

Comity and Clawback Statutes After S.B. 8

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Dobbs v. Jackson Women’s Health Organization ended the fight over the constitutional abortion right. But the interjurisdictional fight over state abortion rights and prohibitions has just begun, raising constitutional questions regarding the extraterritorial reach of state law. Privately enforced abortion bans, such as the controversial Texas Heartbeat Act, make this conflict between antithetical state policies even more vivid. Yet constitutional solutions to interstate extraterritoriality are elusive. While many provisions of the Constitution regulate state power vis-à-vis the other states, no developed framework exists to firmly delineate the extraterritorial reach of state law, particularly when a state can tell a story about why its interests are affected by the out-of-state conduct it wishes to regulate.

But there may be extraconstitutional solutions to the extraterritoriality problem. A few states have begun experimenting with “clawback” statutes, which create a cause of action to recover the amount of a judgment paid where the basis for liability was conduct performed within the enacting state’s borders and legal under its laws. Clawback statutes present a potentially effective solution to privately enforced abortion bans because they take advantage of the same realities of litigation that such bans manipulate. This Note offers the first foray into understanding how clawback statutes can act as a building block in a legal framework that seeks to mimic a constitutional right to travel through private law. In a world of second bests, these laws stand in for constitutional doctrine.

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Introduction

Interstate friction often arises as a natural byproduct of the differences in morality, politics, and culture embodied in state regulatory policies.¹ This friction triggers politicians like Ted Cruz to suggest that newcomers want Texas “to be just like California, right down to tofu and silicon and dyed hair.”² This friction causes Nebraska and Oklahoma to characterize Colorado’s legalization of marijuana as a “direct assault on the health and welfare” of their own citizenry.³ This friction spurs Connecticut to develop legal countermeasures after Texas deputizes the public at large to sue anyone and everyone connected to a Texan’s abortion.⁴

Today, interstate friction splits the polity in seemingly irreconcilable ways, causing one-fifth of Americans to say that they are ready for a “national divorce.”⁵ While many forms of interstate friction are relatively benign, the politics around hotly polarized issues (such as abortion) threaten the bonds of comity that hold the union together. Texas’s privately enforced abortion ban—the Texas Heartbeat Act, Senate Bill 8 (S.B. 8)—is one such manifestation of this increasingly familiar phenomenon.⁶

A constitutional rule imposing a strict territorial limit on the reach of state law would eliminate any direct extraterritorial effect of S.B. 8 and laws

1. Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 61–62 (2014).

2. Eli Watkins, *Cruz: Democrats Want Texas to Be ‘Like California,’ Have ‘Tofu’ and ‘Dyed Hair.’* CNN, <https://www.cnn.com/2018/09/09/politics/ted-cruz-texas/index.html> [<https://perma.cc/TS62-39SY>] (Sept. 9, 2018, 3:45 PM); see also Natalie Walters, *Why Are Californians Moving to Texas and How That Might Change the State*, DALL. MORNING NEWS (Aug. 30, 2022, 6:00 AM), <https://www.dallasnews.com/business/economy/2022/08/30/why-are-californians-moving-to-texas-and-will-they-turn-it-blue/> [<https://perma.cc/33XY-VTF6>] (describing how the increased cost of living and COVID-19 pandemic policies drove a wave of West Coasters into Texas).

3. Brief in Support of Motion for Leave to File Complaint at 12, *Nebraska v. Colorado*, 577 U.S. 423 (2016) (No. 144), 2014 WL 7474136.

4. See Christopher Keating, *Connecticut’s New Abortion Law Offers Protections for Patients, Providers: How Does It Work?*, HARTFORD COURANT, <https://www.courant.com/2022/05/03/connecticuts-new-abortion-law-offers-protections-for-patients-providers-how-does-it-work/> [<https://perma.cc/6USV-894R>] (May 3, 2022, 10:45 PM) (describing how Connecticut’s new “clawback” statute seeks to protect defendants from lawsuits under S.B. 8 and similar state laws).

5. Margaret Talev, *Two Americas Index: 20% Favor a “National Divorce,”* AXIOS (Mar. 16, 2023), <https://www.axios.com/2023/03/16/two-americas-index-national-divorce> [<https://perma.cc/7VK4-LWJN>].

6. S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).

of its kind. For example, a substantive constitutional right to travel could protect individual liberties that are not otherwise constitutionally guaranteed by allowing citizens to evade restrictive home-state law by traveling to a permissive state to engage in the outlawed conduct.⁷ Such a right would necessarily involve resolving a conflict between state laws in favor of territoriality.⁸ In other words, this right would operate like a choice-of-law rule that resolves conflicts in favor of the state where an act occurred.

But the Supreme Court's horizontal federalism jurisprudence does not currently provide a basis for such a rule.⁹ While the Court has repeatedly sought to articulate various limiting principles on the territorial reach of state law, current doctrine imposes only modest restraints.¹⁰ While it is uncontroversial that a state cannot apply its law to *all* extraterritorial conduct, current doctrine provides little guidance on the constitutionality of most extraterritorial regulation.¹¹

Arguably, this dearth of doctrine suggests that the principles of horizontal federalism embedded in the Constitution tolerate and even invite a fair amount of extraterritoriality. As the Court acknowledged just this term, "many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior."¹² Loose limits can be a good thing since, in a system of governance organized along both horizontal and vertical dimensions, friction between states can catalyze the otherwise recalcitrant national government to make policy.¹³ Moreover, as the Court has recognized time and time again, a state may have legitimate interests in regulating extraterritorial conduct that creates meaningful in-state effects.¹⁴

7. Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873, 883 (1993) (stating that the right to travel "seems to be the constitutional protection that tracks most closely the defendant's claim to escape home-state law by leaving the state").

8. *See id.* at 876 (arguing that "the structure of our federal system clearly compels the priority of the territorial state, and that this priority typically invalidates the residence state's claim to regulate").

9. *See, e.g.*, Adam Liptak, *The Right to Travel in a Post-Roe World*, N.Y. TIMES (July 11, 2022), <https://www.nytimes.com/2022/07/11/us/politics/the-right-to-travel-in-a-post-roe-world.html> [<https://perma.cc/3KQW-8ZVL>] (discussing the uphill battle for the unwritten constitutional right to travel).

10. *See infra* Part II.

11. *See infra* Part II.

12. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1156 (2023) (quoting, and snubbing, plaintiffs' extraterritoriality argument).

13. Gerken & Holzblatt, *supra* note 1, at 90.

14. *See, e.g.*, Strassheim v. Daily, 221 U.S. 280, 284–85 (1911) (holding that Michigan could prosecute a defendant who defrauded Michigan even when all the criminal conduct took place outside of Michigan); Allstate Ins. Co. v. Hague, 449 U.S. 302, 305–06, 320 (1981) (upholding the application of Minnesota state law invalidating an insurance policy issued in Wisconsin to a Wisconsin resident killed in an accident that took place in Wisconsin but who worked in Minnesota and whose wife subsequently relocated to Minnesota).

Yet laws like S.B. 8 put pressure on this second proposition. States like Texas argue that they have legitimate interests in regulating extraterritorial abortions performed on their citizens—interests such as the health and safety of the mother, or the potential life of the fetus. Because current constitutional doctrine places only the mildest scrutiny on the legitimacy of a state’s purported interest in applying its own law to out-of-state conduct, precedent offers no clear answers to how such arguments will fare. The growing seriousness of this concern—particularly in the context of abortion and birth control—recently prompted Justice Kavanaugh to say the quiet part out loud: a lack of constitutional controls enables a state “to unilaterally impose its moral and policy preferences . . . on the rest of the Nation,” and such an outcome “undermines federalism and the authority of individual States.”¹⁵

There is no lack of potential constitutional solutions to the interjurisdictional problems created by S.B. 8. For example, Professor Lea Brilmayer argues that, because the Full Faith and Credit Clause of Article IV “applies only to ‘judicial’ proceedings, and because the Supreme Court has defined ‘judicial’ proceedings as limited to Article III cases or controversies,” a state court case “that would not qualify for Article III case-or-controversy jurisdiction does not qualify for the support of the Article IV Full Faith and Credit clause.”¹⁶ Therefore, Professor Brilmayer argues, sister states need not respect S.B. 8 judgments arising from suits that flunk Article III.¹⁷

But reducing the extraterritorial effect of laws like S.B. 8 may not require conditioning the respect due to state judgments on satisfying federal justiciability standards. Abortion-permissive states can formally respect S.B. 8 judgments and undo their extraterritorial application by creating a cause of action to recover the amount of a judgment paid where the basis for liability was an abortion performed within the abortion-permissive state’s borders and legal under its laws.¹⁸

A few states have only just begun experimenting with these so-called clawback statutes.¹⁹ By turning S.B. 8 defendants into clawback-statute plaintiffs, these states are moving towards managing spillovers on their own. Clawback statutes could serve as an important building block in a legal framework that seeks to mimic a constitutional right to travel through private law. This Note explores the current legal landscape in which these clawback

15. *Ross*, 598 U.S. at 1174 (Kavanaugh, J., concurring in part and dissenting in part).

16. Lea Brilmayer, *Abortion, Full Faith and Credit, and the “Judicial Power” Under Article III: Does Article IV of the U.S. Constitution Require Sister-State Enforcement of Anti-Abortion Damages Awards?* 5, 9 (Jan. 10, 2023) (unpublished manuscript), <https://ssrn.com/abstract=4352225> [<https://perma.cc/L8UG-W9PC>].

17. *Id.* at 5.

18. *See infra* subpart III(A).

19. *See infra* subpart III(B).

statutes have arisen and advocates for their broader adoption. Part I reports on the interstate vigilantism battlefield spurred by the enactment of S.B. 8. Part II lays the groundwork for how constitutional horizontal federalism developed into a state of doctrinal disarray. And, finally, Part III makes the case for why clawback statutes inch us closer to an interstate stalemate.

I. S.B. 8 and Its Progeny

In *Dobbs v. Jackson Women’s Health Organization*,²⁰ the Supreme Court restored to the American people their “power to address a question of profound moral and social importance.”²¹ With that, the fight over the constitutional right to an abortion ended. But the interjurisdictional fight over state abortion rights and prohibitions has only just begun.²² With *Roe v. Wade*²³ gone, about half the states will allow some abortions, while the other half may impose near-total bans.²⁴ This is where the spillover effects of state laws become tsunamis, best epitomized by the development of vigilante-enforced abortion bans and the progressive responses they have spurred.

A. S.B. 8’s Machinations

S.B. 8 creates civil liability for anyone who performs or induces, or aids and abets, an abortion after “cardiac activity” becomes detectable.²⁵ Yet what is remarkable about S.B. 8 is not its substance, but its procedure. The drafters of S.B. 8 understood well the importance of knowing the rules²⁶ and fashioned S.B. 8 to contain several procedural features that amplify its punitive effect.²⁷

20. 142 S. Ct. 2228 (2022).

21. *Id.* at 2265, 2284.

22. See generally David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023) (giving a comprehensive account of the post-*Roe* landscape).

23. 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. at 2284.

24. Elizabeth Nash & Isabel Guarnieri, *Six Months Post-Roe, 24 US States Have Banned Abortion or Are Likely to Do So: A Roundup*, GUTTMACHER INST. (Jan. 10, 2023), <https://www.guttmacher.org/2023/01/six-months-post-roe-24-us-states-have-banned-abortion-or-are-likely-do-so-roundup> [<https://perma.cc/KK3N-SE9M>].

25. S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021) (codified as amended at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201(1), 171.208(a) (West 2021)).

26. In the famous words of Former Representative John Dingell (D-Mich.), “If I let you write the substance and you let me write the procedure, I’ll screw you every time.” David Nather, *The ‘Babe Ruth’ of Legislators*, POLITICO (Feb. 24, 2014, 5:59 PM), <https://www.politico.com/story/2014/02/john-dingell-retires-103881.html> [<https://perma.cc/PDY6-V36Z>].

27. However, S.B. 8 is not nearly as punitive as the criminal law that it operates in conjunction with. See TEX. HEALTH & SAFETY CODE ANN. § 170A.004 (West 2022) (performing an abortion in violation of Section 170A is a felony in the first degree).

First, S.B. 8 allows *any private person* to sue under it.²⁸ This feature creates the specter of potentially unbounded litigation because, while “an injury in law is not an injury in fact” for Article III standing,²⁹ state courts are not beholden to this federal doctrine.³⁰ Second, the statute grants a plaintiff an award of statutory damages “not less than \$10,000 for each abortion.”³¹ Third, because S.B. 8 bars preclusion defenses, a victorious defense will not bar future suits challenging the same conduct.³² Fourth, while a plaintiff may recover costs and attorneys’ fees,³³ a court cannot order the same for a defendant under the Texas Rules of Civil Procedure.³⁴ Fifth, S.B. 8 contains a broad venue provision, which allows suit in *any* of Texas’s 254 counties.³⁵ This invites judge-shopping since some counties in Texas are served by single district courts, and each district court has a single partisan-elected judge.³⁶ At the very least, it allows claimants to choose an exceedingly inconvenient venue for the defendant.³⁷ Finally, and most infamously, S.B. 8 attempts to wall itself off from constitutional challenges by barring public enforcement³⁸—even though, at the time of enactment, it conspicuously violated the then-constitutional right to an abortion.³⁹ This feature of S.B. 8 seemingly bypasses the standard procedural mechanism for pre-enforcement review under *Ex parte Young*.⁴⁰

These procedural fortifications matter all the more in light of the Supreme Court’s tepid response to this novel law. In *Whole Woman’s Health I*,⁴¹ abortion providers sought protection in federal district court

28. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West 2021).

29. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021).

30. Zachary D. Clopton, *Justiciability, Federalism, and the Administrative State*, 103 CORNELL L. REV. 1431, 1443 (2018).

31. TEX. HEALTH & SAFETY CODE ANN. § 171.208(b)(2) (West 2021).

32. *Id.* § 171.208(e)(5).

33. *Id.* § 171.208(b)(3).

34. *Id.* § 171.208(c), (i).

35. *See id.* § 171.210 (rendering potential S.B. 8 defendants vulnerable to suit in any county in Texas because a claimant from any county in the state may sue the defendant in the claimant’s county of residence).

36. Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187, 1210 (2023).

37. *Id.*

38. TEX. HEALTH & SAFETY CODE ANN. § 171.207(a) (West 2021).

39. *Whole Woman’s Health v. Jackson* (*Whole Woman’s Health I*), 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting) (admonishing Texas for “insulat[ing] its law from judicial review by deputizing private parties to carry out unconstitutional restrictions on the State’s behalf”).

40. 209 U.S. 123, 159 (1908) (holding that federal courts may enjoin state officers acting in their official capacity from enforcing an unconstitutional law without running afoul of sovereign immunity).

41. *Whole Woman’s Health v. Jackson* (*Whole Woman’s Health I*), 141 S. Ct. 2494 (2021).

before S.B. 8 took effect.⁴² After the Fifth Circuit stayed the district court proceedings, the Supreme Court denied the plaintiffs' application to vacate the stay in a one-paragraph opinion that cryptically referenced the "complex and novel antecedent procedural questions" to justify letting the law play out.⁴³ The Court did so against the forceful objections of four dissenters.⁴⁴ After a chorus of critics joined the dissenters,⁴⁵ the Court changed course and granted certiorari before judgment to a different group of S.B. 8 challengers in *Whole Woman's Health II*.⁴⁶ On round two, the Court held that sovereign immunity did not bar suit against the members of the state licensing board.⁴⁷ But this modest hole in S.B. 8's armor did not ultimately make meaningful inroads toward ensuring federal review. On remand, the Fifth Circuit asked the Texas Supreme Court whether Texas law authorized the state licensing board to enforce S.B. 8,⁴⁸ and the Texas Supreme Court replied that it did not.⁴⁹ So, yet again, the providers were without recourse to pre-enforcement review in federal courts.

Meanwhile, the Justice Department—not precluded by state sovereign immunity—separately challenged S.B. 8 and initially won a preliminary injunction to bar Texas courts from hearing S.B. 8 claims,⁵⁰ but the Fifth Circuit immediately stayed this injunction.⁵¹ After initially granting certiorari, the Supreme Court dismissed the writ as improvidently granted the same day it decided *Whole Woman's Health II*.⁵²

42. Complaint for Declaratory and Injunctive Relief at 2, *Whole Woman's Health v. Jackson*, 556 F. Supp. 3d 595 (W.D. Tex. 2021) (No. 1:21-CV-00616-RP).

43. *Whole Woman's Health I*, 141 S. Ct. at 2495.

44. *Id.* at 2496 (Roberts, C.J., dissenting); *id.* at 2496–97 (Breyer, J., dissenting); *id.* at 2498 (Sotomayor, J., dissenting); *id.* at 2500 (Kagan, J., dissenting).

45. See, e.g., Charlie Savage, *Texas Abortion Case Highlights Concern over Supreme Court's 'Shadow Docket'*, N.Y. TIMES (Sept. 4, 2021), <https://www.nytimes.com/2021/09/02/us/politics/supreme-court-shadow-docket-texas-abortion.html> [<https://perma.cc/K8YV-9R6D>] (criticizing the Court's "backdoor way of making major policy decisions"). See generally STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (2023) (criticizing the Court's use of unexplained and unsigned opinions to decide issues that affect millions of Americans).

46. *Whole Woman's Health v. Jackson (Whole Women's Health II)*, 142 S. Ct. 522, 529–30 (2021).

47. *Id.* at 535–36.

48. *Whole Woman's Health v. Jackson*, 23 F.4th 380, 388–89 (5th Cir. 2022).

49. *Whole Woman's Health v. Jackson*, 642 S.W.3d 569, 583 (Tex. 2022).

50. Order, *United States v. Texas*, 566 F.Supp. 3d 605, 620, 691 (W.D. Tex. 2021) (No. 1:21-CV-796-RP).

51. *United States v. Texas*, No. 21-50949, 2021 WL 4786458, at *1 (5th Cir. Oct. 14, 2021) (per curiam).

52. *United States v. Texas*, 142 S. Ct. 522, 522 (2021) (mem.) (per curiam).

It is possible, and perhaps likely, that S.B. 8's machinations will prove untenable as a means of evading pre-enforcement review.⁵³ When pressed again, the Supreme Court might respond more vigorously to states siphoning away its power to interpret constitutional rights, and the Court may soon have that chance.⁵⁴ But developing robust extraterritorial limitations on states' regulatory power calls for the Court to engage in some heavy-duty constitutional lawmaking.⁵⁵ The pre-*Dobbs* S.B. 8 litigation may reveal the Court's lack of appetite for creating structural protections that substitute for this once-constitutional liberty.

B. *Interstate Vigilantism*

When S.B. 8 took effect on September 1, 2021, it immediately banned almost all abortions in Texas nearly ten months before the Court decided *Dobbs*.⁵⁶ The day before, clinics in Texas became overwhelmed with demand as patients sought abortions—at least 85% of which became unlawful the following day.⁵⁷ And as the chilling effect took hold across Texas, clinics in neighboring states became overwhelmed with demand as patients began flowing out of the second-most-populous state.⁵⁸ Clinics in neighboring states were not alone; abortion providers across the country began seeing an

53. By dismissing the writ of certiorari as improvidently granted in *United States v. Texas*, the Court left open the possibility for pre-enforcement review via challenges to privately enforced state laws brought by the federal government. This approach to challenging state laws that potentially violate individual constitutional rights is admittedly unprecedented. Amy Howe, *Court Seems Inclined to Let Abortion Providers Pursue Their Challenge to Texas Law*, SCOTUSBLOG (Nov. 1, 2021, 5:45 PM), <https://www.scotusblog.com/2021/11/court-seems-inclined-to-let-abortion-providers-pursue-their-challenge-to-texas-law/> [<https://perma.cc/3T2R-UFMB>]. But despite other potential arguments against such suits, state sovereign immunity (and the concomitant limitations of *Ex parte Young*) do not constrain this possibility. See *Alden v. Maine*, 527 U.S. 706, 755 (1999) (“In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government.”).

54. See CAL. BUS. & PROF. CODE §§ 22949.60–71 (West 2023) (creating a ban enforceable only through private civil action against importing, distributing, manufacturing, or selling illegal firearms in California).

55. See *infra* Part II.

56. Adam Liptak, J. David Goodman & Sabrina Tavernise, *Supreme Court, Breaking Silence, Won't Block Texas Abortion Law*, N.Y. TIMES (Nov. 1, 2021), <https://www.nytimes.com/2021/09/01/us/supreme-court-texas-abortion.html> [<https://perma.cc/W85W-CK9P>].

57. Neelam Bohra, *Texas Law Banning Abortion as Early as Six Weeks Goes into Effect as the U.S. Supreme Court Takes No Action*, TEX. TRIBUNE (Sept. 1, 2021), <https://www.texastribune.org/2021/08/31/texas-abortion-law-supreme-court/> [<https://perma.cc/ANR4-PPZ2>].

58. See Sarah McCammon & Lauren Hodges, *Doctors' Worst Fears About the Texas Abortion Law Are Coming True*, NPR (Mar. 1, 2022, 7:37 AM), <https://www.npr.org/2022/02/28/1083536401/texas-abortion-law-6-months> [<https://perma.cc/B7HL-J4TW>] (describing neighboring states' struggle to keep up with the Texan demand for abortions).

influx of Texan travelers.⁵⁹ As wait times began rising in states that lack the capacity to absorb this demand, an apparent reality began to set in—Texas could disrupt access to reproductive healthcare across the nation merely by constricting its own supply.⁶⁰

Other states—both red and blue—have begun experimenting with copycat laws. Before discussing the S.B. 8 copycats, it is worth noting a limitation that perhaps tempers the degree of S.B. 8’s extraterritorial effect. An abortion is only unlawful under S.B. 8 when performed by a Texas-licensed provider.⁶¹ But this does not mean S.B. 8 cannot apply extraterritorially as physicians may be licensed in multiple states,⁶² and nothing under S.B. 8 prevents liability for an out-of-state person or entity that finances (or otherwise aids) an abortion performed by a Texas-licensed physician.⁶³ Moreover, the Texas legislature may eliminate this limitation. After Sidley Austin pledged to cover employees’ travel expenses when in-state reproductive healthcare services are otherwise unavailable,⁶⁴ members of the Texas Freedom Caucus sent the law firm a cease-and-desist letter clarifying their position on the proper reach of Texas law.⁶⁵ They announced their intention to introduce legislation in the next session that would “allow private citizens to sue anyone who pays for an elective abortion performed on a Texas resident . . . regardless of where the abortion occurs, and regardless of the law in the jurisdiction where the abortion occurs.”⁶⁶

In any case, part of S.B. 8’s notoriety comes from what it portends, as evidenced by its copycats. For example, in May of 2022, Oklahoma’s

59. Mary Tuma, *Texas’ Abortion Ban Is Having a ‘Domino Effect’ on Clinics Across the U.S.*, TEX. OBSERVER (Nov. 18, 2021, 5:07 PM), <https://www.texasobserver.org/texas-abortion-ban-is-having-a-domino-effect-on-clinics-across-the-u-s/> [<https://perma.cc/KA83-VGYQ>] (“Texas patients are traveling hundreds and even thousands of miles from their homes to receive abortion procedures in places including Illinois, Washington, Ohio, California, Indiana, Tennessee, and Maryland.”).

60. *Id.*

61. See TEX. HEALTH & SAFETY CODE ANN. § 171.201(4) (West 2021) (defining a “physician” as “an individual licensed to practice medicine in this state”).

62. *Interstate Medical Licensure Compact*, TEX. MED. BD., <https://www.tmb.state.tx.us/page/interstate-medical-licensure-compact> [<https://perma.cc/JYF8-TEEU>] (announcing that, in 2021, Texas joined the Interstate Medical Licensure Compact, which provides a “voluntary, expedited pathway” for qualifying physicians to get licensed to practice in multiple states).

63. Cohen et al., *supra* note 22, at 48–49.

64. Justin Wise, *Sidley Targeted as Republicans Warn Firms on Abortion Pledges*, BLOOMBERG LAW (July 8, 2022, 3:08 PM), https://www.bloomberglaw.com/bloomberglawnews/business-and-practice/X4ON39T4000000?bna_news_filter=business-and-practice#jcite [<https://perma.cc/V9T6-6AJG>].

65. Letter from Mayes Middleton, Representative, Tex. H.R., to Yvette Ostolaza, Chair of the Mgmt. Comm., Sidley Austin LLP 1 (July 7, 2022), <https://www.freedomfortexas.com/uploads/blog/3b118c262155759454e423f6600e2196709787a8.pdf> [<https://perma.cc/92GP-HGSJ>].

66. *Id.* at 1–2.

governor signed an abortion ban enforced by a private civil action⁶⁷ that mimics many features of S.B. 8, including a \$10,000 statutory damages award,⁶⁸ a prohibition on public enforcement,⁶⁹ and a capacious venue provision.⁷⁰ But the Oklahoma law goes further by creating liability at any stage of pregnancy⁷¹ and encompassing conduct with no specific Oklahoma connection.⁷² Similarly, Idaho enacted a copycat ban that mimics many of S.B. 8's features while adding its own, such as limiting the cause of action to family members but increasing the statutory damages award to \$20,000.⁷³ Like Oklahoma's law, Idaho's law is not limited to in-state abortions or abortions performed by Idaho-licensed physicians.⁷⁴ And still more vigilante-enforced abortion bans are on the horizon—seven states have introduced, but have not yet enacted, S.B. 8 copycats, while legislatures from seven other states have publicly avowed to pursue similar legislation.⁷⁵

Some blue states have proposed structurally similar laws that are facially aimed at gun control and domestic violence but appear to serve primarily as retaliation in the national political rivalry between the left and

67. Oriana González, *Oklahoma Gov. Signs into Law Near-Total Abortion Ban Starting at Fertilization*, AXIOS (May 25, 2022), <https://www.axios.com/2022/04/28/oklahoma-abortion-ban-texas-law-stitt-pass> [https://perma.cc/29C8-JQTU]. The Oklahoma Supreme Court recently struck down this abortion ban for violating the right to terminate a pregnancy under life-threatening situations under the due process clause of the Oklahoma state constitution. *Oklahoma Call for Reprod. Just. v. State*, 531 P.3d 117, 122 (Okla. 2023) (citing to *Oklahoma Call for Reprod. Just. v. Drummond*, 526 P.3d 1123, 1130 (Okla. 2023), discussing Oklahoma due process rights in a woman's right to obtain an abortion). But the court passed only on the substance, not the procedure, of the abortion ban, and, following this decision, "Oklahoma's Republican lawmakers, who hold a supermajority in both chambers of the state legislature as well as the governor and attorney general's office, vowed to push for more abortion restrictions in the future." Kim Bellware, 2 *Oklahoma Abortion Bans Unconstitutional, State High Court Rules*, WASH. POST (May 31, 2023, 6:10 PM), <https://www.washingtonpost.com/politics/2023/05/31/oklahoma-supreme-court-abortion-bans-unconstitutional/> [https://perma.cc/4SWA-QBTS].

68. OKLA. STAT. ANN. tit. 63, § 1-745.55.B.2 (West 2022), *declared unconstitutional by Oklahoma Call for Reprod. Just. v. State*, 531 P.3d 117 (Okla. 2023).

69. *Id.* § 1-745.54.

70. *Id.* § 1-745.57.A.

71. *See id.* §§ 1-745.51–52, .55.A (defining abortion without reference to the stage of pregnancy); *see also* González, *supra* note 67 (noting that the ban begins at fertilization).

72. OKLA. STAT. ANN. tit. 63, §§ 1-745.51–52, .55.A (West 2022) (defining the cause of action without reference to any Oklahoma connection).

73. IDAHO CODE ANN. § 18-8807 (West 2023).

74. *See id.* §§ 18-8801–07 (lacking in these limitations).

75. *Memo: Fifteen States and Counting Poised to Copy Texas' Abortion Ban*, NARAL PRO-CHOICE AMERICA, <https://www.prochoiceamerica.org/report/memo-fifteen-states-and-counting-poised-to-copy-texas-abortion-ban/> [https://perma.cc/MEC5-MHCC]. In March of 2022, the Missouri legislature introduced a bill that explicitly created civil liability for extraterritorial abortions performed on Missourian residents, including liability for those who help a Missourian patient leave the state. Cohen et al., *supra* note 22, at 24. Though the legislation failed to pass in the weeks leading up to the *Dobbs* decision, enthusiasm for such a law has not dwindled. *Id.*

the right.⁷⁶ Despite some obvious attempts to provoke controversy,⁷⁷ the only currently enacted progressive law modeled after S.B. 8 explicitly precludes regulation of extraterritorial conduct.⁷⁸

Yet Texas has also inspired a different response from its more progressive sister states. The term “shield law” is a catch-all for various methods of thwarting the extraterritorial application of anti-abortion laws.⁷⁹ For example, while most states have enacted some form of the Uniform Interstate Depositions and Discovery Act, which streamlines discovery across court systems,⁸⁰ a state could exempt abortion providers from such interstate discovery laws when the alleged conduct is otherwise lawful in the provider’s home state.⁸¹ By derailing interstate discovery, abortion-permissive states could help insulate their providers from liability.⁸²

But a bolder subversion of sister-state law comes in the form of clawback statutes, which create a private cause of action against anyone who interferes with lawful reproductive healthcare in the enacting state.⁸³ These statutes turn an S.B. 8 defendant into a clawback-statute plaintiff. Here is how it works: a state defines some types of protected in-state conduct (such as abortions within the state) and then allows recovery of the amount of an out-of-state judgment rendered in conflict with this protection—including attorneys’ fees.⁸⁴ This indemnity is meant to create a fear of liability that disincentivizes the private enforcement of antiabortion laws.⁸⁵ Damages for damages, chilling effect for chilling effect—the purpose of the clawback statute is to cancel the extraterritorial effect. So far, only a few states have enacted clawback statutes, including Connecticut, Delaware, and New

76. Hannah Wiley, *Newsom Signs Gun Law Modeled After Texas Abortion Ban, Setting Up Supreme Court Fight*, L.A. TIMES (July 22, 2022, 11:23 AM), <https://www.latimes.com/california/story/2022-07-22/newsom-signs-gun-bill-modeled-after-texas-abortion-ban-setting-up> [<https://perma.cc/K2CT-MZKD>] (quoting Gavin Newsom, as he signed S.B. 1327 into law, as saying, “If they are going to use this framework to put women’s lives at risk, we are going to use it to save people’s lives here in the state of California”).

77. The Illinois legislature proposed a bill titled The Expanding Abortion Services Act (TEXAS Act), which would give Illinoisans, among other things, the right to seek \$10,000 in damages “for each act of sexual assault or domestic abuse or act that causes an unintended pregnancy.” H.B. 4146, 102d Gen. Assemb., 1st Reg. Sess. (Ill. 2021).

78. CAL. BUS. & PROF. CODE §§ 22949.60–71 (West 2023) (creating liability for conduct in California).

79. Cohen et al., *supra* note 22, at 42–43.

80. *Id.* at 45–46; UNIF. INTERSTATE DEPOSITIONS & DISCOVERY ACT § 3 (UNIF. L. COMM’N 2007).

81. Cohen et al., *supra* note 22, at 46.

82. *Id.* at 45–46.

83. *Id.* at 49.

84. *Id.*

85. *Id.*

York.⁸⁶ By creating tit-for-tat liability, the practical effect is to unwind the out-of-state judgment.⁸⁷

Like S.B. 8 itself,⁸⁸ clawback statutes are not wholly novel. Interstate clawback statutes draw their inspiration from the United Kingdom's Protection of Trading Interests Act, which allows British companies to recover any non-compensatory damages paid when the conduct that gave rise to liability occurred outside the territory of the foreign country imposing the judgment.⁸⁹ The United Kingdom passed this law to deter the private enforcement of American antitrust law against British companies.⁹⁰ When introducing the bill, the United Kingdom's Secretary of State for Trade, John Nott, remarked that the law's purpose was "to reassert and reinforce the defences [sic] of the United Kingdom against attempts by other countries to enforce their economic and commercial policies unilaterally."⁹¹ Nott emphasized that this law was not an act of aggression, but rather a self-managed way of setting boundaries in its relationship with a "valued friend."⁹²

International and interstate relations are not perfectly analogous, largely because the Constitution affirmatively requires states to respect each other's laws.⁹³ Yet, while clawback statutes perhaps do some damage to the substance of the Full Faith and Credit Clause, they are a hands-off and self-regulating approach to managing extraterritoriality.⁹⁴ But before exploring the doctrinal advantages and difficulties of clawback statutes, a detour is necessary to understand why they are important. If the extraterritorial effects of laws like S.B. 8 were unlawful in the first place, there would be no need for clawback statutes. Yet, such unlawfulness is *far* from self-evident.

86. CONN. GEN. STAT. ANN. § 52-571m(b) (West 2023); DEL. CODE ANN. tit. 10, § 3929(b) (West 2022); N.Y. CIV. RIGHTS LAW § 70-b.1 (McKinney 2022).

87. Cohen et al., *supra* note 22, at 49.

88. In 1999, Louisiana passed Act 825, which exposed doctors who performed abortions to unlimited tort liability for any injuries caused to the mother or the fetus. *Okpalobi v. Foster*, 244 F.3d 405, 409 (5th Cir. 2001) (en banc). The Fifth Circuit held that the statute escaped pre-enforcement review in federal court as state officials had "no ability to enforce Act 825, a purely private tort statute, which can be invoked only by private litigants." *Id.* at 422. The officers were therefore protected by the Eleventh Amendment. *Id.* at 424.

89. Michaels & Noll, *supra* note 36, at 1250–51.

90. Stephen A. Tisoris, *Section 6 of Great Britain's Protection of Trading Interests Act: The Claw and the Lever*, 14 CORNELL INT'L L.J. 457, 457–58 (1981).

91. See HC Deb. (15 Nov. 1979) (973) col. 1533 (explaining his goals for the Bill while moving that it be read for the second time).

92. *Id.*

93. U.S. CONST. art. IV, § 1.

94. See *infra* subpart III(B).

II. The Rube Goldberg Machine of Horizontal Federalism

Strict constitutional limits on extraterritoriality could eliminate interstate vigilantism. But there are good reasons to stay skeptical about whether constitutional doctrine can cut this Gordian Knot. The Supreme Court's horizontal federalism doctrines are not only underdeveloped but contradicting, providing space for strong arguments both for⁹⁵ and against⁹⁶ extraterritorial regulation. Moreover, several dichotomies cause the concept of horizontal federalism to refract along multiple intersecting vectors—including the distinction between legislative and adjudicative jurisdiction, the intertwined nature of federalism and liberty interests, and the conflation of states' civil and criminal authority.

Before unpacking these dichotomies, a few basic structural principles require description. The Constitution allocates sovereign power along two dimensions: a vertical plane establishes the boundaries of federal supremacy, and a horizontal plane establishes principles of coordination between the fifty coequal states.⁹⁷ This horizontal dimension has its own distinct sides. There are at least two types of interstate conflicts, and the first is relatively uncontroversial. Disputes (often falling within the Supreme Court's original jurisdiction⁹⁸) that directly implicate states' rights (rather than those of their citizens)—such as border disputes⁹⁹ and water rights¹⁰⁰—are matters of federal common law when Congress has not prescribed a rule of decision.¹⁰¹ Of course, at least five of the nine heads of Article III jurisdiction relate to

95. See generally Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855 (2002) (arguing that the Constitution does not allow state citizens to skirt home-state law by simply traveling to other jurisdictions).

96. See generally Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992) (arguing that extraterritorial regulation violations commitments are embedded in both the original constitutional structure and the Fourteenth Amendment); Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873 (1993) (arguing that the structure of our federal system compels territorial limits on the reach of state law).

97. Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 494 (2008).

98. See U.S. CONST. art. III, § 2, cl. 2 (granting the Supreme Court original jurisdiction over controversies “in which a State shall be Party”); 28 U.S.C. § 1251 (“The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.”).

99. See, e.g., *Louisiana v. Mississippi*, 516 U.S. 22, 27 (1995) (resolving a border dispute between Louisiana and Mississippi); *Cissna v. Tennessee*, 246 U.S. 289, 291, 296 (1918) (discussing “the law of interstate boundaries”).

100. See, e.g., *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 98 (1938) (resolving conflicting claims to divert water from an interstate stream); *Illinois v. Milwaukee*, 406 U.S. 91, 102–03 (1972) (“When we deal with air and water in their ambient or interstate aspects, there is a federal common law.”).

101. Erbsen, *supra* note 97, 555–56 (“Federal common law applies in precisely these scenarios, such as border disputes (dominion cases) [and] actions involving interstate pollution or the downstream effects of up-stream water uses (externality cases).”).

interstate suits.¹⁰² But unlike diversity cases, state law cannot sensibly resolve a border or water dispute—the constitutional grant of jurisdiction over these cases calls for a uniform body of federal law.¹⁰³

But these are not the types of interstate disputes that S.B. 8 and its progeny pose. The second side of horizontal federalism, at issue here, involves diffuse concerns about the regulatory spillover effects of state law. Federal common law cannot assuage these concerns because these cases arise as run-of-the-mill diversity suits that do not generally implicate an exception to *Erie*.¹⁰⁴

The concern over this type of interstate friction is not trivial. It is axiomatic that the Constitution promotes and protects rich political heterogeneity among the states, and extraterritorial regulation contradicts this structural principle.¹⁰⁵ But nevertheless, extraterritorial regulation abounds—such as when out-of-state car manufacturers must choose between exiting the California market or complying with California climate-change regulations or when school boards nationwide must choose between higher prices or textbooks tailored to Texas’s socially conservative curriculum preferences.¹⁰⁶ The extraterritorial consequences of vigilante-enforced regimes are of a different nature since the enacting state goes beyond using its market influence to indirectly drive national policy and instead overtly regulates conduct in sister states. But the line between normal extraterritoriality and rabid extraterritoriality is exceedingly blurry under current constitutional doctrine.

The few scholars who have endeavored to create trans-substantive accounts of horizontal federalism readily admit that “there is no bright-line rule capable of fully confining the effects of a state’s regulation within its

102. U.S. CONST. art. III, § 2 (including the State Controversies Clause, the Diversity Clause, the Land Grants Clause, the Admiralty Clause, and the Out-of-State Citizen Clause).

103. See Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1031 (1967) (federal common law applies when a state is a party because “state competence is excluded by necessary implication from the constitutional grant of jurisdiction”); *Hinderlider*, 304 U.S. at 110 (“For whether the water of an interstate stream must be apportioned between the two States is a question of ‘federal common law’ upon which neither the statutes nor the decisions of either State can be conclusive.”).

104. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79–80 (1938). Moreover, federal courts sitting in diversity must apply the forum state’s choice-of-law rules (as distinct from the general choice-of-law rules that applied pre-*Erie*). *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941). This assumes, of course, that the forum state’s choice of law is constitutional—and it almost surely is. See *infra* notes 145–146 and accompanying text.

105. Gerken & Holtzblatt, *supra* note 1, at 66 (recognizing the “disquieting” nature of “one state’s citizenry regulating another’s” given that spillovers “don’t just generate conflict but unsettle deeply held normative commitments to sovereignty, territoriality, and self-rule”).

106. *Id.* at 79.

borders.”¹⁰⁷ This proposition may be true for many reasons—some are inherent to the nature of the problem,¹⁰⁸ and others are a matter of doctrinal development.¹⁰⁹ One seemingly straightforward way to shut down the extraterritorial application of *criminal* law would be to incorporate the Sixth Amendment’s Vicinage Clause, which requires that all criminal prosecutions be tried “by an impartial jury of the State and district *wherein the crime shall have been committed*.”¹¹⁰ The Supreme Court has never ruled on whether this clause applies to criminal prosecutions in state courts.¹¹¹ This matters because, as S.B. 8 reveals, it would be exceedingly odd if the Constitution prevented a state from applying its criminal law extraterritorially but allowed a state to dodge this limitation by deputizing its citizens to bring highly punitive civil suits. In other words, it’s not obvious why criminal law and civil law should be bound by different jurisdictional limits. As it stands, many states have already adopted vicinage clauses in their own constitutions.¹¹² But, importantly, some states nullify these vicinage clauses by employing the so-called effects doctrine, which allows a state to prosecute someone for out-of-state conduct when such conduct creates harmful in-state effects.¹¹³ If there is any throughline in the Rube Goldberg machine of horizontal federalism, it is that all roads lead back to states’ interests.

A. *Dismantling the Territoriality Principle*

At the founding, courts understood their jurisdiction as limited to the territory of the sovereign, and Professor Kreimer’s originalist account of the right to travel argues that the founders baked such territorial limitations into

107. Erbsen, *supra* note 97, at 502; *see also* Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1472 (2007) (noting that different features of the Constitution “stand in some tension with one another and create confusion about the nature of our horizontal federalism system”).

108. Erbsen, *supra* note 97, at 502 (arguing that because the Constitution allocates power to the states as a group and requires them to share it amongst themselves, interstate friction arises as an inherent structural consequence).

109. Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1060–61 (2009) (noting that “[b]ecause the Court’s pronouncements in these areas have been so murky and contradictory, no clear answer exists to these questions” about extraterritoriality).

110. U.S. CONST. amend. VI (emphasis added).

111. Anthony Sanders, *State Con Law Case of the Week: Vicinage Deference*, INST. FOR JUST. (May 28, 2021), <https://ij.org/cje-post/state-con-law-case-of-the-week-vicinage-deference/> [<https://perma.cc/5EAJ-ETXH>].

112. Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 1018 (2002).

113. *See, e.g.*, *People v. Betts*, 103 P.3d 883, 887 (Cal. 2005) (holding that the state has jurisdiction over criminal acts that take place outside of the state when the conduct affects persons in the state or a state interest, so long as the law is not unclear on whether the defendant is subject to the law); *see also* *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (articulating the effects doctrine).

the Constitution.¹¹⁴ States often respected this principle as axiomatic, even in the context of profoundly divisive issues such as slavery.¹¹⁵ After the Civil War, the Supreme Court imported this principle of territoriality into the brand-new Due Process Clause of the Fourteenth Amendment in *Pennoyer v. Neff*,¹¹⁶ holding that a state's jurisdiction reaches only the people and property within its borders because "the laws of one State have no operation outside of its territory, except so far as it is allowed by comity."¹¹⁷ In Due Process, the territoriality principle stayed—at least for a few decades.

But soon came the effects doctrine to disrupt this principle as it applied to states' criminal authority. In *Strassheim v. Daily*,¹¹⁸ the Court held that conduct occurring "outside a jurisdiction, but intended to produce and producing detrimental effects within it, justif[ies] a State in punishing the cause of the harm as if [the defendant] had been present."¹¹⁹ Thirty years later, the Court held in *Skiriotes v. Florida*¹²⁰ that residency alone was a sufficient hook for Florida to punish conduct that occurred outside Florida's territorial waters.¹²¹

Around this time, the Court began "half-consciously" developing the concept of legislative jurisdiction in the civil context.¹²² Legislative jurisdiction refers to lawmakers' power to dictate the substantive rule that applies in a case,¹²³ whereas adjudicative jurisdiction refers to the authority of a court to entertain a suit.¹²⁴ At first, the Court developed limits on legislative jurisdiction along two fronts: Due Process and Full Faith and

114. Kreimer, *supra* note 96, at 464–69 & n.58 (arguing that "[t]he Constitution was framed on the premise that each state's sovereignty over activities within its boundaries excluded the sovereignty of other states").

115. Compare *Lemmon v. People*, 20 N.Y. 562, 609 (1860) (holding that Virginia citizens could not keep slaves in New York, and asserting that "[t]he position that a citizen carries with him, into every State into which he may go, the legal institutions of the one in which he was born, cannot be supported"), with *People v. Merrill*, 2 Parker Crim. Rep. 590, 596 (1855) (dismissing a prosecution of New York residents who sold a free black man into slavery in D.C. on the conceit that "[i]t cannot be pretended or assumed that a state has jurisdiction over crimes committed beyond its territorial limits").

116. 95 U.S. 714 (1878), *overruled by* *Shaffer v. Heitner*, 433 U.S. 186, 206, 212 & n.39 (1977).

117. *Id.* at 722.

118. 221 U.S. 280 (1911).

119. *Id.* at 285. In *Strassheim*, the defendant defrauded the state of Michigan, but never "set foot in the State until after the fraud was complete." *Id.* at 284–85.

120. 313 U.S. 69 (1941).

121. *Id.* at 77. In *Skiriotes*, the Court analogized to the United States' authority to "control the conduct of its citizens upon the high seas" to conclude that there was "no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest." *Id.*

122. EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 182–83 (2000).

123. Florey, *supra* note 109, at 1059.

124. Howard M. Wasserman, *Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption*, 160 U. PA. L. REV. PENNUMBRA 289, 302 (2012).

Credit.¹²⁵ In *Home Insurance Co. v. Dick*,¹²⁶ the Court held that the forum state may not apply forum law under Due Process when nothing relating to the dispute “was ever done or required to be done in” the forum state.¹²⁷ Two years later, the Court held in *Bradford Electric Light Co. v. Clapper*¹²⁸ that when both parties are residents of the same state, and that state provides a defense to a cause of action, the forum state *must* recognize the defense under Full Faith and Credit.¹²⁹ The injury in *Clapper* occurred in the forum state, so the Court’s rule effectively *required* home state law to have an extraterritorial effect, though, of course, the defense did not *prohibit* out-of-state conduct.¹³⁰

Justice Brandeis authored both opinions and was, more generally, the leader of the legislative jurisdiction project, recognizing the role that constitutional limits on state law would play in his broader vision of horizontal federalism.¹³¹ But, despite all this constitutional law, many states’ conflicts-of-law doctrines began moving away from the territoriality principle and towards looser approaches based on states’ interests.¹³² A few years later, in *Alaska Packers Association v. Industrial Accident Commission*,¹³³ the Court held that Due Process and Full Faith and Credit resolve a conflict of laws by balancing states’ interests.¹³⁴ But in *Allstate Insurance Company v. Hague*,¹³⁵ the Court ditched *Clapper*’s “more exacting standard” of Full Faith and Credit, along with the *Alaska Packers* balancing test.¹³⁶ Under *Hague*’s plurality rule, a forum state need not have a greater or equal interest relative to any other sister state.¹³⁷ Instead, the new Due

125. PURCELL, *supra* note 122, at 184.

126. 281 U.S. 397 (1930).

127. *Id.* at 407–08, 421.

128. 286 U.S. 145 (1932).

129. *Id.* at 160.

130. *Id.* at 157 & n.7.

131. PURCELL, *supra* note 122, at 184–85; *see also* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

132. Florey, *supra* note 109, at 1068–69 (describing how choice of law moved away from vested rights and toward rules that license states to apply forum law when they can state some plausible interest).

133. 294 U.S. 532 (1935).

134. *See id.* at 547 (holding that a conflict is resolved “by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight”).

135. 449 U.S. 302 (1981).

136. *Id.* at 308 n.10. The Court has since affirmed this conclusion. *See Franchise Tax Bd. of Cal. v. Hyatt (Hyatt I)*, 538 U.S. 488, 495–96 (2003) (noting that while the Court, “in the past, appraised and balanced state interests when invoking the Full Faith and Credit Clause to resolve conflicts between overlapping laws of coordinate States” under *Clapper* and *Alaska Packers*, this “balancing approach quickly proved unsatisfactory,” and the Court “abandoned” it in *Hague*).

137. *Id.* at 313.

Process test for legislative jurisdiction now only required the forum to have a “significant aggregation of contacts, creating state interests, such that the choice of its [own] law is neither arbitrary nor fundamentally unfair.”¹³⁸ Notably, this rule blurred the line between adjudicative and legislative jurisdiction by collapsing the doctrines of personal jurisdiction and choice-of-law into very similar contacts-based tests.¹³⁹

In *World-Wide Volkswagen Corporation v. Woodson*,¹⁴⁰ decided the year before *Hague*, the Court characterized personal jurisdiction (a form of *adjudicative* jurisdiction) “as an instrument of interstate federalism” derived from “both the original scheme of the Constitution and the Fourteenth Amendment,” which limits the sovereignty of sister states in relation to each other.¹⁴¹ The Court explained that the minimum contacts test both “protects the defendant against the burdens of litigating in a distant or inconvenient forum” and “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.”¹⁴² Perhaps the Court meant to use adjudicative jurisdiction as a proxy for reigning in legislative jurisdiction, thereby obfuscating the messiness of the state-interest problem.¹⁴³ But in a world with *tag* jurisdiction, where personal jurisdiction “based on physical presence alone constitutes due process,” this doctrine provides little shelter for a right to travel.¹⁴⁴ In other words, personal jurisdiction cannot protect out-of-state conduct when mere physical presence within the state suffices to establish personal jurisdiction.

Four years after *Hague*, the Court reaffirmed the plurality’s loose restraint on legislative jurisdiction in *Phillips Petroleum Company v. Shutts*.¹⁴⁵ When the issue in *Shutts* again came back up to the Court three years later, it emphasized that it had no interest in “constitutionalizing choice-of-law rules” just because “modern scholars” had come to think of the current choice-of-law practices as “unwise.”¹⁴⁶ Thus, a “free-form evaluation” of states’ interests came to replace the principle of territoriality present at the republic’s birth.¹⁴⁷

138. *Id.*

139. Florey, *supra* note 109, at 1077.

140. 444 U.S. 286 (1980).

141. *Id.* at 293–94.

142. *Id.* at 291–92.

143. *See id.* at 294 (explaining that “even if the forum State has a strong interest in applying its law to the controversy,” Due Process may “divest the State of its power to render a valid judgment” when the defendant’s contacts do not establish personal jurisdiction).

144. *Burnham v. Superior Ct. of Cal.*, 495 U.S. 604, 619 (1990).

145. 472 U.S. 797, 818–19 (1985).

146. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727–29 (1988).

147. *Kreimer, supra* 96, at 476.

B. Reconstructing the Territoriality Principle

Just as the Court rid the Constitution of territorial limits, it began obliquely summoning this principle back again. An early example came in 1975, in *Bigelow v. Virginia*,¹⁴⁸ a First Amendment case in which the Court overturned the conviction of a Virginian newspaper editor who advertised New York abortion services.¹⁴⁹ The Court held that Virginia had infringed on constitutionally protected speech because its asserted interest “in regulating what Virginians may *hear* or *read* about the New York services” amounted to “an interest in shielding its citizens from information about activities outside Virginia’s borders, activities that Virginia’s police powers do not reach.”¹⁵⁰ But the Court pressed a bit further—past holding and into dicta—remarking that Virginia could not “prevent its residents from traveling to New York to obtain those services or, as the State conceded, prosecute them for going there” given that Virginia “possessed no authority to regulate the services provided in New York.”¹⁵¹ According to the Court, Virginia’s power could not interfere with “the internal affairs of another State” *even when* “the welfare and health of its own citizens may be affected when they travel to that State.”¹⁵²

It’s tempting to think that *Bigelow* holds promise for a right to travel—and it might—but the Court decided *Bigelow* two years after *Roe v. Wade*, and what was necessary to its holding concerned speech and only speech. In the 1986 case *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*,¹⁵³ the Court expressly limited *Bigelow* on the basis that “the underlying conduct that was the subject of the advertising restrictions [in *Bigelow*] was constitutionally protected and could not have been prohibited by the State.”¹⁵⁴ Thus, Puerto Rico could restrict advertising of casino gambling to its residents because “the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether.”¹⁵⁵ If the constitutionality of the underlying conduct undergirded *Bigelow*’s free-speech holding, it seems reasonable to think that it undergirded *Bigelow*’s right-to-travel dicta as well.

148. 421 U.S. 809 (1975).

149. *Id.* at 811, 829. The advertisement said: “UNWANTED PREGNANCY[?] LET US HELP YOU[.] Abortions are now legal in New York. There are no residency requirements. . . . We will make all arrangements for you and help you with information and counseling.” *Id.* at 812.

150. *Id.* at 827–28.

151. *Id.* at 824 (citation omitted).

152. *Id.*

153. 478 U.S. 328 (1986), *abrogated by* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

154. *Id.* at 345–46.

155. *Id.*

But the story continues. In the 1980s, the Court invoked extraterritoriality to strike down three state laws under the dormant Commerce Clause.¹⁵⁶ Despite sweeping language in these cases,¹⁵⁷ the Court has not used this precedent to strike down a law since.¹⁵⁸ This term, in *National Pork Producers Council v. Ross*,¹⁵⁹ the Court rejected its most recent invitation to do so.¹⁶⁰ Brought by a group of trade associations, *Ross* involved a dormant Commerce Clause challenge to California's Proposition 12, which prohibits the sale of pork from pigs confined in a manner inconsistent with California's health and safety standards.¹⁶¹ Proposition 12 imposes a choice on out-of-state producers: either comply with the law or forego access to California's market.¹⁶² But while the Court held that the plaintiffs failed to state a violation of the dormant Commerce Clause, the decision resulted in an unusual split among the justices that exemplifies the messiness of the extraterritoriality problem.

All nine justices agreed on two basic but fundamental propositions. First, the Court unanimously *rejected* the plaintiffs' *per se* extraterritoriality argument, holding that a law is not unconstitutional merely because it has the "practical effect" of controlling out-of-state commerce.¹⁶³ Rather, as Justice Gorsuch repeatedly insisted, the loadstar of the dormant Commerce Clause is an anti-discrimination principle, which bars states from engaging in economic protectionism.¹⁶⁴ Second, the Court unanimously agreed (in dicta) that "courts must sometimes referee disputes about where one State's authority ends and another's begins—both inside and outside the commercial context."¹⁶⁵

156. *Edgar v. MITE Corp.*, 457 U.S. 624, 641–42 (1982) (Illinois statute); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582–85 (1986) (New York statute); *Healy v. Beer Inst.*, 491 U.S. 324, 336, 343 (1989) (Connecticut statute).

157. *See, e.g.*, *Edgar*, 457 U.S. at 642 (asserting that states may not enact a statute that acts as "a direct restraint on interstate commerce" and has "a sweeping extraterritorial effect"); *Brown-Forman Distillers Corp.*, 476 U.S. at 585 (holding the dormant Commerce Clause "operates with full force whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in . . . another State"); *Healy*, 491 U.S. at 336 (reasoning that a state statute "that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature").

158. *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1172 (10th Cir. 2015). As the then-Judge Gorsuch wryly noted, this extraterritoriality limitation is "the least understood" and "certainly the most dormant" basis for invalidating state laws under the dormant Commerce Clause cases. *Id.*

159. 143 S. Ct. 1142 (2023).

160. *Id.* at 1165.

161. *Id.* at 1150–51.

162. *Id.* at 1149.

163. *Id.* at 1153–56; *id.* at 1167 (Roberts, C.J., concurring in part and dissenting in part).

164. *Id.* at 1154.

165. *Id.* at 1156; *id.* at 1167 (Roberts, C.J., concurring in part and dissenting in part).

But despite so much agreement, *Ross* ultimately resolves so little. Having rejected the *per se* extraterritoriality rule, the Court fractured on whether to apply a softer balancing approach to resolving policy conflicts that affect interstate commerce. Gorsuch's first faction (joined by Justices Thomas and Barrett) thought that federal judges lack the competence to balance non-economic benefits against economic burdens; instead, such apples-to-oranges decision-making is best left to the legislature.¹⁶⁶ But Gorsuch's second faction (joined by Justices Thomas, Sotomayor, and Kagan) thought that—assuming federal judges can balance these benefits and burdens—the plaintiffs did not allege a requisite “substantial burden on interstate commerce.”¹⁶⁷ So, because five justices upheld the law, California won.

However, five justices (Chief Justice Roberts, along with Justices Alito, Kavanaugh, Barrett, and Jackson) thought that the law *does* substantially burden interstate commerce.¹⁶⁸ But, because Barrett also thought that the Court could not balance this substantial economic burden against California's incommensurate moral and public health benefits, California still won.¹⁶⁹ But, as Justice Kavanaugh portended, *Ross* might still come out differently under *other* provisions of the Constitution—an issue that, in his opinion, “warrants further analysis.”¹⁷⁰

Indeed, while the framework of horizontal federalism lacks steadfast rules, it does not want for potentially applicable constitutional provisions. In the 1999 case *Saenz v. Roe*,¹⁷¹ the Court saved the Privileges or Immunities Clause of the Fourteenth Amendment from the oblivion to which the *Slaughter-House Cases*¹⁷² had condemned it. Perceiving a false dichotomy between nothing and everything, the *Slaughter-House* Court interpreted this Clause as guaranteeing next to nothing in the way of new unenumerated liberties.¹⁷³ Despite the scholarly heartache over missed opportunities,¹⁷⁴ in the years between *Slaughter-House* and *Saenz*, this Clause did not much see

166. *Id.* at 1159–61.

167. *Id.* at 1161.

168. *Id.* at 1167 (Barrett, J., concurring in part; Roberts, C.J., concurring in part and dissenting in part).

169. *Id.* (Barrett, J., concurring in part).

170. *Id.* at 1172, 1175 (Kavanaugh, J., concurring in part and dissenting in part).

171. 526 U.S. 489 (1999).

172. 83 U.S. (16 Wall) 36 (1873).

173. *Id.* at 74–76 79–81 (“The amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing.”).

174. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 22–23 (1980) (lamenting that the Privileges or Immunities Clause “was probably the clause from which the framers of the Fourteenth Amendment expected most” but “it has to all intents and purposes been dead for a hundred years” because of the *Slaughter-House Cases*).

the light of day.¹⁷⁵ But in *Saenz*, the Court articulated the “right to travel” as embracing “at least three different components.”¹⁷⁶ The first component is a right of ingress and egress—“the right of a citizen of one State to enter and to leave another State.”¹⁷⁷ The second component is an equality right, which requires states to treat locals and visitors alike.¹⁷⁸ The third component is a second equality right, which bars states from discriminating against newly arrived citizens.¹⁷⁹ To make this framework a bit more confusing, the first component finds a home in the Articles of Confederation’s text but *not* in the text of the Constitution, the second component belongs to the Privileges *and* Immunities Clause of Article IV, and the third component comes from the Privileges *or* Immunities Clause *and* the Citizenship Clause of the Fourteenth Amendment.¹⁸⁰

While *Saenz* leaves open whether other substantive liberties lurk within this composite right to travel, it does not say anything about extraterritorial regulation.¹⁸¹ In other words, while we have a right to leave, a right to come back, and a right to be treated equally to citizens of our host state while we are gone, *Saenz* does not say we have a right to escape our home-state law.

Finally, Due Process struck again, but this time as a limit on punitive damages. In three cases decided over a nine-year span, the Court developed a new rule to reign in punitive damages awarded under state law and referenced extraterritoriality as a rationale each time.¹⁸² Yet these three cases again do not provide meaningful reins on extraterritoriality. The current punitive-damages doctrine is less of a territoriality rule and more of a strict bar on non-party representation. In essence, a jury’s punitive-damages award may redress and deter harm to the plaintiff only and not harm to society

175. See Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 182 (1999) (noting that if “this reawakening of privileges or immunities jurisprudence after more than a century of dormancy, seemed easy, we must not forget that all we have witnessed thus far is a genuinely modest beginning”).

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

177. *Id.* at 500–01.

178. *Id.* at 500–02.

179. *Id.* at 500, 502–03.

180. *Id.* at 501–03.

181. Rosen, *supra* note 95, at 913–14.

182. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572–73 (1996) (musing that, as a matter of sovereignty and comity, a state cannot impose “economic sanctions on violators of its laws with the intent of changing the tortfeasors’ lawful conduct in other States”); *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 421 (2003) (asserting that a state “cannot punish a defendant for conduct that may have been lawful where it occurred”); *Philip Morris v. Williams*, 549 U.S. 346, 355 (2007) (worrying about “the risk that punitive damages awards can, in practice, impose one State’s (or one jury’s) policies . . . upon other States”).

generally.¹⁸³ Despite sweeping language in these cases, the Court’s concern regarding extraterritoriality was broadly tangential to its doctrinal test.¹⁸⁴

It is easy to intuit that there are situations in which, as a matter of fundamental fairness, a state’s law cannot apply to our conduct. But forging a right to travel out of this normative proposition and the Court’s less-than-consistent precedent is no easy feat. One reason robust doctrines of horizontal federalism do not protect individual liberties today may be that the Court’s twentieth-century solution to protecting liberty was to create new constitutional liberties.¹⁸⁵ Whether right or wrong, that approach left a lacuna in the Court’s jurisprudence where a substantive right to travel—a potential guarantee of federalism’s liberty-enhancing features—could have otherwise developed.¹⁸⁶

The Court has tried its hand at creating modern limits on extraterritoriality, which means it has some foundation on which to construct coherent doctrines of horizontal federalism. For example, since six justices in *Ross* approved the balancing-test approach, the Court could perhaps still use the dormant Commerce Clause cases to protect out-of-state providers and non-profits from S.B. 8-like mechanisms.¹⁸⁷ But it would be odd if the Court used this doctrine—which implicitly restrains states’ authority to burden interstate commerce¹⁸⁸—as a vessel for protecting an individual’s freedom to escape home-state law.¹⁸⁹ At best, the liberty interest protected by the dormant Commerce Clause is an economic freedom reminiscent of *Lochner*,¹⁹⁰ which is to say—there isn’t one. Or perhaps the Court could

183. *Philip Morris*, 549 U.S. at 354.

184. Catherine M. Sharkey, *Federal Incursions and State Defiance: Punitive Damages in the Wake of Philip Morris v. Williams*, 46 WILLAMETTE L. REV. 449, 457 (2010) (noting that, while the Court’s extraterritoriality concern is “significant” in these cases, “this federalism-based justification has never been fully developed by the Court,” as it has never identified the “constitutional source of such a limitation” or the “precise contours in terms of how one gauges extraterritorial effect”).

185. See Patrick M. Garry, *The Constitutional Lynchpin of Liberty in an Age of New Federalism: Replacing Substantive Due Process with the Right to Travel*, 45 BRANDEIS L.J. 469, 469–70 (2007) (arguing that, while the Court “ignored federalism” for the better part of the twentieth century, federalism doctrines present “an alternative constitutional approach to the protection of individual liberties” in lieu of the Court’s substantive Due Process “catch-all method”).

186. *Id.*

187. See *Nat’l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1165–69 (2023) (Sotomayor, J., concurring in part; Roberts, C.J., concurring in part and dissenting in part) (stating that a “majority of the Court agrees that it is possible to balance benefits and burdens” of extraterritorial laws); see also *supra* notes 157–173 and accompanying text.

188. *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982).

189. See *Rosen*, *supra* note 95, at 926 (arguing that none of the dormant Commerce Clause cases remotely suggest a state could not regulate its own citizens’ conduct extraterritorially).

190. *Lochner v. New York*, 198 U.S. 45 (1905), *abrogated by West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

extend the punitive-damages doctrine to preclude the extraterritorial application of statutory damages.¹⁹¹ But this only goes so far. Regardless of whether the right to travel conceptually fits within Privileges and/or Immunities, Due Process, Full Faith and Credit, or Commerce, all lines of reasoning lead back to the tension between individual freedom and a state's interest in mitigating in-state effects. This collision of constitutional values tees up a debate perhaps best left alone—fetal personhood. A traveler says that she has a right to escape a state's law when she is not within the state's territory. The state says she has committed murder against one of its own. As some states move towards granting legal rights to fetuses,¹⁹² this debate may become unavoidable in the right-to-travel context.

Some members of the Court may be prepared to embark on the mission of horizontal federalism. For example, in his *Dobbs* concurrence, Justice Kavanaugh said that, in his view, a state could not bar its residents “from traveling to another State to obtain an abortion” because of “the constitutional right to interstate travel.”¹⁹³ But, as Justice Kavanaugh saw it, beyond the *stare decisis* difficulty, these “other abortion-related legal questions” lingering in the wake of *Dobbs* “are not especially difficult as a constitutional matter.”¹⁹⁴ Yet while Court may be prepared to ask the question, answering it will be anything but easy.

III. Conflict and Clawbacks

As a general norm of interstate federalism, “what happens in Vegas, stays in Vegas.” There is no constitutional right to gamble, yet Utah is not known for prosecuting Utahans for playing Texas Hold 'em in Nevada, much less prosecuting Nevadan card dealers.¹⁹⁵ Utah forgoes prosecution even though its total ban on gambling represents the majoritarian view held by Utahans that gambling is wrong.¹⁹⁶ Almost everyone can agree that abortion

191. See Sharkey, *supra* note 184, at 472–73 (describing statutory damages as a “netherworld somewhere between compensatory and punitive damages”).

192. For example, under Georgia law today, “[n]atural person” means any human being including an unborn child” and “[u]nborn child” means a member of the species *Homo sapiens* at any stage of development who is carried in the womb.” GA. CODE ANN. § 1-2-1(b), (e)(2) (West 2020). In an earlier draft bill of its now-enacted six-week abortion ban, “unborn children” would be entitled to “full legal recognition” as “living, distinct persons.” H.B. 481, 155th Gen. Assemb., Reg. Sess., § 2(3)–(4) (Ga. 2019).

193. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

194. *Id.* at 2308–09.

195. See Stan Fox, *Utah Gambling Laws & Legal Age to Gamble* (2023), LETSGAMBLEUSA (July 19, 2023), <https://www.letsgambleusa.com/utah/gambling-laws/> [<https://perma.cc/3TF6-3LK3>] (explaining that all forms of gambling are illegal in Utah).

196. See *Gambling*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://www.churchofjesuschrist.org/study/manual/gospel-topics/gambling?lang=eng>

strikes home unlike any other issue. But, at least in the typical case, this elusive concept called comity typically manages interstate relations. The word comity connotes a receptivity to another state's laws and jurisdiction. Yet all relationships require boundaries. Clawback statutes fortify a state against the undue incursions of sister states. In so doing, they promote individual liberty. This Part makes the case for clawbacks.

A. *The Right in the Real World*

The ultimate effect of moving away from the territoriality principle is that the Court made it permissible for multiple states to have concurrent legislative jurisdiction. To the extent that the Court has reintroduced the territoriality principle, those doctrines appear to be highly circumscribed. But defining an ideal framework for a constitutional right to travel is necessary to solving undue forms of interstate friction. For this right to nullify the extraterritorial effects of laws like S.B. 8, it must contain the constitutional protection “to escape home-state law by leaving the state.”¹⁹⁷ For this right to be functionally operative, it must extend both to the traveler and those who facilitate her conduct in the “host” state—conduct which the “home” state wishes to regulate.¹⁹⁸

Professor Brilmayer has articulated a workable framework for how such a constitutional right could work. She starts with “the general principle that a state *may in most circumstances* apply its law to its residents, even when they are acting outside the state.”¹⁹⁹ But where there is a direct clash between the laws of the host state and those of the home state, “the general principle yields.”²⁰⁰ Where the host state creates “an affirmative right” to engage in certain conduct, this express policy has a “preemptive effect” on the home state’s claim to regulate.²⁰¹ In more direct terms, a host state’s express policy seeking to preserve the right to choose abortion “preempts” the home state’s antiabortion law.²⁰² This is a rule of priority—territoriality trumps residency as a connecting factor in cases of direct conflict between state laws.²⁰³ This constitutional conflicts rule is categorical—it does not ask a court to measure the weightiness of states’ interests. Moreover, this rule strikes the right normative balance because it recognizes in-state effects as a justification for applying state law extraterritorially *except when* there is a direct conflict

[<https://perma.cc/2ENS-YCG8>] (“Church leaders have encouraged Church members to join with others in opposing the legalization and government sponsorship of any form of gambling.”).

197. Brilmayer, *supra* note 7, at 883.

198. *Id.* at 886.

199. *Id.* at 876 (emphasis added).

200. *Id.*

201. *Id.* at 876–77.

202. *Id.* at 876.

203. *Id.* at 884.

between what is protected and what is unlawful. But while “the structure of our federal system” likely “compels” this rule, Supreme Court precedent currently does not.²⁰⁴

Yet clawback statutes can potentially create an outcome much like Professor Brilmayer’s constitutional framework. Take Connecticut’s clawback statute as a template. It grants a cause of action to “any person” (both natural and legal) who has had a judgment entered against them in any other state where liability, in whole or in part, is based on performing an abortion, having an abortion, assisting an abortion, providing material support for an abortion, “or any theory of vicarious, joint, several or conspiracy liability derived therefrom.”²⁰⁵ This statute allows suit against “any party that brought the action leading to that judgment or has sought to enforce that judgment.”²⁰⁶ And it grants damages “including, but not limited to, money damages in the amount of the judgment in that other state and costs, expenses and reasonable attorney’s fees spent in defending the action that resulted in the entry of [that] judgment” along with the “costs, expenses and reasonable attorney’s fees incurred in bringing an action” under the clawback statute.²⁰⁷

But this cause of action is limited in several important respects. First, the abortion must be otherwise legal under Connecticut law.²⁰⁸ Second, the statute is categorically inapplicable when the out-of-state judgment is based on “an action where no part of the acts that formed the basis for liability *occurred in this state*”—in other words, there is no cause of action when nothing happened in Connecticut.²⁰⁹

Note how this clawback statute arrives close to Professor Brilmayer’s constitutional conflicts-of-law prescription. Connecticut’s clawback statute does not interfere with the general principle that a state may, in most circumstances, apply its law to its residents while they are out of state. But it does create an affirmative grant that protects a woman’s right to choose. Moreover, it protects both the traveler along with those who facilitate her abortion, either by performing it, funding it, or materially supporting it in any way.

One important change that would better align the statute with a constitutional conflicts-of-law rule would be to limit the cause of action to *only* the liability for out-of-state judgments arising from in-state conduct

204. *Id.* at 876. As Professor Brilmayer readily acknowledges: “While there is no case directly on point, colorable support exists for the conclusion that a state may regulate its citizens who have abortion or terminate their lives elsewhere.” *Id.* at 880 (footnote omitted).

205. CONN. GEN. STAT. ANN. § 52-571m (West 2023).

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* (emphasis added).

rather than merely requiring *some* in-state conduct. This would create a clean “territoriality trumps” rule, negating direct extraterritorial regulation without directly regulating any out-of-state conduct. In other words, if Connecticut’s clawback statute granted a cause of action to unwind liability for an S.B. 8 defendant’s conduct in, for example, New York, then it would apply extraterritorially. Although abortion-permissive states could enact clawback statutes that are untethered to the territoriality principle (thus matching the aggressiveness of extraterritorial abortion bans), the narrower rule strikes the better balance between states’ interests and individual liberty. And though this might seem like a unilaterally disarming way of combatting S.B. 8-like mechanisms, this is the right approach if the goal is to reach an interstate stalemate. Moreover, clawback statutes might need to be conservative in this way to justify accepting the tenuous formalism that these laws respect the judgments of other states as required by the Full Faith and Credit Clause.²¹⁰

But even under a pure “territoriality trumps” rule, *indirect* extraterritorial regulation still results. Here is an illustration: while in Connecticut, Risa could Venmo Beth, who is in Texas, \$500 to fly to California for a procedural abortion. Risa acted in Connecticut, so if she is made to pay an S.B. 8 judgment, then granting her a clawback cause of action should still respect the territoriality principle though doing so has an indirect effect in Texas and California.²¹¹ Where Risa is when she hits send may seem like a trivial distinction, but formalisms matter when policing what spills over arbitrary state lines.

Assuming S.B. 8 and clawback statutes are equally enforceable,²¹² their collision may result in their mutual annihilation. While S.B. 8 is purportedly enforced by “vigilantes,” it is essential to consider the realities of litigation. Repeat players who frequently engage in anti-abortion litigation will choose whether S.B. 8 is robustly enforced. Regardless of its enforcement, S.B. 8

210. See *infra* subpart III(B).

211. As discussed above, these “in-state effects” arguably justify the constitutionality of laws like S.B. 8. See *supra* notes 118–119 and accompanying text. But the mere existence of spillovers alone does not establish a rule of priority between states’ laws.

212. Personal jurisdiction will meaningfully limit the reach of both extraterritorial abortion bans and clawback statutes. See, e.g., *Harlow v. Children’s Hosp.*, 432 F.3d 50, 62 (1st Cir. 2005) (holding that Maine lacked jurisdiction in a case where a Maine resident brought a malpractice suit against a Massachusetts hospital); *Means v. U.S. Conf. of Cath. Bishops*, 836 F.3d 643, 646, 649 (6th Cir. 2016) (holding that Michigan lacked personal jurisdiction over out-of-state defendants who promulgated ethical directives that arguably led to a Catholic hospital refusing to perform a lifesaving abortion on a patient). But see *Bullion v. Gillespie*, 895 F.2d 213, 214 & n.1, 216–17 (5th Cir. 1990) (holding that Texas had personal jurisdiction when a California doctor mailed medication to a patient in Texas). But if “in-state effects” establish minimum contacts, then this cuts both ways. If Texas can claim jurisdiction over a New Yorker for performing an abortion on a Texas resident—on the argument that it creates “in-state effects”—then New York should also be able to claim jurisdiction over a Texan for interfering with the provision of reproductive healthcare in the state of New York.

achieves its most immediate goal by merely existing—when the law came into effect, abortion providers across Texas shut down months before the Court decided *Dobbs*.²¹³ But organized anti-abortion groups, such as those that lobbied for S.B. 8's enactment, have a nationwide endgame in mind.²¹⁴ And if S.B. 8 proves to be a viable mechanism for outlawing extraterritorial abortions, these groups know how to find plaintiffs.²¹⁵

The question is whether clawback statutes can render S.B. 8 enforcement non-viable. Theoretically, an S.B. 8 plaintiff's expected value could be quite large if he sues an institutional actor, like an abortion provider or a non-profit, for multiple abortions or if he joins multiple defendants in a single suit. But the S.B. 8 plaintiff will not break even as a clawback-statute defendant because he's paying the costs of *both* suits.²¹⁶ This matters because, in a world with clawback statutes, anti-abortion groups need to win more than the other side loses. The S.B. 8 enforcement scheme will achieve profound extraterritorial effects if these groups go after repeat players (such as Planned Parenthood) and push them into bankruptcy—thereby depriving the nationwide reproductive healthcare system of vital resources.²¹⁷ Likewise, anti-abortion groups could force healthcare providers across the country out of the abortion services field with the mere threat of bottomless liability.²¹⁸ But clawback statutes could enable the right to choose by chilling S.B. 8's chilling effect. In other words, anti-abortion groups cannot bankrupt the reproductive healthcare system if they always pick up the bigger bill.

213. Eleanor Klibanoff, *Anti-Abortion Lawyers Target Those Funding the Procedure for Potential Lawsuits Under New Texas Law*, TEX. TRIBUNE (Feb. 23, 2022, 2:00 PM), <https://www.texastribune.org/2022/02/23/texas-abortion-sb8-lawsuits/> [https://perma.cc/8EKM-VNL5].

214. Cohen et al., *supra* note 22, at 23.

215. See Klibanoff, *supra* note 213 (describing pre-litigation discovery petitions brought against non-profits by two women represented by a team of prominent anti-abortion lawyers, including S.B. 8's architect); see also Jordan Smith, *Providers Sue to Block Law that Would Eliminate Nearly All Abortions in Texas*, INTERCEPT (July 15, 2021, 3:00 PM), <https://theintercept.com/2021/07/15/texas-abortion-lawsuit-sb8/> [https://perma.cc/7DE4-Z48D] (reporting that the director of Right to Life East Texas advertised on Facebook: "Let me know if you are looking for an attorney to represent you . . .").

216. CONN. GEN. STAT. ANN. § 52-571m(2)(b) (West 2023).

217. Brilmayer, *supra* note 16, at 3; see also Katherine Florey, *Dobbs and the Civil Dimension of Extraterritorial Abortion Regulation*, 98 N.Y.U. L. REV. 485, 489 (2023) (arguing that "antiabortion advocates will likely find civil remedies a valuable supplement to criminal prosecution"). And, importantly, laws like S.B. 8 represent only one of many techniques that abortion-restrictive states will use to bankrupt reproductive healthcare nonprofits. See Press Release, Att'y Gen. of Texas, *Paxton Sues Planned Parenthood to Disgorge \$10 Million in Medicaid Payments* (Jan. 13, 2022) (<https://www.texasattorneygeneral.gov/news/releases/paxton-sues-planned-parenthood-disgorge-10-million-medicaid-payments>) [https://perma.cc/E47Y-GCN2] (accusing Planned Parenthood of submitting unlawful Medicaid claims).

218. See Cohen et al., *supra* note 22, at 86 (lamenting that the liability risk of lawsuits "might be an insurmountable barrier for some providers").

Admittedly, clawback statutes are not a perfect solution. Most obviously, they are inferior to Professor Brilmayer's constitutional doctrine because they require respecting an S.B. 8 judgment and *then* unwinding it.²¹⁹ In contrast, a constitutional "territoriality trumps" rule would prevent the extraterritorial regulation *ex ante*. But if clawback statutes achieve the intended goal of chilling the enforcement of S.B. 8-type bans, then this might not matter. More fundamentally, clawback statutes cannot unwind criminal prosecutions. This is a significant limitation, but minimizing civil liability is still necessary to enable the right to choose for at least two reasons. First, private civil enforcement bypasses the resource constraints that limit public enforcement.²²⁰ Second, slowly pushing organizations like Planned Parenthood into bankruptcy may be politically safer for abortion-restrictive states than prosecuting women and doctors. Better yet, the mere threat of mounting liability under privately enforced abortion bans creates a deterrent effect even in the absence of enforcement. Risk-averse doctors may cease performing abortions merely because such laws exist. As a result, private enforcement bans are likely a quieter way of constricting access to safe abortions nationwide relative to prosecutions. This political calculus is speculative, but likely true in light of the role that abortion rights played in the 2022 mid-term elections.²²¹

In sum, properly calibrated clawback statutes could reach a rough comity equilibrium that is comparable to Professor Brilmayer's constitutional rule by establishing a right to engage in protected out-of-state conduct. In theory, the opportunity cost of engaging in this conduct might seem quite high if the consequence of doing so means enduring two lawsuits—one as an S.B. 8 defendant and another as a clawback plaintiff. But, in effect, the mere existence of clawback statutes might eliminate the threat of privately enforced abortion-ban litigation. Ultimately, the bottom line is that the Court could constitutionalize Professor Brilmayer's choice-of-law rule (but see Part II), or it could endorse these admittedly imperfect

219. Alternatively, a defendant could seek a declaratory judgment in an abortion-permissive state to establish that they are not liable under the abortion-restrictive state's law before a court in the abortion-restrictive state reaches a final judgment. Florey, *supra* note 217, at 522. But this strategy has limited applications. First, this essentially creates a simple race to the courthouse. Second, the defendant must have a legal reason as to why they are not liable under a law like S.B. 8.

220. J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1153 (2012).

221. Ashley Kirzinger, Audrey Kearney, Mellisha Stokes, Alex Montero, Liz Hamel & Mollyann Brodie, *How the Supreme Court's Dobbs Decision Played in 2022 Midterm Election: KFF/AP VoteCast Analysis*, KFF (Nov. 11, 2022), <https://www.kff.org/report-section/how-the-supreme-courts-dobbs-decision-played-in-2022-midterm-election-kff-ap-votecast-analysis-findings/> [https://perma.cc/N29N-MNNG]; Zack Beauchamp, *The Supreme Court Lost Republicans the Midterms*, VOX (Nov. 10, 2022, 12:40 PM), <https://www.vox.com/policy-and-politics/23451103/2022-midterms-results-data-analysis-abortion-dobbs-shor> [https://perma.cc/L8WJ-UM8T].

state statutes as vehicles for reaching the same practical balance of interests. But, if the latter, clawback statutes must themselves survive constitutional review.

B. Clawbacks Versus the Constitution

Clawback statutes could trigger states like Texas to retaliate by attempting to claw back what was clawed back. But this might not matter. Perhaps the effect of piling clawbacks on clawbacks will be that nobody sues—in which case, the desired result (an interstate stalemate) is attained, albeit by way of an infinite loop. However, this interstate skirmish might be hard for the Supreme Court to ignore. Current doctrine might provide an excuse for the Court to look the other way if Texas creates liability for an out-of-state abortion.²²² But if a Texan recovers damages for a New York abortion, and then a New Yorker recovers damages for a Texas lawsuit, and then the Texan recovers the same damages for the New York lawsuit—this nonsense might raise legitimate questions about whether clawback statutes respect the Full Faith and Credit Clause.

“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”²²³ Without a doubt, this Clause seeks to coordinate fifty states within one federal system.²²⁴ It explicitly “promotes national unity by curbing the powers of each individual state, vis-à-vis every other state.”²²⁵ This Clause *mandates* extraterritoriality “by allowing states to project the products of their sovereignty, such as the decisions of their courts, into other states.”²²⁶ And whatever the far reaches of the full-faith-and-credit command might be, at the very least, reviewing courts must give as much credit to a judgment as that judgment would receive in the rendering court so long as that court’s proceedings satisfy the minimum requirements of procedural Due Process.²²⁷ This is true even when the suit that led to the judgment arises out of conduct occurring in the reviewing state, and the reviewing state’s law would lead to a different outcome than the rendering state’s laws.²²⁸

Formally, clawback statutes respect sister states’ judicial proceedings since the cause of action is not complete until a foreign judgment has been

222. *See supra* Part II.

223. U.S. CONST. art. IV, § 1.

224. Craig Smith, *Full Faith and Credit in Cross-Jurisdictional Recognition of Tribal Court Decisions Revisited*, 98 CALIF. L. REV. 1393, 1397 (2010).

225. *Id.*

226. *Id.*

227. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 (1982).

228. Smith, *supra* note 224, at 1398 (“[I]t is relatively clear that the adjudicatory decisions of courts demand a far more absolute species of full faith and credit than the actual laws of the states.”).

paid.²²⁹ The difficulty lies in the concession that clawback statutes exist to undo extraterritorial anti-abortion judgments.²³⁰ Connecticut's clawback statute exists to undo (at least part of) Texas's abortion ban. In other words, while clawback statutes respect the rendering state's judicial proceedings, they also directly take aim at other states' public acts.

But unsurprisingly, the degree to which the Full Faith and Credit Clause prevents states from adopting policies hostile to the statutes of other states is anything but clear under current precedent. In *Ross*, Justice Kavanaugh suggested that this Clause might be the most appropriate mechanism for resolving conflicts between states' regulatory policies since its primary purpose is to manage extraterritoriality.²³¹ But Justice Kavanaugh cites only one case (from 1955) to support the proposition that the Full Faith and Credit Clause bars states from enacting laws hostile to the statutes of another state.²³² And this case, *Carroll v. Lanza*,²³³ does not provide firm support.

In *Carroll*, the Supreme Court held that the Full Faith and Credit Clause does not limit a forum state to only awarding those remedies that a personal injury plaintiff's home state has made exclusive when other remedies are available under forum-state law.²³⁴ The Court credited the forum state's interests because it was the state of injury and, as such, it had its own interests to serve and protect, which were "large and considerable."²³⁵ Therefore, the Court decided that the forum state had *not* adopted "any policy of hostility" towards the public acts of the home state.²³⁶

Along these lines, *Carroll* seems tolerant of conflicts between home-state law and forum-state law, at least when courts use the forum-state law to address conduct occurring within its borders. Since clawback statutes seek to protect conduct within the enacting state's borders, *Carroll* might support their constitutionality. Moreover, clawback statutes exist in the first place as a remedy to a sister state's policy (e.g., S.B. 8) that directly conflicts with the enacting state's policy (e.g., legal abortions). So, if there is a constitutional problem, it should cut both ways. If clawback statutes offend the Full Faith

229. See CONN. GEN. STAT. ANN. § 52-571m (West 2023) ("When any person has had a judgment entered against such person, in any state . . . such person may recover damages . . .").

230. By contrast, bounty-hunter laws like S.B. 8 target primary conduct. But the former is defensible in a way that the latter is not because clawback statutes help recreate a rule of coordination (the core purpose of the Full Faith and Credit Clause) by enforcing the territoriality principle when a direct conflict between state laws exists.

231. Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1175–76 (2023) (Kavanaugh, J., concurring in part and dissenting in part).

232. *Id.*

233. 349 U.S. 408 (1955).

234. *Id.* at 412–13.

235. *Id.* at 413.

236. *Id.*

and Credit Clause, then the extraterritorial application of laws like S.B. 8 seems equally offensive.

Since the Court abandoned the balancing-of-interests approach to the Full Faith and Credit Clause in *Hague*, a majority of the Court has applied *Carroll* exactly once, in a case called *Franchise Tax Board of California v. Hyatt*,²³⁷ which had the special privilege of making it to the Supreme Court three times. *Hyatt (I, II, and III)* involved the intersection of two notoriously squirrely areas of constitutional jurisprudence—extraterritoriality and state sovereign immunity.²³⁸ This litigation forced the Court to confront its past precedent from *Nevada v. Hall*,²³⁹ under which “one State (here, Nevada) [could] open the doors of its courts to a private citizen’s lawsuit against another State (here, California) without the other State’s consent.”²⁴⁰ In *Hyatt III*, the Court ultimately overruled *Hall*, holding that states retain their sovereign immunity in the courts of other states.²⁴¹ But before reaching that conclusion, the Court tried to curb Nevada’s blatant hostility towards California under *Carroll*.

In *Hyatt I*, the Court held that Nevada did *not* violate the Full Faith and Credit Clause under *Carroll* by allowing private suits against California—even though California statutes forbade such suits—given that Nevadan courts would immunize California where Nevada law would similarly immunize its own state officials.²⁴² But in *Hyatt II*, the Nevada Supreme Court broke with its own principle of parity.²⁴³ Even though Nevada statutory law limited damages to \$50,000 “in a similar suit against its own officials,” the Nevada Supreme Court created a common-law damages rule that would make California liable for *millions* on the reasoning that Nevada’s “policy interest in providing adequate redress to Nevada[’s] citizens” was more important than providing California “a statutory cap on damages” under principles of comity.²⁴⁴

237. *Hyatt I*, 538 U.S. 488, 495, 499 (2003); *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt II)*, 578 U.S. 171, 176 (2016); *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt III)*, 139 S. Ct. 1485 (2019).

238. *Hyatt I*, 538 U.S. at 496–97; *Hyatt II*, 578 U.S. at 176; *Hyatt III*, 139 S. Ct. at 1492.

239. 440 U.S. 410 (1979).

240. *Hyatt II*, 578 U.S. at 173.

241. *Hyatt III*, 139 S. Ct. at 1492.

242. *See Hyatt I*, 538 U.S. at 498–99 (“The Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California’s sovereign status, relying on the contours of Nevada’s own sovereign immunity from suit as a benchmark for its analysis.”).

243. *See Hyatt II*, 578 U.S. at 175 (explaining that the Nevada Supreme Court did not adhere to comity when imposing damages against the defendant California agency above Nevada’s statutory damages cap against public officials).

244. *Id.* (quoting *Franchise Tax Bd. of Cal. v. Hyatt*, 335 P.3d 125, 147 (Nev. 2014)).

The U.S. Supreme Court held that this brand-new damages rule reflected a “policy of hostility to the public Acts’ of a sister State.”²⁴⁵ But the Court was at pains to emphasize that this holding was not a “return to a complex ‘balancing-of-interests approach to conflicts of law under the Full Faith and Credit Clause.’”²⁴⁶ Rather, by disregarding “its own ordinary legal principles” in favor of a “special and discriminatory rule,” Nevada violated the Full Faith and Credit Clause.²⁴⁷

Clawback statutes do not create legal double standards between citizens and out-of-staters. Instead, these statutes represent a state’s *fidelity* to uniformly enforcing its own laws with respect to conduct occurring within its own borders. For example, if a Connecticut resident sues a Texan under S.B. 8 for helping another Texan get an abortion in Connecticut, the clawback statute operates the same whether the clawback defendant (i.e., the S.B. 8 plaintiff) is a citizen or an out-of-stater.

Ultimately, no clear rules (other than a bar on blatant discrimination against now-immune defendant-states) currently define what degree of conflict between state policies might give rise to a Full Faith and Credit violation. With few exceptions, the Court’s interpretation of this Clause has been “overwhelmingly concerned with judicial decisions rather than legislative enactments.”²⁴⁸ As Justice Ginsberg put it, “[Supreme Court] precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments” so that “[t]he Full Faith and Credit Clause does not compel ‘a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.’”²⁴⁹ This is true even when “the statute of another State reflect[s] a conflicting and opposed policy.”²⁵⁰ In other words, this Clause no longer demands the application of a particular state’s law, and it has even come to embrace the possibility that sister states may undermine each other’s public policies through choice-of-law rules in pursuit of enforcing their own policies within their own jurisdiction.²⁵¹

Today, states may mostly ignore each other’s laws when enforcing their own, but they must nevertheless recognize each other’s judgments once they

245. *Id.* at 173–74 (quoting *Hyatt I*, 538 U.S. at 499). *Hyatt I*, in turn, quoted *Carroll v. Lanza*, 349 U.S. 408, 413 (1955), for this assertion.

246. *Hyatt II*, 578 U.S. at 179 (quoting *Hyatt I*, 538 U.S. at 496).

247. *Id.* at 178.

248. Smith, *supra* note 224, at 1399.

249. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (quoting *Pacific Emps. Ins. v. Indus. Accident Comm’n*, 306 U.S. 493, 501 (1939)).

250. *Carroll*, 349 U.S. at 412.

251. Smith, *supra* note 224, at 1399–1400.

are final.²⁵² Clawback statutes fit within this rule. They do not interrupt an S.B. 8 plaintiff's ability to take a valid judgment into court and begin executing on the defendant's assets. The Supreme Court could look behind this formalism and assess the substance of whether these laws do violence to the full-faith-and-credit command. But this Note has aimed to show that clawback statutes help avoid a much messier constitutional question—one for which there is no easy formalistic solution. Supreme Court precedent leaves plenty of space for potential doctrines of horizontal federalism but preordains none of them. If Professor Brilmayer's constitutional conflicts-of-law rule is the doctrinal gold standard, such an outcome requires doing exactly what the Court has vowed it would not—"constitutionalizing choice-of-law rules."²⁵³

Conclusion

Extraterritorial regulation is a feature of a healthy federalist system. From California's climate-change regulations²⁵⁴ to Texas's organizational law,²⁵⁵ regulatory spillovers have an agenda-setting function. Whether or not California and Texas intend to unilaterally create national policy, they can, in theory, catalyze a congressional response.²⁵⁶ The greater the friction created by states foisting unwelcome policies on each other, the greater the need for a federal referee.²⁵⁷ In this way, the health of vertical federalism relies on the friction generated by horizontal federalism. And yet, S.B. 8 and its progeny operate "in the vacuum created by federal legislative and regulatory inactivity."²⁵⁸ That is to say, failures of vertical federalism (along with the help of creative state legislatures) are responsible for modern-day vigilantism.

252. *Id.* at 1399 ("While Nevada and California may disregard the laws of one another, they are nonetheless bound to recognize the judgments issued against them by the courts of the other.") (referencing *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt I*), 538 U.S. 488, 498–99 (2003)); *see also Baker*, 522 U.S. at 233 ("A court may be guided by the forum State's 'public policy' in determining the law applicable to a controversy. But [this Court's] decisions support no roving 'public policy exception' to the full faith and credit due judgments.") (citations omitted).

253. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727–29 (1988).

254. *See* Brad Plumer, *California Approves a Wave of Aggressive New Climate Measures*, N.Y. TIMES (Sept. 29, 2022), <https://www.nytimes.com/2022/09/01/climate/california-lawmakers-climate-legislation.html> [<https://perma.cc/3VPA-4HLY>] (describing the sweeping new climate-change legislation recently adopted by the world's fifth largest economy).

255. *See* Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 MICH. L. REV. ONLINE 38, 41 (2022), <https://michiganlawreview.org/texas-two-stepping-out-of-bankruptcy/> [<https://perma.cc/27TF-EP9A>] (describing how nationwide corporations are using Texas law to "extinguish claims against an asset-rich business through the bankruptcy of the liability-laden one, cutting off tort claimants from any further recovery").

256. Gerken & Holtzblatt, *supra* note 1, at 90.

257. *Id.* ("One way to get the teacher's attention is to raise your hand. The other is to pull the pigtailed of the girl sitting next to you.")

258. Michaels & Noll, *supra* note 36, at 1192.

The constitutional right to an abortion is gone, and the political recourse for a federal guarantee seems doubtful—any federal statutory protection of reproductive rights will require “a majority of the House, sixty votes in the Senate, and a Democratic president, something that last occurred for seventy-two legislative days in 2009 and early 2010.”²⁵⁹ Given this and our modern political divisiveness, the need for a right to travel is palpable. But this right is presently far from a guarantee. Clawback statutes present a small step toward recognizing limits on extraterritorial authority. These statutes are nothing more than state law causes of action. Yet, if properly calibrated, they help enforce a critical structural principle of our Constitution.

259. *Id.* at 1215.