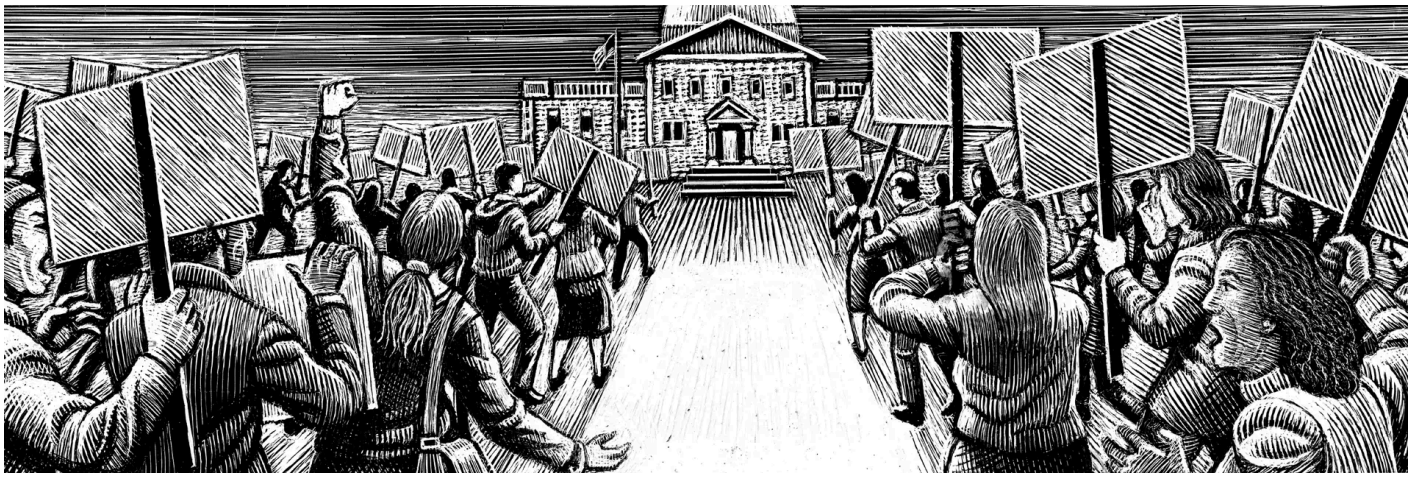
STATECOURTREPORT



REPRODUCTIVE RIGHTS | JUDICIAL INTERPRETATION

Choice of Law in an Era of Abortion Conflict

When a citizen of an anti-abortion state travels to another state to receive the procedure, which state's law should apply?

By Roderick M. Hills Jr. | **Published:** February 3, 2025 | **Last Updated:** July 16, 2025

Louisiana Texas New York Florida Arkansas Nevada

---

*UPDATE: In the lawsuit brought by the Texas attorney general against a New York doctor who sent abortion-inducing drugs to a woman in Texas, a Texas judge in February **ordered** the doctor to stop prescribing such pills and imposed the $100,000 civil penalty requested by the attorney general. The judgment was a default judgment, the kind issued when the defendant does not make an appearance in the case or file a response. Citing New York's "shield law" — a law intended to protect healthcare providers who help people from other states seek abortions — a New York county clerk has **twice** **refused** Texas's filings seeking to enforce the judgment against the doctor.*

In October, then-candidate Donald Trump **declared** that the regulation of abortion was "up to the states to decide based on the will of their voters." This federalism-oriented stance seemed to **suggest** that Trump might stand by his promise to leave regulating abortion "up to the states."

But which states get to regulate which abortions?

Last week, a Louisiana grand jury **indicted** a New York doctor for allegedly mailing abortion-facilitating pills to a Louisiana teenager. In December, Texas Attorney General Ken Paxton **filed a lawsuit seeking a $100,000 fine** against the same doctor for mailing pills to a Texas woman. Texas also enacted S.B. 8, which creates a private cause of action **allowing anyone to seek a $10,000 bounty** from Texans the plaintiff believes are involved in abortion in Texas — or elsewhere. Texas women, therefore, could be liable to S.B. 8 "bounty hunters" for abortions they obtain in New York. New York has responded by enacting a **so-called clawback statute** allowing non-residents who obtain abortions in New York to sue for damages and attorneys' fees anyone who brings an action against them based on such extraterritorial laws.

The challenge of sorting out states' competing civil and criminal state jurisdiction over abortion has provoked a flurry of legal scholarship on the extraterritorial effect of state abortion regulations and judgments. For notable contributions just in 2023 and 2024, see **this article** on extraterritorial reach of criminal laws by Darryl Brown, **this article** on the extra-territorial reach of S.B. 8 judgments by Lea Brilmayer, and **this article** on abortion and choice of law by Paul Berman, Roey Goldstein, and Sophie Leff. These articles join an older line-up of scholarship on abortion and choice of law from **Brilmayer**, **Seth Kreimer**, and **Richard Fallon**.

A review of this literature and the legal doctrine on the constitutional limits of states' legislative jurisdiction reveals three main conclusions. First, doctrine construing the 14th Amendment's Due Process Clause and Article IV, Section 1's Full Faith and Credit Clause provides some basis for limiting anti-abortion states' enforcement of their abortion regulations against abortion providers in other states. Second, the doctrine is deeply uncertain: There are precious few precedents upholding states' prohibition of their citizens' actions when those actions are permitted by the law of the place where the actions occur. Third, whatever the theoretical justification for such grabby

state behavior, there is a pragmatic argument in favor of the U.S. Supreme Court's constitutionally requiring a territorial choice-of-law rule that would simplify the resolution of otherwise bitterly intractable interstate conflicts.

Constitutional Doctrines Governing States' Legislative Jurisdiction

State legislatures do not have unlimited power to regulate actions outside their territory. ***Allstate Insurance v. Hague*** and ***Phillips Petroleum v. Shutts***, decided in 1981 and 1985 respectively, hold that a state may not apply its law to a dispute absent some "significant contact or significant aggregation of contacts" between the dispute and the regulating state "creating state interests" that "ensure that the choice of [the regulating state's law] is not arbitrary."

The *Hague* and *Shutts* courts derived this requirement of "significant contacts" indicative of "state interests" from the Due Process Clause and the Full Faith and Credit Clause without much explanation of the quoted terms or their relationship to constitutional text. The general idea, however, is that each state must "**respect the legitimate interests of other States and avoid infringement upon their sovereignty**." States without a sufficient interest in a dispute ought not to apply their laws to that dispute. But the Supreme Court has not provided much guidance about whether and how to identify the state with the predominant interest.

An Easy Case for Extraterritorial Regulation

Measured by this loose standard, extraterritorial legislative jurisdiction is sometimes uncontroversial. As Darryl Brown explains in a **recent article**, longstanding legal tradition permits states to regulate extraterritorial actions in one state that are intended to have effects in another state. If I stand on the Arkansas side of the Arkansas-Texas border and shoot someone in Texas, then Texas criminal law can be uncontroversially extended to my action, despite my pulling the trigger outside Texas, because the action in Arkansas has obvious and intended effects within Texas. (Believe it or not, state courts as late as the 1890s **sometimes barred such extraterritorial enforcement of criminal law**, but state legislatures have mostly overruled such formalistic territorialism).

Extended to the case of abortion, the logic of such effects-based jurisdiction suggests that there is no federal constitutional prohibition on Texas's attorney general suing a

New Yorker who sends abortion-facilitating pills to a Texas recipient. Put in the maddeningly vague terms of *Hague-Shutts*, the "contact" of both bullets and pills with a Texan while present in Texas is likely "significant" enough to indicate that Texas has an "interest" in controlling the out-of-state action that caused the contact.

Just because Texas is constitutionally permitted to regulate out-of-state abortion providers does not mean that Texas statutes have actually done so. Texas's regulations of abortions **repeatedly define** "physician" as "an individual licensed to practice medicine in this state," words that apparently exclude extraterritorial application to New York-licensed physicians. The Texas legislature could, however, amend the statute to extend the reach of the law to providers licensed in other states without offending any constitutional limitation.

Situations in which Extraterritorial Regulation Is a Harder Sell

Suppose, however, that a Texas citizen travels from Texas to New York to receive an abortion from a New York abortion provider. Can Texas regulate either the provider or its own citizen based solely on the latter's domicile?

Texas's interest in regulating services provided to its citizens entirely in another state seems weak: As a matter of common practice and judicial precedent, it is extraordinarily unusual for states to prohibit their citizens from engaging in activities that are permitted by the law of the state where those activities occur. Texas, for instance, **prohibits casino gambling** while Nevada permits it, but Texas law does not prohibit Nevada casinos from serving Texans who travel there to gamble. In theory, Texas has an interest in preventing its citizens from running up gambling debts in other states and then returning bankrupt to Texas, burdening the state treasury and Texan family members with their financial ruin. In practice, however, Texas, like other anti-gambling states, vindicate this interest merely by **barring their own courts** from enforcing gambling debts incurred outside the state.

The same goes for state criminal law more generally within the United States: It is **overwhelmingly dominated** by a territorial choice of law rule. As the Supreme Court **noted** in 1909, "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."

The dominance of regulation based on the location of a regulated activity does not mean that the Constitution necessarily prohibits states from regulating based on the citizenship of the actor. In the international context, nations occasionally regulate their citizens' conduct abroad. For instance, federal law prohibits American tourists from **having sex with minors** outside the United States regardless of whether such actions violate the laws where the actions take place.

Perhaps states within the American federal system are constitutionally permitted to do to other states what the United States does to foreign nations: Export their laws to other states based solely on persons' citizenship rather than the location of regulated conduct. Put doctrinally, state citizenship could alone be a sufficiently "significant contact" to give states an "interest" under *Hague-Shutts* to regulate their citizens' conduct wherever that conduct occurs. Each state's abortion laws, on this theory, could follow each citizen around like a legal cloud, governing them even when they entered a state with an entirely different abortion-regulating regime.

The single precedent commonly cited for the idea that states can regulate their own citizens wherever they might travel is 1941's ***Skiriotes v. Florida***, in which the U.S. Supreme Court permitted Florida to enforce its regulation barring the use of deep-sea diving equipment to harvest commercial sponges against a Florida citizen who collected the sponges on the high seas. In justifying this extension of Florida's power, however, Chief Justice Charles Evans Hughes emphasized that the defendant was "operating outside the territory of the state . . . but within no other territorial jurisdiction."

By contrast, the Texan who seeks an abortion in New York "operates" within a "territorial jurisdiction" — New York — that deliberately protects the Texan's right to avail herself of New York law. Allowing Texas to tie its abortion rules to Texas citizens wherever they might travel subverts New York's interest in controlling its own territory. Indeed, such a citizenship-based choice-of-law rule would subvert Texas's territorial sovereignty by requiring Texas hospitals to follow New York's abortion laws when providing medical care to New York tourists. As Brilmayer **argued** back in 1993, it is plausible to believe that states have a greater interest in controlling their own territory than they have in controlling the conduct of their citizens when outside the state.

The Case for Constitutionalizing Territorial Choice-of-Law Rules

That a citizenship-based choice-of-law rule undercuts territorial sovereignty does not automatically imply that such a rule is unconstitutional. States, after all, have some interest in how their citizens are regulated while visiting other states. Anti-abortion states particularly want to protect what they regard as the lives of unborn children — fertilized embryos or fetuses — from "abortion tourism" to pro-choice states.

So why should the Supreme Court constitutionalize the territorial version of states' interests over the citizenship version?

One reason might be the sheer practical difficulties of citizenship-based extraterritorial rules. Take the situation of abortion providers. Under a citizenship-based choice-of-law rule, they would have to determine each patients' domicile — presumably by consulting drivers' licenses, utility bills, rental agreements, and so on — to apply the often-complex legal regime of that patient's home state. Each provider might therefore have to master as many unfamiliar abortion laws as they have out-of-state patients.

One state's insistence on such citizenship-based extra-territoriality would predictably trigger similar demands from other states across a wide range of issues. States with stringent limits on the purchase of firearms, for instance, could insist that more libertarian states enforce the formers' limits against their own citizens when they are hunting in pro-firearms states. The aggravation to sellers and service providers of applying unfamiliar out-of-state law would drive many to ignore such laws, secure in the knowledge that litigants in other states would **not be able to obtain personal jurisdiction** over them merely because of the citizenship of their customers. The legal uncertainty and sheer lawlessness of such a citizenship-based regime suggests why states have almost never adopted it — and why the Supreme Court might be tempted to constitutionalize a prohibition on such state grabbiness.

• • •

More than 30 years ago, Douglas Laycock **argued** that territoriality was the constitutional basis for American choice of law. Brilmayer has recently **made the**

case for reviving territorialism. Maybe the current fight over choice of law in abortion regulation will finally illustrate the wisdom of their arguments.

Roderick M. Hills Jr. is the William T. Comfort, III Professor of Law at New York University.

Suggested Citation: Roderick M. Hills Jr., *Choice of Law in an Era of Abortion Conflict*, STATE COURT REPORT (Feb. 03, 2025, updated Apr. 3, 2025), **https://statecourtreport.org/our-work/analysis-opinion/choice-law-era-abortion-conflict**

Related Commentary

REPRODUCTIVE RIGHTS | CIVIL RIGHTS

Case Trends: Post-*Dobbs* and *Skrmetti*, State Courts Are Battlegrounds for Transgender and Reproductive Rights

State courts are leaning on their unique state constitutional provisions, departing from federal precedent, and deciding who can challenge restrictive laws.

By Chihiro Isozaki

Montana **Ohio** **Wyoming** **Georgia** **Kentucky** **North Dakota** October 10, 2025

REPRODUCTIVE RIGHTS | JUDICIAL INTERPRETATION

New York Courts Should Reject Texas's Attempt to Enforce its Abortion Ban Beyond its Borders

Precedent supports the refusal to enforce out-of-state civil judgments that punish an individual in the name of protecting the public.

By Lindsay Wiley

New York **Texas** **Mississippi** **Missouri** September 29, 2025

REPRODUCTIVE RIGHTS | VOTING RIGHTS AND ELECTIONS

The Power of State Reproductive Freedom Amendments

A new report analyzes the language and effects of recently adopted amendments protecting reproductive rights and highlights their potential for abortion access and beyond.

By Cathren Cohen, Diana Kasdan

California **Colorado** **Michigan** **Vermont** **Maryland** **Missouri** **New York** **Ohio** **Arizona** **Montana** September 23, 2025

REPRODUCTIVE RIGHTS | VOTING RIGHTS AND ELECTIONS

Despite Constitutional Amendment, Abortion Still Out of Reach in Missouri

The Missouri Supreme Court reinstated restrictions on abortion this week, effectively making the procedure impossible to access in the state.

By Mary Ziegler

Missouri **Arizona** September 22, 2025