLOKH CONSPIRACY (Jan. 20, 2018, 7:53 AM), https://perma.cc/4YDJ-MXUW (describing the opposition of Rep. Chris Cox to the Supreme Court's grant of certiorari in *Wayfair* and the dormant Commerce Clause challenges raised by the boundary-less nature of the Internet).

221. *See* Midwest Title Loans, Inc. v. Mills, 593 F.3d 660, 667–68 (7th Cir. 2010) (explaining that the dormant Commerce Clause makes it unconstitutional to "exalt the public policy of one state over that of another").

222. For more detailed proposals, *see, e.g.*, Vick & Jassy, *supra* note 29, at 17–19; Goodman, *supra* note 42; Alex J. Berger, Note, *Righting the Wrong of Publicity: A Novel Proposal for a Uniform Federal Right of Publicity Statute*, 66 HASTINGS L.J. 845 (2015) (arguing for a federal right of publicity statute addressing inconsistent state approaches to a First Amendment defense against right of publicity violations).

it would have to address whether such a right should even exist after death, remedying the current split between states.[223] Second, if such a right were to exist, the federal statute would have to set a uniform term for the postmortem right of publicity, in comparison to the significant variation between current state statutes.[224] Third, the federal statute would have to address whether or not the postmortem right of publicity applied retroactively and for how long.[225] Finally, in order to resolve the current conflict among the states, a federal statute would have to specify whether the postmortem right of publicity would apply to all individuals or only those with commercially valuable personas and/or those who exploited their personas during life.[226] Such a federal postmortem right of publicity provision would not alleviate the burdens imposed on interstate commerce by the postmortem right of publicity. However, it would remedy the dormant Commerce Clause violations raised by current state statutes. One core concern underlying the dormant Commerce Clause doctrine is preventing individual states from usurping Congress's enumerated constitutional responsibility of regulating interstate commerce.[227] A federal postmortem right of publicity statute would ensure that Congress has properly considered the economic effects of a postmortem right of publicity, rather than allowing individual states to impose their policy preferences on other jurisdictions.

Alternatively, Congress could pass legislation explicitly authorizing states to maintain their current postmortem right of publicity schemes. The Supreme Court has held that "[i]f Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge."[228] Thus, if Congress were to pass legislation expressly allowing for state legislation with regard to the postmortem right of publicity, current laws in place would no longer violate the dormant Commerce Clause. Such an "authorization" statute would of course lack many of the benefits of a federal right of publicity law, such as uniformity, predictability, and the ability for different interest groups to make their voices heard in establishing the proper scope of the federal right of publicity. It also seems more unlikely that Congress would take such an approach, though it is not without precedent. For example, in *Prudential Insurance Co. v. Benjamin*, the Supreme Court held that discriminatory state taxes on insurance companies did not violate the dormant Commerce Clause because Congress had explicitly authorized

223. *See* Rothman, RIGHT OF PUBLICITY ROADMAP, *supra* note 3; *see also* MCCARTHY, *supra* note 13, § 9:2-10 (outlining policy arguments for and against the postmortem right of publicity).

224. *See supra* note 53 and accompanying text.

225. *See supra* note 54 and accompanying text.

226. *Id.*; *see also* MCCARTHY, *supra* note 13, §§ 9:11–15 (discussing the debate over whether lifetime exploitation is required for the postmortem right of publicity to accrue).

227. *See* Comptroller of the Treas. v. Wynne, 135 S. Ct. 1787, 1794 (2015) (explaining that the Commerce Clause contains within it a negative limitation preventing certain state legislation even when Congress has failed to legislate on the subject).

228. Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 652–53 (1981).

such taxes.[229] Concerning federal "right-of-publicity authorization" legislation, Congress could even authorize state postmortem right of publicity statutes with the precondition that states first make some attempt to harmonize their right of publicity regimes.[230] At the very least, such an "authorization" statute would guarantee that Congress has considered how the current milieu of state right of publicity laws are affecting interstate commerce and that it has determined that a federal right of publicity is not yet necessary.

IV. CONCLUSION

This Note has examined how state postmortem right of publicity statutes run afoul of the dormant Commerce Clause. Over the past century, the right of publicity has grown from a fairly circumscribed doctrine concerned with personal privacy and public image into a full-blown property right that can be used as a powerful tool to commoditize an individual's persona. The postmortem right of publicity, in particular, allows an individual's estate to control the market for his or her likeness sometimes decades after that person has died. As a result, the postmortem right of publicity can create significant burdens and restrictions on businesses engaged in interstate commerce. As the PRINCE Act and New York's proposed postmortem right of publicity bill show, more states are considering and enacting their own postmortem right of publicity laws, especially in the wake of local celebrity deaths and advocacy by actor and celebrity representatives. But in today's increasingly global and digital economy, the effects of these laws cannot easily be limited to the borders of the states who enact them. As a result, the United States has developed an overlapping and burdensome patchwork of postmortem right of publicity regulations that any company operating over the Internet or interstate must traverse with caution. In order to alleviate the burden these statutes impose on interstate commerce, federal postmortem right of publicity legislation is necessary. It would bring much-needed attention to an increasingly powerful realm of property law and hopefully create greater consistency and predictability to how we are allowed to depict the dead.

229. *See* Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 431 (1946) (holding that the federal McCarran Act eliminated the dormant Commerce Clause issue because Congress "in effect declared[] that uniformity of regulation, and of state taxation, are not required in reference to the business of insurance").

230. For a similar proposal in the Internet use tax context, *see* Brief of Chris Cox, Former Member of Congress and Co-Author of the Internet Tax Freedom Act, as Amicus Curiae in Support of Respondents at 23–24, South Dakota v. Wayfair, 86 U.S.L.W. 3351 (No. 17-494) (Jan. 12, 2018), https://perma.cc/C7HY-YTMP (explaining that Congress "has more nuanced alternatives" of dealing with Internet taxes than simply abrogating *Quill*, including requiring states to "harmonize their sales tax regimes" and, only after that was completed to Congress's satisfaction, authorizing "States to enforce collection beyond their borders.").