

MARIJUANA, STATE EXTRATERRITORIALITY, AND CONGRESS

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Abstract: The Trump administration inherits the Obama administration's policy of under-enforcing federal marijuana laws and a nation with a patchwork of divergent state laws. Although allowing diversity and experimentation, such divergence may impose spillover costs to some states. Some states may attempt to address these costs by exercising extraterritorial regulatory powers on their citizens. Although it is unclear and a matter of dispute whether and to what extent states have such extraterritorial authority, this Article shows that it is certain that Congress has power to set the bounds of state extraterritorial regulation, subject to only limited constitutional restraints. The Article then explores several surprising implications of this congressional power. It argues that although Congress would set state extraterritorial powers by means of legislation, most of the considerations informing that legislation would belong to the constitutional domain, not the domain of mere politics. Relying on another work by the author that argues that Congress ought to be governed by *Special Norms* when it engages in constitutional decisionmaking, this Article shows how such Special Norms would operate in relation to Congress's determination of state extraterritorial powers

INTRODUCTION

Although federal law prohibits the possession, sale, and transportation of marijuana,¹ the Obama administration signaled that it would tolerate marijuana in states that legalized its use. Since then, the number of states that permit marijuana has steadily increased, though substantial swaths of the country still do not. In the aftermath of the 2016 election, more than half the states allow marijuana for medical purposes, and seven states (along with the District of Columbia) also permit its recreational use.²

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¹ See Comprehensive Drug Abuse, Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, 1248 (1970) (codified as amended at 21 U.S.C. §§ 801–971). Marijuana is classified as a Schedule I drug. 21 U.S.C. § 812 (2012).

² See Christopher Ingraham, *Marijuana Wins Big on Election Night*, WASH. POST (Nov. 8, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/11/08/medical-marijuana-sails-to-victory-in-florida/> [<https://perma.cc/GR43-6MX3>]; John Wagner & Matt Zaposky, *Spicer: Feds Could Step up Enforcement Against Marijuana Use in States*, WASH. POST (Feb. 23, 2017), <https://>

If the Trump administration continues the Obama administration's under-enforcement of the federal marijuana laws,³ the United States will continue to be governed by a patchwork of divergent state laws. Such diversity across states can provide two benefits well-rehearsed in federalism scholarship, namely experimentation and diversity. As to the first, states can experiment with different regulatory approaches. This is particularly useful where there are empirical uncertainties, such as whether marijuana itself is dangerous, and whether marijuana is a gateway to other more dangerous drugs.

Diversity, the second potential benefit, is frequently conflated with experimentation, but is independent of it. Whereas experimentation typically presumes a future convergence when data reveals the objectively superior policy, diversity anticipates enduring policy divergences that reflect durable differences in political sensibilities across states. There's no reason to think that Utah and Idaho's social conservatism will (or should) shift, any more than we should expect (or hope) that California and Oregon will shed their social progressivism. And lasting regulatory diversity across states can be a normative good. It gives people with different views the option of living in a place that fits their preferences. Regulatory diversity as to divisive social issues also may operate as a pressure valve that helps maintain the social cohesion necessary to preserve a federal union among our country's immense and heterogeneous population.

A patchwork of divergent state marijuana laws also can create costs, however, including spillover effects.⁴ For example, a state's law prohibiting marijuana to guard against impaired driving and addiction can be thwarted if its citizens can simply cross the border and smoke in a neighboring state

www.washingtonpost.com/news/post-politics/wp/2017/02/23/spicer-feds-could-step-up-anti-pot-enforcement-in-states-where-recreational-marijuana-is-legal/ [<https://perma.cc/B57R-VDMA>].

³ Though Attorney General Jeff Sessions has been a longtime critic of marijuana, his testimony during confirmation hearings left it uncertain what precisely he will do once in office. See Tom Hudleston, Jr., *What Jeff Sessions Said About Marijuana in His Attorney General Hearing*, FORTUNE (Jan. 10, 2017), <http://fortune.com/2017/01/10/jeff-sessions-marijuana-confirmation-hearing/> [<https://perma.cc/Q4NZ-A9VM>] (noting that Attorney General Sessions said that he "won't commit to never enforcing federal law" when asked about possible federal involvement in state marijuana markets). Regardless of what happens during the Trump Administration, a future administration might revive the Obama Administration's approach in the event Congress does not amend federal law. States may also attempt to challenge other state efforts to decriminalize marijuana. See Chad DeVeaux & Anne Mostad-Jensen, *Fear and Loathing in Colorado: Invoking the Supreme Court's State-Controversy Jurisdiction to Challenge the Marijuana-Legalization Experiment*, 56 B.C. L. REV. 1829, 1881–96 (2015).

⁴ A multiplicity of divergent laws also makes it more difficult, and hence costly, for citizens to know the applicable law. Divergent regulatory approaches can also lead to genuine legal uncertainty, as when a single transaction or occurrence straddles two states with meaningfully different laws.

that permits recreational marijuana use.⁵ In the other direction, a neighboring state's more restrictive laws can reduce the value of the benefits a regulatorily permissive state hopes to provide its citizens.⁶ Such spillover effects can undercut federalism's benefits of experimentation and diversity, insofar as they reduce the efficacy of each state's distinctive laws.

States can avoid many of their sister states' spillover effects, and thereby bolster the efficacy of their own law, by extending the reach of their law beyond their state's border.⁷ For example, a socially conservative state concerned with impaired driving and addiction might consider prohibiting its citizens from using marijuana even when they are in a state that permits recreational use. Effective enforcement might require that a state aim to apply its laws to the purveyor of the marijuana, even if it be a non-citizen acting in another state.

Whether states have such extraterritorial regulatory powers is a complex doctrinal question that has been the subject of substantial scholarly debate.⁸ The extent of a state's extraterritorial powers is not governed by a single constitutional provision, but turns on multiple complicated doctrines, including due process, the Dormant Commerce Clause, Article IV's Privileges and Immunities Clause, and the right to travel.⁹

In a series of earlier articles I argued that as a matter of positive law, states presently have substantial powers to extraterritorially regulate their citizens, and some (though less) power to extraterritorially regulate non-citizens.¹⁰ These extraterritorial regulatory powers are only presumptive,

⁵ See generally Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855 (2002) (discussing the possibility of "travel-evasion").

⁶ In the context of gun rights, this fuels calls for Reciprocal Concealed Carry laws. See *infra* notes 165–166 and accompanying text.

⁷ Doing so would not eliminate spillover effects, but redistribute them by shifting some of them to a sister state.

⁸ Important contributions include 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, 1064–67 (2009); 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, 487–519 (1992); Seth F. Kreimer, "But Whoever Treasures Freedom . . .": *The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907, 913–17 (1993); 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).

⁹ The Sixth Amendment is also implicated for criminal matters, though this Article does not address it because it focuses on civil regulation. As explained below, the scope of states' extraterritorial powers also implicates the Fourteenth Amendment's Citizenship Clause. See *supra* notes 90–103 and accompanying text.

¹⁰ See Rosen, *supra* note 5, at 911–13; Mark D. Rosen, "Hard" or "Soft" Pluralism?: Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers, 51 ST. LOUIS U. L.J. 713, 744–50 (2007) [hereinafter Rosen, *Hard or Soft Pluralism?*]; Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133, 1143–55 (2010) [hereinaf-

however, insofar as they may be modified by Congress.¹¹ Subject to only limited constitutional constraints, Congress has the final word in determining the states' extraterritorial regulatory powers.¹²

This Article explores several facets of, and implications concerning, Congress's power to determine the bounds of state extraterritorial powers. Part I makes clear that most of the extraterritoriality restrictions that to date have attracted scholarly and judicial attention constrain states, but not Congress.¹³ Part I then identifies the several sources of Congress's power to determine states' extraterritorial powers, and explains the constitutional limitations to which those powers are subject.¹⁴ In so doing, this Article also aims to make a contribution to our understanding of the right to travel.

Part II argues that although Congress would set state extraterritorial powers by means of legislation, most of the considerations that would inform that legislation belong to the constitutional domain, not the domain of ordinary politics.¹⁵ This is because legislation determining states' extraterritorial powers would play a substantial role in building out our nation's system of horizontal federalism, by determining the extent to which states can efficaciously pursue divergent policies in fields as to which federal law does not demand a uniform nationwide approach. To elaborate, a state frequently will be unable to accomplish a constitutionally permissible policy goal if her citizens can free themselves of their home state's regulation simply by entering another state. If the home state cannot apply its law to its traveling citizen so as to preclude "travel-evasion" of a constitutionally permissible policy, then the range of policy options open to the states in our federal union will be limited as a practical matter. Such a federal regime – one where it will be difficult for a state to have efficacious regulations that are stricter than what is allowed by more permissive states – is what elsewhere I have dubbed *Soft Pluralism*.¹⁶ A federal regime of *Hard Pluralism*, by contrast, would allow states to extraterritorially regulate so as to counteract travel-evasion, thereby allowing states to efficaciously regulate wherever federal law does not require nationwide uniformity.¹⁷ In deciding between Hard and

ter Rosen, *State Extraterritorial Powers Reconsidered*]; see also Mark D. Rosen, *Choice-of-Law as Non-Constitutional Federal Law*, 99 MINN. L. REV. 1017, 1058–64 (2015) [hereinafter Rosen, *Choice-of-Law*]; Mark D. Rosen, *Congress's Primary Role in Determining What Full Faith and Credit Requires: An Additional Argument*, 41 CAL. W. INT'L L. J. 7, 21 (2011).

¹¹ Rosen, *State Extraterritorial Powers Reconsidered*, *supra* note 10, at 1142–43.

¹² *Id.* at 1151–52.

¹³ See *infra* notes 27–39 and accompanying text.

¹⁴ See *infra* notes 40–104 and accompanying text.

¹⁵ See *infra* notes 105–120 and accompanying text.

¹⁶ See Rosen, *Hard or Soft Pluralism?*, *supra* note 10, at 715–16.

¹⁷ See *id.* at 716.

Soft Pluralism, federal legislation setting the bounds of state extraterritorial powers would determine the very nature of our federal union, and of what is entailed by national and state citizenship. Deciding between Hard and Soft Pluralism accordingly belongs to the domain of constitutional decisionmaking, not the domain of ordinary politics.

Pivoting from description to prescription, Part III argues that Part II's lesson that congressional determinations of state extraterritorial powers are substantially informed by constitutional considerations should affect the way Congress acts.¹⁸ Part III draws on a work-in-progress of mine that claims Congress ought to be governed by *Special Norms* when it engages in constitutional decisionmaking, in contradistinction to the virtually no-holds-barred norms of Hardball Politics that are permissible in ordinary politics.¹⁹ The Special Norms include the norm of *Proactivity*, which imposes a duty for Congress to act in certain circumstances,²⁰ and the norm of *Explicitness*, which presumptively requires Congress to explicitly consider constitutional issues when they arise.²¹ Finally, Congress's constitutional decisionmaking should be governed by the norm of *Tempered Politics*, rather than Hardball Politics. Tempered Politics encompasses a cluster of attitudinal, behavioral, and substantive guidelines that encourage persuasion and compromise in service of finding consensus, in contrast to the brute majoritarianism that is permissible under the norms of Hardball Politics.²²

In short, the Special Norms structure Congress's constitutional decisionmaking in a manner designed to generate responsible, Constitution-worthy action. The Special Norms aim to harness Congress's unique institutional capacities that account for the value Congress can, and should, add to the multi-institutional process by which our polity renders its constitutional judgments. Although the Special Norms do not dictate a unique answer re-

¹⁸ See *infra* notes 121–204 and accompanying text. By contrast, the scholar who has done the most work identifying Congress's extensive powers to structure interstate relations has assumed that Congress's decisionmaking in this realm would be no different from how Congress operates when deciding mill run political questions. See Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1484 (2007) (writing that Congress would not be “disinterested” in some platonic sense” when deciding interstate matters, but that “members of Congress can be expected to advance their own policy preferences or those of particular interest groups—businesses and residents in their states, perhaps, or powerful national enterprises and associations”).

¹⁹ See Mark D. Rosen, *The Special Norms Thesis: Why Congress' Constitutional Decisionmaking Should be Disciplined by More than the Usual Norms of Politics* 32–55 (unpublished manuscript) (on file with author) [hereinafter Rosen, *Special Norms Thesis*].

²⁰ *Id.* at 57–58.

²¹ *Id.* at 58–63.

²² *Id.* at 63–77.

garding state extraterritorial powers, they eliminate some options that otherwise would be available under Hardball Politics.

I. DISENTANGLING CONGRESS AND THE STATES

It is unsurprising that the extensive scholarly literature considering state extraterritoriality has undertaken its analysis almost exclusively from the vantage point of state governments, examining what states can (and cannot) presently do extraterritorially.²³ Yet that perspective is incomplete, because Congress has substantial powers to determine whether and to what extent states can act extraterritorially.

This Part clarifies Congress's prerogative to set state extraterritorial powers. Section A identifies the several restrictions that constrain states but not Congress.²⁴ Section B then locates the constitutional provisions that give Congress power to determine states' extraterritorial powers.²⁵ Section C explores constitutional limits to which Congress's powers are subject.²⁶

A. Constraints That Limit States, but Not Congress

The 'constitutional' restriction on state extraterritoriality that has received the most attention from courts and scholars is the Dormant Commerce Clause.²⁷ It no doubt owes its prominence to the several Supreme Court cases that have explicitly discussed the issue of extraterritoriality and laid down an apparently clear, categorical prohibition against such state powers.²⁸ In one frequently cited case, for instance, the Court flatly stated that "the 'Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether

²³ See *supra* note 8 (citing several articles regarding states' extraterritorial regulatory powers).

²⁴ See *infra* notes 27–39 and accompanying text.

²⁵ See *infra* notes 40–61 and accompanying text.

²⁶ See *infra* notes 62–104 and accompanying text.

²⁷ Courts and scholars typically refer to the Dormant Commerce Clause as providing a "constitutional" limitation on states. See, e.g., *Edwards v. California*, 314 U.S. 160, 172–73 (1941) (finding a state law to be an "unconstitutional barrier to interstate commerce" under the Dormant Commerce Clause). Dormant Commerce Clause restrictions, however, are better understood as a form of federal common law, insofar as they are judicially created in areas of unexercised Commerce Clause power that accordingly can be legislatively overridden by Congress. See *Rosen, Hard or Soft Pluralism?*, *supra* note 10, at 726–27, 727 n.67; see, e.g., *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003) ("Congress certainly has the power to authorize state regulations that burden or discriminate against interstate commerce.").

²⁸ See, e.g., *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (holding that a Connecticut statute prohibiting an interstate beer distributor from selling to Connecticut clients at higher prices than they charged in surrounding states violated the Commerce Clause); *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982).

or not the commerce has effects within the State.”²⁹ Whether that was ever accurate,³⁰ and what if any of this doctrine remains valid today,³¹ are important questions that courts and scholars are still discussing.³²

These complicated doctrinal questions need not detain us, however, because the Dormant Commerce Clause’s limitations do not constrain Congress. Because Dormant Commerce Clause doctrines are judge-made restrictions on states in areas of unexercised Commerce Clause power, Congress is always free to exercise those Commerce Clause powers by enacting legislation that reverses Dormant Commerce Clause restrictions.³³ So even if Dormant Commerce Clause doctrine prohibited states from regulating commerce outside their borders, federal legislation could lift those limitations.

Professor Seth Kreimer has argued that Article IV’s Privileges and Immunities Clause provides another important limitation on state extraterritoriality.³⁴ Also known as the Comity Clause, it provides “[t]he citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”³⁵ Kreimer argues that a Home State’s attempt to extraterritorially regulate its citizen while they visited another state would run afoul of the Privileges and Immunities Clause, insofar as the visitor would not enjoy the same privileges and immunities as the Host State’s citizens.³⁶ Elsewhere I have argued that Kreimer’s argument is not correct as a matter of black letter law.³⁷ But even if he were right, the Comity Clause would not restrict Congress’s powers to set states’ extraterritorial powers because the Clause’s language by its terms limits states, not Congress.³⁸ Indeed, Pro-

²⁹ *Healy*, 491 U.S. at 336 (quoting *Edgar*, 457 U.S. at 642–43); see Rosen, *State Extraterritorial Powers Reconsidered*, *supra* note 10, at 1126–27.

³⁰ Elsewhere I have suggested not. See Rosen, *supra* note 5, at 919–30; Rosen, *Hard or Soft Pluralism?*, *supra* note 10, at 727–30.

³¹ *See Energy & Env’t Legal Inst. v. Epel*, 793 F.3d 1169, 1174–75 (10th Cir. 2015).

³² This Article is part of a symposium that addresses these questions. See Jessica Berch, *Reefer Madness: How Non-Legalizing States Can Revamp Dram Shop Laws to Protect Themselves from Marijuana Spillover from Their Legalizing Neighbors*, 58 B.C. L. REV. (forthcoming May 2017); Chad DeVeaux, *One Toke Too Far: The Demise of the Dormant Commerce Clause’s Extraterritoriality Doctrine Threatens the Marijuana Legalization Experiment*, 58 B.C. L. REV. (forthcoming May 2017).

³³ See Rosen, *Hard or Soft Pluralism?*, *supra* note 10, at 727 n.67; Metzger, *supra* note 18, at 1480–85; see, e.g., *Hillside Dairy*, 539 U.S. at 66.

³⁴ Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 1000 (2002)

³⁵ U.S. CONST. art. IV, § 2, cl. 1; see Kreimer, *supra* note 34, at 1000.

³⁶ See Kreimer, *supra* note 34, at 1000, 1003.

³⁷ See Rosen, *Hard or Soft Pluralism?*, *supra* note 10, at 733–36. The Comity Clause prevents a Host State from discriminating against its out-of-state visitors. It does not limit a Home State’s powers to regulate its traveling citizens, nor does the Comity Clause prevent a Host State from cooperating with the visitor’s Home State by allowing Home State law to govern a visitor. See *id.*

³⁸ See U.S. CONST. art. IV, § 2, cl. 1.

fessor Gillian Metzger has persuasively argued that Congress has power to license state conduct that otherwise would violate the Privileges and Immunities Clause, as is true of Dormant Commerce Clause restrictions.³⁹

B. Sources of Congressional Authority to Set States' Extraterritorial Powers

Having discussed two restrictions on states that would not carry over to Congress, it is time to identify the affirmative sources of congressional authority to set state extraterritorial powers. There are three: the Commerce Clause, the Effects Clause, and Section Five of the Fourteenth Amendment.⁴⁰

The Commerce Clause undoubtedly is the most obvious source to contemporary constitutionalists. The Commerce Clause's applicability to state extraterritoriality is the flipside of the Dormant Commerce Clause's anti-extraterritoriality doctrine. Yet although Congress likely has substantial authority under contemporary Commerce Clause jurisprudence to regulate extraterritoriality, there are two reasons the Clause cannot ground comprehensive legislation setting states' extraterritorial powers.

First, any activity that Congress regulates under the Commerce Clause itself must qualify as "economic."⁴¹ Thus although a visitor's consumption of a good or service may be within Congress's regulatory authority, her non-economic activities would not. For example, Congress probably could not use the Commerce Clause to extend a Home State's marijuana prohibition to its citizen's marijuana use in a regulatorily permissive Host State if the marijuana were supplied *gratis* by a friend who lives in the Host State.

Second, today's jurisprudence would allow Congress to regulate under the Commerce Clause only if the visitor's economic activity in the Host State "substantially affects interstate commerce."⁴² As to those economic activities that would not satisfy this requirement if undertaken by the Host State's citizens, there will not be Commerce Clause power to regulate the

³⁹ See Metzger, *supra* note 18, at 1486–88 (concluding that "[g]iven the overlap of the two clauses [the Commerce Clause and the Privileges and Immunities Clause], Congress's ability to authorize Dormant Commerce Clause violations by the states would seem to entail that Congress also possesses power to authorize discriminatory state regulations that are currently prohibited by the Privileges and Immunities Clause"). This is not to suggest that Congress's powers in this regard are without limit. See *id.* at 1512–31.

⁴⁰ See Rosen, *Hard or Soft Pluralism?*, *supra* note 10, at 752–57.

⁴¹ *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). Though "economic" does not apply to the first and second prongs taken from *United States v. Lopez*, most state regulations do not apply to the channels (prong one) or instrumentalities (prong two) of interstate commerce. See *United States v. Lopez*, 514 U.S. 549, 559 (1995).

⁴² *Lopez*, 514 U.S. at 560. See the caveat *supra* note 41 as regards *Lopez*'s first and second prongs, as to which the substantially affects interstate commerce requirement does not apply.

visitor unless the spillover effects in their Home State “substantially affect” interstate commerce. Would the bare fact that a visitor’s out-of-state activity undermined their Home State’s law satisfy this requirement? If not,⁴³ then we have identified a second reason why the Commerce Clause cannot be the sole ground for comprehensive federal regulation setting state extraterritorial powers.

There are two other sources of congressional power that are more conceptually and doctrinally suited than the Commerce Clause to setting states’ extraterritorial powers. The constitutional grant most closely allied to determining the scope of states’ regulatory authority is the “Effects Clause,” which is part of the Full Faith and Credit Clause.⁴⁴ The Full Faith and Credit Clause’s first sentence provides that “Full Faith and Credit shall be given in each State to the public Acts . . . of every other State,” and its second sentence states that “Congress may by general Laws prescribe . . . the Effect” of such “Acts.”⁴⁵ The Full Faith and Credit’s language of “public Acts” long has been understood to encompass state legislation,⁴⁶ and also likely includes common law.⁴⁷ Citing the Effects Clause’s plain language, the Supreme Court has said Congress can “prescribe[.]” the “extra-state effect” of a state statute.⁴⁸ Congress has relied on the Effects Clause to enact a few statutes that determine the scope of States’ extraterritorial powers in discrete circumstances.⁴⁹

In short, the Full Faith and Credit Clause explicitly gives Congress power to determine what effect one state’s law is to have in another state. Probably because the Effects Clause is designed to address extraterritoriality, it is not subject to the limitations identified just above that make the Commerce Clause incapable of comprehensively grounding a federal law setting states’ extraterritorial powers.⁵⁰ In fact, the Supreme Court has not

⁴³ The question would then arise as to what other factors must be present to support Commerce Clause regulation of a visitor’s extraterritorial activities.

⁴⁴ Rosen, *Hard or Soft Pluralism?*, *supra* note 10, at 752 (citing U.S. CONST. art. IV, § 1); *see also* Rosen, *Choice-of-Law*, *supra* note 10, at 1093–94.

⁴⁵ U.S. CONST. art. IV, § 1.

⁴⁶ *See Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998).

⁴⁷ Though “public Acts” was not originally understood to include common law, there are powerful reasons to do so post-*Erie*. *See* Elliott E. Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581, 603 (1951) (citing *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 436 (1943)) (“There is a categorical statement by the Supreme Court of the United States that common law is within the protection of the [Full Faith and Credit] clause.”); Rosen, *Choice-of-Law*, *supra* note 10, at 1094 & nn.385–87;

⁴⁸ *Pac. Emp’rs Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 502 (1939).

⁴⁹ *See* Rosen, *State Extraterritorial Powers Reconsidered*, *supra* note 10, at 1141–42 (discussing the Parental Kidnapping Protection Act, codified at 28 U.S.C. § 1738A (2012)).

⁵⁰ *See supra* notes 41–43 and accompanying text.

identified any limits on Congress's Effects Clause powers that derive from the Effects Clause itself.⁵¹ Although Congress's powers under the Effects Clause are constrained by constitutional principles extrinsic to that Clause (as discussed further below), the Effects Clause probably is sufficient in and of itself to be the source of comprehensive federal legislation setting states' extraterritorial powers.

Though the Effects Clause may suffice, it is important to observe that Congress may have yet another source of power to set states' extraterritorial powers, namely Section Five of the Fourteenth Amendment. Section Five grants Congress the "power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment, which thereby includes Section One's references to both state and national citizenship.⁵² Congress's enforcement power under Section Five may include setting states' extraterritorial powers because extraterritoriality is a crucial determinant of the nature of both state and national citizenship.⁵³ As to the nature of state citizenship: it must be determined whether state citizenship includes possibly being subject to the regulatory jurisdiction of one's Home State while in a sister state if one's out-of-state activity risks undermining a Home State policy as to which there is no requirement of nationwide uniformity. As to the nature of federal citizenship: it must be determined whether we are citizens of a nation that has a federal regime of Soft or Hard Pluralism. To wit, are we citizens of a nation of Soft Pluralism, where each citizen of the United States has a right to all "goods and services available in the sister states to which a United States citizen travels?"⁵⁴ Or are we citizens of a nation whose federal union allows for Hard Pluralism, where the fact that every citizen "can, of his own volition, become a citizen of any State of the Union"⁵⁵ matters so much because state citizenship really matters, because (among other reasons) one's home state can extraterritorially regulate to assure the efficacy of state policies?

The point for present purposes is not to decide once and for all the substantive question of whether states should have extraterritorial powers, but to appreciate that whether they do has profound implications for the nature of state and national citizenship. Because extraterritoriality is so

⁵¹ Moreover, "[t]he Court has observed that the Effects Clause gives Congress the power to enact rules regarding the requirements of full faith and credit that vary from those that the Court has identified." Rosen, *Hard or Soft Pluralism?*, *supra* note 10, at 753.

⁵² U.S. CONST. amend. XIV, § 5 (declaring that "[a]ll persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside," and that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States").

⁵³ See *infra* notes 106–120 and accompanying text.

⁵⁴ See Rosen, *Hard or Soft Pluralism?*, *supra* note 10, at 741.

⁵⁵ Slaughter-House Cases, 83 U.S. 36 (16 Wall.), 80 (1872).

connected to citizenship, Congress's enforcement powers under Section Five properly extend to extraterritoriality determinations.

The conclusion that Section Five authorizes extraterritoriality determinations may seem superfluous, on account of Congress's broad Effects Clause powers. Perhaps. Even so, understanding that Congress has powers under Section Five to determine the scope of states' extraterritorial powers may be beneficial. First, Congress's Effects Clause and Section Five powers may be mutually reinforcing, especially if there were any doubts as to whether its Effects Clause powers extend to the profound task of determining the nature of our federal union. Second, because Section Five connects extraterritoriality to citizenship, Section Five can help sustain conceptual clarity as to what is at stake in setting states' extraterritorial powers. Third, though jurisprudence has not yet identified any internal limitations of the Effects Clause, this may be an artifact of the paucity of case law concerning that Clause, on account of its having only been sparsely relied upon by Congress. Were Congress to more heavily lean on the Effects Clause, cases might arise that permit the Court to identify appropriate internal limits to the Effects Clause. Any such limitations would not necessarily carry over to Section Five, which authorizes only the subset of extraterritorial determinations that help determine the nature of state and national citizenship. To put it a bit differently, Congress's Effects Clause and Section Five powers may not be perfectly coincident after all.

It might be thought that the U.S. Supreme Court's conclusions in *City of Boerne v. Flores* as to the "remedial, rather than substantive, nature of" Section Five⁵⁶ would preclude Congress's use of Section Five to set states' extraterritorial powers pursuant to its own substantive views as to state and national citizenship. Yet "[t]his is not a necessary interpretation, however, or even the best one" of *Boerne's* holding.⁵⁷ *Boerne* chastised Congress for aiming to statutorily override an earlier constitutional holding, and used *Boerne* as an opportunity to reiterate *Marbury's* assertion of judicial supremacy over Congress in determining what the Constitution permits.⁵⁸ Nothing in *Boerne's* reasoning suggests Congress cannot come to, and act upon, its own substantive understandings of the Fourteenth Amendment where the Court has not yet offered its own. And it would be unfortunate were *Boerne* so extended. Where Congress is the first-mover in relation to a constitutional question, its constitutional input should be solicited, not quashed. Congress is a coordinate branch of the federal government, and its many distinctive institu-

⁵⁶ *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

⁵⁷ *Id.* at 528. The irony of my use of this quotation for this purpose is intentional.

⁵⁸ *See id.* at 527–29.

tional characteristics can add important value within the multi-step and multi-institutional process through which our polity comes to its ultimate constitutional judgments.⁵⁹

The proposition that *Boerne* does not disable Congress from rendering its own substantive constitutional judgment where the Court has not yet spoken leaves unanswered the question of how much deference courts should give to Congress's constitutional judgment. Contemporary jurisprudence and scholarship chronicle many factors that are relevant to setting the appropriate level of judicial deference,⁶⁰ and this Article does not purport to answer that question in relation to Section Five. This much can be said, however: Congress's compliance with the Special Norms ought to increase the *deference-worthiness* of Congress's constitutional judgment.⁶¹

C. Constitutional Limits on Congress

Having identified the constitutional sources of Congress's authority to set states' extraterritorial powers, it is time to consider the several constitutional limits to those powers. These constitutional limits restrict the states as well,⁶² though several conceivably could apply differently to the federal government.⁶³

To be clear, the goal here is not to identify the precise metes and bounds of these constitutional constraints, but to flag the constitutional considerations that would be applicable to Congress's extraterritorial determinations. The Supreme Court has not yet determined the precise limits of several of these constitutional limitations. A consequence of this is that Congress should seriously address these constitutional considerations if⁶⁴ and when it takes up the question of states' extraterritorial powers.

⁵⁹ See Rosen, *Hard of Soft Pluralism?*, *supra* note 10, at 750–52; Rosen, *Special Norms Thesis*, *supra* note 19, at 13–16.

⁶⁰ See Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1582–96 (2005). See generally, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (providing an overview and analysis of judicial review).

⁶¹ See Rosen, *Special Norms Thesis*, *supra* note 19, at 4.

⁶² *Contra* notes 27–39 (considering limits that apply to states but not to Congress).

⁶³ See Rosen, *supra* note 60, at 1527–38 (considering four approaches to applying limits differently to the federal and state governments).

⁶⁴ Under some circumstances Congress may be obligated to address state extraterritoriality. In other words, though Congress typically is master of its legislative agenda, whether Congress addresses state extraterritoriality may not be a matter of unfettered discretion. See *infra* notes 135–141 and accompanying text.

1. Due Process

The first constitutional limitation to consider is due process. A substantial body of case law considers whether states can apply their laws extraterritorially. Although due process certainly imposes some limitations, it is clear that a state's extraterritorial application of its law is not *per se* unconstitutional.⁶⁵ The Supreme Court has upheld the application of a Home State's law to its citizens when they were outside the Home State's borders,⁶⁶ and even the application of a state's law to the out-of-state conduct of a non-citizen.⁶⁷ Relying on these and other cases, the Restatements and Model Codes forthrightly recognize that extraterritoriality is not *per se* inconsistent with due process.⁶⁸

More specifically, case law requires a state to have "a significant contact . . . creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."⁶⁹ As I have shown elsewhere, citizenship on its own has sufficed to give the Home State adequate interest to regulate its citizens' out-of-state activities for purposes of the Due Process Clause, at least when those activities have some effects in the Home State.⁷⁰ Although the case law regarding non-citizens is less well-developed, it is clear that

⁶⁵ See Rosen, *Hard or Soft Pluralism?*, *supra* note 10, at 718–25; Rosen, *Extraterritoriality and Political Heterogeneity*, *supra* note 10, at 882–91.

⁶⁶ See *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941); see also Rosen, *Hard or Soft Pluralism?*, *supra* note 10, at 719 (discussing *Skiriotes*).

⁶⁷ See *Strassheim v. Daily*, 221 U.S. 280, 281–82 (1911); see also Rosen, *Hard or Soft Pluralism?*, *supra* note 10, at 719 (discussing *Strassheim*).

⁶⁸ The Restatement (Third) of Foreign Relations Law provides that States "may apply at least some laws to a person outside [State] territory on the basis that he is a citizen, resident, or domiciliary of the State." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 n.5 (AM. LAW INST., 1987). Directed to the criminal context, the Model Penal Code provides that State A may impose liability if "the offense is based on a statute of this State that expressly prohibits conduct outside the State . . ." MODEL PENAL CODE § 1.03(1)(f) (AM. LAW INST., 1962). The Model Penal Code affirms that State A has extraterritorial legislative jurisdiction even if the activity it prohibits occurs in a State in which the activity is permissible. *Id.* § 1.03(2). The major limitation identified by the Model Penal Code is that the regulated conduct must "bear[] a reasonable relation to a legitimate interest of [the regulating] State . . ." *Id.* § 1.03(1)(f). The Comment states that the "reasonable relation to a legitimate interest" requirement "expresses the general principle of the fourteenth amendment limitation on state legislative jurisdiction." See *id.* § 1.03 cmt. 6.

⁶⁹ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981)).

⁷⁰ See *Shutts*, 472 U.S. at 842 n.24 (Stevens, J., concurring in part and dissenting in part) (observing that neither party in the case "nor the Court contends that Kansas cannot constitutionally apply its own laws to the claims of Kansas residents, even though the leased land may lie in other States and no other apparent connection to Kansas may exist"); Rosen, *Extraterritoriality and Political Heterogeneity*, *supra* note 10, at 871–76.

extraterritorial regulation of noncitizens also is not *per se* unconstitutional.⁷¹ Courts can be expected to draw upon several due process doctrines that police adjudicatory jurisdiction (probably the most obvious candidate being purposeful ailment) in determining when extraterritorial regulations may be applied against non-citizens, even though adjudicatory and regulatory jurisdiction are conceptually and doctrinally distinct.⁷² This Article identifies an additional consideration that may be relevant to due process's limits on regulatory jurisdiction, though it has no bearing on adjudicatory jurisdiction.⁷³

The Supreme Court's due process jurisprudence in relation to extraterritoriality has been developed in the context of challenges to states' actions. The question arises as to whether these Fourteenth Amendment-based restrictions on states would carry over to the Fifth Amendment's due process limitations on Congress.⁷⁴ Though there are strong reasons why constitutional doctrines concerning horizontal federalism might vary depending on whether the federal government or a state undertook the legal challenge,⁷⁵ two considerations suggest that Congress likely would be held to the same due process limits on extraterritoriality that the Court has applied to the states. First, the Court lately has resisted differentiating between states and the federal government in regard to constitutional restrictions, preferring instead to treat limits that apply to more than one level of government in a "one-size-fits-all" rather than a "tailored" manner.⁷⁶ Second, the Fourteenth Amendment restriction the Court has identified seems equally appropriate to Congress in this context. Congress, like the states, should not extend a

⁷¹ See *supra* note 67 and accompanying text (citing support for extraterritorial regulation of non-citizens); see also *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 323 (1976) (applying a California dram shop law to a Nevada tavern keeper for drinks served in Nevada to a California citizen).

⁷² See *Hague*, 449 U.S. at 317, 330 n.23 (plurality opinion) (noting that "[t]he Court has recognized that examination of a State's contacts may result in divergent conclusions for jurisdiction and choice-of-law purposes") (citing *Kulko v. Superior Court of California*, 436 U.S. 84, 98 (1978)).

⁷³ Namely, a duty for states to support their sister states. See *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 159 (1932) (requiring one state to apply another's different law because "[i]f this were not so . . . the effectiveness of the [sister state's] act would be gravely impaired"); see also *infra* note 196 and accompanying text.

⁷⁴ See *Rosen*, *supra* note 60, at 1582–90 (considering the impact of malfunctions in the representative process at the state and federal levels on the need to tailor constitutional principles at different levels). But see *infra* note 76 and accompanying text.

⁷⁵ See *Rosen*, *supra* note 60, at 1583–87.

⁷⁶ See *id.* at 1516 (distinguishing "one-size-fits-all" from "tailoring"); see also, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 765–67, 784–85 (2010) (holding that Second Amendment restrictions apply in the same way to federal and state governments); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226–27 (1995) (announcing the principle of "congruence between the standards applicable to federal and state racial classifications"). But see *Rosen*, *supra* note 60, at 1557–80.

state's law beyond its borders if this would be "arbitrary . . . or fundamentally unfair."⁷⁷ Perhaps, however, a reviewing court should give more deference to Congress's judgment than to a state's when applying this standard, particularly if there are indicia of deference-worthiness,⁷⁸ insofar as congressional action eliminates concerns that externalities are being imposed on unrepresented outsiders.⁷⁹

2. The Right to Travel, and the Nature of Citizenship

A second constitutional constraint that may apply to federal law setting the bounds of state extraterritoriality is the right to travel. I say *may* because the Court has never held that the right to travel applies to extraterritorial legislation designed to secure the efficacy of a Home State's law. No case has held that State A's effort to bar its citizen from doing in State B what State B allows its own citizens implicates the right to travel.⁸⁰ Nor does this sort of extraterritorial regulation run afoul of any of the "three different components" of the right to travel that the U.S. Supreme Court identified in *Saenz v. Roe* in 1999, the Court's most recent right to travel decision.⁸¹ To wit, federal legislation authorizing a Home State to extraterritorially regulate so it can secure the efficacy of its distinctive law does not deny [1] the right of a citizen of one State to enter and to leave another State, violate [2] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, or [3] for those travelers who elect to become permanent residents, undermine the right to be treated like other citizens of that State.⁸² Simply put, a state's extraterritorial regulation of its own citizens interferes with none of the three components that *Saenz* ascribes to the right to travel.

Notwithstanding *Saenz*, Professor Kreimer has forcefully argued that the right to travel limits the degree to which State A can regulate its citizens

⁷⁷ See *Shutts*, 472 U.S. at 818 (internal quotation omitted) (quoting *Allstate*, 449 U.S. at 326) (Stevens, J., concurring in part and dissenting in part)).

⁷⁸ For example, compliance with the Special Norms, or at least evidence that Congress specifically considered the constitutional question and rendered a constitutional decision. See Rosen, *Special Norms Thesis*, *supra* note 19, at 4.

⁷⁹ See Rosen, *supra* note 60, at 1583–87; see also Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 821–23 (2006) (arguing that courts sometimes give more deference to Congress than the states when applying the formally identical legal test).

⁸⁰ See Rosen, *Extraterritoriality and Political Heterogeneity*, *supra* note 10, at 913–14; see also Kreimer, *supra* note 34, at 1008 (acknowledging that no case has held that extraterritorial regulation implicates the right to travel).

⁸¹ See *Saenz v. Roe*, 526 U.S. 489, 500 (1999); Rosen, *Hard or Soft Pluralism?*, *supra* note 10, at 736–37.

⁸² See *Saenz*, 526 U.S. at 500.

when they are located in a sister-state.⁸³ In his view, the value of the right to travel would be largely gutted if a visitor were still governed by her Home State's law.⁸⁴ Elsewhere I have explained at length that Kreimer's view is not supported by the case law.⁸⁵ But as I also have previously stated, Kreimer's approach is conceptually plausible,⁸⁶ and our current right to travel doctrine cannot be safely assumed to be settled because, among other reasons, there is not a societal consensus regarding extraterritoriality embodied either in widespread practice or broad based acceptance.⁸⁷ For these reasons, Kreimer's position is fairly characterized as a plausible prescriptive argument, even if it is not descriptive of present doctrine.

Because the right to travel is plausibly implicated by state extraterritoriality, and because it cannot be safely assumed that *Saenz's* doctrine has reached a stable final resting state, it would be appropriate for Congress to forthrightly consider what if any implications it believes the right to travel has on state extraterritoriality.⁸⁸ Part III shows that Professor Kreimer's view is not the only plausible approach, as it sketches the Special Norms' decisional framework that Congress ought to use when considering the scope of state extraterritoriality.⁸⁹ Before doing so, however, this Article addresses a few more matters concerning the right to travel that provide doctrinal and conceptual clarity, and that bolster the position that Congress has a crucial constitutional decisionmaking role as regards states' extraterritorial powers.

Though the right to travel is a long recognized constitutional principle, the Court has labored long and hard to locate its source. For some time the

⁸³ See Kreimer, *supra* note 8, at 914–17.

⁸⁴ See *id.* at 915.

⁸⁵ See Rosen, *Extraterritoriality and Political Heterogeneity*, *supra* note 10, at 913–19.

⁸⁶ See Rosen, *Extraterritoriality Reconsidered*, *supra* note 10, at 1137 n.17.

⁸⁷ See Rosen, *Hard or Soft Pluralism?*, *supra* note 10, at 738–40 (“[A]lthough states have been regulating their citizens’ extraterritorial conduct from the earliest days of our country’s history, the practice has not been widespread and has not received considerable attention. There accordingly is not a societal consensus concerning extraterritorial regulation embodied either in widespread practice or broad-ranging acceptance that this is a legitimate (albeit unusual) form of state regulation. Nor has the Supreme Court ever directly confronted the constitutionality of a home state’s effort to extraterritorially regulate its citizens to ensure that they do not seek to circumvent the home state’s policies.”).

⁸⁸ Though extraterritoriality does not fall into any of *Saenz's* three components, see *supra* note 81 and accompanying text, extraterritoriality implicates national citizenship, which *Saenz* connected to the third component. Further, the *Saenz* Court explicitly stated that the third component “is a limitation on the powers of the National Government as well as the States,” and has applied its restrictions identically to both the federal and state government. *Saenz*, 526 U.S. at 507–11. *But see* Rosen, *supra* note 60, at 1542–43 (criticizing *Saenz's* refusal to give serious consideration to tailoring).

⁸⁹ See *infra* notes 121–204 and accompanying text.

Court grounded the right to travel in the Equal Protection Clause,⁹⁰ though *Saenz* appears to have rejected this approach.⁹¹ *Saenz* sourced the right to travel's second component in Article IV's Privileges and Immunities Clause,⁹² the third component in the Fourteenth Amendment's Citizenship Clause,⁹³ and decided that it "need not identify the source of" the first component.⁹⁴

In other words, two centuries of Supreme Court jurisprudence has led to the conclusion that an unenumerated right to travel is composed of two distinct enumerated constitutional components (one from Article IV, the other from the Fourteenth Amendment) and one as-of-yet textually unidentified component. Furthermore, the Court has concluded that the right to travel sometimes restricts only the states,⁹⁵ sometimes constrains the federal government as well,⁹⁶ and sometimes reaches individuals too.⁹⁷ This doctrinal hodgepodge, both as to the right to travel's constitutional source and the right's consequences, is pretty strange.

There is a more straightforward doctrinal approach.⁹⁸ All three components of what the Court calls the right to travel are naturally conceptualized as the entailments of federal and state citizenship in our federal union. This conclusion comfortably aligns with two-thirds of the Court's jurisprudence, which grounds the right to travel's second component in the constitutional text concerning the privileges and immunities attaching to state citizenship,

⁹⁰ See *Shapiro v. Thompson*, 394 U.S. 618, 632–3 (1969); see also *Saenz*, 526 U.S. at 499 (recognizing that *Shapiro* "held that a classification that had the effect of imposing a penalty on the exercise of the right to travel violated the Equal Protection Clause").

⁹¹ See *Saenz*, 526 U.S. at 500–04 (not grounding any of the three components of the right to travel in the Equal Protection Clause).

⁹² See *id.* at 501.

⁹³ See *id.* at 502–04.

⁹⁴ See *id.* at 501.

⁹⁵ This is true of the second component, which is none other than Article IV's Privileges and Immunities Clause. See *supra* notes 35–39 and accompanying text.

⁹⁶ See Rosen, *Hard or Soft Pluralism?*, *supra* note 10, at 752–57.

⁹⁷ See *Saenz*, 526 U.S. at 498 (noting that the right to travel's first component is "assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all") (internal quotation omitted) (quoting *Shapiro*, 394 U.S. at 643).

⁹⁸ It is an interesting question as to whether doctrinal simplicity is a normative good. Put differently, does Occam's razor always carry over to doctrinal analysis? See generally Alan Baker, *Simplicity*, STAN. ENCYCLOPEDIA PHILOSOPHY, <https://plato.stanford.edu/archives/sum2011/entries/simplicity/#OntPar> [<https://perma.cc/SA3G-RY6N>] (last visited Mar. 22, 2017) (discussing Occam's Razor, the principle of parsimony, and why "[m]ost philosophers believe that, other things being equal, simpler theories are better"). I myself am skeptical, though this is not the place to fully explore this issue. Suffice it to say that doctrinal simplicity is not the only consideration favoring the reorientation suggested above in text. Improved conceptual clarity, the second consideration I offer, seems more important.

and the right-to-travel's third component in the Fourteenth Amendment's national citizenship clause. My claim suggests a source for the as-of-yet textually ungrounded first component: the national citizenship clause, on the theory that an entailment of our national citizenship is that everyone can leave their Home State and enter any other.⁹⁹

Put another way, the right to travel does not stand above federal and state citizenship as *Saenz* would have it, but derives from them. Grounding the unenumerated right to travel in (enumerated) federal and state citizenship is a simpler, more straightforward doctrinal approach than is *Saenz*'s chimeric amalgam in which two textually enumerated rights, in conjunction with an unenumerated right, are said to all together constitute an unenumerated, and conceptually prior, right to travel.¹⁰⁰

There are conceptual advantages to understanding the right to travel as textually deriving from, and being an entailment of, national and state citizenship in our federal union. Citizenship is the more apt frame because it provides space for considering not only the individual, but also the interests of states and the federal union.¹⁰¹ Citizenship invites these additional considerations because citizenship is the amalgamation of properties that determine the individual's relation to his or her polity. The right to travel, by contrast, is a linguistic frame that is oriented to the individual, and for that reason may slight considerations of states and the federal union. For this reason, the right to travel's frame may operate so as to put a *sub rosa* thumb on the scales in favor of the individual.

The topic of extraterritoriality illustrates citizenship's superior conceptual frame. Analyzing the normativity of extraterritoriality by only considering how it impacts the individual traveler is incomplete. Extraterritoriality is a determinant of the extent to which states can have efficacious divergent policies where federal law does not demand nationwide uniformity. As such, extraterritoriality is a determinant of the degree to which states are meaningfully empowered sub-federal polities. Insofar as it determines whether we have a regime of Hard or Soft Pluralism,¹⁰² the scope of states' extraterrito-

⁹⁹ See U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside")

¹⁰⁰ In this sense, *Saenz* echoes Justice Douglas' much maligned approach to finding a constitutional right to privacy in *Griswold v. Connecticut*, 381 U.S. 479, 481–86 (1965).

¹⁰¹ The analysis above in text assumes that word choice can influence outcomes by framing the way an issue is analyzed. See generally Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981) ("[D]escrib[ing] decision problems in which people systematically violate the requirements of consistency and coherence, and [tracing] these violations to the psychological principles that govern the perception of decision problems and the evaluation of options.").

¹⁰² See *supra* notes 15–17 and accompanying text.

rial powers literally shapes the very nature of our federal union. Surely these structural implications of extraterritoriality ought to be taken into account, along with extraterritoriality's effects on the traveling individual and those individuals with whom he or she interacts, when assessing the normativity of extraterritoriality. The right to travel's more individual-oriented frame risks systematically undervaluing, or even fully overlooking, extraterritoriality's impact on states and our federal union.

Finally, there may be institutional benefits to reorienting extraterritoriality analysis from the right to travel to citizenship. Insofar as extraterritoriality determines whether we have a federal union that allows for Hard Pluralism or only Soft Pluralism, extraterritoriality quite literally implicates what national citizenship in the United States means. When the U.S. Supreme Court first confronted national citizenship's entailments in the *Slaughter-House Cases* in 1872 it mostly punted, concluding "we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so."¹⁰³ The Court has done virtually nothing since to further flesh out national citizenship's entailments,¹⁰⁴ and has given virtually no attention to whether our federal union requires Soft Pluralism or allows Hard Pluralism. Extraterritoriality's connection to citizenship brings to mind *Slaughter-House's* acknowledgment that we have yet to fully understand what national citizenship entails. And this bolsters the case that Congress has room to formulate its own views on the constitutional issues that inform extraterritoriality.

II. EXTRATERRITORIALITY AND CONSTITUTIONAL DECISIONMAKING

Part I explained the several sources of Congress's constitutional authority to regulate state extraterritoriality, as well as the constitutional limits to which those powers are subject. This Part unpacks an important implication of Part I's analysis. Many considerations that inform *whether* Congress should enact federal legislation regarding state extraterritoriality, and if so *what* it should enact, belong to what might be called the *constitutional domain*, not just the domain of *ordinary politics*. As a result, Congress must engage in substantial *constitutional decisionmaking* in connection with state

¹⁰³ *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 78–79. Though the decision ultimately "venture[d] to suggest *some* which own their existence to the Federal government, its National character, its Constitution, or its laws," its enumeration clearly was not intended to be comprehensive. *Id.* at 79 (emphasis added).

¹⁰⁴ *Saenz v. Roe* appears to be the only other case where the Court has taken up the question. See *Saenz*, 526 U.S. at 502 n.15.

extraterritoriality. Part III fleshes out important implications of the fact that Congress's decisions in relation to state extraterritoriality are substantially informed by constitutional considerations.¹⁰⁵

It is easy to overlook the unusually broad scope of Congress's constitutional decisionmaking in relation to state extraterritoriality. To be sure, "all congressional action contains at least one constitutional ingredient: a preliminary determination that Congress has constitutional power to undertake the action."¹⁰⁶ Much of Part I addressed this threshold power question, a question that appropriately precedes *all* congressional action. Most of the time, however, after Congress decides it has power to act, the subsequent decisions of *whether* it should act, and if so *what* it should do, are informed predominantly, if not exclusively, by sub-constitutional policy considerations.¹⁰⁷ As regards to state extraterritoriality, however, the *whether* and *what* determinations are substantially informed by constitutional considerations. It is in this respect that constitutional considerations play a far larger role than usual when it comes to state extraterritoriality.

To understand the prominence of constitutional considerations in relation to the *whether* and *what* of state extraterritoriality, consider the following not-too-fanciful thought experiment. Nevada and Utah share a border, and marijuana use is permitted in the latter but not the former. Utah does not want its citizens using marijuana in neighboring Nevada, or elsewhere, so it enacts a law proscribing its citizens from so doing, and sets substantial civil penalties for any violations. Utah also prohibits the sale or gift of marijuana to any Utah citizen, regardless of where the sale or gift occurs. Many states hostile to marijuana enact legislation similar to Utah's.

If this occurred, Utah and its followers would have created a regime of Hard Pluralism. Because neither Supreme Court jurisprudence nor settled practice determines whether our federal union allows Hard Pluralism or requires Soft Pluralism, those state cannot be said to have plainly acted unconstitutionally.¹⁰⁸ This does not mean, however, that they would have the last word on the subject. As explained above in Part I, Congress has power to ratify their extraterritorial assertions, reverse them, or limit them.¹⁰⁹

Now consider: *must* Congress do anything? Under some circumstances the answer would appear to be yes, on account of Congress's substantive constitutional views concerning the choice between Hard and Soft Plural-

¹⁰⁵ See *infra* notes 121–204 and accompanying text.

¹⁰⁶ See Rosen, *Special Norms Thesis*, *supra* note 19, at 13.

¹⁰⁷ See *id.*

¹⁰⁸ See Rosen, *Hard or Soft Pluralism?*, *supra* note 10, at 744–50.

¹⁰⁹ See *supra* notes 40–104 and accompanying text.

ism. In other words, the determination of *whether* Congress should act might belong to the domain of constitutional decisionmaking.

To see why, first assume that Congress believes our federal union demands Soft Pluralism. If so, then Utah and its followers have acted unconstitutionally in a realm as to which it is within Congress's power to remedy. This naturally raises the question of whether there exists a constitutional duty for Congress to immediately act. The answer is probably not, because there are other governmental institutions that can be expected to step in—courts. What if, however, courts uphold the state regulations, on the view that the Dormant Commerce Clause does not prohibit non-protectionist extraterritorial regulations? States would be acting in a manner inconsistent with Congress's understanding of what horizontal federalism entails. This would be a constitutional error within Congress's power to correct, and that no other governmental institution stands ready to rectify. In this circumstance, the proposition that Congress has a constitutional duty to act becomes dramatically more colorable.

In other words, this is an instance where the *whether* question as regards state extraterritoriality—the question of whether Congress should enact legislation making clear that states cannot extraterritorially regulate—is determined by the interaction of constitutional considerations (Congress's substantive view that ours is a federal union of Soft Pluralism) and other governmental institutions' (states' and courts') acts and omissions. Unlike ordinary circumstances, where Congress's legislative agenda is entirely determined by political considerations and fully within Congress's discretion, the *whether* question regarding state extraterritoriality thus may depend upon constitutional considerations that potentially can impose a duty on Congress to act.¹¹⁰

The same conclusions emerge if Congress thinks our federal union allows for Hard Pluralism. If so, then Utah and its followers have acted consistently with Congress's constitutional view. Must Congress do anything? Certainly not.¹¹¹ What if, however, opponents of those state regulations convinced a court to strike it down on Dormant Commerce Clause grounds? Such judicial action would preclude the sort of state regulation that Congress believes to be constitutionally consistent with our federal union. Congress has the power to counteract this wrongful abridgment of state powers, and is the only governmental institution that stands ready to do so. This is another instance where the *whether* question with respect to state extraterri-

¹¹⁰ To be clear, even if circumstances were such that the *whether* question was not answered by a constitutional duty to act, Congress would be free to act upon its own discretion.

¹¹¹ Though there would be nothing wrongful were Congress to pass legislation that ratified and confirmed states' extraterritorial powers.

toriality is informed by constitutional considerations that may lead to the conclusion that Congress has a constitutional duty to act.

The analysis so far has considered the constitutional questions Congress would face from two vantage points: if Congress believed our federal union required Soft Pluralism or permitted Hard Pluralism. There is, however, a third possibility: Congress may not yet have a view on the matter. There is nothing *per se* problematic with this final possibility, for Congress need not (and clearly does not) have a well-formulated view on all possible constitutional questions. Under certain circumstances, Congress never need adopt a position. This may be true, for example, if no states wanted to extraterritorially regulate.¹¹² After all, state inaction regarding extraterritoriality does not run afoul of any constitutional position concerning the nature of our federal union and the meaning of national and state citizenship. State inaction is consistent with Soft Pluralism, and does not violate Hard Pluralism, which does not *require* that states extraterritorially regulate.

If states began to extraterritorially regulate, however, Congress at some point would be obligated to determine its constitutional view as to whether ours is a federal union of Soft or Hard Pluralism. This duty to formulate its constitutional position would not arise immediately upon the first state's attempt to regulate extraterritorially. Though Congress would have the power to act at that time, or even before any state has attempted to extraterritorially regulate, there would be nothing amiss for Congress to initially do nothing, and to allow courts to be the first governmental institutions to consider whether states have extraterritorial powers.

At some point after courts gave their answers, however, Congress has a duty to formulate its own view as to the constitutional question. This duty is a consequence of Congress's ultimate powers regarding state extraterritoriality. Once the combination of state action and judicial decision has the effect of creating a federal union of either Soft or Hard Pluralism, it would be incumbent on Congress to decide whether it concurs with the decision, in which case it need do nothing further,¹¹³ or if it disagrees, in which case it would be obligated to act so as to correct what it understands to have been a mistake.

At this point I have shown that the *whether* question regarding state extraterritoriality may be substantially determined by constitutional ques-

¹¹² This is not the same thing as no state extraterritorially regulating. The statement above in text would not apply to a circumstance where states wanted to extraterritorially regulate their citizens but did not because they believed they lacked the power to do so. See *infra* notes 138–140 and accompanying text.

¹¹³ Though Congress could act by either affirming or modifying the regime that has come into existence.

tions. Of course the substance of Congress's action—the *what* question regarding state extraterritoriality—also will be primarily determined not by mere political preferences, but by several constitutional considerations. The first is Congress's view that our federal union, and derivatively what national and state citizenship entail, requires soft pluralism or allows for Hard Pluralism. And if Congress decided upon the latter, it also would have to take account of due process's appropriate limits. Although due process provides the Home State significant berth to extraterritorially regulate its own citizens if their out-of-state action risks undermining the Home State's policy, important unresolved questions remain regarding a state's powers to extraterritorially regulate a non-citizen.

The proposition that Congress could correct judicial decisions concerning state extraterritoriality might seem puzzling in light of *Marbury v. Madison*. Yet this congressional power is wholly unproblematic, and indeed conventional, with respect to Dormant Commerce Clause decisions. Likewise, the Court has indicated that Congress can make alterations under its Effects Clause power to what the Court determines is demanded by the Full Faith and Credit Clause.¹¹⁴ Consistent with Congress' power as regards Dormant Commerce Clause jurisprudence and the judicial holdings concerning the Full Faith and Credit Clause, Professor Metzger has forcefully argued that Congress can authorize state regulations that otherwise would violate the Privileges and Immunities Clause.¹¹⁵

Congressional power to revise judicial rulings concerning state extraterritoriality is a wise epistemic and political division of labor. Courts have well-catalogued institutional characteristics that permit deep dives in the normative domain that is constitutionalism.¹¹⁶ Deep and careful judicial analysis of concrete controversies can be expected to clarify the multiplicity of considerations that are in play. But it is to be expected that those multiple factors sometimes will point in divergent directions, with the result that some decisions will require a judgment as to how those competing factors are to be reconciled or traded-off. In regard to such circumstances, considerations of democratic self-government and institutional synergy strongly support an institutional architecture in which the final decisionmakers are the more accountable political branches of government that can work with the normative clarifications generated by the judiciary's preliminary forays.

¹¹⁴ See Rosen, *Hard or Soft Pluralism?*, *supra* note 10, at 753.

¹¹⁵ See Metzger, *supra* note 18, at 1486–89.

¹¹⁶ See generally Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66 (2013) (explaining the benefits of allowing courts to be the initial institutions to consider constitutional questions, subject to legislative oversight).

It must be acknowledged that the outer bounds of Congress's authority to revise judicial doctrines concerning state extraterritoriality are uncertain as a matter of black letter law. The Court's discussion concerning Congress's revisionary powers under the Effects Clause was dicta, and the Court has never addressed Congress's revisionary powers regarding the Privileges and Immunities Clause, the issue explored by Professor Metzger.¹¹⁷ Further, the U.S. Supreme Court gave short shrift to Congress's revisionary powers when it addressed the Fourteenth Amendment's national Citizenship Clause in *Saenz v. Roe* in 1999.¹¹⁸

The absence of congressional revisionary authority regarding state extraterritoriality, however, would give rise to a political architecture that created surprising and unwise institutional incentives. As explained in Part I, Congress has substantial powers to regulate state extraterritoriality, probably most readily under its authority under the Effects Clause to determine the "Effect" that one state's law has in a sister state.¹¹⁹ If Congress is without power to revise judicial decisions as to what full faith and credit requires, then congressional inaction risks ceding its constitutional powers. To avoid losing its prerogative to determine the scope of states' extraterritorial powers, Congress would have to act before courts did. A "use-it-or-lose-it" architecture that encouraged Congress to race so as to be the first-mover is undesirable for many reasons. Chief among them is that such an incentive system puts at risk the beneficial epistemic division of labor just described, under which Congress can rely on the normative clarifications that emerge from the judiciary's deep-dives when Congress makes the ultimate norma-

¹¹⁷ See Metzger, *supra* note 18, at 1493–98.

¹¹⁸ *Saenz v. Roe*, 526 U.S. 489, 499 (1999). At issue in that case was the constitutionality of a California law that limited certain welfare benefits that new California residents would receive for one year upon their arrival in California. After ruling that the state law violated the right to travel, the Court considered whether congressional approval of such durational requirements mattered. The Court thought the question was "readily answered, for we have consistently held that Congress may not authorize the States to violate the Fourteenth Amendment. Moreover, the protection afforded to the citizen by the Citizenship Clause of that Amendment is a limitation on the powers of the National Government as well as the States." *Id.* at 507–08. Neither of these unexceptional observations addresses, much less answers, Congress's revisionary authority. After all, congressional power to authoritatively determine what citizenship entails neither denies that the Citizenship Clause limits the National Government nor presupposes that Congress can authorize the States to act unconstitutionally. Rather, revisionary authority goes to the question of which institution, Congress or the Court, has the final authority to determine what a particular constitutional provision (the Citizenship Clause) requires. Though it plausibly could be argued that the Court's holding *sub silentio* assumed Congress did not have that power, it seems better to conclude that the *Saenz* Court simply did not consider, or answer, the question.

¹¹⁹ See *supra* notes 44–51 and accompanying text.

tive judgment as to how those judicially-clarified competing considerations should be reconciled or traded-off.¹²⁰

III. HOW THE SPECIAL NORMS SHOULD STRUCTURE CONGRESS'S DECISIONMAKING CONCERNING EXTRATERRITORIALITY

As Parts I and II explained, the considerations that inform Congress's determinations regarding state extraterritoriality are substantially, perhaps overwhelmingly, of constitutional dimension. Although congressional action always requires a threshold constitutional judgment that Congress has power to act, constitutional considerations are far more pervasive in the case of state extraterritoriality. This is because most of the time, once it has been decided that Congress has constitutional power to act, non-constitutional policy considerations alone determine *whether* Congress should act and, if so, *what* it should do. With respect to state extraterritoriality, however, these *whether* and *what* determinations are substantially informed by constitutional considerations. Furthermore, Congress's power to set the scope of state extraterritoriality frequently, perhaps always, survives judicial decisions that address the question.¹²¹

Distinct from the descriptive claims advanced in Parts I and II, it is fair to inquire whether Congress's constitutional decisionmaking responsibilities in relation to state extraterritoriality are cause for celebration or concern. The underlying question is whether Congress is institutionally capable of engaging in quality, responsible constitutional decisionmaking. There are many skeptics, and there indeed are real reasons for concern.¹²² Yet David Currie's series of books *The Constitution in Congress* depicts a sustained era during which Congress appears to have engaged in serious and responsible constitutional decisionmaking.¹²³ Currie's work helps us to avoid the fallacy of mistaking what is for what must be.

¹²⁰ See *supra* notes 116–118 and accompanying text.

¹²¹ See *supra* notes 112–118 and accompanying text.

¹²² See, e.g., Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 610 (1983) (stating that Congress “has not been a model of constitutional decisionmaking” and that “[i]ts hallmark has been superficial and, for the most part, self-serving constitutional debate”).

¹²³ See generally DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829–1861* (2005) (the fourth entry in the series, examining constitutional events in the lead-up to the Civil War); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829–1861* (2005) (the third entry in the series, examining Jacksonian revolution and the “American System” of economics); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829* (2001) (examining the legal decisions of the Legislative and Executive branches from the Jefferson administration to the Jackson administration); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801* (1996) (providing a study of the legal decisions of the first six Congresses).

If Congress's contemporary approach to constitutional decisionmaking indeed is less-than-satisfactory, one reason may be a pervasive view that constitutional judgments are the responsibility of other institutions.¹²⁴ This perspective of course is mistaken, and there is no reason to think it is incapable of correction.¹²⁵

Another contributing factor to Congress's suboptimal constitutional decisionmaking may be a lacuna in institutional norms. A work-in-progress of mine argues that although there is nothing wrongful about Congress engaging in virtually no-holds-barred *Hardball Politics* in the domain of ordinary politics, constitutional decisionmaking is appropriately taken under a different set of norms.¹²⁶ To provide an immensely compressed summary, the *Special Norms* appropriate to the constitutional domain are implicit in the best understanding of our practice of constitutionalism.¹²⁷ The Special Norms encompass three norms that aim to facilitate the generation of responsible, Constitution-worthy decisions.¹²⁸ The Special Norms encourage consensus, by means of compromise and persuasion, over brute force majoritarianism in constitutional decisionmaking.¹²⁹ And even where consensus cannot be reached, the Special Norms place limits on the substantive positions that the majority can adopt.¹³⁰

Part III does not repeat the extensive case made in that work-in-progress for the existence of Special Norms,¹³¹ but builds on it by providing a detailed exposition of how the Special Norms would operate in the specific context of state extraterritoriality. The Special Norms do not generate a unique solution, though they eliminate some options that would be available under *Hardball Politics*. More generally, the Special Norms aim to harness Congress's unique institutional capacities that account for the value Congress can, and should, add to the multi-institutional process by which our polity renders its constitutional judgments. As such, the Special Norms help counteract any anxiety that may accompany the recognition that Congress

¹²⁴ See, e.g., MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 83–85 (2008).

¹²⁵ A work-in-progress of mine provides a typology of the constitutional judgments Congress inevitably must render in connection with its multifarious activities. See Rosen, *Special Norms Thesis*, *supra* note 19, at 9–23. Parts I and II of this Article drew upon that typology when it showed the many constitutional judgments Congress must make in the specific context of state extraterritoriality.

¹²⁶ See *id.* at 32–56.

¹²⁷ See *id.*

¹²⁸ See *id.* at 56–77.

¹²⁹ See *id.* at 68–69, 74–75.

¹³⁰ See *id.*

¹³¹ See *id.* at 32–56.

must make multiple constitutional decisions in relation to state extraterritoriality.

Section A first discusses the Special Norm that I call Proactivity.¹³² Section B applies the norm of Explicitness.¹³³ And Section C explores the norm of Tempered Politics.¹³⁴

A. *The Norm of Proactivity*

In the domain of ordinary politics, Congress is the master of its agenda. Such unfettered freedom, however, does not carry over to the constitutional domain, where the *Norm of Proactivity* can impose a duty on Congress to act.¹³⁵ Sometimes circumstances conspire such that congressional action is a constitutional requirement. In that case, the norm of Proactivity incorporates, and is coincident with, a legal duty. But the norm of Proactivity can require action even where there is no constitutional duty, or even a sub-constitutional legal duty, for Congress to act. In other words, sometimes the norm of Proactivity may be a *bare norm* that does not incorporate a legal obligation.¹³⁶ One of the most important lessons of the norms literature is that bare norms are meaningful. Though norms frequently are embedded in positive law, norms can substantially guide behavior even when they are not incorporated into law.¹³⁷

This Article's earlier discussion identified circumstances where the norm of Proactivity is coincident with a constitutional duty to act in respect of state extraterritoriality.¹³⁸ For example, if courts upheld states' extraterritorial regulations, and Congress believed we had a Soft Pluralist federal union, there would be a constitutional duty for Congress to act so as to protect our horizontal federal system.¹³⁹ But the norm of Proactivity may extend further. Imagine if Congress believed our federal union permitted Hard Pluralism, and yet no states extraterritorially regulated their citizens. If Congress thought states were reluctant to regulate extraterritorially only because they were uncertain it was permissible, or that states did not realize that extraterritorial regulation was an option, the norm of Proactivity might

¹³² See *infra* notes 135–141 and accompanying text.

¹³³ See *infra* notes 142–143 and accompanying text.

¹³⁴ See *infra* notes 144–204 and accompanying text.

¹³⁵ See Rosen, *Special Norms Thesis*, *supra* note 19, at 57–58.

¹³⁶ See *id.* at 24, 58.

¹³⁷ See *id.* at 24–25.

¹³⁸ See *supra* notes 112–113 and accompanying text.

¹³⁹ See *supra* notes 112–113 and accompanying text (discussing Hard and Soft pluralism, and providing a hypothetical illustration of each).

require that Congress clarify states' extraterritorial prerogatives.¹⁴⁰ The norm of Proactivity may require congressional action even where there is no constitutional duty for Congress to act.¹⁴¹

B. *The Norm of Explicitness*

Where Congress confronts a constitutional question—whether it must on account of the norm of Proactivity, or because Congress discretionarily embarks on an activity with constitutional ingredients that necessitate a constitutional decision—the norm of Explicitness imposes a presumptive duty that Congress explicitly consider those constitutional questions.¹⁴² That duty is defeasible only if Congress is incapable of responsibly rendering a particular constitutional decision, or if directly confronting the constitutional question would be inconsistent with a specific institutional need or responsibility. If these conditions do not pertain, the norm of Explicitness requires that Congress forthrightly address the constitutional question.¹⁴³

It seems unlikely that either defeasibility condition would arise in relation to state extraterritoriality. As to the first, there is no reason to think Congress is incapable of deciding whether our federal union permits Hard Pluralism, or instead requires Soft Pluralism. To the contrary, Congress may be the institution most suited to rendering a constitutional decision such as this, which is so unguided by constitutional text yet so determinative of our nation's basic political character. As to the second, it does not seem that decisions concerning state extraterritoriality would arise in circumstances that required suspension of the norm of Explicitness. For instance, although the need for rapid decisionmaking conceivably could be a defeasibility condition, it is difficult to imagine any such need with respect to state extraterritoriality determinations.

It follows that Congress's constitutional decisionmaking in relation to state extraterritoriality likely would be subject to the norm of Explicitness. This means Congress would have to forthrightly confront the many constitutional questions that arise in relation to state extraterritoriality, and decide them in accordance with the last of the Special Norms, the norm of *Tempered Politics*.

¹⁴⁰ I do not take a firm position as to whether the norm of Proactivity would impose a duty in this circumstance. Fleshing out the norms' specifics is a task best suited for Congress. See Rosen, *Special Norms Thesis*, *supra* note 19, at 63.

¹⁴¹ This is a circumstance where many components accounting for the answer to the *what* question (i.e., the substance of congressional action) would belong to the constitutional domain, though the considerations that answer the *whether* question did not.

¹⁴² See Rosen, *Special Norms Thesis*, *supra* note 19, at 61–63.

¹⁴³ See *id.*

C. *The Norm of Tempered Politics*

Tempered Politics comprises two sub-norms. The first, *Reciprocity*, is an internal self-disciplining constraint on the substantive positions each side is permitted to adopt.¹⁴⁴ Constitutional decisionmakers only can espouse positions where they “think it at least reasonable for others to accept, as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position.”¹⁴⁵ Reciprocity requires two things of constitutional decisionmakers. First, they must make two *imaginative leaps*, putting themselves into the shoes of political opponents and then imagining themselves on the losing side of their own proposals.¹⁴⁶ Second, constitutional decisionmakers must think *holistically* rather than narrowly.¹⁴⁷ Holism means that when asking themselves whether it is “at least reasonable” to expect that opponents could accept their substantive constitutional position, they must consider their positions’ implications for related contexts, not just the narrowest possible articulation of the question.¹⁴⁸

The second sub-norm, *Communicative Exchange*, imposes interactive requirements on disputants. Both sides must aim to “work[] out in community what to do” by communicating with each other.¹⁴⁹ The sub-norm of Communicative Exchange thus disallows unilateral decisionmaking in constitutional matters, even where the politically dominant side has disciplined

¹⁴⁴ See *id.* at 63–68 (discussing Reciprocity’s requirements); *id.* at 71–77 (explaining why the Special Norms include Reciprocity).

¹⁴⁵ *Id.* at 65 (quoting JOHN RAWLS, *THE LAW OF PEOPLES, WITH “THE IDEA OF PUBLIC REASON REVISITED”* 136–37 (2001)). By necessity, Reciprocity requires that a constitutional decisionmaker reasonably think that the other side *could* accept his or her position, not that the other side *in fact* does. Interpreting Reciprocity the second way would transform it into a unanimity requirement, blocking too much constitutional decisionmaking. A related question in Reciprocity’s application is how narrowly or broadly-sliced one’s opponents should be. The more thinly-sliced, such that there are more opponent groups as to which Reciprocity’s “at least reasonable” requirement applies, the more unworkable Reciprocity becomes. Indeed, as the opposition is increasingly narrowly-sliced, Reciprocity transforms into an unworkable unanimity requirement. As I have explained elsewhere, it would be up to Congress to determine over time how best to specify the Special Norms. See *id.* at 89. A plausible starting point might be to borrow the simplification upon which our two-party system relies by applying Reciprocity’s “at least reasonable” requirement to a single ideal typical opponent.

¹⁴⁶ See *id.* at 66.

¹⁴⁷ See *id.* at 66–67.

¹⁴⁸ See *id.* at 68; see *infra* note 196 and accompanying text (discussing what does and does not count as related context); see also *infra* notes 163–181 and accompanying text (applying holism to state extraterritoriality).

¹⁴⁹ Rosen, *Special Norms Thesis*, *supra* note 19, at 68 (quoting ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT* 72 (1990)).

itself by adopting a position that complies with Reciprocity.¹⁵⁰ Communicative Exchange requires that each side try to influence how the other thinks,¹⁵¹ while also being open to being influenced. The sub-norm of Communicative Exchange also requires that all sides make a genuine effort to achieve consensus through some combination of persuasion and compromise. Communicative Exchange thereby provides political minorities additional negotiation leverage beyond what they have in the domain of ordinary politics.¹⁵²

Extraterritorial regulation of marijuana is a concrete context that allows a full illustration of Reciprocity's two requirements.

1. Reciprocity

First consider a congressman named Larry Libertarian. Larry is generally skeptical of governmental restrictions on people's liberty, and is particularly repulsed by limits that cut into deeply personal decisions such as what people are allowed to ingest. Larry instinctually believes everyone should be able to use marijuana when they are in a state where its use is permitted. As a member of Congress, he is considering legislation that would so provide.

Let us imagine, not too fancifully, that Larry believes that his instinctual preference is in fact what the Constitution requires. He believes it would be *unconstitutional* for states to extraterritorially prohibit marijuana, or for Congress to license states to do so. The question explored here is whether Tempered Politics permits Larry to hold such a position, and if so what if any constraints Tempered Politics imposes. Notice that Tempered Politics applies only to Larry's *constitutional* positions. There would be nothing improper about Larry concluding that Congress had constitutional power to authorize states to extraterritorially regulate, but that states should not be permitted to do so on policy grounds.¹⁵³ The analysis that follows only concerns Congress's *constitutional* decisionmaking, not its sub-constitutional policy decisions.¹⁵⁴

¹⁵⁰ To be sure, it is uncertain how fully Reciprocity can be realized without Communicative Exchange. Information directly from one's political opponents sometimes may be necessary for Reciprocity's imaginative leaps.

¹⁵¹ By eliciting this information, Communicative Exchange might aid the imaginative leaps that Reciprocity requires.

¹⁵² See Rosen, *Special Norms Thesis*, *supra* note 19, at 68. One side's non-compliance with the Special Norms suspends the norm of Communicative Exchange, but not Reciprocity. See *id.* at 88–92.

¹⁵³ Unless such a restriction itself would violate the Constitution.

¹⁵⁴ This is not to deny that some of the considerations raised during constitutional analysis may influence the parties' policy analysis.

Tempered Politics' first sub-norm, Reciprocity, requires Larry to step into his political opponent's shoes by imagining things from her perspective.¹⁵⁵ Let us begin by clarifying what perspectives his opponent may permissibly entertain. Whether marijuana may be used is a determination the federal government in effect has left to the states,¹⁵⁶ allowing for state experimentation and perhaps even durable diversity.¹⁵⁷ This means Larry's opponent—call her Connie Communitarian—can support prohibition in her state because she thinks marijuana is physically dangerous, addictive, a gateway to more powerful drugs, or that its use is immoral or otherwise problematic.

When complying with Reciprocity, Larry must ask whether it is reasonable to believe that Connie would accept that citizens from her state are constitutionally entitled to use marijuana in a regulatorily permissive state. In so doing, Larry must imagine himself as holding Connie's beliefs as to marijuana's inherent dangerousness, addictive risk, gateway potential, or immorality. He must then recognize that his preferred extraterritoriality policy risks undermining each and every one of these policy concerns that may underwrite marijuana's prohibition in Connie's state.

Reciprocity places the same demands, *mutatis mundi*, on Connie. Connie's instinctual preference is that it would be constitutional for Congress to authorize a Home State to extend its marijuana prohibition to its traveling citizens.¹⁵⁸ Federal policy, however, allows states to permit marijuana use, thereby licensing Larry's libertarian preference. In checking if her initial extraterritoriality preference is consistent with Reciprocity, Connie must imagine herself as a libertarian skeptical of government regulation, and ask

¹⁵⁵ Most of the time, it is best to start the Reciprocity analysis by first undertaking its imaginative leaps before proceeding to holism. This is because the imaginative leaps readily rule out many options, as to which there accordingly is no need to analyze holistically. Sometimes, however, holism must be undertaken to adequately engage in the imaginative leaps. As explained below, this is the case regarding state extraterritoriality. *See infra* notes 169–181 and accompanying text. In these circumstances, the imaginative leaps are not fully independent of holism.

¹⁵⁶ To be sure, this simplifies matters insofar as federal statutory law prohibits marijuana. *See* 21 U.S.C. § 812 (2012). It is only because the federal executive branch has decided to essentially leave that law unenforced that regulation of marijuana has been ceded to the states. This does not, however, affect the discussion above in text, which assumes that Congress does not wish to countermand the executive branch by re-establishing a uniform nationwide marijuana policy, but instead addresses the horizontal federalism question of how to manage the states' divergent regulatory approaches.

¹⁵⁷ *See supra* notes 3–4 and accompanying text (discussing the *supra* current status of marijuana regulation federally and its state-by-state dynamic).

¹⁵⁸ We need not be concerned with the constitutional question of whether states have such inherent powers even without congressional authorization because the discussion above in text is solely designed to illustrate how Tempered Politics would shape Congress's constitutional decisionmaking.

if such a person would think it at least reasonable that a state that prohibits marijuana has constitutional power to extend its restrictions extraterritorially.

Sometimes, what Reciprocity's imaginative leaps demand is very clear. When both sides analyze a policy's costs roughly the same, then Reciprocity's imaginative leap generates easily identified solutions. Consider a proposal that systematically encumbered supporters of only one political party from registering to vote. Because no side would want to be on the losing side of this proposal, Reciprocity unequivocally leads to its rejection.¹⁵⁹

But Reciprocity's application becomes more complicated as the parties' divergent perspectives lead each to analyze a policy's benefits and costs differently. The initial difficulty is the purely operational challenge of stepping into another's conceptual and perceptual universe.¹⁶⁰ Beyond this, it may seem that Reciprocity's dictum that each side only espouse those positions that she "think[s] it at least reasonable for others to accept, as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position,"¹⁶¹ may generate a null set. To illustrate, if Larry successfully puts himself in Connie's shoes, would his preferred libertarian position pass Reciprocity? Perhaps not: why would Connie think it at least reasonable that citizens of her marijuana-prohibiting state can use marijuana when visiting marijuana-permitting states, given her views concerning marijuana's risks? Likewise, if Connie successfully puts herself in Larry's shoes, would her preferred position pass Reciprocity? Once again the answer may appear to be no: why would Larry think it is at least reasonable that citizens from Connie's state cannot use marijuana during their travels, given his libertarian commitments? In short, the more Larry and Connie succeed in stepping into the other's shoes, the more it seems possible that their opponent will not find their preference to be "at least reasonable." And if that occurs, the requirement of Reciprocity will yield a null set.

Although a null set sometimes can arise,¹⁶² it would be premature to declare one with respect to state extraterritoriality at this point in our analysis. To begin, the mere fact that neither Larry's nor Connie's *initial* preferred positions satisfies Reciprocity does not mean no Reciprocity-compliant positions can be found. There might be *other* positions that *do* satisfy Reciprocity, and Reciprocity demands a search for such positions.

¹⁵⁹ See *supra* note 155 and accompanying text (explaining why Reciprocity analysis ordinarily should begin with the interpretive leaps).

¹⁶⁰ For a discussion of this challenge, as well as ways of meeting it, see Rosen, *Special Norms Thesis*, *supra* note 19, at 64–70.

¹⁶¹ *Id.* at 65 (quoting RAWLS, *supra* note 145, at 136–37).

¹⁶² I do not explore here what ought to be done in such a circumstance.

But is there some such middle ground option in respect of extraterritorial state regulation of marijuana? I must confess that none comes to mind. It would seem that citizens from Connie's prohibitory Home-State either are free to use marijuana in accordance with the laws of the state she is visiting (Larry's preference), or they are not (Connie's).

Yet it still would be premature to declare a null set in relation to extraterritorial marijuana regulations because the Reciprocity analysis undertaken so far is incomplete. Recall that in determining what positions satisfy Reciprocity, representatives must analyze state extraterritorial powers *holistically*.¹⁶³ They cannot think only of marijuana, but must consider related contexts where state extraterritoriality may arise, and make sure their constitutional position regarding marijuana conforms with their views on state extraterritorial powers in these related contexts.¹⁶⁴ There of course will be factual differences across these related, though not identical, contexts that potentially could justify varying extraterritoriality conclusions. But any distinctions would themselves have to comply with Reciprocity, meaning that the distinction's proponent must think it at least reasonable that their political opponent would agree that the distinction justifies a differential extraterritorial rule across the two contexts.

Gun rights is one such related context.¹⁶⁵ Some states have laws that permit their citizens to carry concealed weapons. These laws reflect the view that citizens' Second Amendment rights permit them to conceal carry, that citizens should be capable of protecting themselves if they are endangered outside of their home, and more generally that citizens in a free society should have this sort of freedom. All these policy interests can be undermined if a Home State's traveling citizens cannot carry their concealed weapons while out-of-state. For example, if citizens are unable to protect themselves when attacked out-of-state, their Home State will ultimately bear much of the costs that result from their injury or death. Accordingly, a Home State might want its citizens' freedom to carry to operate while they are out of

¹⁶³ For a full explanation as to why, see Rosen, *Special Norms Thesis*, *supra* note 19, at 66–68.

¹⁶⁴ To reiterate, Reciprocity applies to the constitutional question of whether states have power to extraterritorially regulate, but not to the sub-constitutional policy question of whether (assuming such powers would not be unconstitutional) they should so regulate in a particular context. *See id.* at 11–13.

¹⁶⁵ Gun rights is a particularly interesting example. A Home State typically is vulnerable to travel-evasion only if its law is more restrictive than the state to which its citizen might visit. For this reason, it might be expected that those with libertarian and rights-expansive proclivities would generally be averse to state extraterritorial powers. To the extent this is true, holism would not substantially enrich Reciprocity analysis as regards state extraterritoriality. As explained above in text, however, libertarians and rights-advocates may be inclined to support extraterritoriality in relation to gun rights.

state. Indeed, a recently introduced congressional bill would allow citizens with valid concealed carry licenses to carry their firearms in most other states.¹⁶⁶

Abortion is another related context. Some states have parental notification requirements before a minor can obtain an abortion. Parental notification statutes paternalistically protect the minor, and also guard the third party interests of the parents.¹⁶⁷ Because both policy interests are undermined if the minor can get an abortion in a neighboring state without parental notification requirements, the minor's Home State might want to extend its parental notification requirement to her when she is out of state.

Reciprocity's holism requirement disallows constitutional conclusions concerning extraterritoriality to be based on a representative's substantive views of the particular subject of regulation.¹⁶⁸ Reciprocity operationalizes the understanding that it would be wrongful for Larry to take the position that Congress lacks constitutional power to authorize states to extraterritorially regulate marijuana because he objected to marijuana restrictions, and for Larry to then support the extraterritorial extension of concealed carry laws because he supported concealed carry. Likewise, Reciprocity means it would be wrongful for Connie to conclude that Congress had authority to authorize states to extend marijuana prohibitions extraterritorially, but to take the position that states cannot be authorized to apply parental notification requirements to their out-of-state minors because she was pro-choice.

Together, Reciprocity's imaginative leaps and holism requirement aim to generate internally consistent constitutional positions.¹⁶⁹ Consistency is designed to ensure that, as regards constitutional decisions, representatives do not adopt positions as to which they themselves would not be willing to be subject. Reciprocity's requirement of consistency is fitting because the constitutional domain establishes the foundational entailments of citizenship, and our democratic constitutional order is bottomed on a commitment to equal citizenship. A willingness to live in accordance with the foundational rules that determine citizens' political relations is a minimal condition for a polity of equal citizenship among inhabitants with sharply divergent commitments.

¹⁶⁶ See Concealed Carry Reciprocity Act of 2017, H.R. 38, 115th Cong. (2017). The bill does not go as far as it possibly could, for it does not authorize concealed carry in states that prohibit the carrying of concealed firearms.

¹⁶⁷ For now I shall put aside the possibility that such laws are an incremental measure to reduce abortions.

¹⁶⁸ See Rosen, *Special Norms Thesis*, *supra* note 19, at 66–68.

¹⁶⁹ See *id.* at 71–75.

So let us return to Larry and Connie. In considering whether Larry's preferred constitutional position (that visiting citizens are constitutionally entitled to use marijuana when visiting a regulatorily permissive state) satisfies Reciprocity, we must take account of the fact that his preferred position has implications for gun regulation. If states cannot constitutionally extend their marijuana restrictions to their traveling citizens, then Reciprocity means that states likewise cannot extend their carry concealed carry permissions to their out-of-state citizens, unless a Reciprocity-compliant distinction differentiates the two contexts.

One of three results can follow from Larry's holistic analysis. First, Larry might accept Reciprocity's implications that states cannot have extraterritorial powers in the domain of gun rights.¹⁷⁰ Pursuant to the oath he takes to uphold the Constitution, Larry would then be bound to act consistently with his constitutional conclusion in the future.¹⁷¹ This illustrates how Tempered Politics may restrict the constitutional positions a representative can put forward. Second, Larry might abandon his preliminary position regarding marijuana, and instead concede that Congress has constitutional authority to authorize states to extraterritorially regulate their citizens' use of marijuana.¹⁷² This is another illustration of Reciprocity's operation so as to constrain the substantive constitutional positions a representative may espouse.

Third, Larry might try to draw a distinction between marijuana and gun rights to support the conclusion that although states cannot be authorized to extraterritorially regulate marijuana, they can be allowed to extraterritorially regulate concealed carry. I can conceive of two possible distinctions, though in the end neither seems to be Reciprocity-compliant. First, it might be suggested that concealed carry laws are connected with a constitutional right in a way that marijuana consumption is not. But this distinction is unable to satisfy Reciprocity. There is not at present a generally accepted constitutional right to carry a concealed weapon.¹⁷³ Nor could the distinction be resuscitated by positing that Larry and his state compatriots think the Second Amendment properly encompasses a right to carry, even though present doctrine does not so provide, because supporters of marijuana de-

¹⁷⁰ This would return us to the question posed in this Article as to whether Larry's position complies with Reciprocity from the vantage point of the imaginative leap.

¹⁷¹ The statement above in text is not intended to foreclose good faith changes in constitutional views.

¹⁷² This formulation is designed to take no position on the question of whether states have such extraterritorial powers absent congressional authorization.

¹⁷³ See, e.g., *Peruta v. County of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (en banc) (holding that the Second Amendment does not guarantee a right to carry a concealed weapon).

regulation likewise might insist that its consumption ought to be constitutionally protected (under privacy or liberty, for example).¹⁷⁴

As to the second possible distinction, Larry might suggest that states have extraterritorial powers to enhance, but not limit, liberty. On this view, there would be nothing inconsistent with Larry taking the position that Home States lack extraterritorial power to restrict citizens from using marijuana out-of-state but have extraterritorial powers to enhance their citizens' liberty to carry concealed weapons. But this one-way ratchet would not pass Reciprocity because it is not reasonable to think Connie would accept it. First, insofar as she supports marijuana restrictions for paternalistic reasons, Connie may think that such prohibitions are ultimately liberty-enhancing. This would put extraterritorial marijuana limitations on level ground with extraterritorial licenses to concealed carry, undermining any purported distinction between them for purposes of extraterritoriality. Second, Connie might well reject the proposition that liberty enhancement is the sole criterion accounting for the scope of states' extraterritorial powers. Connie believes there are multiple societal interests that are sufficiently important to justify regulation. For example, she might think that marijuana prohibitions protect the third-party interests of a would-be user's family. If reasons apart from liberty-enhancement justify regulation, why should liberty-enhancement alone license extraterritoriality? For these two reasons, it is not reasonable to assume Connie would accept the second distinction, meaning that it (too) is not Reciprocity-compliant.

Because neither distinction is sufficient, Reciprocity requires Larry to have consistent views concerning states' extraterritorial powers concerning both marijuana and concealed carry. And as explained above, there are two possible Reciprocity-compliant positions Larry might take: that Congress has constitutional authority to authorize extraterritorial state regulations concerning *both* concealed carry and marijuana, or as to *neither*.

This conclusion serves double duty. Most obviously, it identifies the restricted range of Reciprocity-compliant positions among which Larry may select. Second, Larry's possible Reciprocity-complaint positions is an input into *Connie's* Reciprocity analysis. After all, Reciprocity means Connie can adopt only those positions that Larry reasonably could be thought to support. So the conclusion that Larry might agree that states have extraterritorial regulatory powers in relation to marijuana (so long as he comes to the

¹⁷⁴ The statement above in text should not be construed as suggesting that states are without authority to act according to their independent constitutional understandings as to matters about which courts have not yet ruled, but only concerns the question of whether the proposed distinction is Reciprocity-compliant.

same conclusion as regards concealed carry) shows that Reciprocity does not disqualify Connie's initial policy preference.

Does this mean that Reciprocity does not generate a null set in the context of state extraterritoriality after all? To answer this, we must consider how Reciprocity's holism requirement affects Connie. As was true with Larry, Connie's initial preferred position must be squared with her views regarding state extraterritorial powers in related contexts. Reciprocity's requirement of consistency means Connie would have to concede that states also have power to apply parental notification requirements to traveling minors and concealed carry permissions to their out-of-state citizens, unless there are Reciprocity-compliant distinctions.

I cannot think of a principled Reciprocity-compliant distinction that would justify extraterritoriality differences between marijuana restrictions and parental notification requirements. One conceivable difference is that abortion is connected to a constitutional right in a way marijuana use is not,¹⁷⁵ but this seems unpersuasive for the reasons explained above in relation to Larry.¹⁷⁶ Another possible distinction is the relative cost of the extraterritorial restriction's interference with liberty. On this approach, the consequences of foregoing an abortion are immeasurably greater than those of foregoing marijuana.¹⁷⁷ This distinction is problematic, however, because it ultimately is parasitic on the merits of the substantive regulation, and for that reason cannot satisfy Reciprocity. For example, supporters of parental notification requirements would disagree that the criterion of relative cost would decide against extraterritoriality, for they think a minor's unguided out-of-state abortion decision profoundly undermines parental liberty and also the minor's ultimate best interests. And it is not hard to imagine a marijuana advocate who believed that marijuana's prohibition worked a profound restriction on his liberty to fully self-actualize, or to better accept, and perhaps comprehend, reality. For this or many other readily imagined reasons, marijuana restrictions might be counted as a very substantial interference with liberty. This is why it is not possible to make Reciprocity-compliant distinctions based on a comparative assessment of the degree to which a law enhances liberty. So if Connie wants to stick with the position that states can constitutionally be authorized to prohibit their citizens' out-

¹⁷⁵ As explained above, Connie's political commitments would not permit her to assert Larry's liberty-enhancement distinction.

¹⁷⁶ Though both she and Larry might be inclined to accept the distinction, it is unacceptable because it is not principled for the reasons explained above in text.

¹⁷⁷ This turns out to be virtually identical to Larry's liberty-enhancing distinction insofar as its infirmities perfectly mirror what dooms the liberty-enhancing distinction.

of-state use of marijuana, she must concede that states also can regulate their traveling minors.

There is, however, a principled Reciprocity-compliant distinction for treating concealed carry differently than marijuana. The scope of states' extraterritorial powers is an artifact of the nature of our federal union, more specifically whether we have a Soft or Hard Pluralist federal regime.¹⁷⁸ Connie's view that states can extraterritorially apply marijuana prohibitions to their traveling citizens reflects a commitment to Hard Pluralism. Reciprocity's requirement of a consistent commitment to Hard Pluralism across all substantive policies does not translate into a conclusion that states always must have power to extraterritorially regulate. This is true because extraterritorial regulatory power can sometimes undermine Hard Pluralism. A consistent commitment to Hard Pluralism leads to the conclusion that states should *not* have extraterritorial powers in such circumstances.

Concealed carry illustrates this point. For so long as there is no authoritative determination that the Second Amendment encompasses the right to carry concealed weapons, states are free to regulate as they wish. This opens the door to diverse state policies, which in fact describes the status quo in the United States. State A can permit concealed carry for any of the reasons canvassed in this Part,¹⁷⁹ and State B can refuse to permit concealed carry for a myriad of other reasons. For example, State B might believe that armed citizens create more dangers than benefits, or that concealed carry risks injecting fear among strangers that disrupts desirable social relations. If State A can license its citizens to carry in State B, such extraterritoriality would risk undermining State B's capacity to realize its preferred policy's expected benefits. It is in this respect that concealed carry is a context where extraterritorial powers can undermine, rather than support, Hard Pluralism.¹⁸⁰ For this reason, Hard Pluralism provides a principled distinction between extraterritorial regulations of marijuana and concealed carry.

But Hard Pluralism can serve as a distinction between marijuana prohibitions and parental notification laws, on the one hand, and concealed carry, on the other, only if Hard Pluralism itself is Reciprocity-compliant. Is it at least reasonable to think Larry could accept Hard Pluralism? Yes. Though

¹⁷⁸ See *supra* notes 16–17 and accompanying text.

¹⁷⁹ See *supra* notes 165–166 and accompanying text.

¹⁸⁰ This simplifies the analysis, because the lack of extraterritorial powers may undermine a licensing states' capacity to fully advance *its* policies. See *supra* notes 165–166 and accompanying text. The statement above in text presumes that extraterritoriality's costs to a prohibitory state would exceed the costs a licensing state would experience without extraterritorial powers. This strikes me as a plausible position insofar as extraterritoriality would risk wholly undermining the prohibitory state's policy, whereas the converse is not true.

Larry prefers a government that only lightly regulates its citizens, Connie could reasonably assume that Larry recognizes that not all citizens share his libertarian predilections. Our federal union guarantees that people like Larry can choose to live in a state that best mirrors his libertarian preferences, and Hard Pluralism maximizes each state's capacity to secure its idiosyncratic political preferences while remaining part of a federal union. Though logic does not demand that all libertarians accept Hard Pluralism,¹⁸¹ it would be reasonable for Connie to think Larry could accept it. And that is all that is required to show that the Hard Pluralism distinction is Reciprocity-compliant.

The upshot is that Reciprocity's requirement of holistic analysis makes consistency demands on Connie's constitutional positions (as it did with Larry). If Connie insists that states have constitutional power to prohibit their citizens' extraterritorial use of marijuana, then she must accept that states have power to extraterritorially extend their parental notification requirements as well. Holism would not require that Connie also concede that states could be authorized to extraterritorially license their citizens to concealed carry, however, because Hard Pluralism provides a Reciprocity-compliant distinction.

Although Connie's preliminary position (that states can be authorized to extraterritorially prohibit their citizens' use of marijuana) is Reciprocity-compliant, holism may lead her to retreat from that original preference. She instead may conclude that states *cannot* be authorized by Congress to extraterritorially regulate, on account of holism's implications for parental notification. This possibility has important implications for Larry's Reciprocity analysis, for it means that his initial policy preference (that states cannot extraterritorially regulate their citizens) is Reciprocity-compliant.

In the end, Reciprocity generates neither a null set nor a unique solution as regards state extraterritorial powers. There are several Reciprocity-compliant positions available to both Larry and Connie, among which each can choose. Reciprocity is the start of a process where each party aims to

¹⁸¹ "Proselytizing" libertarians who hope that all citizens will live under regulatorily minimal polities would prefer Soft Pluralism because it systematically undermines regulations that exceed the regulatory minimum of any single state. But other libertarians may prefer Hard Pluralism. For example, the influential libertarian theorist Robert Nozick has argued that people preferring greater regulation should move to a polity that reflects their preference. *See, e.g.,* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 312 (1974) (defending a "framework for utopias" that permits citizens to opt in and out of the regulatory regime they prefer). Insofar as Hard Pluralism increases the range of regulatory options, a Nozickean might prefer it to Soft Pluralism. Moreover, Soft Pluralism can undermine libertarian preferences in some circumstances. For example, Soft Pluralism may undermine libertarianism if a neighboring state's regulations fall short of the governmental protections a libertarian believes to be necessary. These reasons justify the conclusion above in text. For a preliminary discussion of how thinly or thickly to slice the opposition for purposes of Reciprocity analysis, see *supra* note 145.

step into its opposition's shoes. In so doing, Reciprocity typically reduces the options that otherwise would be available under ordinary Hardball Politics, as state extraterritoriality illustrates. Those Reciprocity-compliant options are then the subjects of Tempered Politics' second norm, Communicative Exchange.

2. Communicative Exchange

Reciprocity initially operates as an internal self-disciplining norm with which each party is expected to comply in determining her preferred position.¹⁸² This means Reciprocity can be fully satisfied by one side's purely unilateral activities. Tempered Politics, however, does not believe that constitutional decisionmaking should be unilateral, even if the political majority has a (Reciprocity-generated) enlightened position. Constitutional decisions instead should be taken jointly, to the extent possible, owing to the nature of the constitutional domain in a modern heterogeneous democracy.¹⁸³

Tempered Politics' norm of Communicative Exchange is directed to satisfying constitutional decisionmaking's interactive requirements. This is not to say that Commutative Exchange has no connection to Reciprocity. Communicative Exchange can augment each party's capacity to step into the other's shoes, furthering the process each party began on its own during Reciprocity. And the enhanced understanding of the other's perspective that Communicative Exchange affords might refine each side's understanding of what positions are Reciprocity-compliant.

But Communicative Exchange does much more than facilitate Reciprocity. Communicative Exchange also operationalizes a preference for deciding constitutional questions by means of consensus that is reached through some combination of persuasion and compromise (to the extent possible) rather than the brute force of majoritarianism politics. The preference for consensual decisionmaking in the domain of constitutionalism, which underwrites Communicative Exchange, is implicit in the best understanding of the practice of constitutionalism in large heterogeneous democracies.¹⁸⁴

To be sure, Tempered Politics does not guarantee a unique solution to each constitutional question. Tempered Politics understands that many, if not most, questions belonging to the constitutional domain are not susceptible to resolution through logic alone, but are necessarily decided through the messy, nonlinear political process through which most decisions con-

¹⁸² *But see supra* note 151 and accompanying text (discussing Reciprocity).

¹⁸³ *See Rosen, Special Norms Thesis, supra* note 19, at 73–77.

¹⁸⁴ *See id.* at 68–73.

cerning the polity's social life are taken. But Tempered Politics insists that questions belonging to the constitutional domain are appropriately decided pursuant to a special type of politics—a *tempered* form of politics—that is a reflection of what sets the constitutional domain apart from the domain of ordinary politics. Tempered Politics aims to generate Constitution-worthy decisions that are suited to the constitutional domain.

The norm of Communicative Exchange requires that each party *aim-to-influence* the other as to the merits of its Reciprocity-compliant position.¹⁸⁵ Correspondingly, Communicative Exchange also requires that each party be *open-to-being-influenced* by the others' arguments.¹⁸⁶ Openness-to-being-influenced does not unrealistically or unattractively assume a lack of commitment to one's position. Rather, Communicative Exchange's openness-to-being influenced requirement reflects that what is at stake in constitutional disputes is not the ultimate truth, concerning which open-minded flexibility is not necessarily hoped for, but the framework for determining social relations among a large group of politically-equal citizens with divergent preferences. And as regards *that*, an openness-to-being-influenced is proper and sensible.

As each side aims to influence the other, Communicative Exchange also imposes *prima facie* duties on the parties to compromise so as to reach a consensus. One promising template for compromise is for the parties to make trade-offs among Reciprocity-compliant positions. Reciprocity's holism requirement can be expected to facilitate compromises of this sort. By requiring that the parties consider related issues when formulating their preferred position, holism facilitates the simultaneous consideration of these related issues during Communicative Exchange. The considering of related issues as the parties interact enables an airing of the intensity of each party's preferences in respect of each issue. This can be expected to facilitate the identification of intelligible trade-offs that potentially can lead to consensus.¹⁸⁷

In short, Communicative Exchange is designed to generate consensus solutions that emerge from some combination of persuasion and compromise.¹⁸⁸ Communicative Exchange's preference for consensus, and the pri-

¹⁸⁵ See *id.* at 70–73.

¹⁸⁶ See *id.* at 69–70. Communicative Exchange's requirements that each party aim-to-influence the other while being open-to-being influenced together create what might be called a norm of *Mutual Influence*.

¹⁸⁷ See *id.* at 75–76 (explaining this way, as well as the other ways that Tempered Politics can facilitate consensus).

¹⁸⁸ To be sure, in practice it can be difficult to distinguish persuasion from compromise. This need not concern us because Communicative Exchange is concerned with consensus, and is indifferent to the mixture of persuasion and compromise that accounts for it.

ma facie duties that preference generates, are artifacts of what constitutionalism is in diverse modern democracies. It is the nature of what constitutionalism is in such polities that makes consensus more important in the constitutional domain than in the domain of ordinary politics.¹⁸⁹

There are multiple ways constitutionalism's consensus-aiming duties may be operationalized. One is the formal supermajority requirement for the *production* of new constitutional text.¹⁹⁰ Communicative Exchange addresses *post-production* constitutional decisionmaking,¹⁹¹ and operationalizes constitutionalism's consensus-demands in a meaningfully different way than does a supermajority requirement.¹⁹² Among other differences, Communicative Exchange's consensus-aiming duties are suspended if the other party does not comply with the Special Norms.¹⁹³ Further, even when there is compliance, Tempered Politics permits post-production constitutional decisions to be made pursuant to majority decision when consensus cannot be reached.¹⁹⁴

Having clarified Communicative Exchange's distinctiveness from supermajority requirements, it is worth reiterating that Tempered Politics' majority decisionmaking is distinctive from Hardball Politics even when Communicative Exchange does not bring consensus. This is because Tempered Politics requires that the policy that the political majority adopts complies with Reciprocity. Further, the political majority's understanding of what is Reciprocity-compliant must be updated by any insights into its opposition's view that Communicative Exchange has afforded.

As applied to state extraterritoriality, Communicative Exchange would require each party to make a genuine effort to convince the other of the merits of its Reciprocity-compliant position.¹⁹⁵ On account of holism's de-

¹⁸⁹ See Rosen, *Special Norms Thesis*, *supra* note 19, at 73–77.

¹⁹⁰ See, e.g., U.S. CONST. art. V.

¹⁹¹ See Rosen, *Special Norms Thesis*, *supra* note 19, at 9–11 (distinguishing between the production of constitutional text and post-production constitutional decisionmaking with that text).

¹⁹² See *id.* at 79.

¹⁹³ See *id.* at 89–92.

¹⁹⁴ This might be thought to invite gaming by the political majority, who could maximize their preferences by always refusing to compromise so that they can unilaterally select a reciprocity-compliant position. Such action would not be consistent with what the norm of Tempered Politics requires. The check against such action is the fact that Tempered Politics is a norm. That is to say, the factors that account for the special norm of Tempered Politics can be expected to lead Congress to comply with the norm. For a full discussion, see *id.* at 31–32. To be sure, the risks of gaming are greatest before the norms have become entrenched. But this is true of all norms that are not embodied in positive law, and such norms nevertheless arise. Why? Most likely on account of the social coordination benefits that the norms promise. See *id.* at 27–28.

¹⁹⁵ Tempered Politics neither requires nor expects that this would be performed by each and every representative. It would be adequate for Communicative Exchange to occur in a suitably representative committee, though it may be wise, if not necessary, to allow input from non-

mand to think beyond marijuana, Communicative Exchange would lead each party to consider more deeply for itself, and to discuss with the other, the relative merits of Soft and Hard Pluralism.¹⁹⁶ The serious exchange that Communicative Exchange requires is strongly desirable. Whether our Constitution permits Hard Pluralism or requires Soft Pluralism is a foundationally important question that substantially informs the nature of our federal union. Because constitutional text does not answer the question, but instead allocates decisionmaking authority over it to Congress,¹⁹⁷ surely it is beneficial for Congress to undertake this decisionmaking in a serious way. And that is what Communicative Exchange aims to bring about.

While the related contexts where state extraterritoriality questions arise are under consideration, Communicative Exchange imposes a duty¹⁹⁸ on the parties to seek consensus concerning the constitutional questions through some combination of persuasion and compromise. This might appear paradoxical. Holism demands that a party's position be internally consistent, yet Communicative Exchange permits, and indeed encourages, trade-offs. Because trade-offs can result in outcomes that are not internally consistent, Communicative Exchange might be thought to be inconsistent with holism.

But there is no paradox. Reciprocity's insistence on internal consistency applies to a party's pre-negotiation position, whereas Communicative Exchange concerns the ultimate constitutional outcome. Communicative Exchange's preference for tradeoffs reflects the understanding that there is nothing problematic about a constitutional outcome that reflects compromise that is in service of consensus.¹⁹⁹ Given the various purposes that constitutions

committee members. In any event, this Article does not purport to exhaust the many important institutional design questions involved in institutionalizing Tempered Politics.

¹⁹⁶ If the nod were given to Hard Pluralism, many additional constitutional questions would have to be addressed at some point, such as precisely when states have power to apply their laws to the out-of-state activities of non-citizens, and whether states have some constitutional duty to take steps to support the efficacy of sister states' laws. See *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 159 (1932) (requiring one state to apply another's different law because "[i]f this were not so . . . the effectiveness of the [sister state's] act would be gravely impaired"); *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 323 (1976) (applying California law to Nevada innkeeper). These constitutional questions need not be addressed when Congress first considers the choice between Hard and Soft Pluralism. Reciprocity's holism requirement would not demand their immediate consideration because their resolution is independent of a determination that our federal union allows Hard Pluralism. For this reason, they qualify as follow-on constitutional questions, not "related contexts" for purposes of holism. See *supra* notes 146–148 and accompanying text.

¹⁹⁷ See *supra* notes 23–104 and accompanying text (Part II, discussing Congress's decisionmaking authority).

¹⁹⁸ Tempered Politics' requirements are not judicially enforceable. See Rosen, *Special Norms Thesis*, *supra* note 19, at 25–26.

¹⁹⁹ The possibility of mutual compromise in service of consensus does not undermine the importance of Reciprocity's requirement of internal consistency with respect to each party's initial

serve in a large diverse democracy, consistency in constitutional outcomes is not always desirable. Reflective of this, our written Constitution famously embodies many compromises among competing commitments.²⁰⁰ These compromises did not result in internally consistent outcomes, but generated either stable split-the-baby solutions or unresolved tensions that had to be worked out over time. This is not to suggest that all compromises are normatively defensible.²⁰¹ To the contrary, there unquestionably are “rotten compromises” that never ought to be made.²⁰² But rotten compromise is a very small category, primarily because compromise in setting the terms of social relations is such a powerful normative good.²⁰³ Just as compromise was crucial to the production of our written Constitution, compromise can be expected to continue to be an essential part of post-production constitutional decisionmaking.²⁰⁴

CONCLUSION

For so long as the federal government does not insist on a uniform nationwide policy concerning marijuana, disparate state laws may lead some

positions. To the contrary, Reciprocity’s consistency requirement facilitates, and may be a precondition for, the process of compromise.

²⁰⁰ This includes the Great Compromise of 1787, which led to our bicameral federal legislature, and the Madisonian compromise. *See generally* Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 121, 142–47 (1996) (discussing the Great Compromise and “examin[ing] the tensions inherent in the ‘neither wholly national nor wholly federal’ constitutional order created in 1789”); Lumen N. Mulligan, *Did the Madisonian Compromise Survive Detention at Guantanamo?*, 85 N.Y.U. L. REV. 535, 539–40 (2010) (explaining the Madisonian compromise).

²⁰¹ Here I mean to include the compromises baked into our Constitution that allowed slavery to continue. *See generally* Jamal Greene, *Originalism’s Race Problem*, 88 DENV. U. L. REV. 517 (2011) (considering the question, “[h]ow can any political document retain democratic authority across successive generations?” in the context of the Constitution’s “race problem”).

²⁰² *See* AVISHAI MARGALIT, ON COMPROMISE, AND ROTTEN COMPROMISE 54 (2009) (defining rotten compromises, which must be categorically avoided, as any agreement that “establishes or maintains an inhuman political order based on systematic cruelty and humiliation as its permanent features”).

²⁰³ *See id.* at 1–3 (arguing that compromise can be normatively justifiable even when the compromise comes at the cost of some justice); Rosen, *Special Norms Thesis*, *supra* note 19, at 74–76 (discussing the many benefits of consensus in constitutional matters).

²⁰⁴ This is not to suggest that pre-Constitution and post-Constitution circumstances are identical. To the contrary, it is to be hoped that the deep social divisions that typically require a constitution’s drafters to paper-over sharp differences will yield to increasing social cohesion over time. *See* Cass R. Sunstein, *Incompletely Theorized Agreements in Constitutional Law*, 74 SOC. RES. 1, 13–16 (2007). Yet the conditions that make it likely that sharp disputes among citizens in free societies will endure suggest that constitutional disagreements also will not disappear. *See* JOHN RAWLS, *POLITICAL LIBERALISM* xviii–xix (expanded ed. 2005) (discussing pluralism). As such, compromise can be expected to remain important in the domain of post-production constitutional decisionmaking.

states to consider extraterritorially regulating their citizens so as to fully realize their policy preferences. Although there is legitimate uncertainty as to whether states have the authority to take the initiative to regulate extraterritorially, Congress unquestionably has the power under the Constitution to decide if and to what extent states can regulate extraterritorially. The determinations of *whether* Congress should enact legislation clarifying the scope of states' extraterritorial powers, and if so *what* the substance of that federal legislation should be, are substantially informed by constitutional considerations.

The fact that the *whether* and *what* questions concerning state extraterritoriality largely belong to the domain of constitutional decisionmaking should affect the way Congress goes about resolving them. When engaged in constitutional decisionmaking, Congress should act in accordance with the Special Norms, instead of the minimal norms operative during ordinary politics that permit virtually no-holds-barred political warfare. The norm of Proactivity may require congressional action concerning state extraterritoriality, and the norm of Explicitness will demand that Congress explicitly address the myriad constitutional questions that are implicated by state extraterritoriality, whether Congress addresses extraterritoriality out of duty or discretionarily.

And those constitutional questions should be decided in accordance with the norm of Tempered Politics. Tempered Politics comprises two sub-norms. Reciprocity demands that parties take only those constitutional positions that they reasonably believe their opponents can accept, which requires interpretive leaps in relation to a holistic consideration of the issues, thereby generating internally consistent constitutional positions. Tempered Politics' sub-norm of Communicative Exchange places interactive demands on all sides that are aimed at facilitating a full airing of the constitutional issues. Communicative Exchange also imposes a *prima facie* duty on the parties to strive for consensus through some combination of persuasion and compromise, instead of the brute force majoritarian decisionmaking that is perfectly permissible in the domain of ordinary politics.

Tempered Politics does not purport to generate a unique solution to constitutional questions. It does, however, eliminate some positions that otherwise could be live considerations under the norms of Hardball Politics, as it structures constitutional decisionmaking to both encourage and facilitate the production of Constitution-worthy decisions.

