

ESSAYS

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STATE EXTRATERRITORIAL POWERS  
RECONSIDERED

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INTRODUCTION

To what extent may a state in this country apply its laws to people and events outside its territorial borders? In what probably will be surprising to most readers, constitutional doctrine still does not offer a clear or settled answer to this basic “horizontal federalism” question.<sup>1</sup> In a recent article published in this journal, Professor Katherine Florey provides a sustained analysis of two doctrines (due process

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1 I return at the end of this Essay to this issue of “surprise.” See *infra* Part II.B.3.

and the dormant Commerce Clause) that bear on the scope of states' extraterritorial powers.<sup>2</sup> Florey shows that the doctrines are in tension, and proposes that courts integrate them into a single constitutional principle that would determine the scope of states' extraterritorial powers.<sup>3</sup>

Florey's thoughtful piece appears to stake out only modest ground, stating that it only "briefly suggest[s] a substantive direction that such a revised extraterritorial standard could take."<sup>4</sup> In fact, however, the article implicitly pushes extraterritoriality considerations in a very definite, yet nonaxiomatic, direction. This Essay fleshes out three assumptions that infuse Florey's informative article—two of which also can be found in the work of other commentators who have tackled the subject of state extraterritorial powers. My goal in unmasking these assumptions is to more precisely describe the status quo and to explicitly identify all options. An enhanced understanding of what is and what could be facilitates consideration of whether there is a contemporary problem in need of fixing and, if there is, of what form the fix should take.

Though I agree that the two doctrines Florey highlights stand in tension with one another and require further clarification, this Essay expresses skepticism that a court-generated constitutional doctrine is the best mechanism for checking states' exercise of extraterritorial powers. Rather, I suggest that apart from some important outer limits that are imposed by several distinct constitutional provisions, the Constitution itself does not set the limits on state extraterritorial powers, but instead allocates the authority to draw such limits to Congress. Absent congressional action, federal courts may (and do) create federal common law limitations that, by their nature, can be overridden by Congress. In the event that neither federal statute nor federal common law governs—what describes the situation in respect to most contemporary questions concerning state extraterritorial regulatory authority—each state has the authority to set for itself the limit of its regulatory powers. Though this might sound like an unstable and unsound "fox guarding the henhouse" arrangement, it has not worked out so poorly—which is one reason why neither Congress nor the federal courts have settled so many questions concerning states' extraterritorial powers. States have come to coordinated solutions to

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2 See generally Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057 (2009).

3 See *id.* at 1064, 1123–33.

4 *Id.* at 1128.

many recurring problems. This Essay suggests that though the status quo is not ideal, it is far from a crisis. And any problems that the status quo cannot handle are best managed by political institutions, not court-generated constitutional doctrines, with the caveat that courts can (and probably should) generate first-cut solutions that can be legislatively overridden.

## I. FLOREY'S THREE UNSTATED ASSUMPTIONS

Professor Florey's apparently unassuming suggestion that courts aim to develop a single constitutional extraterritorial principle is premised on three deep, unspoken assumptions, two of which are shared by other prominent scholars who have considered the scope of states' extraterritorial powers. All three assumptions merit identification and forthright consideration.

### A. *One or Multiple Extraterritoriality Principles?*

Florey's starting point is that there presently exist two different extraterritoriality principles that were developed in two different contexts. Courts relied on due process in what she calls the "choice of law" context, articulating a weak constraint that allows states to act extraterritorially so long as the state possesses a "significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction."<sup>5</sup> Florey notes the similarity between this and the Court's minimal contacts test for personal jurisdiction, and correctly observes that satisfying personal jurisdiction typically will satisfy the "choice of law" test as well.<sup>6</sup>

In what Florey calls the "legislative" context, by contrast, the Supreme Court has articulated a far stricter limitation on states' extraterritorial powers. A strand of dormant Commerce Clause jurisprudence provides that states may not regulate "commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State," if its "practical effect . . . is to control conduct beyond the boundaries of the State" or if it risks creating a problem with "inconsistent legislation arising from the projection of one State regulatory regime into the jurisdiction of another

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

6 Florey, *supra* note 2, at 1058–59. This is not always true. See, e.g., Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 823 (1985) (holding that Kansas state court had personal jurisdiction over nationwide class action but could not apply Kansas law on behalf of most of the plaintiffs).

State.”<sup>7</sup> This is a strict extraterritoriality test because it purports to bar regulation of out-of-state activities that have “effects within the State” if the regulation risks creating “inconsistent legislation,” and this condition is always satisfied insofar as extraterritorial regulations applicable to places where other polities have regulatory authority *always* create a risk of inconsistent regulations.

To begin, the presence of two apparently inconsistent legal principles does not, on its own, necessarily mean that they are in tension and need be collapsed into one. A plausible alternative is that each standard is appropriate in different contexts, but that the common law process has not yet clearly identified the appropriate scope of each. Here are three plausible ways to harmonize the two extraterritoriality standards: perhaps the stricter approach applies only (1) to regulations of *commerce*,<sup>8</sup> (2) to regulations whose out-of-state costs exceed their in-state benefits,<sup>9</sup> or (3) perhaps (narrower still) only to protectionist state regulations.<sup>10</sup>

More troublesome to Florey’s project of promoting a single extraterritoriality standard is that there are many *other* legal principles apart from due process and the dormant Commerce Clause that together serve to determine the scope of states’ extraterritorial powers. Most important of these is the Full Faith and Credit Clause,<sup>11</sup>

7 Healy v. Beer Inst., 491 U.S. 324, 336–37 (1989) (quoting Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982)); see also Florey, *supra* note 2, at 1084–90 (discussing dormant Commerce Clause case law).

8 A stricter limit vis-à-vis extraterritorial regulations of commerce could be desirable so as to protect the smooth operation of our national economy without unduly limiting states from regulating extraterritorially to accomplish important and legitimate state interests. For a full discussion of the legitimate interests that a state’s extraterritorial regulations can serve, see Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 882–91 (2002) [hereinafter Rosen, *Extraterritoriality*]; Mark D. Rosen, “Hard” or “Soft” Pluralism?: Positive, Normative, and Institutional Considerations of States’ Extraterritorial Powers, 51 ST. LOUIS U. L.J. 713, 744–50 (2007) [hereinafter Rosen, “Hard” or “Soft” Pluralism?].

9 See Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 804–06 (2001).

10 Rosen, *Extraterritoriality*, *supra* note 8, at 922–26. Indeed, Florey considers yet another distinction, suggesting that due process applies to court-made decisions arising in choice-of-law battles and the dormant Commerce Clause to legislature-created regulations. Florey, *supra* note 2, at 1119–22. In fact, this distinction inspires the very title of Florey’s article—which speaks of the extraterritoriality principles that appear in “choice of law” and “legislation.” As Florey notes, though this distinction may accurately describe where each doctrine originally developed, it poorly tracks the mature case law because courts today apply dormant Commerce Clause limitations to judge-made doctrines and also apply due process where “choice-of-law” makes no appearance. See *id.* at 1112, 1118.

11 U.S. CONST. art. IV, § 1.

which determines the effect that one state must give to another state's "judicial Proceedings" and "public Acts."<sup>12</sup> Consider as well the sub-doctrine of the Double Jeopardy Clause known as the "dual sovereignty doctrine." While the Double Jeopardy Clause<sup>13</sup> famously protects a person from being "subject for the same offence to be twice put in jeopardy of life or limb,"<sup>14</sup> the dual sovereignty doctrine ensures that one state's criminal adjudication will not impede a second state from prosecuting the person for breaking *its* laws, even if the identical actions were the subject of the two prosecutions.<sup>15</sup> The dual sovereignty doctrine thus protects the second state's interests by depriving the first state's prosecution of extraterritorial effects.<sup>16</sup> Finally, it has been strenuously argued that the "right to travel" limits the degree to which State *A* can regulate its citizens when they are located in a sister state.<sup>17</sup>

The fact that there are multiple doctrinal limits on states' extraterritorial powers puts a heavy burden of persuasion on Florey to explain why only a single extraterritoriality principle should be created. This is particularly so where there is no single constitutional text that is an obvious hook to which *the* extraterritorial principle can be tied. In such circumstances, why is a unitary principle preferable?

Florey never addresses this question, but instead assumes that one is superior to many. But this may not be true. There instead may be benefits to maintaining distinct extraterritoriality principles. The extraterritoriality doctrines mentioned above protect at least three distinct (albeit sometimes overlapping) interests: (1) individuals, (2) states, and (3) the interstate federal system. Right now, due process primarily protects individuals from being unfairly subject to another

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12 See *id.* ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

13 U.S. CONST. amend. V.

14 *Id.*

15 See Rosen, *Extraterritoriality*, *supra* note 8, at 951–55 (discussing *Heath v. Alabama*, 474 U.S. 82 (1985)).

16 Florey states that her project ignores criminal law as well as State *A*'s attempts to regulate its citizens when they are in sister states, but she gives no persuasive reason why her effort to reconceptualize extraterritoriality should ignore these aspects of extraterritoriality. See Florey, *supra* note 2, at 1063 n.26. To the contrary, they are integral to extraterritoriality, and for that reason are properly taken into account in a project that considers the appropriate scope of states' extraterritorial powers.

17 See Seth F. Kreimer, "But Whoever Treasures Freedom . . .": *The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907, 914–17 (1993). I have argued that Professor Kreimer's approach to the right to travel is not supported by case law and that it is normatively undesirable. See Rosen, *Extraterritoriality*, *supra* note 8, at 913–19. However, I certainly think it is conceptually plausible.

state's laws, the dormant Commerce Clause primarily protects the interstate system from being mucked up by inconsistent state laws, and the Full Faith and Credit Clause and the dual sovereignty doctrine protect different aspects of states' sovereignty. A single extraterritoriality principle risks slighting, or wholly ignoring, one or more of these interests. This is so because protecting the distinct interests by separate doctrines forces the decisionmaker (for the time being, let us say the judge) to give sustained attention to each, something that may not happen under a single extraterritoriality test. It might be thought that the danger of slighting some interests can be addressed by simply listing all interests in a single doctrinal laundry list, but this is not so. The *Second Restatement of Conflicts*,<sup>18</sup> for example, utilizes a single test that provides a list of legally relevant considerations. Courts typically give attention to only one (or a few) and ignore most of the others.<sup>19</sup>

There is yet another danger of Florey's effort to combine the disparate constitutional principles into a single test. Under current doctrine, some of the Court's limitations bind Congress while others are legislatively defeasible (more on this soon).<sup>20</sup> Intermixing all considerations threatens to obscure this complex allocation of decisionmaking authority.

### B. *Constitutional Limits?*

A second assumption built into Professor Florey's approach, as well as that of virtually all scholars who have considered the scope of state extraterritorial powers, is that extraterritorial principles are of *constitutional* dimensions.<sup>21</sup> There of course are strong reasons for thinking that this may be true. After all, the scope of states' extraterritorial powers may appear at first glance to be the sort of question of

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18 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

19 DAVID P. CURRIE ET AL., CONFLICT OF LAWS 226–27 (7th ed. 2006).

20 See *infra* Part I.C.

21 See, e.g., C. Steven Bradford, *What Happens if Roe is Overruled? Extraterritorial Regulation of Abortion by States*, 35 ARIZ. L. REV. 87, 90–92, 170–71 (1993) (noting multiple constitutional problems with the exercise of extraterritorial jurisdiction); Florey, *supra* note 2, at 1083 (discussing “undercurrents” to extraterritoriality arising from various constitutional provisions); Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973 (2002) (defending his earlier thesis that the rights of American citizenship permit citizens to choose their home state and the accompanying laws to which they are subject); 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, 1885 (1987) (arguing that “the extraterritoriality principle is not to be located in any particular clause [of the Constitution]” but instead “is one of those foundational principles of our federalism which we infer from the structure of the Constitution as a whole”).

governmental powers that would be answered at the federal constitutional level.

But perhaps not. The United States Constitution for the most part creates and determines the powers of the federal government.<sup>22</sup> The states themselves determine the powers of their own state governments to the extent that the Federal Constitution does not. Because the Federal Constitution provides only a handful of limits on states' powers,<sup>23</sup> much of the task of determining the scope of state governmental power falls to the states themselves, not the U.S. Constitution.

Furthermore, even if the Federal Constitution *does* have provisions applicable to state extraterritoriality—and it does, as I'll soon show—it does not follow that the limits on extraterritorial state powers have the status of constitutional law. The Constitution could vest authority in Congress to regulate the scope of states' extraterritorial powers. Any such limitations on state extraterritorial powers then would have the status of statutory, rather than constitutional, law.<sup>24</sup>

To recapitulate, limits on state extraterritorial powers conceivably could come from three different sources: federal constitutional law, federal statutory law, or from the states themselves. But this does not exhaust the possibilities: limitations also can arise out of informal or negotiated agreements among the states. Indeed, as we will soon see, this has been an important mechanism for limiting states' extraterritorial powers.<sup>25</sup>

In truth, the menu of options is even more complicated because limitations on states' extraterritorial powers could come from some *combination* of these four. For example, the Federal Constitution

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22 The unamended Constitution's limitations on state power are primarily found in Article I, section 10 and in Article IV. Incorporation of the Bill of Rights through the Fourteenth Amendment added many other important limitations. See Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1527–38 (2005). See generally Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493 (2008) (examining the Constitution as a whole to more coherently understand the clauses that regulate horizontal federalism); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468 (2007) (arguing that limits on Congress's power to authorize interstate discrimination are rooted in the Fourteenth Amendment). Unlike Article IV's Full Faith and Credit Clause, none of these other constitutional provisions explicitly address extraterritoriality.

23 See *supra* note 22.

24 Cf. Ernest A. Young, *The Constitutional Outside the Constitution*, 117 YALE L.J. 408, 417–422 (2007) (noting the extent to which legislation plays the role of “constituting” the government—a role typically thought of as belonging to constitutional law). In the absence of congressional action, federal courts could generate law to govern states' extraterritorial powers, but this would have the status of federal common law—not constitutional law.

25 See *infra* Part II.B.

might impose some clear limits that mirrored what virtually everyone in our political community would agree would constitute flatly illegitimate extraterritorial regulation, and leave more normatively contested limits to extra-constitutional processes.

Such a “combination” approach is a fair way to characterize our current system. Supreme Court case law flatly bars State *A* from penalizing a company’s actions in State *B* that are permissible in State *B* and that affect only citizens of State *B*.<sup>26</sup> But how much work does this doctrine do in limiting states? Not much, it would seem, for I am not aware of any scholars or courts that actually believe that states should be able to extraterritorially regulate in this fashion.<sup>27</sup> Rather, there would appear to be agreement in our political culture that State *A* would not have a legitimate interest to regulate in this circumstance,<sup>28</sup> and the Court’s holding constitutes merely a formal restatement of a consensus.

By contrast, very hard questions arise when more than one state has a plausible interest to assert because an action undertaken in State *B* has effects either on State *A*<sup>29</sup> or on one of State *A*’s citizens. In such a circumstance, States *A* and *B* both have plausible regulatory interests. Consider, for example, the situation where a husband and wife raise a child in State *A* and then obtain a divorce and child custody order in State *A*. If the father and child move to State *B*, but mother stays in State *A*, can State *B* modify the custody order? In this scenario, States *A* and *B* both have plausible regulatory interests: (1) State *A* was the family domicile, issued the divorce and custody order, and is still the domicile of one of the parents, while (2) State *B* is the present domicile of the child and one of the parents. Federal constitutional doctrine has not determined which of the two states has the power to modify such a custody order, but instead permits either state

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26 See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421–22 (2003) (holding that in assessing punitive damages, a jury cannot take account of a defendant’s out-of-state conduct that was “lawful in the jurisdiction where it occurred”); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572–73 (1996) (holding that State *A* “does not have the power . . . to punish [a defendant] for conduct that was lawful where it occurred and that had no impact on [State *A*] or its residents”).

27 For instance, no parties in *BMW v. Gore* or *Campbell* took this position.

28 This is not to suggest that this is the only conceptually plausible approach. For an account of an alternative, see Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053, 1064–71 (1998).

29 See *infra* notes 54–56 and accompanying text (discussing *Strassheim v. Daily*, 221 U.S. 280 (1911)).

to modify it.<sup>30</sup> This opened the door to interstate conflicts and uncertainty, so the states themselves came to a solution in the form of a uniform state law that aimed to vest a single state with the power to modify custody orders.<sup>31</sup> Congress thereafter enacted a statute under the Full Faith and Credit Clause's Effects Clause<sup>32</sup> that helped implement the uniform law and that fixed imperfections in the uniform act,<sup>33</sup> and the states then modified the uniform law to conform with the federal act. As a result, contemporary limitations on states' extraterritorial powers in the child custody context arise from a combination of state and federal statutes.

The upshot is this: while it is possible that Florey is correct that limitations on state extraterritorial powers appropriately have the status of federal constitutional law, such a position requires justification and cannot simply be assumed. This is so because there are plausible alternatives to Florey's assumption, and neither the Constitution's text nor settled practice suggests—much less establishes—that the limits on state extraterritorial powers are of exclusively federal constitutional status.

To the contrary, the Constitution says otherwise. The Full Faith and Credit Clause's Effects Clause gives *Congress* the role of determining by statute the scope of state extraterritorial powers when it provides that "Congress may by general *Laws* prescribe the . . . Effect" of states' statutes, records, and judicial proceedings.<sup>34</sup> The Supreme Court long has stated that the Effects Clause gives Congress power to prescribe the "extra-state effect" of a state statute.<sup>35</sup> Furthermore, Congress has relied on the Effects Clause in enacting statutes that govern the scope of states' extraterritorial powers in particular circum-

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30 See *Sampsel v. Superior Court*, 197 P.2d 739, 749–50 (Cal. 1948) (Traynor, J.) (concluding that child custody awards could constitutionally be modified in the state where the child was domiciled, where she was physically present, and where there was personal jurisdiction over the parents); Leonard G. Ratner, *Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act*, 38 S. CAL. L. REV. 183, 184 (1965).

31 Known as the Uniform Child Custody Jurisdiction Act (UCCJA), it was adopted by all states. See UNIF. CHILD CUSTODY JURISDICTION ACT (1968), 9(1A) U.L.A. 271 (1999), amended by UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT (1997), 9(1A) U.L.A. 657 (1999).

32 The federal law is known as the Parental Kidnapping Protection Act, 28 U.S.C. § 1738A (2006).

33 U.S. CONST. art. IV, § 1

34 *Id.* (emphasis added).

35 See *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 502 (1939).

stances. The Parental Kidnapping Protection Act,<sup>36</sup> for example, specifies when State *B* must give effect to State *A*'s child custody decree.<sup>37</sup> Consider as well the dormant Commerce Clause doctrine that features prominently in Florey's article. Congress has the power to statutorily override the Court's dormant Commerce Clause jurisprudence,<sup>38</sup> and there is no reason to think that Congress's powers disappear in relation to the dormant Commerce Clause's extraterritoriality limitations.

### C. *What Institutions?*

A third crucial assumption in Florey's article, as well as the scholarship of many others who have addressed state extraterritorial powers, is that extraterritorial limitations are to be sculpted primarily by courts.<sup>39</sup> As shown above, however, there are two other institutions that conceivably could play a role in determining the scope of states' extraterritorial powers: Congress and the states themselves.

What role is played by which institutions turns in large part on how the questions raised in Part I.B are resolved. If the U.S. Constitution fully describes the scope of states' extraterritorial powers, then courts play a dominant, but not necessarily the sole, role; Congress

36 28 U.S.C. § 1738A (2006).

37 See *id.* For a fascinating analysis of many bills considered by early Congresses that would have determined the effect of state records, see generally Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201 (2009). Although the bills were not ultimately enacted into legislation, Sachs shows that this was due to mill-run political factors, not because Congress concluded that it was without power to determine the effects of state records. See *id.* at 1248–49, 1253–57, 1264–66. To be clear, Sachs's article addresses the Effects Clause in relation to state "records," not "acts" (i.e., legislation). See *id.* at 1207 n.27. Sachs intends to explore whether early Congresses considered bills that would have determined the effects of state acts as well. *Id.* I am eager to see what he finds.

38 See *supra* note 24 and accompanying text.

39 I may be overstating the differences between Professor Florey and myself here. Though her article seems almost entirely directed to courts, Professor Florey in one crucial footnote states that courts should "take the first cut at the problem." Florey, *supra* note 2, at 1112 n.286. Even there, however, she appears to equivocate as to Congress's role, stating that she is "not prepared to say that there are no areas of the extraterritoriality problem in which Congress may productively intervene." *Id.* In the end, when fairly read, I think that Professor Florey's article is court-focused, as is most of the rest of the scholarly literature concerning state extraterritorial powers. One notable exception is Professor Gillian Metzger, though her magisterial article doesn't address extraterritoriality in particular, but instead concerns Congress's wide-ranging powers to regulate interstate matters. See Metzger, *supra* note 22, at 1478–79. In any event, I agree with Professor Florey's explanation as to why courts are well suited to take "the first approach to the problem." Florey, *supra* note 2, at 1112 n.286.

would still play a crucial part if the Effects Clause grants Congress the power of determining what “effects” must constitutionally be given states’ laws.<sup>40</sup> The only role for states, on this approach, is that they could be first-movers to the extent the Court’s and Congress’s constitutional determinations left matters unresolved.

On the other hand, if the Constitution only partially delimits the scope of states’ extraterritorial powers—as I argued above—then there is room for multiple institutions to participate. The Court would primarily be responsible for determining the Constitution’s outer bounds on state extraterritorial powers. Congress could further refine the scope of states’ extraterritorial powers by enacting statutes pursuant to the Effects and Commerce Clauses.<sup>41</sup> In the absence of congressional action, federal courts can generate federal common law doctrines that could be overridden by federal statute.<sup>42</sup> Where there is neither federal statute nor federal common law, each state could determine for itself the scope of its extraterritorial powers or, alternatively, the states could coordinate by adopting uniform laws or state compacts.<sup>43</sup>

What does all this mean? Regardless of how one answers the questions raised in Part I.B, Congress as well as the federal courts play a role in determining the scope of states’ extraterritorial powers. If the Constitution does not fully define states’ extraterritorial powers, then states also may play a role, though their decisions are reversible by federal courts or Congress.

For these reasons, I conclude that Florey’s proposal erroneously elevates the role of federal courts as it minimizes Congress’s and the states’. The next Part explains why Florey’s proposed allocation of decisionmaking authority is troublesome.

## II. THE BIG PICTURE: TWO COMPETING VIEWS OF THE STRUCTURE OF POWER-ALLOCATION AMONG THE STATES

In a well-known tale, a group of blind people touches an elephant to learn what it is like. After each describes only the part he feels, a

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40 For reasons beyond the scope of this Essay, however, I think it better to understand Congress’s role under the Effects Clause to be statute-enacting rather than Constitution-interpreting.

41 See *supra* Part I.B; *supra* note 40.

42 See *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423–24 (1946); Metzger, *supra* note 22, at 1480–85; Rosen, “Hard” or “Soft” Pluralism?, *supra* note 8, at 726–28.

43 Some compacts, though not all, may require congressional approval. See U.S. CONST. art. I, § 10, cl. 3. For a deep and illuminating discussion of state compacts, see Erbsen, *supra* note 22.

wise person explains how each individual's description is part of an integrated whole.<sup>44</sup>

All critiques I've leveled so far at Professor Florey's assumptions amount to comments that have been directed to discrete parts of what in fact is an integrated whole. The whole, in this context, is the large-scale structure of the power allocation among states.

So let us now discuss the large-scale structure of state power. This Part explains that there are two possibilities. I'll show that modern Supreme Court doctrine endorses one of these, and I'll explain why the chosen structure is the more sensible of the two. I then will show that structure's relation to the three assumptions discussed in Part I. In particular, I'll suggest that rejecting Florey's three unspoken assumptions makes sense under the preferred structure of state power. In short, it readily follows from a full understanding of the preferred structure that although the Constitution imposes some limitations on state extraterritorial powers from multiple constitutional sources, most limitations are sub-constitutional and are best (ultimately) chosen by the political branches rather than courts.

#### A. *The Two Possibilities: Exclusivity and Concurrence*

The first possible structure is that each state's regulatory authority is exclusive and nonoverlapping with other states. On this understanding, every person, transaction, and occurrence is subject to being regulated exclusively by only one state. Call this an "exclusivist" understanding of state regulatory power.

The second possibility is that one state's regulatory authority overlaps with other states' regulatory authority. Under this approach, many transactions, occurrences, and people can be regulated by two or more states. Call this an understanding that states have significant "concurrent" regulatory authority.

#### B. *Choosing Between Exclusivity and Concurrence*

How is the choice between exclusivity and concurrence to be made? This Part explains why concurrence is the preferable structure and shows what implications this has for the three assumptions that undergird Florey's article.

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44 For one version, see JOHN GODFREY SAXE, *The Blind Men and the Elephant: A Hindoo Fable*, in *THE POEMS OF JOHN GODFREY SAXE* 111, 111–12 (Boston, Houghton, Mifflin & Co. 1882) (1868).

## 1. A Little Bit of History

The commonly told story, well narrated by Professor Florey,<sup>45</sup> is that American constitutional law first took (what I dub) an “exclusivist” approach, defining state regulatory authority on the basis of geographical borders. In his famed *Commentaries on the Conflict of Laws*, Justice Story wrote that “the laws of every state affect and bind directly all property . . . within its territory . . . and all persons who are resident within it” and that “no state . . . can, by its laws, directly affect or bind property out of its own territory, or bind persons not resident therein.”<sup>46</sup> Under this view, states had absolutely no power to regulate extraterritorially: because each state’s power extended only to its physical borders—and no further—states’ regulatory powers did not overlap. Several early Supreme Court cases described the structure of interstate regulatory authority in this way.<sup>47</sup>

But this exclusivist approach to state regulatory powers never squared with actual practice. From the start of our country’s history, states have applied their laws to persons, transactions, and occurrences that lay beyond their physical borders. For example, a Virginia statute enacted in 1792 criminalized “all felonies committed *by citizen against citizen* in any such place.”<sup>48</sup> In the 1819 decision of *Commonwealth v. Gaines*,<sup>49</sup> the General Court of Virginia held that this statute supported the Virginia Attorney General’s prosecution of a Virginia citizen for having stolen a horse in the District of Columbia that belonged to a fellow citizen of Virginia.<sup>50</sup> Consider as well a nine-

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45 See Florey, *supra* note 2, at 1069–72.

46 JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 18, 20 (2d ed. 1841).

47 An 1881 decision declared that “[n]o State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular.” *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). A 1914 decision similarly stated, “It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority . . . .” *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914). An opinion eleven years after *Bonaparte* asserted that “[l]aws have no force of themselves beyond the jurisdiction of the State which enacts them.” *Huntington v. Attrill*, 146 U.S. 657, 669 (1892). In all these cases, the Court uses the term “jurisdiction” to mean the state’s physical borders.

48 See *Commonwealth v. Gaines*, 4 Va. (2 Va. Cas.) 172, 1819 WL 726, at \*1 (1819) (emphasis added).

49 4 Va. (2 Va. Ca.) 172, 1819 WL 726 (1819).

50 See *id.* Interestingly, the Virginia court’s decision contained an important choice-of-law holding: what qualified as a “felon[y]” was to be determined by Virginia law, not the law of the place where the activity occurred. See *id.*, 1819 WL 726 at \*6. The dissenters in the case acknowledged that “it is competent for a State to legislate

teenth century Texas law that provided that persons out of the state “may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this chapter *which do not in their commission necessarily require a personal presence in this State . . .*”<sup>51</sup> Interpreting this law, an 1882 Texas decision upheld the application of Texas criminal law to an act of forgery of a land certificate for Texas property even though all the criminal acts had occurred in the State of Louisiana.<sup>52</sup> The court further observed that Texas criminal law could be applied even if the defendants’ acts were “no crime against the State in which [they were] perpetrated.”<sup>53</sup>

In the twentieth century, the United States Supreme Court formally recognized the power of states to regulate persons and things that lay beyond their physical borders. In the 1921 case of *Strassheim v. Daily*,<sup>54</sup> the Court permitted Michigan to prosecute a non-Michiganer for acts he undertook outside of Michigan that defrauded Michigan.<sup>55</sup> Writing for the Court, Justice Holmes wrote that “[a]cts 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.”<sup>56</sup>

Today’s Restatements and Model Codes explicitly acknowledge states’ significant extraterritorial regulatory powers and, in so doing, endorse a “concurrent” structure of state regulatory powers. The *Third Restatement of Foreign Relations Law* provides that states “may apply at least some laws to a person outside [State] territory on the

rules of conduct for its citizens while resident beyond its territorial limits,” but did not believe that the Virginia legislature had intended to create such an extraterritorial regulation. *Id.*, 1819 WL 726 at \*8 (Holmes, J., dissenting). The Virginia legislature modified the statute in 1819 to make clear that they did not intend to extend extraterritorial jurisdiction. *See id.*

51 *See Hanks v. State*, 13 Tex. Ct. App. 289, 305 (1882) (emphasis added) (quoting Tex. Pen. Code Ann. § 454 (Vernon 1879)).

52 *Id.* at 308–09.

53 *Id.* For more examples, see Rosen, “Hard” or “Soft” Pluralism?, *supra* note 8, at 719–20.

54 221 U.S. 280, 281–82, 284–85 (1911).

55 *Id.* at 281–82, 284–85.

56 *Id.* at 285. Thirty years later, in *Skiriotes v. Florida*, 313 U.S. 69 (1941), the Court upheld the application of a Florida statute prohibiting sponge fishing to a Florida citizen’s activities that occurred wholly outside of Florida’s territorial waters. *Id.* at 79. The *Skiriotes* Court analogized Florida’s extraterritorial regulatory powers to the unquestioned power of the federal government to regulate its citizens when they are “upon the high seas or even in foreign countries.” *Id.* at 73. The Court adverted to Tenth Amendment principles as the source of similar state extraterritorial powers. *See id.* at 77.

basis that he is a citizen, resident or domiciliary of the State.”<sup>57</sup> The Restatement asserts that this principle applies to both extraterritorial criminal and civil legislative powers.<sup>58</sup> Directed to the criminal context, the Model Penal Code provides that State *A* may impose liability if “the offense is based on a statute of this State that expressly prohibits conduct outside the State.”<sup>59</sup> The Model Penal Code further provides that State *A* has extraterritorial legislative jurisdiction even if the activity it prohibits occurs in a state in which the activity is permissible.<sup>60</sup>

Because states can regulate extraterritorially, more than one state’s laws frequently can apply to a given person, transaction, or occurrence. The Supreme Court explicitly acknowledged this in 1981 when it observed that “a set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction.”<sup>61</sup>

In short, though Justice Story and some early Supreme Court decisions conceptualized a state’s regulatory powers as beginning and ending at the state’s physical borders—with the result that state regulatory power never overlapped—such an “exclusivist” structure never accurately described what states actually did. In the twentieth century the Court formally endorsed a “concurrent” structure of state regulatory authority, recognizing that two or more states frequently have the power to regulate a given person, transaction, or occurrence. This is still good law.

## 2. Why Concurrence Is More Sensible than Exclusivity in this Context

There are good reasons why concurrence has prevailed over exclusivity in the context of state regulatory powers. Simply put, there is a longstanding sense in this country that a state has a legitimate interest in regulating its citizens (call this the “Citizen” principle), as well as events that occur or have effects within its borders (call this the “Place” principle). These two sensibilities give rise to concurrence. Concurrence sometimes arises due to a confluence of the two principles; concurrence results from combining (1) the Citizen principle

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57 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 n.5 (1987).

58 The *Third Restatement of Foreign Relations* is explicit about this. *See id.* § 403 cmt. f (“The principles governing jurisdiction to prescribe set forth in section 402 and in this section apply to criminal as well as to civil regulation.”).

59 MODEL PENAL CODE § 1.03(1)(f) (1985).

60 *Id.* § 1.03(2).

61 *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 (1981).

(that State *A* sometimes can legitimately regulate its citizen's actions in State *B*) with (2) the Place principle (that State *B* can legitimately regulate Citizen *A* while she is in State *B*). Sometimes the Place principle on its own can give rise to concurrence; concurrence results from the combination of (1) State *A*'s ability to regulate actions undertaken within State *A* with (2) State *B*'s ability to regulate actions that have an effect in State *B* even though they were undertaken in State *A*.

To tell the same story a bit differently, Justice Story's exclusivist vision failed because geographical borders are a problematic basis for demarcating state power.<sup>62</sup> There is a longstanding consensus in the United States that a state's legitimate interests do not end at its borders, but instead (sometimes) extend to the state's citizen when she is out-of-state,<sup>63</sup> and (sometimes) extend to even noncitizens whose out-of-state actions affect the state.<sup>64</sup> For this reason, a single person, transaction, or occurrence frequently is subject to multiple states' regulatory authority rather than to only one state's regulatory authority. State regulatory authority accordingly is concurrent rather than exclusivist.

More generally, it may be helpful to observe that the question of whether power is held exclusively by a single governmental institution, or concurrently by multiple institutions, recurs in American constitutional law.<sup>65</sup> For example, the Constitution provides that the U.S. Supreme Court has original jurisdiction over cases involving ambassadors. Can federal district courts *also* exercise original jurisdiction over such cases? Exclusivity would dictate "no," whereas concurrence would allow for a "yes." As I've shown elsewhere, American law has opted for concurrence in this context of adjudicatory jurisdiction, and in many other contexts as well.<sup>66</sup> Moreover, most instances of contemporary concurrence amount to reversals of the Court's initial view that power was held exclusively<sup>67</sup>—just as the Court's current understanding that more than one state can regulate a given occurrence consti-

62 See Rosen, *Extraterritoriality*, *supra* note 8, at 968 n.455.

63 Cf. *Commonwealth v. Gaines*, 4 Va. (2 Va. Cas.) 172, 1819 WL 726 (1819) (permitting prosecution of a Virginia citizen for a crime committed out of state against another Virginia citizen).

64 See *e.g.*, *Strassheim v. Daily*, 221 U.S. 280 (1911) (permitting prosecution of nonresident charged with defrauding the state of Michigan from outside its borders).

65 See generally Mark D. Rosen, *From Exclusivity to Concurrence*, 86 MINN. L. REV. (forthcoming 2010) (manuscript at 6, on file with author).

66 See *id.* The U.S. Supreme Court upheld concurrent jurisdiction vis-à-vis ambassadors as between inferior federal courts and the Supreme Court in *Ames v. State of Kansas*, 111 U.S. 449, 470–72 (1884).

67 See *Ames*, 111 U.S. at 470–72; Rosen, *supra* note 65 (manuscript at 20–51).

tutes a rejection of Justice Story's contrary understanding. In short, although exclusivity may be the structure that people naturally expect, we should not be put off by concurrence. To the contrary, the widespread shift from exclusivity to concurrence across many contexts suggests that concurrence is the superior structure in many circumstances.<sup>68</sup>

Though concurrent power structures have certain advantages,<sup>69</sup> they also carry some serious costs. Of particular relevance here is that whereas exclusivity ensures the absence of conflict (since only one state has the power to regulate), concurrence opens the door to conflict and confusion as more than one state potentially can regulate a given person, transaction, or occurrence.

True enough. But it is important not to overstate the cost of potential conflicts. Concurrence *always* creates the possibility of conflict among the institutions with overlapping authority. American law has been able to deal with conflicts in the many contexts of concurrence by means of assorted practices and through creating several conflict-resolution mechanisms. The result is that concurrence's costs have been contained without disturbing concurrence's many benefits.<sup>70</sup>

So, too, in the context of state regulatory powers. As Florey herself notes, despite the fact that due process imposes only modest constraints on states' extraterritorial powers, and notwithstanding the doctrinal tensions she identifies, there is not (and indeed never has been) a crisis in which states systematically have overreached by means of extraterritorial regulation.<sup>71</sup> Instead, states for the most part have asserted only modest extraterritorial powers,<sup>72</sup> and what conflicts have emerged have been handled almost entirely at the sub-constitutional level by a combination of state conflicts-of-law doctrines, uniform state laws, and (a handful of) federal statutes. On only a few occasions has

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68 See *Rosen*, *supra* note 65 (manuscript at 17–43).

69 See *id.* (manuscript at 43–57).

70 For a full discussion, see *id.* (manuscript at 58–62).

71 Florey, *supra* note 2, at 1124 (noting 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”).

72 There are a few notable exceptions. For example, in an era when divorces were difficult to obtain, Nevada sought to make its quickie divorces available to noncitizens who visited Nevada for the purpose of divorcing their homebound spouses. Nevada’s encouragement of “suitcase divorces” quite plausibly can be characterized as extraterritorial overreaching. See generally David P. Currie, *Suitcase Divorce in the Conflict of Laws: Simons, Rosenstiel, and Borax*, 34 U. CHI. L. REV. 26 (1966).

the U.S. Supreme Court been called on to articulate constitutional limits on states' extraterritorial powers.<sup>73</sup>

### 3. Implications

The factors that have given rise to concurrence in the interstate context have implications for the three deep assumptions that are built into Florey's argument, namely that the scope of states' extraterritorial powers are a function of a (1) single (2) court-developed (3) constitutional principle.

The lessons are as follows. It is impossible to discern clear lines of demarcation between states' regulatory powers because there is long-standing consensus that there are two legitimate bases for state regulations—Citizenship and Place—and there is no consensus as to how the two principles are to be prioritized when each licenses a different state to regulate a particular person, transaction, or occurrence.<sup>74</sup> If our normative sensibilities give rise to a world of concurrent (and not exclusive) state regulatory authority, then how are the contours of state regulatory power best determined? There are two options. First, we *could* turn to courts to articulate constitutional limitations—but why would we want to? Absent constitutional text or a strong tradition that guided limits, what criteria would the courts use?

Second, we could use judge-made constitutional doctrines to police only egregious regulatory efforts that undermine other constitutional commitments, and primarily rely on institutions apart from federal courts to work out the limits on state extraterritorial powers at the sub-constitutional level. As to the judge-made constitutional limitations: if, as I've suggested, there is no general constitutional limitation on states' extraterritorial powers, but only limits that come into

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73 Several of those cases concerned Nevada's efforts to make its more liberal divorce laws available to noncitizens. *See Williams v. North Carolina*, 325 U.S. 226, 262 (1945) (Black, J., dissenting); *Williams v. North Carolina*, 317 U.S. 287, 302–04 (1942); *see also Currie, supra* note 72, at 26–27 (“It is no secret that Nevada makes divorce law for the whole country.”)

74 In truth, the impossibility of drawing hard and fast lines between states' legitimate regulatory powers should not be surprising. After all, American law has not succeeded in drawing clear lines between institutions even where there is a *prima facie* reason to think that the different institutions' powers are conceptually distinct: it is now widely acknowledged that executive, legislative, and judicial functions overlap to a considerable degree, and, likewise, American law no longer aims to draw judge-made constitutional lines between federal and state legislative powers. *See, e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 539–47 (1985). In contrast to the separation of powers and federalism contexts, there is no plausible conceptual basis for distinguishing between states' regulatory powers. For this reason, it would seem to follow *a fortiori* that clear lines between states' authority cannot be expected.

play when a state regulation goes too far and runs afoul of some constitutional principle that is not specific to extraterritoriality, then we would expect there to be multiple constitutional doctrines—not just one—that operate to limit states' extraterritorial powers. This is an accurate description of the status quo, where, although extraterritorial regulations are not per se unconstitutional, a particular extraterritorial regulation could overreach by: (1) being so extreme as to unfairly surprise the person to whom it is being applied, thereby running afoul of due process concerns; or (2) problematically interfering with other states' abilities to legitimately regulate, thereby running afoul of the requirements of full faith and credit; or (3) (perhaps) undermining the benefits that are supposed to flow from a federal union, thereby interfering with peoples' constitutional right to travel.<sup>75</sup>

Apart from such egregious extraterritorial regulatory attempts, however, limitations on extraterritorial state regulations are sub-constitutional, and they come through political institutions—either Congress or the states themselves.<sup>76</sup> If Congress or the state legislatures acted, the limitations would be the result of political compromise rather than constitute an imposition of legal judge-made principles. Politics would seem to be the right source of extraterritorial limitations since line-drawing involves the harmonization of two competing principles—the Citizenship and Place principles—that are incommensurable. How such incommensurable commitments are reconciled is a matter of subjective preference, rather than logic,<sup>77</sup> and for that reason is better decided by the political branches rather than courts. Legislatures are preferable for the related reason that the normatively preferable harmonization is likely to be highly context-dependent, and the fact-specific line-drawing that is appropriate to context-dependent solutions falls more to the domain of legislatures than courts.

This does not mean that courts properly play no role. To the contrary, absent legislative action, courts can provide a first cut at determining the appropriate bounds of state extraterritorial powers. In fact, to the extent that normatively appropriate outcomes are highly context-dependent, American courts' case-by-case, inductive

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<sup>75</sup> See *supra* note 17.

<sup>76</sup> With the caveat, discussed below, that courts can act as first-movers to generate federal common law. See *infra* notes 78–81 and accompanying text.

<sup>77</sup> For a discussion regarding the subjectivity inherent in deciding among incommensurable values, see Mark D. Rosen, *Why The Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 967–70 (2006).

methodology is well suited to analyzing conflicts; courts are well suited to providing the intense scrutiny to specific circumstances that context-dependent decisionmaking requires.<sup>78</sup> Such focused scrutiny can clarify the stakes in a way that a legislature's prospective perspective may overlook.<sup>79</sup> When courts ultimately render a decision, though, they unavoidably will make normative judgments as they make tradeoffs against the competing considerations that their scrutiny has clarified. For this reason, it is desirable on the grounds of both democracy and institutional competency<sup>80</sup> that judge-made decisions (beyond those concerning the Constitution's outer limits of state extraterritorial powers) be understood as federal common law that can be legislatively modified—meaning that courts may have the first, but not the *last* word, on the scope of states' extraterritorial powers. Once again, by and large that is how things operate now: the most potentially extensive extraterritoriality regulating doctrine is part of the dormant Commerce Clause jurisprudence, which, as is well recognized, is subject to modification by Congress.

Two more comments concerning the doctrinal status quo are in order. First, federal courts' powers to generate first-cut common law rules to decide the scope of states' extraterritorial powers goes beyond matters of interstate commerce. This is so because the space left by unexercised Commerce Clause power is not the only space that courts can fill by creating federal common law;<sup>81</sup> courts can make common

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78 For this reason I agree with Professor Florey that courts can play an important role. See Florey, *supra* note 2, at 1112 n.286.

79 I recognize that this is a controversial statement. For an insightful discussion of cognitive errors to which courts rendering particularistic decisions are prone, see generally Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006). For the start of a response to Schauer, see generally Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933 (2006). This is not the place to fully defend the proposition above in text. But here is a brief response: Many features of common law adjudication counteract the cognitive fragilities Schauer identifies, see generally Emily Sherwin, *Judges as Rulemakers*, 73 U. CHI. L. REV. 919 (2006), and courts' inductive reasoning is superior for many purposes to the deductive reasoning that legislatures would have to rely on if courts did not generate common law. Insofar as legislatures have the power to reject or refine courts' common-law-making, our current system of (non-constitutional) lawmaking has the best of both worlds: courts can engage in illuminating deductive reasoning of the sort that legislatures cannot, but legislatures ultimately can bring their broader perspectives and democratic legitimacy to lawmaking as they oversee courts' common law products.

80 For an interesting discussion of legislatures' superior institutional competency to make tradeoffs, see Rachlinski, *supra* note 79, at 944–46 (explaining why a legislature, unlike courts, is an “institution that is accustomed to making tradeoffs”).

81 See, e.g., Rosen, *supra* note 65, (manuscript at 46–47) (discussing the source of federal courts' power to create federal common law).

law in the space of unexercised congressional Effects Clause powers as well. Indeed, the Full Faith and Credit Clause is the more natural source for limitations on state extraterritorial powers because that clause at its core is concerned with extraterritoriality; that Clause addresses the effects that one state's legislation, court judgments, and records have in other states. By contrast, extraterritoriality is only peripherally related to the Commerce Clause.<sup>82</sup>

Second, under the doctrinal status quo, in the absence of congressional action, federal *courts* have priority over state *legislatures* with regard to imposing limitations on state extraterritorial powers. Is this sensible? There are two reasons in its favor: (1) *courts* may be better than legislatures at undertaking highly context-sensitive inquiries, and (2) *federal* institutions may be superior to state institutions vis-à-vis policing state powers insofar as the federal institution is likely to be less self-interested. On the other hand, state legislatures may operate well in this context after all for two reasons. First, legislatures may be preferable to courts on account of the highly subjective judgment that ultimately must be made in determining the scope of states' extraterritorial powers. Second, state legislatures are particularly well suited to what is likely the most desirable outcome of all:<sup>83</sup> coordinated negotiated political solutions among the states to resolve recurring conflicts.<sup>84</sup> Having highlighted the question and some considerations, I leave unresolved for now the question of which institution, absent congressional action, is best suited to resolve the scope of states' extraterritorial powers.

#### CONCLUSION

Our Constitution provides multiple principles that limit particularly egregious extraterritorial regulations, but does not provide any principle that is dedicated to regulating extraterritoriality as such. This does not mean that the Constitution has no bearing on states' extraterritorial powers, apart from proscribing egregious conduct. The Constitution creates (and recognizes preexisting) institutions that *themselves* have the power to determine the scope of states' extraterritorial powers. By means primarily of the Commerce and Full

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82 To be clear, I do not mean to suggest that Commerce Clause principles should play no role in respect of extraterritoriality, but only to point out that there is another constitutional provision that appropriately is the primary source of extraterritoriality considerations.

83 For the most influential argument to this effect, see William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 42 (1963).

84 See *supra* notes 28–31 and accompanying text.

Faith and Credit Clauses, the Constitution gives Congress power to statutorily control states' extraterritorial powers. If Congress does not act, then federal courts can step in by creating congressionally defeasible federal common law. In the absence of federal legislative and judicial action, the states can decide for themselves to what extent they have extraterritorial powers. They can either go it alone in answering this question or they can come to a coordinated resolution.

It is time to return to (what I anticipated would be) the surprising observation made at this Essay's start: that constitutional doctrine to this day does not clearly tell us to what extent states may regulate people and things outside their borders. This is so, we can now conclude, because the Constitution allocates decisionmaking authority for resolving the scope of state extraterritorial powers, but does not itself answer the question. In so doing, the authority for resolving the question is left primarily to political processes.<sup>85</sup>

In the end, perhaps we should not be terribly surprised that the Constitution does not itself tell us the scope of states' extraterritorial powers. After all, if we take a broader view of things, the following pattern emerges: while the Constitution is quite good at creating our governing institutions,<sup>86</sup> it is less adept at explaining how they are to interact, particularly if the institutions have overlapping powers. Political process rather than sharply defined judicial doctrines (now) police the borders between many of our constitutionally created institutions: between (1) federal and state regulatory powers,<sup>87</sup> (2) Congress's regulatory authority and administrative agencies' rulemaking powers,<sup>88</sup> and (3) the Senate and President's treaty-making power, on

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85 This conclusion vis-à-vis horizontal federalism is structurally similar to Herbert Wechsler's famed argument that political processes determine the boundaries between the federal and state governments in the context of vertical federalism and Jesse Choper's argument that political processes similarly determine the bounds between executive, legislative, and judicial power in the separation of powers context. See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 4–59, 175–84 (1980). See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *COLUM. L. REV.* 543 (1954).

86 Though not perfect, of course—it didn't anticipate the administrative state that many dub the "fourth branch" of our federal government.

87 See generally *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551–65 (1985) (discussing the political safeguards of federalism).

88 It is widely appreciated that the nondelegation doctrine provides virtually no constraint on Congress's ability to delegate lawmaking powers to agencies. See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 *U. CHI. L. REV.* 1721, 1731 (2002); Cass R. Sunstein, *Nondelegation Canons*, 67 *U. CHI. L. REV.* 315, 322 (2000).

the one hand, and Congress's ordinary legislative powers, on the other.<sup>89</sup> Similarly, as regards the question at hand, we can say that the Constitution recognizes states and makes an invaluable important power allocation in respect of determining the relationship among them by giving the federal legislature the final say. But by leaving the ultimate resolution to political processes, the Constitution significantly underdetermines the substantive rules that govern the relationship among states. And so long as Congress does not act, federal courts and even the states themselves can take the initiative in determining the scope of states' extraterritorial powers.

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89 See Rosen, *supra* note 65 (manuscript at 6).

