Federalism Limits on State Criminal Extraterritoriality

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Abstract

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

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

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

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Introduction

Americans by the millions pour into Las Vegas casinos confident that they cannot be prosecuted for doing so under their home states' anti-gambling laws. As this article will show, the federal constitutional requirement of state criminal territoriality makes that expectation legally reasonable.[1]

The notion that what happens in Vegas stays in Vegas has also recently become politically controversial, especially in the abortion context. Shortly after the U.S. Supreme Court overturned *Roe v. Wade*, legislators in several states considered authorizing residents to be charged criminally for abortions they undergo elsewhere in the country.[2] "Just because you jump across a state line doesn't mean your home state doesn't have jurisdiction," said one pro-life attorney.[3] An Arkansas legislator who is president of the National Association of Christian Lawmakers compared an extraterritorial abortion ban with measures against human trafficking.[4] Alabama's attorney general threatened to prosecute as conspiracy in-state travel arrangements made for out-of-state

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

[2] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022); Darryl K. Brown, *Extraterritorial State Criminal Law, Post*-Dobbs, 113 J. CRIM. L. & CRIMINOLOGY 853, 858 & n.16 (2024) (citing proposals from Texas); David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 22–25 (2023); Marnie Leonard, Comment, *Pro-Choice (of Law): Extraterritorial Application of State Law Using Abortion as a Case Study*, 31 AM. U.J. GENDER SOC. POL'Y & L. 195, 208 (2023); Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients from Crossing State Lines*, WASH. POST (June 30, 2022), https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines/.

[3] Kitchener & Barrett, *supra* n.2.

[4] *Id.*; *cf.* J. David Goodman, *In Texas, Local Laws to Prevent Travel for Abortions Gain Momentum*, THE N.Y. TIMES (Oct. 24, 2023), https://www.nytimes.com/2023/10/24/us/texas-abortion-travel-bans.html (discussing county ordinances restricting passthrough travel for abortion purposes); *see also* Am. Oversight, *Behind the Scenes of Abortion Travel Bans*, AM. OVERSIGHT, https://americanoversight.org/behind-the-scenes-of-abortion-travel-bans-2/ (accessed Oct. 11, 2024).

abortions.[5] The head of South Dakota Right to Life endorsed blocking state residents from procuring abortions elsewhere.[6] Legislation proposed in Missouri in 2022 would have explicitly criminalized residents of that state receiving an abortion "regardless of where the abortion is or will be performed."[7]

Criticism of these measures has noted that they "conflict with a basic assumption about how domestic criminal law works": "we . . . tend to assume that Pennsylvania criminal law stops at the state's borders and that Ohio courts cannot apply Pennsylvania criminal law."[8] However, critics have yet to raise the historical territoriality requirements discussed in this article: states cannot constitutionally enforce ordinary criminal laws against activity that happens in another state, though there are exceptions to this rule authorizing some related measures. The historical rules in this area of law can provide much-needed clarity.

Territoriality is an ancient rule with foundations in common law. Readily recognized throughout nineteenth-century jurisprudence, it remains almost a given.[9] However, its constitutional rationale has been forgotten.[10] Some commentators identify constitutional limits to

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

[6] Kitchener & Barrett, *supra* n.2.

[7] Mo. H.B. 2012, 101st Gen. Assemb., 2d Reg. Sess. (2022), 4488H03.01H, *available at* https://documents.house.mo.gov/billtracking/bills221/amendpdf/4488H03.01H.pdf; *see also* Leonard, 31 AM. U.J. GENDER SOC. POL'Y & L. at 207.

[8] Kaufman, 121 MICH. L. REV. at 355.

[9] *See* Oklahoma v. Castro-Huerta, 597 U.S. 629, 652–53 (2022) ("Under the Constitution, States have jurisdiction to prosecute crimes within their territory except when preempted[.]"); Emma Kaufman, *Territoriality in American Criminal Law*, 121 MICH. L. REV. 353, 356, 361–63 (2022).

[10] *See, e.g.*, Vasquez, 428 Mass. 842, 848 (1999) ("The source of this rule is unsettled and has not been ascribed to any particular constitutional provision, yet it has been called . . . 'too deeply embedded in our law to require justification.'") (internal citation omitted) (quoting Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 318 (1992)).

state criminal extraterritoriality in the Dormant Commerce Clause, while others look to Article IV's Privileges and Immunities Clause or the substantive due process right to travel.[11] One debate concerns conflict-of-laws rules.[12] Richard Fallon Jr. looked to the Full Faith and Credit Clause, but could not "pretend to pronounce a confident judgment" as to it.[13] Emma Kaufman's recent survey describes criminal territoriality as traceable to the federal Constitution and assumed in state constitutions.[14] She is right that territoriality is implicit in constitutional federalism.[15] However, she concedes a lack of detailed scholarship on state criminal territoriality and notes that writers "never quite specify" whether it is "a doctrine, a practice, or simply an assumption."[16] Meanwhile, her treatment of early legal history relies on Drew Kershen's research from the

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[11] *See* Dobbs, 597 U.S. at 346 (Kavanaugh, J., concurring); Brown, 113 J. CRIM. L. & CRIMINOLOGY at 882; Katherine Florey, *The New Landscape of State Extraterritoriality*, 102 TEX. L. REV. 1135 (2024); Leonard, 31 AM. U.J. GENDER SOC. POL'Y & L. at 209, 216, 219–20; Mark D. Rosen, *Marijuana, State Extraterritoriality, and Congress*, 58 B.C. L. REV. 1013, 1027–28 (2017); Mark D. Rosen, *"Hard" or "Soft" Pluralism?: Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers*, 51 ST. LOUIS U. L.J. 713, 717–18 (2007); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 896–933 (2002); Robert A. Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 CASE W. RES. L. REV. 44, 46–49 (1974); *cf.* Laycock, 92 COLUM. L. REV. at 265, 269 (discussing civil law and the Privileges and Immunities Clause).

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

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

[14] Kaufman, 121 MICH. L. REV. at 368–69.

[15] *See id.* at 361–75.

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

1970s.[17] This work does not address state criminal proceedings.[18] Another recent survey by Darryl K. Brown suggests that the main hurdle to state criminal extraterritoriality is personal jurisdiction—while also noting that relevant constitutional law is "unclear and underdeveloped."[19]

This article picks up where Kershen, Kaufman, and Brown left off. It explores the historical rules of territoriality incorporated into constitutional federalism.[20] Perhaps these rules have been overlooked because of the rarity of states seeking to criminalize acts outside their territory, or perhaps it is because of others' focus on specific constitutional provisions.[21] Either way, neglect has caused needless confusion.[22] This article will show that most criminal laws can be applied

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[17] *See* Kaufman, 121 MICH. L. REV. at 365–66.

[18] Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 803, 804 n.2 (1976); Drew L. Kershen, *Vicinage*, 30 OKLA. L. REV. 1 (1977).

[19] Brown, 113 J. CRIM. L. & CRIMINOLOGY at 859.

[20] *Cf.* Kaufman, 121 MICH. L. REV. at 365–66 (noting briefly the possible relevance of the Venue and Vicinage Clauses, discussed below); Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 976 (2002); Donald H. Regan, *Siamese Essays: (1)* CTS Corp. v. Dynamics Corp. of Am. *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1895 (1987) (describing territoriality as "a structural inference"). This article does not comprehensively survey territoriality's evolution in more recent history.

[21] Brown, 113 J. CRIM. L. & CRIMINOLOGY at 882; *cf.* N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914) ("It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound.").

[22] *See, e.g.*, Katherine Florey, *Dobbs and the Civil Dimension of Extraterritorial Abortion Regulation*, 98 N.Y.U. L. REV. 485, 486 (2023) (describing extraterritorial prosecution of abortion as a "long-unresolved" issue); Kaufman, 121 MICH. L. REV. at 360 n.34 ("[T]he decline of territorialism has unsettled a theory of criminal jurisdiction that would provide an easy resolution to questions about the ambit of state criminal law."); Regan, 85 MICH. L. REV. at 1889 ("It is not so obvious that Georgia may not regulate the sexual behavior of Georgians in Illinois . . . .").

only to acts happening within state borders because of the historical requirement of territoriality.[23]

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

States lack the power to prosecute abortions that happen outside their borders, regardless of whether those acts are legal where they are performed. However, territoriality does not stop them from blocking drug-induced abortions completed within them, nor the importation of abortion-inducing drugs. States can prosecute cybercrimes if relevant people, computers, or servers are located within them. States can also defend their elections against interference, even if the interfering acts happen beyond their boundaries. Historical rules do not resolve every constitutional question around these current controversies, but they do clarify the law and should resolve certain key issues.

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[23] This article is about substantive criminal law—not investigations, prior convictions, or interstate offender supervision. *See* 4 U.S.C. § 112; Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 264–65 & n.34, 267–80 (2005); John Bernard Corr, *Criminal Procedure and the Conflict of Laws*, 73 GEO. L.J. 1217, 1220–21 (1985) (analyzing conflict of laws and evidentiary exclusion); Interstate Comm'n for Adult Offender Supervision, https://interstatecompact.org/ (accessed Sept. 23, 2024); *see also* U.S. CONST. art. I, § 10, cl. 3. This article also sidesteps tribal criminal jurisdiction. *See generally* Castro-Huerta, 597 U.S. 629; McGirt v. Oklahoma, 591 U.S. 894 (2020); United States v. Wheeler, 435 U.S. 313, 322–30 (1978).

I. English common law required crimes to be tried locally.

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

A. England tried crimes in the county where they were committed.

Criminal law and territoriality have been connected since at least the ancient Roman Code of Justinian.[24] Medieval jurists developed choice-of-law doctrines specifying that courts should apply the law of the jurisdiction where an alleged crime took place.[25] Magna Carta required that cases be tried "in a certain fixed place" by "honest and law-worthy men of the neighbourhood."[26]

A few centuries later, English courts applied the idea of localism extremely strictly, holding that if a person was fatally wounded in one county but died in another, neither could try this as murder.[27] Territoriality was required because jurors were expected to use personal knowledge in trying cases.[28] Statutes eventually provided that the county where the harm was fully realized could try a crime.[29] However, territoriality remained the common law's "exclusive basis of

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

[25] Grossi, 86 TUL. L. REV. at 635.

[26] Magna Carta §§ 11, 14 (Nicholas Vincent trans., 2007), *available at* https://www.archives.gov/exhibits/featured-documents/magna-carta/translation.html.

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

[28] Tyler v. People, 8 Mich. 320, 339 (1860) (Campbell, J., dissenting); *see also* David J. Bederman, *Compulsory Pilotage, Public Policy, and the Early Private International Law of Torts*, 64 TUL. L. REV. 1033, 1071 (1990) (describing an early "insular legal culture in which the only facts recognized were those known to a jury").

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

criminal jurisdiction."[30] Early English rules of territoriality received further articulation and development in the American context, as discussed below in Part II.

B. Territoriality was part of the law of nations.

English law required strict territoriality even though every county applied the same criminal, procedural, and evidentiary laws and were subject to the same sovereign authority.[31] Still, international-law doctrines were also part of early thinking about territoriality—albeit with less importance within American federalism than they are often afforded. In particular, the law of nations allowed for people to be punished for crimes committed abroad upon their return home—a rule that does not hold within the American context. Despite this crucial difference, the law of nations is important background for American territoriality jurisprudence.

Emer de Vattel said sovereignty joined with territory conferred exclusive jurisdiction over crimes and exclusive authority to define local rights.[32] One British jurist described sovereignty as including "the exclusive decision of what [people] shall be free or not free to do" within a territory.[33] Otherwise, "differing legal consequences might be annexed to the same act, rendering it both lawful and unlawful."[34] English courts noted that criminals were punished only if they

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[30] *Id.* at 1163.

[31] Commonwealth v. Uprichard, 69 Mass. 434, 436 (1855).

[32] STORY, *supra* n.24, at 12–13 (quoting de Vattel's THE LAW OF NATIONS bk. 2, ch. 7, §§ 84–85).

[33] Berge, 30 MICH. L. REV. at 240 (citation omitted).

[34] *Id.* (citation omitted); *cf.* Joost Blom, *Whither Choice of Law? A Look at Canada and Australia*, 12 WILLAMETTE J. INT'L L. & DISPUTE RES. 211, 222 (2004) ("As of 1870, the English common law rule allowed a claimant to sue upon a foreign tort in England only if the claim was actionable according to English law and 'not justifiable' according to the law of the place where the tort was committed. The latter requirement could be satisfied by showing that what the defendant had done was either criminally or civilly illegal [where committed].").

violated the laws of the place where the act occurred, even describing this as "the law of all civilized nations."[35]

Colonial and Founding-era American law are discussed below, but an early international-law treatment of extraterritoriality came in the U.S. Supreme Court's 1825 decision in *The Antelope*.[36] That case concerned a Spanish slave ship seized by privateers and brought into port in the United States.[37] The Court held that no country can "execute the penal laws of another," so the lawfulness of the capture depended on Spanish law.[38] While the case arose on the open seas and not conflicting territorial sovereignty claims, the Court held that every sovereign had to respect others' decisions as to what they would legalize, and none could "prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it."[39]

Justice Story's treatise on conflict of laws agreed that territoriality limits jurisdiction. He noted that different sovereign nations have "many variances in their institutions, customs, laws, and polity."[40] Law had to specify the extent of sovereigns' powers or else "utter confusion" would result.[41] One paramount norm was that a sovereign's laws lack "intrinsic force" outside its territory.[42] Local laws bound foreigners abroad.[43] Every sovereign "gives the supreme law within its own dominions on all subjects appertaining to its sovereignty."[44] No sovereign could "regulate

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[35] State v. Ellis, 3 Conn. 185, 190 (1819) (Peters, J., dissenting) (quoting Mure v. Kaye, 4 Taun. 34, 43, 128 E.R. 239 (C.P. 1811)).
[36] 23 U.S. 66.
[37] *Id.* at syll.
[38] *Id.* at 118, 123.
[39] *Id.* at 122.
[40] STORY, *supra* n., at 1.
[41] *Id.* at 9.
[42] *Id.* at 11.
[43] *Id.*
[44] *Id.* at 12.

either persons or things not within its own territory."[45] Holding otherwise would mean making different sovereigns; powers concurrent, which would be absurd.[46] Any sovereign who tried to regulate behavior abroad could be disobeyed.[47] Each had "an exclusive right to regulate persons and things within its own territory according to its own sovereign will and public policy."[48]

This rule applied even in cases of drastic moral disagreement. Story observed that the laws of "heathen nations" could be "totally repugnant" to Christian justice—even authorizing "despotic cruelty over persons" and "crushing" the vulnerable.[49]

These norms limited each sovereign's criminal jurisdiction. The common law saw "crimes as altogether local, and cognizable and punishable exclusively in the country, where they are committed. No other nation, therefore, has any right to punish them[.]"[50] The law governing the place of commission applied to alleged crimes under both common law and the law of nations.[51] Early twentieth-century authorities, too, recognized that sovereign prerogatives over territory included "the exclusive decision of what [all persons] shall be free to do or not free to do there."[52] Surveying Anglo-American law and the law of nations, Wendell Berge concluded in 1931: "a crime can only be punished by the state wherein it occurs, which state's right to punish is exclusive."[53]

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[45] *Id.* at 30.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.* at 36.
[50] *Id.* at 1013; *see also id.* n.1 (citing Rafael v. Verelst, 2 Wm. Black. R. 1055, 1058, 96 E.R. 579 (K.B. 1779)).
[51] *Id.* at 1014–16 (citing Warrender v. Warrender, 9 Bligh 119, 120 (1835), as well as Scottish and French authorities).
[52] Berge, 30 MICH. L. REV. at 241 (quoting THE COLLECTED PAPERS OF JOHN WESTLAKE ON PUBLIC INTERNATIONAL LAW 126 (L. Oppenheim ed., 1914)).
[53] *Id.*

However, under the law of nations, sovereigns could punish people's conduct abroad once they returned home.[54] Still, the importance of sovereign prerogatives, including to make things legal that others would condemn, is important background for territoriality within American federalism—a rule which ultimately proved stricter.[55]

II. American federalism strengthened the territoriality requirement.

American constitutional federalism transformed territoriality in two ways. It did not grant to Congress constitutional authority to abrogate territoriality through statute and it required of states greater respect for each other's exclusive jurisdiction.

A. The U.S. Constitution adopted territoriality for federal criminal proceedings.

Territoriality influenced the design of the federal government even before being applied to state criminal proceedings. In the late 1760s, Parliament revived a law of King Henry VIII allowing for treason cases to be adjudicated by royal commissioners "in such shire of the realm" as they designated.[56] This provision was meant to combat tax protests in Massachusetts.[57] Virginia's legislature protested that colonial defendants had the right to be tried locally.[58] However, Parliament soon extended the law mentioned above to the destruction of military facilities and supplies, as well as to trials of Massachusetts law enforcement officials and tax collectors.[59] The first Continental Congress protested the first measure and Thomas Jefferson

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[54] STORY, *supra* n., at 33.
[55] *See* Kaufman, 121 MICH. L. REV. at 363; Bederman, 64 TUL. L. REV. at 1093 n.287 (quoting a nineteenth-century commentator: "[T]o say that behavior disturbs a country's social order, or that it is of acute concern to a community, is to say that it is, or ought to be, criminal.").
[56] Kershen, 29 OKLA. L. REV. at 805–06.
[57] *Id.* at 806.
[58] *Id.* (citing William W. Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59, 63 (1944)).
[59] *Id.* at 806–07.

thought the second one risked colonists' deportation for trials overseas.[60] The Founders loathed these measures for depriving the accused of local support.[61] The Declaration of Independence condemned King George III's "transporting us beyond Seas to be tried for pretended offenses."[62] (No such trials in fact took place.[63])

With this history in mind, the Framers required in Article III that federal criminal trials be held "in the State where the said Crimes shall have been committed" (the Venue Clause).[64] Additionally, the Sixth Amendment required juries to be selected from "the State and district wherein the crime shall have been committed" (the Vicinage Clause).[65] Neither provision directly addresses state criminal territoriality (and the U.S. Supreme Court has not held that either clause applies to state prosecutions), though both measures imply limits on extraterritoriality.[66] Scholarship has identified self-governance as an important aspect of venue and vicinage.[67] They allow communities to determine what conduct to criminalize.[68]Additionally, Article III provides that crimes "not committed within any State" can be tried in a venue designated by Congress, which also received an enumerated power to "define and punish piracies and felonies committed

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[60] *Id.* at 807.
[61] Kaufman, 121 MICH. L. REV. at 366.
[62] Nat'l Archives, *Declaration of Independence: A Transcription*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/declaration-transcript.
[63] Paul Mogin, *"Fundamental Since Our Country's Founding":* United States v. Auernheimer *and the Sixth Amendment Right to Be Tried in the District in Which the Alleged Crime Was Committed*, 6 U. DENV. CRIM. L. REV. 37, 41 (2016).
[64] Kaufman, 121 MICH. L. REV. at 365 (quoting U.S. CONST. art. III, § 2).
[65] *Id.* (quoting U.S. CONST. amend. VI).
[66] Kershen, 29 OKLA. L. REV. at 830 (noting the territoriality-based assumption "that the place of trial and the place from which the jurors were to be selected were the identical place"); *id.* at 832 n.107 ("A jury of the vicinage is . . . from the place of the commission of the crime . . . ."); Bradford, 35 ARIZ. L. REV. at 137; Lindsay Farmer, *Territorial Jurisdiction and Criminalization*, 63 U. TORONTO L.J. 225, 233 (2013) (noting territoriality's common law origins in vicinage).
[67] Kershen, 29 OKLA. L. REV. at 843.
[68] *Id.* at 839.

on the high seas, and offenses against the law of nations."[69] The Constitution contains no similar provision authorizing Congress to determine criminal venue as a general matter. This is some evidence, albeit indirect, that territoriality is stricter in constitutional federalism than it was under English law.

Also relevant to territoriality was the structure of the federal judiciary.[70] The U.S. Constitution did not directly establish any inferior courts and some Founders anticipated that federal crimes would be tried in courts of the states governing the territory where they were committed.[71] During their first two centuries of existence, federal district courts' criminal jurisdiction remained limited to their home states' territory.[72] The Judiciary Act of 1789 cabined their jurisdiction to crimes "committed within their respective districts."[73] Only in the late nineteenth century did the U.S. Supreme Court distinguish between federal criminal jurisdiction and venue due to the creation of intra-district divisions.[74] Kershen summarizes: "Find the court

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

[70] *Cf.* ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 178–79 (2010) (discussing the centrality to early federalism of jurisdictional disputes); *but see* Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084, 1098–99 (2011) (book review) (claiming LaCroix overstated her case).

[71] Kershen, 29 OKLA. L. REV. at 812.

[72] *Id.* at 812, 846; *see also* United States v. Ta-Wan-Ga-Ca, 28 F. Cas. 18, 19 (D. Ark. 1836) ("Congress has specifically defined the boundaries of the state of Arkansas, and by giving to this court only the powers given to the Kentucky district court by the act of 1789, it has given this court no jurisdiction beyond those boundaries.").

[73] Kershen, 30 OKLA. L. REV. at 3.

[74] *Id.* at 5 (citing Rosencrans v. United States, 165 U.S. 257 (1897); Post v. United States, 161 U.S. 583 (1896); Logan v. United States, 144 U.S. 263 (1892)).

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

B. Early federal jurisprudence was ambiguous as to state criminal territoriality.

What about state criminal territoriality? Story described conflict-of-laws rules as being of their greatest importance in the United States due to its system of "distinct states, and in some respects independent states."[77] Balancing those two conceptions proved difficult for early federal jurists due partly to disagreements about the nature of the American Union. Was the federal Constitution a treaty enacted by independent states, an enactment of national sovereignty, or a hybrid of these two models?[78] Thomas Jefferson believed the states were akin to sovereign nations governed by the law of nations.[79] James Madison viewed federalism as "a mixture" of

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[75] Kershen, 30 OKLA. L. REV. at 8; *see also* Ex parte Crow Dog, 109 U.S. 556, 559 (1883) ("[T]he Sioux reservation is within the geographical limits of the Territory of Dakota, and . . . the district court of that Territory, within the geographical boundaries of whose district it lies, may exercise jurisdiction . . . over [federal] offences . . . committed within its limits."); United States v. Wood, 28 F. Cas. 755, 761 (C.C.D. Pa. 1818) (per Washington, J.) (holding invalid a federal indictment that did not specify which of a state's two judicial districts was the site of the crime).

[76] Kershen, 29 OKLA. L. REV. at 812.

[77] STORY, *supra* n.24, at 13; *accord* Michael J. Zydney Mannheimer, *Three-Dimensional Dual Sovereignty: Observations on the Shortcomings of* Gamble v. United States, 53 TEX. TECH L. REV. 67, 72 (2020) (writing that the common law "addressed the relations between fully independent states and applied reflexively to the then-new Federal Republic. As Justice Kennedy so evocatively put it: 'Federalism was our Nation's own discovery. The Framers split the atom of sovereignty.'") (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 837 (1995) (Kennedy, J., concurring)); Laycock, 92 COLUM. L. REV. at 250 ("Choice of law takes on a whole new significance in . . . a [federalist] nation.").

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

[79] *Id.* at 17–21.

international sovereignty and national union.[80] John Marshall and James Wilson believed the new country was a unified nation.[81]

These differences affected the role of the law of nations in interpreting the Constitution.[82] One delegate to the 1787 Constitutional Convention evidently assumed an international model for interstate relations, proposing that the text should specifically deny travelers immunity from criminal prosecutions outside their home states.[83] Early U.S. Supreme Court precedent did not definitively resolve the question of state criminal extraterritoriality, partly due to the tension between competing notions of the Union. Some antebellum Supreme Court opinions applied international law to the interstate context: coequal sovereignty forbade "concurrent power in two distinct sovereignties to regulate the same thing."[84] No state could "draw within its jurisdiction objects which lie beyond it."[85] Extraterritoriality was a "partial right of sovereignty" excluded by federalism.[86] States held every power "necessary to their internal government."[87] Each state had "exclusive[]"power to decide "all internal matters which relate to its moral and political

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[80] *Id.* at 23 (quoting The Federalist No. 39 (Madison); Letter from James Madison to Edward Everett (Aug. 28, 1830), in 9 WRITINGS OF JAMES MADISON 383–84 (Gaillard Hunt ed., 1910)).
[81] *Id.* at 26–31 (quoting Thomas Jefferson, *Notes of Proceedings in the Continental Congress* (July 30–Aug. 1, 1776), in 1 THE PAPERS OF THOMAS JEFFERSON 309, 327 (Julian P. Boyd ed., 1950) (remarks of Rep. Wilson)).
[82] *Id.* at 36; Jonathan Gienapp, *The Federalist Constitution: In Search of Nationhood at Its Founding*, 89 FORDHAM L. REV. 1783, 1804–09 (2021).
[83] Kershen, 29 OKLA. L. REV. at 811 n.27 (citing 1 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 177 (1836)).
[84] Smith v. Turner [the Passenger Cases], 48 U.S. 283, 399 (1849) (McLean, J., concurring).
[85] *Id.* at 408.
[86] *Id.* at 422 (Wayne, J., concurring).
[87] *Id.* at 424; *accord* Anonymous Case, 2 N.C. 28, 30 (1794) ("[T]he least intermeddling by any foreign power with the internal policy of this government, is an invasion of their privileges . . . ."); *id.* at 32 ("[W]here the [state constitutional] Convention are declaring the rights of the people, and use the words of the Magna Charta of England, . . . they declare that the people of this state ought to have the sole and exclusive right of regulating the internal government and police thereof . . . .").

welfare."[88] States held the police power "exclusively" and acted "within [their respective] sphere."[89] Although these opinions analogized between interstate and international relations, no precedent held specifically that a state could punish citizens for acts committed in another state where these were legal.

Other authorities thought territoriality needed to be adjusted for constitutional federalism. Madison wrote that interstate extradition to wherever a crime was committed was necessary because without it wrongdoers "cannot be punished at all"; he also assumed that a state could not "punish its citizens for extraterritorial wrongs."[90] In 1791, Pennsylvania demanded that Virginia extradite three Virginians who kidnapped and enslaved a free Black man in Pennsylvania.[91] Virginia protested that Pennsylvania had no authority over Virginians.[92] U.S. Attorney General Edmund Randolph, Virginia's former governor, responded: "It is notorious that the crime is cognizable in Pennsylvania; for crimes are peculiarly of a local nature."[93] President Washington and Congress then enacted interstate extradition legislation.[94] In 1832, a U.S. Supreme Court

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[88] Thurlow v. Massachusetts (the License Cases), 46 U.S. 504, 588 (1847) (McLean, J., concurring in the judgment).

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

[90] Kreimer, 150 U. PA. L. REV. at 976 n.12 (quoting Letter from James Madison to Edmund Randolph (Mar. 10, 1784), *reprinted in* 4 THE FOUNDERS' CONSTITUTION 517 (Philip B. Kurland & Ralph Lerner eds., 1987)).

[91] Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 466 (1992); *see also* California v. Super. Ct. of Cal., 482 U.S. 400, 406 (1987).

[92] Kreimer, 67 N.Y.U. L. REV. at 466.

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

[94] *Id.* The Constitution requires state extradition, and although this provision is not self-executing, the U.S. Supreme Court has looked to the early legislation as "a contemporary construction." Roberts v. Reilly, 116 U.S. 80, 94 (1885); *see also* Kentucky v. Dennison, 65 U.S. 66, 104–09 (1861),

justice noted that while every state holds "the right of sovereignty, commensurate with her territory," this is limited by the Supremacy Clause within federal enclaves and for Indian tribes.[95] In 1849, too, justices wrote that constitutional interpretation required considering federalism.[96] Authorities looked to the particularities of constitutional federalism in exploring criminal territoriality.

The 1859 decision in *Ableman v. Booth* showcased this approach.[97] The Court held that the Constitution was designed "mainly to secure union and harmony" among the states.[98] The states thus had to yield a measure of their sovereignty to the federal government.[99] Constitutional federalism implied limits on state sovereignty.[100] The Court could adjudicate interstate boundary disputes so that these would not cause civil war.[101] It also decided intergovernmental controversies to preserve "internal tranquillity."[102] While nations could resort to military force, the states were bound to the Constitution.[103] Federal defendants were thus subject to exclusive federal jurisdiction, with which no state could interfere (for example, by granting habeas corpus to a man who was being held in federal custody after helping a fugitive slave escape from a U.S.

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overturned on other grounds by Puerto Rico v. Branstad, 483 U.S. 219 (1987); *cf.* Nat'l Archives, *Articles of Confederation (1777)* art. IV, § 2, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/articles-of-confederation (requiring interstate extradition).

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

[96] *The Passenger Cases*, 48 U.S. at 449 (Catron, J., concurring).

[97] 62 U.S. 506, 517.

[98] *Id.*

[99] *Id.*

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

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

[102] *Id.* at 520–21.

[103] *Id.* at 521, 524.

marshal).[104] The reason: no state court could exceed its constitutionally allowed jurisdiction.[105] Federalism transformed the criminal jurisdiction states might otherwise enjoy.

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

Given the momentous historical context, one might have thought this was the end of the international-law model of constitutional federalism, but the Court frequently returned to international law through the end of the nineteenth century. In the landmark case *Pennoyer v. Neff*, the Court cited the law of nations for the rule that state extraterritorial jurisdiction is limited in the civil context, then continued that each state's independence implies exclusive powers.[107] Each could determine the "rights and obligations arising from them" touching on local people and property.[108] States could resolve claims against non-residents by seizing their local property, but if there was no such property, "there [was] nothing upon which the tribunals [could] adjudicate."[109] State courts lacked jurisdiction outside of state territory.

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[104] *Id.* at 513–14, 523. In *Ableman*, Wisconsin courts granted habeas relief to. *Id.* at 507.
[105] *Id.* at 524 (referring also to the Supremacy Clause, U.S. CONST. art. VI, cl. 2).
[106] Paul v. Virginia, 75 U.S. 168, 180–81 (1869), *cited in part in* Kreimer, 150 U. PA. L. REV. at 976 n.13. For a recent decision applying a federalism-specific approach, see Franchise Tax Bd. v. Hyatt, 587 U.S. 230, 237–38, 245–46 (2019). For a modern decision instead emphasizing state sovereignty, see Heath v. Alabama, 474 U.S. 82, 89 (1985).
[107] 95 U.S. 714, 722 (1877).
[108] *Id.*
[109] *Id.* at 723–24.

An 1881 decision held that a state's entry into the Union conferred upon it criminal jurisdiction over the people living in its territory.[110] In 1888, the Court cited the general rule that "the penal laws of a country do not reach beyond its own territory."[111] It quoted Lord Kames: "The proper place for punishment is where the crime is committed, and no society takes concern in any crime but what is hurtful to itself."[112] Then, in 1892, the Court cited the international-law rule that crimes are "local, and the jurisdiction of crimes is local," so they "can only be defined, prosecuted and pardoned by the sovereign authority of that State; and the authorities . . . of other States take no action with regard to them, except by way of extradition."[113] Crimes could be tried only "in the country where they were committed."[114]

Early U.S. Supreme Court precedent never coalesced into a single approach that would resolve the issue of state criminal extraterritoriality. Some justices analogized states to sovereign nations. International law did deem territoriality important, but also let nations punish citizens upon their return home. That said, while arguments from silence are risky, no justice cited this rule in the context of interstate travelers.[115] What is more, a number of justices thought constitutional federalism required seeing states as sisters and not fully separate sovereigns, an approach better aligned with limiting their extraterritorial powers. Brown overlooks this in relying

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[110] United States v. McBratney, 104 U.S. 621, 624 (1881).
[111] Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 289 (1888).
[112] *Id.* at 291 (quoting 2 HENRY HOME KAMES, PRINCIPLES OF EQUITY 326 (3d ed., Edinburgh: 1778)).
[113] Huntington v. Attrill, 146 U.S. 657, 669 (1892) (quoting *Rafael*, 2 W. Bl. at 1058); *cf.* Sparf v. United States, 156 U.S. 51, 88 (1895) (recognizing a "responsible tribunal" as a prerequisite for a crime) (citation omitted).
[114] *Huntington*, 146 U.S. at 681 (citation omitted).
[115] *Cf.* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 418, 435 (2017) ("This is a dog that didn't bark: if the district courts had been issuing national injunctions, the silence of the report would be inexplicable.").

on international law.[116] In early federal decisions, "the differences between interstate and international criminal jurisdictional problems" were arguably "as significant, if not more so, than the similarities."[117]

C. A consensus of early state jurisprudence reflected territoriality.

Crucially, though, a near-consensus of state courts did hold that crimes were punishable only where they occurred. Like their colonial predecessors, state courts "felt themselves perfectly free to pick and choose which parts of English common law they would adopt."[118] However, criminal territoriality was embraced all but universally. Several colonial governing documents required vicinage.[119] Four state constitutions—New Hampshire, Georgia, Maryland, and Massachusetts—imposed venue requirements even before the federal Constitution's ratification.[120]

Judicial precedent began very early after Independence. In 1799, the North Carolina Supreme Court invalidated a law directing the state to prosecute counterfeiters in neighboring states.[121] Holding that the states are "independent sovereignties," it nevertheless continued that crimes "are punishable only by the jurisdiction of that State where they arise."[122] Each state's authority is based on the consent of its citizens and those travelers who choose to enter it, so no state can punish "crimes committed in another State, the citizens of which, while they remain there, are bound to regulate their . . . conduct only according to their own laws."[123] The court did not

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[116] *See* Brown, 113 J. CRIM. L. & CRIMINOLOGY at 860–65.
[117] Daniel L. Rotenberg, *Extraterritorial Legislative Jurisdiction and the State Criminal Law*, 38 TEX. L. REV. 763, 768 n.20 (1960).
[118] Rogers v. Tennessee, 532 U.S. 451, 475 (2001) (Scalia, J., dissenting).
[119] Bradford, 35 ARIZ. L. REV. at 138 (citing seventeenth-century examples from the colonies of West New Jersey and Virginia).
[120] Kershen, 29 OKLA. L. REV. at 807.
[121] State v. Knight, 1 N.C. 143, prior hist., 144 (1799).
[122] *Id.*
[123] *Id.*

expressly mention North Carolina's powers over its own citizens traveling abroad, but was concerned "lest our own citizens should be harassed" by other states for acts that were legal at home.[124] Concerned to ensure that people were not prosecuted for "acts which are not criminal in the State where committed," the court thought it "better to yield up the offender to the laws of his own State than, by inflicting a punishment under the exercise of a doubtful jurisdiction, furnish a precedent for a sister State to legislate against acts committed by our own citizens, and within the limits of our own territory."[125]

Likewise, in 1817, New York's highest court held that criminal laws lack extraterritorial effect because they "are strictly local, and affect nothing more than they can reach."[126] Two years later, Chancellor Kent wrote that "wheresoever a crime has been committed, the criminal is punishable according to the *lex loci* [law of the place] of the country against the law of which the crime was committed."[127] In 1819, a Connecticut justice recognized territoriality as a requirement of American common law.[128] In 1855, the Massachusetts Supreme Court held in a criminal case that states are "sovereign and independent," but within federalism, each should understand each other as more akin to a fellow English county than a foreign nation.[129] Criminal laws "are essentially local, and limited to the boundaries of the state prescribing them."[130] The Maine Supreme Court agreed three years later.[131]

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[124] *Id.* at 145.
[125] *Id.*
[126] Scoville v. Canfield, 14 Johns. 338, 340 (N.Y. 1817) (citing Foliot v. Ogden, Cowp. 343).
[127] In re Washburn, 4 Johns. Ch. 106, 111 (N.Y. Ch. Ct. 1819) (quoting *Mure*, 4 Taun. 34).
[128] Ellis, 3 Conn. at 190 (Peters, J., dissenting).
[129] Uprichard, 69 Mass. at 438. Contrary to Grossi's description, then, American conflict of laws rules have roots in both continental European law and English common law. Grossi, 86 TUL. L. REV. at 637.
[130] *Uprichard*, 69 Mass. at 439.
[131] State v. Underwood, 49 Me. 181 (1858).

States continued to apply this rule as the Civil War approached and then passed. Somewhat relatedly, in 1860, a Michigan justice wrote of state authority to prosecute offenses committed within their territory: "Their own state can not protect them" in other states, not even by formally protesting to the other state's officials.[132] In 1862, the Pennsylvania Supreme Court held (in an election-interference case discussed further in Part IV.B below) that states "are not foreign countries to us" and each has "no more power to legislate over a sister state . . . than we would have to legislative for France or England."[133] Finally, by 1881, the North Carolina Supreme Court found it "so plain a proposition" that an act committed elsewhere "is no violation of the criminal law of the State" as to need no elaboration.[134]

Virginia was the one outlier. In 1819, its supreme court held by analogy to foreign extraterritoriality that the state could punish a horse theft committed by one Virginian against another in the District of Columbia.[135] Offenders were to be tried according to Virginia law, not local law.[136] While the District is not a state, as late as 1895, Virginia affirmed that the states are "as foreign to each other as each State is to foreign governments"—and so rejected an attempt to prosecute under common law "one who steals property in another State and brings it within our borders."[137] Virginia alone saw no distinction between American states and foreign countries.[138]

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[132] Tyler v. People, 8 Mich. 320, 342 (1860) (Campbell, J., dissenting).
[133] Commonwealth v. Kunzmann, 41 Pa. 429, 438–39 (1862).
[134] State v. Barnett, 83 N.C. 615 (1880) (per curiam).
[135] Commonwealth v. Gaines, 4 Va. 172, 176–77 (1819), *abrogated by statute as recognized by* Howell v. Commonwealth, 187 Va. 34, 38–39 (1948). *Gaines* is cited by Rosen, 51 ST. LOUIS L.J. at 719 & n.28.
[136] *Gaines*, 4 Va. at 181.
[137] Strouther v. Commonwealth, 92 Va. 789, 792 (1895); *see also* Doane v. Commonwealth, 218 Va. 500, 502 (1977) (distinguishing Virginia's allowing of venue in any county where goods were taken if stolen in Virginia, but not if purloined outside its borders).
[138] Brown cites *Gaines* without noting its outlier status. *See* Brown, 113 J. CRIM. L. & CRIMINOLOGY at 870 n.68; *see also* Bradford, 35 ARIZ. L. REV. at 98.

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

III. Constitutional federalism implies state criminal territoriality.

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

A. The U.S. Supreme Court recognizes rules implicit in constitutional federalism.

The U.S. Supreme Court has held that numerous rules of federalism are implicit in the Constitution. As early as 1819's watershed decision in *McCulloch v. Maryland*, Chief Justice

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[139] THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS (2d ed., 1871); *see also* Rotenberg, 38 TEX. L. REV. at 769 (citing DAVID RORER, AMERICAN INTER-STATE LAW 228 (1879); 1 JOEL PRENTISS BISHOP, CRIMINAL LAW §§ 120–21 (4th ed. 1868)). The first edition of Cooley was punished in 1868.

[140] *Id.* at 2.

[141] *Id.* at 127–28.

[142] *Id.* at 128.

[143] *Id.*

[144] *Id.* at 399.

[145] Kreimer, 67 N.Y.U. L. REV. at 464.

Marshall looked to "no express provision" of the Constitution concerning federalism, but instead "a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds."[146] He continued that constitutional federalism protects the country "from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve."[147]

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

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

The modern Court recognizes state sovereign immunity because "the Constitution's structure, and its history, and the authoritative interpretations by th[e] Court" show that it "is a

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[146] 17 U.S. 316, 426.
[147] *Id.* at 430.
[148] Texas v. White, 74 U.S. 700, 725 (1869).
[149] Lane County v. Oregon, 74 U.S. 71, 76 (1869).
[150] United States v. Texas, 143 U.S. 621, 645 (1892).
[151] Principality of Monaco v. Mississippi, 292 U.S. 313, 322.

fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution."[152] States retain their "inviolable sovereignty," as confirmed by the Tenth Amendment.[153] However, each one's sovereignty "implie[s] a limitation on the sovereignty of all of its sister states—a limitation express or implicit" in the Constitution.[154] One limit is that a state cannot "apply its own law to interstate disputes" in a variety of contexts.[155]

Critical to sovereign immunity jurisprudence is "the practice [and] the understanding that prevailed in the States at the time the Constitution was adopted."[156] The Court has looked to how "the Constitution's text, across" different provisions, "strongly suggests" requirements of federalism.[157] Also relevant are "evidence of the original understanding of the Constitution, early congressional practice, [and] the structure of the Constitution itself[.]"[158]

A structural approach based on the "insight" that divided sovereignty is part of constitutional federalism has also led the Court to block Congress from "commandeering" state governments and their personnel.[159] This rule arises from "historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of th[e] Court."[160] Likewise, the Court frequently resolves state-border disputes using unwritten constitutional rules.[161]

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[152] Alden v. Maine, 527 U.S. 706, 713 (1999).
[153] *Id.* at 713–15 (quoting The Federalist No. 39 (Madison), at 245); *accord* Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996) ("[E]ach State is a sovereign entity in our federal system . . . .").
[154] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980).
[155] *Franchise Tax Bd.*, 587 U.S. at 246.
[156] *Alden*, 527 U.S. at 721.
[157] Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580, 590 (2022).
[158] *Id.* at 610 (Thomas, J., dissenting) (citations and internal quotation marks omitted).
[159] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 577 (2012).
[160] Prinz v. United States, 521 U.S. 898, 905 (1997); *see also* New York v. United States, 505 U.S. 144, 188 (1992).
[161] Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1817 (2012).

Both "[t]he text and the structure of the Constitution protect various rights and principles," including some derived from common law.[162] In assessing whether a state has yielded sovereignty, the Court considers what the state implicitly consented to as part of the "plan of the Convention, which is shorthand for the structure of the original Constitution itself."[163] It has described a state's control of its own "fundamental political processes" as being "at the heart of the political accountability so essential to our liberty and republican form of government."[164] Such basic assumptions are constitutionally binding even if not explicitly stated in the Constitution's text.

B. Recent scholarship recognizes rules implicit in constitutional federalism.

Rules implicit in constitutional federalism have drawn scholarly attention as well. Will Baude has written that textualism's rise to prominence has triggered awareness that legal text "is incomplete."[165] It has to be supplemented by "attention to our entire legal framework"—including "unwritten law," such as "background principles against which interpretation takes place."[166] Indeed, this approach has historical pedigree, one set aside partly due to textualism.[167] It does not authorize judicial imagination, but rather inquiry into first principles, custom, and other

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[162] *Alden*, 527 U.S. at 733.

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

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

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

[166] Baude, 46 HARV. J.L. & PUB. POL'Y at 1336.

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

sources of law.[168] Baude, Jud Campbell, and Stephen Sachs have termed such other sources "general law."[169] "[T]his shared body of unwritten law was not derived from any enactment by a single sovereign," but "by common practice and consent among a number of sovereigns" across the Anglo-American milieu.[170] General law comes from common law, equity, the law of nations, and other sources.[171]

General law has been sidelined, partly due to positivism.[172] However, it long guided jurisprudence.[173] It also never entirely disappeared. Practices uniform at the time of the Founding have been understood to reflect the Constitution's original meaning.[174] As is evident from the preceding section, there are still "constitutional 'backdrops': rules of law that aren't derivable from the Constitution's text, but instead are left unaltered by the text, and in fact are protected by the text from various kinds of legal change."[175] The Constitution "was enacted as part of a common law legal system" and should be interpreted using general law.[176]

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[168] Baude, 46 HARV. J.L. & PUB. POL'Y at 1346–47.
[169] William Baude, Jud Campbell, & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1190 (2024).
[170] *Id.* (quoting in part William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984)) (quotation marks omitted); *see also id.* at 1194 (citing United States v. Burr, 25 F. Cas. 187, 188 (C.C.D. Va. 1807) (No. 14,694) (Marshall, Cir. J.)).
[171] *Id.* at 1190 & n.20 (collecting recent articles on general law and the Bill of Rights).
[172] *Id.* at 1195 ("To [Justice Oliver Wendell] Holmes, the common law was 'not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified.'") (quoting S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)); *see also id.* at 1250 (citing Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting) (criticizing general law as "often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject")).
[173] *Id.* at 1196, 1199–1206.
[174] William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 4, 61–62 (2019).
[175] Sachs, 80 GEO. WASH. L. REV. at 1816.
[176] *Id.* at 1818.

Apart from general law, scholars also note the constitutional role of post-ratification traditions.[177] Such traditionalism is controversial in the constitutional rights context, but not in separation of powers cases.[178] There, under "Founding-era pedigree and stare decisis," longstanding practices can count as constitutional "liquidation."[179] Liquidation also extends to federalism precedent, and indeed, "the archetypical example of liquidation was the controversy over the national bank."[180] Liquidation depends on the Constitution's meaning being originally indeterminate but then understood consistently by officials and the public over time.[181] It does not necessarily privilege early practices over ones arising at a later time when constitutional meaning remains unsettled.[182] Liquidation may not be permanent where it is based on a misperception of constitutional indeterminacy, it has been replaced by other liquidation, or perhaps given extraordinarily strong reasons and sustained consensus-building.[183]

C. State criminal territoriality is implicit in constitutional federalism.

State criminal territoriality is a rule implicit in constitutional federalism. Sachs left open the question of whether the general law limits state extraterritoriality.[184] He agreed that general law cabined state jurisdiction territorially,[185] but queried whether this requirement was made "immune from the usual means of legal change" by the Constitution.[186] The answer is yes. Territoriality has

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[177] *See, e.g.*, Girgis, 138 HARV. L. REV. F. at 5.
[178] *Id.* (discussing Justices Kavanaugh and Barrett).
[179] *Id.* at 6. The term "liquidation" is derived from The Federalist No. 37 (Madison), at 225, though other authorities of the era also relied on constitutional settlement. *Id.* at 4 n.25; Baude, 71 STAN. L. REV. at 4, 32–34. "Liquidation" could mean clarification back then. Baude, 71 STAN. L. REV. at 12.
[180] Baude, 71 STAN. L. REV. at 49–50.
[181] *Id.* at 16–17, 20.
[182] *Id.* at 60.
[183] *Id.* at 53–59; Michael McConnell, *Lecture: Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1774 (2015).
[184] Sachs, 80 GEO. WASH. L. REV. at 1876.
[185] *Id.* (quoting United States v. Bevans, 16 U.S. (3 Wheat.) 336, 387 (1818) (per Marshall, C.J.).
[186] *Id.* at 1874.

strong foundations in English common law, and while English common law did not directly bind American colonies and states, most state constitutions had venue and jury-selection clauses akin to those found federally—some of which were interpreted to specifically limit criminal extraterritoriality.[187] As discussed above in Parts II.B and C, while early federal courts did not decide the permissibility of state criminal extraterritoriality, territoriality was recognized as a binding limit by nearly all state courts from Independence through the end of the nineteenth century.

To be sure, "[e]ven the grandest structural inference" must point to "some concrete manifestation in the constitutional text."[188] Multiple manifestations suggest territoriality limits. In addition to the Venue and Vicinage Clauses, states have to extradite criminal defendants "to the State having jurisdiction of the Crime"—though extradition is not required for extraterritorial prosecutions.[189] The Fugitive Slave Clause assumed that states could free enslaved people traveling within their territory, regardless of the law of travelers' home states.[190] The Full Faith and Credit Clause assumes that borders limit the reach of state judicial power, and the modern Supreme Court has observed that this provision "does not require that sister States enforce a foreign penal judgment."[191] The Constitution and state-admission laws have always assumed

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[187] Robert A. Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 CASE W. RES. L. REV. 44, 46 (1974).

[188] Regan, 85 MICH. L. REV. at 1895.

[189] Kreimer, 150 U. PA. L. REV. at 976 (citing U.S. CONST. art. IV, § 2, cl. 2); Brown, 113 J. CRIM. L. & CRIMINOLOGY at 860; Alejandra Caraballo et al., *Extradition in Post-*Roe *America*, 26 CUNY L. REV. 1, 3 (2023) (noting 1850s state laws helping escaped slaves resist extradition).

[190] Kreimer, 150 U. PA. L. REV. at 976 n.13 (citing Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 611 (1842); *id.* at 647 (Wayne, J., concurring)).

[191] Regan, 85 MICH. L. REV. at 1894 (citing U.S. CONST. art. IV, § 1); *Nelson v. George*, 399 U.S. 224, 229 (1970); *see also* Corr, 73 GEO. L.J. at 1225 (writing of the Full Faith and Credit Clause: "Binding the states together in a cooperative federal venture requires deference to one another's laws . . . .").

coequal state sovereignty.[192] Article IV's Privileges and Immunities Clause presupposes that travelers are governed by local law.[193] The Tenth Amendment reserves powers "to the states *respectively*, or to the people."[194]

Other scholars strain to ground territoriality in these provisions.[195] It is better to consider them as supporting an analogy. The case for state criminal territoriality being implicit in constitutional federalism is at least as strong as that justifying state sovereign immunity and the anti-commandeering doctrine. It is part of the general law adopted into the constitutional structure of American union. Assuming it is not, then it is a liquidation of constitutional meaning. The federal Constitution's direct silence as to the issue qualifies as indeterminacy.[196] Territoriality was understood by state courts and legal scholars as a binding limit on state criminal power for well over a century. That settlement has not become unsettled, replaced by another liquidation, or subjected to wide-ranging public debate. State criminal territoriality is part of constitutional federalism.

Three decisions of the U.S. Supreme Court already suggest this. First, in 1909, the Court held that a state could not forbid a regulatory crime committed within another's territory.[197] *Nielsen v. Oregon* concerned Oregon's prosecution of a man for operating a purse net on the Columbia

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[192] Laycock, 92 COLUM. L. REV. at 288; *see also* U.S. CONST. art. IV, § 3, cl. 1; Coyle v. Smith, 221 U.S. 559, 567 (1911) ("The power is to admit 'new States into this Union.' 'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself.").

[193] Kreimer, 150 U. PA. L. REV. at 976 n.13; *see also The License Cases*, 46 U.S. at 585 (Taney, C.J., concurring in the judgment) (in *obiter dicta*) (arguing that states cannot confer U.S. citizenship because this Clause "operate[s] beyond the territory of the State, and compel[s] other States").

[194] U.S. CONST. amend. X (emphasis added).

[195] *See* discussion *supra* at Introduction.

[196] *See* Baude, 71 STAN. L. REV. at 66–68.

[197] Nielsen v. Oregon, 212 U.S. 315, 320–21 (1909).

River.[198] The man did so within Washington, which had granted him a license for that activity.[199] However, Congress had granted both states concurrent jurisdiction over the river, which marked the boundary between them.[200] The question was whether Oregon could "practically override" Washington's licensing authority.[201] The Court held that it could not.[202] It noted that the case involved a malum prohibitum, not a malum in se.[203] Finding "little authority" on point, the Court held that an act done within a state's territory and with its positive permission could not be punished by another state.[204] However, the modern Court has held that *Nielsen* has "unusual facts and has continuing relevance, if it all, only to questions of jurisdiction between two entities deriving their concurrent jurisdiction from a single source of authority."[205]

This limitation notwithstanding, the modern Court has also used structural analysis to limit punitive civil extraterritoriality. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, a jury awarded punitive damages against an insurance company based on evidence concerning its payment policies across a number of states.[206] The Court reversed, holding that states generally cannot impose punitive damages to punish a defendant for extraterritorial acts—lawful or unlawful.[207] A state cannot punish "conduct that may have been lawful where it occurred."[208] A jury cannot "use evidence of out-of-state conduct to punish a defendant for action that was

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[198] *Id.* prior history.
[199] *Id.* at 321.
[200] *Id.* at 319.
[201] *Id.* at 321.
[202] *Id.*
[203] *Id.* at 320.
[204] *Id.* at 321.
[205] *Heath*, 474 U.S. at 91.
[206] 538 U.S. 408, 415 (2003).
[207] *Id.* at 421, 429. Writing before *State Farm*, Bradford was skeptical that the Court would limit states' own power through constitutional federalism (as opposed to that of the federal government). Bradford, 35 ARIZ. L. REV. at 165–67.
[208] *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 421.

lawful in the jurisdiction where it occurred."[209] Though *State Farm* was decided under due process, "[a] basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."[210]

Lastly, in the First Amendment case *Bigelow v. Virginia*, the Court addressed extraterritoriality and abortion.[211] There, Virginia sought to enforce a criminal abortion-advertising ban against a notice placed in a Virginia newspaper by a New York abortion provider.[212] In rebuffing this attempt, the Court noted the legality of abortion under New York law, observing that Virginia "obviously could not have proscribed the activity in that State" nor "prevent its residents from traveling to New York to obtain those services or, as the State conceded, prosecute them for going there."[213] The Court relied on right-to-travel precedent and the federal right to an abortion.[214] However, it also observed: "A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."[215] *Bigelow*'s dicta reflected that state criminal territoriality is one of the rules inhering in constitutional federalism, in line with the Court's jurisprudence and scholarly theories of general law and liquidation.

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[209] *Id.* at 422; .
[210] *Id.*; *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572–73 (1996) ("Alabama does not have the power . . . to punish [a corporation] for conduct that was lawful where it occurred and that had no impact on Alabama or its residents.").
[211] 421 U.S. 809, 811 (1975).
[212] *Id.* at 811–12.
[213] *Id.* at 823–24, 829 (in *obiter dictum*) (internal citation omitted).
[214] *Id.* at 822–24 (citing Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973); Shapiro v. Thompson, 394 U.S. 618, 629–31 (1969); United States v. Guest, 383 U.S. 745, 757–59 (1966)).
[215] *Id.*

IV. State criminal extraterritoriality is constitutional in three situations.

Territoriality is not an absolute requirement.[216] It contains three nuances or exceptions governing: (1) continuing and distinct crimes; (2) crimes against state interests, with some conspiracies as a subset; and (3) crimes committed outside of any state.

A. Continuing and distinct crimes nuance territoriality.

Continuing crimes are those "begun, continued, or completed" in different jurisdictions (in the words of a modern federal statute; such offenses were called "transitory" at common law).[217] Each such jurisdiction can prosecute the crime[218]—and define where it occurs. This nuance has its origins in English statutory law. To recall, at common law, a murder could not be prosecuted anywhere if the deadly injury was inflicted in one county but the victim died in another.[219] This was due to jurors' role as quasi-witnesses: "the grand jury in neither county could take cognizance of facts occurring in the other."[220]

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[216] *See* Farmer, 63 U. TORONTO L.J. at 241 (writing of territoriality that "the common law has primacy [and] exceptions . . . do not disturb the underlying order . . . .") (punctuation omitted).
[217] 18 U.S.C. § 3237(a); United States v. Saavedra, 223 F.3d 85, 88 (2d Cir. 2000); *see also* Brown, 113 J. CRIM. L. & CRIMINOLOGY at 866 & n.56 (discussing MODEL PENAL CODE § 1.03(1)(a) (Am. L. Inst. 1985) ("[A] person may be convicted under the law of this State of an offense committed by his own conduct . . . if . . . either the conduct that is an element of the offense *or the result* that is such an element *occurs within this State*.") (alteration in original)); *cf.* Christopher L. Blakesley & Dan Stigall, *Wings for Talons: The Case for the Extraterritorial Jurisdiction Over Sexual Exploitation of Children through Cyberspace*, 50 WAYNE L. REV. 109, 118 (2004) (noting that international law follows a similar definition). Extraterritorially punishing accessories to a crime within a state fit logically within this category. *See, e.g.*, Berge, 30 MICH. L. REV. at 258–59 (discussing such laws).
[218] The Supreme Court has reaffirmed its double-jeopardy precedent holding that different sovereigns can prosecute a defendant for the same conduct. U.S. CONST. amends. V, XIV; Gamble v. United States, 587 U.S. 678, 681–82 (2019).
[219] Berge, 30 MICH. L. REV. at 239.
[220] *Id.*

Parliament ultimately enacted a statute allowing for prosecution in the county where the victim died.[221] Venue here depended more on historical accident than principle, and Parliament could just as logically have chosen to require trial wherever the injury was inflicted.[222] Besides, the question is less of an exception to territoriality and more of a nuance in defining it.[223] Consider an 1860 murder case arising from the shooting of a ship passenger on the St. Clair River in Ontario.[224] The victim survived long enough to die in Michigan.[225] Michigan prosecuted the killer, a Canadian.[226] A dissenting justice protested that this was impermissible extraterritoriality.[227] However, the majority held that the murder was completed only upon the victim's death in Michigan.[228] Had the victim survived, the defendant would have been liable only for assault and battery—completed within Ontario, these acts could have been punished only by

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[221] Perkins, 22 HASTINGS L.J. at 1159–60.

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

[223] *See* Perkins, 22 HASTINGS L.J. at 1165 (writing that a continuing crime "is not within the exclusive jurisdiction of another state since by definition it is done partly within the enacting state."); *see also* Albert Levitt, *Jurisdiction Over Crimes (pt. 1)*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 316, 318 (1925) [hereinafter "Levitt, *(pt. 1)*"], at 318 ("[Courts'] primary problem, so far as jurisdiction over criminal offenses is concerned, is to determine whether the gist of the offense occurred in such a place that they have the legal power to take cognizance of that offense."); *cf.* Regan, 85 MICH. L. REV. at 1886 (writing that assuming continuing crimes are illegal everywhere they are committed—as many scholars do—makes it "too easy" to "argue in favor of broad extraterritorial jurisdiction").

[224] *Tyler*, 8 Mich. at syllabus.

[225] *Id.* at 333–34.

[226] *Id.* at 331.

[227] *Id.* at 347–48 (Campbell, J., dissenting).

[228] *Id.* at 334 (majority op.); *cf.* Leflar, 25 CASE W. RES. L. REV. at 47 ("Even in prosecutions brought under interstate compacts or reciprocal statutes [governing] boundary streams, the theory is that the forum state is enforcing its own law, made applicable by mutual agreement to the entire area . . . ."); Berge, 30 MICH. L. REV. at 242 ("[S]ome courts have sought to localize the whole crime in one state when only part of the constituent acts occurred there."). Concerning interstate boundary rivers, see *Nielsen*, 212 U.S. 315; Wedding v. Meyler, 192 U.S. 573 (1904).

Canada.[229] The majority did not reject territoriality, it simply defined murder as being completed upon death.[230]

Notably, in 1926, Albert Levitt wrote that abortion initially followed this rule: "At other times the *consequence of* the act was held to be the gist of the offense, as in the case of an abortion, where the voiding of the foetus is the gist of the offense. Soon, however, it was seen that both act and consequence might be harmful to the territory in which either occurred . . . ."[231] Levitt was indicating that the state where an abortion was induced or the one where it ended with "voiding" the remains were the ones that could prosecute the act.

Three years after the murder case, the Michigan Supreme Court considered distinct but interrelated crimes—a larceny where the defendants broke into an Ontario store, then brought goods they stole across the river into Detroit.[232] The same dissenter as in the murder case again criticized extraterritoriality.[233] However, the majority held that the defendants were not "on trial for what they did in Canada."[234] Only Canada could punish the taking of the goods, but because the defendants possessed the goods in Michigan with no legal right to do so, they committed a separate larceny there.[235] This rule, derived from English common law, eventually became the

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[229] *Tyler*, 8 Mich. at 334.

[230] *Contrast* Rosen, 51 ST. LOUIS L.J. at 720 (citing as support for broad extraterritoriality an 1891 West Virginia statute providing for homicide venue along the lines of the Michigan decision).

[231] Albert Levitt, *Jurisdiction Over Crimes (pt. 2)*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 495, 495 (1926) [hereinafter "Levitt, *(pt. 2)*"].

[232] Morrissey v. People, 11 Mich. 327, 328 (1863).

[233] *Id.* at 336 (Campbell, J., dissenting).

[234] *Id.* at 329 (majority op.).

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

majority American rule for larceny (and indeed, modern law recognizes the possession of stolen goods as a distinct crime[236]).[237] It was cited against territoriality objections.[238]

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

B. Crimes against special state interests can be prosecuted extraterritorially.

States can also extend their laws extraterritorially if a crime abroad targets special state interests.[239] Brown notes that the Model Penal Code is "capacious" in allowing for extraterritorial prosecutions where "the conduct bears a reasonable relation to a *legitimate interest* of this State."[240] He concludes that states can likely protect unborn victims' lives extraterritorially, a conclusion also reached by other scholars.[241] However, Brown concedes that constitutional doctrines may

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

[237] People v. Scott, 74 Cal. 94, 95–96 (1887); *Kunzmann*, 41 Pa. at 436; *Uprichard*, 69 Mass. at 437, 439 (holding that territoriality foreclosed prosecution for possessing goods stolen in Nova Scotia); Ellis, 3 Conn. at 187; Peaper v. State, 14 Md. App. 201, 207–08 (1972). Concerning the relationship between common law and colonial substantive criminal law, see Paul Samuel Reinsch, *English Common Law in the Early American Colonies*, in SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 399, 402 (Ass'n Am. L. Sch., 1907).

[238] *Scott*, 74 Cal. at 95–96; *see also* Archer v. State, 106 Ind. 426, 430–31 (1886) (collecting precedent discussing venue in continuing larceny and homicide cases).

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

[240] Brown, 113 J. CRIM. L. & CRIMINOLOGY at 869 (quoting MODEL PENAL CODE § 1.03(1)(f)); *see also* Rosen, 51 ST. LOUIS L.J. at 721 & nn.41–42 (noting that comment 6 to this part of the Model Penal Code justifies the limitation based only on due process).

[241] Brown, 113 J. CRIM. L. & CRIMINOLOGY at 871; Cohen et al., 123 COLUM. L. REV. at 31–32.

limit this.[242] As a commenter on the then-draft Code noted, its approach is "extremely liberal," both drawing on and surpassing "the most liberal statutes of all the states."[243] Indeed, read liberally, the Code surpasses the Constitution's territoriality requirement. Certain state interests do authorize extraterritoriality, especially to prosecute acts against governing institutions and in-state property. But this exception does not extend to ordinary crimes—much less acts made legal by the state where they occur.

Consider two cases involving soldiers voting during the Civil War (the first is cited by Brown[244]). In 1862, Wisconsin allowed its Union soldiers to vote wherever they were stationed.[245] A losing candidate challenged the law's constitutionality.[246] The state supreme court noted that Wisconsin could not extraterritorially regulate other states' citizens.[247] However, citizens owe their governments allegiance even when traveling abroad and crimes against this can be punished upon the return home.[248] Extraterritoriality is allowed against "certain acts which are peculiarly injurious to [a state's] rights or interests, or those of its citizens."[249] These include treason and interference with the state's commerce or peaceful relations.[250] States could punish such offenses: "For it is purely a question between the state and its own citizens, and the act is one which would probably constitute no offense whatever against the laws of the state where committed."[251]

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[242] Brown, 113 J. CRIM. L. & CRIMINOLOGY at 870.
[243] Rotenberg, 38 TEX. L. REV. at 770.
[244] *See* Brown, 113 J. CRIM. L. & CRIMINOLOGY at 870 n.68.
[245] State ex rel. Chandler v. Main, 16 Wis. 398, 411 (1863).
[246] *Id.*
[247] *Id.* at 412.
[248] *Id.* at 419–20.
[249] *Id.* at 420 (quoting People v. Tyler, 7 Mich. 161, 221 (1859) (Christiancy, J., concurring)). This second *Tyler* case involves the same murder discussed above.
[250] *Id.*
[251] *Id.* at 421.

Similar analysis is found in a contemporary Pennsylvania decision.[252] In 1861, Pennsylvania held an election at a Washington, D.C. military camp.[253] A non-U.S. citizen allegedly participated fraudulently.[254] The Pennsylvania Supreme Court acknowledged that a Pennsylvanian who voted illegally would be liable to punishment upon returning home, but the state lacked jurisdiction over a non-citizen abroad.[255] One justice would have gone further, saying not even Pennsylvanians could be tried in-state for offenses committed abroad.[256]

Wayne LaFave cites an early election-related case from Kentucky's highest court as authority for the principle that extraterritoriality may be available when "necessary to defeat subterfuges," such as when two state residents cross a border to avoid a state ban on gambling or dueling.[257] As LaFave notes, though, the case he cites involved election betting, and indeed, the court noted that the law's purpose was to "protect the purity of the elective franchise, and to secure perfect freedom and impartiality in the exercise of this inestimable right."[258] The court did express concern that "betting can easily be conducted and without any danger of prosecution in all of the forty-eight border counties of Kentucky by merely going across the line into Ohio, Indiana, Illinois, Missouri, Tennessee or West Virginia, and there putting up the money pursuant to an agreement which had already been made in Kentucky."[259] However, it is not clear that the court was referring to non-political wagers, as the only other gambling precedent it cited also concerned election betting.[260] The court's other three citations concerned a municipality line

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[252] *Kunzmann*, 41 Pa. 429.
[253] *Id.* at 435.
[254] *Id.* at 436.
[255] *Id.* at 438.
[256] *Id.* at 440–41 (Read, J., concurring in the judgment).
[257] LAFAVE, *supra* n.224, § 4.4(a) (citing Commonwealth v. Crass, 180 Ky. 794 (1918)).
[258] *See id.*; *Crass*, 180 Ky. at 797.
[259] *Id.* at 798–99.
[260] *See id.* at 798 (citing Brand v. Commonwealth, 110 Ky. 980 (1901)).

within Kentucky (a context not involving sovereignty, as municipalities are creatures of states[261]) and an interstate border river, but pre-dating *Nielsen v. Oregon*.[262] Besides, one of these cases defined the purchase of illegal alcohol aboard a river vessel as a continuing crime complete "on the Kentucky shore, where it was begun, and where it was consummated."[263] Early precedent following this authority involved a de minimis crossing of the state line—twenty feet into Tennessee where illegal liquor had been placed on the ground—and did not mention the legality of that act where it occurred.[264] These cases do not support the existence of broad state criminal extraterritoriality.

To be sure, not all special state interests concern elections or, as discussed in the next section, public-contract fraud.[265] Levitt noted that classically, every sovereign can "protect his own territory" from acts "harmful or likely to prove harmful to the persons or property within the territory."[266] However, this broad formulation assumes that a "territorial unit is looked upon as being self-sufficient, self-protecting, and unconnected with any other territorial unit."[267] This

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[261] *See, e.g.*, Walker v. Richmond, 173 Ky. 26, 30 (1916) (describing a municipality as "a creature of the state, and continuing its existence under the sovereign will and pleasure").
[262] *See also Crass*, 180 Ky. at 797–98 (citing Lemore v. Commonwealth, 127 Ky. 480 (1907); Merritt v. Commonwealth, 122 Ky. 669 (1906); Commonwealth v. Adair, 121 Ky. 689 (1905)).
[263] *Lemore*, 127 Ky. at 484.
[264] Huddleston v. Commonwealth, 171 Ky. 310, 311 (1916); *see also* W. Calvin Dickinson, *Temperance*, TENNESSEE ENCYCLOPEDIA (Mar. 1, 2018), https://tennesseeencyclopedia.net/entries/temperance/.
[265] *See* Hanks v. State, 13 Tex. Ct. App. 289, 309 (1882) (holding that a forgery affecting title to in-state lands could be prosecuted extraterritorially); Rosen, 51 ST. LOUIS L.J. at 720 (discussing extraterritorial interference with in-state property and marriages); Fallon, 51 ST. LOUIS L.J. at 631 & n.86 (discussing interstate child-support enforcement). Child support is akin to an in-state property interest. *See* LAFAVE, *supra* n.224, § 4.4(a) ("[T]he crime of non-support of the family is committed where the duty to support should be discharged—where the family lives.").
[266] Levitt, *(pt. 2)*, at 495. Many of the extraterritorial acts that can threaten in-state persons also qualify as continuing crimes. *See* Part IV.A *supra*.
[267] *Id.* at 496.

assumption does not hold true within constitutional federalism. As the U.S. Supreme Court held in 2007, echoing the earlier nationally oriented decisions discussed above in Part II.B: "When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions . . . ."[268]

The category of special interests authorizing extraterritoriality are limited. As the Michigan Supreme Court held in 1859, a state cannot simply "punish foreign crimes": its people "can not complain until they are injured, and they can not be injured by any act done abroad by strangers. The coming of a person within the jurisdiction can not change his previous foreign acts into injuries against this state or its authorities."[269] Similarly, in 1904, the Arkansas Supreme Court reversed the conviction of a Missourian for letting his cattle run loose in Arkansas.[270] Arkansas "has no power to punish a resident of Missouri for a lawful act done in that State"—even if the defendant knew the cattle were likely to cross the state line—because it "cannot compel" Missourians to follow a law their own state had not enacted.[271]

This is a borderline decision, given the immediate threat to Arkansas property posed by cattle wandering near the state line, and it only further illustrates that few state interests authorize criminal extraterritoriality. It also confirms that states cannot extraterritorially prosecute acts made legal by the state where they occur.[272] States can protect things and people within their territories—not citizens' property or persons that are elsewhere in the country. The special state

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

[269] Bromley v. People, 7 Mich. 472, 477 (1859).

[270] Beattie v. State, 73 Ark. 428, 430 (1904).

[271] *Id.*

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

interests exception extends to acts threatening government institutions, property, and persons remaining in a state—not acts against citizens during their stay in another state, and especially not to acts that are legal where they occur.

C. Conspiracies against special state interests can be prosecuted extraterritorially.

The reasoning of the Wisconsin and Pennsylvania courts was eventually adopted by the U.S. Supreme Court in *Strassheim v. Daily*.[273] There, the Court held that acts "intended to produce and producing detrimental acts within" a state justify extraterritoriality.[274] However, the context was akin to that of the cases above: the defendant attempted to defraud the prosecuting state.[275] What is more, the defendant committed "material steps in the scheme" inside that state, thereby committing a continuing crime as well.[276]

Mark Rosen cites *Strassheim* for the idea that states have "presumptive extraterritorial power."[277] This conclusion is too broad. Rosen thinks the main constitutional limit on extraterritoriality comes from due process, backed by the Dormant Commerce Clause, the Privileges and Immunities Clause, and the right to travel.[278] For Rosen, *Strassheim*, foreign extraterritoriality, and Virginia's early precedent support sweeping state extraterritoriality.[279] As noted above in Part II.C, though, Virginia was an outlier, and as discussed below, foreign extraterritoriality is exceptional. Neither does *Strassheim* support Rosen's view that states can

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[273] 221 U.S. 280 (1911).
[274] *Id.* at 285.
[275] *Id.* at 284–85.
[276] *Id.* at 285.
[277] Rosen, 51 ST. LOUIS L.J. at 720.
[278] *Id.* at 717–18.
[279] *Id.* at 717–19.

exercise long-arm criminal jurisdiction.[280] Rather, it illustrates nuances of territoriality for conspiracy law. At common law, a conspiracy could be tried in any county where an overt act furthering it was committed.[281] The fraud conspiracy at issue in *Strassheim* featured acts illegal where they were committed that targeted the prosecuting state's government.[282] As the Supreme Court held in *Hyde & Schneider v. United States*, a 1912 case about a San Francisco-based conspiracy to defraud a federal agency located in the District of Columbia, a legislature can define "what shall constitute the offense of conspiracy or when it shall be complete" and treat it like other continuing crimes.[283]

Justice Holmes dissented in *Hyde & Schneider* on territoriality grounds, but just like the dissenting Michigan justice in the homicide and larceny cases discussed above, he differed from the majority mainly in defining conspiracy as happening only where the planning occurs.[284] Curiously, he authored *Strassheim* just a year before *Hyde & Schneider*, writing in the earlier case that the defendant did not need to have "set foot" within the state to be subject to its jurisdiction.[285] His *Hyde & Schneider* dissent noted his earlier opinion for the conclusion that a target state "is very likely" to punish a conspirator "if it can catch him . . . although he was not

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[280] *See id.* at 721–23 (citing civil precedent and First Amendment precedent holding the federal government can consider state laws in awarding interstate radio licenses); *see also* Ford Mot. Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 360 (2021) (discussing permissible state civil jurisdiction).
[281] *Hyde & Schneider v. United States*, 225 U.S. 347, 365 (1912) (citing 1 ARCHIBOLD'S CRIM. PRAC. & PLEADING 226 (8th ed.) (Banks & Bros., 1880)).
[282] *Cf.* Caraballo et al., 26 CUNY L. REV. at 43–44 (discussing the "dual criminality" rule, which can limit international extradition to "crimes regarded as serious in both states" and so "honors differential viewpoints on what conduct is not harmful and therefore not meriting punishment").
[283] *Hyde & Schneider*, 225 U.S. at 364.
[284] *Id.* at 390 (Holmes, J., dissenting).
[285] *Strassheim*, 221 U.S. at 285.

subject to its laws when he did the act."[286] However, he concluded that venue had to where the planning was.[287]

The justices' dispute in *Hyde & Schneider* was only about the substantive definition of conspiracy.[288] Conspiracy does present doctrinal complications, as discussed further in Part V below.[289] However, these cases extend only far enough to support state prosecution over conspiracies against their special interests and those that occur partly within their territories.

D. Crimes committed outside any state can be prosecuted extraterritorially.

A final exception exists for offenses committed outside any state. Article III lets Congress designate venue for such crimes, some of which were punished not under the common law but under the law of nations.[290] The Constitution acknowledges the difference by giving Congress the power to "define and punish piracies and felonies committed on the high seas, and offenses against the law of nations."[291]

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[286] *Hyde & Schneider*, 225 U.S. at 386 (Holmes, J., dissenting).
[287] *Id.* at 391 (quoting Regina v. Best, 1 Salk. 174 (1705)).
[288] *Cf.* People v. Adams, 3 Denio 190, 210 (N.Y. Sup. Ct. 1846) (applying an agency theory of liability to fraud: "This in no sense affirms or implies an extension of our laws beyond the territorial limits of the State. . . . What [the defendant] did in Ohio was not, nor could it be, an infraction of our law or a crime against this State. He was indicted for what was done here, and done by himself. True, the defendant was not personally within this State, but he was here in purpose and design, and acted by his authorized agents."); LAFAVE, *supra* n.224, § 4.4(a) (noting that at common law, an accessory before the fact who does not act within a state is not subject to its jurisdiction, though this rule has been statutorily modified in many states).
[289] *See also* LAFAVE, *supra* n.224, § 4.4(a) ("Courts have experienced some difficulty in determining the situs of inchoate offenses, such as attempt and conspiracy.").
[290] U.S. CONST. art. III, § 2, cl. 3; *see also* Jones v. United States, 137 U.S. 202, 211 (1890); United States v. Dawson, 56 U.S. 467, 488 (1854) ("A crime . . . committed against the laws of the United States, out of the limits of a State, is not local, but may be tried at such place as Congress shall designate by law."); Perkins, 22 HASTINGS L.J. at 1156 (discussing piracy).
[291] U.S. CONST. art. I, § 8.

The U.S. Supreme Court considered foreign criminal extraterritoriality in 1941's *Skiriotes v. Florida*, featuring a state prosecution for deep-sea sponge-diving.[292] The Court followed historic international law in holding that the United States as a whole can punish its citizens upon their return home for offenses "upon the high seas or even in foreign countries *when the rights of other nations or their nationals are not infringed*."[293] This was because citizens owe their home countries certain duties while abroad.[294] They had to refrain from acts that "are directly injurious to the government, and are capable of perpetration without regard to particular locality."[295] Nothing in American law restricted enforcement of these duties to the federal government.[296] Besides, Florida had an interest in maintaining its sponge fishery.[297]

Skiriotes reflected an exception for acts committed outside of any state. The Court relied on its earlier holding in *The Hamilton*, which specified that under international law, "the bare fact of the parties being outside the territory in a place belonging to no other sovereign would not limit the authority of the State."[298] The rule from the classical law of nations appears to survive: a state can prosecute a resident who returns home after committing an act outside of any state.

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[292] 313 U.S. 69, 69. Earlier authorities had assumed only the federal government could exercise extraterritoriality abroad. *See* Perkins, 22 HASTINGS L.J. at 1163 & n.47 (citing RESTATEMENT OF CONFLICT OF LAW § 63 (1934); People v. Merrill, 2 Parker's Crim. Rep. 590, 602 (N.Y. Super. Ct. 1855)).

[293] *Skiriotes*, 313 U.S. at 73 (emphasis added).

[294] *Id.*

[295] *Id.* at 73–74.

[296] *Id,* at 74–75.

[297] *Id.* at 75.

[298] The Hamilton, 207 U.S. 398, 403 (1907), *cited approvingly by Skiriotes*, 313 U.S. at 77–79; *see also* Leflar, 25 CASE W. RES. L. REV. at 50 ("Probably forum state citizenship alone would be too little if the defendant citizen's act were done in a sister state, so that the sister state's law could be deemed to govern it.").

However, LaFave summarily, and incorrectly, concludes that *Skiriotes* should straightforwardly apply to interstate extraterritoriality.[299] Offenses committed abroad are matters of international law and do not implicate interstate constitutional federalism. Other leading scholars agree. Levitt observed that some courts "have jurisdiction over offenses committed anywhere within the territory belonging to their sovereign"—distinguishing this from extraterritorial jurisdiction over treason, conspiracy, or crimes on the high seas.[300] Rollin Perkins noted that the foreign-extraterritoriality exception notwithstanding, "no state may punish its citizen for what he does in the exclusive territorial jurisdiction of another state where what was done was lawful."[301] Brown concurs that "*Skiriotes* offered no clue" concerning a state citizen who "acts in *another state's* territory."[302]

What is more, this exception is preempted when it interferes with constitutional federalism. In *American Insurance Association v. Garamendi*, the Supreme Court considered the constitutionality of a state law requiring disclosures about Holocaust-era insurance policies.[303] The federal government had entered into international agreements that the state law would apparently undermine.[304] The Court held that there is "no question" that state sovereignty must yield to constitutional federalism.[305] The state law was preempted because there was a "sufficiently clear conflict" with another sovereign's constitutional authority.[306] Though this case concerned a state-

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[299] LAFAVE, *supra* n.224, § 4.4(c)(2).
[300] Levitt, *(pt. 1)*, at 316, 320, 322–23.
[301] Perkins, 22 HASTINGS L.J. at 1164. Perkins cited the Full Faith and Credit Clause without elaborating. *Id.*
[302] Brown, 113 J. CRIM. L. & CRIMINOLOGY at 870.
[303] 539 U.S. 396 (2003).
[304] *Id.* at 413.
[305] *Id.*
[306] *Id.* at 420.

federal conflict, it does support the proposition that the exception for foreign extraterritoriality is subordinate to constitutional federalism's requirements.[307]

None of the categories discussed in this section undermine the general territoriality requirement.[308] The territoriality rule is not absolute, but it is robust.

V. Territoriality determines modern controversies.

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

> In the absence of constitutional constraint, not only may Pennsylvania prosecute its citizens for obtaining abortions in New Jersey, but New Jersey might punish its residents for hiring surrogate mothers in Pennsylvania. . . . while Missouri might interfere with its citizens' efforts to take advantage of a right to die in Minnesota. California could prosecute its citizens for harassing women at abortion clinics in Utah, and Utah in turn could press charges against Utah residents for smoking marijuana in Alaska, or drinking alcohol and reading pornography in Nevada.[309]

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

A. Extraterritorial abortions cannot be prosecuted, but some related acts can be.

States cannot prosecute citizens upon returning home from undergoing an extraterritorial abortion. Abortion need not be a continuing crime—no part of it need occur in a citizen's home state. The special state interests exception does not include killing a state's person, even assuming

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[307] *See also* United States v. Lozoya, 982 F.3d 648, 651–52 (9th Cir. 2020) (en banc) (holding airspace to be outside any state); *accord id.* at 658–60 (Ikuta, J., dissenting in part and concurring in the judgment).

[308] *Cf.* LAFAVE, *supra* n.224, § 4.4(b) ("[S]ome conduct or result of conduct must still occur within the state[.]").

[309] Kreimer, 67 N.Y.U. L. REV. at 462.

abortion to be a homicide.[310] An abortion committed elsewhere is not an act against a state's governing institutions.[311] Nor is it an act against property or a person remaining inside the prosecuting state. An abortion committed in another state does not fit within the exception for acts committed outside of any state.[312] States cannot prosecute as inchoate crimes acts facilitating an abortion that will ultimately take place in a state where that act is legal, due to the defense of pure legal impossibility.[313]

A special case is presented by Idaho Code Ann. § 18-623(1), (3), which criminalizes transporting a minor to receive an abortion abroad without parental consent. *Dobbs* held that laws regulating abortion are subject to rational-basis review.[314] Even during the *Roe* era, the Court upheld an abortion parental-notification law because parents could legitimately advise their daughter about "religious or moral implications" of the act and give "needed guidance and counsel."[315] However, *Hodgson* depended on the availability of a judicial bypass procedure.[316] The status of *Hodgson* after *Dobbs* is unclear. Whether a minor still has some constitutional right to an otherwise-legal abortion without parental consent, and if so when, appear to be relevant to the extraterritoriality analysis. After all, protecting in-state family interests is a valid ground for

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

[311] *See* Part IV.B *supra*.

[312] *See* Part IV.D *supra*.

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

[314] 597 U.S. at 301.

[315] Hodgson v. Minnesota, 497 U.S. 417, 448–49 (1990) (op. of Stevens, J.).

[316] *Id.* at 452 (plurality op.).

extraterritorial criminal enforcement of child support because it affects in-state financial interests, and extraterritorial interference with in-state family relations may be analogous.[317]

Other kinds of extraterritorial abortion prosecutions are likely impermissible even if the abortion is illegal in the state where it happens. To be sure, cases involving extraterritoriality over public-contract fraud have noted the illegality of those acts where they happened.[318] However, such prosecutions also involve continuing and distinct crimes and crimes against special state interests.[319] Other cases have held that mere common illegality does not support extraterritoriality.[320] That said, territoriality limits are at their apex when one state seeks to prosecute an act that is legal in the state where it occurs.[321] Extraterritoriality certainly cannot extend to abortions in states where that act is legal. This is so no matter the moral urgency with which the home state views abortion.[322]

Territoriality is the best framework for assessing abortion limits in the interstate context. Other constitutional doctrines, such as the Dormant Commerce Clause and Full Faith and Credit Clause, call for interest-balancing, which provides no justiciable answer here.[323] Many supporters of abortion rights believe they are indispensable to bodily autonomy and women's equality.[324]

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[317] Fallon, 51 ST. LOUIS L.J. at 631 & n.86; LaFave, *supra* n.224, § 4.4(a). Similar issues arise in the context of California's law blocking other states' extraterritorial criminal enforcement of laws limiting underage gender transitions. *See* CAL. PENAL CODE § 819(a)–(c).

[318] *See* Part IV.C *supra*.

[319] *See* Part IV.A *supra*.

[320] *See* Part IV.B *supra*.

[321] *See* Part IV.B–D *supra*.

[322] *Cf.* STORY, *supra* n.224, at 36 (defending international-law limits on extraterritoriality even where other nations allow "totally repugnant" acts, such as "despotic cruelty" and "crushing" the weak).

[323] *See Franchise Tax Bd.*, 578 U.S. at 179 (eschewing "a complex balancing-of-interests approach" to the Full Faith and Credit Clause, but still inquiring into the sufficiency of a state's policy interests) (citation and internal quotation marks omitted); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

[324] *See Dobbs*, 597 U.S. at 224.

Many opponents believe abortion takes a human life.[325] Other people "think that abortion should be allowed under some but not all circumstances."[326] As a normative matter, these interests are not commensurate and judges have neither the ability nor the authority to "balance" them.[327] Besides, some originalists reject the Dormant Commerce Clause altogether.[328] Others express skepticism of modern right-to-travel doctrine as threatening to "become yet another convenient tool for inventing new rights."[329] The entire notion of unenumerated rights is suspect for some jurists.[330] The original meaning of the Privileges and Immunities Clause is debated.[331]

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[325] *See id.* at 223–24.

[326] *Id.* at 224–25.

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

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

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

[330] *See, e.g.*, *Dobbs*, 597 U.S. at 330 *et seq.* (Thomas, J., concurring).

[331] *See, e.g.*, RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT 41–260 (2021); KURT T. LASH. THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 9–66 (2014).

Formal territorial rules derived from constitutional federalism are more legitimate and accepted. Such rules can be implied.[332] Justice Gorsuch even recently called criminal territoriality in the tribal context one of "the most essential attributes of sovereignty."[333]

Territoriality does not forbid all state efforts to limit interstate abortion. Even though abortion need not be a continuing crime, it can be one if someone starts the procedure elsewhere before returning home to finish it.[334] Telehealth counseling is legally considered to take place wherever the patient is, and that state's laws govern the interaction.[335] Sending abortion-inducing drugs could be considered part of a continuing crime of in-state abortion.[336] Shipping abortion drugs also arguably affects the safety of an in-state person, assuming a state treats a preborn life as one.[337] Such prosecutions may meet with obstacles from federal preemption, state "shield" laws thwarting extraterritorial enforcement, and non-territoriality constitutional rules like personal jurisdiction, the right to travel, Privileges and Immunities, and the Full Faith and Credit Clause.[338] These issues are beyond this article's scope. However, territoriality would not stand in the way.

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[332] *See, e.g.*, *Franchise Tax Bd.*, 587 U.S. at 247–48 (per Thomas, J.) (criticizing "ahistorical literalism" because many constitutional doctrines "are not spelled out in the Constitution but are nevertheless implicit in its structure and supported by historical practice").

[333] *Castro-Huerta*, 597 U.S. at 668 (Gorsuch, J., dissenting).

[334] *See* MacCarthy, 103 B.U. L. REV. at 2273 ("[O]ne or both [abortion] pills could be obtained in one state, taken in another state in part or in whole, and the pregnancy could end in yet another state."); Levitt, (*pt. 2*), at 495 (noting that abortion came to be prosecutable where induced or completed).

[335] David S. Cohen et al., *Abortion Pills*, 76 STAN. L. REV. 317, 355–56 (2024).

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

[337] *See, e.g.*, *Dobbs*, 597 U.S. at 257 (noting that Mississippi law considers abortion the taking of "the life of an unborn human being") (citation and internal quotation marks omitted).

[338] *See* Cohen et al., 123 COLUM. L. REV. at 6, 15, 42–71; *but see* Cohen et al., 76 STAN. L. REV. at 342–47 (noting the technical federal illegality of mailing abortion pills under the Comstock Act, 18 U.S.C. §§ 1461 & 1462(c), but also that this prohibition has long gone unenforced).

Territoriality yields varying results in the interstate abortion context but provides the most legitimate way of assessing it.

B. States can prosecute cybercrimes where people or computers are located.

The internet is nearly as unmoored from specific territory as anything can be. Nevertheless, cybercrime does not require a complete departure from territoriality.[339] As the Third Circuit has held, "cybercrimes do not happen in some metaphysical location that justifies disregarding constitutional limits on venue. People and computers still exist in identifiable places in the physical world."[340] Those places may be disparate, with elements of a crime strewn across "time and space" and the defendant located at a physical remove.[341] Still, such places can be identified. For instance, the Third Circuit considered two co-conspirators who were in California and Arkansas, illegally accessed computer servers in Texas and Georgia, then leaked private subscriber email addresses to a reporter whose location was somewhere other than New Jersey.[342] The court held that New Jersey was not proper venue for a federal prosecution even though 4500 out of the 114,000 of the leaked emails belonged to residents of that state.[343]

The Third Circuit declined to rely on Second Circuit precedent holding that venue should be determined using "substantial contacts rule that takes into account a number of factors—the site of the defendant's acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of each district for accurate fact-finding."[344] It found no

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

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

[341] *Saavedra*, 223 F.3d at 86.

[342] *Auernheimer*, 748 F.3d at 531.

[343] *Id.* at 529, 536.

[344] *Id.* at 536–38 (discussing United States v. Reed, 773 F.2d 477 (2d Cir. 1985)).

precedent holding that "the locus of the effects" alone establishes venue.[345] Rather, the court held that maintaining territoriality is especially essential now that the internet's ubiquity tempts the government to "choose its forum free from any external constraints."[346]

The substantial-contacts test has been adopted by the Sixth Circuit, cited by the Seventh Circuit, adopted but then abandoned by the Fourth Circuit, and rejected by the Tenth and Third Circuits.[347] It should be rejected. Traditional limits on extraterritoriality have survived "the advent of railroad, express mail, the telegraph, the telephone, the automobile, air travel, and satellite communications."[348] The internet is not such a quantum leap forward as to require a constitutional amendment concerning territoriality—much less justify its equivalent through judicial innovation. Longstanding rules can continue to protect constitutional federalism and defendants' rights, even in an electronic era.

C. States can prosecute extraterritorial interference with their elections.

Finally, territoriality supports extraterritoriality against election interference. Following the 2020 presidential election, Georgia charged then-former President Donald Trump and co-defendants with violating the state RICO (Racketeer Influenced and Corrupt Organizations) Act.[349] The Act provides for venue in any county where "an incident of racketeering occurred" or where a relevant enterprise or property "is acquired or maintained."[350] The RICO charge was

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[345] *Id.* at 537.
[346] *Id.* at 541 (quotation marks omitted) (citing, *inter alia*, Travis v. United States, 364 U.S. 631, 634 (1961)).
[347] *See* Mogin, 6 U. DENV. CRIM. L. REV. at 49; *see also* United States v. Mink, 9 F.4th 590, 601–02 (8th Cir. 2021) (citing *Auernheimer* favorably).
[348] *Auernheimer*, 748 F.3d at 541.
[349] *See* Indictment, State v. Trump, No. 23SC188947, at *1 (Fulton Cnty. Super. Ct. Aug. 14, 2023) [hereinafter *Indictment*] (charging a violation of O.C.G.A. § 16-14-4(c)), *available at* https://d3i6fh83elv35t.cloudfront.net/static/2023/08/CRIMINAL-INDICTMENT-Trump-Fulton-County-GA.pdf.
[350] O.C.G.A. § 16-14-11.

predicated partly on acts occurring in six states named in the indictment as well as the District of Columbia.[351] Charged extraterritorial acts included conversations, phone calls, emails, internet postings, and meetings.[352] Georgia alleged that these acts were part of a conspiracy intended to "unlawfully change the outcome of the election in favor of Trump."[353]

Even though many of these acts did not happen within Georgia, the state can prosecute them extraterritorially under the special state interests exception. As discussed in Part IV.B above, several of that exception's earliest cases arose in the context of Civil War-era election interference. The protection of political institutions, including elections, is the paradigmatic special state interest that can be protected extraterritorially.

The Pennsylvania Supreme Court did disavow jurisdiction over a non-Pennsylvanian who wrongly participated in an extraterritorial state election.[354] However, *Strassheim* allowed Michigan to prosecute a man who defrauded it even if "he never had set foot in the State until after the fraud was complete," so long as his act was "intended to produce and producing detrimental effects within it."[355] *Hyde & Schneider* similarly held that defendants conspiring to commit fraud against a government could be prosecuted under a theory of "constructive presence" (the special state interests exception reaches the same conclusion without the legal fiction).[356]

A question could arise should Georgia attempt to rely on an interest in protecting the federal government, as precedent does not reveal whether a state can assert the special interests of some

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[351] *Indictment*, *supra* n.354, at *15, *21–24, *26–32, *35–37, *39, *43–46, *48–49, *52, *57–58, *60–64, *69.
[352] *See id.*
[353] *Id.* at *14.
[354] *Kunzmann*, 41 Pa. at 438.
[355] *Strassheim*, 221 U.S. at 284–85.
[356] *Hyde & Schneider*, 225 U.S. at 362.

other sovereign.[357] However, so long as Georgia prosecutes the defendants for interfering with its electoral processes, it will satisfy territoriality.

Conclusion

Territory—the basis of political sovereignty—is "inseparable from the institution of criminal law."[358] Up until the twentieth century, both civil and criminal law followed strict territoriality requirements.[359] Civil jurisdiction has become bewilderingly complex.[360] But state criminal territoriality has remained a keystone, if an often-overlooked one, of constitutional federalism.[361]

Territoriality is also an essential part of constitutional federalism.[362] It lets American adults vote with their feet as well as their ballots, traveling to exercise freedom in the ways they see fit.[363] This is especially true where "the basic moral commitments of the states differ."[364]

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[357] *See Indictment*, *supra* n.354, at *14 (containing language that could be read to charge the defendants with attempting to interfere with the entire national election).

[358] Farmer, 63 U. TORONTO L.J. at 241.

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

[360] *Id.* at 1037–38.

[361] Kaufman, 121 MICH. L. REV. at 357.

[362] Rosen argues that Congress can abrogate this rule through the Fourteenth Amendment. Rosen, 59 B.C. L. REV. at 1022–23 (discussing U.S. CONST. amend. XIV, § 5). He claims support for the idea that "states have a legitimate interest in their citizens' out-of-state activities if such activities undermine legitimate state policy" in *United States v. Edge Broad'g Co.*, 509 U.S. 418 (1993). *See* Rosen, 51 ST. LOUIS U. L.J. at 722. However, that case concerned only federal regulators' consideration of state laws in deciding whether to allow interstate lottery advertising. *Edge Broad'g Co.*, 509 U.S. at 421. If anything, there might be a due-process right *against* state criminal extraterritoriality. *See* Kreimer, 150 U. PA. L. REV. at 979 (citing civil cases: "Within a decade after the Fourteenth Amendment's adoption in 1868, the Supreme Court began to read the territorial restrictions on state sovereignty into the definition of due process."); *cf.* Dan E. Stigall, *International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law*, 35 HASTINGS INT'L & COMPAR. L. REV. 323, 373 (2012) (noting due-process limits on international criminal extraterritoriality).

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

[364] Kreimer, 91 MICH. L. REV. at 916.

Territoriality unquestionably impairs the effectiveness of state laws.[365] In return, though, it "offers a continual challenge to justify the decision of the home state . . . and a security against the efforts of any faction to capture a state's authority in order to impose its own enthusiasms on unwilling minorities."[366] Pro-lifers would say abortion is a prime example of federalism covering for abuses. However, the proper remedy is correctly interpreting, or if need be amending, the Constitution—not jettisoning constitutional federalism.[367]

Justice Gorsuch recently asked, "why not allow Texas to enforce its laws in California? Few sovereigns or their citizens would see that as an improvement."[368] Good intentions do not mean a state can "impose its will on other states whose voters may have different priorities."[369] State criminal territoriality is a rule implicit in constitutional federalism. What happens in Vegas must be tried in Vegas, if anywhere.

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[365] Rosen, 91 B.C. L. REV. at 1016; *see also* Rosen, 150 U. PA. L. REV. at 964 (defending the desirability of state criminal extraterritoriality).

[366] Kreimer, 150 U. PA. L. REV. at 982.

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

[368] *Castro-Huerta*, 597 U.S. at 688 (Gorsuch, J., dissenting).

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