

STATE EXTRATERRITORIAL POWERS
RECONSIDERED: A REPLY

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INTRODUCTION

I greatly appreciate Professor Rosen's thoughtful reply¹ to my recent article.² In many ways, our differences on extraterritoriality doctrine and practice are modest. We agree that current doctrine has its flaws; we agree that courts are useful "first cut" actors in formulating responses to extraterritoriality disputes;³ and we agree that the system functions as harmoniously as it does because states, for the most part, have chosen to regulate in a way that respects their neighbors' territorial prerogatives.⁴

I respond to Professor Rosen primarily to clarify what I take to be our principal area of disagreement: that is, whether current doctrine reflects meaningful and coherent policy choices (such as a decision to recognize multiple constitutional values) or, instead, whether it is better described as a haphazard assemblage of sometimes-inconsistent principles that courts have failed to justify or reconcile to any meaningful degree. I argue, of course, for the latter view—and it is my

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1 Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133 (2010).

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

3 See Rosen, *supra* note 1, at 1151.

4 I take no issue, for example, with Rosen's observations that the present extraterritoriality problem is "far from a crisis." Rosen, *supra* note 1, at 1135. It is undoubtedly the case that, even in the absence of clear doctrinal standards, states' good faith—not to mention their self-interest—have in most circumstances operated to reduce substantially potential areas of regulatory conflict. Yet the fact that any extraterritoriality problem states currently face is far more modest than it might be does not mean that there is no reason to address it.

skepticism of the current doctrinal regime, more than my belief in a single doctrinal standard for its own sake, that leads me to argue for a reconsideration of the approach courts take to extraterritoriality problems.

I. LIMITATIONS OF THE CURRENT FRAMEWORK

At the moment, we have (at least) two standards for assessing the extraterritorial effect of state regulation.⁵ On the one hand, state legislation affecting commerce is purportedly governed by the *Edgar/Healy* dormant Commerce Clause standard (itself something of a jumble of standards, possibly prohibiting both regulation of wholly out-of-state conduct and regulation that creates the danger of “inconsistent legislation”⁶). On the other, the decision of a state court to apply state law to a given dispute (whether commercial in nature or not) is governed by the *Hague* “aggregation of contacts” standard, apparently rooted in both the Due Process and the Full Faith and Credit Clauses.⁷ Both of these standards are themselves unsatisfactory; they can be rightfully criticized for their unclear scope (in the case of the *Edgar/Healy* test) and (in the case of the *Hague* test) their toothlessness and their slighting of full faith and credit concerns. As a result, they simply do not—jointly or individually—supply courts with a useful way of thinking about extraterritoriality problems. But perhaps even more troublingly, the existence of these two tests rests on a distinction between regulation by state legislatures and application of state law by state courts that simply cannot be maintained or justified.⁸

5 Rosen quite rightly points out that other constitutional provisions, such as the right to travel or the dual sovereignty “sub-doctrine” Double Jeopardy Clause, function at least in part to ensure that states do not overstep their territorial boundaries in specific circumstances. Rosen, *supra* note 1, at 1137. These provisions, however, apply in narrow, clearly delineated circumstances (respectively, permitting second state criminal prosecutions and (arguably) limiting states’ right to regulate the conduct of their citizens out of state) and thus, have only modest relevance to the more general problem of extraterritorial regulation. (Rosen also mentions the Full Faith and Credit Clause, but full faith and credit concerns could easily be incorporated into any unified extraterritoriality standard, just as they are nominally (if perhaps unsatisfactorily) taken into account in the *Hague* regime. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.10 (1981) (plurality opinion)).

6 See *Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989); *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality opinion).

7 See *Hague*, 449 U.S. at 308 (plurality opinion).

8 To be sure, this distinction has already broken down in a variety of contexts. For example, in striking down courts’ awards of punitive damages for out-of-state conduct, the Court’s reasoning has appeared to draw on both the *Edgar* and *Hague* traditions. See Florey, *supra* note 2, at 1097.

A New York regulation that purports to apply New York standards to out-of-state conduct is, in most respects, functionally indistinguishable from the decision of a New York court to enjoin the defendant from engaging in behavior in another state that violates New York law. Yet our existing case law would apply sharply divergent standards in assessing each act's constitutionality.

Professor Rosen likewise sees deficiencies in current case law.⁹ But he defends the current regime on the grounds that two (or, he would argue, more) extraterritoriality standards are not only unproblematic but also desirable. In Rosen's view, multiple standards are called for, first, because multiple constitutional provisions potentially speak to the extraterritoriality problem¹⁰ and, second, because an act of extraterritorial regulation may in fact affect the disparate interests of "individuals, . . . states, and . . . the interstate federal system."¹¹

Fair enough. A coherent extraterritoriality standard should in fact take account of all these interests. While such a standard should integrate the disparate strands of current doctrine, it need not be monolithic. It could, for example, provide for the application of varying levels of scrutiny where meaningful distinctions are present, the most important one being whether the state is attempting to regulate commercial or noncommercial conduct.¹² The current standards, however, are simply imperfectly tailored to protect *any* of these interests. The *Hague* standard, for example, nominally rests on the Due Process Clause—but it is a spectacularly inadequate safeguard for shielding individuals from overreaching states because it adds virtually nothing to the protections already conferred by personal jurisdiction doctrine.¹³ By contrast, the *Edgar/Healy* standards, if applied literally, have the potential to invalidate such a wide swath of state legislation that many commentators have concluded that the Court cannot possibly be taken at its word in those cases.¹⁴ Such vague and shifting standards cannot operate as meaningful safeguards of multiple constitutional interests; rather, they simply foster confusion and uncertainty.

9 See Rosen, *supra* note 1, at 1135 (noting that "the status quo is not ideal").

10 *Id.* at 1136–37.

11 *Id.*

12 See Florey, *supra* note 2, at 1119.

13 See *id.* at 1127.

14 See, e.g., Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 806 (2001); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1521–22 (2007).

A second reason to reject the application of multiple, wholly separate standards is that there is a good deal of overlap among all three interests (individual due process, state sovereignty, and federalism) that Rosen identifies. If a Minnesotan is subjected to onerous regulation by the state of Illinois, Illinois's act is likely to offend the Minnesotan's due process interests, Minnesota's domestic authority in a wider sense, and the harmonious functioning of the interstate system in equal measure. Certainly it may be possible to conceive of examples where these three interests are implicated to slightly different degrees, but since any egregious act of extraterritorial regulation is likely to affect all of them, a single extraterritoriality framework is likely to be at least serviceable in defending all three.

Moreover, advocating the use of particular extraterritorial principles to protect discrete constitutional interests assumes that judges apply such principles with care and deliberation. That, to say the least, is not always the case. Rather, courts have in many situations elected simply to pick and choose, often rather arbitrarily, from the increasingly garbled menu of extraterritoriality options available. This has led to results that are often sweeping and unpredictable. Consider, for example, *American Libraries Ass'n v. Pataki*,¹⁵ in which a federal district court forcefully revived—and indeed extended—the *Edgar/Healy* line of cases in striking down a New York statute criminalizing computer-to-computer transmission of pornography to a minor.¹⁶ In so doing, the court expressed skepticism of *all* state regulation of the Internet, noting that “state regulation of those aspects of commerce that by their unique nature demand cohesive national treatment is offensive to the Commerce Clause.”¹⁷ While *Pataki*'s reasoning has been far from universally embraced,¹⁸ the case highlights the ways in which the uncertain bounds of current doctrine can create problems for states attempting to gauge the proper limits of their regulatory reach.

Such unpredictability is at least potentially a serious problem because an absence of clear extraterritoriality standards can lead to error in both directions. Thus, the danger is not merely that states will be allowed to invade the legitimate interests of other states or their citizens through extraterritorial legislation—because, as previously noted, a variety of pressures, including states' own interests in

15 969 F. Supp. 160 (S.D.N.Y. 1997).

16 See *id.* at 163–67.

17 *Id.* at 169.

18 See *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 959 (N.D. Cal. 2006) (summarizing case law rejecting *Pataki*).

cooperation in various arenas, militate against such an outcome in many cases. It is also the flip side of this concern: that courts will unpredictably strike down certain acts of state regulation as extraterritorial even where such regulation is motivated by a defensible concern for the in-state effects of out-of-state conduct.

II. THE COURTS' ROLE

Beyond my call for an integrated standard, most of my differences with Professor Rosen are small. Rosen suggests that primary responsibility for formulating a set of extraterritoriality limits should come not from courts but from Congress or the states themselves.¹⁹ He also recognizes, however, that courts have a valuable role both in policing “egregious” instances of extraterritorial regulation and as “first cut” responders in developing solutions to extraterritoriality problems in the absence of congressional involvement.²⁰ We do not disagree. Some congressional involvement, certainly, is both part of the constitutional scheme and, at least in some situations, desirable. (The fact that at least one prong of extraterritoriality restrictions rests on the dormant Commerce Clause certainly suggests that, at the very least, Congress has the same power to override judicial decisions in this area as it does in other dormant Commerce Clause situations.²¹) At the same time, it is open to question whether Congress is the actor best suited either to formulating extraterritoriality principles or to fleshing out how they should be applied in what are often highly individual and fact-specific contexts. Even more important, to the extent that constitutional provisions such as the Due Process Clause do provide outer limits on states' power to regulate extraterritorially, it is important that such limits be meaningful and clear. That sub-constitutional devices may, in many situations, prevent extraterritoriality issues from arising in the first place does not obviate the need for a clear understanding of constitutional standards in situations where those mechanisms have broken down.

19 See Rosen, *supra* note 1, at 1139–41.

20 See *id.* at 1150–51.

21 It is worthy of note, however, that some commentators have seen the *Edgar* line of cases as rooted in constitutional concerns transcending the dormant Commerce Clause context. See, e.g., 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, 1894–95 (1987).

CONCLUSION

My proposal to integrate and reconcile the current extraterritoriality standards is a relatively modest one. In suggesting that we can most profitably address the problem of extraterritoriality by recognizing correspondences between the regulatory acts of state legislatures and the choice-of-law decisions of state courts, I have not attempted to wrestle with the question of what the substantive outer limits of what states' extraterritorial powers should be, including the much-debated question (on which Professor Rosen has been one of the most thoughtful voices to weigh in) of whether states do and should have the power to regulate the conduct of their own citizens beyond state borders.²² Further, my proposal does not attempt to resolve the exclusivity vs. concurrence debate (though the standard for which I tentatively advocate, which would give more consideration to in-state effects than does the current regime, would certainly recognize that more than one state may have a legitimate interest in regulating behavior in certain circumstances).²³ Finally, my proposal is not aimed at expanding the role of courts beyond that they have currently assumed in moderating extraterritoriality disputes. It is not that courts are always the *best* actors in policing the extraterritoriality arena; it is simply that, to the extent they have a role, it should be sensibly and coherently defined. And that, as I see it, is the real area in which current doctrine could benefit from reform.

²² See, e.g., Mark D. Rosen, "Hard" or "Soft" Pluralism?: Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers, 51 ST. LOUIS U. L.J. 713, 731–38 (2007).

²³ It might be argued, in fact, that the current drift of extraterritoriality doctrine is back toward exclusivity in some respects. This is particularly true in the recent punitive damages cases, as with the Supreme Court's statement in *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408 (2003), that, in assessing whether punitive damages should be granted for non-Utah conduct to non-Utah residents, "the Utah courts, in the usual case, would need to apply the laws of [those parties'] relevant jurisdiction." *Id.* at 421–22; see also Florey, *supra* note 2, at 1095–98 (discussing such cases). A reevaluation of extraterritoriality principles might in fact help moderate this trend.