ROVING EXTRATERRITORIALITY: THE MURKY DOCTRINE ON STATE LAWS REGULATING ABSENT CITIZENS

*Leo Schlueter**

It is generally agreed that sovereigns have the power to punish the crimes of their citizens abroad, at least in some situations. But sovereigns rarely exercise this power, and its contours are not well understood. This is especially true in the context of American federalism. It is unclear to what degree states have retained their sovereign extraterritorial powers, and the Supreme Court has never had occasion to fully explain their limits. Recent political developments, however, make it plausible that the question will soon arise. This Note attempts to provide some insight into the future debate over state criminal extraterritorial jurisdiction by describing its doctrinal history and constitutional implications. It explores how wider doctrinal debates regarding the limits and rationale of extraterritorial power over citizens in the national context affected, and continue to affect, how courts and scholars have approached the issue in the state context. Specifically, a shifting understanding of extraterritoriality within the Supreme Court's precedent has caused its subsequent treatment of the state issue to be remarkably unclear. The Note concludes by discussing the constitutional questions and opportunities presented by the potential doctrinal approaches, particularly in context of the Article IV Extradition Clause, the 6th Amendment jury right, and the line of cases culminating in Hyatt III.

INTRODUCTION

A hypothetical: what would happen if Texas attempted to criminalize its citizens' participation in surrogate birth activities outside the state? Ethical and policy problems aside, it is highly unclear what the constitutional status of such a law would be. This Note will discuss that question: namely, what authority a State has in its own courts over its own citizens, based solely on their citizenship rather than their location at the time of the act. The discussion will be lim-

* J.D. Candidate, Notre Dame Law School, 2025. I am deeply grateful to Professor Christian Burset for his excellent guidance during the drafting of this Note. I am also grateful to Professors Sherif Girgis and Samuel Bray for helpful comments on the original idea. Special thanks to my colleagues on the *Notre Dame Law Review* for their edits and advice. Most of all, I am thankful for my wife, Margaret, who supports me in all things. AMDG.

ited to the criminal dimension of such authority, since, for reasons which will be outlined below, the criminal dimension of this exterritoriality issue has been far less clearly addressed than its civil corollary. The *Fourth Restatement of Foreign Relations* refers to this type of authority as "active-personality" jurisdiction,[1] and so that term will be used throughout this Note.

Partially because something like this has never been attempted by states within the U.S. system, there is very little scholarship, and even less precedent, on the topic. What little writing does exist is deeply divided and often ambiguous. In an attempt to clarify the discussion surrounding active-personality jurisdiction, this Note seeks to be descriptive rather than normative, outlining the scholarship, doctrine, precedent, and contextual law which is most relevant to the active-personality jurisdiction question. Specifically, this Note will focus on the doctrinal history and content of active personality, a dimension which has been especially neglected in prior discussions.

Towards that end, this Note will consist of three parts: Part I will discuss what the power of nations to regulate extraterritorially with regard to their citizens has been recognized to be, both generally and within American jurisprudence. Part II will investigate to what extent the states have retained that power, specifically through the lens of Supreme Court precedent. Finally, Part III will briefly touch on the implications that state active-personality power might have for other provisions of the Constitution, especially in light of several modern Court precedents. This is important because while constitutionality is not the main focus of the Note, it may affect how the Court interprets the threads of relevant doctrinal history.

I. FRAMING: WHY ACTIVE PERSONALITY MATTERS

One cause for the murkiness surrounding the nature of active-personality jurisdiction is that the states have provided very little opportunity for it to become a controversy before the Court.[2] However, such a law may be more plausible than it first appears.

---

1 RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 410 (AM. L. INST. 2017).

2 One reason for this is that the issues which some predicted to be lines of substantive disagreement ended up reaching a larger consensus than initially anticipated. As Katherine Florey has discussed, this is essentially what happened with cannabis regulation. Katherine Florey, Dobbs *and the Civil Dimension of Extraterritorial Abortion Regulation*, 98 N.Y.U. L. REV. 485, 537 (2023). While initially there was much discussion over major state differences, and even potential criminal extraterritorial regulation, the states ended up legalizing or softening their policies so quickly that there was never any real possibility of a robust enforcement regime. *See id.* at 538–39. And there is some indication that the overturning of *Roe* has actually made Americans *more* willing to liberalize abortion, not less.

Surrogacy, although perhaps not as controversial as many other ethics issues,[3] has received substantial attention by the Catholic Church and a small but vocal group of conservatives. Recently, Pope Francis condemned what he called the "despicable . . . practice of so-called surrogate motherhood," calling on the international community to "prohibit this practice universally."[4] Several conservative commentators have also touched on this theme.[5]

In the political sphere, Italy's legislature under Giorgia Meloni has recently passed a bill which renders surrogacy, already illegal in Italy and many other European nations, a "universal crime[]," meaning that it applies to Italian citizens who participate in so-called procreative tourism by traveling to other countries, such as the United States or India, where the practice is legal.[6] As of this Note's writing, nothing like this has been presented in the United States, at either the federal or state level.[7] However, Italy's example, and other prac-

---

See Kate Zernike, *How a Year Without* Roe *Shifted American Views on Abortion*, N.Y. TIMES (June 24, 2023), https://www.nytimes.com/2023/06/23/us/roe-v-wade-abortion-views.html [https://perma.cc/6HST-SEPE].

3 *See* YOUGOV, SURROGACY POLL (Nov. 25–30, 2015) (showing that seventy-one percent of Americans at least "somewhat approve" of surrogacy).

4 Jason Horowitz, *Francis Urges Ban on Surrogacy, Calling It 'Despicable,'* N.Y. TIMES (Jan. 8, 2024), https://www.nytimes.com/2024/01/08/world/europe/pope-francis-surrogacy-ban.html [https://perma.cc/HM7M-8QUS]; *see Address of His Holiness Pope Francis to Directors of The Federation of Catholic Family Associations in Europe*, VATICAN (June 10, 2022), https://www.vatican.va/content/francesco/en/speeches/2022/june/documents/20220610-assoc-familiari.html [https://perma.cc/YE4A-SHN2].

5 Katy Faust, *The Conservative, Pro-Life Case Against Surrogacy*, FEDERALIST (Dec. 4, 2023), https://thefederalist.com/2023/12/04/the-conservative-pro-life-case-against-surrogacy/ [https://perma.cc/GU36-4XJP]; Jordan Boyd, *Pope Francis Is Right: Every Nation Should Ban The 'Despicable' Rent-A-Womb Industry*, FEDERALIST (Jan. 8, 2024), https://thefederalist.com/2024/01/08/pope-francis-is-right-every-nation-should-ban-the-despicable-rent-a-womb-industry/ [https://perma.cc/U83Z-J4MS].

6 Frances D'Emilio, *Italians Pursuing Parenthood via Surrogates Abroad Could Face Prosecution Under Proposed Law*, AP NEWS (June 20, 2023, 12:09 PM EDT), https://apnews.com/article/italy-surrogate-ban-lgbtq-parents-c1d9fdb74d1e5302698432d9a2a7226e [https://perma.cc/MQM7-RJB2]; Emma Bubola, *Italy Criminalizes Surrogacy from Abroad, a Blow to Gay and Infertile Couples*, N.Y. TIMES (Oct. 16, 2024), https://www.nytimes.com/2024/10/16/world/europe/italy-surrogacy-law.html [https://perma.cc/5N8V-4H2H].

7 In fact, Michigan recently removed its longstanding surrogacy ban. *See* Press Release, Governor Gretchen Whitmer, Gov. Whitmer Signs Bills Decriminalizing Surrogacy and Protecting IVF (Apr. 1, 2024), https://www.michigan.gov/whitmer/news/press-releases/2024/04/01/whitmer-signs-bills-decriminalizing-surrogacy-and-protecting-ivf [https://perma.cc/P3ZV-DUBH]; MICH. COMP. LAWS. ANN. § 722.1701–1909 (West 2024).

tical considerations, give some reason to think that such a move could be on the horizon.[8]

II. ACTIVE-PERSONALITY JURISDICTION GENERALLY

A. Conflict of Laws and Criminal Law

Criminal active-personality jurisdiction has a quirk which sets it apart from most conflict-of-laws discussions; namely that "[t]he Courts of no country [state] execute the penal laws of another."[9] This fact renders much of the traditional conflict-of-laws discussions irrelevant, since those doctrines deal with the application of one jurisdiction's law by another.[10] Criminal law is different, since the only courts that *could* be applying the law would be the courts of the country which enacted it. Thus, application of criminal law is only a binary question: Does forum law apply or not? The answer can only be yes or no.

Generally, the reach of criminal law is territorially limited. The general rule, Story tells us, is that "crimes [are] altogether local" which makes them "cognizable . . . and punishable exclusively in the country, where they are committed."[11] However, when Story wrote that criminal laws are "local" he was simply recognizing the aforementioned principle that they are not recognized by other jurisdictions, and that because of this, "[t]he courts of no country *execute* the penal laws of another."[12] This discussion does not apply to active-personality jurisdiction, where a country *is* executing its own penal laws.

---

8 A bargaining-inequality valence which works against extraterritorial application in the abortion context may somewhat change in the surrogacy context. While, for reasons similar to the abortion context, a state might be hesitant to prosecute a vulnerable woman who rents her womb out, a wealthy businessman traveling out of his anti-surrogacy domicile to contract for and receive a baby may seem to some a figure more appropriate for extraterritorial prosecution. Moreover, while more liberal states might loosen their surrogacy restrictions, other conservative states might react by enacting active-personality laws.

9 Robert A. Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 CASE W. RSRV. L. REV. 44, 46 (1974) (alterations in original) (quoting The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825) (Marshall, C.J.)).

10 Thus, laws or doctrines like the *Second Restatement of Conflict of Laws* deal with what jurisdiction's law a court should apply. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF L. (AM. L. INST. 1971).

11 JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 620 (Boston, Little, Brown, & Co. 6th ed. 1865).

12 *Id.* § 621 (emphasis added) (quoting *The Antelope*, 23 U.S. (10 Wheat.) at 123).

B. The Consensus

In fact, Story made quite clear that active-personality jurisdiction was appropriate, although it was used more rarely than territorial jurisdiction. He wrote that "although the laws of a nation have no direct binding force, or effect, except upon persons within its own territories . . . every nation has a right to bind its own subjects by its own laws in every other place."[13] This is no small exception; Story described how it is "well founded in the practice of nations."[14]

This rule arises multiple times in the *Commentaries*. In another section, Story wrote that "no sovereignty can extend its process beyond its own territorial limits."[15] Again, Story meant only that the enforcement process cannot be implemented by *other countries*; right after this, he reemphasized that as to citizens domiciled abroad, so far as their "rights, duties, obligations, and acts afterwards come under the cognizance of the tribunals of the sovereign power of their own country, . . . there may be no just ground to exclude this claim."[16] But of course, when "duties, obligations, and acts come under the consideration of other countries . . . the duty of recognizing and enforcing such a claim of sovereignty, is neither clear, nor generally admitted."[17] This principle, of course, follows directly from the aforementioned fact that one sovereign cannot enforce the criminal laws of another.

Story was not crafting a novel rule here; in pointing out that "there may be no just ground" to exclude the claim that the actions of citizens while abroad can "come under the cognizance of the tribunals of the sovereign power of their own country,"[18] and describing the rule that "[e]very nation . . . possesses the right to regulate and govern its own native-born subjects everywhere,"[19] he derived support from Blackstone, who spoke of the "implied, original, and virtual allegiance" which the citizens owed to their own country, even while abroad.[20] Writing two years after Story's *Commentaries* were first pub-

13 *Id.* § 21.

14 *Id.*

15 *Id.* § 539.

16 *Id.* § 540.

17 *Id.* Story acknowledged that it could be enacted as a matter of comity, but this is not the same as a pure obligation. *Id.*

18 *Id.*

19 *Id.* § 21.

20 1 WILLIAM BLACKSTONE, COMMENTARIES *356–57. It is notable that Story, while carrying on Blackstone's rule, suggested a new justification for it which is more fitting of the modern age. Blackstone justified active-personality jurisdiction as a "debt of gratitude" to the king, in return for the king's protection when subjects were in infancy and thus "incapable of protecting" themselves. Blackstone thought it was "unreasonable that

lished, renowned American scholar (and third Supreme Court reporter[21]) Henry Wheaton noted that the judicial power of "every independent State" extends to the punishment of all local offenses by its subjects "wheresoever committed."[22]

It is not particularly difficult to find English cases which demonstrate that Story's description of active-personality jurisdiction was taken for granted by the English legal system. In *Rex v. Sawyer*,[23] the court rejected the idea that "the words of the statute could not extend to places situate[d] in the dominions of an independent foreign power," stating that "for this no authority was cited . . . and, in fact, the cases are all the other way."[24] *Sawyer* is particularly striking, because although it initially appears to be an argument about the legality of active-personality jurisdiction per se, it turns out that both parties agreed on the propriety of such laws. The defense acknowledged that "[i]f the jurisdiction is to be supported here, I apprehend that it must be upon the ground that a British subject owes allegiance to the laws of his country wherever he goes."[25] The disagreement was merely over whether "it is essential that [the fact that the accused is a British citizen] should appear on the face of the indictment."[26] Thus,

---

[the citizen] . . . should be able at pleasure to unloose those bands, by which he is connected to his natural prince." *Id.* at 357–58. Even to Story, the limitations to this would have been obvious. First, in an age when monarchy was beginning to decline, the idea of a debt of gratitude tying a subject to the sovereign seemed tenuous. Second, Blackstone's justifications would hold less weight in an age when migration between countries was becoming common and inexpensive. Thus, Story, not wanting to take on this baggage, was quick to state that although extraterritorial power over citizens was viable in the sense that it was "well founded in the practice of nations," "it is incorrect, or, at least, it requires qualification," with regard to the theory of "natural allegiance." STORY, *supra* note 11, § 21. Story thought that Vattel provided a more modern theoretical framework than Blackstone. *Id.* (citing DE VATTEL, THE LAW OF NATIONS §§ 220–28 (Joseph Chitty ed., London, S. Sweet et al. 1834) (1758)) (describing how Vattell "seems to admit the right of allegiance not to be perpetual even in natives; and that they have a right to expatriate themselves, and . . . dissolve their connection with the parent country").

21 Stephen R. McAllister, Wheaton v. Greenleaf*: A (Story) Tale of Three Reporters*, J. SUP. CT. HIST., 1998, at 53, 54.

22 HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 110 (Philadelphia, Carey, Lea & Blanchard 1836).

23 R v. Sawyer (1815) 175 Eng. Rep. 41. In *Sawyer*, the defendant had shot and mortally wounded a British subject in Lisbon, Portugal. *Id.* at 41.

24 *Id.* at 48. Specifically, the court found that the defendant's status as a British subject was the factual hook for the court's jurisdiction and that the Crown had sufficiently demonstrated this fact, writing that "taking it that the jurisdiction only extended to British subjects, the Judges are of opinion that sufficient is stated on the indictment to put the other party on shewing the contrary." *Id.*

25 *Id.* at 44.

26 *Id.* at 44, 48.

both parties in *Sawyer* took for granted the possibility and efficacy of active-personality legislation.

The 1843 case of *Regina v. Azzopardi*[27] used parallel reasoning to that of *Sawyer*. Here, the statute explicitly provided for "the trial of any of her Majesty's subjects who shall be charged in England with any murder or manslaughter committed on land out of the United Kingdom, 'whether within the king's dominions or without.'"[28] At first blush, the prisoner's defense looked to be a rejection of active personality; "[t]o constitute the crime of murder at common law, it was necessary that both parties should be British subjects, or, if the subjects of another country, they must be brought, by some circumstances, under British protection."[29] However, the case's subsequent discussion regarding the application of the statute is telling; it turns out that the only disagreement in *Azzopardi* was not about whether the statute was actually *capable* of providing for the prosecution of crimes committed against non-British subjects, but rather whether the common law "default," which did not assume extraterritorial application of statutes, had actually been altered.[30]

Thus, although the Court in *Azzopardi* did in fact rule for the Crown,[31] the holding of the case is not as important as the arguments used. Neither defense counsel nor the Crown argued that the state did not have the power to enact active-personality jurisdiction statutes. Rather, as in *Sawyer*, both parties were arguing about what in fact the statute directed.

This principle of active-personality jurisdiction, whatever its theoretical origins, appears to be maintained today in both legal scholarship and actual law. In 1942, Edmund Schwenk, then holder of the Brandeis Fellowship at Harvard Law School, considered it "well settled that a nation has the power to prohibit and punish acts by its own citizens while they are in a foreign state or country, if the legislature sees fit to do so."[32] Edward S. Stimson, citing *Sawyer* and *Azzopardi*, distilled the principle to the rule that courts should apply

27 R v. Azzopardi (1843) 174 Eng. Rep. 776.

28 *Id.* at 776.

29 *Id.* at 777.

30 While the Crown argued that "it is quite clear that the intention of the [statute] was to give jurisdiction over murders committed upon persons not British subjects," the defense argued that "although the intention of the legislature may have been to provide for the killing of a person not a British subject, yet that is not so expressly enacted." *Id.*

31 The court ruled that the "case does fall within the statute" and that "a British subject, living under the protection of the British government, [is] subject to the laws of Great Britain." *Id.* at 778.

32 Edmund H. Schwenk, *Criminal Codification and General Principles of Criminal Law in Argentina, Mexico, Chile, and the United States: A Comparative Study*, 4 LA. L. REV. 351, 351, 355 n.22 (1942).

laws extraterritorially to citizens "when the legislative body clearly intended that the law apply to citizens abroad."[33] More recently, Glenn Cohen has described how international law is quite clear that nations are permitted to "assert jurisdiction over the acts of [their] citizens wherever they take place."[34] To show that this principle still obtains in full force, Cohen cites a 2009 English case where an English court refused to clarify that it would *not* apply its law against assisting suicides to the husband of a woman who wished to travel to Switzerland to die.[35]

The judges in *Sawyer* and *Azzopardi*, as well as Blackstone and Story, were not articulating a doctrine limited to its historical context. The idea of jurisdiction attaching to the citizen has perdured through to the modern era; the concept of active-personality jurisdiction is found consistently in every single *Restatement of Foreign Relations*.[36] The *Restatement* is quite clear on the bounds of active-personality jurisdiction, which are that "[i]nternational law recognizes a state's jurisdiction to prescribe law with respect to the conduct, interests, status, and relations of its nationals outside its territory."[37]

The U.S. does in fact exercise jurisdiction along these lines. A primary example is 18 U.S.C. § 2423, which grants extraterritorial jurisdiction over citizens who commit sex trafficking crimes against children outside the United States.[38] Hewing to the jurisdictional requirements of the *Restatement*, this part of the statute does not base its jurisdiction on the protection of children who are U.S. citizens or even on the more general protection of U.S. interests. Rather, it criminalizes U.S. citizens for their participation in the crime, regardless of the effects and where they are located.[39] In this sense, it is similar in application to the British murder statute discussed in *Rex v.*

33 Edward S. Stimson, *Which Law Should Govern?*, 24 VA. L. REV. 748, 766 (1938).

34 I. Glenn Cohen, *Circumvention Tourism*, 97 CORNELL L. REV. 1309, 1329 (2012).

35 *Id.* at 1327. Cohen argues that although nations are not *obligated* to extend their law extraterritorially to their citizens, *id.* at 1328–29, it is normatively ideal that "in many cases, the home country should extend its domestic criminal prohibition extraterritorially" to nationals who flee the territory in order to circumvent local laws, *id.* at 1337.

36 RESTATEMENT (SECOND) OF FOREIGN RELS. L. OF THE U.S. § 30 (AM. L. INST. 1965); RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 402 (AM. L. INST. 1987); RESTATEMENT (FOURTH), *supra* note 1, § 410. The *Fourth Restatement of Foreign Relations* gives four bases for jurisdiction, with one of them originating the term used throughout this piece: "Jurisdiction Based on Active Personality." *Id.* §§ 410–13.

37 *Id.* § 410. The *Restatement* goes on to say that "[j]urisdiction based on active personality depends on the nationality or residence of the person being regulated, not on the nationality of the person whom the regulation is designed to protect." *Id.*

38 18 U.S.C. § 2423(c) (2018).

39 *Id.*

Sawyer, which criminalized acts of British citizens wherever they were found.[40]

C. A Different Rule?

Was there any dissent from the conception of active-personality jurisdiction articulated by Blackstone, Story, and the *Restatement*? Professor Anthony J. Bellia has indicated that there was. He identifies Story's view, discussing how "[c]ertain early nineteenth century accounts of the law of nations recognized a sovereign prerogative in states to regulate their citizens no matter where they were."[41] However, he points out that there was an alternate rule, under which "a state only had jurisdiction to punish citizens for acts committed abroad when the offense was particularly injurious to the state."[42] There are three sources he points to as exemplifying this proposition: the renowned conflict of laws scholar Francis Wharton's *Treatise on the Conflict of Laws*,[43] an 1859 Michigan Supreme Court opinion written by Justice Christiancy in *People v. Tyler*,[44] and the Supreme Court case *Skiriotes v. Florida*.[45] Of these three, *Skiriotes* is particularly unique, and so it will be discussed in detail below.[46] Wharton's treatise and Justice Christiancy's opinion, on the other hand, discuss active-personality jurisdiction generally.[47]

It is certainly not implausible to interpret Wharton and Christiancy as expressing a "sovereign interest" understanding of active-personality jurisdiction. Christiancy wrote that "if [a crime is] committed by a citizen or subject of [a] sovereignty . . . unless [the crime is] calculated to injure the sovereignty or its citizens, no government can have any legitimate right to punish offenses committed within or

40 *See supra* notes 23–26 and accompanying text.

41 Anthony J. Bellia Jr., *Federalism Doctrines and Abortion Cases: A Response to Professor Fallon*, 51 ST. LOUIS U. L.J. 767, 772 (2007).

42 *Id.* at 773.

43 *Id.* at 774 (citing FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAWS §§ 858–75 (Philadelphia, Kay & Brother 1872)).

44 *Id.* at 773–74 (quoting People v. Tyler, 7 Mich. 161, 221–22 (1859) (opinion of Christiancy, J.)).

45 *Id.* at 774 (citing Skiriotes v. Florida, 313 U.S. 69 (1941)).

46 *Skiriotes* is the only major U.S. case which attempts to draw a line in the active-personality context between the extraterritorial powers of the states and the extraterritorial powers of the federal government. *See* Emma Kaufman, *Territoriality in American Criminal Law*, 121 MICH. L. REV. 353, 379 (2022).

47 *See* WHARTON, *supra* note 43, § 867; *Tyler*, 7 Mich. at 226–27 (opinion of Christiancy, J.). While *Tyler* was a state case, Christiancy did not distinguish his reasoning based on federalist principles, and instead looked to the traditional conflicts scholarship. *Tyler*, 7 Mich. at 221, 226–27.

without its limits."[48] The examples he subsequently provided help reinforce this: in cases where a citizen "commit[s] treason by acts or combinations abroad[,] the commerce of a nation [is] injured, or its pacific relations with other governments [are] endangered, by . . . criminal conduct," "the offender may be punished by the government of which he is a citizen."[49] This discussion does seem to imply that the *only* justifiable uses of active-personality jurisdiction would be where there was some national interest at stake.

This would line up with the understanding articulated by Wharton, who wrote that "with the single exception in England of homicides, the Anglo-American practice [of asserting jurisdiction over citizens extraterritorially] is to take cognizance only of offences directed against the sovereignty of the prosecuting state."[50]

However, there are elements of Wharton's and Christiancy's writings which call into question how much they meant to state a general "sovereign interest" rule regarding active-personality jurisdiction. First, both Christiancy and Wharton seem to be basing their understanding at least partially on Story;[51] in fact, he is the only scholar Christiancy cited in that part of the discussion.[52] One might expect a clearer statement if Wharton and Christiancy were planning on a relatively novel departure from the scholar who seemed to guide much of their analysis.

Second, Wharton used language which belies a strict application of his "sovereign interest" limitation test. Although he discussed a unique Anglo-American rule, Wharton gave an ardent defense of active-personality jurisdiction in general. He discussed how, if there was no way to regulate the extraterritorial behavior of citizens, the boundary lines between states would become "barricades behind which subjects could securely organize triumphant crime."[53] Thus, he concluded that the *locus delicti* principle of crimes being purely

48 *Tyler*, 7 Mich. at 221 (opinion of Christiancy, J.) (emphasis omitted).

49 *Id.* at 221–22.

50 WHARTON, *supra* note 43, § 916. Examples of this might be attempts to defraud the state, strip its resources, or harass its citizens.

51 Both sources begin their analysis by citing Story for the proposition that crimes are altogether or entirely local. *See id.* § 853; *Tyler*, 7 Mich. at 221 (opinion of Christiancy, J.). Their descriptions also track Story in that they describe active-personality jurisdiction as an "exception" to the usual territoriality of criminal law. *See* WHARTON, *supra* note 43, § 856 ("And, in fact . . . [territoriality] has been subjected by its advocates to so many exceptions, as to deprive it, even on their showing, of extra-territorial force."); *Tyler*, 7 Mich. at 221 (opinion of Christiancy, J.) ("But the general principle . . . is subject to some qualifications or exceptions.").

52 *See Tyler*, 7 Mich. at 218–22 (opinion of Christiancy, J.).

53 WHARTON, *supra* note 43, § 856.

territorial had been "subjected by its advocates to so many exceptions, as to deprive it . . . of extra-territorial force."[54]

Even Wharton's reference to an "Anglo-American practice" which takes "cognizance only of offences directed against the sovereignty of the prosecuting state" is not definitive.[55] Is this a descriptive or a normative claim? As a normative statement, it is tricky; the English homicide cases discussed above, though they were *about* homicides, did not state such a categorical limitation in their reasoning.[56] Such an interpretation would also conflict with Story, who certainly meant to include Anglo-American law in his treatise.[57] Moreover, it is unclear how Wharton could fit an exception such as this within a normative framework of "justice" concerning a state's relations to its citizens: why would it be unjust to prohibit in France what is unjust in England?

However, as a descriptive claim, Wharton's statement makes more sense. It may very well be true that at the time of writing, all of the Anglo-American cases *had* been limited to homicides.[58] This would explain why Wharton called the lack of extensive active-personality statutes a "practice" and not a "rule."[59] A descriptive account would also explain Wharton's approving comment that the Anglo-American view was "most consistent with a sound and wise system of international law."[60] Here, then, Wharton may have been articulating (1) a descriptive claim about how the U.S. operates in practice and (2) a practical defense for that policy. One can certainly see the arguments for limiting active-personality legislation to only a very small subset of crimes. Without such a limitation, the prosecutorial costs of extraterritorial enforcement might simply be too great. Wharton would not have been the first to express that there might be *practical* reasons for a legislature to restrict its use of active-personality jurisdiction; writing thirteen years before Wharton, Sir George Cornewall Lewis advised against it, pointing out that "a sovereign government, which pursues its subjects into foreign countries, and keeps its criminal law suspended over them, attempts a task . . . which

54 *Id.*

55 *Id.* § 916.

56 *See supra* notes 23–31 and accompanying text.

57 *See* STORY, *supra* note 11, at xi.

58 At least, no others were found in the researching of this Note. *See, e.g.*, R v. Sawyer (1815) 175 Eng. Rep. 41; R v. Azzopardi (1843) 174 Eng. Rep. 776.

59 WHARTON, *supra* note 43, § 916.

60 *Id.*

will probably be performed in a careless, indifferent, and intermitting manner."[61]

There is another principle of international law which renders Christiancy's discussion a bit odd. His opinion limited extraterritorial crimes to those of citizens against the sovereign. However, it is well established that nations have the ability to prosecute *any* crimes against their sovereignty,[62] and American state courts have explicitly adopted this principle.[63] Christiancy's discussion of the twofold "citizenship plus harm" limitation would seem redundant if there was background law which claimed that *any* sovereign harm was cognizable, regardless of the perpetrator's citizenship. Moreover, the rule, if limited to sovereign interests, would be completely discordant with the English cases cited above, where courts found jurisdiction in homicide cases which completely lacked harms to the sovereign.[64] Accordingly, Christiancy's rule does not sit particularly well with either past precedent or additional international law principles. It is notable that contemporary discussions, including Wharton's, do not cite to *Tyler* or any other case which affirmatively ruled out the possibility of general active-personality jurisdiction.

In fact, even a subsequent state supreme court case which cited Christiancy's opinion took it to be saying something much more in line with Story and Blackstone. Writing four years after *Tyler*, the Wisconsin Supreme Court cited Christiancy, along with Story and Wheaton, for the principle that "every nation has the right to punish its own citizens for the violation of its laws wherever committed."[65]

Perhaps then, like Wharton, Christiancy might have been articulating a pragmatic rather than a normative truth about active-personality jurisdiction: that use of such authority often makes the *most* practical sense when it concerns actions directed against the state. There are certainly good reasons why a country might want to prevent its citizens from conspiring internationally to harm the sovereign and also reasons why it might want to limit that policy to its own citizens for diplomacy reasons. Christiancy, in focusing exclusively on crimes injurious to the sovereign, might simply have done a

---

61 GEORGE CORNEWALL LEWIS, ON FOREIGN JURISDICTION AND THE EXTRADITION OF CRIMINALS 30 (London, John W. Parker & Son 1859).

62 Wharton himself describes this, writing how, with regard to offenses committed "distinctively against its Sovereignty," countries have penal jurisdiction over "all Offences committed against the Laws of such Country." WHARTON, *supra* note 43, § 897.

63 *See* Strassheim v. Daily, 221 U.S. 280, 281–82, 284–85 (1911) (holding that it was well within Michigan's power to prosecute a non-Michigan citizen for acts which occurred outside Michigan but which defrauded the State of Michigan).

64 *See* R v. Sawyer (1815) 175 Eng. Rep. 41; R v. Azzopardi (1843) 174 Eng. Rep. 776.

65 State *ex rel.* Chandler v. Main, 16 Wis. 398, 419–420 (1863).

bad job of articulating whether he was describing a universal rule of international law or proposing a kind of "best practices" recommendation. A descriptive account would also line up with later descriptions by treatise writers. The 1929 version of Wheaton's *Elements of International Law* noted that, in differentiation from the general practice, criminal offenses in the United States and Great Britain are generally considered "justiciable only by the Courts of that country where the offense is committed," but that this practice is "occasionally disregarded" by the legislation of both countries.[66]

Thus, it is not surprising that no per se "sovereign harm" test has been recognized at any point by the *Restatement*, subsequent legal treatises, or actual legislation. Indeed, it is clear that "[n]early all the nations of Europe extend their penal statutes to their nationals wherever they are" and that, "[a]s to their right to do this, there can be no question, internationally speaking."[67] Professor Wendell Berge wrote that "[o]ne of the leading examples of non-territorial jurisdiction is the jurisdiction which states and nations exercise over their citizens abroad" and that "[t]he right of a nation or state to exercise such jurisdiction is quite freely conceded."[68] And international law scholar Sir William E. Beckett stated in 1925 that "though Great Britain and America exercise the right which it gives them to punish their nationals for offences committed abroad less than most other countries," "[t]he theory of allegiance—permanent or temporary—as the sole source of jurisdiction is still asserted by many British and American writers."[69]

Thus, although we do find language which could be interpreted to refer to a per se "sovereign interest" test, there are manifold problems with that reading. At any rate, the historical sources for such a test are far less clear than the general rule articulated by Story, *Sawyer*, and *Azzopardi*.

II. THE STATE CONTEXT: UNPACKING *SKIRIOTES*

A. How Skiriotes *Lacks Clarity*

There is really only one U.S. Supreme Court case which has explicitly addressed the problem of state active-personality power: *Skiri-*

66 1 WHEATON'S ELEMENTS OF INTERNATIONAL LAW 270 (A. Berriedale Keith ed., Steven & Sons, Ltd. 6th English ed. 1929) (1836).

67 Note, *Extraterritorial Criminal Jurisdiction*, 26 MICH. L. REV. 429, 429 (1928).

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

69 W.E. Beckett, *The Exercise of Criminal Jurisdiction over Foreigners*, 6 BRIT. Y.B. INT'L L. 44, 52 (1925).

otes v. Florida.[70] There are several reasons why *Skiriotes* was the Court's best chance to address this issue. First, the statute at issue was penal. Second, the statute regulated conduct outside of the territorial boundaries of Florida. And finally, the defendant was a citizen of the state.[71] Unfortunately, it is extremely difficult to distill a coherent rule from *Skiriotes*.

The overall analytical structure of *Skiriotes* is sensible, proceeding from a general analysis of active-personality jurisdiction to a specific analysis in the state context. In discussing the general rules of active-personality jurisdiction, the Court made clear that "the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed."[72] The Court found that "[w]ith respect to such an exercise of authority there is no question of international law, but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government."[73] In this regard, *Skiriotes* echoed the aforementioned consensus which began with Story and continued into the *Restatement of Foreign Relations*: that countries have free reign to regulate the behavior of their citizens extraterritorially and that this comes from the "duty" of the citizen towards their home country. There was no mention of the "sovereign interest" limitation rule which Justice Christiancy described in *Tyler*.

The Court then analyzed active personality from the state perspective, pointing out that "[s]ave for the powers committed by the Constitution to the Union, the State of Florida has retained the status of a sovereign."[74] This is where things become confusing. Given these two principles, it would have been logical for the Court to do one of two things: It might have concluded that there were *no* federal powers which preempted the statute, and thus that it was valid. Alternatively, it might have decided that there *were* federal powers preempting the statute, rendering it invalid. This would have provided a clean framework for evaluating state active-personality jurisdiction powers going forward.

---

70 Skiriotes v. Florida, 313 U.S. 69 (1941). In the case, the defendant was convicted in Florida based on a state statute which forbade the use of diving suits, helmets, or other apparatus by deep-sea divers for the purpose of taking sponges from the Gulf of Mexico. *Id.* at 69–70. In his defense on appeal, Skiriotes claimed that "the criminal jurisdiction of the courts of Florida could not extend beyond the international boundaries of the United States." *Id.* at 71.

71 *Id.* at 72.

72 *Id.* at 73.

73 *Id.* (footnote omitted).

74 *Id.* at 77.

However, the Court did neither of these things. Instead, it gave a patchwork of apparently independent rationales, with little explanation of how they fit together. First, *Skiriotes* made a distinction based on the fact that with extraterritorial regulation on the high seas, there is significantly *no* other jurisdiction.[75] Second, the Court used a tradition-based analysis, discussing how "[t]here is nothing novel in the doctrine that a State may exercise its authority over its citizens on the high seas."[76] *Skiriotes* also seemed to invoke some type of "legitimate interest" test, writing that a State may govern extraterritorial behavior of citizens on the high seas *only* when the State has a legitimate interest.[77] This test echoes the sort of reasoning expressed by Justice Christiancy in *Tyler*. However, the opinion did not cite any authority for the legitimate-interest proposition.

It is unclear how these rationales work together. If the Court meant to announce a general legitimate-interest rule regarding state extraterritoriality, then it only needed to state such a principle and frame its reasoning in light of that. Perhaps the historical analysis could have been used to demonstrate that Florida did indeed have a legitimate interest. Alternatively, the Court could have pointed out that the lack of overlapping jurisdictions made a legitimate-interest claim more plausible. Instead, the Court mentioned a legitimate-interest test but then did not expound on it, failing even to mention what the interests could be. There are plausible candidates,[78] but the Court did not explicitly connect them to the test. This would be extremely odd if the test was the linchpin of the Court's entire holding. Moreover, the Court concluded the opinion with a suggestion that its entire discussion was really only about maritime regulation anyway.[79]

Perhaps most importantly, the legitimate-interest test is particularly discordant with the Court's initial premises: (1) that sovereigns have a plenary right to regulate the activity of their citizens (the "plenary-powers" premise), and (2) that "[s]ave for the powers committed by the Constitution to the Union . . . Florida has retained the sta-

75 *Id.* at 73–74 (noting that the defendant was "not in a position to invoke the rights of other governments or of the nationals of other countries").

76 *Id.* at 77.

77 *See id.* (explaining that the state may control extraterritorial conduct of citizens where "the [s]tate has a legitimate interest").

78 For example, the Court mentioned that "[i]t is also clear that Florida has an interest in the proper maintenance of the sponge fishery," *id.* at 75, but this is not directly connected to the legitimate-interest test discussed later and appears to be part of the Court's discussion on federal preemption.

79 In the final pages of the opinion the Court wrote that "[w]hen its action does not conflict with federal legislation, the sovereign authority of the State over the conduct of its citizens upon the high seas is analogous to the sovereign authority of the United States over its citizens in like circumstances." *Id.* at 78–79.

tus of a sovereign."[80] Any limitations upon Florida's plenary power would need to be (1) justified as a limit deriving from a power reserved or (2) denied under the constitutional system. But the Court did not present the test as a constitutional limitation and gave no hints about where such a limitation might be found.

Thus, in *Skiriotes*, the Court gave inconsistent, and even contradictory, justifications. Of course, this means that it is not at all clear how a subsequent Court would apply *Skiriotes*. Is the rule a general legitimate-interest test? If so, from where does that test derive? Alternatively, is the rule of decision a tradition-based analysis? Is *Skiriotes*'s entire discussion really just about extraterritorial regulation on the high seas?

More importantly, it seems reasonable to ask why *Skiriotes* was so ambiguous about these things. It would not have been difficult for the Court to limit its holding. As a result, *Skiriotes* gives a distinct impression that the Court itself was uncertain about what the true rationale should be. Instead of authoritatively relying on one line of reasoning, the *Skiriotes* Court threw in a bit of history, a bit of analogy, a bit of precedent, and a bit of judicial scrutiny to create a patchwork holding where the sum was somehow supposed to be greater than the parts. What explains this approach?

B. Explaining Skiriotes*'s Confusion: The Holmes Precedents*

As discussed above, *Skiriotes* doesn't follow through. It began by articulating two general premises, but then did not operate as if it fully recognized the validity of those premises. However, what if the reason for the Court's hesitation was uncertainty over how categorical those premises actually were, regardless of how strongly the Court seemed to express them? This Section discusses how the "plenary powers" premise of active-personality jurisdiction may have been less clear to the Justice Hughes of 1927 than his expression in *Skiriotes* would suggest.

Hughes's confusion may be explained by the precedent he was working with; prior to *Skiriotes*, the Court had generated a series of opinions authored by Justice Holmes which, though never fully on point, repeatedly called into question the extent of the plenary-powers premise. That *Skiriotes* cited these opinions for its understanding of the active-personality principle suggests that the language in these cases may have caused its ambiguous reasoning.

80 *Id.* at 77.

Skiriotes's clearest articulation of the traditional active-personality jurisdiction rule[81] first cited Story, but subsequently cited the majority-Holmes opinion in *American Banana Co. v. United Fruit Co.*[82] This is interesting because *American Banana* did not provide for nearly so broad a rule of active-personality jurisdiction as the one described by Story. In fact, it rejected a general active-personality rule. Holmes wrote that "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*."[83] In asserting this, Holmes cabined other historical examples as *sui generis*. Citing *Rex v. Sawyer*, he referred to it as the "startling application[]" of a "notion" that "English statutes bind British subjects everywhere."[84]

In fact, Holmes's articulation of the general rules of active-personality jurisdiction is strikingly similar to *Skiriotes*'s reasoning vis-à-vis the *states*; Holmes described the two possibilities for active-personality jurisdiction as being admiralty related and sovereign-interest related, writing that "[n]o 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, and keep to some extent the old notion of personal sovereignty alive."[85] According to Holmes, the only other appropriate use of active-personality jurisdiction is in "cases immediately affecting national interests," such as "criminal correspondence with foreign governments."[86]

In this language, it is easy to see the origins of the "legitimate interest" test which Justice Hughes articulated in *Skiriotes*.[87] If Justice Hughes was reading both Story's treatise and Holmes's writing, he would have been confronted with two quite different articulations of

81 Hughes wrote that "the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed. With respect to such an exercise of authority there is no question of international law, but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government." *Id.* at 73.

82 Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), *abrogated on other grounds by* Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962). In *American Banana*, the plaintiff and defendant were both American corporations, one incorporated in Alabama and one in New Jersey. *Id.* at 354. In a series of events which occurred wholly in Panama, the defendant conspired with the Costa Rican government to interfere with and prevent the legal construction of the infrastructure for a banana plantation in Panama. *Id.* at 354–55. The plaintiff sued under the Sherman Act for illegal restraint of trade. *Id.* at 357.

83 *Id.* at 356 (emphasis added).

84 *Id.* (citing R v. Sawyer (1815) 175 Eng. Rep. 41).

85 *Id.* at 355–56.

86 *Id.* at 356.

87 *See supra* note 77 and accompanying text.

active-personality jurisdiction. Story would have been quite comfortable with *Rex v. Sawyer*. Holmes dismissed it as the "startling application[]" of an "old notion."[88] He did not cite Story at all in the *American Banana* opinion and cited Blackstone only once, in a different context.[89]

How did Hughes deal with this? It seems that he bifurcated the theories, applying Story's conception generally, but then averting to a more Holmesian analysis in the state context. Given this, Hughes's hesitancy to fully articulate the Holmes analysis as a general rule makes sense; in doing so, he would have had to explain why he was rejecting an older tradition which fully accepted active-personality jurisdiction.

What, then, is the support for Holmes's analysis in *American Banana*? It appears to be Holmes himself, writing in previous cases. For the general rejection of active-personality jurisdiction, Holmes cited his previous opinion in *Slater v. Mexican National Railroad Co.*[90]

However, the legal issue in *Slater* was not active-personality jurisdiction, but a rather traditional conflict-of-laws question.[91] In the end, *Slater* was merely a question about in what court a plaintiff could exercise a given cause of action in tort.[92] However, Holmes framed the issue in the terms of active-personality jurisdiction; he described the plaintiff as claiming that an act "[gives] rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be

88 *Am. Banana*, 213 U.S. at 356; *see supra* 84 and accompanying text.

89 *See generally Am. Banana*, 213 U.S. 347.

90 *Id.* at 356 (citing Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120, 126 (1904)).

91 *Slater*, 194 U.S. at 122. The question was to what degree a court should recognize the laws of another jurisdiction in its decisionmaking. The plaintiffs sued the Mexican defendant in an American federal forum using a combination of Mexican and American law, claiming a Mexican cause of action, while at the same time allocating damages using a lump sum in a federal common law jury action. Justice Holmes, speaking for the Court, noted that "we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught." *Id.* at 126. Holmes pointed out that this would lead to the injustice of allowing "a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose." *Id.* The correct action, Holmes believed, would be to use the *whole* of Mexican law, since "the cause of action relied upon is one which is supposed to have arisen in Mexico under Mexican laws." *Id.* at 127.

92 The plaintiff's theory was that his damage sustained in Mexico could be enforced in Texas using Texas law, while Holmes found that "as the only source of th[e] obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, but equally determines its extent." *Id.* at 126, 125–26 (citing Smith v. Condry, 42 U.S. (1 How.) 28 (1843)).

enforced wherever the person may be found."[93] Holmes then rejected this principle, writing that "[w]e are aware that expressions of a different tendency may be found in some English cases."[94] However, he did not inquire further, indicating that those cases "do not cover the question before this court."[95]

Thus, although Holmes acknowledged that active-personality jurisdiction was not actually being raised in the case, his allusion to the "English cases" and his discussion of an "obligation" painted the outlines of a broader principle. He then concretized that principle by citing it in *American Banana* for a "general and almost universal rule" against active-personality jurisdiction.[96]

Let us turn, then, to the cases Holmes used to demonstrate the proposition that active-personality jurisdiction is limited to a "region[] subject to no sovereign, like the high seas."[97] Again, Holmes cited himself. In *The Hamilton*, the Court dealt with whether the corporation managing a steamship could be liable under Delaware tort law to another steamship corporation for a collision which occurred on the high seas.[98]

Like in *Slater*, there was no need for the Court to address the question of extraterritoriality, since it took for granted that "[n]o one doubts the power of England or France to govern their own ships upon the high seas."[99] The main point of contention in the case was *not* the general ability of states to regulate conduct on the high seas, but rather whether the regulation of activity on the high seas was precluded by the federal government's power under the Constitution.[100] However, like in *Slater*, Holmes appeared to make a statement concerning a more broad question of state extraterritorial powers, pointing out that Delaware's law operated "outside the territory of the State . . . but within no other territorial jurisdiction."[101] If the main question was merely federal preemption (which it was), this discussion was completely unnecessary. Holmes's approach in *The Hamilton* matched the pattern in *Slater*. Only a traditional conflict-of-laws or federalism analysis was required. However, Holmes instead outlined

93 *Id.* at 126.
94 *Id.* at 127.
95 *Id.*
96 Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) (citing *Slater*, 194 U.S. at 126).
97 *Id.* at 355–56.
98 The Hamilton, 207 U.S. 398, 402–03 (1907).
99 *Id.* at 403.
100 *Id.* at 403–04. The Court concluded that it was not. *Id.*
101 *Id.* at 403.

the beginnings of a broad limiting rule on active-personality jurisdiction.

As for Holmes's *American Banana* reference to "sovereign interest" limitations, it has the same problem which the Michigan Supreme Court had in *Tyler*; the fact that most states *do* limit their extraterritorial jurisdiction statutes to situations where the sovereign interest is involved may have its source in prudential rather than absolute limitations.[102]

C. How American Banana *and* Skiriotes *Caused Confusion*

This chain of cases, culminating in *Skiriotes*, helps explain some of the tangled web of confusion that the law finds itself in with regard to active-personality jurisdiction. In fact, Justice Hughes was not the only legal actor to be confused by Holmes's precedents. Writing almost a decade before *Skiriotes* would be penned by the Court, Chester Rohrlich tried to make sense of the Court's precedent on active-personality jurisdiction.[103] He noted the generally accepted principle that "[e]ven when outside the territorial limits of his state a citizen is, in many important respects, subject to its laws" and "may be punished for crimes against its laws even when they are committed outside its territory."[104] However when Rohrlich tried to reconcile this with Supreme Court precedent as articulated by Holmes in *American Banana*, he concluded that American law had departed from this principle and that "[i]n American law this penal jurisdiction is limited by the notion 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'" with the exception that "acts which may react prejudicially upon the state itself" may still be restricted and prosecuted.[105] In making this statement, Rohrlich's discussion picked up on Holmes's "legitimate interest" principle, where the extraterritorial legislation must be limited to a "harm" caused to the sovereign entity of the State, rather than extending to someone by very nature of his citizenship.[106] Rorhlich's understanding was premonitory; as we shall see, *Skiriotes* reached the same conclusion, but, unable to reconcile it with the larger body of national active-personality doctrine, applied that conception only to the states rather than to all levels of the U.S. system.

---

102 *See supra* notes 58–66 and accompanying text.

103 Chester Rohrlich, *World Citizenship*, 6 ST. JOHN'S L. REV. 246, 255–56 (1932).

104 *Id.* at 255.

105 *Id.* at 256 (quoting Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909)).

106 *See supra* notes 86–88 and accompanying text.

D. Moving on from Skiriotes

Skiriotes, attempting to make sense of confusing precedent, has itself become a source of confusion for legal scholarship. This can be seen across both the *Restatement of Conflicts* and the *Restatement of Foreign Relations*; despite being a relatively old case, *Skiriotes* has not been treated the same way in any version of the *Restatements*.

The *Second Restatement of Conflict of Laws* cites *Skiriotes* for the ambiguous proposition that "[a]n individual State of the United States also has jurisdiction to apply its local law in certain instances to its absent citizens."[107] What are those "certain instances" and how are they defined? The *Restatement* does not say.[108] This ambiguity, however, is forgivable, because *Skiriotes* does not say either.

The draft *Third Restatement* is slightly more clear, stating that, while there is a general rule that "States may regulate extraterritorially on the same terms as the federal government," this type of regulation "raises different concerns, and implicates different constitutional provisions, than applying State law extraterritorially in an interstate context."[109] Neither *Restatement* seems to be a more correct articulation of *Skiriotes*; rather, they are simply emphasizing different aspects of the holding. The *Second Restatement* picks up on the Holmes-influenced limitation rule, while the *Third* draft focuses on Story's more general principle.

This confusion is also present in the *Restatement of Foreign Relations*. Despite the *Second Restatement*[110] being released in 1965, more than two decades after *Skiriotes*, the *Restatement* makes no mention of the case.[111] The *Third Restatement*, citing *Skiriotes*, does point out that a State "may apply at least some laws to a person outside its territory on the basis that he is a citizen," but notes that the cases upholding this jurisdiction have "generally involved acts or omissions that also had effect within the State."[112] The *Fourth Restatement* is notable in that its understanding of *Skiriotes* is actually inconsistent across the *Restatement*. In one section, the *Restatement* cites *Skiriotes* for the prin-

107 RESTATEMENT (SECOND), *supra* note 10, § 9 (citing Skiriotes v. Florida, 313 U.S. 69 (1941)).

108 *Id.*

109 RESTATEMENT (THIRD) OF CONFLICT OF L. § 5.01 (AM. L. INST., Tentative Draft No. 3, 2022) (first citing *Skiriotes*, 313 U.S. at 77; and then citing Hannah L. Buxbaum, *Determining the Territorial Scope of State Law in Interstate and International Conflicts: Comments on the Draft Restatement (Third) and on the Role of Party Autonomy*, 27 DUKE J. COMPAR. & INT'L L. 381, 388–95 (2017)).

110 Which, in fact, was the first published edition. *See The Story of ALI*, AM. L. INST., https://www.ali.org/about-ali/story-line/ [https://perma.cc/GJ7B-HZLZ].

111 *See generally* RESTATEMENT (SECOND), *supra* note 36.

112 RESTATEMENT (THIRD), *supra* note 36, § 402 (citing *Skiriotes*, 313 U.S. 69).

ciple that "States may regulate extraterritorially on the same terms as the federal government."[113] However, elsewhere, the *Restatement* notes that only "a State *with a legitimate interest* may regulate extraterritorially to the same extent as the federal government."[114] These are not quite the same proposition. As across the *Restatements of Conflict of Laws*, the *Fourth Restatement of Foreign Relations* picks up on different disparate elements of *Skiriotes*, with some lines emphasizing the Holmes "sovereign interest" or "legitimate interest" rule, while others emphasize the plenary-powers theory of Story.

Could the *Skiriotes-Banana* line of cases be another source of a state "sovereign interest" test to which the Supreme Court might validly turn? Unfortunately, like *Tyler*, these cases are difficult to use as precedent. First, especially in the Holmes opinions, most of the relevant principles articulated in the cases are dicta. Second, any expressions of a limiting rule are a departure from prior understandings. This is not in and of itself a problem, but it is a problem that they are departed from without announcement or explanation. Although he expressed disdain for the old active-personality rules, Holmes did not declare himself to be outlining a radically new theory. Because of this, he did not really explain why the old system should be departed from. Finally, and probably most importantly, the general principles of extraterritoriality articulated in these cases failed to be picked up by large strains of subsequent legal scholarship and caselaw. As we have seen, by the time the *Restatement of Foreign Relations* was written, there was no recognition of a separate American rule. Even by the time of *Skiriotes*, the Court had to acknowledge that the federal government, at least, *did* have the ability to pass active-personality laws.[115] In sum, *Skiriotes* isn't a problem because it stands for a separate state rule on active personality; it's a problem because it uses two different conceptions of non-state extraterritorial authority and arbitrarily applies one (Story's) to the federal government, while applying the other (Holmes's) to the states.

E. Finding a Rule in Other Precedent?

Given the ambiguity of *Skiriotes*, some scholars have tried to find other Supreme Court precedent which points to a rule on state extraterritorial powers. This has been difficult. One of the primary examples is found in a debate between Professors Seth Kreimer and Mark Rosen. Professor Kreimer's main precedential argument against active-personality jurisdiction is based on the Supreme

113 RESTATEMENT (FOURTH), *supra* note 1, § 404 (citing *Skiriotes*, 313 U.S. at 77).

114 *Id.* § 406 (emphasis added).

115 *Skiriotes*, 313 U.S. at 73.

Court's holding in *Bigelow v. Virginia*, where the Court evaluated a First Amendment claim that Virginia did not have the right to restrict the access of its residents to information regarding abortion services outside Virginia.[116]

As Professor Rosen points out, there are several reasons why *Bigelow* is not particularly relevant as precedent. First, *Bigelow* was dealing with a separate constitutional question from extraterritoriality: not whether a State could restrict its citizen's actions in other states, but whether it could control its citizen's access to information in other states. The location of the person was irrelevant.[117] *Bigelow* was simply a First Amendment question, and because of that "[t]he *Bigelow* Court consequently did not have to decide any larger extraterritoriality principles in coming to its conclusion that Virginia's statute violated the First Amendment, rendering the Court's extraterritoriality observations mere dicta."[118] The Court clarified this in a subsequent case, *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico.*[119]

For his part, Rosen cites two Supreme Court cases which purportedly support the "inherent power" of the states to regulate their citizens extraterritorially: *Strassheim v. Daily*[120] and the much-discussed *Skiriotes v. Florida.*[121] Rosen proposes that these cases, by supporting the State's power with respect to *some* forms of extraterritorial authority, demonstrate that active personality was not a "sovereign power[] . . . delegated to the federal government in the Constitution and

116 Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 459–60 (1992) (citing Bigelow v. Virginia, 421 U.S. 809 (1975)). In a standard First Amendment analysis, the Court held that Virginia's interest in controlling information access about activities outside its borders was "entitled to little, if any, weight," since Virginia's police powers do not reach activities outside the Virginia border. *Bigelow*, 421 U.S. at 827–28.

117 Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 893 (2002) ("[T]he principle that a state may regulate its citizens' out-of-state activities is not incompatible with the principle that a state may not control its citizens' knowledge of what activities are permissible in other states.").

118 *Id.*

119 *Id.* at 895 (citing Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 345–46 (1986)). The case, in holding that Puerto Rico could restrict its gambling establishments from advertising to Puerto Rico residents, clarified that *Bigelow* came out the way it did only because Virginia was attempting to regulate matters that the Constitution prohibits states from banning. *Id.* (citing *Posadas*, 478 U.S. at 345–46).

120 *Id.* at 864 (citing Strassheim v. Daily, 221 U.S. 280, 281–82 (1911)). In *Strassheim*, the Court held that a defendant could be held liable under a Michigan criminal statute for engaging in bribery, even though he was not a citizen of Michigan and had not performed the criminal acts in Michigan. *See Strassheim*, 221 U.S. at 281, 284–85.

121 Rosen, *supra* note 117, at 865–66 (citing Skiriotes v. Florida, 313 U.S. 69 (1941)). *Skiriotes* will not be discussed here, as the discussion above is hopefully sufficient to understand its status as precedent. *See supra* Part II.

accordingly not retained by the states under the Tenth Amendment."[122]

However, Rosen's precedents prove too little. *Skiriotes* is difficult to derive a simple rule from for the reasons stated above.[123] *Strassheim* certainly does not hurt, and perhaps rather buttresses, the claim that states retain *some* extraterritorial powers, but it did not speak at all to the active-personality question. First, the Michigan law in question was not a personal statute; it applied equally to both Michigan residents and residents of other states, and the Court did not even discuss the question of whether the defendant was a citizen or resident of Michigan.[124] Rather, the rule of decision was that Michigan could restrict extraterritorial actions which were "intended to produce . . . detrimental effects" within the state.[125] The one extraterritorial power does not imply the other; it could make constitutional sense for a State to be able to prosecute individuals who try to injure the State, while not having *plenary* active-personality jurisdiction over its citizens.

III. THE CONSTITUTIONAL DIMENSION

A. Specific Provisions

Of course, even if the precedent pointed to states having extraterritorial powers, the Constitution might have something to say about it, either in the Fourteenth Amendment or in various "structural" provisions. This Section provides a concise summary of the potential constitutional issues which state active-personality jurisdiction could present.

One possible limiting principle could be the Article IV Privileges and Immunities Clause.[126] On a prima facie reading, it might make sense that the Clause's general prohibition on interstate discrimination would grant citizens at least some substantive rights in the states they travel into. Professor Kreimer invokes this argument, pointing out that since the Clause grants a right "of Utah residents under article IV to obtain an abortion in California on a basis of equality with Californians" and creates a right which "owe[s its] existence to . . . the Federal government, its National character, [or] its Constitution," the right is secured through Privileges and Immunities.[127]

---

122 Rosen, *supra* note 117, at 869.

123 *See generally supra* Part II.

124 *See generally Strassheim*, 221 U.S. 280.

125 *Id.* at 285.

126 U.S. CONST. art. IV, § 2, cl. 1.

127 Kreimer, *supra* note 116, at 517 (first alteration and omission in original).

However, this line of reasoning has several weaknesses. As Professor Rosen points out, "well-established caselaw provides that the Privileges and Immunities Clause does not apply to a State's regulation of its own citizens, but rather applies to the regulation of states' relationships with visitors who are citizens of other states."[128] Thus, applying the Clause against a citizen's *home* state rather than the one they traveled into would be a radical departure from privileges and immunities jurisprudence. Even if this were possible, the scope of extraterritorial rights would then have to be defined; for example, abortion, which was a constitutional right at the time of Kreimer's writing, is no longer a constitutional right.[129]

Another potential doctrine could be the dormant Commerce Clause.[130] This argument may hold some promise, since the "[c]ommerce clause doctrine is scarcely a taut and unchanging framework."[131] The doctrine has clearly been used in other areas to invalidate statutes with purely extraterritorial applicability,[132] and it might apply if a court found that the active-personality regulation in question was an "extraterritorial commercial intervention[],"[133] which, since it seeks to "control commercial activity in other states,"[134] would "transgress commerce clause limits."[135]

However, Kreimer himself notes what seems to be the main problem with the argument, which is that "all of the cases in which statutes have been invalidated [under the dormant Commerce Clause] have involved laws which in some sense could be characterized as economic protectionism or predation."[136] The intuition that the Commerce Clause is limited to legislation which is at least a *proxy* for economic protectionism was recently confirmed in *Pork Producers v. Ross*, where the Court declined to strike down a California law which had extraterritorial effects.[137] The Court disagreed on exactly

128 Rosen, *supra* note 117, at 897.

129 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022).

130 Kreimer points to the dormant Commerce Clause, arguing that the tactic of prosecuting citizens who travel to more permissive locales and then return home would "be of doubtful constitutional validity under current commerce clause doctrine." Kreimer, *supra* note 116, at 489.

131 *Id.* at 496.

132 *Id.*

133 *Id.* at 492.

134 *Id.* at 495.

135 *Id.* Kreimer points to *Baldwin v. G.A.F. Seelig*, which stated 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." *Id.* at 492 (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935)).

136 *Id.* at 496.

137 Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1150 (2023).

why the law was constitutional; some Justices argued that the plaintiffs had failed to state the economic burden necessary under modern Commerce Clause doctrine,[138] while others argued that even if there *was* an economic burden, it was "incommensurable" with the moral benefits of humane animal treatment.[139] However, what these two justifications held in common was that there was at least *some* economic-discrimination valence to Commerce Clause regulation.[140] Thus, while certain specific active-personality regulations might raise this issue (such as a prohibition on gambling or using recreational drugs) others (such as traditionally criminal activity, medical procedures, or noneconomic behaviors) might be far less likely to. At the very least, *Ross*'s economic analysis would not be able to provide a blanket rule against active-personality jurisdiction.

There are two final constitutional provisions that would almost certainly pose conundrums for the Supreme Court. Since *Duncan v. Louisiana*, criminal defendants have had a right to a trial by jury in the state and district in which the individual allegedly committed a crime.[141] This provision becomes logistically tricky in extraterritorial cases, where it appears that the prosecuting State would need to somehow organize and summon a jury from another state. This scenario might be especially difficult if the state where the "crime" was committed was hostile to the very idea of the act being a crime.

The Article IV Extradition Clause also poses problems.[142] For example, let us posit that Texas makes surrogacy illegal both territorially and extraterritorially, while California considers it an affirmative right in which it wants all people in California to be able to participate. It would appear that under the Extradition Clause, Texas would have the right to request that California return Texas citizens who had engaged in surrogacy activities in California. To some, this might raise the disturbing possibility of a scenario similar to in *Ableman v. Booth*, where Wisconsin, a free state, was forced to hand over a slave to a Southern owner by the terms of the Fugitive Slave Act, although such an action was strongly against the public policy of the State of Wisconsin.[143]

One can see how this might be awkward. The discomfort is compounded by the fact that it probably *will* be true that the state where the crime is committed will be permissive of the act in ques-

138 *Id.* at 1161 (opinion of Gorsuch, J.).

139 *Id.* at 1167 (Barrett, J., concurring in part).

140 *Id.* at 1164 n.4 (opinion of Gorsuch, J.) ("[A] majority agrees that [the economic burdens test] seek[s] to smoke out purposeful discrimination in state laws . . . .").

141 Duncan v. Louisiana, 391 U.S. 145, 153 (1968).

142 U.S. CONST. art. IV, § 2, cl. 2.

143 Ableman v. Booth, 62 U.S. (21 How.) 506, 524, 526 (1859).

tion. If surrogacy was illegal in Texas, it would only make sense for citizens to travel to states where it *was* legal. There might be potential ways for a court to get around this. Perhaps if the defendant was already in the foreign state, they could not be considered "flee[ing] from Justice" and thus might not fall under the Extradition Clause.[144] However, it is not at all obvious that the Clause works like this.

B. The Hyatt III *Solution*

These arguments of "constitutional awkwardness" alone might be insufficient. However, they become more operationalizable in light of the Court's recent decision in *Hyatt III*.[145] There are some significant parallels between the unsuccessful plaintiff's argument in *Hyatt III*[146] and a general claim of active-personality jurisdiction. The argument was that "before the Constitution was ratified, the States had the power of fully independent nations to deny immunity to fellow sovereigns," and that, because of this, the states must retain that power today with respect to each other because "nothing in the Constitution or formation of the Union altered that balance among the still-sovereign states."[147] The Court rejected this, responding that "[t]he problem with Hyatt's argument is that the Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns."[148] The Court explained this holding by discussing how the constitutional structure implies constitutional limitations on the sovereignty of sister states, and that "[o]ne such limitation is the inability of one State to hale another into its courts without the latter's consent."[149] *Hyatt* cited several constitutional provisions to support this argument: First, Article I divests states of the "traditional diplomatic and military tools that foreign sovereigns possess," such as the ability to bargain for sovereign immunity recognition though import and export duties, treaties, or war.[150] Second, the Full Faith and Credit Clause, Privileges and Immunities Clause, and Extradition Clause emphasize the fundamental principle of *equal* sovereignty among the states.[151] *Hyatt* al-

144 U.S. CONST. art. IV, § 2, cl. 2.

145 Franchise Tax Bd. v. Hyatt (*Hyatt III*), 139 S. Ct. 1485 (2019).

146 *Id.* at 1498. The plaintiff argued that states retain the ability to override a fellow state's sovereign immunity.

147 *Id.* at 1496.

148 *Id.* at 1497.

149 *Id.*

150 *Id.* at 1497–98 (first citing Shelby County v. Holder, 570 U.S. 529 (2013); then citing New Hampshire v. Louisiana, 108 U.S. 76 (1883); and then citing Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981)).

151 *Id.* at 1497–98 (citing *Shelby County*, 570 U.S. 529).

so cited a series of other precedents where various sovereign rights were held to no longer exist under the Constitution.[152]

Thus, the Court could conclude that active-personality jurisdiction, like the recognition of sovereign immunity or border requirements, is one of those things that states no longer have power over given their correlate stripping of "traditional diplomatic and military tools."[153] On one hand, this feels intuitively plausible; perhaps the Court would use that rationale to confirm one specific reading of *Skiriotes*, under which states possess active-personality authority only in contexts where strong state interests are at stake or where another state's territory is not implicated. On the other hand, this would certainly seem to be a marked extension of the *Hyatt III* precedent. Notably, *Hyatt III* and all of its supporting examples involved situations where the institutional authority of another State was directly attacked. Active-personality jurisdiction is different. It does not directly attack the authority or sovereignty of a State, but only limits the possible scope of actions for those people that are residents of the restrictive state. This is opposed to state authority only in the sense of limiting how many *positive* rights the State can afford visitors. If Texas bans surrogacy, California's interests are implicated only inasmuch as California desires all visitors to have an affirmative *right*. However, this is a novel way to view state sovereignty, and is clearly different from if Texas were to, say, annex Southern California. Thus, an announcement that a *Hyatt III*-type rule applies to active-personality jurisdiction would be, while not entirely unprecedented, both a significant addition to the breadth of the reasoning in *Hyatt III* and a substantial reframing of the traditional understanding of active-personality jurisdiction's place in intersovereign disputes. However, all this shows is that *Hyatt III* is not perfectly on point. If a State's arms are tied by the Extradition Clause, perhaps this is a sign that active-personality legislation which forces states to extradite defendants which were, from their perspective at least, innocent is simply not one of the powers which makes sense under the federal system. Going forward, that line of debate would seem to be the most promising for legal actors seeking to strike down active-personality laws.

152 *Id.* at 1498 (first citing Cissna v. Tennessee, 246 U.S. 289, 295 (1918) (state cannot apply its own law to interstate border disputes); then citing Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (state cannot apply its own law to water rights disputes); and then citing Petty v. Tenn.-Mo. Bridge Comm'n, 359 U.S. 275, 278–79 (1959) (state cannot apply its own law to interstate compacts)).

153 *Id.* at 1497.

CONCLUSION

If the Supreme Court ever has to pronounce on the status of active-personality jurisdiction, it will not be able to easily close the question with a simple constitutional provision, precedential case, or traditional appeal. In particular, the Court cannot cite *Skiriotes* for a clean proposition without ignoring significant ambiguities and inconsistencies in the case's holding and background sources.[154] On one hand, there is a strong historical tradition of active-personality legislation being valid for nations, and it might make logical sense to carry that power on to the states through the Tenth Amendment.[155] On the other hand, such a law would create unique knock-on constitutional complications, primarily through the Extradition and Jury Clauses.[156] But because of the sparse historical and precedential foundation for limiting rules regarding active-personality legislation, any limitation the Court creates will probably be somewhat novel, perhaps drawing on the arguments in *Hyatt III*. In playing out these complications and possibilities, this Note has attempted to provide an accurate "lay of the land." It is the work of future scholars, attorneys, and judges to map out the path forward.

154 *See supra* Part II.

155 U.S. CONST. amend. X.

156 *See supra* notes 141–43 and accompanying text.