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WHAT HAPPENS IF ROE IS OVERRULED? EXTRATERRITORIAL REGULATION OF ABORTION BY THE STATES

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WHAT HAPPENS IF *ROE* IS OVERRULED? EXTRATERRITORIAL REGULATION OF ABORTION BY THE STATES*

C. Steven Bradford**

TABLE OF CONTENTS

I. INTRODUCTION.....	88
II. THE IRISH ABORTION DECISION.....	92
III. STATE EXTRATERRITORIAL APPLICATION OF CRIMINAL LAW	95
A. <i>Criminal Jurisdiction Generally</i>	95
B. <i>Abortion</i>	99
C. <i>Child Custody Cases</i>	100
D. <i>Child Support Cases</i>	103
E. <i>Cases Involving Kidnapping, Followed by an Assault in Another State</i>	105
F. <i>Other Criminal Cases</i>	107
IV. FULL FAITH AND CREDIT/DUE PROCESS	109
A. <i>Application to the Woman Seeking the Abortion</i>	109
1. <i>Allstate Insurance Co. v. Hague</i>	110
2. <i>The Application of Hague to an Extraterritorial Abortion Statute</i>	114
3. <i>Other Due Process/Full Faith and Credit Cases</i>	118
B. <i>Application to the Doctor Performing the Abortion</i>	121
V. SUPREME COURT ANALYSIS OF THE EXTRATERRITORIAL APPLICATION OF STATE CRIMINAL LAW	127
VI. THE SIXTH AMENDMENT.....	136
A. <i>Does the Sixth Amendment Vicinage Requirement Apply to the States?</i>	137
B. <i>Sixth Amendment Limitations on Extraterritorial Abortion Prosecutions</i>	144
VII. THE COMMERCE CLAUSE	148
A. <i>Introduction</i>	148
B. <i>Stricter Scrutiny: Discrimination, Inconsistent Regulation and Economic Protectionism</i>	159
C. <i>Balancing Burdens and Benefits</i>	151
D. <i>The New Territorialism</i>	153

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VIII. THE CONSTITUTIONAL RIGHT TO TRAVEL	158
IX. PRINCIPLES OF FEDERALISM.....	165
X. THE CONSTITUTIONALITY OF LESSER RESTRICTIONS IF <i>ROE</i> IS NOT OVERRULED	167
XI. CONCLUSION	170

I. INTRODUCTION

Since 1973, states have effectively been prohibited from regulating most abortions. As every lawyer, law student, and almost every other American adult knows, the United States Supreme Court held in *Roe v. Wade*¹ that a woman has a constitutional right to have an abortion. It is also common knowledge that in recent years the Supreme Court has been slowly restricting, or refusing to extend, that right.²

The future of *Roe v. Wade* is uncertain, particularly after the Supreme Court's most recent abortion decision, *Planned Parenthood v. Casey*.³ The actual restrictions on abortion upheld in *Casey*⁴ are less important than the positions of the various justices. Four justices in *Casey* voted to overrule *Roe* and eliminate entirely the constitutional right to obtain an abortion.⁵ Three jus-

1. 410 U.S. 113 (1973).

2. In *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), the Supreme Court upheld state requirements that women give written consent to abortions and that hospitals and clinics maintain records of the abortions they perform. In *Maher v. Roe*, 432 U.S. 464 (1977), the Court held that neither the federal government nor the states were required to provide Medicaid funding for non-therapeutic abortions. In *Harris v. McRae*, 448 U.S. 297 (1980), the Court upheld the exclusion of Medicaid funding for abortions even when those abortions are medically necessary to protect the woman's health. In *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983), the Court upheld state requirements that a second physician be present during abortions performed after viability, that a pathology report be prepared for all abortions, and that minors obtain parental or court consent before obtaining an abortion. In *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), the Court upheld the parts of a state law that prohibited public employees from performing abortions and prohibited public facilities from being used for abortions. In *Hodgson v. Minnesota*, 497 U.S. 417 (1990), the Court upheld a 48-hour waiting period for abortions for minors and a state requirement that, subject to a judicial bypass, both parents of minors seeking abortions be notified prior to the abortion. In *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990), the Court upheld a state statute requiring a doctor to notify one of the parents before performing an abortion on a minor, subject to judicial bypass procedures. And, in *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), the Court upheld federal regulations prohibiting projects receiving funds pursuant to Title X of the Public Health Service Act from engaging in abortion counseling or referral, or activities advocating abortion as a method of family planning.

3. 112 S. Ct. 2791 (1992).

4. The Court upheld a requirement that the physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, the probable gestational age of the unborn child, and the availability of certain printed materials published by the state. *Id.* at 2822-23 (O'Connor, Kennedy, & Souter, JJ.). The Court also upheld a 24-hour waiting period for the abortion, subject to an exception for medical emergencies, *id.* at 2825-26 (O'Connor, Kennedy, & Souter, JJ.), a requirement of parental consent for abortions on minors, subject to a judicial bypass, *id.* at 2832 (O'Connor, Kennedy, & Souter, JJ.), and certain recordkeeping and reporting requirements, *id.* at 2832-33 (O'Connor, Kennedy, & Souter, JJ.). The only part of the Pennsylvania abortion law held unconstitutional was a requirement that married women notify their husbands prior to having the abortion. *Id.* at 2826-31 (O'Connor, Kennedy, & Souter, JJ.).

5. *Id.* at 2855 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 2873-74 (Scalia, J., concurring in the judgment in part and dissenting in part). Prior to this time, only Justice Scalia had clearly and consistently expressed his desire to overrule *Roe*.

tices reaffirmed the constitutional interest underlying the right to abortion, but modified the standard for reviewing restrictions on abortion.⁶ Their plurality opinion indicated that a state still may not constitutionally prohibit abortion altogether,⁷ but adopted an "undue burden" standard to evaluate restrictions on the abortion of a nonviable fetus.⁸ Only two justices completely endorsed *Roe*.⁹

It may be only a matter of time before a majority of the Court votes to overrule *Roe*, or *Roe* may never be overruled. As Chief Justice Rehnquist recognized, the *Casey* decision "leaves the Court no less divided than beforehand."¹⁰ Justice Blackmun also recognized that the battle is far from over. "In one sense," he wrote, "the Court's approach is worlds apart from that of the Chief Justice and Justice Scalia. And yet, in another sense, the distance between the two approaches is short—the distance is but a single vote."¹¹ "I am 83 years old," he warned. "I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made."¹²

The uncertainty surrounding *Roe* makes this a propitious time to examine what might happen if *Roe* were overruled. What if states were free to prohibit abortion? Proponents of abortion rights have argued that the elimination of a constitutional right to abortion will penalize only the poor. Some states would continue to allow abortions, and pregnant women with sufficient resources could still obtain abortions by traveling to those states. According to this argu-

to this time, only Justice Scalia had clearly and consistently expressed his desire to overrule *Roe*. See, e.g., *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 520 (1990) (Scalia, J., concurring); *Webster v. Reproductive Health Services*, 492 U.S. 490, 532–537 (1989) (Scalia, J., concurring in part and concurring in the judgment).

6. The plurality, consisting of Justices O'Connor, Kennedy, and Souter, stated that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." *Casey*, 112 S. Ct. at 2803. According to the plurality, that essential holding has three parts:

First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

Id. at 2804 (O'Connor, Kennedy, & Souter, JJ.).

7. The Court held that a state regulation that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" is invalid. *Id.* at 2820 (O'Connor, Kennedy, & Souter, JJ.). "Understood another way, we answer the question, left open in previous opinions . . . , whether a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability could be constitutional The answer is no." *Id.* at 2820–21.

8. *Id.* at 2819–21 (O'Connor, Kennedy, & Souter, JJ.). This standard is clearly different from the strict scrutiny standard employed under *Roe*. *Id.* at 2862 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

9. *Id.* at 2839–41 (Stevens, J., concurring in part and dissenting in part); *Id.* at 2844–45 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

10. *Id.* at 2855 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

11. *Id.* at 2854 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

12. *Id.* at 2854–55 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

ment, only poor women who live in states prohibiting abortion will suffer, as they could not afford to travel elsewhere.

But is that vision necessarily correct? It is premised on a belief that states can regulate only abortions performed within their territorial boundaries—if women go elsewhere for abortions, their home state is powerless. This article examines the validity of that assumption: Could a state prohibit its residents from leaving the state to obtain a legal abortion elsewhere and subject them to criminal penalties for doing so? Could a state criminally punish a doctor who performs an abortion, legal where performed, on a woman whose domicile prohibits such abortions?

Given the continuing controversy surrounding *Roe*, it is surprising that the question of extraterritoriality has received so little attention. One Supreme Court case states flatly, in dictum, that a state could not regulate extraterritorial abortions, but no real justification is offered for that view.¹³ On the other hand, two prominent constitutional scholars, William Van Alstyne and Donald Regan, have tentatively concluded that an extraterritorial abortion statute would be constitutional.¹⁴ However, Van Alstyne devotes less than a page to the question, and Regan, although spending a little more time on the subject, describes his conclusion as tentative speculation.¹⁵ In short, no one has given extraterritoriality the attention it deserves.¹⁶

The purpose of this article is not to debate whether *Roe v. Wade* should be overruled or to discuss my views about whether state statutes restricting abortion are desirable. I assume the demise of *Roe*.¹⁷ I further assume that Congress does not regulate abortion or give women a federal statutory right to abortion. The effect of these assumptions is that a state would be constitutionally free to allow, disallow, or restrict abortions within the state's territory.¹⁸ But could a state go beyond that and criminalize abortions performed outside of the state?

13. *Bigelow v. Virginia*, 421 U.S. 809, 822–24 (1975). *Bigelow* is discussed in greater detail *infra* text accompanying notes 531–40.

14. 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, 1684; 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, 1906–08, 1912–13 (1987).

15. Regan, *supra* note 14, at 1913.

16. Other scholars are just now beginning to focus on this issue. See Seth Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992); Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. (forthcoming March 1993).

17. I also assume that the Supreme Court does not hold that the fetus is a person itself entitled to full constitutional protection. Such a holding, although unlikely, could force all of the states to prohibit abortion and eliminate the diversity in state law on which this article is premised.

18. The Due Process Clause of the Fourteenth Amendment might arguably require that the state allow abortions if the mother's life is at risk, particularly if the Court decides that the fetus is not a constitutional "person." That issue is beyond the scope of this article. I assume that the statute is tailored to meet any such constitutional challenge. For example, if there is a constitutional requirement that life-saving abortions be allowed, the hypothetical statute examined would have such an exception. In other words, I assume that the state tries to prohibit extraterritorially whatever it would have clear constitutional power to prohibit within its territory.

Potential state statutes making abortion illegal fall into four categories depending on the domicile of the pregnant woman¹⁹ and the site of the abortion. In descending order of the strength of the state's regulatory interest, these four categories are: (1) a state's attempt to make criminal a resident's abortion within the state; (2) a state's attempt to make criminal a non-resident's abortion within the state; (3) a state's attempt to make criminal a resident's abortion obtained in another state; and (4) a state's attempt to make criminal a non-resident's abortion obtained in another state.

The first category is easy. A state clearly can apply its criminal statutes to its own residents when they are acting within its territorial boundaries.²⁰ This is so self-evident that it is impossible to find an argument to the contrary. The second category is only slightly more difficult. The Supreme Court has permitted the states broad authority to govern conduct occurring within their territory; it is clear that a non-resident cannot enter a state and violate its criminal law with impunity. The fourth category is also easy, although the result is contrary to the first two. The Supreme Court has consistently held that a state may not apply its law when it has no significant contacts with a dispute.²¹ The only difficult category is the third. Does a state's connection to a resident pregnant woman (and to the resident fetus) give it sufficient constitutional power to prevent that woman from having an abortion in another state?

Such an exercise of extraterritorial jurisdiction by a state presents at least five possible constitutional problems.²² First, it might run afoul of the choice-of-law restrictions in the Full Faith and Credit Clause²³ and in the Due Process Clause of the Fourteenth Amendment.²⁴ This possibility is discussed in Part IV and, less directly, in Part V. Second, extraterritorial regulation of abortion might result in a violation of the defendant's Sixth Amendment right to a jury "of the State and district wherein the crime shall have been committed,"²⁵ if that right is applied to the states through the Due Process Clause of the Fourteenth Amendment.²⁶ The Sixth Amendment right is discussed in Part VI. Third, it might violate the dormant commerce limitation on state regulation

19. I shall assume that the pregnant woman's domicile is not merely a technical domicile, but a state with which she has significant contacts. She resides in the state of domicile, works there, spends most of her time there, and has no significant connections to any other state. This obviates the need to define domicile and allows me to avoid the few cases where a domiciliary might have stronger residential connections with another state. *See* Home Ins. Co. v. Dick, 281 U.S. 397 (1930) (mere domicile is insufficient to justify the application of Texas law).

20. This assumes, of course, that federal law has not preempted state regulation.

21. *See, e.g.,* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (Kansas may not apply its substantive law to oil leases involving land and royalty owners outside of Kansas). *See also* Dick, 281 U.S. 397 (Texas may not apply its contract law to an insurance contract issued by a Mexican company covering a boat only in Mexican waters, even though the plaintiff is a Texas domiciliary); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986) (striking down New York's controls on liquor prices in New York because their practical effect is to control liquor prices in other states).

22. Two other possible constitutional sources of limitation on the extraterritorial application of state law are the Privileges and Immunities Clause, U.S. CONST. art. IV, § 2, and the Equal Protection Clause of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 1. Neither is discussed because, in this context, each would require some sort of discrimination against nonresidents, and an extraterritorial abortion statute would not discriminate. *See infra* part VII.

23. U.S. CONST. art. IV, § 1.

24. U.S. CONST. amend. XIV, § 1.

25. U.S. CONST. amend. VI.

26. U.S. CONST. amend. XIV, § 1.

arising out of the Commerce Clause.²⁷ This is discussed in Part VII. Fourth, it might constitute an unconstitutional restriction of the woman's constitutional right to travel, an issue discussed in Part VIII. Finally, even if such an extraterritorial application of criminal law is not contrary to any particular provision of the United States Constitution, it might unconstitutionally infringe upon general principles of federalism inherent in the Constitution but not attributable to any particular provision. This possibility is discussed in Part IX. In the final section of the article, Part X, I relax the assumption that *Roe* has been overruled and ask whether restrictions that are acceptable under *Casey*'s undue burden standard could be applied extraterritorially.

I offer two other topics as a prelude to the constitutional discussion. In Part II, I discuss the opinions of the Irish courts in a recent, highly publicized case, *Attorney General v. X*,²⁸ where Ireland attempted to bar an Irish woman from obtaining an abortion in England. And, in Part III, I discuss common law and state views on the extraterritoriality of criminal law.

II. THE IRISH ABORTION DECISION

The Irish abortion case²⁹ is, in some ways, a bad example to use in discussing the power of one state to regulate abortions in other states. Obviously, it involved the application of Irish, rather than American, constitutional law, and nothing the Irish Supreme Court said bears directly on the issue examined in this article. Also, the Irish case involved travel from one independent country to another, rather than travel within a federal system. The need for harmony in a federal system, underlying constitutional prohibitions such as the Full Faith and Credit Clause, presents a greater obstacle to extraterritoriality in a federal setting than in an international setting.

But the effect of these differences should not be exaggerated; the Irish case presents many issues relevant to the discussion in this article. Ireland, like the United States, recognizes a constitutional right of its citizens to travel,³⁰ and all of the Irish Supreme Court justices expressly dealt with the interaction between that right to travel and the prohibition on traveling to another jurisdiction to obtain an abortion.³¹ The geographical proximity of Ireland and Britain and the relatively free travel between the two countries also make the Irish case a good vehicle for illustrating what might happen in the United States if *Roe* is overruled. And, unless *Roe* is actually overruled, one is unlikely to find any recent domestic examples of state extraterritorial regulation of abortion.

In the Irish case, a fourteen-year-old Irish girl was raped by her friend's father, after more than a year of molestation.³² She eventually told her parents,

27. U.S. CONST. art. I, § 8.

28. *Attorney General v. X*, [1992] I.L.R.M. 401 (Ir. Mar. 5) (LEXIS, Intlaw Library, Irecas File), *rev'g* *Attorney General v. X*, [1992] I.L.R.M. 401 (Ir. H. Ct. Feb. 17) (LEXIS, Intlaw Library, Irecas File).

29. *Id.*

30. *Id.* at *13 (Finlay, C.J.).

31. *Id.* at *13-14 (Finlay, C.J.); *id.* at *27-28 (Hederman, J.); *id.* at *37-38 (McCarthy, J.); *id.* at *41 (Egan, J.); *id.* at *44 (O'Flaherty, J.).

32. Except where otherwise indicated, the facts stated in the next two paragraphs are taken from Judge Costello's High Court opinion. *Attorney General v. X*, [1992] I.L.R.M. 401 (Ir. H. Ct. Feb. 17) (LEXIS, Intlaw Library, Irecas File).

and a medical exam revealed that she was pregnant. The girl and her parents decided that she should get an abortion, but a 1983 amendment to the Irish Constitution prohibits abortion,³³ and abortions are generally unavailable in Ireland. Therefore, like thousands of Irish women before her,³⁴ she traveled to England to obtain an abortion.

Before leaving, her parents notified the Garda Siochana, the Irish police, of the crime, told them that the family was considering an abortion, and asked about the appropriate procedure for scientifically testing the fetus to determine the father's identity. On February 7, 1992, the day after the child and her parents went to England, the Irish Attorney General obtained an ex parte interim injunction from the Irish High Court restraining the girl and her parents from leaving the country or terminating the pregnancy.³⁵ Upon learning of the injunction, the parents returned with the girl to Ireland, having never obtained the abortion. A hearing was held and, on February 17, Judge Costello of the High Court entered an order restraining the girl from leaving Ireland for nine months and "from procuring or arranging a termination of pregnancy or abortion either within or without the jurisdiction of the Honourable Court."³⁶

The girl and her parents appealed the High Court's order to the Irish Supreme Court. A majority of the Irish Supreme Court justices voted to set aside the High Court's order, but for reasons unrelated to its extraterritoriality. Four of the five Supreme Court justices decided that the constitutional provision, with its reference to the equal right to life of the mother and its guarantee

33. The Eighth Amendment to the Irish Constitution provides: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right." IR. CONST. art. 40.3.3 (1983), *quoted in* Attorney General v. X, [1992] I.L.R.M. 401 (Ir. Mar. 5) (LEXIS, Intlaw Library, Ireacas File), at *24 (Hederman, J.).

34. Statistics compiled by Britain's Office of Population Censuses and Surveys indicate that 4,064 Irish women had abortions in England and Wales in 1990. *Teen Can't Leave Ireland for Abortion*, CHI. TRIB., Feb. 18, 1992, at 6. However, some counseling services believe that Irish women often conceal their national origin by using the addresses of friends or relatives in Britain and that the actual number is much higher. Paul Majendie, *Fourteen-Year-Old Raped by Friend's Father Refused Abortion*, REUTERS NEWS SERVICE, Feb. 17, 1992, available in LEXIS, Nexis Library, Reuter File; Chris Ryder, *Irish Torn Over Abortion Ban on Rape Girl*, THE DAILY TELEGRAPH, Feb. 14, 1992, at 4, available in LEXIS, Nexis Library, Telegr File.

35. This apparently was the first time Irish authorities had tried to prevent a woman from having an abortion elsewhere. *Irish to Discuss Abortion Ban*, N.Y. TIMES, Feb. 19, 1992, at A10; *Irish Teen's Rape Case Stirs Abortion Debate*, CHI. TRIB., Feb. 19, 1992, at 5.

36. The full order provided as follows:

IT IS ORDERED

(a) that the defendants, their servants or agents or anyone having knowledge of the order be restrained from interfering with the right to life of the unborn as contained in Article 40.3.3 of the Constitution of Ireland

(b) that the first named defendant [the girl] be restrained from leaving the jurisdiction of this Honourable Court or the second and third named defendants [her parents] their servants or agents or anyone having knowledge of the said order from assisting the first named defendant to leave the aforesaid jurisdiction for a period of nine months from the date hereof

(c) that the first named defendant her servants or agents or anyone having knowledge of the said order be restrained from procuring or arranging a termination of pregnancy or abortion either within or without the jurisdiction of the Honourable Court.

Attorney General v. X, [1992] I.L.R.M. 401 (Ir. Mar. 5) (LEXIS, Intlaw Library, Ireacas File) at *2 (Finlay, C.J.). In a humorous sidelight to what is certainly not a humorous incident, note that paragraph (c), as worded, would technically prohibit anyone anywhere with notice of the Order from obtaining an abortion.

of the unborn's right to life only "as far as practicable," allows termination of a pregnancy if its continuation involves a real and substantial risk to the life of the mother.³⁷ They concluded that evidence concerning the girl's suicidal tendencies was sufficient to show such a risk.³⁸

All five justices went on to discuss in dicta the extraterritorial effect of the order and its relationship to the girl's constitutional right to travel. The High Court's order barred the girl from leaving the jurisdiction for any purpose for nine months,³⁹ but the Attorney General conceded that the order should be weakened to restrain the girl from leaving the jurisdiction only for the purpose of having an abortion.⁴⁰

Justice McCarthy took the strongest position against the order's extraterritoriality. He argued that the girl's constitutional right to travel could not be curtailed because of an intent to commit a particular action in another jurisdiction, even if that action was also unlawful in the other jurisdiction.⁴¹ Thus, Justice McCarthy would have held that even the weakened order without the absolute restriction on travel violated the girl's constitutional rights. Justice O'Flaherty stated that the High Court should not "interfere to this extraordinary degree with the individual's freedom of movement," but did not say whether his objection was only to the absolute bar on the girl's travel or also to the more limited bar on travel to obtain an abortion.⁴² Justice Hederman, for reasons not entirely clear from his opinion, would have refused to grant an order generally restricting the right to travel, but he would have upheld the parts of the order prohibiting travel outside of the jurisdiction to obtain an abortion.⁴³ He pointed out that prior cases had upheld the power of the Oireachtas (the Irish parliament) to make Irish criminal law applicable to acts committed outside of Ireland⁴⁴ and argued that the woman's right to travel is necessarily a lesser right than the unborn's right to life.⁴⁵ Thus, the right to travel could be restricted to protect the right to life. The remaining two justices of the Supreme Court also accepted the argument that the right to travel, as a less important and

37. *Id.* at *10 (Finlay, C.J.); *id.* at *34 (McCarthy, J.); *id.* at *41 (Egan, J.); *id.* at *43 (O'Flaherty, J.). Judge Hederman argued that a pregnancy could be terminated only if the evidence would "leave open no other conclusion but that the consequences of the continuance of the pregnancy will, to an extremely high degree of probability cost the mother her life." *Id.* at *29 (Hederman, J.). He concluded that this tougher standard had not been met.

38. For a detailed discussion of the testimony concerning the girl's mental state, see *id.* at *19-24 (Hederman, J.).

39. *Id.* at *2 (Finlay, C.J.). See *supra* note 36.

40. *Id.* at *14 (Finlay, C.J.); *id.* at *38-39 (Egan, J.). The Attorney General nevertheless took an extremely broad view of the High Court's extraterritorial power:

Counsel for the Attorney General expressly conceded that, if such a power existed, it could not be confined to a girl under age, as here, a citizen, as here, or in any way to restrict the ambit of its application from any pregnant woman then in the State, irrespective of her nationality, citizenship, or indeed, where the conception had taken place. If, as in this case is quite a reasonable possibility, the girl was living with her parents in London and had come to Ireland on holiday, a holiday perhaps as part of the treatment for her ordeal, she not merely could but should be prevented from returning to her home if her objective in doing so, partly or otherwise, was to have an abortion.

Id. at *36 (McCarthy, J.).

41. *Id.* at *37 (McCarthy, J.).

42. *Id.* at *44 (O'Flaherty, J.).

43. *Id.* at *31 (Hederman, J.).

44. *Id.* at *28 (Hederman, J.).

45. *Id.* at *27 (Hederman, J.).

fundamental right than the right to life, could be restricted to prevent an extraterritorial abortion.⁴⁶ Thus, a majority of the Irish Supreme Court justices found no problem with the order's extraterritoriality.

III. STATE EXTRATERRITORIAL APPLICATION OF CRIMINAL LAW

For some reason, an extraterritorial abortion statute and the general idea of extraterritorial application of criminal law seem almost intuitively improper. However, a close examination of state criminal cases reveals that the extraterritorial application of criminal law is not as uncommon as one might think. There are several accepted theories of criminal jurisdiction not based on territoriality, and many courts, both past and present, have upheld convictions where the defendant's relevant conduct occurred outside the prosecuting jurisdiction. I shall begin with these cases as an introduction to the issue of extraterritoriality; only after that introduction will I turn to the constitutionality of such prosecutions.

A. Criminal Jurisdiction Generally

At least five distinct theories of criminal jurisdiction are recognized in international law: (1) territorial jurisdiction, (2) Roman jurisdiction, based on the citizenship of the offender, (3) passive personality jurisdiction, based on the citizenship of the victim, (4) protective or injured forum jurisdiction, based on injuries to protected interests within the forum, and (5) cosmopolitan, or universal, jurisdiction.⁴⁷ Under the territorial theory, a state or nation has the power to apply its law to a crime only if the crime occurred within its territory.⁴⁸ The Roman theory, sometimes termed the "personal" theory of criminal jurisdiction, rests on the citizenship of the perpetrator of the crime. A state or nation has jurisdiction over its citizens wherever they may be and can apply its criminal law to them for actions committed anywhere.⁴⁹ The passive personality theory is based on the citizenship, not of the perpetrator, but of the victim: a state has jurisdiction whenever its citizens are the victims of criminal activity elsewhere.⁵⁰ The protective, or injured forum, theory allows the state or nation to apply its criminal law to any action that harms state-protected interests, even if the harmful action occurs outside of the state's territorial limits.⁵¹ The cos-

46. *Id.* at *13 (Finlay, C.J.); *id.* at *41 (Egan, J.).

47. See Christopher L. Blakesley, *A Conceptual Framework for Extradition and Jurisdiction over Extraterritorial Crimes*, 1984 UTAH L. REV. 685; B.J. George, Jr., *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 613-614 (1966); Harvard Research in Int'l Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435 (Supp. 1935). Professor George adds a sixth type of jurisdiction: the floating territory principle applying to acts on ships or aircraft under the flag of the nation. This seems to me to be just a variant of the territorial theory and, in any event, is not particularly relevant to this article. See also WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* 180, 190-92 (1986) (discussing all five theories, but rejecting jurisdiction based on the citizenship of the victim); ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 39-40 (3d ed. 1982) (omitting the passive personality principle); Rollin M. Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS L.J. 1155, 1155-56 (1971) (same as Perkins and Boyce).

48. PERKINS & BOYCE, *supra* note 47, at 39.

49. *Id.*

50. George, *supra* note 47, at 614. See also LAFAYE & SCOTT, *supra* note 47, at 191 (recognizing, but rejecting, this theory of jurisdiction).

51. PERKINS & BOYCE, *supra* note 47, at 39.

mopolitan theory has no limits—it grants a state or nation criminal jurisdiction over an action committed anywhere by anyone.⁵²

The common law adopted the territorial theory of criminal jurisdiction: state criminal law applied only to crimes committed within the state.⁵³ The common law also initially took the view that a crime occurred in only one state; for each crime, one particular act was deemed vital, and only the state where that vital act occurred had territorial jurisdiction.⁵⁴ However, state courts developed various legal fictions and other devices to stretch the strict territorial principle,⁵⁵ and state legislation often eliminated the common law's single-situs rules to allow the exercise of criminal jurisdiction when any part of the crime occurred within the state.⁵⁶ Some state legislation rejected the limits of territorialism entirely and expanded criminal jurisdiction based on other principles.⁵⁷

Given the prevalence of territorialism in common law doctrine, early examples of extraterritorial criminal jurisdiction are surprisingly common. A nineteenth century English statute provided for the punishment of any English subject for murder or manslaughter "whether [committed] within the King's Dominions or without."⁵⁸ As early as 1670, the Colony of New Plymouth provided for the punishment of extraterritorial crime:

It is enacted by the Court that whosoever having comitted uncleanes in another Collonie and shall come hither and have not satisfied the law where the fact was comitted they shalbe sent backe or heer punished according to the nature of the crime as if the acte had bine heer done.⁵⁹

This is, in part, an extradition provision, but it also allows punishment within New Plymouth for crimes committed elsewhere. It is unclear whether the application of New Plymouth criminal law was intended ("as if the acte had bine heer done") or whether this is merely a venue provision allowing prosecution in New Plymouth pursuant to the criminal law of the other jurisdiction ("have not satisfied the law where the fact was comitted"). In a time of predominantly common law crimes, it probably made little difference.

Cases applying state criminal law extraterritorially are also not uncommon.⁶⁰ Many of these cases arose when territorialism was at its zenith. Some of these cases do not even mention potential federal constitutional problems. There are surprisingly few state cases holding state extraterritorial criminal statutes

52. *Id.*

53. LAFAVE & SCOTT, *supra* note 47, at 180; PERKINS & BOYCE, *supra* note 47, at 40.

54. LAFAVE & SCOTT, *supra* note 47, at 180-86; PERKINS & BOYCE, *supra* note 47, at 40-41. The similarity to the vested rights theory for choice of civil law is obvious. The vested rights theory also focused on a single event in a cause of action and also said that the law of the state where that event occurred should apply to the cause of action. LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* 18-22 (1991); ROBERT ALLEN LEFLAR ET AL., *AMERICAN CONFLICTS LAW* 255-61 (4th ed. 1986).

55. Paul D. Empson, *The Application of Criminal Law to Acts Committed Outside the Jurisdiction*, 6 AM. CRIM. L.Q. 32, 36-37 (1967); George, *supra* note 47, at 622-23.

56. LAFAVE & SCOTT, *supra* note 47, at 186-90; PERKINS & BOYCE, *supra* note 47, at 41.

57. *See, e.g.*, George, *supra* note 47, at 623-24.

58. PERKINS & BOYCE, *supra* note 47, at 42 (citing 9 Geo. 4, ch. 31, § 7 (1828)). This statute was upheld in *Regina v. Azzopardi*, 174 Eng. Rep. 776 (1843).

59. Daniel L. Rotenberg, *Extraterritorial Legislative Jurisdiction and the State Criminal Law*, 38 TEX. L. REV. 763, 770 n.38 (1960) (quoting BRIGHAM, *CHARTER AND LAWS OF NEW PLYMOUTH* 162 (1836)).

60. *See infra* parts III.C.-III.F.

invalid; the more common tact in the state courts is to read a territorial limit into the statute.⁶¹

At least four of the bases of jurisdiction listed above could support the extraterritorial regulation of abortion. First, the cosmopolitan theory obviously would support such extraterritorial regulation, since it imposes no restrictions whatsoever. No country has ever attempted to exercise criminal jurisdiction to the full extent of the cosmopolitan theory, but there are limited examples of the exercise of criminal jurisdiction, particularly with respect to piracy, that would fit within no other theory.⁶² However, no American state has ever purported to exercise such broad criminal jurisdiction,⁶³ so this is an unlikely basis for an extraterritorial abortion law.

A second possible jurisdictional basis for an extraterritorial abortion law is, surprisingly, the territorial theory itself. At least one authority has argued that a prohibition on leaving the state to commit a particular act is within the territorial principle, even if the act is lawful in the state where it is committed.⁶⁴ This is because the prohibited act itself is not the crime, but merely leaving the state with a particular intent.⁶⁵ Thus, if a statute barred women from leaving the state for the purpose of obtaining an abortion, instead of outlawing the abortion itself, the statute arguably would not violate the territorial principle.

A third possible basis of jurisdiction for an extraterritorial abortion statute is the citizenship of both the pregnant woman and, to the extent the fetus is treated as a person, the fetus. This would support jurisdiction under both domicile-based theories of criminal jurisdiction, since the woman would be the offender and the fetus would be the injured "person."⁶⁶

The right of a nation or state to exercise criminal jurisdiction on the basis of domicile is "quite freely conceded"⁶⁷ and is a generally accepted theory of international law.⁶⁸ It is clearly an accepted basis for federal criminal jurisdiction,⁶⁹ and assertions of such criminal jurisdiction by the states date back to at least the early nineteenth century. In *Commonwealth v. Gaines*,⁷⁰ the defendant was convicted of stealing a horse, the theft having been committed in the District of Columbia, after which the horse was brought to Virginia. A Virginia statute, first passed in 1786, provided for trial in Virginia of, among other things, "all felonies committed by citizen against citizen" "in any place out

61. Rotenberg, *supra* note 59, at 773-780. See, e.g., *People v. Werblow*, 148 N.E. 786, 789 (N.Y. 1925); *People v. Costa*, 469 N.Y.S.2d 545 (Sup. Ct. 1983); *Wilson v. State*, 184 P. 603, 604 (Okla. Crim. App. 1919).

62. PERKINS & BOYCE, *supra* note 47, at 39-40.

63. LAFAVE & SCOTT, *supra* note 47, at 192 (referring to the theory as universal jurisdiction).

64. Perkins, *supra* note 47, at 1165-66.

65. *Id.*

66. My references to the fetus as a "person," "citizen," or "resident" are intended for editorial convenience only. I do not intend to express a position on the moral and philosophical question of when a fetus becomes a human being.

67. Wendell Berge, *Criminal Jurisdiction and the Territorial Principle*, 30 MICH. L. REV. 238, 265 (1931).

68. Blakesley, *supra* note 47, at 706.

69. E.g., *Blackmer v. United States*, 284 U.S. 421, 437 (1932); *United States v. Bowman*, 260 U.S. 94, 102 (1922).

70. 4 Va. (2 Va. Cas.) 172 (1819).

of the jurisdiction of the Courts of Common Law in this Commonwealth."⁷¹ The court rejected the defendant's territorial challenge to this statute. It pointed out that English law punished English citizens for crimes committed in foreign countries⁷² and concluded that the statute was constitutional.⁷³ Three judges dissented, but even they conceded that the legislature had the power "to legislate rules of conduct for its citizens while resident beyond its territorial limits."⁷⁴

Commonwealth v. Gaines should be compared to another, roughly contemporaneous case, *State v. Knight*,⁷⁵ decided in 1799. In *Knight*, the defendant was convicted of violating a statute prohibiting the counterfeiting of North Carolina bills of credit by persons resident in other states.⁷⁶ According to the court, the North Carolina legislature was empowered to punish crimes committed within North Carolina by North Carolina citizens because they "are supposed to have consented to all laws made by the Legislature."⁷⁷ The legislature could also punish crimes committed within North Carolina by non-citizens because they, by their temporary presence, "do impliedly agree to yield obedience to all such laws as long as they remain in the State."⁷⁸ However, "the right of punishing, being founded upon the consent of the citizens, express or implied, can not be directed against those who never were citizens, and who likewise committed the offence beyond the territorial limits of the State claiming jurisdiction."⁷⁹ Note, however, that this reasoning does not completely reject extraterritorial jurisdiction. It leaves open the possibility of punishing North Carolina citizens for their extraterritorial conduct, based on their implied consent to such laws enacted by their legislature.⁸⁰

A fourth possible basis for jurisdiction is under the protective theory.⁸¹ Jurisdiction under this theory would be based on the state's interest in protecting the fetus and the argument that, since the fetus "resides" within the prosecuting state, the effect of any injury to the fetus is felt in that state.

Assertions of state legislative jurisdiction, even criminal jurisdiction, based upon effects within the prosecuting state, are also not modern. The most well-known early application of state criminal law to purely extraterritorial actions is an 1882 case, *Hanks v. State*.⁸² In *Hanks*, the defendant was indicted in Texas for forging a land title certificate for Texas land; the indictment alleged

71. *Id.* at 174.

72. *Id.* at 176.

73. *Id.* at 177. The opinion seems to be referring to the state constitution, although it does not say so.

74. *Id.* at 183 (Holmes, J., dissenting).

75. 1 N.C. (Tay.) 65 (1799).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. The dictum of the court, however, is broader: "Crimes and misdemeanors committed within the limits of each [state] are punishable only by the jurisdiction of that State where they arise." *Id.* at 66. This broader language is obviously contrary to *Commonwealth v. Gaines*.

81. Professor Blakesley classifies jurisdiction based on effects in the forum within the territorial principle and limits the protective theory to offenses posing a threat to security, sovereignty, or important governmental functions. Blakesley, *supra* note 47, at 701. Other authorities do not appear to be so limiting in their application of the protective principle. See LAFAYE & SCOTT, *supra* note 47, at 190-91; PERKINS & BOYCE, *supra* note 47, at 39; George, *supra* note 47, at 613-14.

82. 13 Tex. App. 289 (1882).

that the forgery occurred in Louisiana.⁸³ The court held that, since the forgery affected the title to Texas lands, there was an injury to Texas at the time of the forgery,⁸⁴ "no matter whether the perpetrator of the crime was at the time of its consummation within or without her territorial limits."⁸⁵ The court specifically held that the Texas legislature had constitutional authority to pass the statute at issue.⁸⁶ A number of other cases also approve the application of criminal law to extraterritorial actions on the basis of effects within the prosecuting jurisdiction.⁸⁷

B. Abortion

At least two criminal cases decided prior to *Roe* dealt with the extraterritorial application of state criminal laws to out-of-state abortions, but both cases were resolved on issues of statutory construction.

In *People v. Buffum*,⁸⁸ four women separately went to a doctor's office in Long Beach, California, and asked him to perform abortions. The doctor refused, but gave the women the telephone number of another person. This person drove the women to Mexico, where they received abortions. The doctor and his confederate were indicted and convicted in California state court for conspiring to violate the California criminal statute prohibiting abortions.⁸⁹ The California Supreme Court reversed those convictions. The Court held that, because neither the criminal abortion statute nor the criminal conspiracy statute referred to the place of the violation, "we must assume that the Legislature did not intend to regulate conduct taking place outside the borders of the state."⁹⁰

The state relied on two California statutes that attempted to broaden the criminal jurisdiction of the state beyond the strict common law territorial principle. One allowed conviction if a crime was committed "in whole or in part" within the state.⁹¹ The other allowed conviction if "a person, with intent to commit a crime, does any act within this state in execution or part execution of such intent, which culminates in the commission of a crime, either within or

83. *Id.* at 305.

84. *Id.* at 309.

85. *Id.* at 308.

86. *Id.* at 306.

87. *See, e.g.,* *Turquette v. State*, 298 S.W. 15 (Ark. 1927) (extraterritorial assault as contempt of court); *Pennington v. State*, 521 A.2d 1216 (Md. 1987) (extraterritorial stabbing as obstruction of justice); *Commonwealth v. Welch*, 187 N.E.2d 813 (Mass. 1963) (extraterritorial acceptance of money as bribery); *People v. Corsino*, 397 N.Y.S.2d 342 (N.Y. City Crim. Ct. 1977) (extraterritorial assault on an airplane approaching New York City as misdemeanor assault).

88. 256 P.2d 317 (Cal. 1953).

89. The California law provided:

Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years.

Id. at 319 n.2.

The prosecution proved that abortion was also illegal in Mexico, but the court said that this evidence should not have been admitted because "the charge was not conspiracy to violate Mexican law, but, rather conspiracy to violate the law of California." *Id.* at 322.

90. *Id.* at 320 (citations omitted).

91. *Id.*

without this state."⁹² The Court held that these provisions applied only where the acts done within the state were sufficient to amount to an attempt to commit a crime;⁹³ merely transporting the women from California to Mexico for an abortion was insufficient to constitute an attempt within California.⁹⁴

A similar disposition was reached in *Edge v. State*,⁹⁵ a Tennessee case that did not involve a direct prohibition on abortion. In *Edge*, the defendant allegedly hired a physician in Tennessee to perform an abortion on a woman named Lilah Johnson. The abortion occurred in North Carolina, after which Johnson returned to Tennessee. When Johnson died in Tennessee as a result of the abortion, the defendant was indicted and convicted in Tennessee as an accessory before the fact to second degree murder (of the mother, not the fetus). The Tennessee Supreme Court reversed, holding that the Tennessee statute did not confer criminal jurisdiction in the absence of more activities within Tennessee.⁹⁶

C. Child Custody Cases

Some child custody cases have raised jurisdictional issues analogous to those raised by the extraterritorial regulation of abortion. These cases involve a non-custodial parent who unlawfully detains his children in a state other than the prosecuting state; the prosecuting state is usually the state in which the custodial parent and the children reside. In some cases, the non-custodial parent unlawfully kidnapped the children from within the custodial parent's state; in other cases, he took them pursuant to a lawful visitation, then unlawfully refused to return them; in at least one case, the defendant was never within the prosecuting state and initially received the children outside the state. The issue raised in these cases is whether the custodial parent's state may prosecute the non-custodial parent, even though the unlawful detention, and sometimes the taking as well, is extraterritorial. The results of these cases are fairly evenly split.⁹⁷ However, the result sometimes rests on the language of the particular

92. *Id.*

93. *Id.* For a strong criticism of this argument, see George, *supra* note 47, at 625-26. Professor George argues that the California Supreme Court's decision "stands as an excellent example of the triumph of the rote of the territorial principle over the pragmatic needs of law enforcement." *Id.* According to Professor George, the case "succeeded only in creating a haven for criminals whose acts chiefly circumvented the public policy embodied in the California Penal Code that abortions should not be freely available." *Id.* at 625.

94. *Buffum*, 256 P.2d at 321. The Court argued that decisions upholding convictions under statutes making transportation for certain purposes a crime were not helpful because no such statute was at issue. *Id.* at 321-22.

95. 99 S.W. 1098 (Tenn. 1907).

96. According to the court,

A careful scrutiny of this statute will show a definition of what is meant by the consummation of the crime in this state. It is not sufficient merely to show that the death ensued in this state as the result of a criminal act performed in another state, but there must be some further intervention in this state proceeding directly from the principal, through an innocent or guilty agent, or by any other means. No such facts appear on the face of this indictment, and hence this section of the Code is wholly inapplicable.

Id. at 1099.

97. *Trindle v. State*, 602 A.2d 1232 (Md. 1992); *People v. Harvey*, 435 N.W.2d 456 (Mich. Ct. App. 1989); *Wheat v. State*, 734 P.2d 1007 (Alaska Ct. App. 1987); *Rios v. State*, 733 P.2d 242 (Wyo. 1987); *People v. Gerchberg*, 181 Cal. Rptr. 505 (Ct. App. 1982); *Roberts v. State*, 619 S.W.2d 161 (Tex. Crim. App. 1981); *Addis v. State*, 404 N.E.2d 59 (Ind. Ct.

state statute. In those cases that discuss non-statutory limitations on the state's criminal jurisdiction, the analysis is often sketchy or confused. Sometimes, the court discusses the defendant's challenge to the court's subject matter jurisdiction without even indicating whether the source of that challenge is the state constitution or the federal Constitution, much less the particular constitutional provision involved.⁹⁸

*Rios v. State*⁹⁹ is typical of the doctrinal confusion of the courts when dealing with such cases. In *Rios*, neither the child nor the defendant father had ever been in Wyoming, the prosecuting state.¹⁰⁰ The father had temporary custody of his children for the summer of 1984. During that summer, the mother moved to Wyoming. When, at the end of the summer, the father did not return the children, he was apprehended, extradited to Wyoming, and convicted of interference with child custody. He argued that his conviction violated the Sixth Amendment. The majority opinion discussed the common law territorial principle, common law and statutory expansions of that principle, and cases construing both common law and statutory jurisdictional limitations, but it offered no explanation of how those cases and concepts relate to the Sixth Amendment. The court simply affirmed the conviction on the basis of the mother's presence in the state, arguing that her presence resulted in the effects of the unlawful detention being felt in Wyoming.¹⁰¹

Another case applying child kidnapping laws to a defendant with only limited connections to the forum is *Trindle v. State*,¹⁰² a recent Maryland decision. In that case, the defendant Trindle and his wife were divorced in Maryland, with the wife receiving custody of the children. After the divorce, Trindle married the defendant Marcus and moved to Pennsylvania. Trindle's ex-wife customarily drove her children to Delaware, where Trindle would meet her and take the kids back to Pennsylvania for weekend visits. After one such visit, Trindle and Marcus refused to return the kids, and Marcus took the children out of the country. In a criminal prosecution in Maryland, Marcus challenged the court's criminal jurisdiction over her.¹⁰³ The court recognized the view that "generally a state may only punish those crimes committed within its territorial limits,"¹⁰⁴ but held that "a crime will also be considered as

App. 1980); *State v. McCormick*, 273 N.W.2d 624 (Minn. 1978); *State v. Cochran*, 538 P.2d 791 (Idaho 1975).

98. *Trindle*, 602 A.2d 1232; *Harvey*, 435 N.W.2d 456; *Roberts*, 619 S.W.2d 161. The dissent in *Trindle* relies on the Maryland Declaration of Rights and the Sixth Amendment to the U.S. Constitution. *Trindle*, 602 A.2d at 1246 (Eldridge, J., concurring in part and dissenting in part).

99. 733 P.2d 242 (Wyo. 1987).

100. *Id.* at 243.

101. *Id.* at 250. The dissent is no more clear. Although focusing on the lack of a Wyoming statute extending subject matter jurisdiction beyond the common law territorial limit, the dissent, without expansion, states that "[t]he majority opinion effectively circumvents established, constitutionally mandated limitations on the exercise of jurisdiction." *Id.* at 251 (Brown, C.J., dissenting). The source of those "constitutionally mandated limitations" is not identified.

102. 602 A.2d 1232 (Md. 1992).

103. The exact source of that challenge is unclear from the majority opinion. The dissent focuses on the Sixth Amendment and a section of the Maryland Declaration of Rights. *Id.* at 1246 (Eldridge, J., concurring in part and dissenting in part). Trindle made a similar challenge, but he died before the case was argued, and the court therefore vacated his convictions. *Id.* at 1234.

104. *Id.* at 1235.

committed in a state where its intended result occurs if the definition of the crime includes such a result."¹⁰⁵ Since an element of the crime was an intent to deprive the custodial parent of custody, and the custodial parent resided in Maryland, the court concluded that the crime took place in Maryland. Thus, Marcus' conviction was affirmed even though she never set foot in Maryland or had any contact with Maryland.¹⁰⁶

The other child custody cases approving jurisdiction involve some contact with the forum state—the defendant took the children from that state and thus was at least within the state at one time.¹⁰⁷ However, these cases are still analogous to the case of a woman taking a fetus to another state for the purpose of having an abortion.

Of the four cases overturning a conviction for kidnapping or unlawfully detaining a child outside the state, two were decided on purely statutory grounds. The courts held that such extraterritorial conduct was not covered by the criminal statute at issue.¹⁰⁸ One of these two cases indicated, in dictum, that the defendant could have been properly convicted under another statutory provision.¹⁰⁹ The other two cases disapproving convictions for extraterritorial conduct say that states lack jurisdiction over extraterritorial crimes, but neither case identifies the specific source of such restrictions.¹¹⁰

The child kidnapping cases differ in at least two important respects from the extraterritorial regulation of abortion. First, the custodial parent in the child custody cases resides in the prosecuting jurisdiction, making it easier to argue that the effects of the unlawful detention of the child are felt there. In the extraterritorial abortion case, the effect with which the state is concerned is felt by the fetus itself, which is not in the state at the time of the abortion. A less direct "effects" argument is necessary, focusing on the state's interest in protecting the unborn "domiciled" fetus,¹¹¹ much as interest analysis focuses on a state's interest in protecting its domiciliaries, wherever they go. On the other hand, the "effects" analysis is artificial to begin with, so if the courts can artificially assume effects on the resident mother, it seems equally valid to assume that the effects on the fetus are constructively felt in the state of domicile of the mother and the fetus.

The second distinction between the child custody cases and the abortion issue relates to the legality of the conduct where the conduct occurred. The child custody cases generally involve conduct that is unlawful not only in the state asserting jurisdiction, but also in the state where the children were unlawfully detained. All states prohibit the detention of minor children contrary to a valid custody order. Thus, the conduct is illegal in both states. At least one

105. *Id.*

106. *See also* *Wheat v. State*, 734 P.2d 1007 (Alaska Ct. App. 1987) (similar facts, although it is unclear whether the defendant originally picked up the children within the jurisdiction or they were sent to him).

107. *See* *People v. Harvey*, 435 N.W.2d 456 (Mich. Ct. App. 1989); *Roberts v. State*, 619 S.W.2d 161 (Tex. Crim. App. 1981).

108. *People v. Gerchberg*, 181 Cal. Rptr. 505 (Ct. App. 1982); *Addis v. State*, 404 N.E.2d 59 (Ind. Ct. App. 1980).

109. *Addis*, 404 N.E.2d at 64.

110. *State v. McCormick*, 273 N.W.2d 624 (Minn. 1978); *State v. Cochran*, 538 P.2d 791 (Idaho 1975).

111. Obviously, a fetus is incapable of forming the intent necessary to establish a domicile of its own. As with minor children, I am assigning the domicile of the mother to the fetus.

court has focused on this fact to justify its conclusion that prosecution for extraterritorial detention of minor children is not fundamentally unfair to the defendant.¹¹² An extraterritorial abortion statute, on the other hand, is necessary only if the abortion is legal in the state where it is performed. To criminalize conduct that is legal where performed involves a greater intrusion upon the sovereignty of the other state and probably poses more of a due process problem in terms of violating the justified expectations of the defendant.

On the other hand, the child custody cases are, in one sense, constitutionally weaker than the extraterritorial regulation of abortion, at least insofar as prosecution of the pregnant woman is concerned. The hypothetical abortion statute would apply only to pregnant women residing in the enacting state who left the state to obtain an abortion. The child custody cases typically involve prosecutions of defendants who do not reside in the state of prosecution and, in some cases, have no connection whatsoever with that state. Everything else being equal, a state arguably has a greater interest in controlling the activities of its own residents than it does in controlling the activities of nonresidents.

D. Child Support Cases

Closely related to the child kidnapping cases are criminal prosecutions of nonresident parents for failure to support their children.¹¹³ Several cases have upheld convictions where the defendant had apparently never before been to the prosecuting state¹¹⁴ or had been there only infrequently.¹¹⁵ In fact, there are few cases to the contrary.¹¹⁶ *People v. Jones*¹¹⁷ is representative of such cases. The defendant had never been in California until extradited for the prosecution. He, the mother of the child, and the child resided in Florida until he and the mother were divorced. After the divorce, the mother and child moved to California, and the defendant father moved to Ohio. The only child support

112. "[B]ecause Arizona's statute governing custodial interference is substantially similar to Alaska's, Wheat is foreclosed from asserting that his conduct was privileged under the laws of the state in which it occurred." *Wheat v. State*, 734 P.2d 1007, 1012 (Alaska Ct. App. 1987).

113. *E.g.*, *People v. Jones*, 64 Cal. Rptr. 622, 623 (Ct. App. 1967); *State v. Shaw*, 539 P.2d 250, 253 (Idaho 1975); *State v. Wellman*, 170 P. 1052, 1056 (Kan. 1918); *In re Fowles*, 131 P. 598, 602 (Kan. 1913); *Commonwealth v. Donovan*, 220 S.W. 1081, 1082 (Ky. 1920); *Ex parte Heath*, 287 P. 636, 638 (Mont. 1930); *State ex rel. Brito v. Warrick*, 125 N.W.2d 545, 548 (Neb. 1964); *State v. Carr*, 225 A.2d 178 (N.H. 1966); *State v. Tickle*, 77 S.E.2d 632 (N.C. 1953); *State v. Sanner*, 90 N.E. 1007, 1008 (Ohio 1910); *Boetscher v. State*, 782 S.W.2d 954, 957 (Tex. Ct. App. 1990), *rev'd on other grounds*, 812 S.W.2d 600 (Tex. Crim. App. 1991); *State v. Paiz*, 777 S.W.2d 575, 577 (Tex. Ct. App. 1989), *modified on other grounds*, 817 S.W.2d 84 (Tex. Crim. App. 1991); *Osborn v. Harris*, 203 P.2d 917, 921 (Utah 1949); *State v. Klein*, 484 P.2d 455, 457 (Wash. Ct. App. 1971); *Poole v. State*, 208 N.W.2d 328, 331 (Wis. 1973).

114. *E.g.*, *In re Fowles*, 131 P. 598, 599 (Kan. 1913); *Brito*, 125 N.W.2d at 547; *Paiz*, 777 S.W.2d at 575; *Klein*, 484 P.2d at 456.

115. *State v. Wellman*, 170 P. 1052, 1053, 1055 (Kan. 1918); *Donovan*, 220 S.W. at 1081; *Heath*, 287 P. at 636; *Tickle*, 77 S.E.2d at 633; *Osborn*, 203 P.2d at 917-18.

116. *E.g.*, *State v. Hopkins*, 132 So. 501 (La. 1931) (state has no jurisdiction over portion of affidavit alleging nonsupport while defendant was domiciled and resident out of state, even though wife and child then resided in state); *Ex parte Kuhns*, 137 P. 83 (Nev. 1913) (refusing to extradite father to Pennsylvania where alleged nonsupport occurred after defendant moved to Nevada, even though wife and children still lived in Pennsylvania).

117. 64 Cal. Rptr. 622 (Ct. App. 1967).

order was issued by an Ohio court. The California court held that California had criminal jurisdiction.

Some of these cases premise criminal jurisdiction on the prosecuting state's "vital interest in the welfare of its children, who, if not provided for by the parents, must become charges upon the state."¹¹⁸ Other cases focus less on the prosecuting state's policy interest and more on territoriality, holding that the failure to support the children occurs where the children reside.¹¹⁹ At least two of these cases invoke a weak causal argument that the defendant's non-support effectively forced the children into the prosecuting state, much as if he took them there personally: "The husband may be charged with the offense of failure to provide in the state in which he has permitted his wife or children to live, or in which his misconduct has induced them to seek refuge."¹²⁰ Some of these cases offer almost no rationale at all.¹²¹

As with the child kidnapping cases, these cases could be distinguished from an extraterritorial abortion prosecution on the ground that the defendant's conduct in the non-support cases was probably also unlawful in his home jurisdiction. He was not being penalized for conduct legal in his home state. In fact, in a couple of these cases, the defendant was subject to a support order issued by a court of his home state.¹²² For example, in *Ex parte Boetscher*,¹²³ the court summarily rejected the defendant's argument that he could not have reasonably anticipated being subjected to Texas' criminal jurisdiction:

Failure to support one's minor children is a criminal offense in Michigan, just as it is in Texas, and Michigan's criminal non-support statute on its face does not limit its reach to resident offenders. And we must presume appellant was aware of Michigan law. Therefore, if appellant, as alleged in the indictment, intentionally or knowingly failed to support his minor children, whom he knew lived in Texas, then he should have reasonably anticipated that Texas law regarding nonsupport might be similar to Michigan law and that it (i.e., Texas law) might reach his conduct.¹²⁴

118. *Donovan*, 220 S.W. at 1082. *Accord* *Boetscher v. State*, 782 S.W.2d 954, 957 (Tex. Ct. App. 1990), *rev'd on other grounds*, 812 S.W.2d 600 (Tex. Crim. App. 1991); *Paiz*, 777 S.W.2d at 577; *Klein*, 484 P.2d at 457; *Brito*, 125 N.W.2d at 548.

119. *E.g.*, *Poole v. State*, 208 N.W.2d 328, 331 (Wis. 1973); *People v. Jones*, 64 Cal. Rptr. 622, 623 (Ct. App. 1967); *State v. Carr*, 225 A.2d 178 (N.H. 1966); *Brito*, 125 N.W.2d at 548; *Donovan*, 220 S.W. at 1082; *Wellman*, 170 P. at 1056.

120. *Osborn v. Harris*, 203 P.2d 917, 921 (Utah 1949). *See also In re Fowles*, 131 P. 598, 602 (Kan. 1913) (if the father permitted the mother to bring the child to the state without support, "his conduct was as reprehensible and as punishable as it would have been had he brought the child here and abandoned him on purpose."). For an extremely loose causal argument, see *State v. Tickle*, 77 S.E.2d 632 (N.C. 1953), where the court stated:

There is a constructive presence of the defendant in this jurisdiction for by his lust in Virginia he begot a bastard child upon the body of Ruby Elizabeth Hamlett, and thereby put into operation a force which produced the result of his bastard child and her mother being domiciled in this state from the date of the child's birth until now, and further produced the result of his wilful failure to support his bastard child in North Carolina.

Id. at 637.

121. *E.g.*, *State v. Shaw*, 539 P.2d 250, 253 (Idaho 1975); *Ex parte Heath*, 287 P. 636, 638 (Mont. 1930); *State v. Sanner*, 90 N.E. 1007, 1008 (Ohio 1910).

122. *Jones*, 64 Cal. Rptr. 622; *Klein*, 484 P.2d at 456.

123. 812 S.W.2d 600, 602 (Tex. Crim. App. 1991).

124. *Id.* at 603.

In the abortion case, on the other hand, the abortion would be illegal in only one of the two states and legal where obtained. However, at least one child support case imposed a state's criminal law in a situation where the defendant would have had no support obligation under his home state law.¹²⁵

E. Cases Involving Kidnapping, Followed by an Assault in Another State

Several relatively recent state court cases have held that a state may punish an assault or robbery in another state where that assault or robbery followed a kidnapping from the prosecuting state.¹²⁶ *Smith v. State*¹²⁷ is typical of such cases. In *Smith*, the defendant kidnapped the victim from her home in Nevada, drove her across the state line into California, and, in California, sexually assaulted her and attempted to murder her.¹²⁸ The court held that Nevada had jurisdiction to prosecute the defendant not only for the kidnapping, but also for the extraterritorial assault and attempted murder.

Two different rationales are offered to support jurisdiction in such cases. Some of these cases focus on the elements of the crime and hold that the state may prosecute because, although the actual assault was committed outside of the state, one or more of the other elements of the crime occurred within the state.¹²⁹ For example, in *State v. Jones*,¹³⁰ the defendant abducted the victim in Maryland and drove her to the District of Columbia, where he raped her. The court pointed out that first degree rape had five elements: (1) intercourse, (2) force, (3) lack of consent, (4) display of a dangerous article, and (5) placement of the victim in imminent fear of kidnapping.¹³¹ Of these five elements, force was applied in the initial abduction in Maryland, consent was withheld in Maryland, and the victim was placed in fear of kidnapping in Maryland. It was unclear from the evidence where the display of the dangerous article—an ice scraper—occurred, so only one of the elements—the intercourse—clearly occurred outside of Maryland. Accepting the rule that “[o]ne state cannot punish

125. *State v. Tickle*, 77 S.E.2d 632 (N.C. 1953), upheld the conviction under North Carolina law of a Virginia man for nonsupport of his illegitimate North Carolina child. The court recognized that the general common law rule, modified in North Carolina, was that a father had no legal obligation to support an illegitimate child. *Id.* at 634. The court held that the Virginia rule was irrelevant: “The prosecution in this action is based on our statute. Whether under the Virginia law a father is required or not required to support his bastard child is not involved.” *Id.* at 635. At the time, Virginia imposed no such obligation. See *Brown v. Brown*, 32 S.E.2d 79 (Va. 1944) (accepting the common law rule and refusing to impose an obligation on the father to support an illegitimate child). Thus, North Carolina was holding a non-resident responsible for failure to perform a duty that did not exist in the state where he resided.

126. *E.g.*, *Heath v. State*, 536 So. 2d 142 (Ala. Crim. App. 1988); *Thomas v. State*, 553 S.W.2d 32 (Ark. 1977); *Smith v. State*, 697 P.2d 113 (Nev. 1985); *Bright v. State*, 490 A.2d 564 (Del. 1985); *State v. Jones*, 443 A.2d 967 (Md. Ct. Spec. App. 1982); *Adair v. United States*, 391 A.2d 288 (D.C. App. 1978); *Conrad v. State*, 317 N.E.2d 789 (Ind. 1974). *Contra State v. Harvey*, 730 S.W.2d 271 (Mo. Ct. App. 1987). See generally Larry Kramer, *Jurisdiction over Interstate Felony Murder*, 50 U. CHI. L. REV. 1431 (1983) (arguing that only the state in which the underlying felony was committed has an interest in prosecuting an interstate felony murder).

127. 697 P.2d 113 (Nev. 1985).

128. *Id.* at 114.

129. *Bright*, 490 A.2d at 567–68; *Jones*, 443 A.2d at 972–73.

130. 443 A.2d 967 (Md. Ct. Spec. App. 1982).

131. *Id.* at 972. The court actually held that either element number four or element number five would support the conviction and that it was not necessary to prove both. *Id.*

a defendant for a crime committed in another state,"¹³² the court nevertheless held that Maryland had common law jurisdiction to prosecute the rape.¹³³

Other cases focus less on the individual elements of the crime and simply find it sufficient that the extraterritorial crime arose from a continuing course of conduct that began within the prosecuting state.¹³⁴ An example of a case following this theory is *Conrad v. State*.¹³⁵ In *Conrad*, the defendant assaulted the victim in Indiana, placed her in the trunk of his car, drove the car into Ohio, and there murdered her.¹³⁶ The Indiana Supreme Court held that the assault and abduction in Indiana provided a sufficient jurisdictional base for the murder conviction because "[t]here was substantial evidence presented from which the jury could find that the assault and abduction ... were integrally related to the victim's murder."¹³⁷ Some courts use both theories interchangeably.¹³⁸

Not all of the cases involving kidnapping and an extraterritorial assault hold that the state has criminal jurisdiction. In *State v. Harvey*,¹³⁹ for example, the defendant kidnapped the victim in Missouri and took her to Illinois, where he murdered her.¹⁴⁰ The court noted that capital murder requires proof of three elements: (1) intent to kill, (2) a knowing killing, and (3) premeditation.¹⁴¹ Conceding that the evidence supported a finding that the intent and the premeditation existed at the time of the kidnapping in Missouri,¹⁴² the court nevertheless held that the defendant could not be tried in Missouri, because "the essential element of the charge, the killing[,] did not occur in the State of Missouri."¹⁴³

These extraterritorial kidnapping/assault cases are similar, in some ways, to possible prosecutions for extraterritorial abortions, but there are also obvious differences. Both types of cases involve a defendant taking a resident of the state outside the state to perform some act that the state of origin considers wrongful. In the assault cases, the resident is the victim of the assault; in the abortion case, the "resident" victim is the fetus. In neither case does the "person" whom the state is trying to protect consent to the defendant's actions—in the assault case because the transportation is coerced, in the abortion case because the fetus is incapable of giving such consent. In each case, the intent to do the wrongful act is formed before the defendant leaves the state. Thus, the extraterritorial assault cases might support jurisdiction in the extraterritorial abortion case.

132. *Id.* at 971.

133. For a similar approach under the Sixth Amendment, see *infra* part VI.

134. *E.g.*, *Adair v. United States*, 391 A.2d 288, 290 (D.C. App. 1978); *Conrad v. State*, 317 N.E.2d 789, 791-92 (Ind. 1974).

135. 317 N.E.2d 789 (Ind. 1974).

136. *Id.* at 790, 791.

137. *Id.* at 792. The trial court had instructed the jury to acquit the defendant if they found that the intent to kill the victim originated in Ohio after the kidnapping and "was not part of one continuous plan, design and intent, and not the result of one continuous course of action by the defendant, but was a separate and independent set of acts occurring outside of the State of Indiana." *Id.* at 791.

138. *E.g.*, *Heath v. State*, 536 So. 2d 142, 143-44 (Ala. Crim. App. 1988); *Smith v. State*, 697 P.2d 113, 114-15 (Nev. 1985).

139. 730 S.W.2d 271 (Mo. App. 1987).

140. *Id.* at 276-77.

141. *Id.* at 277.

142. *Id.*

143. *Id.* at 278.

However, there are important differences between the two cases. Most importantly, none of the extraterritorial assault cases involve an out-of-state defendant who merely assisted the misconduct and had no connection at all to the originating state. Thus, these cases provide no support at all for the prosecution of the doctor performing the abortion. There are also differences important to the possible prosecution of a woman for obtaining an extraterritorial abortion. In the extraterritorial assault cases, the assault is wrongful not only in the state where the kidnapping originates, but also in the state where the conduct occurs. Rape and murder are universally prohibited in the United States. The defendant therefore has no argument that he was privileged to do what he did in the other state or that his reasonable expectation was that his conduct would not be punished. In the extraterritorial abortion case, the conduct is lawful where the pregnant woman acts. She might argue that her reasonable expectation was that her conduct was lawful and would not be punished. Also, in the extraterritorial assault cases, the taking itself (the kidnapping) is wrongful. Thus, the defendant's course of conduct is wrongful from its inception. In the abortion case, the taking itself (traveling interstate with the fetus) is not wrongful. In fact, absolutely prohibiting a pregnant woman from traveling interstate for any purpose would undoubtedly be an unlawful interference with her constitutional right to travel.¹⁴⁴ State jurisdiction over a course of conduct is easier to defend when that course of conduct is wrongful from its inception than when the course of conduct becomes wrongful only when a particular action occurs outside the state.

F. Other Criminal Cases

There are many other state cases involving the extraterritorial application of state criminal law. These cases involve a variety of offenses, from bigamy to bribery, from stealing a horse to attempting to blow up an airplane. These cases vary in their willingness to allow extraterritorial criminal jurisdiction. No consistent pattern or rule emerges from these cases, but one thing is clear: although almost all of these cases pay lip service to territorialism, the notion that American state courts have consistently and strictly adhered to the territorial theory of criminal jurisdiction is simply wrong.

Many of the cases approving the extraterritorial application of state criminal law involve actions, such as larceny, theft, or murder, that clearly would be illegal in the state where the action was performed, as well as in the prosecuting state. As argued above, the illegality in the state of the action could be used to distinguish the extraterritorial assault, child kidnapping, and child support cases from the extraterritorial application of an abortion law. In the abortion case, the abortion would be legal where performed. However, this distinction should not be overstated. It clearly has not made a difference in the civil choice-of-law cases, where the defendant's conduct often would not result in liability where the defendant acted.¹⁴⁵

Also, not all of the cases upholding criminal convictions for extraterritorial conduct involve conduct illegal where it occurred. In a few cases, defendants have been convicted under state criminal law even though their action was legal where performed. For example, the defendant in *Commonwealth v.*

144. See *infra* part VIII.

145. See *infra* part IV.

*Crass*¹⁴⁶ was convicted in Kentucky of betting on an election. He argued that the bet was not made in Kentucky—that the parties travelled across the state line to Tennessee and there made the bet.¹⁴⁷ Apparently, such gambling was then legal in Tennessee.¹⁴⁸ The court noted that “[i]f the statute can be evaded by so simple a device as that here attempted, it means nothing.”¹⁴⁹ Although there was no evidence of any communication in Kentucky concerning the bet, the court held that the bet was made in Kentucky and therefore could be prosecuted in Kentucky.¹⁵⁰

Another similar Kentucky case is *Lemore v. Commonwealth*,¹⁵¹ upholding a conviction for unlawfully selling liquor. The defendant picked up customers in a boat on the Kentucky side of the Mississippi River, ferried them to the Missouri side of the river, sold them liquor, and then brought them back to Kentucky.¹⁵²

In *State v. Mueller*,¹⁵³ the defendant was convicted of violating a Wisconsin statute that required court permission for a Wisconsin resident to remarry when subject to a Wisconsin child support order. The defendant's remarriage occurred outside Wisconsin, where, presumably, it was legal. The court held that Wisconsin's “legitimate and substantial protectible interest ... both as to the protection of the welfare of its minors and the marriage relationship of its residents” justified the “inconvenience to the accused and invasion, if any, upon the sovereignty of sister states” caused by the extraterritorial application of the statute.¹⁵⁴

A final example is *Jacobson v. Maryland Racing Commission*,¹⁵⁵ involving not a criminal conviction, but a monetary fine imposed by the state racing commission. The defendant had claimed three horses at Maryland claiming races, subject to a rule prohibiting resale of a claimed horse within sixty days.¹⁵⁶ Within sixty days, he resold the horses in New York. The court held that allowing extraterritorial sales would frustrate the purpose behind the Maryland resale limitation—to keep horses racing in Maryland¹⁵⁷—and that the detrimental effect within Maryland was sufficient to justify punishing the defendant for a New York resale.¹⁵⁸

146. 203 S.W. 708 (Ky. 1918).

147. *Id.* at 708.

148. The court does not say so, but one could infer this from the defendant's conduct. The court also cites another case involving parties traveling from Kentucky to Tennessee to place a bet. *Id.* at 709.

149. *Id.* at 709.

150. *Id.* at 708.

151. 105 S.W. 930 (Ky. 1907).

152. *Id.* at 931. The court relied in part, but not exclusively, on Kentucky's concurrent jurisdiction over the Mississippi River. *Id.* at 932.

153. 171 N.W.2d 414 (Wis. 1969).

154. *Id.* at 418.

155. 274 A.2d 102 (Md. 1971).

156. *Id.* at 103.

157. According to the court,

A main purpose of the Rule is to keep horses racing at the Maryland meeting at which they are claimed and this purpose would be frustrated if a horse could be sold outside of Maryland any minute after it was claimed in Maryland but could not be sold in Maryland under those circumstances for sixty days.

Id. at 105.

158. *Id.* at 106-07.

IV. FULL FAITH AND CREDIT/DUE PROCESS

A. Application to the Woman Seeking the Abortion

It is clear from the previous section that an extraterritorial abortion statute would not be a sharp break from other state exercises of extraterritorial criminal jurisdiction. But would it be constitutional? The first potential sources of constitutional limitation on state criminal jurisdiction I will discuss are the Due Process Clause of the Fourteenth Amendment¹⁵⁹ and the Full Faith and Credit Clause of Article IV of the Constitution.¹⁶⁰ Although these two clauses were adopted at different times and have different functions, the modern Supreme Court has generally treated them identically in examining restrictions on state choice of law.¹⁶¹ Thus, due process and full faith and credit restrictions on state legislative jurisdiction can be analyzed together.

All of the due process and full faith and credit cases have involved a state's application of its civil, rather than its criminal, law. Lea Brilmayer and Charles Norchi have suggested that the absence of criminal cases is due less to

159. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

160. "Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

161. EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* 78-79 (2d ed. 1992); BRILMAYER, *supra* note 54, at 127; LEFLAR et al., *supra* note 54, at 165.

In *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), both the plurality opinion and the dissent treat the two clauses as imposing the same restrictions on choice of law. Justice Brennan does not distinguish between the two clauses and states that "[t]his Court has taken a similar approach in deciding choice-of-law cases under both the Due Process Clause and the Full Faith and Credit Clause." *Id.* at 308 n. 10 (Brennan, J.). Justice Powell's dissent also applies the same test under both clauses, stating that "the Court has recognized that both the Due Process and the Full Faith and Credit Clauses are satisfied if the forum has such significant contacts with the litigation that it has a legitimate state interest in applying its own law." *Id.* at 333 (Powell, J., dissenting). Justice Powell applies a two-part test, but there is no indication in his opinion that one part of the test arises from the due process clause and the other arises from the full faith and credit clause.

Two later cases have distinguished the Due Process and Full Faith and Credit Clauses, but not in a way that meaningfully affects the analysis. The majority opinion in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), reads Justice Powell's *Hague* dissent as distinguishing the two clauses. *Shutts* states that "The dissent [in *Hague*] stressed that the Due Process Clause prohibited the application of law which was only casually or slightly related to the litigation, while the Full Faith and Credit Clause required the forum to respect the laws and judgments of other States, subject to the forum's own interests in furthering its public policy." *Id.* at 819. However, *Shutts* then analyzes the choice-of-law problem without distinguishing the two clauses. *Id.* at 819-23. See also *id.* at 824 (Stevens, J., concurring in part and dissenting in part) ("The Court's choice-of-law analysis ... treats the two relevant constitutional provisions as though they imposed the same constraints on the forum court.").

Only in *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), does the majority analyze the two clauses separately, and even then the Court seems to see no substantial difference between the two. The majority says that

The nub of the present controversy, in other words, is the scope of constitutionally permissible legislative jurisdiction, and it matters little whether that is discussed in the context of the Full Faith and Credit Clause, as the litigants have principally done, or in the context of the Due Process Clause. Since we are largely traversing ground already covered, our discussion of the due process claim can be brief.

Id. at 729-30 n.3. The Court recognized that the first of two cases discussed in the due process part of its opinion involved full faith and credit challenges, but it did not seem to care. *Id.* at 730.

the fact that there are differences between criminal and civil jurisdiction than to the fact that "states themselves have been less inclined to press the limits of the Constitution than have their individual citizens when they seek monetary judgments."¹⁶² I will begin by discussing the civil cases and their possible application to an extraterritorial abortion statute. In Part V, I will turn specifically to the question of criminal legislative jurisdiction and whether the criminal context makes a difference.

The Supreme Court has long rejected the view that only one state may constitutionally apply its law to any particular dispute. Instead, the Court has said that "a set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction."¹⁶³ Currently, the Court requires that a state, in order to apply its substantive law, must have "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."¹⁶⁴

I. Allstate Insurance Co. v. Hague

The starting point for the constitutional analysis must be the Supreme Court's most expansive choice-of-law opinion, *Allstate Insurance Co. v. Hague*,¹⁶⁵ a decision that produced no majority opinion. Justice Brennan wrote a plurality opinion which three other justices joined, Justice Stevens wrote a concurrence, and Justice Powell wrote a dissent joined by two justices. Since all but one of the justices agreed on the applicable standard¹⁶⁶ and only disputed the application of that standard to the facts, the facts of the case deserve detailed discussion.

Ralph Hague died when the motorcycle on which he was a passenger was struck from behind by an automobile. The accident occurred in Wisconsin, both of the drivers were Wisconsin residents, and Ralph Hague was a Wisconsin resident. At the time of the accident, he held an insurance policy issued by Allstate Insurance. The policy covered three automobiles and provided for uninsured motorist coverage of \$15,000 for each car.

After the accident, Ralph Hague's spouse moved to Minnesota. She was appointed personal representative of her deceased husband's estate and filed a lawsuit in Minnesota state court seeking a declaration that under Minnesota law the \$15,000 uninsured motorist coverage on each of Mr. Hague's three cars could be "stacked" to provide total coverage of \$45,000. Allstate argued that Wisconsin, rather than Minnesota, law should apply "since the insurance policy

162. Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1242 (1992).

163. *Hague*, 449 U.S. at 307 (Brennan, J.). *Accord Wortman*, 486 U.S. at 727; *Shutts*, 472 U.S. at 823; *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66, 72-73 (1954).

164. *Hague*, 449 U.S. at 313 (Brennan, J.). *Accord Shutts*, 472 U.S. at 821-22; *Hague*, 449 U.S. at 332-33 (Powell, J., dissenting) (accepting Justice Brennan's formulation of the basic principles to use in reviewing state choice-of-law decisions).

The Court has held that a state may apply its own *procedural* law to actions litigated in its courts even absent any substantive contacts with the underlying dispute. *Wortman*, 486 U.S. at 722.

165. 449 U.S. 302 (1981).

166. It might be more correct to say that, while they agree on the phrasing of the standard, their application of that standard to the facts suggests that they have very different concepts in mind.

was delivered in Wisconsin, the accident occurred in Wisconsin, and all persons involved were Wisconsin residents at the time of the accident."¹⁶⁷ However, the Supreme Court upheld the Minnesota court's application of Minnesota law. Justice Brennan's plurality opinion concluded that the aggregation of three Minnesota contacts was sufficient to justify the application of Minnesota law: (1) Mr. Hague worked in Minnesota and commuted daily to his job there; (2) Allstate did business in Minnesota; and (3) Mrs. Hague became a Minnesota resident prior to suing.

First, Justice Brennan argued that Minnesota had an interest in the well-being of its work force and the effect of injured employees on Minnesota employers.¹⁶⁸ According to Justice Brennan,

If Mr. Hague had only been injured and missed work for a few weeks, the effect on the Minnesota employer would have been palpable and Minnesota's interest in having its employee made whole would be evident. Mr. Hague's death affects Minnesota's interest still more acutely, even though Mr. Hague will not return to the Minnesota work force.¹⁶⁹

Justice Powell's dissent agreed that employment could be a significant contact for some purposes, but argued that the place of employment had no connection to the stacking issue:

Minnesota does not wish its workers to die in automobile accidents, but permitting stacking will not further this interest. The substantive issue here is solely one of compensation, and whether the compensation provided by this policy is increased or not will have no relation to the State's employment policies or police power.¹⁷⁰

The second contact on which Justice Brennan focused was Allstate's business presence in Minnesota. He argued, without elaboration, that this gave Minnesota an interest in regulating Allstate's insurance obligations insofar as they affected a Minnesota resident, Mrs. Hague, and a Minnesota employee, Mr. Hague.¹⁷¹ Furthermore, this contact mitigated any claim of unfairness that Allstate might make: "By virtue of its presence, Allstate can hardly claim unfamiliarity with the laws of the host jurisdiction and surprise that the state courts might apply forum law to litigation in which the company is involved."¹⁷² Justice Powell again demanded a more particularized connection between the contact and the dispute.¹⁷³ He conceded that Minnesota had an interest in regulating the practices of an insurance company doing business in Minnesota, but only with respect to the business actually done there. Justice Powell pointed out that Allstate did business in all fifty states and argued that "[t]he forum State has no interest in regulating that conduct of the insurer unrelated to property, persons, or contracts executed within the forum State."¹⁷⁴

167. *Id.* at 306.

168. *Id.* at 314 (Brennan, J.).

169. *Id.* at 315 (Brennan, J.).

170. *Id.* at 339 (Powell, J., dissenting).

171. *Id.* at 318 (Brennan, J.).

172. *Id.* at 317-18 (Brennan, J.).

173. Justice Powell's dissent "requires a rather precise identification of the policies the state law in question reflects and a determination whether those policies would be advanced within the state by its application." James R. Pielemeier, *Constitutional Limitations on Choice of Law: The Special Case of Multistate Defamation*, 133 U. PA. L. REV. 381, 405 (1985).

174. *Hague*, 449 U.S. at 338 (Powell, J., dissenting).

Third, Justice Brennan argued that Mrs. Hague's post-accident move to Minnesota gave Minnesota an interest in her recovery—to keep her off the welfare rolls and enable her to meet her financial obligations.¹⁷⁵ Justice Powell, without denying that domicile was an important connection, argued that *post-occurrence* changes of domicile were constitutionally irrelevant.¹⁷⁶

Justice Powell tried to flesh out the “significant contacts” analysis, arguing that the significance of a state's contacts should be evaluated in light of two constitutional policies.¹⁷⁷ The first policy focuses on the “reasonable expectations” of the parties: “[T]he contacts between the forum State and the litigation should not be so ‘slight and casual’ that it would be fundamentally unfair to a litigant for the forum to apply its own State's law.”¹⁷⁸ Justice Powell concluded that the first part of his test was met:

The risk insured by petitioner was not geographically limited. The close proximity of Hager City, Wis., to Minnesota, and the fact that Hague commuted daily to Red Wing, Minn., for many years should have led the insurer to realize that there was a reasonable probability that the risk would materialize in Minnesota.¹⁷⁹

Justice Powell's second requirement is that the forum have a legitimate public policy interest in the outcome of the litigation.¹⁸⁰ This requires “some connection between the facts giving rise to the [claim] and the scope of the State's lawmaking function.”¹⁸¹ A state has a legitimate interest “only if the facts to which the rule will be applied have created effects within the State, toward which the State's public policy is directed.”¹⁸² For the reasons discussed above, Justice Powell concluded that the contacts between Minnesota and the litigation were not relevant to any public policy of Minnesota, and, therefore, the second part of his test was not met.

Justice Stevens' concurrence in *Hague* differed markedly from the other two opinions. He began by asserting, contrary to what he recognized as the established view of the Court, that the Due Process Clause and the Full Faith and Credit Clause require different analyses.¹⁸³ Under the Full Faith and Credit Clause, a state's application of forum law is valid “unless that choice threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State.”¹⁸⁴ Justice Stevens concluded that Minnesota's refusal to apply Wisconsin law did not directly or indirectly threaten Wisconsin's sovereignty.¹⁸⁵ His analysis of this point is as sketchy as his statement of the rule, but he relied, at least in part, on the “justifiable expectations” of the parties.¹⁸⁶

175. *Id.* at 319 (Brennan, J.).

176. *Id.* at 337 (Powell, J., dissenting).

177. *Id.* at 333 (Powell, J., dissenting).

178. *Id.*

179. *Id.* at 336 (Powell, J., dissenting) (citation omitted).

180. *Id.* at 334 (Powell, J., dissenting).

181. *Id.*

182. *Id.*

183. *Id.* at 320–22 (Stevens, J., concurring in the judgment).

184. *Id.* at 323 (Stevens, J., concurring in the judgment).

185. *Id.* at 325 (Stevens, J., concurring in the judgment).

186. “Since the policy provided coverage for accidents that might occur in other States, it was obvious to the parties at the time of contracting that it might give rise to the application of the law of States other than Wisconsin.” *Id.* at 324 (Stevens, J., concurring in the judgment).

Justice Stevens argued that the issue under the Due Process Clause is whether a choice-of-law decision is "totally arbitrary" or "fundamentally unfair to either litigant."¹⁸⁷ After hinting that he would almost never find a judge's application of his own state's law totally arbitrary,¹⁸⁸ Justice Stevens turned to the fundamental unfairness part of the analysis. Application of a state's law would be fundamentally unfair if it "favored residents over nonresidents, if it represented a dramatic departure from the rule that obtains in most American jurisdictions, or if the rule itself was unfair on its face or as applied."¹⁸⁹ Justice Stevens concluded that the stacking rule was not unfair on its face because it was accepted by most jurisdictions when the policy was issued, and it made economic sense.¹⁹⁰ Justice Stevens' test for whether a rule was unfair as applied is whether it frustrates the parties' justifiable expectations, resulting in unfair surprise:¹⁹¹ "[I]f, in engaging in the activity which is the subject of the litigation, [the litigants] could not reasonably have anticipated that their actions would later be judged by this rule of law,"¹⁹² its application is unconstitutional. Justice Stevens concluded that the parties could have reasonably anticipated the application of Minnesota law.¹⁹³ He pointed out that nothing in the contract, such as a choice-of-law clause, indicated that the parties anticipated the application of a particular state's law. Further, Allstate was doing business in Minnesota, and it was therefore aware of Minnesota law and of the possibility that it might be sued in Minnesota.¹⁹⁴ Because the policy provided nationwide coverage, the parties could have anticipated an accident in another state and the resulting application of that state's law. According to Justice Stevens, it is the parties' expectations at the time of the contract that are important, and it is therefore irrelevant that the accident actually occurred elsewhere.¹⁹⁵ In fact, it does not even matter how likely it was at the time of contracting that another state's law would apply, as long as the parties perceived it as possible.¹⁹⁶

187. *Id.* at 326 (Stevens, J., concurring in the judgment).

188. *Id.*

189. *Id.* at 327 (Stevens, J., concurring in the judgment).

190. *Id.* at 327-28 (Stevens, J., concurring in the judgment).

191. *Id.* at 327 (Stevens, J., concurring in the judgment).

192. *Id.*

193. *Id.* at 328-30 (Stevens, J., concurring in the judgment).

194. *Id.* at 328-29 (Stevens, J., concurring in the judgment).

195. *Id.* at 329 n.22 (Stevens, J., concurring in the judgment).

196. *Id.* at 331 n.24 (Stevens, J., concurring in the judgment). That Justice Stevens really meant this justified expectations test to be as weak as it sounds is made clear in his partial dissent in *Phillips Petroleum Co. v. Shutts*, where he argues as follows:

Neither Phillips nor the Court contends that Kansas cannot constitutionally apply its own laws to the claims of Kansas residents, even though the leased land may lie in other States and no other apparent connection to Kansas may exist. Phillips has done business in Kansas throughout the years relevant to this litigation and it seems unarguable that application of Kansas law, or indeed the law of any of the 50 States where royalty owners reside, to the claims of at least some of the plaintiff class members was thus "perceived as possible" by Phillips "at the time of contracting." It was also possible, of course, that any number of royalty owners might have moved to Kansas in the years Phillips held their suspense royalties, and that Kansas has a substantial interest in seeing its residents treated fairly when they invoke the jurisdiction of its courts. Because Phillips must have anticipated application of Kansas law to some claims, the eventual geographic distribution of royalty owners' residences goes only to "likelihood" and not to fairness of the application of Kansas law.

472 U.S. 797, 842 n.24 (1985) (Stevens, J., concurring in the judgment) (citations omitted).

2. *The Application of Hague to an Extraterritorial Abortion Statute*

One striking aspect of *Hague* is its rejection of the territorial view that only the state of the accident could apply its law. All three opinions concede that, given sufficient other contacts, Minnesota could constitutionally apply its law to the Wisconsin accident.¹⁹⁷ Extraterritoriality alone does not violate due process or full faith and credit. If this is also true for criminal law, an issue to be discussed further in Part V, *Hague* would not absolutely bar the extraterritorial application of a criminal abortion statute. But would a state have sufficient contacts in the abortion case to justify such extraterritoriality?

The prosecuting state's interest in the extraterritorial abortion case is both stronger and more direct than the first *Hague* contact, Mr. Hague's employment in Minnesota. The purported interest of a state adopting an extraterritorial abortion law is in protecting the life, or potential life, of the fetus, which "resides" within the prosecuting state. Even *Roe v. Wade* conceded the state's "important and legitimate interest in protecting the potentiality of human life."¹⁹⁸ It merely held that the state's interest in fetal life was not sufficiently compelling in the early stages of pregnancy to overcome the woman's right to privacy.¹⁹⁹ The state interest in protecting fetal life is arguably stronger than Minnesota's interest in protecting the property interests of its in-state employers. Even if the fetus is treated as "property," the interest in protecting the fetus is at least equivalent to Minnesota's interest in *Hague*. The interest in the abortion case is also more direct. In *Hague*, the first contact was significant because Minnesota's protection of the non-resident decedent would indirectly protect resident employers. In prohibiting extraterritorial abortion, the state is directly protecting a "resident" from injury.

The pregnant woman's connection to the prosecuting state is also much stronger than the second contact in *Hague*—Allstate's business connection to

197. Justice Brennan states that "[a]n automobile accident need not occur within a particular jurisdiction for that jurisdiction to be connected to the occurrence." *Hague*, 449 U.S. at 314 (Brennan, J.). "While the place of the accident is a factor to be considered in choice-of-law analysis, to apply blindly the traditional, but now largely abandoned, doctrine would fail to distinguish between the relative importance of various legal issues involved in a lawsuit as well as the relationship of other jurisdictions to the parties and the occurrence or transaction." *Id.* at 316 n.22 (Brennan, J.) (citations omitted). Justice Brennan argued that, if the accident had occurred in Minnesota, Wisconsin certainly could have applied its law on the bases of Mr. Hague's residence and the insurer's presence in Wisconsin, even if the policy had been executed in Minnesota and covered a Minnesota automobile. *Id.* at 315-16 (Brennan, J.).

Justice Powell, focusing on the expectations of the parties, argues that "[t]he fact that the accident did not, in fact, occur in Minnesota is not controlling because the expectations of the litigants before the cause of action accrues provide the pertinent perspective." *Id.* at 336-37 (Powell, J., dissenting).

Justice Stevens' opinion does not so expressly reject the territorial, place-of-the-accident view, but his rejection of that view is inherent in his decision that Minnesota could constitutionally apply its law.

For a historical view of the Supreme Court's territorial analysis of choice of law under the due process clause, see Ralph V. Whitten, *The Constitutional Limitations on State Choice of Law: Due Process*, 9 HASTINGS CONST. L.Q. 851, 853-59 (1982). Professor Whitten concludes that the Court had entirely abandoned the territorial approach by 1943. *Id.* at 859.

198. *Roe v. Wade*, 410 U.S. 113, 162 (1973). The plurality in *Casey* also accepted the state's interest in protecting potential life, *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2817 (1992) (O'Connor, Kennedy, & Souter, JJ.), but held that, until the fetus became viable, the state could not fully protect this interest by prohibiting abortion absolutely. *Id.* at 2811-12 (O'Connor, Kennedy, & Souter, JJ.).

199. *Roe*, 410 U.S. at 162-64.

Minnesota. Allstate was doing business in all fifty states; a woman seeking an abortion has only a single residence, the prosecuting state. To paraphrase *Hague*, by virtue of her residence, the pregnant woman can hardly claim unfamiliarity with the laws of her domicile and surprise that the state courts might apply forum law to litigation in which she is involved.²⁰⁰

The third contact relied on by the *Hague* plurality was the plaintiff's after-acquired domicile. The "plaintiff" in a criminal case is the state, and, in a simple sense, the plaintiff is thus domiciled in the forum. However, to ground criminal jurisdiction on this contact is nonsensical, because the state has this contact in every criminal prosecution.²⁰¹ A better approach is to focus on why the plaintiff's domicile was important in *Hague*—because it gave the state an interest in protecting her. Thus, what is important in a criminal prosecution is the interest the state is trying to protect, the life or potential life of the unborn fetus. Since the fetus also "resides" within the state, the state has an interest in protecting it, although that interest might be less than its interest in protecting Mrs. Hague, a person already born. However, the possibly weaker interest in protecting the fetus as opposed to a "born" person is more than offset by the nature of the interest being protected—the life, or potential life, of the fetus, versus Mrs. Hague's purely economic interest. Thus, the interest in the extraterritorial abortion case seems at least as strong as the third contact in *Hague*.²⁰² There is also a difference in this third contact in terms of fairness and reasonable expectations. Mrs. Hague's after-acquired domicile was something Allstate could not have expected when it entered into the contract. A pregnant woman's domicile is known at the time of the abortion, and surprise to the defendant in the abortion case is therefore less.

Extraterritorial regulation of abortion also appears constitutional under the Powell dissent's two-part expansion of the significant contacts idea. Justice Powell's first test focuses on the reasonable expectations of the parties: There must be sufficient contacts so that the application of forum law would not be fundamentally unfair. Unfortunately, *Hague* and all of the cases Justice Powell discusses are contract cases. In contract cases, the issue is whether the parties, at the time of contracting, could have anticipated an injury in the forum.²⁰³ This analysis is difficult to apply to criminal law without circularity. One might argue that people expect only the criminal laws of the place where they act to

200. See *supra* note 172 and accompanying text.

201. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985):

Even if one could say that the plaintiffs "consented" to the application of Kansas law by not opting out, plaintiff's desire for forum law is rarely, if ever controlling. In most cases the plaintiff shows his obvious wish for forum law by filing there. . . . Even if a plaintiff evidences his desire for forum law by moving to the forum, we have generally accorded such a move little or no significance. In *Allstate* the plaintiff's move to the forum was only relevant because it was unrelated and prior to the litigation. Thus the plaintiffs' desire for Kansas law, manifested by their participation in this Kansas lawsuit, bears little relevance.

Id. at 820 (citations omitted).

202. Notice, however, that equating the fetus' domicile with the plaintiff's domicile in *Hague* transforms what were three contacts in *Hague* into two in the abortion case. The fetus' domicile is standing in place of two of the *Hague* plurality's factors. However, the state's interest with respect to this factor is stronger than the equivalent interests in *Hague*, so this should not matter. It is not important to have an equivalent number of contacts, only an equivalent state interest.

203. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 333, 336–37 (1981) (Powell, J., dissenting).

government, but that expectation, to the extent it is legitimate, is only the result of prior state practice. If the states aggressively prosecuted extraterritorial crime, people would expect otherwise, and expectations to the contrary would not be reasonable or justified.²⁰⁴ Under this view, states could constitutionally do now only what they have done in the past. What has been done before is constitutional; what has not been done before is unconstitutional.²⁰⁵ In any event, as I demonstrated earlier, state practice really is not that consistently and exclusively territorial.²⁰⁶ Thus, any expectations to the contrary with respect to extraterritorial abortion arguably would not be justified. Further, this expectations argument must somehow distinguish between civil and criminal cases. Most lay persons probably expect civil law to be applied on a territorial basis as well,²⁰⁷ but extraterritorial applications of civil law to a state's domiciliaries are commonplace and constitutionally approved. The better view is probably that a woman could reasonably expect her state of domicile to be interested in her removal of a fetus from that state for the purpose of abortion. Thus, the application of her domicile's criminal law should not surprise her.

Justice Powell's second requirement is that the forum state must have a legitimate interest in the outcome of the litigation, measured by effects within the state toward which the state's public policy is directed. Justice Powell cites Professor Brainerd Currie, a strong proponent of domicile-based state interests, to support this proposition,²⁰⁸ seemingly indicating Powell's acceptance for constitutional purposes of Currie's domicile-based interest analysis.²⁰⁹ If so, the prosecuting state would appear to have a valid interest in protecting the resident fetus, particularly *vis-à-vis* another resident. As mentioned earlier, even *Roe* concedes the state's legitimate interest in protecting the unborn fetus. Powell argues in *Hague* that the insurer's business presence gave Minnesota no interest in regulating conduct of the insurer "unrelated to property, persons, or con-

204. As the late James Martin aptly stated, "from a strictly logical point of view, surprise is an irrelevancy in a legal system that charges litigants with knowledge of the law—including the law of choice of law." James A. Martin, *The Constitution and Legislative Jurisdiction*, 10 HOFSTRA L. REV. 133, 134 (1981). Professor Martin distinguished this kind of surprise from what he called "factual surprise"—failure to anticipate subsequent events, such as an after-acquired domicile, that would connect a dispute with a particular state. The pregnant woman's residence in the prosecuting state at the time of the abortion would seem to eliminate any factual surprise argument.

205. The Court has held that consistent prior practice may make a choice of law constitutional. See *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988). However, the modern Supreme Court has rejected the view that there is only one appropriate choice of law, see *supra* note 163 and accompanying text, and it has never held that prior state practice makes a contrary choice of law unconstitutional.

206. See *supra* part III.

207. Aaron D. Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQ. L. REV. 373, 381-82 (1971).

208. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 334-35 (1981) (Powell, J., dissenting) (citing BRAINERD CURRIE, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 188, 189 (1963)).

209. Professor Weintraub argues that "*Hague* places the imprimatur of the United States Supreme Court on the new choice-of-law methodology The three dissenters would go so far as to raise interest analysis, *à la* Brainerd Currie, to a constitutional requirement." Russel J. Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law?*, 10 HOFSTRA L. REV. 17, 33-34 (1981). Robert Sedler agrees. Robert Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59, 71 (1981).

tracts executed within the forum State."²¹⁰ The connection to the defendant in the abortion case—domicile—is stronger than mere business presence, so this language might not apply. More importantly, although the conduct occurs elsewhere, it is not unrelated to property or persons within the forum. Whether treated as property or as a person, the fetus “resides” in the forum, and this gives the regulated abortion a connection to the forum. To argue that the state of domicile may not regulate the abortion is to do precisely what Justice Powell accuses the majority in *Hague* of doing: “[focusing] only on physical contacts *vel non*, and in doing so [paying] scant attention to the more fundamental reasons why our precedents require reasonable policy-related contacts in choice-of-law cases.”²¹¹

It is difficult to determine whether an extraterritorial abortion statute would pass constitutional muster under Justice Stevens’ *Hague* opinion. His full faith and credit analysis is simply too vague to apply, primarily because he does not explain when application of a state’s law unjustifiably infringes upon the legitimate interests of another state. He hints that a forum state would never violate this standard in applying its law, even without any contacts.²¹² Justice Stevens expounds a little on his full faith and credit test in *Phillips Petroleum Co. v. Shutts*,²¹³ writing that, “[w]hen a suit involves claims connected to States other than the forum State, the Constitution requires only that the relevant laws of other States that are brought to the attention of the forum court be examined fairly prior to making a choice of law.”²¹⁴ Without a definition of fair examination, it is impossible to tell when this standard has been violated.

One could argue that application of one state’s criminal law to conduct in another state where that conduct is not criminal unjustifiably infringes on the legitimate interests of the state of conduct. However, that argument, like Justice Stevens’ test, is without content unless one explains why the particular infringement is “unjustifiable.” As explained earlier, the prosecuting state clearly has a policy interest, so it is not unjustifiable in that sense. And why is a state’s application of criminal law more of an unjustifiable infringement on the legitimate interests of the state of conduct than its application of civil law, as in *Hague*? Criminal law historically had a territorial basis, but so did civil law, and *Hague* refused to constitutionalize civil law territorialism.

210. *Hague*, 449 U.S. at 338 (Powell, J., dissenting).

211. *Id.* at 339–40 (Powell, J., dissenting).

212. “I question whether a judge’s decision to apply the law of his own State could ever be described as wholly irrational. For judges are presumably familiar with their own state law and may find it difficult and time consuming to discover and apply correctly the law of another State. The forum State’s interest in fair and efficient administration of justice is therefore sufficient, in my judgment, to attach a presumption of validity to a forum State’s decision to apply its own law to a dispute over which it has jurisdiction.” *Id.* at 326 (Stevens, J., concurring in the judgment). See also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 843 n. 25 (1985) (Stevens, J., concurring in part and dissenting in part) (quoting the same language); Arthur T. von Mehren & Donald T. Trautman, *Constitutional Control of Choice of Law: Some Reflections on Hague*, 10 HOFSTRA L. REV. 35, 46 (1981) (Stevens’ view in *Hague* is that “the Court should abdicate responsibility for controlling choice of law except in cases so egregious as to be almost unthinkable.”).

Of course, Justice Stevens’ argument is weaker with respect to criminal cases, where the state itself has brought the claim. In that context, the state could more easily solve its concern for efficient administration by not bringing the case in the first place and leaving prosecution to the other jurisdiction.

213. 472 U.S. 797 (1985).

214. *Id.* at 843 (Stevens, J., concurring in part and dissenting in part).

Justice Stevens' due process analysis looks not only at the conflicts issue, but also at the substance of the law being applied. One must ask if the law being applied favors residents over nonresidents, represents a dramatic departure from the rule that obtains in most American jurisdictions, or is unfair on its face or as applied.²¹⁵ A statute criminalizing abortions by residents does not favor residents over nonresidents; in fact, it penalizes residents for doing something that nonresidents could lawfully do. Depending on one's view of abortion, one could argue that statutes criminalizing abortion are unfair, but, if the Court overrules *Roe*, the substantive due process claim is foreclosed.

One could also argue that the extraterritorial application of a criminal abortion statute is a dramatic departure from the rule in most American jurisdictions, but this portion of the Stevens test appears to be limited to the substance of the rule being applied (the prohibition of abortion), not the territorial extent of its application. For the latter question, Justice Stevens turns to a reasonable expectations analysis. That portion of the due process analysis has already been dealt with in discussing Justice Powell's dissent,²¹⁶ so no further exposition is necessary.

3. Other Due Process/Full Faith and Credit Cases

Hague is obviously not the only Supreme Court choice-of-law case. However, other modern full faith and credit and due process cases have little to say about the constitutionality of an extraterritorial abortion statute.

Watson v. Employers Liability Assurance Corp.,²¹⁷ for example, is further support for the proposition that a state may apply its law to a defendant that has had little contact with the state relative to the particular matter being litigated. In *Watson*, the plaintiff, a resident of Louisiana, was injured while using a home permanent product. She brought a direct action against the manufacturer's liability insurance company. The insurance policy prohibited direct actions; that prohibition was enforceable where the policy was made, but not in Louisiana. Recognizing that the policy was "bought, issued and delivered outside of Louisiana,"²¹⁸ the Court nevertheless held that Louisiana could apply its law. According to the Court, Louisiana had an interest in "safeguarding the rights of persons injured there;"²¹⁹ Louisiana's interest in these people was premised in part on their residence in Louisiana.²²⁰ However, because the accident occurred in Louisiana and the Court states that Louisiana's interest also extends to nonresidents injured in Louisiana,²²¹ *Watson* represents less of a break from territorialism than *Hague* and only weakly supports the constitutionality of an extraterritorial abortion statute.

The two choice-of-law cases decided by the Supreme Court after *Hague* also provide little assistance. One of the post-*Hague* decisions, *Phillips Petroleum Co. v. Shutts*,²²² involved the issue of whether interest was due on

215. *Hague*, 449 U.S. at 326-27 (Stevens, J., concurring in the judgment).

216. See *supra* text accompanying notes 203-07. Justice Stevens' reasonable expectations analysis is weaker than Justice Powell's. See *supra* text accompanying notes 191-96.

217. 348 U.S. 66 (1954).

218. *Id.* at 70.

219. *Id.* at 73.

220. *Id.* at 72.

221. *Id.*

222. 472 U.S. 797 (1985).

gas royalty payments that were withheld from royalty owners pending Federal Power Commission approval of rate increases. In a class action, the Kansas Supreme Court applied Kansas substantive law to all such claims, including claims involving both non-Kansas royalty owners and gas leases in other states. The Court held that, if all of the relevant conduct occurred elsewhere, a state could not apply its law to a corporation merely because the corporation was doing business in that state.²²³ However, as pointed out earlier, the residence of the defendant woman in the abortion case is a stronger contact than a corporation's mere business presence in a state. More importantly, most of the gas leases and most of the plaintiffs in *Shutts* had no connection to the forum.²²⁴ Kansas was applying its law not only to out-of-state activities, but also to out-of-state plaintiffs, and the Court has subsequently read *Shutts* as reversing "that part of [the Kansas Supreme Court opinion] which held that Kansas could apply its substantive law to claims by residents of other states concerning properties located in those States."²²⁵ Thus, the *Shutts* Court was not rejecting the principle that a state has an interest in protecting either its residents or its property; it was merely saying that a state cannot apply its law when neither interest is present. Thus, whether the fetus is treated as a person or as property, *Shutts* does not reject the state's interest in protecting it extraterritorially.

The other leading choice-of-law case decided by the Supreme Court since *Hague is Sun Oil Co. v. Wortman*.²²⁶ In that case, the Court held that a forum can apply its own "procedural" law, including its statute of limitations, even if the forum has no substantive connection to the dispute and the substantive law of another state therefore applies. The narrow holding of *Wortman* is unimportant for present purposes because an abortion statute is decidedly not procedural, no matter how that term is defined. What is important is the analysis the Court used to reach its decision.

Wortman sets forth two important propositions of constitutional analysis.²²⁷ First, the Court holds that the restrictions imposed by the Full Faith and Credit Clause (and presumably those imposed by the Due Process Clause as well²²⁸) must be read in light of principles of international conflicts law. According to the Court:

[T]he most pertinent comment at the Constitutional Convention, made by James Wilson of Pennsylvania, displays an expectation that [the Full Faith and Credit Clause] would be interpreted against the background of principles developed in international conflicts law. Moreover, this expectation was practically inevitable, since there was no other devel-

223. The Court noted that "Petitioner owns property and conducts substantial business in the State, so Kansas certainly has an interest in regulating petitioner's conduct in Kansas." *Id.* at 819. However, the Court held that this contact was insufficient to justify applying Kansas law where the claim arose out of claims otherwise unrelated to Kansas.

224. "[O]ver 99% of the gas leases and some 97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for this lawsuit." *Id.* at 815.

225. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 721 (1988). See also *Shutts*, 472 U.S. at 822 ("There is no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control.")

226. 486 U.S. 717 (1988). This case arose from the same underlying dispute as *Shutts*.

227. Three justices reject both of the principles discussed in the text. *Id.* at 740-42 (Brennan, J., concurring in part and concurring in the judgment). Whether or not a majority of the Court will follow these principles in future cases remains to be seen.

228. See *supra* note 161 and accompanying text.

oped body of conflicts law to which courts in our new Union could turn for guidance.²²⁹

The Court's apparent view is that, insofar as the Full Faith and Credit Clause is concerned, states are free to apply their law to the same extent as independent sovereigns under international law. The Court expressly states that the famous statement in *Milwaukee County v. M. E. White Co.* that "[t]he very purpose of the Full Faith and Credit Clause was to alter the status of the several states as independent foreign sovereignties"²³⁰ was not meant to be to the contrary.²³¹ This reliance on international conflicts law is not absolute; it is subject to subsequent common law development, although the Court never makes clear exactly how that process of common law development works.²³²

The second important principle arising from *Wortman* is its focus on historical analysis. To determine whether the Full Faith and Credit Clause precludes an uninterested forum's application of its statute of limitations, the Court looks to "reported state cases in the decades immediately following ratification of the Constitution."²³³ The Court holds that the "implicit understanding" of "judges writing in the era when the Constitution was framed and ratified" carries "great weight" in interpreting the Full Faith and Credit Clause.²³⁴ *Wortman* rejects the argument that the opinions of modern choice-of-law scholars could make those "long established and still subsisting" theories unconstitutional.²³⁵

Wortman's effect, if any, on the constitutionality of a state statute restricting extraterritorial abortions is expansive, rather than restrictive. The majority was apparently not saying that a state is required to apply the law consistent with international conflicts law or historical practice, only that it may.²³⁶ If supported by principles of international law or historical application,

229. *Wortman*, 486 U.S. at 723 (citation omitted).

230. *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276-77 (1935).

231. The Court argues that the *Milwaukee County* statement

is true, as the context of the statement in *Milwaukee County* makes clear, not because the Clause itself radically changed the principles of conflicts law but because it made conflicts principles enforceable as a matter of constitutional command rather than leaving enforcement to the vagaries of the forum's view of comity.

Wortman, 486 U.S. at 723 n.1. Justice Brennan strongly disagrees with this interpretation of *Milwaukee County*. *Id.* at 740 n.3 (Brennan, J., concurring in part and concurring in the judgment).

232. The Court says:

It is not our point that the content of the Full Faith and Credit Clause is governed by international conflicts law, but only ... that its original content was properly derived from that source. The conflicts law embodied in the Full Faith and Credit Clause allows room for common-law development, just as did the international conflicts law that it originally embodied. But the concurrence points to no such common-law development.

Id. at 724 n.1.

233. *Id.* at 724.

234. *Id.* at 725.

235. *Id.* at 728-29. See also *id.* at 727-28 ("If we abandon the currently applied, traditional notions of such entitlement we would embark upon the enterprise of constitutionalizing choice-of-law rules, with no compass to guide us beyond our own perceptions of what seems desirable.")

236. The Court indicates that the Full Faith and Credit Clause "allows room for common-law development." *Id.* at 724 n.1. The Court makes it clear that Kansas is free to apply another state's statute of limitations if it chooses to do so:

a choice of law is allowed even if it does not meet the *Hague* "sufficient contacts" test. Thus, if a state has significant contacts, *Wortman* would not preclude the extraterritorial application of criminal law even if both early principles of international law and state practice were strictly territorial. *Wortman* would, however, allow the extraterritorial application of criminal law if it was consistent with international conflicts principles and early state practice, even if the state did not have significant contacts. This is important, particularly with respect to application of such a criminal statute to a woman seeking an extraterritorial abortion, because it is a clear principle of international law that a nation may regulate the extraterritorial activities of its own citizens.²³⁷

B. Application to the Doctor Performing the Abortion

To this point, I have been focusing on the application of an extraterritorial abortion statute to the woman seeking the abortion. But what about the application of such a statute to the doctor and others performing the abortion? The case for such a statute is weaker, but, given the uncertainty of the Supreme Court analyses, one cannot say for certain that it would violate full faith and credit or due process.

With respect to the *Hague* plurality's analysis, the analysis of two of the three contacts would be the same as for prosecution of the woman seeking the

[S]ince the legislative jurisdictions of the States overlap, it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another Today, for example, we do not hold that Kansas must apply its own statute of limitations to a claim governed in its substance by another State's law, but only that it may.

Id. at 727. This in itself is inconsistent with the historical view that a cause of action could arise in only one jurisdiction. At another point, the Court notes that "[i]f current conditions render it desirable that forum States no longer treat a particular issue as procedural for conflict of laws purposes, those States can themselves adopt a rule to that effect." *Id.* at 729.

However, the Court also indicates that the Full Faith and Credit Clause "made conflicts principles enforceable as a matter of constitutional command rather than leaving enforcement to the vagaries of the forum's view of comity." *Id.* at 723 n.1. This statement is difficult to reconcile with the Court's expressly stated view that states need not follow the long-standing and well-settled principle that applies the forum's statute of limitations.

The Court's response to a criticism in Justice Brennan's concurrence also raises questions about the Court's meaning. Justice Brennan cites a passage in the *Hague* plurality opinion that criticizes a 1934 case for giving controlling constitutional significance to the old place-of-contracting conflicts rule. *Id.* at 740 (Brennan, J., concurring in part and concurring in the judgment). The majority in *Wortman* responds to Brennan's criticism as follows:

That criticism [in *Hague*] merely rejected the view that the Constitution enshrines the rule that the law of the place of contracting governs validity of all provisions of the contract. By the time of *Allstate*, of course, such a rule could not have been characterized as a subsisting tradition, if it ever could have been, in light of escape devices such as the doctrine of public policy, characterization of an issue as procedural, and the rule that the law of the place of performance governs matters of performance.

Id. at 728 n.2. If, as the Court says, states are not required to follow the historical rule, the second part of the majority's response is irrelevant. The Court could simply have said that the 1934 case was wrong because it *required* the application of the law of the state of contracting; *Wortman* would allow a state with significant contacts to apply its law even if historical principles would look to another state. The quote above does not do that, however. It seems to accept the view that states are bound by tradition, but argues that traditions change. Rather than assume that the Court in this one sentence in a footnote meant to take back what it stated expressly in the text, it is probably better to assume that the Court simply did not appreciate the stronger argument it could have made.

237. See *supra* notes 67-68 and accompanying text.

abortion. The state's interest in protecting the fetus, which, as I indicated above, is analogous to both the employment connection and the after-acquired domicile in *Hague*, would be identical whether the defendant is the mother or the doctor. The analogy to the second *Hague* contact would, however, be substantially different because this contact focuses on the connections between the defendant and the state whose law is applied. The physician performing an extraterritorial abortion would not necessarily have any contact at all with the prosecuting state. Abortion is illegal within the prosecuting state, so it is unlikely that the doctor is performing other abortions within that state. It is possible that the abortionist also practices medicine in the prosecuting state, but only performs abortions elsewhere. If so, his connection is similar to the business presence of the defendant in *Hague*; the contact would be even stronger if he simply took his patients across the state line for abortions. However, it is more likely that the doctor only practices medicine in the state where he performs abortions and does no business in the prosecuting state. In the absence of this second contact, it is not clear that the prosecuting state could exercise legislative jurisdiction over him. Of course, the more the doctor solicits patients from within the prosecuting state, the stronger the state's case would be. This helps to establish that the doctor "does business" in the state, and that, unlike *Hague*, the particular litigation would arise out of that business contact. At best, however, the application of the plurality's analysis leaves the constitutionality of prosecuting the doctor indeterminate.

Justice Powell's dissent in *Hague*, as mentioned earlier, splits the analysis into parts: (1) whether application of the state's law frustrates the reasonable expectations of the parties, and (2) whether the forum has a legitimate public policy interest in the outcome of the litigation. The second part of the analysis does not depend on whether the pregnant woman or the doctor is being prosecuted; the state's policy interest in protecting the fetus is the same in both cases. The analysis is different with respect to the first factor, however, because the defendant is different and the reasonable expectations of that defendant might also differ.

Analysis of the doctor's expectations presents the same problem of circularity that analysis of the pregnant woman's expectations did. People's expectations are, at least in part, dependent on what states constitutionally may do. However, unlike the pregnant woman, the doctor is not domiciled in the prosecuting state and therefore is not to be expected to have knowledge of that state's law. As Peter Hay has argued, "a resident of another state, doing business in his home state, ordinarily has no reason to suspect that disabilities under foreign law might attach to a local transaction and thus is unlikely to inquire into such matters."²³⁸ But this response hardly seems sufficient. People who contract with those in other states or are involved in a tort with those domiciled in other states are often equally unaware of that other state's law, but it is often applied to them. A doctor operating on a patient domiciled in another state might expect the application of that other state's law to the same extent that an insurance company might expect Minnesota law to apply when it insures a Minnesota employee. That expectation would be even stronger if the doctor solicited the patient to come from the other state to obtain the abortion. Thus, at least

238. Peter Hay, *Judicial Jurisdiction and Choice of Law: Constitutional Limitations*, 59 U. COLO. L. REV. 9, 30 (1988).

arguably, if the doctor is aware of the woman's domicile, it might not frustrate his reasonable expectations to apply that state's law to him, particularly if the statute and its extraterritorial effect are well-publicized (as they almost certainly would be). It would be easier to decide this issue if the Court articulated a standard for deciding when reasonable expectations are frustrated, but, unfortunately, it has not.

As for Justice Stevens' *Hague* analysis, the expectations portion of his due process analysis would be similar to that under Justice Powell's test, but his due process analysis would not otherwise differ appreciably from that applicable to the woman. This might be the rare case where his full faith and credit analysis has teeth, but the vagueness of his test makes certainty impossible. Justice Stevens, it will be recalled, said that a state's application of its law is invalid under the Full Faith and Credit Clause only if the application of that law unjustifiably infringes upon the legitimate interests of another state, threatening that state's sovereignty.²³⁹ The infringement on the other state's sovereignty is arguably greater when, not only do the events occur in that other state, but the defendant to whom the extraterritorial law is applied is a citizen of that other state. However, the prosecuting state still has a legitimate interest in its resident woman and the fetus she carries that would be furthered by prosecuting the non-resident doctor, so the answer ultimately hinges on what Justice Stevens means by "unjustifiable." We can say only that the case for prosecuting the doctor is weaker than the case for prosecuting the woman seeking the abortion.

The Supreme Court's opinion in *Home Insurance Co. v. Dick*²⁴⁰ also is relevant to the case against those performing the abortion. *Dick* was an action to recover on a fire insurance policy for the loss of a tug. The insurance company was a Mexican company, the policy was entered into in Mexico, and it only covered the vessel in certain Mexican waters. The plaintiff, *Dick*, was a Texas domiciliary, but, at the times of the contract and of the loss, he was living in Mexico.²⁴¹ The Court held that the application of a Texas statute abrogating a one-year statute of limitations in the policy was an unconstitutional denial of due process:

A State may, of course, prohibit and declare invalid the making of certain contracts within its borders. Ordinarily, it may prohibit performance within its borders, even of contracts validly made elsewhere, if they are required to be performed within the State and their performance would violate its laws. But, in the case at bar, nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas. All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of re-insurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were invoked for any purpose, except by *Dick* in the bringing of this suit. The fact that *Dick's* permanent residence was in Texas is without significance. At all times here material, he was physically present and acting in Mexico.

239. See *supra* text accompanying note 184.

240. 281 U.S. 397 (1930).

241. *Id.* at 404.

Texas was, therefore, without power to affect the terms of contracts so made.²⁴²

Similarly, all actions by the doctor performing an extraterritorial abortion would be performed outside of the state. If Dick's Texas domicile is insufficient to apply Texas law to the insurance company, the pregnant woman's domicile might be insufficient to apply the state of domicile's criminal law to the doctor.²⁴³

However, *Dick* is distinguishable from the extraterritorial abortion case. First, Dick's connection to Texas was weak; he lived in Mexico at the time of the contract and only returned to Texas after the loss. The Court was careful to point out that Dick had no existing residence in Texas at the time of the events in question. The woman seeking an extraterritorial abortion would have an existing residence in the regulating state. Justice Powell's dissent in *Hague* cites *Dick* as holding that a post-occurrence change of residence is insignificant.²⁴⁴ This is consistent with other Supreme Court cases dismissing the relevance of post-occurrence changes of residence²⁴⁵ and would not automatically prevent a state from regulating extraterritorially a transaction involving its *current* resident. Second, the application of Texas law in *Dick* would have upset a contractual expectation as to the applicable rule. At least one member of the Court has expressed the view that a contractual choice-of-law provision is entitled to great weight in determining whether the application of some other law would upset the parties' expectations.²⁴⁶ In the abortion case, there presumably would be no such contractual limitation on choice of law, and, even if there were, the dispute involves the interests of parties foreign to the contract—the state and the fetus.

The application of a state's criminal law to one who has never entered the state is not as farfetched as it might seem. As discussed earlier, some of the criminal child custody and child support cases have done exactly that.²⁴⁷ And there are certainly analogues in the civil choice-of-law cases.

The civil case most analogous to the criminal prosecution of a non-resident doctor is *Rosenthal v. Warren*,²⁴⁸ a 1973 Second Circuit decision. *Rosenthal* was a wrongful death action. The decedent, Rosenthal, was a citizen of New York who traveled to Boston for an operation performed by Dr. Warren, a Massachusetts surgeon. Eight days after the operation, Rosenthal died. His executrix sued Dr. Warren and the Massachusetts hospital where the operation was performed.

The Massachusetts wrongful death statute limited recovery to no more than \$50,000; New York law contained no such limitation.²⁴⁹ Applying New

242. *Id.* at 407-08.

243. Although *Dick* might affect the case against the nonresident doctor and others performing the abortion, it is reasonably clear that it would not affect the case against the woman seeking the abortion. The Court made it clear that *Dick* was not concerned with the potential application of Texas law to Dick himself: "We need not consider how far the state may go in imposing restrictions on the conduct of its own residents." *Id.* at 410.

244. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 337 (1981) (Powell, J., dissenting).

245. *See John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936).

246. *Hague*, 449 U.S. at 328-29 (Stevens, J., concurring in the judgment).

247. *See supra* parts III.C. and III.D.

248. 475 F.2d 438 (2d Cir. 1973).

249. *Id.* at 439.

York choice-of-law rules,²⁵⁰ the court noted that New York had rejected "the wooden rule that the law of the place of the tort inevitably governed."²⁵¹ Instead, the court held that New York's interest in the decedent and his wife and children justified the application of New York's wrongful death law to the Massachusetts operation.²⁵²

Judge Lumbard, dissenting, argued that the application of New York law violated the Full Faith and Credit Clause.²⁵³ "I cannot see," he wrote, "how the alleged malpractice and subsequent death of plaintiff's decedent can be classified as anything other than a local incident."²⁵⁴ The majority disagreed, finding that New York's domiciliary connection to the decedent and his next of kin and the fact that "the defendant hospital is a national one in terms of its patients, its staff, its reputation and its efforts to obtain out-of-state contributions" were sufficient for constitutional purposes.²⁵⁵ The majority's constitutional analysis, written before the Supreme Court's decision in *Hague*, did not focus on the expectations of the parties,²⁵⁶ but the court did consider expectations in its choice-of-law analysis. The court held that the application of New York law did not violate any reasonable expectations of the defendants because the conduct of the hospital and the doctor was not patterned upon the Massachusetts wrongful death limitation: "Quite probably it never occurred to Dr. Rosenthal, Dr. Warren or to the New England Baptist Hospital that a choice-of-law problem would arise; at least one does not ordinarily think of wrongful death limitations even when undertaking surgery."²⁵⁷ Thus, it was not unfair to apply New York law to them.

Rosenthal might be distinguished from the extraterritorial abortion case on the ground that *Rosenthal* did not involve a liability/no-liability distinction. The defendants in *Rosenthal* were liable under the laws of both states; the only question was the amount of their liability. For this reason, the court argued, the choice-of-law decision would not affect their behavior, since the same non-negligent conduct was expected under the laws of both states. This argument is, of course, naive in its assumption that the amount of liability does not affect

250. *Id.* at 440.

251. *Id.* at 441.

252. *Id.* at 446.

253. *Id.* at 448-49 (Lumbard, J., dissenting).

254. *Id.* at 449 (Lumbard, J., dissenting). Judge Lumbard expanded on this earlier in his opinion:

Here the decedent made a deliberate choice to undergo the operation in Massachusetts at defendant hospital. Hence, he journeyed into Massachusetts and registered in defendant hospital where he was under the care of defendant, Dr. Warren. The alleged negligence that resulted in decedent's death, the operation by Dr. Warren, occurred wholly within Massachusetts under the care of Massachusetts residents and in a Massachusetts institution. New York's only connection with this occurrence was the patient's permanent residence in New York. I do not see that New York's interest in this occurrence is enhanced by the fact that this Massachusetts physician and Massachusetts institution have such an eminent reputation that a substantial number of their patients, many from New York, are not Massachusetts residents and choose to come into Massachusetts and undergo treatment there; for there is no evidence that either defendant solicited patients from outside Massachusetts—their popularity is due solely to their reputation and the choice of the individual patients.

Id. at 447-48 (Lumbard, J., dissenting).

255. *Id.* at 446.

256. The court termed the expectations of the parties "legally irrelevant." *Id.* at 444.

257. *Id.*

behavior. The defendants in *Rosenthal* could have decided that the possibility of paying \$50,000 justified risks that they would not have taken had they realized that they might lose more under New York law. The amount of liability clearly can affect behavior and thus differences in the amount of liability can frustrate expectations as easily as differences between liability and no liability.

An even stronger response to this proposed distinction is another case decided by the same court five years later. In *O'Connor v. Lee-Hy Paving Corp.*,²⁵⁸ the court faced the liability/no-liability case and reached the same result. *O'Connor* was also a wrongful death case. The decedent, O'Connor, a New York resident, was working for his New York employer at a construction site in Virginia when he was killed in an industrial accident.²⁵⁹ The administratrix of O'Connor's estate sued the paving subcontractor, a Virginia corporation that transacted no business in New York,²⁶⁰ and an employee of the paving subcontractor, a resident of Virginia also with no connection to New York.²⁶¹ A fellow servant provision of the Virginia workers' compensation statute would have barred damage actions against the defendants; New York law would not apply such a bar.²⁶² The court held that New York choice-of-law rules dictated that the New York law apply.²⁶³ Thus, even where the choice is one between liability or no liability, some courts have not hesitated to apply their civil law to extraterritorial activities involving an injured resident.

The Supreme Court might find these cases difficult,²⁶⁴ but nothing in *Hague* or other constitutional choice-of-law cases makes such an extraterritorial application of civil law obviously unconstitutional. Thus, if an extraterritorial abortion statute is unconstitutional under the Full Faith and Credit or Due Process Clauses, the rationale must lie in an inherent difference between civil and criminal law—a view that crimes are simply more territorial than civil law. In the next section, I turn to the few Supreme Court statements on extraterritorial criminal jurisdiction to see if this dichotomy between criminal and civil cases is justified or if it is just a remnant of the old common law, territorial view that criminal law, like civil law, is local.

258. 579 F.2d 194 (2d Cir. 1978).

259. *Id.* at 196-97.

260. *Id.* at 197.

261. *Id.*

262. *Id.* at 203.

263. Surprisingly, the defendants raised no constitutional challenge to the application of New York law. *Id.*

264. See Hay, *supra* note 238, at 30-31 (arguing that the application of local law in *Rosenthal* was constitutionally impermissible); Andreas F. Lowenfeld & Linda J. Silberman, *Choice of Law and the Supreme Court: A Dialogue Inspired by Allstate Insurance Co. v. Hague*, 14 U.C. DAVIS L. REV. 841, 845 (1981) (Lowenfeld arguing that both *Rosenthal* and *O'Connor* "come dangerously close to the constitutional fairness line."). But see Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 483 (arguing that the application of local law in *Rosenthal* was constitutionally permissible); Alfred Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960, 972-73 (1981) (arguing that *Rosenthal* is constitutional under Justice Brennan's plurality opinion in *Hague*).

V. SUPREME COURT ANALYSIS OF THE EXTRATERRITORIAL APPLICATION OF STATE CRIMINAL LAW

The federal courts have been relatively lenient in allowing the extraterritorial application of *federal* criminal law. Several federal cases, including two Supreme Court cases, approve the exercise of federal criminal jurisdiction over extraterritorial acts when the defendant is a United States citizen.²⁶⁵ These cases obviously do not resolve the present issue because the federal government does not face the same constitutional restrictions as the states. The Full Faith and Credit Clause does not apply, the dormant Commerce Clause does not apply, and the Due Process Clause of the Fifth Amendment has not been applied as aggressively to the extraterritorial application of federal law as has the Due Process Clause of the Fourteenth Amendment to the extraterritorial application of state law.²⁶⁶ As Professor Rotenberg argued,

the realities of social existence within the United States, the fact that each state is part of a larger nation, and the fact that the Constitution is a superimposed authority over the "sovereignty" of the states—and all that these connote—mean that the differences between interstate and international criminal jurisdictional problems are as significant, if not more so, than the similarities.²⁶⁷

Some scholars argue strongly that the extraterritorial application of state criminal law, even to a state's own residents, is unconstitutional. For example, Rollin Perkins and Ronald Boyce argue that "the territorial theory has such a dominant position that no state may punish its citizen for what he does in the exclusive territorial jurisdiction of another state where what was done was lawful."²⁶⁸ Similarly, a leading conflict-of-laws treatise states that "[t]here is no likelihood that application of state criminal law against a state citizen, for conduct altogether located at another place where a modern legal system currently prevails, would be upheld."²⁶⁹ However, there is little authority to support these broad statements. Professors Perkins and Boyce cite only the Full Faith and Credit Clause itself.²⁷⁰ No authority is cited in the conflicts treatise.²⁷¹

265. *Blackmer v. United States*, 284 U.S. 421, 436–37 (1932); *United States v. Bowman*, 260 U.S. 94, 102 (1922); *United States v. King*, 552 F.2d 833, 851 (9th Cir. 1976); *United States v. Layton*, 509 F. Supp. 212, 216 (N.D. Cal.), *appeal dismissed*, 645 F.2d 681 (9th Cir.), *cert. denied*, 452 U.S. 972 (1981); *United States v. Daniszewski*, 380 F. Supp. 113, 116 (E.D.N.Y. 1974). *See also* *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824) ("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens.").

266. For an argument that the Fifth Amendment due process clause limits federal extraterritoriality in much the same manner that the Fourteenth Amendment due process clause limits state extraterritoriality, see Brilmayer & Norchi, *supra* note 162.

267. Rotenberg, *supra* note 59, at 768 n.20.

268. PERKINS & BOYCE, *supra* note 47, at 42. They even provide an example: "California could not validly make it a crime for its citizens to 'play the slot machines' in Las Vegas, Nevada, where this is lawful." *Id.*

269. LEFLAR ET AL., *supra* note 54, at 316–17. *Contra* George, *supra* note 47, at 634–35, 637.

270. PERKINS & BOYCE, *supra* note 47, at 42 n.27. The lack of authority for their broad condemnation of extraterritorial criminal law is especially difficult to understand, because they discuss *Skiriotas* in the preceding paragraph.

271. The authors continue with a statement that "[s]ome punishable impact within the prosecuting state would be required." LEFLAR ET AL., *supra* note 54, at 317. They do not say

The few Supreme Court cases to touch on the extraterritorial application of state criminal law certainly do not support such broad generalizations. At best, these cases are mixed. There is language in Supreme Court cases rejecting extraterritoriality, but there is also language allowing it.

The strongest Supreme Court case against the extraterritorial application of state criminal law, *Nielsen v. Oregon*,²⁷² is over eighty years old. In *Nielsen*, an Oregon statute prohibited the use of purse nets or seines to take fish from the Columbia River. The Columbia River forms the boundary between Washington and Oregon, and a federal statute gave Washington and Oregon "concurrent jurisdiction over all offenses committed on" the river.²⁷³ The defendant, a resident of Washington, was fishing on the Washington side of the river with a purse net when he was arrested by Oregon authorities. Even though he had a Washington state license to operate a purse net on the river, he was convicted in Oregon of violating the Oregon statute. The Court indicated that either state could prosecute a person for committing an act prohibited by the laws of both states, regardless of where on the river that act was committed.²⁷⁴ However, "for an act done within the territorial limits of the State of Washington under authority and license from that State one cannot be prosecuted and punished by the State of Oregon."²⁷⁵ No constitutional basis or other justification for this conclusion was given.

Read broadly, *Nielsen* would prohibit one state from prosecuting even a resident for obtaining a lawful abortion in another state. However, there are differences between what Oregon did in *Nielsen* and the extraterritorial regulation of abortion. First, the defendant in *Nielsen* was not a resident of Oregon, and thus Oregon could not justify its regulation on that basis. Oregon had no connection at all to the case, either territorial or domicile-based. Thus, *Nielsen* is similar to *Phillips Petroleum Co. v. Shutts*,²⁷⁶ where the Court also disapproved the extraterritorial application of state law. However, although the Court in *Nielsen* recognized that the defendant was a Washington resident,²⁷⁷ this fact was not significant in the Court's opinion.²⁷⁸

A second possible distinction focuses on the license issued by the state of Washington allowing the defendant to use purse nets on the Columbia River. One might argue that Oregon's criminalization of conduct that Washington specifically licensed the defendant to engage in is a greater affront to Washington's sovereignty than if no license was granted. Justice Brewer's opinion in *Nielsen* repeatedly focuses on the Washington license²⁷⁹ and hints

what impact would be required or whether such an impact could be present where the conduct itself is altogether extraterritorial.

272. 212 U.S. 315 (1909).

273. *Id.* at 316.

274. *Id.* at 320.

275. *Id.* at 321.

276. 472 U.S. 797 (1985). See *supra* notes 222-25 and accompanying text.

277. *Nielsen*, 212 U.S. at 316.

278. Professor Perkins argues that the result might be different if the defendant were domiciled in Oregon. Perkins, *supra* note 47, at 1165. However, he reaches this result only by combining Oregon's interest in regulating its domiciliary with the congressional grant of concurrent jurisdiction; in the absence of concurrent jurisdiction, he argues that even a conviction of an Oregon resident would be unconstitutional. *Id.*

279. The Court says:

The plaintiff in error was within the limits of the State of Washington, doing an act which that State in terms authorized and gave him a license to do. Can the

that the result might differ if Washington had not authorized the act. Justice Brewer states that the Court need not determine "whether, in the absence of any legislation by the State of Washington authorizing the act, Oregon could enforce its statute against the act done anywhere upon the waters of the Columbia."²⁸⁰

A pregnant woman presumably would not have a specific license from the state of the abortion to have an abortion, so *Nielsen* might be distinguished on this basis. However, this distinction should not matter. Whether Washington grants a license specifically allowing the defendant to use a purse net, passes a statute allowing people generally to use purse nets, or just does nothing to prohibit the use of purse nets, the effect is the same—purse nets are allowed in Washington. The extraterritorial application of Oregon law interferes equally with the Washington rule, and thus with Washington's territorial sovereignty, in all three cases, even though the interference is more obvious in the license case. Similarly, extraterritorial regulation of abortion infringes to the same extent upon the territorial powers of the state where the abortion takes place whether pregnant women are specifically licensed to abort or a state statute grants a more general license allowing abortion. In any event, this distinction may make little practical difference. If the validity of extraterritorial regulation of abortion turned on the absence of a specific license, states allowing abortion would be tempted to establish procedures to grant such licenses routinely, much as marriage licenses are routinely granted even to non-residents.

The greatest problem with *Nielsen* is that it reflects a discredited constitutional philosophy of choice of law. When *Nielsen* was decided, the Supreme Court applied strict territorial limits even to civil choice of law. The Court accepted the assumption that only a single state was competent to apply its law to a dispute²⁸¹ and seemed to be constitutionalizing vested rights territorialism.²⁸² Just as the Court said in *Nielsen* that a state could not apply its criminal law to crimes occurring in other jurisdictions, it said in cases like *New York Life Insurance Co. v. Dodge*²⁸³ and *Mutual Life Insurance Co. v. Liebong*²⁸⁴ that a state could not apply its contract law to contracts "made" in other states.²⁸⁵ Similarly, the Court said in *Western Union Telegraph Co. v.*

State of Oregon, by virtue of its concurrent jurisdiction, disregard that authority, practically override the legislation of Washington, and punish a man for doing within the territorial limits of Washington *an act which that State had specially authorized him to do?*

Nielsen, 212 U.S. at 321 (emphasis added). Later, the Court says: "It is enough to decide, as we do, that for an act done within the territorial limits of the State of Washington *under authority and license from that State* one cannot be prosecuted and punished by the State of Oregon." *Id.* (emphasis added).

280. *Id.* Even if the result were different in the absence of a Washington license, that would not necessarily answer the abortion question, because Oregon in *Nielsen* was operating under a special congressional grant of concurrent jurisdiction, authority that would be lacking in the abortion case.

281. BRILMAYER, *supra* note 54, at 118; LEFLAR ET AL., *supra* note 54, at 163.

282. BRILMAYER, *supra* note 54, at 117-18; RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 511 (3d ed. 1986); WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 234-36 (1984).

283. 246 U.S. 357 (1918).

284. 259 U.S. 209 (1922).

285. In *Dodge*, Dodge, a resident of Missouri, applied in Missouri for a life insurance policy issued by the defendant, a New York corporation headquartered in New York. The policy allowed the insured to borrow against the policy, which he did. He signed a loan application and

*Brown*²⁸⁶ that a state could not apply its tort law unless it was the place of the tort, at least not if its law provided for greater liability.²⁸⁷

Thus, *Nielsen* merely reflects the territorial attitude of all of the other choice-of-law cases of its era. As shown in the previous section, the territorial limits established in these early cases have been rejected in subsequent civil cases²⁸⁸ and nothing in *Nielsen* justifies treating civil and criminal cases differently. We must look beyond *Nielsen* for territorial limits on state criminal law.

Other more recent Supreme Court cases expressly allow the extraterritorial application of state criminal law. For example, in *Skiriotes v. Florida*,²⁸⁹ a Florida resident was convicted of using diving equipment to take sponges from the Gulf of Mexico off the coast of Florida, in violation of Florida law. He argued that his activities occurred outside of the territorial waters of Florida and that Florida was powerless to make extraterritorial conduct criminal.²⁹⁰ The Court assumed that the appellant's activities were outside of Florida's territorial waters, but nevertheless upheld the conviction. The Court held that a state

loan agreement in Missouri and gave them to the insurance company's Missouri branch office, which forwarded the instruments to New York, where they were accepted and the proceeds mailed to Dodge. When Dodge defaulted on the loan payments, the company applied the cash value of the policy to repay the loan, as allowed by both the policy and New York law, and cancelled the policy. A Missouri statute limited such forfeitures. The Supreme Court held that it was unconstitutional to apply the Missouri statute to this loan. The Court conceded that the policy itself was a Missouri contract, but held that the loan was "made" in New York. The Court therefore held that, because the loan was a New York contract, "it was one which the Missouri legislature could not destroy or prevent a citizen within its borders from making beyond them" *Dodge*, 246 U.S. at 376-77. The Court argued that "[t]o hold otherwise would ... sanction the impairment of that liberty of contract guaranteed to all by the Fourteenth Amendment." *Id.* at 377. For an interesting comparison of this case to *Mutual Life Ins. Co. v. Liebong*, see WEINTRAUB, *supra* note 282, at 512-15. See also *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149-50 (1934); *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389, 399 (1924); *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914); *Allgeyer v. Louisiana*, 165 U.S. 578, 590-93 (1897).

286. 234 U.S. 542 (1914).

287. In *Brown*, a telegram was sent from South Carolina to Washington, D.C., to inform the plaintiff that her sister had died. As a result of Western Union's negligence, the telegram was not delivered, and the plaintiff missed her sister's funeral. She sued in South Carolina pursuant to a South Carolina statute allowing recovery for mental anguish. The United States Supreme Court reversed a judgment in her favor, stating:

[I]t is established as the law of this court that when a person recovers in one jurisdiction for a tort committed in another he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground but the measure of the maximum recovery. The injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act or omission complained of is obvious; and when a State attempts in this manner to affect conduct outside its jurisdiction or the consequences of such conduct, and to infringe upon the power of the United States, it must fail.

Id. at 547 (citations omitted).

288. See *supra* text accompanying note 197.

289. 313 U.S. 69 (1941).

290. *Id.* at 75-76. The Florida statute only applied to taking sponges "from the Gulf of Mexico, or the Straits of Florida or other waters within the territorial limits of the State of Florida." *Id.* at 70 n.1 (emphasis added). The Florida courts held that the activity was within Florida's territorial waters, even though outside the territorial waters of the United States. *Id.* at 70. The United States Supreme Court found it unnecessary to decide the extent of Florida's territorial waters; it assumed that the appellant's conduct was extraterritorial. *Id.* at 76. The Court noted the inconsistency between this assumption and the language of the statute, but dismissed that problem as a state law issue of statutory interpretation. *Id.* at 79.

has broad power to control the conduct of its citizens on the high seas. This authority, the Court wrote, "is analogous to the sovereign authority of the United States over its citizens in like circumstances."²⁹¹

The "high seas" context limits *Skiriotes*' value to the present discussion. *Skiriotes* does hold that state citizenship gives a state a sufficient basis to regulate extraterritorially,²⁹² but the applicable constitutional constraints were weaker in *Skiriotes* than they would be in an extraterritorial abortion case. Full faith and credit concerns were completely absent in *Skiriotes*; since the conduct occurred on the high seas, there was no other state law to which full faith and credit could be given. Due process concerns might also be weaker in the high seas context. A Florida citizen acting on the high seas off the coast of Florida certainly does not expect any other state's law to apply, even if he might not expect Florida law to apply. A citizen acting in another state might reasonably expect the criminal law of that other state to apply, and the application of her domicile state's law would result in a greater frustration of her expectations than if she were on the high seas.

Skiriotes did not discuss this distinction, but the Court was very careful to limit its statements to conduct on the high seas. Chief Justice Hughes also quoted language from an earlier case that limits such legislative jurisdiction to citizens "operating outside the territory of the State, ... but *within no other territorial jurisdiction*."²⁹³ *Skiriotes* nevertheless supports the conclusion that, in at least some contexts, a state may apply its criminal laws extraterritori-

291. *Id.* at 79.

Since *Skiriotes*, several cases have approved state criminal jurisdiction over fishing in extraterritorial waters. *Felton v. Hodges*, 374 F.2d 337 (5th Cir. 1967); *F/V American Eagle v. State*, 620 P.2d 657 (Alaska 1980); *People v. Weeren*, 607 P.2d 1279 (Cal. 1980); *State v. Sieminski*, 556 P.2d 929 (Alaska 1976); *State v. Bundrant*, 546 P.2d 530 (Alaska 1976). *See also Corbin v. State*, 672 P.2d 156 (Alaska Ct. App. 1983) (upholding conviction for extraterritorial theft of crab pots because of the crime's close connection to the crab fishing industry). *But see Hjelle v. Brooks*, 377 F. Supp. 430, 440-41 (D. Alaska 1974) (enjoining Alaska's regulation of crab fishing outside Alaska's territorial waters where Alaska failed to show a sufficient nexus between its extraterritorial regulation and protection of the crab fishery within territorial waters).

Most of those cases involved defendants who were residents of the regulating state, as in *Skiriotes*. However, one case extended the *Skiriotes* principle to cover non-residents. *State v. Bundrant*, 546 P.2d 530 (Alaska 1976). The state in that case argued that, because the defendants held Alaska fishing licenses and had other connections to Alaska, they had effectively become "crab fishing citizens" of Alaska. *Id.* at 556. The court refused to adopt this theory, but held that Alaska's police power did extend to non-resident defendants. The court's theory seemed to be that allowing non-residents to fish would frustrate the conservation purposes underlying Alaska's extraterritorial regulation. *Id.* at 554-55.

Surprisingly, the Florida Supreme Court, which upheld the conviction in *Skiriotes*, subsequently held that a prosecution for extraterritorial spear fishing violated the accused's right to a trial in the county where the crime was committed. *Mounier v. State*, 178 So. 2d 714, 717 (Fla. 1965). The Florida Supreme Court quoted both the Florida constitution and the Sixth Amendment to the United States Constitution, without specifying whether it felt that its result was compelled by both. The requirement of a trial in the "county" where the crime was committed is, of course, present only in the state constitution. *See also Bateman v. State*, 238 So. 2d 621 (Fla. 1970) (conviction reversed on venue grounds where state failed to prove that prohibited shrimp fishing occurred within territorial boundaries of county and state).

292. *Skiriotes*, 313 U.S. at 77-78.

293. *Id.* at 78 (quoting *Old Dominion S.S. Co. v. Gilmore* (The *Hamilton*), 207 U.S. 398 (1907)) (emphasis added). *The Hamilton* also involved conduct on the high seas, so the emphasized language is dictum. Further, there is no discussion in *The Hamilton* of that limitation.

ally.²⁹⁴ In fact, at least one authority believes that the *Skiriotos* principle applies outside the high seas context: "Although on its facts the case is limited to jurisdiction over a state's citizens for conduct on the high seas, the same principle should be applicable to acts done on land outside the state, either abroad or in another state of the United States."²⁹⁵

*Strassheim v. Daily*²⁹⁶ is another Supreme Court case often cited to justify the extraterritorial application of state criminal law. *Strassheim* was a habeas corpus proceeding; the respondent, Daily, was trying to avoid extradition from Illinois to Michigan. Daily allegedly bribed the warden of a Michigan prison to purchase second-hand machinery represented as new. The bribe occurred in Illinois,²⁹⁷ although Daily had been to Michigan several times in connection with the bid.²⁹⁸ The Court held that Daily was subject to punishment under the Michigan criminal law:

[T]he usage of the civilized world would warrant Michigan in punishing him, *although he never had set foot in the State until after the fraud was complete*. Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power. We may assume therefore that Daily is a criminal under the laws of Michigan.²⁹⁹

There are several problems in using *Strassheim* to justify extraterritorial regulation of abortion. First, the Court's approval of Michigan criminal jurisdiction in the absence of any action in Michigan is dictum. Daily went to Michigan several times to further his scheme. Nevertheless, this dictum is important because, when *Strassheim* was decided, the territorial view was still strong on the Court.³⁰⁰ *Strassheim* is also important because one of the cases Justice Holmes cites, *American Banana Co. v. United Fruit Co.*,³⁰¹ is a civil case arising under federal law. In citing this case, Justice Holmes arguably saw no distinction between civil and criminal cases or between federal extraterritorial powers and state extraterritorial powers.

However, the conduct in *Strassheim* is different from an extraterritorial abortion in an important respect. Daily's conduct in *Strassheim*, bribery, was probably also illegal where it occurred. The abortion would be legal where performed. This might make a difference, although the Supreme Court certainly did not focus on it.

The Supreme Court also had to deal with extraterritorial aspects of state criminal law in the *Williams v. North Carolina* bigamy cases.³⁰² Each of the two petitioners in those cases was married and living with his or her spouse in

294. "To be sure, the defendant was not within the territory of any other state or country Still, allowing criminal prosecution in these circumstances indicates that a state's constitutionally permissible interest in the behavior of its citizens does not stop at its territorial boundaries." Regan, *supra* note 14, at 1908.

295. LAFAVE & SCOTT, *supra* note 47, at 191-92.

296. 221 U.S. 280 (1911).

297. *Id.* at 283.

298. *Id.* at 284.

299. *Id.* at 284-85 (citations omitted and emphasis added).

300. See *supra* notes 281-87 and accompanying text.

301. 213 U.S. 347 (1909).

302. *Williams v. North Carolina*, 325 U.S. 226 (1945) (hereinafter *Williams II*); *Williams v. North Carolina*, 317 U.S. 287 (1942) (hereinafter *Williams I*).

North Carolina. In May 1940, they went to Las Vegas, and, in June of that year, each filed a divorce action in the Nevada courts. The Nevada court granted the divorces, after which they married each other and returned to North Carolina. North Carolina tried and convicted them of bigamous cohabitation.

Williams I reversed the original convictions. Both the majority and the dissenters seemed to recognize that a state had power over its domiciliaries, at least in the matrimonial context; the dispute centered on whether there was a domicile connection to the prosecuting state. The majority assumed that the petitioners were domiciled in Nevada at the time of the divorce³⁰³ and argued that this was enough: "Domicil creates a relationship to the state which is adequate for numerous exercises of state power."³⁰⁴ Since Nevada was the petitioners' domicile, the majority felt that the Nevada divorce decree was due full faith and credit, and North Carolina could not prosecute for bigamy:

It is difficult to perceive how North Carolina could be said to have an interest in Nevada's domiciliaries superior to the interest of Nevada. Nor is there any authority which lends support to the view that the full faith and credit clause compels the courts of one state to subordinate the local policy of that state, as respects its domiciliaries, to the statutes of any other state.³⁰⁵

The majority refused to say "whether North Carolina could refuse to recognize the Nevada decrees because, in its view and contrary to the findings of the Nevada court, petitioners had no actual, *bona fide* domicile in Nevada"³⁰⁶ Justice Jackson, in dissent, argued that the petitioners never were domiciled in Nevada and stated that "[a] state can have no legitimate concern with the matrimonial status of two persons, neither of whom lives within its territory."³⁰⁷

Following the reversal, North Carolina retried the petitioners, this time charging the jury to convict only if they were not convinced that the petitioners were domiciled in Nevada at the time of the divorces.³⁰⁸ The petitioners were convicted, and this time the Court upheld the convictions. The majority, in an opinion written by Justice Frankfurter, held that Nevada's jurisdiction to grant the divorce depended on domicile³⁰⁹ and that North Carolina had the right to ascertain that jurisdictional fact for itself.³¹⁰ Since the North Carolina jury had

303. Justice Douglas' majority opinion stated that [h]owever it might be resolved in another proceeding, we cannot evade the constitutional issue in this case on the easy assumption that petitioners' domicile in Nevada was a sham and a fraud. Rather, we must treat the present case for the purpose of the limited issue before us precisely the same as if petitioners had resided in Nevada for a term of years and had long ago acquired a permanent abode there.

Williams I, 317 U.S. at 292.

304. *Id.* at 298. Interestingly, the majority cited, *inter alia*, *Skiriotos* for this proposition. *Id.*

305. *Id.* at 296. The Court cites two civil choice-of-law cases for this proposition, indicative perhaps that the Court saw no distinction between civil and criminal full faith and credit.

306. *Id.* at 292-93.

307. *Id.* at 320 (Jackson, J., dissenting).

308. *Williams II*, 325 U.S. 226, 235-36 (1945).

309. *Id.* at 229.

310. *Id.* at 230, 234.

found that the petitioners were not domiciled in Nevada at the time of the Nevada divorce, they were subject to prosecution for bigamous cohabitation.³¹¹

Justice Rutledge, dissenting, argued that the case involved more than just full faith and credit to the Nevada judgment, but also the credit due to the Nevada statutory law and the policy underlying the judgment.³¹² "Stripped of its common law gloss," he argued,

the basic constitutional issue inherent in the problem is whether the states shall have power to adopt so-called 'liberal' divorce policies and grant divorces to persons coming from other states while there transiently or for only short periods not sufficient in themselves, absent other objective criteria, to establish more than casual relations with the community.³¹³

Justice Black also dissented. He argued that the conviction was supportable only on two grounds, neither of which he felt was correct: "(1) North Carolina has extra-territorial power to regulate marriages within Nevada's territorial boundaries, or, (2) North Carolina can punish people who live together in that state as husband and wife even though they have been validly married in Nevada."³¹⁴ Justice Black also argued that allowing such convictions impermissibly burdened the right to travel, subjecting people to criminal prosecutions for adultery or bigamy "merely because they exercise their constitutional right to pass from a state in which they were validly married into another state which refuses to recognize their marriage."³¹⁵

The *Williams* cases, although not directly relevant, make a few points important to the constitutionality of state extraterritorial abortion statutes. First, the Supreme Court allowed North Carolina to regulate criminally the validity of an extraterritorial event—the Nevada divorce—which was legal where performed. One could analogize the *Williams* petitioners' extraterritorial flight to obtain a divorce to a pregnant woman's extraterritorial flight to obtain an abortion. If the petitioners' extraterritorially legal divorce and remarriage subject them to criminal sanctions in their state of domicile, then, by analogy, a pregnant woman's extraterritorially legal abortion might subject her to criminal sanctions in her state of domicile.³¹⁶ Second, both cases contain general statements about a state's power to regulate its domiciliaries with respect to extraterritorial conduct, including a citation to *Skiriotes* in *Williams I*. Third, the majority in *Williams II* cites the civil choice-of-law cases without qualification or any indication that full faith and credit standards might differ in civil and criminal cases. This supports the use of the civil choice-of-law cases to justify the extraterritorial regulation of abortion. Fourth, in *Williams II*, even though the petitioners acted within the territorial boundaries of another state and apparently believed that what they were doing was legal, the Court still upheld their criminal conviction. Any expectations that Nevada law would apply were apparently unimportant.

311. *Id.* at 238.

312. *Id.* at 249 (Rutledge, J., dissenting).

313. *Id.* at 256 (Rutledge, J., dissenting).

314. *Id.* at 264 (Black, J., dissenting).

315. *Id.* at 265 (Black, J., dissenting) (citing *Edwards v. California*, 314 U.S. 160 (1941), one of the early right-to-travel cases).

316. This analogy is not totally apposite because of divorce law's historically unique focus on domicile.

Although the *Williams* cases provide some support for the extraterritorial regulation of abortion, *Williams I* also provides a possible way around such a statute. *Williams I* rejected, as a natural consequence of the Full Faith and Credit Clause, the argument that extraterritorial flight could allow a person to circumvent state laws.³¹⁷ Thus, a pregnant woman wishing to obtain a legal abortion could first establish domicile in a more liberal state, then obtain the abortion. This could lead to "abortion mill" states, much like Nevada was at one time considered a "divorce mill" state. However, *Williams II* says that the original domicile state can always challenge domicile upon the woman's return. Thus, an extraterritorial abortion would be risky for the pregnant woman unless she truly intended to change residence and not return to her original domicile. A more fundamental question is whether a legitimate change of domicile would have the same preclusive effect on the prosecuting state in the abortion case that it does in divorce cases.³¹⁸

A final Supreme Court case touching on the extraterritorial application of state criminal law is *Zablocki v. Redhail*,³¹⁹ decided in 1978. In *Zablocki*, the Supreme Court faced equal protection and due process challenges to a Wisconsin statute that prohibited Wisconsin residents under child support obligations from remarrying, within or without Wisconsin, without court permission. Two of the opinions noted the extraterritorial reach of the statute.³²⁰

317. Justice Jackson argued in *Williams I* that the decision subjects matrimonial laws of each state to important limitations and exceptions that it must recognize within its own borders and as to its own permanent population. It nullifies the power of each state to protect its own citizens against dissolution of their marriages by the courts of other states which have an easier system of divorce. ... It is not an exaggeration to say that this decision repeals the divorce laws of all the states and substitutes the law of Nevada as to all marriages one of the parties to which can afford a short trip there.

Williams I, 317 U.S. 287, 311-12 (1942) (Jackson, J., dissenting). Justice Douglas rejected this objection. According to Justice Douglas,

It is objected, however, that if such divorce decrees must be given full faith and credit, a substantial dilution of the sovereignty of other states will be effected. For it is pointed out that under such a rule one state's policy of strict control over the institution of marriage could be thwarted by the decree of a more lax state. But such an objection goes to the application of the full faith and credit clause to many situations.

Id. at 302.

318. Since the fetus has no control over its residence, can the state's interest in the fetus be bound by the mother's change of domicile? Probably so, for two reasons. First, if the mother's domicile is not binding on the fetus, then what is the fetus's domicile? If it is not the mother's domicile, every state through which the fetus passes might acquire an interest in it that would justify application of that state's abortion law. This opening would present a host of issues, including the personhood of the fetus, with which the Supreme Court would probably rather not deal. Second, even if the fetus is treated as a person, the interest of the fetus in the extraterritorial abortion case is not unlike the interest of the other spouse in the extraterritorial divorce cases. If one spouse's state of domicile can harm the other spouse by terminating the marital relationship without the other spouse's consent, then perhaps a mother's state of domicile can allow harm to the fetus by terminating the fetus's existence through an abortion. Admittedly, the harm is different, but, in each case, the "non-domiciled" party is being affected without consent by the laws of one party's state of domicile.

319. 434 U.S. 374 (1978).

320. Justice Marshall describes the statute's reach as follows: "Under the challenged statute, no Wisconsin resident in the affected class may marry in Wisconsin or elsewhere without a court remedy." *Id.* at 387 (emphasis added). He also states:

Counsel for appellee informed us at oral argument that appellee was married in Illinois some time after argument on the merits in the District Court, but prior to judgment. Tr. of Oral Arg. 23, 30-31. This development in no way

Justice Marshall's majority opinion even cited a Wisconsin case applying the statute to an extraterritorial marriage.³²¹ The extraterritorial reach of the statute was necessary to affect the appellee because he had already remarried in another state.³²² Yet, not one of the six opinions in the case questioned the statute's extraterritoriality. If extraterritorial regulation of domiciliaries were a possible constitutional defect, one would at least expect the Court to mention it, particularly because the cited Wisconsin case involved a direct challenge to the statute's extraterritoriality.³²³

Thus, the Supreme Court has decided several cases that, while not conclusively indicating that an extraterritorial abortion statute would be constitutional, at least cast doubt on the unsupported assertions of some scholars that state criminal law may not be applied extraterritorially. Cases like *Skiriotes*, *Strassheim*, *Williams I*, and *Williams II* bolster the previous section's argument that an extraterritorial abortion statute, especially as applied to a resident woman, could survive due process and full faith and credit challenges. I now turn to other possible constitutional sources of limitation on the extraterritorial application of abortion law.

VI. THE SIXTH AMENDMENT

Another possible restriction on state criminalization of extraterritorial abortions is the Sixth Amendment right to trial by a jury of the state and district where the crime was committed.³²⁴ This Amendment, like the rest of the

moots the issues before us. First, appellee's individual claim is unaffected, since he is still a Wisconsin resident and the Illinois marriage is consequently void under the provisions of §§ 245.10(1), (4), (5). See *State v. Mueller*, 44 Wis. 2d 387, 171 N.W.2d 414 (1969) (§ 245.10 has extraterritorial effect with respect to Wisconsin residents).

Id. at 382 n.9. Justice Powell's concurrence in the judgment also notes the extraterritorial reach of the statute: "The monopolization present in this case is total, for Wisconsin will not recognize foreign marriages that fail to conform to the requirements of § 245.10." *Id.* at 401 (Powell, J., concurring in the judgment).

321. See *supra* note 320.

322. See *supra* note 320.

323. See *Mueller*, 171 N.W.2d at 418. The *Mueller* court held that

We are of the opinion that § 245.10, Stats., and the penalty section, 245.30(1)(f), are valid legislative acts. Only the conduct of Wisconsin residents can be punished; the interest Wisconsin seeks to protect is a legitimate and substantial protectible interest of this state both as to the protection of the welfare of its minors and the marriage relationship of its residents; it does not call for enforcement nor impose duties upon any foreign state; it does not violate due process because it applies to only residents of this state; and the statutory permission to marry, and the enforcement of the statute is in the courts of this state, and it is not repugnant to the laws of another state.

In determining whether a given legislative enactment can have extraterritorial effect, we believe the legitimate protectible interests of the state should be balanced against inconvenience to the accused and invasion, if any, upon the sovereignty of sister states. In balancing these interests as applied to the statutes in question we believe the legitimate interests of the state of Wisconsin clearly preponderate and the statute should be upheld as a legitimate exercise of legislative power.

Id.

324. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by

Bill of Rights, was probably not originally intended to apply to the states,³²⁵ but the Supreme Court has held that the Fourteenth Amendment selectively incorporates and makes applicable to the states various Sixth Amendment requirements.³²⁶ However, the Court has never held, or even stated in dictum, that the Sixth Amendment vicinage requirement applies to the states, so, before discussing the substance of the Sixth Amendment limitation, I must first deal with the incorporation question.

A. Does the Sixth Amendment Vicinage Requirement Apply to the States?

The Supreme Court has rejected the "total incorporation" theory that the Fourteenth Amendment made all of the Bill of Rights' guarantees applicable to the states.³²⁷ Only those rights that are "fundamental to the American scheme of justice" are applied to the states through the Fourteenth Amendment.³²⁸ The question is not whether a civilized system could exist without a particular Bill of Rights protection, but whether the requirement is "fundamental in the context of the criminal processes maintained by the American States,"³²⁹ "whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty."³³⁰ In making this determination, the Supreme Court has looked to the practices of England and the American colonies prior to the adoption of the Constitution,³³¹ requirements in state constitutions and the current practices of the states,³³² and the policy reasons underlying the particular requirement.³³³

law" U.S. CONST. amend. VI (emphasis added). This is not the only place in the Constitution where such a limitation appears. Article III, § 2, provides that

The Trial of all Crimes except in Cases of Impeachment shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. CONST. art. III, § 2. Article III deals with the judicial power of the federal government and is an unlikely source for a restriction on state legislative jurisdiction. The Sixth Amendment, as incorporated by the Fourteenth Amendment, is a much more plausible source for restrictions on state powers.

Strictly speaking, the Sixth Amendment deals with vicinage, because it deals with the location from which jurors are to be selected, and Article III, § 2, is a venue provision, because it deals with the location of the trial. However, "[t]his technical distinction has been of no importance." 2 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 301, at 190 (2d ed. 1982).

325. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 332 (4th ed. 1991). Although *Barron v. Baltimore* was a Fifth Amendment claim, the Court subsequently held that the *Barron* position applied to the Sixth Amendment as well. *Twitchell v. Pennsylvania*, 74 U.S. (7 Wall) 321, 325, 327 (1868). For a later view that the Sixth Amendment did not apply to the states, see *Gaines v. Washington*, 277 U.S. 81, 85 (1928).

326. See *Duncan v. Louisiana*, 391 U.S. 145 (1968) (trial by jury); *Washington v. Texas*, 388 U.S. 14 (1967) (compulsory process to obtain witnesses); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (confrontation of witnesses against the defendant); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (assistance of counsel); *Irvin v. Dowd*, 366 U.S. 717 (1961) (impartial jury); *In re Oliver*, 333 U.S. 257 (1948) (public trial; information of the nature and cause of the accusation).

327. NOWAK & ROTUNDA, *supra* note 325, at 332.

328. *Duncan*, 391 U.S. at 149.

329. *Id.* at 149 n.14.

330. *Id.*

331. *Id.* at 151-52.

332. *Id.* at 153-54.

333. *Id.* at 155-56.

The distinction between total incorporation of the Bill of Rights and selective incorporation of only fundamental rights may be more apparent than real, because "virtually all of the provisions of the Bill of Rights have been incorporated into the Fourteenth Amendment and made applicable to the states."³³⁴ There are exceptions, however,³³⁵ so it is necessary to determine if the vicinage requirement might be one of those exceptions.

The vicinage requirement did not originate with the Constitution. Trial by a jury from the vicinity of the crime was a practice in England hundreds of years before the Constitution was written.³³⁶ Some of the early colonial charters and constitutions contained provisions requiring juries to be selected from the locale where the crime was committed. For example, West New Jersey's Charter of Fundamental Laws of 1676 provided that the trial of all civil and criminal cases shall be heard by a jury "of the neighborhood, only to be summoned and presented by the sheriff of that division, or propriety where the fact or trespass is committed"³³⁷ In Virginia, the General Court in Jamestown, where all Virginia cases involving loss of life or limb had to be tried, originally drew jurors from among the bystanders at court.³³⁸ However, a 1662 statute provided that the sheriff of the accused's county was to summon six freeholders from the neighborhood for jury service, with the other six jury members to continue to be selected as before.³³⁹

Vicinage and venue of criminal trials also assumed importance in the events leading to the American Revolution. An English statute passed in 1543 provided for the trial of treasons committed outside the realm "before such commissioners, and in such shire of the realm, as shall be assigned by the King's majesty's commission."³⁴⁰ On December 15, 1768, the House of Lords adopted resolutions condemning certain acts of the Massachusetts Bay colonists and approved an address to the King recommending that the King utilize this statute to deal with any treason committed by those colonists.³⁴¹ The House of Commons approved these resolutions and the address on January 26, 1769.³⁴² The Virginia legislature was in session when it received news of Parliament's

334. NOWAK & ROTUNDA, *supra* note 325, at 385.

335. The only explicit exceptions made by the Supreme Court are the Second Amendment guarantee of the right to bear arms, the Fifth Amendment guarantee of criminal prosecutions only on a grand jury indictment, and the Seventh Amendment guarantee of a jury trial in civil cases. NOWAK & ROTUNDA, *supra* note 325, at 332-34.

336. Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801, 813 (1976); William W. Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59, 60 (1944).

337. West New Jersey Charter of Fundamental Laws ch. XXII (1676), *reprinted in* 5 FRANCIS N. THORPE, THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2551 (1909). The Fundamental Constitutions of East New Jersey provided for a trial by a jury of "as near as it may be, peers and equals, and of the neighborhood" Fundamental Constitutions for the Province of East New Jersey in America ch. XIX (1683), *reprinted in id.*, vol. 5, at 2580. However, the text of this provision does not specify whether it means the neighborhood of the crime or the neighborhood of the defendant.

338. FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT 20 (1951).

339. *Id.*

340. 35 Hen. VIII, c. 2 (1543), *discussed in* Blume, *supra* note 336, at 62.

341. Kershen, *supra* note 336, at 806; Blume, *supra* note 336, at 63-64.

342. Blume, *supra* note 336, at 64.

action, and it immediately introduced and passed resolutions that later became known as the Virginia Resolves.³⁴³ One of these resolutions stated that any trials for treason should be "held within the said Colony, according to the fixed and known Course of Proceeding."³⁴⁴ The resolution further argued that "the seizing any Person or Persons, residing in this Colony, suspected of any Crime whatsoever, committed therein, and sending such Person, or Persons, to Places beyond the Sea, to be tried, is highly derogatory of the Rights of *British* subjects; as thereby the inestimable Privilege of being tried by a Jury from the Vicinage ... will be taken away from the Party accused."³⁴⁵

Parliament responded with further legislation allowing prosecutions involving revolutionary activities to be tried outside of the American colonies.³⁴⁶ Such legislation provoked an angry reaction from the first Continental Congress, which declared in 1774 "that the respective colonies are entitled to the common law, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of the law."³⁴⁷ Two years later, the Declaration of Independence mentioned the colonists' warnings against "attempts by their [the British] legislature to extend an unwarrantable jurisdiction over us," and one of the particular complaints against the King relates to "transporting us beyond Seas to be tried for pretended offences."³⁴⁸

There are other indications that the founding fathers considered the right to trial in the vicinage important. In the Virginia convention on the adoption of the Constitution, Patrick Henry objected to the lack of a narrowly drawn vicinage requirement, arguing that "this great privilege ... is prostrated by this paper. Juries from the vicinage being not secured, this right is in reality sacrificed. All is gone"³⁴⁹ Grayson echoed Henry's attack: "It may be laid down as a rule that, where the governing power possesses an unlimited control over the *venue*, no man's life is in safety"³⁵⁰ Holmes made another strong attack in the Massachusetts convention, arguing that a local jury was needed to properly judge the character of the accused and the credibility of the witnesses.³⁵¹

343. *Id.*

344. Kershen, *supra* note 336, at 806; Blume, *supra* note 336, at 64.

345. Kershen, *supra* note 336, at 806; Blume, *supra* note 336, at 64; 2 WRIGHT, *supra* note 324, at 189.

346. One statute provided that persons charged with destroying "in any place out of this realm" the King's dock yards, magazines, ships, ammunition, and stores could be indicted and tried "in any shire or county within this realm." 12 Geo. III, c. 24 (1772), *discussed in* Blume, *supra* note 336, at 63. A statute passed two years later allowed persons accused of certain murders or other capital offenses to be tried in another province or in England if "an indifferent trial cannot be had within the said province." 14 Geo. III, c. 39 (1774), *discussed in* Blume, *supra* note 336, at 63.

347. Declaration of Rights of the Continental Congress art. 5 (1774), *quoted in* HELLER, *supra* note 338, at 21. *See also* Blume, *supra* note 336, at 65.

348. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

349. HELLER, *supra* note 338, at 25. For an extensive discussion of the debate concerning vicinage during ratification of the Sixth Amendment, see Kershen, *supra* note 336, at 817-28.

350. HELLER, *supra* note 338, at 25-26.

351. Holmes argued:

It is a maxim universally admitted, that the safety of the subject consists in having a right to a trial as free and impartial as the lot of humanity will admit of. Does the Constitution make provision for such a trial? I think not; for in a criminal process, a person shall not have a right to insist on a trial in the vicinity where the fact was committed, where a jury of the peers would, from their local situation,

In light of these protestations by the American colonists, the practice of the states themselves with respect to vicinage and criminal venue is surprisingly mixed. Contemporaneous with the adoption of the Constitution and the Bill of Rights, at least two, and possibly three, state constitutions provided for a jury of the vicinage in criminal cases.³⁵² One of those states, Vermont, also expressly prohibited extradition of a person to another state for a crime committed in Vermont.³⁵³ An additional four states required that criminal venue be where the crime was committed.³⁵⁴ Two of those state constitutions contained language indicating the drafters considered the right to trial in the place where the crime was committed fundamental. The Maryland Constitution of 1776 declares the right to a trial of the facts where they arise "one of the [greatest] securities of the lives, liberties and estates of the people."³⁵⁵ Similarly, the Massachusetts Constitution of 1780 calls it "one of the greatest securities of the life, liberty, and property of the citizen."³⁵⁶

However, at the time the Constitution and the Bill of Rights were approved, about half of the states had nothing in their state constitutions expressly restricting criminal venue or vicinage.³⁵⁷ When the Fourteenth Amendment was ratified in 1868, sixteen states still had no constitutional pro-

have an opportunity to form a judgment of the *character* of the person charged with the crime, and also to judge of the *credibility* of the witnesses. There a person must be tried by a jury of strangers; a jury who *may be* interested in his conviction; and where he *may*, by reason of the distance of his residence from the place of trial, be incapable of making such a defence as he is, in justice, entitled to, and which he could avail himself of, if his trial was in the same county where the crime is said to have been committed.

Debate in Massachusetts Ratifying Convention (Jan. 30, 1788), reprinted in 5 THE FOUNDERS' CONSTITUTION 260 (Philip B. Kurland & Ralph Lerner eds., 1987).

Gore responded to Holmes that the impartiality of the jury was premised on the jury not knowing the character and circumstances of the parties and that Holmes' rationale for a vicinage requirement was therefore flawed. *Id.* at 261.

352. PA. CONST. of 1790, art. IX, § 9, reprinted in 5 THORPE, *supra* note 337, at 3100; VA. CONST. of 1776, Bill of Rights, § 8, reprinted in 7 THORPE, *supra* note 337, at 3813. Pennsylvania's 1776 constitution and Vermont's 1777 constitution may have been intended to have a similar effect. Each provided for an "impartial jury of the country." PA. CONST. of 1776, Declaration of Rights, art. IX, reprinted in 5 THORPE, *supra* note 337, at 3083; VT. CONST. of 1777, ch. I, § X, reprinted in 6 THORPE, *supra* note 337, at 3741.

353. VT. CONST. of 1777, ch. I, art. XIX, reprinted in 6 THORPE, *supra* note 337, at 3742.

354. GA. CONST. of 1789, art. III, § 4, reprinted in 2 THORPE, *supra* note 337, at 788; GA. CONST. of 1777, art. XXXIX, reprinted in 2 THORPE, *supra* note 337, at 783; MD. CONST. of 1776, Declaration of Rights, art. XVIII, reprinted in 3 THORPE, *supra* note 337, at 1688; MASS. CONST. of 1780 part I, art. XIII, reprinted in 3 THORPE, *supra* note 337, at 1891; N.H. CONST. of 1784, part I, art. XVII, reprinted in 4 THORPE, *supra* note 337, at 2455-56.

355. MD. CONST. of 1776, Declaration of Rights, art. XVIII, reprinted in 3 THORPE, *supra* note 337, at 1688.

356. MASS. CONST. of 1780, part I, art. XIII, reprinted in 3 THORPE, *supra* note 337, at 1891.

357. See CONN. CONST. of 1818, reprinted in 1 THORPE, *supra* note 337, at 536; DEL. CONST. of 1776, reprinted in 1 THORPE, *supra* note 337, at 562; DEL. CONST. of 1792, reprinted in 1 THORPE, *supra* note 337, at 568; N.J. CONST. of 1776, reprinted in 5 THORPE, *supra* note 337, at 2594; N.Y. CONST. of 1777, reprinted in 5 THORPE, *supra* note 337, at 2623; N.C. CONST. of 1776, reprinted in 5 THORPE, *supra* note 337, at 2787; R.I. CONST. of 1842, reprinted in 6 THORPE, *supra* note 337, at 3222; S.C. CONST. of 1776, reprinted in 6 THORPE, *supra* note 337, at 3241; S.C. CONST. of 1778, reprinted in 6 THORPE, *supra* note 337, at 3248; S.C. CONST. of 1790, reprinted in 6 THORPE, *supra* note 337, at 3258.

visions restricting criminal venue or vicinage.³⁵⁸ Even today, eleven states have nothing in their state constitutions expressly restricting criminal venue or vicinage,³⁵⁹ and another three provide only for a jury of the defendant's peers,³⁶⁰ a provision that might arguably be construed to include a vicinage requirement. Thus, the evidence of the historical and current practices of the states is hardly overwhelmingly in favor of characterizing the vicinage right as fundamental. The criminal processes of at least some of the states have apparently functioned quite well without an express vicinage requirement.

But perhaps the policies underlying the Sixth Amendment requirement are important enough that a vicinage requirement should be imposed on the states in spite of the mixed historical evidence. The difficulty is in determining exactly what those policies are. The Supreme Court has offered no consistent view of exactly what the public policy of the vicinage requirement is.³⁶¹ Vicinage restrictions arose at a time when jurors were expected to decide cases based, in part, on their own personal knowledge of the facts.³⁶² That expectation made vicinage essential; a jury living elsewhere would not have the relevant personal knowledge. This formed the core of the arguments for a strong Sixth Amendment vicinage requirement.³⁶³ But, as opponents of a vicinage requirement pointed out,³⁶⁴ by 1789, jurors were expected to decide cases based on the evidence heard in court, and knowledge of the case had become a principal cause for the rejection of jurors.³⁶⁵ Other policies might also support a

358. CAL. CONST. of 1849, *reprinted in* 1 THORPE, *supra* note 337, at 391; CONN. CONST. OF 1818, *reprinted in* 1 THORPE, *supra* note 337, at 536; DEL. CONST. of 1831, *reprinted in* 1 THORPE, *supra* note 337, at 582; FLA. CONST. of 1868, *reprinted in* 2 THORPE, *supra* note 337, at 704; GA. CONST. of 1868, *reprinted in* 2 THORPE, *supra* note 337, at 822; IOWA CONST. of 1857, *reprinted in* 2 THORPE, *supra* note 337, at 1136; MD. CONST. of 1867, *reprinted in* 3 THORPE, *supra* note 337, at 1779; NEB. CONST. of 1866, *reprinted in* 4 THORPE, *supra* note 337, at 2349; NEV. CONST. of 1864, *reprinted in* 4 THORPE, *supra* note 337, at 2401; N.J. CONST. of 1844, *reprinted in* 5 THORPE, *supra* note 335, at 2599; N.Y. CONST. of 1846, *reprinted in* 5 THORPE, *supra* note 337, at 2653; N.C. CONST. of 1868, *reprinted in* 5 THORPE, *supra* note 337, at 2800; R.I. CONST. of 1842, *reprinted in* 6 THORPE, *supra* note 337, at 3222; S.C. CONST. of 1868, *reprinted in* 6 THORPE, *supra* note 337, at 3281; TEX. CONST. of 1866, *reprinted in* 6 THORPE, *supra* note 337, at 3569; VT. CONST. of 1793, *reprinted in* 6 THORPE, *supra* note 337, at 3762.

Of these 16 states, six had provisions in their constitutions requiring a judgment of the accused's peers, language that might arguably support a vicinage requirement. DEL. CONST. of 1831, art. I, § 7, *reprinted in* 1 THORPE, *supra* note 337, at 583; MD. CONST. of 1867, art. 23, *reprinted in* 3 THORPE, *supra* note 337, at 1781; N.Y. CONST. of 1846, art. I, § 1, *reprinted in* 5 THORPE, *supra* note 337, at 2653; R.I. CONST. of 1842, art. I, § 10, *reprinted in* 6 THORPE, *supra* note 337, at 3223; S.C. CONST. of 1868, art. I, § 14, *reprinted in* 6 THORPE, *supra* note 337, at 3282; VT. CONST. OF 1793, ch. I, art. 10, *reprinted in* 6 THORPE, *supra* note 337, at 3763.

359. See ALASKA CONST.; CONN. CONST.; IDAHO CONST.; IOWA CONST.; MICH. CONST.; NEV. CONST.; N.J. CONST.; N.Y. CONST.; N.C. CONST.; N.D. CONST.; TEX. CONST.

360. DEL. CONST. art. I, § 7; R.I. CONST. art. I, § 10; W. VA. CONST. art. III, § 10.

361. Note, *Criminal Venue in the Federal Courts: The Obstruction of Justice Puzzle*, 82 MICH. L. REV. 90, 91 (1983).

362. HELLER, *supra* note 338, at 95; Kershner, *supra* note 336, at 813.

363. Kershner, *supra* note 336, at 833-34.

364. *Id.* at 834-35.

365. HELLER, *supra* note 338, at 95. *But see* United States *ex rel.* Owen v. McMann, 435 F.2d 813 (2d Cir. 1970), where the court stated that it

would not lightly assume that the jury's original role as the voice of the country may not sufficiently persist that neither the specific guarantees of an impartial jury and of confrontation nor the more general one of due process would be violated

vicinage requirement. For one thing, since most crimes are committed where the defendant resides, such a requirement is usually more convenient to the defendant.³⁶⁶ However, this policy is not directly furthered by the Sixth Amendment vicinage requirement, because the trial is required to be held where the crime was committed, which is not necessarily where the defendant resides. The relevant evidence and witnesses are most likely to be found where the crime was committed,³⁶⁷ but even that presumption sometimes fails given the leniency with which the Supreme Court has interpreted the vicinage requirement.³⁶⁸ Some authors have argued that the vicinage requirement is based, at least in part, on the concept of the jury as an institution for "customizing" local criminal law.³⁶⁹ The jury, as "the conscience of the community,"³⁷⁰ can adapt the general criminal law to meet local circumstances and mores. This fits well with the traditional territorial restrictions on criminal jurisdiction—the idea that the only state that can speak to whether behavior is criminal is the state in which that behavior occurs.

Whatever the policies served by the Sixth Amendment vicinage requirement, the Court seems to consider them important. In *United States v. Johnson*,³⁷¹ the Court spoke of "the unfairness and hardship to which trial in an environment alien to the accused exposes him"³⁷² and stated that questions of venue in criminal cases "are not merely matters of formal legal procedure."³⁷³ Instead, "[t]hey raise deep issues of public policy"³⁷⁴ and "touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests."³⁷⁵ The Court saw the placement of venue restrictions in both Article III, Section 2 and the Sixth Amendment as underscoring the importance of the venue safeguard.³⁷⁶ However, it is impossible to determine whether the Supreme Court considers the policies underlying vicinage so important that the Sixth Amendment vicinage requirement is "necessary to an Anglo-American regime of ordered liberty"³⁷⁷ and therefore applicable to the states.

Although the Supreme Court has not yet considered the issue, a few lower federal courts have done so. Both the Fifth and Sixth Circuits have held that the Sixth Amendment vicinage requirement does not apply to state prose-

simply because jurors with open minds were influenced to some degree by community knowledge that a defendant was "wicked" or the reverse, even though this was not in evidence.

Id. at 817.

366. *United States v. Cores*, 356 U.S. 405, 410 (1958); *United States v. DiJames*, 731 F.2d 758, 762 (11th Cir. 1984); Kershen, *supra* note 336, at 808–09.

367. *DiJames*, 731 F.2d at 762; Kershen, *supra* note 336, at 810. For an argument, based on historical evidence, that this was the primary purpose of the constitutional venue limitation, see Note, *supra* note 361, at 105–08.

368. See *infra* part VI.B.

369. Kershen, *supra* note 336, at 839–40. See also *Hernandez v. Municipal Court*, 781 P.2d 547, 548 n.1 (Cal. 1989) (arguing that the vicinage right "protects the right of the offended community to pass judgment in criminal matters"); *People v. Guzman*, 755 P.2d 917, 929 (Cal. 1988) (same).

370. Kershen, *supra* note 336, at 843.

371. 323 U.S. 273 (1944).

372. *Id.* at 275.

373. *Id.* at 276.

374. *Id.*

375. *Id.*

376. *Id.* at 275.

377. *Duncan v. Louisiana*, 391 U.S. 145, 149–50 n.14 (1968).

cutions.³⁷⁸ In *Cook v. Morrill*,³⁷⁹ the Fifth Circuit concluded, without much discussion, that the right to trial in the district where the crime was committed "is not one of those rights which rises to the level of being 'fundamental and essential to a fair trial,'"³⁸⁰ and thus does not apply to the states.³⁸¹ Technically, these cases involved only attempts to require a trial in the particular district or county where the crime was committed; the "state" portion of the Sixth Amendment vicinage requirement was not at issue. However, the cases do not distinguish the "state" and "district" requirements, and the language of the opinions is often broad enough to encompass both.³⁸²

Several state court cases have also held, usually with little analysis, that the Sixth Amendment vicinage requirement does not apply to prosecutions in state court.³⁸³ However, most state cases involving Sixth Amendment vicinage

378. *Caudill v. Scott*, 857 F.2d 344, 345 (6th Cir. 1988); *Cook v. Morrill*, 783 F.2d 593, 595 (5th Cir. 1986). *Accord* *United States ex rel. Chatary v. Nailon*, 211 F. Supp. 676, 678 (E.D. Pa. 1962). *See also* *Martin v. Beto*, 397 F.2d 741, 748 (5th Cir. 1968). *But see* *State v. Brown*, 295 F. Supp. 63, 77-82 (D. Md. 1969) (assuming that the Sixth Amendment venue requirements apply to the states but rejecting the view that the "district" requirement requires trial in the county where the crime was committed).

379. 783 F.2d 593 (5th Cir. 1986).

380. *Cook*, 783 F.2d at 595. *Cook* followed an earlier Fifth Circuit case, *Martin v. Beto*, 397 F.2d 741 (5th Cir. 1968), which *Cook* reads as holding that the vicinage provision of the Sixth Amendment does not apply to the states. 783 F.2d at 595. The *Martin* opinion is confusing, to say the least. In *Martin*, the court noted that the Sixth Amendment vicinage requirement had not yet been held applicable to the states, argued that the requirement was an important one of long standing, indicated that the issue "is a question of extreme difficulty and gravity," and then proceeded without further discussion to state that it found the change of venue at issue not to violate due process. 397 F.2d at 748. However, the court in *Martin* seems to concede that the venue requirement might be fundamental. *Martin* states that the venue requirement "is more than a matter of formal legal procedure and touches 'closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests.'" *Id.* *Martin* also noted that the venue restriction was designed to protect the accused against the hardship and unfairness of trial in a remote place and argued that "an accused in a State court, no less than an accused in federal court" is exposed to that hardship. *Id.*

381. The court in *Cook* was not willing to concede that a state has latitude to try a defendant wherever it chooses. "In a state conviction where the change of venue resulted in a conviction obtained without due process," the court noted, "a petitioner could obtain relief on due process grounds," *Cook*, 783 F.2d at 596, but the court held that the defendant in *Cook* had shown no prejudice resulting from the change of venue. The situation at which this dictum is aimed is unclear; perhaps the court is merely precluding transfer into a venue where, due to pretrial publicity or some other cause, a defendant could not receive a fair trial.

382. For example, the Fifth Circuit panel in *Cook* writes that "[t]he United States Supreme Court has yet to decide whether the venue provision of the sixth amendment applies to the states; however, the Fifth Circuit has previously decided that it does not." *Id.* at 595. The district court in *United States ex rel. Chatary v. Nailon* similarly makes no such distinction: "The Sixth Amendment guarantees to the accused a trial 'by an impartial jury of the State and district wherein the crime shall have been committed.' This is a limitation, however, upon Federal and not State courts." 211 F. Supp. 676, 678 (E.D. Pa. 1962).

383. *State v. Bowman*, 588 A.2d 728, 730 (Me. 1991); *State v. Byrnes*, 150 N.W.2d 280, 282 (Iowa 1967); *People v. Lee*, 54 N.W.2d 305, 308 (Mich. 1952). *See also* *Commonwealth v. Duteau*, 424 N.E.2d 1119, 1126 (Mass. 1981) (Sixth Amendment state-and-district requirement "has never been held to apply to the States, and might not be even relevant to State prosecutions."); *State v. Paiz*, 817 S.W.2d 84, 85-86 (Tex. Crim. App. 1991) ("We have found no case from the United States Supreme Court holding that the Sixth Amendment's vicinage provision is applicable to the states."). *But see* *Mississippi Publishers Corp. v. Coleman*, 515 So.2d 1163, 1165 (Miss. 1987) (vicinage right is fundamental and thus incorporated by the Fourteenth Amendment and applicable to the states).

challenges simply assume, without analysis, that the Amendment applies.³⁸⁴ In some cases the applicability of the federal constitutional provision does not matter because a similar state limitation on venue or vicinage exists.³⁸⁵ It is often difficult to tell whether some of these decisions are based on common law territorial limits on criminal jurisdiction, state constitutional limits, state statutory limits, or the Sixth Amendment.³⁸⁶

In conclusion, the applicability of the Sixth Amendment's vicinage requirement to the states is far from certain. The weight of federal authority seems to be to the contrary, although the Supreme Court has not spoken, and one could certainly make a colorable argument for incorporation. If the vicinage requirement does not apply to the states, no further discussion is necessary. In the next subsection, I assume that it does apply to state prosecutions and ask whether, if applicable, the Sixth Amendment vicinage requirement would preclude a state from enforcing a ban on extraterritorial abortions by its citizens.

B. Sixth Amendment Limitations on Extraterritorial Abortion Prosecutions

The Supreme Court's Sixth Amendment jurisprudence has become little more than "formalistic statutory analysis,"³⁸⁷ looking to the verbs used in the statute to determine where the crime was committed.³⁸⁸ What one author wrote more than sixty-five years ago is still true: "All federal crimes are statutory, and these crimes are often defined, hidden away amid pompous verbosity, in terms of a single verb. That essential verb usually contains the key to the solution to the question: [I]n what district was the crime committed?"³⁸⁹ As a result, "[b]y altering the verb in a statute [Congress] may alter the nature of the offense, and thus the proper venue, or it may proscribe some additional offense

384. *Wheat v. State*, 734 P.2d 1007, 1008 (Alaska Ct. App. 1987); *Hayes v. Commonwealth*, 698 S.W.2d 827, 830 (Ky. 1985); *Trindle v. State*, 602 A.2d 1232, 1233-39 (Md. 1992) (Eldridge, J., concurring in part and dissenting in part); *State v. Harvey*, 730 S.W.2d 271, 277 (Mo. App. 1987); *State v. Bretz*, 534 P.2d 496, 497-98 (Mont. 1975); *State v. Darroch*, 287 S.E.2d 856, 859-60 (N.C. 1982); *State v. Beuke*, 526 N.E.2d 274, 288 (Ohio 1988); *State v. Murphy*, 353 A.2d 346, 348 (Vt. 1976); *State v. Harrington*, 260 A.2d 692, 697-98 (Vt. 1970); *State v. Klein*, 484 P.2d 455, 456 (Wash. Ct. App. 1971); *State v. Moore*, 66 P.2d 836, 840-42 (Wash. 1937).

385. *E.g.*, *Wheat v. State*, 734 P.2d 1007 (Alaska Ct. App. 1987) (state statutory restriction on criminal jurisdiction); *State v. Smith*, 421 N.W.2d 315 (Minn. 1988) (state constitutional restriction on venue in criminal cases); *State v. Bretz*, 534 P.2d 496 (Mont. 1975) (same); *State v. Murphy*, 353 A.2d 346 (Vt. 1976) (state constitutional vicinage requirement).

386. *E.g.*, *State v. Smith*, 421 N.W.2d 315 (Minn. 1988); *State v. Darroch*, 287 S.E.2d 856 (N.C. 1982).

387. Note, *supra* note 361, at 91-92.

388. *E.g.*, *United States v. Johnson*, 323 U.S. 273, 277-78 (1944); *Salinger v. Loisel*, 265 U.S. 224, 234 (1924); *United States v. Lombardo*, 241 U.S. 73, 78-79 (1916); *Hornor v. United States*, 143 U.S. 207, 214 (1892). Lower federal courts have recognized that one acceptable method of determining the situs of a crime is to examine the key verbs in the statute defining the offense. *E.g.*, *United States v. Barsanti*, 943 F.2d 428, 434 (4th Cir. 1991); *United States v. Kibler*, 667 F.2d 452, 454 (4th Cir. 1982); *United States v. Tedesco*, 635 F.2d 902, 905 (1st Cir. 1980); *United States v. Chestnut*, 533 F.2d 40, 46-47 (2d Cir. 1976).

389. *Armistead M. Dobie, Venue in Criminal Cases in the United States District Court*, 12 VA. L. REV. 287, 289 (1926).

related to the principal offense."³⁹⁰ Thus, the venue possibilities accepted by the Supreme Court "virtually negate the constitutional venue limitations,"³⁹¹ and the Sixth Amendment is not a significant restriction on legislative power.³⁹²

At least two principles are clear from the Supreme Court's Sixth Amendment decisions. First, the Court does not accept the old common law territorial view that a crime has only a single situs; for Sixth Amendment purposes, a crime may be committed in more than one jurisdiction.³⁹³ The Supreme Court has stated that

where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done; or where it may be said there is a continuously moving act commencing with the offender and hence ultimately consummated through him, as the mailing of a letter; or where there is a confederation in purpose between two or more persons, its execution being by acts elsewhere, as in conspiracy.³⁹⁴

Second, it is clear that, for Sixth Amendment purposes, a crime may be committed in a place even though the defendant was not there at the time of the crime: "The constitutional requirement is that the *crime* shall be tried in the State and District where committed, not necessarily in the State or District where the party committing it happened to be at the time."³⁹⁵

Given the focus on the verbs in the statute, it is reasonably clear that a statute prohibiting a state resident from having an abortion in another state could be worded to avoid Sixth Amendment problems. If the statute prohibited leaving the state to obtain an abortion, the relevant verb, "leaving," would involve activity in the prosecuting state. Under the Supreme Court cases, that would apparently be enough. Where the crime is defined in terms of transportation, the Supreme Court has stated that the crime is committed, for Sixth

390. 2 WRIGHT, *supra* note 324, at 201. See also HELLER, *supra* note 336, at 100 (the nature of a crime depends on the terms of the statute, and the situs of the crime for Sixth Amendment purposes is therefore "not a question of procedure but of substantive criminal law").

391. Note, *supra* note 361, at 93.

392. 2 WRIGHT, *supra* note 324, at 201.

393. Numerous examples could be offered. In *United States v. Cores*, 356 U.S. 405 (1958), for example, the crime charged was willfully remaining in the United States for more than the 29 days allowed an alien by a conditional landing permit. The Court held that the offense was committed in any district where the defendant stayed after the twenty-ninth day, not just in the district where he was on the twenty-ninth day. *Id.* at 408-09. In *United States v. Johnson*, 323 U.S. 273, 274 (1944), the Court indicated that Congress could constitutionally make a criminal statute regulating the mailing of dentures triable in any federal district through which the dentures were transported. In *Salinger v. Loisel*, 265 U.S. 224, 233-34 (1924), the Court indicated that a criminal prosecution for wrongful use of the mails could be tried either in the district where the offending material was deposited in the mails or where delivered. In *Armour Packing Co. v. United States*, 209 U.S. 56 (1908), the Court held that the crime of shipping goods pursuant to an unlawful rate concession could be tried anywhere those goods were transported: "[T]he transportation being of the essence of the offense, when it takes place, whether in one district or another, whether at the beginning, at the end, or in the middle of the journey, it is equally and at all times committed." *Id.* at 74.

394. *United States v. Lombardo*, 241 U.S. 73, 77 (1916). See also *In re Palliser*, 136 U.S. 257, 266 (1890) (crime committed partly in one district and partly in another may be tried in either district).

395. *Burton v. United States*, 202 U.S. 344, 387 (1906). Accord *Salinger*, 265 U.S. at 235; *Armour Packing Co.*, 209 U.S. at 74; *Palliser*, 136 U.S. at 265.

Amendment purposes, in any jurisdiction through which the transportation occurs.³⁹⁶

A state statute prohibiting the extraterritorial abortion itself, without any "leaving the state" language, would be more difficult. Such a statute would clearly falter under the Supreme Court's focus on the verbiage of the statute because the abortion would occur elsewhere. However, it might still survive a Sixth Amendment challenge on one of two possible theories. First, the Supreme Court has held that, where the offense is a failure to perform a duty, such as failure to report for duty or failure to file a report, the crime occurs where the duty should have been performed—the place where the defendant was supposed to report or the place where the report was to be filed.³⁹⁷ The Court was aware of state court decisions holding that a state may punish a father for nonsupport even though the father is outside the state and apparently viewed them as consistent with the Sixth Amendment.³⁹⁸ As in the child support cases, one might argue that the mother owed the duty to the fetus primarily in the state of domicile, and that therefore the violation of that duty was also in the state of domicile, even though the abortion was in the other state. Second, an extraterritorial abortion statute might also survive under a test that considered not just the location of the abortion but also its effects, focusing on the state's interest in protecting the fetus, no matter where the fetus is taken. It is unclear whether the Supreme Court would accept vicinage based solely on a policy interest such as this when the actual physical injury occurs elsewhere. However, the Second Circuit has recently developed,³⁹⁹ and two other circuits have followed,⁴⁰⁰ a "substantial contacts" rule, which "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 factfinding."⁴⁰¹ Of particular interest for present purposes is the rule's focus on the effects of the criminal conduct, and not just the conduct itself. According to the Second Circuit, "[s]uch districts have an obvious contact with the litigation in their interest in preventing such effects from occurring."⁴⁰² A state prohibiting extraterritorial abortion would have a better Sixth Amendment argument using such an effects-based test.⁴⁰³ However, it is unclear if this

396. *Armour Packing Co.*, 209 U.S. 56. See also *United States v. Walden*, 464 F.2d 1015, 1017 (4th Cir. 1972) (crime of transportation of stolen money across state lines may be tried where the interstate transportation began or ended).

397. *Johnston v. United States*, 351 U.S. 215 (1956); *United States v. Anderson*, 328 U.S. 699 (1946); *Rumely v. McCarthy*, 250 U.S. 283 (1919). These holdings appear to be based more on statutory construction than on any independent restrictions imposed by the Sixth Amendment. See *Johnston*, 351 U.S. at 224 (Douglas, J., dissenting) (conceding that the issue is a statutory one and that Congress could constitutionally place venue where the majority held).

398. In *Lombardo*, 241 U.S. 73, the Court stated:

It may be that where there is a general duty it may be considered as insistent both where the "actor" is and the "subject" is, to borrow the Government's apt designation, as in the case of the duty of a father to support his children; and if the duty have criminal sanction it may be enforced in either place.

Id. at 77–78. See also *Johnston*, 351 U.S. at 220 n.5 (apparently favorable reference to the state cases punishing a nonresident father for nonsupport of resident children).

399. *United States v. Reed*, 773 F.2d 477, 481 (2d Cir. 1985).

400. *United States v. Goldberg*, 830 F.2d 459, 466 (3d Cir. 1987); *United States v. Williams*, 788 F.2d 1213, 1215 (6th Cir. 1986).

401. *Reed*, 773 F.2d at 481.

402. *Id.* at 482.

403. For a discussion of the "effects" justification for regulation of extraterritorial abortions, see *supra* note 111 and accompanying text.

effects-based analysis is supported by the Supreme Court cases. A focus on effects is consistent with the Supreme Court's choice-of-law cases,⁴⁰⁴ but it has never expressly entered into the Court's Sixth Amendment determination of where a crime occurs. In addition, more recent Second Circuit cases, although reciting the "substantial contacts" test, appear more traditional in focusing on the verbs in the criminal statute and the place of such conduct.⁴⁰⁵ Thus, the Second Circuit itself may be silently retreating from this position.

If the state can constitutionally prosecute the woman for having the abortion, it is reasonably clear that prosecuting the doctor for performing the abortion would not violate the Sixth Amendment. The Supreme Court has held that conspirators may be prosecuted in the jurisdiction where the agreement was formed⁴⁰⁶ or in the jurisdiction where any overt act occurred, even if some of the conspirators were not present where the overt act occurred.⁴⁰⁷ The latter holding was based on a theory of constructive presence.⁴⁰⁸ The lower courts have extended this view to aiding-and-abetting prosecutions, holding that an aider and abettor may be prosecuted where the principal commits the offense, even if the aider and abettor was not present there.⁴⁰⁹ Thus, the doctor probably could be prosecuted for aiding and abetting the woman's crime, even though the doctor never entered the prosecuting state.

The state court cases involving Sixth Amendment challenges often ignore the federal Sixth Amendment cases entirely. Instead, these courts often treat the question of where the crime occurred for Sixth Amendment purposes as coextensive with the question of whether the state has criminal jurisdiction.⁴¹⁰ These courts apparently take the view that, if a state has jurisdiction to prosecute an offense, the crime occurs there for Sixth Amendment purposes. Given the Supreme Court's focus on statutory language in Sixth Amendment cases, the equivalence of the two concepts is doubtful. However, to the extent that these state cases are correct, the analysis would track that in the earlier section discussing criminal jurisdiction.⁴¹¹

404. See *supra* part IV.

405. *United States v. Delia*, 944 F.2d 1010, 1013 (2d Cir. 1991); *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1189-90 (2d Cir. 1989).

406. *Hyde v. Shine*, 199 U.S. 62, 76-77 (1905).

407. *Hyde v. United States*, 225 U.S. 347 (1912).

408. *Id.* at 362.

409. *E.g.*, *United States v. Brantley*, 733 F.2d 1429, 1434 (11th Cir. 1984); *United States v. Kibler*, 667 F.2d 452, 455 (4th Cir. 1982); *United States v. Buttorff*, 572 F.2d 619, 627 (8th Cir. 1978); *United States v. Jackson*, 482 F.2d 1167, 1178-79 (10th Cir. 1973); *United States v. Kilpatrick*, 458 F.2d 864, 868 (7th Cir. 1972). *But cf.* *United States v. Walden*, 464 F.2d 1015, 1019-20 (4th Cir. 1972) (accessory may be tried at the location of the crime he assists or at the location of his accessorial acts, but principal violator may not be tried at place where the accessory acts).

410. *E.g.*, *Wheat v. State*, 734 P.2d 1007, 1008-1012 (Alaska Ct. App. 1987); *Trindle v. State*, 602 A.2d 1232, 1238-39 (Md. 1992) (Eldridge, J., concurring in part and dissenting in part); *State v. Smith*, 421 N.W.2d 315, 318-19 (Minn. 1988); *State v. Darroch*, 287 S.E.2d 856, 859-865 (N.C. 1982); *Rios v. State*, 733 P.2d 242, 244-49 (Wyo. 1987).

The extent to which the state courts often ignore the Supreme Court's Sixth Amendment jurisprudence is indicated by a quote from a state case involving a Sixth Amendment challenge: "How a state chooses to label a crime cannot be relevant to jurisdiction. To conclude otherwise would be to place form above substance." *Darroch*, 287 S.E.2d at 863. As can be seen from the Supreme Court cases discussed earlier, how a crime is labeled is in fact determinative for Sixth Amendment purposes.

411. See *supra* part III.

VII. THE COMMERCE CLAUSE

A. Introduction

The most likely source for holding an extraterritorial abortion statute unconstitutional is the Commerce Clause.⁴¹² The Commerce Clause does not expressly prohibit state extraterritorial regulation; it merely authorizes Congress to "regulate Commerce with the foreign Nations, and among the several States."⁴¹³ Nevertheless, the Supreme Court has read into that clause a "negative," or "dormant," Commerce Clause limitation on the power of states to interfere with interstate commerce.⁴¹⁴

The dormant Commerce Clause is one constitutional provision for which the distinction between civil choice-of-law doctrine and state regulatory law may make a difference. The Commerce Clause has been "generally ignored" in the civil choice-of-law context,⁴¹⁵ but it has much to say concerning the application of a state's regulatory and criminal law.

Unfortunately, as even the Supreme Court recognizes, the Court's interpretation of the negative Commerce Clause "has not always been easy to follow."⁴¹⁶ The Court has articulated a variety of tests,⁴¹⁷ and the decision depends on a close examination of the facts of each case.⁴¹⁸

412. U.S. CONST. art. I, § 8, cl. 3.

413. *Id.*

414. *E.g.*, South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 184 n.2 (1938), and cases cited therein. Not everyone accepts these dormant Commerce Clause limitations. Martin Redish and Shane Nugent make a convincing argument that

[t]he dormant commerce clause lacks a foundation or justification in either the Constitution's text or history, and, despite the efforts of respected constitutional scholars, the clause cannot be satisfactorily rationalized outside the text of the Constitution. More importantly, the dormant commerce clause alters the delicate balance of federalism clearly manifested in the constitutional text.

Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 617. See also Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 428 (1982) (arguing for a "radically diminished role" for the dormant Commerce Clause).

415. Harold W. Horowitz, *The Commerce Clause as a Limitation on State Choice-of-Law Doctrine*, 84 HARV. L. REV. 806, 807 (1971). Professor Horowitz argues that the Commerce Clause should be applied to control civil choice-of-law doctrine. *Id.* at 813-23.

416. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987). Earl Maltz quotes a facetious 1932 restatement of constitutional law that still rings true:

Although the power of the Federal Government over interstate commerce is plenary, the states may regulate commerce some, but not too much. If a state attempts to regulate commerce too much such regulation will be unconstitutional.

Caveat: This Restatement is not intended to express any opinion as to how much regulation is too much.

Earl M. Maltz, *How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47, 47 (1981). Professor Maltz accuses the Court of failing to generate "the kind of consistent, principled decisionmaking that is essential to the orderly development of constitutional law." *Id.* at 89.

417. *CTS Corp.*, 481 U.S. at 87; *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440-41 (1978).

418. See, e.g., *Raymond Motor Transp.*, 434 U.S. at 441 ("[T]he inquiry necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce."); *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714, 719 (1963) ("[C]ourts must examine closely the facts of each case to determine whether the dangers and hardships of diverse regulation justify foreclosing a State from the exercise of its traditional powers.").

B. Stricter Scrutiny: Discrimination, Inconsistent Regulation, and Economic Protectionism

The principal objects of negative Commerce Clause scrutiny have been state statutes that discriminate against interstate commerce.⁴¹⁹ "When a state statute ... discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [the Court has] generally struck down the statute without further inquiry."⁴²⁰ Some scholars contend that almost all of the Supreme Court's Commerce Clause decisions are explainable on the basis of discriminatory purpose or impact: The Court usually upholds nondiscriminatory state regulation and invalidates discriminatory state regulation.⁴²¹ Other scholars, while not necessarily conceding that discrimination is all the Court is worried about, have argued that discrimination is all the Court should be worried about.⁴²²

An extraterritorial abortion statute clearly would not discriminate against interstate commerce or favor local economic interests over out-of-state economic interests. Whether one focuses on the purpose of such a statute or its effect, the regulation is evenhanded. The state would prohibit abortions on its residents, whether performed within or without the state, whether performed by local doctors and clinics or out-of-state doctors and clinics. The only arguable discrimination is against the state's own resident women, who may not obtain abortions outside the state, and in favor of out-of-state women, who may. This is hardly the discrimination *against* interstate commerce at which the dormant Commerce Clause is aimed.

The Court has also looked askance at state laws that might subject a single person to inconsistent regulation by different states.⁴²³ According to the Court, the practical effect of the particular state regulation being challenged "must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every State, adopted similar legislation."⁴²⁴ A state statute prohibiting a resident from leaving the state to obtain an abortion presents no problem of inconsistency. As long as each state regulates only its own residents, each woman

419. *CTS Corp.*, 481 U.S. at 87.

420. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).

421. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1206-84 (1986); Robert A. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885, 965 (1985).

422. Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENTARY 395, 403-06 (1986). Professor Farber argues that this is the only rule consistent with what he calls the process rationale for the negative Commerce Clause: preventing discrimination against outsiders who are not represented in the state's political process. *Id.* at 400-01. See also *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 447 (1978) (criticizing statutory exemptions for specified local industries as undermining "the assumption that the State's own political processes will act as a check on local regulations that unduly burden interstate commerce"); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 164-65 (accepting the political theory of the Commerce Clause). For a criticism of this political process model, see Redish & Nugent, *supra* note 414, at 612-17.

423. See, e.g., *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336-37 (1989); *CTS Corp.*, 481 U.S. at 88, and cases cited therein; *Brown-Forman Distillers Corp.*, 476 U.S. at 583.

424. *Healy*, 491 U.S. at 336.

would be subject to only one rule. No inconsistency results even if the other state attempts to apply its more liberal abortion law on a territorial basis. The more liberal state is not requiring the woman to obtain the abortion; thus, the application of her own state's prohibition of abortion does not subject her to inconsistent, irreconcilable obligations.⁴²⁵ She can comply with the laws of both states.

Regulation of the doctor performing the abortion presents a trickier issue of inconsistent regulation. Presumably, nothing in the law of the doctor's home state would require him to perform abortions, so he is not facing inconsistent obligations in that sense.⁴²⁶ He might face inconsistent obligations, however, if the state regulation in question was something short of an absolute prohibition on abortion. If, for example, the woman's state of residence required that no abortion be performed unless the doctor distributed certain material or obtained a certain type of consent, and the doctor's state required different information or a different type of consent, inconsistency would result. An absolute prohibition would not, however, present the type of inconsistency with which the Court is concerned.

The Supreme Court has also applied a stricter standard of review when the state regulation is designed to protect local economic interests than when the state regulation is designed to promote health or safety:⁴²⁷

The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. ...

425. In a forthcoming article, Lea Brilmayer argues that regulation of abortion could present a case of inconsistent regulation. Brilmayer, *supra* note 16. She argues that a regulatory state's prohibition of an extraterritorial abortion may conflict with the territorial state's affirmative grant to those within its borders of the autonomy to choose. She further argues that, as a matter of constitutional law, the territorial state's grant of autonomy should trump the domiciliary state's prohibition of abortion.

Professor Brilmayer's article appears to be prescriptive rather than descriptive. She makes an analogy to federal preemption cases, where the Supreme Court has held that federal law may preempt state law, even if it is possible to comply with both. *See, e.g., Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954). However, she does not claim that any existing Commerce Clause case directly supports her position.

Her prescriptive rule presents difficulties. She does not explain why the territorial state has an overriding interest in granting autonomy to women domiciled in other states. Also troublesome is her argument that the autonomy interest involved in not regulating abortion is qualitatively different from other refusals to regulate. Whatever the merits of her prescriptive argument, however, her position does not appear to be supported by the Court's existing Commerce Clause cases. The Court seems to be using "inconsistent regulation" in the sense indicated in the text—where it is impossible to comply with the laws of both states. *See CTS Corp.*, 481 U.S. at 88 (state regulation of corporate voting rights presents no problem of inconsistent regulation as long as each state regulates only its own domestic corporations).

426. Such a possibility is certainly conceivable. Assume, for example, that the doctor practices in a state hospital that requires him to perform abortions on all women who do not have the financial resources to pay for them, and that this obligation is not restricted to women residing in the state. The doctor would then face inconsistent obligations. His home state requires him to perform an abortion on the nonresident woman, but her law subjects him to criminal penalties if he does.

427. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956 (1982); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949).

But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the court has adopted a much more flexible approach, the general contours of which were outlined in *Pike v. Bruce Church, Inc.*⁴²⁸

Again, an extraterritorial abortion statute would be subject to a lesser standard of review, for it clearly is not designed to protect local economic interests, nor would it have that effect. As long as abortion is also prohibited within the state, the prohibition on a woman leaving the state to obtain an abortion furthers no local economic interest, nor is such a provision designed to prevent out-of-state businesses from competing with local businesses.

C. Balancing Burdens and Benefits

The Supreme Court's Commerce Clause analysis currently involves a two-tiered approach. The first tier is the strict scrutiny triggered by statutes discriminating against interstate commerce.⁴²⁹ However, the Court does not automatically approve state regulation lacking discriminatory purpose or effect. Instead, it engages in a weaker, second tier of analysis, first articulated in *Pike v. Bruce Church, Inc.*:⁴³⁰ "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."⁴³¹ Among other things, the Court will consider whether the state's objective could be accomplished as well through an alternative means less burdensome on interstate commerce.⁴³²

Thus, assuming that an extraterritorial abortion statute, at least as applied to the woman, does not fall within the first tier of the Court's Commerce Clause analysis, one must balance its benefits against the burden it imposes on interstate commerce. It is difficult to predict the result of such balancing. The state interest and the burdens on interstate commerce are fairly easily identifiable, but the weighing of those interests is much less predictable, because the

428. *City of Philadelphia*, 437 U.S. at 623-24 (citations omitted). For an argument that, except in cases involving transportation and taxation, the Court has been concerned exclusively with preventing states from engaging in economic protectionism, see Regan, *supra* note 421.

429. It is not completely clear from the cases whether the problems of inconsistent regulation or economic protectionism themselves trigger the strict scrutiny approach or merely weigh very heavily in the balancing of the benefits and the burdens on interstate commerce. The Court itself does not strictly separate the two tiers of its Commerce Clause analysis, indicating that "there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). The issue is not important for present purposes, because, as explained in the text, an extraterritorial abortion statute would involve neither inconsistent regulation nor economic protectionism.

430. 397 U.S. 137 (1970).

431. *Id.* at 142. *Accord Brown-Forman Distillers Corp.*, 476 U.S. at 579. Not all of the justices accept the balancing approach. Justice Scalia would invalidate a state statute under the Commerce Clause "if, and only if, it accords discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state purpose." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 898 (1988) (Scalia, J., concurring in the judgment). See also *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part and concurring in the judgment).

432. *Pike*, 397 U.S. at 142.

Court has not adequately specified how the weighing is done.⁴³³ Justice Scalia has cynically likened Commerce Clause balancing to "judging whether a particular line is longer than a particular rock is heavy."⁴³⁴ It appears likely that the application of an extraterritorial prohibition to the resident woman would survive this balancing process, but the constitutionality of a law applicable directly to the doctor performing the abortion is much less certain.

The principal benefit of an extraterritorial abortion statute is the protection of the resident fetus. As discussed earlier, the Supreme Court recognized this interest as legitimate in both *Roe v. Wade* and *Planned Parenthood v. Casey*.⁴³⁵ If *Roe* is overruled, it is unlikely that the Court would contest the legitimacy of the state's interest in protecting the unborn fetus.

Against this benefit, the burden on interstate commerce must be weighed. If the extraterritorial abortion statute applies only to the woman seeking the abortion, the impact on interstate commerce is trivial. The statute would not in any way inhibit doctors performing abortions in other states, as the doctor would not be subject to prosecution. If the doctor performed an abortion on a woman from a state with an extraterritorial abortion statute, he might be requested to provide evidence, but this request would be no more burdensome than a civil discovery request, and the Court has allowed state civil law to be applied in interstate disputes.⁴³⁶ In any event, such evidentiary requests are separate from the criminal statute itself; if the state goes too far, such as by trying to force the doctor to come to the prosecuting state to testify, those requests could themselves be subjected to interstate commerce analysis. The constitutionality of the underlying criminal prohibition should not depend on the constitutionality of certain means of gathering evidence to prove the crime.

There is, of course, a minor burden on the out-of-state doctor's business: he has fewer patients. But that burden is hardly disruptive of interstate commerce. As long as the burden on the out-of-state doctor is no greater than the burden on the in-state doctor, the fact that the out-of-state doctor now has fewer abortion patients would not preclude state regulation. Additionally, it is without question that a state could prohibit the out-of-state doctor from entering the state and performing abortions there. This has an impact on interstate commerce similar to prohibiting the woman from going to the out-of-state doctor, but no one suggests that the former would violate the Commerce Clause. In sum, a criminal prohibition limited to the woman seeking the abortion would probably survive Commerce Clause balancing.

The question is more difficult if the state law also tries to make the out-of-state doctor a criminal defendant, for that would impose a much greater burden. To avoid criminal liability, every doctor in every state would have to screen all of his or her patients to make sure they were not from a state that prohibits extraterritorial abortions. If the statute did not require that the doctor, to be liable, have actual knowledge of the patient's residence, the investigatory burden would be enormous. The doctor would have to investigate each patient and verify her identity and address before performing the abortion. The

433. This uncertainty is, of course, "inherent in the basic balancing approach itself." Maltz, *supra* note 416, at 89.

434. *Bendix Autolite Corp.*, 486 U.S. at 897 (Scalia, J., concurring in the judgment).

435. *See supra* note 198 and accompanying text.

436. *See supra* part IV.

doctor would endure this burden for every patient, whereas the benefit of regulation would exist only for those few patients actually from the state regulating the abortion. Weighing benefits and burdens is difficult, particularly when an economic interest is on one side of the balance and an interest in life or potential life is on the other. However, because of the greater burden, such a statute would be less likely to survive Commerce Clause balancing.

If the statute allowed the doctor to rely on the address provided by the patient, no additional investigatory burden would be imposed. The doctor, or his or her staff, would only have to look at the admission form and reject patients from states with prohibitory abortion laws. Since the staff already has to review the forms for medical history, the additional burden appears to be minimal. Even here, however, the burden would be more substantial if the state law involved not an absolute prohibition, but less restrictive limitations on the right to an abortion. The criminality of abortion might vary depending upon the age of the patient, whether a waiting period has been observed, whether the appropriate consent or disclosure form has been signed, how advanced the pregnancy is, and so on. It would undoubtedly prove difficult and costly for doctors to keep up with various states' abortion laws and apply these different rules. Given this burden, the Court probably would not accept the application of such laws directly to the doctor.

D. *The New Territorialism*

There is a final strand of analysis in the Commerce Clause cases that is tremendously important to the constitutionality of an extraterritorial abortion statute. Older Commerce Clause cases distinguished between direct regulation of interstate commerce and state regulation with only indirect effects on interstate commerce.⁴³⁷ Recently, that distinction has returned to the Supreme Court's Commerce Clause cases, with a definite territorial component.⁴³⁸ In its current recitation of the two-tier Commerce Clause analysis, the Court includes within the category deserving stricter scrutiny state statutes that "directly regulate" interstate commerce.⁴³⁹

The "direct regulation" line of analysis has arisen most recently in the Court's review of liquor price affirmation statutes, pursuant to which a state requires distributors of alcoholic beverages to post a schedule of prices at which those beverages will be sold to wholesalers within the state and to affirm that the posted prices are no higher than the prices charged in other states.⁴⁴⁰ In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*⁴⁴¹ and

437. *E.g.*, *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935); *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925). *See also* Sam Kalen, *Reawakening the Dormant Commerce Clause in its First Century*, 13 U. DAYTON L. REV. 417, 452-62 (1988) (arguing that concepts of territorial sovereignty were one factor affecting the validity of state statutes in nineteenth century Supreme Court cases).

438. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 580-82 (1986); *Edgar v. MITE Corp.*, 457 U.S. 624, 640, 642-43 (1982) (White, J.). *See* Kalen, *supra* note 437, at 422 (arguing that *CTS* and *Brown-Forman* represent a newly emerging concern over the extraterritorial effect of state regulations, resurrecting constitutional theory that has long been eroded).

439. *Brown-Forman Distillers Corp.*, 476 U.S. at 578-79.

440. *See Healy*, 491 U.S. 324; *Brown-Forman Distillers Corp.*, 476 U.S. 573.

441. 476 U.S. 573 (1986).

Healy v. Beer Institute, Inc.,⁴⁴² the Supreme Court held that such statutes violated the Commerce Clause because the statutes had the practical effect of controlling prices in other states.⁴⁴³ According to the Court, a state "may regulate the sale of liquor within its borders, and may seek low prices for its residents, [but] it may not 'project its legislation into [other States] by regulating the price to be paid' for liquor in those States."⁴⁴⁴ *Healy* summarized this territorialist view of the negative Commerce Clause:

First, the "Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State"; and, specifically, a State may not adopt legislation that has the practical effect of establishing "a scale of prices for use in other states" Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.⁴⁴⁵

It is unclear what to make of these cases. *Healy* hints that these principles are not inexorable, but are based on specific calculations of burdens on commerce.⁴⁴⁶ Furthermore, all of the new territorial cases involve discrimination against interstate commerce,⁴⁴⁷ economic protectionism,⁴⁴⁸ or the possibility of inconsistent regulation.⁴⁴⁹ Thus, these laws would have been subjected to stricter scrutiny even in the absence of their extraterritoriality. It is unclear whether the Court would actually subject a state statute to strict scrutiny merely because of its extraterritoriality, where it is neither discriminatory nor designed to protect local economic interests.

Assuming that the Court meant what it said, the application of an abortion statute to an out-of-state doctor performing an out-of-state abortion would clearly be extraterritorial and therefore unconstitutional. This would apparently be true even if the regulating state could demonstrate that the out-of-state abortion affected the regulating state's interests.⁴⁵⁰

442. 491 U.S. 324 (1989).

443. *E.g., id.* at 337-39.

444. *Brown-Forman Distillers Corp.*, 476 U.S. at 582-83.

445. *Healy*, 491 U.S. at 336 (citations omitted).

446. After reciting the rules quoted above, the Court writes,

We further recognized in *Brown-Forman* that the critical consideration in determining whether the extraterritorial reach of a statute violates the Commerce Clause is the overall effect of the statute on both local and interstate commerce. Our distillation of principles from prior cases involving extraterritoriality is meant as nothing more than a restatement of those specific concerns that have shaped this inquiry.

Id. at 337 n.14.

447. *Id.* at 340-41.

448. *Id.* at 339; *Brown-Forman Distillers Corp.*, 476 U.S. at 579-80.

449. *Brown-Forman Distillers Corp.*, 476 U.S. at 583; *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (White, J.). See also *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88 (1987) (reading the plurality opinion in *Edgar v. MITE Corp.* as based on the problem of inconsistent regulation).

450. *Healy*, 491 U.S. at 336; *Edgar*, 457 U.S. at 642-43.

The application of an extraterritorial abortion statute to the woman seeking the abortion is more likely to be upheld.⁴⁵¹ The new territorial Commerce Clause cases have recognized that states have legitimate interests in protecting their residents,⁴⁵² and it is clear that a legitimate interest in protecting residents from something other than economic competition can justify some extraterritoriality. The Supreme Court has consistently distinguished "between the power of the State to shelter its people from menaces to their health or safety ..., even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage."⁴⁵³ For example, in *Baldwin v. G.A.F. Seelig, Inc.*,⁴⁵⁴ the Court rejected as a direct burden on interstate commerce a state law that prohibited the sale of milk imported into New York unless an acceptable price was paid to the out-of-state milk producers. The Court found that the law was not designed to further any health or safety interest,⁴⁵⁵ but indicated, in dictum, that extraterritoriality would be more acceptable if such an interest were served. To protect its interest in sanitary precautions in producing milk, the Court said, "[a]ppropriate certificates may be exacted from farmers in Vermont and elsewhere; milk may be excluded if necessary safeguards have been omitted."⁴⁵⁶ Thus, the same type of extraterritorial control that was rejected if designed to further economic ends was acceptable to further health ends. An extraterritorial abortion statute, designed to protect the resident fetus from physical harm, might take advantage of this distinction.

The contrast between two cases involving state anti-takeover statutes further illustrates the Court's recognition of states' interest in protecting their own residents. In *Edgar v. MITE Corp.*,⁴⁵⁷ the Court struck down an Illinois law directly regulating hostile tender offers for companies with certain connections to Illinois. The plurality opinion condemned the statute's "sweeping extraterritorial effect,"⁴⁵⁸ pointing out that the Illinois law could apply to an out-of-state corporation having no shareholders residing in Illinois.⁴⁵⁹ In the only portion of the opinion commanding a majority, Justice White wrote, "While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders."⁴⁶⁰ Five years later, in *CTS Corp. v. Dynamics Corp. of America*,⁴⁶¹ the Court approved an anti-takeover statute limiting the stock voting rights of shareholders trying to gain hostile control of Indiana corporations. The statute clearly might burden interstate tender offers, but the Court distinguished *MITE* because, unlike the statute in *MITE*, the Indiana act applied only to Indiana corporations, and

451. For analysis tentatively reaching the same conclusion as that expressed in the text, although on slightly different grounds, see Regan, *supra* note 14, at 1912.

452. *Brown-Forman Distillers Corp.*, 476 U.S. at 580; *Edgar*, 457 U.S. at 644 (White, J.).

453. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949). See also *supra* notes 427-28 and accompanying text.

454. 294 U.S. 511 (1935).

455. *Id.* at 523.

456. *Id.* at 524.

457. 457 U.S. 624 (1982).

458. *Id.* at 642 (White, J.).

459. *Id.*

460. *Id.* at 644 (White, J.).

461. 481 U.S. 69 (1987).

[m]oreover, unlike the Illinois statute invalidated in *MITE*, the Indiana Act applies only to corporations that have a substantial number of shareholders in Indiana. Thus, every application of the Indiana Act will affect a substantial number of Indiana residents, whom Indiana indisputably has an interest in protecting.⁴⁶²

Similarly, an extraterritorial abortion statute would apply only to the state's residents and only to protect resident fetuses, whom the state indisputably has an interest in protecting. The state's interest in protecting the non-economic interests of its residents might sufficiently distinguish an extraterritorial abortion statute from the extraterritorial regulations disapproved by the recent Commerce Clause cases.

Also, if the statute, instead of prohibiting the abortion itself, prohibits the woman from leaving the state to obtain the abortion, the statute is no longer purely extraterritorial. By analogy to the Sixth Amendment cases, the crime (leaving) then occurs, in part, in the regulating state, and the Court's rejection of extraterritoriality is arguably irrelevant. The question then becomes whether it is constitutional to restrict the woman's right to travel in this manner, a question I deal with in a later section.⁴⁶³ However, it is not clear if the Commerce Clause concept of territoriality is equivalent to the Sixth Amendment concept of territoriality. Language in some of the most recent Commerce Clause cases focuses on whether the "practical effect" of the state law is to regulate commerce wholly outside of the state's borders.⁴⁶⁴ The Court has not defined "practical effect," but it could mean that a state may not do indirectly what it cannot do directly. Although a statute making it criminal to leave the state to obtain an abortion does not directly prohibit the extraterritorial transaction, its "practical effect" may be to do so. This argument is consistent with the case that introduced the "practical effect" language, *Southern Pacific Co. v. Arizona*.⁴⁶⁵ The *Southern Pacific* case involved an Arizona restriction on the length of trains that applied only within the state of Arizona. In spite of the law's territorial limit, the Court held that it was an impermissible burden on interstate commerce. However, given the Court's limited definition of the "practical effect" terminology, applying it to an extraterritorial abortion statute is little more than supposition.

Other than right-to-travel cases,⁴⁶⁶ which are sometimes premised on the Commerce Clause but are discussed in a separate section of this article, there are almost no Commerce Clause cases involving statutes prohibiting a citizen from leaving a state to engage in a particular activity elsewhere.⁴⁶⁷ There are cases holding that states generally may not prohibit the exportation of commodities to other states.⁴⁶⁸ However, there are at least two important differ-

462. *Id.* at 93.

463. *See infra* part VIII.

464. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 332, 336 (1989); *Edgar*, 457 U.S. at 643.

465. 325 U.S. 761, 775 (1945).

466. *See infra* part VIII.

467. One such case is *Riis v. Commonwealth*, 418 S.W.2d 396 (Ky. 1967), where the court rejected, with little discussion or analysis, a Commerce Clause challenge to a state statute making it a crime to unlawfully transport others beyond the bounds of the state.

468. *E.g.*, *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (state prohibition on selling outside the state hydroelectric energy generated within the state); *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (state statute prohibiting transportation or shipment for sale out of state of minnows obtained from state waters). *See also* *H.P. Hood & Sons, Inc. v. Du*

ences between those cases and a prohibition on leaving the state for the purpose of obtaining an extraterritorial abortion. First, the motivation behind prohibitions on exportation is generally economic protectionism—the state is benefiting local consumers and producers at the expense of out-of-state consumers and producers. A prohibition on leaving the state to obtain an abortion would not have the purpose or effect of protecting the economic interests of local consumers or producers, but instead would be motivated by a health interest—protecting the resident fetus. Second, cases striking down prohibitions on exportation often involve discrimination against interstate commerce—state law bans only export of the product, not its internal sale or use.⁴⁶⁹ The Court's opinion in *Hughes v. Oklahoma*⁴⁷⁰ is instructive in this regard. *Hughes* held unconstitutional an Oklahoma statute prohibiting the shipment for sale outside the state of minnows obtained from Oklahoma waters. The Court recognized the legitimacy of the state's interest in preserving its minnow population,⁴⁷¹ but refused to allow Oklahoma to protect that interest in a discriminatory manner. The Court suggested instead a less discriminatory alternative, such as a general prohibition on taking or disposing of minnows within the state.⁴⁷² This is precisely how an extraterritorial abortion statute would work—it would not discriminate against those leaving the state, but it would prohibit state citizens from obtaining abortions either within or without the state. The Court approved such an evenhanded prohibition in *Sporhase v. Nebraska ex rel. Douglas*.⁴⁷³ *Sporhase* approved, in part, a Nebraska statute that restricted the withdrawal of groundwater intended for use in an adjoining state.⁴⁷⁴ The Court noted that the statute imposed similar restrictions on water withdrawn for use within Nebraska and concluded that the state was not discriminating against interstate commerce:

Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State. An exemption for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation.⁴⁷⁵

In reaching this result, the Court specifically noted the distinction between health and safety regulation, on the one hand, and economic protectionism, on the other hand.⁴⁷⁶ Thus, a prohibition on leaving the state to obtain an abortion might survive because it is not discriminatory and it is intended to promote health rather than economic interests.

Mond, 336 U.S. 525 (1949) (involving the state's denial of a license for a milk plant that would receive milk to be shipped out of state).

469. E.g., *New England Power Co.*, 455 U.S. 331; *Hughes*, 441 U.S. 322.

470. 441 U.S. 322 (1979).

471. *Id.* at 337.

472. *Id.* at 338.

473. 458 U.S. 941 (1982).

474. The Court struck down the portion of the statute that limited exportation to states that granted reciprocal rights to withdraw and transport water to Nebraska. *Id.* at 957–58.

475. *Id.* at 955–56.

476. The Court stated that

a State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens—and not simply the health of its economy—is at the core of its police power. For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulations, on the other.

VIII. THE CONSTITUTIONAL RIGHT TO TRAVEL

Another possible constitutional argument against an extraterritorial abortion statute is that it might violate the woman's constitutional right to travel.⁴⁷⁷ The Supreme Court has long recognized a constitutional right to travel among the states,⁴⁷⁸ although the textual source of that right is unclear.⁴⁷⁹ In *Crandall v. Nevada*,⁴⁸⁰ the Court wrote that "[w]e are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States."⁴⁸¹ All citizens must be free to engage in such travel, "uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."⁴⁸² State laws may restrict or burden the right to travel only if they serve a sufficiently compelling governmental interest.⁴⁸³

The exact standard for reviewing state-imposed burdens on the right to travel is unclear. In *Shapiro v. Thompson*,⁴⁸⁴ the Supreme Court required a "compelling governmental interest" to justify restrictions on the right to travel.⁴⁸⁵ But in *Jones v. Helms*,⁴⁸⁶ the Court apparently applied a rational basis standard.⁴⁸⁷ Later cases are no more helpful. The Court either avoided deciding what the standard is by concluding that the state law did not even meet the rational basis standard⁴⁸⁸ or was unable to produce a majority opinion.⁴⁸⁹ Whatever the standard, an extraterritorial abortion standard would probably not be an unconstitutional restriction on the right to travel.

Most of the cases involving the right to travel involve laws restricting or discouraging the entry of non-residents into the state.⁴⁹⁰ These statutes present a

Id. at 956.

477. Justice Blackmun's opinion in *Planned Parenthood v. Casey* recognizes a possible right-to-travel problem if *Roe* is overruled. He asks, "What effect would differences among States in their approaches to abortion have on a woman's right to engage in interstate travel?" *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2854 n.12 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justice Blackmun neither explains nor answers his question.

478. *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Edwards v. California*, 314 U.S. 160 (1941); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867). *See generally* NOWAK & ROTUNDA, *supra* note 325, § 14.38.

479. *See* NOWAK & ROTUNDA, *supra* note 325, at 300-03; *Jones v. Helms*, 452 U.S. 412, 418-19 (1981). *See, e.g.*, *Shapiro*, 394 U.S. at 630 ("We have no occasion to ascribe the source of this right ... to a particular constitutional provision.")

480. 73 U.S. (6 Wall.) 35 (1867).

481. *Id.* at 49.

482. *Shapiro*, 394 U.S. at 629.

483. NOWAK & ROTUNDA, *supra* note 325, at 873.

484. 394 U.S. 618 (1969).

485. *Id.* at 634.

486. 452 U.S. 412 (1981).

487. *Id.* at 422-23.

488. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Zobel v. Williams*, 457 U.S. 55, 60-62 (1982).

489. In the most recent Supreme Court pronouncement, Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 904-07 (1986) (Brennan, J.), four justices concluded that a compelling governmental interest must be shown.

490. *E.g.*, *Hooper*, 472 U.S. 612 (state property tax exemption conditioned on residency in the state before a certain date); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (state statutes denying welfare benefits to persons who had not resided within the jurisdiction for at least a year); *Edwards v. California*, 314 U.S. 160, 170 (1941) (state statute penalizing bringing a non-resident indigent person into the state). *See generally* NOWAK & ROTUNDA, *supra* note 325, § 14.38 (collecting right-to-travel cases).

concern not applicable to statutes preventing residents from leaving the state. With respect to the former, there is no inner political check: The non-residents burdened by the regulation had no voice in the political process through which the provision was enacted.⁴⁹¹ Residents, on the other hand, have a weaker complaint against burdens on travel imposed by their own legislature because residents elect the legislators and have political power to remove the burdens imposed. However, not all of the Supreme Court's right-to-travel cases have involved restrictions on non-residents; some involve burdens on a resident's right to travel elsewhere.⁴⁹² One of the earliest right-to-travel cases, *Crandall v. Nevada*,⁴⁹³ struck down a state law imposing a capitation tax of one dollar on every person leaving the state "by any railroad, stage coach, or other vehicle engaged or employed in the business of transporting passengers for hire."⁴⁹⁴ Although *Crandall*'s narrow holding is suspect, at least where the state has a legitimate public purpose for enacting the tax,⁴⁹⁵ the view that the right to travel protects the right to leave, as well as to enter, the state remains unchallenged.

The Supreme Court's decision in *Jones v. Helms*⁴⁹⁶ deserves special attention. *Jones* involved a Georgia statute that made it a misdemeanor for a parent to willfully and voluntarily abandon his or her dependent child.⁴⁹⁷ The same statute made it a felony for a parent to abandon the child and thereafter leave the state.⁴⁹⁸ The Court held that the statute, as applied to a parent who was a resident of Georgia,⁴⁹⁹ did not unconstitutionally impair the right to travel.

The Court held that the appellee's criminal conduct in Georgia prior to leaving "necessarily qualified his right thereafter freely to travel interstate"⁵⁰⁰ and thus rendered the case on a different footing from the claims in the earlier right-to-travel cases.⁵⁰¹ This rationale would not support a state statute making it a crime to leave the state for an extraterritorial abortion. At the time she left the state to obtain an abortion, a woman would not have already committed a separate crime in her state of domicile (other than merely leaving, which clearly could not be absolutely prohibited).⁵⁰² Thus, the Court's analogies in *Jones* to criminal extradition and laws restricting the mobility of persons convicted of crimes⁵⁰³ would be inapposite.

However, the *Jones* Court gave a second rationale for approving the statute. According to the Court, "a restriction that is rationally related to the offense itself—either to the procedure for ascertaining guilt or innocence, or to the imposition of a proper punishment or remedy—must be within the State's

491. *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975); *Edwards*, 314 U.S. at 174.

492. *Jones v. Helms*, 452 U.S. 412 (1981); *Evansville-Vandenberg Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867).

493. 73 U.S. (6 Wall.) 35 (1867).

494. *Id.* at 36.

495. *See Delta Airlines, Inc.*, 405 U.S. 707 (distinguishing *Crandall* and upholding state per-passenger service charges on airlines using public airports in the state).

496. 452 U.S. 412 (1981).

497. *Id.* at 413.

498. *Id.*

499. The Court expressed no opinion as to whether the statute could constitutionally be applied to a non-resident parent. *Id.* at 417-18 n.11.

500. *Id.* at 421.

501. *Id.*

502. "[A] simple penalty for leaving a state is plainly impermissible." *Id.* at 422.

503. *Id.* at 419.

power."⁵⁰⁴ Thus, "if departure aggravates the consequences of conduct that is otherwise punishable, the State may treat the entire sequence of events, from the initial offense to departure from the State, as more serious than its separate components."⁵⁰⁵ Since the state had an unarguably legitimate interest in having parents support their children, and since departure made that obligation more difficult to enforce, the additional penalty was justified.⁵⁰⁶

A state might similarly argue that departure from the state makes it more difficult, in fact impossible, for the state to enforce its interest in protecting the unborn fetus. Therefore, the state should be able to prevent that departure for the purpose of circumventing the statutory obligation not to injure the fetus.

The state's argument that an extraterritorial abortion statute does not impermissibly infringe upon the right to travel is even stronger than the argument in *Jones*. First, an extraterritorial abortion statute would more carefully tie the restriction on travel to the state interest. Unlike the statute in *Jones*, an extraterritorial abortion statute would not absolutely bar the pregnant woman from leaving the state; she could travel freely as long as her purpose was not to obtain an abortion. Second, unlike the statute in *Jones*, an extraterritorial abortion statute would not place a greater burden on those who travel than on those who do not. Pregnant women residing in the state would face the same penalties and restrictions whether they had the abortion within the state or travelled to another state for the abortion. In *Jones*, the statute penalized parents leaving the state more than those who stayed.⁵⁰⁷ Rather than burdening the right to travel, an extraterritorial abortion statute merely equalizes the burden on those who travel with the burden on those who do not.

This analysis is consistent with the Supreme Court's most recent explanation of the right to travel in *Bray v. Alexandria Women's Health Clinic*,⁵⁰⁸ a case which also involved the right to an abortion. The plaintiffs in *Bray* argued that the defendants' attempts to block access to abortion clinics deprived women of their constitutional rights, including the right to travel, in violation of 42 U.S.C. § 1985.

The plaintiffs in *Bray* pointed out that substantial numbers of women trying to reach the blockaded clinics were from other states, and argued that the blockade therefore deprived these women of their right to interstate travel. Justice Scalia's majority opinion disagreed. Justice Scalia stated that the right to travel only protects interstate travelers against two sets of burdens: (1) "the erection of actual barriers to interstate movement;"⁵⁰⁹ and (2) "being treated differently from intrastate travelers."⁵¹⁰ Since the blockaders did not discriminate against women from other states, Justice Scalia held that the right of interstate travel was not implicated.⁵¹¹ The majority apparently accepted the charac-

504. *Id.* at 422.

505. *Id.* at 422-23.

506. *Id.* at 423.

507. This sounds like the discriminatory treatment analysis used in Commerce Clause cases. See *supra* part VII.B. That should not be surprising because the Commerce Clause has been used as one of the textual bases for the right to travel. E.g., *Edwards v. California*, 314 U.S. 160 (1941). But see *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 763 n.7 (1993) (concluding that the right to travel does not derive from the Commerce Clause).

508. 113 S. Ct. 753 (1993).

509. *Id.* at 763 (quoting *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982)).

510. *Id.* (quoting *Zobel*, 457 U.S. at 60 n.6).

511. *Id.*

terization in Justice Stevens' dissent that "even an intentional restriction on out-of-state travel is permissible if it imposes an equal burden on intrastate travel."⁵¹²

A prohibition on extraterritorial abortion apparently survives the *Bray* analysis. Such a statute would not bar the pregnant woman's interstate movement and, since in-state abortions would also be prohibited, interstate travelers would be treated no differently from intrastate travelers.

Several lower court cases have approved *federal* statutes making it a crime to travel interstate for the purpose of doing something unlawful in another state. These cases are relevant because the Supreme Court has held that the constitutional right to travel restricts both the federal and state governments.⁵¹³ Two lower court cases held that a federal statute making it unlawful to travel in interstate commerce with the intent to incite, organize, promote, or encourage a riot did not violate the constitutional right to travel.⁵¹⁴ Another case upheld a federal statute making it unlawful to travel in interstate commerce to further an unlawful activity.⁵¹⁵ These cases held that the government's interest in the underlying unlawful activity justified an interference with travel in aid of that activity.⁵¹⁶ One might argue that a state has no legitimate governmental interest in preventing the wrongful action in another state and thus no compelling governmental interest to justify restricting travel. That issue, however, goes to the question of criminal jurisdiction, discussed earlier. If the state has a legitimate, otherwise constitutional, interest in controlling abortions performed on its residents out of the state (in other words, if the state law survives full faith and credit, due process, and Commerce Clause challenges), these lower court cases would arguably allow the infringement on the right to travel.

Cases involving restrictions on a custodial parent's right to take a child to another state⁵¹⁷ are also analogous. The child custody cases have uniformly held that a state may constitutionally condition child custody on the custodial parent remaining in the state, if it is in the best interests of the child to do so.⁵¹⁸

512. *Id.* at 793 (Stevens, J., dissenting). *Cf. id.* at 763 n.7.

513. *See* Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969) (applying right-to-travel restrictions to District of Columbia Code adopted by Congress).

514. *United States v. Dellinger*, 472 F.2d 340, 362 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973); *United States v. Hoffman*, 334 F. Supp. 504, 509 (D.D.C. 1971).

515. *United States v. Corallo*, 281 F. Supp. 24, 28 (S.D.N.Y. 1968).

516. *Dellinger*, 472 F.2d at 362; *Corallo*, 281 F. Supp. at 28.

517. *E.g.*, *Miller v. Superior Court*, 138 Cal. Rptr. 123 (Ct. App. 1977), *vacated*, 587 P.2d 723 (Cal. 1978); *Ziegler v. Ziegler*, 691 P.2d 773 (Idaho Ct. App. 1985); *Clark v. Atkins*, 489 N.E.2d 90 (Ind. Ct. App. 1986); *Carlson v. Carlson*, 661 P.2d 833 (Kan. Ct. App. 1983); *Le Bouef v. Fontenot*, 390 So. 2d 266 (La. Ct. App. 1980); *In re Marriage of Cole*, 729 P.2d 1276 (Mont. 1986); *Jaramillo v. Jaramillo*, 823 P.2d 299 (N.M. 1991); *Alfieri v. Alfieri*, 733 P.2d 4 (N.M. Ct. App. 1987); *McRae v. Carbnno*, 404 N.W.2d 508 (N.D. 1987).

518. *Ziegler*, 691 P.2d at 779-81; *Clark*, 489 N.E.2d at 99-100; *Carlson*, 661 P.2d at 836; *Le Bouef*, 390 So. 2d at 269; *Alfieri*, 733 P.2d at 7-8; *McRae*, 404 N.W.2d at 509. *See also Miller*, 138 Cal. Rptr. at 130 (rejecting right-to-travel challenge to Australian court order that required court approval to move the children outside of Australia); *Cole*, 729 P.2d at 1280-81 (approving district court's refusal to impose such a restriction, but stating that such a restriction would be constitutional if in the best interests of the child); *Jaramillo*, 823 P.2d at 305-07 (agreeing that the parent's right to travel may be infringed if in the best interests of the child, but finding sufficient evidence to support the district court's finding that the move was in the child's best interests). *See generally* Anne L. Spitzer, *Moving and Storage of Postdivorce Children: Relocation, the Constitution, and the Courts*, 1985 ARIZ. ST. L.J. 1, 18-31; Blair W.

Although these are not criminal cases, they do involve the deprivation of the parent's important, constitutionally protected interest in the child,⁵¹⁹ an interest that presumably approaches the liberty interest present in criminal cases.

Some of these cases have argued that such restrictions do not impair the custodial parent's right to travel because "[s]he is free to travel as she pleases *without* the children."⁵²⁰ This argument simply misses the point:⁵²¹ "[I]t makes no difference that the parent who wishes to relocate is not prohibited outright from doing so; a legal rule that operates to chill the exercise of the right, absent a sufficient state interest to do so, is as impermissible as one that bans exercise of the right altogether."⁵²² And, "[i]t is certainly an inhibition of the constitutional right if one has to choose between its exercise and having custody of one's child."⁵²³

The better argument is that made by most of such cases—that the state has a compelling interest in the welfare of the child, which warrants interference with the constitutional right to travel.⁵²⁴ Where such a move would deprive the other parent of reasonable visitation rights and thus deprive the children of "the parental love, affection, support, guidance and companionship to which they were entitled,"⁵²⁵ restrictions on travel are justified.⁵²⁶

If a state's interest in protecting a minor child from psychological harm is sufficient to justify restrictions on the right to travel, it seems unquestionable that a state's interest in protecting an unborn fetus from injury would justify such restrictions. The state arguably has a greater interest in protecting children after birth than in protecting fetuses before birth, but this difference is dwarfed by the offsetting difference in magnitude of the possible harms. In the custody cases, no physical harm, certainly not death, is threatened; the injury is to the child's psychological well-being and development. In the abortion cases, the mother is threatening to destroy the fetus entirely. If *Roe* is overruled and the state's interest in protecting the fetus is no longer offset by the mother's liberty interest in the abortion, it would be difficult not to conclude that the state's protective interest is compelling.

Further, the state in the abortion case has a much stronger argument that it is not infringing on the mother's right to travel at all. Unlike the custody cases, where the custodial parent would lose the children by choosing to move to another state, the pregnant woman in the abortion case loses nothing if she chooses to travel interstate. She pays no penalty for the travel itself; the only question is what she may do when she goes elsewhere. Leaving the state is not

Hoffman, Note, *Restrictions on a Parent's Right to Travel in Child Custody Cases: Possible Constitutional Questions*, 6 U.C. DAVIS L. REV. 181, 189-93 (1973).

519. E.g., *May v. Anderson*, 345 U.S. 528, 533-34 (1953).

520. *Miller*, 138 Cal. Rptr. at 130. *Accord Clark*, 489 N.E.2d at 100.

521. Spitzer, *supra* note 518 at 26, 28.

522. *Jaramillo*, 823 P.2d at 306.

523. Hoffman, *supra* note 518, at 191 n.67.

524. E.g., *Ziegler*, 691 P.2d at 780; *Clark*, 489 N.E.2d at 100; *Carlson*, 661 P.2d at 836; *Cole*, 729 P.2d at 1280-81. See Spitzer, *supra* note 518, at 27 (arguing that this may be a compelling state interest that could justify infringement of the right to travel if the evidence supports the need for such an infringement and no less restrictive means are available); Hoffman, *supra* note 518, at 191-92 (same).

525. *Ziegler*, 691 P.2d at 780-81.

526. *Id.*; *Clark*, 489 N.E.2d at 100; *Cole*, 729 P.2d at 1280-81; *Alfieri*, 733 P.2d at 8; *McRae*, 404 N.W.2d at 509-10.

itself a crime unless she thereafter has an abortion. In fact, if, as in the custody cases, she wants to move to the other state, she faces no restriction at all on her actions because the prohibition would only apply to extraterritorial abortions by domiciliaries. Thus, it seems clear that, if the custody cases are correct, penalizing the pregnant woman for an extraterritorial abortion would not violate her right to travel.

Bray v. Alexandria Women's Health Clinic is not the Supreme Court's only right-to-travel case involving abortion. In *Doe v. Bolton*,⁵²⁷ decided at the same time as *Roe*, the Court considered a challenge to a Georgia statute that, among other things, provided that abortions could be performed in Georgia only on Georgia residents. The Court held, with little discussion, that this residency requirement was an unconstitutional violation of the right to travel, because it denied to nonresidents the general medical care available to Georgia residents.⁵²⁸

One might argue that the holding in *Doe* supports its mirror image: If a state cannot prevent non-residents from entering the state to obtain an abortion, it also cannot prevent residents from exiting the state to obtain an abortion. On closer examination, however, there are strong differences between the two cases.⁵²⁹ In *Doe*, the state was discriminating against non-residents, prohibiting them from obtaining a medical procedure available to Georgia residents. As *Bray* recently indicated, the right to travel protects interstate travelers from "being treated differently" from intrastate travelers.⁵³⁰ In the case of an extraterritorial abortion statute, there is no discrimination. The state prohibits both residents and non-residents from obtaining abortions within the state, and prohibits its residents from obtaining abortions whether they travel intrastate or interstate.

A second distinction focuses on the state's interest in regulation. When *Doe* was decided, *Roe* had just held that states had no legitimate interest in generally prohibiting abortions, even abortions performed within the state. State statutes prohibiting or regulating abortion can exist at all only to the extent that the Court overrules or limits *Roe* and recognizes such a state interest. Once the state interest in protecting the unborn fetus is recognized, the only issue is whether that interest is sufficiently compelling to justify state infringement of the right to travel. *Doe* never had to reach this issue because (1) Georgia could hardly argue that it had a compelling state interest in protecting the fetuses of non-resident pregnant women when it allowed its own residents to obtain abortions and (2) in any event, *Roe* rejected as insufficient the only potentially compelling state interest.

There is dictum in another Supreme Court case indicating that a state may not regulate abortions extraterritorially. *Bigelow v. Virginia*⁵³¹ was a First Amendment challenge to a Virginia statute making it a misdemeanor to encourage or prompt, by the sale or circulation of any publication, the procuring of an abortion. At issue was an advertisement in a Virginia newspaper for a New

527. 410 U.S. 179 (1973).

528. *Id.* at 200.

529. See Regan, *supra* note 14, at 1907 (recognizing that the two issues are "quite different," without discussing that difference).

530. *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 763 (1993).

531. 421 U.S. 809 (1975).

York abortion placement service.⁵³² The Court held that the Virginia statute violated the First Amendment and, in the course of its opinion, said the following:

The Virginia Legislature could not have regulated the advertiser's activity in New York, and obviously could not have proscribed the activity in that State. *Huntington v. Attrill*, 146 U.S. 657, 669 (1892). Neither could Virginia prevent its residents from traveling to New York to obtain those services or, as the State conceded, Tr. of Oral Arg. 29, prosecute them for going there. See *United States v. Guest*, 383 U.S. 745, 757-759 (1966); *Shapiro v. Thompson*, 394 U.S. 618, 629-631 (1969); *Doe v. Bolton*, 410 U.S. at 200.⁵³³

In dissent, Justice Rehnquist, joined by Justice White, argued that the majority's attempt "to impose a rigid and unthinking territorial limitation, whose constitutional source is unspecified, on the power of the States to regulate conduct ... is plainly wrong."⁵³⁴ Justice Rehnquist argued that this territoriality was "quite at war with our prior cases."⁵³⁵ On this point, the Rehnquist dissent clearly has the better argument; the majority's rigid territorial view is not supported by either the prior case law or the cases decided since *Bigelow*.

There are several reasons to minimize the language in *Bigelow*.⁵³⁶ It is, of course, dictum, and, as indicated in the quote, the proposition stated appears not to have been challenged by the state. Its value is weakened further by its apparent inconsistency with many of the other Supreme Court cases discussed in this article.⁵³⁷ In addition, it is dictum from a Court that no longer exists. Of the justices remaining from the *Bigelow* Court, there is now a 2-1 majority in favor of the dissent.⁵³⁸

However, there is an easy explanation for this dictum, an explanation that makes it clearly correct, yet consistent with the rest of the Court's jurisprudence. The dictum in *Bigelow* relies on right-to-travel cases, which require a "compelling governmental interest" to justify restrictions on the constitutional right to travel.⁵³⁹ *Bigelow* was decided after *Roe*, which generally denied to states the right to prohibit abortions. Thus, when *Bigelow* was decided, a state could not prosecute a resident for obtaining an abortion, whether the abortion was performed within or without the state. The Court's dictum is, therefore, literally true. In terms of the right-to-travel cases, there is no compelling governmental interest in preventing residents from traveling elsewhere for abortion services because, under *Roe*, there is no compelling governmental interest in preventing abortions anywhere. If *Roe* is overruled, and a state has a governmental interest in prohibiting or regulating abortions within the state, one

532. *Id.* at 811-12.

533. *Id.* at 822-24 (footnote omitted).

534. *Id.* at 834 n. 2 (Rehnquist, J., dissenting).

535. *Id.* Justice Rehnquist cites several cases discussed earlier in this article, including *Strassheim v. Daily*, 221 U.S. 280 (1911), *Hyde v. United States*, 225 U.S. 347 (1912), and *Skiriotes v. Florida*, 313 U.S. 69 (1941).

536. See also Regan, *supra* note 14, at 1907-08. For an argument that the *Bigelow* view on territoriality is consistent with constitutional history, see Kreimer, *supra* note 16, at 464-519.

537. See *supra* parts IV-V.

538. Of the majority in *Bigelow*, only the author of the opinion, Justice Blackmun, remains on the Court. Chief Justice Burger and Justices Marshall, Stewart, Powell, Douglas, and Brennan have all resigned. Both of the dissenters, Justices Rehnquist and White, remain.

539. See *supra* text accompanying notes 482-89.

must determine whether that interest is sufficiently compelling to justify the restriction on the right to travel. This is a question that *Bigelow* did not need to address.

The *Bigelow* majority probably would not have accepted this limitation on its dictum, for the opinion goes on to broadly state that “[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.”⁵⁴⁰ However, this language, if ever adopted as a holding, would overrule a substantial body of Sixth Amendment, full faith and credit, due process, and criminal jurisdiction precedent. The *Bigelow* dictum is troublesome, but it is hard to believe that the modern Court would follow it.

Thus, if *Roe* is overruled, a state could constitutionally prohibit its own residents from exiting the state to obtain abortions, as long as it equally prohibited abortions within the state. If the Court is true to its right-to-travel holdings, an extraterritorial abortion statute would probably pass constitutional muster.

IX. PRINCIPLES OF FEDERALISM

Even if an extraterritorial abortion statute does not violate any of the specific constitutional prohibitions discussed above, it might nevertheless be unconstitutional because of its inconsistency with our federal system. The Supreme Court has at times been willing to strike down legislation based on its violation of principles of federalism.

However, most of the cases resting expressly on principles of federalism have involved the imposition of federal legislative power on the states and limits on that federal power.⁵⁴¹ Such cases find their constitutional source in the Tenth Amendment, which provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁵⁴² The Tenth Amendment, of course, is an unlikely source of limits on *state* power. Its express purpose is to reserve power to the states unless the Constitution prohibits them from exercising such powers. If anything, the Tenth Amendment supports an argument that, unless it violates one of the express constitutional provisions discussed earlier, a state is free to exercise extraterritorial criminal jurisdiction.⁵⁴³

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

541. *E.g.*, *New York v. United States*, 112 S. Ct. 2408 (1992); *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). *See also* *Evans v. United States*, 112 S.Ct. 1881, 1901-03 (1992) (Thomas, J., dissenting) (arguing that principles of federalism justify a narrow construction of the Federal Hobbs Act).

For a more general discussion of the limits our system of federalism places on the national government, see Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987); H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513 (1987); RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987). *See also* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988) (arguing that the guarantee of a republican form of government in art. IV, § 4 of the Constitution imposes limits on federal power).

542. U.S. CONST. amend. X.

543. Pielemeier, *supra* note 173, at 408.

Some scholars have taken the position that the needs of our federal system should constrain a state's application of its own law,⁵⁴⁴ including its criminal law.⁵⁴⁵ At least some of the Justices on the Supreme Court have argued that general principles of federalism constrain state choice of law in some instances. In *Nevada v. Hall*,⁵⁴⁶ California residents were injured in a collision in California with a vehicle owned by the University of Nevada. They sued the state of Nevada in California state court, and the California courts refused to apply a Nevada statute limiting to \$25,000 any tort recovery against Nevada.⁵⁴⁷ The majority decided that California's refusal to apply the Nevada immunity rule did not violate the Full Faith and Credit Clause;⁵⁴⁸ it then had to deal with Nevada's argument that a limitation on California's power was implicit in the Constitution: "Even apart from the Full Faith and Credit Clause, Nevada argues that the Constitution implicitly establishes a Union in which the States are not free to treat each other as unfriendly sovereigns."⁵⁴⁹ Although the Court hinted that the result might be different if the infringement on Nevada's sovereignty was greater,⁵⁵⁰ the majority soundly rejected Nevada's argument. The Court noted that it might be "wise policy" for California to grant Nevada immunity,⁵⁵¹ but argued that a holding requiring California to do so "would constitute the real intrusion on the sovereignty of the States."⁵⁵² The majority noted specific limitations on state power in the Constitution, then added:

Each of these provisions places a specific limitation on the sovereignty of the several States. Collectively they demonstrate that ours is not a union of 50 wholly independent sovereigns. But these provisions do not imply that any one State's immunity from suit in the courts of another State is anything other than a matter of comity. Indeed, in view of the Tenth Amendment's reminder that powers not delegated to the Federal

544. *E.g.*, LEFLAR ET AL., *supra* note 54, at 292-93. These authors argue that "The great political interest of our states, apart from mere preference for local law and local persons, is primarily in a need for systematization, for an orderliness that will make our federal system work with reasonable efficiency. Deliberate preference for local law and local persons, unaccompanied by independent justification, is a disregard of this interest."

The free and unpenalized movement of people and goods from state to state, and freedom in commercial intercourse, are necessary to the success of our federal system, and it is part of the law's task to assure these advantages. Deference to sister state law in situations in which the sister state's substantial contacts with a problem give it a real interest in having its law applied, even though the forum state also has an identifiable interest, will at times usefully further this part of the law's total task.

Id. (footnote omitted). However, they do not contend that deference beyond that required by specific provisions of the Constitution is constitutionally required. They admit that such considerations "are not (not yet, at least) hardened into constitutional limitations." *Id.* at 292.

545. Donald Regan argues that limits on the extraterritorial application of state law do not fit within any of the express constitutional provisions, Regan, *supra* note 14, at 1888-95, but are justified "by a structural inference from our system as a whole." *Id.* at 1895. However, Professor Regan tentatively concludes that a state law preventing a woman from obtaining an abortion in another state would not violate such territorial limits. *Id.* at 1912. The Supreme Court cases upon which Professor Regan relies are expressly grounded in the Commerce Clause, and I have therefore chosen to deal with them in that section of the article. *See supra* part VII.

546. 440 U.S. 410 (1979).

547. California had waived its own sovereign immunity for tort actions. *Id.* at 424.

548. *Id.* at 421-24.

549. *Id.* at 424-25.

550. *Id.* at 424 n.24.

551. *Id.* at 426.

552. *Id.* at 426-27.

Government nor prohibited to the States are reserved to the States or to the people, the existence of express limitations on state sovereignty may equally imply that caution should be exercised before concluding that unstated limitations on state power were intended by the Framers.⁵⁵³

The three dissenters argued that Nevada's sovereign immunity was "a guarantee that is implied as an essential component of federalism."⁵⁵⁴ Justice Blackmun pointed out that the "concept of sovereign immunity prevailed at the time" the Constitution was drafted⁵⁵⁵ and argued that it was not specifically mentioned in the Constitution only because "it was too obvious to deserve mention."⁵⁵⁶ Justice Rehnquist similarly argued that sovereign immunity was one of those "important concepts of sovereignty that do not find expression in the literal terms of those provisions, but which are of constitutional dimension because their derogation would undermine the logic of the constitutional scheme."⁵⁵⁷ Even in the absence of an express textual limitation on state power, Justice Rehnquist argued, the Court could rely upon "the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers."⁵⁵⁸

This argument has not been accepted by a majority of the Court, and, given the structure of the Constitution, it is hard to see why it should be, at least in this context. As shown above, the drafters of the Constitution placed numerous textual limits on a state's application of its criminal law. Given the Tenth Amendment's reservation of power to the states, it is hard to believe that those who drafted these express limitations intended other limitations on state power to arise amorphously from the penumbrous mists surrounding the system they created. The Supreme Court may have misconstrued the specific restrictions the founders imposed on the states, particularly the Full Faith and Credit Clause, but that hardly justifies adding to the founders' handiwork.

X. THE CONSTITUTIONALITY OF LESSER RESTRICTIONS IF *ROE* IS NOT OVERRULED

To this point, I have assumed that *Roe v. Wade* has been overruled and that a state would be totally free to restrict, or regulate, abortion within the state. But what if *Roe* is not overruled? Would regulation of the sort approved in *Casey* be constitutional if it were applied extraterritorially? Would it be constitutional for a state to provide, for example, that minors resident in the state must obtain parental consent, or that resident women must wait twenty-four hours, before obtaining an abortion outside the state of residence? Although that is not the main focus of this article, much of what is said above would apply to lesser restrictions as well.

The analysis of some of the constitutional limitations does not change at all. The Sixth Amendment would locate the crime in the same jurisdictions whether or not *Roe* was overruled. Nothing in the Supreme Court's Sixth

553. *Id.* at 425 (footnote omitted).

554. *Id.* at 430 (Blackmun, J., dissenting).

555. *Id.* at 431 (Blackmun, J., dissenting).

556. *Id.*

557. *Id.* at 439 (Rehnquist, J., dissenting).

558. *Id.* at 433 (Rehnquist, J., dissenting).

Amendment cases turns on the legitimacy of the state's policy interest in regulating or whether there are other constitutional restrictions on that policy interest. The same may be said with respect to any restrictions that might arise from general principles of federalism. The state may either regulate extraterritorially or it may not; whether the scope of that regulation is limited for other reasons is irrelevant.

However, the continued acceptance of a woman's constitutional right to an abortion might affect the analysis of those constitutional provisions with respect to which the Supreme Court considers the state's policy interest. The right-to-travel cases require the Court to balance a compelling governmental interest against the burden on the right to travel.⁵⁵⁹ The Court's due process and full faith and credit cases require that a state have significant contacts creating a policy interest.⁵⁶⁰ The balancing portion of the Commerce Clause analysis requires the Court to balance the benefits of the state regulation against the burdens on interstate commerce.⁵⁶¹ It could be argued that the woman's offsetting constitutionally protected right to abortion weakens the state's policy interest and thus changes the balance under these tests.

With respect to the Due Process and Full Faith and Credit Clauses, that argument simply will not work. The Supreme Court's due process/full faith and credit cases require only that the state have sufficient contacts to create a legitimate policy interest; that policy interest need not be strong enough to outweigh anything else. There simply is no balancing. Thus, even if the state's interest in protecting the fetus is somehow weakened by the offsetting right to abortion, the due process/full faith and credit analysis would be unaffected. The state would still have a legitimate policy interest in applying its law.

In fact, the state interest might even be stronger in the case of restrictions on the rights of minors, such as parental notification or consent statutes. There, the state not only has an interest in protecting the fetus, but could also assert an interest in family unity and parental control and a *parens patriae* interest in protecting minors from decisions the state deems them incompetent to make. These additional interests make the state's argument in favor of restrictions on extraterritorial abortions even more compelling.

The Court does balance the state interest against other concerns in both the Commerce Clause and the right-to-travel cases, so, if the state interest is weakened, the balance might swing the other way. However, it is not clear that *Casey's* preservation of the woman's constitutional right to an abortion weakens the state's interest in regulating abortion for Commerce Clause and right-to-travel purposes. The burden on the pregnant woman is always there, whether or not that burden is constitutionally recognized. Giving that burden constitutional status does not make the state's interest any less compelling for Commerce Clause and right-to-travel purposes. If, as *Casey* says, the state interest in regulation is sufficiently compelling to overcome the woman's interest in autonomy, could it not also be sufficiently compelling to overcome these other constitutionally protected interests?

559. See *supra* part VIII.

560. See *supra* part IV.

561. See *supra* part VII.C.

The only argument to the contrary would necessarily take an additive view of constitutional rights, positing that state regulation is acceptable when it interferes with one constitutional right or the other, but not when it interferes with both. Only one Supreme Court case, *Employment Division v. Smith*,⁵⁶² a free exercise case involving the religious use of peyote, has ever expressly taken this additive view of constitutional rights. In *Smith*, Justice Scalia's majority opinion distinguished earlier free exercise cases by arguing that they were "hybrid" cases, involving not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections.⁵⁶³ Justice Scalia's position apparently is that two or more inadequate constitutional claims can cumulatively result in unconstitutionality. As Mark Tushnet explains this additive process,

there may be some circumstances in which a claim based on the Free Exercise Clause standing alone would not trigger the balancing process, but a Free Exercise claim joined with another claim would. It is important to understand that this model makes sense only on the assumption that the second claim standing alone would also not trigger the balancing process, for otherwise it is the second claim alone, and without any contribution from the Free Exercise claim, that does the work.⁵⁶⁴

This additive model of constitutional interests so far has only been recognized by the Court in *Smith* itself, and it may be theoretically inconsistent with the Court's views in other areas of constitutional law.⁵⁶⁵ It is not clear why a claim that is insufficient when analyzed under each of two separate constitutional provisions attains greater weight when the two provisions are considered together. The Court itself offers no theoretical justification for this approach, and some scholars have been skeptical.⁵⁶⁶ Michael McConnell suggests that the hybrid, additive approach was created in *Smith* for the sole purpose of distinguishing earlier precedent.⁵⁶⁷ My colleague, Richard Duncan, on the other hand, argues that the additive approach might explain some of the Court's earlier decisions.⁵⁶⁸ It remains to be seen whether the *Smith* additive approach will survive. If it does, and if it is extended beyond the free exercise cases, it might support a holding that an extraterritorial abortion statute is unconstitutional. The Court might decide that a state interest in protecting the fetus, although sufficient to justify a restriction on the right to an abortion, and sufficient to justify a restriction on the right to travel, and sufficient to justify a burden on interstate commerce, is not sufficiently compelling to justify all three burdens combined. Analysis of that outcome must await further development of the *Smith* additive approach.

The case against requiring an out-of-state doctor to comply with restrictions such as those approved in *Casey* is stronger, but for a different reason.

562. 494 U.S. 872 (1990).

563. *Id.* at 881.

564. Mark Tushnet, *Public and Private Education: Is There a Constitutional Difference?*, 1991 U. CHI. LEGAL F. 43, 71-72.

565. For example, Mark Tushnet argues that the additive approach is inconsistent with the Court's rejection of Justice Marshall's equal protection analysis. *Id.* at 72.

566. *Id.* at 71-72; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1121 (1990).

567. McConnell, *supra* note 566, at 1121.

568. Richard F. Duncan, *Religious Freedom in Education*, in RELIGIOUS FREEDOM: THE COURTS AND THE LAW 16 (The Rutherford Inst. ed., 1992).

The Commerce Clause cases require that the state's interest be weighed against the burden on interstate commerce, and, as I have already demonstrated,⁵⁶⁹ lesser restrictions on abortion would burden interstate commerce more than an absolute prohibition. However, no additional burden on commerce would be imposed when the statute applies only to the woman, because the out-of-state doctor would not need to concern himself with whether the patient had complied with her home state's law.

XI. CONCLUSION

In summary, the intuitive reaction against the extraterritorial application of abortion laws is not wholly justified by the case law. Whether or not *Roe* is overruled, a state probably could not constitutionally apply its criminal abortion law to a doctor performing abortions in another state, even if those abortions involve the state's residents. The application of such a statute to the doctor would probably violate the Commerce Clause and possibly the Sixth Amendment as well. However, if *Roe* is overruled, a plausible case could be made that the application of an abortion statute to a resident woman who goes to another, more liberal jurisdiction to obtain an abortion would be constitutional. Even if *Roe* is not overruled, and the *Casey* plurality's test remains the law, extraterritoriality would not necessarily be unconstitutional. States then could not, of course, prohibit abortion entirely, either within or without the state, but a plausible argument could be made that at least some of the restrictions approved in *Casey*, and particularly parental notification or consent requirements applicable to minors, could constitutionally be applied extraterritorially.

In both instances, I say a "plausible" case, because a definitive answer is impossible given the vagaries of the Commerce Clause balancing test and the "significant contacts" test applicable under the Due Process and Full Faith and Credit Clauses. Additional uncertainty results from the fact that the Supreme Court simply has not had to deal with many cases involving the extraterritorial application of criminal law.

The difficulties presented by an extraterritorial abortion statute result from two conflicting themes running through the cases. One theme, which appears most prominently in some of the recent Commerce Clause cases, is the principle of territoriality: a state should exercise legislative jurisdiction only over events that occur within that state. My purpose in this article has not been to argue the merits of territorialism; others have argued persuasively that there should be territorial limits on state regulation.⁵⁷⁰ My analysis does show, however, that in many areas—due process, full faith and credit, the Sixth Amendment, and, until recently, the Commerce Clause—the Supreme Court has strayed far from the territorial ideal.⁵⁷¹

569. See *supra* part VII.C.

570. E.g., Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992); Aaron D. Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 HOFSTRA L. REV. 149 (1981).

571. Diversions from territorialism that seem relatively minor in civil choice-of-law cases are magnified in cases such as the one examined in this article, where the interest at stake is personal liberty rather than "mere" property. For adherents of territorialism, the language of the

The second theme in these cases, which appears most prominently in the due process and full faith and credit cases, is not fully consistent with the principle of territorial autonomy. The second theme is the legitimate state interest in protecting its citizens and property from what it perceives to be injury. A state is not created to protect territory. A state is created to protect people, and sovereignty in part includes the power of a state over its citizens. But, in a system of strict territorialism, the state's interest in its citizens is easily circumvented by citizens crossing state lines. An offender may thus visit upon the state the effects the state was trying to prevent without actually acting within the state. This is particularly true where, as in the case of abortion, the "victim" the state is trying to protect has no choice but to accompany the offender outside the state.

At some point, the Supreme Court must resolve the tension between these two opposing themes and decide exactly how far a state may go in regulating extraterritorially. Given the aggressive way in which some states are testing the boundaries of constitutionality in the abortion area, an extraterritorial abortion statute may soon be presented to the Court. Already, volunteers have organized an "Overground Railroad" network, which offers housing, transportation, and escorts to women, apparently including minors, seeking to travel out of states with restrictive abortion laws to states where abortions are more freely available.⁵⁷² It is probably only a matter of time before a zealous legislature tries to prevent state law from being circumvented in this manner. If so, the question of extraterritoriality will add yet one more issue to the abortion debate that has consumed this country for the last twenty years.

recent Commerce Clause cases may represent a welcome change of direction that could eventually reach into the Court's analysis of other parts of the Constitution.

572. Eloise Salholz et al., *Abortion Angst*, NEWSWEEK, July 13, 1992, at 16; Mimi Hall, *Abortion "Railroad" Planned in Case Roe Overturned*, USA TODAY, June 8, 1992, at 7A; Sandy Banisky, *Overground Railroad to Roll If Abortions Are Reduced*, BALTIMORE MORNING SUN, June 2, 1992, at 1A.

