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THE REHNQUIST COURT AND HORIZONTAL FEDERALISM: AN EVALUATION AND A PROPOSAL FOR MODERATE CONSTITUTIONAL CONSTRAINTS ON HORIZONTAL FEDERALISM

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"The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."—Chief Justice Salmon P. Chase[1]

"[T]he constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized."—Justice Horace H. Lurton[2]

Horizontal federalism is an essential part of our Constitution. Professor Steven G. Calabresi has observed, "[t]he constitutional text's overreaching concern is with questions of institutional competence, and its main theme is the division and allocation of power with a focus on who decides what questions and subject to what checks and balances."[3] Part of this division of power concerns federalism—the allocation of authority between the federal government and the states (vertical federalism) and the allocation of authority among the states (horizontal federalism). This allocation of authority protects both the individual and the states. As James Madison declared:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[4]

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1. Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868).
2. Coyle v. Smith, 221 U.S. 559, 580 (1911).
3. Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373, 1373 (1998).
4. THE FEDERALIST NO. 51, at 349 (James Madison) (Carl Van Doren ed., The Easton Press 1979).

Similarly, Professor John C. Yoo has asserted, "[s]overeignty is not maintained for sovereignty's sake, but instead is necessary to check those driven by power for power's sake."[5]

Vertical federalism has been a major concern of the Rehnquist Court. In a series of cases, the Court has protected states' rights from imposition by the federal government.[6] First, the Court has limited Congress' power to pass statutes that infringe upon state sovereignty under Congress' authority under the Commerce Clause and under Section 5 of the Fourteenth Amendment.[7] Second, the Court has enforced the "etiquette of federalism"[8] by forbidding Congress from "commandeer[ing] the legislative processes of the States . . ."[9] or commanding state officers "to administer or enforce a federal regulatory program."[10] Finally, the Court has limited Congress' ability to abrogate state sovereign immunity.[11]

The Rehnquist Court has not been similarly concerned with horizontal federalism—the relations among the states. With the exception of one limited area (due process limits on punitive damages), the Court has not created new constraints, it has continued the minimal restrictions on horizontal federalism from previous Courts, and, in one instance, it has retreated from the constraints created by prior Courts. Three cases from the 2002-2003 term, *State Farm Mutual Automobile Insurance Co. v. Campbell*,[12] which concerns due process limits on punitive damages awards, *Franchise Tax Board v. Hyatt*,[13] which involves the Full Faith

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5. John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 32 (1998).

6. *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 769 (2002); Bd. of Trs. of the Univ. of Ala. v. Garrett, 351 U.S. 356, 374 (2001); United States v. Morrison, 529 U.S. 598, 627 (2000); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91-92 (2000); Alden v. Maine, 527 U.S. 706, 709-10 (1999); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647-48 (1999); Printz v. United States, 521 U.S. 898, 935 (1997); City of Boerne v. Flores, 521 U.S. 507, 536 (1997); Seminole Tribe v. Florida, 517 U.S. 44, 76 (1996); United States v. Lopez, 514 U.S. 549, 567-68 (1995); New York v. United States, 505 U.S. 144, 188 (1992); *see also* Gregory v. Ashcroft, 501 U.S. 452, 473 (1991) (concluding that the Equal Protection Clause does not prohibit the Missouri Constitution's mandatory retirement provision for judges). *But see* Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972, 1977, 1981 (2003) (holding that it was within Congress' authority to allow state employees to recover money damages in federal court where the state failed to comply with the family-care provision of the Family and Medical Leave Act (FMLA), despite Eleventh Amendment immunity, because the FMLA provision was congruent and proportional to the targeted gender discrimination).

7. *Morrison*, 529 U.S. at 627; *City of Boerne*, 521 U.S. at 536; *Lopez*, 514 U.S. at 567-68.

8. *Printz*, 521 U.S. at 964 (quoting *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring)).

9. *Id.* at 963 (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981)); *New York*, 505 U.S. at 161 (quoting *Hodel*, 452 U.S. at 288).

10. *Printz*, 521 U.S. at 935.

11. *See Fed. Mar. Comm'n*, 535 U.S. at 769; *Garrett*, 531 U.S. at 374; *Kimel*, 528 U.S. at 91-92; *Alden*, 527 U.S. at 709-10; *Coll. Sav. Bank*, 527 U.S. at 691; *Fla. Prepaid*, 527 U.S. at 647-48; *Seminole Tribe*, 517 U.S. at 76; *see also Gregory*, 501 U.S. at 473 (concluding that the Equal Protection Clause does not prohibit Missouri's mandatory retirement provision for judges).

12. 123 S. Ct. 1513 (2003).

13. 123 S. Ct. 1683 (2003).

and Credit Clause, and *Pharmaceutical Research & Manufacturers of America v. Walsh*,[14] which concerns dormant commerce clause limits, vividly illustrate the Court's minimal and selective horizontal federalism jurisprudence.

Michael Greve has criticized the Rehnquist Court's horizontal federalism jurisprudence that existed prior to the 2002-2003 term:

> The Rehnquist Court has waged its federalism campaign on behalf of "states' rights" against national impositions, but the rehabilitation of a plausible, constitutional federalism is a two-front war. Federalism surely must limit the national government's powers over the states and protect intergovernmental immunities . . . . However, it must also protect states from aggression and exploitation by other states; moreover, it must protect the common economic market from regulatory balkanization.[15]

Before the New Deal Court, there were significant constitutional constraints on state power.[16] That Court eliminated or limited restrictions on state authority in the following areas: (1) the Court eliminated substantive due process; (2) the Court drastically scaled back the scope of the dormant commerce clause; (3) the Court reduced the impact of federal statutes on the states by replacing the automatic preemption of state law by federal law in the same area with a presumption against preemption; (4) the Court virtually halted the application of parts of the Bill of Rights to the states through the Fourteenth Amendment; (5) the Court enhanced state judicial power through the *Erie* doctrine, which requires the use of state law in diversity cases; and (6) the Court increased state judicial power by creating federal court abstention, by expanding state court territorial jurisdiction, and by significantly reducing constitutional constraints on state choice of law.[17] Although the Court created a balancing approach to the dormant commerce clause beginning with *Southern Pacific Co. v. Arizona*[18] in 1945 and returned to a substantive due process analysis of fundamental rights in *Griswold v. Connecticut*[19] in 1965,

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14. 123 S. Ct. 1855 (2003).

15. Michael S. Greve, *Federalism's Frontier*, 7 TEX. REV. L. & POL. 93, 95 (2002); *see also* Scott Fruehwald, *If Men Were Angels: The New Judicial Activism in Theory and Practice*, 83 MARQ. L. REV. 435, 494 (1999) ("While previous cases have focused on vertical federalism, there is also a great need to police the relation of the states.") [hereinafter Fruehwald, *If Men Were Angels*].

16. *See* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 487 (1997). Some of these constraints are horizontal, such as constitutional constraints on a state's choice of law, while others, such as substantive due process and federal preemption are vertical.

17. *Id.* at 488-89.

18. 325 U.S. 761, 775-76 (1945); *see* Gradbaum, *supra* note 16, at 509-10, 529-30.

> By 1949 at the latest, and probably by 1945, a majority of the Court was persuaded to retreat from the full radicalism of 1938. Nonetheless, overall the "modern approach" to the dormant Commerce Clause that was forged in these years reflects a significantly less nationalistic vision than the predominant one during the Lochner era.

Id. at 509.

19. 381 U.S. 479 (1965).

most of the minimal constraints on state power from the New Deal Court remain today.

This author believes that the Court should give as much attention to horizontal federalism as it has given to vertical federalism. States can interfere with state sovereignty almost as much as the federal government can interfere with state sovereignty. Equally important, an individual should not be subject to a state extending its laws beyond its authority. In addition, these greater constraints on horizontal federalism should be created in a principled manner based on a neutral reading of the Constitution's structural provisions.

This Article will concentrate on three constitutional provisions that regulate the relations among the states:[20] (1) the Due Process Clause of the Fourteenth Amendment;[21] (2) the Full Faith and Credit Clause;[22] and (3) the dormant commerce clause.[23] The Due Process Clause regulates the relationship between the state and the individual, and it should prevent a state from applying its laws to an individual when that state has a tenuous connection to the individual or controversy. The Full Faith and Credit Clause requires that states recognize the laws and judgments of other states, and it should preclude a state from extending its authority in a way that interferes with the sovereignty of other states. Finally, the dormant commerce clause protects the states as a whole, and it should prohibit a state from regulating the market beyond its borders and discriminating against interstate commerce.

Part I of this Article will examine the strong due process constraints the Court has placed on a state's authority to impose punitive damages in torts cases based on conduct in other states. It will conclude that those limits are proper under the Due Process Clause, but that the Court has not properly stated the basis for those limits. Part II will discuss the Court's Full Faith and Credit Clause cases concerning choice of law and judgments. Part II will conclude that the Court has given almost no content to the Full Faith and Credit Clause in choice of law cases and it has improperly created exceptions to full faith and credit for judgments. It will also propose a consistent standard for giving full faith and credit to another state's laws and judgments. Part III will evaluate the Court's ap-

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20. Other clauses that relate to horizontal federalism or regulation of the states include U.S. CONST. art. I, § 10; the Privileges and Immunities Clause, *id.* art. IV, §§ 2, 3; the Supremacy Clause, *id.* art. VI, cl. 2; amend. XIV. In addition, the structure of the Constitution, as a whole, supports limits on horizontal federalism. Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1885 (1987) ("The truth, I shall argue presently, is that the extraterritoriality principle is not to be located in any particular clause. It is one of those foundational principles of our federalism which we infer from the structure of the Constitution as a whole.") [hereinafter Regan, *Siamese Essays*]. I will not discuss vertical constraints, such as federal preemption, in this Article.

21. U.S. CONST. amend. XIV, § 1.

22. *Id.* art. IV, § 1.

23. *Id.* art. I, § 8.

proach to the dormant commerce clause, and it will argue that the Court has retreated from the proper dormant commerce clause analysis in its latest important decision in this area, *Pharmaceutical Research & Manufacturers of America v. Walsh.*

Finally, Part IV will examine the Court's horizontal federalism jurisprudence as a whole. It will contend that the Court has no consistent approach to horizontal federalism; rather, it has used horizontal federalism to further its agenda in other areas, particularly concerning limits on punitive damages awards. Specifically, the Court has placed strong due process limits on punitive damages, it has given no content to the Full Faith and Credit Clause, and it has retreated from earlier constraints in its latest dormant commerce clause decision. Part IV will then propose that the Court adopt consistent, moderate constitutional constraints on horizontal federalism based on the Constitution's structural provisions that limit a state's ability to extend its laws beyond its authority but that do not interfere with a state's proper sovereignty.

I. DUE PROCESS LIMITS ON STATE'S ABILITY TO IMPOSE PUNITIVE DAMAGES

A. *Due Process Limits in* State Farm Mutual Automobile Insurance Co. v. Campbell[24] *and* BMW of North America, Inc. v. Gore[25]

The only area in which the Rehnquist Court has placed significant limits on a state's authority to interfere with other states' powers involves whether state court punitive damages awards violate the Due Process Clause of the Fourteenth Amendment.[26] In *BMW of North America, Inc. v. Gore*, the Court struck down an Alabama court's award of punitive damages against an automobile distributor for repainting a new car without disclosing the repainting to the purchaser.[27] BMW had repainted the top, hood, trunk, and quarter panels of the car at a cost of $601.37, which constituted approximately 1.5 percent of the suggested retail price.[28] At that time, BMW had a nationwide policy that, if the repair cost did not exceed three percent of the suggested retail price, BMW sold the car as new without telling the dealer that repairs had been

24. 123 S. Ct. 1513 (2003).

25. 517 U.S. 559 (1996).

26. *See Campbell*, 123 S. Ct. at 1517, 1522-23, 1526; *Gore*, 517 U.S. at 567-68; *see also* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001) (concluding that the court of appeals should apply a de novo standard of review when reviewing a district court's determination of the constitutionality of a punitive damages award); United States v. Bajakajian, 524 U.S. 321, 334 (1998) (concluding that a punitive forfeiture violated the Excessive Fines Clause because it was grossly disproportional to the gravity of the defendant's offense); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 462 (1993) (holding that the punitive damages award did not violate due process); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24 (1991) (recognizing that although the punitive damages assessed were large in proportion to the compensatory damages, they did not violate due process).

27. *Gore*, 517 U.S. at 563, 585.

28. *Id.* at 563-64, 563 n.1.

made.[29] The jury returned a verdict against BMW for $4,000 in compensatory damages and $4,000,000 in punitive damages.[30] The Alabama Supreme Court reduced the punitive damages to $2,000,000.[31] The United States Supreme Court reversed.[32]

Similarly, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court held that a punitive damages award of $145,000,000 involving a $1,000,000 compensatory award in a Utah case against an insurance company for bad faith, fraud, and intentional infliction of emotional distress violated the Due Process Clause.[33] Campbell was involved in an automobile accident in which one person was killed and another was permanently disabled.[34] Although the parties reached an early consensus that Campbell was at fault, Campbell's insurance company, State Farm, decided to contest liability and refused offers to settle for the policy limits.[35] The jury found against Campbell and awarded $185,849 to the plaintiffs. State Farm refused to cover any excess liability, and it told the Campbells, "[y]ou may want to put for sale signs on your property to get things moving."[36] In addition, State Farm refused to post a supersedeas bond to allow Campbell to appeal.[37]

After the appellate court denied Campbell's appeal, State Farm paid the entire amount, including the excess liability.[38] However, the Campbells sued State Farm for bad faith, fraud, and intentional infliction of emotional distress.[39] The trial court granted summary judgment for State Farm because it had paid the excess amount, but an appellate court reversed.[40] On remand, the trial court refused State Farm's motion to exclude evidence of alleged conduct that occurred in unrelated cases outside the state.[41] However, it reduced the jury award of $2,600,000 in compensatory damages and $145,000,000 in punitive damages to $1,000,000 and $25,000,000, respectively.[42] Applying the test the United States Supreme Court had developed in *Gore*, the Utah Supreme Court reinstated the $145,000,000 punitive damages award.[43] The United States Supreme Court reversed on due process grounds.[44]

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29. *Id.* at 563.
30. *Id.* at 565.
31. BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 621 (Ala. 1994).
32. *Gore*, 517 U.S. at 586.
33. *Campbell*, 123 S. Ct. at 1517-18, 1526.
34. *Id.* at 1517.
35. *Id.* at 1517-18.
36. *Id.* at 1518 (internal quotations omitted).
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 1519.
43. Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1147-48 (Utah 2001).
44. *Campbell*, 123 S. Ct. at 1526.

In punitive damages cases, the Court begins with the principle that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."[45] "Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."[46]

1. The Court's Due Process Test for Punitive Damages Cases

In determining a state's legitimate interest in imposing punitive damages, the Court makes two due process inquiries: (1) whether a state has exceeded its legislative authority[47] and (2) whether the defendant had fair warning "'not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.'"[48] The first inquiry concerns horizontal federalism—a state's power to extend its laws into other states. The second inquiry involves fairness—notice and the severity of the punishment in relation to the misconduct.

The Court begins the first inquiry by looking at a basic tenet of federalism—that states may reasonably differ in their policy judgments.[49] For example, in *Gore*, the Court found "a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States."[50] The Court has stated the basic principle of state sovereignty: "No State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular."[51] If a uniform national policy is desired, Congress has the power to enact such a policy, but "it is clear that no single State could do so, or even impose its own policy choice on neighboring States."[52] "While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation."[53] Accordingly,

45. *Gore*, 517 U.S. at 568; *see also Campbell*, 123 S. Ct. at 1519-20 (noting that although states have discretion over the imposition of punitive damages, there are procedural and substantive constitutional limits on these awards).

46. *Gore*, 517 U.S. at 568; *see also Campbell*, 123 S. Ct. at 1519-20 (noting that the Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary awards).

47. *Campbell*, 123 S. Ct. at 1521-23; *Gore*, 517 U.S. at 571.

48. *Campbell*, 123 S. Ct. at 1520 (quoting *Gore*, 517 U.S. at 574).

49. *See Gore*, 517 U.S. at 568.

50. *Id.* at 570. For instance, some states have protected their citizens by requiring notice of presale repairs that affect a car's value through legislation, while others have done so judicially. *Id.* at 569. Other states may not have disclosure requirements if they believe they are unnecessary because of the automobile trade's self-interest in customer goodwill or if they believe the administrative costs of full disclosure would raise car prices. *Id.* at 570. Finally, other states may want some disclosure requirements, but want to exempt minor repairs. *Id.*

51. Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881).

52. *Gore*, 517 U.S. at 571.

53. *Id.* at 585.

"[a] State cannot punish a defendant for conduct that may have been lawful where it occurred."[54]

In addition, a state does not have a legitimate interest in imposing punitive damages on a defendant for unlawful conduct outside that state, and any such adjudication would require the inclusion of the affected parties and the application of the relevant states' laws.[55] Consequently, as the Court stated in *Gore*, "one State's power to impose burdens on the interstate market for automobiles is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States."[56] The Court has declared: "We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."[57] Punishing a person for doing what the law allows him to do "is a due process violation of the most basic sort."[58]

In *Gore*, the plaintiff contended that the large punitive damages award was needed to cause BMW to change its nationwide nondisclosure policy.[59] However, the Court found that "by attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States."[60] Alabama can only further its interest in protecting its own consumers and its own economy; it lacks the power to punish conduct that was lawful where it occurred and that did not affect Alabama or its residents.[61] Similarly, in *Campbell*, the Court thought that the case "was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country."[62] The Court averred: "From their opening statements onward the Campbells framed this case as a chance to rebuke State Farm for its nationwide activities."[63]

The second half of the due process inquiry regarding punitive damages involves fair warning and the prevention of the arbitrary deprivation of property.[64] The Court opined: "Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior. A State can have no legitimate interest in deliberately making the law so arbi-

54. *Campbell*, 123 S. Ct. at 1522; *see also Gore*, 517 U.S. at 572-73 (concluding that Alabama cannot punish BMW for conduct that was lawful where it occurred).
55. *Campbell*, 123 S. Ct. at 1522.
56. *Gore*, 517 U.S. at 571 (internal citations omitted).
57. *Id.* at 572.
58. *Id.* at 573 n.19 (quoting Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)).
59. *Id.* at 572.
60. *Id.*
61. *Id.* at 572-73.
62. *Campbell*, 123 S. Ct. at 1521.
63. *Id.* at 1522.
64. *Id.* at 1520.

trary that citizens will be unable to avoid punishment based solely upon bias or whim."[65] Similarly, Justice Breyer has declared:

> This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion. Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself.[66]

He continued: "Legal standards need not be precise in order to satisfy this constitutional concern. . . . But they must offer some kind of constraint upon a jury or court's discretion, and thus protection against purely arbitrary behavior."[67] The imposition of punitive damages implicates such concerns when they are determined with vague jury instructions or evidence that has little bearing on the amount that should be awarded.[68]

The fair notice inquiry used by the Rehnquist Court involves a three-part test: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[69] Concerning the first factor, degree of reprehensibility, "exemplary damages imposed on a defendant should reflect 'the enormity of his offense'" and "the accepted view that some wrongs are more blameworthy than others."[70] A court should

> determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.[71]

65. *Id.* at 1520 (quoting *Haslip*, 499 U.S. at 59 (O'Connor, J., dissenting)).
66. *Gore*, 517 U.S. at 587 (Breyer, J., concurring) (internal citation omitted); *see Campbell*, 123 S. Ct. at 1520.
67. *Gore*, 517 U.S. at 588.
68. *Campbell*, 123 S. Ct. at 1520.
69. *Id.* (citing *Gore*, 517 U.S. at 575).
70. *Gore*, 517 U.S. at 575.
71. *Campbell*, 123 S. Ct. at 1521.

The Court added: "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect."[72]

Concerning the second factor, the disparity between compensatory and punitive damages, the Court declared, "[t]he principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree."73 Although a court cannot draw a bright-line with this factor, "[w]hen the ratio is a breathtaking 500 to 1, however, the award must surely 'raise a suspicious judicial eyebrow.'"74 In addition, when there are substantial compensatory damages, a lesser ratio between punitive damages and compensatory damages may be required.75

Finally, concerning the third factor, sanctions for comparable misconduct, the Court has stated that courts should "'accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue.'"[76] Moreover, "[g]reat care must be taken to avoid use of the civil process to access criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof."[77]

2. Application of the Court's Punitive Damages Test in *Campbell* and *Gore*

The punitive damages in *Campbell* failed the three-part test.[78] First, the Court held that the reprehensibility guidepost did not justify the imposition of such large punitive damages.[79] As stated above, the existence of out-of-state conduct cannot support punitive damages, and much of the award in this case was based on out-of-state conduct.[80] Moreover, much of the alleged conduct was unrelated to the plaintiffs' harm.[81] The Court asserted: "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."[82] Furthermore, the Court felt that the Campbells had not presented sufficient evidence to establish that State Farm was a recidivist.[83] The Court

72. *Id.*
73. *Gore*, 517 U.S. at 580.
74. *Id.* at 583 (quoting *TXO*, 590 U.S. at 481 (O'Connor, J., dissenting)).
75. *Campbell*, 123 S. Ct. at 1524.
76. *Gore*, 517 U.S. at 583 (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)).
77. *Campbell*, 123 S. Ct. at 1526.
78. *Id.* at 1521.
79. *Id.*
80. *Id.* at 1521-22.
81. *Id.* at 1523.
82. *Id.*
83. *Id.*

concluded: "The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance . . . ."[84]

Second, the Court believed there was a presumption against the constitutionality of punitive damages with a "145-to-1" punitive to compensatory damages ratio.[85] The Court also thought the compensatory damages in this case included a punitive element; the trial court had awarded the Campbells $1,000,000 in damages for eighteen months of emotional distress.[86] The Court also rejected arguments that the damages were justified because State Farm had significant assets.[87] Finally, the significant disparity between the punitive damages and the civil penalties authorized or imposed in comparable cases failed the third factor.[88] The Court stated that "[t]he most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud, an amount dwarfed by the $145 million punitive damages award."[89]

The punitive damages in *Gore* also failed the three-part test.[90] First, the Court held that there were no aggravating factors present that were related to reprehensible conduct.[91] The harm was wholly economic; the repainting had no effect on the car's performance or safety.[92] The Court asserted: "That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award."[93] Second, the Court felt that the ratio of punitive damages to compensatory damages was excessive.[94] The punitive damages award was 500 times the compensatory damages award, and there was no evidence that Gore or any other BMW buyer was subject to additional harm by the nondisclosure.[95] Finally, concerning sanctions for comparable conduct, the $2,000,000 punitive damages award was substantially greater than statutory fines in Alabama or other states for this conduct.[96] Significantly, "at the time BMW's policy was first challenged, there does not appear to have been any judicial decision in Alabama or elsewhere indicating that application of that policy might give rise to such severe

84. *Id.* at 1524.
85. *Id.*
86. *Id.* at 1524-25.
87. *Id.* at 1525 ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.").
88. *Id.* at 1526.
89. *Id.* (internal citation omitted).
90. *See Gore*, 517 U.S. at 574-75.
91. *Id.* at 576.
92. *Id.*
93. *Id.* at 580.
94. *Id.* at 580-83.
95. *Id.* at 582.
96. *Id.* at 583-84.

punishment."[97] The Court concluded: "We cannot . . . accept the conclusion of the Alabama Supreme Court that BMW's conduct was sufficiently egregious to justify a punitive sanction that is tantamount to a severe criminal penalty."[98]

B. Evaluation of the Court's Due Process Limits on Punitive Damages

There are obviously some due process limits on a state's ability to impose punitive damages,[99] and the Court's three-part test is an effective means of evaluating those restrictions. However, some of the Court's reasoning in *Campbell* and *Gore* is faulty, especially concerning the reason the Due Process Clause constrains horizontal federalism.

Concerning the first part of the Court's due process analysis—whether a state has exceeded its legitimate authority under the Due Process Clause—the Court has wrongly stated that the due process test concerns whether a state has burdened interstate commerce, whether a state has imposed its policy choice on neighboring states, and whether a state has respected other states' interests.[100] As has been demonstrated in personal jurisdiction cases and choice of law scholarship, due process has nothing to do with state interests,[101] and it certainly has nothing to do with interstate commerce.[102] Rather, the Due Process Clause concerns the relationship between the state and the individual.[103] The Full Faith and Credit Clause and the Commerce Clause govern the relationship of the states and interstate commerce, respectively.[104]

Nevertheless, the Court is correct in finding that the Due Process Clause affects horizontal federalism.[105] However, it does so by its regulation of the relationship of the state and the individual. As Professor Terry Kogan has declared: "In the context of legislative jurisdiction, the Constitution should be viewed as primarily concerned with protecting individuals, not states, from overreaching by other states."[106] The Rehnquist

97. *Id.* at 584.

98. *Id.* at 585.

99. *See, e.g., id.* at 562 (citing *TXO*, 509 U.S. at 454) (noting that the "Due Process Clause of the Fourteenth Amendment prohibits a state from imposing a 'grossly excessive' punishment on a tortfeasor").

100. *Id.* at 571; *see supra* notes 49-63 and accompanying text.

101. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 n.10 (1982); EDWIN SCOTT FRUEHWALD, CHOICE OF LAW FOR AMERICAN COURTS: A MULTILATERALIST METHOD 67-68 (2001) [hereinafter FRUEHWALD, CHOICE OF LAW]; *see also* Martin H. Redish, *Federalism, Due Process, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1113-14 (1981) (discussing the Due Process Clause as a shield against individual injustices).

102. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 305 (1992) (explaining that the Due Process Clause and the Commerce Clause differ in several ways).

103. *See* Terry S. Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity*, 62 N.Y.U. L. REV. 651, 694 n.230 (1987); Martin H. Redish, *Procedural Due Process and Aggregation Devices in Mass Tort Litigation*, 63 DEF. COUNS. J. 18, 25 (1996).

104. *See* U.S. CONST. art. IV, § 1; *id.* art. I, § 8.

105. *See Gore*, 517 U.S. at 572.

106. Kogan, *supra* note 103, at 694 n.230.

Court has recognized this in cases that involved whether the court can impose a tax on an individual or a corporation under the Due Process Clause: "The Due Process Clause requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax, and that the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State."[107] Concerning the first part of the above, the Court has asserted: "[T]he due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him."[108] The Court has made similar statements concerning due process in personal jurisdiction cases: "The restriction on state sovereignty power described in *World-Wide Volkswagen Corp.* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause."[109]

Viewed as a due process constraint on a state's ability to impose its laws on an individual's conduct outside that state, the restrictions in *Campbell* and *Gore* make sense. Under the Due Process Clause, the statement that "[n]o state can legislate except with reference to its own jurisdiction. . . . Each state is independent of all others in this particular"[110] is true because a state lacks the power to impose its law on an individual when there is not a sufficient connection between the state and that individual's conduct.[111] Accordingly, it is not that a state cannot impose its policy choices on another state under the Due Process Clause,[112] but that a state lacks the power to hold a defendant liable for actions in another state based on the first state improperly applying its laws to the defendant's actions in the second state.[113] Moreover, the federal courts must enforce this right because a state cannot determine disinterestedly whether it has exceeded its authority.

A state obviously should lack the power to penalize an individual for conduct that is lawful in another state by imposing punitive damages. A state should also not be able to calculate punitive damages based on conduct that is unlawful in another state under the Due Process Clause. This is true partially because, as the Court noted in *Campbell*, such a determination should require the inclusion of the affected parties and the application of the relevant state's laws.[114] Without the joinder of all affected parties, a defendant could be subject to multiple liability for the same conduct and other parties' rights might be compromised. More

107. *Quill*, 504 U.S. at 306 (internal quotations and citations omitted).
108. *Id.* at 312.
109. *Ins. Corp. of Ir.*, 456 U.S. at 703 n.10.
110. *Gore*, 517 U.S. at 571 (quoting *Bonaparte*, 104 U.S. at 594).
111. *Quill*, 504 U.S. at 312.
112. *But see Gore*, 517 U.S. at 571.
113. *See id.* at 572-73.
114. *Campbell*, 123 S. Ct. at 1522 (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-22 (1985)).

fundamentally, calculating punitive damages based on conduct occurring in other states allows a state to transfer resources belonging to citizens of that state to its own citizens. Damages from wrongful conduct in a state should go to the citizens of that state, not citizens in another state who have no connection to that state. Certainly, a state has no interest—and under the Due Process Clause, no power—to protect consumers in other states,[115] and it has no authority to bring damages from out-of-state misconduct into its jurisdiction to enrich its residents. Finally, because states differ on their criteria for awarding punitive damages,[116] when a court awards punitive damages based on unlawful conduct in another state, it has usurped the other state's authority to set the rules for giving punitive damages,[117] and, more importantly for due process, it has imposed the wrong rules on an individual.

One might argue that, without a state's ability to impose punitive damages on a tortfeasor's nationwide, wrongful conduct, proper deterrence will not occur. However, the Constitution has bestowed the power to regulate nationwide conduct on Congress, not on the states, under the Commerce Clause.[118] It is up to Congress to act when a nationwide solution is required.

Equally important, states can reasonably differ over policies. Allowing different state policies is one of the virtues of our federal system; it permits an individual to move to a state that has laws that are most in accord with his or her views. As Professor Barry Friedman has written: "[F]ederalism enhances our lives by preserving and creating diversity."[119] Professor Laycock has similarly observed: "Territorial bounda-

115. *Cf.* Bigelow v. Virginia, 421 U.S. 809, 824 (1975) ("A State does not acquire power of supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."); Edgar v. MITE Corp., 457 U.S. 624, 644 (1982) ("While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders."). *But see* Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 891-96 (2002) (arguing that *Bigelow* is limited "to mean that the Home State's police powers do not extend to the extraterritorial regulation of matters that the Constitution prohibits Home States from banning").

116. As Margaret Meriwether Cordray has observed:

> Laws regulating the various aspects of punitive damages vary dramatically from state to state. States employ different substantive tests for finding a defendant liable for punitive damages, different standards of proof that must be met, and different procedures for determining whether to grant a punitive award. Some states have even prohibited punitive damages almost entirely, and others have placed relatively strict caps on the amount that may be awarded.

Margaret Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 OR. L. REV. 275, 307 (1999).

117. *Gore*, 517 U.S. at 572.

118. *See id.* at 571.

119. Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 402 (1997); *see also* United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("In this circumstance, the theory and utility of our [vertical] federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest

ries between states and their law support the role of law as enforcer of strongly held norms."[120] For example, Vermont has recently given gay and lesbian couples that right to enter into domestic partnerships,[121] while no other state offers recognition to such relationships. Thus, gay and lesbian couples who want to enter into domestic partnerships can move to Vermont. Likewise, some individuals might want the freedom to own guns, while others might want the protection of gun control laws. Similarly, some states might want strong medical malpractice laws, while other states might feel that some relief from high malpractice awards improves healthcare by encouraging the best doctors to practice in the state. Even when states agree on policies, they can disagree on how those policies should be enforced.[122] For example, one jurisdiction might want to control guns through prohibition; another through registration.

The other half of the Court's due process evaluation of punitive damages awards—fair warning and the avoidance of arbitrariness—is correct. It is the essence of due process that a person receive notice of what conduct is forbidden and the penalty for violations so that he can order his life and activities.[123] As Justice Scalia has observed, "[r]udimentary justice requires that those subject to the law must have the means of knowing what it prescribes."[124] In most punitive damages cases, there are few guidelines to restrict juries, and, thus, a defendant has little warning of the extent of the damages.[125] For example, as noted above, when BMW's policy was first challenged in *Gore*, there did not appear to be any judicial decision in Alabama or any state that suggested that the use of the policy might subject BMW to severe punishment.[126]

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of the country."); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 150 (2001). Professors Baker and Young similarly note: "[S]tate-by-state diversity generally will allow government to accommodate the preferences of a greater proportion of the electorate, as long as those preferences are unequally distributed geographically." *Id.* They add that "[g]iven the unpredictability of national elections over the long term, the rational and risk-averse position, even for those who believe there are 'right answers' to important questions of social policy, is to favor states' rights." *Id.* at 153; *see also* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1503-04 (1987) ("The liberty that is protected by federalism is not the liberty of the apodictic solution, but the liberty that comes from diversity coupled with mobility.") [hereinafter McConnell, *The Founders' Design*].

120. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 318 (1992).

121. VT. STAT. ANN. tit. 15, § 1202 (2003).

122. *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) ("While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal.").

123. *See* LON L. FULLER, THE MORALITY OF LAW 38-40 (2d ed. 1969); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

124. Scalia, *supra* note 123, at 1179.

125. *Gore*, 517 U.S. at 588 (Breyer, J., concurring) ("The standards the Alabama courts applied here are vague and open ended to the point where they risk arbitrary results. . . . This is because the standards, as the Alabama Supreme Court authoritatively interpreted them here, provided no significant constraints or protection against arbitrary results.").

126. *Id.* at 584.

The fair warning requirement also helps assure that similarly situated persons will be treated similarly.[127] As Justice Jackson stated, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."[128]

At first glance, this second part of the due process inquiry regarding punitive damages seems to have little to do with horizontal federalism. However, fair warning and the avoidance of arbitrariness relate to horizontal federalism. As noted above, a state should not impose liability on an individual without fair warning.[129] When a state calculates punitive damages based on conduct that is lawful in another state, the defendant has not been given fair warning of potential liability. This is also true when a court imposes punitive damages for unlawful conduct in another state when the compensatory damages involve only conduct that occurred in the forum state. In such circumstances, a defendant is subject to the whim of the court, and it cannot order its conduct with any certainty.[130]

Moreover, arbitrary punitive damages awards—awards that exceed a state's need to protect its interests and its citizens' interests—allows a state to impose its views on other states and to reap benefits for its citizens beyond those to which they are entitled. Similarly, such awards place unfair burdens on out-of-state defendants.[131] Finally, such awards force other states to adopt similarly aggressive schemes in "a race to the bottom."

The three-part test effectively evaluates the above concerns, including those of horizontal federalism. First, evaluating the degree of reprehensibility of the defendant's conduct insures that a state is not reaping damages that belong to other states and that it is not exploiting out-of-state defendants for its unjustified benefit. This factor prevents punitive damages from being based on out-of-state conduct, and it ensures that the punishment "reflect[s] 'the enormity of [the] offense.'"[132] Second, considering the ratio between the punitive damages and the compensatory damages serves a similar function. A too great ratio indicates that a state is not just trying to further its legitimate interest but instead is attempting to exploit benefits that belong to other states. Finally, it should be obvious that punitive damages in a civil suit should not exceed legislatively mandated civil and criminal penalties.

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127. *Id.* at 587 (Breyer, J., concurring).

128. Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

129. *Gore*, 517 U.S. at 574.

130. *See Haslip*, 499 U.S. at 59 (O'Connor, J., dissenting).

131. Even unpopular defendants, such as corporations, deserve to be treated in a fair and constitutional manner.

132. *Gore*, 517 U.S. at 575 (quoting Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851)).

The Rehnquist Court has not extended its due process limits on punitive damages to other areas of the law, even areas where one might argue that one state is imposing its policy on other states.[133] From this, one can conclude that the Court's focus is on limiting the size of punitive damages, not horizontal federalism. Thus, *Campbell* and *Gore* are anomalies in horizontal federalism, with their results dictated by a purpose other than horizontal federalism. As discussed in more detail below, this author rejects such inconsistency in constitutional adjudication. If due process limits are justifiable in punitive damages cases, they are justifiable in other cases in which a state has unreasonably extended its laws beyond its borders to burden individuals.

II. FULL FAITH AND CREDIT LIMITS ON HORIZONTAL FEDERALISM

Theoretically, the Full Faith and Credit Clause protects a state's sovereignty by requiring other states to respect its laws and judgments.[134] However, the Rehnquist Court has given little content to the Full Faith and Credit Clause concerning choice of law, and it has created confusing exceptions to the full faith and credit due judgments.

A. The Rehnquist Court's Analysis of the Full Faith and Credit Clause

1. The Full Faith and Credit Clause and Choice of Law

In *Franchise Tax Board v. Hyatt*,[135] the Court held that Nevada could refuse to extend full faith and credit to California's sovereign immunity statute in a case involving alleged tortious acts in Nevada by the California Franchise Tax Board (CFTB).[136] Hyatt had filed a part-year resident income tax form with California for 1991, claiming that he had ceased to be a California resident on October 1, 1991, shortly before he received licensing fees for patents.[137] The CFTB performed an audit, and it determined that Hyatt was a California resident until April 3, 1992.[138] The CFTB issued notices of proposed assessments for income taxes for 1991 and 1992, and it imposed substantial penalties.[139]

Hyatt filed an administrative protest in California and brought suit in Nevada state court against the CFTB claiming invasion of privacy, outrageous conduct, abuse of process, fraud, and negligent misrepresentation.[140] The CFTB filed motions for summary judgment and, in the alternative, for dismissal in the Nevada case for lack of subject matter

133. See *infra* Part IV.C.1 for a detailed discussion for other areas in which the Court should apply greater due process constraints.
134. *See* U.S. CONST. art. IV, § 1.
135. 123 S. Ct. 1683 (2003).
136. *Hyatt*, 123 S. Ct. at 1685.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 1685-86.

jurisdiction, arguing that sovereign immunity, full faith and credit, choice of law, comity, and failure to exhaust administrative remedies required Nevada to apply California's sovereign immunity statute.[141] The trial court denied the motion, and Hyatt filed a writ of mandamus with the Nevada Supreme Court.[142] The Nevada Supreme Court granted the petition and ordered the trial court to enter summary judgment in favor of the CFTB.[143]

On rehearing, however, the Nevada Supreme Court granted the petition in part and denied it in part, holding that the district court lacked jurisdiction over the negligence claim under comity,[144] but that the intentional tort claims could be tried.[145] The court noted that, while Nevada had not conferred immunity on its state agencies for intentional torts committed within the scope of employment, California had.[146] The court held that giving California immunity for intentional torts contravened Nevada public policy because Nevada does not afford such immunity and Nevada has an interest in protecting its citizens from intentional torts committed by sister state governmental employees.[147] Thus, according to the court, Nevada's policy in protecting its citizens outweighed California's policy conferring sovereign immunity on its state taxation agency.[148]

The United States Supreme Court evaluated the case under the Full Faith and Credit Clause, which provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[149] The Court emphasized that "[w]hereas the full faith and credit command 'is exacting' with respect to '[a] final judgment . . . rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment,'. . . it is less demanding with respect to choice of laws."[150] The Court noted that "[w]e have held that the Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a

141. *Id.* at 1686. California's sovereign immunity statute reads:
Neither a public entity nor a public employee is liable for an injury caused by:
(a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax.
(b) An act or omission in the interpretation or application of any law relating to a tax.
CAL. GOV'T CODE § 860.2 (West 1995).

142. *Hyatt*, 123 S. Ct. at 1686.

143. *Id.*

144. *Id.* at 1686-87 (stating that comity is "an accommodation policy, under which the courts of one state voluntarily give effect to the laws and judicial decisions of another state out of deference and respect, to promote harmonious interstate relations . . . ." (internal quotations omitted)).

145. *Id.* at 1686.

146. *Id.*

147. *Id.* at 1687 ("With respect to the intentional torts, however, the court held that 'affording [CFTB] statutory authority . . . does contravene Nevada's policies and interests in this case.'" (citation omitted)).

148. *Id.*

149. *Id.* (quoting U.S. CONST. art. IV, § 1).

150. *Id.* (quoting Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998)).

subject matter concerning which it is competent to legislate.'"[151] The Court then found that Nevada was competent to legislate with respect to intentional torts occurring within its borders.[152] Next, the Court reaffirmed the standard that earlier courts had applied to choice of law cases, specifically: "'[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'"[153] The Court felt that Nevada had significant contacts to employ its law because the alleged injury and some of the conduct that caused that alleged injury occurred in Nevada.[154]

The CFTB had urged the Court "to adopt a 'new rule' mandating that a state court extend full faith and credit to a sister State's statutorily recaptured sovereign immunity from suit when a refusal to do so would 'interfer[e] with a State's capacity to fulfill its own sovereign responsibilities.'"[155] The Court declined to adopt this rule.[156] It observed that it had considered the question of whether full faith and credit requires the courts of one state to recognize the sovereign immunity of another state in *Nevada v. Hall*.[157] In that case, a Nevada employee had been involved in an automobile accident in California, and California had refused to select a Nevada statute that capped damages against Nevada.[158] The Court affirmed, holding that the Constitution does not confer sovereign immunity on a state when sued in the courts of another state.[159] Hyatt had not asked the Court to reexamine this ruling.[160]

The Court then concentrated on the second aspect of *Hall*, that a state does not have to respect another state's sovereign immunity when it would violate the first state's legitimate public policy.[161] The Court had stated in a footnote in *Hall*:

> California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism.

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151. *Id.* (quoting Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988)).
152. *Id.*
153. *Id.* (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985)).
154. *Id.* at 1688.
155. *Id.*
156. *Id.* at 1688-89 ("[A]cknowledging this shift, CFTB contends that this case demonstrates the need for a new rule under the Full Faith and Credit Clause . . . . We disagree.").
157. *Id.* at 1689 (citing Nevada v. Hall, 440 U.S. 410 (1979)).
158. *Hall*, 440 U.S. at 411-12.
159. *Id.* at 426-27.
160. *Hyatt*, 123 S. Ct. at 1689. The Court declined the invitation of the *amici* states to do so. *Id.* I believe the petitioner wrongly argued the case when it refused one of the justice's invitation to ask the Court to overrule *Hall*. *See* Transcript of Oral Argument, *Hyatt*, 123 S. Ct. 1683 (No. 02-42), *available in* 2003 U.S. TRANS LEXIS 12, at *2-3 (Feb. 24, 2003). In his dissent in *Hall*, then-Justice Rehnquist had made a sovereign immunity argument very similar to the one the Court later adopted in *Alden* and its progeny. *Compare Hall*, 440 U.S. at 432-43 (Rehnquist, J., dissenting), *with* Alden v. Maine, 527 U.S. 706 (1999).
161. *Hyatt*, 123 S. Ct. at 1689.

> Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result.[162]

The Court refused to adopt the CFTB's proposed rule primarily because of its past experience in balancing interests under the Full Faith and Credit Clause.[163] The Court observed that it had abandoned a balancing of interests approach to conflict of laws under the Full Faith and Credit Clause because of the lack of guiding standards.[164] Instead, the Court declared that "'it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another.'"[165]

The Court thought that, since a suit against a state in another state's court implicates the power of both sovereigns, "the question of which sovereign interest should be deemed more weighty is not one that can be easily answered."[166] The Court also noted that in *Garcia v. San Antonio Metropolitan Transit Authority*[167] it had rejected a rule of state sovereign immunity from federal regulation depending on whether the function was "integral" or "traditional" on the ground that the rule was unsound and unworkable.[168] The Court also believed that there was not a significant distinction between Nevada's interest in tort claims arising out of its employee's automobile accident at issue in *Hall*, and California's interest in tort claims arising out of its tax collection agency's audit in the instant case.[169] The Court asserted that "[t]o the extent CFTB complains of the burdens and expense of out-of-state litigation, and the diversion of state resources away from the performance of important state functions, those burdens do not distinguish this case from any other out-of-state lawsuit against California or one of its agencies."[170]

The Court observed:

> States' sovereignty interests are not foreign to the full faith and credit command. But we are not presented here with a case in which a State has exhibited a policy of hostility to the public Acts of a sister State. The Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, relying

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162. *Hall*, 440 U.S. at 424 n.24.
163. *Hyatt*, 123 S. Ct. at 1689.
164. *Id.* at 1688 (citing Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 n.10 (1981) (plurality opinion)).
165. *Id.* (quoting *Sun Oil Co.*, 486 U.S. at 727).
166. *Id.* at 1689.
167. 469 U.S. 528 (1985).
168. *Hyatt*, 123 S. Ct. at 1689 (citing *Garcia*, 469 U.S. at 546-47).
169. *Id.* at 1690.
170. *Id.*

on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis.[171]

The Court concluded that "[w]ithout a rudder to steer us, we decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause."[172]

2. Exceptions to Full Faith and Credit for Judgments.

In addition to giving the Full Faith and Credit Clause little content in *Hyatt*, the Court in *Baker v. General Motors Corp.* created an exception to full faith and credit for judgments.[173] The majority stated the issue as "the authority of one State's court to order that a witness' testimony shall not be heard in any court of the United States."[174]

In a Michigan lawsuit, which involved a wrongful discharge claim by a "whistle blower," GM paid Ronald Elwell, a former GM employee, an undisclosed sum of money for which the parties entered into a permanent injunction.[175] The injunction prohibited Elwell from "testifying, without the prior written consent of [GM], . . . as . . . a witness of any kind . . . in any litigation already filed, or to be filed in the future, involving [GM] as an owner, seller, manufacturer and/or designer . . . ."[176] GM also agreed that if Elwell were compelled to testify by a court, such testimony would not violate the injunction.[177] Thereafter, in a Missouri lawsuit (*Baker*), the plaintiffs, who were not parties to the Michigan lawsuit, subpoenaed Elwell to testify in a product liability action.[178] The Court held that the Full Faith and Credit Clause did not preclude Elwell's testimony before the Missouri court.[179]

The Court stated that a final judgment, rendered with proper jurisdiction, "qualifies for recognition throughout the land."[180] The Court also noted that there is no public policy exception to the full faith and credit due judgments.[181] Moreover, the Court felt that full faith and credit applies to equity judgments (e.g., injunctions), as well as to money judgments.[182] However, the Court thought that full faith and credit does not require states to "adopt the practices of other States regarding the time,

171. *Id.* (internal quotations and citation omitted).
172. *Id.*
173. *Baker*, 522 U.S. at 240-41.
174. *Id.* at 225-26.
175. *Id.* at 227.
176. *Id.* at 226 (internal quotations omitted).
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* at 233.
181. *Id.*
182. *Id.* at 234.

manner, and mechanisms for enforcing judgments."[183] The Court noted that the preclusive effects of a judgment are different from the enforcement measures for that judgment in that the latter are under the control of the enforcing forum law.[184] The Court noted:

> Orders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no authority. Thus, a sister State's decree concerning land ownership in another State has been held ineffective *to transfer title* . . . .[185]

Similarly, antisuit injunctions do not control a second state court's actions concerning litigation in the second court.[186]

Concerning the current suit, the Court declared:

> Michigan's judgment, however, cannot reach beyond the Elwell-GM controversy to control proceedings against GM brought in other States, by other parties, asserting claims the merits of which Michigan has not considered. Michigan has no power over those parties, and no basis for commanding them to become intervenors in the Elwell-GM dispute. Most essentially, Michigan lacks authority to control courts elsewhere by precluding them, in actions brought by strangers to the Michigan litigation, from determining for themselves what witnesses are competent to testify and what evidence is relevant and admissible in their search for the truth.[187]

The Court stated, that while the Michigan injunction could prevent Elwell from volunteering to testify, it could not determine evidentiary issues in another state's courts.[188] The Court concluded by noting that "Michigan has no authority to shield a witness from another jurisdiction's subpoena power in a case involving persons and causes outside Michigan's governance. . . . [A] Michigan decree cannot command obedience elsewhere on a matter the Michigan court lacks authority to resolve."[189]

B. Evaluation of the Rehnquist Court's Analysis of the Full Faith and Credit Clause

In *Hyatt*, the Court gave little meaning to the Full Faith and Credit Clause,[190] and, in *Baker*, the Court created a confusing exception to the

183. *Id.* at 235.
184. *Id.*
185. *Id.*
186. *Id.* at 236.
187. *Id.* at 238 (internal citation omitted).
188. *Id.* at 239.
189. *Id.* at 240-41.
190. *Hyatt*, 123 S. Ct. at 1687-90.

full faith and credit rule for judgments.[191] While this author agrees with the outcomes in both cases for other reasons, the Court has reaffirmed questionable precedent and gone beyond what was necessary to decide both cases.

1. Evaluation of Full Faith and Credit Constraints on Choice of Law in *Hyatt*

Hyatt continued the Court's questionable refusal to give the Full Faith and Credit Clause any content in relation to choice of law.[192] This approach dates back to the New Deal era when the Court generally rejected constraints on governmental regulation, adopting instead a philosophy of judicial restraint.[193] While most writers have stressed the New Deal Court's restraint in the areas of substantive due process, federalism, and delegation, it also occurred in connection with the full faith and credit clause.[194] As the Court had previously done in other areas of law, the Court in *Hyatt* took a hands-off approach to choice of law and let the state decide when its law should apply.[195]

As noted above, the Court restated that it gives less full faith and credit to a state's laws than it does to judgments.[196] The problem with this declaration is that there is nothing in the Constitution that supports this distinction.[197] The Full Faith and Credit Clause "shall" apply to "public Acts, Records, and judicial Proceedings," without exception.[198] Several judges and authors, including the present author, have recently advocated that all clauses of the Constitution should be given their full content.[199] For example, Chief Judge Wilkinson has asserted:

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191. *Baker*, 522 U.S. at 240-41.

192. *See* FRUEHWALD, CHOICE OF LAW, *supra* note 101, at 70-71 (criticizing the Court's treatment of the Full Faith and Credit Clause in connection with choice of law).

193. G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 155, 215-16 (1988).

194. *See, e.g.*, FRUEHWALD, CHOICE OF LAW, *supra* note 101, at 16-20.

195. *See Hyatt*, 123 S. Ct. at 1689-90.

196. *Id.* at 1687; *see also* Laycock, *supra* note 120, at 290-95 (arguing that there is no question that the Full Faith and Credit Clause applies to all types of state law, including statutes, case law, and judgments).

197. *See* U.S. CONST. art. IV, § 1 (making no distinction for judgments).

198. *Id.*

199. *See* Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 894-95 (4th Cir. 1999) (Wilkinson, C.J., concurring) (finding it "patently inconsistent" for a court to place great weight on one constitutional provision and little to no weight on others), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000); MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 6-7 (1995) [hereinafter REDISH, POLITICAL STRUCTURE]; Baker & Young, *supra* note 119, at 77-78 ("The fact is that for much of the last century, the Supreme Court, with widespread academic support, has behaved as if 'constitutional provisions are like the animals in George Orwell's barnyard: some are considerably more equal than others.'" (quoting Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, 29 FLA. ST. U. L. REV. 925, 944 (2001))); Fruehwald, *If Men Were Angels*, *supra* note 15, at 486-94 (discussing the inconsistent enforcement of constitutional provisions associated with "new judicial activism"); Scott Fruehwald, *The Principled and Unprincipled Grounds of the New Federalism: A Call for Detachment in the Constitutional Adjudication of Federalism*, 53 MERCER L. REV. 811, 825-26 (2002) [hereinafter Fruehwald, *The New Federalism*]; Vicki C. Jackson, *Holistic Interpretation:* Fitzpatrick v. Bitzer

> [I]t is hard to understand how one can argue for giving capacious meanings to some constitutional provisions while reading others out of the document entirely. . . . It seems patently inconsistent to argue for a Due Process Clause that means a great deal and a Commerce Clause that means nothing. How one clause can be robust and the other anemic is a mystery when both clauses, after all, are part of our Constitution.[200]

Similarly, as Martin Redish has pointed out, "by choosing not to enforce a constitutional limitation on the majoritarian branches because of disagreement with its social or political purpose or impact, the courts are engaging in undue judicial activism."[201] Likewise, Professor Baker and Professor Young have observed that "the Constitution does not come with 'do not enforce' labels attached to some of its provisions."[202] This principle of enforcement of all constitutional provisions should be applied to give the Full Faith and Credit Clause its full content with all possible applications, judgments, statutes, and case law.[203]

Hyatt has also continued the Court's questionable practice of refusing to balance interests under the Full Faith and Credit Clause or to make some comparable determination concerning which state has the closest connection to the case.[204] It is understandable that when two states' interests are nearly equal a court should not balance interests because it is difficult to make such a determination and both states have a significant stake in applying their laws. However, when one state's interest is significantly stronger than the other state's interest, the Court can and, as will be argued below, should balance interests or undertake a similar evaluation based on connections.[205] The Court frequently makes fine distinctions such as deciding whether Congress has acted properly under its commerce clause powers and other structural clauses.[206] There is no

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and Our Bifurcated Constitution, 53 STAN. L. REV. 1259, 1304-05 (2001) (discussing judicial construction of the privileges and immunities clause); Laycock, *supra* note 120, at 267 ("[W]e should take the whole Constitution seriously. We cannot legitimately pick and choose the clauses we want enforced."); William J. Rich, *Taking "Privileges or Immunities" Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153, 154-59, 227-32 (2002) (arguing that the courts should give effect to the Privileges and Immunities Clause of the Fourteenth Amendment).

200. *Brzonkala*, 169 F.3d at 894-95 (Wilkinson, C.J., concurring).

201. REDISH, POLITICAL STRUCTURE, *supra* note 199, at 164.

202. Baker & Young, *supra* note 119, at 100.

203. *See* Laycock, *supra* note 120, at 290 (arguing that "[a]s a simple matter of constitutional text, the Clause must have the same meaning with respect to rules of law [as it does to judgments]").

204. *Hyatt*, 123 S. Ct. at 1687-88.

205. *Cf.* United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) (making a similar argument in connection with vertical federalism that "[a]lthough it is the obligation of all officers of the Government to respect the constitutional design, the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far" (internal citations omitted)); New York v. United States, 505 U.S. 144, 155 (1992) (discussing the intricacies and balance of sovereignty between federal and state power).

206. *See, e.g.*, *Morrison*, 529 U.S. at 617-18; *Lopez*, 514 U.S. at 575 (Kennedy, J., concurring) ("Of the various structural elements in the Constitution, separation of powers, checks and balances, judicial review, and federalism, only concerning the last does there seem to be much uncertainty

reason why the Court cannot do so for the Full Faith and Credit Clause. As Justice Kennedy has noted, "we are often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines."[207] Also, the Full Faith and Credit Clause is much clearer than other provisions the Court has used to create rights, such as using the liberty part of the Due Process Clause to create a right of privacy.[208] Moreover, the federal courts need to make the determination of whether a state has exceeded its authority under the Full Faith and Credit Clause because, as was mentioned earlier in connection with due process determinations, a state cannot make a disinterested evaluation concerning whether it has exceeded its authority. Finally, as will be shown below, this refusal to balance interests was unnecessary because Nevada had at least an equal, and maybe a greater, interest than California in applying its law to the controversy in *Hyatt*.

The Court also reaffirmed the questionable standard for evaluating a state's choice of law from earlier cases, "'[f]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'"[209] Because the Court has interpreted "significant contact" to apply to almost anything, a state can (and usually does) apply its law to a case even when it has a tenuous connection to that matter. For example, in *Allstate*, the first case that stated this rule, the Court held that Minnesota could apply its law to the question of whether uninsured motorist coverage under three automobile insurance policies could be "stacked"—all three policies paid off to their limits, rather than limiting recovery to the maximum under one policy.[210] The motorcycle accident had occurred in Wisconsin, the policy was delivered in Wisconsin, and all relevant parties lived in Wisconsin at the time of the accident.[211] The connections with Minnesota were: (1) the decedent worked in Minnesota and commuted from Wisconsin to Minnesota; (2) Allstate did business in Minnesota; and (3) the widow moved to Wisconsin after the accident but before the litigation.[212] The connections with Minnesota were so weak

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respecting the existence, and the content, of standards that allow the Judiciary to play a significant role in maintaining the design contemplated by the Framers. Although the resolution of specific cases has proved difficult, we have derived from the Constitution workable standards to assist in preserving separation of powers and checks and balances.").

207. *Lopez*, 514 U.S. at 579 (Kennedy, J., concurring); *see also* Baker & Young, *supra* note 119, at 93-94 ("[T]he courts have a responsibility to exercise 'reasoned judgment' even when bright-line rules are not available to enforce particular constitutional principles . . . ." (quoting Washington v. Glucksberg, 521 U.S. 702, 769 (1997) (Souter, J., concurring))).

208. U.S. CONST. art. IV, § 1; *id.* amend. XIV; *see also* Laycock, *supra* note 120, at 334 (stating that "[t]he Court must make choices with respect to details, but the choices are guided by concrete principles set forth in the Constitution and the federal structure").

209. *Hyatt*, 123 S. Ct. at 1687 (quoting *Phillips Petroleum*, 472 U.S. at 818).

210. Allstate Ins. Co. v. Hague, 449 U.S. 302, 306-07, 319-20 (1981) (plurality opinion).

211. *Hague*, 449 U.S. at 306.

212. *Id.* at 313-14, 317-19.

that it should not have been able to apply its law to the controversy under the Full Faith and Credit Clause. First, all significant connections—the place of the accident, the place of contracting and delivery, and the parties' domiciles at the time of the accident—were with Wisconsin.[213] Second, the fact that the decedent worked in Minnesota is irrelevant to an accident that occurred in another state and an insurance policy that was entered into in that other state. Third, that Allstate did business in Minnesota is irrelevant; a state cannot apply its law to a party doing business in a state when that controversy has no connection to that state. Finally, the fact that a widow moved to another state after an occurrence should not allow that state to apply its law to a case when it has no other connection to the matter. With the irrelevant connections to Minnesota and the strong connections to Wisconsin, the Court in *Allstate* should have held that Minnesota adopting its law violated the Full Faith and Credit Clause—that Minnesota had given no credit to Wisconsin law without any justification.[214] However, the Court failed to do so and *Hyatt* has exacerbated the mistake by adhering to the *Allstate* standard.[215]

Despite the Court's questionable analytical framework, *Hyatt*'s result was correct; Nevada should not have been forced to apply California's sovereign immunity statute in its courts when one of its citizens has been injured.[216] First, the Court properly rejected the Franchise Tax Board's argument that the Court should adopt a new rule "mandating that a state court extend full faith and credit to a sister State's statutorily recaptured sovereign immunity from suit when a refusal to do so would interfere with a State's capacity to fulfill its own sovereign responsibilities."[217] There is nothing in the text of the Full Faith and Credit Clause to support such a narrow rule.[218] Rather, courts should evaluate full faith and credit on a case-by-case basis, looking carefully at the laws that are vying for application. As the Court pointed out, it is hard to say that one state's interest in protecting its ability to tax with sovereign immunity is any more important than another state's interest in protecting its citizens.[219]

The main reason that *Hyatt* came to the correct conclusion was that Nevada had as strong an interest in applying its law to the case as California did and, perhaps, even a stronger interest.[220] The conduct com-

213. *Id.* at 306.

214. One might argue that the *Allstate* outcome was the best decision from a normative viewpoint that an insured who had paid premiums on three policies received the full benefits of those policies. However, ignoring the Constitution's structural provisions to achieve a socially advantageous outcome in one case is dangerous because it may lead to unprincipled judging in other areas.

215. *See Hyatt*, 123 S. Ct. at 1687-88; *Hague*, 449 U.S. at 320.

216. *See Hyatt*, 123 S. Ct. at 1688-89.

217. *Id.* at 1688 (internal quotations omitted).

218. *See* U.S. CONST. art. IV, § 1.

219. *See Hyatt*, 123 S. Ct. at 1690.

220. *See id.* at 1687-88 (noting the Nevada Supreme Court's discussion regarding competing state interests).

plained of occurred in Nevada.[221] Obviously, Nevada should be able to establish whether conduct occurring within its borders constitutes tortious conduct for which a plaintiff can recover damages. Less obvious, but equally correct, a state should be able to determine when a government is immune for acts committed within its borders. California should not be able to extend its sovereign immunity statute to encompass conduct occurring outside California.[222] If the case had involved tortious conduct occurring in California sued upon in a Nevada court, Nevada should enforce the California sovereign immunity, even if the case involved a Nevada citizen, because the tort occurred in California and a state (here, Nevada) should not be able to protect its citizens from liability for acts occurring outside its borders when that liability does not violate the Constitution.[223] But this case did not involve California conduct; it involved Nevada conduct.[224] Accordingly, the Court could have made its decision without differentiating between law and judgments, refusing to balance interests under the Full Faith and Credit Clause, or reaffirming *Allstate*'s questionable rule.

The Court could have dealt with the concerns it voiced in balancing state interests but still could have given the Full Faith and Credit Clause content if it had adopted a rule for the full faith and credit evaluation of state choice of law where a state's choice of law violates the Full Faith and Credit Clause when another state has a significantly closer connection to the matter.[225] This rule does not require careful evaluation of state interests when they are virtually the same, but only when one state's connection to a case is significantly closer than another state's connection. Thus, a state can protect its interests and still give full faith and credit to other states' laws.

2. Evaluation of the Exceptions to Full Faith and Credit for Judgments in *Baker*

In *Baker*, the majority limited the ability of one state's courts to control litigation in another state's courts through a confusing exception to the full faith and credit rule for judgments.[226] As Justice Kennedy's concurrence in *Baker* pointed out, the full faith and credit analysis in that

221. *See id.* at 1685-86.

222. *See* Bigelow v. Virginia, 421 U.S. 809, 824 (1975); *see also* Cordray, *supra* note 116, at 293 ("[R]espect for the sovereignty of each individual state demands that all states limit the reach of their laws and the exercise of their authority to govern within their own boundaries.").

223. *See Bigelow*, 421 U.S. at 824 ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.").

224. *See Hyatt*, 123 S. Ct. at 1685-86.

225. This author has previously suggested this standard for the full faith and credit (and due process) evaluation of state choice of law. *See, e.g.*, FRUEHWALD, CHOICE OF LAW, *supra* note 101, at 77. The Multistate Tax Commission referred to this standard in its *amicus* brief in *Hyatt*. *See* Brief of Amicus Curiae Multistate Tax Commission at 12 n.20, *Hyatt* 123 S. Ct. 1683 (No. 02-42).

226. *See Baker*, 522 U.S. at 240-41.

case was unnecessary and unfortunate because the matter could have been settled by establishing the preclusive effect of the Michigan judgment.[227] After examining Michigan law, Justice Kennedy concluded: "The simple fact is that the Bakers were not parties to the Michigan proceedings, and nothing indicates Michigan would make the novel assertion that its earlier injunction binds the Bakers or any other party not then before it or subject to its jurisdiction."[228] He noted that the Michigan Supreme Court had "twice rejected arguments that injunctions have preclusive effect in later litigation" based in part on the fact that the later litigation involved new parties.[229]

In addition, as Justice Scalia observed in his concurrence, no execution may issue on a judgment in a second state until the enforcing party brings a new suit in the enforcing state.[230] Although this was not done in *Baker*, the injunction was not deemed unenforceable on this ground alone.[231]

The majority opinion allows for the possibility of two significant and confusing exceptions to the rule that a state must recognize the judgments of another state under the Full Faith and Credit Clause: (1) a court may "decline to enforce those judgments purporting to accomplish an official act within the exclusive province of [a sister] State" and (2) full faith and credit does not apply to "injunctions interfering with litigation over which the ordering State had no authority."[232] Concerning the first exception, the Supreme Court acknowledged other cases that upheld court orders requiring the conveyance of property in other states.[233] The Court had not used the second exception before *Baker*.[234] As Justice Kennedy argued, such "exceptions to full faith and credit have a potential for disrupting judgments, and this ought to give us considerable pause."[235]

The question of whether one state must give full faith and credit to the injunctions of another state's courts in general is unsettled.[236] While

227. *See id.* at 243, 251 (Kennedy, J., concurring).

228. *Id.* at 247 (Kennedy, J., concurring).

229. *Id.* at 248 (Kennedy, J., concurring).

230. *Id.* at 241 (Scalia, J., concurring) ("The Full Faith and Credit Clause 'did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them, *as evidence*. No execution can issue upon such judgments without a new suit in the tribunals of other States.'" (quoting Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 462-63 (1873))); *see also* Williams v. North Carolina, 325 U.S. 226, 229 (1945) (noting that the Full Faith and Credit Clause "does not make a sister-State judgment a judgment in another State").

231. *See Baker*, 522 U.S. at 237-41.

232. *Id.* at 243 (Kennedy, J., concurring) (internal quotations omitted).

233. *Id.* at 244 (Kennedy, J., concurring).

234. *Id.*

235. *Id.*

236. *See generally* Katherine C. Pearson, *Common Law Preclusion, Full Faith and Credit, and Consent Judgments: The Analytical Challenge*, 48 CATH. U. L. REV. 419 (1999) (discussing state court recognition of consent judgments under the Full Faith and Credit Clause); Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747 (1998) (discussing the authority of

the Court has said that the rule for judgments is exacting,[237] this has not always been true in practice. First, the Supreme Court has not adjudicated all the questions that might arise in connection with the enforcement of judgments, especially equity judgments. As Professor Polly J. Price has observed, the "expansive use of equitable remedies creates significant potential for interstate conflict."[238] Second, the Supreme Court has not always given full faith and credit to judgments, including *Baker*,[239] a consent decree that involved issue preclusion against the federal government,[240] and a case involving successive worker's compensation awards.[241] Justice Stone has noted:

> As this Court has often recognized, there are many judgments which need not be given the same force and effect abroad which they have at home, and there are some, though valid in the state where rendered, to which the full faith and credit clause gives no force elsewhere. In the assertion of rights, defined by a judgment of one state, within the territory of another, there is often an inescapable conflict of interest of the two states, and there comes a point beyond which the imposition of the will of one state beyond its own borders involves a forbidden infringement of some legitimate domestic interest of the other.[242]

Thus, the *Restatement (Second) of Conflict of Laws* states:

> A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State.[243]

Third, giving exacting full faith and credit to all judgments would violate the Due Process Clause in certain instances, such as when the judgment binds persons who were not parties to the original action.[244] Thus, instead of stating that the rule for full faith and credit is exacting and then creat-

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state courts to assert equitable remedies that extend beyond state and jurisdictional boundaries); Stewart E. Sterk, *The Muddy Boundaries Between Res Judicata and Full Faith and Credit*, 58 WASH. & LEE L. REV. 47 (2001) (discussing the state preclusion doctrine extending beyond state and jurisdictional boundaries in light of the Full Faith and Credit Clause); Chris Heikaus Weaver, *Binding the World: Full Faith & Credit of State Court Antisuit Injunctions*, 36 U.C. DAVIS L. REV. 993 (2003) (discussing unsettled question of preclusive effect of state court antisuit injunctions across state lines).

237. *See, e.g.*, *Hyatt*, 123 S. Ct. at 1687; *Baker*, 522 U.S. at 233. *But see* Yarborough v. Yarborough, 290 U.S. 202, 214 (1933) (Stone, J., dissenting) (discussing how the "broad language [of the Full Faith and Credit Clause] has never been applied without limitations").

238. Price, *supra* note 236, at 748.

239. *See Baker*, 522 U.S. at 240-41.

240. *See* United States v. Int'l Bldg. Co., 345 U.S. 502, 505-06 (1953).

241. *See* Thomas v. Wash. Gas Light Co., 448 U.S. 261, 286 (1980).

242. *Yarborough*, 290 U.S. at 214-15 (Stone, J., dissenting).

243. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1971).

244. The Bakers presented a similar argument to the Supreme Court. *See* Petitioner's Brief at 12-18, *Baker*, 522 U.S. 222 (No. 96-653).

ing confusing exceptions, it might be better to re-examine when a state's equity judgments should be accorded full faith and credit.

The best way to approach this issue is by asking questions of horizontal federalism. In issuing the injunction, has the court exceeded its territorial authority? Does the underlying law have proper extraterritorial effect or does enforcing the injunction involve enforcing another state's laws? Has the court enjoined an action that is legal in another state? Does a court in one state have the power to bind parties in another state that were not parties in the original action? Is a court in one state dictating the procedures of another state's courts? Does the injunction control activities in another state?

These questions can be combined into one inquiry: Does one state have a significantly closer connection to the controversy than the other state?[245] As this author argued above, acts and judgments should be given the same full faith and credit, and a state should give another state's laws full faith and credit when the other state has a significantly closer connection to the controversy. The same rule can be applied to judgments.[246] This will not change the long-standing rule for money judgments—when a money judgment has been properly rendered, the matter is settled, and the rendering state has the closest connection to the controversy.[247] On

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245. The "significantly" requirement allows for the possibility that two states may have close connections to the controversy. In such an instance, the Full Faith and Credit Clause is not implicated, unless the forum chooses its law because it is state law.

246. One might wonder what effect the full faith and credit statute, 28 U.S.C. § 1738 (2000), has on the enforcement of judgments. The statute states:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Id. This statute obviously extends full faith and credit requirements to federal courts, territories, and possessions. Whether greater substantive full faith and credit is required than under the Full Faith and Credit Clause is unclear. If taken literally, the statute would require a state to give the laws or "acts" of another state the same credit in its courts as it has in its own courts. This might mean that the other state's law would trump the forum state's law. If taken less literally, the statute would not allow the choice of law standard in *Allstate* discussed above. Thus, one can conclude that the modern court does not seem to give the statute any substantive effect for choice of law beyond that required by the Full Faith and Credit Clause.

The statute's effect on judgments is also unclear based on recent Supreme Court cases. Although the majority opinions of *Baker* and *Thomas* mention the statute, the opinions do not give the statute any different substantive effect than the constitutional clause. *See Baker*, 522 U.S. at 231-32; *Thomas*, 448 U.S. at 264 n.1. As Professor Brilmayer has noted, the "apparently clear command" of the statute does not seem to have prevented courts from ignoring it on occasion. LEA BRILMAYER, CONFLICT OF LAWS 307 (1995).

The real problem, of course, is the typical one of statutory analysis—that when Congress first enacted the statute it probably did not consider its effect on equity judgments. For purposes of this Article, I will assume that the full faith and credit statute has the same effect on equity judgments as the Full Faith and Credit Clause.

247. Professor Sterk has argued that when a money judgment is involved, enforcing other states' judgments "imposes only weak limits on the sovereign power of a state to control behavior within its borders" because it involves past conduct. Sterk, *supra* note 236, at 49. In addition, Professor Brilmayer has noted: "Finality dictates that the losing party to a dispute not be able to reopen a

the other hand, when an equity judgment has been rendered, on-going conduct is involved, and, if the injunction involves conduct in the enforcing state, the enforcing state should have to give the judgment full faith and credit only if the rendering state has a significantly closer connection to the conduct.[248] When a forum refuses to recognize another state's injunction because the forum has the closest connection to the controversy, it is not interfering with the rendering state's sovereignty because the state that is refusing to enforce the judgment is regulating conduct within its sovereignty.

Asking the above questions and applying the significantly closer connection standard, *Baker* is an easy case, even if a Michigan court would have enforced the injunction. First, enforcing the injunction would bind persons who were not parties to the Michigan litigation. If this were a simple contract, it would not be enforceable against third parties.[249] Second, Michigan cannot dictate to Missouri its rules of evidence. Third, the Michigan injunction, if applied, would control activities in Missouri. As Professor Pearson has observed, "[t]he Elwell/GM consent judgment represents a distinct instance in which at least one party intended to affect the important interests of nonparties across the nation . . . ."[250] It would allow a Michigan lawsuit to silence a whistle blower in Missouri, as well as the rest of the world. Finally, Missouri has a significantly closer connection to the questions of whether evidence is admissible and whether it will enforce a confidentiality agreement in Missouri courts than does Michigan. Thus, while Michigan does have an interest in enforcing its judgments, that interest does not extend into Missouri to control litigation involving persons not parties to the original action. In short, Michigan cannot bind the world.

III. DORMANT COMMERCE CLAUSE LIMITS ON HORIZONTAL FEDERALISM

A. Introduction

The principal method of regulating horizontal federalism since the 1940s has been through the dormant commerce clause.[251] This limitation

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decision without good reason." BRILMAYER, *supra* note 246, at 298. This principle of finality does not apply to future conduct. *Id.* at 299.

248. Professor Sterk has argued that judgments should not be enforceable under the Full Faith and Credit Clause when they involve post-judgment behavior. Sterk, *supra* note 236, at 107. Judgments, in particular money judgments, usually adjudicate past behavior. *Id.* at 49. An injunction judgment, because it controls future behavior, can control a sovereign's ability to regulate activity within its territory. *Id.* at 50. Thus, an injunction judgment is like a sister-state act, to which the courts traditionally give less full faith and credit. *Id.*

249. *See* Pearson, *supra* note 236, at 420 (noting that consent judgments, like the one involved in *Baker*, "are often little more than the parties' contracts, rubber-stamped by the court").

250. *Id.* at 451.

251. The Commerce Clause reads, "[t]he Congress shall have the Power . . . To regulate Commerce . . . among the several States . . . ." U.S. CONST. art. I, § 8, cl. 3. "It is long established that, while a literal reading evinces a grant of power to Congress, the Commerce Clause also directly

determines "[t]he scope of permissible state regulation in the absence of congressional action."[252] It prevents a state from imposing economic protections based on the concept that the Commerce Clause was intended to create free trade among the states and eliminate trade barriers.[253] For example, the Court has used the dormant commerce clause to strike down a state law limiting the length of trains that pass through a state as a part of interstate commerce,[254] a state safety regulation that required the use of contour mud flaps on interstate trucks within the state,[255] a state regulation that set minimum milk prices that out-of-state dealers had to pay to producers,[256] an Oklahoma statute that required Oklahoma electric plants to burn a mixture of coal containing at least ten-percent Oklahoma-mined coal,[257] and a local ordinance that required all solid waste generated within the city to pass through that city's new treatment center.[258]

Healy v. The Beer Institute[259] and *Quill Corp. v. North Dakota*[260] show how the Rehnquist Court has regulated horizontal federalism through the dormant commerce clause. The Court in *Healy* held that a

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limits the power of the States to discriminate against interstate commerce." Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992). Several judges and authors, however, have argued that the dormant commerce clause is not supported by the Constitution. *E.g.*, Pharm. Research Mfrs. of Am. v. Walsh, 123 S. Ct. 1855, 1878 (2003) (Thomas, J., concurring) ("'[T]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.'" (quoting Camps Newfound/Owatanna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting))); REDISH, POLITICAL STRUCTURE, *supra* note 199, at 97-98 ("The dormant Commerce Clause lacks a foundation or justification in either the Constitution's text or history, and, despite the efforts of respected constitutional scholars, the clause cannot be satisfactorily rationalized outside the text of the Constitution."); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 428, 474-85 (1982) (arguing for a "radically diminished role for both the dormant commerce clause and the Court as its interpreter"). While it is beyond the scope of this article to consider these arguments in depth, Professor Donald H. Regan has made a convincing argument concerning the validity of the dormant commerce clause:

> There is much evidence that the main point of this grant [of the commerce power] . . . was not to empower Congress, but rather to disable the states from regulating commerce among themselves. . . . The framers wanted commerce among the states to be free of state-originated mercantilist impositions. Giving Congress the power to regulate internal commerce was one way of denying states that power, under the view, much more natural to the framers than to us, that granted regulatory powers were exclusive.

Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1125 (1986).

252. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 8.1, at 309 (6th ed. 2000).

253. *Id.* at 310.

254. S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 770-71, 783-84 (1945) (finding that the burden on interstate commerce outweighed the state's questionable interest in safety).

255. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 521-22, 529 (1959) (holding that the Illinois mud flap law unconstitutionally burdened interstate commerce where it conflicted with the requirements of other jurisdictions).

256. Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 519-20, 527-28 (1935).

257. *Oklahoma*, 502 U.S. at 440.

258. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 394 (1994) ("[T]he town may not employ discriminatory regulation to give [the new waste center] an advantage over rival businesses from out of State.").

259. 491 U.S. 324 (1989).

260. 504 U.S. 298 (1992).

Connecticut statute requiring "out-of-state shippers of beer to affirm that their posted prices for products sold to Connecticut wholesalers are, as of the moment of posting, no higher than the prices at which those products are sold in the bordering States of Massachusetts, New York, and Rhode Island" was unconstitutional under the Commerce Clause.[261] The Court noted "the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres."[262] Limits on the extraterritorial effect of state economic regulation involves three propositions.[263] First, the Commerce Clause forbids "the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[264] In particular, a state may not enact legislation that effectively establishes "'a scale of prices'" for other states.[265] Second, a statute that has the practical effect of directly controlling commerce that occurs completely outside a state's borders exceeds the limits of that state's power, even if the legislature did not intend for the statute to reach beyond state boundaries.[266] Finally, a court evaluates a statute's effect not only by considering the statute's direct consequences, but by determining how the statute interacts with legitimate laws of other states as well.[267] The Commerce Clause "protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State," and it "dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another."[268]

The Court concluded that the Connecticut statute effectively controlled commercial activity wholly outside Connecticut.[269] The Court declared: "[T]he practical effect of this affirmation law, in conjunction with the many other beer-pricing and affirmation laws that have been or might be enacted throughout the country, is to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude."[270] Moreover, the statute on its face discriminated against brewers and shippers in interstate commerce because it applied entirely to interstate brewers or shippers of beer.[271]

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261. *Healy*, 491 U.S. at 326.
262. *Id.* at 335-36 (internal footnotes omitted).
263. *Id.* at 336.
264. *Id.* (quoting Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982) (plurality opinion)).
265. *Id.* (quoting *Baldwin*, 294 U.S. at 528).
266. *Id.*
267. *Id.*
268. *Id.* at 337.
269. *Id.*
270. *Id.*
271. *Id.* at 340-41.

Quill held unconstitutional North Dakota's "attempt to require an out-of-state mail-order house that [had no] outlets nor sales representatives in the State to collect and pay a use tax on goods purchased for use within the State."[272] In a 1967 case, the Court had held that a "seller whose only connection with customers in the State is by common carrier or the United States mail" lacked sufficient contacts with the state necessary to impose a similar tax requirement.[273] The Court in *Quill* refused to modify this rule despite the "tremendous social, economic, commercial, and legal innovations" since 1967.[274]

The Court will uphold "a tax against a Commerce Clause challenge so long as the 'tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.'"[275] The Court stated that "[t]he first and fourth prongs, which require a substantial nexus and a relationship between the tax and state-provided services, limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce."[276] Although the Court's rule that "a State may compel a vendor to collect a sales or use tax" turns on the presence of "a small sales force, plant, or office" in a taxing state may set a bright-line rule.[277] Such a bright-line rule "firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes."[278] In addition, if Congress disagrees with this rule, it is free under the Commerce Clause to change it.[279]

B. Pharmaceutical Research & Manufacturers of America v. Walsh[280]

The Court's most recent dormant commerce clause decision, *Walsh*, involved the "Maine Rx" program, enacted in 2000, which primarily provided discounted drugs to Maine's uninsured, non-Medicaid citizens through rebates from manufacturers to Maine pharmacies.[281] Under the program, Maine would try to negotiate with drug manufacturers to provide rebates to fund reduced prices for drugs for program participants.[282] If a manufacturer refused to enter into such an agreement, it would be required to obtain prior authorization for its Medicaid sales.[283] An organization of nonresident drug manufacturers challenged the program's

272. *Quill*, 504 U.S. at 301.
273. Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 758 (1967).
274. *Quill*, 504 U.S. at 301-02 (internal quotations omitted).
275. *Id.* at 311 (quoting Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977)).
276. *Id.* at 313.
277. *Id.* at 315.
278. *Id.*
279. *Id.* at 318.
280. 123 S. Ct. 1855 (2003).
281. *Walsh*, 123 S. Ct. at 1860.
282. *Id.*
283. *Id.*

constitutionality on the grounds that it was "pre-empted by the federal Medicaid statute" and that it violated the dormant commerce clause.[284]

Maine had created the program to enable its residents to obtain prescription drugs at a reduced price.[285] The program's purpose was to enable non-Medicaid participants to purchase drugs at pharmacies discounted to an amount approximately equivalent to the after-rebate price of Medicaid purchases.[286] The Court described the statute:

> The statute provides that any manufacturer or "labeler" selling drugs in Maine through any publicly supported financial assistance program [i.e., Medicaid] "shall enter into a rebate agreement" with the State Commissioner of Human Services (Commissioner). The Commissioner is directed to use his best efforts to obtain a rebate that is at least equal to the rebate calculated under the federal program created pursuant to OBRA 1990. Rebates are to be paid into a fund administered by the Commissioner, and then distributed to participating pharmacies to compensate them for selling at discounted prices.[287]

Among the penalties for a manufacturer's failure to enter into a rebate agreement was the imposition of "prior authorization requirements in the Medicaid program . . . for the dispensing of prescription drugs provided by those [nonparticipating] manufacturers and labelers."[288] Under proposed rules, access would be limited to "individuals who do not have a comparable or superior prescription drug benefit plan"[289]—in other words, mainly uninsured Maine citizens.

The trial court granted the manufacturer's motion for a preliminary injunction on the grounds that "Maine had no power to regulate the prices paid to drug manufacturers in transactions that occur out of the State," and "the Medicaid Act pre-empted Maine's Rx Program insofar as it threatened to impose a prior authorization requirement on nonparticipating manufacturers."[290] The Court of Appeals reversed.[291] The Supreme Court agreed with the court of appeals on both the preemption and the dormant commerce clause challenges.[292]

Concerning the dormant commerce clause argument, the manufacturers contended that "the rebate requirement constitutes impermissible extraterritorial regulation, and second, that it discriminates against inter-

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284. *Id.*
285. ME. REV. STAT. ANN. tit. 22, § 2681 (West Supp. 2002).
286. *Walsh*, 123 S. Ct. at 1862.
287. *Id.* at 1863 (internal citations omitted).
288. tit. 22, § 2681(7).
289. *Walsh*, 123 S. Ct. at 1863 (internal quotations omitted).
290. *Id.* at 1865.
291. Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66, 85 (1st Cir. 2001).
292. *Walsh*, 123 S. Ct. at 1870-71.

state commerce in order to subsidize in-state retail sales."[293] The Court rejected both arguments.[294] Concerning the first contention, the Court declared, "unlike price control or price affirmation statutes, 'the Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect.'"[295] Maine neither requires that drug manufacturers sell to wholesalers at a fixed price, nor is it tying the price of Maine products to out-of-state prices.[296] Concerning the second contention, the manufacturers relied on *West Lynn Creamery, Inc. v. Healy*,[297] which held that a state may not make an assessment on out-of-state dairy farmers for the benefit of in-state dairy farmers that "effectively imposed a tax on out-of-state producers to subsidize production by their in-state competitors."[298] The manufacturers contended that Maine's Rx fund was similar to *West Lynn* in that it was created by rebates from out-of-state manufacturers, and it was employed "to subsidize sales by local pharmacists to local consumers."[299] The Court, however, found that *West Lynn* was not applicable because the Maine program would "not impose a disparate burden on any competitors."[300] The Court added: "A manufacturer could not avoid its rebate obligation by opening production facilities in Maine and would receive no benefit from the rebates even if it did so; the payments to the local pharmacists provide no special benefit to competitors of rebate-paying manufacturers."[301]

C. Evaluation of Walsh

Walsh is a retreat from the dormant commerce clause analysis seen in *Healy* and *Quill*. First, the Court is wrong that the statute does not constitute external regulation. Maine does require manufacturers to sell their drugs for a certain price; it is disingenuous to say that a rebate (a price reduction) is not part of the price. Also, Maine is not controlling retail sales that occur in Maine; it is regulating wholesale transactions outside the state. Most of the wholesale sales happened out-of-state, and the manufacturers had nothing to do with the drugs once they were sold to the distributors.[302] In other words, Maine is regulating prices paid in out-of-state transactions; it is extending its authority outside its bor-

293. *Id.* at 1870.
294. *Id.*
295. *Id.* at 1871 (quoting *Concannon*, 249 F.3d at 81-82).
296. *Id.*
297. 512 U.S. 186 (1994).
298. *Walsh*, 123 S. Ct. at 1871.
299. *Id.*
300. *Id.*
301. *Id.*
302. *See* Petitioner's Brief at 29, *Walsh*, 123 S. Ct. 1855 (No. 01-188) ("Typically, both the manufacturers and their customers (independent wholesalers and distributors) are located outside Maine. The drugs are usually delivered at the manufacturers' facilities outside Maine . . . . The wholesalers and distributors then sell the drugs to their customers, including pharmacies in Maine.").

ders.[303] It is hard to understand how the Court could hold that imposing taxes on an out-of-state retailer who sold products to state residents by mail violated the dormant commerce clause,[304] but that Maine regulating out-of-state sales from a manufacturer to a wholesaler did not. Also, as in *Quill*, Maine is violating the first and fourth prongs of the *Complete Auto Transit* test.[305] First, the activity—out-of-state sales from manufacturers to distributors—does not have a "substantial nexus" with Maine. Although the drugs eventually go into Maine, the relevant transactions occurred outside of Maine. Thus, the rebate is like a tax on an out-of-state sale. Similarly, the out-of-state sales are not fairly related to services provided by Maine since Maine provides no services in relation to the transactions.

Second, the rebate program does have an external effect and an internal benefit—it burdens interstate commerce to subsidize in-state retail sales. Manufacturers will have to raise the prices they sell their drugs for in other states in order to make up for the Maine rebate. Also, Maine pharmacies and citizens are being benefited at the expense of out-of-state citizens who pay those higher prices. Thus, there has been a redistribution from out-of-state manufacturers and consumers to in-state pharmacists and consumers.[306] While such redistribution may be justifiable on public policy grounds, redistribution from out-of-state citizens to in-state citizens is the province of the federal government, not a state.[307] As the petitioner pointed out, Maine had constitutional alternatives to help needy citizens buy drugs.[308] The alternatives included subsidizing drug purchases out of general revenues, giving state income tax credits for drug purchases, or imposing a tax on retail pharmacy sales in Maine.[309] What Maine should not have been allowed to do is to fund its program by burdening interstate commerce.

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303. *See Edgar*, 457 U.S. at 642-63 ("The Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.").

304. *See Quill*, 504 U.S. at 301-02; *Nat'l Bellas Hess*, 386 U.S. at 758.

305. *Brady*, 430 U.S. at 279.

306. As the Court pointed out, it is true that, unlike *West Lynn*, there has been no discrimination against out-of-state competitors. *Walsh*, 123 S. Ct. at 1871. However, the dormant commerce clause protects more than out-of-state competitors; it protects all those who operate in interstate commerce. *See Carbone*, 511 U.S. at 405 (O'Connor, J., concurring) ("[W]e have long recognized that 'a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to . . . the people of the State enacting such statute.'" (quoting Brimmer v. Rebman, 138 U.S. 78, 83 (1891))); *see also* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 580 (1986) ("Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States.").

307. Of course state regulation often has externalities and all externalities cannot be avoided. However, this externality seems more direct and substantial than many other ones.

308. Petitioner's Brief at 26, *Walsh*, 123 S. Ct. 1855 (No. 01-188).

309. *Id.*

IV. THE REHNQUIST COURT'S HORIZONTAL FEDERALISM JURISPRUDENCE AND THE FUTURE OF HORIZONTAL FEDERALISM

A. Evaluation of the Rehnquist Court's Horizontal Federalism Cases

As one can see, the Rehnquist Court has been inconsistent in how it has treated horizontal federalism. It has placed strong due process constraints on a state's ability to impose punitive damages based on conduct in other states, it has continued the minimal full faith and credit constraints for choice of law that date back to the New Deal Court, and it has cut back on constraints under the dormant commerce clause and created confusing exceptions to the full faith and credit rule for judgments. In viewing the Rehnquist Court's horizontal federalism cases as a whole, one must conclude that the Court lacks any coherent jurisprudence concerning the relations of the states. Instead, the Court treats each area of horizontal federalism separately, without considering what it is doing in another area. In fact, one might argue that the Court is not thinking about horizontal federalism at all, but rather that the results in horizontal federalism cases are due to other purposes that have nothing to do with horizontal federalism. How else can one explain the Court's due process rule in punitive damages cases that a state cannot impose its policies on other states in contrast to the Court's failure to give the Full Faith and Credit Clause any content, when the Full Faith and Credit Clause's main purpose is to prevent the imposition of one state's policies on another?

Why has the Court given such attention to vertical federalism and almost none to horizontal federalism? The answer lies partially in the reasons behind the Court's vertical federalism. The main purpose behind the new vertical federalism seems to be distrust of the national government and the related attempt to increase the authority and dignity of state governments.[310] The New Deal saw the beginning of a "liberal" revolution that increased the power of the federal government and eliminated the constraints on vertical federalism.[311] This bigger government, from the 1930s to the present, has furthered liberal values at the expense of conservative values. Thus, a way for a conservative Court to change this

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310. *See* Erwin Chemerinsky, *The Constitutional Jurisprudence of the Rehnquist Court*, *in* THE REHNQUIST COURT: A RETROSPECTIVE 195, 198 (Martin H. Belsky ed., 2002) ("A cornerstone of the Rehnquist Court's approach to constitutional law has been the protection of states from perceived federal intrusions."); MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 80 (1999) ("[T]he core of the Supreme Court's federalism is not citizen choice and state competition but the preservation of state and local sovereignty."); Greve, *supra* note 15, at 95; Rosalie Berger Levinson, *First Monday—The Dark Side of Federalism in the Nineties: Restricting Rights of Religious Minorities*, 33 VAL. U. L. REV. 47, 47 (1998) ("Although this term [federalism] refers to maintaining a proper balance between state and federal power, to the Rehnquist Court it has meant restoring power to the states."); *see also* Alden v. Maine, 527 U.S. 706, 748-49 (1999) (recognizing sovereign immunity as a means for preserving the dignity and respect owed to states).

311. *See* Baker & Young, *supra* note 119, at 75 (stating that "[f]rom 1937 to 1995, federalism was part of a Constitution in exile" (internal quotations omitted)).

trend was to cut back on the power of the federal government in relation to the states. This purpose does not carry over to horizontal federalism.

Other explanations for the new vertical federalism cannot completely support it. Some writers, including the present author, have advocated enforcing the Constitution's structural provisions (that allocate power) as a basis for a new, principled federalism.[312] However, it is clear that this reason, at best, is only secondary for the Rehnquist Court's vertical federalism. While cases that limit Congress' power to pass statutes, such as *Lopez* and *Morrison*, are well-ground in Article I and the Tenth Amendment, sovereign immunity cases such as *Alden* lack any textual basis in the Constitution. Moreover, if the Court were giving greater attention to the Constitution's structural provisions, it would have given greater content to the Full Faith and Credit Clause in *Hyatt* and applied its due process constraints from punitive damages cases to other areas.

What has happened in horizontal federalism is that the Court has mainly continued the principles from previous Courts without thinking much about how horizontal federalism affects our national system and without trying to come up with consistent jurisprudence for all areas of federalism.[313] As noted earlier, when the Court did place greater constraints on punitive damages, it did so because of its concern with large punitive damages, not a concern with horizontal federalism. Horizontal federalism was not the purpose for these cases; it was the justification for another purpose. Thus, horizontal federalism has developed in the piecemeal fashion described earlier, with strong constraints in one area and almost none in others.

B. Justifications for Greater Constraints on Horizontal Federalism

As has been demonstrated above, horizontal federalism can be firmly grounded in the constitutional text;[314] it does not depend for its existence on normative views or conceptions outside the text, as state sovereign immunity does in *Alden* and its progeny.[315] Thus, all the Court has to do is enforce the Constitution's Due Process Clause, Full Faith and Credit Clause, dormant commerce clause, and other horizontal federalism provisions. As mentioned above, not enforcing those provisions gives some parts of the Constitution meaning and other parts none at all.

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312. *See* Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 895-96 (4th Cir. 1999) (Wilkinson, C.J., concurring), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000); Fruehwald, *The New Federalism*, *supra* note 199, at 865-66; Fruehwald, *If Men Were Angels*, *supra* note 15, at 444-51, 494-96; REDISH, POLITICAL STRUCTURE, *supra* note 199, at 6, 164.

313. *See* Greve, *supra* note 15, at 106 ("When it comes to the regulation of economic conduct, the Supreme Court has sustained the regime established under the New Deal: a vast realm of virtually unlimited, concurrent powers, which both the states and the national government occupy.").

314. *See* discussion *supra* Part I.

315. I will present several normative justifications for horizontal federalism below. However, no matter how strong a normative justification is, to be valid, the policy must be supported by the constitutional text.

Does horizontal federalism matter? Policy reasons supporting horizontal federalism include: (1) a state should not be able to interfere with the proper authority of another state; (2) the danger of interstate rivalry; (3) a state should not be able to improperly externalize costs and internalize benefits; (4) the lack of political safeguards that prevents a state from overextending its authority; (5) horizontal federalism allows for local choice and experimentation, and it is often more efficient; and (6) horizontal federalism protects individuals.

The first justification for horizontal federalism is that a state should not be able to interfere with the sovereignty of other states. As previously noted, the New Deal Revolution not only removed constraints from the federal government increasing federal power, it eliminated many of the constraints on states increasing state power.[316] The net result was that governments on all levels had more regulatory power.[317] Equally important, a state may be able to extend its authority beyond its borders, creating clashes with other states.[318]

While the question of whether increased government is good or bad is complicated, the lack of horizontal constraints that allows one state to interfere with the authority of other states is a real problem.[319] A state should not be able to apply its law to a matter unless it is connected to an event within the state's borders;[320] a state should not be able to extend its authority to interfere with the sovereignty of other states.[321] Democracy should be respected, but laws should be made by the proper democratic institution. All states are equal in authority to the other states under our Constitution; one state should not be able to decide the policies of another state.[322] A state is not sovereign if another state can regulate within the scope of its authority. If a state wants to adopt a policy that is different than the policies of all other states, that state should be able to do so as long as the policy does not violate the Constitution. For example, while one state may believe that strict liability is a proper basis for recovery in products liability cases, another state may feel that proof of negligence should be required. Both positions have sound reasons supporting them, and a state should be able to choose which one it wants.

316. *See* Gardbaum, *supra* note 16, at 485-91; Greve, *supra* note 15, at 105-06.

317. *See* Gardbaum, *supra* note 16, at 485-91; Greve, *supra* note 15, at 105-06.

318. *See* Alaska Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 550 (1935) (settling conflict of California and Alaska worker's compensation laws); Pac. Employers Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 502, 504-05 (1939) (same).

319. *See* Greve, *supra* note 15, at 106-07 (noting that "[o]ne cannot unshackle the states without allowing them to exploit each other").

320. Laycock, *supra* note 120, at 251.

321. *See* Greve, *supra* note 15, at 122 (observing that "[s]tate autonomy cannot possibly entail a license to aggress and exploit").

322. *See id.* at 99 ("Federalism rests on principles of state autonomy and equality: each state governs its own territory and citizens but not, of course, the territory and citizens of sister states."); Laycock, *supra* note 120, at 288 ("The Constitution assumes, without ever quite saying so, that the several states are of equal authority.").

The same applies to most decisions states make, such as gun control, medical malpractice, and domestic relations law. Only when a state's decision exceeds the Constitution or requires a nationwide solution should an institution intrude. Those institutions should be the Supreme Court and Congress, not co-equal states.

Second, interstate rivalry was a concern at the time of the Constitution's drafting.[323] As Professor Richard B. Collins has stated, "[i]nterstate rivalry was the Convention's greatest concern. Small states feared the power of large, and the South feared commercial domination by the North and federal interference with slavery."[324] As is well-known, James Madison considered the Union as a check on factions, declaring "[t]he influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States . . . ."[325] In a letter to George Washington, he wrote:

> Over and above this positive power, a negative *in all cases whatsoever* on the legislative acts of the States, as heretofore exercised by the Kingly prerogative, appears to me to be absolutely necessary, and to be the least possible encroachment on the State jurisdictions. Without this defensive power, every positive power that can be given on paper will be evaded [and] defeated. The States will continue to invade the national jurisdiction, to violate treaties and the law of nations [and] to harass each other with rival and spiteful measures dictated by mistaken views of interest.[326]

Interstate rivalry is still a concern today. Professor Laycock has written: "It is critical to the Union that we continue to think of ourselves as a single people, and it is important that we not knowingly create legitimate interstate grievances."[327]

Third, states should not be able to externalize costs and internalize benefits, giving benefits to itself or its citizens, but placing part of the cost on other states or their citizens.[328] An obvious example is the limit

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323. Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 53 (1988).

324. *Id.*

325. THE FEDERALIST NO. 10, at 62 (James Madison) (Carl Van Doren ed., The Easton Press 1979).

326. 9 THE PAPERS OF JAMES MADISON 383-84 (Robert A. Rutland et al. eds., 1975).

327. Laycock, *supra* note 120, at 264; *see also* Greve, *supra* note 15, at 95 ("[Federalism] must also protect states from aggression and exploitation by other states; moreover, it must protect the common economic market from regulatory balkanization.").

328. *See* John S. Baker, Jr., *Respecting a State's Tort Law, While Confining Its Reach to that State*, 31 SETON HALL L. REV. 698, 699 (2001) ("Unfortunately, Supreme Court decisions regarding personal jurisdiction and choice of law, premised on the Due Process Clause rather than the territorial structure of federalism, have had the unforeseen effect of allowing some states to impose their laws and costs on other states."); Collins, *supra* note 323, at 67 (arguing that when states "impose the cost of suppression on outsiders, they interfere in policy choices of other states or the federal government, and judicial intervention may be warranted"); Greve, *supra* note 15, at 100 ("Manufacturers have no practical way of keeping their products out of particular jurisdictions. Plaintiffs, on the other hand, get to choose their own forum and law. As a result, the most restrictive and plaintiff-

on punitive damages in *Campbell* and *Gore*, which prevents states from giving punitive damages to its citizens for injuries suffered by the citizens of other states.[329] Another example would be limiting a state's ability to impose its tort rules on an occurrence in another state that is completely connected to that other state except that the injured party is from the first state. For instance, a New York citizen goes to Massachusetts for an operation in a Massachusetts hospital by Massachusetts doctors.[330] The patient cannot obtain the operation in New York because New York doctors do not perform that operation since it is new and the cost of malpractice insurance is high in New York. On the other hand, Massachusetts has put damages caps on medical malpractice recoveries in order to encourage the best doctors to practice in Massachusetts and to provide the best medical care for its citizens. The patient dies due to the surgeon's malpractice, and his widow files suit in a New York court to recover damages. If the New York court ignores the Massachusetts malpractice limit, it is giving its citizens unearned benefits, while unfairly externalizing the cost on Massachusetts and its citizens. The New York citizen is getting the benefit of New York law for an occurrence in Massachusetts, while not having to suffer the burdens of that benefit—inferior health care in New York. Thus, New York has made a transfer of wealth to one of its citizens by extending its law into Massachusetts. In addition, New York has imposed its policies on Massachusetts. New York has substituted its tort law for that of Massachusetts in a case that is internal to Massachusetts; New York has applied its law to a matter that has no connection to an event within its territory. As mentioned above, the Court has declared that "[a] State does not acquire . . . supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."[331]

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friendly jurisdiction will effectively impose its liability and product norms on the entire country and redistribute income from out-of-state manufacturers (and their shareholders and workers) to in-state plaintiffs in the process."); Laycock, *supra* note 120, at 251 ("[I]n deciding which things or events control choice of law, a state's interests in enriching local citizens and extending the territorial reach of its own law are illegitimate.").

Professor McConnell has posed a similar argument that the cost of a state's liability laws are borne nationwide and that "consumers in states with less generous products-liability laws pay" part of the recoveries received by plaintiffs in the more generous states. *See* Michael W. McConnell, *A Choice-of-Law Approach to Products Liability Reform*, *in* NEW DIRECTIONS IN LIABILITY LAW 90, 92-93 (Walter Olson ed., 1988). He adds: "Each state can profit at the expense of the others by expanding its scope of liability, at least until the others catch up." *Id.* at 92. "Under these conditions, states no longer serve as laboratories for social experimentation." *Id.* at 97.

It may not always be possible to prevent some externalization of costs to other states. For example, when one state imposes large compensatory damages in a products liability suit, the cost of the damages may be spread among consumers in other states. However, constraints on horizontal federalism will help prevent externalization to a significant degree.

329. *See* discussion *supra* Part I.

330. This hypothetical is based on *Rosenthal v. Warren*, 475 F.2d 438, 446-47 (2d Cir. 1973), where the appellate court refused to apply Massachusetts's statutory damage limitation.

331. *See* Bigelow v. Virginia, 421 U.S. 809, 824 (1975). As a New York court said over 140 years ago, "[t]he position that a citizen carries with him, into every State into which he may go, the

Fourth, political safeguards do not constrain a state from overextending its power. It has been argued (unsuccessfully) in recent vertical federalism cases that "politics" should control the relationship between the federal and state governments—that federal courts do not need to protect states' rights because the political branches, Congress and the Executive, can do so.[332] The political branches, however, are not disinterested concerning whether the federal government has overstepped its authority and interfered with states' rights. As Justice Kennedy has contended, "the absence of structural mechanisms to require those officials [in the political branches] to undertake this principled task [of protecting state authority], and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role."[333] Further, "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far."[334]

It should be obvious that politics as a constraint is an even weaker argument in horizontal federalism cases. There is no political safeguard against a state overextending its legal authority against another state or one of its citizens. Congress cannot protect a particular state because it enacts uniform rules. In fact, when Congress is acting at the behest of the states, it is imposing the majority state view on the minority of states.[335] Moreover, in the area of choice of law, Congress has not intervened. Thus, the federal courts need to regulate the relations of the states because they are the only institution that can deal with the states neutrally.[336]

Fifth, as pointed out in Part II, state lawmaking allows for local choice and experimentation. It is also often more efficient.[337] As Professor Collins has pointed out:

> Efficiency of local lawmaking is a basic justification for state autonomy in the federal system. Local lawmaking can be more exactly tailored to particular problems and can more readily experiment with different solutions. Competition among legal systems generates

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legal institutions of the one in which he was born, cannot be supported." Lemon v. People, 20 N.Y. 562, 609 (N.Y. 1860).

332. *See, e.g.*, *Morrison*, 529 U.S. at 647-52 (Souter, J., dissenting); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985) ("State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.").

333. United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

334. *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring).

335. Baker & Young, *supra* note 119, at 117-18.

336. *See* Laycock, *supra* note 120, at 259 ("The results [in choice of law] have been predictably chaotic, because federal abdication leaves no disinterested umpire to resolve an important class of interstate disputes. State law cannot supply the answers, because the questions are about interstate relations and no state is empowered to answer for any other.").

337. *See* Collins, *supra* note 323, at 68.

> efficiencies as jurisdictions compete to attract and retain people and capital. Local lawmaking best serves these ends when people and resources are mobile and when local laws do not export significant costs.[338]

Finally and most importantly, horizontal federalism protects individuals from a state's overreaching.[339] A state should not be able to extend its laws to an individual who has no connection or a tenuous connection to that state. Moreover, an individual should not be subject to the contrary laws of different states for a single transaction or occurrence. As Professor Laycock has noted: "People cannot obey the law unless they know it; they cannot know the law unless they know which law to learn."[340] In the original Constitution (before the Bill of Rights), protection of individuals came from a division of power;[341] that protection should not be diluted by permitting states to subject an individual to a tug-of-war. In addition, when a state exploits its own citizens, those citizens can protect themselves through the right to vote. Foreigners to that state lack such protection. In sum, it is hard to understand why the Court has been enforcing individual rights under the due process and equal protection clauses, while ignoring protections for individuals under horizontal federalism. Having a state's law applied to an individual when another state's law should govern is just as wrong as equal protection or due process violations.[342]

Are there reasons not to regulate horizontal federalism? First, one might argue that in striking down state action, a federal court is interfer-

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338. *Id.*; *see also* McConnell, *The Founders' Design*, *supra* note 119, at 1493-1500 (setting forth three arguments in favor of decentralized, local decision making).

339. *Cf.* New York v. United States, 505 U.S. 144, 181 (1992) ("The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.").

340. Laycock, *supra* note 120, at 319.

341. *See* Calabresi, *supra* note 3, at 1373. Professor Steven G. Calabresi pointed out that until at least the 1950s, constitutional law was mainly concerned with division of authority, not personal liberty. *Id.* Individual freedom was protected mainly through the Constitution's structural provisions. *Id.* He also noted that "the text of our written Constitution devotes only fifty-two words to the protection of individual liberty from the depredations of state government in the Fourteenth Amendment, while devoting several thousand words to the subject of allocating and dividing power among governmental institutions." *Id.* at 1376-77.

342. One author has gone further and argued that a particular kind of factionalism justifies constraints on horizontal federalism and state power. *See* Greve, *supra* note 15, at 123-26. Michael Greve has written that without limitations on the states, "trial lawyers and activist state attorneys general are launching assaults on sister states. . . . [T]he product liability crisis—as well as state litigation campaigns against the tobacco, financial, and pharmaceutical industries—demonstrate that state aggression presents an increasingly serious economic and constitutional problem." *Id.* at 96. He continued: "Their initiatives . . . are not simply an attack on corporate America (which may deserve it); they are also, and inherently, an assault on the integrity, autonomy, and equality of sister states." *Id.* He concluded that the Court has "brought us to the brink of being unable to preempt the trial bar." *Id.* This author agrees that Mr. Greve has identified a problem; however, I believe that the problem is not as serious as he asserts. In particular, I am not concerned by recent actions by state attorneys general to protect their citizens.

ing with democratic decisions of that state. However, there is no "countermajoritarian" difficulty here. The court is not overruling a proper democratic decision; it is saying that the state had no power to apply its law to a situation. Thus, a court is acting "more as an umpire than as a lawmaker."[343] Second, one might contend that the federal courts are interfering with state sovereignty. However, a court cannot interfere with sovereignty that does not exist. Finally, one might wonder whether the enforcement of horizontal federalism is worth the cost. The reasons given above, especially the protection of individuals, more than justify the cost.

C. The Future of Horizontal Federalism

What criteria should the Court use to regulate horizontal federalism?[344] First, any regulation should respect each state's sovereignty. Any constraint should restrict a state's ability to extend its laws beyond its authority, but not interfere with its rightful sovereignty. Second, any regulation should limit the reach of a state's laws and activities so as not to intrude on the sovereignty of other states and not to impose improper externalities on other states or bring improper benefits into the state. Third, horizontal federalism should be based on pragmatic territorialism, not strict territorialism, which would always limit the reach of a state's laws to its borders.[345] In other words, a state should be able to regulate

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343. Calabresi, *supra* note 3, at 1383. As Professor Calabresi has noted, "[m]ajority rule or democracy presupposes that one knows and respects the relevant jurisdictional lines." *Id.* at 1391.

344. While this author feels that courts should protect state sovereignty from encroachment by other states through the Due Process Clause, the Full Faith and Credit Clause, and the dormant commerce clause, author Michael Greve believes that it can best be done by eliminating the presumption against federal preemption. *See* Greve, *supra* note 15, at 116-25. He has written:

> Preemptive statutes, in contrast [to regulatory statutes], merely establish limits within which states remain free to do as they wish. Preemptive statutes are inherently less intrusive than regulatory statutes. Thus, there is no functional justification for subjecting them to a judicial test of the devastating force of the clear statement rule.

Id. at 117. The main reason that Mr. Greve emphasizes preemption rather than other doctrines is because although he believes the other horizontal federalism doctrines are important, he has little confidence in horizontal federalism doctrines succeeding at this time. *See id.* at 121-22.

I am not sure that eliminating the presumption against preemption would be a good thing because it would curtail the states' ability to create diverse policies. For example, regardless of the legal basis, I do not think that the decision in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 570-71 (2001), which preempted Massachusetts's stricter regulation on tobacco advertising, is good from a normative viewpoint. States should be able to adopt stricter laws than the federal government when they only apply internally. Also, I am more confident that the Court can change its horizontal federalism doctrines in light of *Campbell* and *Gore*. I am also hopeful that the Court will become convinced that enforcing the structural provisions of the Constitution is important in both vertical and horizontal federalism. Finally, the Court has unanimously rejected challenges to state statutes and common law on federal preemption grounds in two cases in the 2002-2003 term. *See* Ky. Ass'n of Health Plans, Inc. v. Miller, 123 S. Ct. 1471 (2003); Sprietsma v. Mercury Marine, 537 U.S. 51 (2002).

345. Strict territorialism is where a state's laws always stop at its borders. *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 18.1, at 19 (1834) ("[E]very nation possesses an exclusive sovereignty and jurisdiction within its own territory."). Strict territorialism was the basis of the territorial personal jurisdiction rule in *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878). "One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory." *Pennoyer*, 95 U.S. at 722. "The other principle of public law follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over

out-of-state conduct that has a *significant* effect in the state, such as out-of-state defamation that causes injury to someone's reputation in the state.[346] Finally, any regulation should be principled; it should be firmly ground in the Constitution's structural provisions, and it should be applied consistently and neutrally.

1. Due Process Constraints

The Court should continue its due process approach as seen in *Campbell* and *Gore*, with the refinements in reasoning mentioned in Part I.B. Further, the Court should extend its approach to other areas. It should step in whenever a state has extended its laws beyond their proper limits and applied them to individuals with which the state or those laws do not have a proper connection. In particular, as this author has previously suggested, the Court should place due process limitations on a state's choice of law.[347] Prior to the New Deal Court, the Court had imposed significant due process limitations on a state's choice of law.[348] As was true of the Full Faith and Credit Clause limits on a state's choice of law discussed in Part II, beginning in the mid-1930s, the Court began to move to minimal due process constraints on choice of law that resulted in the *Allstate* rule, which allows a state to apply its law when it has even a tenuous connection to a case.[349] However, when a state applies its law to a case when it has only a tenuous connection to an individual, a case, or an issue in that case, it is violating the individual's due process rights in the same way that it violates the defendant's due process rights in a punitive damages case when the punitive damages are based on conduct in other states.

This author has previously suggested a two-part test to determine whether a state's choice of law is proper under the Due Process Clause.[350] First, the court should apply a rational basis test: is there a reasonable relation between the law's reach and its legitimate purpose? Second, when the laws of two or more states might apply under step one,

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persons or property without its territory." *Id.*; *see also* JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 4.12, at 46 (1935) ("By its very nature law must apply to everything and must exclusively apply to everything within the boundary of its jurisdiction."); *id.* at § 5.2, at 52 (stating "[t]hat the law is territorial, that there can be no law in a particular state except the law of that state . . .").

346. *See* Allen Rostron, *The Supreme Court, the Gun Industry, and the Misguided Revival of Strict Territorial Limits on the Reach of State Law*, 2003 DETROIT COLL. L. MICH. ST. U. L. REV. 115, 124-25. Mr. Rostron has described the end of strict territorialism during the New Deal Court:

> They did so, not by forsaking the notion that the fundamental limit on state power is territorial, but by adopting a more expansive view of what it means for a state to have authority over its territory. Courts began to recognize a state's authority to regulate conduct that has effects within the state's borders, regardless of where the conduct occurs.

Id.

347. FRUEHWALD, CHOICE OF LAW, *supra* note 101, at 67-76.

348. *Id.* at 12-14.

349. *Id.* at 32-35.

350. *Id.* at 74.

the Court should determine whether one of the state's laws has a significantly closer connection to the case. When a state has applied its law to a controversy when another state has a closer connection to that controversy, the first state has violated the individual's due process rights. The state has overreached by making conduct that is legal in the state that has the closest connection to a case illegal. Thus, as was mentioned above in connection with full faith and credit, a state should not be allowed to apply its law to a matter when another state has a significantly closer connection.

For example, assume that Georgia allows strict liability in products liability cases against retailers, but California does not. A Georgia resident goes to California for a two-week vacation, and when he gets there he buys a new car from a California retailer, which he intends to use on his vacation, then drive back to Georgia. After he returns to Georgia, he is seriously injured in an automobile accident. He sues the manufacturer and retailer of the car under strict liability in a Georgia court. Assuming there is no personal jurisdiction problem, should Georgia be able to apply its strict liability law to the California retailer? While Georgia has an interest in protecting its citizens for accidents that happen in Georgia, Georgia should not be able to apply its law because California has a significantly closer connection to the case. The issue is whether a Georgia defendant can sue a California retailer who has no connection to Georgia. For this issue, California obviously has the closer connection. The transaction occurred in California. The retailer has no connection with Georgia. The Georgia resident bought the car in California. California should be able to regulate the conduct of retailers who operate only in California; Georgia should not be able to extend its law to California to regulate a California retailer. If the Georgia consumer had wanted the Georgia protection, he could have bought the car in Georgia.

Yu v. Signet Bank/Virginia[351] illustrates the proper application of the Court's due process standard from *Gore* by a state court to areas other than punitive damages. In *Yu*, the Yus, California residents, filed a class action in California against Signet Bank/Virginia and Capitol One Bank, both Virginia corporations, for eight causes of action,[352] including "distant forum abuse."[353] Although the parties' agreement said that it would be governed by Virginia and federal law, the Yus never used the credit card in Virginia or went to Virginia.[354] The Yus failed to make payments on their account.[355] Signet dealt with out-of-state debtors who defaulted

351. 82 Cal. Rptr. 2d 304 (Cal. Ct. App. 1999).
352. *Yu*, 82 Cal. Rptr. 2d at 307-08.
353. *Id.* at 308. Signet spun off its accounts to Capitol One in 1995. *Id.* at 307.
354. *Id.*
355. *Id.*

on their accounts by filing suit in Virginia district trial courts.[356] More than ninety percent of the lawsuits ended in default judgments.[357]

The Yus received a "Warrant in Debt," which was similar to a California summons and complaint but filed in Richmond, Virginia, claiming that they owed Signet $2,191.38 plus interest.[358] The Yus claimed they did not understand the warrant's legal effect.[359] After a default judgment was obtained against the Yus, a garnishment summons was served on the Virginia office of Mr. Yu's employer.[360]

The Yus filed a class action suit in California against the banks, asserting: (1) tortious violation of California Code of Civil Procedure § 395(b); (2) abuse of process; (3) tortious violation of California Code of Civil Procedure §§ 1710.10 *et. seq.* and 1913(a); (4) violation of due process; (5) restitution and injunctive relief under California Business and Professional Code § 17200; (6) violation of California Civil Code § 1788.15; (7) negligent infliction of emotional distress; and (8) intentional infliction of emotional distress.[361] The trial court granted the banks' motion for summary judgment.[362]

After finding that the Virginia court had lacked personal jurisdiction over the Yus,[363] the appellate court addressed the Yus' claim of "distant forum abuse."[364] In *Barquis v. Merchants Collection Ass'n*,[365] the California Supreme Court held that a creditor who "wilfully commenced actions in improper [venues], with knowledge that such [venues] are improper, and for the improper ulterior purpose of impairing its adversaries' ability to defend such suits," is guilty of "gross abuse of process" and "unlawful . . . business practice."[366] The *Yu* court felt that the distant forum abuse was even worse than in *Barquis* because *Barquis* involved the wrong venue within California, while *Yu* involved the wrong jurisdiction in another state altogether.[367] Under California law, the suit should

356. *Id.*

357. *Id.* The bank sent a "change of jurisdiction" letter to the debtors, which advised the debtors that the bank intended to file suit in Virginia and that, if they preferred trial in their state, they must give notice within twenty-one days. *Id.* If the customer requested a change of jurisdiction, the bank would dismiss the Virginia action. *Id.* The Yus disputed that they had received the letter. *See id.*

358. *Id.* at 307-08.

359. *Id.* at 308.

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.* at 311.

364. *See id.* at 311-15.

365. 496 P.2d 817 (Cal. 1972).

366. *Barquis*, 496 P.2d at 820 (finding that this practice by creditors is prohibited under California statutes) (internal quotations omitted).

367. *Yu*, 82 Cal. Rptr. 2d at 312.

have been filed in the county where the debtor lived, or the county where the contract was formed or to be performed.[368]

As one of their defenses, the banks asserted that *Gore* barred the claims because their program was lawful in Virginia and that "California cannot 'regulate' conduct 'that is lawful in other states.'"[369] The court responded that *Gore* supported the Yus' claim rather than the banks' defense, stating:

> The [*Gore*] case would thus prohibit an award of punitive damages herein to punish or deter respondents' conduct with respect to consumers in states other than California. However, appellants are not seeking any such award. [*Gore*] establishes that California may indeed protect its own consumers, and punish the conduct of an out-of-state defendant if it has an impact on them regardless of whether the conduct might be lawful elsewhere.[370]

The court, however, found that four of the statutes sued upon by the Yus involving California actions and California judgments could not have out-of-state applicability.[371] In addition to the fact that the court

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368. *Id.*

369. *Id.* at 313.

370. *Id.* at 314.

371. *Id.* at 315-17. The court reviewed the statutes sued upon and the Yus' allegations as follows:

> The first cause of action in appellants' complaint is for violation of Code of Civil Procedure section 395, subdivision (b), which provides in relevant part: "Subject to the power of the court to transfer actions or proceedings as provided in this title, in an action arising from an offer or provision of goods, services, loans or extensions of credit intended primarily for personal, family or household use, . . . the county in which the buyer or lessee resided at the time the contract was entered into, or the county in which the buyer or lessee resides at the commencement of the action is the proper county for the trial thereof." Appellants contend that Signet violated this venue statute by suing them in Virginia.
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> The third cause of action in the complaint is for violation of Code of Civil Procedure section 1710.10, et seq., which set forth the procedures for entry of a California judgment based on a sister state judgment, and Code of Civil Procedure section 1913, subdivision (a), which provides in pertinent part that "the effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced in this state by an action or special proceeding." Appellants contend that Signet violated these statutes when it enforced the Virginia judgment by serving a wage garnishment order in Virginia, rather than domesticating the judgment in California as provided in these statutes.
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> The sixth cause of action is for violation of Civil Code section 1788.15, which states that: "(a) No debt collector shall collect or attempt to collect a consumer debt by means of judicial proceedings when the debt collector knows that service of process, where essential to jurisdiction over the debtor or his property, has not been legally effected. [¶] (b) No debt collector shall collect or attempt to collect a consumer debt, other than one reduced to judgment, by means of judicial proceedings in a county other than the county in which the debtor has incurred the consumer debt or the county in which the debtor resides at the time such proceedings are instituted, or resided at the time the debt was incurred." (Civ.Code, § 1788.15.) Appellants contend that Signet violated these provisions of the Robbins-Rosenthal Fair Debt Collection Practices Act (Civ.Code, § 1788 et seq.) by suing them in Virginia before their debt was otherwise reduced to judgment," and by improperly garnishing Mr. Yu's wages.

thought that the statutes were not intended to have out-of-state applicability, it believed that applying the statutes extraterritorially would violate *Gore*'s admonition that "no state can 'impose its own policy choice' on others, or 'legislate except with reference to its own jurisdiction.'"[372]

In *Yu*, the court properly applied the horizontal federalism principles from *Gore*. It did not violate due process to extend the *Barquis* abuse of process action to Virginia banks who filed suit in Virginia, even if such actions are legal in Virginia, because the effect was felt in California. Thus, California had an interest in protecting its own consumers and economy.[373] It was not trying to regulate conduct that was legal in Virginia; it was trying to protect California consumers from illegal out-of-state conduct.

Under my refined due process analysis, *Yu* is also correct. It is not a violation of the banks' due process rights to be left alone by a state that has little or no connection to the banks or occurrence. Further, it does not offend the Due Process Clause to have California law applied to them when the consumers lived in California, the banks solicited the consumers by mail in California, they intended to collect a debt against California consumers, and the injury they caused was felt in California. In fact, this author would argue that California had a significantly closer connection to the controversy than Virginia based on the above connections and the Yus' lack of any connection to Virginia.

The court's holding that the California statutes concerning California actions and judgments could not be applied to violations in Virginia was also correct because California cannot extend its procedural rules to Virginia actions. California has no interest in governing Virginia actions and judgments, even if its own residents are involved.

> The [Robbins-Rosenthal] Fair Debt Collection Practices Act provides for recovery in an individual action of the debtor's actual damages, as well as reasonable attorney's fees and costs, plus a fine of $100 to $1,000 if the creditor's violation is willful and knowing. (Civ.Code, § 1788.30.) Appellants seek tort damages for the alleged violations of the Code of Civil Procedure under the theory that "'[v]iolation of a statute embodying a public policy is generally actionable even though no specific remedy is provided in the statute; any injured member of the public for whose benefit the statute was enacted may bring an action.' [¶] The effect of such statutes, in essence, is to create a duty or standard of conduct, the breach of which, where it causes injury, gives rise to liability in tort." (*Castillo v. Friedman* (1987) 243 Cal.Rptr. 206, 197 Cal.App.3d.Supp. 6, 14 [citations omitted]; see *Czap v. Credit Bureau of Santa Clara Valley* (1970) 7 Cal.App.3d 1, 6, 86 Cal.Rptr. 417 [recognizing tort action for violation of former unfair debt collection practice statute]; Debt Collection Tort Practice (Cont.Ed.Bar 1971) pp. 84-86.) We need not decide whether damages are recoverable under this theory because these statutes are inapplicable in appellants' case in any event.

Id. at 315-16.

372. *Id.* at 317 (quoting BMW of N. Am. v. Gore, 517 U.S. 559, 571 (1996)).

373. *See Gore*, 517 U.S. at 585 (holding that a state can further its interest in protecting its own consumers, but lacks the power to punish conduct that was lawful where it occurred and did not affect the state's residents).

2. Full Faith and Credit Constraints

The Court should give the Full Faith and Credit Clause content. First, statutes, laws, and judgments should receive equal full faith and credit. As mentioned above, there is no textual basis to distinguish among them.[374] Second, there should be no exceptions to full faith and credit for judgments, as the Court created in *Baker*.[375] Again, there is no textual basis for such exceptions. As noted in Part II, the real problem is the Court's failure to define what full faith and credit means for judgments and its failure to recognize the difference between money judgments and equity judgments.[376] While exceptions may not be needed, an enforcing court in each case needs to judge whether the rendering court acted within its authority. This is already done in connection with personal jurisdiction; a court does not have to enforce a judgment if the judgment court lacked personal jurisdiction over a defendant.[377] Thus, when a court issues a judgment that purports to bind the courts of other states, the enforcing court should ask whether the judgment court acted within its power when it did so. In addition, for equity judgments, a court should ask which state has the closest connection to the controversy. A court should not have to enforce another court's injunction when it governs activity occurring in the forum when the forum has a significantly closer connection to the conduct.

Most importantly, the Court should give content to the Full Faith and Credit Clause as it applies to other states' laws. As Professor Laycock has pointed out, "[c]hoice-of-law questions are about the allocation of authority among the several states."[378] He has also noted that the Full Faith and Credit Clause "provides for the equal authority of each state's law."[379]

First, the Court should eliminate the public policy exception that allows a state not to apply foreign law when its selection would violate state policy.[380] If a state's law should govern because that state has the closest connection to the controversy (or the greatest interest in applying its laws), then another state should not be able to refuse to apply that law because it contravenes the forum's public policy. If another state is more closely connected to a controversy, then applying its laws does not violate the forum's public policy. In addition, if a state refuses to employ the law of a state that is more closely connected to the controversy because

374. *See* discussion *supra* Part II.B.1.
375. *See* discussion *supra* Part II.A.2.
376. *See* discussion *supra* Part II.B.2.
377. *See* Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998).
378. Laycock, *supra* note 120, at 250.
379. *Id.* at 289.
380. *See* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1966-67 (1997); *see also* Laycock, *supra* note 120, at 313 ("The public-policy exception is a relic carried over from international law without reflection on the changes in interstate relations wrought by the Constitution.").

the case is being heard in its courts, it is imposing its law on other states. If a court applies its state's laws when it has the closest connection to the controversy and another state's laws when that other state has the closest connection, then both states' policies are satisfied.

The Court should also give content to the Full Faith and Credit Clause by applying it to choice of law in general. As Professor Laycock has argued: "[T]he clause is most plausibly read as requiring each state to give the law of every other state the same faith and credit it gives its own law—to treat the law of sister states as equal in authority to its own."[381] Moreover, it is inconsistent to say that a state cannot impose its policies on another state through punitive damages, but that it can through choice of law. Therefore, as mentioned above, a court should not be able to apply its law under the Full Faith and Credit Clause to a controversy or issue when another state has a closer connection to the controversy or issue. Thus, in the Georgia-California hypothetical from above, the result would be the same under the Full Faith and Credit Clause as it was under the Due Process Clause. California law should apply because California has an interest in regulating California retailers, while Georgia does not. The Full Faith and Credit Clause mandates that California law govern because California is the proper sovereign and because Georgia should not be able to impose its law on California. Further, the Due Process Clause requires that Georgia not be able to extend its law to govern a California retailer acting in California with no connection with Georgia.

3. Dormant Commerce Clause Constraints

The Court should also retreat from its position in *Walsh*. It should prevent a state from placing externalities on other states, reaping benefits that belong to other states, extending its laws to control commerce outside its borders, and interfering with commerce when a national solution is needed. As Michael Greve has pointed out, "[t]he prevention of aggression and exploitation among the states is the central, irreducible purpose of the Commerce Clause."[382] Moreover, as James Wilson declared at the Pennsylvania ratifying convention, "whatever object of government extends, in its operation or effects, beyond the bound[aries] of a particular state, should be considered as belonging to the government of the United States."[383]

Several lower courts have properly applied the dormant commerce clause rules that were in place before *Walsh*. For example, Kentucky refused to apply its civil rights statute to a claim for employment discrimination that took place outside the state against a corporation with its

381. Laycock, *supra* note 120, at 296.

382. Greve, *supra* note 15, at 105.

383. 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 424 (2d ed. 1907).

headquarters in Kentucky.[384] Similarly, a California court refused to employ California's Fair Employment and Housing Act in a case involving a sexual harassment claim against a California company for conduct that occurred outside California.[385] Lower courts have also used the dormant commerce clause rules in situations where some of the conduct was in-state but other conduct was out-of-state. For instance, *Shearson Lehman Bros. Inc. v. Greenberg*[386] held that a California statute could not be employed "to impose a nationwide permanent injunction" against a securities dealer to change its business practices, including changing the format of its internal account forms and monthly statements and altering its communications with its customers, because it improperly regulated interstate commerce.[387] Similarly, in *Hyatt Corp. v. Hyatt Legal Services*,[388] the court refused to extend Illinois's anti-dilution statute to conduct that did not affect Illinois on dormant commerce clause grounds.[389]

In all these cases, application of state law to out-of-state occurrences that did not have a significant in-state effect would violate the dormant commerce clause. A state cannot apply its civil rights laws to out-of-state conduct just because the company's headquarters is in that state. In such an instance, a state would be extending its laws beyond its borders to cover activities in other states. This is also true in cases where some of the conduct is in-state, such as when a state court issues an injunction that covers in-state and out-of-state activities, as in *Shearson Lehman* and *Hyatt Legal*.[390] In such instances, the injunction is valid concerning in-state activity, but the injunction cannot apply to out-of-state conduct under the dormant commerce clause (or due process) because a state is extending its laws to govern conduct in another state that does not have an effect in-state.

However, the dormant commerce clause should not be taken so far as to preclude a state from regulating injuries from products used within its borders.[391] The main reason that a strict dormant commerce clause rule should not apply to products liability cases is that the state is not regulating interstate commerce when it applies its torts law to a manufacturer; it is regulating safety within its borders. When a person is injured by a product within a state, that state has the strongest interest in making

384. Union Underwear Co. v. Barnhart, 50 S.W.3d 188, 189, 193 (Ky. 2001).
385. Campbell v. Arco Marine, Inc., 50 Cal. Rptr. 2d 626, 629, 632-33 (Cal. Ct. App. 1996).
386. No. 93-55535, 1995 WL 392028 (9th Cir. July 3, 1995).
387. *Greenberg*, 1995 WL 392028, at *3.
388. 610 F. Supp. 381 (N.D. Ill. 1985).
389. *Hyatt Corp.*, 610 F. Supp. at 385.
390. *See Greenberg*, 1995 WL 392028, at *3; *Hyatt Corp.*, 610 F. Supp. at 385.
391. Gun manufacturers have recently posed the opposite argument. *See* Rostron, *supra* note 346, at 117 ("The gun companies have seized upon the Supreme Court's recent decisions striking down extraterritorial applications of state law and have argued that those rulings should have a far broader impact than anyone previously imagined. [Similar to] most products, . . . most gun injuries do not occur in the state in which the manufacturer produced and sold the gun, and many occur in a state in which no distributor or dealer ever sold the gun.").

sure that the person is compensated for his or her injury. Moreover, regulation of injuries from products in a state can be distinguished from the regulation of mud flaps on interstate trucks in *Bibb v. Navajo Freight Lines, Inc.*[392] and the length of interstate trains in *Southern Pacific Co. v. Arizona*[393] on the ground that the product is no longer traveling in interstate commerce and a state's purely internal safety regulations cannot burden interstate commerce. In *Bibb*, a truck would have to change its mud flaps at the state border,[394] and, in *Southern Pacific*, a train would have to change its length at the border.[395] There is no comparable burden concerning products liability.

4. Constraints on a State's Ability to Regulate Its Citizens' Out-of-State Conduct

Finally, considering horizontal federalism in relation to a state's ability to regulate its citizens' out-of-state activities will illustrate how the parts of horizontal federalism work together. Professor Rosen has argued that "Home States indeed have a presumptive power to regulate their citizens' out-of-state activities to avoid travel-evasion."[396] In contrast, I do not think that states can control their citizens when they are outside the state to the extent that Professor Rosen does. First, a person in the United States is both a federal citizen and a citizen of the state in which they reside.[397] Thus, a state lacks complete sovereignty over its citizens, and it must respect the federal Constitution. A state citizen is not a child of that state. Second, Professor Rosen understates the importance of territoriality in connection with state sovereignty.[398] The authority of

392. 359 U.S. 520 (1959).

393. 325 U.S. 761 (1945).

394. *See Bibb*, 359 U.S. at 524.

395. *See S. Pac.*, 325 U.S. at 774.

396. Rosen, *supra* note 115, at 896. Rosen states that "[s]uch 'travel-evasion,' which in effect gives citizens the power to choose which state's laws are to govern them on an issue-by-issue basis, can cripple the ability of states to accomplish constitutional objectives." *Id.* at 856-57; *see also* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 42 (3d ed. 1982) (discussing a state's ability to punish its citizens' extraterritorial activities that violate state criminal laws); C. Steven Bradford, *What Happens if* Roe *Is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87, 170 (1993) (discussing the extraterritorial effects of regulating abortion if *Roe v. Wade* were overturned); Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873, 876 (1993) (discussing state regulation of its citizens abroad); Mark P. Gergen, *Equality and the Conflict of Laws*, 73 IOWA L. REV. 893, 907 n.94 (1988) (discussing states' ability to regulate and punish extraterritorial acts except abortion); 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, 462 (1992) (discussing "efforts by states to punish their citizens for conduct that is protected in [a] sister state where it occurs"); Regan, *Siamese Essays*, *supra* note 20, at 1912 (discussing state regulation of its citizens' extraterritorial activities); William W. Van Alstyne, *Closing the Circle of Constitutional Review from* Griswold v. Connecticut *to* Roe v. Wade*: An Outline of a Decision Merely Overruling* Roe, 1989 DUKE L.J. 1677, 1684-85 (discussing evasion of state abortion laws and the ability of states to enforce such laws extraterritorially on its citizens).

397. U.S. CONST. amend. XIV, § 1.

398. *See* Rosen, *supra* note 115, at 964 n.455 ("Finally, I would like to say that I, like Professor Kreimer, believe that states' physical boundaries are very important. I believe, however, that careful consideration shows that they are only imperfect surrogates for demarcating where a polity's legiti-

the states is defined by their borders.[399] In addition, as Professor Seth F. Kreimer has observed, "[t]he Constitution was framed on the premise that each state's sovereignty over activities within its boundaries excluded the sovereignty of other states."[400] While domicile might give a state power over a person in limited circumstances, the most important source of power for a state over a person is that the person is within a state's borders. One state simply cannot invade another state's territory and dictate what is legal in that state. Third, Professor Rosen overstates the extent of concurrent jurisdiction. Two states may apply their laws to the same matter when the occurrence significantly involves both states. However, the fact that a person is domiciled in a state does not generally make that person's activities in another state a multi-state matter, invoking concurrent jurisdiction. Finally, Professor Rosen ignores *Gore*'s dictate that one state cannot impose its policy on another state. In fact, Professor Rosen does not mention *Gore* at all. Thus, as Professor Kreimer has written: "The tradition of American federalism stands squarely against efforts by states to punish their citizens for conduct that is protected in the sister state where it occurs."[401]

Consider two examples: one in which a state does not have an interest in regulating its citizens' out-of-state activities and another where it does have an interest, at least in part. State X believes that gambling is

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mate interests end. This mismatch between physical boundaries and legitimate interests has grown over time due to various technological revolutions that increase the frequency of cross-border activities and, in the process, provide citizens ever greater opportunities to structure their activities so as to free themselves of their Home State's regulations.").

399. *See* Regan, *Siamese Essays*, *supra* note 20, at 1887 (stating "[i]n short, territoriality is presupposed as the relevant criterion of legislative jurisdiction").

The main cases that Professor Rosen uses to support his position are weak. Professor Rosen relies heavily on *Skiriotes v. Florida*, 313 U.S. 69 (1941). Rosen, *supra* note 115, at 865. In this case, the Supreme Court held that Florida could prohibit its citizens from sponge fishing in an area outside its territorial waters. *Skiriotes*, 313 U.S. at 79. This case was decided in 1941 at the height of the Court's hands off approach to state regulation, and before the Court started to impose greater dormant commerce clause regulations on a state's ability to regulate outside its borders. More importantly, Florida was regulating the high seas, not within the borders of another state; there was no clash between state sovereigns. *Id.* at 77.

Professor Rosen also relies on *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (plurality opinion), particularly for the fact that the Court allowed jurisdiction partly on the ground that the widow lived in Minnesota at the time of the lawsuit. Rosen, *supra* note 115, at 872-73 ("In short, *Hague* suggests that bona fide residence on its own is virtually, if not wholly, a sufficient basis for empowering a state to regulate that person's out-of-state activities."). As I stated above, allowing a state to choose its law solely because a person has moved to a state after an occurrence is a gross violation of due process and full faith and credit. A state has no interest in what happened to one of its citizens before he or she moved to that state.

Finally, Professor Rosen cites to *In re Busalacchi*, No. 59582, 1991 WL 26851 (Mo. Ct. App. Mar. 5, 1991). Rosen, *supra* note 115, at 878-79. In this case, a Missouri court prohibited a father from moving his daughter, who was in a persistent vegetative state, out-of-state, so he could have her feeding tube removed. *Busalacchi*, 1991 WL 26851, at *1, *5. However, in this case, the court was not regulating out-of-state conduct. The court did not prohibit an act from taking place outside the state. Rather, it prevented the daughter's removal from the nursing home she was currently in inside Missouri. *Id.*

400. Kreimer, *supra* note 396, at 464.

401. *Id.* at 462.

immoral, and it wants to protect its citizens who are addicted to gambling, so it passes a law that makes gambling illegal. Can State X extend its law to cover its citizens' gambling in other states? The answer to this question should be no. A state should not be able to control its citizens' conduct beyond its borders when that activity is legal in the other state. Allowing a state to extend its laws beyond its borders in such an instance ignores the fact that the person is a federal citizen and offends the person's due process rights by making conduct that is legal in a jurisdiction illegal.

On the other hand, assume that a same-sex couple wants to get married, but that marriages by same-sex couples are illegal in their domicile. However, marriages of same-sex couples are legal in State Y, so the couple goes to State Y and gets married. They then come back to their domicile and want it to recognize their marriage and give them the same benefits as other married couples. Does the domicile have to recognize the marriage? The answer should be no because the domicile has the authority to control marriage status within its territory by its citizens.[402]

In both the gambling hypothetical and the marriage hypothetical, state citizens have gone out-of-state to avoid state laws they dislike. The difference is, in the gambling hypothetical, the activity is wholly out-of-state, while in the marriage hypothetical, the couple is asking for recognition of their marriage status in their domicile. Obviously, the domicile could not forbid the couple to get married in another state because it is an extraterritorial act, but it can refuse to allow any consequences from that marriage in its territory.

CONCLUSION

This Article has demonstrated that the Rehnquist Court has been inconsistent in its adjudication of horizontal federalism, creating strong constraints in the limited area of the effect of the Due Process Clause on state punitive damages awards, but giving little meaning to the Full Faith and Credit Clause and cutting back on the scope of the dormant commerce clause. It has also suggested that the Court should place greater constraints on a state's ability to extend its laws to interfere with other states' sovereignty or to unduly burden individuals. This can be accomplished by applying the due process principles it used in punitive damages cases to other types of cases, by giving the Full Faith and Credit Clause significant content, and by not limiting the scope of the dormant commerce clause.

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402. *See* Williams v. North Carolina, 325 U.S. 226, 238-39 (1945) (holding that North Carolina could prosecute a couple for bigamous cohabitation when the North Carolina residents divorced and remarried in Nevada, then returned to live together in North Carolina). The issue of the recognition of same-sex marriages is complicated. I believe that in some instances states will have to recognize same-sex marriage celebrated elsewhere. *See generally* Scott Fruehwald, *Choice of Law and Same-Sex Marriage*, 51 FLA. L. REV. 799 (1999).

The analysis of the Rehnquist Court's horizontal federalism cases and this Article's suggestions for constraints on horizontal federalism come from a moderate, pragmatic reading of the constitutional text.[403] This Article has advocated giving meaning to all the structural provisions of the Constitution[404] and reading these provisions in a detached, value-free manner.[405] The suggestions for greater constraints on horizontal federalism are an attempt to allocate authority to the proper sovereign, not to further a political agenda.

403. *See* REDISH, POLITICAL STRUCTURE, *supra* note 199, at 9-10. Professor Redish asserts his concept of pragmatic formalism:

> One may legitimately accept that the nature of a constitutional system imposes on the judiciary an obligation to engage in principled, consistent analysis and to make decisions that are capable of rational reconciliation with governing textual directives, yet simultaneously recognize that within those confines there exists room for the judiciary to take at least some account of pragmatic concerns.

Id.

404. I strongly agree with Professor Redish's declaration that "in our form of constitutional democracy the Court's role requires that its constitutional pronouncements not contravene the unambiguous directives contained in the text of the document that the Court interprets and enforces, regardless of the Court's assessment of the political or social merits of those directives." *Id.* at 6. He added: "Unless the unaccountable judiciary is constrained by the outer boundaries of constitutional text in invalidating majoritarian action, it is effectively transformed into a philosopher king, sitting in judgment on the wisdom and morality of all of society's social policy choices." *Id.* at 8.

405. *Cf.* Fruehwald, *The New Federalism*, *supra* note 199, at 865-66 (arguing for similar detachment in the area of vertical federalism).