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THE LAW OF CHOICE AND CHOICE OF LAW: ABORTION, THE RIGHT TO TRAVEL, AND EXTRATERRITORIAL REGULATION IN AMERICAN FEDERALISM

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In American federalism, states differ among themselves in regulating morally contested issues such as abortion, sexual activity, and the right to die. Because of these differences, Americans often travel to neighboring states to take advantage of legal options unavailable at home. In this Article, Professor Kreimer examines the constraints that the American federal structure and the constitutional commitment to national citizenship place on states that would seek to limit their citizens' abilities to take advantage of such options. Professor Kreimer first demonstrates that the constitutional structure set in place by the framers of the Constitution and the fourteenth amendment did not contemplate extraterritorial state regulation. He argues that although constitutional restrictions on extraterritorial regulation have been diluted since the New Deal, as a matter of federal structure and due process, states do not have the authority to forbid their citizens' extraterritorial acts when those acts are permitted by the moral commitments of the states in which the acts occur. He then shows that a state's efforts to preempt its citizens' access to such options through restrictions on travel would violate the constitutional commitments to national union and national citizenship. Such regulations are barred by the citizenship clause of the fourteenth amendment, the commerce clause, and the privileges and immunities clause of article IV of the Constitution.

INTRODUCTION

A fragile five-member majority of the Supreme Court has responded

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to the challenge posed in *Planned Parenthood v. Casey*¹ by reaffirming *Roe v. Wade* after a fashion.² The fate of any particular regulation of abortion now hangs on the joint evaluation of the three none too libertarian Justices who formed the *Casey* plurality as to whether the regulation constitutes an "undue burden."³ The four dissenters in *Casey* announced in the strongest possible terms their intent to press for the elimination of all constitutional protection of reproductive choice;⁴ they await only a single vote to make their viewpoint the law of the land. In terms of federal constitutional protections for reproductive choice, the world of the 1990s bids fair to resemble more closely the world of the 1950s and 1960s than that of the 1980s.⁵

In that world, national uniformity is unlikely. States like Utah and Pennsylvania will leave no more room for choice on the abortion issue than the governing federal law demands, while the fundamental laws of Florida, Massachusetts, California and New Jersey already provide greater protection than the federal Constitution did even at the zenith of *Roe's* constitutional protection.⁶ The most recent estimates suggest that

¹ 112 S. Ct. 2791 (1992). In the interests of full disclosure, the reader should be aware that I was a member of the counsel team for the petitioners in *Casey*, and remain involved with the case on remand.

² 410 U.S. 113 (1973).

³ *Casey*, 112 S. Ct. at 2820.

⁴ *Id.* at 2860 (Rehnquist, J., dissenting).

⁵ For purposes of this Article, I assume that Congress will play no active role. In the present political constellation, neither proponents nor opponents of reproductive freedom seem to be able to generate successful coalitions at the federal level. At the issue's core, neither the Right to Life Amendment nor the Freedom of Choice Act have moved to the floor of Congress. See, e.g., Nat Hentoff, *The Fading Freedom of Choice Act*, Wash. Post, Sept. 12, 1992, at A19. President Bush indicated his intention to veto Congressional efforts to protect reproductive autonomy. President Clinton, by contrast, has proclaimed his support for abortion rights. See e.g., E.J. Dionne, *Abortion Rights Supporters Claim Election Gains*, Wash. Post, Nov. 9, 1992, at A9; Ruth Marcus, *At Issue: Abortion; On Support for Choice and Limits, Bush-Clinton Contrasts Are Sharp*, Wash. Post, Aug. 19, 1992, at A21; Elaine Povich, *Clinton Expected to Reverse Federal Policy on Abortions*, Chicago Tribune, Nov. 7, 1992, at 1.

A change in political circumstance sufficient to precipitate Congressional action on either side might well obviate the issues I address in this Article. Obviously, if Congress uniformly protects or prohibits abortions, as it has the power to do under current commerce clause doctrine, disuniformity no longer will be a difficulty. If it exercises the commerce power to protect interstate choice, the statute will be dispositive. If, however, Congress sought to prohibit interstate choice, the issue of whether either the right to travel or the privileges and immunities clause bind Congress would arise. Cf. *White v. Massachusetts Council of Const. Employers*, 460 U.S. 204, 215-16 n.1 (1983) (Blackmun, J.) (doubting whether Congressional authorization could render constitutional privileges and immunities violation); *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969) (finding infringement of right to travel despite Congressional authorization).

⁶ Massachusetts, New Jersey, and California provide constitutional protection for Medicaid funding of abortions. See, e.g., *Committee to Defend Reprod. Rights v. Meyers*, 625 P.2d 779, 781 (Cal. 1981); *Moe v. Secretary of Admin. Fin.*, 417 N.E.2d 387, 397 (Mass. 1981); *Right to Choose v. Byrne*, 450 A.2d 925, 927 (N.J. 1982). The United States Supreme Court

roughly fifteen states are committed solidly to protecting abortion rights, and an equal number are poised to limit or prohibit abortions to the extent that the federal courts allow, with the remainder mixed.⁷ The withdrawal of federal constraint would leave a state-by-state patchwork quilt of reproductive autonomy, if not, as in the regulation of alcohol before and after Prohibition, a pattern in which regulations differ from county to county.

In the years immediately preceding *Roe*, a similar patchwork of reproductive autonomy prevailed.⁸ In consequence, about 40% of all legal abortions performed in the United States in 1972 were performed on women outside of their state of residence.⁹ Two years after *Roe*, only

earlier had rejected this position in *Harris v. McRae*, 448 U.S. 297, 326 (1980) (holding that the Hyde Amendment, which denies public funding for certain medically necessary abortions, does not violate establishment clause of first amendment or due process clause of fifth amendment), and *Maher v. Roe*, 432 U.S. 464, 479-80 (1977) (holding that equal protection clause does not require state participating in Medicaid program to pay for nontherapeutic abortions when state pays for childbirth). Florida's explicit constitutional protection of privacy has been held to bar parental consent requirements of a sort that would be upheld under federal standards. See *In re T.W.*, 551 So.2d 1186, 1195-96 (Fla. 1989).

⁷ National Abortion Rights Action League, *Who Decides?: A State by State Review of Abortion Rights in America* 143-46 (3d ed. 1992).

⁸ See Nanette J. Davis, *From Crime to Choice* 260-61 (1985) (surveying abortion laws as of April 1, 1971). According to Davis' survey, Alaska, Hawaii, New York, and Washington State were without substantial legal restrictions on pre-viability abortions. On the other hand, Arkansas, California, Colorado, Delaware, Kansas, Maryland, New Mexico, North Carolina, Oregon, South Carolina, and Virginia required that the continuation of the pregnancy "gravely impair the physical or mental health" or create a "substantial risk" to the "physical or mental health" of the mother. Other states had more rigid prohibitions. See *id.*; see also Carole Joffe, *Portraits of Three "Physicians of Conscience": Abortion Before Legalization in the United States*, 2 *J. Hist. of Sexuality* 46, 49 (1991) (characterizing period from 1880s "to the *Roe* era" as one in which abortion regulations produced "enormous variations from state to state, and often even within states").

Even given a single legal standard, the application of the standard could vary widely. By late 1970 in California, for example, under a "gravely impair" standard, 99.2% of women who applied for abortions were granted one, and "one out of every three pregnancies was ended by a legal abortion." Kristin Luker, *Abortion and the Politics of Motherhood* 94, 88 & n.* (1984).

⁹ N. Davis, *supra* note 8, at 228 & tbl. 10.1 (estimating that in 1972 43.8% of abortions performed outside state of patient's residence); *id.* at 119 (describing referral "pipeline" from Michigan to New York City, Michigan women accounting for largest proportion of New York's non-resident abortions); *id.* at 122 (describing profit-seeking out-of-state doctors flying to New York City to perform abortions); *id.* at 199 (calculating that 63.4% of New York City abortions from July 1, 1970 to June 30, 1972 performed for out-of-state women); Jean Pakter et al., *Legal Abortion: A Half-Decade of Experience*, 7 *Fam. Plan. Persp.* 248, 248-49 & tbl. 2 (1975) (noting that, after New York liberalization, which took effect in July of 1970, 131,172 of the 206,673 abortions performed in New York City in 1971, or about 63%, were provided for out-of-state women; in 1972, 130,592 of 203,247, or approximately 64%, were for non-residents; by 1974, 32,712 of 120,829, or 27%, were for out-of-state women, 15,562 of whom were from Connecticut or New Jersey); Christopher Tietze & Sarah Lewit, *Interim Report on the Joint Program for the Study of Abortion*, 8 *J. Sex Res.* 170, 171 (1972) (noting that, for 1970-71 sample, 40% of all abortion patients were non-residents, with 88% of clinic patients

13.4% of legal abortions involved women from another state,¹⁰ and by 1977 the figure had dropped below 10%.¹¹ Even with legalization, however, local opposition and reluctance by local medical establishments to provide abortions forced a substantial number of women to travel to obtain abortions.¹²

Before *Roe*, supporters of reproductive autonomy sought to minimize the effect of hostile state law by setting up counseling and referral networks that directed women to abortion opportunities in more sympa-

being non-residents, as "defined by each [provider] in terms of its customary area of service"; Edward Weinstock et al., *Abortion Need and Services in the United States 1974-1975*, 8 *Fam. Plan. Persp.* 58, 61 (1976) (citing Center for Disease Control report that, of reported abortions where the patient's state of residence was known, 40% in 1972, 20% in 1973, and 10% in 1974 were performed on patients from another state).

The location of illegal abortions is harder to discern. Estimates of the number of illegal abortions in the years before *Roe* range from 200,000 to 2,000,000 per year. N. Davis, *supra* note 8, at 214; see also Lawrence Lader, *Abortion II: Making the Revolution 20 & n.2* (1974) [hereinafter L. Lader, *Abortion II*] (discussing estimates of 1,000,000 "secret" abortions per year); Nancy Howell Lee, *The Search for an Abortifacient* 5 (1969) (discussing estimates ranging from 200,000 to 2,000,000 per year). Before legalization, doctors often sent patients for abortions in other states. See Joffe, *supra* note 8, at 59 (account of out-of-state referrals); Lawrence Lader, *Abortion 53-54* (1966) [hereinafter L. Lader, *Abortion I*] (10% of ob/gyns surveyed in 1964 admitted referring patients to abortion providers, mostly in California, Florida, New York, and Washington); *id.* at 111 (early account of doctors moving patient out of New Hampshire to obtain abortion). Obtaining an illegal abortion before *Roe* often involved foreign travel as well. See, e.g., Joffe, *supra* note 8, at 50 (documenting referrals to Japan, Puerto Rico, England, and Mexico); L. Lader, *Abortion I*, *supra*, at 56-57 (1966) (noting many abortions obtained in Mexico and Puerto Rico).

¹⁰ See N. Davis, *supra* note 8, at 228 tbl. 10.1 (43.8% in 1972, 25.2% in 1973, 13.4% in 1974).

¹¹ Norah Henry & Milton E. Harvey, *Social, Spatial, and Political Determinants of U.S. Abortion Rates*, 16 *Soc. Sci. Med.* 981, 987 (1982).

¹² See Gerald Rosenberg, *The Hollow Hope* 191 (1991) (in 1973, 150,000 women traveled out of state for abortions; in 1982, the figure was 100,000 women, and, in 22 states, 10% or more of the women obtaining abortions obtained them out of state); Stanley K. Henshaw et al., *Abortion Services in the United States, 1984 and 1985*, 19 *Fam. Plan. Persp.* 63, 66-67 & tbl. 4 (1987) (in 1982, 6% of all abortions, or 101,260 abortions, were performed out of state; and, in 1985, 82% of all United States counties were without identified abortion providers); Stanley K. Henshaw & Jennifer Van Vort, *Abortion Services in the United States, 1987 and 1988*, 22 *Fam. Plan. Persp.* 102, 105-107, tbls. 3 & 4 (1990) (in 1985, 6% of all abortions, or 88,820 abortions, were performed out of state; in 1988, 83% of counties lacked providers); Stanley K. Henshaw et al., *Characteristics of U.S. Women Having Abortions, 1987*, 23 *Fam. Plan. Persp.* 75, 80 & tbl. 6 (1991) (in 1987, 6% of all abortions or 90,830 abortions, were performed out of state).

In 1985, 98% of abortions were performed in metropolitan areas. Arkansas, Delaware, Idaho, Kentucky, Mississippi, Nebraska, North Dakota, Rhode Island, South Dakota, Utah, West Virginia, and Wyoming had fewer than 10 abortion providers. Colorado, Georgia, Hawaii, Illinois, Maryland, Massachusetts, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Texas, Virginia, and Washington State had more than 50 providers. California, Florida, and New York have more than 100. National Abortion Rights Action League, *American Women at Risk: A State by State Ranking* (1992) (state-by-state analysis examining positions of executive and legislative bodies, restrictions on abortion, and number of in-state providers).

thetic jurisdictions.¹³ The re-establishment of similar networks in the next few years is likely.¹⁴ As a first approximation, the late Professor John Kaplan probably was correct in predicting that the elimination of federal constitutional protection would reduce only marginally the total number of abortions and that "[t]he marginal reduction in abortions [would] come from among the very poor who are unable to afford transportation to states where the practice is permitted."¹⁵ One should add,

¹³ See, e.g., Arlene Carmen & Howard Moody, *Abortion Counseling and Social Change, From Illegal Act to Medical Practice* 88 (1973) (describing the Clergy Consultation Service on Abortion, which by 1970 was referring 50,000 to 60,000 women per year for abortions); *id.* at 25 (recounting Service's practice of referring women to physicians in other jurisdictions); N. Davis, *supra* note 8, at 61 (describing Michigan referral networks which referred women out of state); *id.* at 92-96 (describing private referral network involved with local organized crime); *id.* at 133 (asserting that Clergy Consultation Service involved 300 clergy by 1973); *id.* at 140-41 (discussing Michigan "clergy brokers" who referred women out of state to avoid "police surveillance"); *id.* at 144 (explaining that for-profit referral services in Michigan after New York legalization "absorbed" 1/2 to 2/3 of Michigan "market" from Clergy service); L. Lader, *Abortion II*, *supra* note 9, at 24-26 (describing Lader's referral activities); *id.* at 27-28 (describing Patricia McGinnis' referrals to Mexican doctors); *id.* at 42-50, 94-96 (describing how Clergy Consultation Service was advised to refer women to out-of-state doctors); *id.* at 50-51 (describing Minnesota service making referrals to Canada and Mexico); *id.* at 51-53 (describing referrals by William Baird in New York); K. Luker, *supra* note 8, at 98 (describing Society for Humane Abortion, which, during early 1960s in California, referred women to abortion providers in Mexico); *id.* at 122-23 (describing California referral network including clergy in late 1960s); *id.* at 243 n.* (discussing evidence that Mafia considered entering the abortion field during 1960s); Bernard N. Nathanson with Richard N. Ostling, *Aborting America* 42-44 (1979) (providing less admiring account of Clergy Consultation Service, claiming 1,200 counselors "at its zenith"); G. Rosenberg, *supra* note 12, at 259-60 (by 1971, Clergy Consultation Service operated in 18 states with a staff of about 700); Pauline B. Bart, *Seizing the Means of Reproduction: An Illegal Feminist Abortion Collective—How and Why It Worked*, 10 *Qualitative Soc.* 339, 339-40 (1987) (describing counseling service established in 1969 by Chicago Women's Liberation Union, which evolved by 1971 into program which itself provided illegal abortions).

¹⁴ See, e.g., Marianne Constantinou, *Railroad a Ticket to Abortion*, *Philadelphia Daily News*, May 27, 1992, at 3 (claiming that there are currently 300 volunteers in 31 states ready to form "overground railroad" to provide transportation to states where abortion is legal); cf. Jodi Enda, *N.J. Centers Expect an Influx from Pa.*, *Philadelphia Inquirer*, June 30, 1992, at 1 (observing that referrals to New Jersey expected to avoid 24-hour waiting period and parental consent requirements in Pennsylvania); Tamar Lewin, *Parental Consent to Abortion: How Enforcement Can Vary*, *N.Y. Times*, May 28, 1992 at A1 (noting that Indiana abortion clinics advise teenagers seeking abortions without parental consent to go to neighboring Kentucky or Illinois, and that 100 teenagers a month have sought abortions outside Massachusetts to avoid parental consent requirements of that state).

¹⁵ John Kaplan, *Abortion as a Vice Crime: A What If Story*, 51 *Law & Contemp. Probs.*, 151, 159 (Winter 1988) (footnote omitted); see also Bart, *supra* note 13, at 341 (observing that middle-class women seeking abortions frequently went to other states once abortion became legal there, while "poor Black women" and other poor women continued to seek abortions locally); N. Davis, *supra* note 8, at 199 (noting that non-residents making use of New York abortion availability were 87.2% white, in contrast to in-state users, of whom 44.9% were white, and that "[o]ut-of-state travel costs prevented most poor minorities from using the new abortion broker arrangements"); Carole Joffe, *Physician Provision of Abortion Before Roe v. Wade*, 9 *Res. in the Soc. of Health Care* 21, 28-30 (1991) (recalling that abortions before *Roe*

in the interests of realism, that the marginal reduction likely would come as well from among women who are young, uninformed, dependent, or otherwise vulnerable.¹⁶ The narrowing of constitutional protections in *Casey* is likely to be blunted in a similar fashion. The reduction in the number of abortions performed will be limited and restricted to certain segments of the population; most women in states with restrictive regulations who wish to evade the restrictions upheld in *Casey* will simply travel to neighboring states.

This situation, I suspect, will be deeply unsatisfying to zealous abortion opponents. In the early 1970s, the United States witnessed numerous state efforts to disrupt referral networks. States prosecuted counselors,¹⁷ travel agents,¹⁸ doctors,¹⁹ and newspaper editors²⁰ who

were more readily available to women with resources or contacts, while "poor, young and minority women" were "disproportionately . . . vulnerable"; Tietze & Lewit, *supra* note 9, at 172 (non-resident women obtaining abortions more likely to be white than resident women obtaining abortions). In the most extensive study of pre-*Roe* illegal abortions, Nancy Howell Lee concluded that "competent doctors make their services discreetly available to their middle class patients and the informal networks circulate this information among people similar in background, while poor women find only nonphysicians or self-induced methods available to them." N. Lee, *supra* note 9, at 168-69.

¹⁶ Cf. K. Luker, *supra* note 8, at 242-43 (predicting that "nominally illegal" abortion would still be obtainable by those with "the right combination of money and information"); James D. Shelton et al., *Abortion Utilization: Does Travel Distance Matter?*, 8 *Fam. Plan. Persp.* 260, 262 (1976) (noting that negative correlation between abortion rates and distance from abortion facilities in Georgia strongest for black teenagers).

On the barriers before *Roe*, see N. Davis, *supra* note 8, at 163-70 (claiming that women seeking abortions typically had to go through four intermediaries); N. Lee, *supra* note 9, at 155 (indicating that networks of contacts crucial for access to abortion). Survey data in Steven Polgar & Ellen S. Fried, *The Bad Old Days: Clandestine Abortions Among the Poor in New York City Before Liberalization of the Abortion Law*, 8 *Fam. Plan. Persp.* 125, 125-26 (1976) suggest that, at least among the women of childbearing age in poverty areas surveyed in 1965 and 1967, only 4% knew of a physician who could provide an abortion. Of those women who sought to terminate pregnancy only 2% used doctors, and 80% attempted to terminate themselves. *Id.*

¹⁷ See, e.g., *Landreth v. Hopkins*, 331 F. Supp. 920, 921-22 (N.D. Fla. 1971) (involving investigation and threatened prosecution of Tallahassee abortion counselors who referred women for legal abortions in New York); *People v. Orser*, 107 Cal. Rptr. 458, 462-64 (Cal. Ct. App. 1973) (striking down conviction for offering to make arrangements for Mexican abortion); *Commonwealth v. Hare*, 280 N.E.2d 138, 139 (Mass. 1972) (prosecution of operator of Cleveland abortion referral service for referring women to abortions in Massachusetts); *Lefkowitz v. Women's Pavilion*, 321 N.Y.S.2d 963, 964 (Sup. Ct. 1971) (Attorney General's effort to subpoena abortion referral service's records in criminal investigation); *State v. Abortion Info. Agency*, 323 N.Y.S.2d 597 (Sup. Ct. 1971) (granting injunction against abortion referral service), *aff'd*, 334 N.Y.S.2d 174 (1972); *People v. Lovell*, 242 N.Y.S.2d 958 (Oneida County 1963) (partially granting defendant's motion to access grand jury records in prosecution for abortion referral); *A. Carmen & H. Moody*, *supra* note 13, at 55-56 (recounting Massachusetts' efforts to prosecute Ohio pastor for referring Ohio woman for abortion in Massachusetts, as well as Michigan indictment of Illinois rabbi for referring Illinois woman for abortion in Detroit); L. Lader, *Abortion II*, *supra* note 9, at 74-76 (describing Massachusetts's efforts to extradite Cleveland minister for referral to Massachusetts doctor); *id.* at 76-77 (detailing Michigan's efforts to prosecute Chicago rabbi for referral to Michigan doctor using undercover

provided information or referrals regarding out-of-state abortions. Contemporary European governments intent on limiting abortion have taken the process a step further.

Ireland has sought to bar Irish women from leaving the country in order to prevent them from taking advantage of more liberal abortion laws elsewhere in the European Community. Its courts have enjoined student health groups and women's health clinics from proffering information about legal abortion providers in England,²¹ while Irish prosecu-

agents and searches of rabbi's files).

¹⁸ Cf. *State v. Bartlett*, 270 A.2d 168, 171 (Vt. 1970) (prosecution for transporting woman from Vermont to Montreal to obtain abortion); *Ads for London Abortions Stir Legal Questions*, N.Y. Times, January 26, 1970, at 20 (effort by Massachusetts authorities to prevent advertising by agency offering to arrange for transportation to and from abortion clinics in England); *Lawyer Pleads Not Guilty in Abortion Package Deal*, N.Y. Times, February 3, 1970, at 40 (prosecution of that agency).

¹⁹ See *People v. Belous*, 458 P.2d 194, 195-96, 206 (Cal. 1969) (prosecution of doctor who referred patients to medical practitioners in Mexico and California for "conspiracy to commit abortion"), cert. denied, 397 U.S. 915 (1970); cf. *Kudish v. Bd. of Registration in Medicine*, 248 N.E.2d 264, 265-66 (Mass. 1969) (revoking medical license of physician convicted for providing an unlawful abortion).

²⁰ See *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975) (reversing newspaper editor's conviction); cf. *Atlanta Coop. News Project v. United States Postal Serv.*, 350 F. Supp. 234, 238-39 (N.D. Ga. 1972) (striking down federal statute prohibiting mailing of any writing giving information as to how, where, or from whom abortion could be performed); *State v. New Times, Inc.*, 511 P.2d 196, 198 (Ariz. Ct. App. 1973) (holding unconstitutional Arizona's prosecution of newspaper for publishing abortion advertisements).

I do not address in this paper the problem of private efforts to disrupt referral networks. Depending on the resolution of *Bray*, only state remedies may be available, although presumably out-of-state providers could invoke federal diversity jurisdiction. See *Bray v. Alexandria Women's Health Clinic*, cert. granted, 111 S. Ct. 1070 (Feb. 25, 1992) (No. 90-985), reargument ordered, 122 S. Ct. 2935 (June 8, 1992). Since the right to travel has no state action requirement, it might be technically possible to bring a *Bivens* action against private parties.

²¹ *SPUC v. Grogan*, [1989] I.R. 753, 766, [1990] 1 C.M.L.R. 689, 700 (Ir. S. C. Dec. 19, 1989) (granting injunction against student counseling); *Attorney Gen. ex rel. SPUC v. Open Door Counselling, Ltd.*, [1988] I.R. 593, 627 [1988] 2 C.M.L.R. 443, 452 (Ir. S. C. Mar. 16, 1988) (confirming injunction against assisting pregnant women in Ireland from traveling abroad to obtain abortions, including assistance in form of supplying the identity or location of abortion providers).

In *SPUC v. Grogan*, [1991] 3 C.M.L.R. 849, the European Court of Justice held that an injunction against the dissemination of the location of overseas abortion providers by an Irish student group was not an improper restriction on free flow of goods and services under the Treaty of Rome, which established the European Community. On the other hand, in that case the Advocate General expressed the view that a "ban on pregnant women going abroad or a rule under which they would be subjected to unsolicited examinations upon their return" would violate the Treaty of Rome as a "disproportionate" interference with free travel rights. See *id.* at 875, 885. The judgment of the Court left the question open. The Advocate General also suggested that the Irish prohibition would not infringe on free speech rights, see *id.* at 883-84, but the European Court declined to reach the issue. Elizabeth Spahn, *Abortion, Speech and the European Community*, 1 J. Soc. Welfare & Fam. L. 17, 26 (1992).

The European Commission of Human Rights in *Open Door Counselling, Ltd. v. Ireland*, 7 March 1991 Application No. 1434/88 and 1435/88, expressed the opinion that an injunction against abortion counseling entered by the Irish Supreme Court, [1988] I.R. 593, violated the

tors unsuccessfully sought to prevent a fourteen-year-old rape victim from traveling to England to obtain an abortion.²²

Some German authorities adopted a different tack under the former West German abortion law, seeking to impose domestic criminal penalties on women for obtaining abortions in more permissive countries. German border guards forced gynecological examinations upon women reentering Germany at the Dutch border in the search for evidence of extraterritorial abortions, while prosecutors brought criminal charges against German women upon their return from abortions obtained in other European countries with more permissive laws.²³

free speech guarantees of Article 10 of the European Human Rights Convention. The judgment was based on a failure by Ireland to provide adequate notice. Report of The Commission 13; see also *Grogan*, 3 C.M.L.R. at 882. The European Court of Human Rights recently held that Ireland's ban on information about abortions in the U.K. violated Article 10 because the restriction was disproportionate to the aim pursued. See *Freedom to Receive and Impart Information Violated by Ireland*, London Times, Nov. 5, 1992, available in LEXIS, Nexis Library, INTL File; European Court of Human Rights Court Rules for Pro-Choice Activists, United Press International. Oct. 29, 1992, available in LEXIS, Nexis Library, UPI File.

²² The Irish Supreme Court reversed an injunction prohibiting a fourteen-year-old rape victim from traveling to England to obtain an abortion. Four of the five members of the Irish Supreme Court held that in this particular case, the danger of suicide made the abortion one that could be performed in Ireland itself. *Attorney Gen. v. X*, [1992] ILRM 401 (Ir. S. C. Mar. 5, 1992), available in LEXIS, Ireland Library, Cases File (opinions of Justices Finley, McCarthy, Eagan, and O'Flaherty). It appears, however, that the judgment does not loosen the constraints on referrals in other cases, and indeed three of the Justices explicitly rejected the proposition that there is a right to leave the country to obtain an abortion that would be impermissible in Ireland (opinions of Justices Finley, Hederman (dissenting) and Eagan).

The Irish efforts have not eliminated foreign abortions. See Anthony Blinken, *Womb for Debate*, New Republic, July 8, 1991 at 12 (citing estimate by "France's Family Planning Movement, a pro-choice group" of "some 15,000" Irish women per year receiving abortions); Kieran Cooke, *European Diary*, Ireland, Doubts Over a Small Dublin Hospital Recall a Great Poet's Warning, Financial Times (London), July 26, 1990, § I, at 2 (asserting that "many thousands of . . . women travel to England each year" from Ireland to have abortions, and that recent court judgments make counselors liable to prosecution); Chris Ryder, *Irish Torn Over Abortion Ban on Rape Girl*, Daily Telegraph (Ireland), Feb. 14, 1992, at 4 (estimating that 6,000 Irish women per year travel to England for abortions); William E. Schmidt, *Girl, 14, Raped and Pregnant, Is Caught in Web of Irish Law*, N.Y. Times, Feb. 18, 1992, at A1, A7, A13 (estimating that 4,000 Irish women per year travel to England or Wales for abortions).

There are also reports that thousands of French women per year also obtain extraterritorial abortions. Blinken, *supra*, at 12 (estimating that almost 3,000 French women travelled to Britain in 1989 to obtain abortions which would have been illegal in France).

²³ See *Debates*, 1991 O.J. (Annex 3-403) 202-205 (Mar. 14, 1991) (*Debates of European Parliament*) (debate on resolutions condemning compulsory gynecological examinations by German officials of returning German women at the Dutch-German border); *id.* at 203 (statement of Rep. Van Den Brink) ("over 6000 German women have had . . . abortion[s] in the Netherlands"); *id.* at 204 (statement of Rep. Keppelhoff-Wiechert) (defending searches on the ground that officials "are required by the code of criminal procedure to investigate illegal abortions of this kind carried out abroad where there are grounds for suspecting that such has been committed . . ."); see also Karen Y. Crabbs, *The German Abortion Debate: Stumbling Block to Unity*, 6 Fla. J. Int'l L. 213, 222-23 & n.103 (1991) (account of prosecutions, searches, and examinations of returning German women); Nina Bernstein, *Germany Still Di-*

In the United States, constitutional doctrine that developed contemporaneously with *Roe* put an end to such government interdiction. In *Doe v. Bolton*,²⁴ the Court held that article IV's privileges and immunities clause protected out-of-state women who entered Georgia in order to seek abortions. Under article IV, Georgia could not prohibit doctors from providing abortions to non-residents.²⁵ Two years later, in *Bigelow v. Virginia*,²⁶ the Court overturned a Virginia newspaper editor's conviction for running an advertisement for a New York abortion referral service. Because the services were legal in New York at the time, the Court announced, in an opinion from which Justices White and Rehnquist dissented, that

[t]he Virginia Legislature could not have regulated the advertiser's activity in New York, and obviously could not have proscribed the activity in that state. . . . Neither could Virginia prevent its residents from traveling to New York to obtain those services, or, as the state conceded, prosecute them for going there. Virginia possessed no authority to regulate the services provided in New York²⁷

vided on Abortion, *Newsday* (New York), March 11, 1991, at 5 (providing account of German woman returning from Netherlands who was forced to submit to vaginal examination at Catholic hospital near border and charged with illegal abortion; noting that study by Max Planck Institute finds that such "inquisitions" are "standard practice"). The European Parliament condemned the searches and resolved that "the internal borders of the European Community may not be used to threaten citizens with prosecution for activities that are perfectly legal in some Members States but not in others." Resolution on Compulsory Gynecological Examinations at the Dutch-German Border of March 14, 1991, 1991 O.J. (C 106) 113.

Because the national German prohibition on abortion was administered with varying degrees of stringency by state authorities, over half of the women who obtained abortions in West Germany before German reunification travelled out of their own states to obtain abortions in more liberal jurisdictions. Michael G. Mattern, *German Abortion Law: The Unwanted Child of Reunification*, 13 *Loyola L. A. Int'l & Comp. L.J.* 643, 686 & n.360 (1991). With reunification, the decision to retain East Germany's substantially more permissive abortion law within the old East German borders provided the option of travelling to East Germany as well. *Id.* at 686; cf. Tyler Marshall, *Abortion Law Split Imperils German Talks*, *L.A. Times*, August 28, 1990, at A4 (indicating that after unification, Christian Democrats sought to apply law of place of residence to punish West German women who obtained abortions in former East Germany).

The conflict in Germany may be ameliorated by the new liberalized uniform abortion law which the unified German legislature has adopted, although conservatives have vowed to challenge the law. Tamara Jones, *Abortion is Legalized in Germany*, *L.A. Times*, June 26, 1992, at A10.

²⁴ 410 U.S. 179, 200 (1973).

²⁵ See *id.* The Court also adverted to the right to travel relied on in *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969). See *id.*

²⁶ 421 U.S. 809 (1975).

²⁷ *Id.* at 822-24 (citations omitted). Professor Donald Regan, in *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 *Mich. L. Rev.* 1865, 1907 (1987) [hereinafter Regan, *Siamese Essays*], seeks to treat these statements as dicta, asserting that "there is no ground for claiming [Justice Blackmun's] actual argument depends on such a premise."

Characterizing the *Bigelow* principle as dictum is a dubious move. At oral argument in

Bigelow might seem dispositive on the question of state interdiction or prosecution of women's travel to sympathetic jurisdictions.²⁸ One difficulty with such a quick conclusion, of course, is that, under the Rehnquist Court, reliance on previous decisions has become a somewhat hazardous enterprise.²⁹ More is at stake, however, than the vitality of precedent under a new regime.

Justice Rehnquist's dissent in *Bigelow* accused the majority of establishing a "rigid territorial limitation" whose source was "not revealed" and which was "at war with prior cases."³⁰ *Bigelow* has been criticized as being out of step with modern thinking in conflict of laws, which tends to recognize residence rather than territoriality as the primary determinant of legal obligation.³¹ Working from what they regard as general

Bigelow, the state conceded under questioning that it could not regulate abortions performed in New York. Transcript of Oral Argument at 29, *Bigelow v. Virginia*, 421 U.S. 809 (1975) (statement of D. Patrick Lacy, Assistant Attorney General of Virginia). Not only did lower courts treat the *Bigelow* determination as a holding in the year before Professor Regan wrote, see, e.g., *Florida Dep't of Health and Rehabilitative Servs. v. Friends of Children, Inc.*, 653 F. Supp. 1221, 1227 (N.D. Fla. 1986) (reading state statute so as not to permit extraterritorial jurisdiction of Florida legislature), but Justice Rehnquist in *Posadas de P.R. Assoc. v. Tourism Co.*, 478 U.S. 328, 345 (1986), distinguished *Bigelow* from a limitation on advertising for domestic gambling on the ground that "the underlying conduct that was the subject of the advertising restrictions [in *Bigelow*] was constitutionally protected and could not be prohibited by the state." As the *Bigelow* Court observed, the underlying for-profit referral services which were at issue in *Bigelow* were subsequently declared illegal by New York, and were not themselves constitutionally protected against regulation by New York. *Bigelow*, 421 U.S. at 822 n.8, 827. The only "constitutional protection" which serves to distinguish *Bigelow* is the protection against extraterritorial regulation of conduct legal where it occurs.

²⁸ See Kaplan, *supra* note 15, at 160 & n.60 (citing *Bigelow* for proposition that a state cannot prevent its citizens from receiving out-of-state abortions "by inhibiting information as to where out-of-state abortions may be performed").

²⁹ See, e.g., *Payne v. Tennessee*, 111 S. Ct. 2597, 2609-11 (1991) (declaring *stare decisis* less compelling in constitutional than in statutory cases). A quick body count this Term finds constitutional precedent still standing after challenges in *Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1907 (1992); *Allied Signal, Inc. v. Director, Div. of Taxation*, 112 S. Ct. 2251, 2261-63 (1992); *Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2213 (1992); *Hilton v. South Carolina Pub. Rys. Comm.*, 112 S. Ct. 560, 563-64 (1991); and *Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992). Constitutional precedent was wounded, but remained viable, in *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2808-16 (1992); and *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2551 (1992) (White, J., concurring) (majority "casts aside long established First Amendment doctrine"). Cases which left precedent critically injured include: *Foucha v. Louisiana*, 112 S. Ct. 1780, 1791-94 (1992) (Kennedy, J., dissenting) (accusing majority of "overruling without mention" recent precedent); *New York v. United States*, 112 S. Ct. 2408, 2441-44 (1992) (White, J., concurring in part and dissenting in part) (majority opinion's rule is inadequately supported, improperly applies prior test, and omits relevant cases); and *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2904 (1992) (Blackmun, J., dissenting) (majority opinion remakes traditional rules of review and creates new rules).

³⁰ *Bigelow*, 421 U.S. at 834 & 835 n.2.

³¹ It has not been uncommon for modern conflict of laws scholars to assert that a state has unlimited authority over its citizens extraterritorially. See, e.g., Mark P. Gergen, *Equality and the Conflict of Laws*, 73 Iowa L. Rev. 893, 907 n.94 (1988) ("States may punish citizens for criminal acts done outside the state." (citation omitted); *Bigelow* is the "only decision calling

principles, at least two commentators have argued that if *Roe* were removed, there would be no constitutional obstacle to states' efforts to prohibit their citizen's extraterritorial abortions.³²

The reach of these arguments transcends the context of abortion. As the Supreme Court withdraws from its position as arbiter of fundamental national values, we can expect a state-by-state patchwork to

into question the extraterritorial authority over citizens . . ."). This conclusion is compounded by the contemporary reaction against the territorialism of earlier conflicts methodology and the uncritical application of the international law principles which permit the United States to apply its own law outside of national boundaries. As this Article will demonstrate, the first element fails to take account of a strong tradition of American federalism which territorially limits state criminal authority, and the second ignores the differences between international and interstate relations under the American Constitution.

³² Professor William Van Alstyne, in his essay *Closing the Circle of Constitutional Review from Griswold v. Connecticut to Roe v. Wade: An Outline of Decision Merely Overruling Roe*, 1989 Duke L.J. 1677, 1684 n.27, takes the position, without mentioning *Bigelow*, that "nothing in the constitution would hold it amiss" if a state sought to prosecute one of its female citizens for an extraterritorial abortion. Professor Van Alstyne relies on *Williams v. North Carolina*, 325 U.S. 226, 238-39 (1945), which permitted a prosecution for bigamous cohabitation to proceed against North Carolina residents divorced and remarried in Nevada, who returned to live together in North Carolina.

Williams is not on point, for the cohabitation which formed the basis for the prosecution took place within the borders of North Carolina. *Id.* at 227 n.1. Indeed, North Carolina courts have long held that a statute seeking to punish a resident for a bigamous marriage which took place in another state would exceed the constitutional authority of the state, and impinge on federally guaranteed constitutional rights. See *State v. Batdorf*, 238 S.E.2d 497, 502 (N.C. 1977) (discussing long recognition of territorial limits on criminal jurisdiction of state courts); *State v. Ray*, 66 S.E. 204, 205 (N.C. 1909) (bigamous marriage outside state not indictable offense); *State v. Cutshall*, 15 S.E. 261, 264 (N.C. 1892) (state statute proscribing bigamous marriage in another state implicates federal vicinage rights, privileges and immunities, and unconstitutionally burdens interstate commerce). In response to the constitutional limitations, North Carolina amended its laws to make cohabitation within its own borders the basis for prosecution. *State v. Herren*, 94 S.E. 698, 699 (N.C. 1917). Thus, if the facts of *Williams* stand for anything, it is that the constraints of due process and federalism *would* hold it very much amiss for a state to seek to prosecute for an extraterritorial act. See also Thomas Reed Powell, *And Repent at Leisure, An Inquiry into the Unhappy Lot of Those Whom Nevada Hath Joined Together and North Carolina Hath Put Asunder*, 58 Harv. L. Rev. 930, 994 (1945) ("North Carolina did not punish this couple for anything that they did outside of North Carolina North Carolina's statute does not forbid the getting of an outside divorce, and the unbiased sampler will find no flavor in the Court's opinion suggesting that North Carolina has the power to do so.").

Professor Donald Regan in the course of a broader discussion of extraterritoriality, treats *Bigelow's* protection as dictum, and announces his "stronger intuition" that "if *Roe v. Wade* were overruled, states would be free to forbid their citizens from having abortions elsewhere." Regan, *Siamese Essays*, supra note 27, at 1906-12. Still other commentators differ on the possibility of such an occurrence. Compare Laurence H. Tribe, *Abortion, The Clash of Absolutes* 127 (1990) (asserting that if the Constitution permitted a state to regard the fetus as a baby, the state in which a woman conceived could forcibly restrain her from traveling to a more permissive state to obtain an abortion) with Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 260 (1992) ("[N]o state has yet tried to prosecute resident women who undergo abortions out of state, or even forbid insurance coverage for such abortions, and perhaps none will.").

emerge in other domains of contested morality. Where the contesting moralities are deeply held, we can also expect efforts by each side to project its values extraterritorially. 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.³³ Georgia could punish its residents for traveling to Missouri to engage in consensual sexual practices, while Missouri might interfere with its citizens' efforts to take advantage of a right to die in Minnesota.³⁴ 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.³⁵

There are, as I will demonstrate in this Article, profound objections of constitutional practice and theory to such scenarios.³⁶ Despite the claims of Justice Rehnquist and some modern commentators, *Bigelow* is a case with strong foundations. The tradition of American federalism stands squarely against efforts by states to punish their citizens for conduct that is protected in the sister state where it occurs. The Framers of the fourteenth amendment inherited a legal landscape in which a state's sovereignty was limited to its own borders, and they established a supervening national citizenship which guaranteed the right to travel and to take advantage of the legal entitlements of neighboring jurisdictions.

³³ Cf. Susan Frelich Appleton, *Surrogacy Arrangements and the Conflict of Laws*, 1990 Wis. L. Rev. 399, 444-52 (concluding such prosecution would be an "unfamiliar, untested, and perhaps constitutionally problematic experiment").

³⁴ See *In re Busalacchi*, No. 59582, 1991 Mo. App. LEXIS 315, at *13-*16 (Ct. App. Mar. 5, 1991) (order prohibiting guardian from transferring ward who was in persistent vegetative state to Minnesota hospital because of perception that he was doing so to avoid Missouri's law and remanding for further hearings), remanded, 1991 Mo. LEXIS 107, *1 (Mo. Oct. 16, 1991).

³⁵ Cf. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 694 (1984) (invalidating state regulation requiring cable television operators to delete all advertisements for alcoholic beverage appearing in out-of-state signals retransmitted within state).

³⁶ I frame my arguments primarily in terms of the text, history, and structure of the Constitution. I leave for a future article the enterprise of elaborating more fully the theoretical underpinnings of the constitutional argument and their relation to the theories of conflict of laws.

Support for my position comes from unlikely sources. See, e.g., Brief for United States Amicus Curiae Supporting Petitioners, *Bray v. Alexandria Women's Health Clinic*, cert. granted, 111 S. Ct. 1070 (No. 90-985) (Feb. 25), reargument ordered, 112 S. Ct. 2935 (June 8, 1992) ("For a State either to 'prevent' its citizens from travelling to another State, or to prosecute them after-the-fact for making such a trip, would directly and purposefully interfere with their right of interstate travel . . .").

This Article also focuses on the question of direct prohibition of travel for extraterritorial abortions, since the premise of the *Bigelow* decision, at least as interpreted by *Posadas*, is that prohibition of advertising is impermissible because prohibition of extraterritorial abortions is unconstitutional. Having established the arguments for the *Bigelow* premise in this Article, I hope to address in a future article the *Bigelow* result and the associated first amendment issues that arise from efforts to interfere with referral networks.

Modern cases have modified, but not eliminated, this basic scheme. Even if the Court withdraws its protection of extra-textual constitutional liberties under the due process clause, that withdrawal does not vitiate the obligations national citizenship imposes on the states. Indeed, if the Court's decision to abandon protection of reproductive autonomy rests on the ground that constitutional decisions must take account of the "relevant tradition protecting, or denying protection to, the asserted right,"³⁷ the Court, if it is to be consistent, must also defer to our traditions of moral pluralism and mobility among states.

American citizens may be subject to different moral agendas in different locations. This is the essence of American federalism. But federalism does not entail a moral Balkanization, in which competing moral agendas seek without restraint to conquer foreign territories; it should not be a system in which citizens carry home-state law with them as they travel, like escaped prisoners dragging a ball and chain.

This Article is divided into two Parts. Part I discusses the constraints that the structure of the American federal system and respect for neighboring states impose on states that seek to regulate the extraterritorial behavior of their citizens. It examines the history of extraterritorial regulation, beginning with a review of the strict conception of territorial jurisdiction which accompanied the framing of the Constitution and the fourteenth amendment, and which long dominated judicial review of state efforts to regulate the extraterritorial behavior. It then traces the dilution of these limitations from the New Deal to recent decades. It concludes that, particularly in criminal cases, the principle that states must respect the disparate moral commitments of other states regarding behavior in neighboring territories remains intact. Efforts to prosecute citizens for taking advantage of opportunities made available in other states violate this principle.

Part II discusses the constraints on states that inhere in the constitutional commitments to national union and national citizenship. It argues that state efforts to control the interstate movement of citizens and services in order to limit the ability of citizens to enjoy the full benefits made available in neighboring states would be inconsistent with both the commerce clause and the privileges and immunities clause of article IV.

³⁷ *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2874 (1992) (Scalia, J., dissenting); see also *id.* (abortion "is not constitutionally protected—because . . . the longstanding traditions of American society have permitted it to be legally proscribed"); *id.* at 2876 (abortion cannot be protected because it is conduct which has "long been criminalized in American society"); *id.* at 2859 (Rehnquist, J., dissenting) (fundamental right must be linked to the "historical traditions of the American people").

I

MORAL DISSENSUS AND TERRITORIAL JURISDICTION
IN A FEDERAL REPUBLIC*A. The First Republic and Territorial Jurisdiction*

Moral dissensus is not new to America. The most prominent example in the period of our founding centered on the question of slavery. From the origins of the Republic, disparate commitments regarding the morality of slavery threatened national cohesion, and in turn were threatened by it.³⁸ The equilibrium reached in the first period of American history apportioned each state moral sovereignty within its own boundaries and obliged neighboring states to accede to that sovereignty.³⁹

The Constitution was framed on the premise that each state's sovereignty over activities within its boundaries excluded the sovereignty of other states. The understanding that a citizen of one state venturing into another state would be bound by the local law of that other state motivated the adoption of article IV's privileges and immunities clause;⁴⁰ it was necessary to guarantee that the host would not use its exclusive power to the detriment of visitors from other states in the Union. The fugitive slave clause⁴¹ was tacit recognition that, absent constitutional constraint, local law could emancipate slaves who found their way across borders whatever the rules in their home state.⁴² On the other hand, the

³⁸ In the Constitutional Convention, Madison contended "the States were divided into different interests not by their difference of size . . . but principally from the effects of their having or not having slaves." Notes of Debates in the Federal Convention of 1787 Reported by James Madison 224 (Adrienne Koch ed., 1966) [hereinafter *Federal Convention Debates*]. See generally Paul Finkelman, *An Imperfect Union* 22-40 (1981) (discussing impact of slavery at Constitutional Convention).

³⁹ See P. Finkelman, *supra* note 38, at 15 ("The third option, which most states ultimately adopted, was the enforcement of the *lex fori* (law of the forum) and rejection of the *lex loci* (law of the state of residence) of the slaves involved."); Joseph Story, *Commentaries on the Conflict of Laws* 116 (1846) ("foreign slaves would no longer be deemed such after their removal [to free states]").

⁴⁰ U.S. Const. art. IV, § 2, cl. 1.

⁴¹ U.S. Const. art. IV, § 2, cl. 3.

⁴² Cf. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 612 (1842) (Story, J.) ("if the constitution had not contained [the fugitive slave clause,] every non-slave-holding state in the Union would have been at liberty to have declared free all runaway slaves coming within its limits"); *id.* at 648 (Wayne, J.) (absent fugitive slave clause, escaped slaves could be freed in North Carolina (quoting Iredell, J., addressing North Carolina Convention)).

In the Constitutional Convention, Charles Pinckney first sought to qualify rights of the host state under the privileges and immunities clause by including a protection "in favor of property in slaves," an effort which was rejected. See *Federal Convention Debates*, *supra* note 38, at 545. He then, along with Pierce Butler, sought to insert the fugitive slave clause. *Id.* This effort succeeded the next day. *Id.* at 552. See generally P. Finkelman, *supra* note 38, at 35 (discussing reasons why Pinckney and other slaveholders at the Convention would have

extradition clause of article IV, providing that an accused who flees from the state where a crime is committed be "delivered up, and removed to the state having jurisdiction of the crime," acknowledged that the sole responsibility and prerogative for punishment rests with the state within which the crime occurred.⁴³

This limitation of jurisdiction to territory was more than a recognition of the structure of sovereignty. For statesmen who had claimed that British efforts "depriving us in many cases, of the benefits of Trial by Jury" and "transporting us beyond Seas to be tried for pretended offenses"⁴⁴ were grounds for revolution, the right to be tried by a jury of the vicinage—the place where the crime had been committed—functioned as a bulwark against tyranny.⁴⁵

been concerned about free movement of masters with their slaves).

⁴³ U.S. Const. art. IV, § 2, cl. 2. Cf. Letter of James Madison to Edmund Randolph (Mar. 10, 1784), 4 Founders' Constitution 517 (Philip B. Kurland & Ralph Lerner eds., 1987) ("Unless Citizens of one State transgressing within the pale of another be given up to be punished by the latter, they cannot be punished at all."). Madison was discussing the demand by South Carolina that Virginia extradite a Virginia citizen for an assault in South Carolina; his assumption was that Virginia would have no authority to punish its citizens for extraterritorial wrongs.

Professor Laycock argues forcefully that, as a matter of constitutional law, "state authority is in fact divided territorially. . . . State boundaries do what ordinary citizens think they do: divide the authority of separate sovereigns." Laycock, *supra* note 32, at 320. As well as relying on political thought of the Framers and their opponents, *id.* at 315-16, he observes, *inter alia*, that the prohibition in art. IV, § 3, cl. 1 of forming new states "within the jurisdiction of any other state" equates jurisdiction with territory. *Id.* at 317.

⁴⁴ The Declaration of Independence para. 23, 24 (U.S. 1776), reprinted in 4 Founders' Constitution, *supra* note 43, at 390; *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968) (quoting Declaration).

⁴⁵ At common law, a crime could be prosecuted only before a jury from the county in which the crime occurred. See William Wirth Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 Mich. L. Rev. 59, 60-61 (1944); Drew L. Kershen, *Vicinage*, 29 Okla. L. Rev. 801, 803 (1976). British threats in 1769 to extradite colonial trouble makers from Massachusetts for trial in England drew immediate and unanimous outrage from colonial legislatures. For example, the Virginia House of Burgesses, in a resolution passed in 1769, decried the practice as "highly derogatory of the Rights of *British* subjects; as thereby the inestimable Privilege of being tried by a Jury from the Vicinage . . . will be taken away from the Party accused." Blume, *supra*, at 64; Kershen, *supra*, at 814-15. In 1774, the Continental Congress asserted the "great and inestimable privilege of being tried by their peers of the vicinage," and claimed that a British Act which authorized violations of the act occurring outside the realm to be tried "in any shire or county within the realm" deprived Americans of "a constitutional trial by jury of the vicinage." Continental Congress Declaration and Resolves 14 Oct. 1774 in 5 Framers' Constitution, *supra* note 32, at 258.

According to Madison, it was the "uniformity of trial by Juries of the vicinage" among the states which made extradition under the Articles of Confederation to the place where the crime occurred palatable.

The transportation to G[reat] B[ritain] seems to have been reprobated on very different grounds: it would have deprived the accused of the privilege of trial by jury *of the vicinage* . . . and have exposed him to trial in a place where he was not even alleged to have ever made himself obnoxious to it.

Letter of James Madison to Edmund Randolph 4 (Mar. 10, 1784), 4 Founders' Constitution,

The guarantee of a jury local to the site of the alleged crime was also embodied in article III's requirement that, for federal offenses, "[t]he trial of all Crimes . . . shall be held in the State where said Crimes shall have been committed."⁴⁶ As the Supreme Court has noted, fears "that Article III's provision failed to preserve the common law right to be tried by a 'jury of the vicinage' . . . furnished part of the impetus for introducing amendments to the Constitution that ultimately resulted in the jury trial provisions of the Sixth Amendment"⁴⁷ The sixth amendment now guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed"⁴⁸

The strains of moral dissensus survived the framing, and the constitutional pattern of exclusive territorial sovereignty came into play immediately. In 1791, Pennsylvania demanded of Virginia the extradition of three Virginia residents charged by Pennsylvania with kidnapping a free black man from within its borders; the victim was subsequently sold into slavery. Against a background of abolitionist activity in Pennsylvania, Virginia refused to recognize Pennsylvania's right to punish Virginia residents, even though the kidnapping had taken place in Pennsylvania. The intervention of President Washington and the Congress, responding with legislation that implemented the article IV extradition clause, ultimately tempered Virginia's intransigence.⁴⁹

By the time of the Civil War, the territorial equilibrium remained. In *Kentucky v. Dennison*,⁵⁰ a unanimous Supreme Court retained the principle that the law at place of commission determined criminality, and held that the principle worked in favor of slavery as well as freedom.

supra note 43, at 390.

⁴⁶ U.S. Const. art. III, § 2, cl. 3. Article III also provides for cases in which the federal crime is committed outside of state territory. This may either simply indicate that it was contemplated that the United States would hold sovereignty over territory not within any state, or that the nation, unlike the states, could expect to exercise extraterritorial jurisdiction in international cases.

⁴⁷ *Williams v. Florida*, 399 U.S. 78, 93-94 (1970) (citations omitted).

⁴⁸ U.S. Const. amend. VI.

⁴⁹ See *California v. Superior Court*, 482 U.S. 400, 407 (1987) (describing the Pennsylvania-Virginia dispute). Accounts of the imbroglio are also contained in P. Finkelman, supra note 38, at 6; 2 John Codman Hurd, *Law of Freedom and Bondage in the United States* 386-87 (1862); James Alexander Scott, *Law of Interstate Rendition* 5-9 (1917); Correspondence in 9 National State Papers of the United States 1789-1817, pt. II, 140-46 (Eileen Daney Carzo ed., 1985); William R. Leslie, *A Study in the Origins of Interstate Rendition: The Big Beaver Creek Murders*, 57 *Am. Hist. Rev.* 63, 66-76 (1951).

Although Virginia took the position that extradition was unnecessary because Virginia possessed jurisdiction to punish its citizens for acts committed in Pennsylvania, United States Attorney General Randolph responded that "[i]t is notorious that the crime is cognizable in Pennsylvania; for crimes are peculiarly of a local nature." Leslie, supra, at 72.

⁵⁰ 65 U.S. (24 How.) 66 (1861).

Faced with Kentucky's demands that Ohio extradite a free black man whom Kentucky accused of assisting in the escape of a slave, the Court held that Ohio's anti-slavery commitments failed to justify its refusal to honor Kentucky's criminal law.⁵¹ The assistance, though praiseworthy in Ohio, was still criminal in Kentucky where it took place.⁵² Article IV's extradition clause, according to the Court, "included, and was intended to include, every offence made punishable by the law of the State in which it was committed"⁵³

Although a state could enforce its morality within its own boundaries, it was not empowered to project that power extraterritorially to accompany its citizens. A Virginia citizen, although able to buy, own, and sell human beings in Virginia, was not permitted to retain those slaves on the territory of free-soil New York. The privileges and immunities clause of article IV, according to the leading New York case, meant that

[a] citizen of Virginia, having his home in that State . . . has the same rights under our law which a native born citizen, domiciled elsewhere, would have But where the laws of the several states differ, a citizen of one State asserting rights in another must claim them according to the laws of the last mentioned State, not according to those which obtain in his own. The position that a citizen carries with him, into every State into which he may go, the legal institutions of the one in which he was born, cannot be supported.⁵⁴

⁵¹ See *id.* at 102-03.

⁵² See *id.*

⁵³ *Id.* at 103; see also 2 J. Hurd, *supra* note 49, at 402 ("However contrary the act charged may have been to the laws of the State making the requisition, it must also have been committed within its territorial jurisdiction."). The force of the conclusion in *Dennison* was somewhat diminished by the further determination that this "duty" was not judicially enforceable. *Dennison*, 65 U.S. (24 How.) at 107-10.

It is worth noting that the *Dennison* result is at odds with practice in international extradition, where the principle of "double criminality" requires that the acts at issue be punishable in both the requesting and sending jurisdictions. See *Factor v. Laubenheimer*, 290 U.S. 276, 280 (1933) (offense held extraditable although not a crime under laws of place of asylum because specifically made extraditable by treaty); *Brauch v. Raiche*, 618 F.2d 843, 847 (1st Cir. 1980) (tracing this requirement to Jay Treaty of 1794).

⁵⁴ *Lemmon v. People*, 20 N.Y. 562, 608-09 (1860). Cf. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 612 (1842) (Story, J.) ("if the constitution had not contained [the fugitive slave clause,] every non-slave-holding state in the union would have been at liberty to have declared free all runaway slaves coming within its limits"); *id.* at 648 (Wayne, J.) (absent fugitive slave clause, escaped slaves could be freed in North (quoting Iredell, J., addressing North Carolina Convention)); *Mitchell v. Wells*, 37 Miss. 235, 238-39 (1859) (slave manumitted by Mississippi owner in Ohio would not be recognized as free by Mississippi law within Mississippi territory).

The opposite outcome in *Lemmon* would have paved the way for Lincoln's nightmare of the Court extending *Dred Scott* to protect slavery in free states. See, e.g., P. Finkelman, *supra* note 38, at 318-19 (suggesting that Lincoln had *Lemmon* in mind when discussing the "next *Dred Scott* case" during political appearances in 1859-1860). While Finkelman believes that had *Lemmon* been appealed, the Supreme Court would have reversed it, *id.* at 313, the Supreme Court cited *Lemmon* with approval in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180

At the same time, New York recognized that its own power to defeat slavery ended at its borders. New York's judiciary, in *People v. Merrill*,⁵⁵ dismissed a prosecution of two of its residents for selling into slavery in the District of Columbia a free black man who had been "inveigled" into leaving New York. The court observed that "[i]t cannot be pretended or assumed that a state has jurisdiction over crimes committed beyond its territorial limits."⁵⁶ Any such assumption, the court noted, would be contrary to the constitutional scheme in at least two dimensions:

First. That this state, as a sovereign and independent member of the confederacy, cannot protect its citizens beyond its territorial limits. . . .

Second [in view of the jury venue provision of the sixth amendment, and the privileges and immunities clause of Article IV,] [t]he penal acts of one state can have no operation in another state Here, laws are local, and affect nothing more than they can reach.⁵⁷

At the time it was announced, the conclusion of the New York court was in harmony with virtually unanimous judicial authority in other states reaching back to the founding of the Republic.⁵⁸

(1869), overruled on other grounds, *United States v. S.E. Underwriters Ass'n*, 322 U.S. 533, 545-49 (1944), where it announced that "if . . . the Constitution could be construed to secure to the citizens of each State in the other States the peculiar privileges conferred by their laws, an extra-territorial operation would be given to local legislation utterly destructive of the independence and the harmony of states." *Id.* at 181.

Indeed, fourteen years before *Lemmon*, in *Conner v. Elliott*, 59 U.S. (18 How.) 591 (1855), the Supreme Court suggested, in a unanimous opinion, that a statute which affixed legal obligations because "those who enter into such contracts are citizens of the state" would violate the privileges and immunities clause. *Id.* at 594.

⁵⁵ 2 Parker Crim. Rep. 590 (1835).

⁵⁶ *Id.* at 596. In language of some relevance to the theories advanced by Professor Van Alstyne, the court continued: "[n]o one can contend that a citizen of this state, who is guilty of the murder of another citizen in the state of New Jersey, can be tried for that crime in this state." *Id.* at 601; cf. *Prigg*, 41 U.S. at 622 (Story, J.) ("state sovereignty could not rightfully act beyond its territorial limits").

⁵⁷ *Merrill*, 2 Parker Crim. Rep. at 602-03; see, e.g., *People v. Mosher*, 2 Parker Crim. Rep. 195, 196 (N.Y. Sup. Ct. 1855) (in holding that bigamy occurring out of state could not be prosecuted, court reasoned that "[a]n attempt of the legislature to subject individuals to trial and punishment within this state, for acts done without the territorial limits of the state . . . would be simply void"); *People v. Gardener*, 2 Johns. 477 (N.Y. Sup. Ct. 1807) (New York cannot prosecute defendant for stealing horse in Vermont); *People v. Schenck*, 2 Johns. 479 (N.Y. Sup. Ct. 1807) (New York cannot prosecute defendant for stealing gun in New Jersey); cf. *Burnham v. Superior Court*, 495 U.S. 604, 614 & n.3 (1990) (Scalia, J.) (construing 1817 New York case, *Gardner v. Thomas*, 14 Johns. 134 (N.Y. Sup. Ct. 1817), to embody the "principle that no state will enforce the penal laws of another . . ." in refusing to entertain suit for assault committed in California).

⁵⁸ See *State v. Chapin*, 17 Ark. 561, 565 (1856) ("The laws of Arkansas have no extra-territorial operation. Each State possesses the exclusive power to provide for the punishment of crimes committed within its limits, except so far as this power may have been surrendered to the Government of the United States . . ."); *State v. Grady*, 34 Conn. 118, 129-30 (1867) ("It is undoubtedly true . . . that the courts of this state can take no cognizance of an offense

B. *The Civil War and Fourteenth Amendment Due Process*

The Civil War and the adoption of the thirteenth and fourteenth amendments ended the national debate on slavery. Moral dissensus

committed in another state The general proposition [is] that no man is to suffer criminally for what he *does* out of the territorial limits"); *Gilbert v. Steadman*, 1 Root 403, 403 (Conn. 1792) (prosecution in Connecticut for theft in Massachusetts dismissed as "out of the jurisdiction of this court."); *Johns v. State*, 19 Ind. 421, 424 (1862) ("[T]he criminal laws of a State do not bind, and cannot affect those out of the territorial limits of the State. Each State, in respect of the others, is an independent sovereignty, possessing ample powers, and the exclusive right, to determine, within its own borders, what shall be tolerated and what prohibited."); *State v. Haskell*, 33 Me. 127, 130 (1851) ("The offense of embezzlement and all other offenses are punishable only in the State, within whose jurisdiction they have been committed."); *Gordon v. State*, 4 Mo. 375, 376 (1836) (prosecution for challenge to fight duel dismissed because of lack of evidence that offense was committed within the state); *State v. Wyckoff*, 31 N.J.L. 65, 69-70 (1864) (on "general and recognized principles of law," defendant who commissions theft in New Jersey from New York cannot be prosecuted in New Jersey since the defendant "can only be punished by the authority of the state of New York, to whose sovereignty alone he was subject at the time"); *State v. Carter*, 27 N.J.L. 499, 501-03 (1859) (murder committed in New York cannot be prosecuted in New Jersey; New Jersey statute authorizing prosecution for murder committed in New York "would necessarily be void" since "[t]he act was a crime against [New York's] sovereignty [t]hat was supreme within its territorial limits and in its very nature, and in fact is exclusive We may exercise jurisdiction over the wastes of ocean or of land, but we must necessarily stop at the boundary of another."); *State v. Knight*, 1 N.C. (1 Tay.) 44, 45 (1799) ("Crimes and misdemeanors committed within the limits of each are punishable only by the jurisdiction of the state in which they arise."); *Simpson v. State*, 23 Tenn. (1 Hum.) 456, 462-63 (1844) ("The state authority is . . . omnipotent and co-extensive with the limits of the State but no further. So soon as this boundary is passed, another rule of action, based upon a different authority, the sovereign power of another State, springs into existence, exercising its control over a different section of country, unrestricted and uncontrolled by that of the other."); cf. *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 655 (1829) ("The legislative and judicial authority of New Hampshire were bounded by the territory of that state and could not be rightfully exercised to pass estates lying in another state."); *Commonwealth v. Van Tuyl*, 58 Ky. (1 Met.) 1, 4 (1858) (noting that, where fraud was begun in Ohio and consummated in Kentucky, Kentucky had jurisdiction because the crime "was committed therefore in this State . . ."); *Commonwealth v. Uprichard*, 69 Mass. (1 Gray) 434, 439 (1855) ("Laws to punish crimes are essentially local, and limited to the boundaries of the state prescribing them."); *State v. Lord*, 16 N.H. 357, 359 (1844) (stating that, if erection of dam in Maine had been the offense, prosecution would fail because it "would have been committed without the jurisdiction of the court").

Tyler v. People, 8 Mich. 320 (1860), is sometimes cited as contrary early authority. In fact, the case merely held that a state could punish extraterritorial acts which took effect within the state. See *id.* at 333-34 ("[T]he crime, though commenced in Canada was consummated in Michigan Had death not ensued, he would have been guilty of an assault and battery . . . and would have been criminally accountable to the laws of Canada only."); cf. *id.* at 342 (Campbell, J., dissenting) ("I do not conceive that any state of this Union has any such extraterritorial power over its citizens.").

State ex rel. Chandler v. Main, 16 Wis. 422 (1863), which is cited for the claim that American state jurisdictions, like English, have long recognized extraterritorial jurisdiction over citizens, stands virtually alone in its time. In the course of upholding the right of Wisconsin to authorize Union soldiers to vote in state and federal elections while serving in the Civil War, the case announced in dicta that Wisconsin could punish the filing of illegal absentee ballots. *Id.* at 446-47. The pressure of Republican self-interest in such a situation is palpable. Moreover, *Chandler* relied on the proposition that, like treason, illegal voting was "peculiarly

among the states, however, continued. During the late nineteenth and early twentieth centuries, the Supreme Court continued to draw tight boundaries around states' endeavors to project their public moralities into other states.

In the year that the fourteenth amendment was enacted, Thomas Cooley articulated the received wisdom that, as a matter of constitutional structure,

[t]he legislative authority of every state must spend its force within the territorial limits of the State. The legislature of one State cannot make laws by which people outside the State must govern their actions. . . .

It cannot provide for the punishment as crimes of acts committed beyond the State boundary⁵⁹

Within a decade after the fourteenth amendment's adoption, the Supreme Court began to read these territorial restrictions into the definition of due process.⁶⁰ At the state level, courts likewise continued to view state criminal authority as limited to acts that occurred or reached fruition within the prosecuting state.⁶¹

injurious to" the rights of the sovereign. *Id.* at 444.

The only antebellum case I have found upholding a strictly extraterritorial prosecution is *Commonwealth v. Gaines*, 2 Va. Cas. 172 (1819), which by a 4-3 opinion rejected a constitutional challenge to a statute asserting extraterritorial criminal jurisdiction. *Id.* at 182. That assertion of jurisdiction had already been repealed at the time the case was argued. See *id.*; 1 Rev. Code of Laws of Va. ch. 162 Para. 8 (1819) (limiting jurisdiction to crimes "committed at any place in this Commonwealth").

⁵⁹ Thomas Cooley, *Treatise on Constitutional Limitations* 127-28 (1868); see also David Rorer, *American Inter-State Law* 228 (Levy Mayer ed., reprint 1983) (relying both on extradition clause and on colonial hostility to being tried in England).

Justice Scalia repeatedly has suggested that the understanding that prevailed at the time of the adoption of the fourteenth amendment should be given substantial weight in construing the reach of legitimate state power. See, e.g., *Burnham v. Superior Court*, 495 U.S. 604, 611 (1990) (in defining due process under fourteenth amendment, "crucial time" for determining legality of jurisdiction was 1868); *Michael H. v. Gerald D.*, 491 U.S. 110, 122 n.2 (1989) (purpose of due process clause is "to prevent future generations from lightly casting aside important traditional values"); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 724-27 (1987) (arguing that, for full faith and credit purposes, statute of limitations questions should be answered using historical context at time Constitution was adopted as a guide and that issue is whether "the society which adopted the Constitution" regarded practice as acceptable); *id.* at 730 (maintaining that for due process purposes as well, courts should look to the "tradition in place when the constitutional provision was adopted").

⁶⁰ See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878) ("[E]very state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . [and] no state can exercise direct jurisdiction and authority over persons or property without its territory. The several States are of equal dignity and authority and the independence of one implies the exclusion of power from all others.').

⁶¹ See, e.g., *Stewart v. Jessup*, 51 Ind. 413, 415 (1875) (stating that "it is settled . . . that [appellant] cannot be . . . convicted and punished" in one state for a crime committed within another state); *In re Carr*, 28 Kan. 1, 5-6 (1882) (holding that Kansas cannot prosecute for extraterritorial forgery); *Johnson v. Commonwealth*, 5 S.W. 365, 365 (Ky. 1887) (dismissing prosecution for extraterritorial bigamy because second marriage "like any other criminal act,

By the turn of the century, the Court established, as a command of the due process clause, the principle that states could not legislate extra-territorially—even with respect to their own citizens. In 1892, the Court gave controlling effect to the maxim that “crimes are in their nature local and the jurisdiction of crimes are local” because “[l]aws have no force of themselves beyond the jurisdiction of the state which enacts them”⁶² Five years later, in *Allgeyer v. Louisiana*,⁶³ the Court addressed a statute by which Louisiana sought to punish one of its citizens for entering into an out-of-state insurance contract. A unanimous opinion rejected the claim that the penalty was necessary to save the “sovereignty of the state” from “mockery” by “compel[ing] its citizens to respect its laws.”⁶⁴ The statute violated due process because it “prohibits an act which under the federal constitution the defendants had a right to perform.”⁶⁵ The state’s power “does not and cannot extend to prohibiting a citizen from making contracts . . . outside the limits and jurisdiction of the state.”⁶⁶

must transpire here in order to be subject to indictment and punishment”); *W. Transp. & Coal Co. of Mich. v. Kilderhouse*, 87 N.Y. 430, 435 (1882) (invoking principle that “[i]t is very well settled that penal laws have no extra-territorial force” in deciding that usury statute has no effect on extraterritorial contract); *Ormes v. Dauchy*, 82 N.Y. 443, 448 (1880) (reaffirming that New York legislature has no extraterritorial jurisdiction over contract to advertise lotteries legal in place of advertisement); *State v. Cutshall*, 15 S.E. 261, 265 (N.C. 1892) (statute punishing extraterritorial bigamy by citizen unconstitutional); *State v. Mitchell*, 83 N.C. 674, 676 (1880) (dismissing charges for extraterritorial assault and battery since “[t]he courts of this state have jurisdiction only of offenses committed within its territorial boundaries”); *State v. Stuart*, 92 S.W. 878 (Mo. 1906) (statute construed not to punish act of extraterritorial bigamous marriage “which of course is punishable in the state where it occurs,” but only to punish subsequent cohabitation within state); *State v. Gritzner*, 36 S.W. 39, 41 (Mo. 1896) (dismissing prosecution of extraterritorial gaming, reasoning that state cannot constitutionally “provide for the punishment, as crimes, of acts committed beyond the state boundary” (quoting Justice Cooley)); cf. *State v. Morrow*, 18 S.E. 853, 860 (S.C. 1893) (although “none will dispute” the proposition that “the legislature of this State cannot define and punish crimes committed in another state,” sending abortifacient from Washington to woman in South Carolina produced effect in South Carolina which could be punished).

⁶² *Huntington v. Attrill*, 146 U.S. 657, 669 (1892); see also *id.* at 681 (citing rule of international law that “breaches of public law . . . were only cognizable and punishable in the country where they were committed”). The issue at stake in *Attrill* was actually whether the full faith and credit clause required Maryland to take cognizance of an allegedly penal judgment entered in New York under New York law against a Canadian citizen. See *id.* at 666.

⁶³ 165 U.S. 578 (1897).

⁶⁴ *Id.* at 585 (reciting opinion of Louisiana Supreme Court).

⁶⁵ *Id.* at 591.

⁶⁶ *Id.* The Court distinguished *Hooper v. California*, 155 U.S. 648 (1895), on the ground that *Hooper* involved an agent who brokered foreign insurance contracts *within* the territorial jurisdiction of California, see *Allgeyer*, 165 U.S. at 587, and that *Hooper* assumed that an effort to regulate contracts by citizens “beyond [the] confines of the state” would be unconstitutional. *Hooper*, 155 U.S. at 659.

Nutting v. Massachusetts, 183 U.S. 553, 558 (1902), reaffirmed this distinction by upholding a prohibition on the domestic activities of brokers for out-of-state insurance, emphasizing

In several post-*Allgeyer* cases the Court affirmed the states' power to punish "acts done outside a jurisdiction but intended to produce and producing detrimental effects within it."⁶⁷ The principle that state legislation seeking to control extraterritorial actions violates due process, however, remained controlling through the first third of the twentieth century.⁶⁸

the "vital distinction between acts done within and acts done beyond a state's jurisdiction." See also *New York, Lake Erie and W. R.R. Co. v. Pennsylvania*, 153 U.S. 628, 646 (1894) (holding that Pennsylvania had no power to compel corporation doing business in the state to collect money from bond-holders in New York); *Crutcher v. Kentucky*, 141 U.S. 47, 61 (1891) (stating that "when the commercial power of Congress . . . or some other exclusive power of the federal government, is not in question, the police power of the state extends to almost everything within its borders").

⁶⁷ *Ford v. United States*, 273 U.S. 593, 620, 624 (1927) (quoting *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (holding that extraterritorial conspiracy to import liquor into United States is within United States jurisdiction)); see also *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (concerning extraterritorial scheme directed to defraud state government on bids within the state).

This exception is perhaps inconsistent with strict common law territorialism based on the limits of sovereign power. However, if the theory of the territorial limitation of criminal law is based on the heritage construing crimes as acts against "the king's peace," guaranteed to those within the realm, it is perfectly sensible to view acts which come to fruition within the territory as interfering with the sovereign interests of the state. The prospect of allowing a defendant to bombard the receiving state with impunity from over the state line was simply unacceptable in a country containing automobiles, telephones, and railroads.

A sufficiently broad conception of in-state "effects" would, of course, eliminate all territorial limitation on jurisdiction: every action by a citizen is likely to have some distant repercussions back in her home state. An understanding which permits the non-existence within New Jersey of a murder victim who would exist but for a murder in Pennsylvania, the existence within New Jersey of a woman who had committed an immoral act in Delaware, or the effect on citizens of New Jersey of the knowledge that persons outside of New Jersey can contract as surrogate mothers to count as "effects" justifying punishment by New Jersey would relegate the territorial limitation to impotence. The cases which have recognized local effects, however, have relied on intended and much more palpable physical or economic impacts.

In *Hyatt v. People ex rel. Corkran*, 188 U.S. 691, 719 (1903), the Court held that extradition under article IV required proof that the accused "was in fact within the demanding State at the time when the alleged crime was committed," and that an alleged fugitive who had re-entered Tennessee after the alleged crime could not be extradited where there was "no evidence or claim that he then committed any act which brought him within the criminal law of the State of Tennessee." Note, however, that the Court acknowledged that the "exercise of jurisdiction by a State to make an act committed outside its borders a crime against the State" is another issue. *Id.* at 712.

⁶⁸ *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930) (holding that Texas cannot affect the terms of a contract entered into by Texas resident in Mexico without violating due process); *Fidelity Deposit Co. v. Tafoya*, 270 U.S. 426, 435 (1926) (striking down a statute seeking to prohibit out-of-state payments by corporations doing business in New Mexico); *Saint Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346, 349 (1922) (striking down a statute imposing a tax upon persons placing insurance extraterritorially); *New York Life Ins. Co. v. Dodge*, 246 U.S. 357, 376-77 (1918) (holding that state cannot control contract entered into by resident and foreign corporation in foreign state); *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) ("[I]t would be impossible to permit the statute of Missouri to operate beyond the jurisdiction of that State and in the State of New York . . . without throwing down the consti-

C. *The New Deal Court and Extraterritorial Regulation*

The principle began to erode by the mid-1930s. From one direction, increasing academic skepticism under the banner of legal realism ate away at the theoretical underpinnings of strict territoriality as a basis for conflict of laws decisions.⁶⁹ From another, doubts about dual federalism and the propriety of judicial value choice under substantive due process undermined the principle that the Constitution implicitly constrained application of state law.⁷⁰

The emerging weakness of territorial limits was most sharply manifest in the international arena. In *Blackmer v. United States*,⁷¹ the Court rejected a due process challenge to a contempt citation issued against an American citizen living in France for his failure to obey a court order that required him to return to the United States in order to give evidence. "By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country."⁷² As the doctrine has evolved, the extraterritorial jurisdiction of the United States over its citizens is today constrained only by a statutory construction requirement that extraterritorial juris-

tutional barriers by which all the States are restricted within their orbits of lawful authority."); *Western Union Tel. Co. v. Brown*, 234 U.S. 542, 543 (1914) (finding that state statute cannot impose tort liability for acts outside of state territory in District of Columbia); cf. *The Hamilton*, 207 U.S. 398, 403 (1907) (upholding extension of Delaware tort law to citizens domiciled within the state with respect to actions on the high seas, "a place belonging to no other sovereign").

The Court also appeared to contemplate imposing similar territorial limitations to criminal prosecutions by the federal government. See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-56 (1909) (stating that generally "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done").

⁶⁹ The proposition—underlying strict territoriality in conflict of laws decisions—that litigants are entitled to rights which "vested" in the state where the last relevant actions occurred was dissected by the legal realists in the 1920s and 1930s. See generally David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 *Harv. L. Rev.* 173 (1933); Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 *Yale L.J.* 457 (1924); Walter Wheeler Cook, *The Jurisdiction of Sovereign States and the Conflict of Laws*, 31 *Colum. L. Rev.* 368 (1931); Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 *Yale L.J.* 736 (1924). The American Law Institute, however, retained the theory in the 1934 *Restatement of Conflict of Laws*. See, e.g., Lea Brilmayer, *Conflict of Laws: Foundations and Future Directions* 22-24 (1991) (discussing strong territorialist philosophy in First *Restatement of Conflict of Laws*); Harold Korn, *The Choice of Law Revolution: A Critique*, 83 *Colum. L. Rev.* 772, 779, 807 (1983) (same); James R. Pielemeier, *Why We Should Worry About Full Faith and Credit to Laws*, 60 *S. Cal. L. Rev.* 1299, 1304 (1987) (same).

⁷⁰ See, e.g., David P. Currie, *The Constitution in the Supreme Court: The Second Century 1888-1986*, at 242-43 (1991) (linking decline of territorialism, substantive due process and emergence of the *Erie* doctrine); Brainerd Currie, *Selected Essays on Conflict of Laws* 272 (1963) ("The choice between the competing interests of coordinate states is a political function of the highest order, which ought not in a democracy to be committed to the judiciary.").

⁷¹ 284 U.S. 421, 438-40 (1932).

⁷² *Id.* at 436.

diction be asserted by a clear congressional statement.⁷³

At the same time, the extraterritorial authority recognized in states expanded, though with a greater sense of restraint.⁷⁴ *Alaska Packers Ass'n v. Industrial Accident Commission*⁷⁵ cited *Allgeyer* as good law, but upheld California's use of its Workers Compensation law to redress an injury that took place in Alaska by invoking the fact that the underlying employment contract was formed in California.⁷⁶ In *Skiriotes v. Florida*,⁷⁷ the Court confronted the prosecution of a Florida resident under a

⁷³ See *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1235 (1991) (holding that United States discrimination law does not apply to discrimination by American corporations in other nations); *Lauritzen v. Larsen*, 345 U.S. 571, 574-75 (1953) (holding that jurisdiction exists over maritime accidents); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952) (holding that jurisdiction exists over trademark infringement in Mexico); cf. *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (upholding kidnapping of Mexican national to be tried in United States for conspiracy to torture United States government agents in Mexico); see also *Lea Brilmayer & Charles Norehi*, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 *Harv. L. Rev.* 1217, 1229 (1992) (account of rules on federal extraterritorial criminal prosecution); *Jonathan Turley*, "When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality, 84 *Nw. U. L. Rev.* 598, 655-62 (1990) (same).

An earlier version of the doctrine held that, at least as a matter of statutory construction, "crimes against private individuals . . . which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it," but that crimes against the United States government itself would be enforceable against American citizens wherever found. *United States v. Bowman*, 260 U.S. 94, 98 (1922); cf. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (arguing that cases immediately affecting national interests may exercise extraterritorial jurisdiction over citizens).

⁷⁴ In part this is a function of the fact that the Constitution generally has not played the same limiting role in the assertion of United States jurisdiction as it has in the limitation of state jurisdiction. See *Lea Brilmayer*, *Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 *Law & Contemp. Probs.*, 11, 24-26 (Summer 1987).

⁷⁵ 294 U.S. 532 (1935).

⁷⁶ *Id.* at 550; cf. *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 157 n.7 (1932) (Brandeis, J.) (stating that the effect of Vermont workers compensation statute in denying relief for injury sustained in New Hampshire was not illegally extraterritorial, because it "does not undertake to prohibit acts beyond the borders of the State").

With respect to amenability to suit, the Court has declared

[a]s in the case of the authority of the United States over its absent citizens, the authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. . . . [T]he relationship is not dissolved by mere absence from the state. . . . One such incident of domicile is amenability to suit. . . .

Milliken v. Myer, 311 U.S. 457, 463 (1940). However, as Justice Scalia has recently reminded us, jurisdiction to adjudicate is not the same as jurisdiction to legislate. *Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1923 (1992) (Scalia, J. concurring) ("I do not understand this to mean that the due process standards for adjudicative jurisdiction and those for legislative . . . are necessarily identical; and on that basis I join Parts I, II, and III of the Court's opinion."); cf. *Martin H. Redish*, *Due Process, Federalism and Personal Jurisdiction: A Theoretical Evaluation*, 75 *Nw. L. Rev.* 1112, 1114 (1981) (arguing that, although concept of federalism is properly considered a limit to application of laws, concept does not limit personal jurisdiction).

⁷⁷ 313 U.S. 69 (1941).

Florida statute that punished sponge fishing in diving suits in the Gulf of Mexico. Although the violation occurred outside Florida's territorial waters, the Court upheld the conviction, commenting that "[i]f the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest, and where there is no conflict with acts of Congress."⁷⁸

Skiriotes made a point of the fact that the conduct in question occurred "on the high seas," rather than in some other state's territory; it is far from a blanket approval of state extraterritorial jurisdiction.⁷⁹ Still, at the close of the Court's New Deal revolution, the due process question

⁷⁸ *Id.* at 77; cf. *United States v. Louisiana*, 363 U.S. 1, 78-79 (1960) (stating that regulation of fishing constituted "police power measures which a State can enforce against its citizens beyond its boundaries").

⁷⁹ There is language early in the *Skiriotes* opinion analogizing Florida's power to the authority of the United States government "in foreign countries." *Skiriotes*, 313 U.S. at 73. That language relies on the construction of federal power in *Blackmer v. United States*, 284 U.S. 421 (1932). The holding of *Skiriotes*, however, is carefully phrased in terms of conduct on "the high seas." *Id.* at 77, 79. It relies on Holmes' opinion in *The Hamilton*, 207 U.S. 398 (1908), and quotes the section which characterizes the conduct as "within no other territorial jurisdiction." *Skiriotes*, at 78.

The accepted wisdom on which *The Hamilton* was predicated was sketched by Holmes' opinion for a unanimous Court in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-56 (1909): "No doubt in regions subject to no sovereign, like the high seas . . . countries may treat some relations between their citizens as governed by their own law. . . . But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." (citing *The Hamilton*). A contrary rule would "not only be unjust, but would be an interference with the authority of another sovereign." *Id.* at 356.

Contemporary commentators divide on the reach of *Skiriotes*. Compare Brilmayer & Norchi, *supra* note 73, at 1241-42 ("It is also fairly well established that a state may regulate its residents, even when they are acting outside the state.") (citing *Skiriotes*, but conceding that "[f]ewer cases exist . . .") and Gergen, *supra* note 31, at 907 n.94 (stating that *Skiriotes* stands for proposition that "[s]tates may punish citizens for criminal acts done outside the state") with Lea Brilmayer et al., *An Introduction to Jurisdiction in the American Federal System* 326-27 (1986) ("It is not clear, however, whether [*Skiriotes*] should be read so broadly. . . . *Bigelow v. Virginia* casts some doubt on a state's authority to regulate the activities of residents while in other states."); Robert A. Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 *Case W. Res. L. Rev.* 44, 50 (1974) (maintaining that, in light of *Skiriotes*, "[p]robably forum state citizenship alone would be too little [to allow punishment consistent with due process] 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"); James A. Martin, *Constitutional Limitations on Choice of Law*, 61 *Cornell L. Rev.* 185, 197 (1976) (arguing that *Skiriotes* relies on the fact that activity regulated is "not within the border of another sovereign"); Daniel L. Rotenberg, *Extraterritorial Legislative Jurisdiction and State Criminal Law*, 38 *Tex. L. Rev.* 761, 781 (1960) (asserting *Skiriotes* reasoning not applicable to interstate situation, and "shibboleth of territoriality remains"); and Larry Kramer, Note, *Jurisdiction Over Interstate Felony Murder*, 50 *U. Chi. L. Rev.* 1431, 1448 n.91, 1451 n.111 (1983) (stating that application of *Skiriotes* to conduct within another state would violate the full faith and credit clause).

No Supreme Court case has extended *Skiriotes* to conduct wholly within another state.

for states had become in large measure the "reasonableness" of the state's concern, not solely the territorial reach of the state's regulation.⁸⁰ While doubts concerning the propriety of states' extraterritorial regulation of their citizens have persisted,⁸¹ the free-form evaluation of state "interests" casts doubt on the principle, dating to the republic's birth, that states do not have the authority to project their moral judgments into their neighbors' territory.⁸²

⁸⁰ Some commentators tend to view *Alaska Packers* as an abandonment of constitutional concerns with extraterritoriality. See, e.g., Gary Simson, *State Autonomy in Choice of Law: A Suggested Approach*, 52 S. Cal. L. Rev. 61, 62-64 (1978). This is something of an exaggeration.

The courts of the 1940s retained at least a nominal allegiance to the extraterritoriality principle. The Court in *Osborn v. Ozlin*, 310 U.S. 53 (1940), upheld Virginia's insurance regulations, emphasizing that "the question is not whether what Virginia has done will restrict appellant's freedom of action outside of Virginia by subjecting the exercise of such freedom to financial burdens, [but] whether Virginia has reached beyond her borders to regulate a subject that was none of her concern because the Constitution has placed control elsewhere." The Court still felt compelled to distinguish *Allgeyer*, *Tafuya*, and *St. Louis Compress*. *Id.*

Likewise, in *Hoopston Canning Co. v. Cullen*, 318 U.S. 313 (1943), the Court announced that in "determining the power of a state to apply its own regulatory laws to insurance business activities," the crucial determinant was "the protection of state interests" as judged by "highly realistic considerations," but again distinguished *Allgeyer* as a case in which "no act was done in the state of Louisiana." *Id.* at 316; see also *Robertson v. California*, 328 U.S. 440, 461 (rejecting due process challenge to California's insurance regulations because "nothing which California requires touches or affects anything the society or the appellant may do or wish to do in Arizona or elsewhere than in California"), reh'g denied, 392 U.S. 818 (1946).

⁸¹ See *FTC v. Traveler's Health Ass'n*, 362 U.S. 293, 302 (1960) (noting doubts which constitutional limitations might create as to Nebraska's power to regulate extraterritorial activity of Nebraska corporation) (citing *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 249 U.S. 532 (1985)); *Traveler's Health Ass'n v. Virginia*, 339 U.S. 643, 649-51 (1950) (noting dubious constitutionality of efforts to punish extraterritorial violations); cf. *State Bd. of Ins. v. Todd Shipyards*, 370 U.S. 451, 455 (1962) (*Allgeyer* principle incorporated into McCarran-Ferguson Act limited state regulation of insurance). The *Todd Shipyards* conclusion is of some relevance where a state seeks to interfere with the provision of medical insurance for abortions.

⁸² See, e.g., Restatement (Third) of Foreign Relations Law § 403 (1987) (eight factors determine "unreasonableness" which would bar application of law). Restatement (Third) of Foreign Relations Law § 402 cmt. 5 (1987) takes the position that while states "generally exercise jurisdiction on the basis of territoriality," they "may apply at least some laws to a person outside [state] territory on the basis that he is a citizen." It acknowledges, however, that such cases "have generally involved acts or omissions that also had effect within the state." *Id.*

The Model Penal Code § 1.03(1)(a), approved in 1962, generally requires that conduct which is an "element of the offense" or a "result that is an element of the offense" occur within a state as a predicate for criminal liability. It also provides, however, in § 1.03(1)(f), that liability can be imposed if "the offense is based on a statute of this state that expressly prohibits conduct outside the state when the conduct bears a *reasonable relation to a legitimate interest of this state.*" (emphasis added).

The Comments to this Section observe that "[S]o long as sovereignties are spatially defined, their reciprocal interests imply, at least in general, a limitation of their regulatory goals to influencing what occurs within their borders." American Law Institute, Model Penal Code Commentary § 1.03 cmt. 1, at 37-38. They state that the "reasonable relation to legitimate interests" requirement "expresses the general principle of the fourteenth amendment limitation

The last generation of Supreme Court cases has provided no substantial clarification. The Court has not directly addressed the constitutionality of state criminal statutes aimed at regulating extraterritorial behavior, although at least one Warren Court case implies that extraterritorial criminal regulation is constitutionally dubious.⁸³ The only explicit guidance comes from civil cases, and that guidance is less than crisp.

In the civil context, the Court has held that neither the full faith and credit clause, nor the due process clause, requires a state "to substitute for its own [laws], applicable to persons and events within it, the conflicting law of another state," even if the other state is the residence of the parties or the place in which the relationship began.⁸⁴ It has held as well that mere residence is not talismanic: a home state "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them" simply on the basis of residence of one of the parties.⁸⁵

Between these poles, a state's effort to apply its own law must be based on "a significant contact . . . creating state interests, such that

on state legislative jurisdiction" and "affords the courts the opportunity to reexamine antecedent extraterritorial regulation in light of a standard that takes due account of the problem of federalism that is inescapably involved." *Id.* § 1.03 cmt. 6, at 55.

In discussing this section, Professor Wechsler observed that "[i]f the state wants to make gambling criminal, for example, when the wager is to be placed in another state . . . it may do so far as that is constitutional." 1962 Proceedings of the American Law Institute 64.

The Comments to Tentative Draft No. 5 § 1.03 observed that "Control over citizens is of more significance in the relations between nations than it is in the relation between states of the Union The question of constitutionality will have to be considered in relation to the individual statute." *Id.* at 12-13. In his comments at the 1956 Proceedings of the American Law Institute, Professor Wechsler stated that the tentative draft "does not legitimize anything," but "relies on the constitutional bar" to limit extraterritorial jurisdiction. 1956 Proceedings of the American Law Institute 97-99.

⁸³ My colleague Steve Morse kindly pointed out to me that in *Robinson v. California*, 370 U.S. 660, 665-66 (1962), reh'g denied, 371 U.S. 905 (1965), the Court took as given the constraint that California could punish legitimately only for the actual use of narcotics "within the state." In *Robinson*, although the evidence clearly demonstrated the recent use of narcotics, the jury did not necessarily find use within California. The Court, therefore, treated the punishment as resting impermissibly on status, rather than conduct.

⁸⁴ *Phillips Petroleum v. Shutts*, 472 U.S. 797, 822 (1985) (quoting *Pac. Employees Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 502 (1939)).

⁸⁵ *Id.* at 820-22 (citing *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930)); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308-09, 311, 313 (1981) (stating in dicta that residence "standing alone" is inadequate, and, citing *Dick*, stating that application of the law must be neither arbitrary nor fundamentally unfair), reh'g denied, 450 U.S. 971 (1981). The residence at issue in *Dick*, *Shutts* and *Hague* was that of the plaintiff, and the claim on behalf of choice of in-state law was that harm to a state resident is a basis for regulating extraterritorial activities that produce such harm. The cases do not directly address a claim based on residence of the defendant, nor the theory that the state has a right to regulate the extraterritorial activities of its own citizens by virtue of their citizenship.

choice of its law is neither arbitrary nor fundamentally unfair."⁸⁶ The evaluation of "unfairness" may apparently be informed by "the tradition in place when the constitutional provision was adopted [or by] subsequent practice."⁸⁷

Under this schema, the extent of *Bigelow's* continued vitality in the face of the erosion of *Roe* will turn on the level of "significance" the Court is willing to accord to the state "interest" offered as justification for the efforts to prevent or punish extraterritorial abortions. The interests must be such that the application of home-state law is "neither arbitrary nor fundamentally unfair." If past arguments are any guide, the Court will be required to evaluate two such "interests": the interest of the home state in preventing state residents from engaging in activities the state deems immoral, and the interest of the home state in protecting the well-being of the fetus.

If the interest the Court recognizes in regulating abortion is primarily the interest in preventing the woman from engaging in what is regarded by her home state as an immoral act, then the "unfairness" of punishing an act approved by the jurisdiction in which it occurs might well raise sufficient due process concerns to invalidate prosecutorial efforts.⁸⁸ The O'Connor-Kennedy-Souter bloc in *Casey* viewed the state's

⁸⁶ *Shutts*, 472 U.S. at 818 (quoting *Hague*, 449 U.S. at 312-13).

⁸⁷ *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988); cf. *Burnham v. Superior Ct.*, 495 U.S. 604, 611 (1990) ("[J]udging by the evidence of contemporaneous or near-contemporaneous decisions, one must conclude that [Justice] Story's understanding was shared by American courts at the crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted.").

⁸⁸ Cf. *Hague*, 449 U.S. at 334 (Powell, J., dissenting, joined by Rehnquist, J.) ("The State has a legitimate interest in applying a rule of decision to the litigation only if the facts to which the rule will be applied have created effects within the State, toward which the State's public policy is directed."); see also note 95 *infra* (discussing *Nielsen*).

Precedents involving taxation cast doubt on the claim that a state may regulate all extra-territorial activities of a person domiciled within the state. In the tax area, due process requires both a "minimum connection between a state and the person, property or transaction it seeks to tax" and a "relation to the benefits obtained" from the taxing state. *Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1909 (1992); see also *Allied-Signal, Inc. v. Director, Div. of Taxation*, 112 S. Ct. 2251, 2258 (1992); *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 316 (1982); *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 219-20 (1980); *Mobil Oil v. Comm'r of Taxes*, 445 U.S. 425, 436-37 (1980).

With respect to corporations, "there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax." *Allied-Signal*, 112 S. Ct. at 2258; see also *ASARCO Inc.*, 458 U.S. at 346 (O'Connor, J., dissenting) (under due process clause, "a domiciliary State [like a nondomiciliary State] may tax investment income only if it confers benefits on or affords protection to the investment activity"). It is precisely the relation to the activity of obtaining an abortion that is lacking in German-style prosecutions.

A state may tax a natural person's income from out-of-state activities on the theory that a natural person owes a reasonable degree of support to the state she inhabits in exchange for the protection that makes the receipt of income possible. See *New York ex rel. Cohn v. Graves*.

interest as one of providing a "structural mechanism by which the State or the parent or guardian of a minor may express profound respect for the life of the unborn."⁸⁹ The adverse impact on home state expression of respect for the unborn does not warrant the state control of conduct in other states which have different priorities.⁹⁰ In a nation which guarantees the right to travel among states and proclaims a national citizenship "entitling" visitors to take advantage of the "privileges and immunities" enjoyed by local residents, such efforts to export moral jurisdiction are dubious in the extreme.⁹¹

The "significance" of the state's second possible interest, fetal protection, will turn in the first instance upon whether the Court is willing to regard a fetus as a protected "person" in the teeth of the situs state's determination that fetuses are unprotected. This is precisely the morass

Goldstein, Note, "Resident" Taxpayers: Internal Consistency, Due Process and State Income Taxation, 91 Colum. L. Rev. 119, 129 (1991). The obligation to pay a fair share of the costs of government, however, does not speak to an obligation to obey state policy beyond state borders. The tax on income is an assessment based on what the state regards as the ability to pay, an ability related to the ultimate receipt of income within the jurisdiction, see *Graves*, 300 U.S. at 312-13, and does not reflect an effort to control the extraterritorial actions of the resident. The wealth of domestic corporations is not localized in the same fashion as is the wealth of natural persons, but rather consists in a network of interactions. As a result, under the due process clause, the state may tax only income proportional to those interactions which take place within the district. With respect to the *actions* of natural persons, a similar concept suggests that the state may only tax or control activities that take place within the taxing jurisdiction.

Thus, although a state may impose an income tax on its residents' extraterritorial income on the theory that the increment to the wealth of the resident ultimately takes place within the jurisdiction, it cannot impose extraterritorial excise, inheritance, or use taxes, which attach to particular extraterritorial activities or tangible property. Cf. *American Oil Co. v. Neill*, 380 U.S. 451 (1965) (excise tax); *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954) (use tax); *Treichler v. Wisconsin*, 338 U.S. 251 (1949) (inheritance tax on tangible property); *Frick v. Pennsylvania*, 268 U.S. 473 (1925) (inheritance tax on tangible property). States must impose use taxes on property used within the jurisdiction because they are barred from collecting sales taxes on extraterritorial purchases by their residents. See *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 555 (1977) (noting state practice of limiting use taxes to consumption within state so as to avoid problems of due process that might arise from the extension of the sales tax to interstate commerce); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 586 (1937) (holding that tax on use within state not vulnerable to constitutional objections to tax on foreign sale). Extraterritorial regulation is more like an excise or sales tax than an income tax.

⁸⁹ *Planned Parenthood v. Casey*, 112 S. Ct. at 2791, 2820. Elsewhere the opinion refers to an "important and legitimate interest in potential life," *id.* at 2817, and to an "interest . . . in promoting prenatal life." *Id.* at 2818.

⁹⁰ At one extreme, the point seems clear. Abortions performed for California residents in California may have an "effect" of providing role models that undercut the morality or "concern for the life of the unborn" which Utah wishes to promote. This effect, however, does not give Utah authority to prosecute California residents for feticide, even if they subsequently enter Utah. If the woman in question is a Utah resident, the effect of her extraterritorial

of value choice from which Justice Scalia's rejection of *Roe*, joined in *Casey* by three other Justices, has sought to extricate the Court, on the theory that the Constitution has nothing to say about abortion rights.⁹² If nothing else, the mobility of American citizens and the moral pluralism facilitated by American federalism suggest that no such line of retreat is available. The state-by-state moral dissensus surrounding abortion will confront the Court with different voices in which "the people" of different states have spoken. In passing on state efforts at extra-territorial interdiction in the wake of the continuing erosion of *Roe*, the Court will be forced to confront squarely the moral status of the fetus.⁹³

If the Court defers to the state of origin in viewing the fetus as not simply a "potential" but an "actual" person, the "home" state might have an interest in fetal well-being sufficient to extend its prescriptive jurisdiction to the conduct of its citizens in other states.⁹⁴ Characteriza-

⁹² *Casey*, 112 S. Ct. at 2874 (Scalia, J., dissenting) (abortion unprotected because "the Constitution says absolutely nothing about it," and "longstanding traditions of American society have permitted it to be legally proscribed"); *id.* at 2884-85 (accusing majority of using a "process of constitutional adjudication that consists primarily of making *value judgments*," and lamenting "if we can ignore a long and clear tradition clarifying an ambiguous text . . . the people know that their value judgments are quite as good as those taught in any law school—maybe better.") (emphasis in original); see also *Ohio v. Akron Ctr. for Reprod. Health*, 110 S. Ct. 2972, 2984 (1990) (Scalia, J., concurring) (right to abortion cannot "be logically deduced from the text of the Constitution—not, that is, without volunteering a judicial answer to the nonjusticiable question of when human life begins. Leaving this matter to the political process is not only legally correct, it is pragmatically so."); *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2960-61 (1990) (Scalia, J., dissenting) ("One will search in vain the document we are supposed to be construing for text that provides the basis for argument over [abortion rights . . . or in our society's tradition for] any indication how a constitutional argument about them ought to be resolved. The random and unpredictable results of our consequently unchanneled individual views make it increasingly evident, Term after Term, that the tools for this job are not to be found in the lawyer's—and hence not in the judge's—workbox."); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 793-94 (1986) (White, J., dissenting) ("[T]he fact that many men and women of good will and high commitment to constitutional government place themselves on both sides of the abortion controversy strengthens my own conviction that the values animating the Constitution do not compel recognition of the abortion liberty as fundamental."); *id.* at 796-97 (White, J., dissenting) ("Abortion is a hotly contested moral and political issue. Such issues, in our society, are to be resolved by the will of the people . . . I would return the issue to the people by overruling *Roe v. Wade*.").

⁹³ *Cf. Casey*, 112 S. Ct. at 2854 n.12 (Blackmun, J., concurring) (accusing Justice Scalia of being "uncharacteristically naive" in assuming that overruling *Roe* would take the Court out of the arena of abortion, arguing that "[s]tate efforts to regulate in a post-*Roe* world" would raise issue of the "effect . . . differences among States in their approaches to abortion [would] have on a woman's right to engage in interstate travel").

⁹⁴ *Cf. Allstate Ins. Co. v. Hague*, 449 U.S. 302, 318 (1981) (opinion of Brennan, J.) (state interests in "safety and well-being" of residents and work force justify application of local law to out-of-state insurer). Such an approach might raise what are now law school hypotheticals to a form of high-stakes scholasticism. Can Utah claim that a fetus conceived in Utah by two visiting Californians is a Utah citizen? What if the male is a resident of California and the female from Utah or vice versa? Does prosecution require proof beyond reasonable doubt of the citizenship of the father and the locus of conception? The fact that the fourteenth amend-

tions with less moral force would have correspondingly lower levels of "significance" in justifying extraterritorial regulation. Furthermore, in terms of "fairness," there is a difference between seeking to deter acts that both states agree are evil and seeking to punish an action that is regarded as protected by the constitution of the state in which it occurs.⁹⁵

Such constitutional suspicions are amplified if "history" or "tradition" is relevant.⁹⁶ At the time of the framing of the fourteenth amendment, it was clear and settled law that the structure of the Union did not permit states to punish extraterritorial conduct that was not intended to produce tangible in-state effects. Citizens could be punished by the law of the state where the act occurred, but they also had the right to rely on that law if it gave them permission to engage in the act. Until the 1930s, the Court clearly continued this principle in both civil and criminal cases under the rubric of substantive due process. And while such limitations have not applied to federal prosecution since the 1930s, no Supreme Court case has upheld an extraterritorial state prosecution for conduct occurring entirely in another state.

It could be argued that giving weight to this history would make an anachronistic hash of modern conflict of laws approaches. These approaches allow states to apply their own law to issues arising from occur-

ment defines "citizenship" in terms of persons "born" in the United States might well suggest that the Court should decline to recognize assertions of the "citizenship" of fetuses by states seeking to protect them.

⁹⁵ In *Neilsen v. Oregon*, 212 U.S. 315, 320 (1909), the Court dismissed an Oregon prosecution of a Washington resident for fishing, in violation of an Oregon statute, in a portion of the Columbia river subject to the concurrent jurisdiction of Oregon and Washington. The *Neilsen* Court said "[w]here an act is malum in se, prohibited and punishable by the law of both States, the one first acquiring jurisdiction of the person may prosecute Doubtless the same rule would apply if the act were [malum prohibitum] prohibited by each State separately." *Id.* But where "the opinion of the legislatures of the two States is different . . . the one State cannot enforce its opinion against that of the other at least as to an act done within the limits of that other State." *Id.* at 321.

Heath v. Alabama, 474 U.S. 82 (1985), is the only modern case in which the Court addressed *Neilsen* and the question of conflicting state sovereignties in the criminal context. The Court upheld Alabama's efforts to punish a kidnap-murder which began in Alabama but ended in Georgia. Although Justice O'Connor recognized Alabama's "interest in vindicating its sovereign authority through enforcement of its [criminal] laws," *id.* at 93, that interest arose by virtue of the crime's Alabama origin rather than by virtue of the defendant's Alabama citizenship. *Id.* at 92-93. Indeed, the defense would apparently have succeeded had the jury accepted its argument that the kidnapping did not begin in Alabama.

⁹⁶ Justice Scalia's insistence on the importance of a "specific relevant tradition protecting or denying protection to, the asserted right" in his dissent in *Casey*, 112 S. Ct. at 2874, (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989)), is mirrored by a series of other opinions relying on historical practice in construing the demands of due process. See note 59 *supra*; see also *Casey*, 112 S. Ct. at 2859-60 (Rehnquist, J., dissenting) (arguing that "historical traditions of the American people" do not support classifying abortion as a fundamental right); *Medina v. California*, 112 S. Ct. 2572, 2577 (1992) (holding that historical practice is probative of whether criminal rule of procedure regarding burden of proof is constitutionally mandated).

rences outside of their borders on the basis of an appropriate state "interest," even where traditional "lex locus delicti" principles would dictate application of the law of the situs of the injury. The proposition that a state's relationship with its own citizens often serves as an adequate interest to allow it to apply its own law occurs frequently in modern conflicts discussions. The tacit acceptance by the Supreme Court of "interest analysis," one might say, effectively dispenses with the claims of history.⁹⁷ Thus, several conflicts scholars to whom I have shown this Article have adduced a series of leading cases in which home states have applied their own law to accidents involving their residents which occur in foreign territory.⁹⁸

I am not a conflicts scholar. Still, to the untrained eye, the historical concern for allowing states to determine their own moral climate seems in fact to be incorporated into much of modern judicial conflicts methodology. The cases applying home law to extraterritorial occurrences usually do not involve the issue of moral dissensus which is at the heart of the abortion debate; instead, they involve issues regarding loss distribution from actions which both of the conflicting states regard as impermissible. Most cases adopting any of the "modern" conflicts methods acknowledge the power of the law of the place where primary conduct occurs to determine its basic permissibility or wrongfulness.⁹⁹

⁹⁷ See *Hague*, 449 U.S. at 314-15 nn.19-20 (Brennan, J., for four Justices) ("Numerous cases have applied the law of a jurisdiction other than the situs of the injury where there exists some other link between that jurisdiction and the occurrence The injury or death of a resident of State A in State B is a contact of State A with the occurrence in State B."). The Court in *Hague* held that neither the due process clause nor the full faith and credit clause barred Minnesota from applying its own rules regarding stacking of automobile insurance policies to a claim regarding a Wisconsin accident under policies issued in Wisconsin to a Wisconsin resident. Justice Brennan's plurality opinion relied on the facts that the driver insured under the policy commuted to Minnesota, that the beneficiary had later taken up residence in Minnesota, and that the insurance company was registered to do business in Minnesota. *Id.* at 313-20.

Hague is obviously not a decision that gives great weight to the territory in which the operative acts occurred. However, a decision regarding the legal effects of a contract made in another state is different from an effort to apply controversial moral norms to forbid conduct permitted in the state where it occurs. See text accompanying notes 100-05 *infra* (discussing "conduct regulating rules"). Justice Stevens' concurrence in *Hague* relied on the failure of the insurance company to establish "any direct or indirect threat to Wisconsin's sovereignty." *Id.* at 325.

⁹⁸ Frequently mentioned cases include: *Bernhard v. Harrah's Club*, 546 P.2d 719, 722-26 (Cal.), cert. denied, 429 U.S. 859 (1976) (applying California dramshop statute to tavern owners who served California resident in Nevada); *Reich v. Purcell*, 432 P.2d 727 (Cal. 1967) (refusing to apply Missouri damage limitation to accident occurring in Missouri); *Tooker v. Lopez*, 249 N.E.2d 394, 398-400 (N.Y. 1969) (refusing to apply Michigan guest statute to auto accident occurring in Michigan); *Babcock v. Jackson*, 191 N.E.2d 279, 284-85 (N.Y. 1963) (refusing to apply Ontario guest statute to accident occurring in Ontario).

⁹⁹ There are, of course, exceptions. The Rhode Island Supreme Court in *Labree v. Major*, 306 A.2d 808, 817 (1973), in the course of refusing to apply what it regarded as a moribund

*Babcock v. Jackson*¹⁰⁰ is the leading case rejecting "lex loci delicti," in favor of an "interest analysis." Although the New York Court of Appeals used an "interest analysis" approach in reaching a decision not to apply the guest statute of Ontario in adjudicating an action between two New York residents regarding an accident in Ontario, the court emphasized that the issue was one of loss distribution, rather than primary conduct:

Where the defendant's exercise of due care in the operation of his automobile is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive concern. In such a case, it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule of law in some other place.¹⁰¹

Likewise, the Connecticut Supreme Court recently adopted the approach embodied in the Restatement (Second) of Conflicts over the "lex loci delicti" approach, and, accordingly, applied Connecticut law to determine compensation for an auto accident between two Connecticut residents in Quebec. The court noted, however, that

Quebec, as the place of injury, has an obvious interest in applying its standards of conduct to govern the liability, both civil and criminal, of persons who use its highways If the issue at stake in the present controversy were whether the defendant's conduct was negligent, we might well conclude that Quebec's interest in applying its law was of paramount significance.¹⁰²

Finally, in *Bernhard v. Harrah's Club*,¹⁰³ a "comparative impairment" approach to conflict of laws was used by the court to apply California law concerning dramshop liability to a sale of liquor that took place in Nevada. The California Supreme Court relied on the fact that "[a]lthough the State of Nevada does not impose such *civil* liability on its tavern keepers, nevertheless they are subject to *criminal* penalties under a statute making it unlawful to sell or give intoxicating liquor to any

Massachusetts rule requiring "gross negligence" for recovery by a guest against a driver for an accident in Massachusetts, took the position that Rhode Island's "interest in imposing upon its drivers a duty of ordinary care towards their passengers transcends consideration of the guest's residence and of the state in which the vehicle is operated."

¹⁰⁰ 191 N.E.2d 279 (N.Y. 1963).

¹⁰¹ *Id.*, at 284. *Babcock* was later quoted with approval by *Tooker*, 249 N.E.2d at 396 ("We were careful to distinguish the interest of Ontario in this case from what it would have been, had the issue related to the manner in which the defendant had been driving his car at the time of the accident."), and *Schultz v. Boy Scouts of Am.*, 480 N.E.2d 679, 684 (N.Y. 1985) ("[W]hen the conflicting rules involve the appropriate standards of conduct . . . the law of the place of the tort 'will usually have a predominant, if not exclusive, concern.'").

¹⁰² *O'Connor v. O'Connor*, 519 A.2d 13, 23 (Conn. 1986).

¹⁰³ 546 P.2d 719 (Cal.), cert. denied, 429 U.S. 859 (1976).

person who is drunk."¹⁰⁴ It seems that it would do no great damage to the structure of modern conflicts law to take these courts at their words; the widespread rejection of strict territoriality is not equivalent to an open invitation to apply controversial regulations to extraterritorial conduct in cases of moral dissensus.¹⁰⁵

The sixth amendment further exacerbates doubts regarding the constitutionality of criminal prosecutions for extraterritorial abortions. Adopted in part in recollection of George III's threats to transport the American colonists to England for the prosecution of acts committed in Massachusetts, the amendment guarantees "an impartial jury of the state and district wherein the crime shall have been committed." An abortion "committed" in the state of California could not, if the sixth amendment applies, be prosecuted before a jury of the state of Utah.¹⁰⁶

Although the Supreme Court has never directly addressed the issue of whether this vicinage requirement of the sixth amendment applies to

¹⁰⁴ *Id.* at 725. This was in accord with Chief Justice Traynor's opinion in *Reich v. Purcell*, 432 P.2d 727, 728-31 (Cal. 1967). In the course of refusing to apply a Missouri damage limitation to an automobile collision which occurred in Missouri, Chief Justice Traynor observed: "Missouri is concerned with conduct within her borders and as to such conduct she has the predominant interest of the states involved. Limitations of damages for wrongful death, however, have little or nothing to do with conduct. They are concerned not with how people should behave, but with how survivors should be compensated." *Id.* at 730-31. It is also worth noting that the accident in *Harrah's* occurred within California, and the court relied on California's interest to "prevent tavern keepers from selling alcoholic beverages to obviously intoxicated persons who are likely to act in California in the intoxicated state." *Id.* at 725.

¹⁰⁵ One founder of modern conflicts law, Walter Wheeler Cook, seemed to assert that "only a blind following of unsound territorial notions would lead to the conclusion" that any effort by a state to apply its criminal law extraterritorially is necessarily unconstitutional. Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws* 16 (1949). The charge that my contentions are inconsistent with Cook's, however, should not trouble us unduly. Brainerd Currie, scarcely a dyed-in-the-wool territorialist, viewed it as "intolerable" for Georgia to invalidate a contract entered into on Sunday in Kansas by two Georgia residents.

The Georgia Court would hardly have taken the position that the parties in entering into this transaction in Kansas had committed an offense against the criminal laws of Georgia. This is true even though it happens that both parties were Georgia residents at the time. The court gave that circumstance no weight, and would doubtless have found uncongenial the "cosmopolitan principle" whereby a state may punish its citizens. . . . for acts abroad which if committed within the state would be punishable.

B. Currie, *supra* note 70, at 59-60 (1963). For more modern commentary, see, e.g., Korn, *supra* note 69, at 805 ("When conduct and injury do occur at the same place, there has never been any question under either the traditional or modern learning that the *lex loci delicti* should be applied to resolve conflicts involving the so-called "conduct regulating" rules of tort law.").

¹⁰⁶ This leaves aside the limitations that may be imposed by state constitutions. Professor B.J. George, Jr., in *Extraterritorial Application of Penal Legislation*, 64 *Mich. L. Rev.* 609, 630, 635-36 (1966), suggested, without much analysis, that states may prosecute their citizens for extraterritorial conduct without violating federal due process constraints. He nonetheless notes that state constitutional vicinage requirements are an obstacle to nationality jurisdiction in 29 states, albeit an obstacle that "preserv[es] in constitutional amber the rote thinking" of a bygone era.

the states by virtue of the due process clause of the fourteenth amendment,¹⁰⁷ dicta in two Warren and Burger Court cases strongly support incorporation.¹⁰⁸ Further, while there is controversy regarding the manner in which the sixth amendment's requirement of a "jury of the district" applies to state prosecutions, a solid line of recent state cases supports the proposition that sixth amendment principles stand in the way of state prosecutions of acts committed entirely in another state.¹⁰⁹

¹⁰⁷ *Nashville, Chattanooga and St. Louis Ry. Co. v. Alabama*, 128 U.S. 96, 101 (1888), holds that the article III requirement that crimes be prosecuted where they are committed is inapplicable to the states, but makes no mention of the sixth amendment. Since the application of the sixth amendment to the states through the fourteenth amendment lay eighty years in the future, see *Duncan v. Louisiana*, 391 U.S. 145 (1968), the failure to address the sixth amendment is hardly either surprising or dispositive. In addition, *Nashville* involved an Alabama prosecution of an out-of-state company for employing a conductor to operate a train within Alabama in violation of state licensing laws. *Nashville*, 128 U.S. at 97-98.

Likewise, *Skiriotes v. Florida*, 313 U.S. 69, 77-79 (1941), which approved a Florida prosecution for sponge diving in international waters outside of Florida, was decided a generation before the incorporation of the sixth amendment. Compare *Gaines v. Washington*, 277 U.S. 81, 85 (1928) (holding that sixth amendment does not apply to state criminal prosecutions); *Twitchell v. Pennsylvania*, 74 U.S. (7 Wall.) 321, 326-27 (1868) (same).

¹⁰⁸ In *Williams v. Florida*, 399 U.S. 78, 92, 94-98 (1970), the Court held that a 12-member jury was not constitutionally required, emphasizing that the contrast between the common law tradition of twelve jurors and the explicit constitutional protection of the vicinage requirement shows that "where Congress wanted to leave no doubt that it was incorporating existing common-law features of the jury system, it knew how to use express language to that effect." *Williams'* emphasis on the jury as a vehicle for "community participation," *id.* at 100, and the need for a size sufficient to allow a "fair possibility of obtaining a representative cross section of the community," *id.*, requires a definition of which "community" is to be represented. In light of the vicinage requirement, the relevant community would seem to be the community where the crime occurred.

Likewise, *Duncan v. Louisiana*, in tracing the lineage of the jury trial right as applied to the states, recounted the American colonial subjects' outrage at being deprived of the "inestimable privilege of being tried by their peers of the vicinage." *Duncan*, 391 U.S. at 152.

¹⁰⁹ See, e.g., *People v. Jones*, 510 P.2d 705, 709-10 (Cal. 1973) (sixth amendment vicinage provisions apply to California state courts to require jury from judicial district where crime occurred), modified by *Hernandez v. Mun. Court*, 781 P.2d 547, 549 (Cal. 1989) ("[W]e hold that vicinage is defined as the county in which the crime was committed"); *Patterson v. Balkcom*, 266 S.E.2d 179, 180-81 (Ga. 1980) (sixth amendment requires jury drawn from vicinage within Georgia); *Mareska v. State*, 534 N.E.2d 246, 248-50 (Ind. Ct. App. 1989) (use of city-drawn jury to try offense in county violates sixth amendment vicinage standards); *Hayes v. Commonwealth*, 698 S.W.2d 827, 830 (Ky. 1985) (applying sixth amendment to forbid state's prosecution of out-of-state theft); *State v. Smith*, 421 N.W.2d 315, 318, 321 (Minn. 1988) (finding that sixth amendment embodies territorial jurisdiction principle and refusing jurisdiction over murder where none of the elements were alleged to have occurred in Minnesota); cf. *Mississippi Publishers Corp. v. Coleman*, 515 So. 2d 1163, 1165 (Miss. 1987) (vicinage requirement of sixth amendment applies against states); *State v. Beuke*, 526 N.E.2d 274, 287-88 (Ohio 1988), cert. denied, 489 U.S. 1071 (1989) (applying sixth amendment, but concluding that Ohio trial for murder in which death occurred in Indiana does not violate sixth amendment because sufficient elements of crime occurred in Ohio); *State v. Harrington*, 260 A.2d 692, 698 (Vt. 1969) (sixth amendment applies to interstate jurisdiction and requires that an element of the crime be committed in state to support jurisdiction); see also *Davis v. Warden*, 867 F.2d 1003, 1007 (7th Cir.), cert. denied, sub nom. *Davis v. O'Leary*, 493 U.S. 920

The reaffirmation last Term of governmental authority to abduct criminal defendants forcibly from foreign countries and other states¹¹⁰ provides a final reason for caution regarding extraterritorial state criminal jurisdiction. Given the exigencies of the international arena, we may be willing to allow the federal government to extend its authority to actions in foreign countries by hook or by crook. We may countenance occasional abductions from overseas of those who violate U.S. laws and rely on diplomatic processes to compensate for excesses. But within a federal republic characterized by moral pluralism, a similar result between states should be unacceptable. An approach that would permit prosecution for extraterritorial acts legal in the state of commission would, under current doctrine, justify forcible abduction as well. The image of state agents or private parties seeking to carry doctors or women across state borders to be tried for feticide has too chilling a resemblance to our memory of ante-bellum slave catchers to be within the range of constitutional permissibility.

The same objections, however, do not apply as forcefully to efforts to prohibit women who seek abortions from leaving their home state of the sort attempted by Irish authorities.¹¹¹ Because such efforts address conduct initially within a state's own boundaries, they do not run afoul of the constraints on extraterritoriality. Nonetheless, efforts by states to deny a United States citizen the right to travel in order to take advantage of opportunities available in neighboring states face overwhelming objections rooted in the nature of "our federalism," objections which also strengthen the case against attempts at extraterritorial criminal prosecu-

(1989) (applying sixth amendment vicinage clause to determine whether a venire-area was sufficiently large; noting that "the 'district and state' language of the sixth amendment places some parameters on a [state] legislature's power to draw the jurors but does not per se prevent a legislature from delineating a smaller area from which to draw a jury").

Only one court has refused to apply the sixth amendment's requirement regarding "state of offense" juries to state prosecutions in recent years. *People v. Caruso*, 519 N.E.2d 440, 446 (Ill. 1987), cert. denied, 488 U.S. 829 (1988) (sixth amendment does not forbid Illinois from exercising jurisdiction over extraterritorial crime of child abduction because amendment pertains only to venue and not to jurisdiction); cf. *Caudill v. Scott*, 857 F.2d 344, 345-46 (6th Cir. 1988) (sixth amendment "district of offense" requirement does not apply to Kentucky state courts); *Cook v. Morrill*, 783 F.2d 593, 595-96 (5th Cir. 1986) (sixth amendment "district of offense" requirement does not apply to Texas state courts); *State v. Bowman*, 588 A.2d 728, 730 (Me. 1991) (sixth amendment is inapplicable to any state for crime occurring within its borders).

¹¹⁰ *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2189 (1992), reaffirming authority of *Frisbie v. Collins*, 342 U.S. 519 (1952). *Frisbie*, the latest of a line of similar cases, upheld the conviction in Michigan of a defendant who had been kidnapped in Chicago by Michigan officers. *Frisbie*, 342 U.S. at 519-20. *Frisbie*, unlike *Alvarez-Machain*, involved a crime that had been committed within the kidnapping jurisdiction.

¹¹¹ See notes 21-22 and accompanying text *supra*.

tion analogous to recent German efforts.¹¹²

II

NATIONAL UNION AND NATIONAL CITIZENSHIP IN "OUR FEDERALISM"

The decay of substantive due process limitations on legislative jurisdiction over citizens has left the federal government essentially without territorial constraints on its power to legislate in regard to the behavior of Americans abroad. Despite some loose language in the writings of both courts and commentators, however, the power of states to legislate the behavior of their citizens in other American states is distinct from the Federal government's power to legislate overseas. States, as members of a federal union, are not free to treat other states as foreign countries.¹¹³

By the explicit terms of our national compact, states are obliged to give to one another's public acts "full faith and credit."¹¹⁴ They must extradite fugitives to neighboring states on demand,¹¹⁵ and cannot resort to war or diplomatic processes to resolve grievances among themselves.¹¹⁶ Under the fourteenth amendment states may not define their own citizenship; they are obliged to accept as citizens any national citizen who may seek to reside within their borders.¹¹⁷ Visiting citizens from sister states are entitled to the privileges and immunities of local citizens.¹¹⁸ The territories of the states are determined by national mandate.¹¹⁹

Whereas a national sovereign has plenary control over the passage of goods and persons across its borders, explicit constitutional limits bar states from taxing imports or exports.¹²⁰ Furthermore, as the Court has construed the mandates of national union and the commerce clause, states are not permitted in any way to cut themselves off from the tides of

¹¹² See note 23 and accompanying text *supra*.

¹¹³ A separate reason for circumspection in applying international norms to interstate problems is that international law recognition of jurisdiction over crimes committed by citizens abroad is "justified on the ground that a State's treatment of its nationals is not ordinarily a matter of concern to other states or to international law." Draft Convention on Jurisdiction with Respect to Crime, 29 *Am. J. Int'l Law* 439, 519 (Supp. 1935). Adoption of the fourteenth amendment makes it difficult to maintain that the U.S. Constitution is similarly indifferent to the relations between a state and its citizens.

¹¹⁴ U.S. Const. art. IV, § 1.

¹¹⁵ See U.S. Const. art. IV, § 2.

¹¹⁶ See U.S. Const. art. I, § 10.

¹¹⁷ See U.S. Const. amend. XIV, § 1.

¹¹⁸ See U.S. Const. art. IV, § 2.

¹¹⁹ See U.S. Const. art. IV, § 3 (return of fugitive slaves); art. III, § 2 (conflicting land grants in original jurisdiction of Supreme Court).

¹²⁰ See U.S. Const. art. I, § 10.

the national economy of which they and their neighbors are a part.¹²¹ It is no surprise, therefore, that, unlike the federal government in its relations with foreign nations, the states are constrained by the commerce clause, article IV, and the principles of federalism in their dealings with one another and in their ability to regulate their citizens extraterritorially.¹²²

A. *The Commerce Clause*

For state citizens who seek more hospitable jurisdictions in which to engage in morally-contested activities barred to them at home, the federal protection of interstate commerce offers shelter. Although the exact parameters of the activities protected as "interstate commerce" have changed over the years, the two methods by which states might endeavor to prevent their citizens from obtaining out-of-state abortions are both repugnant to the commerce clause.

First, states might seek to follow the Irish example and bar women from departing for "immoral" purposes. American courts, from *Gibbons v. Ogden*¹²³ forward, have found the interstate movement of persons to be a form of interstate commerce that is protected against state obstruction.¹²⁴ Thus, a leading case, *Edwards v. California*,¹²⁵ invalidated California's criminal prohibition on knowingly bringing indigent non-residents into the state. The commerce clause barred such efforts:

It is difficult to conceive of a state statute more squarely in conflict with [the theory of the commerce clause]. . . . Its express purpose and inevitable effect is to prohibit the transportation of indigent persons across the California border. The burden upon interstate commerce is intended and immediate; it is the plain and sole function of the

¹²¹ *Edwards v. California*, 314 U.S. 160, 173 (1942) (stating that of all limits on state activity "none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders").

¹²² Cf. *Brilmayer*, *supra* note 69, at 28 (noting that neither commerce clause nor article IV limit assertion of federal extraterritorial jurisdiction). In this regard, the Restatement (Third) of Foreign Relations Law is in error when it states that "exercise of jurisdiction to prescribe by States is governed by the same principles whether the exercise of jurisdiction has international or inter State implications." Restatement (Third) of Foreign Relations Law § 402 cmt. 5 (1986).

¹²³ 22 U.S. (9 Wheat.) 1 (1824).

¹²⁴ See, e.g., *Pickard v. Pullman S. Car Co.*, 117 U.S. 34, 48 (1886); *Head Money Cases*, 112 U.S. 580, 591-94 (1884); *Henderson v. Mayor*, 92 U.S. 259, 270 (1875); cf. *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (California statute seeking to exclude immoral immigrants struck down); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 42-43 (1867) (passenger trains constitute commerce, but not clear that dollar per person exit tax constitutes impermissible burden); *Passenger Cases*, 48 U.S. (7 How.) 283 (1850) (tax and inspection of passengers violates the commerce clause).

¹²⁵ 314 U.S. 160 (1942).

statute.¹²⁶

Statutes that directly forbid citizens from departing for "immoral" purposes would similarly constitute impermissible interferences with interstate commerce.¹²⁷

Second, a state might follow Germany's example and seek to punish women who travel to more permissive locales only upon their return home. As we will see, this tactic would also be of doubtful constitutional validity under current commerce clause doctrine.

The offer of services by out-of-state providers and women's purchase of them, insofar as women travel across state lines to make the purchases, are both forms of interstate commerce.¹²⁸ Since the mid-nineteenth cen-

¹²⁶ *Id.* at 174.

¹²⁷ *Jones v. Helms*, 452 U.S. 412 (1981), in upholding an enhanced penalty against a non-supporting father who fled the state, suggests that a state could inhibit the exit of a person who has *already* committed a crime within the state, at least where "departure aggravates the consequences of conduct that is otherwise punishable[.]" *id.* at 422, just as it could arrest her, or have her remitted by extradition. But, by hypothesis, when a citizen departs from the state to obtain an abortion, no crime has yet been committed (unless interstate travel is a criminal offense) and the abortion itself will occur on the other side of the border.

Similarly, a number of quarantine cases which reject commerce clause challenges rest on the power of the state to protect against dangerous consequences within its own borders. See *Reid v. Colorado*, 187 U.S. 137, 152-53 (1902) (upholding inspection of potentially infected cattle); *Compagnie Francaise de Navigation à Vapeur v. Louisiana State Bd. of Health*, 186 U.S. 380, 396-97 (1902) (upholding exclusion of Italian immigrants from area declared to be in quarantine for infectious diseases); *Railway Co. v. Husen*, 95 U.S. 465, 472 (1878) (striking down statute prohibiting importation of Mexican cattle, but in dictum suggesting that "when absolutely necessary for its self protection," a state may "prevent persons and animals suffering under contagious diseases or convicts, &c, from entering the state" (and paupers and lewd women as well)); see also text accompanying note 160 & accompanying text *infra* (discussing "local" effects).

One colleague has suggested that a state could avoid a commerce clause attack by making it a crime to travel over any road within the state for the purpose of obtaining an abortion, and seek to punish the travel leading up to interstate movement rather than the movement itself. In addressing a similar stratagem in *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019, 2024 (1992), the Court recently observed, "our prior cases teach that a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." The principle, presumably, applies to the movement of people as well. Cf. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824) ("Can a trading expedition between two adjoining states commence and terminate outside of each? . . . [The commerce power] must be exercised within the jurisdiction of the several states.").

¹²⁸ Professional services were not considered to be "commerce" for much of the nation's history. See, e.g., *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U.S. 436, 442-44 (1920) (services of advertising agency not "commerce"). Today, however, a citizen seeking to patronize a foreign abortion clinic would be held to be engaged in interstate commerce. See, e.g., *Summit Health v. Pinhas*, 111 S. Ct. 1842, 1847 (1991) (ophthalmologic surgery performed on out-of-state residents for pay is interstate commerce); *United States v. Oregon Medical Soc'y*, 343 U.S. 326, 337-39 (1952) (provision of medical services by doctor-sponsored corporations constitutes interstate commerce). See generally *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 539 (1944) ("Commerce," as referred to in the commerce clause, refers to any trade or business in which people "bought and sold, bar-

ture, the commerce clause has been held to be a barrier to state statutes that seek to "obstruct" or regulate commerce in other states.¹²⁹ In an era when due process was thought to limit a state's authority strictly to its own territory, the doctrine could hardly have been otherwise. The states' inherent "police power" might permit the burdening of interstate commerce under some circumstances, but if the state's authority stopped at its borders, its "police power" could reach no further. When the morals of one state conflicted with those of its neighbor, moralizing efforts to interfere with commerce necessarily had to stop at the state boundary. This issue was fought out in the struggles over attempts by states to impose Prohibition.¹³⁰ In reasserting the commerce clause as a barrier to Iowa's efforts to deny its citizens access to liquor from neighboring states, for example, the Court characterized its prior limitations on interstate prohibition as resting upon "the obvious want of power of one State to destroy contracts [by its citizens] concerning interstate commerce, valid in the States where made."¹³¹

gained and contracted," including the sale of fire insurance).

Likewise, while certain "deleterious or injurious" articles were held "to lose all benefit of protection as articles or things of commerce," *Crutcher v. Kentucky*, 141 U.S. 47, 60-61 (1891); see also *Sligh v. Kirkwood*, 237 U.S. 52, 60 (1915) (rotten fruit), items which are the subject of moral debate have always remained subjects of commerce. See, e.g., *Leisy v. Hardin*, 135 U.S. 100, 110 (1890) (alcohol); *License Cases*, 46 U.S. (5 How.) 504, 576-86 (1847) (Taney, C.J.) (alcohol). See generally *Fort Gratiot*, 112 S. Ct. at 2023, n.3 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978)) ("All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset.").

¹²⁹ The first case to strike down a state law on commerce clause grounds was *State Freight Tax Case*, 82 U.S. (15 Wall.) 232, 281-82 (1872) (striking down Pennsylvania tax on railroads operating through state on per-ton basis).

¹³⁰ See *Leisy*, 135 U.S. at 159 (Gray, J., dissenting) (Iowa liquor laws should be upheld because "they are not aimed at interstate commerce . . . but operate only on intoxicating liquors within the territorial limits of the state"); *id.* at 153 (police power to "secure the safety of persons and property within their territorial limits" allows regulation of railroads); *Bowman v. Chicago & N.W. Ry.*, 125 U.S. 465, 479, 498-99 (1888) (striking down state prohibition on importation of liquor because "[i]t is not an exercise of the jurisdiction of the State over persons and property within its limits . . . it is an attempt to exert that jurisdiction over persons and property within the limits of other states"); *cf.* *Crossman v. Lurman* 192 U.S. 189, 198-200 (1904) (New York food and drug law could apply to shipment of coffee from Brazil to residents of Maryland without violating commerce clause because "the contract of sale was made in New York, the storage and delivery in the City of New York was therein provided for").

¹³¹ *American Express Co. v. Iowa*, 196 U.S. 133, 143 (1904); see *id.* at 143-44 ("To sustain, therefore, the ruling of the court below would require us to decide that the law of Iowa operated in another state so as to invalidate a lawful contract as to interstate commerce made in such other state . . . it would subject contracts made by common carriers and valid by the laws of the State where made to the laws of another State.").

Similarly, in *Shafer v. Farmer's Grain Co.*, 268 U.S. 189, 196, 199 (1925), the Court reviewed a state statute that regulated in-state sales of grain with a goal of preventing "unreasonable margins of profit" on out-of-state resales, struck it down, and proclaimed that "a state statute which by its necessary operation directly interferes with or burdens commerce is a prohibited regulation and invalid regardless of the purpose with which it was enacted." See

Even though strict territoriality has faded in the due process area, the Court has continued to regard efforts to regulate commerce in other states as usurpations under the commerce clause. To some extent this is analytically inevitable. From the point of view of the market participants, a situation in which Utah prohibits its residents from entering into transactions in California is the same as the situation in which California prohibits residents of Utah from competing in local California markets. In either case, Utah citizens cannot do business in California. The commerce clause prohibition against "discriminatory" regulations by California barring Utah residents from local markets is clearly established. Whether this clarity results from Court recognition of the adverse impact of such quasi-tariffs on the national market,¹³² or national unity,¹³³ the commerce clause should also prevent Utah from erecting barriers with similar effects.¹³⁴

Western Union Tel. Co. v. Brown, 234 U.S. 542, 547 (1914) (Holmes, J., for a unanimous Court) (state statute imposing tort liability for negligent delivery of telegram outside of state territory violates commerce clause).

¹³² See *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266, 280 (1987) ("we have steadfastly adhered to the central tenet that the Commerce Clause 'by its own force created an area of trade free from interference by the States,' "); *Hood & Sons v. DuMond*, 336 U.S. 525, 539 (1949) ("Our system, fostered by the commerce clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation . . . every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any."); cf. *Dennis v. Higgins*, 111 S. Ct. 865, 871-72 (1991) ("Commerce Clause . . . confer[s] a 'right' to engage in interstate trade free from restrictive state regulation . . . 'intend[ed] to benefit' " those engaged in interstate commerce, not only to promote national economic union).

¹³³ See *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) (commerce clause "reflected a central concern among the Framers . . . the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization"); *Baldwin v. GAF Seelig*, 294 U.S. 511, 523 (1935) ("The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together and that in the long run prosperity and salvation are in union and not division.").

¹³⁴ The legitimacy of import barriers and extraterritorial regulation differs if the negative commerce clause focuses exclusively on protecting unrepresented outsiders, see, e.g., *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 185 (1938), and avoiding economic protectionism, see, e.g., *Wyoming v. Oklahoma*, 122 S. Ct. 789, 800 (1991) (statutes invalid when they "amount to simple economic protectionism"). Cf. *Tyler Pipe Indus. Inc. v. Washington Dep't of Revenue*, 483 U.S. 232, 258-65 (1987) (Scalia, J., dissenting) (arguing that protection should be limited to "rank discrimination against citizens of other states"); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., dissenting) (only discriminating statutes or those which impose risk of inconsistent regulation violate commerce clause). Extraterritorial regulation of citizens does not raise the concern for state exploitation of non-citizens.

An exclusive focus on protecting outsiders, however, is inconsistent with the proposition, recently reaffirmed in *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019, 2025 (1992), that "a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the State enacting such statute" (quoting *Brimmer v. Rebman*,

The modern touchstone is *Baldwin v. GAF Seelig*,¹³⁵ where New York sought to condition intrastate milk sales on a New York milk distributor's payment of a minimum price for milk that it purchased in Vermont. The Court declared that under the commerce clause it was undisputed that "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there," even when regulating a New York milk dealer.¹³⁶ The New York prohibition sought to do exactly that: the statute's "avowed purpose" was to affect the price of milk in Vermont, and, under the commerce clause, "[o]ne state may not put pressure of that sort upon others to reform their economic standards."¹³⁷

Although commerce clause jurisprudence has evolved since *Baldwin*, the proposition that extraterritorial commercial interventions violate the clause has remained intact.¹³⁸ In *Edgar v. MITE Corp.*,¹³⁹ the Court struck down an Illinois statute that regulated take-over bids for

138 U.S. 78 (1891)). See also *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951) (Wisconsin statute protecting local dairy industry against out-of-state competition by imposing limit that bore on both in-state and out-of-state marketers struck down as violation of commerce clause).

Nor is economic exploitation of other states the only evil at which the commerce clause is directed. If California had rested its desire to exclude indigents in *Edwards v. California*, 314 U.S. 160 (1942), exclusively on claims about "[t]he increase of rape and incest traceable to the crowded conditions in which these people are forced to live" and the "petty crime among them [which] has featured the criminal calendars of every community into which they have moved," *id.* at 168 (argument for appellees), the non-economic nature of the state purposes would not make the prohibition of immigration any less an impermissible burden on commerce. Similarly, if a public-spirited state wholly without self-interest forbade its residents from exporting wastes in order to save the landfill capacities of its neighbors, the burden on commerce would not be less for the lack of discrimination or desire to benefit in-state merchants at the expense of out-of-staters. Cf. *Waste Sys. Corp. v. County of Martin*, 784 F. Supp. 641, 644 (D. Minn. 1992) (emphasizing that purpose of regulation prohibiting export of wastes is not necessarily dispositive on issue of regulation being impermissible burden on commerce); *Stephen D. De Vito Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp.*, 770 F. Supp. 775, 780 (D.R.I.) (same), *aff'd per curiam*, 947 F.2d 1004 (1st Cir. 1991).

¹³⁵ 294 U.S. 511 (1935).

¹³⁶ *Id.* at 521.

¹³⁷ *Id.* at 522-24; cf. *Hood & Sons v. DuMond*, 336 U.S. 525, 556-57 (1949) (Black, J., dissenting) ("It was because New York attempted to project its law into Vermont that even its admitted health purpose was insufficient to outweigh Vermont's interest in controlling its own local affairs"); *id.* at 570 (Frankfurter, J., dissenting) ("The nakedness of New York's purpose to reach into Vermont was ill-concealed by the tenuous justification that if Vermont farmers got cheap prices for their milk they would be tempted to save the expense of sanitary precautions and thereby affect the health of New York consumers.").

¹³⁸ In *New Energy Co. v. Limbach*, 486 U.S. 269, 275 (1988), Justice Scalia, who is usually unenthusiastic about negative commerce doctrine, cited *Baldwin* for a unanimous court as a "leading case." See also *Fort Gratiot*, 112 S. Ct. at 2024 (citing *Baldwin* as one example of what was termed in *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978), a "presumably legitimate goal sought to be achieved by the illegitimate means of isolating the State from the national economy").

¹³⁹ 457 U.S. 624 (1982).

Illinois-affiliated corporations, no matter where the bids were initiated or where the takeover was consummated. Justice White's plurality observed that while "not every exercise of state power with some impact on interstate commerce is invalid,"¹⁴⁰ "direct regulation is prohibited."¹⁴¹ The Illinois Act "directly regulates transactions which take place across state lines" and hence was held invalid.¹⁴² The commerce clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the state."¹⁴³

In his opinion in *CTS v. Dynamics Corp. of America*,¹⁴⁴ Justice Powell appeared to limit *MITE*. He emphasized that the *MITE* opinion did not represent the views of the full court and went on to interpret *MITE*'s commerce clause analysis as resting not on extraterritoriality but on the possibility that the takeover statute would lead to inconsistent regulation of interstate commerce,¹⁴⁵ as well as on Illinois's absence of interest in protecting nonresident shareholders of nonresident corporations.¹⁴⁶ The Indiana statute at issue in *CTS*, which structured the voting rules for Indiana corporations with substantial blocs of Indiana shareholders, was vulnerable on neither count. Indiana, the Court held, had established the corporate charter it was seeking to regulate, and "[had] a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing."¹⁴⁷

CTS, however, was not the end of the matter. In *Healy v. Beer Institute, Inc.*,¹⁴⁸ a majority of the Court relied on *MITE* for the proposition that "the 'Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders whether or not the commerce has effects within the State.'"¹⁴⁹ The

¹⁴⁰ *Id.* at 640.

¹⁴¹ *Id.*

¹⁴² *Id.* at 641 (joined by Burger, Stevens, & O'Connor, J.J.).

¹⁴³ *Id.* at 642-43. The plurality went on to characterize the statute in the alternative as a "burden on interstate commerce" whose effects were excessive in relation to Illinois' interests. *Id.* at 643.

¹⁴⁴ 481 U.S. 69 (1987).

¹⁴⁵ *Id.* at 88.

¹⁴⁶ *Id.* at 93.

¹⁴⁷ *Id.*

¹⁴⁸ 491 U.S. 324 (1989).

¹⁴⁹ *Id.* at 536 (citing *MITE*, 457 U.S. 624 (1982)); see also *id.* at 536 n.13 (citing *MITE*) ("any attempt 'directly' to assert extraterritorial jurisdiction over persons or property . . . exceed[s] the inherent limits of the State's power"); *id.* at 333 n.9 (*MITE* "significantly illuminates the contours of the constitutional prohibition on extraterritorial legislation").

Arguably support for the reaffirmation of the *MITE* principle was even broader, since Justices Stevens and O'Connor, who joined in *MITE*, joined Justice Rehnquist's dissent in *Healy*, which was based on the absence of "concrete evidence that the Connecticut regulation will have any effect on the beer prices charged in other states." *Id.* at 347. In his concurrence

Court invalidated Connecticut's efforts to link the price of beer that interstate brewers sold within Connecticut to the prices that those brewers charged in neighboring states. The Court observed that the scheme "has the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State."¹⁵⁰ It thus violated the stricture that "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature."¹⁵¹

Most recently, in *Quill Corp. v. North Dakota*,¹⁵² a majority of the Court reaffirmed the existence under the commerce clause of a "safe harbor for vendors 'whose only connection with customers in the [taxing] State is by common carrier or the United States mail.'"¹⁵³ The *Quill* Court's proposition that the commerce clause mandates a "physical pres-

in *Healy*. Justice Scalia explicitly declined to join in the *MITE* analysis, calling it "dubious and unnecessary" since it rested on the "mere economic reality" that the brewers could be expected to change their policies in neighboring states. *Id.* at 345. This position does not directly address the question of the status of an explicit effort to regulate out-of-state transactions.

¹⁵⁰ *Id.* at 337.

¹⁵¹ *Id.* at 336; see, e.g., *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 523 (1989) ("We have applied a 'virtually per se rule of invalidity' . . . when a state law 'directly regulates or discriminates against interstate commerce.'") (citations omitted); *K-S Pharmacies, Inc. v. American Home Prods. Corp.*, 962 F.2d 728, 730 (7th Cir. 1992) (Easterbrook, J.) ("No state may require sellers to charge the same price within its borders as they charge elsewhere. Such statutes, the Supreme Court has held, assert extraterritorial jurisdiction of a kind denied to the states by the 'negative' or 'dormant' commerce clause.").

Healy was prefigured both by the Court's summary affirmation of the invalidation of Connecticut's predecessor statute in *United States Brewers Ass'n v. Healy*, 692 F.2d 275, 279 (2d Cir. 1982), *aff'd*, 464 U.S. 909 (1983) ("If the purpose or effect of a state's law is to regulate conduct occurring wholly outside the state, the burden on commerce is generally held impermissible, and the fact that the law may not have been intended as protectionist or discriminatory will not save it."), and by the invalidation of New York's price affirmation law in *Brown-Forman Distillers Corp. v. New York Liquor Auth.*, 476 U.S. 573, 579-80 (1986) ("When a state statute directly regulates or discriminates against interstate commerce . . . we have generally struck down the statute without further inquiry. . . . Our inquiry, then, must center on whether New York's affirmation law regulates commerce in other states."). Cf. *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 n.12 (1992) (citing *Brown-Forman* with approval).

¹⁵² 112 S. Ct. 1904 (1992).

¹⁵³ *Id.* at 1914 (citing *National Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753, 758 (1967), overruled by *Quill*) (with respect to due process clause)). The Court suggested that the "physical presence" requirement had its root in aspects of the test enunciated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), "requir[ing] a substantial nexus and a relationship between the tax and State-provided services [which] limit the reach of State taxing authority so as to ensure that State taxation does not unduly burden interstate commerce." *Quill*, 112 S. Ct. at 1923.

Justices Scalia, Kennedy and Thomas concurred only on grounds of *stare decisis*, declining to reach the merits of the "safe harbor" approach. See *id.* at 1923. Justice White dissented, characterizing a "physical presence" requirement as "anachronistic," in light of the benefits that mail order sellers derive from the customer state's court and commercial credit systems. See *id.* at 1920.

ence" prerequisite for jurisdiction-to-tax supports the parallel proposition that the clause embodies a "physical absence" limit on direct extraterritorial regulation. If a state may not impose tax collection obligations on interstate vendors' transactions, even when one end of the transaction is within the taxing state, because one party to the transaction is absent, then a state certainly may not tax a transaction occurring entirely outside its borders.¹⁵⁴ A fortiori, it may not prohibit that transaction.

Efforts to punish or regulate legal extraterritorial abortions seek to control commercial activity in other states. They do not seek to prevent the exercise of state-created intangible privileges as a "shield for unfair business dealing" as in *CTS*, for the women whose futures are at issue do not owe their existence to the state in which they reside. Attempts to regulate extraterritorial abortions do not attach consequences only tangentially to events occurring in other states, for they are intentionally directed at wholly preventing transactions that are legal in the states where they occur.¹⁵⁵ Such efforts would thus transgress commerce clause limits even if the due process clause would permit the exertion of "legislative jurisdiction."¹⁵⁶

This conclusion, however, is subject to two limitations. First, it is

¹⁵⁴ Under the commerce clause, domicile alone does not give a state authority to tax the out-of-state transactions of the domiciliary. See, e.g., *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 30 (1988) (use taxation of domiciliary corporation's activities must meet test articulated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287 (1977): "activity [must have] a substantial nexus with [the state], and the tax [must be] fairly apportioned, [must] not discriminate against interstate commerce, and [must be] fairly related to benefits provided by the State"); *id.* at 32 ("fair apportionment" required that state "not attempt to tax that portion of the catalogs that went to out-of-state customers"); see also *Goldberg v. Sweet*, 488 U.S. 252, 263 (1989) ("We believe that only two States have a nexus substantial enough to tax a consumer's purchase of an interstate telephone call": the state of the service address where the call is billed, and the state of origination); *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 314 (1938) (gross receipts tax on Indiana domiciliary corporation's out-of-state sales violated commerce clause); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 583 (1937) (use tax on domestic use of product permitted although tax on extraterritorial purchase by state resident would not be). Indeed, *Complete Auto Transit*, the case that enunciated the currently governing standard, itself involved a domiciliary corporation. See Goldstein, *supra* note 88, at 136.

According to *Quill*, the "substantial nexus" and "relationship" requirements of *Complete Auto Transit* "limit the reach of State taxing authority so as to ensure that State taxation does not unduly burden interstate commerce," while the "fair apportionment" and "non-discrimination" elements prohibit imposing "an unfair share of the tax burden" on interstate commerce. *Quill*, 112 S. Ct. at 1913.

¹⁵⁵ Cf. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (discussing "direct regulation"); text accompanying notes 99-105 *supra* (discussing "conduct regulating" rules).

¹⁵⁶ Cf. *Quill*, 112 S. Ct. at 1913-14 (tax invalid under commerce clause for lack of physical contact with seller, even though valid under due process as exhibiting requisite "nexus"); *Tyler Pipe Indus. v. Washington State Dep't of Revenue*, 483 U.S. 232, 253 (1987) (multiple activities exemption of state tax invalid, even though due process "nexus" challenge to wholesale tax rejected).

well recognized that Congress may intervene to alter commerce clause constraints.¹⁵⁷ A right to seek an out-of-state abortion premised on the commerce clause is only as solidly rooted as the Congressional majority or Presidential veto which prevents the imposition of limitations. In some ways, however, this factor is an advantage of the commerce clause theory. It allows the Court to constrain state imposition, while at the same time permitting the Justices to disavow efforts to impose their own constitutional vision upon the democratic process. If Congress can always override the Court's decisions, the Court can claim at least the shadow of majoritarian legitimacy. The recent *Quill* case highlights the Court's attraction to this aspect of the doctrine. The net effect of the commerce clause theory is to put the ability to protect the rights of women who can travel in the hands of any blocking coalition at the national level. Under this theory a national consensus is necessary before any individual state can attempt the tactics tried by Ireland or Germany. The hypothesis upon which this Article has proceeded is that such a consensus is unlikely to develop.

Second, although it has been said that "direct regulations" of interstate commerce are subject to a rule of virtual "per se invalidity," and extraterritorial limitations "exceed the limitations of the enacting state's authority," all of the cases in which statutes have been invalidated have involved laws which in some sense could be characterized as economic protectionism or predation. Commerce clause doctrine is scarcely a taut and unchanging framework; it might be soft enough to allow the Court to invoke the proposition that while exclusionary regulations are subject to "strict scrutiny," such regulations may be acceptable if they are "demonstrably justified by a valid factor unrelated to economic protectionism."¹⁵⁸ Such a modification would, like the due process theories canvassed earlier, directly confront the Court with the question of what weight to give the state's interest in fetal protection as against the inter-

¹⁵⁷ See, e.g., *Quill*, 112 S. Ct. at 1912, 1916 (describing four-prong test Court uses to sustain tax against commerce clause challenge and deferring to Congress's "ultimate power to resolve" the matter); *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 523-24 (1989) (citing Congress' power to identify state action that does *not* violate commerce clause, despite its effect on interstate commerce).

¹⁵⁸ See, e.g., *Maine v. Taylor*, 477 U.S. 131, 151-52 (1986) (Maine statute prohibiting importation of live baitfish upheld to prevent environmental risks to wildlife population), cited in *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992), and *New Energy Co. v. Limbach*, 486 U.S. 269, 274 (1988); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019, 2024 (1992) (quoting *New Energy*); *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2015 (1992) (quoting *Wyoming v. Oklahoma*); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956 (1982) (striking down Nebraska statute banning transport of water without a permit for use in adjoining state, noting that "[f]or Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other").

ests of national economic union and unimpeded interstate commerce.

The modern cases which have successfully invoked this justification for burdening interstate commerce, however, have involved efforts to protect against in-state health and welfare dangers.¹⁵⁹ Indeed, the kinds of justifications which might meet the test often have been described as "local" ones, in keeping with the earlier definitions of police power.¹⁶⁰ To the extent that states seek to interfere with abortions which occur in other states, it is difficult to characterize the effects they seek to avoid as "local" ones.

This conclusion is strengthened by considering the privileges and immunities clause, the constitutional provision which the Court has described as having a "mutually reinforcing relationship" with the goals of union embedded in the commerce clause doctrine.¹⁶¹

B. Privileges, Immunities, and National Citizenship

One of the concerns reflected in the commerce clause is a concern with preserving the opportunities of citizens in a federal system composed of states with competing public agendas. The text of the clause, however, seems an unlikely vehicle with which to regulate interstate contests of morality. There is, however, a constitutional provision whose words more directly address the issue of what it means to be a citizen of a federal republic afflicted or blessed with moral dissensus. Article IV's privileges and immunities clause provides that "[t]he citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."¹⁶²

The text's apparent meaning is that when American citizens travel outside of the territory of their home state—and thus "in the several states"—they are "entitled" to partake of the "privileges and immunities" of local citizens. In cases of moral dissensus, all American citizens present in a state are equally entitled to the privileges and immunities of the local climate.

¹⁵⁹ See *Maine*, 477 U.S. at 140-41 (protection of Maine's fisheries); *Sporhase*, 458 U.S. at 954-55 (conservation of diminishing ground water sources). Note that *Sporhase* struck down a reciprocity requirement that sought to obtain comparable water from another state. *Sporhase*, 458 U.S. at 960.

¹⁶⁰ See *Fort Gratiot*, 112 S. Ct. at 2028 (Rehnquist, J., dissenting) (arguing that dormant commerce clause should not apply to "law[s] directed to legitimate local concerns"); *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (applying "strictest scrutiny [to] any purported legitimate local purpose"), quoted in *Chemical Waste Management*, 112 S. Ct. at 2014; *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977) (state must be able "to justify [statute] both in terms of the local benefits flowing from statute and the unavailability of non-discriminatory alternatives"), quoted in *Chemical Waste Management*, 112 S. Ct. at 2014.

¹⁶¹ *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978).

¹⁶² U.S. Const. art. IV, § 2, cl.1.

I. Constraints on Inhospitable Hosts

At its most uncontroversial, the privileges and immunities clause constrains discrimination against out-of-state citizens. The "privileges and immunities" granted to residents cannot be denied to out-of-state citizens. Beginning with *Ward v. Maryland*,¹⁶³ in which the Court determined that Maryland could not tax foreign traders at a higher rate than it imposed on domestic traders, and culminating most recently in a trio of cases in which the Court invalidated states' refusals to allow local practice by out-of-state attorneys,¹⁶⁴ the Court has regularly interpreted the clause to place constitutional barriers in the path of states' efforts to deny citizens of other states rights or privileges granted to their own residents.¹⁶⁵ Thus, even if *Roe* is overruled and abortion becomes merely another regulated medical procedure, *Doe v. Bolton*'s conclusion that the privileges and immunities clause prevents a state in which abortion services are available from denying access to non-residents¹⁶⁶ seems well

¹⁶³ 79 U.S. (12 Wall.) 418, 430-32 (1871).

¹⁶⁴ See *Barnard v. Thorstenn*, 489 U.S. 546, 559 (1989); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 70 (1988); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 288 (1985).

¹⁶⁵ The barriers are not absolute. The most recent Supreme Court articulation of the test is found in *Barnard v. Thorstenn*, 489 U.S. at 552 ("When a challenged restriction deprives nonresidents of a privilege or immunity protected by this Clause, it is invalid unless '(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective' in light of less restrictive means available to accomplish the objective.").

In *Piper*, Justice Rehnquist voiced dissent from the "least restrictive means" branch of the analysis. See *Piper*, 470 U.S. at 294-95. His dissent in *Friedman* "on the same basis as *Piper*" was joined only by Justice Scalia, who did not join the Rehnquist dissent in *Barnard*. See *Friedman*, 487 U.S. at 71. The dissent in *Barnard*, joined by Justices White and O'Connor, was based on the "unique circumstances of legal practice in the Virgin Islands." See *Barnard*, 489 U.S. at 560. Justice Rehnquist's own articulation seems to be found in *United Bldg. & Constr. Trades v. Mayor of Camden*, 465 U.S. 208, 222 (1984) (the clause "does not preclude discrimination against citizens of other States where there is a 'substantial reason' for the difference in treatment . . . [and] the degree of discrimination bears a close relationship to [the reason].").

Thus, in dealing with the problem of extraterritorial regulation of abortion, the members of the Court who seek to avoid taking a position on abortion by treating it as a question entirely for the legislature will be thrown back by doctrine to the task of determining whether the effort to prevent extraterritorial abortions is a "substantial" interest. In this regard, the holding in *Austin v. New Hampshire*, 420 U.S. 656, 668 (1975), that under the privileges and immunities clause "the constitutionality of one State's statutes affecting nonresidents [cannot] depend upon the present configuration of the statutes of another State," suggests that a simple desire to honor the home state's anti-abortion policy would not justify prohibiting out-of-state residents obtaining abortions on a basis of equality with domestic residents. See also *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 82 (1920) ("A State may not barter away the right, conferred upon its citizens by the Constitution of the United States, to enjoy the privileges and immunities of citizens when they go into other States."), quoted with approval in *Austin*, 420 U.S. at 667.

¹⁶⁶ 410 U.S. 179, 200 (1973).

grounded. The opportunity to obtain an abortion is no less a "privilege and immunity" than the opportunity to practice law or to fish for shrimp.¹⁶⁷ Article IV's long-standing obligation to "place the citizens of each State upon the same footing with citizens of other States"¹⁶⁸ will constrain efforts to bar inhabitants of other states from the abortion opportunities permitted to locals.¹⁶⁹

¹⁶⁷ This seems particularly to be the case in states which regard abortion as a right protected under their own constitutions. It would be difficult to argue that a state constitutional right is not a "privilege or immunity" of state citizenship. The exclusions from the definition of "privilege and immunity" which the Court has explicitly recognized in recent years have included: (1) an exception for activities that are not "basic and essential" in *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 377-78 (1978) (elk hunting license); (2) an exception dictated by the structure of federalism for the right to vote and hold political office, in *Piper*, 470 U.S. at 282 n.13 (right to vote and to hold political office); and (3) an exception for goods and services created by the state itself, in *Martinez v. Bynum*, 461 U.S. 321, 333 (1983) (upholding residence requirement for tuition-free public education). In *Sosna v. Iowa*, 419 U.S. 393, 407 (1975), the Court also upheld a one-year residence requirement for divorce on the ground that Iowa had an interest in avoiding extraterritorial attack on its divorce decrees.

¹⁶⁸ *Friedman*, 487 U.S. at 64 (quoting *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869), overruled on other grounds by *United States v. South Eastern Underwriters Ass'n*, 322 U.S. 533 (1944)).

The obligation is mirrored with respect to aliens by 42 U.S.C. § 1981 (1988) which provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties . . . and to no other." Most recent litigation has focused on equality with *white* citizens. However, equality with *white citizens* was also contemplated. See *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *Bhandari v. First Nat'l Bank of Commerce*, 808 F.2d 1082, 1099, reh'g en banc, 829 F.2d 1343 (5th Cir. 1987); see also *Truax v. Raich*, 239 U.S. 33, 39 (1915) (legally admitted alien admitted "with the privilege of entering and abiding . . . in any State in the Union.").

¹⁶⁹ Indeed, even if abortion were considered to be the equivalent of homicide, it seems doubtful that a state could deny the advantages of its own law to out-of-state residents. Suppose that New Jersey recognizes a "battered wife" defense. It would plainly violate the privileges and immunities clause to make that defense available only where a New Jersey killing was committed by New Jersey residents.

Assume further that Pennsylvania does not offer such a defense, and a Pennsylvania battered wife kills her Pennsylvania husband while on vacation in New Jersey. Would not the privileges and immunities clause prevent New Jersey courts or legislature from denying the defense to the non-resident wife in a New Jersey prosecution? (Conversely, if Pennsylvania punishes marital rape but New Jersey does not, New Jersey could not provide for the prosecution of only Pennsylvania husbands who rape their wives in New Jersey.)

A general statute that all defendants are to be governed by the law of their place of origin might raise different issues. Even so, in *Austin v. New Hampshire*, 420 U.S. 656, 668 (1975), the Court held that "the constitutionality of one State's statutes affecting nonresidents [cannot] depend upon the present configuration of the statutes of another State." More importantly, in a criminal context it is inconceivable that New Jersey would say conduct is governed "only" by the law of the state of origin, for that could mean that a Pennsylvanian coming into New Jersey would be immune from New Jersey criminal sanctions.

2. *The Right to Travel: Constraints on Barriers to Entry and Exit*

American citizens are entitled under article IV's privileges and immunities clause to avail themselves of reproductive options in neighboring states on a "footing of equality" with residents of those states; a refusal by host states to accord such equality would violate the clause. California could not deny women from Utah the right to obtain abortions that would be lawful for California citizens. To take advantage of this entitlement, of course, a Utah woman must get to California. The question thus arises, in light of Ireland's recent efforts, whether California or Utah could prohibit women from traveling to California for that purpose. One answer, as we have noted, lies in the commerce clause, which limits the states' powers to interfere with interstate transit of persons and products. Yet the right to interstate travel has deeper roots.¹⁷⁰

The predecessor of the privileges and immunities clause was contained in article IV of the Articles of Confederation, which provided:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and *the people of each state shall have free ingress and regress to and from any other state . . .*¹⁷¹

Although there is little legislative history of this provision, it appears that the Articles of Confederation generally sought to fuse disparate states into a whole, not only by protecting a right to relocate one's residence to another state, but by ensuring the ability to travel among the states for purposes other than permanent migration.¹⁷²

Although the current privileges and immunities clause was modeled on the Articles' provision,¹⁷³ it omits explicit mention of "free ingress

¹⁷⁰ It is worth highlighting these roots in view of the Supreme Court's decision to rehear *Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991), and of the re-emergence of state statutes which seek to impose durational residency requirements on welfare benefits. Given the limits of *stare decisis* in the Rehnquist court, *Shapiro v. Thompson*, 394 U.S. 618 (1969), may soon be relitigated. Cf. *Nordlinger v. Hahn*, 112 S. Ct. 2326, 2332 (1992) (declining, on standing grounds, to reach right to travel challenge to "welcome stranger" tax assessment).

¹⁷¹ Articles of Confederation art. IV (1777) (emphasis added). Professor Bogen traces the right to "ingress and regress" back to the Magna Carta and inter-colonial movement. David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 Case W. Res. L. Rev. 794, 811-14 (1987).

¹⁷² The draft presented to the Continental Congress entitled inhabitants "going to reside in [] other State[s]" to the "rights and privileges" of "natural born free Citizens" of their destination. Bogen, *supra* note 171, at 820 n.70 (citing 9 Journals of the Continental Congress 1774-1789, at 889 (W. Ford ed., 1907)). The Congress broadened the Article to protect the "privileges and immunities" of all free inhabitants in foreign states, not only those "going to reside."

¹⁷³ Charles Pinckney, who claimed to have drafted article IV section 2 of the Constitution, told the convention that this article was "formed exactly upon the principles of the 4th Article

and regress." It has been accepted for the better part of two centuries, however, that the current Constitution incorporates a right of interstate travel. Initially, the right was rooted in the "ingress and regress" heritage of the Articles of Confederation embodied in the privileges and immunities clause of article IV.¹⁷⁴ The purpose of the privileges and immunities clause, like its predecessor in the Articles of Confederation, was to recognize a national identity that made states fellow-members of a broader polity. One of the constituents of that identity was the right of citizens of each of the newly-formed United States to travel among the states on a basis of equality.

The dimensions of this right formed part of the matrix for the controversy that swirled through the middle of the nineteenth century over whether free blacks were citizens of the states in which they resided. During the first half of the eighteenth century, many states sought to exclude free blacks from their borders or to prevent their interstate

of the present Confederation." 3 Max Farrand, *The Records of the Federal Convention of 1787*, at 106, 112 (1937); *Zobel v. Williams*, 457 U.S. 55, 79 (1982) (O'Connor, J. concurring); cf. *United States v. Wheeler*, 254 U.S. 281, 294 (1920) ("The text of Article IV, § 2, of the Constitution makes manifest that it was drawn with reference to the corresponding clause of the Articles of Confederation and was intended to perpetuate its limitations."); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75-76 (1872) ("there can be but little question that the purpose of both these provisions is the same," referring to the fourth article of the Articles of Confederation and article IV of the Constitution).

¹⁷⁴ The earliest assertion was that of Justice Washington in *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230) (article IV privileges and immunities include "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise"). See *United States v. Wheeler*, 254 U.S. 281, 297-98 (1920) ("Undoubtedly the right of citizens of the States to reside peacefully in, and to have free ingress into and egress from, the several States [against both their own and other states]" fused into one by article IV, section 2); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871) ("[T]he clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation."); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869), overruled on other grounds by *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) (privileges and immunities clause "gives [citizens of each state] the right of free ingress into other States, and egress from them").

More recent opinions relying on the article IV heritage include: *Zobel v. Williams*, 457 U.S. 55, 79 (1982) (O'Connor, J. concurring); *Shapiro v. Thompson*, 394 U.S. 618, 630 n.8 (1969). Justices Stevens and Rehnquist joined Justice O'Connor's opinion in *Attorney Gen. v. Soto-Lopez*, 476 U.S. 898, 920 (1986) (O'Connor, J., dissenting) (article IV, section 2 provides relevant basis for analysis in evaluating claims of right to interstate travel or migration), even though Justice Rehnquist had previously rejected the analysis in *Zobel*, 457 U.S. at 84 n.3, on the basis of the *Slaughter-House* objection. See text accompanying note 190 *infra*.

Professor David Bogen argues that a right to interstate travel is implicit in the entitlement to exercise privileges and immunities in the host state because "[i]f the state of origin prohibits leaving, it will prevent a citizen from obtaining article IV privileges. Similarly if the state of destination excludes the citizen, it also obstructs obtaining the privileges." Bogen, *supra* note 171, at 847. Whether or not the argument will support a generally applicable right to travel, it certainly casts doubt on travel limitations that are designed to interfere with extraterritorial abortion.

travel.¹⁷⁵ It was conceded on all sides, however, that such efforts would be impermissible if free blacks were state citizens. The issue was initially tested in controversies over an 1821 South Carolina statute restricting the rights of free black seamen to debark from their vessels while in port. If blacks were "citizens," article IV was conceded by both North and South to give them the right to travel into other states.¹⁷⁶

A decade later, arguments in the case of Prudence Crandall, who was convicted of running a school for free black immigrants to Connecticut without a license, turned on whether the blacks were "citizens"; if so, their right to immigrate was conceded by the prosecutors.¹⁷⁷ According to legal learning common at the time of the Civil War, state citizenship entailed the right to travel among the states.¹⁷⁸ It was this understanding

¹⁷⁵ See, e.g., Ill. Const. of 1848, art. XIV (requiring exclusion of "free persons of color"), reprinted in Francis N. Thorpe, 2 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the State, Territories and Colonies Now or Heretofore Forming the United States of America 1009* (1909); Ind. Const. of 1851, art. XIII, § 1 ("No negro or mulatto shall come into, or settle in the State"), reprinted in F. Thorpe, *supra*, at 1089; Mo. Const. of 1820 Art III § 26, reprinted in F. Thorpe, *supra*, at 2154 (excluding "free negroes and mulattoes"); Or. Const. of 1857, art. I, Bill of Rights, § 36 ("No free negro or mulatto . . . shall come, reside or be within this State"), reprinted in 5 F. Thorpe, *supra*, at 3000.

By the Civil War, Alabama, Arkansas, Delaware, Florida, Georgia, Iowa, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, Texas and Virginia all prohibited or punished by statute the entry of free blacks who were not already residents of the state, and Delaware, Georgia, Louisiana, North Carolina, South Carolina and Virginia prohibited free black residents from traveling outside of their own state with an intention to return. See J. Hurd, *supra* note 49, at 279-80. Louisiana also sought to prohibit the travel of masters with slaves to free states. P. Finkelman, *supra* note 38, at 211-12.

¹⁷⁶ See House Comm. on Commerce, Report on Free Colored Seamen, H.R. Rep. No. 80, 27th Cong., 3d Sess. 2 (1843); *The Reconstruction Amendments' Debates ii-iii* (Alfred Avins ed., 1967) [hereinafter *The Reconstruction Amendments' Debates*]; Don E. Fehrenbacher, *Slavery, Law, and Politics 37-38* (1981); P. Finkelman, *supra* note 38, at 233; J. Hurd, *supra* note 49, at 279-80.

¹⁷⁷ *Crandall v. State*, 10 Conn. 339, 344-47 (1832); see Harold M. Hyman & William M. Wiecek, *Equal Justice Under Law 94-95* (1982).

¹⁷⁸ See *Smith v. Moody*, 26 Ind. 299, 301, 304 (1866) (invalidating Indiana's constitutional prohibition on entry of blacks into the state, under article IV privileges and immunities clause, holding that *Dred Scott* had been effectively overruled by, inter alia, Civil Rights Act conferring citizenship); *Case of Andrew Hatfield*, 3 Western L. J., July 1846, at 477-78 (discharging, under privileges and immunities clause, free black arrested for coming from Pennsylvania to Missouri without license); J. Hurd, *supra* note 49, at 279 ("So far as judicial opinion has been expressed on the question, it seems almost unanimous that these laws would be unconstitutional, were negroes to be held citizens of a State."); cf. *Pendleton v. State*, 6 Ark. 509, 510 (1846) (upholding statute to exclude free blacks as against Article IV attack on ground that blacks could not be citizens); *Tennessee v. Claiborne*, 19 Tenn. (1 Meigs) 331, 339, 341 (1838) (conviction of free black for illegal immigration to Tennessee upheld against Article IV attack on ground that blacks could not be citizens); *id.* at 333 (argument of Attorney General conceding states "cannot pass laws to exclude citizens of one of the Component States"). Compare *Moore v. Illinois*, 55 U.S. (9 How.) 13, 18 (1852) (stating that states bordering slave states have the right "to protect themselves against the influx either of liberated or fugitive slaves"), with *Lemmon v. People*, 20 N.Y. 562, 610-11 (1860) (arguing that "any law which should attempt to deny [citizens] free ingress or egress would be void," and explaining *Moore*, *supra*, as resting

that gave particular salience to Justice Taney's strained conclusion in *Dred Scott* that blacks could not become state or national citizens.¹⁷⁹

The understanding that citizenship brought with it the right to travel among states was common currency in the political branches as well. In 1821, Congress faced the question of whether to admit to the Union the State of Missouri, whose constitution excluded from its boundaries "free negroes and mulattoes."¹⁸⁰ If blacks could be citizens, the constitution of Missouri would be inconsistent with the Constitution of the United States. Congress ducked the issue; Missouri's admission was secured by the adoption of a proviso recognizing that such exclusion was applicable only to individuals who were not "citizens of the states in the union," without defining whether blacks could be members of that class.¹⁸¹

Justice Taney's opinion in *Dred Scott* purported to resolve that issue. Still, in the 1858 and 1859 Congressional debates on the admission of Oregon, the would-be state's draft constitutional provision excluding all black persons from the state was challenged as a violation of article IV.¹⁸² In order to establish the validity of the restrictions, Oregon's successful proponents relied on *Dred Scott*'s repressive conclusion that

on the proposition that slaves are not citizens). See also *Willard v. People*, 5 Ill. (4 Scam.) 461, 472 (1843) (the Law of Nations states that "the citizens of one government have a right of passage through territory of another . . . without the latter's acquiring any right over the person or property. . . . Much less would we disregard their constitutional rights, as citizens of one of the states, to all the rights, immunities and privileges of the citizens of the several states"); *Julia v. McKinney*, 3 Mo. 193, 194 (1833) (under article IV "it is the right of every citizen of the United States to pass freely through every other state with his property of every description, including negro slaves without being in any way subject to forfeit his property").

¹⁷⁹ See *Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1857) (Taney, J.) (if blacks were state citizens, "it would give [them] the right to enter every other State whenever they pleased").

¹⁸⁰ Mo. Const. of 1820 art. III, § 26, reprinted in 4 F. Thorpe, *supra* note 175, at 2154.

¹⁸¹ See Joint Resolution of March 2, 1821, 16th Cong., 2d Sess., 3 Stat. 645, 645 (1821) ("No law shall be passed in conformity thereto, by which any citizen, of either [sic] of the states in this Union, shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the constitution of the United States."); see also J. Hurd, *supra* note 49, at 168, 280 (discussing Joint Resolution); Leon F. Litwack, *North of Slavery: The Negro in the Free States 1790-1860*, at 34-39 (1961) (discussing "the legislative debates of 1820-21 on the admission of Missouri" and "the matter of negro citizenship").

¹⁸² See Cong. Globe, 35th Cong., 1st Sess. 1964 (1858) (statement of Sen. Fessenden of Maine) (viewing prohibition on travel as unconstitutional); Cong. Globe, 35th Cong., 2d Sess. 952 (1859) (statement of Rep. Granger) (arguing that exclusion violates constitutional right "of the people of one State going to another either on business or to remain there" under privileges and immunities clause) (emphasis omitted); *id.* at 974 (statement of Rep. Dawes) (exclusion is "plainly and . . . palpably" unconstitutional under the privileges and immunities clause); *id.* at 984 (statement of Rep. Bingham) (arguing that Oregon exclusion violates privileges and immunities clause; "[t]his guaranty of the Constitution of the United States is senseless and a mockery, if it does not limit State sovereignty and restrain each and every State from closing its territory . . . against citizens of the United States.").

blacks could not be citizens.¹⁸³

In the aftermath of the Civil War, but before authoritative rejection of *Dred Scott*, the Supreme Court reached beyond article IV to construe the right to interstate travel as an element of political union. In striking down a Nevada tax on railroad passengers leaving the state, the Court adopted the views of Justice Taney:

For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.¹⁸⁴

The fourteenth amendment was intended to provide explicit constitutional warrant for a right to travel that extended to both blacks and whites, overturning the regime under which southern states excluded free blacks and abolitionists.¹⁸⁵ The issue of state citizenship as a predicate

¹⁸³ Cong. Globe, 35th Cong., 1st Sess. 1965 (1858) (statement of Sen. Douglas of Illinois) (arguing that exclusions of blacks is permissible); Cong. Globe, 35th Cong., 2d Sess. 970 (1859) (statement of Rep. Clark of Missouri) (relying on proposition in *Dred Scott* that "the negro is not, and cannot be, a citizen of the United States," and, therefore, cannot claim privileges and immunities).

¹⁸⁴ *Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849) (Taney, J., dissenting) (quoted in *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 48-49 (1868), as stating more clearly "the principles here laid down"). Justice Rehnquist has commented approvingly on *Crandall's* use of inferences from the constitutional framework "that the power to obstruct totally the movements of people is incompatible with the concept of one Nation." *Nevada v. Hall*, 440 U.S. 410, 441, reh'g denied, 441 U.S. 917 (1979) (Rehnquist, J., dissenting); see also Charles Black, *Structure and Relationship in Constitutional Law* 27-29 (1969) (explaining *Crandall* and *Edwards*: "the fact that the United States is a single nation warrants inference as to mobility of population, quite aside from strictly governmental needs. . . . [It is] a unitary nation, to which, because of its nationhood, internal barriers to travel are unthinkable.").

A parallel protection was provided in the decade after *Crandall* by the interpretation of the commerce clause which made the regulation of interstate transportation of passengers a matter of national concern, while reserving under the police power the right to exclude "convicts, paupers, idiots, and lunatics, and persons likely to become a public charge." *Railroad Co. v. Husen*, 95 U.S. 465, 471 (1877); see notes 123-27 and accompanying text *supra*.

The *Crandall* outcome in Nevada was prefigured by *In re Archy*, 9 Cal. 147, 162 (1858), which enunciated a right to vacation with slaves in California on the ground that "this right of free passage [is] a right that necessarily flows from the relation that the States sustain to each other, under the general bond of the Union[.] We are *one* government, for certain specified purposes; and is not the right of transit across the territory of a sister State one of the necessary incidents of the purposes and ends for which the federal government was created?"

¹⁸⁵ See, e.g., Chester J. Antieau, *The Original Understanding of the Fourteenth Amendment* 33 (1981) ("The denial of the opportunity to move freely throughout the land was one of the badges of servitude imposed upon the slave . . . and, in ratifying the Fourteenth Amendment the people intended that the privileges and immunities clause of that Amendment would protect Blacks, as well as Whites, in their freedom to move and travel around the country, without restriction by the States and their political subdivisions."); P. Finkelman, *supra* note 38, at 342-43 ("Perhaps the most important legacy of *Aves*, *Dred Scott*, *Lemmon* . . . is [the Fourteenth Amendment]. The men who witnessed these cases and others drafted an amendment that not only made freedmen citizens, but also demanded that their privileges and immu-

for the article IV privileges was laid to rest with the fourteenth amendment's grant of residency-based state citizenship. After that grant, the right to travel between states could not be denied to blacks on the ground that they were not "citizens." The Framers' expectation for the fourteenth amendment was that blacks, like other citizens, would be able to lay claim under its aegis to the article IV right to interstate travel.¹⁸⁶

nities be respected nationwide. . . . In making the freedmen citizens of the states in which they resided, the amendment . . . required that the individual states recognize the rights of citizenship and therefore grant comity to blacks entering from other states. No longer could a southern state imprison a free black sailor from the North or, indeed, prohibit free blacks from entering their domain.").

¹⁸⁶ Senator Howard introduced the first sentence of the fourteenth amendment as an amendment on the floor on May 30, 1866 to "settle the great question of citizenship and remove all doubts as to what persons are or are not citizens of the United States." See Cong. Globe, 29th Cong., 1st Sess. 2883 (1866).

It was clear to all concerned that the status of citizenship would entail a right to interstate travel. Discussing Howard's amendment, Senator Cowan of Pennsylvania observed, "[a]s I understand the rights of the States under the Constitution at present, California has the right, if she deems it proper, to forbid the entrance into her territory of any person she chooses who is not a citizen of some one of the United States. She cannot forbid [a citizen's] entrance." *Id.* at 2891. Cowan argued against the amendment because he was "unwilling on the part of my state to give up the right . . . of expelling [Gypsies]." *Id.* Senator Conness of California responded that California's efforts to curtail Chinese immigration had been struck down as violating the commerce clause by the California Supreme Court. *Id.* at 2892.

Representative Bingham, drafter of the phrase "privileges and immunities," was on record as believing that citizenship entailed the right to interstate travel. See note 182 *supra* (Bingham arguing that Oregon's exclusion of blacks violated their privileges and immunities as citizens).

Senator Reverdy Johnson, who had represented the prevailing party in the *Dred Scott* case, see The Reconstruction Amendments' Debates, *supra* note 176, at xi, thought that Howard's proposed definition of federal citizenship was both necessary and appropriate "if there are to be citizens of the United States entitled everywhere to the character of citizens of the United States." See Cong. Globe, 39th Cong., 1st Sess. 2893 (1866). It is unclear whether this is a reference to the article IV privileges or immunities to which citizens are "entitled" upon traveling "everywhere" in the Union, and which *Dred Scott* had denied to blacks, or the fourteenth amendment privileges and immunities. In the absence of the amendment, Johnson continued to maintain that the Civil Rights Bill exceeded Congress's powers. See *id.*

Others manifested similar understandings. See, e.g., *id.* at 475 (statement of Sen. Trumbull of Illinois, Chair of Judiciary Committee, draftsman of Civil Rights Act) ("A person who is a citizen in one state . . . is entitled to . . . the right to travel, to go where he pleases. This is a right which belongs to the citizen of each state. A law that does not allow a colored person to go from one county to another is certainly a law in derogation of the rights of a freeman."); *id.* at 1757 (statement of Sen. Trumbull) (citizen has a right "to go into any state in the union and to reside there, and the United States Government will protect him in that right"); *id.* at 941-42 (statement of Sen. Trumbull) (objecting to pass system in Texas by which freedman found at large without a pass is whipped); *id.* at 2765 (statement of Sen. Jacob Howard of Michigan, author of Citizenship definition) (arguing that "right to pass through or reside in any state" is among the "privileges and immunities spoken of in the second section of the fourth article of the Constitution") (quoting *Corfield v. Coryell*, 6 Fed. Cas., 547, 552 (C.C.E.D. Pa. 1823)); *id.* at 497 (statement of Sen. Van Winkle, opposed to Civil Rights bill) (arguing that if blacks were citizens, Indiana exclusion and other state exclusions would be illegal under article IV, and concluding: "I think it needs a constitutional amendment to make these people citizens of the

The fourteenth amendment went on to establish birthright citizenship in the nation, and explicitly to forbid states from "abridging" the privileges or immunities of that national citizenship. National union entailed national citizenship as the primary allegiance, a fact expressly recognized in the adoption of the citizenship clause of the fourteenth amendment. The definition of state citizenship was derived from national citizenship: any United States citizen was ipso facto a citizen of the state in which she resided.¹⁸⁷ Regardless of the vagaries of state law, the United States citizen was protected against "abridgments of the privileges or immunities" of national citizenship.

Debate surrounding the privileges and immunities clause was marked by references to the experience of Representative Samuel Hoar of Massachusetts, which was notorious at the time in Republican circles. In 1844, Representative Hoar was dispatched from New England to South Carolina to challenge that state's laws forbidding the entry of black seamen. He was driven out of the state by threats of violence with the connivance of South Carolina authorities, a result that was widely viewed by Congressional Republicans as a violation of his rights as a national citizen.¹⁸⁸ The protection of the fourteenth amendment's privileges and immunities clause was designed in part to alleviate Congress's perceived lack of power to enforce article IV's protection of the right to travel freely among the states.¹⁸⁹

United States"); id. at 1082 (statement of Sen. Stewart) (suggesting that privileges or immunities clause was unnecessary, and arguing that exclusion by Illinois of free blacks violated article IV); id. at 1263 (statement of Rep. Broomall of Pennsylvania) ("rights and immunities of citizenship" denied by southern states to northerners included "right of transit" and "right of domicile").

¹⁸⁷ This was contrasted, in the debates on the definition of citizenship, with the preexisting law by Senator Reverdy Johnson: "[a]s it now stands[,] . . . [w]ho is a citizen of the United States is an open question. The decision of the courts and the doctrine of commentators is that every man who is a citizen of a state becomes *ipso facto* a citizen of the United States; but there is no definition as to how citizenship can exist in the United States except through the medium of a citizenship in a State." Id. at 2893.

¹⁸⁸ P. Finkelman, *supra* note 38, at 109 n.28; H. Hyman & W. Wiecek, *supra* note 177, at 81; *The Reconstruction Amendments' Debate*, *supra* note 176, at 1-2, 4, 6-7, 11-12; William M. Wiecek, *The Sources of Antislavery Constitutionalism in America 1760-1848*, at 139-40 (1977).

¹⁸⁹ See Cong. Globe, 39th Cong., 1st Sess. 41 (1865) (statement of Sen. Sherman of Ohio) (arguing that under article IV, "a man who was recognized as a citizen of one state had the right to go anywhere within the United States and exercise the immunity of a citizen of the United States; the trouble was with enforcing it This constitutional provision was in effect a dead letter as to [Hoar]."); *Cincinnati Commercial*, Sept. 29, 1866, at 1 (Sherman, Speech of 29 Sept. 1866, in *Cincinnati*) ("Everybody born in this country or naturalized . . . should have the right to go from county to county and state to state."); see also Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull) (arguing that Hoar had right to travel under article IV privileges and immunities, but without enforcement it was to no avail); id. at 1066 (statement of Rep. Price) (arguing that goal of protecting privileges and immunities in early draft of fourteenth amendment was to protect the "rights of citizens of one state in going into

Subsequent case law has firmly established that one of the privileges of national citizenship is the right to travel within the nation without interference from its constituent subdivisions.¹⁹⁰ What is sometimes overlooked, however, is that this protection is not rooted solely in inferences from constitutional structure, but stems directly from the concrete expectations and historical experience of those who drafted and ratified the fourteenth amendment.

Let us return to the example of a Utah woman who seeks to travel

another"); Cincinnati Commercial, Aug. 31, 1866, at 2. (Rep. Delano speaking at Coshocton, Ohio, on Aug. 28, 1866) (amendment provides protection to right to travel in south, referring to Hoar).

Some Republicans took the position that even without the fourteenth amendment, article IV protected "fundamental rights which every citizen of the United States holds as gift of his national government," among which were thought to be the right "to pass through or reside in the State at pleasure." Cong. Globe, 39th Cong., 1st Sess. 1293 (1866) (statement of Rep. Shellabarger) (discussing bill protecting travelers' civil rights).

¹⁹⁰ Zobel v. Williams, 457 U.S. 55, 67 (1982) (Brennan, J., concurring) ("unquestioned historic recognition of the principle of free interstate migration" finds "its unmistakable essence in that document that transformed a loose confederation of States into one Nation"); Dunn v. Blumstein, 405 U.S. 330, 338 (1971) (right to travel is "fundamental personal right"); Griffin v. Breckenridge, 403 U.S. 88, 106-07 (1971) (right to pass freely from State to State protected by national citizenship, although it does not necessarily rest on the fourteenth amendment); Shapiro v. Thompson, 394 U.S. 618, 629 (1969) ("This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land."); United States v. Guest, 383 U.S. 745, 758 (1966) ("A right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union."); id. at 764-67 (Harlan, J.) ("The right to unimpeded interstate travel, regarded as privilege and immunity of national citizenship was historically seen as a method of breaking down state provincialism, and facilitating the creation of a true federal union."); Edwards v. California, 314 U.S. 160, 178 (1941) (Douglas, J., concurring) ("The right to move freely from State to State is an incident of national citizenship."); id. at 185-86 (Jackson, J., concurring) ("Rich or penniless, Duncan's citizenship under the Constitution pledges his strength to the defense of California as a part of the United States, and his right to migrate to any part of the land he must defend is something she must respect under the same instrument."); Twining v. New Jersey, 211 U.S. 78, 97 (1908) ("right to pass freely from state to state" is a privilege of national citizenship); Williams v. Fears, 179 U.S. 270, 274 (1900) ("Undoubtedly . . . the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment . . ."); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1872) (rights recognized by Crandall v. Nevada, 73 U.S. (16 Wall.) 35 (1867), are privileges of national citizenship); Paul v. Virginia, 75 U.S. 169, 180 (1869) (article IV gives citizens of each state the right of free ingress into other states and egress from them), overruled on other grounds by United States v. S.E. Underwriters Ass'n, 322 U.S. 533 (1944), quoted in Hicklin v. Orbeck, 437 U.S. 518, 524 (1978), in Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371, 380 (1978), in United States v. Wheeler, 254 U.S. 294, 295 (1921), in Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 78 (1920), and in Blake v. McClung, 172 U.S. 239 (1898)).

As a matter of statutory grant, the same privileges attach to aliens. 42 U.S.C. § 1981 (Supp. 1992) provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every state to . . . make and enforce contracts . . . as enjoyed by white citizens, and shall be subject to like punishment, pains, penalties . . . and no other." If a state is barred from interdicting travel by citizens, the "pains and penalties" of interdiction cannot be inflicted on aliens within its jurisdiction. See note 168 *supra*.

to California to obtain an abortion. Because of article IV's privileges and immunities clause, the fourteenth amendment's own privileges and immunities clause, and the nature of national citizenship, California cannot exclude prospective residents because they threaten to take advantage of its employment opportunities¹⁹¹ or welfare system.¹⁹² Neither would it be able to exclude residents of other states who travel to avail themselves of its abortion laws.

On its own side of the border, Utah has no greater right to interfere. In *Crandall v. Nevada*,¹⁹³ the Court held that Nevada could not tax residents leaving the state without interfering with the rights of national citizenship. Should Utah seek to emulate Irish efforts to prohibit its citizens from leaving the state to obtain an abortion, the effort would be inconsistent with the Constitution's guarantees of interstate travel rights.¹⁹⁴

¹⁹¹ See *Edwards*, 314 U.S. at 163-64.

¹⁹² See *Shapiro*, 394 U.S. at 629-31; cf. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 269-70 (1974) (conditioning indigent's right to non-emergency hospitalization on residency requirements impermissibly impinges on right of interstate travel by denying newcomers basic necessities of life).

¹⁹³ 73 U.S. (6 Wall.) 35, 49 (1867).

¹⁹⁴ Under current law, a substantial infringement of interstate travel rights is invalid unless necessary to achieve a compelling state interest. See *Shapiro*, 394 U.S. at 634 (right to travel cannot be penalized without "a compelling state interest") (emphasis in original); *id.* at 643-44 (Stewart, J., concurring) (same). A nine month prohibition on departure from the state is clearly a substantial infringement and at present, the state's interest in preventing previability abortions is not compelling. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2811-12, 2817 (1992). Indeed, the *Casey* dissenters seem to rely on claims that the abortion right is either unprotected or not fundamental rather than that the fetal protection is compelling. *Id.* at 2860, 2867 (Rehnquist, J., dissenting) (finding abortion right "a form of liberty protected by" but not classified as "fundamental" under due process clause of fourteenth amendment); *id.* at 2874 (Scalia, J., dissenting) ("The issue is whether [abortion] is a liberty protected by the Constitution of the United States. I am sure it is not.").

In *Jones v. Helms*, 452 U.S. 412 (1981), the Court held that while a "simple penalty for leaving a State is plainly impermissible," the right to travel is necessarily qualified by a state's right to prevent criminals from fleeing the jurisdiction. *Id.* at 421-22 and n.18; cf. *Zobel*, 457 U.S. at 78-79 n.8 (O'Connor, J., concurring) (substantial reason necessary for durational residency requirement); see also U.S. Const. art. IV § 2, cl. 2. (extradition clause); *New York v. O'Neill*, 359 U.S. 1, 7 (1959) (detaining material witness in criminal proceeding justified "temporary interference with voluntary travel"). Thus, *Jones* upheld a Georgia statute which enhanced the penalty for child abandonment when the defendant left the jurisdiction after committing the offense, on the theory that "if departure aggravates the consequences of conduct that is otherwise punishable, the state may treat the entire sequence of events from initial offense to departure" as more serious. *Jones*, 452 U.S. at 422-23.

Unlike the defendant who abandoned a child in *Jones*, a woman who seeks to leave Utah to obtain an abortion has engaged in no "misconduct" in Utah that "qualifies her right to interstate travel." *Id.* at 420. Nor would it warrant her extradition unless Utah has the constitutional power to punish a Utah resident for either obtaining a California abortion, or traveling through Utah to the border to obtain an abortion. As demonstrated elsewhere, Utah has no power to punish the woman for wholly extraterritorial conduct. See Part I *supra*; Part IIA *supra*; Part IIB(3) *infra*. The effort to prohibit travel toward the border would be in both intent and effect an effort to prohibit the protected travel itself. Cf. *Gibbons v. Ogden*, 22 U.S.

3. *Constraints on Extraterritorial Prosecution*

Article IV and the principles of federalism establish that California may not deny a resident of Utah the "privilege" or "immunity" of obtaining an abortion that California extends to its own citizens. The Utah citizen is "entitled" under article IV to the "privilege" of obtaining an abortion on a basis of equality with the citizens of California.¹⁹⁵ The whole point of national citizenship is that citizens of one state who enter another are not aliens, but fellow citizens of the nation, entitled to function on a basis of equality with native residents. As the modern Court has articulated it, the purpose of article IV "was to help fuse into one Nation a collection of independent sovereign states. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."¹⁹⁶ In light of this constitutional "entitlement," can Utah nonetheless adopt the stratagem tried in German jurisdictions and prosecute its citizens for exercising their "entitlement" in California?

On its face, article IV is directed impartially against any interference with the privileges to which citizens are "entitled." The fact that Utah would like to project its moral standards into California would be no more cognizable a reason for denying Utah residents who venture into California the "same privileges" as Californians than would be a desire on the part of California to prevent an influx of Utah residents fleeing local strictures. Utah and California are not independent sovereigns. They lack the prerogatives granted under international law to define their own citizenship, to exclude one another's citizens, and to limit the entitlements of immigrants and visitors from other states. The states of the Union are, rather, members of a single nation. Any United States citizen residing within a state's boundaries can demand recognition as a state citizen. Any national citizen residing in another state can claim free entry and exit and the right to the privileges and immunities of fellow citizens rather than be forced to suffer the disabilities of an alien.¹⁹⁷ Just as

(9 Wheat.) 1, 196 (1824) ("Can a trading expedition between two adjoining states commence and terminate outside of each? . . . [the commerce power] must be exercised within the territorial jurisdiction of the several states.").

¹⁹⁵ See *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281 n.11 (1985) (noting that Court has never held that privileges and immunities clause protects only economic interests) (citing *Doe v. Bolton*, 410 U.S. 179, 200 (1973) (state statute limiting in-state abortions to residents violates privileges and immunities clause)).

¹⁹⁶ *Toomer v. Witsell*, 334 U.S. 385, 395 (1948), quoted in *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64 (1988); in *Piper*, 470 U.S. at 279-80; in *United Bldg. & Constr. Trades v. Mayor of Camden*, 465 U.S. 208, 216 (1984); and in *Zobel*, 457 U.S. at 74 (O'Connor, J., concurring).

¹⁹⁷ Cf. *The Federalist* No. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It may be esteemed the basis of the Union that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."); see also *Lemmon v. People*, 20

a California citizen is entitled, under the California Constitution's right of privacy, to obtain an abortion, Utah cannot reduce the Utah citizen who visits California to second class alien status.

This, indeed, was the New York judiciary's conclusion in the era of national moral dissensus before the Civil War in *People v. Merrill*.¹⁹⁸ Despite the state's anti-slavery commitments, an effort to prosecute New York residents who sold a free black man from New York in Washington, D.C. was held to violate article IV, section 2:

The Constitution was intended to be binding, as it regards the rights of the citizens of the several states, upon the people of the whole union. It was never intended that a legislature should violate state comity or national rights, as the section in question does, by assuming to punish as a felony a sale of property in a state or district where the right exists by the laws of the locality to make such a sale.¹⁹⁹

If this conception of supervening national citizenship was, in some measure, disputed during the Union's first eight decades, the Civil War and the Reconstruction amendments embedded it firmly in the national structure. Whatever obligations a citizen owes to her home nation while abroad in a foreign land, after the adoption of the fourteenth amendment, a state citizen, when in another state, cannot be regarded as an alien. United States citizenship is "paramount and dominant instead of being subordinate and derivative."²⁰⁰

With the memory of the struggle for Union raw in the national consciousness, the Court set the course for future interpretation by articulating article IV's role in the federal system in no uncertain terms.

It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with the citizens of other States so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage

N.Y. 562, 607-09 (1860) ("No provision in [the Constitution] has so strongly tended to constitute the citizens of the United States one people as this Every citizen of every other state shall have the same privileges and immunities—that is the same rights—which the citizens of that State possess. In the first place, they are not to be subjected to any of the disabilities of alienage The position that a citizen carries with him into every State into which he may go the legal institutions of the one in which he was born cannot be supported."), cited with approval in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869), overruled on other grounds by *United States v. S.E. Underwriters Ass'n*, 322 U.S. 533 (1944).

¹⁹⁸ 2 Parker's Criminal Cases 590 (1855).

¹⁹⁹ *Id.*

²⁰⁰ *Selective Draft Law Cases*, 245 U.S. 366, 388-89; see also *Edwards v. California*, 314 U.S. 160, 182 (1941) (Jackson, J., concurring) ("This clause was adopted to make United States citizenship the dominant and paramount allegiance among us."); *Hague v. C.I.O.*, 307 U.S. 496, 510 (1939) (Roberts, J., concurring) ("The first sentence of the Amendment settled the old controversy as to citizenship Thenceforward citizenship of the United States became primary and citizenship of a State secondary."); note 186 *supra* (statement of Sen. Reverdy Johnson).

in other States . . . it insures to them in other states the same freedom possessed by citizens of those States It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States . . . the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.²⁰¹

The goal of replacing a "league of states" with a "republic," comprised of "one people" whose allegiance is primarily national, requires that American citizens who go from state to state should not be identified as aliens by a personal law they carry with them from their home state. Members of the national polity are Americans first and state citizens only derivatively. As such, they are "entitled" by article IV to move from state to state, and to take advantage of the local privileges and immunities "upon the same footing" with local residents. Efforts by their home states to prevent the exercise of those privileges by prosecuting citizens upon their return are destructive of the capacity to travel as free and equal members of "one people."²⁰²

This line of reasoning faces two sets of objections. The first is a countervailing claim that federalism and article IV's full faith and credit clause permit—and perhaps require—that state citizens be governed by their home state law while out-of-state. California's article IV obligation

²⁰¹ *Paul*, 75 U.S. at 180. This passage was quoted with approval in *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64 (1988), in *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978), in *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 380 (1977), in *United States v. Wheeler*, 254 U.S. 294, 295 (1921), and in *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 78 (1920).

In *State v. Cutshall*, 15 S.E. 261 (N.C. 1892), the court held that an effort to prosecute a North Carolina resident for a bigamous marriage contracted in South Carolina would be unconstitutional, commenting, "[t]he attempt to evade the organic law, by making the coming into this state (after committing an offense in another) a crime is too palpable, in view of the admitted fact that the constitution of the United States gives to citizens of all the states the immunities and privileges of its own citizens . . ." *Id.* at 264. See also *Detroit v. Osborne*, 135 U.S. 492, 498 (1890) ("A citizen of another State going into Michigan may be entitled under the federal Constitution to all the privileges and immunities of citizens of that State; but under that Constitution he can claim no more. He walks the streets and highways in that State, entitled to the same rights and protection, but none other, than those accorded by its laws to its own citizens.").

²⁰² This proposition does not necessarily mean that the home state can never exert the authority of its laws beyond its borders. Corporations, for example, cannot claim the protection of the privileges and immunities clause. See *Paul*, 75 U.S. at 177-82. Furthermore, where a home state's rules as to natural persons are identical with those of the foreign state, there is no infringement of the "entitlement" to local privileges and immunities. Likewise, where the basic rules of conduct imposed by the home state are identical, differences in the rules regarding loss allocation or contractual liability would not impair the basic commitment to establishing a national citizenship. In cases of moral dissensus, however, the effort to impose home state morality conflicts with the citizen's entitlement under article IV.

to accord "full faith and credit" to Utah's restrictive laws might trump a Utah citizen's article IV "entitlement" to California's privileges and immunities.²⁰³ This objection suffers two defects, however. To begin with, it can be stood on its head. When Utah punishes its citizen for an action California regards as protected, one could equally well argue that Utah itself fails to grant full faith and credit to California's more permissive "public acts." Indeed, commentators occasionally have taken the position that efforts at extraterritorial regulation of locally protected conduct are violations of the full faith and credit clause.²⁰⁴ More importantly, settled law holds that "the full faith and credit clause does not require a state to apply another state's law in violation of its own legitimate policy;" visiting citizens under the full faith and credit clause are generally governed by laws implementing local policy.²⁰⁵

The second objection to the proposed interpretation of article IV is somewhat better rooted in precedent. Advocates of this objection would argue, relying on the *Slaughter-House Cases*, that when Utah prosecutes its citizens for taking advantage of their article IV entitlements in California, there is no article IV violation because the privileges and immunities clause "does not profess to control the power of State governments

²⁰³ Since California cannot be required to waive its criminal regulations for visitors, this would mean that full faith applies only to the visitor's disadvantage. This is, to say the least, an odd result given that the privileges and immunities clause encompasses interstate equality.

²⁰⁴ See Kramer, *supra* note 79, at 1448 n.91, 1451 n.111 (1983) (asserting that the full faith and credit clause limits the ability of states "to justify punishing citizens for acts committed in other states"); Rollin Perkins, *The Territorial Principle in Criminal Law*, 22 *Hastings L.J.* 1155, 1164 (1971) ("California could not validly make it a crime for its citizens to 'play the slot machines' in Las Vegas, Nevada, where this is lawful. Such a statute would violate the full faith and credit clause.").

Professor Laycock's recent account of the interplay among the full faith and credit clause, the privileges and immunities clause, and the concepts of federalism does not take a direct position on the validity of extraterritorial criminal prohibitions, but his analysis suggests their invalidity under the full faith and credit clause. See Laycock, *supra* note 32. Under his view, the full faith and credit clause imposes a requirement that "there are occasions when the law of a sister state applies and occasions when it doesn't." *Id.* at 297, 327. He states, "[w]hen I fly from Texas to California, I knowingly leave the territory that Texas is empowered to govern and submit myself to the authority of California," *id.* at 318, which apparently would allow a visitor to take advantage of California's permissions as well as its prohibitions, because "[i]t is no answer to say that I can usually comply with the more restrictive rule, because that eliminates the political authority of the more permissive state." *Id.* at 319. Finally, he emphasizes that under his view of the federal system, a citizen does not "carry her own law with her like a Roman citizen visiting the barbarians." *Id.* at 326.

²⁰⁵ *Nevada v. Hall*, 440 U.S. 410, 422 (1979); see also *Pacific Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 502-03 (1939) ("In the case of statutes, the extra-state effect of which Congress has not prescribed, we think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state."). Indeed, even earlier, the Court held in *Huntington v. Attrill*, 146 U.S. 657, 669 (1892), that the clause does not require enforcement of penal statutes.

over the rights of its own citizens."²⁰⁶ While the language has been repeated regularly,²⁰⁷ the quotations have been in either dicta or dissent; the language has only been grounds for one Supreme Court decision.²⁰⁸ In recent years, Justice O'Connor—joined on occasion by both Justices Brennan and Rehnquist—has manifested skepticism regarding the soundness of this argument, at least insofar as it is invoked to uphold the home state's efforts to interfere with the exercise of article IV's historical privileges of "ingress and regress."²⁰⁹

Justice O'Connor's skepticism is well-founded. There is no textual warrant for concluding that article IV's privileges and immunities clause fails to bind a citizen's state of origin. The rest of article IV is regularly applied against a citizen's home state: the full faith and credit clause would entitle a Utah citizen to enforce at home a judgment obtained in California; the strictures of the extradition clause would protect a Utah

²⁰⁶ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77 (1873) (asserting that article IV's guarantee of privileges and immunities provided "no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State Governments over the rights of its own citizens").

²⁰⁷ See *Zobel v. Williams*, 457 U.S. 55, 84 n.3 (1982) (Rehnquist, J., dissenting); *Shapiro v. Thompson*, 394 U.S. 618, 666 (1969) (Harlan, J., dissenting) (finding article IV irrelevant to right to travel claim, "for it appears settled that this clause neither limits federal power nor prevents a State from distinguishing among its own citizens"); *United States v. Wheeler*, 254 U.S. 281, 298 (1928) (holding article IV inapplicable to private action); *United States v. Harris*, 106 U.S. 629, 643 (1883) (same); *Blake v. McClung*, 172 U.S. 239, 252 (1898) (holding article IV forbids priority to state residents in bankruptcy); cf. *United Bldg. & Constr. Trades v. Mayor of Camden*, 465 U.S. 208, 217 (1983) (citing *Slaughter-House Cases* for proposition that New Jersey residents had no claim against New Jersey under the privileges and immunities clause, but also citing O'Connor in *Zobel*); *Zobel*, 457 U.S. at 60 n.5 (1982) (discrimination among residents not "the kind of discrimination against which the Privileges and Immunities clause was designed to prevent"); *Edwards v. California*, 314 U.S. 160, 181 (1942) (Douglas, J., concurring) (implying that article IV does not apply to rules burdening domestic citizens).

Holmes' opinion in *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 353 (1908), is characteristically aphoristic. Although the syllabus characterizes it as asserting in the alternative that an article IV claim cannot "be raised by a citizen of the State itself," the opinion, after denying that any violation of the clause exists goes on to make the statement "[b]ut this question does not concern the defendant, which is a New Jersey corporation." *Id.* at 358. Since corporations are not citizens within the meaning of the clause, it is hard to tell whether Holmes is adverting to the fact that defendant is a corporation or a New Jersey corporation, or both.

²⁰⁸ See *Bradwell v. State*, 83 U.S. 130, 138 (1872) (because "[t]he protection designed by that clause, as has been repeatedly held, has no application to a citizen of the State whose laws are complained of," an Illinois woman seeking admission to bar of Illinois could not claim that exclusion of women violated article IV privileges and immunities).

²⁰⁹ Justice O'Connor's concurrence relied on her view that article IV applied to home-state actions in *Zobel*, 457 U.S. at 74-75, to strike down Alaska's classifications among its residents that imposed a disability on new residents who had "ventured into Alaska" from out of state. Justice Brennan proffered support in his concurrence. *Id.* at 66. Justice O'Connor reiterated her views in a dissent joined by Justices Stevens and Rehnquist in *Attorney General v. Soto Lopez*, 476 U.S. 898, 920 (1986). Cf. *United Bldg. & Constr. Trades*, 465 U.S. at 217-18 (Rehnquist, J., citing Justice O'Connor's *Zobel* concurrence with approval).

resident against improper extradition by his home government; the fugitive slave clause obligated a state of refuge to return the fugitive regardless of the citizenship of the master.

The seemingly contrary language in the *Slaughter-House Cases* is directed primarily to the question of whether the clause vests any rights unrelated to interstate movement. Faced with the claim that Louisiana butchers could invoke "privileges and immunities" against a Louisiana statute regulating actions in Louisiana, the *Slaughter-House* Court rejected the notion that a citizen can claim this constitutional protection of an undefined set of natural rights against the laws of her own state.²¹⁰ The Court's opinion, however, does not speak to the situation where claims of interstate migration or travel are at issue.²¹¹

A flat rule that a citizen holds no article IV "entitlements" against her home state would be understandable if the sole value protected by the clause were a concern for bias against non-residents arising from the fact that "nonresidents are not represented in the . . . legislative halls."²¹² Any state resident subjected to an objectionable rule by her home state has, of course, the opportunity to seek redress from her state legislators.

²¹⁰ *Slaughter-House Cases*, 83 U.S. at 77.

²¹¹ The quoted language from the *Slaughter-House Cases* is followed by the comment that the clause's "sole purpose was to declare to the several states that whatever those rights are as you grant or establish them to your own citizens, . . . the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction." *Id.* at 77.

As Justice Roberts articulated the matter in *Hague v. C.I.O.*, 307 U.S. 496, 511 (1939), "[a]t one time it was thought that this section recognized a group of rights which, according to the jurisprudence of the day, were classed 'natural rights;' . . . guaranteeing the citizens of every State the recognition of this group of rights by every other State It has come to be the settled view that Article IV § 2 [guarantees] . . . that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy." See also Bogen, *supra* note 171, at 850-51 ("If citizens of a state were to be protected only in states where they were not citizens, the article should have used the phrase 'in any other of the states.' . . . [Recognition of a right to travel] would not necessarily revive fundamental rights analysis" which troubled the *Slaughter-House* majority.).

²¹² *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975); see *Baldwin v. Montana Fish & Game Comm'n.*, 436 U.S. 371, 402 (1978) (Brennan, J., dissenting) (quoting *Austin*); *United Bldg. & Constr. Trade*, 465 U.S. at 217 ("New Jersey residents have no claim under the Privileges and Immunities Clause But New Jersey residents at least have a chance to remedy at the polls any discrimination against them. Out-of-state citizens have no similar opportunity.").

This conception has been at the core of Dean Ely's vision of the clause. See generally John Hart Ely, *Democracy and Distrust* 83, 90-91 (1980); John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 *Wm. & Mary L. Rev.* 173, 189-91 (1981) [hereinafter Ely, *Choice of Law*]. See also Gary Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 *U. Pa. L. Rev.* 379, 384 (1979) (arguing that laws disadvantaging nonresidents epitomize government without consent of governed); Bryan H. Wildenthal, Note, *State Parochialism, the Right to Travel and the Privileges and Immunities Clause of Article IV*, 41 *Stan. L. Rev.* 1557, 1568, 1586 (1989) (arguing that traditional view of privileges and immunities clause as protecting "only current nonresidents" is problematic).

But, as the history of the clause makes manifest, concern with the political vulnerabilities of out-of-staters does not exhaust the purposes of the clause, designed as it was to "fuse into one nation a collection of independent sovereign states" and to "constitute the citizens of the United States one people."²¹³

In *Supreme Court of New Hampshire v. Piper*, the Court held that New Hampshire's exclusion of a Vermont citizen from legal practice on grounds of non-residency violated the privileges and immunities clause.²¹⁴ If one took seriously the *Slaughter-House* dictum that the

²¹³ *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869), overruled on other grounds by *United States v. S.E. Underwriters Ass'n*, 322 U.S. 533 (1944). The Court has in recent years remarked on the "mutually reinforcing relationship between the privileges and immunities clause of article IV, section 2 and the commerce clause—a relationship that stems from their common origin in the fourth Article of Confederation and their mutual commitment to the proposition that 'in the long run prosperity and salvation are in union and not division.'" *Hicklin v. Orbeck*, 437 U.S. 518, 534 (1978); see also *Baldwin*, 436 U.S. at 379-80 (common origin of commerce and privileges and immunities clauses); *id.* at 383 (distinctions prohibited where they "hinder the formation, purpose or development of a single Union of those states"; immunities protected which "bear upon the vitality of the Nation as a single entity"); *Austin v. New Hampshire*, 420 U.S. 656, 661 (1975) (describing "force of the clause in fashioning a single nation").

My erstwhile colleague Gerald L. Neuman articulated the point with characteristic clarity:

[T]he Court has interpreted the privileges and immunities clause as serving a broader purpose than merely compensating for lack of representation. . . . Both the wording of the clause and its interpretation suggest as a paradigm the right of a citizen of state A, while physically within the borders of state B, to interact with citizens of state B on the same legal terms as those that govern their interaction among themselves. . . . Nonresidents who are known to carry their domicile's law with them cannot participate as equals in the life of the state.

Gerald Neuman, *Territorial Discrimination, Equal Protection and Self-Determination*, 135 U. Pa. L. Rev. 261, 320-24 (1987) (footnotes omitted); see also Douglas Laycock, *Equality and the Citizens of Sister States*, 15 Fla. St. U. L. Rev. 431, 438-39 (1987); Laycock, *supra* note 32, at 261-66 ("The Clause is first and foremost a national unity provision" with the dual purpose of "achieving national unity and preserving states as separate polities."); Jonathan Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 518-19 (1981) ("The framers adopted the constitutional ban on state discrimination against non-residents primarily as an instrument of national unification. [It] fosters cumulative attachment among people in different states . . . and leaves people free to make their home in one state without sacrificing the opportunity to share in the bounty found in others.").

Dean John Ely acknowledges, despite his affinity for the "representation" theory, see Ely, *Choice of Law*, *supra* note 212, at 191, that "one might maintain that Article IV's general goal of making us more one nation is sufficiently disserved by gearing choice of law determinations to residence . . . to justify invalidating such references under the Privileges and Immunities Clause," but views this as better characterized as an argument that there is "something somehow out of accord with . . . our small 'c'onstitution—out of accord in particular with the reasons we as a nation decided to supersede the Articles of Confederation." *Id.* at 192.

Professor Tribe also seems sympathetic to Justice O'Connor's position. See Laurence Tribe, *American Constitutional Law* 542-43, 545 (2d ed. 1988) (viewing a "national cohesion" argument as a crucial element of article IV, although he retains the claim that the "core concern" of article IV is "the protection of outsiders").

²¹⁴ 470 U.S. 274, 288 (1985). In *Barnard v. Thorstenn*, 489 U.S. 546, 557-59 (1989), it

clause does not "control the power of State governments over the rights of its own citizens,"²¹⁵ New Hampshire likely could achieve an identical Balkanization by simply showing respect for the professional monopoly of the Vermont bar. New Hampshire could induce Vermont to prohibit its attorneys from practicing in New Hampshire in exchange for itself forbidding local attorneys from practicing in Vermont. Such an incentive to reciprocal protectionism is the precise opposite of the goal of "fusing the states into one nation."²¹⁶

The outcome would be one that directly burdens only those who are "represented in the legislative halls." The Court, however, has twice held that the mere fact that the disadvantage an out-of-state resident suffers can be cured by actions in her home state is insufficient to avoid a privileges and immunities challenge: "[a] State may not barter away the right, conferred upon its citizens by the Constitution of the United States, to enjoy the privileges and immunities of citizens when they go

applied the same principle to invalidate a similar residency requirement in the Virgin Islands, and in *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 70 (1988), it invalidated a refusal to admit non-residents to the bar "on motion."

²¹⁵ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77 (1872).

²¹⁶ The public-choice style analysis is this: the sellers in each state gain more from the preservation of a local monopoly than they lose from foregoing the opportunity to trade in other states. If one assumes that the concentrated bar or interest groups can predominate over the diffuse consumer interest, the fact that the consumers in both states lose from the Balkanization does not make the outcome improbable.

On a slightly different tack, the Court struck down a statute requiring out-of-state residents to obtain a license not required of Maryland residents before offering goods for sale in Maryland. *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1870). From the privileges and immunities clause, said the Court, "it follows that the defendant might lawfully sell . . . any goods which the permanent residents of the State might sell." *Id.*

Another provision of the Maryland law prohibited both residents and non-residents from permitting unlicensed non-residents to sell goods at their "store, warehouse or place of business." *Id.* at 420, 424. Is it conceivable that the outcome would have been different if the case had come up as an appeal from conviction of a Maryland resident allowing her warehouse to be used rather than as an appeal from conviction of a New Jersey resident offering harnesses for unlicensed sale? If not, then it can hardly be the case that article IV cannot give rights against one's home state.

Professor Kramer's analysis of the clause, see Larry Kramer, *Myth of the Unprovided-for Case*, 75 Va. L. Rev. 1045, 1066 (1989), views the "central purpose" of the clause as "reducing interstate friction," and takes the position that "the privileges and immunities clause does not require State A to extend the benefit of its law to a State B resident if State B wants State B law applied." Thus, ignoring the fact that avoidance of interstate friction was viewed as a means to national unity, Kramer, apparently, would allow reciprocal protectionism, as well as home state prohibitions on travel.

On the other hand, Professor Gergen's suggestion in *The Selfish State and the Market*, 66 Tex. L. Rev. 1097, 1128 (1988), that "the Framers sought by the privileges and immunities clause only to ensure outsiders the right to engage in trade and commerce free from discriminatory tax or regulatory burdens," although at odds with the text of the clause and the "ingress and egress" heritage generally acknowledged in the half century after the framing, would appear to prevent reciprocal barriers.

into other States."²¹⁷ Even less should it be able to prohibit directly the enjoyment of those privileges and immunities.

Moreover, even if we take the *Slaughter-House* dictum at face value, the efforts of Utah to prosecute her residents upon return must still deal with the *Slaughter-House* holding: that the fourteenth amendment's prohibition of abridging the "privileges or immunities of citizens" protects the rights which "owe their existence to the Federal government, its National character, its Constitution or its laws."²¹⁸ The example of such a right given in the *Slaughter-House Cases* was the right to travel recognized in *Crandall v. Nevada*.²¹⁹

The "entitlement" of Utah residents under article IV to obtain an abortion in California on a basis of equality with Californians is also a right which "owe[s its] existence to . . . the Federal government, its National character, its Constitution." Utah's effort to prevent its citizens from taking advantage of that entitlement by prosecuting them for doing so, even if it does not violate article IV, would "abridge" that entitlement in violation of Utah's obligations under the fourteenth amendment.²²⁰

This was the reasoning in *Colgate v. Harvey*,²²¹ where a majority of the Court struck down a Vermont statute imposing a higher tax on income from out-of-state investments.

The right of a citizen of the United States to engage in business, . . . or to make a lawful loan of money in any state other than that in which the citizen resides is a privilege equally attributable to his national citizenship. A state law prohibiting the exercise of these rights in another state would, therefore, be invalid under the Fourteenth Amendment The purpose of [the article IV privileges and immunities clause] was to require each state to accord equality of treatment to the citizens of other states One purpose and effect of the privileges and immunities clause of the Fourteenth Amendment, read in light of this interpretation, was to bridge the gap left by that article so as also to safeguard citizens of the United States against any legislation of their own states [When] a citizen of the United States residing in Vermont goes into New Hampshire, he does not enter foreign territory, but passes from one field into another field of the same national domain. When he trades, buys or sells . . . across the state line, when he . . . exercises rights of national citizenship which the law of neither

²¹⁷ *Austin v. New Hampshire*, 420 U.S. 656, 667 (1975) (quoting *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 82 (1920)).

²¹⁸ 83 U.S. (16 Wall.) 36, 79 (1872).

²¹⁹ 73 U.S. (6 Wall.) 35, 44 (1868).

²²⁰ Cf. *Bogen*, supra note 171, at 849 ("As a right secured by Article IV to all citizens, under the Fourteenth Amendment [the right to travel] is also a privilege and immunities [sic] of United States citizenship.")

²²¹ 296 U.S. 404, 431 (1936).

state can abridge²²²

The holding of *Colgate* was a casualty of the New Deal Court; the decision was overruled four years later in *Madden v. Kentucky*,²²³ a case which upheld a differential tax on out-of-state bank deposits. The demise of *Colgate's* reasoning is less clear. The *Madden* Court reaffirmed that the fourteenth amendment's privileges and immunities clause extends "to rights which are inherent in national citizenship,"²²⁴ but, invoking the reluctance of the Court to "restrict the power of the states to manage their own fiscal affairs," held that "the right to carry out an incident to a trade, business or calling such as the deposit of money in banks is not a privilege of national citizenship."²²⁵ If, with Justice O'Connor, we reaffirm the "ingress and regress" heritage of article IV as inherent in national citizenship, then the specific rejection of *Colgate* on the ground that "an incident to a trade" is not a privilege of national citizenship

²²² *Id.* at 430-31, 433. Justice Stone's dissent, joined by Justices Brandeis and Cardozo, denied that the "movement of persons across state lines" for purposes other than national business was a privilege of national citizenship protected by the fourteenth amendment. See *id.* at 445. In the alternative, the dissent denied that the "privilege of acquiring . . . investments without the state is a privilege of federal citizenship," *id.* at 447, on the ground that a tax on investment "has no necessary relation to his movements interstate."

Justice Stone also sought to rely on *Williams v. Fears*, 179 U.S. 270, 278 (1900), which upheld against a fourteenth amendment challenge a Georgia tax on persons hiring laborers employed outside of the state. The Court in *Fears*, however, relied on the fact that the tax was comparable to taxes levied on other occupations, and that "the intention to prohibit this particular business cannot properly be imputed from the amount of the tax payable." *Id.* at 275.

²²³ 309 U.S. 83 (1940), overruling *Colgate v. Harvey*, 269 U.S. 404 (1936).

²²⁴ *Id.* at 91; see also *Snowden v. Hughes*, 321 U.S. 1, 6-7 (1944) (citing *Madden* for proposition that "[t]he protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law").

²²⁵ *Id.* at 92-93. This reading finds support in Justice Douglas' concurrence in *Bell v. Maryland*, 378 U.S. 226, 250 (1964):

There has been a judicial reluctance to expand the content of national citizenship beyond racial discrimination, voting rights, the right to travel, safe custody in the hands of a federal marshal, diplomatic protection abroad, and the like. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); *Logan v. United States*, 144 U.S. 263 (1892); *United States v. Classic*, 313 U.S. 299 (1941); *Edwards v. California*, 314 U.S. 160 (1941); *Kent v. Dulles*, 357 U.S. 116 (1958). The reluctance has been due to a fear of creating constitutional refuges for a host of rights historically subject to regulation. See *Madden v. Kentucky*, 309 U.S. 83 (1940), overruling *Colgate v. Harvey*, 269 U.S. 404 (1935). But those fears have no relevance here, where we deal with Amendments whose dominant purpose was to guarantee the freedom of the slave race and establish a regime where national citizenship has only one class.

Cf. *Head v. New Mexico Board*, 374 U.S. 424, 433 n.12 (1963) (upholding New Mexico's prohibition on New Mexico radio station broadcasting from New Mexico advertisements of Texas optometrist, and asserting that "[t]he Privileges and Immunities Clause of the Fourteenth Amendment does not create a naked right to conduct a business free of otherwise valid state regulation").

leaves untouched *Colgate's* reasoning that a home state's efforts to interfere with interstate equality impinge on the fourteenth amendment rights of national citizenship.²²⁶

CONCLUSION

In a federal republic which takes seriously the claims of state sovereignty, we must expect and indeed revel in variations in moral commitments from state to state. But the federal system, as it has been understood since the founding of our republic, demands that the moral commitments of each state be tempered by a regard for the commitments of its neighbors; the moral sovereignty of each state ends at its borders. From the founding, this limitation was understood not only as protection for state prerogatives, but for individual liberty. The effort to prosecute a citizen at home for taking advantage of the options permitted by a sister state is at odds with this understanding of federalism.

Equally important, the American Constitution as reformulated after the Civil War contemplates a national citizenship which gives to each of its members the right to travel to other states where, on a basis of equality with local residents, they can take advantage of the economic, cultural and moral options permitted there. The effort of any political subdivision of the nation to coerce its citizens into abjuring the opportunities offered by its neighbors is an affront not only to the federal system, but to the rights that the citizens hold as members of the nation itself. The right to travel to more hospitable environs could not, after the fourteenth amendment, be denied to former slaves seeking a better life. Under the same principles, even if *Roe* continues to erode or is ultimately overruled, that right cannot be denied to women seeking to choose their future.

²²⁶ The reluctance in *Edwards* to reaffirm *Crandall* as a national citizenship case also seems to be a thing of the past. Even if article IV does not by itself protect against abridgment by a home state, it is perfectly plausible to argue for such protection of citizens travelling in other states from the structure of national citizenship contemplated by the constitutional design, including the fourteenth amendment's citizenship clause. See, e.g., *United States v. Wheeler*, 254 U.S. 281, 299 (1921) ("Nor is the situation changed by assuming that . . . a State has the power by depriving its own citizens of the right to reside peacefully therein and to free ingress thereto and egress therefrom The proposition assumes that a State could, without violating the fundamental limitations of the Constitution other than those of Article IV enact legislation incompatible with its existence as a free government and destructive of the fundamental rights of its citizens . . . the existence of federal power to detriment the repugnancy of such action to the Constitution is not disputed."); Ely, *Choice of Law*, supra note 212, at 191-93 (arguing that general goals of article IV of "making us more one nation" and "the reasons we as a nation decided to supercede [sic] the Articles of Confederation" are inconsistent with "a system of 'personal law' wherein people carry their home states' legal regimes around with them").