

STATE COURTS, STATE TERRITORY, STATE  
POWER: REFLECTIONS ON THE  
EXTRATERRITORIALITY PRINCIPLE IN  
CHOICE OF LAW AND LEGISLATION

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## INTRODUCTION

Do state courts—say, the courts of California—have the power to prescribe the standards of conduct that should apply to events in another state—say, Massachusetts? Is this power lesser or greater than the power of the California legislature to enact extraterritorial laws? And if these two powers are different in scope, to what extent and why?

To illustrate this rather abstract problem, an example may be helpful. Suppose gun manufacturers have the ability to design guns using a trigger design that, while much more expensive, causes fewer accidental deaths.<sup>1</sup> Suppose that California would like to promote usage of the safer design as widely as possible, even among gun manufacturers who operate out of state. There might be several reasons, of course, why California wishes its laws to have broad geographical scope. California might have an interest that most people would regard as legitimate. It might be the case, for example, that most guns brought into or stored in California are manufactured in other states. Or perhaps California simply wants to make its power felt as widely as possible. But whatever the reason, California would like to change the conduct of gun manufacturers outside California as well as within it. Does California have the power to do this?

Conventional choice-of-law theory gives us two answers, depending on the route that California takes. Suppose California attempts to affect the manufacturers' nationwide behavior through the imposition of damages or the issuance of injunctions in California courts. If it does so, few constitutional alarms are likely to be sounded. Indeed, according to *Allstate Insurance Co. v. Hague*,<sup>2</sup> state courts may apply whatever law they please so long as the state possesses a "significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction."<sup>3</sup> This standard strongly resembles the "minimum contacts" test for personal jurisdiction, and—especially outside the class action context<sup>4</sup>—it is normally a fair assumption that, so long as a state court has personal jurisdiction over the defendant, it probably has the power to apply forum law to her

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1 I choose this example deliberately; gun regulation has in fact been central to the debate over extraterritorial application of state law. See, e.g., Allen Rostron, *The Supreme Court, the Gun Industry, and the Misguided Revival of Strict Territorial Limits on the Reach of State Law*, 2003 L. REV. MICH. ST. U.-DETROIT C.L. 115.

2 449 U.S. 302 (1981).

3 *Id.* at 308 (plurality opinion).

4 See discussion *infra* Part I.B.1.

actions as well.<sup>5</sup> This assumption is also relatively uncontroversial; after decades of academic efforts to expunge territorial formalism from choice-of-law theory,<sup>6</sup> we are not accustomed to thinking of state courts' routine choice-of-law decisions as raising serious extraterritoriality problems.

But what if the California legislature attempts to shape the manufacturers' conduct prospectively, through some form of regulation that functions as a direct command—say, levying a fine on manufacturers unless they certify that they comply with California's safety standards in their operations nationwide? Under an orthodox choice-of-law understanding, this form of regulation might initially appear also to present little difficulty. In theory, both the application of forum law by state courts and the enactment of legislation by state legislatures are simply two aspects of states' legislative jurisdiction—that is, the power to dictate the substantive legal rules that apply to a given situation.<sup>7</sup> That power would appear to be equally at play whether a legislature purports to make its law applicable to out-of-state events or whether a court actually applies that law to individual actors—and, indeed, in the international context, the two powers are treated as equivalent.<sup>8</sup> Commentators have sometimes spoken as if the same

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5 Technically, of course, it does not strictly follow that the existence of the minimum contacts necessary for personal jurisdiction means that the state can also apply forum law: “[E]xamination of a State’s contacts may result in divergent conclusions for jurisdiction and choice-of-law purposes.” *Hague*, 449 U.S. at 317 n.23 (plurality opinion). Notably, for example, the choice-of-law test uses the word “significant” while the minimum contacts test does not. Nonetheless, outside the realm of class actions, the situations where one test will be satisfied while the other is not are few. See Friedrich K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems*, 73 TUL. L. REV. 1309, 1333 (1999) (“Because of the ‘minimum contacts’ requirement for judicial jurisdiction, a court will rarely lack the necessary ‘significant contacts.’” (footnote omitted)). Indeed, because the *Hague* test permits consideration of the plaintiff’s contacts with the state as well as the defendant’s, in most situations it is narrower than the test for personal jurisdiction.

6 See Hayward D. Reynolds, *The Concept of Jurisdiction: Conflicting Legal Ideologies and Persistent Formalist Subversion*, 18 HASTINGS CONST. L.Q. 819, 880 (1991).

7 See Howard M. Wasserman, *Jurisdiction, Merits, and Non-Extant Rights*, 56 U. KAN. L. REV. 227, 261 (2008); see also Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1587 (1978) (“Legislative jurisdiction . . . is the power of a state to apply its law to create or affect legal interests.”).

8 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401(a) (1987) (explaining that the “jurisdiction to prescribe” is the state’s power “to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court”). The jurisdiction to prescribe is distinguished from the “jurisdiction to adjudicate, *i.e.*, to subject persons or things to the process of its courts or administrative tribunals” and the “jurisdiction to enforce, *i.e.*, to induce or

principle applies in interstate relations as well<sup>9</sup>—and, at least at first glance, there seems no obvious reason why it should not. After all, the basic nature of the power to set substantive standards applicable to out-of-state conduct would seem to be the same whether that power is exercised by a legislature or a court.

We know, however, that this cannot be the whole story—first, and primarily, because an important, if sometimes poorly understood,<sup>10</sup> extraterritoriality principle constrains the reach of the laws state legislatures may enact.<sup>11</sup> That principle may be rooted in the dormant Commerce Clause—indeed, the Supreme Court has several times indicated that it is—but it may be better understood as a prohibition rooted in general structural principles of horizontal federalism.<sup>12</sup> As a result, we know that “[f]or the most part, states may not legislate extraterritorially, whatever exactly that means.”<sup>13</sup> The exact scope of this limit, however, remains notoriously unclear, and its applicability to state courts is even foggier. Is the extraterritoriality principle a narrow one, applying only to the actions of state legislatures and/or to the types of activities (such as state protectionism of local industries) that are the core concern of more orthodox dormant Commerce Clause doctrine? Or, conversely, is the extraterritoriality principle a larger one that constrains the actions of state courts or modifies

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compel compliance or to punish noncompliance with its laws or regulations.” *Id.* § 401(b), (c).

9 See, e.g., Rostron, *supra* note 1, at 121 (“Choice of law is a matter of jurisdiction to prescribe. For example, when a plaintiff sues for negligence, the court must decide which state’s common law can and should apply to the claim.”).

10 See Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1884 (1987) (“[W]e do not understand the extraterritoriality principle (the principle that states may not legislate extraterritorially) nearly as well as we should. . . . [W]e have no acceptable account of the constitutional underpinnings of the principle.”).

11 The classic account of the extraterritoriality principle is found in Regan, *supra* note 10, at 1884–913; see also Reese, *supra* note 7, at 1590 (arguing that the idea of due process as the constitutional limitation on legislative jurisdiction lies in the difference between its provisions and that of full faith and credit); Alex Ellenberg, Note, *Due Process Limitations on Extraterritorial Tort Legislation*, 92 CORNELL L. REV. 549, 555 (2007) (“[A] state may also exercise legislative jurisdiction over foreign conduct that has consequences within its boundaries, although . . . [it] would be limited by applicable constitutional restrictions.” (footnote omitted)). For a discussion of how court issued injunctions may run afoul of the principle, see David S. Welkowitz, *Preemption, Extraterritoriality, and the Problem of State Antidilution Laws*, 67 TUL. L. REV. 1, 39–40 (1992).

12 See Regan, *supra* note 10, at 1895.

13 *Id.* at 1896 (internal quotation marks omitted).

*Hague's* broad authorization for the application of forum law? Because the Court's pronouncements in these areas have been so murky and contradictory, no clear answer exists to these questions.

A second problem for the traditional account of the relationship between legislative jurisdiction and choice of law is that the scope of state courts' power to apply forum law to geographically remote events—an issue that the Supreme Court seemed to have resolved in *Hague*,<sup>14</sup> *Phillips Petroleum Co. v. Shutts*,<sup>15</sup> and *Sun Oil Co. v. Wortman*<sup>16</sup>—has itself been called into question. In *BMW of North America, Inc. v. Gore*,<sup>17</sup> the Court first suggested that constitutional limits, based on “principles of state sovereignty and comity”<sup>18</sup> as well as the Due Process Clause,<sup>19</sup> might exist on state courts' ability to “impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.”<sup>20</sup> More recently, in *State Farm Mutual Automobile Insurance Co. v. Campbell*,<sup>21</sup> the Court not only expanded upon this principle but also gave it a particular choice-of-law spin, suggesting that the courts of one state, in seeking to impose damages for defendants' out-of-state conduct, have an obligation to “apply the laws of [those defendants'] relevant jurisdiction.”<sup>22</sup> While *Gore* and *Campbell* are nominally limited to awards of punitive damages, they offer no wholly convincing reason why the conceptual framework they articulate should not apply to compensatory damages as well,<sup>23</sup> and both courts and litigants have in some cases sought to

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14 *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 319–20 (1981) (plurality opinion).

15 472 U.S. 797, 802, 821 (1985).

16 486 U.S. 717, 730–31 (1988).

17 517 U.S. 559 (1996).

18 *Id.* at 572.

19 *See id.* at 562.

20 *Id.* at 572. In other words, “Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents.” *Id.* at 572–73.

21 538 U.S. 408 (2003).

22 *See id.* at 421–22. In a third case, *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1060 (2007), the Court considered the extent to which harm to third parties can be considered in punitive damages analysis, although it did not consider the problem of extraterritoriality per se.

23 An obvious basis for a compensatory/punitive distinction—and one on which the Supreme Court appeared to rely—is that punitive damages resemble a criminal sanction more than civil law. *See Campbell*, 538 U.S. at 417; *Gore*, 517 U.S. at 572–73 & n.19. But a variety of commentators have long assumed that states enjoy approximately the same latitude to apply criminal laws to out-of-state conduct as they do to apply civil laws under *Hague*. *See, e.g.,* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1242 (1992) (arguing that civil and criminal jurisdiction are treated “only slightly differently,” but

extend their holdings to choice-of-law practice more generally.<sup>24</sup> Thus, *Gore* and *Campbell* suggest that a more general extraterritoriality prohibition lurks somewhere in the Constitution, having nothing to do with the dormant Commerce Clause or *Hague's* "aggregation of contacts" test, and potentially applying to the activities of courts as well as legislatures.

Given these contradictory signals, the current situation is as follows. State legislatures appear to be subject to some prohibition against enacting laws with an extraterritorial reach—although the exact scope and textual basis of this stricture is not perfectly clear. At the same time, state courts enjoy great apparent latitude to apply the law of their choosing to geographically far-flung disputes<sup>25</sup>—but the Supreme Court has at times suggested that problems of extraterritoriality may also attend the exercise of state court power. This doctrinal muddle has proven complicated for litigants and courts, and fails to provide any clear guidance to states or their citizens about how far state power may legitimately extend.

This Article suggests ways in which current doctrine might be reconsidered and its two main strands harmonized. In particular, it considers the question of whether the power exercised by state legislatures over out-of-state conduct differs meaningfully from that exercised by state courts. Is there a principled justification for treating the exertion of power over out-of-state events differently depending on whether it is done by a court or a legislature? Or do state courts and state legislatures embody state power in similar ways such that the

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that fewer cases exist in the criminal realm, perhaps because states are less likely to "press the limits of the Constitution" than individual litigants); Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 630 (2007) ("[T]here is reason to think that the Supreme Court would assess a state's efforts to apply its criminal laws to out-of-state events by employing a contacts-based framework similar to that which it employs in gauging the permissibility of a state's application of its civil laws to transactions occurring out of state.").

24 See Rostron, *supra* note 1, at 151.

25 Note that this power is not simply a matter of either personal jurisdiction or choice-of-law principles; it is the result of the way in which both these doctrines intersect. Minimum contacts-based personal jurisdiction demands only a tenuous territorial connection in the first instance between the forum and the dispute; the notion that only modest constitutional constraints exist on states' choice-of-law analysis then permits states to apply forum law (or another law of their choosing) broadly to the events that come before them. Thus, the end result is that, say, a Colorado court has broad power both to hear and to apply Colorado law to events taking place almost entirely outside Colorado. This phenomenon will be explored in more depth later in this Article.

extraterritorial implications of their actions should be assessed according to the same or similar standards?<sup>26</sup>

In attempting to answer these questions, this Article proceeds in three parts. In the first Part, it surveys current notions of extraterritoriality as they have evolved in choice-of-law principles and in legislation. It begins by looking at various models of how we might regard extraterritorial legislative jurisdiction. It then moves on to consider the two frameworks articulated by the Supreme Court for analyzing the issue of state power over out-of-state conduct: one grounded in the Due Process Clause<sup>27</sup> and imposing limits on choice-of-law decisions; the other ostensibly rooted in the dormant Commerce Clause and aimed at extraterritorial legislation.

The second Part of this Article considers the ways in which lines of division between choice-of-law limits and legislative extraterritorial-

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26 The Article deliberately focuses on issues of civil regulation and liability, since criminal proceedings raise somewhat different questions of due process and state power, although some of its examples are drawn from cases treating criminal liability and much of its analysis may be relevant to the criminal context as well. In addition, this Article does not discuss at length the much-debated issue of whether states have the power to regulate the extraterritorial activities of their citizens—a question that entails consideration of a variety of constitutional provisions not discussed in this article, including the Article IV Privileges and Immunities Clause, the Fourteenth Amendment Citizenship Clause, and the constitutional right to travel. See Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 973 (2002) (responding to and rejecting Rosen's argument); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 863–64 (2002) [hereinafter Rosen, *Extraterritoriality*] (claiming that states do and should have the power to regulate their citizens' extraterritorial activities); Mark D. Rosen, "Hard" or "Soft" Pluralism?: *Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers*, 51 ST. LOUIS U. L.J. 713, 731–38 (2007) [hereinafter Rosen, "Hard" or "Soft" Pluralism] (considering and rejecting the possibility that, under current doctrine, these provisions might restrain states' ability to regulate their citizens' extraterritorial conduct). While recognizing the importance of this debate to a comprehensive consideration of the extraterritoriality problem, I choose not to address it here for a number of reasons. First, it has most often been considered in the context of criminal statutes. Second, it is a largely theoretical topic; few states have actually asserted their right to exercise this power. See Rosen, *Extraterritoriality*, *supra*, at 860 ("[F]ew states have tried to frustrate travel-evasion by regulating their citizens' out-of-state activities."). Finally, and most important, I would argue that the issue of states' power to regulate the extraterritorial conduct of their citizens is bound up in the debate of the proper relationship between states and their citizenry—an issue quite separate from the question of the degree to which states can project their power to encompass the out-of-state activities of strangers. See Rosen, "Hard" or "Soft" Pluralism, *supra*, at 745–48 (discussing various considerations involved in the question of whether, as a normative matter, state citizens should have the ability effectively to evade state law by traveling out-of-state to conduct their activities).

27 U.S. CONST. amend. XIV, § 1.

ity concerns have started to break down. It considers four examples of this apparent conflation: the Supreme Court's punitive damages jurisprudence; the controversy over contractual choice of law; the problem of legislation affecting the Internet that crosses geographical lines; and the possibility that extraterritoriality principles might limit the issuance of nationwide injunctions or other state court remedies.

Finally, the third Part of this Article considers how the apparent discrepancies between choice-of-law limits and the legislative extraterritoriality principle can be reconciled. First, it makes the case that the standards for assessing legislative and judicial acts should be combined into a single framework. Second, it argues that, even within such a framework, there is a case for subjecting certain kinds of state actions to a more stringent extraterritoriality analysis. It concludes by arguing for a standard that incorporates elements of both unification and differentiation.

## I. EXTRATERRITORIALITY FRAMEWORKS

It is fairly obvious that regulation by a particular jurisdiction outside its own territory raises a constellation of concerns. Other jurisdictions may, for example, view such regulation as an encroachment on their sovereignty and autonomy. Competing claims by various sovereigns to regulate the same behavior may lead to inconsistent standards being applied and uncertainty on the part of actors who wish to conform their conduct to the law. After-the-fact problems may also arise if, for example, different jurisdictions issue inconsistent judgments. Therefore, in both the international and interstate context, both courts and commentators have wrestled with the problem of how to delineate and contain the territorial scope of legislation.

This Part begins by discussing prior scholarly approaches to the problem of how state extraterritorial regulation might be considered. It then moves on to discuss the two strands of the case law the Court has developed to deal with domestic extraterritoriality issues: first, the *Hague* standard that limits the degree to which state courts can apply forum law; second, the limits on the extraterritorial reach of state legislation.

### A. *Theories of Extraterritoriality*

The idea that there exists some prohibition against extraterritorial legislation in the interstate context has a long history. In the nineteenth century, the Supreme Court frequently expressed the view that state power should be, in the first instance, defined territorially. *Pen-*

*noyer v. Neff*,<sup>28</sup> for example, while notable mostly for its understanding of the then-limited power of state courts over out-of-state defendants, also contains the famous statement that “the laws of one State have no operation outside of its territory, except so far as is allowed by comity.”<sup>29</sup> Likewise, in a case roughly contemporaneous with *Pennoyer*, *Bonaparte v. Tax Court*,<sup>30</sup> the Court held that neighboring states could not exempt Maryland-issued securities from taxation, on the ground that “[n]o State can legislate except with reference to its own jurisdiction.”<sup>31</sup>

Following these various suggestions from the Supreme Court, commentators have frequently argued that the Constitution establishes some limits on the degree to which states can regulate events in other jurisdictions. An influential (though now somewhat outdated) 1978 article on legislative jurisdiction by Willis L.M. Reese argued that the Due Process Clause restricts the degree to which states can regulate events outside their borders.<sup>32</sup> Reese argued that, just as the Due Process Clause serves as “an instrument of federalism” in the personal jurisdiction context by preventing assertions of jurisdiction that improperly trench upon the interests of sister states,<sup>33</sup> so does the Due

28 95 U.S. 714 (1878).

29 *Id.* at 722. The Court elaborated that

every State has the power to determine for itself the civil *status* and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them . . . and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred.

*Id.* Even in the post-*Pennoyer* “minimum contacts” world, the Court and various commentators have suggested that restrictions on personal jurisdiction are not merely a product of the Due Process Clause; they also contain a federalism component. *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (noting that personal jurisdiction analysis should take into account such factors as “the shared interest of the several States in furthering fundamental substantive social policies”).

30 104 U.S. 592 (1881); *see also* Regan, *supra* note 10, at 1887 (discussing *Bonaparte* and its significance).

31 *Bonaparte*, 104 U.S. at 594. Similar notions of the territorial limits of state power persist in the standard currently applied to tax cases. In more recent tax cases, the Supreme Court has required a “minimal connection” and a “rational relationship” between the activity to be taxed and the state. *Mobil Oil Corp. v. Comm’r of Taxes*, 445 U.S. 425, 436–37 (1980). This requirement is rooted in the Due Process Clause and resembles both the minimum contacts test for jurisdiction and the “aggregation of contacts” test for choice of law. *See Welkowitz, supra* note 11, at 42–43 (discussing case law and noting that “behind the test for the validity of state taxation of interstate activity is an obvious concern about extraterritorial overreaching”).

32 *See* Reese, *supra* note 7, at 1589.

33 *Id.*

Process Clause also impose parallel limits on states' legislative jurisdiction.<sup>34</sup> In other words, Reese argued, the Due Process Clause fulfills the same "twofold role" in legislative jurisdiction as it does in adjudicative (that is, personal) jurisdiction: it "protect[s] persons against the unfair application of a law" while also "furthering other interstate . . . values," including the particularly important notion that "a state should not without good reason take action that would adversely affect the interests of another state or states."<sup>35</sup>

With these issues in mind, Reese proposed a two-part test under the Due Process Clause to assess the permissibility of legislative jurisdiction in a particular situation: whether the act in question "would be fair to the parties and also consistent with the needs of the federal . . . system."<sup>36</sup> The key inquiry under the first part of the test would be one of reliance—in other words, whether the party in question had acted under the assumption that a particular jurisdiction's legal rules would be applied to his transaction.<sup>37</sup> Under the second part, courts would consider a variety of issues having to do with interstate comity. For example, when a state lacked an "interest of its own"<sup>38</sup> in applying its law to a given situation, it should be found to lack legislative jurisdiction unless it had substantial contacts with the situation or it was "the state of the governing law under an established rule of choice of law."<sup>39</sup> When state rules came into direct conflict, courts would consider whether the application of a given state's law would "extend beyond the reasonable scope of the state's regulatory power"—or, in other words, "entail too great a sacrifice of the interests of other states."<sup>40</sup>

In a later article, Donald Regan proposed a different model of the extraterritoriality principle, one rooted in broad notions of federalism rather than any specific constitutional provision. In Regan's view, the Due Process Clause is an inappropriate place to locate the principle because the constraints the principle imposes are ones "not of fundamental fairness, but of our federalism."<sup>41</sup> Additionally, while

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34 *Id.*

35 *Id.*

36 *Id.* at 1592.

37 *Id.* at 1595.

38 *Id.* at 1599.

39 *Id.* at 1600. Reese felt the latter two exceptions were necessary under existing case law. *See id.* at 1559–600.

40 *Id.* at 1602.

41 Regan, *supra* note 10, at 1891. Regan argued that the extraterritoriality principle cannot be rooted in the Full Faith and Credit Clause because the Clause, according to Regan, concerns a state's obligation to apply the laws of a different state, not the limits on a state's ability to apply its own law. *See id.* at 1893 ("[T]here are two

Reese saw the question of legislative jurisdiction in predominantly choice-of-law terms—that is, what law would be applied by state courts to situations that came before them—Regan deliberately excluded conflicts-of-law principles from his analysis.<sup>42</sup> Regan further argued that extraterritorial regulation could not be based on foreseeability or the consequences of behavior—the principle is “about the location of the regulated behavior itself,” not that behavior’s effects<sup>43</sup>—but could be based on the shared interests of the various states in establishing rules of conduct for their citizens.<sup>44</sup> Thus, in Regan’s view, a state may not regulate extraterritorially in the sense of “introduc[ing] discriminations against nonresidents into its law in order to benefit itself or its residents,” but it may discriminate against nonresidents in ways designed “to respect the interests of other states in the behavior, even the extraterritorial behavior, of their citizens.”<sup>45</sup>

Much subsequent literature has focused on the constitutionality of more specific acts of extraterritorial regulation.<sup>46</sup> Thus, various scholars have considered the problem of extraterritoriality as it relates to abortion restrictions<sup>47</sup> and gun regulation.<sup>48</sup> For the most part, however, these scholars have focused on which types of legislation are constitutional under existing case law rather than attempt to set forth a comprehensive theory of extraterritoriality.

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distinct questions, whether a state may apply its own law in a particular case, and whether it must apply some other state’s law. The extraterritoriality principle addresses the first question, and the full faith and credit clause the second.”). Further, the exercise of full faith and credit “presupposes” a valid act of legislative jurisdiction, so any extraterritoriality constraints on legislative jurisdiction must come from another source. *Id.* at 1894. As discussed later in this Article, Regan believed the Commerce Clause to be an inadequate basis for the principle as well, primarily because extraterritoriality concerns are not limited to commercial activity. *See id.* at 1887–89.

42 *See id.* at 1885 (“I shall virtually ignore the conflicts literature. . . . [T]he cases I am interested in are quite unlike the standard fare of conflicts analysis.”).

43 *Id.* at 1899.

44 *Id.* at 1908–09.

45 *Id.* at 1912.

46 In addition, a vigorous academic debate currently exists about the power of states to regulate their citizens’ out-of-state conduct. *See Kreimer, supra* note 26, at 984–85; Rosen, *Extraterritoriality, supra* note 26, at 856–57. This Article does not treat this debate in depth for a variety of reasons. *See discussion supra* note 26.

47 *See* C. Steven Bradford, *What Happens If Roe Is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87, 88–92 (1993); Fallon, *supra* note 23, at 626–40.

48 *See* Rostron, *supra* note 1, at 116–20; Ellenberg, *supra* note 11, at 564–67.

### B. *The Supreme Court and Extraterritoriality*

In marked contrast to the international setting, the Supreme Court has not developed a uniform standard for assessing the proper scope of state legislative jurisdiction. Rather, it has set forth two somewhat different standards that apply in different contexts, although in neither case has the Court clearly delineated the standard's exact limits. First, the Court has articulated constitutional limits on the extent to which states can apply their law in their own courts. Second, the Court has announced a set of extraterritoriality principles that apply to invalidate certain kinds of state regulation.

#### 1. Constitutional Limits on State Choice of Forum Law

The first—and perhaps, the primary—set of limits on state legislative jurisdiction derives from restrictions the Supreme Court has imposed on the degree to which state courts can apply their law to the disputes that come before them. In some ways, choice-of-law decisions are a logical setting in which to impose restrictions on legislative jurisdiction. That is, the primary means of applying a state's regulatory law is likely to be through the actions of state courts, whether in assessing liability on the basis of standards supplied by state law or in issuing injunctions that aim to compel defendants to conform their actions to state law. Thus, imposing limits on states' ability to apply their own law to disputes would seem to be an obvious means of limiting states' ability to assert their power extraterritorially.

This analysis, however, is complicated by the fact that the choice-of-law doctrine itself has historically embodied separate notions of what state territory means and how state power is territorially manifested— notions somewhat in conflict with a notion of an extraterritoriality principle that proscribes the regulation of state conduct outside state borders. Under traditional notions of conflicts of law, state courts have wide authority to apply state law to causes of action that become complete within their borders, even if all relevant conduct occurred elsewhere.<sup>49</sup> More modern choice-of-law traditions likewise permit states great license to apply their own law to out-of-state events in which they can state some plausible interest.<sup>50</sup> The existence of these traditions has complicated the formulation of a meaningful extraterritoriality principle in the choice-of-law context.

This section thus begins by looking briefly at how notions of state power and territory have evolved in the choice-of-law theories applied

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49 See *infra* notes 51–58 and accompanying text.

50 See *infra* notes 59–64 and accompanying text.

in state courts. It then goes on to discuss how the Supreme Court has attempted to fashion constitutional limits in the choice-of-law context.

a. From Territorialism to Interest Analysis

Like federal choice-of-law theory—and, perhaps more to the point, like *Pennoyer*-era personal jurisdiction doctrine—choice-of-law doctrine as applied to states has strongly territorial roots.<sup>51</sup> Early choice-of-law theorists reconciled territorial notions of state power with the practical need to permit transitory causes of action by developing a theory of “vested rights,” under which a cause of action came into being in a certain place upon occurrence of a particular event, such as the nonperformance of a contract or the infliction of an injury (the venerable torts principle known as *lex loci delicti*—the law of the place of the wrong); the laws of the jurisdiction in which such an event occurred would then govern the resulting cause of action.<sup>52</sup>

The vested rights theory is most strongly associated with Joseph H. Beale, who believed that as soon as the relevant elements of a cause of action occurred in a particular place, they immediately gave rise to a right that persisted across state borders and that courts in other jurisdictions were bound to respect.<sup>53</sup> Some of Beale’s ideas, however, are traceable to an earlier treatise by Justice Story.<sup>54</sup> According to Story, state law was only directly applicable to “all property . . . within its territory; and all persons, who are resident within it . . . ; and also all contracts made, and acts done within it.”<sup>55</sup> Therefore, when jurisdictions applied foreign law, they did so as a matter of comity, not necessity.<sup>56</sup> Although these two theories provided different justifications for the cross-jurisdictional application of foreign law—Beale believed that foreign-created rights vested automatically, while Story held that they were enforced only as a matter of comity—they shared a territorial conception of state law. In other words, they both sub-

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51 As noted, “territorial” has a distinct meaning in this context—an issue I will address later in this paper. See discussion *infra* Part I.B.1.b.

52 See 2 JOSEPH H. BEALE, *TREATISE ON THE CONFLICT OF LAWS* § 61.2, at 1268, § 378.2, at 1289 (1935).

53 See *id.* §§ 377.1–378.3, at 1286–90.

54 See Andrew T. Guzman, *Choice of Law: New Foundations*, 90 *GEO. L.J.* 883, 890 (2002).

55 JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* § 18, at 19 (Boston, Hilliard, Gray & Co. 1834).

56 *Id.* § 23, at 24 (“[W]hatever force and obligation the laws of one country have in another, depend solely upon the laws, and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent.”).

scribed to the notion that state law applied directly only to events within state borders, and that the law of the state in which a cause of action arose continued, in some sense, to govern of its own force, even when the cause of action was heard by the courts of another state.

Of course, the very reason that choice-of-law theory is necessary in the first instance is because chains of events leading to a cause of action often involve more than one jurisdiction. Thus, the territorial theories would have been meaningless without some way of establishing, in a situation where events had occurred in various places, which state could actually claim territorial control over the events. As a result, associated with the early territorial notions of choice of law was a set of specific principles for determining where a cause of action came into being—the *lex loci delicti* principle, for example, or the maxim that the validity of a contract was governed by the law of the place of contracting, while breach of contract was governed by the law of the place of performance.<sup>57</sup> These principles were, for the most part, enshrined in the *Restatement (First) of Conflict of Laws*.<sup>58</sup>

Ultimately, both the first Restatement's theoretical "vested rights" underpinning and its practical approach came under fire from a number of reformers on grounds of both logic and policy<sup>59</sup>—for its unnecessary formalism, for ignoring other valid state interests such as the protection of state residents, and for erroneously conceiving of rights as independently existing entities that could be shifted from court to court without changing their basic nature.<sup>60</sup> Although the solutions proposed by proponents of this "conflicts revolution" differed, many of the proposals shifted their focus from the last-triggering-event-based formalism of the first Restatement to choice-of-law principles focusing on the degree to which state legislatures had legitimate interests in protecting state residents. Thus, for example, Brainerd Currie famously advocated the use of "interest analysis," under which, when a party urged the application of a law other than forum law, a court was to look to the "governmental policy expressed in [forum] law" and determine whether the forum had an interest in having its law applied.<sup>61</sup> Because states normally had legitimate interests in the

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57 See RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 332, 358 (1934).

58 See *id.* § 377 ("The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.").

59 See, e.g., David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 175 (1933); Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 174–77; Symposium, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963).

60 See Currie, *supra* note 59, at 174–77.

61 See *id.* at 178.

application of their law only when the welfare of their residents was at stake, governmental interest analysis necessarily tended to shift the focus from the location where events occurred to the domicile of the litigants as the principal concern of choice-of-law doctrine.<sup>62</sup>

A further—and, for the purposes of this discussion, significant—insight of the reformers was that foreign state law did not apply in the courts of another state of its own force; rather, all law applied by the courts of a given state was an aspect of what was known as “local law.”<sup>63</sup> Thus, if, say, a Massachusetts court decided that a given dispute before it should be governed by Connecticut law, it did so not because Connecticut law applied of its own force (as Beale would have it) or because (as Story might say) Massachusetts, as a matter of comity, permitted Connecticut law to apply in its courts. Rather, under local law theory, Massachusetts would, in effect, apply Massachusetts law fashioned into a facsimile of Connecticut law.<sup>64</sup>

Local law theory itself has come in for its share of derision; Larry Kramer has described it as “hardly constitut[ing] a major breakthrough,”<sup>65</sup> the idea being that it is of only highly formal significance whether the law applied by a Massachusetts court is “really” Connecticut law or Massachusetts law that resembles Connecticut law in every particular. But the distinction does have potential significance in considering the extent to which the application of a particular law by a state court represents an exercise of that state’s power. If we believe that all law applied by the courts of a given state is local law, the effect is to obscure somewhat the distinction between legislative and adjudicative jurisdiction—since the consequence of a given state’s courts accepting jurisdiction over a dispute is, in essence, that the law of that state will, in one form or other, apply to it. As I will explain shortly, Supreme Court case law on choice of law’s constitutional limits has in fact resulted in the blurring of the legislative/adjudicative distinction, even though the Supreme Court itself has not explicitly endorsed

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62 See Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819, 1847 (2005).

63 See Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 988 (1991).

64 *Id.*

65 See *id.* at 989. Kramer relates an anecdote in which choice-of-law scholar David Cavers explained local law theory by describing how his four-year-old son reconciled himself to eating tuna fish by telling himself it was “fish made of chicken.” *Id.* (quoting David F. Cavers, *The Two “Local Law” Theories*, 63 HARV. L. REV. 822, 823 (1950)).

local law theory, and it is indeed in some tension with the Court's current choice-of-law understanding.<sup>66</sup>

The "conflicts revolution" also had some impact on the actual practices of state courts (although not perhaps to the extent that it influenced academic debate). Some courts developed their own revisions of old principles that were influenced by the reformers' views, even if they did not necessarily conform to them precisely.<sup>67</sup> Amid some confusion over the direction choice of law should take, the second Restatement adopted a catchall approach that advised courts to choose the law of the state with the "most significant relationship" to the cause of action—but the determination of exactly *which* state that might be could potentially rest on a variety of factors.<sup>68</sup> Perhaps as a result of the second Restatement's failure to take a clear stand, state courts today differ substantially in which choice-of-law principles they use, with several continuing to follow the first Restatement, a somewhat larger group adhering to the second Restatement, and the remainder using a hodgepodge of other modern approaches.<sup>69</sup>

#### b. The Nature of Choice-of-Law Territorialism

Before launching into a discussion of constitutional restrictions on application of state law to out-of-state events, it is worth considering the question of what, precisely, the concept of "territorialism" means in the choice-of-law context. Since presumably no one ques-

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66 See Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1845 (2005) (suggesting that local law theory appears to create constitutional problems because it would call for the application of forum law in situations where the state lacks the required contacts under the Due Process Clause).

67 See, e.g., *Babcock v. Jackson*, 191 N.E.2d 279, 281–84 (N.Y. 1963) (surveying choice-of-law literature and, in particular, critiques of the vested rights approach).

68 See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971). In determining which state's law should apply to a tort, for example, the second Restatement instructed courts to look to the traditional place-of-injury criterion, but also to consider other factors: the place of conduct causing the injury, the domicile, residence, the place of business of the parties, and the place where the parties' relationship was centered. *Id.*

69 See generally Symeon C. Symeonides, *Choice of Law in the American Courts in 2006: Twentieth Annual Survey*, 54 AM. J. COMP. L. 697, 712–13 (2006) (charting each state's choice-of-law approaches in both contract and tort law, with twenty-three states adopting the second Restatement approach in contract law, twenty-three states adopting the second Restatement approach in tort law, twelve states adopting the first Restatement approach in contract law, ten states adopting the first Restatement approach in tort law, ten states adopting a combined approach to contract law, six states adopting a combined approach in tort law, seven states adopting a different modern approach in contract law, and eleven states adopting a different approach in tort law).

tions the right of state courts to apply forum law to events occurring entirely within state borders, the very existence of a choice-of-law problem presupposes that relevant events have occurred in more than one jurisdiction. When this is the case, there is an inherent difficulty in separating “territorial” from “nonterritorial” choice-of-law theories. In other words, all choice-of-law theories that deal with the problem of multijurisdictional contacts rely, to some extent, on territorial boundaries and the location of physical events. Where such theories differ is largely in which physical circumstances they choose to privilege. Thus, vested rights theories attach great importance to the occurrence of the last event creating a cause of action;<sup>70</sup> governmental interest analysis may rely on other factors, such as the domicile of the litigants or the interests of the affected communities<sup>71</sup>—but these are factors that are also, inevitably, related to physical boundaries.<sup>72</sup> To talk about territorialism in choice-of-law theory, therefore, is to refer to the particular *strain* of territorialism that looks to the occurrence of a specific event in a particular location as the circumstance that gives a sovereign power to apply its law to that event. Further, even the choice-of-law theories that are denominated as “territorial” do not necessarily include any substantive grappling with the extent to which states should be permitted to assert control—directly or indirectly—over conduct occurring outside their borders.

The well-known choice-of-law case *Alabama G.S.R. Co. v. Carroll*<sup>73</sup> illustrates this distinction. *Carroll* concerned an accident involving a freight train passing through several southern states.<sup>74</sup> The accident was allegedly caused by negligent maintenance of the train in Alabama, which caused a link between two cars to break in Mississippi, injuring the plaintiff.<sup>75</sup> Because the relevant conduct had occurred in Alabama and the plaintiff had further been acting pursuant to an Alabama contract,<sup>76</sup> the plaintiff argued that a provision of the Alabama Code should apply.<sup>77</sup> Applying traditional vested rights principles,

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70 See *supra* notes 52–53 and accompanying text.

71 See *supra* notes 61–62 and accompanying text.

72 See Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1306 (1989) (“Clearly there is no way to formulate a choice of law regime other than to found it upon territorial assumptions of some sort.”).

73 11 So. 803 (Ala. 1892).

74 *Id.* at 804.

75 *Id.*

76 *Id.* at 804, 807. In addition, the plaintiff was an Alabama resident and the defendant was an Alabama corporation. *Id.* at 803.

77 *Id.* at 805. Because Mississippi law followed the rule immunizing employers from liability for accidents caused by a fellow employee, plaintiffs could state a claim only under the law of Alabama, which had abandoned this rule. *Id.*

however, the court rejected this argument, applying Mississippi law because it was in Mississippi where the injury had occurred and where a cause of action had consequently arisen.<sup>78</sup> As the court reasoned, “[s]ection 2590 of the Code of Alabama had no efficacy beyond the lines of Alabama. It cannot be allowed to operate upon facts occurring in another state, so as to evolve out of them rights and liabilities which do not exist under the law of that state.”<sup>79</sup> For the court, therefore, the relevant facts were those relating to the immediate occurrence of the accident and the resulting cause of action, not those relating to the conduct that had caused the accident to occur.<sup>80</sup>

If one understanding of territorialism is that states should have the power to govern conduct that occurs within their territory, the effect of the Alabama court’s decision in *Carroll* was to permit Mississippi law to apply extraterritorially. First Restatement theories thus in effect allow states wide scope to assign responsibility—and assess damages and other penalties—retrospectively for conduct occurring in another jurisdiction, provided that the last event creating the relevant cause of action occurred in that state’s territory. Note that this makes for an understanding of state power that is somewhat different from the equivalent notion of national power under effects-based jurisdiction in international law, since the last triggering event that creates a vested right may not necessarily have significant consequences for the state in which it takes place. In the *Carroll* example, the conduct resulting in the cause of action had occurred in Alabama and (since both parties were Alabama residents) had its principal effect there; indeed, the fact that the cars happened to break in Mississippi was purely happenstance.<sup>81</sup> Yet the vested rights theory—the standard practice of state courts for many years—mandated the application of Mississippi law to the resulting cause of action.<sup>82</sup>

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78 *Id.* at 809.

79 *Id.* at 806–07.

80 *Id.* at 809.

81 *See id.* at 803–04.

82 In *Carroll*, of course, the application of Mississippi law was an act of comity by the Alabama court. *See id.* at 808–09. We might say that *Carroll* thus should not raise extraterritoriality concerns because the issue was not the Alabama court’s power to apply Alabama law to the dispute at hand. That is, when a given state’s law applies beyond its borders only because a sister state permits its law to have extraterritorial effect, there may be fewer concerns about state overreaching. Note, however, that the logic of *Carroll* would have applied equally had a Mississippi court been hearing the dispute, since the cause of action would still have arisen in Mississippi notwithstanding the extensive Alabama contacts of the disputants and the case. *See id.* at 804. The vested rights theory thus had the effect of giving state courts, in appropriate circumstances, broad license to apply forum law to far-flung events.

It thus may be potentially useful to distinguish between two types of territorialism in talking about state power. On the one hand, there is the form of territorialism that focuses on borders as formal markers that promote predictability and certainty. This is the type of territorialism embodied in the vested rights approach; under such an approach, it is generally clear (even if subject to potentially arbitrary and easily manipulated factors) which jurisdiction has the authority to pronounce on certain conduct. A second framework through which to look at territorialism, however, focuses on states' substantive authority to regulate extraterritorially. In thinking about territorialism, it is thus worth noting that the first view has a long history in interstate choice-of-law thinking, while the second—while sometimes paid lip service to—has had less effect in practice. As will be seen, confusion of these two types of territorialism has sometimes resulted in uncertainty about whether and how to limit the extraterritorial application of state law by state courts.<sup>83</sup>

### c. Choice of Law and the Constitution

Despite the diversity of choice-of-law approaches applied by state courts—and the substantial shift in those approaches that has occurred in the past half-century or so—the Supreme Court has only rarely suggested that a state's choice-of-law decisions might be subject to constitutional limits. In early cases like *Home Insurance Co. v. Dick*,<sup>84</sup> the Court indicated that modest bounds might exist under the Due Process Clause on state courts' ability to impose forum law where a state had few significant contacts with a dispute.<sup>85</sup> Yet even in cases (such as *Alaska Packers Ass'n v. Industrial Accident Commission*<sup>86</sup> and *Pacific Employers Insurance Co. v. Industrial Accident Commission*<sup>87</sup>) decided while the vested rights notion of state power still held sway, the Court permitted state courts to apply forum law to out-of-state events despite arguments that the Full Faith and Credit Clause<sup>88</sup> (a provision the Court found not to be at issue in *Dick*<sup>89</sup>) required appli-

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83 See discussion *infra* Part I.B.2.

84 281 U.S. 397 (1930).

85 *Id.* at 402–05, 408 (holding that principles of due process precluded Texas from applying its law to invalidate a clause in an insurance contract entered into in Mexico and valid in Mexico, where the boat that was the subject of the underlying insurance dispute had been destroyed in Mexico).

86 294 U.S. 532 (1935).

87 306 U.S. 493 (1939).

88 U.S. CONST. art. IV, § 1.

89 See *Dick*, 281 U.S. at 410–11.

cation of the law of some other state.<sup>90</sup> Indeed, these cases suggested, so long as the state had some minimal interest in the dispute—in the sense of “interest” as used by choice-of-law scholars like Currie—it would always be constitutional for the state to apply forum law.<sup>91</sup>

The Court established the modern framework for assessing constitutional limits on choice-of-law in *Allstate Insurance Co. v. Hague*, in which a plurality of Justices permitted a Minnesota court to apply Minnesota law to a dispute over “stacking” of insurance coverage for an accident.<sup>92</sup> Minnesota’s connection to the case was tenuous: the insurance policy at issue had been delivered in Wisconsin, the accident had occurred in Wisconsin, and all persons involved in the accident were Wisconsin residents when it occurred.<sup>93</sup> All contacts with Minnesota were incidental and unrelated to the subject matter of the suit: the accident victim, Hague, worked in Minnesota;<sup>94</sup> Allstate did business in Minnesota;<sup>95</sup> and Hague’s widow (the plaintiff) had married a Minnesota resident and moved to Minnesota prior to filing the lawsuit.<sup>96</sup> Nonetheless, however, the Minnesota court reached its conclusion by relying on the work of choice-of-law theorist Robert A. Leflar,<sup>97</sup> who advocated that courts choose the law that was “better,” in the sense of “mak[ing] good socio-economic sense for the time when

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90 In *Alaska Packers*, the Court permitted California to award worker’s compensation to an employee despite the fact that he had been injured in Alaska. See 294 U.S. at 538–39. *Pacific Employers* reached a similar conclusion as to California courts’ obligation to apply Massachusetts law. See 306 U.S. at 504–05.

91 See Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 448 (1982) (noting that, under *Alaska Packers* and *Pacific Employers*, “there are, in fact, no limits whatsoever on the choice of an interested state’s laws”).

92 *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 305, 320 (1981) (plurality opinion). Specifically, the plaintiff, whose husband had been killed in a motorcycle accident, sought a declaration that her late husband’s insurance policies could be “stacked” pursuant to Minnesota law. *Id.* at 305. Notably, the issue of whether policies could be stacked under Minnesota law was a court formulated rule, although one based on an interpretation of Minnesota statutes. See *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 49 (Minn. 1979); *Van Tassel v. Horace Mann Mut. Ins. Co.*, 207 N.W.2d 348, 350–52 (Minn. 1973).

93 *Hague*, 449 U.S. at 306 (plurality opinion).

94 *Hague* also commuted to work in Minnesota, although the accident had not occurred during his commute. *Id.* at 314.

95 *Id.* at 317.

96 *Id.* at 318–19. While acknowledging that a post-accident move would be “insufficient in and of itself” as a basis for the application of a given state’s law, the Court nonetheless found that “such a change of residence was [not] irrelevant.” *Id.* at 319 (citing *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936)).

97 See *Hague*, 289 N.W.2d at 46 n.4.

the court speaks<sup>98</sup>—a metric that, the court found in this case, pointed toward Minnesota law.<sup>99</sup>

Noting that “[i]t is not for this Court to say whether . . . we would make the same choice-of-law decision if sitting as the Minnesota Supreme Court,” the Court plurality nonetheless held that it would not disturb a state court’s choice of law provided it was “neither arbitrary nor fundamentally unfair.”<sup>100</sup> This test, the plurality indicated, would be satisfied if the state whose law was applied had any “significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.”<sup>101</sup> This set of standards was rooted, the plurality found, in both the Due Process Clause and the Full Faith and Credit Clause, but its essential requirements were the same under both.<sup>102</sup>

The standard set forth in *Hague*—especially as applied by the *Hague* plurality—is hardly a rigorous one; indeed, it has been described as marking “[t]he apparent end of all meaningful limits” on state choice-of-law decisions.<sup>103</sup> In addition to its express suggestion that, within very broad limits, choice of law was essentially a matter to be left to state courts, the *Hague* test is also notable for collapsing to some degree the boundaries between state adjudicative and legislative jurisdiction. In other words, the *Hague* “aggregation of contacts” test strongly resembles the basic test for contacts-based personal jurisdiction<sup>104</sup>: that the defendant have “certain minimum contacts [with the

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98 Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1588 (1966). Leflar in fact advocated consideration of several factors (including predictability, maintenance of interstate order, simplification of the judicial task, and advancement of the forum’s governmental interests) in addition to the question of which law was “better,” although he did acknowledge that the latter factor was a “potent” one. *Id.* at 1586–88.

99 *See Hague*, 289 N.W.2d at 49.

100 *Hague*, 449 U.S. at 307–08 (plurality opinion).

101 *Id.* at 308.

102 *See id.* at 308 n.10. However, Justice Stevens, in concurrence, argued that the Full Faith and Credit Clause spoke to a slightly different set of concerns. Under Stevens’ formulation, the due process portion of the analysis asks whether the state in question may apply forum law, while the full faith and credit portion asks whether it is required to apply the law of some other state. *See id.* at 320 (Stevens, J., concurring). In some ways, the standard Stevens advocates would incorporate a greater extraterritoriality focus into the *Hague* standard, since it would acknowledge that a state’s decision to apply forum law potentially affects not only the rights of individuals but those of other states.

103 Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 257 (1992).

104 I am not the first to make this observation. *See Juenger, supra* note 5, at 1333.

forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”<sup>105</sup>

The analysis of minimum contacts and the choice-of-law “aggregation of contacts” is likely to differ in only one context: class actions. In *Phillips Petroleum Co. v. Shutts*, even as a majority of the Court reaffirmed the *Hague* standard by endorsing the approach of the *Hague* plurality, the Court suggested that, at least in certain circumstances, *Hague* might pose meaningful limits on courts’ choice-of-law discretion beyond those placed by personal jurisdiction requirements.<sup>106</sup> *Shutts* involved claims by 28,100 class members entitled to royalties on oil and gas leases who alleged that they were entitled to interest on delayed payments.<sup>107</sup> The plaintiffs had apparently chosen Kansas because of its favorable substantive law, and there were few actual contacts between the plaintiffs and Kansas.<sup>108</sup> Only a small fraction of the class members lived in Kansas, the defendant was not headquartered or incorporated there, and the large majority of the leases concerned property outside the state.<sup>109</sup> Under such circumstances, the Court found, the state court could not, consistent with the Due Process and Full Faith and Credit clauses, apply Kansas law to all the leases.<sup>110</sup>

The Court acknowledged that “[the defendant] owns property and conducts substantial business in the State, so Kansas certainly has an interest in regulating [its] conduct in Kansas.”<sup>111</sup> Further, Kansas had an interest in protecting the rights of the relatively small portion of class members who were Kansas residents.<sup>112</sup> Nonetheless, these contacts were insufficient to support the application of Kansas law to the claims of plaintiffs unconnected to Kansas.<sup>113</sup>

*Shutts*, then, is notable for articulating the main distinction between the minimum contacts test for personal jurisdiction and the *Hague* choice-of-law formulation: the personal jurisdiction test applies only to defendants (the Court rejected the suggestion that it lacked personal jurisdiction over class members),<sup>114</sup> while the choice-of-law test is assessed by considering plaintiffs’ contacts as well.<sup>115</sup> *Shutts* is

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105 *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

106 *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821–22 (1985).

107 *See id.* at 799–801.

108 *See id.* at 820–21.

109 *Id.* at 799–801.

110 *See id.* at 821–22.

111 *Id.* at 819.

112 *Id.*

113 *Id.* at 821–22.

114 *Id.* at 814.

115 *See id.* at 812, 821–22.

further significant for showing that, at least in the context of a class action, the Court was willing to give the *Hague* test some bite. Finally, *Shutts* suggests two bases on which to assess whether contacts are meaningful: the expectation of the parties as to which state's law will control their transaction, and the question of whether there is any relationship between the suit and "anything done or to be done within" the forum's borders.<sup>116</sup> The latter of these two factors bears some relationship to an effects test of the sort applied in international law.

In some ways, these were significant steps. Even if *Shutts* nominally reaffirms *Hague's* liberal approach to choice of law in individual lawsuits, it minimized to some extent the *Hague* principle's implications. *Shutts* makes clear, for example, that the fact that a defendant does business in a forum will not in itself support the application of forum law where the plaintiff and the claim lack connection to the forum.<sup>117</sup> Further, *Shutts's* specific condemnation of the automatic application of forum law to nationwide class actions<sup>118</sup> served to limit an important circumstance in which state law might otherwise have significant extraterritorial reach. That is, since nationwide class actions by definition involve many litigants and cross-territorial boundaries, they are much more likely than individual suits to raise concerns about the excessively broad application of a particular state's law.

*Shutts*, however, represented an extreme case; the class members at issue lived outside Kansas, had no property in Kansas, and apparently lacked any other contacts of note with Kansas.<sup>119</sup> Thus, *Shutts* leaves open the possibility of applying forum law in a situation like *Hague*, where the plaintiff has some contacts—however tangential—with the forum.<sup>120</sup> For that reason, the significance of *Shutts* may be limited outside the class action context.<sup>121</sup>

Moreover, even if *Shutts* suggested a new willingness on the part of the Court to invalidate the application of forum law in the absence of meaningful contacts, the Court has failed to follow through on that

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116 *Id.* at 822 (quoting *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930)).

117 *Id.* at 814–15, 818–23.

118 *See id.* at 820–22.

119 *See id.* at 815.

120 *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313–19 (1981) (plurality opinion).

121 Note that, in *Shutts*, all but two of the out-of-state plaintiffs were class members who were simply passive participants in the lawsuit. 472 U.S. at 800–01. When a plaintiff has an active role in choosing the forum in which to file and the causes of action to assert, she is in a much better position to identify and highlight contacts with the state that support the application of forum law.

suggestion, particularly in individual lawsuits. Indeed, a curious coda to *Hague* and *Shutts*, *Sun Oil Co. v. Wortman*, forcefully reaffirmed the principle that the Court would not disturb reasonable decisions by state courts to apply forum law. The basic holding of *Wortman* was simply a reiteration of the long standing principle that, even if a state court lacks the power to apply its substantive law to disputes, forum procedural law (such as a statute of limitations) still applies.<sup>122</sup> More broadly, however, the Court announced that—because it had no interest in “constitutionalizing choice-of-law rules”—matters such as the characterization of a rule as substantive or procedural for choice-of-law purposes would normally be left to the states.<sup>123</sup> *Wortman*, indeed, suggests that the Constitution is indifferent to which state’s law is applied under most circumstances, suggesting that “the legislative jurisdictions of the States overlap” and that “frequently . . . a court can lawfully apply either the law of one State or the contrary law of another.”<sup>124</sup>

*Wortman* further (and more puzzlingly, given the many points of disparity between interstate and international conflicts principles) suggests that state courts’ choice-of-law powers under the Full Faith and Credit Clause are “interpreted against the background of principles developed in international conflicts law.”<sup>125</sup> At least one scholar has argued, therefore, that *Wortman* broadens the test articulated in *Hague*, permitting the application of forum law in a way “supported by principles of international law or historical application, . . . even if it does not meet the *Hague* ‘sufficient contacts’ test.”<sup>126</sup>

Despite some incoherence and uncertainty about the precise reach of the *Hague* standard, one can make two broad statements about the Court’s choice-of-law decisions as a whole. First, they permit state courts great latitude—especially in individual suits—to apply their law to disputes over which they have jurisdiction. Second, they generally have failed to grapple with the issue of extraterritoriality *per se*—in other words, to treat choice of law as in part an issue of state sovereignty as well as one of due process. Indeed, the Court’s choice-of-law decisions resemble its personal jurisdiction ones not only in the substantive content of the standard they establish, but in that stan-

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122 *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988).

123 *Id.* at 727–28. As the Court reasoned (referring to the long tradition of treating statutes of limitations as procedural), “long established and still subsisting choice-of-law practices that come to be thought, by modern scholars, unwise, do not thereby become unconstitutional.” *Id.* at 728–29.

124 *Id.* at 727.

125 *Id.* at 723.

126 Bradford, *supra* note 47, at 120–21.

dard's animating concerns. In both settings, the Court has been primarily preoccupied with protecting litigants from unfair or unwanted results and has given relatively little attention to questions of interstate comity or horizontal federalism.<sup>127</sup>

In the personal jurisdiction context, the Court's focus on due process at the expense of federalism concerns has recently been both criticized<sup>128</sup> and defended,<sup>129</sup> with some scholars arguing that the Court should expand upon suggestions in cases like *World-Wide Volkswagen* that personal jurisdiction also has implications for the balance of power among the various states.<sup>130</sup> For the moment, however, it is important to note that the near-exclusive focus on due process in the tests for *both* personal jurisdiction and choice of law means that no real opportunity exists in any exercise of power by a state court—any exercise, that is, of *either* its adjudicative or legislative jurisdiction—to consider what effect it may have on broader concerns of interstate relations. In other words, if one were to look only at *Hague* coupled with the tests for personal jurisdiction, one might think that states enjoy a virtually unlimited power to prescribe substantive standards applicable to out-of-state conduct so long as that power is exercised in a way that does not cause unfair surprise to individuals.

In some ways, of course, it seems unlikely that such a broad scope for individual legislation by states could be workable, particularly given the variety of choice-of-law regimes applied by the various states.<sup>131</sup> And, as I will subsequently describe, it is not the whole story. The Court has frequently invoked a second extraterritoriality principle—possibly rooted in the dormant Commerce Clause, but possibly

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127 See *supra* notes 84–105 and accompanying text.

128 See Charles W. “Rocky” Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 568–70 (2007) (describing—although arguing against—the extensive body of scholarship rejecting due process as a basis for personal jurisdiction restrictions); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 172 (2004) (“[T]he basic territorial framework of the limitations on state court jurisdiction stems not from the Due Process Clause, or any other provision protecting individuals from untoward assertions of state power, but from federal common law rules developed under the influence of the Full Faith and Credit Clause to allocate judicial power among the states.” (footnote omitted)).

129 See, e.g., Rhodes, *supra* note 128, at 572–77.

130 See, e.g., Weinstein, *supra* note 128, at 171–72, 264–70.

131 Note that the vested rights approach, when it was followed fairly universally by all states, had the advantage of specifying only one state's law to govern a given dispute. In other words, if an accident occurred and caused injury in Mississippi, various state courts would recognize that Mississippi law was appropriately applied to the resulting dispute. See Scott Fruehwald, *Constitutional Constraints on State Choice of Law*, 24 U. DAYTON L. REV. 39, 42–44 (1998).

also in broader structural principles of federalism—to invalidate state legislation purporting to regulate out-of-state conduct. It is this principle I will describe in the following section.

## 2. Restrictions on State Powers to Legislate

One might think, at least at first glance, that state courts' power to apply forum law to out-of-state events would essentially define the limits of state legislative jurisdiction. That is, to the extent that a state statute purports to reach extraterritorial conduct, the courts of that state are likely the primary, if not the sole, means of enforcing that statute. Suppose, for example, that the State of California wishes to adopt a statute imposing safety regulations on gun manufacturers nationwide. It is clear that California lacks the power to coerce compliance with the statute in Nevada by, say, sending inspectors to Nevada facilities who are empowered to levy fines for violations. While other alternatives (such as conditioning state benefits on compliance with the statute's requirements, for example) might suggest themselves, the most straightforward way of ensuring compliance with the statute is likely to be to allow litigants to enforce it in California courts—either by seeking an injunction or by asserting that violation of the statute forms an element in a case for liability.<sup>132</sup> While these two situations pose somewhat different issues, the extent to which California courts can apply California law to the dispute might appear to be the primary issue in both.<sup>133</sup>

Nonetheless, courts have generally addressed the question of the permissible extraterritorial reach of a state's laws through a separate line of cases from those establishing the extent of a state's ability to apply forum law to out-of-state disputes. For this reason, the canoni-

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132 I set aside as somewhat beyond the scope of this Article a final possibility—that the state itself could bring a criminal or civil enforcement proceeding in California court against an out-of-state entity. It is not in fact clear that such an action would be analyzed, under many choice-of-law theories, in dramatically different terms from private litigation. See, e.g., Fallon, *supra* note 23, at 628–29 (suggesting that the basic framework for assessing the constitutionality of states' choice of law also applies to the criminal context). Nonetheless, because the criminal context may raise special issues of federalism and individual rights, I confine my analysis to civil litigation. Further, in practical terms, it is unlikely to be feasible for states to enforce compliance with regulatory statutes through official proceedings in most—or even many—cases.

133 Plaintiffs might, of course, also seek relief in Nevada courts or Wyoming courts or Massachusetts courts, for that matter, assuming appropriate jurisdictional requirements were met. While it seems unlikely, as a practical matter, that foreign state courts would be likely to give another state's law broad extraterritorial application, any principle governing state courts' choice-of-law decisions should of course encompass such a possibility.

cal scholarly treatment of legislative extraterritoriality deliberately ignores traditional conflicts analysis.<sup>134</sup>

Like its relationship to choice-of-law restrictions, the exact constitutional source of the extraterritoriality principle is something of a mystery. In general, the Supreme Court's counsel on this subject has been expressed not in terms of clear prohibitions but rather "consistent undercurrent[s] contained within several sets of doctrines" that "[t]aken together . . . produce a line of thought limiting the extraterritorial power of the states."<sup>135</sup> These "undercurrents" arise from several different constitutional provisions. Thus, "[n]o one is quite certain what part of the Constitution should be regarded as imposing restrictions on a state's jurisdiction to prescribe its law to extraterritorial conduct."<sup>136</sup>

An initial question worth considering is what precisely such an extraterritoriality principle might add to the *Hague* line of cases, which presumably provides a basis for objecting to unfair or arbitrary application of forum law by state courts to out-of-state conduct.<sup>137</sup> That is, given that *Hague* appears to impose a limit on extraterritorial application of state law, why should we need a second standard, and what justification is there for having one? It is this problem that I will consider in depth in the final part of this Article. For the moment, however, it is worth noting that there are at least two situations (one of which I have already alluded to briefly) in which an extraterritoriality principle might not be redundant. First, there is the situation where a state uses some nonjudicial means of enforcing such a regulation by attempting to condition some benefit—such as the right to do business in a state—on an entity's compliance with the state's efforts to regulate its out-of-state conduct. Second, there is the idea that, under some circumstances, a litigant may wish to challenge the validity of the underlying *legislation* as applied to out-of-state conduct rather than the propriety of a court's particular *decision to apply forum law* to an individual case. It is perhaps questionable whether the sub-

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134 See Regan, *supra* note 10, at 1885 ("[T]he cases I am interested in are quite unlike the standard fare of conflicts analysis."). Regan, however, also argues that conflicts scholarship could benefit from greater attention to the extraterritoriality principle he discusses. See *id.* at 1886.

135 Welkowitz, *supra* note 11, at 23.

136 Rostron, *supra* note 1, at 122.

137 It is fairly obvious, for example, that the net effect of the Court's decision in *Hague* was to permit Minnesota to apply its law to Wisconsin conduct. See Welkowitz, *supra* note 11, at 49–50 (noting that in allowing "a Minnesota court to apply Minnesota law to an insurance coverage issue relating to a car accident that occurred outside the state and that involved no Minnesota residents," the Supreme Court permitted Minnesota to give its law extraterritorial effect).

stantive standard applied to assess the state's regulatory power should be different from the *Hague* standard in either of these two instances. But, at least theoretically, neither of these situations is strictly a question of the choice of law made by a court. Thus, it is possible to see why a separate line of cases might have evolved to govern these particular circumstances—even if the lines of demarcation between states' exercise of legislative jurisdiction by, on the one hand, the enactment of a statute and, on the other, the application of state law in state courts, are not particularly clear.<sup>138</sup>

a. Legislative Jurisdiction and the *Edgar* Extraterritoriality Principle

In a series of cases in the 1980s, the Supreme Court articulated a strong—if not entirely clear—prohibition on extraterritoriality under the rubric of the dormant Commerce Clause. Nonetheless, it has done so in a line of cases that appears quite separate—doctrinally and conceptually—from garden-variety dormant Commerce Clause jurisprudence, and that (as some have argued) is better understood as reflecting broader concerns of structural federalism rather than specific issues of interstate commerce.

In general, conventional dormant Commerce Clause analysis has nothing to do with extraterritorial effects *per se*.<sup>139</sup> Normally, facially neutral state regulation that has an impact on interstate commerce is subject only to the balancing test of *Pike v. Bruce Church, Inc.*,<sup>140</sup> which asks whether the statute in question “regulates even-handedly to effectuate a legitimate local public interest” and whether “its effects on interstate commerce are only incidental”;<sup>141</sup> if so, the statute does not pose a constitutional problem “unless the burden imposed on such commerce is clearly excessive in relation to the putative local bene-

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138 The extent to which issues of legislative extraterritoriality arise is limited by the common assumption that state statutes are intended to apply only within state borders. See Regan, *supra* note 10, at 1886. Nonetheless, state legislatures with reasonable frequency indicate that they wish their laws to have some sort of extraterritorial effect, or at least to “hover around the borderline of the prohibition on extraterritoriality.” *Id.*

139 Scholars have frequently argued that the primary function of dormant Commerce Clause cases is and should be to smoke out state protectionism. See, e.g., Earl M. Maltz, *How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47, 50 (1981); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1095 (1986).

140 397 U.S. 137 (1970).

141 *Id.* at 142.

fits.”<sup>142</sup> State regulation that appears facially discriminatory against out-of-state commerce is subject to strict scrutiny.<sup>143</sup>

While the Court had earlier suggested that dormant Commerce Clause analysis might be intertwined with more general concerns about extraterritoriality,<sup>144</sup> the Court substantially broadened and expanded upon those concerns in a series of cases decided the 1980s, beginning with *Edgar v. MITE Corp.*<sup>145</sup> *Edgar* concerned an Illinois statute authorizing the Secretary of State to hold a fairness hearing about—and, potentially, to deny registration to—a tender offer targeting a corporation that had its principal office in Illinois, was organized under Illinois law, or had at least ten percent of its stated capital in the state.<sup>146</sup> The Court affirmed a lower court decision finding that the statute was inconsistent with the Commerce Clause.<sup>147</sup>

A plurality of the Court rested its conclusion on the idea that the dormant Commerce Clause balancing test permitted only “incidental” regulation of interstate commerce, and the Illinois statute “directly regulate[d] transactions which take place across state lines, even if wholly outside the State of Illinois.”<sup>148</sup> As the Court noted, “if Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled.”<sup>149</sup> In reaching this conclusion, the plurality articulated a wide-ranging prohibition on extraterritorial regulation, finding that the Commerce Clause “precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, *whether or not the commerce has effects within the State.*”<sup>150</sup>

The Court subsequently applied and extended *Edgar*’s test in several additional cases. In *CTS Corp. v. Dynamics Corp. of America*,<sup>151</sup> the Court—even while upholding against a Commerce Clause challenge

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142 *Id.*

143 *See, e.g.,* *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

144 *See, e.g.,* *S. Pac. Co. v. Arizona*, 325 U.S. 761, 773 (1945).

145 457 U.S. 624 (1982).

146 *Id.* at 626–27.

147 *Id.* at 643–46. While only a plurality of the Court found that the Illinois statute violated an extraterritoriality principle, *id.* at 641–42 (plurality opinion), a majority agreed that the statute failed the *Pike* balancing test, *see id.* at 643 (majority opinion). Majorities of the Court in later cases adopted the key features of Justice White’s extraterritoriality analysis in *Edgar*. *See* *Healy v. Beer Inst.*, 491 U.S. 324, 335–37 (1989); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582–84 (1986).

148 *Edgar*, 457 U.S. at 641 (plurality opinion).

149 *Id.* at 642.

150 *Id.* at 642–43 (emphasis added).

151 481 U.S. 69 (1987).

an Indiana anti-takeover statute narrower than the one at issue in *Edgar*—held that a proper Commerce Clause inquiry also includes scrutiny of whether the statute at issue “may adversely affect interstate commerce by subjecting activities to inconsistent regulations.”<sup>152</sup> As will be discussed shortly, many commentators have seen *CTS* as establishing an additional “inconsistent regulations” prong of dormant Commerce Clause analysis, in addition to more straightforward extraterritoriality concerns. In two later cases—*Brown-Forman Distillers Corp. v. New York State Liquor Authority*<sup>153</sup> and *Healy v. Beer Institute*<sup>154</sup>—the Court cited *Edgar* in invalidating two “price affirmation” statutes requiring liquor sellers, prior to doing business in the state (New York and Connecticut, respectively), to file a schedule of prices and affirm that they were not offering lower prices elsewhere.<sup>155</sup> In both cases, the Court focused on the extraterritorial effects of the statute. In *Brown-Forman*, the Court reasoned: “Once a distiller has posted prices in New York, it is not free to change its prices elsewhere in the United States during the relevant month. Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce.”<sup>156</sup> Likewise, in *Healy*, the Court disregarded small differences between the Connecticut statute and the one at issue in *Brown-Forman*<sup>157</sup> to conclude that the statute “has the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State.”<sup>158</sup>

In *Healy*, the Court (in dicta) also articulated perhaps its most far-reaching set of restrictions on legislation affecting out-of-state behavior. In attempting to summarize existing extraterritoriality/dormant Commerce Clause jurisprudence, the Court suggested that legislation might be unconstitutionally extraterritorial if it applies “to commerce

152 *Id.* at 88; see also Regan, *supra* note 10, at 1869 (criticizing the *CTS* Court’s treatment of extraterritoriality as a Commerce Clause issue).

153 476 U.S. 573 (1986).

154 491 U.S. 324 (1989).

155 In *Brown-Forman*, the price affirmation law included all liquor sellers and covered the entire United States. 476 U.S. at 576. In *Healy*, it was limited to beer sellers and bordering states. 491 U.S. at 326–27. Further, after an earlier version was struck down, the Connecticut legislature amended the law to permit sellers to change their out-of-state prices after posting the affirmation. See *id.* at 328–29. A related statute, however, prohibited shippers from selling beer in Connecticut at higher prices in any given month than were offered in bordering states. See *id.*

156 *Brown-Forman*, 476 U.S. at 582 (footnote omitted).

157 See *supra* note 155 (describing differences). The Court found the *Healy* statute “essentially indistinguishable” from the one at issue in *Brown-Forman*. *Healy*, 491 U.S. at 339.

158 *Healy*, 491 U.S. at 337.

that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State,"<sup>159</sup> if its "practical effect . . . is to control conduct beyond the boundaries of the State,"<sup>160</sup> or if it would create a problem with "inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."<sup>161</sup>

The Court set forth two bases for these restrictions. First, in suggesting that the statute at issue "has the practical effect of controlling Massachusetts prices," the Court suggested that there was something improper about extraterritorial regulation per se—in other words, with any attempt by a state to control out-of-state conduct, regardless of the state's intent or the effects of such conduct within the state.<sup>162</sup> Second, the Court echoed the concern raised in *CTS* about haphazard and inconsistent regulation, noting that the "effect of this affirmation law, in conjunction with the many other beer-pricing and affirmation laws that have been or might be enacted throughout the country, is to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude."<sup>163</sup>

These two concerns articulated by the Court in *Healy* are sometimes thought to embody two separate sets of potential restrictions on state legislation—one prohibiting extraterritorial regulation per se (the restriction on regulation of commerce "wholly outside of the State's borders") and one prohibiting state regulation when it is likely to create a patchwork of inconsistent regulations.<sup>164</sup> The first of these principles appears straightforward enough—it is presumably fairly easy, at least as a theoretical matter, to determine whether a particular form of commerce is occurring in state or out of state. But the exact scope of this principle is unclear. As we have seen, the imposition of tort liability in a given state—especially under traditionally territorial choice-of-law rules—may have the effect of implicitly creating a standard of conduct for wholly out-of-state behavior, but the *Edgar* line of

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159 *Id.* at 336 (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (plurality opinion)).

160 *Id.*

161 *Id.* at 337.

162 *Id.* at 338.

163 *Id.* at 337.

164 See Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 *YALE L.J.* 785, 806 (2001). Note that the concern here is not that defendants may be subjected to directly conflicting obligations (for example, being required to perform an act in one jurisdiction that is illegal in another) but that enterprises that operate nationally may find it burdensome to comply with a variety of local regulations. See *id.* at 806–07.

cases—while not explicitly limiting their holdings to legislation<sup>165</sup>—gives no sign that the Court foresaw or intended a sweeping invalidation of such rules. Nonetheless, state courts have sometimes differentiated between statutory and common law (or, in some cases, between regulatory prohibitions and tort liability) in their extraterritoriality analysis.<sup>166</sup>

The second principle—the apparent prohibition on inconsistent regulation—is potentially even more problematic. It is obviously inherent in the nature of a federalist system that some differences—even substantial differences—exist in the way particular states regulate the same activity. While suggesting that a high degree of inconsistency, particularly one that appreciably burdens firms that operate in many states, raises constitutional problems, the Supreme Court has not been particularly clear about what degree of inconsistency is required.<sup>167</sup> Further, the Court has left ambiguous the relationship between concerns about inconsistent regulation and extraterritoriality more generally. The inconsistent regulations test, on its face, embodies concerns about “undermin[ing] a compelling need for national uniformity in regulation”—concerns that seem more about vertical federalism vis-à-vis the federal government than issues of the balance

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165 Cf. Harold W. Horowitz, *The Commerce Clause as a Limitation on State Choice-of-Law Doctrine*, 84 HARV. L. REV. 806, 813–21 (1971) (arguing—before the Court’s decision in *Edgar*—that the Commerce Clause should apply to states’ choice-of-law decisions).

166 In *City of Boston v. Smith & Wesson Corp.*, 12 Mass. L. Rptr. 225 (Super. Ct. 2000), the court noted that established case law dealing with the extraterritoriality prong of the Commerce Clause “focus[es] on positive law—statutes or regulations,” *id.* at 233, and that this line of cases’ applicability to common law tort and contract causes of action was “unsettled,” *id.* As a result, the court refused to grant a motion to dismiss for failure to state a claim of nuisance, negligence, failure to warn, and other common law actions against gun manufacturers. *Id.* at 234–37. While suggesting that *BMW of North America, Inc. v. Gore* might possibly establish an extraterritoriality principle relevant to state common law claims, the court regarded this principle as relevant primarily to the remedy imposed, not to the failure to state a claim in the first instance. See *City of Boston*, 12 Mass. L. Rptr. at 233–34. In *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146 (Ct. App. 1999), *rev’d on other grounds*, 28 P.3d 116 (Cal. 2001), a California appellate court rejected an argument that the imposition of a common law duty of care on gun manufacturers would constitute extraterritorial regulation. *Id.* at 178 & n.21. The court reasoned that the plaintiffs were seeking only damages for past conduct, not an injunction for future conduct; further, the court distinguished tort liability from the “state regulatory or penal statutes” at issue in cases like *Edgar*. *Id.* at 178–79 & n.21. Notably, the relevant distinction for the *Merrill* court was between regulatory law and tort law, not statutory law and common law. *Id.*

167 See Goldsmith & Sykes, *supra* note 164, at 789 (describing the inconsistent regulations prong as “unsettled and poorly understood”).

of power among states.<sup>168</sup> Yet, as Donald Regan has noted, the problem of inconsistent regulations is inextricably linked with that of extra-territoriality, since “if every legally regulable event or state-of-affairs could be unambiguously assigned to a unique territorial jurisdiction, then a prohibition on extraterritorial legislation would make inconsistent regulations . . . impossible.”<sup>169</sup> In other words, regulatory inconsistency across borders makes regulation of out-of-state events more problematic; analyses of these two issues are thus difficult to separate.<sup>170</sup>

In part because the *Edgar* line of cases represents a shift in focus from ordinary dormant Commerce Clause jurisprudence, some scholars have argued that they should be properly understood as rooted not specifically in the Commerce Clause but in broader structural notions of federalism implicit in the Constitution, or perhaps in the very notion of what state power might mean.<sup>171</sup> Donald Regan has argued that the Commerce Clause provides an inadequate basis for understanding the extraterritoriality principle because some state regulation that we would clearly condemn as extraterritorial has nothing to do with commerce.<sup>172</sup> Writing in the *Bowers v. Hardwick*<sup>173</sup> era, Regan gives the example of homosexual conduct that is legal in some states but not others; assuming Georgia prohibits such conduct, Georgia cannot punish an Illinois citizen who happens to be traveling through the state for a prior homosexual act that took place within his home state of Illinois.<sup>174</sup> Thus, Regan argues, the principle is rooted not in a specific constitutional provision but in a “structural inference from our system as a whole.”<sup>175</sup> The Supreme Court has provided

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168 *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12 (1997).

169 Regan, *supra* note 10, at 1875 (“[O]ne way to attack inconsistency is by a prohibition on extraterritoriality, and one reason to prohibit extraterritoriality is to avoid inconsistency.”).

170 Interestingly, issues of the interplay between individual state interests and national effects may arise in the choice-of-law context as well. Some scholars have, for example, made an interesting argument that choice-of-law rules—whether based on law of the place of injury or interest analysis—provide an incentive for states to pass pro-plaintiff legislation, since to do so means their residents will be able to recover in state court, while the costs of compliance with more stringent standards are borne by out-of-state manufacturers. See Bruce L. Hay, *Conflicts of Law and State Competition in the Product Liability System*, 80 GEO. L.J. 617, 618–19 (1992).

171 See Regan, *supra* note 10, at 1885 (arguing that the extraterritoriality principle is one of the “foundational principles of our federalism which we infer from the structure of the Constitution as a whole”).

172 See *id.* at 1888.

173 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

174 See Regan, *supra* note 10, at 1888.

175 *Id.* at 1895.

some grounds for such speculation by citing *Edgar* and *Healy* as support for a more general prohibition on state regulatory activity that fails to “respect the interests of other States.”<sup>176</sup> Therefore, it is arguable that the *Edgar* line of cases does more than simply provide a supplement to the *Hague* standard where commercial regulation is at stake; instead, it articulates a competing vision of extraterritoriality.

#### b. State Borders and the Nature of the *Edgar* Standard

The extraterritoriality prohibition articulated in *Edgar* and *Healy* is so sweeping that most commentators have assumed that these cases cannot mean what they appear to say.<sup>177</sup> As Gillian Metzger has noted, “[i]n practice, states exert regulatory control over each other all the time.”<sup>178</sup> The corporate law of Delaware, for example, has “de facto nationwide application due to the number of major companies incorporated there.”<sup>179</sup> Some scholars have thus attempted to make sense of *Edgar*, *Brown-Forman*, and *Healy* by proposing a narrower, more plausible reading of the principles for which these cases stand. Jack Goldsmith and Alan Sykes argue that these cases are best understood as reflecting a principle of proportionality, as articulating the view that states “may not impose burdens on out-of-state actors that outweigh the in-state benefits.”<sup>180</sup> Donald Regan argues, somewhat more elaborately, that while prospective price affirmation laws like those at issue in *Brown-Forman* raise extraterritoriality issues, retroactive laws are of concern only if they have a protectionist motive.<sup>181</sup>

Even taking such a narrowed view, however, the *Edgar* line of cases presents a strikingly different set of concerns about extraterritoriality than those that courts generally consider in either the domestic

176 *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996).

177 See, e.g., Goldsmith & Sykes, *supra* note 164, at 806 (suggesting that the Court’s “overbroad extraterritoriality dicta” can be ignored).

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

179 *Id.*

180 Goldsmith & Sykes, *supra* note 164, at 804.

181 See Regan, *supra* note 10, at 1903–05. A prospective affirmation law requires a seller to affirm in advance that he will not sell the product out-of-state for a price lower than that reflected on the filed in-state schedule. *Id.* at 1903. A retrospective affirmation law simply requires the seller to affirm that she has not, during a previous month, charged less in another state than she intends to charge in-state. *Id.* at 1905. Regan was writing before the *Healy* decision, in which the Court announced that retrospective price affirmation statutes were also unconstitutionally extraterritorial. See *Healy v. Beer Inst.*, 491 U.S. 324, 342–43 (1989). The statute at issue in *Healy* itself was “neither prospective nor retrospective, but rather ‘contemporaneous.’” *Id.* at 335.

choice-of-law context or in the international notions of legislative jurisdiction. The *Edgar* cases, for example, are unconcerned with the number or nature of contacts between the legislating state and the targeted out-of-state activity, and they do not ask whether the out-of-state activity being regulated causes harm within the state. Indeed, *Edgar* announces that the Commerce Clause “precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.”<sup>182</sup>

As a result, these cases are in some tension with the ideas of territorial state power that undergird conflicts theory. As the previous section has discussed, all choice-of-law theories provide some basis for the application of state law to commerce “wholly outside of the state’s borders.”<sup>183</sup> Indeed, because early, “territorial” choice-of-law theories favored the law of the jurisdiction where the last event creating a cause of action had occurred—regardless of the location of relevant conduct—they almost inevitably resulted in the application of state law to extraterritorial conduct that had little connection to the forum. Interest analysis and other modern theories, while resting less on formalism, also frequently find that application of forum law is appropriate when the forum has an interest in the dispute, as when the welfare of one of its domiciliaries is at stake.

Thus, the choice-of-law and the legislative extraterritoriality cases appear to be motivated by somewhat different concerns. The legislative extraterritoriality cases appear to be rooted in a belief—whether grounded in the Commerce Clause or in larger principles of federalism—that states should be limited in the extent to which they can exert disproportionate influence over activities that fall within the proper regulatory province of other states. Such cases further call attention to the practical dangers of permitting competing states to exert control over the same activities. This concern finds expression most clearly in the line of cases dealing with inconsistent regulations. But it also—as Regan has argued—forms a part of the more straightforward prohibition on extraterritoriality, since delineating a proper scope of concern for state regulation avoids inconsistency and conflict among multiple jurisdictions.<sup>184</sup>

By contrast, the Court’s choice-of-law cases explicitly accept that more than one state can apply its law to a given cause of action—despite the fact that, when states apply their own law to events occur-

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182 *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (plurality opinion).

183 See discussion *supra* Part I.B.1.

184 See Regan, *supra* note 10, at 1875.

ring out of state, they are clearly exercising control over conduct that another jurisdiction at least arguably has a concurrent right to regulate. This is particularly true given that states vary in the choice-of-law regimes they apply; thus, a given transaction may potentially be governed by the laws of a number of different states depending on the courts that ultimately hear it. Some choice-of-law theories—particularly those based on first Restatement/vested rights models—do place weight in a different sense on principles of predictability and interstate harmony.<sup>185</sup> Under the vested rights view, for example, it was clear that if a tort victim was injured in New York then only New York would have the right to apply its law, theoretically eliminating the possibility of friction with other states over whose law should govern.<sup>186</sup> Further, even today, the modest constitutional limits imposed by the Supreme Court have sought to foster predictability in the sense that parties should not be unfairly surprised by the law that is applied to their disputes.<sup>187</sup> To say that state law may be applied only when its application is somewhat foreseeable, however, is very different from saying that states may not regulate conduct at all outside their borders. The first principle is primarily about predictability and fairness; the second, though it may have the side effect of fostering predictability, is primarily about extraterritoriality *per se*.

*Edgar*, *Brown-Forman*, and *Healy* thus all embody a “pure” strain of territorial concern that sees state authority as primarily existing within state borders. This concern finds little expression in cases that deal with state choice of law, and the two lines of cases are thus in many respects hard to reconcile.

## II. INFLUENCE AND OVERLAP

Because of the various ambiguities and inconsistencies of Supreme Court doctrine, it may be useful to try to simply construct a descriptive account of what the Supreme Court has said about the extraterritoriality problem in choice of law and legislation. That account might go as follows: Minimal constraints exist on a state court’s decision to apply forum law to a particular case and a particular individual.<sup>188</sup> Whatever limits exist are, like personal jurisdiction limits, grounded in the Due Process Clause (and, nominally, the Full Faith and Credit Clause as well). Further, the test for assessing the propriety of choice-of-law decisions outside the class action context is

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185 See, e.g., *Paul v. Nat’l Life*, 352 S.E.2d 550, 555–56 (W. Va. 1986).

186 See *id.* at 556 n.14; *supra* notes 52–58 and accompanying text.

187 See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985).

188 See discussion *supra* Part I.B.1.

similar to that for establishing the existence of personal jurisdiction under the “minimum contacts” test—perhaps appropriately so, because both tests center on the issue of fairness to individual plaintiffs, not broader structural concerns.

By contrast, limits on the extraterritorial reach of state legislation are somewhat more stringent, if also more ambiguous.<sup>189</sup> The extraterritoriality principle purportedly derives from the dormant Commerce Clause and certainly applies at a minimum to invalidate some commercial legislation that purports to regulate out-of-state conduct. But it is perhaps best understood as a means of establishing order—and confining each state to its proper sphere of authority—in a federalist system. It is also worth noting that, in formal terms, an attack on the grounds discussed in *Edgar* manifests itself as an objection to the validity of a statute itself—and not merely to a court’s decision to apply the statute in the particular circumstances of a given case.

From the account I have provided thus far, this description—even if perhaps less than satisfying—is roughly accurate. It nonetheless, however, provides a notably incomplete picture. In numerous situations, courts have to some extent conflated these two principles—by relying on one line of cases in support of the other, by suggesting that both are manifestations of a single extraterritoriality principle, or by blurring the due process rationale of *Hague* with the structural federalism rationales of *Edgar* and *Healy*. Despite the apparent separation of the two lines of cases, this conflation is also logical in some ways, given the fact that the kind of state power that has triggered concerns in the *Edgar* line of cases may also be exercised when state courts apply state law. Notably, this blended approach is also more in keeping with international law notions of legislative jurisdiction, which generally do not distinguish between the application of forum law by a nation’s courts and attempts by its legislature to prescribe standards applicable to conduct outside its borders.<sup>190</sup>

This Part thus considers four of the instances of conflation of such extraterritoriality concerns: the Supreme Court’s recent imposition of due process restrictions on punitive damages; concerns about

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189 See discussion *supra* Part I.B.2.

190 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401(a) (1986) (stating that the “jurisdiction to prescribe” is the state’s power “to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court”). Of course, there are also many reasons for distinguishing interstate notions of extraterritoriality from international ones; for example, any restrictions the dormant Commerce Clause imposes are unique to the interstate context.

extraterritoriality in Internet regulation; questions about whether state courts have the power to issue nationwide injunctions based on state law; and the controversy over permitting parties more scope to select the law to be applied to their contracts.

### A. *The Punitive Damages Cases*

The Supreme Court's recent reexaminations of states' power to impose punitive damages—*BMW of North America, Inc. v. Gore* and *State Farm Mutual Automobile Insurance Co. v. Campbell*—represent one of the more puzzling manifestations of the choice-of-law/extraterritoriality difficulty. These cases both hold that state courts are limited in their ability to impose punitive damages for out-of-state conduct, particularly conduct that was lawful where it occurred.<sup>191</sup> In reaching these conclusions, the Court has combined analysis apparently rooted in the Due Process Clause with a nod to much broader extraterritoriality concerns.

In *Gore*, the Court set aside a jury's award of \$2 million in punitive damages against BMW, leveled because of BMW's companywide policy of failing to disclose that its cars had been subject to minor repairs.<sup>192</sup> BMW argued that this award was unfair in part because its policy had never been found unlawful in any jurisdiction at the time the action was filed.<sup>193</sup> *Gore's* most important holding was that punitive damages would be subject to a proportionality analysis under the Due Process Clause under which they would be appropriate only to the extent to which (1) the defendant's conduct was reprehensible, (2) the award of punitive damages bore a "reasonable relationship" to compensatory damages, and (3) similar civil and criminal penalties existed for comparable misconduct.<sup>194</sup> Before announcing this three-part test, however, the Court indicated that its consideration of the "legitimate interests" punitive damages would be permitted to serve was in part also grounded in concerns about extraterritoriality.<sup>195</sup> As the Court found, it "follows from . . . principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws

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191 See *infra* notes 195–98, 203–06 and accompanying text.

192 *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562–63, 585–86 (1996). The jury's original award of \$4 million had been reduced by the Alabama Supreme Court. *Id.* at 567.

193 *Id.* at 565. Shortly thereafter, another Alabama jury also found BMW's nondisclosure of repainting to be fraudulent. *Id.*

194 See *id.* at 574–85.

195 See *id.* at 568–71 (“[W]hile we do not doubt that Congress has ample authority to enact such a policy for the entire Nation, it is clear that no single State could do so, or even impose its own policy choice on neighboring States.” (footnote omitted)).

with the intent of changing the tortfeasors' lawful conduct in other States."<sup>196</sup> Specifically, Alabama could not "punish . . . conduct that was lawful where it occurred and that had no impact on Alabama or its residents."<sup>197</sup> The Court cited the Commerce Clause and the "need to respect the interests of other States" in support of this conclusion.<sup>198</sup>

While extraterritoriality was not an explicit part of the test the Court announced under the Due Process Clause, the Court made clear that concepts of the limits of state power were, to some extent, intertwined with the three-part analysis. The Court suggested, for example, that the defendant's nondisclosure policy was less reprehensible because it appeared to be legal in the jurisdictions in which it occurred.<sup>199</sup> Further, in discussing the appropriate purposes of punitive damages, the Court opined that "[w]hile each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation."<sup>200</sup> The Court thus suggested that structural federalism concerns—as well as considerations of individual fairness—should play some role in applying the three-part test.

In making this suggestion, the *Gore* Court further conflated statutory and common law in a way it had not done in either the *Hague* or *Edgar* cases. In the course of announcing restrictions on states' ability to punish lawful out-of-state conduct, the Court observed that "[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute."<sup>201</sup> This statement calls into question the notion that the *Edgar* line of cases applied specifically or exclusively to legislation, and certainly suggests that limits on state court power must go beyond the minimal constraints of *Hague*. The Court's statement that courts may not impose sanctions with "the *intent of changing* the tortfeasors' lawful conduct in other States"<sup>202</sup> is also striking in this regard, because it suggests that damages, especially punitive damages, have regulatory purposes—that is, that they are designed to shape future conduct as well as to punish past conduct.

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196 *Id.* at 572.

197 *Id.* at 573.

198 *Id.* at 571.

199 *See id.* at 578 ("[T]he record contains no evidence that BMW's decision to follow a disclosure policy that coincided with the strictest extant state statute was sufficiently reprehensible to justify a \$2 million award of punitive damages.").

200 *Id.* at 585.

201 *Id.* at 572 n.17.

202 *Id.* at 572 (emphasis added).

In the follow-up case to *Gore*, *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Supreme Court struck down another award of punitive damages—this time against an insurer who had refused in bad faith to settle a claim against its insured.<sup>203</sup> Again, the Court applied *Gore*'s three-part test<sup>204</sup> while also making reference to notions of extraterritoriality.<sup>205</sup> In particular, the Court found that the Utah courts had erred in considering “the perceived deficiencies of State Farm’s operations throughout the country”—in other words, its allegedly similar practices in other states—in determining the degree to which its conduct was reprehensible.<sup>206</sup>

Strikingly, the Court in *Campbell* phrased the prohibition on extraterritoriality explicitly in terms of choice-of-law requirements. After finding that Utah lacked a “legitimate concern” in imposing punitive damages for out-of-state conduct, the Court went on to observe, citing *Shutts*, that “[a]ny proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction.”<sup>207</sup> In other words, the Court suggested, any judicial pronouncement—even by Utah courts—on non-Utah conduct required the consideration of non-Utah law.<sup>208</sup>

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203 *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419–20 (2003).

204 *See id.* at 418.

205 *See id.* at 421.

206 *Id.* at 420.

207 *Id.* at 421–22 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821–22 (1985)).

208 This line of reasoning can perhaps be explained, in part, by the Court’s increasing tendency to analogize punitive damages to criminal sanctions. As the Court explained in *Campbell*, punitive damages “serve the same purposes as criminal penalties” but lack the protections of criminal trials, thus making it particularly important that they not be administered in an “imprecise” or “arbitrary” manner. *Id.* at 417. Thus, perhaps, in the Court’s view, it is necessary for punitive damages to conform somewhat more to the stricter limits of criminal law. *See* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 *YALE L.J.* 347, 431 (2003) (noting that the core of the Court’s concern appears to be procedural protections). As Wayne Logan points out, however, principles of criminal punishment are in fact somewhat broader than the Court suggested in *Campbell*, both permitting punishment for extraterritorial acts designed to produce in-state effects and allowing consideration of prior extraterritorial bad acts. *See* Wayne A. Logan, *Civil and Criminal Recidivists: Extraterritoriality in Tort and Crime*, 73 *U. CIN. L. REV.* 1609, 1629–31 (2005) (describing modern criminal law’s trend of considering extraterritorial acts).

Various commentators have noted that *Campbell* appears to announce a new choice-of-law limitation,<sup>209</sup> though it does so in a particularly ambiguous and perhaps somewhat incoherent way. As one scholar has noted, the *Campbell* Court appears to have conflated the determination of liability in the first instance with the analysis of reprehensibility in awarding punitive damages, thus “elid[ing] the subtle distinction drawn in *Gore* between ‘punishing’ extraterritorial misconduct (impermissible) and using it as an evidentiary basis to gauge reprehensibility in assessing damages (permissible).”<sup>210</sup> Further, the Court has created an apparent discrepancy between awards of punitive damages and awards of compensatory damages in, for example, class actions, which continued to be governed by the rather modest limits of *Shutts*.<sup>211</sup>

*Gore* and *Campbell* thus suggest that the Supreme Court may be interested in synthesizing the *Hague* and *Edgar* lines of cases—or even in articulating yet a third set of concerns about extraterritoriality. Indeed, one of the striking features of the extraterritoriality analysis in these two cases is that it sounds themes not found in either choice-of-law or dormant Commerce Clause doctrine. *Gore*, for example, speaks of Alabama’s lack of power to punish conduct “that had no impact on Alabama or its residents”—suggesting, as *Hague* and *Edgar* do not, that a key feature of the states’ power to regulate conduct may be the extent to which such conduct has in-state effects.<sup>212</sup> *Gore* is also at odds with the Court’s various assertions in choice-of-law cases that conduct may properly be governed by the law of more than one jurisdiction. Instead, the *Gore* Court indicates, conduct is either “lawful” or “unlawful” where it occurred<sup>213</sup>—suggesting, in other words, the

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209 See Logan, *supra* note 208, at 1628 (“To the *State Farm* majority, the consideration of extraterritorial misconduct amounted to a choice of law question.”); Sharkey, *supra* note 208, at 431 (commenting on Court’s apparent choice-of-law framework).

210 Logan, *supra* note 208, at 1628. In a more recent pronouncement on the Due Process Clause and punitive damages, the Court clarified this issue somewhat, noting that the Due Process Clause does not “permit[] a jury to base that award in part upon its desire to *punish* the defendant for harming persons who are not before the court (*e.g.*, victims whom the parties do not represent),” Phillip Morris USA v. Williams, 127 S. Ct. 1057, 1060 (2007), but that conduct to nonparties can be relevant to establish reprehensibility. *Id.* at 1065.

211 See Logan, *supra* note 208, at 1628–29; Sharkey, *supra* note 208, at 429–32.

212 BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 573 (1996); see also *id.* at 574 (noting that the punitive damages award must be based on “interests of Alabama consumers, rather than those of the entire Nation”). For a more complete discussion of legislative jurisdiction based on effects, see *infra* Part III.C.

213 See *Gore*, 517 U.S. at 573.

jurisdiction where the conduct physically took place has the power to determine in the first instance whether it is proper or not.

A number of litigants have seized on these inconsistencies and ambiguities to test the outer limits of the extraterritoriality doctrine. For example, in *District of Columbia v. Beretta, U.S.A., Corp.*,<sup>214</sup> plaintiffs sued gun manufacturers under a provision of the D.C. Code establishing strict liability for manufacturers of machine guns or assault weapons “for all direct and consequential damages that arise from bodily injury or death . . . result[ing] from the discharge of the assault weapon or machine gun in the District of Columbia.”<sup>215</sup> The defendants challenged this statute on both due process and Commerce Clause grounds, arguing that the imposition of strict liability for lawful out-of-state manufacture of firearms both “impermissibly burdens the lawful interstate commerce of firearms and ‘arbitrarily’ attempts to impose a regulatory scheme beyond the boundaries of the jurisdiction enacting it.”<sup>216</sup> The court rejected the Commerce Clause–based extraterritoriality challenge on the grounds that, unlike the regulations at issue in cases like *Brown-Forman*, the strict liability statute was not a direct attempt to affect out-of-state pricing of firearms, even if it might “conceivably affect the defendants’ pricing or insurance decisions.”<sup>217</sup>

The defendants’ more innovative—and troubling—argument, based on *Gore* and *Campbell*, was that the strict liability statute constituted an “attempt by the District to impose its own policy choices as to gun regulation on other states where the manufacture of machine guns is lawful, thereby violating due process.”<sup>218</sup> The court dismissed this argument as well, but its brief, conclusory reasoning is less than fully satisfying. First, the court said, punitive damages and compensation are different: “One looks in vain in either *Gore* or *State Farm* for a suggestion that a state may not permissibly decide that certain products . . . are so dangerous that their manufacturers should face strict liability . . . for injuries the products contribute to within the State.”<sup>219</sup> Second, according to the court, the Supreme Court in the punitive damages cases acknowledged that “[l]awful out-of-state conduct may be probative’ if it has ‘a nexus to the specific harm suffered by the plain-

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214 872 A.2d 633 (D.C. 2005).

215 D.C. CODE ANN. § 7-2551.02 (LexisNexis 2008).

216 *Beretta*, 872 A.2d at 655.

217 *Id.* at 657. The court also rejected a more conventional Commerce Clause argument based on *Pike v. Bruce Church, Inc.* *Beretta*, 872 A.2d at 657–58.

218 *Beretta*, 872 A.2d at 659.

219 *Id.* (emphasis added).

tiff.’”<sup>220</sup> Thus, because the District was only attempting to punish conduct that had an impact within its borders, the statute did not raise due process concerns.<sup>221</sup>

On the one hand, the court’s conclusion is amply supported by the *Hague* formulation and by doctrine and tradition in both the interstate and international contexts. It is widely accepted as a matter of international law that a jurisdiction may regulate conduct causing harmful effects within its territory;<sup>222</sup> further, a nexus between such conduct and harm within the jurisdiction would seem to easily satisfy the “contacts” requirement of *Hague*. On the other hand, the D.C. Court of Appeals’ attempt to narrowly cabin the significance of *Gore* and *Campbell* is not necessarily consistent with the Supreme Court’s actual reasoning in those cases. While it is true that the Court in those cases gave no indication that their holdings might apply outside the punitive damages context, it is hard to see what the basis for such a limitation might be. In general, the power of states to impose criminal sanctions on extraterritorial conduct is probably no narrower—it may, if anything, be broader—than their power to make such conduct the basis for civil compensatory damages in their courts.<sup>223</sup> Further, although the Supreme Court has sought to distinguish punitive and compensatory damages, some of its distinctions may be difficult to maintain. In *Campbell*, for example, the Court reasoned that compensatory damages are intended only to “redress the concrete loss that

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220 *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003) (alteration in original)).

221 *Id.*

222 *See, e.g.*, *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 922 (D.C. Cir. 1984) (“It has long been settled law that a country can regulate conduct occurring outside its territory which causes harmful results within its territory.”). Causing harm within the jurisdiction is also an established basis for permitting state criminal prosecution of extraterritorial conduct. *See, e.g.*, *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (“Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.”); Bradford, *supra* note 47, at 98–99 (considering the assertion that a state has jurisdiction to regulate abortion under “protective theory” because fetuses “reside[]” within the prosecuting state and injury to them has effects in the state (internal quotation marks omitted)).

223 In many scholars’ view, for example, states clearly have the power to punish criminally acts of state citizens performed in a different state. *See* Fallon, *supra* note 23, at 627–32 & n.82 (discussing the possibility of enforcing state abortion laws against citizens of other states and concluding that the question would be “difficult” for the Supreme Court); *see also* Bradford, *supra* note 47, at 127–36 (considering the same question and finding that recent Supreme Court cases potentially support extraterritorial extension of state criminal law).

the plaintiff has suffered,'” not deter future violations.<sup>224</sup> Yet many commentators have argued that compensatory damages serve the function of deterrence as well as compensation,<sup>225</sup> and the Court’s indications that a state may not attempt to “deter conduct that is lawful in other jurisdictions”<sup>226</sup> may thus have relevance for compensatory awards as well.

It seems clear from the *Beretta* litigation—and other cases in which litigants have raised *Gore* issues in cases involving nonpunitive remedies<sup>227</sup>—that, at the very least, *Gore* and *Campbell* leave ambiguous the degree to which courts awarding damages based on out-of-state conduct should be guided by concerns about territorial limits on state power. But simply by indicating that concerns about extraterritoriality do not end when state power is being exercised by a court awarding damages, the punitive damages cases suggest that the *Hague* framework is inadequate to understand the sort of issues that are at stake when state courts assess damages for out-of-forum conduct.

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224 *Campbell*, 538 U.S. at 416 (quoting *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001)).

225 See, e.g., F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: “Morals Without Technique”?*, 60 FLA. L. REV. 349, 375 (2008) (“[J]udicial enforcement of private rights through compensatory damages awards in the tort system has become an important part of deterring wrongful conduct . . .”).

226 *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 (1996).

227 In a more nuanced discussion in *Yu v. Signet Bank/Virginia*, 82 Cal. Rptr. 2d 304 (Ct. App. 1999), a California court attempted to apply the *Gore* due process standard to causes of action involving only compensatory damages. The Yus, California residents, brought a class action against their Virginia-based credit card issuers and stated claims for so-called “distant forum abuse” based on the defendants’ practices of seeking default judgments for unpaid debts in Virginia state court in a manner inconsistent with California debt-collection and consumer-protection statutes. *Id.* at 308. The defendants argued that to permit the plaintiffs’ claims for abuse of process and unfair business practices would constitute extraterritorial regulation of practices allegedly legal in Virginia. *Id.* at 313. Relying on *Gore*, the court held that California could, consistent with the Due Process Clause, prohibit consumer practices that affected California residents. *Id.* at 314. The court read *Gore* as permitting states to “punish the conduct of an out-of-state defendant if it has an impact on them regardless of whether the conduct might be lawful elsewhere.” *Id.* However, the court found, to permit plaintiffs to state a cause of action based on violation of statutes establishing procedures for debt collection in California (which specified, among other provisions, a California venue in which such actions must be filed) would be to give such statutes impermissible extraterritorial effect. *Id.* at 316–17. The court suggested, for example, that if (contrary to the actual facts of the case) the Yus “had traveled every month to Virginia and maintained a bank account there” it would be improper for California to require that proceedings against them be filed in California alone. *Id.* at 317.

B. *The Internet and Extraterritoriality Concerns*

Situations in which state law may have nationwide effect have also arisen frequently in the Internet context. The early days of the Internet sparked widespread discussion about what it would mean for traditional territorial notions of law and power. David Johnson and David Post, for example, famously argued that “[c]yberspace radically undermines the relationship between legally significant (online) phenomena and physical location” by enabling communication without regard to geography and without any of the usual physical “cues” that make location significant.<sup>228</sup> Thus, many scholars worried, for example, that the Internet might require revision of the minimum contacts standard for personal jurisdiction because of the potentially far-flung and unforeseeable geographical effects of posting information on the Web.<sup>229</sup> Further, many believed the Internet raised serious extraterritoriality problems under the dormant Commerce Clause because the wide geographical reach of Internet activity was likely to subject Internet users to overbroad or inconsistent state regulation.<sup>230</sup>

In early cases involving Internet regulation, courts announced a number of concerns about the potentially nationwide implications of state regulation. In *American Libraries Ass’n v. Pataki*<sup>231</sup> (ALA), a federal district court found invalid under the Commerce Clause a New York statute making it a crime to knowingly send sexual or pornographic material to a minor using computer-to-computer transmission.<sup>232</sup> The court cited both *Edgar* and *Gore* in support of the

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228 David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370–71 (1996). Johnson and Post thought that these attributes of the Internet would pose problems for substantive law incorporating notions of geographical boundaries, such as trademark law, which relies on the notion that a particular mark has meaning within a bounded geographical area. See *id.* at 1376–77.

229 See, e.g., Robert W. Hamilton & Gregory A. Castanias, *Tangled Web: Personal Jurisdiction and the Internet*, LITIGATION, Winter 1998, at 27, 27 (“When it comes to issues of personal jurisdiction, the law doesn’t seem to know quite what to make of the Web.”); Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 2–3 (1996) (arguing that the Internet will require new theories of personal jurisdiction).

230 See, e.g., Spencer Kass, *Regulation and the Internet*, 26 S.U. L. REV. 93, 104–05 (1998) (finding that, because “[t]he Internet primarily encompasses fields which are traditionally national in origin,” it was likely to raise dormant Commerce Clause issues); James E. Gaylord, Note, *State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie*, 52 VAND. L. REV. 1095, 1096 (1999) (noting that many believe that “the information superhighway is a dangerous new means for states to export their legislative products to other jurisdictions”).

231 969 F. Supp. 160 (S.D.N.Y. 1997).

232 See *id.* at 163–64 (describing N.Y. PENAL LAW §§ 235.15(1), 235.20(6), 235.21(3), 235.23(3), 235.24 (McKinney 1989 & Supp. 1999)).

proposition that the Commerce Clause “embodies a principle of comity that mandates that one state not expand its regulatory powers in a manner that encroaches upon the sovereignty of its fellow states”—a “horizontal limitation,” in addition to the “vertical limitation” vis-à-vis federal authority that the Commerce Clause places on state power.<sup>233</sup> Seen in this light, the statute represented New York’s improper attempt to “deliberately impose[] its legislation on the Internet and, by doing so, project[] its law into other states.”<sup>234</sup>

In reaching this conclusion, the court went so far as to suggest that state regulation of the Internet was inherently inappropriate. As the court observed, “state regulation of those aspects of commerce that by their unique nature demand cohesive national treatment is offensive to the Commerce Clause.”<sup>235</sup> The Internet was one of those areas, the court argued, because “states’ jurisdictional limits are related to geography; geography, however, is a virtually meaningless construct on the Internet.”<sup>236</sup>

While *ALA* was one of the more forceful judicial expressions of concern about possible extraterritorial effects of state regulation of the Internet, other courts relied on *ALA*’s reasoning to invalidate similar state prohibitions on pornographic communications.<sup>237</sup> Other state courts considered related Commerce Clause concerns in striking down state anti-spam laws.<sup>238</sup>

For two reasons, *ALA* and similar cases have complicated extraterritoriality analysis. First, they represent a forceful revival by lower courts of the extraterritoriality concerns of *Edgar* and *Healy*—and, in some ways, an extension of those principles.<sup>239</sup> *ALA*, for example, expanded the potential reach of *Edgar* and *Healy* by explicitly extending their reasoning from core commercial activities (corporate

233 *Id.* at 175–76.

234 *Id.* at 177.

235 *Id.* at 169.

236 *Id.*

237 *See* Goldsmith & Sykes, *supra* note 164, at 792 n.45 (citing cases).

238 *See id.* at 793–94 & nn.57–60; *see also* Jeffrey D. Zentner, Note, *State Regulation of Unsolicited Bulk Commercial E-mail and the Dormant Commerce Clause*, 8 VAND. J. ENT. & TECH. L. 477, 484–87 (2006) (discussing state cases in California and Washington that addressed Commerce Clause claims in relation to anti-spam laws).

239 *See* Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521, 530 (2003) (noting that courts have applied the dormant Commerce Clause “somewhat differently” where the Internet is concerned—that is, they are “more likely to invalidate state regulation of the Internet under the dormant commerce clause because the inherently interstate nature of Internet communications burdens a larger class of people with understanding and complying with a multitude of regulations”).

takeovers, liquor sales) to not-for-profit communications.<sup>240</sup> Second, courts—in *ALA* and otherwise—have relied on arguments that draw from the due process concerns of *Gore* as well as the Commerce Clause reasoning of *Edgar*. Thus, the court in *ALA* suggested, overbroad state regulation had the potential to hamper individual freedom as well as sister state autonomy. Because of the Internet’s “unique nature,” a substantial risk existed “that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed.”<sup>241</sup> Such language echoes not only *Gore* but also personal jurisdiction cases that seek to protect defendants from being haled into court based on “‘random,’” “‘fortuitous,’” or “‘attenuated’” contacts,<sup>242</sup> as opposed to “actions by the defendant *himself* that create a ‘substantial connection’ with the forum State.”<sup>243</sup>

Despite the potentially far-reaching implications of these ideas, the Internet has not brought about the complete revolution in thinking about territoriality that early commentators predicted. In recent years, many courts have upheld statutes prohibiting transmission of pornography to minors, distinguishing them from *ALA* by relying on provisions that, unlike the original New York statute at issue, require an intent to seduce the minor, thus “greatly narrow[ing] the scope of the law and its concomitant effect on interstate commerce.”<sup>244</sup> More broadly, governments and courts have recognized that the Internet is not some autonomous realm free of physical ties; rather, it involves “users, hardware and software, Internet service providers, and financial institutions” who have a physical location and who can be regulated or found liable.<sup>245</sup> Further, technological advances—such as the ability of both Internet providers and governments to block content from being seen in a particular jurisdiction—have also allowed the Internet to be increasingly regulated according to traditional geo-

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240 *ALA*, 969 F. Supp. at 172 (“The non-profit nature of certain entities that use the Internet or of certain transactions that take place over the Internet does not take the Internet outside the Commerce Clause.”).

241 *Id.* at 168–69.

242 See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (quoting first *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984), then *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980)).

243 *Id.* (quoting *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

244 *People v. Garelick*, 74 Cal. Rptr. 3d 815, 825 (Ct. App. 2008) (citing *People v. Hsu*, 99 Cal. Rptr. 2d 184, 190–92 (Ct. App. 2000); *Hatch v. Superior Court*, 94 Cal. Rptr. 2d 453, 472 (Ct. App. 2000)).

245 *Goldsmith & Sykes*, *supra* note 164, at 785–86.

graphical conceptions.<sup>246</sup> Finally, while the dormant Commerce Clause implications of state Internet regulation continue to be debated, the focus of discussion has shifted to some extent from the *Edgar* extraterritoriality principle to the more conventional dormant Commerce Clause issues of protectionism and balancing.<sup>247</sup>

Nonetheless, one can still make two broad generalizations about the Internet: first, it increases the number and variety of situations in which the laws of more than one jurisdiction can potentially come into collision; second, it arguably requires at least some rethinking of traditional geographical cues and markers, thus enabling a range of new arguments about which sovereign's law applies in a given situation.<sup>248</sup> As a result, arguments from *ALA* and similar cases continue to crop up in new areas of law—for example, state prohibitions on Internet gambling.<sup>249</sup> Thus, it is fair to say that the existence of the Internet has re-raised in a new form the sort of questions discussed in *Edgar* and *Healy*, and made the need for a coherent understanding of the limits of state power more acute.

### C. *Nationwide Injunctions Pursuant to State Law and Other Problematic Judicial Remedies*

While some commentators have regarded the Commerce Clause as a limit on judicial as well as legislative activity,<sup>250</sup> the *Edgar* line of cases does not discuss how they might apply to actions by state courts applying state law. Nonetheless, at least a handful of courts have read

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246 See Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. PA. L. REV. 1951, 1953 (2005) (noting that increasingly sophisticated information technology both increases the nexus between Internet users and their home jurisdiction and permits governments to enforce Internet regulations technologically rather than legally).

247 See, e.g., Mark B. Dubnoff, *State Bans on Internet Gambling May Be Unconstitutional*, 12 GAMING L. REV. & ECON. 207, 218 (2008) (analyzing issue of state prohibitions on Internet gaming primarily in terms of traditional *Pike* analysis).

248 One interesting twist, for example, is that many advocates of increased Internet freedom from governmental regulation have married new technology to traditional formalism by relying on highly territorial principles of regulation—arguing, for example, that substantive law is inapplicable if “it is not the law of the place where the Internet activity was launched, such as the place where the server is located.” See Reidenberg, *supra* note 246, at 1956–57.

249 See Dubnoff, *supra* note 247, at 217.

250 See Horowitz, *supra* note 165, at 814 (noting that the logic of dormant Commerce Clause cases applies to the choice-of-law context and urging the adoption of “a general principle for application of the commerce clause in making choice-of-law decisions in cases involving commercial transactions: where more than one state has an interest in having its law prevail, the court should choose the governing law that would best facilitate multistate commercial transactions”).

such cases to prohibit the application of state law by courts to wholly out-of-state conduct. This has been true especially in circumstances where courts are asked to issue nationwide injunctions pursuant to state law that may reach conduct permissible in other states. Even prior to *Gore* and *Campbell*, many courts and commentators articulated doubts under the existing law of extraterritoriality about the propriety of issuing nationwide injunctions under state law or other state-law remedies with “extraterritorial” effects. Thus, in a 1992 article, David Welkowitz addressed the possible problems of extraterritoriality created by the issuance of nationwide state injunctions against the use of trademarks that violated state antidilution protections.<sup>251</sup> At the time of Welkowitz’s article (the enactment of federal antidilution law has since changed the legal landscape), about half the states had antidilution laws,<sup>252</sup> while the other half had no restrictions.<sup>253</sup> As Welkowitz noted, widespread use of nationwide injunctions by the states with antidilution statutes could have the effect of undermining policy choices by the states that had chosen not to enact such statutes.<sup>254</sup> Further, such injunctions could have the effect of permitting a state

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251 See Welkowitz, *supra* note 11, at 3–4; see also Brendan Mahaffey-Dowd, *Famous Trademarks: Ordinary Inquiry by the Courts of Marks Entitled to an Extraordinary Remedy*, 64 BROOK. L. REV. 423, 433 (1998) (noting that the House Report proposing federal antidilution legislation cited the reluctance of state courts to issue nationwide injunctions as a justification for federal action). Note that the passage of the Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (1996) (codified as amended at 15 U.S.C. §§ 1125(c), 1127 (2006)), renders moot the particular issue of disparate state antidilution statutes, though the underlying problem of state courts’ power to issue state law injunctions with nationwide effects (particularly when substantive law differs significantly from state to state) remains the same.

252 In the trademark sense, “‘dilution’ occurs when the marketing value of a well-known trademark is diminished by the use of the mark on other, usually noncompeting, goods. The public identification of the mark with a single source or product is said to lessen as a result of these other uses, even if the public is not deceived or confused about the source of the other goods.” Welkowitz, *supra* note 11, at 3 n.3.

253 See *id.* at 6. At the time, federal trademark law did not include antidilution protections; that has since changed. See *supra* note 251. However, it is still frequently the case that related areas of law, such as laws governing unfair competition, vary substantially from state to state while frequently applying to nationwide activity. See Paul Heald, Comment, *Unfair Competition and Federal Law: Constitutional Restraints on the Scope of State Law*, 54 U. CHI. L. REV. 1411, 1412 (1987). Another issue that has the potential to trigger extraterritoriality concerns is the enforceability of noncompete agreements. For example, in *Application Group, Inc. v. Hunter Group, Inc.*, 72 Cal. Rptr. 2d 73, 76–77 (Ct. App. 1998), a California court refused to enforce a noncompete agreement between a company incorporated and headquartered in Maryland and its Maryland-based employee, notwithstanding the fact that the agreement specified that it would be governed by Maryland law.

254 See Welkowitz, *supra* note 11, at 68–69.

court to exert regulatory control over wholly out-of-state activity—an action that would seem to run directly afoul of the prohibitions in *Edgar*.<sup>255</sup>

Based on these sorts of extraterritoriality concerns, some courts have hesitated to issue injunctions that would have the effect of applying a particular state's policies to nationwide activity. In *Hyatt Corp. v. Hyatt Legal Services*,<sup>256</sup> for example, one federal court refused to issue a nationwide injunction pursuant to a state antidilution statute on the grounds that it would violate the *Edgar* extraterritoriality principle.<sup>257</sup> As the court reasoned, the proposed injunction would “reach way beyond the limits of Illinois, affecting advertising and promotion in areas which have little, if any, effect on the strength of plaintiff's trademark within Illinois.”<sup>258</sup>

Similar concerns have guided courts even outside the antidilution context. In *Ciba-Geigy Corp. v. Bolar Pharmaceutical Co.*,<sup>259</sup> the Third Circuit suggested rather cryptically that an injunction based solely on New Jersey law governing “unprivileged imitation” would, “in accordance with the full faith and credit clause, be valid only in New Jersey.”<sup>260</sup> Similarly, a federal district court in California expressed concern about issuing an injunction under a California unfair business practices statute aimed at changing the corporate policies of a brokerage operating nationally.<sup>261</sup> In affirming (though primarily on different grounds), the Ninth Circuit found that, because the injunction would reach activities such as “the format of . . . monthly statements” that “necessitate[d] decision-making at the national level,” the action “[sought] to directly regulate interstate commerce” and was thus unconstitutional.<sup>262</sup> Finally, a Tennessee court, citing *Hyatt*, found that an order enjoining the defendant, a private security firm, from inducing former employees to breach restrictive covenants, was “overly broad and inappropriate”<sup>263</sup> given that “the level of support

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255 See *id.* at 38–39. Welkowitz himself, however, does not advocate such a broad understanding of the extraterritoriality principle. See *id.* at 38–40.

256 610 F. Supp. 381 (N.D. Ill. 1985).

257 *Id.* at 385.

258 *Id.*

259 747 F.2d 844 (3d Cir. 1984).

260 *Id.* at 854 & n.6.

261 *Shearson Lehman Bros., Inc. v. Greenberg*, Nos. CV-93-0609-R, CV-93-0623-R, 1993 WL 144856, at \*1 (C.D. Cal. Mar. 15, 1993); see also *Rostron*, *supra* note 1, at 141 (discussing *Shearson Lehman Bros., Inc. v. Greenberg*, No. 93-55535, 1995 WL 392028 (9th Cir. July 3, 1995)).

262 *Shearson Lehman Bros.*, 1995 WL 392028, at \*3.

263 *Guardsmark, Inc. v. Borg-Warner Protective Servs.*, No. 2A01-9409-CH-00207, 1998 WL 959664, at \*9–10, 13 (Tenn. Ct. App. Nov. 4, 1998).

for the enforcement of restrictive covenants may differ from state to state.”<sup>264</sup>

These cases, obviously, occur at the margins of extraterritoriality doctrine; only a handful of courts have raised such concerns, and many have rejected the notion that any difficulty exists with issuing nationwide injunctions based on state law.<sup>265</sup> Nonetheless, the existence of these cases makes manifest the very real theoretical possibility that the *Edgar* line of cases might also be applied to the actions of state courts. Such cases thus raise fundamental questions about the nature of extraterritoriality prohibitions. Do state laws such as the antidilution statute at issue in *Hyatt* run afoul of the Commerce Clause merely by their existence? If not, is it the judicial act of applying such laws to a particular situation—or ordering a given remedy—that creates the problem of extraterritoriality? And if the latter, is the entire issue better characterized as a choice-of-law problem rather than a dormant Commerce Clause one?

Concerns about *Edgar*'s application to judicial actions have cropped up in other areas as well. In *Campbell v. Arco Marine, Inc.*,<sup>266</sup> a California appeals court held that a Washington resident, Michelle Campbell, who was offered a job over the phone at her home with an oil transport company headquartered in Long Beach, California, could not take advantage of the sexual harassment provisions of the California Fair Employment and Housing Act (FEHA)<sup>267</sup> for events that occurred in Washington and at sea.<sup>268</sup> As the court found, “[t]he relationship with California is slight”: Campbell was hired while living in Washington, her job duties were performed on the high seas, and the alleged harassment had taken place either at sea or in Washington.<sup>269</sup> The court thus avoided what it called “serious constitutional concerns” by construing FEHA—in the absence of clear legislative intent to the contrary—not to apply to nonresidents employed outside California.<sup>270</sup> Interestingly, the trial court had reached the same conclusion as to FEHA, but allowed the plaintiff's common law

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264 *Id.* at \*12.

265 *See, e.g.*, *Deere & Co. v. MTD Prods., Inc.*, No. 94 CIV. 2322 (DLC), 1995 WL 81299, at \*4 (S.D.N.Y. Feb. 28, 1995) (noting that while a few courts have found problems with nationwide injunctions based on state law, “[t]he weight of authority . . . is, however, to the contrary”).

266 50 Cal. Rptr. 2d 626 (Ct. App. 1996).

267 CAL. GOV. CODE §§ 12900–12996 (West 2008).

268 *Campbell*, 50 Cal. Rptr. 2d at 627–28.

269 *Id.* at 631.

270 *Id.* at 631–32.

defamation claim, based on the same series of events, to proceed.<sup>271</sup> Because Campbell subsequently dismissed this claim voluntarily, it was not before the court of appeals.<sup>272</sup>

The Supreme Court has never delineated the precise boundaries of the circumstances under which the *Edgar* extraterritoriality principle applies, nor articulated any reason why it should *not* also be relevant to judicial actions. Thus, it is unsurprising that some courts have interpreted *Edgar* to limit their freedom to issue injunctions mandating out-of-state actions or to award damages based on out-of-state conduct. Such interpretations also, however, bring *Edgar* into collision with the liberal *Hague* standard.

#### D. *The Question of Contractual Choice of Law*

A second area suggesting change in the relationship between choice-of-law doctrine and the extraterritoriality principle (especially as that principle relates to inherent limits on state sovereignty) is in the controversy over the extent to which contracting parties should be permitted to choose the law that will apply to their transaction. In general, the degree to which individual choice of law should be permitted in contracting has always been fraught with some tension. Early theorists were dubious about allowing contracting parties to select the law of their choice, precisely because such an action mimics state regulation; Beale, for example, described this sort of provision as a “legislative act.”<sup>273</sup>

Nonetheless, under modern choice-of-law regimes, most states have permitted parties to a contract to increase predictability by choosing among the various states’ laws that might plausibly be construed to apply to their transaction should a dispute arising out of the

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271 *Id.* at 629.

272 *Id.* This case thus raises the question of whether a state court’s application of a statute to events occurring out of state might raise constitutional problems that reliance on state common law does not.

273 See Richard K. Greenstein, *Is the Proposed U.C.C. Choice of Law Provision Unconstitutional?*, 73 TEMP. L. REV. 1159, 1164 (2000) (describing Beale’s view of contractual choice of law). It should be noted, of course, that contractual choice of law is not the only way in which parties may exercise influence over the law they wish to have applied to their transactions. Parties can also shape their activities (by, say, incorporating in Delaware) to increase the likelihood that the law of a particular state will apply to their disputes. Moreover, because states continue to employ a variety of choice-of-law principles, parties can bring suit, or attempt to avoid it, in particular states based on the substantive law that those states are likely to find applicable to the suit.

contract end up in court.<sup>274</sup> This regime permits some degree of party choice, but does not pose significant problems under the *Hague* framework, since whatever state's law is chosen by the parties will presumably have the requisite number of contacts with the underlying dispute.

This way of handling the contractual choice-of-law issue, however, has been called into question by two proposed pieces of model legislation. First, the Uniform Computer Information Transactions Act (UCITA), model legislation intended to fill in perceived gaps of the Uniform Commercial Code (UCC) with respect to software transactions, includes a choice-of-law provision that permits contracting parties to select the law of their choice without restriction and without the requirement of any connection to the chosen jurisdiction.<sup>275</sup> In addition, proposed revisions to the UCC itself include a new choice-of-law approach that would permit parties to select the law of any jurisdiction so long as it did not contravene a fundamental policy of the jurisdiction whose law would otherwise be applicable.<sup>276</sup> The liberal understanding of contractual choice of law implicit in both provisions is in contrast to the prior version of the UCC and to what is fairly universal state choice-of-law practice, both of which require that parties select the law of a jurisdiction that bears a reasonable relationship to the transaction (subject to a public policy exception as well).<sup>277</sup>

There are many justifications for permitting greater party autonomy in contractual choice of law—from the allegedly reduced impor-

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274 See William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. REV. 697, 700, 704 (2001) (describing the limited freedom of parties to choose which forum's law will apply to their transaction).

275 See UNIF. COMPUTER INFO. TRANSACTIONS ACT § 109 cmt. 2a (Proposed Official Draft 2002) (noting that the model statute's choice-of-law provision—section 109(a)—does not follow U.C.C. § 1-105 “which requires that the selected state have a ‘reasonable relationship’ to the transaction. In a global information economy, limitations of that type are inappropriate, especially in cyberspace where physical locations are often irrelevant or not knowable. Parties may appropriately wish to select a neutral forum because neither is familiar with the law of the other’s jurisdiction. In such a case, the chosen state’s law may have no relationship at all to the transaction”).

276 See U.C.C. § 1-301(f) (2004) (“[A choice of law agreement] is not effective to the extent that application of the law of the State or country designated would be contrary to a fundamental policy of the State or country whose law would govern in the absence of agreement . . .”).

277 See Woodward, *supra* note 274, at 712. Notably, however, states have only rarely invalidated parties’ contractual choice of law on such grounds, perhaps because their unenforceability is so clear that parties do not include them in the first place. See *id.* at 716–17 (discussing this phenomenon and speculating about why it might be the case).

tance of borders in Internet-based transactions<sup>278</sup> to the need to facilitate contracting between parties located in different jurisdictions by permitting them to choose a “neutral” state’s law.<sup>279</sup> Nonetheless, these arguments have not been persuasive to many scholars and legislators. In both cases, the new provisions aroused great controversy and have met with virtually no legislative success.<sup>280</sup> Numerous commentators have suggested that a choice-of-law provision that dispenses with the “reasonable relationship” requirement might be unconstitutional—relying, in particular, on the notion that the Full Faith and Credit Clause might, under some circumstances, require the application of the law of a state having an interest in a transaction—a position advocated by Justice Stevens in his *Hague* concurrence but not reflected in established doctrine.<sup>281</sup>

The constitutional and policy objections to the proposed choice-of-law provisions clearly do not fit neatly into the due process framework of *Hague*. The law of a state freely selected by contracting parties is presumably not “unfair” or “arbitrary”—at least if arbitrariness is assessed with respect to the desires and expectations of the contracting parties.<sup>282</sup> Further, the parties’ very decision to apply the law of the chosen state also arguably constitutes a sufficient contact

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278 See *supra* note 228.

279 See Jack M. Graves, *Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C. § 1-301 and a Proposal for Broader Reform*, 36 SETON HALL L. REV. 59, 76 (2005) (noting that the more liberal choice-of-law provisions avoid the problem of contracting parties from more than one jurisdiction whose “domocentric” biases create an inherent conflict).

280 The UCITA has proved unpopular for a number of reasons (some of them having nothing to do with choice of law), and as of this writing has been adopted only by Maryland and Virginia (though other states have enacted certain of its features). See *Ams for Fair Elec. Commerce Transactions, Links and Resources*, <http://www.ucita.com/links1.html#legislation> (last visited Feb. 28, 2009). Indeed, several states adopted “bomb shelter” legislation prospectively invalidating as contrary to public policy any attempt by contracting parties to take advantage of UCITA provisions. *Id.* Likewise, although many states have enacted other features of the revised UCC, none has chosen to include the new choice-of-law provisions. Posting of Keith A. Rowley to *Commercial Law*, <http://ucclaw.blogspot.com/2008/05/tennessee-enacts-revised-ucc-article-1.html> (May 24, 2008, 18:10 EDT).

281 See Greenstein, *supra* note 273, at 1174–75 (arguing that Full Faith and Credit Clause analysis under *Hague* should be—as Justice Stevens’ concurrence advocated—distinguished from due process analysis).

282 See *id.* at 1173 (“Since application of [the chosen] law is precisely what the parties contracted for, it is hard to imagine what *due process* complaint either could raise.”). Fairness issues are perhaps raised by the choice of an arbitrary state’s law in a contract of adhesion, but the force of this objection is undermined by the fact that courts generally permit enforcement of similar provisions in arbitration clauses. See Graves, *supra* note 279, at 84–85 (describing how parties might use the generally

with the state to satisfy the *Hague* framework (though some have questioned this conclusion).<sup>283</sup> Finally, the Full Faith and Credit objections urged by some scholars<sup>284</sup> also seem hard to square with current doctrine. In many contractual dealings, a number of states will have a reasonable relationship of some sort to the underlying transaction. It therefore seems difficult to argue (at least within the framework of *Hague*) that any particular state has an interest in having its law applied.

As a result, it seems most logical to understand the objection to unlimited contractual choice of law as reflecting a fundamental concern with sovereignty and extraterritoriality, and an unease with allowing state law to apply to events to which it has no physical or territorial connection. This presents a slightly different problem of extraterritoriality from most of the examples discussed in this paper, since any perceived problem with the liberal proposed provisions results from private individuals choosing to extend a jurisdiction's law to events to which it has no connection, not from a state overreaching in attempting to regulate out-of-state conduct. Yet the contractual choice-of-law problem is like the other issues of extraterritoriality in that it hinges on a concern that allowing a state to exercise undue influence beyond its borders will interfere with the sovereign rights of sister states.<sup>285</sup> If parties favor the law of a particular jurisdiction on a particular substantive matter, that jurisdiction will obviously gain disproportionate influence in determining how that issue tends to be decided nationwide. Thus, unlimited contractual choice of law raises concerns about the structural balance of power among the states—concerns that are not clearly addressed by the *Hague* line of cases.

### III. RECONCILING EXTRATERRITORIALITY DOCTRINES

The preceding sections have described two lines of cases setting outer limits on the extent to which states can make their laws applica-

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favorable attitude of courts toward arbitration to choose UCITA in their contracts through an arbitration clause).

283 See, e.g., Greenstein, *supra* note 273, at 1174–75 (asking—and answering in the negative—whether merely choosing a given state's law is a sufficient contact under *Hague*).

284 See, e.g., *id.* at 1173 (arguing that the amendments to the UCC are likely in breach of the Full Faith and Credit Clause because they remove the requirement of a connection between the transaction and the forum).

285 See Graves, *supra* note 279, at 61 (“[O]pponents of expanded party autonomy suggest that, if the parties are granted complete autonomy, they may abuse it to deprive a state of its sovereign power to legislate for the benefit and protection of its citizenry.”).

ble to out-of-state persons and conduct. Those two lines of cases stem from conceptually separate origins, but in practice sometimes blur and overlap, leading to confusion about the exact scope of the extraterritoriality principle, and about the relationship between judicial acts and legislative ones. Further, while the Supreme Court has suggested in cases like *Gore* and *Campbell* that the two lines of cases may overlap, it has never fully reconciled them. As a result, the current doctrine lacks coherence, clear boundaries, and ease of application.

With these problems in mind, this Part argues that the tests for choice of law and for legislative acts should be integrated—that state courts applying forum law to out-of-state conduct and legislatures purporting to enact law to govern such conduct are exercising state power in a similar way, and that both sorts of activities potentially raise concerns related to state sovereignty and due process. Thus, it makes sense to treat them under a single rubric, and to recognize that cases from *Edgar* to *Hague* to *Gore* are motivated by a unified set of concerns. Having argued for an essentially unified standard, this Part, however, goes on to make the more tentative case that, in limited circumstances, some acts of extraterritorial regulation by states perhaps should be treated differently from others—though these differences should fall along different lines than those that current doctrine recognizes. Finally, this Part closes by arguing that any harmonization of the *Hague* and *Edgar* lines of cases will require a substantive re-envisioning of the law of extraterritoriality.

I emphasize that the various ideas for reform I propose throughout this Part are tentative and exploratory. The intention of this Article is not to rewrite substantive extraterritoriality jurisprudence, or to pronounce definitively upon how far states should be able to go in regulating out-of-state conduct. That task is obviously beyond this Article's scope, and a variety of frameworks—constitutional, economic, procedural—would have to come into play in analyzing this issue. I simply want to suggest that, whatever substantive degree of extraterritorial regulation we want to permit, the current framework does a poor job of accommodating it. The aim of this Part, therefore, is not to propose a definitive solution, but simply to suggest several lines along which current doctrine might develop toward greater coherence.<sup>286</sup>

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286 Throughout this discussion, I have assumed that courts should be the lead actors in any such doctrinal revision—an assumption that requires some explanation, given that Congress also possesses powers to act in this area. The Effects Clause of the Full Faith and Credit Clause, which provides that “the Congress may by general Laws prescribe the Manner in which such [state] Acts, Records and Proceedings shall be proved, and the Effect thereof,” U.S. CONST. art. IV, § 1, is generally understood to

A. *Choice of Law and Extraterritorial Legislation:  
The Case for Unification*

This subpart argues that because the *Edgar* and *Hague* lines of cases deal with what is essentially the same problem, they are best dealt with within the same doctrinal framework.

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confer on Congress the power to fashion interstate choice-of-law rules if it chooses, including the power to prescribe the extraterritorial effects of state legislation. See, e.g., Rosen, “*Hard*” or “*Soft*” *Pluralism*, *supra* note 26, at 752–53. Because Congress has the power to statutorily override the Supreme Court’s dormant Commerce Clause decisions, Congress likely has the power to revise the Supreme Court’s *Edgar/Healy* jurisprudence as well. It should be noted that it cannot be said with absolute certainty that Congress possesses this second power. We do not know whether the principle that *Edgar* and *Healy* articulate is exclusively rooted in the dormant Commerce Clause; both the Court’s language in *Edgar* and *Healy* themselves and its later reliance on these cases in *Gore* and *Campbell* suggest that it is possibly better conceived as an inference from constitutional structure more generally. Nonetheless, it is fair to say that Congress certainly has the power to revise the *Hague* side of the extraterritoriality equation, and perhaps to reconsider the *Healy* side as well. Why, then, leave the solution to the courts?

I am not prepared to say that there are no areas of the extraterritoriality problem in which Congress may productively intervene. Indeed, assuming that Congress does indeed have some power to revise *Healy*, there is no reason why Congress could not take an active role in the partial unification of the *Healy* and *Hague* principles I suggest. I would nonetheless argue, however, that it is desirable for courts to take the first cut at the problem, for two central reasons. First, as I have argued, the reasoning underlying extraterritoriality decisions like *Healy* has influenced courts in formulating a variety of areas of doctrine, from limits on punitive damages to Internet regulation. It would therefore be immensely beneficial for courts considering the numerous spillover effects of an extraterritoriality principle to have the benefit not merely of a more coherent set of rules but of a comprehensively re-imagined understanding of the problem. Second, to the extent the extraterritoriality problem plays out against the backdrop of conflicts-of-law doctrine, courts simply have a great deal more experience in appreciating the nuances of choice-of-law problems. However unsatisfactory current choice-of-law doctrine may be in certain respects, it nonetheless reflects many years of trial and error that should not be discarded lightly. It is hard to think of a congressional solution that could address the problem with the needed degree of subtlety and flexibility.

In this I respectfully disagree with Professor Rosen, who has argued that the normative choices inherent in decisionmaking about extraterritoriality demand the involvement of an elected branch. See Rosen, “*Hard*” or “*Soft*” *Pluralism*, *supra* note 26, at 752. Rosen argues, “Only clear cut institutional advantages would justify allocating this heavily normative-based decision to the least democratically accountable branch of government.” *Id.* In response to Professor Rosen, I would argue that (1) the theoretical check Congress provides on judicial overreaching functions as some mechanism of democratic accountability (as is true in the more ordinary dormant Commerce Clause context) and (2) courts do indeed possess institutional advantages sufficient to justify permitting them at least the first approach to the problem.

A first argument to be made in favor of this understanding is that the concerns underlying the *Hague* “aggregation of contacts” framework already incorporate—or at least substantially overlap with—those that motivate the *Edgar* extraterritoriality principle. That is, in terms of their explicit reasoning, the *Hague* principles are rooted primarily in notions of due process and individual fairness, with perhaps a token nod to ideas of interstate comity. But it is, in many respects (and as Reese’s influential article argues),<sup>287</sup> difficult to separate principles of fairness to individuals from those of appropriate solicitude for the policy decisions of states.

Take, for example, the classic (if seldom arising) scenario of problematic extraterritorial effects: imposing liability on a person for an act he was required to perform in his home jurisdiction.<sup>288</sup> The idea of subjecting a person to inconsistent obligations, noncompliance with either one of which will expose him to potential liability or other sanctions, raises obvious fairness concerns.<sup>289</sup> Indeed, the Supreme Court in *Gore* suggested that even less acute problems of regulatory inconsistency—such as the problem of conduct lawful in one jurisdiction being subject to liability in another—constituted a potential infringement on individual due process rights.<sup>290</sup> The Court observed that “[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.”<sup>291</sup>

If the problem of being subject to unexpected or inconsistent regulations by a state to which one has minimal connection is one of due process, it is also one of federalism. Due process, of course, implies the right to be free of state power exercised arbitrarily or unfairly. But when a state exerts influence outside its borders, the rights potentially affected are not just those of individuals but of other

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287 Reese, *supra* note 7, at 1594–95.

288 This problem is discussed at length by Reese, who (writing before the Court’s decision in *Hague*) believed that limits on legislative jurisdiction should be grounded in the Due Process Clause. *See id.* at 1595.

289 *See id.*

290 *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572–74, 573 n.19 (1996).

291 *Id.* at 573 n.19 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)). Note that *Bordenkircher*, the original source for this statement, uses it in a wholly different context—to make the wholly unremarkable point that a criminal defendant cannot be punished for relying on his legal rights (for example, a defendant cannot be punished more harshly because he has chosen to attack his original conviction). *See Bordenkircher*, 434 U.S. at 363. It is a significant extension of this principle to say that similar due process concerns are at stake when a defendant engages in conduct that, while legal in the jurisdiction where it occurs, may potentially subject him to liability in another.

states whose separate right to regulate the relevant events is being encroached upon. Importantly, a state that ignores due process guarantees through the heedless application of forum law is generally violating the rights not only of the defendants in question but of *another state*.<sup>292</sup> In other words, if State *X* imposes its law on a dispute that is properly governed by the law of State *Y* or State *Z*, it is not only interfering with the negative rights of the defendants to act unhindered by State *X*'s laws, but also with the affirmative rights of State *Y* and State *Z* to decide what substantive standards should apply to the conduct at issue. Thus, the problem is connected both to ideological principles of federalism (that is, the idea that states are entitled to some autonomous sphere in which to make policy free of interference from other sovereigns) and practical realities of federalism (the fact that state-by-state regulation will cease to function if citizens cannot be sure whether their conduct is lawful or unlawful).<sup>293</sup>

*Hague* choice of law and *Edgar* extraterritoriality concerns are thus thematically linked. An additional argument in favor of integrating them, however, is that they do not merely touch upon similar concerns, but are also conceptually impossible to separate. Suppose a Massachusetts litigant in Connecticut court argues that a Connecticut statute has impermissibly extraterritorial effects. A previous section of

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292 Justice Stevens' concurrence in *Hague* attempts to work out a variation on this distinction, separating the choice-of-law inquiry into two questions: whether the forum can apply its law in a particular situation, and whether the forum has an obligation to apply another state's law. See *supra* note 102. Federalism concerns may be triggered, however, even if there is no other one particular state that has the *exclusive* right to apply its law. Thus, there may be circumstances in which any of States *Y* or *Z* or *A* may properly apply its law, but the application of State *X* law may overstep the boundaries of State *X*'s power. This interferes not with the rights of a particular state but with the more general balance of power among all states, which may all have an interest in not allowing State *X* to exceed the limits of its legitimate authority.

293 In this, the problem of extraterritoriality resembles that of personal jurisdiction, which also integrates notions of personal fairness with broader structural concerns of territoriality and federalism. Indeed, the Court has analogized the prohibition on extraterritoriality to limits on personal jurisdiction, observing that "[t]he limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts." See *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion). The *Edgar* Court also relied on *Shaffer v. Heitner*, 433 U.S. 186 (1977), the classic quasi in rem case, when proposing that "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Edgar*, 457 U.S. at 643 (plurality opinion) (quoting *Shaffer*, 433 U.S. at 197). As Rostron points out, however, the citation to *Shaffer* is puzzling since in the cited passage, the Court was summarizing *Pennoyer*-era conceptions of territoriality, not accurately stating current law. See Rostron, *supra* note 1, at 131.

this Article suggests that perhaps a subtle difference exists between an argument that Connecticut law cannot apply at all in this situation and an argument that this particular statute, applied in this situation, has impermissibly extraterritorial effects.<sup>294</sup> This distinction seems particularly easy to grasp when a statute is directly aimed at out-of-state conduct, as was true in the alcohol price affirmation cases.<sup>295</sup> In *Healy*, no one was arguing that there was anything improper with the application of Connecticut law to the brewers in general, or even that distillers could not be subject to ordinary Connecticut penalties and liabilities as a result of their activities selling beer in Connecticut. Rather, the argument was that the specific scheme of regulatory approval the statute created was unconstitutional because it was directed at wholly out-of-state conduct.<sup>296</sup>

However reasonable—even obvious—this distinction seems, however, it requires some interrogation. A court's decision to apply a particular state's law never happens in a void; it necessarily hinges on the circumstances of the individual litigant and cause of action. Thus, for example, it is possible to imagine the *Hague* test being satisfied as to one cause of action as to a particular defendant but not as to another. As a result, it is essentially meaningless to say that, because Connecticut law could apply to the brewers as to other aspects of their conduct, the choice-of-law analysis is separate from the analysis of the constitutionality of this particular piece of legislation. True, the mechanisms of enforcement of particular statutes or regulations may be different, and that may affect the manner in which the issue of their constitutionality is raised in court. For example, *Healy* was an affirmative challenge to the price affirmation legislation brought by a brewers' organization as a plaintiff.<sup>297</sup> But that does not mean that it would equally raise constitutional problems for a court to apply the statute to the brewers in some more conventional conflicts-of-law context. Suppose, for example, that the problem in *Healy* had arisen because the Connecticut statute created a cause of action for restitution for con-

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294 See *supra* Part I.B.2.

295 See *supra* notes 153–58 and accompanying text.

296 *Healy v. Beer Inst.*, 491 U.S. 324, 336–37 (1989).

297 *Id.* at 327–28. The procedural posture in *Brown-Forman* was slightly different. There, the New York Liquor Authority attempted to revoke the distillers' license for noncompliance with the price affirmation regulation; the distillers then challenged this action in state court. See *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 577–78 (1986). Nonetheless, the distillers similarly argued that New York's price affirmation statute violated the Commerce Clause on its face. *Id.* at 578.

sumers who were charged higher prices than any brewers' posted schedule would permit.<sup>298</sup>

Further, the distinction on which the *Hague/Edgar* separation appears to turn—that judicial acts such as the award of damages raise different concerns from prospective regulation—is at best a questionable one. The imposition of after-the-fact damages for conduct can clearly—indeed, is designed to—function as a tool of regulation. Damages, compensatory as well as punitive, are generally intended to have a deterrent effect and to shape prospective conduct.<sup>299</sup> Indeed, the Supreme Court has at times explicitly embraced the view that damages awarded by state courts involve state power in the same way as prospective regulation. In *San Diego Building Trades Council v. Garmon*<sup>300</sup> (cited in *Gore*<sup>301</sup>), the Court set aside as preempted by federal law an award of damages by a California court under tort and labor law for business loss caused by union picketing.<sup>302</sup> In reaching this conclusion, the Court noted that state regulation inconsistent with national policy “can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.”<sup>303</sup>

Perhaps, one might argue, the *Hague/Edgar* distinction is not between liability and other forms of regulation, but between regulation enacted by legislators and remedies imposed by courts. But such a distinction is equally difficult to maintain. Legislative and judicial acts overlap enormously. In many situations, the effect of a judicially created rule is identical to that of a legislative enactment—for example, either the courts or a legislature may announce a rule of comparative negligence, or decide that a certain activity should be subject to strict liability. Conversely, a statute may serve as a guidepost for courts, who may, for example, look to regulatory violations as the basis for allowing a negligence per se claim, or may develop a common law rule grounded in policies expressed in state statutes. For all these reasons, the Supreme Court has elsewhere recognized the similar effect

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298 Along these lines, *Edgar's* language prohibiting “the *application* of a state statute to commerce that takes place wholly outside of the State’s borders” is significant. *Edgar*, 457 U.S. at 642 (plurality opinion) (emphasis added). In other words, *Edgar* suggests, it is the decision to *apply* a particular statute to particular out-of-state conduct that is what raises constitutional concerns. See *id.* at 642–43.

299 See Hubbard, *supra* note 225, at 375.

300 359 U.S. 236 (1959).

301 See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 n.17 (1996).

302 *Garmon*, 359 U.S. at 237–38, 246–48.

303 *Id.* at 246–47.

of state statutory enactments and common law rules, noting that “[t]he test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.”<sup>304</sup>

The difference between the two lines of cases as they have evolved is not, then, based on meaningful distinctions between the types of activities at issue in *Hague* and those at stake in *Edgar*. Instead, it is likely to be something of a historical artifact, reflecting the somewhat anomalous view of territorialism in the choice-of-law context. Historically, choice-of-law territorialism has been understood as being about the location in which a cause of action arises, not the location of the behavior to be regulated.<sup>305</sup> Even more modern choice-of-law theories have brought little clarity to the relationship between conflicts theory and physical borders. Indeed, they have in some ways confused it—through, for example, local law theory, which blurs distinctions between the exercise of jurisdiction by a court and the application of forum law by suggesting that all the law being applied by a given court is really that of the forum.<sup>306</sup>

The fact that choice-of-law theory has operated under a different set of territorial assumptions poses a conceptual gulf that must be crossed in integrating constitutional choice-of-law limits with the *Edgar* extraterritoriality principle, or indeed with developing any theory of the limits of state legislative jurisdiction that also incorporates conflicts theory.<sup>307</sup> But this problem should not obscure the essential similarity in the way state power operates in the *Edgar* case and in the *Hague* one. This fundamental sameness means that—if we are to have a notion of extraterritoriality that does not simply rest on arbitrary distinctions—the tension between the two lines of cases must be grappled with, not ignored.

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304 See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964). As the Court elaborated:

Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute.

*Id.*

305 See *supra* notes 51–52 and accompanying text.

306 See discussion *supra* Part I.B.1.a.

307 It is notable that Reese’s legislative jurisdiction proposal made an exception for exercises of state jurisdiction that had been traditionally sanctioned by state choice-of-law principles. See Reese, *supra* note 7, at 1599–600.

B. *Choice of Law and Extraterritorial Legislation:  
The (Possible) Case for (Some) Divergence*

The previous subpart has argued for a recognition that state courts and state legislatures embody state power in similar ways and that the fundamental concerns about allowing either to regulate across state boundaries are similar. Having made this argument, however, I now want to backtrack a bit—to argue that, in certain cases, an argument may exist for differentiating among various kinds of state regulation in considering what territorial limits should apply.

If so much commonality exists among the different varieties of state regulation, why should this sort of differentiation ever be appropriate? After all, as the previous subpart has argued, both legislative and judicial actions constitute similar manifestations of state power that are conceptually difficult to separate. This is, however, an incomplete picture in two ways. First, it fails to incorporate concerns specific to the dormant Commerce Clause—concerns that certainly play a role in the *Edgar* line of cases. Second, it fails to consider the different *potential* for abuse of state power depending on what sort of law is at issue. In other words, even if we think that state courts and state legislatures exercise power in the same way, it may be the case that state legislatures have more incentives to use that power in ways that overreach. That fact might counsel for more searching scrutiny of legislative action even if the ultimate standard applied to judicial and legislative acts is similar.

With these concerns in mind, there are at least three different lines along which justifiable differences in approach are possible. First, courts could apply a more rigorous standard to commercial rather than noncommercial legislation; second, to statutes rather than common law; and, third, to prospective regulation rather than retrospective liability.

The distinction between commercial and noncommercial activity simply acknowledges the fact that the Commerce Clause imposes some limits on the extent to which individual states can burden out-of-state commerce. Even if it is true both that the problem of extraterritoriality is not merely a Commerce Clause issue and that most Commerce Clause problems do not raise issues of extraterritoriality per se, it nonetheless also is the case that attempts by states to impose substantial restrictions on out-of-state activity often serve as pretexts for the sort of protectionist motives that dormant Commerce Clause anal-

ysis is designed to uncover.<sup>308</sup> Further, it is fair to say that, in the *Edgar* line of cases, the Court, in striking down regulations as extraterritorial, has been guided at least in part by characteristic dormant Commerce Clause concerns (such as the notion that a state may try to unfairly advantage its residents by posing unreasonable restrictions on the way out-of-state entities do business).<sup>309</sup> Thus, it is appropriate to incorporate some special concern for commercial regulation, narrowly defined, into a more general extraterritoriality standard.

The distinction between statutes and common law arises from similar concerns as the distinction between commercial and noncommercial activity. Common law is less likely to arise from protectionist motives, and far more difficult to implement in a way that serves narrow state interests.<sup>310</sup> The public, for example, is unlikely to assess the abilities of even elected state judges according to whether they have advanced the state economy relative to that of its neighbors, and as a result state judges are subject to fewer temptations to craft law in a way that unfairly burdens out-of-state residents. In addition, because judges are to some degree reactive—forced to work within an existing system of precedent and to make law appropriate to the individual cases that happen to come before them—they arguably have less power to act in a way that systematically and unfairly advantages state interests.<sup>311</sup> By contrast, the efforts of legislatures to regulate extraterritorially may spark the same sorts of suspicions that motivate dormant Commerce Clause inquiries—that the legislature is attempting to benefit state residents disproportionately at the expense of outsiders.

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308 See Catherine Gage O’Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 600–03 (1997).

309 Indeed, Goldsmith and Sykes offer a plausible reading of the extraterritoriality cases as motivated largely by a dormant Commerce Clause concern with disproportionate burdens on out-of-state entities; as they note, many of the Court’s more sweeping statements can be dismissed as dicta. See *infra* note 320.

310 Cf. Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1882 (2008) (“Traditionally, courts articulating common-law rules have not been supposed to act like legislatures; even when a court overturns an old decision or articulates a new common-law rule in a case of first impression, the past has been thought to constrain common-law development more than it constrains Congress.”).

311 To some extent, therefore, the distinction between common and statutory law overlaps with the distinction between prospective and retrospective law. In general, legislatures make law prospectively, while courts can only apply law to events that have already occurred. To begin with, it should be noted that this distinction applies only imperfectly because courts can also act prospectively. Most obviously, for example, courts can announce a rule that is to be applied to future cases.

In addition, because courts can fashion common law in a way that is inherently case specific and adaptable, common law is less likely to result in divergent rules that will subject state citizens to conflicting obligations. *Timberlane*-era international choice-of-law principles recognized that courts can apply comity principles to moderate problems of inconsistency and unpredictability that extraterritorial laws can create.<sup>312</sup> Similarly, state courts can attempt to mediate conflicts among the laws of various states by, for example, applying choice-of-law principles that take into account concerns about extraterritoriality, or by modifying the remedy they award.<sup>313</sup> Indeed, courts already have experience doing so—since, in many cases, the choice-of-law principles they customarily apply are designed in part to foster interstate harmony.<sup>314</sup>

Finally, a case can be made that a greater level of scrutiny should attach to *ex ante* regulation than after-the-fact liability. This Article has argued that both regulation and the imposition of liability are attempts to shape conduct, and that for the most part they should be regarded in similar ways. But, as various commentators have observed, the imposition of liability arguably affects actors' behavior in different ways from prospective regulation.<sup>315</sup> In particular, one might argue—borrowing from the reasoning of the handful of courts to have considered this issue—that (1) the imposition of liability tends to imply less of a moral judgment than the enactment of a prospective regulation, and (2) liability permits prospective actors more freedom to continue to engage in the conduct at issue than does a prospective regulation.<sup>316</sup> Both of these distinctions are relevant to the question

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312 See *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613 (9th Cir. 1976). For a discussion on the *Timberlane* standard, see *infra* notes 342–45.

313 Of course, as the previous Part has pointed out, state legislation can come into play in a number of ways and can, in certain circumstances, overlap with common law. See discussion *supra* Part II. State statutes can, for example, attempt to modify or refine the common law of liability. This sort of legislative dabbling in traditional common law areas might trigger an intermediate level of concern.

314 See Courtland H. Peterson, *A Response to the Hague Symposium: Particularism in the Conflict of Laws*, 10 *HOFSTRA L. REV.* 973, 999 (1982) (explaining various choice-of-law policy rationales including interstate harmony). Indeed, the long experience of state courts with managing choice-of-law principles in a way that (mostly) avoids acute interstate conflict itself counsels in favor of giving state courts a wider presumptive latitude to apply state law in a way that they see fit.

315 See, e.g., Richard A. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 *GEO. L.J.* 295, 311–29 (1996) (comparing the effectiveness of mass tort litigation with that of government regulation as devices to regulate social behavior).

316 See *McCarthy v. Olin Corp.*, 119 F.3d 148, 169–70 (2d Cir. 1997) (Calabresi, J., dissenting) (“There is all of the difference in the world between making something illegal and making it tortious. Making an activity tortious forces the people who

of extraterritoriality, since both imply less interference with foreign states' abilities to make public policy judgments about which conduct is blameworthy or undesirable (hence raising fewer concerns about federalism and the proper relationships among the states) and both also impose a less severe burden on individuals' right to be free of unanticipated state regulation (thus raising fewer issues of individual due process).<sup>317</sup>

Especially given the variety and unpredictability of after-the-fact remedies, the distinction between prospective and retrospective regulation can be overstated. Further, as with the other points of differentiation I have mentioned, the distinction is not, of course, always entirely clear. The already discussed problem of nationwide injunctions, for example, may confound this distinction to some degree; courts may order an injunction on the basis of a defendant's past behavior that is nonetheless intended to have entirely prospective effects.<sup>318</sup> Despite such forms of overlap, however, it may nonetheless be useful to distinguish in a rough and flexible way between these two forms of regulation.

While these distinctions to some extent mirror characteristic differences in the fact patterns of the *Hague* line of cases and the *Edgar* line, this framework differs from current law in making these distinctions clear and explicit. Further, this proposal would involve distinctions that are more nuanced than the relatively stark *Hague/Edgar* division. In other words, essentially the same extraterritoriality standard would apply to all these forms of state activity; certain characteristics (the presence of commercial, statutory, and/or prospective regulatory law) would simply trigger a more careful and searching inquiry within the same basic framework.

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derive benefit from it to internalize the costs associated with it, thereby making sure that the activity will only be undertaken if it is desired by enough people to cover its costs. It does not proscribe it altogether." (footnote omitted)); *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 179 (Ct. App. 1999), *rev'd on other grounds*, 28 P.3d 116 (Cal. 2001) (noting that "imposing liability does not reflect as great a condemnation as a criminal or regulatory prohibition" and citing Calabresi's dissenting opinion in *McCarthy*).

317 This distinction also resembles (although it is not identical to) an argument Regan makes about prospective and retrospective price affirmation laws. Regan argues that retrospective affirmation laws do not pose an extraterritoriality problem because they do not attempt to directly govern future behavior (even if they may inevitably affect such behavior). Regan, *supra* note 10, at 1904–05.

318 Welkowitz makes this point, noting that an injunction may prohibit the defendant from engaging in future conduct that may be legal in her home state. See Welkowitz, *supra* note 11, at 16–18.

C. *A Final Note: The Case for Revising Both Tests*

I close by making two brief final observations about any attempt to unify and integrate the two standards.

First, it is important to note that the most obvious way of consolidating the *Hague* and *Edgar* standards would be to apply one or the other to all problems of extraterritoriality. On the one hand, we could have a regime in which all state regulation, like choice-of-law decisions, is subject only to the fairly minimal “aggregation of contacts” requirement of *Hague*.<sup>319</sup> The dormant Commerce Clause would of course still apply to such legislation, but only in the form of the traditional *Pike* balancing test, without adding any additional layer of extraterritoriality analysis. This approach might be called the “minimalist solution.”<sup>320</sup> On the other hand, we could impose a more rigorous extraterritoriality analysis on the acts of courts as well as

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319 See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (plurality opinion).

320 A brisk, clearing-out-the-cobwebs approach to the extraterritoriality problem that advocates something like the minimalist solution has been proposed in the context of Internet regulation by Jack Goldsmith and Alan Sykes, who frankly acknowledge that their approach “does not accord with some of the Court’s overbroad extraterritoriality dicta.” Goldsmith & Sykes, *supra* note 164, at 806. Goldsmith and Sykes assume, first, that *Hague* is and should be the prevailing standard for all state regulation affecting out-of-state conduct. See *id.* at 806 & n.91. Rather than dispensing with *Edgar*’s concerns, however, they argue that issues of extraterritoriality should be incorporated into something that looks more like conventional dormant Commerce Clause analysis—in other words, a balancing test that is primarily concerned with smoking out protectionist or inefficient state regulation. *Id.* at 797–806 (noting that the dormant Commerce Clause’s function has historically been to prevent efforts at state protectionism, and advancing a new analysis suggesting that the Clause may also serve the purpose of ensuring that where “harms cross jurisdictional boundaries, . . . corrective measures are properly calibrated”—that is, not an inefficiently disproportionate response to the problem). Thus, they argue, courts should “fold[] the extraterritoriality concern” into a more conventional balancing analysis that would ask whether a statute “impose[s] burdens on out-of-state actors that outweigh the in-state benefits.” *Id.* at 804, 806. This language closely echoes the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This proposal, they argue, captures much of the Supreme Court’s true concerns in cases like *Healy* and *Gore*. Goldsmith & Sykes, *supra* note 164, at 805. In those cases, they argue, the real issue was that the legislative acts at issue (the beer price limits in *Healy* and the punitive damages in *Gore*) were a *disproportionate* response to an otherwise legitimate desire to protect in-state residents. *Id.* Goldsmith and Sykes would treat the problem of inconsistent regulation through a similar balancing test—an approach they see as appropriate to address the real concerns inconsistent regulation raises, the problem that “different regulatory judgments may create costs of compliance with the various state regimes that are clearly out of proportion to the benefits of permitting decentralized regulation.” *Id.* at 807–08. Through this framework, Goldsmith and Sykes argue, it would be possible to “reconcile[] the extraterritoriality prong of the dormant Com-

legislatures—asking, for example, whether a given injunction or an award of damages has the effect of regulating wholly out-of-state conduct, and invalidating it as improperly extraterritorial if it does (under either the dormant Commerce Clause, or broader structural principles of federalism). This approach might be called the “higher scrutiny solution.”

I want to close by arguing—briefly—that neither of these solutions is desirable. Indeed, the unsuitability of either *Hague* or *Edgar* as a general standard for assessing extraterritoriality may account for the Supreme Court’s failure to unify and harmonize the two lines of cases. Because both *Hague* and *Edgar* have distinct limits, neither one suggests itself as a ready compromise solution that would apply to all extraterritoriality problems, however they may arise. Devising such a solution may, then, require a more comprehensive reworking of current law.

The “higher-scrutiny solution”—in other words, the widespread application of *Edgar* to invalidate all state action that reaches extraterritorial conduct—is perhaps the easier of the two to dismiss. It is first worth noting that such an application of *Edgar* would represent an enormous shift from current choice-of-law practices. We are accustomed to a choice-of-law regime that allows state courts much scope to engage in the kind of de facto regulation that *Edgar* appears to prohibit.<sup>321</sup> Indeed, it is hard to see how state courts could be permitted to decide *any* matters involving events in numerous jurisdictions if they were subject to an absolute bar on pronouncing on out-of-state conduct. Thus, subjecting state court actions to higher scrutiny would require a radical rethinking of choice-of-law doctrine and the relationships among state courts—a reappraisal for which there seems no obvious justification.

This is especially true given that the extraterritorial effects of state courts’ choice-of-law decisionmaking do not pose, at the moment, an acute crisis for interstate relations or the federal system. It is true that

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merce Clause with the scores of choice-of-law decisions that have cross-border effects, as well as with constitutional limitations on choice of law.” *Id.* at 806.

There is much that is appealing about this framework. It is straightforward and easy for courts to apply, and represents one way of making sense of current case law—since, as Goldsmith and Sykes point out, whatever the Court has said about extraterritoriality in cases like *Gore* and *Healy*, the *results* in such cases can be explained in terms of failure to pass a balancing test. *See id.* at 805–06. Nonetheless, as the remainder of this Article goes on to argue, because of the limitations of *Hague* as the sole substantive limit on state noncommercial legislation, a more thorough reenvisioning of current doctrine may be required.

321 *See supra* notes 92–105 and accompanying text.

a few rapidly changing areas of litigation—such as punitive damages and Internet activity—have raised new and important extraterritoriality concerns.<sup>322</sup> Further, hotly contested issues within more traditional areas of common law—such as the imposition of strict liability on gun manufacturers—have also inspired litigants to test the limits of the extraterritoriality principle.<sup>323</sup> Nonetheless, the choice-of-law decisions of state courts—even, indeed particularly, those based on traditional principles—routinely have the effect of subjecting out-of-state conduct to standards based on forum law. Such extraterritorial applications of state law have never been thought to constitute a crisis. Because the choice-of-law principles applied by state courts are well known—and litigants recognize that, whenever a state court has jurisdiction, the application of forum law is, more often than not, a reasonable possibility—most such applications of forum law proceed without occasioning much surprise or unfairness to individuals.<sup>324</sup> Further, in part because such applications of state law are venerated by tradition, they are unlikely, especially in routine cases, to raise concerns by other states about unfair applications of state power. This is particularly so because the privilege of widely applying forum law is reciprocal. State *X* may, that is, accept the fact that its citizens and events occurring within its borders may ultimately be governed by standards imposed by State *Y* because it may wish its own courts to have the power to apply forum law to State *Y* activities. Thus, to adopt the *Edgar* extraterritoriality principle in the choice-of-law context would be a severely disproportionate response to the problem.

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322 See discussion *supra* Parts II.A, II.B.

323 See *supra* notes 214–26 and accompanying text.

324 A likely reason that punitive damages questions have raised such acute extraterritoriality concerns is simply that the sums involved are so great that they highlight problems of inconsistency that, in other settings, we have simply learned to live with. See, e.g., Rachel M. Janutis, *Fair Apportionment of Multiple Punitive Damages*, 75 *MISS. L.J.* 367, 378–90 (2006) (discussing the debate over the Supreme Court's recent punitive damages jurisprudence in reference to extraterritorial concerns); Michael L. Rustad, *Happy No More: Federalism Derailed by the Court That Would Be King of Punitive Damages*, 64 *MD. L. REV.* 461, 461–67 (2005) (discussing the recent Supreme Court doctrine concerning large punitive damage awards and the extraterritorial ramifications). The imposition of a hundred million dollar judgment may drive a corporation out of business; it is thus easy to take seriously whatever extraterritoriality concerns such a judgment may trigger. By contrast, a small award of compensatory damages in a tort case against the same corporation may not strike us as problematic and further may not be worth it to the corporation to mount a serious constitutional challenge to it—even if the judgment was based on conduct that was lawful in its home jurisdiction and thus might seem to raise due process/federalism concerns at least akin to those discussed in *Gore* and *Campbell*.

Moreover, even if one were to attempt to adopt something like the *Edgar* standard, articulating precisely how it should apply would be difficult. Commentators and lower courts have had difficulty fathoming *Edgar*'s precise limits.<sup>325</sup> Even giving *Edgar* its narrowest possible reading—supposing, that is, that it applies only to prospective commercial regulation by state legislatures—many commentators have assumed that it cannot possibly mean what it literally says, simply because states have so long been permitted to exert both direct and de facto regulatory control over events in other jurisdictions.<sup>326</sup> Once one accepts that the *Edgar* standard permits some sort of state regulation of out-of-state events, it is difficult to know where to draw the line between permissible and problematic extraterritorial regulation. While some commentators have attempted to articulate where this difference might lie,<sup>327</sup> the Supreme Court's actual pronouncements are sufficiently muddled that it is difficult to find a basis for any such distinction in actual case law.

That leaves us, then, with the "minimalist solution." This solution is in some respects more appealing. To begin with, it resembles much more closely the Supreme Court's actual jurisprudence and would require far less rewriting of current law, since *Hague* and *Shutts* often are said to articulate the outer limits of the extraterritorial application of state power (at least outside the context of state commercial regulation).<sup>328</sup> It would further recognize the traditional understanding that, for many years, states have been allowed great latitude in the choice-of-law principles they have chosen to apply, and that for the most part this state of affairs has not raised either constitutional or practical problems. Further, a minimalist standard would continue to permit some scrutiny, under more traditional dormant Commerce Clause analysis, in the relatively rare instances when state legislation appears driven by protectionist purposes or creates serious problems of national inconsistency.<sup>329</sup>

Although these arguments for adopting a more minimalist standard are compelling, a strong case can nonetheless be made for a reevaluation of the specific framework articulated in *Hague*. As an initial matter, the *Hague* standard has never attracted much praise.<sup>330</sup>

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325 See *supra* notes 165–66, 177–81 and accompanying text.

326 See, e.g., Goldsmith & Sykes, *supra* note 164, at 806 (“[S]cores of choice-of-law decisions . . . have cross-border effects . . .”).

327 See *id.* at 805–06.

328 See *supra* note 320.

329 See *supra* note 320.

330 See, e.g., Terry S. Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity*, 62 N.Y.U. L. REV. 651, 679–82 (1987) (noting that the “fundamen-

Even regarded purely as an outer limit on choice-of-law doctrine, *Hague* has the rather obvious problems of toothlessness (it very rarely constrains actual decisionmaking by state courts) and redundancy (it adds little to the personal jurisdiction analysis). When *Hague* is also used as the main check on the power of legislatures (at least in situations not involving interstate commerce), it becomes even more problematic. Perhaps the largest difficulty with *Hague* is the fact that it simply fails to articulate a theory of the application of forum law as a means of exercising state power. The standard *Hague* imposes is mostly a contact-counting one—and one that appears easily manipulated whenever even tangential contacts are present.<sup>331</sup> By failing to impose a meaningful test for whether the relevant contacts are connected to genuinely significant state interests, *Hague* fails to reach the question of the legitimacy of a sovereign's concern with the behavior over which it is exerting de facto control.

On the one hand, one could perhaps argue that this limited focus is appropriate to the choice-of-law standard it announces. In other words, perhaps there is a due process right to be free from unfair surprise in applications of state law under choice-of-law rules, regardless of whether the state whose law is being applied might have the theoretical power to regulate the underlying conduct in appropriate circumstances. But if this is the principle articulated by *Hague*, it is, to begin with, not a very meaningful one, since *Hague's* very limited inquiry ensures that, so long as minimum contacts-based personal jurisdiction is present, the right is unlikely to come into play.<sup>332</sup> Further, if this is how we are to understand *Hague*, the test represents an extraordinarily poor metric for assessing the proper bounds of legislative activity. Indeed, it is arguably the limitations of *Hague* that have resulted in the creeping importation of extraterritoriality principles designed for legislation into the state choice-of-law context. Unlike *Edgar* or *Gore*, *Hague* simply provides no hook for courts to consider structural issues of inconsistent regulation or state overreaching—both of which may also ultimately trigger individual fairness concerns. Thus, when state power is exerted in a way that seems to raise such structural problems, courts have been forced to turn to separate lines of cases that seem to address them more squarely.<sup>333</sup>

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tal weakness" of *Hague* is that it fails to distinguish among various types of state contacts).

331 See *supra* notes 92–105 and accompanying text.

332 See *supra* notes 92–105 and accompanying text.

333 See discussion *supra* Part II.

This Article will not attempt to do more than to briefly suggest a substantive direction that such a revised extraterritoriality standard could take. An obvious possibility, however, presents itself: to bring domestic notions of limits on legislative jurisdiction more in line with decisions—past and present—governing the extraterritorial reach of federal law. The international and interstate contexts are, of course, different; choice-of-law issues in each are guided by different sources (international norms on the one hand, constitutional provisions like the Full Faith and Credit Clause and the dormant Commerce Clause on the other), and there is no obvious reason why choice-of-law approaches for each should be identical in every particular. Nonetheless, the international experience in some respects provides a useful and much-tested model. In particular, an extraterritoriality standard could benefit from two ideas that have been advanced in the international setting: first, a focus on within-jurisdiction effects as the basis for regulation; second, the notion that apparent conflicts between the regulatory regimes of various jurisdictions can be mediated through principles of comity.

In the international setting, courts have long grappled with the question of the extent to which U.S. law should apply abroad. For many years, courts assessing the reach of U.S. legislation subscribed to a heavily territorial view of national power—perhaps most famously articulated in *American Banana Co. v. United Fruit Co.*,<sup>334</sup> which pronounced that “[a]ll legislation is *prima facie* territorial”<sup>335</sup> and further that “the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”<sup>336</sup> This territorial orientation found expression in a strong presumption “that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”<sup>337</sup>

*United States v. Aluminum Co. of America (ALCOA)*,<sup>338</sup> marked a turn away from the territorial view of national power. *ALCOA*

334 213 U.S. 347 (1909).

335 *Id.* at 357 (quoting *Ex parte Blain*, (1879) 12 Eh. D. 522, 528 (U.K.)).

336 *Id.* at 356.

337 *EEOC v. Arabian Am. Oil Co. (ARAMCO)*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

338 148 F.2d 416 (2d Cir. 1945); *see also ARAMCO*, 499 U.S. at 248 (1991) (noting that, as a protection against “international discord,” it is a “longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States’” (quoting *Foley Bros.*, 336 U.S. at 285)); *Brilmayer & Norchi*, *supra* note 23, at 1227 (noting that *ALCOA* marked a shift from the vested rights theory in the international context).

announced a view under which courts would presume that Congress intended to act in accordance with international norms that permitted liability for extraterritorial conduct having consequences within the United States.<sup>339</sup> In the wake of *ALCOA*, courts generally accepted that much of U.S. law has some extraterritorial application.<sup>340</sup> But some in the international community objected to the sweeping scope of the effects doctrine and, in response to such criticism, federal courts sought to develop modified versions of the test.<sup>341</sup> Most famously, in *Timberlane Lumber Co. v. Bank of America*,<sup>342</sup> the Ninth Circuit attempted to develop what it called a “jurisdictional rule of reason,”<sup>343</sup> which sought to moderate potential conflicts in antitrust cases with principles of international “comity and fairness.”<sup>344</sup> Under *Timberlane*, courts were to consider a number of factors in assessing the extraterritorial reach of U.S. law, including the parties’ nationality, the likelihood of achieving compliance, the “degree of conflict with foreign law or policy,” the “relative significance of effects on the United States as compared with those elsewhere,” the “extent to which there is explicit purpose to harm or affect American commerce [and] the foreseeability of such effect,” and the “relative importance to the violations charged of conduct within the United States as compared with conduct abroad.”<sup>345</sup>

In *Hartford Fire Insurance v. California*,<sup>346</sup> however, the Court rejected the *Timberlane* approach and reaffirmed the vitality of effects-based jurisdiction, finding that the Sherman Act<sup>347</sup> applied to “con-

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339 148 F.2d at 443.

340 See Andrew Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 885 (2002). In some cases, however, the Court has continued to apply a strong presumption against extraterritoriality. A notable example is *ARAMCO*, in which the Court held that, in the absence of a clear statement by Congress, it would not construe Title VII to apply extraterritorially. See 499 U.S. at 255. Congress ultimately overruled the *ARAMCO* decision in the 1991 Civil Rights Act. See *Smith v. Petra Cablevision Corp.*, 793 F. Supp. 417, 419 n.3 (E.D.N.Y. 1992).

341 See Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: A Postscript on Hartford Fire Insurance Co. v. California*, 34 VA. J. INT’L L. 213, 215 (1993).

342 549 F.2d 597 (9th Cir. 1976).

343 *Id.* at 613.

344 *Id.* at 612.

345 *Id.* at 614–15. Congress ultimately adopted a statutory standard for extraterritorial application of U.S. antitrust laws—permitting application of antitrust laws to exports only when there is a “direct, substantial, and reasonably foreseeable effect” within the United States. See 15 U.S.C. § 6a (2006). Courts, however, continued to interpret that standard in light of the comity concerns of *Timberlane*. See Alford, *supra* note 341, at 216.

346 509 U.S. 764 (1993).

347 15 U.S.C. §§ 1–7 (2006).

duct that was meant to produce and did in fact produce some substantial effect in the United States.”<sup>348</sup> The Court further found that courts can impose liability under U.S. law even for conduct that was lawful in the jurisdiction where it occurred so long as “‘a person subject to regulation by two states can comply with the laws of both,’”<sup>349</sup> and that, in the absence of such direct conflict, considerations of international comity need not come into play.<sup>350</sup> Further, the Court’s view of what constituted such a conflict was narrow. In the circumstances at hand, for example, the fact that “Parliament ha[d] established a comprehensive regulatory regime over the London reinsurance market” with which the defendant’s alleged conduct was “perfectly consistent,” was not sufficient to find the existence of a direct conflict with British law.<sup>351</sup>

Though widely adopted—with some modifications—in other circuits, the *Timberlane* test was criticized for its vagueness, which some believed made it too easy for courts inclined to give U.S. law broad scope to manipulate the factors to permit them to do so.<sup>352</sup> Congress ultimately adopted a statutory standard for extraterritorial application of U.S. antitrust laws—permitting application of antitrust laws to exports only when there is a “direct, substantial, and reasonably foreseeable effect” within the United States<sup>353</sup>—but courts continued to interpret that standard in light of the comity concerns of *Timberlane*.<sup>354</sup>

*Hartford Fire* has been criticized for the Court’s slighting of comity-based restraints on the reach of statutes. Both the effects test, however, and limitations on the test founded in comity potentially have a role to play in the interstate context. As a starting point, within-state effects represent a useful basis for assessing the legitimacy of a state’s concern with a particular activity. If an activity is causing harm within a given state’s borders, it is fair to say that the state has some basis for being concerned with it. Of course, any response must be proportionate. Regan has argued against a focus on effects, asserting for exam-

348 *Hartford Fire Ins.*, 509 U.S. at 796.

349 *Id.* at 799 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 cmt. e (1987)).

350 *See id.* at 798–99.

351 *Id.* In dissent, Justice Scalia objected strongly to this view, arguing that Congress should be presumed to act in accordance with principles of international comity that did not support jurisdiction in this case. *See id.* at 818–20 (Scalia, J., dissenting).

352 *See Alford supra* note 341, at 216.

353 Congress adopted this standard in the Foreign Trade Antitrust Improvement Act (FTAIA) of 1982, Pub. L. No. 97-290, tit. IV, § 402, 96 Stat. 1246, 1246 (codified at 15 U.S.C. § 6a (2006)).

354 *See Alford, supra* note 341, at 217.

ple that Michigan cannot prohibit cigarette production in North Carolina even if such production causes great harm to Michigan's residents.<sup>355</sup> The problem with such regulation, however, is arguably that it sweeps too broadly, regulating activity even beyond the extent to which it affects Michigan's residents. By contrast, imposing strict liability under Michigan law for harm caused by tobacco use would not necessarily represent an excessive response.<sup>356</sup>

A focus on effects would also fill a gap in the framework established by *Edgar*. *Edgar*, of course, does not include any consideration of effects either—in fact, it explicitly prohibits regulation of out-of-state commerce even if such activity “has effects within the State.”<sup>357</sup> This leaves us with the curious situation of one extraterritoriality test (*Edgar*) that prohibits out-of-state regulation even if the out-of-state activity causes significant in-state consequences and another (*Hague*) that permits de facto state control over out-of-state activity even if such activity has minimal impact within the state.

One could make the argument that existing constitutional limits on choice of law in fact incorporate a sort of implicit effects test. It is first important to note that, at the subconstitutional level, the choice-of-law rules that states actually apply frequently take into account where the effects of the conduct at issue have been felt in the determination of which jurisdiction's law to apply.<sup>358</sup> This is perhaps especially true of modern theories incorporating interest analysis: if a jurisdiction has an interest in the dispute that may support the application of its law, it is generally because the dispute affects it in some way.<sup>359</sup> Further, although the Supreme Court has never required state courts to apply any particular choice-of-law rule, it suggested in *Shutts*

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355 Regan, *supra* note 10, at 1899–900. In Regan's hypothetical, Michigan cannot simply address the problem by banning cigarettes within state borders, since cigarettes are smuggled from North Carolina. *Id.*

356 Indeed, courts routinely make decisions that have this sort of effect by applying their own law to out-of-state conduct. For example, in *Bernhard v. Harrah's Club*, 546 P.2d 719 (Cal. 1976) (en banc), California applied a California statute to find a Nevada tavern-keeper potentially liable for harm caused in California as a result of his furnishing alcohol to an intoxicated patron in Nevada. *Id.* at 720, 725–26. As the court reasoned, “[i]t seems clear that California cannot reasonably effectuate its policy if it does not extend its regulation to include out-of-state tavern-keepers such as defendant who regularly and purposely sell intoxicating beverages to California residents [who are likely to return to the state].” *Id.* at 725.

357 *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (plurality opinion).

358 Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 733 (1987).

359 Guzman, *supra* note 54, at 894; Timothy R. Holbrook, *Extraterritoriality in U.S. Patent Law*, 49 WM. & MARY L. REV. 2119, 2167 (2008).

that to be relevant for choice-of-law purposes, contacts should be tied to something “‘done or to be done within’” state borders.<sup>360</sup> *Gore*, too, appears to announce something of an effects test in its suggestion that punitive damages can only be assessed based on conduct that has an “impact” on the state or its residents.<sup>361</sup> An effects test thus seems at the very least harmonious with current law and practice, even if the Supreme Court has not incorporated it explicitly into either the *Hague* standard or to the *Edgar* extraterritoriality principle.

Effects also, of course, come into play in some forms of personal jurisdiction. As the Court famously held in *Calder v. Jones*,<sup>362</sup> California could exercise personal jurisdiction over a Florida newspaper in a libel suit concerning an article that “concerned the California activities of a California resident,” thus ensuring that “the brunt of the harm” caused by the alleged libel would be suffered in California.<sup>363</sup> Under these circumstances, the Court found, jurisdiction over the Florida defendants was proper “based on the ‘effects’ of their Florida conduct in California.”<sup>364</sup> Indeed, given that minimum contacts–based personal jurisdiction is both a more robustly developed area of doctrine and one that is often believed to encompass structural federalism concerns that states not exert too much power outside territorial limits,<sup>365</sup> one might argue that a broader and more carefully articulated set of choice-of-law restrictions is superfluous.

Despite the relevance of effects to personal jurisdiction, however, a place still exists for considering effects in choice of law as well. Most obviously, consideration of effects is confined to the minimum contacts–based theories of personal jurisdiction, and has no role in per-

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360 *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985) (quoting *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930)).

361 *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572–73 (1996).

362 465 U.S. 783 (1984).

363 *Id.* at 788–89.

364 *Id.* at 789. Some courts have understood the *Calder* test to permit effects-based personal jurisdiction even where the relevant conduct is not wrongful or tortious. *See Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 433 F.3d 1199, 1207 (9th Cir. 2006) (en banc) (“[W]e must evaluate all of a defendant’s contacts with the forum state, whether or not those contacts involve wrongful activity by the defendant.”). The Ninth Circuit also sought to clarify the language in *Calder* by explaining that the effects test did not *require* that the brunt of the harm be suffered in the forum state: “If a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state.” *Id.*

365 *See, e.g., Weinstein, supra* note 128, at 181 (arguing that personal jurisdiction rules derive from “federal common law formulated to promote interstate federalism”); *Welkowitz, supra* note 11, at 48–49 (“[T]he Supreme Court often has viewed personal jurisdiction as a reflection of extraterritorial limits . . .”).

sonal jurisdiction based on consent or presence. Even in the minimum contacts realm, effects-based analysis is sometimes limited to suits based on tortious conduct, and is not the framework that applies to suits in contract.<sup>366</sup> Further, where a defendant has extensive contacts with a forum, courts may exert general jurisdiction over that defendant even in matters unrelated to the forum—meaning that there may not necessarily be any connection between the particular matters at issue and the forum notwithstanding the existence of personal jurisdiction.<sup>367</sup>

A second way in which the international context could come into play is in the notion that states can use principles of comity to reconcile apparently contradictory state regulation. Although the *Timberlane* standard is of course no longer the law in assessing the extraterritorial reach of federal statutes,<sup>368</sup> the framework it sets forth nonetheless has continuing potential to be useful in interstate extraterritoriality questions. Indeed, in the interstate context, the considerations of comity articulated in *Timberlane* are potentially even more relevant given that multijurisdictional transactions are so common, indeed routine, in the interstate context. A set of comity principles would not impose precise requirements on states, but would simply ask them to consider the extraterritorial impact—including the potential for inconsistency—that might ensue if forum law is imposed in a given situation.<sup>369</sup>

This brief discussion is not, of course, intended to be full-fledged advocacy for the *ALCOA* or *Timberlane* standard in the interstate context—a separate project that would require a far fuller analysis. It is simply designed to suggest that both *Edgar* and *Hague* embody only half, at best, of the picture of how state power is exercised. For that reason, it seems likely that a new, integrated standard will have to go in a different direction. The international standard provides at least a suggestive model of what that standard might resemble.

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366 See *Yahoo!*, 433 F.3d at 1206.

367 Welkowitz also makes the argument that the existence of general jurisdiction makes personal jurisdiction a possibly inadequate check on state power. See Welkowitz, *supra* note 11, at 56–57.

368 See *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 813 n.8 (9th Cir. 1988) (explaining that § 6a of title 15 of the U.S. Code supersedes *Timberlane*'s test for assessing the extraterritorial reach of federal antitrust law).

369 Integrating comity concerns into the effects test would also help to answer some of the criticisms of the test that have been made in the international context—including the arguments that legislation of extraterritorial conduct inherently lacks democratic legitimacy and invites piecemeal solutions to problems involving multiple jurisdictions. See Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1483–93 (2008) (summarizing such criticisms).

## CONCLUSION

One means by which states can exercise extraterritorial power is through state courts' application of forum law to out-of-state events. While this power is perhaps not identical in all respects to the power a state legislature exercises when it enacts an extraterritorial regulation, both powers have fundamental similarities and raise the same concerns of due process and interstate harmony. The Supreme Court has historically failed to grapple with this basic unity between the two powers, despite the fact that various areas of jurisprudence have called into question the viability of separating the constitutional treatment of state courts' choice-of-law decisions from that of extraterritorial state regulation. Treating these similar powers similarly, in contrast to current practice, would be one way of bringing clarity and sense to this famously murky and unsettled area of law.