

**“HARD” OR “SOFT” PLURALISM?: POSITIVE, NORMATIVE, AND  
INSTITUTIONAL CONSIDERATIONS OF STATES’  
EXTRATERRITORIAL POWERS**

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## INTRODUCTION

If *Roe v. Wade*<sup>1</sup> were overruled,<sup>2</sup> could Mary, a citizen of a state that prohibited abortions (let’s say Utah), be barred from obtaining abortions in a state (let’s say California) in which abortions were legal? This Article makes seven points in relation to answering this question. All the observations made herein are relevant not only to the unlikely event of *Roe*’s demise, but also to a nontrivial class of constitutional state laws that can be circumvented if a citizen can cross his state border and avail himself of his neighboring state’s less restrictive laws. This class includes restrictions on gambling and assisted suicide, mandatory motorcycle helmet laws, and laws that fix prices for agricultural goods.<sup>3</sup>

The first point is that, contrary to many people’s strong intuitions, states in our country’s federal union generally do have the power to regulate their citizens’ out-of-state activities. Indeed, states have been doing so since the earliest days of the republic. States’ exercise of extraterritorial regulatory power has been upheld by the Supreme Court and has been recognized by the Model Penal Code and the Restatement (Third) of Foreign Relations. Doctrinally, such extraterritorial state powers have been tied to the Tenth Amendment.<sup>4</sup> Extraterritorial regulatory jurisdiction is limited by due process’s requirement that the state regulation be neither “arbitrary nor fundamentally unfair,”<sup>5</sup> but a state’s regulation of its own citizen’s out-of-state

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1. 410 U.S. 113 (1973).

2. This is among the difficult constitutional questions that Professor Fallon convincingly argues would soon face the Supreme Court in the event *Roe v. Wade* were overturned. See Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611 (2007). Like Professor Fallon’s contribution, this Article takes no position on the question of whether *Roe v. Wade* should be overruled.

3. For a description of the character of such laws, see *infra* Part I; see also Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 856–60, 883–86 (2002).

4. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively . . .”).

5. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981).

activities to ensure the efficacy of a legitimate state law would satisfy this standard. This broad extraterritorial state regulatory power has not been displaced by the line of Dormant Commerce Clause case law that imposes some limits on extraterritoriality. All these matters are discussed in Part I.

Points two through four are closely related to one another and accordingly are treated together in Part II. The second point is that although states enjoy general extraterritorial regulatory powers, particular extraterritorial regulatory efforts plausibly could run afoul of constitutional limitations concerning interstate relations that are found in the right to travel, Article IV's Privileges and Immunities Clause, and the Fourteenth Amendment's Privileges or Immunities Clause.<sup>6</sup> Point three is that Utah's effort to regulate Mary would not be precluded under any of these doctrines as they currently are understood by the United States Supreme Court. Point four is that current doctrine nevertheless cannot be presumed to be stable because, among other reasons, there has not been a sustained practice of such state extraterritorial regulations that has received attention from legislatures, the public, and the courts.

The remaining points (five through seven) are discussed in Part III. Point five is that answering the doctrinal question of whether Utah can regulate Mary's California travels invariably will turn on normative considerations because, among other reasons, the question is not answered by clear constitutional text, longstanding tradition, or precedent.

The sixth point clarifies the normative question that is presented by Utah's regulatory attempts in relation to Mary. Whether Utah should have such extraterritorial powers is an exceedingly difficult question that goes to the heart of the meaning of state citizenship and national citizenship and, ultimately, to the nature of our country's federal union.<sup>7</sup> Does the "right to travel" and/or national citizenship entail that Mary have a right to the legal entitlement to abortion that is enjoyed by Californians while Mary visits the Golden State?

Some have so argued,<sup>8</sup> but consider the implications. With regard to those policies that neither the Constitution nor federal statutory law demands national uniformity, it is widely recognized that states may take different regulatory approaches. Not infrequently, however, a state will be unable to accomplish its constitutionally legitimate policy goals if its citizen can free herself of her home state's regulation simply by walking into a state that does not so regulate. If the regulating state does not have the power to preclude "travel-evasion" of its legitimate policies, then the extent of the pluralism of

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6. Though I speak here of these constitutional principles as playing a structural role in establishing the nature of interstate relations, I do not mean to suggest that they do not also establish personal rights.

7. I fully agree with Professor Fallon in this regard. See Fallon, *supra* note 2, at 632–48; see Rosen, *supra* note 3, at 911.

8. See Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 981–84 (2002).

state policies possible under our federal union is, as a practical matter, quite limited with regard to those policies that are vulnerable to travel-evasion. Call this a regime of “soft” pluralism. By contrast, a federal system in which Utah can prohibit Mary from obtaining an abortion in California would be a regime of “hard” pluralism in which states can efficaciously regulate across the entire range of matters with respect to which federal law does not demand nationwide uniformity. To be clear, the sixth point does not seek to definitively resolve the choice between “soft” and “hard” pluralism, but only aims to show that the choice is a difficult one and that much rides on how the question is resolved.

The seventh point is largely institutional: what societal institutions are to make the choice between “soft” and “hard” pluralism? Points one and three together establish that, as a purely descriptive matter, our country presently has a regime of “hard” pluralism; each state can decide on its own whether it wishes to extraterritorially regulate its citizens and thereby maximize the efficacy of their regulations or whether it is content ensuring that its citizens comply with its regulations only while they are within state borders. Point seven makes clear that these state-by-state decisions may be legislatively reversed by Congress (in conjunction with presidential participation by virtue of presentment). Congress has the power to determine the scope of state extraterritorial powers under the Full Faith and Credit Clause’s “Effects” Clause, Section Five of the Fourteenth Amendment (in relation to what qualifies as a privilege or immunity of national citizenship), the Commerce Clause,<sup>9</sup> and possibly Article IV’s Privileges and Immunities Clause.<sup>10</sup> Point seven further argues that Congress (and the President) properly have privileged roles in answering such questions because they have institutional advantages vis-à-vis both states and the federal courts in deciding the scope of state extraterritorial regulatory authority and in thereby determining the nature of state and federal citizenship and the resulting character of our federal union.

Before proceeding, I would like to flag an important question that this Article does not explore: how Utah would enforce its extraterritorial regulation of Mary. Though this is a question that merits serious consideration, space limitations allow only a few observations here. First, even difficult-to-enforce regulations can have effects in respect of both norm-creation and behavior.<sup>11</sup> Second, there are a variety of options that could be utilized to enforce

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9. I explain later in the Article why the Commerce Clause is a less suitable source of congressional power than the above mentioned sources. *See infra* Part III.C.2.b.

10. *See* Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1485–88 (2007). For more discussion concerning the Privileges and Immunities Clause as a source of congressional power, *see infra* Part III.C.2.b.

11. *Cf.* Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided?—Some New Answers*, 95 CAL. L. REV. 451 (2007) (showing that racially restrictive covenants that were legally unenforceable nevertheless may have facilitated the creation of racially segregated housing markets).

extraterritorial regulations, including disclosure requirements that entail penalties for misrepresentations, extradition,<sup>12</sup> and federal legislation that aimed to support the state law.<sup>13</sup> Third, the degree of enforceability will turn on the precise subject of extraterritorial regulation. Accordingly, even if privacy concerns or pragmatics were to preclude some enforcement options in relation to Mary, these options might be available vis-à-vis an extraterritorial regulation that seeks to ensure compliance with (for instance) a state law that sets prices for agricultural products.<sup>14</sup> One accordingly should not generalize from the enforceability of Utah's (hypothetical) extraterritorial anti-abortion statute to the enforceability of other extraterritorial regulations.

#### I. STATES' BASELINE POWERS TO REGULATE THEIR CITIZENS' OUT-OF-STATE CONDUCT (POINT ONE)

A comprehensive analysis of the scope of a state's powers to regulate its citizen's out-of-state activities requires analysis of multiple federal constitutional principles. Under contemporary doctrine, the Fourteenth Amendment's Due Process Clause<sup>15</sup> determines the presumptive scope of a state's regulatory jurisdiction.<sup>16</sup> Other constitutional principles—most importantly the Dormant Commerce Clause, the Privileges and Immunities

12. The Extradition Clause requires State A to yield person Z within its territory to extraditing state B even if the activities that Z has been accused of committing would not constitute a crime in state A. See *Puerto Rico v. Branstad*, 483 U.S. 219, 225 (1987) (reaffirming the holding of *Kentucky v. Demmsion*, 65 U.S. (24 How.) 66 (1860), which "rejected the position . . . that the Extradition Clause required only the delivery of fugitives charged with acts which would be criminal by the law of the asylum State"). For a more expansive consideration of similar enforcement questions, 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, 989–99 (2006).

13. For example, bills that have been passed by both houses of Congress prohibit "taking minors across State lines in circumvention of [state] laws requiring the involvement of parents in abortion decisions." Child Interstate Abortion Notification Act, S. 403, 109th Cong. (2006); Child Custody Protection Act, S. 403, 109th Cong. (2006); 152 CONG. REC. S8151–88 (daily ed. July 25, 2006) (providing the version passed in the Senate); 152 CONG. REC. H7412–22 (daily ed. Sept. 26, 2006) (providing the version passed in the House).

14. For such a law, see Rosen, *supra* note 3, at 859–60, 930–32.

15. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty or property, without due process of law . . .").

16. To be analytically clear, the Due Process Clause is not the *source* of state extraterritorial regulatory power; the Court has understood such powers to be an incident of state sovereignty that has been retained under the Tenth Amendment, see Rosen, *supra* note 3, at 865–66 (analyzing relevant case law), and the Due Process Clause instead provides the (initial) limit on such state powers. Nevertheless, courts frequently conflate these distinct analytical steps and speak of the scope of state regulatory authority as being determined by the Due Process Clause. For ease of exposition, the discussion that follows above in text will utilize the common parlance.

Clause,<sup>17</sup> the Privileges or Immunities Clause,<sup>18</sup> and the right to travel—impose discrete but important limitations on states' extraterritorial regulatory powers.

This Part I shows that, notwithstanding some eloquent arguments to the contrary,<sup>19</sup> states have extensive presumptive powers to regulate their citizens' out-of-state activities under contemporary Due Process doctrine, and that this conclusion is not undermined by dicta in some Dormant Commerce Clause cases that speak about limitations on state extraterritorial powers. Parts II and III more closely examine limits on such extraterritorial powers that may be imposed by the Privileges and Immunities Clause, the Privileges or Immunities Clause, and the right to travel.

#### A. *Due Process*

To be clear, the only question this Article explores is the extent of a state's power to regulate *its own citizen's* efforts to opt out of its laws via travel-evasion; it does not address the scope of state A's regulatory powers over the activities of a citizen of state B that occur in State B. A few of the cases discussed below nonetheless address state A's regulatory powers over citizen B's conduct in state B. Why? I imagine that almost everyone would agree that Utah has a greater claim to regulate its own citizen's conduct in California than to regulate the conduct of a California citizen in California. For this reason, appreciating that the Constitution does not flatly foreclose even the latter regulatory effort is relevant to understanding the scope of state A's regulatory powers over its own citizens' extra-state activities.

Under contemporary constitutional law, the Fourteenth Amendment's Due Process Clause is the primary determinant of the presumptive scope of a state's

17. U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

18. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

19. Professor Kreimer first advanced the argument that states lacked the power to regulate its citizens' extraterritorial activities in two articles in the early 1990s. See Seth F. Kreimer, "*But Whoever Treasures Freedom . . .*": *The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907 (1993) [hereinafter Kreimer, "*But Whoever Treasures Freedom . . .*"]; Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992) [hereinafter Kreimer, *The Law of Choice and Choice of Law*]. I took issue with Professor Kreimer's arguments (and those of several other fine academics) in an article a decade later. See Rosen, *supra* note 3. Professor Kreimer authored a nearly fifty-page response that appeared in the same issue of the *University of Pennsylvania Law Review*, with respect to which the *Law Review's* publishing constraints allowed me only a footnote to reply. See Kreimer, *supra* note 8; Rosen, *supra* note 3, at 862 & n.28. Here I provide a fuller answer, in turn, to Professor Kreimer's response.

regulatory jurisdiction.<sup>20</sup> Though perhaps surprising to many, the United States Supreme Court long has upheld the power of states to regulate activities that occur outside their borders.<sup>21</sup> In the 1911 case of *Strassheim v. Daily*, for example, the Court permitted Michigan to prosecute a person who was not a citizen of Michigan for acts he undertook while he was in Illinois to defraud the state of Michigan.<sup>22</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>23</sup> Thirty years later, in *Skiriotes v. Florida*, 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.<sup>24</sup> The *Skiriotes* Court analogized Florida's extraterritorial regulatory powers to the unquestioned power of the federal government to regulate United States citizens when they are "upon the high seas or even in foreign countries"<sup>25</sup> and adverted to the Tenth Amendment as the source of similar state extraterritorial powers.<sup>26</sup>

These Supreme Court cases in effect endorsed extraterritorial powers that had been exercised by states since the beginning of our nation's history. For example, a Virginia statute enacted in 1792 criminalized "all felonies committed by citizen against citizen in any such place."<sup>27</sup> In 1819, 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>28</sup>

20. It is far from obvious that a constitutional provision primarily geared toward protecting individual rights is the appropriate place from which the structural question of the scope of states' legislative jurisdiction is to be derived. Cf. James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169 (2004) (arguing that state adjudicatory jurisdiction is more properly derived from the Full Faith and Credit Clause, not the Due Process Clause). I plan to turn my attention to this question in the future. For present purposes, however, I'm interested only in engaging in positive analysis.

21. For a fuller discussion of these and other cases, see Rosen, *supra* note 3, at 871–91.

22. 221 U.S. 280, 281–82 (1911).

23. *Id.* at 285.

24. 313 U.S. 69 (1941).

25. *Id.* at 73.

26. *Id.* at 77.

27. *Commonwealth v. Gaines*, 4 Va. (2 Va. Cas.) 172, 173 (1819) (quoting Act 1. Rev. Code, 1792, ch. 136, § 7).

28. *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.* at 181. The dissenters in the case acknowledged that "it is competent for a State to legislate 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.* at 183 (Holmes, J., dissenting). The Virginia legislature modified the statute in 1819 to make clear that it did not intend to extend extraterritorial jurisdiction. *See*

Nineteenth century Texas law 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>29</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>30</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 it [was] perpetrated.”<sup>31</sup> A 1915 Delaware law criminalized a married citizen’s second marriage in another state if the first marriage had not been dissolved,<sup>32</sup> which was applied to a Delaware husband who married a second woman in Florida and then returned to his first wife in Delaware, never thereafter communicating with the second woman.<sup>33</sup> An 1891 statute in West Virginia provided that:

if a person be stricken or poisoned out of this state, and die by reason thereof within this state, the offender shall be as guilty, and may be prosecuted and punished, as if the mortal stroke had been given, or poison administered, in the county in which the person so stricken or poisoned may so die.<sup>34</sup>

These statutes and cases thus absolutely refute the claim that has been put forth by one scholar that “the understanding of the scope of the sovereign power of states before the middle of the twentieth century did not include the right to regulate citizens extraterritorially.”<sup>35</sup>

Relying on *Strassheim*, *Skiriotos*, and on longstanding state practices, scholarly restatements of the law reflect the understanding that States have presumptive extraterritorial power to criminally and civilly regulate their citizens’ out-of-state conduct. The Restatement (Third) of Foreign Relations Law provides that States “may apply at least some laws to a person outside [State] territory on the basis that he is a citizen, resident or domiciliary of the

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*id.* at 182. Professor Fallon’s contribution to this symposium brought the *Gaines* case to my attention. See Fallon, *supra* note 2, at 631 n.85.

29. *Hanks v. State*, 13 Tex. Ct. App. 289, 305 (Ct. App. 1882) (quoting Tex. Cr. Code, art. 454).

30. *Id.* at 305, 308–09.

31. *Id.* at 309.

32. See *State v. Bacon*, 112 A. 682, 682 (Del. 1920) (“If any inhabitant of this state shall go out of the state and contract a marriage contrary to this section, with intention to return and reside in this state, and shall return accordingly, such person, notwithstanding such marriage shall be solemnized, or contracted, out of this state, shall be liable to be indicted, tried, convicted and punished in the same manner as if the said marriage had been solemnized, or contracted, within this state.” (quoting Del. Rev. Code 1915, §4785, par. 2)).

33. See *id.* at 682.

34. *Ex parte McNeely*, 14 S.E. 436, 436 (W. Va. 1892) (quoting W. Va. Code 1891, c. 144, §6).

35. Kreimer, *supra* note 8, at 978.



State.”<sup>36</sup> The Restatement asserts that this principle applies to both extraterritorial criminal and civil legislative powers.<sup>37</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>38</sup> Indeed, the Model Penal Code affirms that State A has extraterritorial legislative jurisdiction even if the activity it prohibits occurs in a State in which the activity is permissible.<sup>39</sup> The major limitation identified by the Model Penal Code is that the regulated conduct must “bear[] a reasonable relation to a legitimate interest of [the regulating] State . . . .”<sup>40</sup> The Comment states that the “reasonable relation to a legitimate interest” requirement “expresses the general principle of the fourteenth amendment limitation on state legislative jurisdiction.”<sup>41</sup>

The constitutional limitation on state regulatory jurisdiction noted in the Model Penal Code’s Comment has been grounded by the Court in the Due Process Clause.<sup>42</sup> Case law requires that there be “a significant contact . . . creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”<sup>43</sup> As I have shown elsewhere, citizenship on its own has virtually sufficed to give the home state sufficient interest to regulate its citizens’ out-of-state activities for purposes of the Due Process Clause.<sup>44</sup> This is sensible insofar as a “state has an enduring contact with its citizen and an interest in their well-being.”<sup>45</sup> Though I agree with Professor Fallon that no cases “say[] . . . that the citizenship or residence of one of the parties is *necessarily sufficient* to justify a state in applying its law to an out-of-state occurrence,”<sup>46</sup> it would seem that a state’s additional interest in regulating to ensure that its citizen not undermine legitimate state policies would qualify as any additional “plus” beyond mere citizenship that would justify state extraterritorial regulation. This conclusion would appear to follow from the

36. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 n.5 (1987).

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

38. MODEL PENAL CODE § 1.03(1)(f) (1962).

39. *Id.* § 1.03(2).

40. *Id.* § 1.03(1)(f).

41. *See id.* § 1.03 cmt. 6. The Comment, however, neglects to consider other constitutional limitations that bear on the constitutionality of a state’s extraterritorial regulation. *See Rosen, supra* note 3, at 870 & n.59.

42. For some doubts as to whether the Due Process Clause is the most appropriate constitutional provision to ground such structural limitations on state power, see *supra* note 20.

43. *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981)).

44. *See Rosen, supra* note 3, at 871–76.

45. Fallon, *supra* note 2, at 630.

46. *Id.* at 630 n.80 (emphasis added).

case law that upholds extraterritorial state regulatory powers in relation to non-citizens: such powers understandably are more limited than the state's powers vis-à-vis its own citizens, yet case law has permitted states to regulate the extraterritorial activities of non-citizens that are purposefully directed at undermining legitimate state interests (as in the Supreme Court case of *Strassheim* and the Texas case of *Hanks v. State*, both discussed above).<sup>47</sup>

The Supreme Court's decision in *United States v. Edge Broadcasting Co.*<sup>48</sup> confirms that states have a legitimate interest in their citizens' out-of-state activities if such activities undermine legitimate state policy. That case upheld a federal statute that prohibited the radio broadcast of lottery advertising by radio licensees located in nonlottery states.<sup>49</sup> The broadcaster in *Edge* was located in North Carolina, a nonlottery state, but wanted to broadcast Virginia lottery advertisements.<sup>50</sup> As part of its First Amendment analysis, the *Edge* Court concluded that the statute directly advanced the federal government's interest of "support[ing] the antigambling policy of a State like North Carolina by forbidding stations in such a State [from] air[ing] lottery advertising."<sup>51</sup> If North Carolina already forbade lotteries in North Carolina, in what respect did the federal statute "support" North Carolina's anti-gambling policy? The answer is that Congress and the Court understood that North Carolina's anti-gambling policy would have been undermined had the broadcaster been permitted to broadcast advertisements for an activity that was legal in another state but prohibited in North Carolina.

Stated differently, the Court understood that North Carolina's anti-gambling policy would have been undermined by a North Carolina citizen's out-of-state conduct, even if the gambling occurred in a state in which the activity were legal.<sup>52</sup> This makes sense. An anti-lottery policy might be based on a conclusion that "lotteries play on the hopes of those least able to afford to purchase lottery tickets, and that its citizens would be better served by spending their money on more promising investments,"<sup>53</sup> and "these objectives would be undermined regardless of where gambling occurs."<sup>54</sup> In short, since *Edge* held that the federal government has a legitimate interest in supporting North Carolina's policy concerning North Carolina citizens' out-of-state

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47. See *supra* text accompanying notes 19–20, 25–26.

48. 509 U.S. 418 (1993).

49. *Id.* at 421, 425.

50. *Id.* at 423–24.

51. *Id.* at 428.

52. For further discussion, see Rosen, *supra* note 3, at 879 & n.106.

53. *Edge*, 509 U.S. at 440 n.5 (Stevens, J., dissenting).

54. Rosen, *supra* note 3, at 880. For further discussion, see *id.* at 880 & n.108.

gambling, it follows that North Carolina's underlying policy of concerning itself with its citizens' out-of-state activities is itself legitimate.<sup>55</sup>

Professor Fallon appears to be of the view that the strongest due process-based argument against extraterritorial state regulatory authority comes from language in the 1975 opinion of *Bigelow v. Virginia*<sup>56</sup> to the effect that Virginia could not "prevent its residents from traveling to New York to obtain [abortion] services or, as the State conceded, prosecute them for going there. Virginia possessed no authority to regulate the services provided in New York . . . ."<sup>57</sup> Though I agree that this is the strongest argument that can be made, I do not think it to be particularly robust. First, the language from *Bigelow* was dicta,<sup>58</sup> as Professor Fallon apparently agrees.<sup>59</sup> Second, in

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55. The analysis of *Edge* provided above is fully consistent with the analysis I provided in an earlier article. See *id.* at 879–80. Professor Kreimer's criticism of my analysis of *Edge* attributes positions to me that I do not hold. The point of my analysis of *Edge* is that the case confirms that states may have a legitimate interest for purposes of due process in their citizens' out-of-state activities—a point that Professor Kreimer now concedes. See Kreimer, *supra* note 8, at 990 ("North Carolina itself has an 'interest' sufficient to seek to prohibit gambling on its own territory and to seek to dissuade its residents from gambling in neighboring Virginia . . . ."). I at no point suggested that *Edge*'s analysis—which concerns First Amendment limits on Congress—on its own establishes that "North Carolina [has] authority to prosecute its residents for disregarding its norms within a sister state . . . ." *Id.* at 991. I simply argued that if the Court concluded that a federal policy of supporting state policy "X" is legitimate, then it is fair to conclude that the Court believed that state policy "X" itself was legitimate. Here state policy "X" was concern with its citizens' out-of-state activities, and the conclusion that this constitutes a legitimate policy is relevant to the due process inquiry that determines the scope of state regulatory jurisdiction. See Rosen, *supra* note 3, at 879–80. For this reason, I believe that Professor Kreimer is wrong to assert that *Edge*'s analysis "does not implicate the question of whether North Carolina itself may prosecute its citizens for playing the Virginia lottery." Kreimer, *supra* note 8, at 990.

Finally, Professor Kreimer takes me to task for arguing that the *Edge* Court's conclusion that the federal interest was "derivative" of the state interest overlooks the fact that the federal government has "separate and distinct" powers from the states on account of the fact that "Congress's regulatory authority, unlike that of the states, extends to the entire country." *Id.* at 990. I am well aware of the important institutional differences between the federal and state governments—indeed, I have written at length on this subject. See, e.g., Mark D. Rosen, *Institutional Context in Constitutional Law: A Critical Examination of Term Limits, Judicial Campaign Codes, and Anti-Pornography Ordinances*, 21 J.L. & POL. 223 (2005) [hereinafter Rosen, *Institutional Context*]; Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1520–23 (2005). I accordingly was not suggesting that states enjoy the same regulatory powers that Congress has, but simply meant that the Court's finding of a legitimate federal interest in supporting North Carolina's policy must have followed from an antecedent conclusion that the North Carolina policy itself was legitimate. See Rosen, *supra* note 3, at 879. This is all I intended to signify by the term "derivative."

56. 421 U.S. 809 (1975).

57. *Id.* at 822–24 (citations omitted). I conclude that this is Professor Fallon's view on the basis of his discussion at Fallon, *supra* note 2, at 628–29.

58. To my mind, Professor Donald Regan has convincingly argued that this language from *Bigelow* is dicta. See Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of*

Professor Fallon's words, *Bigelow's* "categorical claim that states may never enact or enforce extraterritorial criminal legislation seems too strong."<sup>60</sup> After all, *Bigelow's* categorical claim, if taken seriously, would have overturned the longstanding Supreme Court precedent and state practice discussed above and declared various provisions of scholarly restatements and model codes unconstitutional without so much as even mentioning those cases, practices, and materials. Third, post-*Bigelow* case law has limited *Bigelow's* dictum.<sup>61</sup>

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*America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1907–08 (1987). Professor Kreimer countered that "[c]haracterizing the *Bigelow* principle as dictum is a dubious move" for three reasons. Kreimer, *The Law of Choice and Choice of Law*, *supra* note 19, at 459 & n.27 (1992). I responded to Professor Kreimer's argument, see Rosen, *supra* note 3, at 891–96, and he to mine, see Kreimer, *supra* note 8, at 988–89. The core dispute between my position and Professor Kreimer's, it seems to me, is semantic: does reasoning that is (1) unnecessary to the Court's disposition, (2) contrary to longstanding practice and multiple Supreme Court precedents, and (3) propounded without even mentioning these longstanding practices and precedents, much less considering how the new reasoning relates to such practices and precedents, constitute dicta? Such reasoning, it seems to me, is dicta. If Professor Kreimer prefers to characterize my argument as a suggestion that *Bigelow's* "holding" has been "narrowed" by subsequent cases I will not protest too loudly, as the line between discarding dicta and narrowing an earlier holding can be gossamer. The more important point for present purposes is the following: for the reasons discussed above in the text, *Bigelow's* categorical assertion that states lack extraterritorial regulatory authority should not be understood to have effect today, if indeed it ever did.

59. See Fallon, *supra* note 2, at 629 & n.75.

60. *Id.* at 629.

61. See Rosen, *supra* note 3, at 893–96 (discussing *United States v. Edge*, 509 U.S. 418 (1993) and *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986)). I showed in an earlier article that *Posadas* explicitly limited *Bigelow*. The *Posadas* Court explained that Virginia's advertising regulations in *Bigelow* were unconstitutional only because the "underlying conduct that was the subject of the advertising restrictions [abortion] was constitutionally protected and could not have been prohibited by the State." *Id.* at 895 (quoting *Posadas*, 478 U.S. at 345–46). This means that State A has a presumptive power to restrict advertisements for out-of-state activities that State A could ban. Professor Kreimer's near fifty-page response to my article did not respond to this argument. See generally Kreimer, *supra* note 8. The *Edge* decision, discussed above, confirms that State A may have an interest in activities undertaken by its citizens in State B. See *supra* notes 48–51 and accompanying text.

The principle from *Edge* that State A has a legitimate interest in its citizens' out-of-state activities has not been undermined by the case of *Greater New Orleans Broadcasting Ass'n v. United States (GNOBA)*. 527 U.S. 173 (1999). Referring to *GNOBA*, Professor Kreimer writes that "[w]hen the Supreme Court finally addressed federal efforts to shore up local moralisms extraterritorially by preventing broadcasters in states where gambling was legal from conveying information to listeners in states where gambling was illegal, it invalidated them. This is not a strong line of authority for extraterritorial moralism." Kreimer, *supra* note 8, at 991–92. There are two problems with Professor Kreimer's argument. First, this is a misleading description of the case, for the *GNOBA* Court took pains to note that federal efforts failed only because the operation of the statute at issue "and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." *GNOBA*, 527 U.S. at 190; see also *id.* at 195 ("Had the Federal Government adopted a more coherent policy . . . this might

Although two recent cases have quoted the *Bigelow* dictum in the course of lengthy string cites, the reference has been for the purpose of establishing the very different (and virtually noncontroversial) principle 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.*"<sup>62</sup> That principle clearly has no bearing whatsoever on the question of whether State A has the power to regulate its own citizens' out-of-state conduct for the purpose of ensuring that its legitimate policies not be undermined.

To quickly conclude, states have a legitimate interest in their citizens' out-of-state activities to support the conclusion that states have presumptive extraterritorial regulatory authority under the Due Process Clause, *Bigelow* notwithstanding.<sup>63</sup>

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be a different case."). *GNOBA* accordingly teaches nothing about the scope of a state's extraterritorial authority, but only establishes that an inconsistent federal approach to supporting state policies will not satisfy First Amendment scrutiny. Second, Professor Kreimer's argument that *Edge* and *GNOBA* "is not a strong line of authority for extraterritorial moralism" is a straw man: if these two were the only cases concerning state extraterritorial power Professor Kreimer would have a point, but a proper analysis of state extraterritorial powers would not begin with case law dating from the 1990s. Rather, the "line of authority" extends back into the nineteenth century, and when the modern decisions of *Edge* and *GNOBA* are considered in conjunction with longstanding practice, the Supreme Court decisions of *Skiriotes* and *Strassheim*, and scholarly restatements and model codes, the basis for state extraterritorial regulatory power is quite strong indeed.

62. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572–73 (1996) (emphasis added); *see also* *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 where it occurred and that had no impact on [the State] or its residents") (quoting *Gore*, 517 U.S. at 572–73). With the exception of the *Bigelow* dictum, the other cases to which the Court cites in both *Gore* and *State Farm* are very old cases from the late nineteenth and early twentieth centuries that reflect a widespread understanding of that era that governmental powers did not extend beyond a polity's physical border. *See Campbell*, 538 U.S. at 421–22; *Gore*, 517 U.S. at 571–72. A work-in-progress documents that this "territorialist" view that physical borders demarcate the end-point of a government's powers was never given categorical effect, shows the larger conceptual apparatus of which this "territorialist" view was a part and that it as well as territorialism was eclipsed in the mid-twentieth century across multiple doctrines, and explains why the contemporary understanding is superior. *See* Mark D. Rosen, *Overlapping Governmental Powers* (unpublished manuscript, on file with author). Quotations from these older cases that appear in string cites in both the *Gore* and *Campbell* decisions employ a rhetoric that reflects the older "territorialist" perspective that is inconsistent with the practices, case law, and scholarly restatements that this Section A has examined at some length. I hope that my work-in-progress will definitively resolve the tension that exists in the case law as regards the significance of physical borders by once and for all discrediting (or, at the least, severely limiting) the older cases.

63. In *Lines in the Sand: The Importance of Borders in American Federalism*, Professor Kreimer recites a "series of cases" he had discussed in two of his articles with which he says I had "decline[d] to come to grips" in my piece on extraterritorial state powers. Kreimer, *supra* note 8, at 993 n.77. My extraterritoriality article had responded to what I judged to have been Professor

### B. *Dormant Commerce Clause*

Professor Fallon concludes that “[a]mong the most serious challenges to the constitutionality of states’ efforts to stop their citizens from obtaining out-of-state abortions would involve the Dormant Commerce Clause”<sup>64</sup> on account

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Kreimer’s strongest arguments. The cases he takes me to task for ignoring offer little support for his position, but since he has referenced them once again let me briefly explain why they do not support his position. It is true that the Court in *Robinson v. California*, 370 U.S. 660 (1962), *reh’g denied*, 371 U.S. 905 (1965), “took as given the constraint that California could punish legitimately only for the actual use of narcotics ‘within the state,’” Kreimer, *supra* note 8, at 993 n.77, but that is not because the Court assumed that California could not regulate extraterritorially. Rather, the Supreme Court assumed as it did because the “instructions of the trial court, implicitly approved on appeal, amounted to ‘a ruling on a question of state law that is as binding on us as though the precise words had been written’ into the statute,” and the lower court instructions permitted conviction only upon a showing that the defendant “did use a narcotic in Los Angeles County, or that while in the City of Los Angeles he was addicted to the use of narcotics.” *Robinson*, 370 U.S. at 663, 666.

All the other cases Professor Kreimer cites are tax cases that are consistent with the position I espouse. I shall treat only the most recent case he cites, *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768 (1992). If anything, *Allied-Signal* supports rather than undermines the approach to due process this Article embraces. The case stands for two propositions: that (1) a single business *can* be taxed by multiple states, but that (2) each state’s taxation is limited to the extent that “there be ‘some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.’” *Id.* at 777 (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344–45 (1954)). Similarly, my claim is that (1) more than one state (home and visitor) can simultaneously regulate a person, but that (2) the home state has extraterritorial regulatory power only when the out-of-state activity has a definite link to the home state (i.e., as when the activity can circumvent the home state’s legitimate policy). Those out-of-state activities that can undermine the legitimate state policy thus constitute the constitutional predicate for extraterritorial regulation, and this seems to be fully consistent with the tax cases’ principle that “there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax.” *Id.* at 778.

Indeed, the tax cases explicitly *reject* any strict territoriality notion that the state can tax only those monies that arise from in-state transactions or in-state assets. Rather, the “unitary business principle” that the Court adopts permits a state to tax a share of the business that is carried on *in other states*. See *id.* (explaining that the unitary business doctrine grew from state efforts to tax railroad and telegraph companies, during which time it became apparent that “what makes such a business valuable is the enterprise as a whole, rather than the track or wires that happen to be located within a State’s borders”). To be sure, states can only tax those monies that are “apportionable” to the state, but what is pertinent to the discussion at hand is that the unitary business principle rejects apportionment on the basis of “geographical . . . accounting.” *Id.* at 778, 783. Similarly, I argue that home states’ regulatory powers are not exclusively determined by physical location but are a function of the fact that a citizen’s out-of-state activities that undermine legitimate policies of her home state are reasonably apportionable (so to speak) to the home state. I do not mean to push the analogy too far, for tax laws are *sui generis* in many respects, but certainly the tax law to which Professor Kreimer cites does not undermine the principles developed above in text that the Due Process Clause does not prohibit states from regulating their citizens’ extraterritorial activities.

64. Fallon, *supra* note 2, at 636.

of language from several cases that would appear to bar state regulations of out-of-state commerce. In one case, for instance, the Court stated that "the 'Commerce Clause . . . precludes the application of a state statute to commerce that take place wholly outside of the State's borders, whether or not the commerce has effects within the State.'"<sup>65</sup>

Some comments are in order here, much of which I am quite certain Professor Fallon would agree with. To begin, even if categorical effect were to be given to such anti-extraterritorial statements, states would not be categorically prohibited from seeking to extraterritorially regulate their citizens. This is because Dormant Commerce Clause doctrine provides only default baseline rules, which may be altered by Congress.<sup>66</sup> States accordingly would be free to seek federal legislation that permitted the state extraterritorial regulation that Dormant Commerce Clause doctrine proscribed. Congress would have the power to do so because, by definition, any state regulatory matters that could be precluded on account of the Dormant Commerce Clause could be congressionally permitted under Congress's Commerce Clause powers.<sup>67</sup> I am certain Professor Fallon would not disagree.

Moreover, as I have argued elsewhere, there are strong reasons to doubt that the Court's Dormant Commerce Clause anti-extraterritoriality statements are best read as categorical proscriptions on state powers to regulate commerce that occurs outside the state's borders.<sup>68</sup> Dormant Commerce Clause jurisprudence utilizes two different sorts of legal tests—a virtual per se rule of illegality for protectionist regulations and a far more deferential balancing test for nondiscriminatory regulations that incidentally burden interstate commerce—and the cases in which the Court has propounded its categorical condemnations of state extraterritorial regulations have involved state laws that

65. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982)).

66. *See, e.g., Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003); Metzger, *supra* note 10, at 1481.

67. Indeed, Congress also has the power to determine the scope of state regulatory authority in respect of matters that fall outside of Congress's Commerce Clause power. *See infra* Parts II, III. In light of Congress's power to legislatively overturn the Court's Dormant Commerce Clause jurisprudence, I chafe at Professor Fallon's terminology that the Court's Dormant Commerce Clause jurisprudence poses "the most serious challenges to the *constitutionality*" of state extraterritorial powers. Fallon, *supra* note 2, at 636 (emphasis added). Although courts and commentators regularly refer to Dormant Commerce Clause constraints as constitutional limitations, Dormant Commerce Clause limitations are better conceptualized as federal common law rather than constitutional determinations on account of Congress's power to revise the Court's Dormant Commerce Clause doctrine. *See Rosen, supra* note 11.

68. *See Rosen, supra* note 3, at 919–30.

were clearly protectionist.<sup>69</sup> Accordingly, a plausible positive case can be made that the Court's proscriptions against extraterritorial regulation are properly limited to protectionist statutes, and that non-protectionist state regulations that extraterritorially regulate a state's citizens are properly analyzed under the more lenient balancing test that invalidates only those state regulations that impose burdens on commerce that are clearly excessive in relation to the putative benefits.<sup>70</sup>

Limiting the Court's anti-extraterritorial statements in this fashion is sensible for several reasons. First, categorically disallowing state power to regulate out-of-state transactions would be inconsistent with longstanding practice and precedents. In *Watson v. Employers Liability Assurance Corp.*<sup>71</sup> for example, the Court upheld the application of a Louisiana law that disregarded a contractual provision that had been entered into by two foreign corporations outside of Louisiana despite the fact that the provision was consistent with the law where the contract had been formed.<sup>72</sup> The *Watson*

69. See *id.* at 922–26. Professor Fallon appears to agree. See Fallon, *supra* note 2, at 638. Professor Kreimer has been unable to find any case law to the contrary. See Kreimer, *supra* note 8, at 995–96.

70. Known as “Pike balancing,” this test comes from the case *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

71. 348 U.S. 66 (1954).

72. The plaintiff, a Louisiana resident, was injured in Louisiana while using a hair-waving product that had been produced by the Toni Company of Illinois, a subsidiary of a Massachusetts corporation. *Id.* at 67. The manufacturer had entered into an insurance contract with the defendant in the case, a non-Louisiana corporation. *Id.* The insurance contract had been negotiated and issued in Massachusetts and had been delivered both to the Toni Company in Illinois and to the parent company in Massachusetts. *Id.* The contract contained a “no action” clause, which “prohibit[ed] direct actions against the insurance company” until there had been a final determination of the insured’s liability to pay personal injury damages. *Id.* at 67–68.

Although “no action” clauses were recognized as binding and legal in Massachusetts and Illinois, Louisiana’s “direct action” statute proscribed them. *Id.* at 68. The plaintiff in *Watson* directly sued the insurance company before having obtained a final judgment or settlement against the Toni Company, and the insurance company moved to dismiss in reliance on the “no action” clause. *Id.* In the Supreme Court, the insurance company argued that “because the policy was bought, issued and delivered outside of Louisiana,” that state was “without power to exercise ‘extraterritorial jurisdiction,’ that is, to regulate and control activities wholly beyond its boundaries.” *Id.* at 71. The Court rejected this argument, ruling that Louisiana could apply its statute to an insurance contract between a non-Louisiana insurance company and a non-Louisiana insured that had been negotiated, made, and delivered outside of Louisiana. *Id.* at 73. Louisiana was justified in applying its statute to the out-of-state contract, the *Watson* Court held, because “Louisiana’s direct action statute is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers. Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them.” *Id.* at 72. For these reasons, the Court held that Louisiana had “legitimate interest in safeguarding the rights of persons injured.” *Id.* at 72–73. Application of Louisiana regulations to a non-Louisiana



case thus upheld Louisiana's regulation of an out-of-state contract, and the Supreme Court's most recent Due Process jurisprudence approvingly referred to the *Watson* decision.<sup>73</sup> Yet the *Watson* decision, and many others,<sup>74</sup> would be imperiled if the categorical anti-extraterritoriality statements found in the Court's Dormant Commerce Clause jurisprudence were taken at face value.

Second, notwithstanding the Court's abovementioned observations in its Dormant Commerce Clause cases, "[s]tate regulations are routinely upheld despite what is obviously a significant impact on outside actors."<sup>75</sup> Consider, for example, products liability actions against out-of-state manufacturers and nuisance actions against polluters across the border.<sup>76</sup> In short, to date the Court has not applied its anti-extraterritoriality principle to reach the many non-protectionist state regulations that impose effects on out-of-state commerce.

Third, giving broad application to the Court's anti-extraterritoriality statements would be an unwelcome throwback to an earlier jurisprudential era that has wisely been eclipsed. Contemporary law is to be praised for moving away from the earlier effort to localize transactions and occurrences as having "happened" in one place such that only one state had regulatory jurisdiction.<sup>77</sup> The new understanding is 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>78</sup> This modern approach is advisable on account of the many factors<sup>79</sup> that frequently conspire to create circumstances where several states have real interests in the same matter, interests that undermine the logic of seeking to identify a single place where a

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insurance company did not raise due process concerns because the company was certified to do business in Louisiana. *See id.* at 68–69 & n.5.

73. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 & n.17 (1981) (holding that states may apply their law consistently with the requirements of due process and full faith and credit when the state has sufficient interests such that application of its law is neither arbitrary nor fundamentally unfair).

74. *See, e.g., Ala. Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532 (1935) (applying California workman's compensation law to an employee injured in Alaska where the employer was a non-Californian and the employment contract provided that Alaska Workmen's Compensation Law was to apply).

75. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 803 (2001).

76. *See id.* at 795.

77. Space limitations preclude me from fully developing and defending the point made in the paragraph above in text (and in fact is the subject of a work-in-progress). *See Rosen, supra* note 62. An example of the earlier approach that sought to locate events and transactions in a single polity was the "vested rights" doctrine in the field of conflict of laws. *See Rosen, supra* note 3, at 940.

78. *Allstate*, 449 U.S. at 307.

79. Such circumstances creating interests include the fact that many occurrences span several states and the spillover effects that a transaction or occurrence may have.

transaction or occurrence has “happened” such that only a single polity can apply its law. In lieu of presuming that only one jurisdiction properly can regulate each transaction or occurrence, today’s doctrine regularly permits multiple states to exercise concurrent regulatory jurisdiction over a single person, transaction, or occurrence.<sup>80</sup>

In short, the Supreme Court’s anti-extraterritoriality statements in its Dormant Commerce Clause jurisprudence harken back to the now-discredited era in which concurrent jurisdiction was resisted. The Court’s statements categorically constraining states’ extraterritorial authority should be confined to circumstances where states are pursuing protectionist agendas.<sup>81</sup> To broadly deny states the power to regulate matters that occur outside their borders problematically hampers them by depriving states of the power over matters that Due Process and Full Faith and Credit doctrines wisely have recognized as being legitimate state interests.

80. See generally Rosen, *supra* note 3, at 945–63. Although concurrent jurisdiction creates complications, the attempt to replace it with a system of non-overlapping regulatory jurisdiction would simplify matters at too great a cost. For a discussion of this, see *id.* at 933–45.

81. Professor Kreimer criticizes my argument that the Court’s anti-extraterritorialism statements should not be extended beyond protectionist legislation. See Kreimer, *supra* note 8, at 995–96. His first justification, that “[t]hese are categories of formidable obscurity, for one person’s public welfare is another person’s protectionism,” *id.* at 995–96, flies in the face of longstanding Dormant Commerce Clause doctrine, which long has drawn distinctions between protectionist and non-protectionist state legislation. See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Indeed, it is unclear how much constitutional doctrine would remain if legal tests utilizing what some might believe to have “obscure” borders were eliminated. Next, Professor Kreimer argues that “cases which uphold ‘health and safety’ justifications in other Commerce Clause contexts do not rely on ‘morals,’ which seem to be the key ‘third party effects’ on which Professor Rosen relies.” Kreimer, *supra* note 8, at 996. This argument is specious for three reasons: (1) a fair reading of my article reveals that it was concerned with a wide range of state interests that could be undermined by a citizen’s extraterritorial activities, see Rosen, *supra* note 3, at 877, not just or even primarily with moral interests; (2) most extraterritorial regulations, including those related to abortion, could be justified on multiple bases (for instance, extraterritorial abortion regulations plausibly could be justified on the policy of protecting unborn fetuses as well as moral considerations); and, in any event, (3) the logic the Court has embraced in adopting its lower level scrutiny carries over to morals legislation: the Court has said that laws that “relat[e] to the health, life, and safety of their citizen,” which derive from what “is compendiously known as the police power,” are permissible if they do “not discriminate against interstate commerce or operate to disrupt its required uniformity.” *Head v. N.M. Bd. of Exam’rs in Optometry*, 374 U.S. 424, 428–29 (1963). Finally, the parade of horrors that Professor Kreimer recites would not occur because my rejection of a per se ban on extraterritorial regulation does not call for eliminating all judicial review of state legislation. Some of the hypotheticals Professor Kreimer describes appear to be purely protectionist efforts that would be unlawful as a per se matter, and the others likely would fail under *Pike* balancing.

## II. INTERSTATE RELATIONS PRINCIPLES POTENTIALLY RELEVANT TO STATE EXTRATERRITORIAL REGULATIONS (POINTS TWO THROUGH FOUR)

Part I showed that states are not without power to regulate their out-of-state citizens. This does not mean, however, that there are no limits on state extraterritorial regulatory powers. Section A of Part II identifies several constitutional principles relating to interstate relations that plausibly may be relevant to determining whether a particular exercise of extraterritorial regulation is impermissible. Section B shows that Utah’s effort to regulate Mary would not be precluded under any of these doctrines as they currently are understood by the Supreme Court. Section C suggests, however, that Section B’s conclusion cannot be presumed to be stable because there has not been a sustained practice of state extraterritorial regulations that has received thoroughgoing attention from legislatures, the public, and the courts.

### A. *Constitutional Principles Relevant to Analyzing Utah’s Effort to Regulate Mary (Point Two)*

Although States have presumptive powers to regulate their citizens’ out-of-state conduct, several constitutional principles potentially constrain the exercise of this power.<sup>82</sup> These principles limit states’ baseline extraterritorial powers for the sake of securing a particular sort of federal union. The primary aspect of federalism these constitutional principles help determine is the nature of interstate relations—what is generally termed “horizontal” federalism—not the more typically analyzed “vertical” relationship between the federal government and states.<sup>83</sup> As a result of these constitutional principles, some extraterritorial state regulations unquestionably, and quite properly, are constitutionally impermissible.

The constitutional doctrines that, as a matter of first principles, potentially could constrain state extraterritorial regulations are the right to travel, Article IV’s Privileges and Immunities Clause, and the Fourteenth Amendment’s Citizenship Clause and Privileges or Immunities Clause. It plausibly could be argued, for example, that Utah’s effort to apply its restrictions to Mary while she is in Utah violates Mary’s constitutional right to travel; the freedom to partake of the liberties that California affords while one is in California, it

82. Professors Lea Brilmayer and Seth Kreimer each have propounded additional “structural” arguments against state extraterritorial regulatory powers in relation to deeply contested policy questions. See Lea Brilmayer, *Interstate Preemption: The Right to Travel, The Right to Life, and the Right to Die*, 91 MICH. L. REV. 873, 876 (1993); Kreimer, “*But Whoever Treasures Freedom . . .*,” *supra* note 19, at 922. I have fully recounted their arguments and, I believe, discredited them. See Rosen, *supra* note 3, at 933–45.

83. For an admirably clear discussion of the difference between vertical and horizontal federalism, see Metzger, *supra* note 10, at 1511–15.

might be said, is necessary if the right to travel is to be meaningful.<sup>84</sup> Similarly, a respectable argument can be made that Article IV's guarantee that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"<sup>85</sup> means that Mary is entitled to "all privileges and immunities" enjoyed by California citizens when she visits California, including the privilege of availing herself of California's abortion laws.<sup>86</sup> Likewise, it could be argued that the "privileges or immunities" of being a "citizen[] of the United States" include that a traveling citizen be entitled to the full array of benefits that are enjoyed by the citizens of the states through which she is traveling.<sup>87</sup>

Another way to think about all of this is that these three constitutional principles are important determinants of what state and national citizenship mean in our country's federal union. Indeed, the arguments sketched in the immediately preceding paragraph, taken together, would create a particular type of federal union. After showing below in Section B that contemporary doctrine does not dictate the legal conclusions postulated in the paragraph immediately above, but in fact would permit Utah to regulate Mary, Part III considers the nature of the federal union that the arguments above would erect and then contrasts that with the alternative conception of federalism that contemporary doctrine currently embraces.

#### *B. Contemporary Doctrine (Point Three)*

This Section B shows that contemporary doctrine pertaining to the Privileges and Immunities Clause, the right to travel, and the Fourteenth Amendment's national Citizenship Clause and Privileges or Immunities Clause would not bar Utah from regulating Mary during her travels to California.<sup>88</sup>

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84. For a clear articulation of this position, see Kreimer, *supra* note 8, at 1006–08.

85. U.S. CONST. art. IV, § 2, cl. 1.

86. See Kreimer, *supra* note 8, at 983–84.

87. *Id.*

88. Although contemporary case law has treated Article IV's Privileges and Immunities Clause and the Fourteenth Amendment's national Citizenship Clause and Privileges or Immunities Clause as "components" of the right to travel, see *Saenz v. Roe*, 526 U.S. 489, 500–03 (1999), cases also continue to treat each of these as distinct constitutional principles. See, e.g., *Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59, 66–68 (2003). In other words, the right to travel has not wholly swallowed these other constitutional principles. Consistent with this precedent, I will treat these as distinct constitutional principles. Indeed, these principles' continuing independent existence is sensible because there is no reason to think that the right to travel exhausts the scope of the Privileges and Immunities Clause, the national Citizenship Clause, or the Privileges or Immunities Clause.

# 1. The Privileges and Immunities Clause

Article IV's Privileges and Immunities Clause provides that "[t]he citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."<sup>89</sup> As I have shown at length elsewhere, the United States Supreme Court has unwaveringly held for more than a century and a quarter that the Clause constrains the ways that a state may act toward visitors from other states, but that it does not apply at all to a state's regulation of its own citizens.<sup>90</sup> There is sensibility to this distinction between host states (to which the Clause applies) and home states (to which it does not). As is suggested by its universally accepted moniker, the "Comity Clause," the Privileges and Immunities Clause has been concerned with ensuring peaceful relations among the states. Interstate peace is threatened when one state treats visitors differently than it treats its own citizens, but is not generally jeopardized by how a state regulates its own citizens.<sup>91</sup> In more modern parlance, the Comity Clause has been understood as a constitutional principle that serves a representation-reinforcement function by limiting the extent to which the paradigmatic unrepresented outsiders—non-citizens—can be regulated by a polity.<sup>92</sup> In short, under contemporary doctrine, which is grounded in longstanding precedent, the Comity Clause does not have even threshold application to Utah's efforts to regulate its own citizen's (Mary's) activities when she is in California.

89. U.S. CONST. art. IV, § 2, cl. 1.

90. See Rosen, *supra* note 3, at 900–03. Although Professor Kreimer acknowledges that the Court in *Bradwell* held that the Privileges and Immunities Clause did not apply to the home state and ultimately acknowledges that his theory (that the Comity Clause should apply to home states as well as host states) would require that the Court "break some new ground," Professor Kreimer advances some hard-to-justify positions along the way. Kreimer, *supra* note 8, at 1003 & n.121. He says that my argument that "*Zobel v. Williams* relied on the inapplicability of the Privileges and Immunities Clause is mysterious" because "*Zobel* invalidated the statute at issue" and "therefore, the Court could not have relied on the *validity* of the statute under Article IV." *Id.* (citations omitted). This is puzzling. The statute at issue in *Zobel*, which applied only to Alaskan citizens but discriminated in its treatment of longstanding residents and new state citizens, was challenged on both Privileges and Immunities and Equal Protection grounds. See *Zobel v. Williams*, 457 U.S. 55, 56–58 (1982). While it is true that the statute was invalidated, the Court struck it down solely on Equal Protection grounds, explicitly holding that the Privileges and Immunities Clause was inapplicable because the statute only regulated citizens. *Id.* at 65. The majority opinion, which I quoted in my previous article, stated as follows:

The statute does not involve the kind of discrimination which the Privileges and Immunities Clause of Art. IV was designed to prevent. That Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." The Clause is thus not applicable to this case.

*Zobel*, 457 U.S. at 59–60 n.5 (citations omitted) (quoting *Toomer v. Witsell*, 334 U.S. 385, 395 (1948)); see also Rosen, *supra* note 3, at 902 (quoting and discussing same). This would constitute a holding on virtually every definition of that term, *pace* Professor Kreimer. The Court reiterated this understanding two years later in *United Building & Construction Trades Council v.*

It might be objected that even if the Privileges and Immunities Clause does not apply to Mary's home state of Utah, it requires that California grant Mary the same access to abortion while she visits the Golden State that is enjoyed by Californians, regardless of what Utah law requires. It is very unlikely, however, that the Privileges and Immunities Clause would impose any such duty on California.<sup>93</sup> The Privileges and Immunities Clause does not generate an "absolute" duty for states to treat citizens and non-citizens alike.<sup>94</sup> Rather, states are permitted to draw lines between citizens and non-citizens—meaning that California can deny Mary access to abortion facilities that California residents are free to use—if "there is a substantial reason for the difference in treatment" and "the discrimination practiced against nonresidents bears a substantial relationship to the State's objective."<sup>95</sup>

The question thus would become whether California's interest in not meddling in Utah's regulation of peripatetic Mary would qualify as a

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*Mayor & Council of Camden* though its comments in *Camden* admittedly were not necessary to the case's ultimate disposition. 465 U.S. 208, 217 (1984) (noting that "disadvantaged New Jersey residents have no claim under the Privileges and Immunities Clause" in respect of a New Jersey statute solely because they are citizens of the regulating state).

91. I say "not generally" because it is possible, of course, for a state to regulate its citizens in a manner that could breed interstate dissension, for instance by forbidding its citizens from purchasing goods from another state. These types of regulations, however, are addressed by other doctrines (in this case, the Dormant Commerce Clause).

92. See *Camden*, 465 U.S. at 217 (stating that New Jersey residents do not have a Privileges and Immunities Clause challenge to a New Jersey law because "New Jersey residents at least have a chance to remedy at the polls any discrimination against them"); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

93. I believe this to be a very strong conclusion. In any event, even if my argument above in text was wrong and the Privileges and Immunities Clause precluded California from withholding its benefits from visitors from other states, this would not mean that the home state's extraterritorial regulation was illicit. Rather, this would mean that Mary would confront a situation where the host state permits an activity that her home state proscribes. There is nothing unconstitutional, or even particularly unusual, about such conflicts where two or more polities have concurrent regulatory authority; indeed, the Model Penal Code anticipates this possibility and specifically provides that a home state can prohibit its citizens from engaging in an activity out of state that is permitted in that state. See MODEL PENAL CODE § 1.03(2) (1962); see also Rosen, *supra* note 3, at 870. Under such circumstances, there are a variety of steps the home state can take to ensure compliance with its regulations. See Rosen, *supra* note 12, at 989–99. For additional discussion of such conflicts, see *supra* note 90.

94. *Saenz v. Roe*, 526 U.S. 489, 502 (1999) (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)).

95. *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 298 (1998). For examples of state laws discriminating as between residents and nonresidents that were upheld against Privileges and Immunities Clause challenges, see *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 390–91 (1978) (addressing a statute that required nonresidents to pay more than residents for hunting license); *Vlandis v. Kline*, 412 U.S. 441, 445 (1973) (addressing a statute that charged nonresidents more to attend state university).

“substantial” reason for purposes of the Privileges and Immunities Clause. There are very good reasons for concluding in the affirmative. As I have explained elsewhere at length, the cases striking down host state laws that discriminated between citizens and non-citizens all have involved instances where the host state sought to benefit itself at the expense of the home state, not instances where the host state sought to assist the home state. The Court has recognized that this distinction between “the unilateral imposition of a disadvantage upon nonresidents” and deference to another state’s laws is determinative in the context of Privileges and Immunities doctrine,<sup>96</sup> and this makes perfect sense to a doctrine that is designed to reduce interstate friction and facilitate harmonious interstate relations.<sup>97</sup> Indeed, even outside the context of the Comity Clause, the Court has upheld as constitutionally legitimate a host state’s desire to withhold the benefits of its law to a visitor for the purpose of supporting the home state’s contrary policy.<sup>98</sup> For all these reasons, under contemporary law, the Privileges and Immunities Clause in all likelihood would not preclude a state (such as California) from trying to accommodate a sister state’s (Utah’s) contrary policies.

A final possible objection may appear to remain: even if California is not constitutionally required to apply its abortion law to Mary, surely California is not disallowed from permitting Mary access to its abortion facilities. While this in all likelihood is true,<sup>99</sup> it does not undermine the question this Article

96. See *Austin v. New Hampshire*, 420 U.S. 656, 667 n.12 (1975) (distinguishing between “unilateral imposition of a disadvantage upon nonresidents” and “the value of reciprocity”).

97. See *Rosen*, *supra* note 3, at 904–09; see also Larry Kramer, *The Myth of the “Unprovided-for” Case*, 75 VA. L. REV. 1045, 1065–69 (1989) (providing a similar analysis).

98. See *Sosna v. Iowa*, 419 U.S. 393 (1975). *Sosna* upheld against Equal Protection and right to travel challenges an Iowa law that imposed a one-year residency requirement for divorce. *Id.* at 395, 410. The Court held that the Iowa law “may reasonably be justified” as reflecting the State’s desire to avoid “officious intermeddling in matters in which another State has a paramount interest.” *Id.* at 406–07. What made the other state’s interest paramount was the divorce petitioners’ de facto citizenship: the petitioners for divorce in Iowa might really intend to return to their true home states after obtaining an Iowa divorce, and in such a circumstance their home states have the paramount interest. See *id.* at 407.

99. The statement in the text above that California would apply its law to Mary likely is true for two reasons. First, California can apply its law because it has a constitutionally legitimate basis for applying its law to a visitor. See, e.g., *Pac. Employers Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 502 (1939). Second, no federal constitutional provision would require California to disregard its own law and apply another state’s law instead. See *Rosen*, *supra* note 12, at 933 & n.60 (explaining that the Full Faith and Credit Clause does not generally require one state to apply another state’s law). This was not always the case, though. Early case law required State A to apply the law of State B when State B’s interest was paramount. It would not be unthinkable to conclude that, on balance, Utah’s interest in regulating Mary’s abortion decision is greater than California’s for so long as Mary remains a citizen of Utah. Though case law has abandoned this approach, Congress likely has power under the Effects Clause to approach Full Faith and Credit as the Court used to. See *Rosen*, *supra* note 12, at 960–70. There is much to be

examines, whether Utah can regulate Mary's out-of-state activities. This is because the mere fact that California can regulate Mary says nothing about another state's power to regulate Mary. Under American law, multiple states frequently have overlapping regulatory jurisdiction, meaning that they both can apply their regulations simultaneously to a given transaction or occurrence, "even when the states' regulations substantively conflict."<sup>100</sup> Indeed, this extends even to the criminal realm, such that two states with regulatory jurisdiction over a particular activity can regulate with the result that the very activity that is permitted by one state may be criminalized by the other.<sup>101</sup>

## 2. The Right to Travel

Though the right to travel is a long-recognized constitutional principle, Utah's effort to regulate Mary while she is in California would not implicate the right to travel as it has been doctrinally developed to date. To begin, no Supreme Court case has held that State A's effort to bar its citizen from doing in State B what State B permits its own citizens to do implicates the right to travel.<sup>102</sup> Further, the United States Supreme Court recently presented a restatement of the right to travel in *Saenz v. Roe*,<sup>103</sup> and none of the "three different components" of the right that it identified would apply to such extraterritorial regulations.<sup>104</sup> Utah's regulation does not interfere with:

[1] the right of a citizen of one State to enter and to leave another State, [2] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, [or] [3] for those travelers who elect to

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said for the notion that Full Faith and Credit doctrine properly takes account of the quantum of the competing states' interests in a matter in determining which state has the power to regulate, see Rosen, *supra* note 3, at 960–62, and the institutional incapacities that plagued courts' efforts to formulate a principled doctrine that would accomplish this are not faced by legislatures. See Mark D. Rosen, *Should 'Un-American' Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 817–23 (2004).

100. Rosen, *supra* note 3, at 949. See generally *id.* at 946–55. Most "conflicts" between state laws do not impose conflicting duties on a person that cannot simultaneously be satisfied because "conflicts" most typically arise where State A bars an activity that State B permits but does not mandate. See *id.* at 958–59. California policy permitting nonresidents access to its abortion facilities would create this sort of conflict. Conflicting state laws that actually imposed inconsistent obligations that cannot be simultaneously satisfied, while rare, cannot be tolerated in a federal union. The only solution is to depart from the norm of concurrent regulatory jurisdiction and permit only one law to apply. I have argued elsewhere that the Full Faith and Credit Clause, not the Dormant Commerce Clause, is the appropriate doctrinal locus for determining which state has the power to apply its law in such circumstances. See *id.* at 960–62.

101. See *id.* at 950.

102. See *id.* at 913–19; see also Kreimer, *supra* note 8, at 1008 (acknowledging this).

103. 526 U.S. 489, 500 (1999).

104. See Rosen, *supra* note 3, at 913–14.



become permanent residents, the right to be treated like other citizens of that State.<sup>105</sup>

The third component patently has no application since Mary has no intention to make California her permanent home and the first component would not be triggered because Utah is not preventing Mary from leaving Utah. Although the second component at first may sound as if it would be applicable to Utah's extraterritorial regulation, the Court has made clear that the second component is none other than Article IV's Privileges and Immunities Clause,<sup>106</sup> and that provision, as shown immediately above in Part II.B.1, applies to host states (California in this case) but not to a citizen's home state (in this case Utah).

### 3. The Fourteenth Amendment's Citizenship Clause and Privileges or Immunities Clause

Nor would the Fourteenth Amendment's Citizenship Clause nor its Privileges or Immunities Clause, as they have been understood to date, apply to Utah's extraterritorial regulations. The opening words of the Fourteenth Amendment declare the existence of national citizenship (designated persons are "citizens of the United States") and proclaim that "[n]o State shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States."<sup>107</sup> The *Slaughter-House Cases* infamously defined the content of "privileges or immunities of citizens of the United States" quite minimally to include a narrow set of rights.<sup>108</sup> Among these is "that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State."<sup>109</sup> The *Saenz* Court relied on this construction of the Privileges or Immunities Clause to ground what it called the "third component" of the right to travel, which *Saenz* then utilized to strike down provisions of a California law that gave new citizens of California less generous welfare benefits than were provided to longstanding Californians.<sup>110</sup> Utah's

105. *Saenz*, 526 U.S. at 500.

106. *See id.* at 501 ("The second component of the right to travel is . . . expressly protected by the text of" the Privileges and Immunities Clause).

107. U.S. CONST. amend. XIV, § 1.

108. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79–80 (1872) (privileges or immunities of national citizenship include "the right of the citizen of this great country, protected by implied guarantees of its Constitution, to 'come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operation of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States.'" (quoting *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1867))).

109. *Id.* at 80.

110. *See Saenz*, 526 U.S. at 511.

extraterritorial regulation would not fall under the privileges or immunities of national citizenship that were the subject of *Saenz*, nor under the other privileges or immunities identified in the *Slaughter-House Cases*.<sup>111</sup>

Finally, no other cases have identified additional rights apart from the aforementioned “privileges or immunities” that arise from the national citizenship that is declared in the Fourteenth Amendment’s first sentence.<sup>112</sup> Taken together, this means that the Fourteenth Amendment’s Citizenship Clause and Privileges or Immunities Clause, as they have been understood to date, would not apply to Utah’s regulations of Mary.

C. *That Current Doctrine Cannot Be Safely Assumed to Be Settled in Relation to States’ Extraterritorial Powers (Point Four)*

Although current constitutional doctrines would not preclude Utah from prohibiting Mary from obtaining an abortion in California, it could not be safely assumed that the current state of the law discussed immediately above in Section B is settled. This is so for several reasons. First, although states have been regulating their citizens’ extraterritorial conduct from the earliest days of our country’s history,<sup>113</sup> the practice has not been widespread and has not received considerable attention. There accordingly is not a societal consensus concerning extraterritorial regulation embodied either in widespread practice or broad-ranging acceptance that this is a legitimate (albeit unusual) form of state regulation. Nor has the Supreme Court ever directly confronted the constitutionality of a home state’s effort to extraterritorially regulate its citizens to ensure that they do not seek to circumvent the home state’s policies.

Another cause for uncertainty as to the stability of the jurisprudence surveyed above is that two of the doctrinal formulations leave ready room for further development.<sup>114</sup> Consider first the right to travel. The Court in *Saenz* stated that “[t]he right to travel” discussed in our cases embraces *at least* three different components.”<sup>115</sup> This indicates that the three components are not necessarily exhaustive of the right to travel. Moreover, a plausible argument can be made that Utah’s regulation already falls within an expanded form of the “first” component of the right to travel: the right to leave one state to visit another, it might be said, would become but a “hollow shell” if the home state

111. See *supra* note 99.

112. See *Saenz*, 526 U.S. at 511 (Rehnquist, J., dissenting) (noting the same).

113. See *supra* notes 21–35 and accompanying text.

114. This is not always the case. When the Court explained the political question doctrine in *Baker v. Carr*, for example, it explicitly stated that the six factors it identified as predicates for a finding of nonjusticiability under the doctrine were an exhaustive list. 369 U.S. 186, 217 (1962) (“Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question’s presence.”).

115. *Saenz*, 526 U.S. at 500 (emphasis added).

can preclude its traveling citizen from enjoying all the benefits that another state allows its citizens.<sup>116</sup>

Consider next the Fourteenth Amendment's Privileges or Immunities Clause. Although the *Slaughter-House Cases*' enumeration of the contents of the Privileges or Immunities Clause has not been expanded by subsequent case law, *Slaughter-House* itself expressly understood that it was providing a non-exhaustive list. Before furnishing its famous enumeration, after all, the Court said as follows:

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such . . . and [are] not by this article placed under the special care of the Federal government, *we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so.*

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest *some* which owe their existence to the Federal government, its National character, its Constitution, or its laws.<sup>117</sup>

As to the final doctrine examined above, Article IV's Privileges and Immunities Clause, the doctrine as formulated is less inviting of alteration than the right to travel or the Fourteenth Amendment's Privileges or Immunities Clause. The doctrine is not written in language that explicitly invites expansion. Further, as regards the doctrinal issue that would be relevant to the Comity Clause's application to Utah's regulation—whether that Clause applies to home states—case law for more than a century consistently has unequivocally answered “no.”<sup>118</sup> There nevertheless have been some scholarly calls for changing the doctrine. Professor Kreimer has argued that the Court should modify contemporary doctrine so that the Comity Clause would also apply to the home state.<sup>119</sup> Professor Fallon believes that this is a “plausible argument”<sup>120</sup> since the Comity Clause, read literally, does not differentiate between home and host states. I think the textual argument to be less strong than may at first appear because the Comity Clause is found in Article IV, and the rest of Article IV deals with relationships among the states, not a single state's relationship with its own citizens. But this is far from a

116. See Kreimer, *supra* note 8, at 1007; see also Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 152 (1999).

117. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78–79 (1872) (emphasis added).

118. See *supra* Part II.B.1.

119. Kreimer, *supra* note 8, at 1003 & n.121.

120. Fallon, *supra* note 2, at 635.

devastating objection,<sup>121</sup> and I agree that the text of the Comity Clause plausibly could be read to entitle a Utah citizen who is visiting California to “all Privileges and Immunities” that are enjoyed by the California citizens in California.

In the end, whether the longstanding, consistent precedent establishing that the Privileges and Immunities Clause is inapplicable to home states should be abandoned primarily turns, it seems to me, on straightforward normative arguments. The same is true for the direction that the right to travel and the Privileges or Immunities Clause takes. For these reasons, it is to normative considerations that this Article now turns.

### III. NORMATIVE AND INSTITUTIONAL CONSIDERATIONS (POINTS FIVE THROUGH SEVEN)

Having shown in Part I that states have extraterritorial regulatory powers and in Part II that several constitutional principles potentially could be developed so as to limit such powers, this Part III explains why normative considerations invariably will influence how doctrine ultimately is developed (Section A), shows that there are powerful arguments on behalf of two different approaches to answering the question of whether states should have extraterritorial powers to regulate their citizens (Section B), and then considers which governmental institutions are best suited to choosing between the two alternatives (Section C).

#### A. *The Triple Duty Played by Normative Considerations (Point Five)*

On the assumption that the current doctrine is not necessarily stable, answering the doctrinal question of whether Utah may regulate Mary’s California visit invariably will turn on normative considerations for three reasons. First, whether Utah’s extraterritorial regulation triggers as a threshold matter any of the constitutional principles discussed above—the right to travel,

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121. For one reason, the Guarantee Clause, which is found in Article IV, could be said to address a state’s relationship with its own citizens. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”). *But see* Metzger, *supra* note 10, at 1497 (construing the Guarantee Clause as concerning interstate relations). Further, a state’s regulation of its own citizens could have interstate effects. It also might be objected that Article IV is a “structural” rather than a rights-generating part of the Constitution, though I am skeptical of the utility of this distinction insofar as structural limitations on governmental power frequently can be said to generate rights on the part of individuals not to be regulated in a particular fashion. In any event, it simply is not the case that Article IV does not contain provisions that generate individual rights. The Full Faith and Credit Clause, for example, certainly has been a source that individuals have relied on to claim the right to have a judgment obtained in one state’s courts enforced in another. *See, e.g.,* *Fauntleroy v. Lum*, 210 U.S. 230 (1908) (citing the Full Faith and Credit Clause in argument for enforcing a Missouri judgment in Mississippi).

the privileges or immunities of national citizenship, or Article IV's Privileges and Immunities Clause—is not answered by clear constitutional text, longstanding tradition, or precedent. Accordingly, determining whether (1) Utah's extraterritorial regulations would even implicate "right to travel" concerns as a threshold matter, whether (2) the "privileges or immunities" that flow from national citizenship entail some right to have access to the goods and services available in the sister states to which a United States citizen travels, and whether (3) the "privileges and immunities" of state citizenship to which a traveling citizen of State A is entitled may as a threshold matter be encroached upon by her home state, will turn, at least in part, on normative considerations under virtually every theory of constitutional interpretation.

Normative considerations are likely to be doctrinally relevant in two additional respects, though some background first must be laid to see how. Even if it should be determined that extraterritorial regulations of the sort imposed by Utah in our hypothetical implicate any or all of the above-mentioned constitutional principles as a threshold matter, the question would arise whether a particular extraterritorial regulation *violated* the constitutional provision.<sup>122</sup> This is so because virtually no constitutional principles are categorical. For example, though the Speech Clause "embodies our profound national commitment to the free exchange of ideas," and while it is true that "[a]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content," the Supreme Court also has noted that "this principle, like other First Amendment principles, is not absolute."<sup>123</sup> Consistent with this, "free speech doctrine permits government to restrict a non-trivial quantum of expression on account of content."<sup>124</sup> Thus the mere fact that a given

122. Professor Fallon makes this point with regard to the right to travel. See Fallon, *supra* note 2, at 638 (observing that although "[i]t is surely arguable that state laws barring their citizens from procuring out-of-state abortions would violate the long recognized constitutional right of interstate travel . . . [i]t would probably be a mistake . . . to regard it as simply settled that a state's prohibition against out-of-state abortions of fetuses conceived within the prohibiting state would always and necessarily violate the right to travel.").

123. *Aschcroft v. ACLU*, 535 U.S. 564, 573 (2002) (internal quotation omitted).

124. Rosen, *Institutional Context*, *supra* note 55, at 249. Indeed,

[n]ot only may American governments regulate obscene materials and fighting words, but government may ban speech that constitutes espionage, enact "content-based advertising restrictions" in relation to the sale of securities, prohibit the advocacy of illegal activities, enact "content-based [regulations] of [labor union] elections and election campaigns—including restrictions on accurate representations by employers about the future consequences of unionization," and more.

See *id.* (internal quotation and citations omitted). Relatedly, Adam Winkler recently has shown that constitutional principles that give rise to strict scrutiny of legislative and executive actions very frequently do *not* result in determinations that the governmental actions are unconstitutional.

expression triggers free speech principles as a threshold matter does not mean that government regulation of that expression violates the Constitution.

What is true for the speech principle is true for the constitutional right to travel principle as well. Thus the Court has explicitly held that the “second component of the right to travel” provides “protections [that] are not ‘absolute’”—states are not categorically proscribed from discriminating against citizens who are visiting from other states, but only are prevented from “discriminat[ing] against citizens of other States where there is no substantial reason for the discrimination . . . .”<sup>125</sup> What the Court has identified as the “third” component of the right to travel likewise appears not to be categorical.<sup>126</sup> Accordingly, even if the Court were to recognize a fourth component of the right to travel that encompassed state efforts to extraterritorially regulate their citizens, the Court would then have to devise a legal test to gauge such regulations’ constitutionality. The same would be true if the Court were to decide that a home state’s extraterritorial regulations implicated the “privileges or immunities” of national citizenship.

It is at this point that normative considerations once again come into play. Why is it that constitutional principles (almost always) are not categorical?<sup>127</sup> Part of the answer<sup>128</sup> clearly is this: the absence of categorical prohibitions reflects the Court’s appreciation of the fact that there always are countervailing

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*See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

125. *Saenz v. Roe*, 526 U.S. 489, 501–02 (1999) (internal citations omitted). The second component of the right to travel, said the Court, has a textual basis in the Constitution: Article IV’s Privileges and Immunities Clause, which was discussed above. *See id.* at 501.

126. *See id.* at 504. The Court declined to precisely identify the appropriate standard for reviewing state regulations that implicate this component of the right to travel. *See id.* At one point the Court stated that “[t]he appropriate standard may be more categorical than that articulated” in *Shapiro v. Thompson*. *Id.* The *Shapiro* Court used a standard very close to strict scrutiny, holding that a classification violated equal protection unless it could have been “shown to be necessary to promote a *compelling* governmental interest.” *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). Yet, the *Saenz* opinion subsequently spent five pages analyzing the justifications California gave for its regulation. *Saenz*, 526 U.S. at 504–08. Had the constitutional principle operated categorically, there would have been no need for the *Saenz* Court to undertake such analysis.

127. The only contemporary exceptions are the Court’s quasi-Tenth Amendment categorical anti-commandeering rules. *See* Mark D. Rosen, *Modeling Constitutional Doctrine*, 49 ST. LOUIS U. L.J. 691, 703–04 (2005). For a strong critique of the Court’s decision to operationalize the constitutional anti-commandeering principle by means of categorical legal tests, see Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2182–83 (1998); *see also* Rosen, *supra*, at 703–06.

128. Answering this is surprisingly difficult because of an unfortunate truth: despite the paucity of categorical constitutional principles and the ubiquity of non-categorical legal tests, *see* RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001), neither the Court nor scholars have paid much attention to the criteria for selecting the appropriate legal test. *See* Rosen, *supra* note 127, at 704–06; Rosen, *Institutional Context*, *supra* note 55, at 234 & n.58.

considerations of which constitutional doctrine appropriately takes account.<sup>129</sup> Stated differently, life and the world are too complex to have “absolute” constitutional doctrines that categorically bar the government from regulating speech, interfering with the free exercise of religion, and so forth. Rather, even our most special and fundamental rights and liberties can be regulated—typically for only “compelling interests” and in “narrowly tailored” ways pursuant to “strict scrutiny,” but sometimes for even less significant governmental interests and in less precisely targeted ways.<sup>130</sup> Choosing which non-categorical legal test is to be used to evaluate governmental action that implicates constitutionally protected interests invariably reflects an assessment of the strength of the countervailing considerations in relation to the weight of the constitutional principle against which they cut. Such determinations, it would seem, invariably will turn at least in part—and, more likely, primarily<sup>131</sup>—on normative considerations.<sup>132</sup>

Normative considerations play an important role at yet one additional point. Even after the legal test has been chosen, courts must decide when the

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129. For example, under contemporary doctrine, although women unquestionably have a constitutional privacy interest in relation to abortion, the Court has concluded that the state has an interest in the health of the unborn fetus. The legal test that the Court has devised to measure the constitutionality of state laws that regulate abortion prior to viability—the “undue burden” standard—is, according to the Court, the “appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992).

130. For example, although abortion rights are an aspect of fundamental privacy rights, the undue burden standard that presently applies to abortion regulations is less strict than strict scrutiny. *Id.* at 846–48, 871 (justifying adoption of the undue burden standard on the basis that it is less strict than strict scrutiny and affords the state greater leeway in regulating in relation to the “potential life” of the fetus).

131. Though I need not establish this stronger proposition for purposes of this Article, the intuition behind the proposition is that the selection of appropriate legal tests is not generally informed by textual or historical analysis. Constitutional text mentions none of the legal tests that populate our constitutional jurisprudence; if anything, text almost always suggests that constitutional principles are categorical, a doctrinal approach that contemporary constitutional jurisprudence almost always rejects. *See Rosen, supra* note 127, at 705. Nor did the Framers discuss legal tests. What is left in choosing the appropriate legal test, then, is precedent and normative considerations.

132. In this regard I largely agree with Justice Scalia’s argument in his dissent in *Casey* that application of the undue burden standard invariably is dependent upon a “value judgment” as to the comparative value of the woman’s liberty to choose and the fetus. *See Casey*, 505 U.S. at 983 (Scalia, J., concurring in the judgment in part and dissenting in part). But I reject Justice Scalia’s assumption that the Court can act in a manner that sidesteps value judgments of these sort. The way to maintain the Court’s legitimacy is not by demanding that it avoid value judgments—something I believe to be impossible—but by expanding the institutional actors that actively participate in determining what our Constitution requires. Much of my recent work, and several ongoing projects, seek to work out the implications of these ideas. *See, e.g., Rosen, supra* note 12, at 967–77.

test has been satisfied such that the governmental action survives constitutional challenge. Excellent empirical analysis has definitively established that even “strict scrutiny” is not always (or even generally) fatal in practice; courts not infrequently determine that strictly protected constitutional interests can be regulated because there are countervailing governmental interests that count as “compelling.”<sup>133</sup> The determination of what countervailing government interests are compelling invariably requires a normative assessment.<sup>134</sup>

To quickly summarize, normative considerations likely enter constitutional analysis at three distinct points: (1) the threshold definition of the scope of the constitutional principle, (2) the choice among non-categorical legal tests to operationalize the constitutional principle, and (3) the determination of which governmental policies satisfy the chosen legal test.

*B. Normative Considerations: The Difficult Choice Between “Soft” and “Hard” Pluralism (Point Six)*

Having shown immediately above in Section A (point five) that normative considerations invariably will inform the development of the constitutional doctrines that are relevant to analyzing Utah’s hypothetical regulation, this Section B labors to make the relatively modest point that there are strong normative arguments for two contending positions. The discussion in this point six is not designed to definitively vindicate one of the two candidates, but to lay the foundation for the next subsection’s institutional conclusion that difficult normative decisions of this sort are better undertaken by the more political branches (Congress and the President) than by courts.

1. Defining “Soft” and “Hard” Pluralism

Let us return to our hypothetical: *should* Utah have the power to preclude Mary from obtaining an abortion in California? The first position, that Utah should *not* be able to regulate Mary extraterritorially, has been well stated by many able scholars<sup>135</sup> and has obvious appeal to many. Arguments that have been made on its behalf primarily boil down to two claims: that disenabling Utah (1) enhances the liberty of individuals such as Mary and (2) vindicates the primacy of national citizenship. As to the first, disallowing such extraterritorial regulation expands Mary’s liberty, it is said, by enabling her to do something in California that she is not permitted to do in her home state of Utah. This theme has been elaborated in near-poetic ways by Professor

133. See Winkler, *supra* note 124, at 812–23, 833–69.

134. Indeed, in practice it may involve a comparative assessment of the strength of the countervailing considerations in relation to the constitutional principle against which they cut, though this stronger proposition is not essential to the argument here.

135. See, e.g., Brilmayer, *supra* note 82, at 876; Kreimer, *supra* note 8; Kreimer, *The Law of Choice and Choice of Law*, *supra* note 19.



Kreimer. Permitting Utah to extraterritorially regulate is tantamount to making Mary "carry home-state law with [her] as [she] travel[s], like escaped prisoners dragging a ball and chain."<sup>136</sup> "In our federal system," he also has said, "by stepping over [state] lines an American citizen may claim her freedom."<sup>137</sup>

As to the second claim concerning the primacy of national citizenship, consider the following statement:

At the time the United States was founded, one could conceive of American citizenship as derived from a more basic identification with each of the component states . . . .

. . . At the time of the Civil War, Robert E. Lee resigned his federal commission, and renounced his oath of allegiance because as a "Virginian" he could not bear to honor that oath. It is hard today to find a citizen of the United States who conceives of her primary identity as a "Virginian" or a "Pennsylvanian" or an "Oregonian," rather than an "American," and our nation is stronger for this fact.

In my view, it is precisely the fact that a resident of Pennsylvania comes to New Jersey as an American citizen that entitles her without blame to take advantage of the "privileges and immunities" offered by New Jersey, whether to wager on games of chance or to end an unwanted pregnancy. This does no violence to the authority of Pennsylvania within its boundaries but recognizes that the primary moral community to which we all owe allegiance is that of the United States of America.<sup>138</sup>

I shall have a few critical words to say about these arguments in support of the first position, but first let me sketch the second plausible position.

The second position, that Utah *should* have the power to prohibit Mary from obtaining an abortion in California, also has significant force. Under our federal system, states may have diverse policies in relation to matters that neither the Constitution nor federal law demands nationwide uniformity. But, as regards a non-trivial set of laws, such pluralism of policy choices can be undermined if the citizen of a state that prohibits the activity in question can simply travel to a state that does not proscribe the activity and do there what her home state proscribes—what might be called "travel-evasion" from the perspective of her home state.<sup>139</sup> Accordingly, what is at stake in determining whether Utah can regulate Mary such that she does not engage in "travel-evasion" of legitimate Utah laws is the extent to which states can maintain efficacious diverse policies in relation to those matters that neither the Constitution nor other federal law demands nationwide uniformity.

136. Kreimer, *The Law of Choice and Choice of Law*, *supra* note 19, at 463.

137. Kreimer, *supra* note 8, at 1017.

138. *Id.* at 983–84.

139. *See* Rosen, *supra* note 3.

To be clear, extraterritorial regulation to address potential travel-evasion is not confined to the context of abortion. The possibility of travel-evasion in relation to state law is present whenever State B permits an activity that State A prohibits for paternalistic purposes, to protect third-party interests, or to generate norms in State A.<sup>140</sup> Consider, for instance, a state law that bans gambling: the state policies of protecting the gambler from himself and protecting his family's assets will be largely vitiated if the gambler is free to gamble in Las Vegas. The same is true of state laws banning assisted suicide, mandating motorcycle helmets, and, if *Roe v. Wade* were to be overruled, proscribing abortions. Indeed, even if *Roe v. Wade* remains good law, the issue of travel-evasion arises in relation to abortion-related laws such as parental notification statutes.<sup>141</sup> Moreover, the problem of travel-evasion is not confined to "hot-button" cultural conflict issues, but can arise in the commercial context. For example, Wisconsin not long ago sought to apply its substantively constitutional dairy regulations to milk sales by large Wisconsin dairy farms that were consummated in Illinois so as to evade Wisconsin regulations that aimed to protect third party interests.<sup>142</sup>

Notice the connection between the power of states to prevent travel-evasion and the degree of political pluralism that can be expected to be found across the country. If travel-evasion can be legally targeted, then states can ensure full enforcement of their laws; the mere fact that State B chooses not to

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140. State policies that aim to norm-generate can be subject to travel-evasion insofar as norm inculcation is a function of the widespread practice of persons that an individual knows. Norm-generation may be undercut if I know that my neighbor is undertaking in a neighboring state the very acts that our home state prohibits. *See id.* at 915.

141. Travel-evasion was the predicate, in fact, for bills recently enacted by the House and Senate. *See supra* note 13; *Child Custody Protection Act: Hearing on H.R. 1755 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong., 2d Sess. 3 (2004) ("Despite widespread support for parental involvement laws and clear public policy considerations justifying them, substantial evidence exists that such laws are regularly evaded by adults who transport minors to abortion providers in States that do not have parental notification or consent laws. The Child Custody Protection Act would curb the interstate circumvention of these laws.") (statement of Rep. Steve Chabot, Chairman, Subcomm. on the Constitution); *see also* Child Custody Protection Act, S. 851, 108th Cong. (2004).

142. The Wisconsin regulators were concerned that smaller dairy farms were being driven out of business because purchasers of raw milk paid premiums to large Wisconsin dairy farms in excess of the economic savings that attended the purchase of milk for large farms. *Dean Foods Co. v. Brancel*, 187 F.3d 609, 611 (7th Cir. 1999). To deprive large Wisconsin farms of financial benefits that were not the result of economic efficiencies and thereby engender fairer competition, Wisconsin prohibited premiums to the extent they exceeded the real economic savings of purchasing milk from large farms. *Id.* The large Wisconsin farms then engaged in classic travel-evasion: with the express purpose of avoiding the Wisconsin law, they restructured the sales so that they technically were consummated in Illinois, which did not have such a restriction on premiums. *Id.* at 612. Wisconsin then sought to apply its regulations extraterritorially to those Illinois sales. *Id.*; *see also* Rosen, *supra* note 3, at 930–31 (discussing *Dean Foods*).

proscribe what State A prohibits does not mean that State A's citizens can effectively opt out of State A's laws by the expedient of driving to State B. A federal regime in which travel-evasion can be targeted thus allows for the possibility of what might be called "hard" pluralism: states can establish efficacious regulations across the spectrum of policies with regard to which federal law does not demand nationwide uniformity.<sup>143</sup> By contrast, the first position sketched above—under which Utah cannot regulate Mary's California conduct—can be usefully described as a regime of "soft" pluralism: states can regulate as they wish as regards matters that federal law does not require national uniformity, but they can make sure that their citizens abide by their policies only when their citizens are physically located within the state's borders. Under a regime of "soft" pluralism, the ready possibility of crossing a border to a more regulatorily relaxed state undermines the extent to which the more regulatorily-heavy states can, as a practical matter, regulate as they see fit. A regime of "soft" pluralism—a system in which states cannot proscribe travel evasion—accordingly has a systematic bias against efficacious regulation of matters about which there is not a national consensus. Indeed, this characteristic of "soft" pluralism is explicitly lauded by its proponents: "Where the moral judgment of two sovereigns clashes, federalism leaves the citizen some opportunity to take advantage of the judgment of either."<sup>144</sup>

## 2. Clarifying What Appropriately Informs the Choice Between "Soft" and "Hard" Pluralism

What should inform the choice between "soft" and "hard" pluralism? Though I personally am sympathetic to "hard" pluralism,<sup>145</sup> my interest here is not to convince the reader of its superiority, but only to clarify what is really at stake in choosing between these two options. In so doing, though, I must critique some of the aforementioned arguments that have been made on behalf of "soft" pluralism.

To begin, let us recall the argument that constitutional doctrine appropriately disallows Utah from prohibiting Mary from obtaining an abortion in California because such a doctrine augments Mary's liberty. This is the assumption behind the claim that "by stepping over [state] lines an

143. Of course, the existence of state and/or federal power to target travel-evasion does not entail the exercise of that power. A federal regime of "hard" pluralism thus would allow room for State A to decide to limit its citizen's activities only for so long as she remains within State A's border. But this only underscores the political diversity that a "hard diversity" regime creates: under such a regime, with respect to policies that federal law does not require national uniformity, a state may decide (1) to not regulate its citizens at all, (2) to regulate its citizens only for so long as they are physically present within the state, or (3) to regulate its citizens when they are both in state and out of state.

144. Kreimer, *supra* note 8, at 1017.

145. See Rosen, *supra* note 3, at 911–13.

American citizen may claim her freedom.”<sup>146</sup> This argument, however, is premised on a mistaken conception of the telos of constitutional law that most people do not share and that actually bears no particular relationship to the issue of extraterritoriality. Contrary to this argument’s implicit assumption, the touchstone for constitutionality is not whether a proposed doctrine minimizes the degree to which government may regulate and thereby “interfere” with an individual’s liberty to do what she wishes. Rather, regulations that restrict an individual’s liberty to act may be constitutionally legitimate when they seek to achieve any one of an array of goals, including the protection of third party interests and the pursuit of paternalism and norm generation.<sup>147</sup> This is not to say that state regulations that aim to accomplish these goals are always constitutional; federal constitutional principles impose many limits on what and how states may regulate. But when state regulations do not run afoul of these constitutional limitations, there is no self-evident normative basis for saying that a proposed constitutional doctrine “enhances” liberty by enabling persons to avoid otherwise constitutional state regulations that are applicable to her.

Indeed, further reflection suggests that the foundation for the liberty-enhancing argument in support of “soft” pluralism must either be substantive opposition to Utah’s law or libertarian desire to minimize government regulation in general. Substantive opposition to Utah’s law, however, is not an appropriate normative basis for advocating constitutional doctrines that restrict state extraterritorial regulation as a general matter. Although libertarian opposition to regulation as a general matter is a plausible normative commitment that could inform constitutional doctrine on many theories of constitutional interpretation, one who is persuaded by the liberty-enhancing argument against extraterritoriality should realize that libertarianism is what she really is embracing.

The second argument offered on behalf of “soft” pluralism—that national citizenship today does and should supersede state citizenship—also misses the mark (though, as I shall show, it at least points us in the right direction). Constitutional doctrine that permitted Utah to extraterritorially regulate Mary would not pit Utah against the nation and amount to a victory of state citizenship as against national citizenship. Rather, doctrine that permitted such extraterritorial regulation would help create a federal union in which national citizenship had a particular content and meaning. More specifically, a regime of “hard” pluralism defines our nation as a union of states that, with regard to those policies about which there is no federal requirement of national uniformity, have the power both to enact laws that embody policies that are at

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146. Kreimer, *supra* note 8, at 1017.

147. See Rosen, *supra* note 3, at 883.

odds with their neighbors' policies and to ensure that such laws are strongly enforced.

A federal system in which states had such powers is not tantamount to a regime in which national citizenship takes a second seat to state citizenship. The normative justification for a regime of "hard" pluralism is not that an individual's identity as a resident of Illinois is more significant to her than her American identity; I fully concur with Professor Kreimer both that this is unlikely to be the case today and that the emergence of a dominant national identity is a good thing.<sup>148</sup> Rather, the justification for a regime of "hard" pluralism (to the extent there is a plausible justification) is that our country's enormous population and its citizens' diverse preferences make a regime of "hard" pluralism normatively attractive. In short, at issue is not whether state citizenship takes precedence over federal citizenship, but the nature of national citizenship in our federal union.

The normative attractiveness of "hard" pluralism is based on three distinct considerations that have been well rehearsed by federalism scholars. First, given the diversity of political commitments held by people in our large country, it may be desirable to allow the fullest possible political expression to those policies that federal law does not require national uniformity. Second, it may be beneficial to allow states to experiment with different policies that national law does not, at any given point in time, demand national uniformity.<sup>149</sup> Third, it may be desirable to give the citizens of our enormous country an opportunity to actively participate in sub-federal democratic politics, and this may be facilitated by giving room for people to participate in lawmaking in respect of matters about which people feel strongly. The argument in support of "hard" pluralism is that it supports these three goals more than "soft" pluralism does.

In short, it is no contradiction in terms to feel primary allegiance to a national identity that is committed to allowing "hard" pluralism at the sub-federal levels in respect of policies that neither the United States Constitution nor federal statutes demand national uniformity. Neither the "nature" of national citizenship nor the primary role that national citizenship plays for most of us answers the question of whether Utah should be able extraterritorially regulate Mary. Professor Kreimer's "national primacy" argument points to the right direction, but it buries the difficult normative analysis that appropriately informs the choice between "hard" and "soft"

148. See Kreimer, *supra* note 8, at 983–84.

149. These two arguments—diversity and experimentalism—are distinct. "Experimentalism" anticipates the possibility that one policy may be proven over time to be superior to others such that it may become the single or dominant policy, whereas "diversity" contentedly contemplates the possibility of enduring differences in policy commitments.

pluralism. And that very difficult question is as follows: what kind of federal union do we want to have?

*C. Institutional Considerations (Point Seven)*

As shown above in points one to three, under current doctrine states have the power to extraterritorially regulate their citizens to address travel-evasion. That is to say, the current answer to the question of whether, as a purely descriptive matter, our federal union is one of “hard” or “soft” pluralism is the former. I also have labored to show in point four, however, that this status quo is not necessarily stable because (among other reasons) it has not received extensive attention and there are several plausible constitutional principles that could be developed in a way that would constrain such state extraterritorial powers.

This final part of the Article considers which societal actors are best situated to choosing between “hard” and “soft” pluralism. My argument is that it is perfectly sensible for states to currently have the power to extraterritorially regulate, and for them to exercise the power as they wish. This will give our society data points as to how such a system will operate in practice. Ultimately, however, I conclude that federal institutions are better situated to answering the question of what type of federal union our country should have. Further, I argue that the Congress and the President, by means of legislation, are institutionally superior to federal courts for the purpose of choosing between “hard” and “soft” federalism. The Article then concludes by identifying the appropriate sources of congressional power for making such a decision: (1) the Full Faith and Credit Clause’s “Effects” Clause, (2) Section Five of the Fourteenth Amendment to create legislation that “enforces” what is entailed by national citizenship, and possibly (3) Article IV’s Privileges and Immunities Clause. Although the Commerce Clause also potentially could be relied upon, it is a less conceptually suited constitutional locus than these other provisions to the task at hand of deciding the nature of our federal union.

1. The Superiority of Federal to State Actors

Once it is clearly understood what is at stake in determining the scope of states’ extraterritorial powers, it readily follows that federal actors are institutionally superior to individual states in making the decision. The choice between “hard” and “soft” pluralism has important implications in respect of the character of our federal union: is it a union in which national citizenship entails that all citizens can have ready access to the laws and public goods of all states, or is it a union in which a sub-federal polity can ensure that its citizens abide by its distinctive public policies wherever she may be for so long as she remains a citizen of the state? The federal government is well-suited because it is inclusive of all interested parties; the political body that represents all should make decisions that concern the character of the whole. The

individual states are not well-suited to deciding the nature of national citizenship and our federal union. They can be expected to give short shrift to systemic federal considerations because looking out for the federal union is not part of their charge.

A similar conclusion emerges when one scales back the level of generality and abstraction of what is at issue. The question posed by our hypothetical concerning Mary is the scope of states' regulatory jurisdiction. What political entity is best suited to answering the question? States cannot be trusted to be the final arbiters of their own powers for two reasons. First, they (like all bureaucracies) are inclined to augment the scope of their own powers even absent good policy reasons for doing so. Second, there is a problem of externalities; the "costs" of a state expanding its extraterritorial powers will fall in significant part upon non-citizens, persons who are not politically represented in the state that is making the decision.

The federal government does not fall prey to these two structural disadvantages. To take the second concern first, the federal government represents all states. When it determines the scope of states' extraterritorial powers, the federal government's decisions accordingly impose no externalities on unrepresented outsiders. This is why the federal government is better suited than the states themselves to umpiring states' powers vis-à-vis one another. As to the first concern, there is little room for worry that the federal government will act in a self-aggrandizing manner when it decides horizontal federalism matters; sorting out the powers that states have vis-à-vis one another does not increase federal power at the expense of states and so does not invite the concerns that attend allowing a bureaucracy to define the scope of its own powers.<sup>150</sup> In short, determining the scope of subfederal polities' regulatory powers in relation to one another is a "quintessentially federal function."<sup>151</sup>

## 2. The Superiority of Congress (and the President) to Courts

### a. Congress's Institutional Superiority

Even if (as I argued above) the federal government is institutionally superior to states to the task of choosing between "hard" and "soft" pluralism, the question remains as to how the decision-making appropriately is divided among the various branches of the federal government. The analysis provided above in point six (which identified the strong normative considerations in favor of both "hard" and "soft" pluralism) in conjunction with point four's

150. See Metzger, *supra* note 10, at 1513 (explaining that "the dangers of congressional aggrandizement are mitigated in interstate or horizontal federalism contexts" unlike the context of vertical federalism).

151. See Rosen, *supra* note 12, at 940.

observation (that the choice between the two regimes has not been clearly made by constitutional text, history, or precedent) jointly suggest that the more political branches of the federal government are better suited than courts to making such an inherently subjective, political choice. Courts simply do not have any particular institutional competency in choosing among the competing normative considerations to make the choice between “hard” and “soft” pluralism.

Only clear cut institutional advantages would justify allocating this heavily normative-based decision to the least democratically accountable branch of government. I see no reasons for concluding that Congress (in conjunction with the President’s participation via, among other things, the constitutional requirement of Presentment) is institutionally incapable or suspect in regard to making the intrinsically normative, political decision as to what type of federal union we are to have. Indeed, there are reasons to believe that Congress is a superior forum for the principled investigation and debate of such deeply normative questions,<sup>152</sup> though more attention than I can commit here is appropriately devoted to these issues of each branch’s institutional competencies.

b. Constitutional Bases for Congress’s Powers

There are four constitutional texts that could provide a basis for congressional legislation that would choose between “hard” and “soft” pluralism. The grant of congressional power most closely allied to determining the scope of states’ regulatory authority is the “Effects Clause” of the Full Faith and Credit Clause. The first clause of that provision states that “Full Faith and Credit shall be given in each State to the public Acts . . . of every other State,” and the so-called “Effects” clause provides that “Congress may by general Laws prescribe . . . the Effect” of such “Acts.”<sup>153</sup> The term “public Acts” long has been understood to encompass state legislation,<sup>154</sup> and so the Full Faith and Credit Clause grants Congress the power to determine what effect one state’s legislation is to have in another state. Applied to our hypothetical, the Effects Clause gives Congress the power to determine whether Utah law would have effect vis-à-vis Mary while she was in California.

This use of the Effects Clause is consistent with the way scholars long have understood it. There have been longstanding scholarly calls for Congress to enact legislation that would provide federal choice-of-law rules to replace the hodgepodge of state choice-of-law rules that currently are relied upon to

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152. See generally Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) (criticizing judicial review of legislation).

153. U.S. CONST. art. IV, §1.

154. See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998).



resolve virtually all choice-of-law questions.<sup>155</sup> Whether Mary is subject to Utah or California abortion law when she is in California can be usefully understood as a conflict-of-laws question. More generally, determining the scope of states' extraterritorial regulatory powers is an aspect of the conflict-of-laws that falls to Congress via the Effects Clause, either on its own or by virtue of the Effects Clause in conjunction with the Sweeping Clause.

Further, there is little question that, under the contemporary case law that defines the scope of the Effects Clause, Congress has the power to enact the type of legislation at issue here. The Court has observed that the Effects Clause gives Congress the power to enact rules regarding the requirements of full faith and credit that vary from those that the Court has identified.<sup>156</sup> Though there is some uncertainty in the case law whether this embraces congressional power to determine that a public act or judgment is to be given less effect than what the Court has determined,<sup>157</sup> the Court has stated explicitly that Congress has the power to give greater effect to a state law than the Court has held to be required by the Full Faith and Credit Clause.<sup>158</sup>

The type of legislation under consideration here would best be characterized as either confirming what Full Faith and Credit case law already permits (if Congress opted for "soft" pluralism) or as increasing the full faith and credit that otherwise is permitted by contemporary jurisprudence (if Congress opted for "hard" pluralism) and, for these reasons, unquestionably could be enacted under Congress's Effects Clause powers.<sup>159</sup> To understand the relationship between the legislation under consideration here and the Court's Full Faith and Credit jurisprudence, it first is necessary to understand the general contours of Full Faith and Credit case law. While early Supreme Court case law interpreting the Full Faith and Credit Clause required State A to

155. See, e.g., William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 42 (1963); Walter Wheeler Cook, *The Powers of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J. 421, 432–33 (1919); Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991).

156. See Rosen, *supra* note 12, at 965–66.

157. See *id.* at 967. Though I have strongly critiqued this "one-way" ratchet approach to congressional power under the Effects Clause, see *id.* at 954–57, the persuasiveness of my argument is not relevant here because Congress would have the power to enact the legislation under consideration even under the "one-way" ratchet approach for the reasons discussed above in text.

158. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 (1988). I discuss this case fully in Rosen, *supra* note 12, at 965–66.

159. Let me stave off potential confusion: that contemporary doctrines examined in Parts I and II (Due Process, Dormant Commerce Clause, right to travel, Privileges and Immunities, Privileges or Immunities) give rise to a regime of "hard" pluralism is not inconsistent with the fact that a different constitutional doctrine—that of Full Faith and Credit—does not require that California apply Utah law in its courts.

apply the law of State B if State B had a superior interest in the matter,<sup>160</sup> modern cases have loosened this understanding of full faith and credit and now permit State A to apply its law so long as State A has sufficient contacts such that applying its law would not violate due process.<sup>161</sup> In short, early case law adopted a “multilateralist” approach under which full faith and credit determinations were based on a comparison of the competing states’ interests in regulating a particular matter, whereas contemporary law has adopted a “unilateralist” approach that only considers whether the state seeking to apply its law has at least a minimum quantum of contacts.<sup>162</sup> Today’s unilateralist approach hence is a less strict approach to what full faith and credit requires than was the “multilateralist” approach of yesteryear’s jurisprudence. Accordingly, regardless of whether Congress adopted legislation that reflected a choice of “soft” or “hard” pluralism, any such legislation would fall under Congress’s Effects Clause powers: legislation indicating that Utah did not have extraterritorial regulatory authority would be consistent with contemporary Full Faith and Credit doctrine, and legislation determining that Utah did have the power to extraterritorially regulate Mary would increase the full faith and credit that California would be required to give to Utah law and thereby also would uncontroversially fall within Congress’s Effects Clause powers.<sup>163</sup>

There is a second constitutional text on which Congress could rely to determine the scope of states’ extraterritorial regulatory powers that is less obvious than the Effects Clause but is, in my view, equally sound as a conceptual matter. As discussed above, the extent of state extraterritorial powers is one of the determinants of what it means to be a citizen of the United States in respect of our country’s federal union. As such, a strong argument can be made that Congress has power under Section Five of the Fourteenth Amendment to “enforce by appropriate legislation”<sup>164</sup> Section One’s guarantee that “[n]o State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States” by defining what is entailed by “citizen[ship] of the United States” and its “privileges and immunities.”<sup>165</sup>

160. See Rosen, *supra* note 3, at 961–62 (discussing *Bradford Elec. Light Co., Inc. v. Clapper*, 286 U.S. 145 (1932) and several other cases).

161. See Rosen, *supra* note 12, at 933 & n.60.

162. See William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT’L L.J. 101, 107–110 (1998) (providing a useful discussion of unilateralism and multilateralism).

163. Institutional reasons can explain why courts were unsuited to making multilateralist determinations but that Congress is well-suited to making such determinations. See Rosen, *supra* note 99, at 817–23.

164. U.S. CONST. amend. XIV, §5.

165. U.S. CONST. amend. XIV, §1.

As sensible as this may seem, the contemporary jurisprudence inaugurated by *City of Boerne v. Flores*<sup>166</sup> casts doubt on (though does not definitively decide the question of) congressional power to determine the scope of state extraterritorial powers pursuant to Section Five. This is so because *Boerne* limits Congress's Section Five powers to providing "congruent and proportional" steps to remedy or prevent state violations of Sections One through Four of the Fourteenth Amendment as it specifically denies Congress the power to define the scope of the substantive protections afforded in Sections One through Four.<sup>167</sup>

On the other hand, there is no basis in the case law for concluding that *Boerne*'s constraints apply to substantive provisions of the Fourteenth Amendment that the Court expressly has not expounded in full, such as the Privileges or Immunities Clause.<sup>168</sup> Indeed, many of the concerns animating the *Boerne* Court would be absent in this context. The *Boerne* Court was quite clearly incensed that Congress sought to effectively undo the Court's constitutional ruling in the *Employment Division, Department of Human Resources of Oregon v. Smith*<sup>169</sup> case, and legislation that expanded on what the Court acknowledged to be only an incomplete list of national privileges or immunities would not be a "dis" to the Court in the way that the Religious Freedom Restoration Act was (and in fact may not be disrespectful to the Court in any respect whatsoever).<sup>170</sup> The *Boerne* Court also was concerned by the "substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power . . . ."<sup>171</sup> Such concerns are present when Congress relies on Section Five to readjust "vertical" federalism's boundaries between federal and state regulatory authority, but they are not raised by legislation directed at the "horizontal" federalism issue of determining the scope of states' extraterritorial regulatory authorities in relation to one another. Notwithstanding these very real differences between the type of legislation that post-*Boerne* jurisprudence has struck down and the legislation contemplated here, one could not be certain that the Court would uphold congressional power under Section Five of the Fourteenth Amendment to determine the scope of states' extraterritorial powers.

Another possible source of congressional power to decide between "hard" and "soft" pluralism is Article IV's Privileges and Immunities Clause. Although the Privileges and Immunities Clause does not contain an explicit

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166. 521 U.S. 507 (1997).

167. *See id.* at 519–20.

168. *See supra* Part II.B.1.

169. 494 U.S. 872 (1990).

170. *Boerne*, 521 U.S. at 519–20.

171. *Id.* at 534.

grant of congressional power, and though other provisions in Article IV do, Professor Gillian Metzger has provided a powerful argument that the Privileges and Immunities Clause nonetheless should be understood as granting Congress legislative powers.<sup>172</sup> If the Clause indeed were a source of congressional power, the Privileges and Immunities Clause could be an additional source for Congress's power to enact the legislation under contemplation here. This is so because the Privileges and Immunities Clause addresses the way that visitors are to be treated when they are in sister states, and there is obvious overlap between the status of visitors and a home state's extraterritorial regulatory powers in relation to its traveling citizens.

The final constitutional provision Congress could rely upon to enact legislation concerning the scope of states' extraterritorial regulatory powers is the all-purpose Commerce Clause, even after *Lopez* and its progeny. In terms of the hypothetical immediately under consideration, Congress undoubtedly could decide that Mary either could or could not obtain an abortion in California insofar as abortion "substantially affects interstate commerce."<sup>173</sup>

While there certainly is a distinguished legacy of legislation enacted under the Commerce Clause that sought to accomplish policy objectives more conceptually tied to other constitutional grants of congressional power,<sup>174</sup> there are strong reasons to believe that it would be preferable for Congress to utilize the constitutional provisions most conceptually suited to accomplishing the particular task at hand. First, relying on the most conceptually appropriate constitutional provision may help maintain congressional clarity as to what the legislation is attempting to do (in this case, determining the scope of states' regulatory authority and thereby deciding the nature of national citizenship in our federal union, just not regulating interstate commerce). Second, relying on less apt constitutional provisions may interfere with maximal accomplishment of Congress's policy goals; for instance, relying on the Commerce Clause eliminates congressional power to address states' extraterritorial regulatory powers in relation to matters that do not have a substantial connection to interstate commerce.<sup>175</sup> Third, to the extent there are constitutional limits that appropriately apply to Congress's exercise of its power in relation to regulating states' extraterritorial powers, it is better to create such doctrinal limitations in

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172. See Metzger, *supra* note 10, at 1485–88.

173. *United States v. Lopez*, 514 U.S. 549, 560 (1995).

174. See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (upholding civil rights legislation as a constitutional exercise of Congress's Commerce Clause power despite the fact that Section Five of the Fourteenth Amendment would have been the more conceptually appropriate basis for enacting civil rights legislation).

175. So, for example, the civil rights legislation at issue in *Heart of Atlanta* applied only to those private businesses large enough to satisfy the Commerce Clause's requirements. *Id.* at 247. Had the legislation rested solely on Congress's Section Five power, there would have been no need to have such a size limitation.

the context of the specific constitutional doctrines that give rise to the congressional power rather than engraft such limitations onto general Commerce Clause doctrine, where the limitations may have unanticipated going-forward consequences when Congress seeks to regulate in very different contexts.

Finally, it is worth noting that the conclusion that the Constitution gives Congress (and the President) primary responsibility for determining the scope of states' extraterritorial powers does not mean that courts play no role. Even absent any legislation whatsoever, it is perfectly appropriate for federal courts<sup>176</sup> to decide whether a state has appropriately regulated extraterritorially under the doctrinal rubric of the Full Faith and Credit Clause, the Fourteenth Amendment's national Citizenship Clause and Privileges or Immunities Clause, or the right to travel. Recognition that Congress plays the primary role in answering such questions means, however, that any judicial answers that precede legislation should not be viewed as limiting Congress if and when it elects to act. Rather, any such judicial answers have the same status as the doctrine known as "Dormant Commerce Clause" that courts have developed when states regulate in respect of matters that Congress has the power to regulate under the Commerce Clause but has not (yet) regulated. It is undisputed that if and when Congress exercises its Commerce Clause powers that had been dormant, it is not bound by the Court's Dormant Commerce Clause doctrine; Congress may go so far as to authorize states to regulate in ways that the Court had held to be impermissible under its Dormant Commerce Clause jurisprudence.<sup>177</sup> As I have argued elsewhere, the Dormant Commerce Clause is best conceptualized as a species of federal common law.<sup>178</sup> Case law concerning the scope of states' extraterritorial regulatory powers decided before Congress enacts legislation on the subject likewise should be deemed to be merely provisional federal common law that in no way diminishes Congress's powers if and when it should choose to exercise them.<sup>179</sup>

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176. Professor Bellia has made the interesting point that state courts typically have the power to make federal common law. See Anthony J. Bellia, Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 839–51 (2005) (showing state courts' role in the formulation of federal common law). This might be unwelcome news in light of the analysis above giving rise to the conclusion that the federal government is better suited than states to deciding the questions of national identity that are raised by the issues discussed in this Article.

177. See Rosen, *supra* note 12, at 972–73.

178. Rosen, *supra* note 11.

179. Congress certainly may look to such case law for guidance when it makes its political decisions, though in so doing it must be careful to distinguish between (1) judicial doctrine that on a case-by-case, inductive basis has identified the principles and counter-principles that appropriately inform the ultimately normative decision that balances such competing considerations and (2) judicial doctrine that reflects appropriate judicial reluctance to resolve the substantive normative question on account of courts' institutional limitations. As I have argued elsewhere, the Full Faith and Credit jurisprudence that has rejected multilateralism and adopted

## CONCLUSION

Were *Roe v. Wade* to be overruled, Utah would have the power under contemporary constitutional jurisprudence to prohibit its citizen Mary from obtaining an abortion in California. This assessment is based on two sub-conclusions: that (1) states have extensive powers to regulate their own citizens' out-of-state activities (under the Tenth Amendment and due process, and not disturbed by observations in recent Dormant Commerce Clause case law) and that (2) assorted constitutional side-constraints on state extraterritorial power, as presently construed by the Supreme Court, would not bar this particular Utah regulation (the right to travel, Article IV's Privileges and Immunities Clause, and the Fourteenth Amendment's Citizenship Clause and Privileges or Immunities Clause).

While the existence of baseline state extraterritorial powers is both longstanding and wise and therefore unlikely to change, the jurisprudence concerning the side-constraints does not enjoy the same presumptive stability. Normative considerations invariably will influence the side-constraints' ultimate doctrinal contours, and whether Utah should have the power to regulate Mary's California activity implicates very deep questions concerning the nature of national citizenship in our federal union. At issue ultimately is whether our country has a regime of "hard" or "soft" pluralism in respect of those policies that federal law does not require national uniformity, and the choice between the two has implications far beyond our unlikely hypothetical concerning Mary. This is so because a home state's power to apply its laws to its traveling citizens is relevant to a wide range of legitimate state laws whose policies can be effectively gutted if citizens can avail themselves of another state's less restrictive laws by simply crossing a border.

Although states largely have the power to decide for themselves whether to regulate their citizens' extraterritorial activities at present, Congress has the power to effectively overrule state decisions in this regard and select either a regime of "hard" or "soft" pluralism via its powers under the Full Faith and Credit Clause, Section Five of the Fourteenth Amendment, and perhaps Article IV's Privileges and Immunities Clause. This allocation of ultimate decisionmaking power is sensible. Determining the scope of states' regulatory authority and deciding between "soft" and "hard" pluralism are functions that properly fall to the federal government, rather than to the states, because how these issues are resolved are important determinants of the character of

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unilateralism by folding Full Faith and Credit analysis into the Due Process doctrine is best understood as doctrine that reflects lack of judicial competence in undertaking the complex balancing of incommensurable considerations that invariably is involved in determining which state has a greater interest in having its law applied in a given circumstance. See Rosen, *supra* note 12, at 978 & n.236. Legislatures, by contrast, are institutionally expected in our democratic system to render these sorts of highly subjective, political judgments.

national citizenship in respect of our federal union. Moreover, these determinations fall more appropriately to the Congress (with presidential participation via the Presentment Clause) than to federal courts because the choice between “soft” and “hard” pluralism—a very hard choice indeed—will be driven by highly subjective judgments that are essentially political in character.

