Federalism Limits on State Criminal Extraterritoriality

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This article explores limits on state criminal extraterritoriality arising from constitutional federalism. This issue has recently taken on new significance due to interstate prosecutions concerning abortion, cybercrime, and election interference. However, previous scholarship has not comprehensively surveyed historical territoriality requirements.

Based on research into English common law and early American jurisprudence, this article concludes that states ordinarily cannot prosecute actions committed beyond their borders. They can, though, prosecute continuing and distinct crimes, extraterritorial crimes against special state interests, and crimes committed outside of any American state. These rules are implicit in constitutional federalism. U.S. Supreme Court precedent, scholarship about the constitutional role of "general law," and theories of constitutional liquidation all support this conclusion.

Lastly, this article addresses current controversies, including out-of-state abortions, cybercrime, and election interference. It closes by considering tradeoffs. Territoriality fosters American pluralism, but it does so by requiring strong moral consensus before many criminal laws can be implemented effectively.

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INTRODUCTION

Americans by the millions pour into Las Vegas casinos confident that they cannot be prosecuted for doing so under their home states' anti-gambling laws. As this article will show, the federal constitutional requirement of state criminal territoriality makes that expectation legally reasonable.[1] The notion that what happens in Vegas stays in Vegas has recently become controversial, especially in the abortion context. Shortly after the U.S. Supreme Court overturned *Roe v. Wade*, legislators in several states considered authorizing residents to be charged criminally for abortions they undergo elsewhere in the country.[2] "Just because you jump across a state line doesn't mean your home state doesn't have jurisdiction," said one pro-life attorney.[3] An Arkansas legislator, the president of the National Association of Christian Lawmakers, compared an extraterritorial abortion ban with measures against human trafficking.[4] Alabama's attorney general threatened to prosecute as conspiracy in-state travel arrangements made for out-of-state abortions.[5] The head of South Dakota Right to Life

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1. *Cf.* William Van Alstyne, *Closing the Circle of Constitutional Review from* Griswold v. Connecticut *to* Roe v. Wade*: An Outline of a Decision Merely Overruling* Roe, 1989 DUKE L.J. 1677, 1685 (suggesting that interstate surveillance of gambling tourists is merely impractical).

2. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022); Darryl K. Brown, *Extraterritorial State Criminal Law, Post*-Dobbs, 113 J. CRIM. L. & CRIMINOLOGY 853, 858 n.16 (2024) (citing proposals from Texas); David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 22–25 (2023) (predicting that some state legislatures would impose criminal charges on those traveling out of state for abortions in the wake of *Dobbs*); Marnie Leonard, Comment, *Pro-Choice (of Law): Extraterritorial Application of State Law Using Abortion as a Case Study*, 31 AM. U. J. GENDER SOC. POL'Y & L. 195, 208 (2023) (noting that abortion providers prepared for antiabortion legislation by requiring prospective patients to provide proof of residency); Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients from Crossing State Lines*, WASH. POST (June 30, 2022), https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines [https://perma.cc/M3J9-9Z6B] (discussing various antiabortion groups' push for legislative changes following the *Dobbs* decision).

3. Kitchener & Barrett, *supra* note 2.

4. *Id.*; *cf.* J. David Goodman, *In Texas, Local Laws to Prevent Travel for Abortions Gain Momentum*, N.Y. TIMES (Oct. 24, 2023), https://www.nytimes.com/2023/10/24/us/texas-abortion-travel-bans.html (discussing county ordinances restricting passthrough travel for abortion purposes); *Behind the Scenes of Abortion Travel Bans*, AM. OVERSIGHT (June 10, 2024), https://americanoversight.org/behind-the-scenes-of-abortion-travel-bans [https://perma.cc/CSV8-FXAC].

5. Catherine Caine MacCarthy, Note, *The Federalism Arms Race over Abortion*, 103 B.U. L. REV. 2251, 2265–66 (2023).

endorsed blocking state residents from procuring abortions elsewhere.[6] Legislation proposed in Missouri in 2022 would have explicitly criminalized residents of that state receiving an abortion "regardless of where the abortion is or will be performed."[7] In 2025, Louisiana prosecutors indicted a New York doctor for sending abortion pills into their jurisdiction.[8]

Criticism of these measures has noted that they "conflict with a basic assumption about how domestic criminal law works."[9] For example, "we . . . tend to assume that Pennsylvania criminal law stops at the state's borders and that Ohio courts cannot apply Pennsylvania criminal law."[10] However, critics have yet to raise the historical territoriality requirements discussed in this article: states cannot constitutionally enforce ordinary criminal laws against activity that happens in another state, though there are exceptions authorizing some related measures.

Territoriality is an ancient rule with foundations in common law. Readily recognized throughout nineteenth-century jurisprudence, it remains a near-universal assumption.[11] However, its constitutional rationale has been forgotten.[12] Some commentators seek limits on state criminal extraterritoriality in the dormant Commerce Clause, while others look to Article IV's Privileges and Immunities Clause or the substantive due process right to travel.[13] Some debate conflict-of-laws rules.[14] Richard

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6. Kitchener & Barrett, *supra* note 2.

7. H.B. 2012, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022), https://documents.house.mo.gov/billtracking/bills221/amendpdf/4488H03.01H.pdf [https://perma.cc/NN4Y-774R]; *see also* Leonard, *supra* note 2, at 207.

8. Pam Belluck & Emily Cochrane, *New York Doctor Indicted Over Sending Abortion Pill*, N.Y. TIMES (Jan. 31, 2025), https://www.nytimes.com/2025/01/31/health/abortion-louisiana-new-york-prosecution-shield-law.html.

9. Emma Kaufman, *Territoriality in American Criminal Law*, 121 MICH. L. REV. 353, 355 (2022).

10. *Id.*

11. *See id.* at 361–63; Oklahoma v. Castro-Huerta, 597 U.S. 629, 652–53 (2022) ("Under the Constitution, States have jurisdiction to prosecute crimes within their territory except when preempted . . . .").

12. *See, e.g.*, *In re* Vasquez, 705 N.E.2d 606, 610 (Mass. 1999) ("The source of this rule is unsettled and has not been ascribed to any particular constitutional provision, yet it has been called . . . 'too deeply embedded in our law to require justification.'") (internal citation omitted) (quoting Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 318 (1992)).

13. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 346 (2022) (Kavanaugh, J., concurring) (asserting that the "constitutional right to interstate travel" allows residents to travel across state lines to receive an abortion); Brown, *supra* note 2 at 882 (stating that the Privileges and Immunities Clause, the dormant Commerce Clause, and the right to travel all

Fallon Jr. analyzed the Full Faith and Credit Clause, but could not "pretend to pronounce a confident judgment."[15] Emma Kaufman's recent survey describes criminal territoriality as traceable to the federal Constitution and assumed in state constitutions.[16] She is right that territoriality is implicit in constitutional federalism.[17] However, she concedes a lack of detailed scholarship on state criminal territoriality and notes that writers "never quite specify" whether it is "a doctrine, a practice, or simply an assumption."[18] Meanwhile, her treatment of early legal history relies on Drew Kershen's research from the 1970s.[19] Kershen's work does not address state criminal

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affect extraterritoriality); Katherine Florey, *The New Landscape of State Extraterritoriality*, 102 TEX. L. REV. 1135, 1136–37 (2024) (noting that the Supreme Court has applied various constitutional provisions in criminal extraterritoriality contexts); Leonard, *supra* note 2, at 209, 216, 219–20 (analyzing the dormant Commerce Clause, the Privileges and Immunities Clause, and the Due Process Clause in the context of Missouri's abortion travel bans); Mark D. Rosen, *Marijuana, State Extraterritoriality, and Congress*, 58 B.C. L. REV. 1013, 1027–28 (2017) [hereinafter Rosen, *Marijuana*] (arguing that a state does not interfere with the constitutional right to travel by imposing its own laws on a resident who travels to another jurisdiction); Mark D. Rosen, *"Hard" or "Soft" Pluralism?: Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers*, 51 ST. LOUIS U. L.J. 713, 717–18 (2007) [hereinafter Rosen, *Pluralism*] (stating that the Privileges and Immunities Clause and the Due Process Clause limit states' rights to apply their laws outside their borders); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 896–933 (2002) [hereinafter Rosen, *Extraterritoriality*] (arguing that the Constitution allows states flexibility to regulate their residents' activity abroad); Robert A. Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 CASE W. RSRV. L. REV. 44, 46–49 (1974) (highlighting text within the Bill of Rights that limits states' jurisdiction in criminal prosecutions); *cf.* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 265, 269 (1992) (discussing civil law and the Privileges and Immunities Clause).

14. *See, e.g.*, Paul Schiff Berman et al., *Conflicts of Law and the Abortion War Between the States*, 172 U. PA. L. REV. 399 (2024); Joseph W. Dellapenna, *Abortion Across State Lines*, 2008 BYU L. REV. 1651; Susan Frelich Appleton, *Gender, Abortion, and Travel after* Roe*'s End*, 51 ST. LOUIS U. L.J. 655 (2007); Gerald L. Neuman, *Conflict of Constitutions? No Thanks: A Response to Professors Brilmayer and Kreimer*, 91 MICH. L. REV. 939 (1993); Seth F. Kreimer, *"But Whoever Treasures Freedom . . .": The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907 (1993); Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873 (1993).

15. Richard H. Fallon Jr., *If* Roe *Were Overruled: Abortion and the Constitution in a Post-*Roe *World*, 51 ST. LOUIS U. L.J. 611, 632 (2007).

16. Kaufman, *supra* note 9, at 368–69.

17. *See id.* at 361–75.

18. *Id.* at 359 n.28, 364; C. Steven Bradford, *What Happens if* Roe *Is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87, 127 (1993) (criticizing a lack of research).

19. *See* Kaufman, *supra* note 9, at 365–66.

proceedings.[20] Another recent survey by Darryl K. Brown suggests that the main hurdle to state criminal extraterritoriality is personal jurisdiction, while also noting that constitutional law here is "unclear and underdeveloped."[21]

This article picks up where Kershen, Kaufman, and Brown left off, exploring the historical rules of territoriality that are incorporated into constitutional federalism.[22] Perhaps these rules have been overlooked because of the rarity of states seeking to criminalize acts outside their territory or because of other scholars' focus on specific constitutional provisions.[23] Either way, neglect has caused needless confusion.[24] This article will show that most criminal laws can be applied only to acts within state borders because of the historical requirement of territoriality.[25]

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20. Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 803, 804 n.2 (1976) [hereinafter Kershen, *Vicinage I*]; *see* Drew L. Kershen, *Vicinage—Part II*, 30 OKLA. L. REV. 1 (1977) [hereinafter Kershen, *Vicinage—Part II*].

21. Brown, *supra* note 2, at 859.

22. *Cf.* Kaufman, *supra* note 9, at 365–66 (noting briefly the possible relevance of the Venue and Vicinage Clauses, discussed below); Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 976 (2002); Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1895 (1987) (describing territoriality as "a structural inference"). This article does not comprehensively survey territoriality's evolution in more recent history.

23. Brown, *supra* note 2, at 882; *cf.* N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York . . . without throwing down the constitutional barriers by which all the States are restricted . . . . This is so obviously the necessary result of the Constitution that it has rarely been called in question . . . .").

24. *See, e.g.*, Katherine Florey, Dobbs *and the Civil Dimension of Extraterritorial Abortion Regulation*, 98 N.Y.U. L. REV. 485, 486 (2023) (describing this subject as "long-unresolved"); Kaufman, *supra* note 9, at 360 n.34 ("[T]he decline of territorialism has unsettled a theory of criminal jurisdiction that would provide an easy resolution to questions . . . ."); Regan, *supra* note 22, at 1889 (declining to decide whether Georgia can "regulate the sexual behavior of Georgians in Illinois").

25. This article is about substantive criminal law—not investigations, prior convictions, or interstate offender supervision. *See* Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 264–65, 265 n.34, 267–80 (2005); John Bernard Corr, *Criminal Procedure and the Conflict of Laws*, 73 GEO. L.J. 1217, 1220–21 (1985); Interstate Comm'n for Adult Offender Supervision, https://interstatecompact.org [https://perma.cc/9AX6-ARKT]; *see also* U.S. CONST. art. I, § 10, cl. 3 (authorizing interstate compacts with congressional consent). This article also sidesteps tribal criminal jurisdiction. *See* Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022) (holding that states have concurrent jurisdiction with the federal government to prosecute crimes by non-Indians in Indian country); McGirt v. Oklahoma, 591 U.S. 894 (2020) (holding that a State did

This article will establish this historical point by turning to federalism's common law prehistory, then covering the importance of territoriality through the nineteenth century (Parts I and II). It next uses theories of general law and constitutional liquidation to explain why the historical rules are constitutionally binding (Part III). The article discusses states' power to punish continuing and distinct crimes that happen partly within their borders, crimes committed abroad against special state interests, and crimes committed outside any state (Part IV). Lastly, it looks at modern territoriality controversies around abortion, cybercrime, and election interference (Part V).

The article concludes that states lack the power to prosecute abortions that happen outside their borders. However, territoriality does not stop them from blocking drug-induced abortions completed within them or the importation of abortion-inducing drugs. States can prosecute cybercrimes if relevant people, computers, or servers are located within them. States can also defend their elections against interference. Historical rules do not resolve every constitutional question around these controversies, but they do clarify important aspects of the law.

I. ENGLISH COMMON LAW REQUIRED CRIMES TO BE TRIED LOCALLY.

The history of territoriality before American independence informed constitutional federalism. The English rule that crimes could be tried only in the county where they occurred set the stage for constitutional territoriality, and, though the classical law of nations let sovereigns punish citizens for acts abroad upon their return home, the principle of exclusive sovereign authority over the legality of local acts contributed to American federalism, too.

A. England Tried Crimes in the County Where They Were Committed.

Criminal law and territoriality have been connected since at least the ancient Roman Code of Justinian.[26] Medieval jurists developed choice-of-

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not have jurisdiction to prosecute a member of a Tribe for crimes taking place on the reservation); United States v. Wheeler, 435 U.S. 313, 322–30 (1978).

26. Simona Grossi, *Rethinking the Harmonization of Jurisdictional Rules*, 86 TUL. L. REV. 623, 634–37 (2012); JOSEPH STORY, CONFLICT OF LAWS 12 (Charles C. Little & James Brown, eds., 3d ed., 1846) (citing material printed at 1 THE DIGEST OF JUSTINIAN bk. 2, tit. 1, l. 20 (Alan Watson ed., rev'd ed., 1998) (discussing Roman *extra territorium* law)).

law doctrines requiring courts to apply the law of the jurisdiction where a crime allegedly took place.[27] Magna Carta required that cases be tried "in a certain fixed place" by "honest and law-worthy men of the neighbourhood."[28]

English courts came to apply localism very strictly, holding that if a person was fatally wounded in one county but died in another, neither could try the killer for murder.[29] Territoriality was required because jurors were expected to rely on their personal knowledge.[30] *Statutes* eventually provided that the county where harm was fully realized could try a crime.[31] However, territoriality remained the *common law's* "exclusive basis of criminal jurisdiction."[32]

B. Territoriality Was Part of the Law of Nations.

English law required strict territoriality even though every county applied the same criminal, procedural, and evidentiary laws and were subject to the same sovereign authority.[33] Still, international law doctrines were also part of early thinking about territoriality, although they were less important to American federalism than is often assumed. The law of nations allowed for people to be punished for crimes committed abroad upon their return home—a rule that generally does not hold within the American interstate context.[34] Despite this crucial difference, the law of nations is important background for American territoriality jurisprudence.

Emer de Vattel said sovereignty joined with territory conferred exclusive jurisdiction over crimes and exclusive authority to define local rights.[35] One British jurist described sovereignty as including "the exclusive decision of

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27. Grossi, *supra* note 26, at 635.

28. *Magna Carta* §§ 11, 14 (Nicholas Vincent trans., 2007), https://www.archives.gov/exhibits/featured-documents/magna-carta/translation.html [https://perma.cc/9MBG-XMZB].

29. Wendell Berge, *Criminal Jurisdiction and the Territorial Principle*, 30 MICH. L. REV. 238, 239 (1931).

30. Tyler v. People, 8 Mich. 320, 339 (1860) (Campbell, J., dissenting); *see also* David J. Bederman, *Compulsory Pilotage, Public Policy, and the Early Private International Law of Torts*, 64 TUL. L. REV. 1033, 1071 (1990).

31. Rollin M. Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS L.J. 1155, 1159–60 (1971).

32. *Id.* at 1163.

33. Commonwealth v. Uprichard, 69 Mass. 434, 436 (1855).

34. *See* Perkins, *supra* note 31, at 1156.

35. STORY, *supra* note 26, at 12–13 (citing EMER DE VATTEL, THE LAW OF NATIONS bk. 2, ch. 7, §§ 84–85).

what [people] shall be free or not free to do" within a territory.[36] Otherwise, "differing legal consequences might be annexed to the same act, rendering it both lawful and unlawful."[37] English courts held that criminals were punished only if they violated the laws of the place where the act occurred, even describing this as "the law of all civilized nations."[38]

Colonial and Founding-era American law are discussed below, but an early international law treatment of extraterritoriality came in the U.S. Supreme Court's 1825 decision in *The Antelope*.[39] That case concerned a Spanish slave ship seized by privateers and brought into port in the United States.[40] The Court held that no country can "execute the penal laws of another," so the lawfulness of the capture depended on Spanish law.[41] While the case arose on the open seas and did not involve conflicting territorial sovereignties, the Court held that every sovereign had to respect others' decisions as to what they would legalize and none could "prescribe a rule for others, none can make a law of nations; and [the slave trade] remains lawful to those whose governments have not forbidden it."[42]

Justice Story agreed that territoriality limits jurisdiction, noting that different nations have "many variances in their institutions, customs, laws, and polity."[43] Law had to specify the reach of sovereigns' powers or else "utter confusion" would result.[44] One basic norm: a sovereign's laws lacked "intrinsic force" outside of its territory.[45] Every sovereign "gives the supreme law within its own dominions on all subjects appertaining to its sovereignty."[46] No sovereign could "regulate either persons or things not

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36. Berge, *supra* note 29, at 241 (quoting JOHN WESTLAKE, THE COLLECTED PAPERS OF JOHN WESTLAKE ON PUBLIC INTERNATIONAL LAW 126 (L. Oppenheim ed., 1914)).

37. *Id.* (quoting CHARLES CHENEY HYDE, INTERNATIONAL LAW AS INTERPRETED AND APPLIED BY THE UNITED STATES 386 (1922)); *cf.* Joost Blom, *Whither Choice of Law? A Look at Canada and Australia*, 12 WILLAMETTE J. INT'L L. & DISP. RES. 211, 222 (2004) (noting that nineteenth-century tort law allowed for extraterritorial tort claims "only if the claim was actionable according to English law and 'not justifiable' according to the law of the place where the tort was committed.").

38. State v. Ellis, 3 Conn. 185, 190 (1819) (Peters, J., dissenting) (quoting Mure v. Kaye [1811] 128 Eng. Rep. 239, 243).

39. The Antelope, 23 U.S. (10 Wheat.) 66 (1825).

40. *Id.* at 67.

41. *Id.* at 118, 123.

42. *Id.* at 122.

43. STORY, *supra* note 26, at 1.

44. *Id.* at 9.

45. *Id.* at 11.

46. *Id.* at 12.

within its own territory."[47] Holding otherwise would mean making different sovereigns' powers concurrent, which would be absurd.[48] Any sovereign who tried to regulate behavior abroad could be disobeyed.[49] Each had an exclusive right to regulate persons and things within its territory.[50] This rule applied even in cases of great moral disagreement: Story observed that the laws of "heathen nations" could be "totally repugnant" to Christian justice—even authorizing "despotic cruelty over persons" and "crushing" the vulnerable.[51]

These norms limited each sovereign's criminal jurisdiction. The common law saw "crimes as altogether local, and cognizable and punishable exclusively in the country, where they are committed."[52] Local law governed alleged crimes under both common law and the law of nations.[53] Early twentieth-century authorities, too, recognized that territorial sovereignty included "the exclusive decision of what [all persons] shall be free to do or not free to do there."[54] Wendell Berge concluded in 1931: "a crime can only be punished by the state wherein it occurs, which state's right to punish is exclusive."[55]

One major caveat: under the law of nations, sovereigns could punish people's conduct abroad once they returned home.[56] Still, the importance of sovereign territorial prerogatives, including to make things legal, is important background for American federalism.[57]

II. AMERICAN FEDERALISM STRENGTHENED THE TERRITORIALITY REQUIREMENT.

The federal Constitution transformed territoriality in two ways. It did not grant legislative authority to abrogate territoriality through statute, and it

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47. *Id.* at 30.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 36.
52. *Id.* at 1013; *see* also 1013 n.1 (citing Rafael v. Verelst [1779] 96 Eng. Rep. 579).
53. *Id.* at 1014–16 (citing Warrender v. Warrender [1835] 6 Eng. Rep. 1239, as well as Scottish and French authorities).
54. Berge, *supra* note 29, at 241 (quoting JOHN WESTLAKE, THE COLLECTED PAPERS OF JOHN WESTLAKE ON PUBLIC INTERNATIONAL LAW 126 (L. Oppenheim ed., 1914)).
55. *Id.*
56. STORY, *supra* note 26, at 33.
57. *See* Kaufman, *supra* note 9, at 363.

required of the American States greater respect for each other's exclusive prerogatives.

A. The U.S. Constitution Adopted Territoriality for Federal Criminal Proceedings.

Territoriality influenced the design of the federal government. In the late 1760s, Parliament revived a law of King Henry VIII allowing for treason to be tried by royal commissioners "in such shire of the realm" as they designated.[58] This was meant to combat Massachusetts tax protests.[59] Virginia's legislature protested that colonial defendants had the right to be tried locally.[60] However, Parliament soon extended the law to the destruction of military facilities and supplies, as well as to trials of Massachusetts law enforcement officials and tax collectors.[61] The first Continental Congress decried the first measure and Thomas Jefferson thought the second risked colonists' deportation for trials overseas.[62] The Founders loathed these measures for depriving the accused of local support.[63] Though no such trials actually happened in England, the Declaration of Independence condemned the King's "transporting us beyond Seas to be tried for pretended offences."[64]

With this history in mind, the Framers required in Article III that federal criminal trials be held "in the State where the said Crimes shall have been committed" (the Venue Clause).[65] Additionally, the Sixth Amendment required juries to be selected from "the State and district wherein the crime shall have been committed" (the Vicinage Clause).[66] Neither provision directly addresses state criminal territoriality (and the U.S. Supreme Court has not held that either applies to state prosecutions), but both imply

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58. Kershen, *Vicinage I*, *supra* note 20, at 805–06.

59. *Id.* at 806.

60. *Id.* (citing William W. Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59, 63 (1944)).

61. *Id.* at 806–07.

62. *Id.* at 807.

63. Kaufman, *supra* note 9, at 366.

64. THE DECLARATION OF INDEPENDENCE para. 21 (U.S. 1776); Paul Mogin, *"Fundamental Since Our Country's Founding":* United States v. Auernheimer *and the Sixth Amendment Right to Be Tried in the District in Which the Alleged Crime Was Committed*, 6 U. DENV. CRIM. L. REV. 37, 41 (2016).

65. Kaufman, *supra* note 9, at 365 (quoting U.S. CONST. art. III, § 2).

66. *Id.* (quoting U.S. CONST. amend. VI).

territoriality as a norm.[67] Scholarship has identified self-governance as an important aspect of venue and vicinage.[68] These rules allow communities to determine what conduct to criminalize.[69] Additionally, Article III provides that crimes "not committed within any State" can be tried in a venue designated by Congress, which also received an enumerated power to "define and punish piracies and felonies committed on the high seas, and offenses against the law of nations."[70] The Constitution contains no similar provision concerning criminal venue as a general matter. This is indirect evidence that territoriality is stricter under constitutional federalism than it was under English law, where it could be altered by Parliament.

Also relevant to territoriality was the structure of the federal judiciary.[71] The Constitution did not directly establish any inferior courts and some Founders anticipated that federal crimes would be tried in courts of the states where they were committed.[72] For 200 years, starting with the Judiciary Act of 1789, federal district courts' criminal jurisdiction remained limited to their home states' territory.[73] Only in the late nineteenth century, due to the creation of intra-district divisions, did the U.S. Supreme Court distinguish between federal criminal jurisdiction and venue.[74] Kershen

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67. Kershen, *Vicinage I*, *supra* note 20, at 830 (noting the territoriality-based assumption "that the place of trial and the place from which the jurors were to be selected were the identical place"); *id.* at 832 n.107 ("A jury of the vicinage is . . . from the place of the commission of the crime . . . ."); Bradford, *supra* note 18, at 137; Lindsay Farmer, *Territorial Jurisdiction and Criminalization*, 63 U. TORONTO L.J. 225, 233 (2013) (noting territoriality's common law origins in vicinage).

68. Kershen, *Vicinage I*, *supra* note 20, at 843.

69. *Id.* at 839.

70. U.S. CONST. art. I, § 8; *id.* art. III, § 2, cl. 3; *see also* Alberto Luis Zippi, *Immunity v. Universal Jurisdiction: The Yerodia Ndombasi Decision of the International Court of Justice*, 63 LA. L. REV. 309, 331–36 (2003) (discussing the modern development of universal jurisdiction for crimes against the law of nations, such as war crimes); Johan D. van der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 FORDHAM INT'L L.J. 286, 332–36 (1999). Concerning modern foreign extraterritoriality, see Section IV.D below and 15A MOORE'S FEDERAL PRACTICE – CIVIL, *Presumption against Extraterritoriality*, § 104.21A (2025).

71. *Cf.* ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 178–79 (2010) (discussing the centrality to early federalism of jurisdictional disputes). *But see* Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084, 1098–99 (2011) (book review) (criticizing LaCroix's argument).

72. Kershen, *Vicinage I*, *supra* note 20, at 812.

73. *Id.* at 812, 846; Kershen, *Vicinage—Part II*, *supra* note 20, at 3; *see also* United States v. Ta-wan-ga-ca, 28 F. Cas. 18, 19 (D. Ark. 1836) (No. 16,435).

74. Kershen, *Vicinage—Part II*, *supra* note 20, at 5 (citing Rosencrans v. United States, 165 U.S. 257 (1897); Post v. United States, 161 U.S. 583 (1896); Logan v. United States, 144 U.S. 263 (1892)).

summarizes: "Find the court with jurisdiction over the crime by finding the place where the crime was committed . . . ."[75] For the Founders and nineteenth-century Americans, he concludes, "no other test aside from the place where the crime was committed would have been compatible with" the Constitution.[76]

B. Early Federal Jurisprudence Was Ambiguous as to State Criminal Territoriality.

What about state criminal territoriality? Story described conflict-of-laws rules as being of their greatest importance in the United States due to its system of "distinct states, and in some respects independent states."[77] Determining just how independent the states were proved difficult for early federal jurists due to disagreements about the nature of the American Union. Was the federal Constitution a treaty enacted by independent states, the legal foundation of a sovereign nation, or a hybrid?[78] Thomas Jefferson believed the states were akin to sovereigns governed by the law of nations.[79] James Madison viewed federalism as "a mixture" of sovereign states and national union.[80] John Marshall and James Wilson believed the new country was fully unified.[81]

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75. *Id*. at 8; *see also Ex parte* Crow Dog (*Ex parte* Kan-gi-shun-ca), 109 U.S. 556, 559 (1883); United States v. Wood, 28 F. Cas. 755, 761 (Washington, Circuit Justice, C.C.D. Pa. 1818) (No. 16,757) (invalidating a federal indictment that did not specify which of a state's two judicial districts was the crime's site).

76. Kershen, *Vicinage I*, *supra* note 20, at 812.

77. STORY, *supra* note 26, at 13; *accord* Michael J. Zydney Mannheimer, *Three-Dimensional Dual Sovereignty: Observations on the Shortcomings of* Gamble v. United States, 53 TEX. TECH L. REV. 67, 72 (2020) (writing that the common law "addressed the relations between fully independent states and applied reflexively to the then-new Federal Republic. As Justice Kennedy so evocatively put it: 'Federalism was our Nation's own discovery. The Framers split the atom of sovereignty.'") (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)); Laycock, *supra* note 13, at 250 ("Choice of law takes on a whole new significance in . . . a [federalist] nation.").

78. Jud Campbell, *Four Views of the Nature of the Union*, 47 HARV. J.L. & PUB. POL'Y 13, 17 (2024).

79. *Id.* at 17–21.

80. *Id.* at 23 (quoting THE FEDERALIST NO. 39 (James Madison); Letter from James Madison to Edward Everett (Aug. 28, 1830), *in* 9 WRITINGS OF JAMES MADISON 383–84 (Gaillard Hunt ed., 1910)).

81. *Id*. at 26–31 (quoting Thomas Jefferson, *Notes of Proceedings in the Continental Congress* (July 30–Aug. 1, 1776), *in* 1 THE PAPERS OF THOMAS JEFFERSON 309, 327 (Julian P. Boyd ed., 1950) (remarks of Rep. Wilson)).

These differences affected the role of the law of nations in interpreting the Constitution.[82] One delegate to the 1787 Constitutional Convention evidently assumed an international model for interstate relations would apply, proposing that the text should deny travelers immunity from criminal prosecutions outside their home states.[83] Early U.S. Supreme Court precedent did not definitively resolve the question of state criminal extraterritoriality. Some antebellum opinions applied international law. Coequal state sovereignty forbade "concurrent power in two distinct sovereignties to regulate the same thing."[84] No state could "draw within its jurisdiction objects which lie beyond it."[85] States held every power "necessary to their internal government."[86] Each had "exclusive[]" power to decide "all internal matters."[87] They held the police power "exclusively" and acted "within [their respective] sphere."[88] Although these opinions analogized between interstate and international relations, no Supreme Court decision held that a state could punish its citizens for acts committed in another state where these were legal.

Other authorities thought territoriality needed to be adjusted to constitutional federalism. Madison wrote that interstate extradition to wherever a crime was committed was needed because without it, wrongdoers "cannot be punished at all."[89] He also assumed that a state could not "punish its citizens for extraterritorial wrongs."[90] In 1791,

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82. *Id.* at 36; Jonathan Gienapp, *The Federalist Constitution: In Search of Nationhood at Its Founding*, 89 FORDHAM L. REV. 1783, 1804–09 (2021).

83. Kershen, *Vicinage I*, *supra* note 20, at 811 n.27 (citing I J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 177 (1836)).

84. Smith v. Turner (The Passenger Cases), 48 U.S. 283, 399 (1849) (McLean, J., concurring).

85. *Id.* at 408.

86. *Id.* at 424; *accord* State v. Anonymous, 2 N.C. 28, 32 (Super. Ct. L. & Eq. 1794) ("[W]here the [state constitutional] Convention are declaring the rights of the people, and use the words of the Magna Charta of England, . . . they declare that the people of this state ought to have the sole and exclusive right of regulating the internal government and police thereof . . . .").

87. Thurlow v. Massachusetts (The License Cases), 46 U.S. 504, 588 (1847) (McLean, J., concurring), *overruled by* Leisy v. Hardin, 135 U.S. 100 (1890).

88. *Id.* at 632 (Grier, J., concurring); *accord* Lane Cnty. v. Oregon, 74 U.S. 71, 76 (1869) ("[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence.").

89. Kreimer, *supra* note 22, at 976 n.12 (quoting Letter from James Madison to Edmund Randolph (Mar. 10, 1784), *reprinted in* 4 THE FOUNDERS' CONSTITUTION 517 (Philip B. Kurland & Ralph Lerner eds., 1987)).

90. *Id.*

Pennsylvania demanded the extradition of three Virginians who kidnapped and enslaved a free Black Pennsylvanian.[91] Virginia protested that Pennsylvania had no authority over Virginia citizens.[92] U.S. Attorney General Edmund Randolph (coincidentally, Virginia's former governor) responded that "the crime is cognizable in Pennsylvania; for crimes are peculiarly of a local nature."[93] President Washington (also a Virginian) and Congress then enacted interstate extradition legislation.[94] In 1832, a U.S. Supreme Court justice noted that while every state holds "the right of sovereignty, commensurate with her territory," this is limited by the Supremacy Clause within federal enclaves and for Indian tribes.[95] In 1849, two justices wrote that constitutional interpretation required considering federalism.[96]

The 1859 decision in *Ableman v. Booth* showcased this approach.[97] The Court held that the Constitution was designed "mainly to secure union and harmony" among the states.[98] The states thus had to yield some of their sovereignty to the federal government.[99] Constitutional federalism implied limits on state sovereignty.[100] The Court could adjudicate interstate boundary disputes so that these would not cause civil war.[101] It also decided

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91. 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, 466 (1992); *see also* California v. Super. Ct. of Cal., 482 U.S. 400, 406 (1987).

92. Kreimer, *supra* note 91, at 466.

93. *Id.* at 466 n.49 (citing William R. Leslie, *A Study in the Origins of Interstate Rendition: The Big Beaver Creek Murders*, 57 AM. HIST. REV. 63, 72 (1951)).

94. *Id.* at 466. The Constitution requires state extradition, and although this provision is not self-executing, the U.S. Supreme Court has looked to the early legislation as "a contemporary construction" of the Constitution. Roberts v. Reilly, 116 U.S. 80, 94 (1885); *see also* U.S. CONST. art. IV, § 2, cl. 2; Kentucky v. Dennison, 65 U.S. 66, 104–09 (1861), *overturned on other grounds by* Puerto Rico v. Branstad, 483 U.S. 219 (1987); *cf.* ARTICLES OF CONFEDERATION OF 1777, art. IV, § 2, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/articles-of-confederation [https://perma.cc/MDA4-UJ29] (requiring interstate extradition).

95. Worcester v. Georgia, 31 U.S. 515, 591 (1832) (M'Lean, J., concurring).

96. *See* Smith v. Turner (The Passenger Cases), 48 U.S. 283, 449 (1849) (Catron, J., concurring); *see also id.* at 422 (Wayne, J., concurring) (describing extraterritoriality as a "partial right of sovereignty" excluded by federalism).

97. Ableman v. Booth, 62 U.S. 506, 517 (1859).

98. *Id.*

99. *Id.*

100. *Accord* Milwaukee Cnty. v. M. E. White Co., 296 U.S. 268, 276–77 (1935) ("The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation . . . .").

101. *Ableman*, 62 U.S. at 519.

intergovernmental controversies in order to preserve "internal tranquility."[102] While nations could resort to military force, the states were bound by the Constitution.[103] Federal defendants were thus subject to exclusive federal jurisdiction with which no state could interfere (in *Ableman*, by granting state habeas corpus to a man who was being held in federal custody after helping a fugitive slave escape from a U.S. marshal).[104] The reason: no state court could exceed its constitutionally allowed jurisdiction.[105] Federalism, then, transformed the authority states might otherwise enjoy.

A decade—and a Civil War waged over the nature of the American nation—later, the Court affirmed in a civil suit that America was a "Union," not a "league of States," and held that attaching travelers' home-state laws to them as they traveled would mean "an extra-territorial operation would be given to local legislation utterly destructive of the independence and the harmony of the States."[106] Interstate travelers were subject solely to the civil laws of the states they were in.[107]

One might have thought this was the end of the international law model of constitutional federalism, especially given the Union victory over the Confederacy, but the Court frequently returned to international law through the end of the nineteenth century. In the landmark jurisdiction case *Pennoyer v. Neff*, the Court cited the law of nations for the rule that state civil extraterritorial jurisdiction is limited, then continued that each state's independence implies exclusive powers.[108] Each could determine the "rights

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102. *Id.* at 520–21.

103. *Id.* at 521, 524.

104. *Id.* at 507, 513–14, 523.

105. *Id.* at 524 (referring also to the Supremacy Clause, U.S. CONST. art. VI, cl. 2).

106. Paul v. Virginia, 75 U.S. 168, 180–81 (1869); *see also* Kreimer, *supra* note 22, at 976 n.13 (citing *Paul*, 75 U.S. 168). For a recent decision applying a federalism-specific approach, see Franchise Tax Bd. v. Hyatt, 587 U.S. 230, 237–38, 245–46 (2019). For a modern decision instead emphasizing state sovereignty, see Heath v. Alabama, 474 U.S. 82, 89 (1985).

As this article was nearing finalization, the Supreme Court issued an opinion strongly distinguishing national from state sovereignty in the course of distinguishing Fifth Amendment due process limits on civil jurisdiction from those arising under the Fourteenth Amendment. *Fuld v. Palestinian Liberation Org.*, 606 U.S. 1 (2025). Whether this approach will become predominant remains to be seen. Concurring in the judgment, Justice Thomas characterized early state court decisions limiting personal jurisdiction as concerned with the law of nations rather than American constitutional law, a framing the present author thinks is too strong a dichotomy. *Id.* at 36–38 (Thomas, J., concurring).

107. *See Paul*, 75 U.S. at 180–81.

108. Pennoyer v. Neff, 95 U.S. 714, 722 (1877).

and obligations arising from them" touching on local people and property.[109] They could resolve claims against non-residents by seizing local property, but if there was none, "there [was] nothing upon which the tribunals [could] adjudicate."[110]State courts lacked jurisdiction outside of state territory.

An 1881 decision held that a state's creation conferred upon it criminal jurisdiction over the people in its territory.[111] In 1888, the Court cited the general rule that "the penal laws of a country do not reach beyond its own territory."[112] It quoted Lord Kames: "The proper place for punishment is where the crime is committed, and no society takes concern in any crime but what is hurtful to itself."[113] Then, in 1892, the Court cited the international law rule that crimes are "local, and the jurisdiction of crimes is local," so they "can only be defined, prosecuted, and pardoned by the sovereign authority of that State; and the authorities . . . of other States take no action with regard to them, except by way of extradition."[114] Crimes could be tried only "in the country where they were committed."[115]

Early U.S. Supreme Court precedent never coalesced into a single approach. Some justices analogized states to sovereign nations. International law did deem territoriality important, but it also let nations punish citizens upon their return home. That said, while arguments from silence are risky, no justice cited this rule in the context of interstate travelers.[116] What is more, a number of justices thought constitutional federalism required seeing states as sisters and not as fully separate sovereigns, an approach better aligned with territoriality limits.[117] In early federal precedent, "the differences between interstate and international criminal jurisdictional problems" were arguably "as significant, if not more so, than the similarities."[118]

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109. *Id.*

110. *Id.* at 723–24.

111. United States v. McBratney, 104 U.S. 621, 624 (1881).

112. Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 289 (1888).

113. *Id.* at 291 (quoting 2 HENRY HOME KAMES, PRINCIPLES OF EQUITY 326 (3d ed. 2014) (1778)).

114. Huntington v. Attrill, 146 U.S. 657, 669 (1892) (quoting Rafael v. Verelst [1776] 96 Eng. Rep. 621, 622).

115. *Id.* at 681.

116. *Cf.* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 435 (2017) (raising an argument from silence).

117. Brown overlooks this in relying on international law. *See* Brown, *supra* note 2, at 860–65.

118. Daniel L. Rotenberg, *Extraterritorial Legislative Jurisdiction and the State Criminal Law*, 38 TEX. L. REV. 763, 768 n.20 (1960); *cf*. Fuld v. Palestine Liberation Org., 606 U.S. 1, 16 (2025) ("Because the State and Federal Governments occupy categorically different sovereign

C. A Consensus of Early State Jurisprudence Reflected Territoriality.

Crucially, however, a near-consensus of state courts held that crimes were punishable only where they occurred. Like their colonial predecessors, state courts "felt themselves perfectly free to pick and choose which parts of English common law they would adopt."[119] Criminal territoriality was embraced all but universally. Several colonial governing documents required vicinage.[120] Even before the federal Constitution's ratification, four state constitutions—New Hampshire, Georgia, Maryland, and Massachusetts—imposed venue requirements.[121]

Judicial precedent arose very early after Independence. In 1799, the North Carolina Supreme Court invalidated a law directing the state to prosecute counterfeiters in neighboring states.[122] Holding that the states are "independent sovereignties," the court continued that crimes "are punishable only by the jurisdiction of that State where they arise."[123] Each state's authority is based on the consent of its citizens and those travelers who choose to enter it, so no state can punish "crimes committed in another State, the citizens of which, while they remain there, are bound to regulate their . . . conduct only according to their own laws."[124] The court did not expressly mention North Carolina's powers over its own citizens traveling abroad, but it was concerned "lest our own citizens should be harassed" by other states for acts that were legal within its borders.[125] Concerned to ensure that people were not prosecuted for "acts which are not criminal in the State where committed," the court thought it "better to yield up the offender to the laws of his own State than, by inflicting a punishment under the exercise of a doubtful jurisdiction, furnish a precedent for a sister State to legislate against acts committed by our own citizens, and within the limits of our own territory."[126]

Likewise, in 1817, the highest New York court held that criminal laws lack extraterritorial effect because they "are strictly local, and affect nothing

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spheres, we decline to import the Fourteenth Amendment [due process civil personal jurisdiction] standard into the Fifth Amendment.").

119. Rogers v. Tennessee, 532 U.S. 451, 475 (2001) (Scalia, J., dissenting).

120. Bradford, *supra* note 18, at 138 (citing seventeenth-century examples from West New Jersey and Virginia).

121. Kershen, *Vicinage I*, *supra* note 20, at 807.

122. State v. Knight, 1 N.C. (Tay.) 143**,** 143 (1799).

123. *Id.* at 144.

124. *Id.*

125. *Id.* at 145.

126. *Id.*

more than they can reach."[127] Two years later, Chancellor Kent held that "wheresoever a crime has been committed, the criminal is punishable according to the *lex loci* [law of the place]."[128] In 1819, a dissenting Connecticut justice recognized territoriality as a requirement of American common law.[129] In 1855, the Massachusetts Supreme Court held in a criminal case that states are "sovereign and independent," but within federalism, each should understand the others as more akin to fellow English counties than foreign nations.[130] Criminal laws "are essentially local, and limited to the boundaries of the state prescribing them."[131] The Maine Supreme Court agreed three years later.[132]

States continued to apply this rule as the Civil War approached and then passed. In 1860, a dissenting Michigan justice wrote that states cannot protect their citizens from prosecutions by other states, not even by formally protesting.[133] In 1862, the Pennsylvania Supreme Court held (in an election-interference case discussed further in Section IV.B below) that states "are not foreign countries to us" and each has "no more power to legislate over a sister state . . . than we would have to legislative for France or England."[134] By 1881, the North Carolina Supreme Court found it "so plain a proposition" that an act committed elsewhere "is no violation of the criminal law of this State" as to need no elaboration.[135]

Virginia was the one outlier. In 1819, its supreme court held, by analogy to foreign extraterritoriality, that the commonwealth could punish a horse theft committed by one Virginian against another in the District of Columbia.[136] While the District is not a state, as late as 1895, Virginia courts affirmed that the states are "as foreign to each other as each State is to foreign governments," and so rejected an attempt to prosecute under

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127. Scoville v. Canfield, 14 Johns. 338, 340 (N.Y. 1817) (citing Foliot v. Ogden [1789] 126 Eng. Rep. 75, 82).

128. *In re* Washburn, 4 Johns. Ch. 106, 111 (N.Y. Ch. Ct. 1819) (quoting Mure v. Kaye [1811] 128 Eng. Rep. 239, 241).

129. State v. Ellis, 3 Conn. 185, 189 (1819) (Peters, J., dissenting).

130. Commonwealth v. Uprichard, 69 Mass. 434, 438 (1855) (Shaw, C.J.). Contrary to Grossi's account, then, American conflict of laws rules have roots in both European law and English common law. Grossi, *supra* note 26, at 637.

131. *Uprichard*, 69 Mass. at 439.

132. State v. Underwood, 49 Me. 181, 186 (1858).

133. Tyler v. People, 8 Mich. 320, 342 (1860) (Campbell, J., dissenting).

134. Commonwealth v. Kunzmann, 41 Pa. 429, 438–39 (1862).

135. State v. Barnett, 83 N.C. 615, 616 (1880) (per curiam).

136. Commonwealth v. Gaines, 4 Va. 172, 176–77, 181 (1819), *abrogated by statute as recognized by* Howell v. Commonwealth, 187 Va. 34, 38–39 (1948). *Gaines* is relied upon by Rosen, *Pluralism*, *supra* note 13, at 719 n.28.

common law "one who steals property in another State and brings it within our borders."[137] Virginia alone among the States saw no distinction between American states and foreign countries.[138]

The near unanimity to the contrary is reflected in Thomas Cooley's post-Civil War treatise on constitutional limits on state government.[139] He wrote that states have "supreme, absolute, and uncontrollable power . . . within their respective territorial limits."[140] However, their legislative power could be exercised only inside their borders.[141] They generally could not "make laws by which people outside the State must govern their actions."[142] In particular, they could not "provide for the punishment as crimes of acts committed beyond the State boundary, because such acts, if offences at all, must be offences against the sovereignty within whose limits they have been done."[143] Any prosecution lacking the authority of the local law "is a wrong done to the State" where an act occurred.[144] State jurisprudence required territoriality.

III. CONSTITUTIONAL FEDERALISM IMPLIES STATE CRIMINAL TERRITORIALITY.

Historical state court decisions and the federal Constitution presuppose that "each state's sovereignty over activities within its boundaries exclude[s] the sovereignty of other states."[145] This reflects a real constitutional limit on state criminal power, not simply historical practice, as shown by U.S. Supreme Court precedent and scholarly commentary.

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137. Strouther v. Commonwealth, 92 Va. 789, 792 (1895); *see also* Doane v. Commonwealth, 218 Va. 500, 502 (1977) (noting Virginia's allowing of venue in any county where goods were taken, but only if they were stolen in Virginia).

138. Brown cites *Gaines* without noting its outlier status. *See* Brown, *supra* note 2, at 870 n.68; *see also* Bradford, *supra* note 18, at 98.

139. THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS (2d ed., 1871); *see also* Rotenberg, *supra* note 118, at 769 (citing DAVID RORER, AMERICAN INTER-STATE LAW 228 (1879); 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW §§ 120–21 (4th ed. 1868) (1856)).

140. COOLEY, *supra* note 139, at 2.

141. *Id.* at 127–28.

142. *Id.* at 127.

143. *Id.*

144. *Id.* at 398.

145. Kreimer, *supra* note 91, at 464.

A. The U.S. Supreme Court Recognizes Rules Implicit in Constitutional Federalism.

The U.S. Supreme Court has recognized rules of federalism that are implicit in the Constitution. As early as 1819's watershed decision *McCulloch v. Maryland*, Chief Justice Marshall looked to "no express provision" concerning federalism, but instead "a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds."[146] He continued that constitutional federalism protects the country "from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down, what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy, what there is a right in another to preserve."[147]

During Reconstruction, the Court reaffirmed that constitutional federalism entails "the preservation of the States, and the maintenance of their governments."[148] State sovereignty is protected horizontally from other states as well as vertically from the federal government: "[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence."[149]

At the end of the nineteenth century, the Court held that states are subject to suit by the federal government by way of constitutional implication: "[T]he permanence of the Union might be endangered if to some tribunal was not [e]ntrusted the power to determine [federal-state disputes] according to the recognized principles of law."[150] In 1934, the Court held: "Behind the words of the constitutional provisions are postulates which limit and control."[151]

The modern Court recognizes state sovereign immunity because "the Constitution's structure, and its history, and the authoritative interpretations" of the Court's precedent show that it "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution."[152] States retain their "inviolable sovereignty," as

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146. 17 U.S. 316, 426 (1819).
147. *Id.* at 430.
148. Texas v. White, 74 U.S. 700, 725 (1868).
149. Lane Cnty. v. Oregon, 74 U.S. 71, 76 (1868).
150. United States v. Texas, 143 U.S. 621, 645 (1892).
151. Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934).
152. Alden v. Maine, 527 U.S. 706, 713 (1999).

confirmed by the Tenth Amendment.[153] However, each one's right "implie[s] a limitation on the sovereignty of all of its sister States—a limitation express or implicit" in the Constitution.[154] "State sovereign authority is bounded by the States' respective borders" and "in view of the relation of the States to each other in the Federal Union."[155] One relevant limit is that a state cannot "apply its own law to interstate disputes" in a variety of contexts.[156]

Critical to sovereign immunity jurisprudence is "the practice [and] the understanding that prevailed in the States at the time the Constitution was adopted."[157] The Court has looked to the way "the Constitution's text, across [different provisions], strongly suggests" federalism rules.[158] Also relevant are "evidence of the original understanding of the Constitution, early congressional practice, [and] the structure of the Constitution itself."[159]

A structural approach based on the general principle of divided sovereignty has also led the Court to block Congress from commandeering state governments.[160] This rule arises in "historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of th[e] Court."[161] Likewise, the Court frequently resolves state-border disputes using unwritten constitutional rules.[162]

Both "[t]he text and the structure of the Constitution protect various rights and principles," including some derived from common law.[163] In assessing whether a state has yielded sovereignty, the Court considers what the States implicitly consented to as part of the "plan of the Convention, which is shorthand for the structure of the original Constitution itself."[164] The Court has described a state's control of its own "fundamental political

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153. *Id.* at 713–15 (quoting THE FEDERALIST No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)); *accord* Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996).

154. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980).

155. Fuld v. Palestinian Liberation Org., 606 U.S. 1, 14 (2025) (quoting Burnet v. Brooks, 288 U.S. 378, 401 (1933)).

156. Franchise Tax Bd. v. Hyatt, 587 U.S. 230, 246 (2019).

157. *Alden*, 527 U.S. at 721.

158. Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580, 590 (2022).

159. *Id.* at 610 (Thomas, J., dissenting) (citations and internal quotation marks omitted).

160. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 577 (2012).

161. Printz v. United States, 521 U.S. 898, 905 (1997); *see also* New York v. United States, 505 U.S. 144, 188 (1992).

162. Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1817 (2012).

163. Alden v. Maine, 527 U.S. 706, 733 (1999).

164. PennEast Pipeline Co. v. New Jersey, 594 U.S. 482, 500 (2021) (quotation marks omitted) (citing *Alden*, 527 U.S. at 728) (discussing eminent domain).

processes" as being "at the heart of the political accountability so essential to our liberty and republican form of government."[165] These basic assumptions are constitutionally binding, even if not explicitly stated in the Constitution's text.[166]

B. Recent Scholarship Recognizes Rules Implicit in Constitutional Federalism.

Rules implicit in constitutional federalism have drawn scholarly attention as well. William Baude has written that textualism's rise has triggered awareness that legal text "is incomplete."[167] It has to be supplemented by "attention to our entire legal framework"—including "unwritten law," the "background principles against which interpretation takes place."[168] This approach has historical pedigree.[169] It authorizes inquiry into first principles, custom, and other sources of law.[170] Baude, Jud Campbell, and Stephen Sachs have termed these "general law."[171] "[T]his shared body of unwritten law was not derived from any enactment by a single sovereign," but "by common practice and consent among a number of sovereigns" across the historical Anglo-American milieu.[172] General law comes from common law, equity, the law of nations, and other sources.[173]

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165. *Alden*, 527 U.S. at 751 (discussing the federal-state power division); *see also* Gregory v. Ashcroft, 501 U.S. 452, 461 (1991).

166. *See* U.S. CONST. amend. X (recognizing that powers not delegated to the federal government remain with the states).

167. William Baude, *The 2023 Scalia Lecture: Beyond Textualism?*, 46 HARV. J.L. & PUB. POL'Y 1331, 1336 (2023); *see also* Sherif Girgis, *Originalism's Age of Ironies*, 138 HARV. L. REV. F. 1, 19 (2024) ("Originalist Justices are grappling with the limits of original sources and the need to supplement them by something—traditions or judicially developed principles.").

168. Baude, *supra* note 167, at 1336.

169. *See id.* at 1344 ("How are judges to decide cases in cases that are not governed by statute? This art has been lost."); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 127 (2010) ("[F]ederal courts willingly applied substantive canons.").

170. Baude, *supra* note 167, at 1346–47.

171. William Baude et al., *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1190 (2024).

172. *Id.* (quoting William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984)); *see also id.* at 1194 (citing United States v. Burr, 25 F. Cas. 187, 188 (C.C.D. Va. 1807) (No. 14,694) (Marshall, Cir. J.)).

173. *Id.* at 1190 & nn.19–20 (collecting recent articles on general law and the Bill of Rights).

General law has been sidelined, partly due to positivism.[174] However, it long guided jurisprudence.[175] It also never entirely disappeared. Practices uniform at the time of the Founding have been understood to reflect the Constitution's original meaning.[176] There are still "constitutional 'backdrops': rules of law that aren't derivable from the Constitution's text, but instead are left unaltered by the text, and in fact are protected by the text from various kinds of legal change."[177] The Constitution "was enacted as part of a common law legal system" and should be interpreted using general law.[178]

Scholars also note the constitutional role of post-ratification traditions.[179] This "traditionalism" is controversial in the constitutional rights context, but widely accepted in separation of powers cases.[180] Longstanding practices can count as constitutional "liquidation," a notion that enjoys the dual weight of "Founding-era pedigree and stare decisis."[181] Liquidation also extends to federalism precedent, and indeed, "the archetypical example of liquidation was the controversy over the national bank."[182] Liquidation depends on the Constitution's meaning being originally indeterminate but then understood consistently by officials and the public over time.[183] It does not necessarily privilege early practices over ones arising at a later time when constitutional meaning still remained unsettled.[184] Liquidation may not be permanent where it is based on a misperception of constitutional

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174. *Id.* at 1195 ("To [Justice Oliver Wendell] Holmes, the common law was 'not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified.'") (quoting S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)); *see also id.* at 1250 (citing Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting) (criticizing general law as "often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject")).

175. *Id.* at 1196, 1199–1206.

176. William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 4, 61–62 (2019).

177. Sachs, *supra* note 162, at 1816.

178. *Id.* at 1818.

179. *See, e.g.*, Girgis, *supra* note 167, at 5.

180. *Id.* (discussing Justices Kavanaugh and Barrett); *see also* Symposium, Tradition in Constitutional Law, 46 HARV. J.L. & PUB. POL'Y 1331, 1336 (2023) (debating the role of tradition in constitutional law).

181. Girgis, *supra* note 167, at 6. The term "liquidation" is derived from THE FEDERALIST No. 37, at 225 (James Madison) (Clinton Rossiter ed., 1961), though other authorities of the Founding Era also relied on constitutional settlement. *Id.* at 4 n.25; Baude, *supra* note 176, at 4, 32–34. "Liquidation" could mean clarification back then. Baude, *supra* note 176, at 12.

182. Baude, *supra* note 176, at 49.

183. *Id.* at 16–17, 20.

184. *Id.* at 60.

indeterminacy, it has been replaced by other liquidation, or perhaps given extraordinarily strong reasons and sustained consensus-building.[185]

C. State Criminal Territoriality Is Implicit in Constitutional Federalism.

State criminal territoriality is a rule implicit in constitutional federalism. Sachs left open the question of whether the general law limits state extraterritoriality.[186] He agreed that general law cabins state jurisdiction territorially,[187] but questioned whether this rule was constitutional in nature.[188] The answer is yes. Territoriality has strong foundations in English common law, and while that system did not directly bind American colonies and states, most state constitutions had venue and jury-selection clauses akin to those found federally—some of which were interpreted to specifically limit criminal extraterritoriality.[189] As discussed above in Sections II.B and C, while early federal courts did not decide the permissibility of state criminal extraterritoriality, territoriality was recognized by nearly all state courts from Independence through the end of the nineteenth century.

"Even the grandest structural inference" must point to "some concrete manifestation in the constitutional text."[190] Multiple constitutional texts suggest state criminal territoriality. In addition to the Venue and Vicinage Clauses, states have to extradite criminal defendants "to the State having jurisdiction of the Crime"—though extradition is *not* required for extraterritorial prosecutions.[191] The Fugitive Slave Clause evidently assumed a default rule that states could free enslaved people traveling within their territory.[192] The Full Faith and Credit Clause assumes that borders limit state judicial power, and the modern Supreme Court has observed that this provision "does not require that sister States enforce a

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185. *Id.* at 53–59; Michael McConnell, *Lecture: Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1774 (2015).

186. Sachs, *supra* note 162, at 1876.

187. *Id.* (citing United States v. Bevans, 16 U.S. (3 Wheat.) 336, 387 (1818)).

188. *Id.* at 1874.

189. Leflar, *supra* note 13, at 46.

190. Regan, *supra* note 22, at 1895.

191. Kreimer, *supra* note 22, at 976 (citing U.S. CONST. art. IV, § 2, cl. 2); Brown, *supra* note 2, at 860; Alejandra Caraballo et al., *Extradition in Post*-Roe *America*, 26 CUNY L. REV. 1, 3 (2023) (noting 1850s state laws helping escaped slaves resist extradition).

192. Kreimer, *supra* note 22, at 976 n.13 (first citing Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 611 (1842); and then citing *Prigg*, 41 U.S. at 647 (Wayne, J., concurring)).

foreign *penal* judgment."[193] The Constitution and laws admitting States to the Union have always assumed coequal state sovereignty.[194] Article IV's Privileges and Immunities Clause presupposes that travelers are governed by local law.[195] The Tenth Amendment reserves powers "to the states *respectively*, or to the people."[196]

Other scholars strain to specifically ground territoriality in one or more of these provisions.[197] It is better to consider them as analogical support for it.[198] The case for state criminal territoriality being implicit in constitutional federalism is at least as strong as that justifying state sovereign immunity and the anti-commandeering doctrine. It is part of the general law adopted into the constitutional structure of American union.

Assuming it is not, then it is a liquidation of constitutional meaning. The federal Constitution's direct silence as to the issue could qualify as indeterminacy.[199] For well over a century after the Constitution's ratification, territoriality was understood by state courts and legal scholars as a binding limit on state criminal power.[200] That settlement has not become unsettled, replaced by another liquidation, or subjected to broad public skepticism. By way of either general law or liquidation, state criminal territoriality is part of constitutional federalism.[201]

Three decisions of the U.S. Supreme Court also suggest this. In 1909, the Court held that a state could not punish a regulatory crime committed

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193. Regan, *supra* note 22, at 1894 (emphasis added) (citing U.S. CONST. art. IV, § 1); Nelson v. George, 399 U.S. 224, 229 (1970); *see also* Corr, *supra* note 25, at 1225 (writing of the Full Faith and Credit Clause: "Binding the states together in a cooperative federal venture requires deference to one another's laws . . . .").

194. Laycock, *supra* note 12, at 288; *see also* U.S. CONST. art. IV, § 3, cl. 1; Coyle v. Smith, 221 U.S. 559, 567 (1911) ("The power is to admit 'new States into this Union.' 'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself.").

195. Kreimer, *supra* note 22, at 976 n.13; *see also* Thurlow v. Massachusetts (The License Cases), 46 U.S. 504, 585 (1847) (Taney, C.J., concurring) (arguing that states cannot confer U.S. citizenship because the Clause "operate[s] beyond the territory of the State, and compel[s] other States. . . ."), *overruled by* Leisy v. Hardin, 135 U.S. 100 (1890).

196. U.S. CONST. amend. X (emphasis added).

197. *See, e.g.*, sources cited *supra* note 13 and accompanying text.

198. *Cf.* Fuld v. Palestinian Liberation Org., 606 U.S. 1, 17 (2025) (describing the Due Process Clause as "an instrument of interstate federalism") (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980)).

199. *See* Baude, *supra* note 176, at 66–68.

200. Kaufman, *supra* note 9, at 353.

201. Baude, *supra* note 176 at 15.

within another's territory.[202] *Nielsen v. Oregon* concerned Oregon's prosecution of a man for using a purse fishing net on the Columbia River.[203] The man did so within Washington, which had granted him a license for that activity.[204] However, Congress had granted both states concurrent jurisdiction over the river (which marks the boundary between them).[205] The question was whether Oregon could "practically override" Washington's licensing authority.[206] The Court held that it could not.[207] It noted that the case involved a *malum prohibitum* (regulatory crime), not a *malum in se* (inherent crime).[208] Finding "little authority" on point, the Court held that an act done within a state's territory and with its positive permission could not be punished by another state.[209] However, the modern Court has held that *Nielsen* has "unusual facts and has continuing relevance, if it all, only to questions of jurisdiction between two entities deriving their concurrent jurisdiction from a single source of authority" (in *Nielsen*, the single source of authority was the federal statute assigning concurrent jurisdiction).[210]

This limitation notwithstanding, the modern Court has also used structural analysis to limit punitive *civil* extraterritoriality. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, a jury awarded punitive damages against an insurance company based on evidence concerning its policies across a number of states.[211] The Court reversed, holding that states generally cannot impose damages to punish a defendant for extraterritorial acts—regardless of whether these are lawful or unlawful.[212] A state cannot punish "conduct that *may have* been lawful where it occurred."[213] Nor can a jury "use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."[214] Though *State Farm* was decided under due process, it held that "[a] basic principle of

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202. Nielsen v. Oregon, 212 U.S. 315, 320–21 (1909).
203. *Id.* at 316.
204. *Id.* at 321.
205. *Id.* at 316.
206. *Id.* at 321.
207. *Id.*
208. *Id.* at 320.
209. *Id.* at 321.
210. Heath v. Alabama, 474 U.S. 82, 91 (1985).
211. 538 U.S. 408, 415 (2003).
212. *Id.* at 421–23. Writing before *State Farm*, Bradford was skeptical that the Court would limit states' own power (as opposed to that of the federal government) through constitutional federalism. Bradford, *supra* note 18, at 165–67.
213. *State Farm*, 538 U.S. at 421 (emphasis added).
214. *Id.* at 422.

federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."[215]

Lastly, in the First Amendment case *Bigelow v. Virginia*, the Court addressed extraterritoriality and abortion.[216] There, Virginia sought to enforce a criminal abortion-advertising ban against a notice placed in a Virginia newspaper by a New York abortion provider.[217] In rebuffing this attempt, the Court noted the legality of abortion under New York law, observing in dictum that Virginia "obviously could not have proscribed the activity" taking place there nor "prevent[ed] its residents from traveling to New York to obtain those services or as the State conceded, prosecute[d] them for going there."[218] The Court's dictum relied on right-to-travel precedent and the federal right to have an abortion.[219] However, it also observed: "A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."[220] *Bigelow* thus recognized in dicta that state criminal territoriality is one of the rules inhering in constitutional federalism.

IV. STATE CRIMINAL EXTRATERRITORIALITY IS CONSTITUTIONAL IN THREE SITUATIONS.

Territoriality is not an absolute requirement.[221] It contains three nuances or exceptions governing: (1) continuing and distinct crimes; (2) crimes against special state interests, with some conspiracies as a subset; and (3) crimes committed outside of any state.

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215. *Id.*; *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 603 (1996) ("Alabama does not have the power . . . to punish [a corporation] for conduct that was lawful where it occurred and that had no impact on Alabama or its residents.").

216. 421 U.S. 809, 835–36 (1975).

217. *Id.* at 811–12.

218. *Id.* at 823–24, 829 (dictum) (citations omitted).

219. *Id.* at 822–24 (first citing Doe v. Bolton, 410 U.S. 179 (1973); then Roe v. Wade, 410 U.S. 113 (1973); then Shapiro v. Thompson, 394 U.S. 618, 629–31 (1969); and then United States v. Guest, 383 U.S. 745, 757–59 (1966)).

220. *Id.* at 824.

221. *See* Farmer, *supra* note 67, at 241 (writing of territoriality that "the common law has primacy, [and] exceptions . . . do not disturb the underlying order").

A. Continuing and Distinct Crimes Nuance Territoriality.

Continuing crimes are those "begun, continued, or completed" in different jurisdictions (in the words of a modern federal statute; common law called these offenses "transitory").[222] Each such jurisdiction can prosecute the crime—and define where it occurs.[223] This nuance has its origins in English statutory law. To recall, at common law, a murder could not be prosecuted anywhere if the deadly injury was inflicted in one county but the victim died in another.[224] "[T]he grand jury in neither county could take cognizance of facts occurring in the other."[225] Parliament ultimately enacted a statute allowing for prosecution in the county where the victim died.[226] But venue here depended more on historical accident than principle—Parliament could just as logically have chosen to require trial wherever the injury was inflicted.[227]

This rule has survived, and it is less an exception to territoriality than a nuance in defining it.[228] Consider an 1860 murder case arising from the shooting of a ship passenger on the St. Clair River in Ontario.[229] The victim

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222. 18 U.S.C. § 3237(a); United States v. Saavedra, 223 F.3d 85, 88 (2d Cir. 2000); *see also* Brown, *supra* note 2, at 866 & n.56 (discussing MODEL PENAL CODE § 1.03(1)(a) (AM. L. INST. 1985) ("[A] person may be convicted under the law of this State of an offense committed by his own conduct . . . if . . . either the conduct that is an element of the offense *or the result* that is such an element *occurs within this State*.") (emphases added)); *cf.* Christopher L. Blakesley & Dan Stigall, *Wings for Talons: The Case for the Extraterritorial Jurisdiction Over Sexual Exploitation of Children Through Cyberspace*, 50 WAYNE L. REV. 109, 118 (2004) (noting that international law follows a similar definition). Extraterritorially punishing accessories to a crime occurring within a state fits logically within this category. *See, e.g.*, Berge, *supra* note 29, at 258–59 (discussing such laws).

223. The Supreme Court has reaffirmed its double-jeopardy precedent holding that different sovereigns can prosecute a defendant for the same conduct. U.S. CONST. amends. V, XIV; Gamble v. United States, 587 U.S. 678, 681–82 (2019).

224. Berge, *supra* note 29, at 239.

225. *Id.*

226. Perkins, *supra* note 31, at 1159–60.

227. *Id.*; *see also* WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 4.4(a) (3d ed.) (writing that common law holds "that each crime has only one situs (or locus), and that only the place of the situs has jurisdiction").

228. *See* Perkins, *supra* note 31, at 1165 (writing that a continuing crime "is not within the exclusive jurisdiction of another state since by definition it is done partly within the enacting state"); *see also* Albert Levitt, *Jurisdiction Over Crimes*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 316, 318 (1925) ("[Courts'] primary problem, so far as jurisdiction over criminal offenses is concerned, is to determine whether the gist of the offense occurred in such a place that they have the legal power to take cognizance of that offense."); *cf.* Regan, *supra* note 22, at 1886 (writing that assuming continuing crimes are illegal everywhere they are committed makes it "too easy" to "argue in favor of broad extraterritorial jurisdiction").

229. Tyler v. People, 8 Mich. 320, 320 (1860).

survived long enough to die in Michigan.[230] Michigan prosecuted the killer, who was Canadian.[231] A dissenting Michigan Supreme Court justice protested that this was impermissible extraterritoriality.[232] However, the majority held that the murder was completed only upon the victim's death in Michigan.[233] Had the victim survived, the defendant would have been liable only for assault and battery—and these acts, completed within Ontario, would have been punishable only by Canada.[234] The majority did not reject territoriality, it simply defined murder as being completed upon death.[235]

Notably, in 1926, Albert Levitt wrote that abortion initially followed this rule: "At other times the *consequence of* the act was held to be the gist of the offense, as in the case of an abortion, where the voiding of the foetus is the gist of the offense. Soon, however, it was seen that both act and consequence might be harmful to the territory in which either occurred . . . ."[236] The state where an abortion was induced or the one where it was completed could prosecute the act.

Three years after the St. Clair River murder case, the Michigan Supreme Court considered distinct but interrelated crimes—a larceny where the defendants broke into an Ontario store, then brought goods they stole across the border river into Detroit.[237] The same dissenter as in the murder case again criticized extraterritoriality.[238] However, the majority held that the defendants were not "on trial for what they did in Canada."[239] Only Canada could punish the taking of the goods, but because the defendants possessed

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230. *Id.* at 333–34.

231. *See id.* at 323, 331.

232. *Id.* at 347–48 (Campbell, J., dissenting).

233. *Id.* at 334 (majority opinion); Berge, *supra* note 29, at 242 ("[S]ome courts have sought to localize the whole crime in one state when only part of the constituent acts occurred there."); *cf.* Leflar, *supra* note 13, at 47 ("Even in prosecutions brought under interstate compacts or reciprocal statutes [governing] . . . boundary streams, the theory is that the forum state is enforcing its own law, made applicable by mutual agreement to the entire area . . . ."). Concerning interstate boundary rivers, see Nielsen v. Oregon, 212 U.S. 315 (1909) (discussed above); Wedding v. Meyler, 192 U.S. 573 (1904).

234. *Tyler*, 8 Mich. at 334.

235. *But cf.* Rosen, *Pluralism*, *supra* note 13, at 720 (citing as support for broad extraterritoriality an 1891 West Virginia statute providing for homicide venue along the lines of the Michigan decision).

236. Albert Levitt, *Jurisdiction over Crimes—II*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 495, 495 (1926).

237. Morrissey v. People, 11 Mich. 327, 328 (1863).

238. *Id.* at 336 (Campbell, J., dissenting).

239. *Id.* at 329 (majority opinion).

the goods in Michigan with no legal right to do so, they committed a separate larceny there.[240] This rule, derived from English common law, eventually became the majority American rule for larceny (and modern law recognizes the possession of stolen goods as a distinct crime[241]).[242] It was cited against territoriality objections.[243]

The outer limits of a state's authority to define what counts as the beginning and end of a crime are not clear from these historical authorities. However, they do treat territoriality as a limit on state powers and so do not support the notion that a state could prosecute a completed act by resorting to too-clever redefinitions of them as ongoing. The prosecution of continuing and distinct crimes is neatly compatible with historical territoriality rules.

B. Crimes Against Special State Interests Can Be Prosecuted Extraterritorially.

States can also extend their laws extraterritorially to crimes targeting certain special interests of theirs.[244] This exception should not be read too broadly. Brown calls the Model Penal Code "capacious" in allowing for extraterritorial prosecutions where "the conduct bears a reasonable relation to a *legitimate interest* of this State."[245] He thus concludes that states can likely prosecute abortions extraterritorially, a conclusion also reached by

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240. *Id.*; *accord* Worthington v. State, 58 Md. 403, 409 (1882) ("[O]ne State cannot enforce the criminal laws of another, but the act of bringing such stolen goods into this State is . . . a new larceny . . . .").

241. *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 550 (2001) (Rehnquist, C.J., dissenting).

242. People v. Scott, 15 P. 384, 385 (Cal. 1887); Commonwealth v. Kunzmann, 41 Pa. 429, 436 (1862); State v. Ellis, 3 Conn. 185, 187 (1819); Peaper v. State, 14 Md. App. 201, 207–08 (1972). *But see* Commonwealth v. Uprichard, 69 Mass. (3 Gray) 434, 437, 439 (1855) (holding that territoriality foreclosed prosecution for possessing goods stolen in Nova Scotia). Concerning the relationship between common law and colonial substantive criminal law, see Paul Samuel Reinsch, *The English Common Law in the Early American Colonies*, *in* 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 399, 402 (Ass'n Am. L. Schs. ed., 1907).

243. *Scott*, 15 P. at 385; *see also* Archer v. State, 7 N.E. 225, 227–28 (Ind. 1886) (collecting precedent discussing venue in continuing larceny and homicide cases).

244. This may be akin to the modern "focus" rule for international extraterritoriality. *See* William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389, 1396 (2020) (discussing RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 337 (2016)).

245. Brown, *supra* note 2, at 869 (quoting MODEL PENAL CODE § 1.03(1)(f)); *see also* Rosen, *Pluralism, supra* note 13, at 721 & nn.41–42 (noting that comment 6 to this part of the Model Penal Code bases the limitation only on due process).

other scholars.[246] However, Brown concedes that constitutional doctrines may limit such prosecutions.[247] As a commenter on the then-draft Code noted, its approach is "extremely liberal," drawing on and even surpassing "the most liberal statutes of all the states."[248] Indeed, the Code apparently exceeds the Constitution's territoriality rules.[249] Some state interests do authorize extraterritoriality, especially to prosecute acts against governing institutions and in-state property.[250] But this exception does not extend to ordinary crimes, much less acts made legal by the state where they occur.[251]

Consider two cases involving soldiers voting during the Civil War.[252] In 1862, Wisconsin let its Union soldiers vote wherever they were stationed.[253] A losing candidate challenged the law's constitutionality.[254] The state supreme court noted that Wisconsin could not extraterritorially regulate other states' citizens.[255] However, citizens owe their governments allegiance even when traveling abroad, and crimes against this duty can be punished upon their return home.[256] Extraterritoriality is allowed against "certain acts which are *peculiarly* injurious to [a state's] rights or interests, or those of its citizens."[257] These include treason and interference with the state's commerce or peaceful relations.[258] States could punish such offenses because "it is purely a question between the state and its own citizens, and the act is one which would probably constitute no offense whatever against the laws of the state where committed."[259]

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246. Brown, *supra* note 2, at 871; Cohen et al., *supra* note 2, at 31–32.

247. Brown, *supra* note 2, at 870.

248. Rotenberg, *supra* note 118, at 770.

249. *See* Brown, *supra* note 2, at 870 (conceding that constitutional doctrines may limit extraterritoriality); Rotenberg, *supra* note 118, at 770 (critiquing the Model Penal Code's "extremely liberal" approach).

250. Dodge, *supra* note 244, at 1396 (drawing on the "focus" test and state interests).

251. *See* Bigelow v. Virginia, 421 U.S. 809, 824–29 (1975).

252. The first is cited by Brown in support of broad extraterritoriality. *See* Brown, *supra* note 2, at 870 n.68.

253. State *ex rel.* Chandler v. Main, 16 Wis. 398, 411 (1863).

254. *Id.*

255. *Id.* at 412.

256. *Id.* at 419–20.

257. *Id.* at 420 (emphasis added) (quoting People v. Tyler, 7 Mich. 161, 221 (1859) (Christiancy, J., concurring)). This second *Tyler* case involves the same St. Clair River murder discussed above.

258. *Id.* at 420–21.

259. *Id.* at 421.

Similar analysis is found in a contemporary Pennsylvania decision.[260] In 1861, Pennsylvania held an election at a District of Columbia military camp.[261] A non-U.S. citizen allegedly participated fraudulently.[262] The Pennsylvania Supreme Court acknowledged that a Pennsylvanian who voted illegally would be liable to punishment upon returning home, but the Commonwealth lacked jurisdiction over a non-citizen abroad.[263] One justice would have gone further, saying not even Pennsylvanians could be tried in-state for offenses committed elsewhere.[264]

Wayne LaFave cites an early election-related case from Kentucky's highest court as authority for the principle that extraterritoriality may be available when "necessary to defeat subterfuges"— such as when two state residents cross a border to avoid a ban on gambling or dueling.[265] As LaFave notes, though, the case he cites involved *election* betting, and indeed, the court noted that the law's purpose was to "protect the purity of the elective franchise, and to secure perfect freedom and impartiality in the exercise of this inestimable right."[266] The court did express concern that "betting can easily be conducted" by stepping across state lines.[267] However, it is not clear that the court was referring to non-political wagers, as the only other gambling precedent it cited also concerned election betting.[268] The court's other three citations concerned an inter-municipality line within Kentucky (a context not involving sovereignty, as municipalities are creatures of states[269]) and an interstate border river (but pre-dating *Nielsen v. Oregon*).[270] One of these cases defined the purchase of illegal alcohol aboard a river vessel as a continuing crime complete "on the Kentucky shore, where it was begun, and where it was consummated."[271] Early precedent following this authority involved a *de minimis* crossing of the

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260. Commonwealth v. Kunzmann, 41 Pa. 429, 429 (1862).

261. *Id.* at 435.

262. *Id.* at 436.

263. *Id.* at 438.

264. *Id.* at 440–41 (Read, J., concurring).

265. LAFAVE, *supra* note 221, § 4.4(a) (citing Commonwealth v. Crass, 203 S.W. 708 (Ky. 1918)).

266. *See id.*; *Crass*, 203 S.W. at 708.

267. *Crass*, 203 S.W. at 709.

268. *See id.* at 709 (citing Brand v. Commonwealth, 63 S.W. 31 (Ky. 1901)).

269. *See, e.g.*, Walker v. Richmond, 189 S.W. 1122, 1124 (Ky. 1916).

270. *See also Crass*, 203 S.W. at 708–09 (citing Lemore v. Commonwealth, 105 S.W. 930 (Ky. 1907); Merritt v. Commonwealth, 92 S.W. 611 (Ky. 1906); Commonwealth v. Adair, 89 S.W. 1130 (Ky. 1906)).

271. *Lemore*, 105 S.W. at 931.

state line—twenty feet into Tennessee where illegal liquor had been placed on the ground—and did not mention whether the act was legal where it occurred.[272] This smattering of cases does not support broad state criminal extraterritoriality, but rather, a narrow state special interests exception.

To be sure, not all special state interests concern elections or public-contract fraud (which is discussed in the next section).[273] Levitt noted that classically, every sovereign can "protect his own territory" from acts "harmful or likely to prove harmful to the persons or property within the territory."[274] However, this broad formulation assumes that a "territorial unit is looked upon as being self-sufficient, self-protecting, and unconnected with any other territorial unit."[275] This is not true of the States within constitutional federalism. As the U.S. Supreme Court reaffirmed in 2007: "When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions . . . ."[276]

The category of special interests authorizing extraterritoriality, then, is limited. As the Michigan Supreme Court held in 1859, a state cannot simply "punish foreign crimes": its people "can not complain until they are injured, and they can not be injured by any act done abroad by strangers. The coming of a person within the jurisdiction can not change his previous foreign acts into injuries against this state or its authorities."[277] Similarly, in 1904, the Arkansas Supreme Court reversed the conviction of a Missourian for letting his cattle run loose in Arkansas.[278] Arkansas "has no power to punish a resident of Missouri for a lawful act done in that state"—even if the defendant knew the cattle were likely to cross the state line—because it "cannot compel" Missourians to follow a law their own state had not

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272. Huddleston v. Commonwealth, 188 S.W. 398, 399 (Ky. 1916); *see also* W. Calvin Dickinson, *Temperance*, TENN. ENCYCLOPEDIA (Mar. 1, 2018), https://tennesseeencyclopedia.net/entries/temperance [https://perma.cc/LC2F-E2ZM].

273. *See* Hanks v. State, 13 Tex. Ct. App. 289, 309 (1882) (holding that a forgery affecting title to in-state lands could be prosecuted extraterritorially); Rosen, *Pluralism*, *supra* note 13 at 720 (discussing extraterritorial interference with in-state property and marriages).

274. Levitt, *supra* note 236, at 495. Many of the extraterritorial acts that can threaten in-state persons also qualify as continuing crimes. *See supra* Section IV.A.

275. Levitt, *supra* note 236, at 496.

276. Massachusetts v. EPA, 549 U.S. 497, 519 (2007) (citation omitted). *But cf.* Francis Wharton, *Extra-Territorial Crime*, 4 SO. L. REV. 676, 700 (1878) (envisioning, in an article about both American federalism and international law, that a state can protect its people's "life, safety, and property" extraterritorially—even through armed invasion).

277. Bromley v. People, 7 Mich. 472, 477 (1859).

278. Beattie v. State, 84 S.W. 477, 477 (Ark. 1904).

enacted.[279] This was a borderline decision, given the immediate threat to Arkansas property, so it only further illustrates that few state interests authorize criminal extraterritoriality. It also confirms that states cannot extraterritorially prosecute acts made legal by the state where they occur.[280]

States can protect things and people within their territories—not their citizens' persons or property located elsewhere. The special state interests exception extends to acts threatening government institutions, property, and persons remaining in a state—not acts against citizens during their stay in another state, and especially not to acts that are legal where they occur.[281]

C. Conspiracies Against Special State Interests Can Be Prosecuted Extraterritorially.

The reasoning of the Wisconsin and Pennsylvania courts concerning special state interests was adopted by the U.S. Supreme Court in the 1911 decision *Strassheim v. Daily*.[282] There, the Court held that acts "intended to produce and producing detrimental effects within" a state justify extraterritoriality.[283] However, the context was akin to that of the cases above: the defendant attempted to defraud the prosecuting state's government.[284] What is more, the defendant committed "material steps in the scheme" inside the target state, thereby committing a continuing crime as well.[285]

Mark Rosen cites *Strassheim* for the idea that states have "presumptive extraterritorial power."[286] This conclusion is too broad. Rosen thinks the main constitutional limit on extraterritoriality comes from due process, backed by the dormant Commerce Clause, the Privileges and Immunities Clause, and the right to travel.[287] For him, *Strassheim*, foreign extraterritoriality, and Virginia's early precedent support sweeping state

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279. *Id.*

280. *Cf.* Gabriel J. Chin, *Policy, Preemption, and Pot: Extraterritorial Citizen Jurisdiction*, 58 B.C. L. REV. 929, 940 (2017) (arriving at this conclusion through interest-balancing).

281. There may also be a special state interest in enforcing certain legal duties owed within the state. Fallon, *supra* note 15, at 631 & n.86 (discussing child support); LAFAVE, *supra* note 227, § 4.4(a); *cf.* Interstate Comm'n for Adult Offender Supervision, *supra* note 25.

282. 221 U.S. 280 (1911).

283. *Id.* at 285.

284. *Id.* at 284–85.

285. *Id.* at 285.

286. Rosen, *Pluralism*, *supra* note 13, at 720.

287. *Id.* at 717–18.

extraterritoriality.[288] As noted above in Section II.C, though, Virginia was an outlier, and as discussed below, foreign extraterritoriality is exceptional. Neither does *Strassheim* support Rosen's view.[289] Rather, it illustrates nuances of territoriality for conspiracy law. At common law, a conspiracy could be tried in any county where an overt act furthering it was committed.[290] The conspiracy at issue in *Strassheim* featured acts illegal where they were committed that targeted the prosecuting state's government.[291] As the Supreme Court held in *Hyde v. United States*, a 1912 case about a San Francisco-based conspiracy to defraud a federal agency located in the District of Columbia, a legislature can define "what shall constitute the offense of conspiracy or when it shall be considered complete," just like other continuing crimes.[292]

Justice Holmes dissented in *Hyde* on territoriality grounds, but like the dissenting Michigan justice in the homicide and larceny cases discussed above, he differed from the majority mainly in how he defined the offense: he considered conspiracy to happen only where the planning occurred.[293] Curiously, he authored the Court's *Strassheim* opinion just a year before *Hyde*, writing in the earlier case that the defendant did not need to have "set foot" within the prosecuting state.[294] His *Hyde* dissent cited his earlier opinion for the conclusion that a target state "is very likely" to say it will punish a conspirator "if it can catch him . . . although he was not subject to its laws when he did the act."[295] However, Justice Holmes concluded that venue had to be in the site of the planning.[296] The Justices' dispute in *Hyde* was only about the substantive definition of conspiracy.[297] Conspiracy does

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288. *Id.* at 717–19.

289. *See also id.* at 721–23 (citing civil precedent and First Amendment precedent holding that the federal government can consider state laws in awarding interstate radio licenses); *see also* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 360 (2021) (discussing permissible state civil jurisdiction).

290. Hyde v. United States, 225 U.S. 347, 365 (1912) (citing 1 JOHN FREDERICK ARCHBOLD, A COMPLETE PRACTICAL TREATISE ON CRIMINAL PROCEDURE, PLEADING AND EVIDENCE, IN INDICTABLE CASES 226 (8th ed. 1877)).

291. Strassheim v. Daily, 221 U.S. 280, 281–82 (1911); *cf.* Caraballo et al., *supra* note 191, at 43–45 (discussing the "dual criminality" rule, which can limit international extradition to "crimes regarded as serious in both states" and so "honors differential viewpoints").

292. 225 U.S. at 364.

293. *Id.* at 390 (Holmes, J., dissenting).

294. *Strassheim*, 221 U.S. at 284–85.

295. *Hyde*, 225 U.S. at 386 (Holmes, J., dissenting) (citing *Strassheim*, 221 U.S. at 285).

296. *Id.* at 391 (quoting Regina v. Best, 1 Salk. 174 (1705)).

297. *Cf.* People v. Adams, 3 Denio 190, 210 (N.Y. 1846) (applying an agency theory of liability to fraud: "This in no sense affirms or implies an extension of our laws beyond the

present doctrinal complications.[298] However, these cases' holdings extend only far enough to support state prosecutions of conspiracies against their special interests and those that occur partly within their territories.

D. Crimes Committed Outside Any State Can Be Prosecuted Extraterritorially.

Another exception exists for offenses committed outside any state. Article III lets Congress designate venue for federal varieties of such crimes, some of which were punished not under the common law but under the law of nations.[299] The Constitution acknowledges the difference by giving Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[300]

The U.S. Supreme Court considered state foreign criminal extraterritoriality in 1941's *Skiriotes v. Florida*, which featured a state prosecution for deep-sea sponge-diving.[301] The Court followed historic international law in holding that the United States as a whole can punish its citizens upon their return home for offenses "upon the high seas or even in foreign countries *when the rights of other nations or their nationals are not infringed*."[302] This was because citizens owe their home countries certain

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territorial limits of the State. . . . What [the defendant] did in Ohio was not, nor could it be, an infraction of our law or a crime against this State. He was indicted for what was done here, and done by himself. True, the defendant was not personally within this State, but he was here in purpose and design, and acted by his authorized agents."); LAFAVE, *supra* note 227, § 4.4(a) (noting that at common law, an accessory before the fact who does not act within a state is not subject to its jurisdiction, though this rule has been statutorily modified in many states).

298. *See also* LAFAVE, *supra* note 227, § 4.4(a) ("Courts have experienced some difficulty in determining the situs of inchoate offenses, such as attempt and conspiracy.").

299. U.S. CONST. art. III, § 2, cl. 3; *see also* Jones v. United States, 137 U.S. 202, 211 (1890); United States v. Dawson, 56 U.S. 467, 488 (1853) ("A crime . . . committed against the laws of the United States, out of the limits of a State, is not local, but may be tried at such place as Congress shall designate by law."); Perkins, *supra* note 31, at 1156 (discussing piracy).

300. U.S. CONST. art. I, § 8, cl. 10; *cf.* Fuld v. Palestine Liberation Org., 606 U.S. 1, 15 (2025) ("[I]nterstate federalism concerns, . . . do not apply to limitations under the Fifth Amendment upon the power of the Federal Government and the corollary authority of the federal courts. The Constitution confers upon the Federal Government—and it alone—both nationwide and extraterritorial authority."); *id.* at 25–26 (Thomas, J., concurring) (finding no constitutional limits on "federal courts' extraterritorial jurisdiction").

301. 313 U.S. 69, 69–70 (1941). Earlier authorities assumed that only the federal government could exercise foreign extraterritoriality. *See* Perkins, *supra* note 31, at 1163 & n.47 (citing RESTATEMENT (FIRST) OF CONFLICT OF L. § 63 (AM. L. INST. 1934); People v. Merrill, 2 Parker's Crim. Rep. 590, 602 (N.Y. Gen. Term 1855)).

302. *Skiriotes*, 313 U.S. at 73 (emphasis added).

duties while abroad.[303] They have to refrain from acts that "are directly injurious to the government, and are capable of perpetration without regard to particular locality."[304] Nothing in American law restricted enforcement of these duties to the federal government.[305] Besides, Florida had an interest in maintaining its sponge fishery.[306]

Skiriotes reflected an exception for acts committed outside any state. The Court relied on its earlier holding in *The Hamilton*, which specified that under international law, "the bare fact of the parties being outside the territory, in a place belonging to no other sovereign, would not limit the authority of the state."[307] The rule from the classical law of nations evidently survives: a state can prosecute a resident who returns home after committing an act outside of any state.

However, LaFave summarily and incorrectly concludes that *Skiriotes* authorizes interstate extraterritoriality.[308] Offenses committed abroad do not implicate interstate constitutional federalism, which keeps states from "destroying the rights of other states, and at the same time saving their rights from destruction by the other states."[309] Other scholars agree. Levitt observed that some courts "have jurisdiction over offenses committed anywhere within the territory belonging to their sovereign"—distinguishing this from extraterritorial jurisdiction over treason, conspiracy, and crimes on the high seas.[310] Rollin Perkins noted that the foreign-extraterritoriality exception notwithstanding, "no state may punish its citizen for what he does in the exclusive territorial jurisdiction of another state where what was done

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303. *Id.*

304. *Id.* at 73–74.

305. *Id.* at 74–75.

306. *Id.* at 75.

307. 207 U.S. 398, 403 (1907) (cited approvingly by *Skiriotes*, 313 U.S. at 77–79); *see also* Leflar, *supra* note 13, at 50 ("Probably forum state citizenship alone would be too little if the defendant citizen's act were done in a sister state, so that the sister state's law could be deemed to govern it.").

308. LAFAVE, *supra* note 227, § 4.4(c)(2).

309. United States v. Bennett, 232 U.S. 299, 306 (1914); *cf.* Fuld v. Palestine Liberation Org., 606 U.S. 1, 15 (2025) ("While 'the limitations of the Constitution are barriers bordering the States and preventing them from transcending the limits of their authority,' there is no equivalent 'ground for constructing an imaginary constitutional barrier around the exterior confines of the United States for the purpose of shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty.'") (quoting *Bennett*, 232 U.S. at 306).

310. Levitt, *supra* note 228, at 316, 320, 322–23.

was lawful."[311] Brown concurs that "*Skiriotes* offered no clue" concerning a state citizen who "acts in *another state's* territory."[312]

What is more, this foreign-acts exception is preempted whenever it interferes with constitutional federalism. In *American Insurance Association v. Garamendi*, the Supreme Court considered the constitutionality of a state law requiring disclosures about Holocaust-era insurance policies.[313] The federal government had entered into international agreements that the state law arguably undermined.[314] The Court held that there is "no question" that state sovereignty must yield to constitutional federalism.[315] The state law was preempted because there was a "sufficiently clear conflict" with another sovereign's constitutional authority.[316] Though this case concerned a state-federal conflict, it supports subordinating the foreign extraterritoriality exception to constitutional federalism.[317] None of the categories discussed in this section undermine the general territoriality requirement. That rule is not absolute, but it is robust.

V. TERRITORIALITY DETERMINES MODERN CONTROVERSIES.

State criminal extraterritoriality could potentially affect a wide range of activities:

> In the absence of constitutional constraint, not only may Pennsylvania prosecute its citizens for obtaining abortions in New Jersey, but New Jersey might punish its residents for hiring surrogate mothers in Pennsylvania. . . . while Missouri might interfere with its citizens' efforts to take advantage of a right to die in Minnesota. California could prosecute its citizens for harassing women at abortion clinics in Utah, and Utah in turn could press

311. Perkins, *supra* note 31, at 1164 (summarily citing the Full Faith and Credit Clause).

312. Brown, *supra* note 2, at 870.

313. 539 U.S. 396 (2003).

314. *Id.* at 413.

315. *Id.*

316. *Id.* at 420.

317. *See also* United States v. Lozoya, 982 F.3d 648, 651–52 (9th Cir. 2020) (en banc) (holding navigable airspace to be outside of any state for purposes of federal criminal venue); *accord id.* at 658–60 (Ikuta, J., dissenting in part and concurring in part). Similarly, "some conduct or result of conduct must still occur within the state." *See* LAFAVE, *supra* note 227, § 4.4(b).

> charges against Utah residents for smoking marijuana in Alaska, or drinking alcohol and reading pornography in Nevada.[318]

Three recent extraterritoriality flashpoints are abortion, cybercrime, and election interference. States cannot prosecute abortions happening in other states, but they can forbid some related activity. Territoriality restricts cybercrime prosecutions to the states where computers or people are located. Territoriality is compatible with states prosecuting election interference undertaken abroad.

A. Extraterritorial Abortions Cannot Be Prosecuted, but Some Related Acts Can Be.

States cannot prosecute citizens upon returning home from undergoing extraterritorial abortions. Abortion need not be a continuing crime—no part of it need occur in a citizen's home state. The special state interests exception does not include killing a state citizen (even assuming a state seeking to prosecute treats abortion as criminal homicide).[319] An abortion committed elsewhere is not an act against a state's governing institutions.[320] Nor is it an act against property or a person remaining inside the prosecuting state. An abortion committed in another state does not fit within the foreign extraterritoriality exception.[321] (And states cannot prosecute as inchoate crimes acts facilitating an abortion that will ultimately take place in a state where that act is legal, due to the defense of pure legal impossibility.[322])

A special case is presented by Idaho Code Ann. § 18-623(1), (3), which criminalizes transporting a minor to receive an abortion abroad without parental consent. *Dobbs* held that laws regulating abortion are subject to

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318. Kreimer, *supra* note 91, at 462.

319. *See* discussion *supra* Section IV.B; Matthew P. Cavedon, *The Admissibility of Christian Pro-Life Politics*, CANOPY F. (Oct. 19, 2022), https://canopyforum.org/2022/10/19/the-admissibility-of-christian-pro-life-politics [https://perma.cc/LM4B-DF6R] (defending this understanding of abortion).

320. *See* discussion *supra* Section IV.B.

321. *See* discussion *supra* Section IV.D. *But see* Christina Cauterucci, *If You Can't Get an Abortion on Land, Can You Get One on a Boat?*, SLATE (July 14, 2022), https://slate.com/news-and-politics/2022/07/abortion-care-boat-gulf-of-mexico.html [https://perma.cc/LXU7-VM6Z].

322. *See* discussion *supra* Section IV.C; Anthony Michael Kreis, *Prison Gates at the State Line*, HARV. L. REV. BLOG (Mar. 28, 2022), https://harvardlawreview.org/blog/2022/03/prison-gates-at-the-state-line [https://perma.cc/2TTC-HCBH] ("Lawmakers cannot throw roadblocks in the way of their residents who want nothing more than to take advantage of the benefits of national citizenship with the aid of other citizens.").

rational-basis review.[323] Even during the *Roe* era, the U.S. Supreme Court upheld an abortion parental-notification law because parents could legitimately advise their daughter about "religious or moral implications" and give "needed guidance and counsel."[324] However, that case depended on the availability of a judicial bypass procedure.[325] Whether that precedent remains valid after *Dobbs* is unclear. So is whether a minor still has some constitutional right to an otherwise-legal abortion without parental consent and, if so, under what conditions. These questions appear to be relevant to territoriality. After all, protecting in-state family interests is why child support can be enforced extraterritorially.[326]

Other kinds of extraterritorial abortion prosecutions are likely impermissible, even if the abortion is *illegal* in the state where it occurs. To be sure, cases involving extraterritoriality over public-contract fraud have noted the illegality of those acts where they happened.[327] However, such prosecutions also involve continuing and distinct crimes and crimes against special state interests.[328] Other cases have held that the mere fact that an act is illegal where it occurs does not support extraterritoriality.[329]

That said, territoriality limits are at their apex when one state seeks to prosecute an act that is *legal* in the state where it occurs.[330] Extraterritoriality cannot extend to abortions in states where that act is legal.[331] This is true no matter the moral urgency with which the prosecuting state views abortion.[332]

Territoriality is the best framework for assessing abortion limits in the interstate context. Other doctrines, such as the dormant Commerce Clause and Full Faith and Credit Clause, call for interest-balancing, which raises

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323. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 301 (2022).

324. Hodgson v. Minnesota, 497 U.S. 417, 448–49 (1990) (Stevens, J.).

325. *Id.* at 457 (plurality opinion).

326. *See* Fallon, *supra* note 15, at 631 & n.86 (explaining that protecting in-state family interests justifies extraterritorial enforcement of child support obligations); LAFAVE, *supra* note 227, § 4.4(a). Similar issues arise in the context of California's law trying to block enforcement of other states' extraterritorial criminal laws limiting minors' gender transitions. *See* CAL. PENAL CODE § 819(a)–(c).

327. *See* cases cited *supra* Section IV.C.

328. *See* discussion *supra* Section IV.A–B.

329. *See* cases cited *supra* Section IV.B.

330. *See* discussion *supra* Section IV.B–D.

331. *See* Perkins, *supra* note 31, at 1164 ("[N]o state may punish its citizen for what he does in the exclusive territorial jurisdiction of another state where what was done was lawful.").

332. *See* STORY, *supra* note 26, at 36 (defending international law limits on extraterritoriality even where other nations allow "totally repugnant" acts, such as "despotic cruelty" and "crushing" the weak).

justiciability questions.[333] Many people believe abortion rights are indispensable to bodily autonomy and women's equality.[334] Many others believe abortion takes a human life.[335] Still others "think that abortion should be allowed under some but not all circumstances."[336] These interests are not easily commensurate and the Supreme Court may doubt judges' ability and authority to "balance" them.[337] Besides, some originalists reject the dormant Commerce Clause altogether.[338] Some also criticize modern right-to-travel doctrine as threatening to "become yet another convenient tool for inventing new rights."[339] The entire notion of unenumerated rights is suspect for some jurists.[340] The original meaning of the Privileges and Immunities Clause is debated.[341] By contrast, rules derived from constitutional federalism can be more legitimate and accepted.[342] Justice

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333. *See* Franchise Tax Bd. v. Hyatt, 578 U.S. 171, 179 (2016) (eschewing "a complex balancing-of-interests approach" to the Full Faith and Credit Clause, but still inquiring into state policy interests) (citation and internal quotation marks omitted); Pike v. Bruce Church, Inc., 397 U.S. 137, 141–42 (1970).

334. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 224 (2022).

335. *See id.* at 223–24.

336. *Id.* at 224–25.

337. *Cf.* Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 382 (2023) (plurality opinion) ("Some might reasonably find one set of concerns more compelling. Others might fairly disagree. How should we settle that dispute? . . . Your guess is as good as ours."); Luis v. United States, 578 U.S. 5, 24–25, 33 (2016) (Thomas, J., concurring) (looking to constitutional text and common law, instead of attempting to balance purportedly incommensurate values); Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 360 (2008) (Scalia, J., concurring in part) ("[C]ourts are less well suited . . . to perform this kind of balancing in every case. The burdens and the benefits are always incommensurate, and cannot be placed on the opposite balances of a scale without assigning a policy-based weight to each of them. It is a matter not of weighing apples against apples, but of deciding whether three apples are better than six tangerines."); Oregon v. Mitchell, 400 U.S. 112, 206–07 (1970) (Harlan, J., concurring in part and dissenting in part) ("Where the balance is to be struck depends ultimately on the values and the perspective of the decisionmaker . . . . [J]udgments of the sort involved here are beyond the institutional competence and constitutional authority of the judiciary.").

338. *See* Vikram David Amar, *Business and Constitutional Originalism in the Roberts Court*, 49 SANTA CLARA L. REV. 979, 989–90 (2009) (discussing the views of Justices Scalia and Thomas).

339. Saenz v. Roe, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting, joined by Rehnquist, C.J.).

340. *See, e.g.*, *Dobbs*, 597 U.S. at 333–34 (Thomas, J., concurring).

341. *See, e.g.*, RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT (2021); KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP (2014).

342. *See, e.g.*, Franchise Tax Bd. v. Hyatt, 578 U.S. 171, 247–48 (2016) (Thomas, J.) (criticizing "ahistorical literalism" because many constitutional doctrines "are not spelled out in

Gorsuch even recently called territorial criminal sovereignty in the tribal context one of "the most essential attributes of sovereignty."[343]

Territoriality does not forbid all state efforts to limit interstate abortion. Abortion can be a continuing crime if someone starts the procedure elsewhere before returning home for it to finish.[344] Telehealth counseling is legally considered to take place wherever the patient is.[345] Sending abortion-inducing drugs could be considered part of a continuing crime of in-state abortion.[346] Shipping abortion drugs to a recipient also affects the safety of an in-state person, assuming a state considers a preborn life to be one.[347] Such prosecutions may meet with other legal obstacles: federal preemption, state "shield" laws thwarting extraterritorial enforcement, and non-territoriality constitutional rules like personal jurisdiction, the right to travel, Privileges and Immunities, and the Full Faith and Credit Clause.[348] Territoriality, though, would not stand in the way. Territoriality yields varying results in the interstate abortion context, but it provides a persuasive and clear way of assessing this.

B. States Where People or Computers Are Located Can Prosecute Cybercrimes.

The internet is nearly as unmoored from specific territory as anything can be. Nevertheless, cybercrime does not require a complete departure from territoriality.[349] As the Third Circuit has held, "cybercrimes do not happen in some metaphysical location that justifies disregarding

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the Constitution but are nevertheless implicit in its structure and supported by historical practice").

343. Oklahoma v. Castro-Huerta, 597 U.S. 629, 668 (2022) (Gorsuch, J., dissenting).

344. *See* MacCarthy, *supra* note 5, at 2273; Levitt, *supra* note 236, at 495.

345. David S. Cohen et al., *Abortion Pills*, 76 STAN. L. REV. 317, 356 (2024).

346. *See, e.g.*, J. David Goodman & Pam Belluck, *Texas Attorney General Sues New York Doctor for Mailing Abortion Pills*, N.Y. TIMES (Dec. 13, 2024), https://www.nytimes.com/2024/12/13/us/texas-new-york-abortion-pills-lawsuit.html.

347. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 257 (2022) (noting that Mississippi law considers abortion the taking of "the life of an unborn human being") (citation and internal quotation marks omitted).

348. *See* Cohen et al., *supra* note 2, at 6, 15, 42–71; *but see* Cohen et al., *supra* note 345, at 342–47 (noting the technical federal illegality of mailing abortion pills under the Comstock Act, 18 U.S.C. §§ 1461 & 1462(c), but also that this prohibition has long gone unenforced).

349. *Cf.* Jacob Taka Wall, Note, *Where to Prosecute Cybercrimes*, 17 DUKE L. & TECH. REV. 146, 160–61 (2019) (criticizing conventional territoriality rules as "nonsensical" in the cyberspace crimes context and recommending instead a "judicially-developed substantial contacts test").

constitutional limits on venue. People and computers still exist in identifiable places in the physical world."[350] Those places may be disparate, with elements of a crime strewn across "time and space" and the defendant located at a physical remove.[351] Still, such places can be identified. For instance, that court considered co-conspirators who were in California and Arkansas, illegally accessed computer servers in Texas and Georgia, and then leaked private subscriber email addresses to a reporter who was not in New Jersey.[352] The court held that New Jersey was not proper venue for a federal prosecution even though 4,500 out of the 114,000 leaked emails belonged to residents of that state.[353]

The court declined to rely on Second Circuit authority holding that venue should be determined using a "substantial contacts rule that takes into account a number of factors—the site of the defendant's acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of each district for accurate fact-finding."[354] It found no precedent holding that "the locus of the effects" alone establishes venue.[355] The court held that maintaining territoriality is especially important now that the internet's ubiquity tempts the government to "choose its forum free from any external constraints."[356]

The substantial-contacts test has been adopted by the Sixth Circuit, cited by the Seventh Circuit, adopted but then abandoned by the Fourth Circuit, and rejected by the Third and Tenth Circuits.[357] It should be rejected. Traditional limits on extraterritoriality have survived "the advent of railroad, express mail, the telegraph, the telephone, the automobile, air travel, and satellite communications."[358] The internet is not such a quantum leap forward as to require a constitutional amendment concerning territoriality—much less justify the equivalent of one through judicial

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350. United States v. Auernheimer, 748 F.3d 525, 541 (3d Cir. 2014).

351. United States v. Saavedra, 223 F.3d 85, 86 (2d Cir. 2000).

352. *Auernheimer*, 748 F.3d at 531.

353. *Id.* at 529, 536.

354. United States v. Reed, 773 F.2d 477, 481 (2d Cir. 1985); *Auernheimer*, 748 F.3d at 536–38.

355. *Auernheimer*, 748 F.3d at 537.

356. *Id.* at 541 (quotation marks omitted) (citing, *inter alia*, Travis v. United States, 364 U.S. 631, 634 (1961)). Compare this author's Brief of Cato Inst. as Amicus Curiae Supporting Petitioner, *Abouammo v. United States* (U.S. No. 25-5146).

357. *See* Mogin, *supra* note 64, at 49, 55; *see also* United States v. Mink, 9 F.4th 590, 601–02 (8th Cir. 2021) (citing *Auernheimer* favorably).

358. *Auernheimer*, 748 F.3d at 541.

invention. Longstanding rules can continue to protect constitutional federalism and defendants' rights, even in an electronic era.

C. States Can Prosecute Extraterritorial Interference with Their Elections.

Finally, territoriality supports extraterritoriality against election interference. Following the 2020 presidential election, Georgia charged then-former President Donald Trump and co-defendants with violating the state RICO (Racketeer Influenced and Corrupt Organizations) Act.[359] The Act provides for venue in any county where "an incident of racketeering occurred" or a relevant enterprise or property "is acquired or maintained."[360] The RICO charge was predicated partly on acts occurring in six states named in the indictment as well as the District of Columbia.[361] Charged extraterritorial acts included conversations, phone calls, emails, internet postings, and meetings.[362] Georgia alleged that these acts were part of a conspiracy intended to "unlawfully change the outcome of the election in favor of Trump."[363]

Even though many of these acts did not happen within Georgia, that state can prosecute them extraterritorially under the special state interests exception. As discussed in Section IV.B above, several of that exception's earliest cases concerned election interference. The protection of governing institutions is the paradigmatic special state interest that can be protected extraterritorially.[364] The Pennsylvania Supreme Court did disavow jurisdiction over a non-Pennsylvanian who wrongly participated in an extraterritorial state election.[365] However, *Strassheim* allowed Michigan to prosecute a man who defrauded its state government even if "he never had set foot in the State until after the fraud was complete," so long as his act was "intended to produce and producing detrimental effects within it."[366]

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359. *See* Indictment at 1, State v. Trump, No. 23SC188947 (Fulton Cnty. Super. Ct. Aug. 14, 2023), https://d3i6fh83elv35t.cloudfront.net/static/2023/08/CRIMINAL-INDICTMENT-Trump-Fulton-County-GA.pdf [https://perma.cc/D9SB-YV4N] (charging a violation of GA. CODE ANN. §16-14-4(c)).

360. GA. CODE ANN. §16-14-11.

361. Indictment, *supra* note 359, at 15, 21–24, 26–32, 35–37, 39, 43–46, 48–49, 52, 57–58, 60–64, 69.

362. *See id.*

363. *Id.* at 14.

364. *See* Strassheim v. Daily, 221 U.S. 280, 284–85 (1911)

365. Commonwealth v. Kunzmann, 41 Pa. 429, 438 (1862).

366. *Strassheim*, 221 U.S. at 284–85.

Hyde similarly held that defendants conspiring to commit fraud against a government agency could be prosecuted under a theory of "constructive presence."[367] The special state interests exception reaches the same conclusion without this legal fiction.

A question could arise should a state attempt to assert an interest in protecting the *federal* government, as precedent does not reveal whether a state can assert the special interests of *some other* sovereign.[368] However, as long as a state prosecutes people for interfering with its own electoral processes, it satisfies territoriality.

VI. CONCLUSION

Territory—the basis of political sovereignty—is "inseparable from the institution of criminal law."[369] Up until the twentieth century, both civil and criminal law followed strict territoriality requirements.[370] Civil jurisdiction has become bewilderingly complex.[371] But state criminal territoriality has remained a keystone, if an underappreciated one, of constitutional federalism.[372]

Territoriality is also an essential part of constitutional federalism.[373] It lets American adults vote with their feet as well as their ballots, traveling to

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367. Hyde v. United States, 225 U.S. 347, 362 (1912).

368. *See* Indictment, *supra* note 359, at 14 (containing language that could be read to charge the defendants with attempting to interfere with the entire national election).

369. *See* Farmer, *supra* note 67, at 241.

370. Chad DeVeaux, *Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause*, 79 GEO. WASH. L. REV. 995, 1037 (2011).

371. *Id.* at 1037–38.

372. Kaufman, *supra* note 9, at 357.

373. Rosen argues that Congress can abrogate this rule through the Fourteenth Amendment. Rosen, *Marijuana*, *supra* note 13, at 1022–23 (discussing U.S. CONST. amend. XIV, § 5). He claims support for the idea that "states have a legitimate interest in their citizens' out-of-state activities if such activities undermine legitimate state policy" from *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993). *See* Rosen, *Pluralism*, *supra* note 13, at 722. However, that case concerned only federal regulators' consideration of state laws in deciding whether to allow interstate lottery advertising. *Edge Broad. Co.*, 509 U.S. at 421. If anything, there might be a due process right *against* state criminal extraterritoriality. *See* Kreimer, *supra* note 22, at 979 (citing civil cases that "[w]ithin a decade after the Fourteenth Amendment's adoption in 1868, the Supreme Court began to read the territorial restrictions on state sovereignty into the definition of due process."); *cf.* Dan E. Stigall, *International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law*, 35 HASTINGS INT'L & COMPAR. L. REV. 323, 373 (2012) (noting due process limits on international criminal extraterritoriality).

exercise freedom in the ways they see fit.[374] It is especially important where "the basic moral commitments of the states differ."[375]

Territoriality unquestionably impairs the effectiveness of state laws.[376] In return, though, it "offers a continual challenge to justify the decision of the home state . . . and a security against the efforts of any faction to capture a state's authority in order to impose its own enthusiasms on unwilling minorities."[377] Pro-lifers would say abortion is a prime example of federalism shielding abuses. However, the proper remedy is correctly reinterpreting, or if necessary, amending, the Constitution—not jettisoning constitutional federalism.[378]

Justice Gorsuch recently asked, "why not allow Texas to enforce its laws in California? Few sovereigns or their citizens would see that as an improvement."[379] Good intentions do not mean a state can "impose its will on other states whose voters may have different priorities."[380] State criminal territoriality is a rule implicit in constitutional federalism. What happens in Vegas must be prosecuted by Nevada or by no state at all.

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374. *See* ILYA SOMIN, FREE TO MOVE: FOOT VOTING, MIGRATION, AND POLITICAL FREEDOM (rev. ed. 2020); Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 76 (2001).

375. Kreimer, *supra* note 14, at 916.

376. Rosen, *Marijuana*, *supra* note 13, at 1016; *see also* Rosen, *Extraterritoriality*, *supra* note 13, at 964 (arguing for the desirability of state criminal extraterritoriality).

377. Kreimer, *supra* note 22, at 982.

378. *See* People v. Merrill, 14 N.Y. 74, 75 (1856) (noting the trial court's grant of a demurrer to counts alleging that the defendant sold a New York man into slavery in the District of Columbia, and that the defendant did not challenge a count charging him with the in-New York kidnapping); Michael A. Taylor, *Abortion and Public Policy: Review of U.S. Catholic Bishops' Teaching and the Future*, 37 ISSUES L. & MED. 129, 138 (2022) (quoting a 1973 resolution of American Catholic bishops endorsing a pro-life constitutional amendment); Mary Ziegler, *The Politics of Constitutional Federalism*, 91 DENV. UNIV. L. REV. ONLINE 217, 221 (2014) (describing pre-*Roe* activism: "Much as the federal courts had identified a constitutional right for married couples to use contraception, antiabortion activists hoped that the federal courts would impose on the states a fundamental right to life.").

379. Oklahoma v. Castro-Huerta, 597 U.S. 629, 688 (2022) (Gorsuch, J., dissenting).

380. Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 MARQ. L. REV. 497, 526 (2016).