2003

The Supreme Court, the Gun Industry, and the Misguided Revival of Strict Territorial Limits on the Reach of State Law

Allen K. Rostron

THE SUPREME COURT, THE GUN INDUSTRY, AND THE MISGUIDED REVIVAL OF STRICT TERRITORIAL LIMITS ON THE REACH OF STATE LAW

*Allen Rostron**

2003 L. REV. M.S.U.-D.C.L. 115

TABLE OF CONTENTS

INTRODUCTION

While tort lawsuits against gun manufacturers and sellers have captured much attention in recent years, there is an intriguing constitutional issue arising in the cases that has largely escaped notice. The gun companies build a defense from statements in a line of recent Supreme Court opinions indicating that the dormant Commerce Clause forbids application of a state statute to commerce occurring wholly outside the state's borders. The gun companies contend that it would be unconstitutional for them to be held liable under state tort law for the manufacture or sale of a gun that occurred outside the state. Several courts have accepted that argument, which would dramatically reduce the reach of state authority, while other courts have

---

* Senior Staff Attorney, Legal Action Project, Brady Center to Prevent Gun Violence. J.D., Yale Law School, 1994; B.A., University of Virginia, 1991. The views expressed in this article are strictly those of the author and do not necessarily represent the views of any parties to the cases discussed or any other litigation.

expressed bewilderment about the lack of clear precedent affirming or rejecting the argument.

This article contends that the Supreme Court should disavow its recent statements about strict territorial limits on the reach of state law. Those statements hark back to a conception of state authority that prevailed throughout the law a century ago but appeared to be dead until the Supreme Court's recent comments revived it. The statements have no support in modern precedent, they arose in part from a Supreme Court opinion's error in citation of authority, and they cannot be correct without rendering unconstitutional a vast number of the products liability and other tort claims that courts hear every day. Lower court decisions trying to follow the Supreme Court's lead on this point have produced only confusion and inconsistency. Strict territorial limits on the reach of state law died long ago for good reasons. The Supreme Court should let them rest in peace. While it ultimately fails, the gun companies' argument highlights the need for courts to clear up the substantial confusion surrounding this important but overlooked constitutional issue.

The notion that a state's territorial borders are absolute limits on the reach of that state's law appeared to be dead. A century ago, that strict territorial conception of state authority prevailed throughout the law. Enactments passed by a state's legislature, orders issued by its executive officials, regulations promulgated by its administrative agencies, and common-law rules established by its courts could govern only acts occurring within the state's borders. A state's courts could exercise jurisdiction only over people and things found within the state. Choice of law determinations turned on formalistic rules about the location of events giving rise to the cause of action. A state's law stopped at the border, regardless of the impact within the state from activities occurring outside it.

For decades, that strict territorial conception grew weaker until it seemed to have expired altogether, replaced by the idea that the reach of a state's law should depend on the nature and degree of the state's interests, not just geographic formalities. Courts obtained the power to exercise jurisdiction over out-of-state defendants having a minimum level of contacts with the state. New choice of law rules looked to which state had the most significant relationship to the subject matter of the litigation. States increasingly applied their legislation, regulations, and common law to conduct that occurred outside the state but had effects within it.

Just when the strict territorial conception of state authority seemed finished, it returned from the dead, appearing in a line of decisions in which the Supreme Court found that several types of state economic legislation violated the dormant Commerce Clause. The most striking thing about these decisions was the Court's pronouncement of a strict territorial rule limiting the

reach of state laws. The Court flatly stated that the Constitution "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[1] While the initial decisions in this line of cases concerned public law enforced by state officials, the most recent involved an award of punitive damages on a state-law fraud claim in a private civil action.[2]

For a time, these decisions had no dramatic effect. Lower courts applied the strict territorial rule to a variety of state regulatory schemes, from legislation limiting corporate takeover attempts to statutes prohibiting indecent material on the Internet. Just as in the bygone era when strict territorialism ruled, courts wrestled with difficult questions about how to assign geographic locations to complex and intangible affairs. At the same time, courts continued in a host of cases to apply other forms of state law to extraterritorial conduct without a hint of concern about the Supreme Court's new pronouncements about the dormant Commerce Clause. No one argued, for example, that courts violated the Constitution by applying a state's products liability law to a defendant's design and manufacture of a defective automobile in another state or country. While the Supreme Court's decisions did not establish any clear framework for determining what limits the Constitution places on extraterritorial application of the many different forms in which state law can be exercised, there was a universal assumption that the Supreme Court had not radically reduced the reach of state tort law.

The gun industry has shattered that complacent situation. Gun manufacturers, distributors, and dealers face a wave of tort litigation brought against them in courts across the nation. Private individuals and public officials have filed lawsuits seeking to hold gun companies responsible for harm allegedly attributable to unnecessarily dangerous ways in which these companies design and distribute their products.

The gun companies have seized upon the Supreme Court's recent decisions striking down extraterritorial applications of state law and have argued that those rulings should have a far broader impact than anyone previously imagined. Like most products, guns routinely move across state lines, both before and after retail sale. As a result, most gun injuries do not occur in the state in which the manufacturer produced and sold the gun, and many occur in a state in which no distributor or dealer ever sold the gun. The gun companies' argument is essentially a call for consistency, specifically a notion that all forms in which state law can be exercised should be subject to identical constitutional limitations on their extraterritorial reach. By simple

---

1. Healy v. Beer Inst., 491 U.S. 324, 336 (1989) (quoting Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982) (plurality opinion)).

2. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568-74 (1996).

syllogism, the gun companies reason that the Supreme Court says a state cannot regulate commerce occurring wholly outside its borders, that tort law is a form of state regulation, and that therefore it should be unconstitutional for a state to apply its tort law to their out-of-state conduct even if they cause harm within the state. If courts accepted and widely applied that conclusion, it would have a staggering impact, drastically reducing the reach of state law.

The lawsuits against the gun companies have been extremely controversial and the theories of liability being advanced by the plaintiffs in them have been the subject of extensive analysis and commentary by legal scholars and commentators. Some view the claims as innovative applications of established legal principles,[3] while others regard them as unprecedented attempts to stretch and distort those principles.[4] Despite its novelty and potentially revolutionary impact, the gun companies' constitutional argument has entirely escaped attention in the fray over these lawsuits.

The gun companies' extraterritoriality argument has generally befuddled the courts that have considered it. There is no precedent that squarely supports the argument, but there is also a remarkable scarcity of precedent that specifically rejects it, because no one previously pressed the issue. Instead, courts simply adjudicated a vast number of claims that would be unconstitutional under the gun companies' theory, untroubled by the concerns the gun companies raise. The gun companies have managed to persuade some courts to endorse their constitutional theory. Courts in several other states have rejected it, while others have deferred ruling on the issue but have suggested it may ultimately limit the relief they can award.

These decisions threaten to have a wider impact as they become precedent for similar constitutional defenses in other litigation. For example, lawsuits against tobacco companies, which inspired the gun litigation to some

---

3. *See, e.g.*, John G. Culhane & Jean Macchiaroli Eggen, *Defining a Proper Role for Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Expedience*, 52 S.C. L. REV. 287 (2001); Brian J. Siebel, *City Lawsuits Against the Gun Industry: A Roadmap for Reforming Gun Industry Misconduct*, 18 ST. LOUIS U. PUB. L. REV. 247 (1999); Frank J. Vandall, *O.K. Corral II: Policy Issues in Municipal Suits Against Gun Manufacturers*, 44 VILL. L. REV. 547 (1999); Note, *Recovering the Costs of Public Nuisance Abatement: The Public and Private City Sue the Gun Industry*, 113 HARV. L. REV. 1521 (2000).

4. *See, e.g.*, H. Sterling Burnett, *Suing Gun Manufacturers: Hazardous to Our Health*, 5 TEX. REV. L. & POL. 433 (2001); Lawrence S. Greenwald & Cynthia A. Shay, *Municipalities' Suits Against Gun Manufacturers–Legal Folly*, 4 J. HEALTH CARE L. & POL'Y 13 (2000); Jeff Reh, *Social Issue Litigation and the Route Around Democracy*, 37 HARV. J. ON LEGIS. 515 (2000).

degree, raise similar questions about the reach of state authority.[5] Critics of the "Master Settlement Agreement" between states and tobacco companies have already begun to argue that the rulings on the extraterritoriality issue in the gun cases provide forceful support for constitutional attacks on that settlement.[6]

While judicial decisions reflect bewilderment at the lack of precedent clearly addressing this basic and fundamentally important point of law, judges are not alone in that feeling. Professor Donald Regan undertook the most thorough scholarly analysis of the Supreme Court's renewed interest in a strict territorial principle concerning state law, and his central conclusion was that "we hardly know how to begin thinking about what the principle entails in any but the easiest cases"[7] and "what we know about extraterritoriality is much less than what we have still to work out."[8] A more recent analysis agreed that the limits on extraterritorial application of state law remain an "unsettled and poorly understood" subject.[9]

This article examines the gun companies' constitutional argument and the questions it raises about the Supreme Court's revival of strict territorial notions about the reach of states' authority. Part I provides a brief overview of the constitutional issue of state legislative or prescriptive jurisdiction. Part II describes the steady demise of the strict territorial view of the limits of state authority and looks at the Supreme Court decisions that breathed new life into that view. Part III finds that the lower courts' efforts to follow the Supreme Court's lead have resulted in confusion and inconsistency. The courts have

---

5. *See, e.g.*, Star Scientific, Inc. v. Beales, 278 F.3d 339, 354-56 (4th Cir.) (denying argument that statute implementing settlement agreement with tobacco companies violates constitutional restrictions on extraterritorial state legislation), *cert. denied sub nom.* Star Scientific, Inc. v. Kilgore, __U.S.__, 123 S. Ct. 93 (2002); Simon v. Philip Morris, Inc., 124 F. Supp. 2d 46 (E.D.N.Y. 2000) (addressing choice of law issues in nationwide class action against tobacco companies).

6. *See* Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Government's Tobacco Litigation*, 33 CONN. L. REV. 1143, 1165-66 (2001).

7. 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). Underscoring the lack of clear standards, Regan attempted to articulate the extraterritoriality principle applicable to legislation and came up with this rule: "For the most part, states may not legislate extraterritorially, whatever exactly that means." *Id.* at 1896.

8. *Id.* at 1913; *see also* David S. Welkowitz, *Preemption, Extraterritoriality, and the Problem of State Antidilution Laws*, 67 TUL. L. REV. 1, 23 (1992) (contending that the Supreme Court has not formulated a general framework for analysis of extraterritoriality issues).

9. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 789 (2001).

no clear framework for determining what forms of state law are subject to the strict rule against extraterritoriality. They also have demonstrated that defining the location of the conduct being regulated can be an arbitrary and indeterminate exercise, just as courts discovered a century ago when strict territorial views of state law prevailed.

Part IV returns to the litigation brought against the gun companies, describing these defendants' novel and extreme attempt to extend the Supreme Court's precedents and the mixed judicial reaction to their effort. I contend that the gun companies' constitutional argument is a distortion rather than a logical extension of the precedents. While the Supreme Court revived the strict territorial view of state law to some limited and ill-defined extent, it did not overturn the established authority of states to apply their tort law to out-of-state conduct that causes harm within the state.

Finally, in Part V, I argue that the Supreme Court's revival of any formalistic rule based on a strict territorial conception of state law was a mistake. That approach to the limits of state power died long ago for good reasons. Courts cannot wholly deprive states of the ability to apply their law to extraterritorial conduct that has an adverse impact on the state or those within it. While there must be constitutional limits on the reach of state law, courts have never succeeded in drawing categorical or absolute rules for this purpose. I submit that a more sound conceptual blueprint for imposing constitutional limits on the reach of state law already exists in the set of analogous principles that determine the extent to which American law can apply to conduct occurring outside the nation's borders.

In the interests of full disclosure, I note that I am not a disinterested observer of the litigation concerning firearms, as I am among the lawyers representing many private and governmental plaintiffs in suits against gun manufacturers and sellers. Whatever one thinks of the merits of these cases, there can be no doubt that the gun companies' novel constitutional defense raises intriguing questions about the extraterritorial application of state law that merit greater attention than they have received to date.

I. THE LIMITS OF STATES' PRESCRIPTIVE JURISDICTION

No one can reasonably deny that the Constitution places some sort of limitations on extraterritorial reach of state law. Common sense tells us that one state cannot wholly usurp the legislative authority of another. For example, the Virginia legislature passed a law prohibiting gun dealers in

Virginia from selling more than one handgun per month to any customer.[10] No one would reasonably argue that the Constitution should permit Virginia's legislature to enact a law imposing the same restriction on sales by gun dealers in Georgia, Montana, or any other state. Likewise, no one would suggest that the California legislature, concerned about the adverse impact of smoking on its citizens' health, should be able to prohibit the production of cigarettes in North Carolina.[11] The hard question is what sort of limitations should apply to each of the many different forms in which state law can be created and enforced.

The basic concepts surrounding the territorial reach of state law are the same whether one is talking about the states of the American union or the nation-states of the world.[12] In fact, those concepts generally have been articulated and differentiated more clearly in the authorities concerning application of United States law to foreign matters, including the Restatement of Foreign Relations Law.[13] In either the domestic or international context, a state's authority has several distinct aspects. The first issue is the scope of the state's "jurisdiction to prescribe" or "legislative jurisdiction," meaning its ability to make its law applicable to an activity or a dispute.[14] Choice of law is a matter of jurisdiction to prescribe. For example, when a plaintiff sues for negligence, the court must decide which state's common law can and should apply to the claim. This issue also can arise as a matter of statutory or regulatory interpretation. Some enactments specifically state how far their authors intended them to reach. For example, a fraud statute may explicitly

---

10. *See* VA. CODE ANN. § 18.2-308.2:2(Q) (Michie 2002); Welkowitz, *supra* note 8, at 47 (suggesting that California should not be able to obtain an injunction ordering forfeiture of guns in Nevada in order to enhance effectiveness of a statute banning them in California).

11. *See* Regan, *supra* note 7, at 1899-1900.

12. *See* Tallentire v. Offshore Logistics, Inc., 754 F.2d 1274, 1286 & n.22 (5th Cir. 1985) (noting congruency between constitutional limits on choice of law and rules governing legislative jurisdiction over acts on high seas), *rev'd*, 477 U.S. 207 (1986); Silverman v. Berkson, 661 A.2d 1266, 1270-73 (N.J. 1995) (noting mirror relationship between jurisdictional principles in domestic and international contexts); Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799, 1801 (1992) (describing how each of the potential approaches to foreign reach of United States antitrust and securities laws "was inspired by or finds echoes in choice-of-law theories intended for the more mundane skirmishes of civil litigation—automobile accidents, contract disputes, and the like").

13. *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW (1986).

14. *See* ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW § 3 (3d ed. 1977); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401(a) (1986) (defining "jurisdiction to prescribe" as state's authority "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court").

state that it applies to misrepresentations made by or to a person in the state. When a statute or regulation does not spell out its jurisdictional reach, courts must fill in the gap and decide what it covers.

The gun companies' constitutional argument is about jurisdiction to prescribe, which must be carefully distinguished from the separate issue of "jurisdiction to adjudicate," meaning a state's ability to subject a defendant to suit in its courts.[15] A court must have some form of *in personam* jurisdiction over a defendant or *in rem* jurisdiction over a thing in order to adjudicate claims concerning them, regardless of which state's or nation's law the court will apply. The gun companies do not deny that they are subject to personal jurisdiction in the courts of the states in which they face suits.

No one is quite certain what part of the Constitution should be regarded as imposing restrictions on a state's jurisdiction to prescribe its law to extraterritorial conduct. The gun companies principally cite the dormant Commerce Clause, but also mention the Due Process Clause. The effect of constitutional principles is what really matters to the gun companies, not their location in the constitutional text.[16]

To the extent extraterritoriality concerns present a dormant Commerce Clause issue, it is essential to maintain the distinctions between that issue and other rules and concepts derived from that same constitutional doctrine. First, courts have invalidated some state laws under the dormant Commerce Clause because they adversely affect interstate commerce by subjecting commercial activities to inconsistent regulations.[17] That concept is related to the extraterritoriality issue, but the two are distinct.[18] The gun companies contend that lawsuits threaten to subject them to inconsistent regulations, an issue to which I will return later in this article.[19]

---

15. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401(b) (1986) (defining "jurisdiction to adjudicate" as state's authority "to subject persons or things to the process of its courts or administrative tribunals").

16. *See* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 251 (1992) (claiming that the principle of territorial allocation of state authority is "so obvious that the Founders neglected to state it"); Regan, *supra* note 7, at 1887-95 (arguing that extraterritoriality principles are not localized in the dormant Commerce Clause, Due Process Clause, Full Faith and Credit Clause, Privileges and Immunities Clause, or any other provision, and instead derive from the overall structure and nature of the Constitution, state sovereignty, and federalism); Welkowitz, *supra* note 8, at 23, 76-81 (finding that limits on the extraterritorial reach of state authority are a "result of a consistent undercurrent contained within several sets of doctrines" rather than a rule located in one constitutional provision).

17. *See, e.g.*, CTS Corp. v. Dynamics Corp., 481 U.S. 69, 88-89 (1987).

18. *See* Regan, *supra* note 7, at 1869 ("[I]t could be disastrously misleading to refer to the extraterritoriality issue with the language of 'inconsistent regulations'").

19. *See infra* notes 273-279 and accompanying text.

Second, the dormant Commerce Clause requires courts to give strict scrutiny to any law that discriminates against interstate commerce.[20] The gun companies have never invoked that rule, because no plaintiff or court has suggested that a state's tort law would apply differently to a gun manufacturer or seller depending on whether it is located inside or outside the state. Even if a state happened to have few or no gun manufacturers, that would not make the application of its tort law to gun makers discriminatory.[21]

Third, the dormant Commerce Clause imposes a lower level of scrutiny, requiring a balancing of benefits and burdens, on laws that do not directly regulate or discriminate against interstate commerce but nevertheless have some incidental effect on it.[22] The gun companies could invoke this rule as a last resort, but have not done so and would prefer not to be forced to do so because it is a highly fact-specific inquiry that is deferential to state law. Instead, they assert that the Constitution categorically forbids the claims that have been brought against them under a strict rule against extraterritorial application of state law, leaving no room for judicial discretion or weighing of state interests.

II. THE FALL AND RISE OF STRICT TERRITORIALISM

The gun companies' argument marks the latest round in a long-running debate about the extent to which a state should have the power to apply its law to acts that occur outside its borders. Courts have been struggling for years to define appropriate constitutional limitations on states' prescriptive and adjudicatory jurisdiction. At the same time, they have wrestled with the closely analogous issues posed by extraterritorial reach of American law, whether federal or state, to people and activities abroad.

A. The Demise of Strict Territorialism

In the nineteenth century, the dominant principle overriding all questions of jurisdiction was that each state had authority over everything that occurred inside its territorial borders and nothing beyond them. Over the course of the next century, that strict territorial conception faded, replaced by recognition that the reach of a state law should be determined by the relative strength of

---

20. *See CTS Corp.*, 481 U.S. at 87.
21. *See id.* at 88; Exxon Corp. v. Governor of Md., 437 U.S. 117, 125 (1978).
22. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

states' interests and contacts with the matter in question rather than by mechanical territorial principles.[23]

Joseph Story provided an early and immensely influential articulation of the strict territorial conception in his *Commentaries on the Conflict of Laws*.[24] He viewed each nation as having exclusive sovereignty and jurisdiction within its geographic territory, and no power outside it.[25] Except to the extent surrendered to the national government under the Constitution, each state had the same exclusive territorial sovereignty. As a result, a state's legislation could govern only with respect to its territory, and its courts could exercise jurisdiction only over persons and things located within the territory.

Story's strict territorial conception of state and national authority drove thinking about personal jurisdiction, choice of law, and the scope of statutes for many years. The Supreme Court's quintessential articulation of the strict territorial view came in *Pennoyer v. Neff*,[26] where the Court held that a state's courts can exercise jurisdiction only over persons or things within the state's borders and declared it to be an "elementary principle, that the laws of one State have no operation outside of its territory."[27] Likewise, scholars and courts developed mechanical choice of law rules turning on the location of selected elements of causes of action.[28] Courts construed statutes as having no extraterritorial application, citing the "general and almost universal rule" that conduct must be governed wholly by the law of the territory in which it occurs.[29] In dormant Commerce Clause cases, courts treated state laws operating extraterritorially as "direct" regulations of interstate commerce infringing on exclusively national authority.[30]

Courts eventually abandoned strict territorial limitations in both the domestic and international contexts. They did so, not by forsaking the notion that the fundamental limit on state power is territorial, but by adopting a more expansive view of what it means for a state to have authority over its territory.

---

23. For a thorough discussion of the erosion of the strict territorial approach see Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1 (1992).

24. *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (Boston, Hillard, Gray, & Co. 1834).

25. *See id.* at 19-22.

26. 95 U.S. 714 (1877), *overruled by* Shaffer v. Heitner, 433 U.S. 186 (1977).

27. Pennoyer v. Neff, 95 U.S. 714, 722 (1877), *overruled by* Shaffer v. Heitner, 433 U.S. 186 (1977).

28. *See* RESTATEMENT OF CONFLICT OF LAWS § 378 (1934).

29. Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).

30. *See* Sam Kalen, *Reawakening the Dormant Commerce Clause in Its First Century*, 13 U. DAYTON L. REV. 417 (1988) (describing the Supreme Court's nineteenth-century dormant Commerce Clause jurisprudence in detail).

Courts began to recognize a state's authority to regulate conduct that has effects within the state's borders, regardless of where the conduct occurs. In criminal cases, courts held that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect."[31] In the civil arena, courts held that a manufacturer could be liable under the products liability law of a state in which the manufacturer was never present but the product caused harm.[32]

Courts extended this "effects principle" to statutory claims as well as those under common law. In *Young v. Masci*,[33] the Supreme Court ruled that a defendant could be required to pay damages under a New York statute imposing liability on the owner of a car for accidents caused by the negligence of a person who borrowed it, even though the defendant was a New Jersey resident and the loan of the car took place in New Jersey.[34] The plaintiff brought the suit in a New Jersey court, so the decision was strictly about New York's jurisdiction to prescribe its law to out-of-state conduct and not about jurisdiction to adjudicate the case. The Court's decision unequivocally embraced the principle of prescriptive jurisdiction based on the in-state effects of out-of-state conduct:

> A person who sets in motion in one State the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument. The cases are many in which a person acting outside the State may be held responsible according to the law of the State for injurious consequences within it.[35]

Likewise, in a landmark decision permitting application of United States antitrust law to foreign conduct, Judge Learned Hand recognized that the trend in modern law was to allow a state to "impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."[36]

Courts and commentators gradually rejected strict territorial approaches to choice of law as well. Under the new analyses, courts sought to determine which state had the most significant relationship to the cause of action, rather

---

31. Strassheim v. Daily, 221 U.S. 280, 285 (1911) (citations omitted).
32. *See, e.g.*, MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).
33. 289 U.S. 253 (1933).
34. *See* Young v. Masci, 289 U.S. 253 (1933).
35. *Young*, 289 U.S. at 258-59.
36. United States v. Aluminum Co., 148 F.2d 416, 443 (2d Cir. 1945) (citations omitted).

than to define the location of a particular act or event.[37] These new choice of law rules passed muster under the Due Process Clause, as the Supreme Court held that a state's law could apply to a claim, regardless of where the defendant's conduct occurred, as long as the state had "significant contacts" with the claim creating state interests strong enough to prevent the choice of that state's law from being arbitrary or unfair.[38] The Supreme Court left no doubt that it had abandoned the notion that a transaction should be subject to the exclusive sovereignty of a single state, explaining that

> [a]s a consequence of the modern practice of conducting widespread business activities throughout the entire United States, this Court has in a series of cases held that more states than one may seize hold of local activities which are part of multistate transactions and may regulate to protect interests of its own people, even though other phases of the same transactions might justify regulatory legislation in other states.[39]

This new conception of state authority radically transformed the constitutional limitations on state adjudicatory jurisdiction as well. Courts slowly weakened the strict territorial rule of personal jurisdiction embodied in *Pennoyer v. Neff*[40] until the Supreme Court cast the old regime aside completely and announced in *International Shoe Co. v. Washington*[41] that a state's courts could exercise jurisdiction over out-of-state defendants based on a requisite level of "minimum contacts" between the defendant and the state.[42]

When courts abandoned strict territorial rules as *limitations* on state authority, they abandoned them as *justifications* for state authority as well. In the past, there was an empowering flip side to the old notion that a state could never regulate anything occurring wholly outside its borders. That strict territorial view permitted a state to regulate conduct if some part of it, however small and inconsequential, occurred within the state's territory. The demise of strict territorialism meant the end of that practice, as states now had to establish a requisite degree of contacts or interests to exercise authority even over people and things within their borders. For example, the Supreme Court ruled in *Shaffer v. Heitner*[43] that a state must satisfy the minimum

---

37. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971); BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963). Judge Weinstein traces the history of choice of law rules back to antiquity in Simon v. Philip Morris, Inc., 124 F. Supp. 2d 46, 62-67 (E.D.N.Y. 2000).

38. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 819 (1985); Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981) (plurality opinion).

39. Watson v. Employers Liab. Assurance Corp., 348 U.S. 66, 72 (1954) (citations omitted).

40. 95 U.S. 714 (1877), *overruled by* Shaffer v. Heitner, 433 U.S. 186 (1977).

41. 326 U.S. 310 (1945).

42. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

43. 433 U.S. 186 (1977).

contacts standard of *International Shoe* for all assertions of its jurisdiction to adjudicate, even *in rem* proceedings concerning assets located within the state.[44] The Court noted the demise of "the theory that territorial power is both essential to and sufficient for jurisdiction."[45]

The strict territorial approach to the reach of state law appeared to be dead as the last decades of the twentieth century began. State law no longer stopped in its tracks at the border, and states no longer lacked power to protect themselves and their inhabitants from out-of-state sources of harm.

B. The Resurrection of Strict Territorialism

The modern line of Supreme Court decisions that revived the idea of strict territorial limits on state law began in 1982 with *Edgar v. MITE Corp.*,[46] a challenge to the constitutionality of an Illinois statute regulating corporate takeover attempts.[47] The statute gave the Illinois Secretary of State discretion to block corporate takeover offers he deemed unfair to the target company's shareholders.[48] The statute applied to a takeover offer if Illinois residents owned ten percent of the target's stock.[49] Alternatively, it applied if two out of three statutory conditions were met – the target had its principal executive office in Illinois, it was incorporated in Illinois, or it had "at least 10% of its stated capital and paid-in surplus represented within the State" – even if the target did not have a single shareholder in Illinois.[50] The application of the statute did not depend on whether the party making the offer had any connection with Illinois.[51] Where it applied, the statute enabled the Secretary of State to block the entire tender offer, including potential transactions in which neither the buyer nor the seller of the securities was in Illinois.[52]

MITE made an offer to acquire all shares of a corporation organized under Illinois law and having twenty-seven percent of its stockholders in Illinois.[53] MITE challenged the Illinois statute on the ground that it regulated transactions occurring wholly outside Illinois. In this case, the statute required MITE, a Delaware corporation based in Connecticut, to obtain permission from an Illinois official to make an offer to buy stock from people in states

---

44. *See* Shaffer v. Heitner, 433 U.S. 186 (1977).
45. *Shaffer*, 433 U.S. at 211-12.
46. 457 U.S. 624 (1982).
47. *See* Edgar v. MITE Corp., 457 U.S. 624, 626 (1982) (plurality opinion).
48. *See Edgar*, 457 U.S. at 626-27.
49. *See id.* at 627.
50. *Id.* at 627, 642 (citations omitted).
51. *See id.* at 641.
52. *See id.* at 641-42, 645.
53. *See id.* at 642.

other than Illinois. Indeed, MITE pointed out that the Illinois statute could apply even if there was not a single owner of the target company's stock in Illinois, although in this instance the target had Illinois shareholders. In the alternative, MITE argued that the statute failed the balancing test required by the Commerce Clause, even if it was not an invalid extraterritorial regulation, because its adverse impact on interstate commerce outweighed its local benefits.[54]

The case produced a fractured set of opinions, with a majority agreeing only that the statute could not survive the balancing test.[55] A plurality of four Justices also concluded that the statute's "sweeping extraterritorial effect" violated the Constitution.[56] While acknowledging that Illinois had authority to regulate stock transactions if the buyer or seller was in Illinois, the plurality observed that this statute went further and regulated sales to be made wholly outside Illinois.[57] In the most striking passage in the opinion, the plurality declared that the Constitution "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[58] While the plurality opinion found this extraterritoriality principle in the dormant Commerce Clause, it made clear that it was a rule distinct from the balancing test applied to laws that regulate interstate commerce only incidentally and not directly.[59] As a result, the plurality indicated that a law violating this extraterritoriality rule would be automatically invalid. Thus, the magnitude of the benefits it achieved or the extent to which it interfered with interstate commerce or out-of-state interests was inconsequential. The plurality's rule was a strict prohibition against extraterritorial regulation, not a matter of degree.

The *Edgar* plurality did not cite any precedent that actually established the rule stated in its opinion. To do so, it would have had to turn back to discredited decisions from the era before the demise of the strict territorial conception of state law. Instead, the plurality cited *Southern Pacific Co. v. Arizona ex rel. Sullivan*,[60] in which the Court struck down an Arizona statute that limited the length of trains running in that state.[61] The statute applied

---

54. *See Edgar*, 457 U.S. at 641-45.

55. *See id.* at 644-45.

56. *Id.* at 642. Of the other five members of the Court, only Justice Powell suggested that he did not agree with the plurality's extraterritoriality analysis, stating that he joined only the "balancing" portion of the opinion because "its Commerce Clause reasoning leaves some room for state regulation of tender offers." *Id.* at 646-47 (Powell, J., concurring in part).

57. *See id.* at 641-42.

58. *Id.* at 642-43.

59. *See Edgar*, 457 U.S. at 640.

60. 325 U.S. 761 (1945).

61. *See* S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945).

only to trains within Arizona and did not literally govern any conduct outside the state's borders, but the Court concluded that it would inevitably have the "practical effect" of controlling train operations "beyond the boundaries of the state."[62] It was impractical for railroads to split longer trains into separate pieces before entering Arizona and to regroup them after exiting the state, and therefore the regulation was likely to have the effect of causing railroads simply to run shorter trains inside and outside of Arizona.[63] While many valid statutes affect out-of-state conduct in myriad ways, this law interfered too much with the unique need for national uniformity in the interstate transportation system compared to the "slight and dubious" safety benefits it achieved.[64] Likewise, the *Edgar* plurality relied on *Shafer v. Farmers Grain Co.*,[65] in which the Court found that a North Dakota statutory scheme governing the sale of wheat had an unduly burdensome effect on interstate commerce, even though it applied only to sales occurring within the state, because most of those who bought wheat in North Dakota did so in order to ship it to other states.[66] Neither of these statutes actually applied to out-of-state conduct. The problem with them was not simply that they had extraterritorial effects, as many laws do, but that they had *excessive* extraterritorial effects compared to the state interests they served.

While neither of those decisions was inconsistent with the strict territorial principle announced by the *Edgar* plurality, they also were not precedent for it. They addressed a different issue. They demonstrated that a state's regulation of in-state conduct *can* violate the Constitution if it places an excessive burden on interstate commerce or out-of-state conduct. From that proposition, it certainly follows that there must be circumstances in which a state's regulation of out-of-state conduct *can* be unconstitutional as well. The *Edgar* plurality went far beyond that and declared that regulation of out-of-state conduct *necessarily* violates the Constitution, regardless of the regulation's relative positive and negative impact inside or outside the state.

---

62. *S. Pac. Co.*, 325 U.S. at 775.
63. *See id.* at 773.
64. *Id.* at 779.
65. 268 U.S. 189 (1925).
66. *See* Shafer v. Farmers Grain Co., 268 U.S. 189, 200 (1925).

That was a significant leap beyond the reasoning of either of the cited precedents.[67]

Edgar's suggestion that there is a categorical constitutional rule against extraterritorial state legislation was only a sentence of dicta in a plurality opinion, but it was nonetheless a stunning reawakening of a notion that had been abandoned throughout the law many years earlier. At the same time, it raised immense questions for which it did not offer even a hint of an answer. Most importantly, the *Edgar* opinion referred only to the application of a "state statute" to out-of-state commerce.[68] More specifically, *Edgar* concerned the validity of a statute enforceable by the Illinois Secretary of State through civil penalties or criminal prosecution.[69] *Edgar* did not even involve a court action brought under or to enforce the statute. The Illinois Secretary of State merely notified MITE of an intent to issue an order requiring MITE to cease and desist its tender offer. The matter came to court only because MITE sued to enjoin the Secretary's enforcement of the statute.[70] Likewise, the statutes at issue in the cases cited in *Edgar* provided for enforcement by state officials and punished violations with criminal sanctions or civil penalties.[71] The *Edgar* opinion did not explain whether the strict territorial rule it advanced had any bearing on any of the many other forms in which state law can be created and applied.

To the extent the plurality's opinion gave any signals about that, they were mixed. After stating that the Commerce Clause forbids application of statutes to commerce wholly outside the state, the plurality observed that "[t]he limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts."[72] That ambiguous reference to "jurisdiction of state courts"[73] could be read to mean that there are separate constitutional rules to deal with extraterritoriality concerns for forms of state

---

67. The *Edgar* plurality cited one other decision in that pivotal portion of its opinion, but did not specifically suggest that it was precedent for a categorical constitutional rule against extraterritorial state regulation. *See Edgar*, 457 U.S. at 642 (citing Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 806 (1976)). In *Hughes*, the issue was whether Maryland could treat out-of-state scrap processors differently from in-state processors, not whether the state's laws could have an extraterritorial reach. *See* Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 802-10 (1976) (holding that Maryland's payments for destruction of scrap automobiles on terms favoring in-state processors did not impermissibly burden interstate commerce because Maryland acted as a market participant rather than as a regulator).

68. *See Edgar*, 457 U.S. at 642-43.

69. *See id.* at 630 n.5.

70. *See id.* at 629.

71. *See S. Pac. Co.*, 325 U.S. at 763; *Shafer*, 268 U.S. at 198.

72. *Edgar*, 457 U.S. at 643.

73. *Id.*

law, such as the law of torts, unlike the regulatory statutes enforced by state officials at issue in *Edgar*. On the other hand, the sentence could be read to mean that the strict territorial rule derived from the Commerce Clause limits prescriptive jurisdiction for all forms of state law and there are merely separate constitutional limits on a state's jurisdiction to adjudicate.

The *Edgar* plurality opinion's next sentence compounds the confusion. It contains what can only be described as an egregious error in citation of precedent. The plurality quoted a statement from *Shaffer v. Heitner*,[74] the recent decision in which the Court held that the "minimum contacts" standard for personal jurisdiction must be satisfied for *in rem* proceedings as well, even those concerning property located within the state.[75] The quoted passage from *Shaffer* sounded like a ringing endorsement of a strict territorial view of a state's jurisdiction to adjudicate: "[But] any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power."[76]

The trouble with quoting that sentence from *Shaffer* as support for a strict territorial rule is that the sentence was not part of the Supreme Court's explanation of its reasons for its decision in *Shaffer*. It was a sentence in which the *Shaffer* opinion described the archaic and obsolete conception of personal jurisdiction, based on rigid notions of mutually exclusive state sovereignty and state judicial authority strictly limited by state territorial boundaries, established by Justice Fuller a century ago in *Pennoyer v. Neff*.[77] The Court described that outmoded thinking at the outset of its opinion in *Shaffer* in order to set the stage for the rest of its opinion in which it explained in detail why the Court had long ago rejected that archaic conceptual structure and superseded it with the modern law of personal jurisdiction focusing on relationships and contacts among the defendant, the forum, and the litigation.[78] The *Edgar* plurality's reliance on the quoted sentence from *Shaffer* is baffling. It is like quoting a sentence from *Brown v. Board of Education*[79] in which the Court described late nineteenth-century notions about equal protection and using it as support for the proposition that the Constitution permits racial segregation today.[80]

---

74. 433 U.S. 186 (1977).

75. *See Edgar*, 457 U.S. at 643 (*citing Shaffer*, 433 U.S. at 197); *see supra* notes 44-45 and accompanying text.

76. *Edgar*, 457 U.S. at 643 (*quoting Shaffer*, 433 U.S. at 197).

77. 95 U.S. 714 (1877), *overruled by* Shaffer v. Heitner, 433 U.S. 186 (1977).

78. *See Shaffer*, 433 U.S. at 202-12.

79. 347 U.S. 483 (1954).

80. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

The strict territorial rule advanced in *Edgar* initially looked as though it might have a short life. The majority of the Supreme Court distinguished *Edgar* in its opinion in *CTS Corp. v. Dynamics Corp.*[81] written by Justice Powell, the one member of the Court who expressed disagreement, albeit vaguely, with the plurality's discussion of extraterritoriality in *Edgar*.[82] Rejecting a dormant Commerce Clause challenge to an Indiana anti-takeover statute, Justice Powell's opinion in *CTS* can easily be read as contradicting the *Edgar* plurality's statement of a strict territorial rule. Powell distinguished the Illinois law struck down in *Edgar* from the Indiana law at issue in *CTS* on the ground that the latter applied only to corporations incorporated in Indiana and having a substantial number of shareholders in Indiana.[83] The *CTS* decision upheld the Indiana statute even though, as the dissent pointed out, it regulated transfers of stock between buyers and sellers wholly outside Indiana.[84] Justice Powell's majority opinion simply explained that the Indiana law did not discriminate against interstate commerce, impose excessive burdens on it, or create an impermissible risk of inconsistent regulation, without explaining how the statute avoided violation of the strict territorial rule proposed in *Edgar*.[85] Powell's opinion thus appears to reject a strict territorial rule. An alternative reading, proposed by Professor Donald Regan, is that Powell implicitly held that the commerce being regulated in *CTS* was not the many transactions between each shareholder and the tender offerer, but the overall transfer of control of the Indiana corporation, a singular legal event deemed to occur inside Indiana.[86]

The Supreme Court gave a more solid signal of support to *Edgar*'s strict territorial rule in a pair of decisions striking down alcohol "price affirmation" statutes. In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,[87] the Court held that it was unconstitutional for Connecticut to require a liquor seller to post its prices in advance, on a monthly basis, and to affirm that it would not sell in Connecticut at a price higher than the lowest price at which it sold in any other state during the month.[88] According to the Court, that requirement had the practical effect of controlling liquor prices in other states, because a seller could not lower its prices in other states without

---

81. 481 U.S. 69, 93 (1987).
82. *See supra* note 56.
83. *See* CTS Corp. v. Dynamics Corp., 481 U.S. 69, 93 (1987).
84. *See id.* at 99-101 (White, J., dissenting).
85. *See id.* at 87-94.
86. *See* Regan, *supra* note 7, at 1876.
87. 476 U.S. 573 (1986).
88. *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 575-76, 582-84 (1986).

obtaining permission from the New York Liquor Authority.[89] The Court cited the *Edgar* plurality opinion for the proposition that "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce."[90] In striking down a similar price-affirmation statute in *Healy v. Beer Institute*,[91] a majority of the Supreme Court signed on to the *Edgar* plurality's more general proposition that the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[92] While the Court decided *Brown-Forman* and *Healy* with a bare majority of five Justices,[93] none of the dissents specifically challenged the majority opinions' statements about the constitutional limitations on extraterritorial application of state law.[94]

Like *Edgar*, the *Brown-Forman* and *Healy* decisions implied that the strict territorial rule would not apply to all forms of state law, but did not identify the boundaries of the category of law to which the rule applied.[95] Both cases involved regulatory statutes that state administrative agencies could enforce without bringing an action in court.[96] Litigation concerning the statutes arose only because the regulated businesses filed suits to challenge the laws' constitutionality, not because anyone brought any cause of action under the laws.[97] Each statute regulated prices for the general benefit of consumers in the state, and neither provided any form of relief or protection against particular injuries as tort actions do. In each case, the Court referred only to statutes and regulations in stating the applicable rules of law.[98] Neither opinion cited any precedent suggesting that the extraterritoriality principles discussed in these cases would apply to a court's adjudication of tort or other

---

89. *See Brown-Forman*, 476 U.S. at 583.

90. *Id.* at 582 (citations omitted).

91. 491 U.S. 324 (1989).

92. Healy v. Beer Inst., 491 U.S. 324, 336 (1989) (citations omitted) (quoting *Edgar*, 457 U.S. at 642-43).

93. The Court decided *Brown-Forman* by a vote of five to three and *Healy* by a vote of five to three, with Justice Scalia concurring in part and concurring in the judgment. *See Healy*, 491 U.S. at 325, 344-45; *Brown-Forman*, 476 U.S. at 574, 586.

94. *See Healy*, 491 U.S. at 344-49; *Brown-Forman*, 476 U.S. at 586-92.

95. *See Healy*, 491 U.S. at 339-42; *Brown-Forman*, 476 U.S. at 580-81, 584-85.

96. *See Healy*, 491 U.S. at 337-39; *Brown-Forman*, 476 U.S. at 576-78.

97. *See Healy*, 491 U.S. at 329 (beer producers and importers filed suit to challenge the statute); *Brown-Forman*, 476 U.S. at 577 (distiller brought suit to challenge the statute after state liquor authority instituted license revocation proceedings).

98. *See Healy*, 491 U.S. at 335-40; *Brown-Forman*, 476 U.S. at 582-84.

state-law claims.[99] Indeed, the *Healy* opinion repeatedly refers to the constitutional limitations on "state economic regulation" and "local economic regulation," rather than referring more broadly to state law, state statutes, or state regulation.[100] The decisions thus appear to rest on an assumption that there is a distinction between "economic regulation" and other forms of state law, but they provided no clear statement of such a distinction or any explanation about how exactly to determine what sorts of state law should be subject to the strict territorial rule.[101]

Legal scholars have not helped to flesh out the distinction.[102] The only debate has been about what kind of rule the Supreme Court's decisions established, not about what kinds of state law the rule governs. Some have praised the decisions for implementing a formal rule rather than a balancing test,[103] others have suggested that the decisions actually involved only balancing and did not impose any formal or strict limitations despite some "overbroad extraterritoriality dicta,"[104] while others simply concluded that it

---

99. The only precedents cited specifically for the extraterritoriality point were *Edgar* and *CTS*. *See Healy*, 491 U.S. at 336-37; *Brown-Forman*, 476 U.S. at 582. In that portion of its *Brown-Forman* opinion, the Court also cited a decision striking down a law prohibiting the sale of milk in New York at prices below a fixed minimum rate. *See* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); *see also Brown-Forman*, 476 U.S. at 582. The law applied to sales in New York only and was unconstitutional because it effectively imposed a tariff on imports of lower-priced milk into the state, not because it regulated conduct outside the state. *See Baldwin*, 294 U.S. at 521-22, 526-28.

100. *See Healy*, 491 U.S. at 336, 337 & n.14.

101. *See id.* at 331-43; *Brown-Forman*, 476 U.S. at 578-85.

102. Only a few observers have even asked whether there is a distinction. *See* C. Steven Bradford, *What Happens if* Roe *Is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87, 148 (1993) (footnote omitted) (suggesting that the dormant Commerce Clause has been largely ignored "in the civil choice-of-law context, but it has much to say concerning the application of a state's regulatory and criminal law" and "is one constitutional provision for which the distinction between civil choice-of-law doctrine and state regulatory law may make a difference"); *cf.* Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 638-55 (1990) (claiming that courts have a bias in favor of giving greater international reach to American antitrust, securities, and other "market statutes" than to employment, environmental, and other "nonmarket statutes").

103. *See* Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 95-96 (1988); Regan, *supra* note 7, at 1878; Welkowitz, *supra* note 8, at 34-37, 61-62, 72.

104. Goldsmith & Sykes, *supra* note 9, at 806; *see also* James E. Gaylord, Note, *State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie*, 52 VAND. L. REV. 1095, 1122-27 (1999) (arguing that the Court's decisions actually reflect a requirement that a state have a sufficient nexus to conduct rather than a strict rule that conduct occur within that state).

is "unclear what to make of these cases."[105] While several have assumed that the Court's decisions worked no significant change in the scope of state tort law,[106] no one has attempted to identify the categories of state law to which the decisions are relevant and the categories to which they do not or should not apply.[107]

C. The *BMW* Decision

The most recent case in this line of decisions, *BMW of North America, Inc. v. Gore*,[108] provides additional important clues because it involved tort claims. Dr. Gore bought a new BMW sedan in Alabama and later discovered that it had been damaged and repainted prior to sale. He sued the corporation that distributes BMWs in the United States for fraud under Alabama law. The cause of action arose under a statute, because Alabama codified its common

---

105. Bradford, *supra* note 102, at 154 (noting that statutes struck down on extraterritoriality grounds could have been invalidated under other dormant Commerce Clause principles and therefore "[i]t is unclear whether the Court would actually subject a state statute to strict scrutiny merely because of its extraterritoriality, where it is neither discriminatory nor designed to protect local economic interests"); *see also* Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 77, 78, 80 (1991) (arguing that the strict territorial rule "has a bizarre ring" and "does not seem to jibe with reasonable understandings of state power" because "[t]he world is too untidy a place to imagine successfully confining a state's regulatory power along arbitrary territorial lines").

106. *See* Mark P. Gergen, *Territoriality and the Perils of Formalism*, 86 MICH. L. REV. 1735, 1736 (1988) (noting that even if a state cannot regulate out-of-state behavior directly through legislation, it may "indirectly influence foreign behavior by acting upon its local effects. Michigan, for example, may influence Indiana polluters by making them liable for emissions that poison Michigan air."); Goldsmith & Sykes, *supra* note 9, at 789-90 & n.26, 795 (stating that the "dormant Commerce Clause plainly does not strike down" applications of state law to out-of-state conduct such as "[n]uisance actions against polluters across the border" or "products liability actions against out-of-state manufacturers").

107. The discussion of that issue has been limited to whether the decisions impose a strict territorial rule limiting a state court's authority to grant an injunction covering conduct in other states. *See* Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747, 837-40 (1998) (arguing that there is no clearly defined constitutional check against extraterritorial injunctions based on state law, but there should be); Welkowitz, *supra* note 8, at 58-72 (arguing that a nationwide injunction under state law should be unconstitutional unless it applies to conduct directed at a state and not merely having an effect within the state); Paul Heald, Comment, *Unfair Competition and Federal Law: Constitutional Restraints on the Scope of State Law*, 54 U. CHI. L. REV. 1411, 1421-23, 1427-31 (1987) (arguing that multi-state injunctions are unconstitutional if based solely on state law and should be based on federal law instead).

108. 517 U.S. 559 (1996).

law cause of action for fraud back in 1907.[109] At trial, Dr. Gore presented proof that the refinishing lowered the car's value by four thousand dollars and that BMW had done the same thing to 983 other cars, selling fourteen of them in Alabama.[110] Dr. Gore argued that the jury should award him four thousand dollars as compensatory damages plus four million dollars in punitive damages based on the approximately one thousand other cars that BMW sold without disclosing that they had been refinished. The jury agreed.[111] BMW challenged the four million dollar punitive damages award on the ground that it should not be punished under Alabama law for sales of cars in other states that had no effect on Alabama or any of its residents. The Alabama Supreme Court agreed with BMW, holding that the out-of-state sales should not be considered in fixing the amount of punitive damages, but only reduced the punitive damages award by half to two million dollars.[112]

The principal issue before the Supreme Court in *BMW* was whether the reduced award of two million dollars in punitive damages was an excessive punishment violating BWM's due process rights.[113] The Alabama Supreme Court purported to have cured the extraterritoriality problem by excluding the out-of-state sales from the punitive damages calculus. However, Dr. Gore reinserted the extraterritoriality issue into the case by arguing to the United States Supreme Court that the two million dollars award was not excessive because it was necessary to induce BMW to change its nationwide policy of not disclosing all damages and repairs to cars sold as new.[114]

A five-member majority of the Supreme Court found that it would be unconstitutional for the punitive damages award to be sustained as a means of inducing BMW to change a nationwide policy. The Court noted that many other states have statutes that expressly regulate whether repairs to a new vehicle must be disclosed to the purchaser.[115] There was no proof that BMW's sales of cars in other states violated any of those laws.[116] The Court concluded that Congress has the authority to make policy decisions for the entire nation but a single state may not do so, and "by attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy

---

109. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 563 n.3 (1996) (citing ALA. CODE § 6-5-102 (1993)).

110. *See BMW of N. Am.*, 517 U.S. at 564.

111. *See id.*

112. *See id.* at 567.

113. *See id.* at 562-63.

114. *See id.* at 572. Four Justices believed that the extraterritoriality section of the Court's opinion was dicta despite Dr. Gore's argument. *See id.* at 604 (Scalia, J., dissenting); *see BMW of N. Am.*, 517 U.S. at 607-10 (Ginsburg, J., dissenting).

115. *See id.* at 569 & n.13.

116. *See id.* at 573.

choices of other States."[117] The Court never specifically mentioned the Commerce Clause, although it relied on cases decided under it, and instead made only a more general reference to "principles of state sovereignty and comity."[118]

The crucial portion of the majority opinion began as though it would carry on the revival of the strict territorial approach to the reach of state law. For the proposition that a state cannot impose its policy choices on neighboring states, the Court quoted language from an array of old opinions espousing a strict territorial conception of state authority. The Court quoted Chief Justice Waite, from 1881, opining that "[n]o State can legislate except with reference to its own jurisdiction."[119] It quoted Chief Justice Fuller, from 1892, declaring that "[l]aws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States."[120] The Court added a statement from Chief Justice White, from 1914, noting that "it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority."[121]

The Court also cited the more recent opinions in *Edgar* and *Healy*.[122] It did not actually quote the strict territorial rule articulated in those cases, forbidding statutes from reaching commerce wholly outside the state, and instead quoted only a more vague reference in *Healy* to the need for "autonomy of the individual States within their respective spheres."[123] The only other modern opinion cited for the *BMW* opinion's discourse about "principles of state sovereignty and comity"[124] was *Bigelow v. Virginia*,[125] in which the Court struck down on first amendment grounds a Virginia statute forbidding advertisements in Virginia newspapers by out-of-state abortion providers.[126] Justice Blackmun's decision in *Bigelow* mentioned that the Constitution would not permit Virginia to prohibit its residents from traveling

---

117. *Id.* at 572.

118. *Id.*; *see supra* note 16. It is unclear whether the Court deliberately chose to avoid reference to the Commerce Clause because the case involved a damages award rather than the constitutionality of a statute or regulation.

119. *BMW of N. Am.*, 517 U.S. at 571 (*quoting* Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881)).

120. *Id.* at 571 n.16 (*quoting* Huntington v. Attrill, 146 U.S. 657, 669 (1892)).

121. *Id.* (*quoting* N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914)).

122. *See id.* at 571-72.

123. *Id.* at 572 (footnote omitted) (*quoting Healy*, 491 U.S. at 336).

124. *Id.*

125. 421 U.S. 809 (1975).

126. *See* Bigelow v. Virginia, 421 U.S. 809, 824 (1975).

to New York to have an abortion or to punish them for doing so.[127] That dicta merely indicated that a state cannot continue to apply its law to the conduct of its citizens no matter where they go, not that its law can never apply to out-of-state conduct.[128]

While it did not cite any precedent for a strict territorial rule more persuasive than *Edgar* or its progeny had, the *BMW* decision shed new light on the issue because it addressed a form of state law unlike that involved in the earlier cases. The decision made clear that the Constitution imposes limits on the extraterritorial reach of all forms of state law, noting that "[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute."[129]

Despite its initial rhetoric and citation of old cases invoking the strict territorial conception of state authority, the *BMW* opinion ultimately veered in the other direction. *Edgar* and the subsequent decisions stated that the Commerce Clause flatly prohibits state legislation that governs commerce occurring wholly outside the state regardless of whether the conduct has effects within the state.[130] The *BMW* decision indicated that a very different test governs a state's authority to award punitive damages for conduct occurring outside the state. Such an award could violate principles of state sovereignty and comity only if (a) the conduct "had no impact on Alabama or its residents"[131] or (b) Alabama's intent was to punish the defendant or to deter its conduct in other states rather than to protect Alabama's own consumers and its own economy from harm.[132]

That is not a strict territorial rule. It is a vindication of the principle that a state's prescriptive jurisdiction extends to conduct that occurs wholly outside the state but has effects within it.[133] Contrary to much of its rhetoric,

---

127. *See Bigelow*, 421 U.S. at 822-24.

128. *See id.* In other words, the *Bigelow* opinion rejected the notion of state regulation based on the "nationality principle," which is a potential justification for extraterritorial regulation but a different concept from the "effects principle" at issue in cases like *BMW*. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(2) cmt. e (1986).

129. *BMW of N. Am.*, 517 U.S. at 572 n.17 (citations omitted).

130. *See, e.g., Edgar*, 457 U.S. at 642-43.

131. *BMW of N. Am.*, 517 U.S. at 573 (footnote omitted).

132. *See id.* at 572-73. The two tests effectively blend into one, as a state invariably will have the required intent to protect in-state interests when there is an adverse impact on those interests, but will lack the intent to prevent in-state harm when there is no such harm. Even if it is possible in theory to have a provision of state law that protects in-state interests but was not intended to do so, it seems unlikely that courts would know the protective intent was absent.

133. The Court suggested that a state might have even broader power to punish out-of-state conduct that was unlawful in the states where it occurred, but did not decide that issue because it concluded that BMW's conduct was lawful where it occurred. *See id.* at 573 n.20.

the Court ultimately came down on the side of "the State's interest in protecting its own consumers and its own economy."[134]

The *BMW* decision did not explain what its embrace of the effects principle meant for the strict territorial rule espoused in decisions like *Edgar* and *Healy*. One possibility is that the decisions can be reconciled by drawing a distinction between two different categories of state law, one containing the anti-takeover and price-affirmation statutes considered in *Edgar* and *Healy* and the other including the award of punitive damages at issue in *BMW*. Since they do not even refer to the existence of such a distinction, the Court's decisions offer no guidance about how to figure out what forms of state law would go on each side of the line.[135]

The division could not be a simple split between positive law and common law, for the fraud claim at issue in *BMW* was statutory.[136] A rule drawing a distinction between statutory and common-law claims would also arbitrarily disadvantage states that happen to provide for products liability, public nuisance, consumer fraud, or other causes of action by statute rather than common law. For example, it cannot be that Louisiana, in which the common law never prevailed, has dramatically less ability than other states to protect its citizens from out-of-state sources of harm.[137] The distinction also could not be a straightforward matter of injunctive commands versus monetary awards, as the Court acknowledged in *BMW* that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief."[138] It could not be merely a distinction between law enforced by public officials and private causes of action, or else it could be circumvented by a state simply giving a private person a right of action to obtain what the state itself could not achieve. The test would have to be some sort of multi-factor, flexible analysis aimed at discerning whether a particular exercise of state law was really and fundamentally more like "economic

---

134. *Id.* at 572.

135. *See generally id.*; *Healy*, 491 U.S. 324; *Edgar*, 457 U.S. 624. Compensatory damages would have to fall in the latter category, as they are, if anything, less "regulatory" and more closely tied to the state's interest in protecting its residents from harm than punitive damages.

136. *See supra* note 109 and accompanying text.

137. *See* Dennick v. R.R. Co., 103 U.S. 11, 18 (1880) (citing Louisiana as an example for why a state court's jurisdiction to adjudicate a cause of action arising under another state's law cannot depend on whether the right to recovery is statutory or common-law).

138. *BMW of N. Am.*, 517 U.S. at 572 n.17 (*quoting* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959)). For example, the Illinois Secretary of State threatened to block the tender offer in *Edgar* by issuing an administrative order, but it would be a strange result if the analysis of the statute's extraterritorial effect was different if the Secretary had sued to obtain the civil penalties afforded for violation of the act. *See Edgar*, 457 U.S. at 630 n.5.

regulation" or more like a traditional tort or other cause of action providing relief and protection against injuries. At that point, the strict territorial approach would not be delivering the benefits of formalism and certainty that would make it an attractive approach in the first place.

The other possibility is that it is impossible to reconcile *BMW*'s endorsement of the effects principle and the earlier cases' revival of interest in a strict territorial rule. If the Court did not intend to draw a distinction between two different types of state law, then *BMW* effectively overruled any strict territorial rule established by the prior decisions. There are tantalizing suggestions of that in the *BMW* decision, including the emphasis on the common nature of all forms of state law, from a statute to "a jury's application of a state rule of law in a civil lawsuit."[139] In particular, the *BMW* decision mentions that its test, allowing state regulation of out-of-state conduct with in-state impact, applies to "legislatively authorized fines [as well as] judicially imposed punitive damages."[140] Legislatively authorized fines are a basic means of enforcing the most quintessentially "regulatory" forms of state law, including the statutory schemes at issue in cases like *Edgar*.[141] If statutory fines are subject to the test set forth in *BMW*, as the opinion indicates, then there can be very little or nothing left of the strict territorial rule espoused by the earlier decisions.

III. THE STRICT TERRITORIAL RULE IN THE LOWER COURTS

The Supreme Court's decisions have charted no clear path for other courts to follow. Lower courts have applied the strict territorial rule in haphazard fashion, usually based on assumptions about its relevance rather than any form of analysis, and have not been able to draw any clear or consistent line as to which forms of state law should be allowed to reach out-of-state conduct with in-state effects. In addition, lower courts' decisions have brought reminders of why strict territorial notions about state law died out in the first place. When the reach of state law depends entirely on formalistic rules about territorial location, cases begin to turn on arbitrary and inconsistent determinations about the geographic location of complex relationships and intangible affairs.

---

139. *BMW of N. Am.*, 517 U.S. at 572 n.17.

140. *Id.* at 572.

141. *See Edgar*, 457 U.S. at 630 n.5 (noting that violation of the Illinois anti-takeover statute could result in action for civil penalties or criminal prosecution).

A. Uncertainty About the Scope of the Strict Territorial Rule

After the Supreme Court began suggesting that state legislation would violate the dormant Commerce Clause if it applied to conduct occurring wholly outside the state, lower courts began to hear constitutional challenges to an array of state legislative and regulatory schemes similar to those struck down by the Supreme Court. Defendants also occasionally began to invoke the Supreme Court's statements about extraterritoriality as a defense to state law claims bearing no resemblance to anything addressed in cases like *Edgar* or *Healy*.

In a few instances, courts assumed that the strict territorial rule stated in the Supreme Court decisions applied to claims based on state statutes, particularly claims seeking injunctive relief. For example, in dicta in an unpublished decision, the Ninth Circuit cited *Edgar* in suggesting that a claim for injunctive relief under a California statute could violate the dormant Commerce Clause.[142] The plaintiff sought a nationwide injunction against the Shearson Lehman brokerage firm "until it changes its business practices, including altering its internal account forms, the format of its monthly statements, and its communications with its customers."[143] The Ninth Circuit's opinion stated that granting such relief on a claim under a California statute would be unconstitutional because "[t]hese are not local decisions; they necessitate decision-making at the national level, which for Shearson would take place in Delaware or New York, not in California."[144]

A federal court in Illinois expressed similar concerns about entering a nationwide injunction on a claim arising from a state statute in *Hyatt Corp. v. Hyatt Legal Services*.[145] While finding that the Hyatt hotel chain was entitled to injunctive relief on its claim against the Hyatt legal services partnership under an Illinois statute prohibiting dilution of trademarks, the court concluded that a nationwide injunction against the partnership's use of the name could violate the Commerce Clause.[146] The court expressed uncertainty about whether a nationwide injunction, applicable to commercial conduct occurring outside Illinois and in states without anti-dilution laws, would be

---

142. *See* Shearson Lehman Bros., Inc. v. Greenberg, 60 F.3d 834, 1995 WL 392028, at *3 (9th Cir. 1995) (unpublished table decision). The statute prohibited unlawful, unfair, and fraudulent business practices. *See* CAL. BUS. & PROF. CODE § 17200 (West 1997); *see infra* note 170 and accompanying text. The statements in the Ninth Circuit's opinion about the Commerce Clause were dicta because the court ruled that § 17200 does not apply to securities transactions. *See Shearson Lehman Bros.*, 1995 WL 392028, at *2.

143. *Shearson Lehman Bros.*, 1995 WL 392028, at *3.

144. *Id.*

145. 610 F. Supp. 381 (N.D. Ill. 1985).

146. *See* Hyatt Corp. v. Hyatt Legal Servs., 610 F. Supp. 381, 385-86 (N.D. Ill. 1985).

unconstitutional per se, or only if the burden it placed on interstate commerce outweighed the local interests served.[147] Either way, the court concluded that the injunction it issued in this particular case "should constitutionally remain within the borders of Illinois."[148]

A few other courts assumed, without specifically analyzing the question, that the strict territorial rule could apply even to state law claims seeking compensatory damages. For example, a California appellate court assumed that the strict territorial rule stated in *Edgar* would apply to an employee's claim for damages under a California employment discrimination statute.[149] In order to avoid "serious constitutional concerns," the court construed the statute as not applying to a sexual harassment claim by a Washington resident against a California employer, where the alleged harassment and most of the employee's work occurred outside California.[150]

Those cases were the rare exceptions. Far more often, courts simply continued to apply the familiar rules of personal jurisdiction and choice of law to claims based on out-of-state conduct, without reference to the Supreme Court's line of decisions about the Commerce Clause and extraterritoriality, regardless of whether the claims arose under statute or common law or sought damages or injunctive relief.[151] Indeed, there appeared to be a universal assumption that the Supreme Court's extraterritoriality decisions had no bearing on the award of relief on common law claims. In the hundreds of reported decisions citing *Edgar* and *Healy*, there was only one in which a defendant even tried to argue that a court's adjudication of common law claims under state law could violate the strict territorial rule. In that case, an Alabama corporation sued two Italian companies for breach of a contract to

---

147. *See Hyatt Corp.*, 610 F. Supp. at 383-85.

148. *Id.* at 385.

149. *See* Campbell v. Arco Marine, Inc., 50 Cal. Rptr. 2d 626, 631-32 (Ct. App. 1996).

150. *Campbell*, 50 Cal. Rptr. at 631-32.

151. *See, e.g.*, Jaurequi v. John Deere Co., 986 F.2d 170 (7th Cir. 1993) (permitting Missouri to apply its products liability law to an Illinois manufacturer of farm machinery sold to an Indiana dealer); *In re* Disaster at Detroit Metro. Airport, 750 F. Supp. 793 (E.D. Mich. 1989) (permitting Michigan to apply its punitive damages law to the conduct of a Missouri airplane manufacturer that occurred in California); Feldt v. Sturm, Ruger & Co., 721 F. Supp. 403 (D. Conn. 1989) (permitting Georgia products liability law to apply to a Connecticut manufacturer that sold a gun to Illinois distributor, who sold it to an Illinois dealer); State *ex rel.* Miller v. Baxter Chrysler Plymouth, Inc., 456 N.W.2d 371 (Iowa 1990) (permitting Iowa to apply its consumer fraud act to Nebraska auto dealerships' placement of ads in a Nebraska newspaper and on a Nebraska television station); O'Connor v. O'Connor, 519 A.2d 13 (Conn. 1986) (permitting Connecticut to apply its no-fault motor vehicle insurance act to an auto accident in Canada); Young v. Fulton Iron Works Co., 709 S.W.2d 927 (Mo. Ct. App. 1986) (permitting Missouri to apply its tort law to injuries caused by a mechanical press manufactured in New Jersey and sold to a purchaser in Michigan).

be performed in Alabama, and the Italian companies argued that it would violate the extraterritoriality principle set forth in *Edgar* if Alabama law determined whether one Italian corporation could be held liable as a corporate successor to another.[152] The Supreme Court of Alabama avoided the need to decide whether *Edgar* could apply to an issue of common law contract liability by finding that the case did not involve application of Alabama law to any commerce taking place wholly outside Alabama's borders.[153]

There was only one type of claim to which courts consistently applied the strict territorial rule. Some states have enacted statutes affording special protection to franchisees or dealers, such as requiring good cause for terminating the franchise or distribution relationship.[154] An extraterritoriality issue arises in situations where a franchisee or dealer had a multi-state territory. If terminated, the franchisee or dealer invariably sues under the law of the state in its territory with the strongest protective statute and seeks relief with respect to the entire territory.[155] Courts consistently assumed that the claims in that situation must satisfy the strict territorial rule under the Commerce Clause, although they reached conflicting conclusions about whether the commerce at issue occurs "wholly outside" the state whose law the plaintiff seeks to invoke.[156]

The Supreme Court's decision in *BMW* in 1996 had remarkably little impact on lower courts' handling of extraterritoriality issues. The lower

---

152. *See* Am. Nonwovens, Inc. v. Non Wovens Eng'g, S.R.L., 648 So. 2d 565, 569 (Ala. 1994).

153. *See Am. Nonwovens*, 648 So. 2d at 569.

154. *See* Edward M. Borges, *Extraterritorial Application of State Law*, 18 FRANCHISE L.J. 102, 102 (1999).

155. *See id.* at 103.

156. *See* Instructional Sys., Inc. v. Computer Curriculum Corp., 35 F.3d 813, 824-26 (3d Cir. 1994) (applying *Edgar* to a claim for damages and injunction under the New Jersey Franchise Practices Act but finding that the defendant's conduct did not occur wholly outside New Jersey); Cent. GMC, Inc. v. Gen. Motors Corp., 946 F.2d 327, 334 (4th Cir. 1991) (suggesting that *Healy* applies to a claim under the Maryland vehicle dealer protection code); Wright-Moore Corp. v. Ricoh Corp., 908 F.2d 128, 134 n.2 (7th Cir. 1990) (noting that application of Indiana franchise law to a franchise selling copiers in other states "may present difficulties" under *Healy* but not deciding the question because it was not considered by the lower court or briefed by the parties); Tousley v. N. Am. Van Lines, Inc., 752 F.2d 96, 103 (4th Cir. 1985) (suggesting that *Edgar* applies to a claim under the South Carolina business opportunities sales act but finding that the defendant's conduct did not occur wholly outside South Carolina); CSS-Wis. Office v. Houston Satellite Sys., Inc., 779 F. Supp. 979, 986 (E.D. Wis. 1991) (applying *Healy* to a claim under the Wisconsin fair dealership statute but finding that the defendant's conduct did not occur wholly outside Wisconsin). For further discussion of these courts' inability to agree about the location of the regulated conduct, see *infra* notes 185-87 and accompanying text.

courts carried on as before, despite the substantial questions that *BMW* raised about the continuing vitality of the strict extraterritorial rule, particularly as applied to adjudication of state law claims for damages. Courts continued to assume that the strict territorial rule was relevant to claims concerning multi-state territories under franchise or dealership protection statutes. [157] In a few isolated instances, they assumed that the strict territorial rule could also apply to claims for damages under other types of statutes, such as employment or anti-discrimination laws.[158] Courts usually mentioned *BMW* only in discussions of punitive damages. Only one reported decision suggested that *BMW* supplied the constitutional rule governing the extraterritorial reach of state law claims in general, not just for punitive damages.[159] No court addressed whether the strict territorial rule of *Edgar* and *Healy* had been nullified by *BMW*.[160] Instead, just as before *BMW*, courts simply continued to adjudicate countless claims concerning out-of-state conduct, with no discussion of the possibility that the Constitution imposed restrictions on

---

157. *See* Morley-Murphy Co. v. Zenith Elecs. Corp., 142 F.3d 373, 378-81 (7th Cir. 1998) (citing *Healy* as support for construing Wisconsin fair dealership law as not providing for civil claims based on sales outside Wisconsin); Mitsubishi Caterpillar Forklift Am., Inc. v. Superior Serv. Assocs., Inc., 81 F. Supp. 2d 101, 118 (D. Me. 1999) (applying *Healy* to a claim for damages under the Maine sale of business opportunities act).

158. *See* Glass v. Kemper Corp., 133 F.3d 999, 1001 (7th Cir. 1998) (citing *Healy* as support for construing Illinois wage payment act as not providing for civil claims based on conduct occurring outside Illinois); Bowers v. NCAA, 151 F. Supp. 2d 526, 537-39, 539 & n.11 (D.N.J. 2001) (suggesting *Edgar* could apply to a claim brought under a New Jersey anti-discrimination statute if defendant's conduct had occurred wholly outside New Jersey); Union Underwear Co. v. Barnhart, 50 S.W.3d 188, 193 (Ky. 2001) (citing *Edgar* as support for construing a Kentucky civil rights statute as not providing for civil claims based on conduct occurring outside Kentucky); *cf.* Ferguson v. Friendfinders, Inc., 115 Cal. Rptr. 2d 258, 264-65 (Ct. App. 2002) (discussing whether *Healy* would apply to a negligence per se claim based on a California statute prohibiting "spam" e-mail, but concluding that the statute does not apply to conduct wholly outside California).

159. *See* Oliveira v. Amoco Oil Co., 726 N.E.2d 51, 61-62 (Ill. App. Ct. 2000) (holding that *BMW* precludes a claim under an Illinois consumer fraud statute based on out-of-state transactions not affecting Illinois or any of its citizens), *rev'd in part, vacated in part*, 776 N.E.2d 151 (Ill. 2002).

160. *But cf.* Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc., 155 F.3d 59, 77-78 (2d Cir. 1998) (holding that *Edgar* does not apply to restrictions imposed by a settlement agreement between a state and private party).

extraterritoriality stricter than those provided by the rules of personal jurisdiction and choice of law.[161]

In the two decades since the *Edgar* decision, only two reported lower court decisions made any sort of explicit attempt to draw a line between the forms of state law subject to the strict extraterritorial rule and those that could reach out-of-state conduct with in-state effects. In *Bruce Church, Inc. v. United Farm Workers*,[162] which was decided prior to *BMW*, an Arizona court drew a distinction between statutory and common law claims, ruling that a lettuce grower's claim for damages against a labor union under the state's unfair labor practices act would violate the strict territorial rule, but that a common law claim for tortious interference with business relations based on the same out-of-state conduct would not.[163] The Arizona statute prohibited certain labor practices, imposing criminal penalties for violations occurring in Arizona and creating a private, civil cause of action for damages for violations "regardless of where such unlawful action occurred and regardless of where such damage occurred."[164] Noting that Arizona obviously could not extend its criminal law to prohibit conduct occurring outside the state, the

---

161. *See, e.g.*, Pennzoil Prods. Co. v. Colelli & Assocs., Inc., 149 F.3d 197, 202 (3d Cir. 1998) (permitting Pennsylvania to apply its tort law to an Ohio manufacturer of solvent sold to Ohio oil producers); Vandelune v. 4B Elevator Components Unlimited, 148 F.3d 943, 947-48 (8th Cir. 1998) (permitting Iowa to apply its products liability law to a British manufacturer of a grain elevator safety device sold to a British distributor and then to an Illinois distributor); A.V. Imports, Inc. v. Col de Fratta, S.p.A., 171 F. Supp. 2d 369, 370-74 (D.N.J. 2001) (permitting New Jersey to apply its unfair trade practices act to an Italian producer of wine sold to a Luxembourg distributor); Bartow v. Extec Screens & Crushers, Ltd., 53 F. Supp. 2d 518, 526-28 (D. Mass. 1999) (permitting Massachusetts to apply its products liability law to a British manufacturer of a machine sold to a Pennsylvania distributor); Purple Onion Foods, Inc. v. Blue Moose of Boulder, Inc., 45 F. Supp. 2d 1255, 1262 (D.N.M. 1999) (permitting New Mexico to apply its unfair competition law to a Colorado producer of a product sold to a Colorado distributor, and permitting Colorado to apply its consumer protection statute to disparagement of a product occurring in New Mexico); Ruckstuhl v. Owens Corning Fiberglas Corp., 731 So. 2d 881, 890-91 (La. 1999) (permitting Louisiana to apply its products liability statute to a Massachusetts manufacturer who supplied filter material to a cigarette maker in New Jersey and Kentucky); E.L.M. LeBlanc v. Kyle, 28 S.W.3d 99, 103-06 (Tex. App. 2000) (permitting Texas to apply its products liability law to a French manufacturer of a product sold to a Vermont distributor); State *ex. rel* Humphrey v. Granite Gate Resorts, Inc., 568 N.W.2d 715, 718, 721 (Minn. Ct. App. 1997) (permitting Minnesota to apply its deceptive trade practices, false advertising, and fraud statutes to a Nevada internet gambling business), *aff'd*, 576 N.W.2d 747 (Minn. 1998).

162. 816 P.2d 919 (Ariz. Ct. App. 1991).

163. *See* Bruce Church, Inc. v. United Farm Workers, 816 P.2d 919, 921 (Ariz. Ct. App. 1991).

164. *Bruce Church*, 816 P.2d at 927 (quoting ARIZ. REV. STAT. ANN. §§ 23-1392, 23-1393(A) (West 1995)).

court held that it was equally impermissible for the legislature "to extend its regulatory powers to control conduct in other states by creating an action similar to a tort claim for personal injuries for conduct that occurred wholly outside the state."[165] The court implied that a statutory claim based on out-of-state conduct would not necessarily violate the Constitution, but that the Arizona statute was invalid because the civil action it created was "essentially penal in nature because it requires as an element of the cause of action a substantive violation of an Arizona penal statute."[166] By that reasoning, the problem with the statute was more semantic than substantive, and the statute would have been valid if it merely created a right of action for damages and did not refer to out-of-state conduct as "unlawful action."[167]

A California court attempted to draw a distinction between different types of statutory claims in *Yu v. Signet Bank/Virginia.*[168] In that case, California residents sued a Virginia bank issuing credit cards, claiming that the bank had a practice of improperly obtaining default judgments against out-of-state cardholders through collection suits filed in Virginia state courts despite knowing that the judgments were legally unenforceable. The plaintiffs brought their action in California, seeking damages and injunctive relief on common law and statutory causes of action.[169] The complaint included a claim under California's statute prohibiting "unlawful, unfair or fraudulent" business practices.[170] The cardholders' other statutory claims were based on provisions of California's laws governing civil procedure and debt collection practices.[171]

Relying principally on *BMW*, the bank argued that it could not be held liable on any of the cardholders' claims because the Constitution barred California from regulating the bank's out-of-state conduct. The California Court of Appeal rejected that argument as to some claims but accepted it as to others. The court held that the Constitution would permit damages or

---

165. *Id.*

166. *Id.*

167. *See id.*

168. 82 Cal. Rptr. 2d 304 (Ct. App. 1999).

169. *See* Yu v. Signet Bank/Va., 82 Cal. Rptr. 2d 304, 308 (Ct. App. 1999).

170. CAL. BUS. & PROF. CODE § 17200 (West 1997). California cities and counties have sued gun makers under that same statute. *See* People v. Arcadia Mach. & Tool, Inc., No. 4095, slip op. at 2 (Cal. Super. Ct. Oct. 4, 2000) (overruling demurrer to claims under § 17200).

171. *See* CAL. CIV. PROC. CODE § 395(b) (West Supp. 2002) (providing that venue for a consumer debt collection action is in the county where debtor resides); *id.* § 1710.10 (providing procedures for entry of a California judgment based on a judgment obtained in another state); *id.* § 1913(a) (providing that the judicial record of a sister state can only be enforced in California by an action or special proceeding); CAL. CIV. CODE § 1788.15 (West 1998) (providing fair debt collection practices); *Yu*, 82 Cal. Rptr. 2d at 315-16.

injunctive relief to be awarded to the cardholders on their abuse of process claim under California common law or their unfair competition claim under California statute. As to those claims, the court held that "a defendant who is subject to jurisdiction in California and who engages in out-of-state conduct that injures a California resident may be held liable for such conduct in a California court."[172] The court correctly read *BMW* as allowing a state to "protect its own consumers, and punish the conduct of an out-of-state defendant if it has an impact on them regardless of whether the conduct might be lawful elsewhere."[173]

On the other hand, the court concluded that there was a constitutional impediment to holding the bank liable on the claims based on California's civil procedure and fair debt collection statutes. The court stated that the "unfair competition" statute "only proscribes unlawful business practices in general terms, and does not purport to direct that any particular debt collection procedure be followed here in California or elsewhere," whereas granting relief on the cardholders' claims under the other statutes would mean that those detailed provisions establish "the sole means by which California consumer debts can be collected and foreign judgments can be enforced" and would preclude lawful process and debt collection practices in other states.[174] Construing the statutes other than the "unfair competition" act as applying to out-of-state conduct "could make them the kind of extra-territorial legislation the United States Constitution forbids."[175] While the decision is not a model of clarity, the court apparently sensed a hazy line between different types of statutes, with some creating what seem more like traditional tort claims and others imposing requirements that seem more regulatory in nature.[176] Hinting at that nebulous distinction is more than any other lower court decision has done to clarify how the Supreme Court's decisions concerning

---

172. *Yu*, 82 Cal. Rptr. 2d at 313 (citations omitted).

173. *Id.* at 314.

174. *Id.* at 316.

175. *Id.* at 317 (citations omitted). The distinction drawn by the California court was not based entirely on the fact that § 17200 creates an express, private right of action since the fair debt collection statute did so as well. *See* CAL. CIV. CODE § 1788.30 (West 1998); *Yu*, 82 Cal. Rptr. 2d at 316.

176. Other courts have relied on a similar distinction among different types of statutes in the dormant Commerce Clause context, although not specifically with respect to the extraterritoriality issue. *See, e.g.*, Chrysler Capital Corp. v. Century Power Corp., 800 F. Supp. 1189, 1195 (S.D.N.Y. 1992) (distinguishing an Arizona anti-fraud statute from the regulatory enactment at issue in *Edgar* on the ground that the former is "not preventative, but remedial in nature . . . [and] like any tort recovery statute, it merely provides a post-hoc remedy for persons aggrieved by allegedly unlawful conduct").

extraterritoriality apply across the spectrum of forms in which state law can be created and exercised.

B. Indeterminacy About Locations

Lower court decisions have also underscored a second problem with the Supreme Court's revival of a strict territorial rule dependent on whether commerce occurs wholly outside a state. To apply that rule, courts must assign locations to a host of complex and intangible matters, from policymaking for a worldwide corporation to transfers of intellectual property rights.[177] The arbitrariness and indeterminacy of that sort of decision-making was a primary reason for the erosion of strict territorial conceptions of state authority in the first half of the twentieth century.[178] Deciding where a transaction or event occurred was hard enough at that time, and becomes only more difficult in an age of ever increasing economic interconnection, not to mention websites, wireless trading, e-mail messages, and other electronic activity without a clear geographic locale. For example, in their initial encounters with this issue, courts have suggested that an out-of-state person who sends an electronic mail message to a recipient in Washington engages in conduct partially within that state,[179] but not a person who puts material on a website available to people in Washington.[180]

There is yet another layer to the problem. Even if courts could consistently and sensibly assign a geographic location to every act, courts would still need to decide how broadly to define the unit of conduct being regulated by the state in order to decide whether the law violated the strict territorial rule. In *Edgar*, for example, the Supreme Court took for granted that each transaction between the tender offerer and potential seller of the

---

177. *See* Born, *supra* note 23, at 98-99 (arguing that "realities of today's international, financial and commercial world [make conclusions about location of transactions] fraught with artifice and arbitrariness").

178. *See* Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2472-73 (1999). Even proponents of a formal territorial approach acknowledge the problem. *See* Regan, *supra* note 7, at 1879 ("This is the sort of difficulty formalism leads to. In the end, some hard cases must simply be decided by judicial intuitions concerning the spirit of the Constitution.").

179. *See* ACLU v. Johnson, 194 F.3d 1149, 1161 (10th Cir. 1999); Cyberspace Communications, Inc. v. Engler, 142 F. Supp. 2d 827, 831 (E.D. Mich. 2001); Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 173-77 (S.D.N.Y. 1997).

180. *See* State v. Heckel, 24 P.3d 404, 411-12 (Wash.), *cert. denied*, 534 U.S. 997 (2001); *see also Ferguson*, 115 Cal. Rptr. 2d at 262-65 (holding that a person's conduct is not "wholly outside" California when a person outside the state sends an electronic mail message through an electronic mail service provider in California to a recipient in California).

target's securities should be analyzed separately.[181] If the tender offer as a whole had been the relevant unit, the Court would have had to find that it did not occur wholly outside Illinois, since Illinois residents owned more than a quarter of the target's stock.[182] Likewise, the Court assumed in *BMW* that the sale of each car was a separate unit of commerce.[183] Had the Court treated the auto company's conduct as a single conspiracy or scheme to defraud rather than a thousand separate sales, the punitive damages would not have been based on commerce occurring wholly outside Alabama.

Lower courts trying to follow the Supreme Court's lead have reached inconsistent and questionable conclusions on this point. As mentioned above, lower courts have generally assumed that the strict territorial rule applies to claims under franchise or dealership protection statutes seeking damages or injunctive relief pertaining to a multi-state territory.[184] Despite the consensus that the strict territorial rule is relevant in that context, courts have split over how to apply it. Some courts have assumed that the whole franchise or dealership relationship is the relevant unit of measure and concluded that a single state's law can apply to the entire multi-state territory because the transactions creating and terminating the relationship do not occur wholly outside that state.[185] Other courts have viewed the same situation as involving regulation of many smaller transactions, such as the franchisee's sales transactions with customers in each of the states in the territory or the multiple franchise agreements that the franchisor could potentially arrange for the various states if it could terminate the existing multi-state arrangement. As a result, these courts conclude that applying one state's statute to the entire multi-state territory would unconstitutionally allow that state to regulate

---

181. *See* Edgar v. MITE Corp., 457 U.S. 624, 641 (1982) (plurality opinion).

182. *See Edgar*, 457 U.S. at 642. Professor Donald Regan argued that Justice Powell's opinion in *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69 (1987), took that unitary view of a tender offer. *See supra* note 86 and accompanying text.

183. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 571-74 (1996).

184. *See supra* notes 156-57 and accompanying text.

185. *See Instructional Sys.*, 35 F.3d at 824-26; *CSS-Wis. Office*, 779 F. Supp. at 986.

transactions occurring wholly outside its borders.[186] In light of this conflicting authority, counsel for franchisors and manufacturers have been advised to draft a series of separate agreements, one for each state, when assigning a multi-state territory to a single franchisee or dealer.[187] It is difficult to imagine why the constitutional limits on states' authority should depend on these sorts of semantic debates and formalities, rather than substantive considerations about the relative degree of states' interests.

These problems do not arise only in the context of franchise or dealership terminations. Commerce Clause cases have presented a myriad of other situations in which courts must decide whether to atomize or to aggregate conduct in order to determine whether it occurs wholly outside or partially inside the state. Some courts break the conduct into small pieces, treating a labor union's activities as multiple boycotts in several states rather than a single multi-state boycott,[188] treating an oil company's conduct as a large number of separate sales rather than a single deceptive advertising campaign,[189] or treating sales of milk by farmers as commercial transactions separate from milk production.[190] Other courts group conduct into one mass, treating a national brokerage firm's business practices as a unitary decision made at the company's headquarters rather than as a large number of separate acts occurring in the states where the company does business,[191] treating disparagement of a product in several states as a single "course of conduct,"[192]

---

186. *See Morley-Murphy Co.*, 142 F.3d at 378-81; *Mitsubishi Caterpillar Forklift Am.*, 81 F. Supp. 2d at 118; Instructional Sys., Inc. v. Computer Curriculum Corp., 826 F. Supp. 831, 842-851 (D.N.J. 1993), *aff'd in part, rev'd in part*, 35 F.3d 813 (3d Cir. 1994); Power Draulics-Nielsen, Inc. v. Libbey Owens-Ford Co., No. 82 Civ. 1134, 1988 WL 31880, at *2 (S.D.N.Y. Mar. 11, 1988). Other courts have held that application of a state statute to a franchisee or dealer with a multi-state territory may be extraterritorial, but it is not unconstitutional because the extraterritoriality results from the parties' own voluntary decision to enter into an agreement assigning a multi-state territory. *See* Synergy Mktg., Inc. v. Home Prods. Int'l, No. Civ. 00-796, 2001 WL 1628691, at *4-5 (D. Minn. Sept. 6, 2001); Rio/Bill Blass v. Bredeson Assocs., Inc., No. C6-97-1386, 1998 WL 27299, at *4 (Minn. Ct. App. Jan. 27, 1998). If the strict extraterritorial rule exists to protect a state's territorial sovereignty, it is unclear why it should be subject to waiver by anyone other than the state.

187. *See* Borges, *supra* note 154, at 105.

188. *See Bruce Church*, 816 P.2d at 928.

189. *See Oliveira*, 726 N.E.2d at 61-62.

190. *See* Dean Foods Co. v. Brancel, 187 F.3d 609, 614-20 (7th Cir. 1999).

191. *See Shearson Lehman Bros.*, 1995 WL 392028, at *3.

192. *See* Am. Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411, 1427 (E.D.N.C. 1986).

or treating the purchase, registration, warranty, and subsequent repair of a car as comprising a single unit of commerce.[193]

An approach focusing exclusively on formal geographic determinations also invites manipulation, such as plaintiffs alleging conspiracies merely to attribute other parties' in-state acts to a defendant, or defendants using intermediary distributors merely to avoid engaging in conduct in a state by shipping directly to distributors or dealers there.[194] Courts have also voiced concern that a purely territorial approach to defining a state's authority would allow a state to regulate too much in some instances, such as where only a tangential part of the regulated conduct occurred in the state.[195]

Lower court decisions do not provide a predictable approach to determining what it means for a defendant's conduct to be wholly outside the state, just as they establish no coherent way to determine what forms of state law are subject to the strict territorial rule in the first place. The Supreme Court decisions that revived a strict territorial rule left immense questions unanswered, and the lower courts have not succeeded in providing answers to any of them.

IV. THE LITIGATION AGAINST GUN COMPANIES

The lawsuits against gun companies have raised the stakes in this unsettled area of constitutional law. The gun companies take the argument for strict territorial limits on state authority to an extreme that no other defendants have attempted. They argue that the Supreme Court's decisions establish a rule that precludes them from being held liable for out-of-state conduct on any type of claim, even suits brought by private individuals seeking to recover compensatory damages on common-law claims. Their argument, if accepted and applied beyond the context of the gun litigation, would truly return the limits on state authority to where they stood a century ago.

---

193. *See* Harmon v. Concord Volkswagen, Inc., 598 A.2d 696, 698-700 (Del. Super. Ct. 1991).

194. *See, e.g.*, New York v. Brown, 721 F. Supp. 629, 640 n.11 (D.N.J. 1989) (expressing concern about potential "subterfuge" and use of "dummy corporations" if New Jersey milk price regulation could not apply to sales of milk to New Jersey retailers merely because the transactions took place outside the state).

195. *See, e.g.*, Coast Cities Truck Sales, Inc. v. Navistar Int'l Transp. Co., 912 F. Supp. 747, 784 (D.N.J. 1995) (holding that the fact that the transactions involved tangential conduct in New Jersey did not mean New Jersey should have power to regulate them).

A. Taking the Strict Territorial Rule to Its Extreme

The gun companies are evasive about the precise limits of the extraterritoriality rule that they think the Constitution imposes. They naturally do not want to suggest that they are asking courts to recognize an unprecedented proposition of constitutional law that would have a dramatic and sweeping effect on the scope of state authority. To avoid that, they imply that there is something special that makes the litigation against them unconstitutional, but would not do the same to all of the other state law claims concerning out-of-state conduct that courts adjudicate every day. The gun companies never definitively state what distinguishes the claims against them, but suggest several possibilities. On closer examination, every one of those potential limitations on the scope of the gun companies' constitutional argument melts away.

In cases brought by state and local governments, the gun companies suggest that the plaintiff's identity magnifies the extraterritoriality problem. More than thirty cities and counties and one state (New York) have sued seeking remedies for harm they allege they suffered as a result of unsafe design and distribution of guns, such as increased costs for law enforcement, courts, social services, school security, and emergency medical services. These cases are not *parens patriae* or subrogation actions brought on behalf of individuals represented by these governments. Instead, the governments assert claims on their own behalf for their own injuries.[196]

While the gun companies suggest these actions are more regulatory than ordinary tort claims, the identity of the plaintiff does not serve to limit the reach of the constitutional principle proposed by the gun companies. Many other lawsuits have been brought by private individuals injured in shootings or by the families or estates of victims killed in shootings.[197] In two cases, private associations such as the NAACP have sued gun companies.[198] The gun companies assert their constitutional argument about extraterritoriality against claims brought by these private individuals and private organizations as well

196. The District of Columbia's case is an exception, as it includes certain statutory subrogation claims. *See* District of Columbia v. Beretta U.S.A. Corp., No. 0428-00, 2002 WL 31811717 (D.C. Super. Ct. Dec. 16, 2002).

197. *See, e.g.*, Young v. Bryco Arms, 765 N.E.2d 1 (Ill. App. Ct. 2001); Smith v. Bryco Arms, 33 P.3d 638 (N.M. Ct. App.), *cert. denied*, 34 P.3d 610 (N.M. 2001).

198. *See* City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415, 419 n.1 (3d Cir. 2002) (includes claims brought by private civic organizations such as a children's advocacy group and an organization of public housing residents' councils); NAACP v. A.A. Arms, Inc., No. 99CV3999 (E.D.N.Y. filed Oct. 5, 1999) (brought by NAACP and National Spinal Cord Injury Association).

as claims brought by governments.[199] Moreover, the gun companies could not sustain a distinction between private and public plaintiffs even if they tried to do so. As indicated by the very cases cited by the gun companies as precedent for their argument, application of state law through litigation is subject to constitutional limitations because the *court* is a government entity exercising state power, regardless of who or what the plaintiff may be.[200]

In cases where the complaint requests injunctive relief, the gun companies suggest that an injunction would be a more blatant form of extraterritorial regulation than a damages award. Once again, the gun companies ultimately acknowledge that this is not a limitation on their constitutional argument. The plaintiffs in these cases seek various forms and combinations of relief, including compensatory damages, punitive damages, and injunctions that would require changes in the manner in which defendants design or distribute their products. In a consolidated action in California, twelve cities and counties seek to recover civil penalties of up to $2,500 for each violation of the state's unlawful unfair trade practices and consumer protection laws.[201] The gun companies assert their argument about extraterritoriality against any and all forms of relief requested, citing precedent for the proposition that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief."[202]

Likewise, the gun companies do not draw any distinctions based on the source of the law underlying the claim, and instead assert their constitutional argument against claims based on common law as well as those created by

---

199. *See, e.g.*, Ileto v. Glock, Inc., 194 F. Supp. 2d 1040, 1049 (C.D. Cal. 2002); Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146, 178 & n.21 (Ct. App. 1999), *rev'd on other grounds*, 28 P.3d 116 (Cal. 2001); Memorandum in Support of Defendants' Motion for Judgment on the Pleadings at 43-50, District of Columbia v. Beretta U.S.A. Corp., No. 0428-00, 2002 WL 31811717 (D.C. Super. Ct. Dec. 16, 2002).

200. The plaintiff was a private individual in every one of the cases cited by the gun companies for the proposition that state-court judges and juries exercise state power and, therefore, must comply with constitutional requirements when they adjudicate state-law claims. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 573 n.17 (1996); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246-47 (1959).

201. *See* CAL. BUS. & PROF. CODE § 17206 (West Supp. 2002); *id.* § 17536 (West 1997).

202. *Garmon*, 359 U.S. at 246-47; *see, e.g.*, Defendants' Memorandum at 49 n.45, *District of Columbia*, No. 0428-00, 2002 WL 31811717 ("Although the Commerce Clause violations can most readily be seen through plaintiffs' request for injunctive relief on their various causes of action, their request for compensatory and punitive damages also amounts to an attempt to regulate extraterritorially.").

statutes.[203] Many cases involve common law causes of action, such as negligence and unjust enrichment. Some cases include products liability claims, which are statutory claims in some states, and common law claims in others.[204] Many cases also rely heavily on public nuisance law, which remains a part of common law in most states, but has been codified in a few states such as California and Indiana.[205] Some cases include other statutory claims, such as claims under state unfair trade practices and consumer protection laws.[206] One lawsuit, brought by the District of Columbia and a number of individual victims of gun violence in the District, includes claims under a unique statute imposing strict liability on manufacturers of high-capacity assault weapons.[207] The gun companies make the same constitutional argument against every one of the claims.

The gun companies intimate at times that the existence of federal laws and regulations concerning guns adds weight to their constitutional argument. Those laws and regulations are not essential to the argument, however, for the gun companies do not actually contend that federal gun laws preempt state tort law. A preemption argument would be implausible given that the federal Gun Control Act, which contains virtually all of the relevant federal law, includes an explicit provision disclaiming preemption of state law unless there is a "direct and positive conflict" between state and federal law such that "the two cannot be reconciled or consistently stand together."[208] With respect to gun design in particular, Congress has left the field of regulation entirely to the states by creating a special exemption for firearms from federal safety oversight under the Consumer Product Safety Act.[209] The lawsuits propose that gun companies should be doing more than the minimum required by federal law, but do not ask gun companies to do anything contrary to any

---

203. The gun manufacturers cite precedent establishing that other constitutional limitations, such as the First Amendment, apply equally to relief awarded under common law and statutes. *See N.Y. Times Co.*, 376 U.S. at 265 ("It matters not that that law has been applied in a civil action and that it is common law only.").

204. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-572 (West Supp. 2002); LA. REV. STAT. ANN. § 9:2800.56 (West 1997); MASS. GEN. LAWS ANN. ch. 106, § 2-314 (West 1999); N.J. STAT. ANN. § 2A:58C-1 (West 2000); OHIO REV. CODE ANN. § 2307.75 (Anderson 2001).

205. *See* CAL. CIV. CODE §§ 3479-3480 (West 1997); IND. CODE ANN. § 32-30-6-6 (Michie 1998).

206. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 17200 (West 1997), § 17500 (West Supp. 2002) (unfair, unlawful, and deceptive business practices); CONN. GEN. STAT. ANN. § 42-110a (West 2000) (unfair trade practices); N.J. STAT. ANN. § 56:8-19 (West 2001) (consumer fraud).

207. *See* D.C. CODE ANN. §§ 7-2551.01 to 7-2551.03 (2001); *see* Markus Boser, *Go Ahead, State, Make Them Pay: An Analysis of Washington D.C.'s Assault Weapon Manufacturing Strict Liability Act*, 25 COLUM. J.L. & SOC. PROBS. 313, 313 (1992).

208. 18 U.S.C. § 927 (2000).

209. *See* 15 U.S.C. § 2052(a)(1)(B), (E) (2000).

statute or regulation. Moreover, every state has many statutes and regulations relating to firearms, some of which impose more demanding requirements than federal law, but which federal law does not preempt. The federal statutes and regulations are ultimately irrelevant to the extraterritoriality issue because the gun companies' argument is that the Constitution itself forbids the claims, not that Congress has preempted them.[210]

Finally, the gun companies' arguments about extraterritoriality often include rhetoric about the plaintiffs' motives for filing suit. Particularly in cases brought by governments, the gun companies accuse plaintiffs of suing in order to impose regulatory measures that legislatures have refused to enact. They have not suggested, however, that the application of the constitutional principle they invoke actually depends on whether the plaintiff has a "regulatory" intent in bringing suit. The gun companies obviously would not concede the constitutionality of a lawsuit that was identical in its extraterritorial reach but brought for other reasons. Indeed, the gun companies also frequently accuse the governments and lawyers suing them as being motivated by greed. It would hardly be a sensible rule of constitutional law for a plaintiff to be allowed to recover if it cares only about financial gain and to be barred from obtaining relief if it hopes to promote safety and to reduce danger.

The gun companies also suggest that extraterritorial regulation of their conduct is particularly egregious because their conduct is "lawful" in the states where it occurs.[211] The gun companies misconstrue what it means for conduct to be "lawful" in this context. While the gun companies suggest that their conduct is "lawful" where it occurs because it is not a crime, the Supreme Court's opinion in *BMW of North America, Inc. v. Gore*[212] makes clear that, in this context, conduct is "lawful" only if it is neither criminal nor actionable in civil court.[213] Moreover, even if the gun companies' interpretation of "lawful" conduct were correct, that would not significantly limit the sweep of the gun companies' constitutional argument, for most tort cases do not involve criminal conduct.

---

210. *See* Sills v. Smith & Wesson Corp., No. 99C-09-283-FSS, 2000 WL 33113806, at *8 (Del. Super. Ct. Dec. 1, 2000) (stating that "defendants do not even allege in passing that federal preemption applies" to tort claims against gun manufacturers and sellers), *appeal denied*, 768 A.2d 471 (Del. 2001).

211. *See BMW of N. Am.*, 517 U.S. at 572-73 (emphasizing that BMW's failure to disclose the refinishing of cars was lawful in states other than Alabama); *see also supra* text accompanying note 133.

212. 517 U.S. 559 (1996).

213. *See BMW of N. Am.*, 517 U.S. at 565-66, 573-74.

In the end, there are no limitations that narrow the gun companies' argument and preclude it from applying equally to all of the many cases in which courts adjudicate state-law claims based on a defendant's commercial conduct that occurs wholly outside the state. Taken to its logical conclusion, their argument applies even to a simple common-law tort claim for damages brought by a private individual against an out-of-state manufacturer of a product that caused an injury. Indeed, the gun companies have repeatedly taken the argument that far. For example, in *District of Columbia v. Beretta U.S.A. Corp.*,[214] the plaintiffs include injured individuals, such as a young man paralyzed by a gunshot and the family of a grandmother who was fatally wounded in crossfire outside her home.[215] The gun companies contend that these plaintiffs seek impermissible extraterritorial relief even to the extent that they ask the court to award compensatory damages under the District's common law of negligence and public nuisance.[216]

B. The Courts' Reactions to the Gun Industry's Argument

The judicial reactions to the gun companies' argument about extraterritoriality have been mixed. Several courts have rejected the argument, several others have embraced it, and courts in several other states have suggested it might limit the relief available but deferred ruling on the issue. The decisions reflect not only inconsistent conclusions, but also

---

214. No. 0428-00, 2002 WL 31811717, *7-8 (D.C. Super Ct. Dec. 16, 2002).

215. *See* Defendants' Memorandum at 43-50, *District of Columbia*, No. 0428-00, 2002 WL 31811717. Likewise, a gun manufacturer argued that the Constitution barred negligence and public nuisance claims under California law brought by victims of a shooting at a Jewish community center, although the trial court dismissed the claims on other grounds and did not address the extraterritoriality issue. See *Ileto*, 194 F. Supp. 2d at 1049.

216. *See* Defendant's Memorandum at 43-50, *District of Columbia*, No. 0428-00, 2002 WL 31811717.

confusion about the question presented and surprise at the lack of clear authority on the point.[217]

The gun companies' extraterritoriality argument made its first appearance in *Merrill v. Navegar, Inc.*,[218] a case in which victims of a horrific shooting in the office of a San Francisco law firm sued the Florida manufacturer of two military-style assault pistols used in the attack.[219] The manufacturer asserted that holding it liable for damages on a common-law negligence claim under California law for its manufacture of the guns in Florida or its sale of the guns to distributors in Arizona and Ohio would violate a constitutional prohibition against extraterritorial application of state law.[220] The trial court granted summary judgment to the manufacturer without mentioning the constitutional issue,[221] but the California Court of Appeal reversed and specifically rejected the notion that imposing a duty on the manufacturer under California negligence law would violate the

---

217. The decisions discussed here should not be confused with decisions addressing a distinct issue of federal subject matter jurisdiction. In a few exceptional circumstances, the Supreme Court has concluded that the preemptive force of a federal statute is so "extraordinary" that it actually "converts an ordinary state common law complaint into one stating a federal claim." Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65 (1987). The gun companies have removed suits on the basis of this doctrine, arguing that the Commerce Clause, other constitutional provisions, or federal statutes "completely preempt" state-law claims against them. Federal courts have unanimously rejected that argument and remanded the cases. *See* City of Gary *ex rel.* King v. Smith & Wesson Corp., 94 F. Supp. 2d 947 (N.D. Ind. 2000); City of Camden v. Beretta U.S.A. Corp., 81 F. Supp. 2d 541 (D.N.J. 2000); McNamara v. Arms Tech., Inc., 71 F. Supp. 2d 720 (E.D. Mich. 1999); Archer v. Arms Tech., Inc., 72 F. Supp. 2d 784 (E.D. Mich. 1999); City of Boston v. Smith & Wesson Corp., 66 F. Supp. 2d 246, 248-51 (D. Mass. 1999); Penelas v. Arms Tech., Inc., 71 F. Supp. 2d 1251 (S.D. Fla. 1999).

218. 89 Cal. Rptr. 2d 146 (Ct. App. 1999), *rev'd on other grounds*, 28 P.3d 116 (Cal. 2001).

219. *See Merrill*, 89 Cal. Rptr. 2d at 146.

220. *See id.* at 179-180. The manufacturer also argued that the plaintiffs were seeking extraterritorial application of the Roberti-Roos Assault Weapons Control Act of 1989, CAL. PENAL CODE §§ 12275-12290 (West 2000), but plaintiffs asserted that common-law negligence liability would be unconstitutional without regard to the role of that statute. *See Merrill*, 89 Cal. Rptr. 2d at 179-180.

221. *See In re* 101 Cal. St. Bldg., No. 959-316 (Cal. Super. Ct. May 6, 1997), *rev'd sub nom.*, Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146 (Ct. App. 1999), *rev'd on other grounds*, 28 P.3d 116 (Cal. 2001).

Constitution.[222] The Court of Appeal noted that all of the cases cited by the manufacturer on this point "involved the attempted extraterritorial application of state regulatory or penal statutes" rather than tort claims.[223] The Supreme Court of California reversed, dismissing the case on other grounds without addressing the constitutional issue.[224]

The other rulings on the issue have come in cases brought by government entities. The gun companies' extraterritoriality argument won approval from a trial court in Indiana.[225] Dismissing claims brought by the City of Gary seeking damages and injunctive relief, the court found that the lawsuit "is seeking to regulate the interstate commerce in firearms in violation of the United States Constitution [and to] regulate the lawful conduct of the defendants outside Gary's borders [and therefore] the City's proposed claim and relief inevitably have an unconstitutional and extraterritorial effect."[226] While deciding an extraordinarily significant point of constitutional law without citing a single precedent, the court suggested that it was only the manner in which the city argued the issue that made it a difficult one.[227] The court accused the city of "completely misstat[ing] defendants' contentions and the supporting law regarding its violations of the Commerce and Due Process Clauses in order to confuse the issues before this Court."[228]

A trial court in Ohio reached the same conclusion, only to be reversed on appeal. Dismissing claims brought by the City of Cincinnati seeking damages and injunctive relief, the court held that

> the City's request that this Court abate or enjoin the defendants' lawful sale and distribution of their products outside the City of Cincinnati exceeds the scope of its municipal powers and, to the extent it asks this Court to regulate commercial conduct

---

222. *See Merrill*, 89 Cal. Rptr. 2d at 178-79 & n.21. In discussing this issue, the court noted that the plaintiffs sought only money damages and were "not asking that any of Navegar's commercial activities be enjoined, nor could they." *Id.* at 178. The court did not explain why it thought the plaintiffs could not seek injunctive relief, but it seems likely that the court simply meant that plaintiffs did not face a continuing threat of harm from the manufacturer's conduct, a necessary requirement for injunctive relief, but not that injunctive relief would be unconstitutional.

223. *Id.* at 178 n.21 (citations omitted).

224. *See* Merrill v. Navegar, Inc., 28 P.3d 116 (Cal. 2001).

225. *See* City of Gary *ex rel.* King v. Smith & Wesson Corp., No. 45D05-005-CT-243, 2001 WL 333111, at *6 (Super Ct. Ind. Jan. 11, 2001), *aff'd in part, rev'd in part*, No. 45A03-0105-CV-155, 2002 WL 31100648 (Ind. Ct. App. Sept. 20, 2002), *leave to appeal granted*, No. 45503-0301-CV-36 (Ind. Jan. 23, 2003). The defendants in *City of Gary* include a number of gun dealers located in Indiana, but the court did not specifically exclude them from its ruling on this point. *City of Gary*, 2001 WL 333111, at *1.

226. *Id.* at *6.

227. *See id.*

228. *Id.*

> lawful in other states, violates the Commerce Clause of the United States Constitution.[229]

The court provided no further explanation of its reasoning on this point and did not cite any precedent for its conclusion. While an intermediate appellate court affirmed the trial court's decision on other grounds, without mentioning the extraterritoriality issue,[230] the Supreme Court of Ohio reversed.[231] The Court ruled that the injunctive and other relief sought in the case would not be unconstitutional, even though it "implicate[s] the national firearms trade," because the defendants' alleged conduct "directly affects the residents of Cincinnati."[232]

In the most recent decision to embrace the gun companies' constitutional argument, the trial court in *District of Columbia v. Beretta U.S.A. Corp.*[233] ruled that the District of Columbia's statute imposing strict liability on assault weapon manufacturers[234] impermissibly regulates out-of-state conduct. The court concluded that Supreme Court decisions such as *Edgar*, *Healy*, and *Brown-Forman Distillers* are "directly on point," even though none of them involved a statute creating a private cause of action.[235] The court found that an assault weapon manufacturer could avoid potential liability under the statute only by "going out of business altogether" or making "drastic changes" in the way it does business.[236] Although the statute creates a cause of action rather than imposing a "formal 'regulatory' scheme," the court decided that "[t]here is no real difference between impermissible extraterritorial regulation that is effectuated through legislation or through the filing of claims for damages."[237]

---

229. City of Cincinnati v. Beretta U.S.A. Corp., No. A9902369, 1999 WL 809838, at *1 (Ohio Ct. Com. Pl. Oct. 7, 1999), *rev'd*, 768 N.E.2d 1136 (Ohio 2002).

230. *See* City of Cincinnati v. Beretta U.S.A. Corp., Nos. C-990729, C-990814, C-990815, 2000 WL 1133078 (Ohio Ct. App. Aug. 11, 2000), *rev'd*, 768 N.E.2d 1136 (Ohio 2002).

231. *See* City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136 (Ohio 2002) [hereinafter *City of Cincinnati*].

232. *City of Cincinnati*, 768 N.E.2d at 1150.

233. No. 0428-00, 2002 WL 31811717, at *43-48 (D.C. Super. Ct. Dec. 16, 2002). The court acknowledged that its analysis of the constitutional issue was purely dicta, because it had already found that the strict liability claims before it failed on other grounds, but addressed the issue anyway "[f]or the sake of completeness." *Id.* at *43.

234. *See* D.C. CODE ANN. § 7-2551.02 (2001).

235. *See District of Columbia*, No. 0428-00, 2002 WL 31811717, at *43-44 (citing Edgar v. MITE Corp., 457 U.S. 624 (1982) (plurality opinion); Healy v. Beer Inst., 491 U.S. 324 (1989); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986)).

236. *Id.* at *44.

237. *Id.* at *44, 48.

Other courts have found the issue confusing because of the lack of clear precedent addressing the gun companies' argument. An extensive discussion of the extraterritoriality issue appeared in a decision by a federal court in New Jersey considering a motion to dismiss state law claims brought by Camden County under the court's diversity jurisdiction.[238] The court correctly understood the gun companies as making an argument about extraterritoriality, although the court blended into the argument the notion that gun companies also complained of lawsuits having an excessive adverse effect on interstate commerce.[239] The court observed that the application of the dormant Commerce Clause to state law tort claims is "unsettled" because virtually all cases concerning that clause have considered state statutes or regulations and not lawsuits.[240] The closest authority the court could find was a Third Circuit decision that "voiced doubt that suits brought under state common law can ever be subject to dormant commerce clause analysis."[241] The court then reached a tentative conclusion that the gun companies' constitutional argument had no merit because it would prove too much:

> Every case that comes before this Court has some potential impact on interstate commerce. This is also true of every decision made in the courts of New Jersey. A case where a plaintiff seeks to prevent allegedly harmful consequences from occurring outside of its borders without respect to the citizenship of the defendant simply does not constitute the sort of state action contemplated by dormant commerce clause jurisprudence. Accordingly, the Court finds it doubtful that dormant commerce clause analysis applies to an action such as this one simply because a governmental entity is the plaintiff.[242]

The court went on to find that the claims could survive even if the dormant Commerce Clause applied to them because they would be subject to a "balancing" analysis comparing the benefits and burdens of the regulation,

---

238. *See* Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 123 F. Supp. 2d 245 (D.N.J. 2000) [hereinafter *Camden County Bd. I*], *aff'd on other grounds*, 273 F.3d 536 (3d Cir. 2001).

239. *See Camden County Bd. I*, 123 F. Supp. 2d at 253.

240. *See id.* at 254.

241. *Id.* (citing Buzzard v. Roadrunner Trucking, Inc., 966 F.2d 777, 784 n.9 (3d Cir. 1992)). The plaintiff in *Buzzard* brought negligence and product liability claims against a truck manufacturer under Pennsylvania law, alleging that the truck's lighting and reflecting devices were inadequate. *See* Buzzard v. Roadrunner Trucking, Inc., 966 F.2d 777, 778-79 (3d Cir. 1992). The manufacturer argued that federal motor vehicle safety statutes preempted the claims and suggested that conflicting state common law standards would have an adverse effect on interstate commerce. *See Buzzard*, 966 F.2d at 780-81. The Third Circuit observed that the argument should have been framed as a dormant Commerce Clause issue, not a preemption issue, but that it failed in any event because the court could find no precedent for the Commerce Clause barring common law tort liability. *See id.* at 785-86.

242. *Camden County Bd. I*, 123 F. Supp. 2d at 254.

which the court could not properly undertake on a motion to dismiss without the benefit of a full factual record.[243] The court ultimately dismissed Camden County's claims on other grounds,[244] and the Third Circuit affirmed without addressing the constitutional issue.[245]

A federal court in Ohio, ruling on a diversity case brought by the City of Cleveland, reached a similar conclusion finding that the action before it did not involve an impermissible application of state law because the city chose to file a products liability lawsuit rather than enacting any form of legislation or ordinance.[246] Like the federal district court in *Camden County*, the judge in Cleveland's case seemed to recognize that the gun companies' constitutional argument had an extraordinarily broad potential sweep, noting it was not plausible that the city's claims could be unconstitutional merely because the alleged tortious conduct occurred outside the state, for the same would be true of "any other product liability claim that implicates a national manufacturer."[247]

Finally, courts in several other states have declined to rule on the constitutional issue on the pleadings, deferring the issue to decision on the basis of a factual record at a later stage of the litigation. In the case brought in New Jersey by the City of Newark, the court rejected the gun companies' argument at the motion to dismiss stage, stating that Newark "seeks damages and/or injunctive relief," the lawsuit is not "designed to affect Defendant's conduct in states other than New Jersey," and "at this stage of the litigation, it is inappropriate to make a prediction that a New Jersey judgment will affect Defendants' ability to do business elsewhere."[248] In a case brought by twelve California cities and counties including Los Angeles and San Francisco, the

---

243. *See id.* at 254-55.

244. *See id.* at 255, 267.

245. *See* Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 273 F.3d 536, 541-42 (3d Cir. 2001).

246. *See* White v. Smith & Wesson, 97 F. Supp. 2d 816, 829-30 (N.D. Ohio 2000).

247. *White*, 97 F. Supp. 2d at 830. A Delaware court also rejected the gun company's constitutional argument without discussing it in detail. *See Sills*, 2000 WL 33113806. Considering claims brought by the City of Wilmington, the court rejected the extraterritoriality objection in a single sentence, stating that the gun companies "have no right to put unreasonably dangerous products into interstate commerce" and that they seemed to be merely preserving the constitutional issue "for later use" rather than seriously litigating it. *Id.* at *8. The court later granted summary judgment to defendants on other grounds. *See* Baker v. Smith & Wesson Corp., No. 99C-09-283-FS, 2002 WL 31741522 (Del. Super. Ct. Nov. 27, 2002) (holding that plaintiffs failed to present proof of recoverable damages).

248. James v. Arcadia Mach. & Tool, Inc., No. ESX-L-6059-99, slip op. at 24-25 (N.J. Super. Ct. Dec. 10, 2001), *leave to appeal granted*, Nos. A-003487-01T3F, A-003098-01T3F, A-003103-01T3F, & A-003101-01T3F (N.J. Super. Ct. App. Div. Feb. 26, 2002).

trial court simply stated that the "constitutional arguments relative to these actions are not appropriate for resolution at the pleading stage."[249]

In *City of Boston v. Smith & Wesson Corp.*,[250] the court ultimately reached the same conclusion, but after a far more detailed discussion of the issue.[251] Reviewing the precedents cited by the gun companies, the court observed that "[t]he applicability of the Commerce Clause to causes of action under state tort and contract law is unsettled" because the standards for analysis under that provision "focus on positive law–statutes or regulations."[252] The court noted that some of the "expansive injunctive relief [requested in Boston's complaint] can be read to seek directly to impact out-of-state conduct."[253] While suggesting that Boston's remedies could be limited by the constitutional principle invoked by the gun companies, the court left the issue for another day, ruling that "[t]he scope and constitutionality of any remedy, should Plaintiffs succeed at trial, is appropriately left to the judge who will have the benefit of a full factual record."[254]

While reaching different conclusions about the gun companies' extraterritoriality argument, courts have made one thing clear. They are baffled by the lack of clear precedent on what seems as though it should be a basic point of constitutional law.

C. The Failure of the Gun Companies' Argument

Courts should reject the gun companies' constitutional argument. The simplest reason is that the gun companies' position contradicts the most recent Supreme Court precedent on point. If the gun companies had a plausible argument based on the ambiguous statement of a strict territorial rule in cases like *Edgar v. MITE Corp.*[255] and *Healy v. Beer Institute*,[256] the majority opinion in *BMW* destroyed it. The Court confirmed in *BMW* that the effects principle, not a strict territorial rule, applies to adjudication of claims for

---

249. People v. Arcadia Mach. & Tool, Inc., No. 4095, slip op. at 1 (Cal. Super. Ct. Oct. 4, 2000). The Appellate Court of Illinois noted the constitutional issue but declined to address it in City of Chicago v. Beretta U.S.A. Corp., No. 1-00-3541, 2002 WL 31455180, at *11 (Ill. App. Ct. Nov. 4, 2002) (reversing dismissal of city's claims).

250. No. 199902590, 2000 WL 1473568 (Mass. Super. Ct. July 13, 2000).

251. *See* City of Boston v. Smith & Wesson Corp., No. 199902590, 2000 WL 1473568, at *11-13 (Mass. Super. Ct. July 13, 2000) [hereinafter *City of Boston I*].

252. *City of Boston I*, 2000 WL 1473568, at *11, 12.

253. *Id.* at *13.

254. *Id.* (footnote omitted). That trial will never come because Boston later voluntarily dismissed its suit.

255. 457 U.S. 624 (1982) (plurality opinion).

256. 491 U.S. 324 (1989).

punitive damages.[257] There is no way a more restrictive limit could be imposed on compensatory damages than on a punitive award. The *BMW* decision specifies that the effects principle also applies to "legislatively authorized fines," like the civil penalties sought by California cities and counties under state statutes.[258] As for injunctive relief, the gun companies themselves cite authority to show that a damages award can have as much of a regulatory effect as an injunction, which undercuts any argument suggesting that preventive relief should be subject to stricter territorial limitations than monetary remedies for past harm.[259] If the strict territorial rule announced in *Edgar* and *Healy* retains any validity, it pertains only to some category of state law not at issue in any of the litigation against the gun companies.

The gun companies' constitutional argument depends entirely on the strict territorial rule, and evaporates once the effects principle enters the picture. In every case, the plaintiff asks the court to apply state law to gun company conduct alleged to have had a severe adverse effect within the state, and therefore, the relief sought is supported by the state's interest in protecting itself, its residents, and its communities.

While the gun companies rely heavily on *BMW* in making their argument, they employ a sleight of hand in doing so. They cite *BMW* for its holding that extraterritoriality concerns exist when states apply their law to out-of-state conduct through adjudication of tort claims, just as when they legislate.[260] The gun companies then turn back to the strict territorial test advanced in the earlier cases like *Edgar* and *Healy*.[261] The gun companies simply ignore the fact that *BMW* establishes a very different test.

Another way of looking at the gun companies' argument is to recognize that it ultimately boils down to a call for stricter constitutional limitations on choice of law. Even if it were accepted, the argument would not put the gun companies entirely beyond the reach of state tort law. It would merely limit the selection of states under the law of which a plaintiff could sue. For example, if a gun moved from a Connecticut manufacturer, to an Ohio distributor, to a Nevada dealer, to a criminal who took it to California and

---

257. *See BMW of N. Am.*, 517 U.S. at 572-73.

258. *Id.* at 572; *see* CAL. BUS. & PROF. CODE § 17206 (West 1997), *id.* § 17536 (West Supp. 2002). California courts have recognized that these fines are "in the nature of" exemplary or punitive damages. People v. Superior Court, 525 P.2d 716, 724 (Cal. 1974).

259. *See BMW of N. Am.*, 517 U.S. at 572 n.17 ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief.") (*quoting Garmon*, 359 U.S. at 247).

260. *See id.* (citations omitted) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.").

261. *See, e.g.*, Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982) (plurality opinion); Healy v. Beer Inst., 491 U.S. 324 (1989).

committed a crime, then there could be no argument about extraterritoriality where the plaintiff sought to hold the manufacturer liable under Connecticut law, the distributor liable under Ohio law, or the dealer liable under Nevada law.[262]

The *BMW* decision similarly demonstrates how choice of law is at the heart of the extraterritoriality issue. BMW refinished Dr. Gore's car in Georgia and sold it to a dealership in Alabama from whom Dr. Gore purchased it.[263] There would not be an extraterritoriality problem if Georgia or Alabama tort law applied to BMW's conduct.[264] It was only the application of Alabama tort law to sales occurring wholly outside Alabama, with neither the buyer nor the seller located in Alabama, that raised extraterritoriality concerns.[265] The extraterritoriality issue in *BMW*, as in the gun litigation, ultimately dissolves into a choice of law issue, a question about *which* state's or states' law can apply to the transaction at issue, not *whether* state law can apply.

While the gun companies have asserted their extraterritoriality argument as a ground for dismissal of claims, they ask it to do too much. Even if the argument were valid, it should result only in a different choice of law. It would essentially constitutionalize a choice of law rule requiring state-law claims to be brought under the law of the state in which the defendant's conduct occurred. With gun litigation, it would force all claims to be brought under the law of the state or states in which the defendant's manufacture or sale of the gun took place, rather than the state in which the shooting occurred.

Note that this would not necessarily limit the constitutionally permissible choice of law to a single state for each claim. For purposes of determining whether conduct occurs "wholly outside" a state, the Supreme Court's decisions indicate that an interstate sale occurs in both the seller's state and the buyer's state, and that either state can regulate the transaction without its

---

262. The extraterritoriality argument would permit the gun companies to escape state tort law completely only if there were a rule of law *forcing* the California shooting victim to sue under California law, but there should never be such a rule. *See, e.g.*, Norwest Mortgage, Inc. v. Superior Court, 85 Cal. Rptr. 2d 18, 27-28 (Ct. App. 1999) (finding that choice of law rules do not become relevant unless there are two interested jurisdictions whose laws could apply without violating constitutional requirements).

263. *See* Brief for the Petitioner, BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) (No. 94-896), *reprinted in* 20 AM. J. TRIAL ADVOC. 105, 109 (1996).

264. The *BMW* opinion did not specify who delivered the car to Alabama or whether title passed from the distributor to the dealer in Georgia or Alabama, suggesting these issues were not relevant to the analysis. *See generally BMW of N. Am.*, 517 U.S. 559.

265. *See generally id.*

law having extraterritorial reach.[266] For example, where a Florida manufacturer sold a gun to an Illinois distributor, the transaction would not be wholly outside either of those states, and a person injured by the gun could sue either company under Florida or Illinois law without implicating any limitations on extraterritorial application of state law.[267]

Courts obviously have not construed the Constitution as requiring all tort claims to be brought under the law of the state or states in which the defendant's conduct occurred.[268] The Supreme Court instead has held that a state's law can apply to a claim if the state had "significant contacts" with the claim creating state interests strong enough to prevent the choice of that state's law from being arbitrary or unfair.[269]

Indeed, the gun companies ultimately might regret if courts were to interpret the Constitution as requiring tort claims to be brought under the law of the state in which the defendant's conduct occurred, and not the state where the plaintiff suffered its injury. In the cases against a large number of gun makers and sellers, such as the cases brought by cities and counties, such a rule might benefit the gun companies by forcing claims to be brought under the law of many different states and making the action vastly more complicated.[270] In other circumstances, the gun companies would suffer. For example, in seeking to avoid certification of class actions against them, gun companies have argued emphatically that each class member's claim should

---

266. *See supra* notes 57 & 264 and accompanying text; *see also* A.S. Goldmen & Co. v. N.J. Bureau of Sec., 163 F.3d 780, 786-87 (3d Cir. 1999) (holding that a sale from a New Jersey seller to a New York buyer does not occur "wholly outside" New Jersey or New York).

267. The gun companies have essentially conceded this point at times in their arguments. *See, e.g.*, Defendant Navegar, Inc.'s Motion for Summary Judgment at 19, *In re* 101 Cal. St. Bldg., No. 959316 (Cal. Super. Ct. Oct. 3, 1996) (arguing that it would be unconstitutional for California to apply its negligence law to the lawful manufacture of guns in Florida and the lawful sale to distributors in Arizona and Ohio).

268. The Supreme Court has construed the Clean Water Act as compelling such a choice of law rule for state law claims concerning water pollution. Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948) (codified as amended in scattered sections of 33 U.S.C.). *See* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 487 (1987) (holding that owners of land on the Vermont side of Lake Champlain can bring nuisance action against a paper mill pouring pollution into the lake from the New York side, but must do so under New York nuisance law and not Vermont law).

269. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 819-23 (1985); Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981) (plurality opinion).

270. *See* Hamilton v. Accu-Tek, 47 F. Supp. 2d 330, 339-40 (E.D.N.Y. 1999) (applying the law of the place of the shooting to claims against a large number of defendants under "market share theory of liability" because "[t]he points of distribution involved many states and vary from company to company" and therefore "if the significant contact were the point of distribution, so many states' laws would be involved that consolidation of defendants would be impractical").

be governed by the law of the place in which that person suffered injury, not the law of the state in which the defendant's conduct occurred.[271] A constitutional rule requiring every plaintiff's claim to be governed by the law of the state in which manufacture occurred would make it significantly easier to bring nationwide class actions against manufacturers, hardly a result the gun companies would relish. If the gun companies want to argue that the Supreme Court should tighten the constitutional restraints on choice of law, they should do so.[272] However, they will have to take the disadvantages that come along with that argument. They will also have to admit that they seek to break new constitutional ground with an argument that would dramatically alter existing choice of law rules.

The failure of the gun companies' extraterritoriality argument is not avoided by the fact that they weave into it the notion that lawsuits subject them to an intolerable patchwork of inconsistent regulations imposed by different states.[273] True regulatory inconsistency would exist only in a situation in which one state required a company to do an act that another state prohibited, or two or more states imposed different requirements that the company could not simultaneously fulfill. For example, a gun manufacturer might be in a bind if one court ordered it to incorporate a combination locking mechanism into its guns to help secure them against unauthorized use and another court ordered that the locking mechanism be key-operated. At this point, the gun companies have not identified any realistic possibility of such

---

271. *See* Spence v. Glock, 227 F.3d 308, 313 (5th Cir. 2000) (reversing certification of a class of purchasers of allegedly defective pistols because "this case implicates the tort policies of all 51 jurisdictions of the United States, where proposed class members live and bought Glock pistols"); *see also* Feldt v. Sturm, Ruger & Co., 721 F. Supp. 403, 405 (D. Conn. 1989) (agreeing with gun manufacturer's argument that products liability claim should be governed by the law of the state in which the shooting injury occurred, even though it was not manufactured or sold there).

272. Some have argued for constitutional constraints, but even harsh critics of the current choice of law regime have not argued that products liability claims should be governed by the law of the place of manufacture. *See* Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 42 (1991) (arguing for the law of victim's domicile); Laycock, *supra* note 16, at 327-28 (arguing for the law of the state of retail sale or victim's injury); Michael W. McConnell, *A Choice-of-Law Approach to Products-Liability Reform*, *in* NEW DIRECTIONS IN LIABILITY LAW, at 98 (Proceedings of the Acad. of Political Sci., Vol. 37, No. 1, 1988) (arguing for the law of the state of retail sale).

273. This supposed problem of inconsistent regulations would not go away even if states could never apply their tort law to transactions occurring wholly outside the state. A gun manufacturer, for example, would still be subject to potential liability under the law of its own state and the law of all states of distributors to which it sold guns. *See supra* notes 266-67 and accompanying text.

an inconsistency resulting from any of the litigation against them.[274] Moreover, in the unlikely event that such an inconsistency arises, the appropriate solution would be for courts to make reasonable accommodation for one another and limit or modify the relief to the extent necessary to avoid the inconsistency, but not to give the gun companies an exemption from responsibility under state tort law at the outset.[275]

The gun companies' actual concern is facing multiple, varying regulations imposed by different states, not conflicting regulations. There is nothing unique about the litigation against gun companies in this respect. Manufacturers of any product distributed nationwide face potential claims under the law of fifty different states. Moreover, there is nothing unusual or unconstitutional about different states imposing different rules. That diversity is an inherent part of our federal system.[276] Such "inconsistent" regulations implicate constitutional concerns only in extremely rare instances in which courts find a special and compelling need for nationwide uniformity, particularly in the area of interstate transportation.[277] Unlike trains or trucks, the design and sale of guns does not uniquely compel the need for nationwide regulatory uniformity. In fact, the exemption of firearms from regulation by the Consumer Product Safety Commission strongly suggests that the safety of gun designs is particularly a subject on which diverse regulations by the states does not infringe upon a need for nationwide regulatory consistency.[278] The fact that gun companies might *prefer* to be subject to only one state's or even no state's authority does not rise to the level of a constitutional entitlement,

---

274. *See* Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 112 (2d Cir. 2001) (requiring proof of "actual conflict between the challenged regulation and those in place in other states"), *cert. denied*, __U.S.__, 122 S. Ct. 2358 (2002).

275. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(3) (1986) (providing that, in the international context, when laws prescribed by two nations conflict, each has an obligation to evaluate its own as well as the other nation's interest and should defer if the other nation's interest is clearly greater); *id.* § 403 cmt. e (noting that regulatory conflict exists only if compliance with both jurisdictions' laws is impossible, not "merely because one state has a strong policy to permit or encourage an activity which another state prohibits, or one state exempts from regulation an activity which another regulates").

276. *See* Goldsmith & Sykes, *supra* note 9, at 806; Robert L. Rabin, *Federalism and the Tort System*, 50 RUTGERS L. REV. 1, 6 (1997).

277. *See, e.g.*, S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 767 (1945); *see also supra* notes 61-64 and accompanying text. Regan argues that transportation and communications infrastructures are the exceptional areas requiring heightened protection from inconsistent regulations. *See* Regan, *supra* note 7, at 1883.

278. *See* 18 U.S.C. § 927 (2000); *see also, e.g.*, Nat'l Kerosene Heater Ass'n v. Massachusetts, 653 F. Supp. 1079, 1094 (D. Mass. 1986) (holding that lack of federal regulation of kerosene heaters by the Consumer Product Safety Commission strongly suggests statewide bans on them do not unduly burden interstate commerce).

for "the commerce clause does not exist to protect a business's right to do business according to whatever rules it wants."[279]

Finally, the extraterritoriality argument is particularly weak coming from the gun industry. The Supreme Court has indicated that one important reason for closely scrutinizing state laws with extraterritorial effect is that they may impose costs on out-of-state actors who lack a voice in the political process that generates the law.[280] From that perspective, the legal actions concerning guns merit the lowest degree of scrutiny. The gun companies have means to participate in the political process in every state in which they face potential liability. The gun industry not only has its own trade associations lobbying on its behalf, but also enjoys the powerful support of the National Rifle Association.[281] No other product in this country has a comparable amount of political muscle behind it. More than half of the state legislatures have enacted measures to give some form of special immunity from suit to the gun industry.[282] Bills to preclude all application of state tort law to the gun

---

279. Valley Bank of Nev. v. Plus Sys., Inc., 914 F.2d 1186, 1192-93 (9th Cir. 1990) (rejecting the bank's argument about inconsistent regulation of ATM networks as "more a jealous defense of its own particular rules and its own concept of how it wants to do business" than a serious constitutional challenge to state law).

280. S. Pac. Co., 325 U.S. at 767-68 n.2 (citations omitted) ("[T]he Court has often recognized that to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected."). For the argument that judicial review of state laws' effects on interstate commerce should be limited to ensuring that the political process operates without defect see Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); James M. O'Fallon, *The Commerce Clause: A Theoretical Comment*, 61 OR. L. REV. 395 (1982); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 (1979).

281. *See* Judy Sarasohn, *Fortune: NRA Lobby Is No. 1 on Capitol Hill*, WASH. POST, May 17, 2001, at A21; *The Rise of 'Soft Money,'* WASH. POST, Feb. 13, 2002, at A25 (listing issue groups that contributed the largest amounts of "soft money" to political parties in the 2000 elections, with the National Rifle Association at number one and the National Shooting Sports Foundation at number three); *see also* Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 936-37 (1996) (explaining that manufacturers are sufficiently few in number to overcome free-rider problems and carry out effective fundraising and lobbying efforts even from outside the state).

282. *See, e.g.*, ALA. CODE § 11-80-11 (Supp. 2001); GA. CODE ANN. § 16-11-184 (Harrison 1998 & Supp. 2001); LA. REV. STAT. ANN. §§ 9:2800.60, 40:1799 (West 2001 & Supp. 2002); ME. REV. STAT. ANN. tit. 30-A, § 2005 (West Supp. 2001); MICH. COMP. LAWS ANN. § 28.435(9) (West Supp. 2002); NEV. REV. STAT. 12.107 (2001); OHIO REV. CODE ANN. § 2305.401 (Anderson 2001); 18 PA. CONS. STAT. ANN. § 6120 (West 2000); TEX. CIV. PRAC. & REM. CODE ANN. § 128.001 (Vernon Supp. 2002).

companies' conduct have even been introduced in Congress.[283] Moreover, the litigation against the gun companies does not reflect a pattern of provincialism, with plaintiffs exploiting home-court advantage against outsiders. Two of the most favorable rulings in the suits brought by local governments have come in states that are home to major producers of firearms, California and Massachusetts.[284]

There are other potential holes in the gun companies' constitutional theory. For example, one could make a strong argument that the conduct at issue in lawsuits against gun manufacturers is not a collection of separate transactions but a single course of conduct carried out in all the states where the manufacturer sells its products.[285] Those arguments merely gild the lily. The bottom line is that the Supreme Court's decision in *BMW* destroys the gun companies' constitutional argument by reaffirming that the effects principle, rather than a strict territorial rule, governs states' jurisdiction to prescribe their law to out-of-state tortfeasors.

V. RE-RETIRING THE STRICT TERRITORIAL RULE

Strict territorial notions concerning the limits of state law appeared to be a thing of the past until the Supreme Court started giving them new life under the dormant Commerce Clause two decades ago. The Court should cancel the revival. Strict territorial concepts gave way to modern rules of law for good reasons and should be returned to the dustbin of legal history.[286]

Whether they govern jurisdiction to prescribe or jurisdiction to adjudicate, strict territorial rules are both under-inclusive and over-inclusive. They leave a state powerless to apply its law to protect against sources of

---

283. *See* Second Amendment Preservation Act of 2002, S. 1996, 107th Cong. (2002); Protection of Lawful Commerce in Arms Act, H.R. 2037, 107th Cong. (2001); Firearms Heritage Protection Act of 2001, H.R. 123, 107th Cong. (2001). These proposals raise serious constitutional issues regarding the scope of Congress's power to legislate under the Commerce Clause. The Supreme Court's most significant recent decision concerning that area of constitutional law also happened to involve firearms. *See* United States v. Lopez, 514 U.S. 549, 565-68 (1995) (holding that federal law prohibiting possession of guns in school zones exceeded Congress's authority under the Commerce Clause).

284. *See Arcadia Machine & Tool*, No. 4095, slip op.; *City of Boston I*, 2000 WL 1473568.

285. *See supra* Part III.B.

286. *See* Simon v. Philip Morris Inc., 124 F. Supp. 2d 46, 66-67 (E.D.N.Y. 2000) (noting how "changing forms of personal injury in the twentieth century, due to increased mobility of goods, people, and information" imposes pressure for more flexible approaches to choice of law); Born, *supra* note 23, at 61-62 (describing how twentieth-century "political, economic, technological, and legal transformations" undermined nineteenth-century notions about national territorial jurisdiction).

substantial harm emanating from outside the state, while enabling the state to regulate other matters in which it has a trivial interest but some minor territorial connection. By forcing decisions to turn entirely on formalistic distinctions, strict territorial rules also direct courts' attention to abstract questions about where complex and intangible events should be deemed to occur and how narrowly or broadly to define the regulated unit of commerce.[287] Courts' answers to those questions are not likely to be more consistent or predictable than they would be if courts instead simply weighed state interests without masking such an analysis behind decisions ostensibly about geography.

The allure of strict territorial principles is clear. States have an interest in preservation of their territorial sovereignty.[288] Except to the extent that a matter requires centralization of authority at the federal level, each state should be allowed to govern with respect to what occurs within its borders. The states' interest in doing so is entitled to constitutional protection, but it cuts both ways in this instance. A state should have the power to make policy decisions, to regulate conduct that occurs within it, and to preclude other states from usurping that authority. At the same time, a state's sovereignty over its territory should mean that it has the power to protect those within its borders from harm, even if the harm originates elsewhere.[289]

For example, if Nevada decides that it wants to allow the construction of factories that will pump huge quantities of pollution into the air that spreads into Utah, it is clear that Utah's policy decision favoring clean air would trump Nevada's policy decision favoring industrial development if Utah could decree that the factories not be built. However, it should be equally clear that Nevada has trumped Utah's policy decision concerning its environment if Nevada can permit the factories to be built and there is nothing that Utah or anyone injured by the pollution in Utah can do about it. One could say that Utah should be required to go to Congress for help to obtain what it wants, but the same could be said for Nevada. Even in the era when strict territorial conceptions of state authority prevailed, Justice Holmes recognized that a state's sovereignty over "all the earth and air within its domain" gave it "the

---

287. *See supra* Part III.

288. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 571 (1996) (citations omitted) (describing how each state's power is "constrained by the need to respect the interests of other States"); Healy v. Beer Inst., 491 U.S. 324, 335-36 (1989) (describing how the Constitution has special concern "with the autonomy of the individual States within their respective spheres").

289. *See* Gergen, *supra* note 106, at 1740 (arguing that ideal of "singular sovereignty" is unattainable because "it is inevitable in a world where behavior touches several states that each sovereign will claim the authority to act upon it" and is not a reasonable way to allocate power because it undervalues the weight of states' interests in protecting against harm from out-of-state behavior).

last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air," even when the pollution came from factories beyond its borders.[290]

To take another example, some have argued that entering a nationwide injunction to protect a trademark under one state's anti-dilution statute would effectively permit that state to set national policy, even for states that have made a policy decision not to provide protection against trademark dilution. On the other hand, if conduct in one state diluting the trademark has the inevitable effect of diluting it elsewhere, then denying nationwide injunctive relief allows states that choose not to provide protection against trademark dilution to trump the policy decision of all states that choose such protection.[291]

By the same logic, a state that prefers to impose minimal restrictions on the design and sale of guns may have an interest in not having that policy choice overruled by other states that would opt for a higher level of safety. But if the harmful consequences of that state's decision are felt throughout the country, that state has effectively set nationwide policy at the expense of other states' interests in protecting those within their borders.

A principal function of tort law is to compel actors to internalize costs of their activities, rather than imposing them on others, so that they have appropriate incentives to strike an efficient balance between the activities' costs and benefits.[292] Allowing states to provide remedies for out-of-state conduct that causes harm within the state ensures that this internalization of costs is not cut off completely at state lines. One state would otherwise be able to establish itself as a haven for manufacturers of guns (or any other product) by granting them complete immunity from liability under its laws, leaving every other state to sit helplessly while out-of-state interests threaten the health and safety of its residents.[293]

Each state thus has an interest in having exclusive authority to apply its law to what goes on within its borders, whether to a person creating a danger or to a person suffering harm as a result. Those interests come into conflict when the dangerous conduct occurs in one state and the harm occurs in another. One solution is to impose a strict rule of singular sovereignty, giving

---

290. Georgia v. Tenn. Copper Co., 206 U.S. 230, 237, 239 (1907) (enjoining factories in Tennessee from discharging noxious gas over Georgia's territory).

291. *See* Welkowitz, *supra* note 8, at 81-84; *supra* notes 145-48 and accompanying text.

292. *See* Goldsmith & Sykes, *supra* note 9, at 798-802.

293. *See* Robert M. Ackerman, *Tort Law and Federalism: Whatever Happened to Devolution?*, 14 YALE L. & POL'Y REV. 429, 458 (1996) (noting that application of products liability law of state in which injury occurs prevents "race for the bottom" in which states adopt law favoring manufacturers to attract them to locate within that state).

one state exclusive authority over the matter and leaving the other powerless. The alternative is to permit both states to act on the matter, giving each state some authority but permitting neither to achieve the ideal of exclusive territorial sovereignty. Courts tried to do the former for many years before recognizing it as a misguided effort and turned to the latter. They should not reverse that course now.

I submit that the Supreme Court should expressly disavow the statements in *Edgar* and *Healy*, which interpreted the Constitution as forbidding the application of a state's commerce statutes to conduct that takes place wholly outside of the state's borders but has effects within the state.[294] While reflecting valid concerns about overreaching state laws, the language in those cases overstated the degree of restriction imposed by the Constitution and understated the extent to which states have the power to prescribe their law to out-of-state conduct with in-state effects. These statements were not essential to the ultimate holdings in either case. There was no sound precedent. Indeed, such statements originated in the *Edgar* plurality opinion supported by citation to an antiquated conception of personal jurisdiction that the Court discarded many years ago.[295]

This is not to say, of course, that the Constitution imposes no limits on extraterritorial application of state law. It does.[296] The constitutional rules on personal jurisdiction impose those limits with respect to a state's jurisdiction to adjudicate, permitting state courts to entertain claims and award relief against defendants over whom they have jurisdiction based on a requisite level of contact between the defendant and the state.[297] That requirement exists to protect states' interests in territorial sovereignty, not just to ensure fairness to defendants.[298] The Due Process Clause also restrains a state's jurisdiction to prescribe its law, requiring the state to have "significant contacts," creating state interests strong enough to prevent the application of that state's law from

---

294. *See Healy*, 491 U.S. at 336; Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982) (plurality opinion).

295. *See supra* notes 75-80 and accompanying text.

296. *See* Tallentire v. Offshore Logistics, Inc., 754 F.2d 1274, 1284 (5th Cir. 1985) ("There are certainly constitutional limits on a state's power to apply its laws to order the rights of individuals, but these limits are not determined entirely by geographic and territorial considerations."), *rev'd*, 477 U.S. 207 (1986).

297. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980).

298. *See World-Wide Volkswagen*, 444 U.S. at 291-92 (recognizing that a personal jurisdiction requirement "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system"); Hanson v. Denckla, 357 U.S. 235, 251 (1958) (recognizing that personal jurisdiction requirements are "a consequence of territorial limitations on the power of the respective States").

being arbitrary or unfair. While the "significant contacts" requirement is most familiar in the context of choice of law,[299] it applies equally to all forms of state legislative or prescriptive jurisdiction.[300] In addition, even without the strict territorial rule, any state regulation of commerce outside the state would remain subject to the other restraints imposed by the dormant Commerce Clause.[301]

Moreover, there is room for development of a heightened requirement in situations where a state seeks to apply its law to out-of-state conduct, but the requirement should come in the form of a standard requiring judicial discretion in its implementation rather than an inflexible and categorical bar. For a suggestive example, courts need look no further than the rules developed to guide application of United States law to events abroad. While they share a common conceptual framework, relations among American states and among nations are obviously two distinct matters, each presenting its own unique concerns.[302] The international analogue makes clear, however, that courts considering the constitutional reach of state law do not face a choice between an unduly restrictive territorial rule and an absence of meaningful limitations.

For example, tracking the reasoning of federal appellate decisions concerning the foreign reach of United States antitrust law,[303] the *Third Restatement of Foreign Relations Law* makes territory the principal ground for jurisdiction, providing that a nation has jurisdiction to prescribe law with respect to "conduct that, wholly or in substantial part, takes place within its territory" and to "the status of persons, or interests in things, present within its territory."[304] The phrase "in substantial part" seeks to avoid the potentially over-inclusive nature of territorial jurisdiction by precluding the state from applying its law where it has only a minor territorial connection to the conduct.[305]

---

299. *See generally* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 819 (1985); Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981) (plurality opinion).

300. *See, e.g.*, Gerling Global Reinsurance Corp. v. Gallagher, 267 F.3d 1228, 1236-37 (11th Cir. 2001) (applying "significant contacts" standard to a Due Process challenge against a state statute requiring insurance companies to produce information regarding nonpayment on German affiliates' policies issued to Holocaust victims); Adventure Communications, Inc. v. Ky. Registry of Election Fin., 191 F.3d 429, 434-37 (4th Cir. 1999) (applying "significant contacts" standard in Due Process challenge to Kentucky campaign finance reform legislation).

301. *See supra* notes 17-22 and accompanying text.

302. *See generally* Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 LAW & CONTEMP. PROBS. 11 (1987).

303. *See generally, e.g.*, Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976).

304. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(1)(a)-(b) (1986).

305. *See id.* § 402 cmt. a.

Along with that, the Restatement permits a nation to prescribe its law to "conduct outside its territory that has or is intended to have substantial effect within its territory."[306] Courts have employed the use of that "substantial effect" standard in determining the extent to which federal antitrust laws and securities laws reach foreign conduct.[307] Congress endorsed this standard, in the Foreign Trade Antitrust Improvements Act of 1982 as setting the proper limits on the reach of the Sherman and Federal Trade Commission Acts.[308] This is a higher standard than the requirement of significant contacts imposed by the Due Process Clause's "significant contacts" limitation on state prescriptive jurisdiction. It limits a nation's ability to reach foreign conduct to those instances in which the nation has not just some form of contacts, but an interest in asserting its law to protect against a significant adverse effect emanating from conduct abroad.[309] At least one court has adopted this "adverse effects" standard from the international context as a suitable limit on the reach of a state's antitrust law, favoring it over the more lenient "contacts-based" standard analogous to the constitutional choice of law limits.[310] The court found the "adverse effects" standard better attuned to the degree of the state's interest in having its antitrust law apply.[311]

The standards put forward in the *BMW* decision aim in the same direction. Beyond a showing of significant contacts necessary for its choice of law to survive constitutional scrutiny, a state has authority to impose sanctions on out-of-state actors through punitive damages only if the defendant's conduct had an impact on the state or its residents sufficient to

---

306. *Id.* § 402(1)(c); *see also id.* § 402 cmt. d (noting that the effects principle "is generally accepted with respect to liability for injury in the state from products made outside the state and introduced into its stream of commerce"). The Restatement provides that nationality and the need to protect special national interests are two additional grounds for jurisdiction to prescribe, which are not relevant in the domestic context. *See id.* § 402(2), (3).

307. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 n.6 (1986); *e.g.*, Alfadda v. Fenn, 935 F.2d 475, 478 (2d Cir. 1991); Tamari v. Bache & Co. (Lebanon) S.A.L., 730 F.2d 1103, 1105-06 (7th Cir. 1984); Des Brisay v. Goldfield Corp., 549 F.2d 133, 135-36 (9th Cir. 1977); Schoenbaum v. Firstbrook, 405 F.2d 200, 209, *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc).

308. *See* Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, §§ 402, 403, 96 Stat. 1246 (codified at 15 U.S.C. § 6a(1) (2000)) (requiring "direct, substantial, and reasonably foreseeable effect"); *see also* Sherman Anti-Trust Act, ch. 647, 26 Stat. 209 (codified as amended in scattered sections of 15 U.S.C.), Federal Trade Commission Act, ch. 311, 38 Stat. 717 (codified as amended in scattered sections of 15 U.S.C.).

309. *Compare supra* notes 298-99 and accompanying text, *with* § 402, 96 Stat. at 1246.

310. *See* Emergency One, Inc. v. Waterous Co., 23 F. Supp. 2d 959, 968-70 (E.D. Wis. 1998).

311. *See Emergency One*, 23 F. Supp. 2d at 968-70.

justify invocation of the state's interest in protecting itself and those within it from harm.[312]

Extraterritorial application of law may be inappropriate in some circumstances despite the existence of a significant impact within the state. Courts should have the ability to check those excesses without being straitjacketed by categorical territorial rules. In the international context, the Restatement adds that a nation should not exercise jurisdiction to prescribe its law to people or activities having connections with another nation when the exercise of jurisdiction would be "unreasonable."[313] Whether the application of the nation's law would be "unreasonable" depends on evaluation of "all relevant factors," including "the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory."[314] Courts can also take into account the importance of the regulation, the extent to which other nations regulate the same activity, the magnitude of their interests in regulating it, and the likelihood of conflict with regulations imposed by other nations.[315]

That sort of flexible balancing of interests is essentially what courts have been doing in the domestic context as well. For example, courts cannot impose an absolute constitutional rule against inconsistent regulations because the imposition of different regulatory requirements by different states is an inevitable part of the federal system, but courts can and do provide a check against excesses.[316] Likewise, the court in *Yu v. Signet Bank/Virginia*[317] undertook that sort of weighing analysis when it decided that some claims about an out-of-state bank's conduct seemed to intrude excessively on other states' prerogatives while other claims regarding the same conduct seemed like reasonable exercises of California's power to protect the interests of its residents.[318] Even when purporting to apply categorical principles like the strict territorial rule, courts inevitably and sensibly gravitate toward a more flexible and realistic form of analysis.

---

312. *See BMW of N. Am.*, 517 U.S. at 572-73.

313. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(1) (1986).

314. *Id.* § 403(2).

315. *See id.* § 403(2)(c), (e), (g), (h); *see, e.g.*, United States v. Javino, 960 F.2d 1137, 1143 (2d Cir. 1992) (applying § 403 of the Restatement and suggesting it would be unreasonable for the United States to regulate all firearm manufacturing activity throughout the world given the "attenuated impact that a foreign-made firearm is likely to have within this country–unless the firearm is imported into the United States").

316. *See supra* notes 273-79 and accompanying text.

317. 82 Cal. Rptr. 2d 304 (Ct. App. 1999).

318. *See* Yu v. Signet Bank/Virginia, 82 Cal. Rptr. 2d 304, 313-17 (Ct. App. 1999); *supra* notes 168-76 and accompanying text.

CONCLUSION

Professor Joseph Beale observed that the "whole history . . . of law is the history of alternate efforts to render the law more certain and to render it more flexible."[319] In seeking to enhance the certainty of the constitutional boundaries of state prescriptive jurisdiction, the Supreme Court's renewed flirtation with the idea of strict territorial limits went too far. The notion that a state's law can never apply to commerce outside its borders, regardless of the effect that commerce has within the state, would turn back the clock by a century and radically curtail the ability of state tort law to provide remedies and protection against sources of harm originating outside the state. To the extent the Supreme Court meant the strict territorial rule it derived from the dormant Commerce Clause to apply only to some limited category of state law, none of its decisions or those of lower courts provide any clear explanation of the boundaries of that category. The Supreme Court's suggestive references to a strict territorial conception of state authority have generated only confusion and inconsistency.

The suits against the gun companies have brought the issue to the fore and revealed the need for clarification of this vital point. The gun companies' argument takes the notion of strict territorial limits on state authority to an extreme that no other litigants have attempted. Courts should reject the gun companies' argument that the Supreme Court's decisions effect a revolutionary curtailment of the reach of state tort law.

At its first opportunity, the Supreme Court should go further and disavow altogether its suggestions of a renewal of strict territorial limits on the reach of state law. While the Constitution imposes limits on a state's prescriptive and adjudicatory jurisdiction, it does not demand that state law stop dead in its tracks at the state's borders. The Court should reaffirm that a state has authority to apply its law to conduct outside its borders having substantial effects within them. Some exercises of that authority may be unreasonable and overreaching, and courts must stand ready to make those determinations on a case by case basis with an eye toward states' competing interests in having authority over conduct and effects within their respective territories. That approach demands the exercise of sound judicial discretion. It is not perfect, but it is better than having the Supreme Court make bold pronouncements of categorical principles concerning the inviolate nature of state sovereignty that prove to be overstatements inconsistent with reality and impossible for courts to follow in practice.

---

319. Simon v. Philip Morris Inc., 124 F. Supp. 2d 46, 67 (E.D.N.Y. 2000) (*quoting* JOSEPH H. BEALE, 1 A TREATISE ON THE CONFLICT OF LAWS 50 (1935)).