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# Abortion Across State Lines

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## Abortion Across State Lines

*Joseph W. Dellapenna\**

In the span of about a year in the mid-1990s, news media featured two stories about adolescent girls and abortion. In examining the somewhat sensationalized accounts of the two stories, one realizes that each could have been presented very differently. The first, from Nebraska, tells of a community strongly opposed to abortion that gathered together to prevent an unmarried pregnant teenager from having an abortion.<sup>1</sup> According to the *New York Times*, the father's family conspired with a doctor, the local sheriff's office and local police, the County Attorney, and the local Juvenile Court judge to deprive the girl and her family of their freedom to choose abortion by kidnapping the girl pursuant to a court order.<sup>2</sup> One could as easily cast the conspirators as heroes fighting to protect the rights of both the unborn child and its father by intervening to save the life of an unborn child in the twenty-third week of gestation—now an infant girl described in a quotation in the *New York Times* as a “darling little baby” being raised by the parents of the unnamed teenage girl.<sup>3</sup>

Pennsylvania provides a contrasting story, with the interveners on the side of “choice” rather than “life.” In northeastern Pennsylvania, Rosa Marie Hartford was convicted of interfering with the custody of a thirteen-year-old girl by taking her to New York for an abortion without the knowledge or consent of the girl's mother, who did not even know that the girl was pregnant.<sup>4</sup> While Hartford claimed that she did so in an ef-

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1. Tamar Lewin, *Nebraska Abortion Case: The Issue is Interference*, N.Y. TIMES, Sept. 25, 1995, at A8.

2. *Id.*

3. *Id.*

4. Marie McCullough, *Woman Convicted Who Aided Abortion: She Took her Son's 13-Year-Old Girlfriend to New York State for the Procedure Without Parental Consent*, PHILA. INQUIRER, Oct. 30, 1996, at A1 [hereinafter McCullough, *Woman Convicted*]; David Stout, *Woman Who Took Girl for Abortion Is Guilty in Custody Case*, N.Y. TIMES, Oct. 31, 1996, at A15; see also Marie McCullough, *Abortion Case Taps Some of Parents' Deepest Fears*, PHILA. INQUIRER, Oct. 27, 1996, at A1 (reporting the circumstances leading up to the conviction) [hereinafter McCulloch, *Deepest Fears*].

fort to help the girl, the Sullivan County District Attorney argued that Hartford had done so to help her nineteen-year-old son avoid a statutory rape conviction.<sup>5</sup> Despite Hartford's efforts, the son faced a jail sentence of up to thirty months.<sup>6</sup> Many people (including, apparently, the seven men and five women on the jury who convicted her—and a majority in the U.S. House of Representatives<sup>7</sup>) saw Hartford's actions as the selfish exploitation of a vulnerable child and a high-handed disregard of the right of the child's parent(s) to determine the medical procedures and cultural values that should play a role in the daughter's life. Kathryn Kolbert, of the Center for Reproductive Law and Policy, and Hartford's defense attorney, saw Hartford as a heroine who facilitated a young woman's lawful choice in the face of an uncaring or even hostile world.<sup>8</sup>

The Hartford case introduced a new element in the debate over the legality of abortion: Hartford had to take the girl to another state for the abortion. Pennsylvania has a rather strict parental notice and consent law,<sup>9</sup> the constitutionality of which has been upheld by the Supreme Court of the United States,<sup>10</sup> but three states that border Pennsylvania do not have comparable requirements.<sup>11</sup> Thus, even when a state like Pennsylvania has strict parental notice and consent laws, they may be evaded easily in a nearby state where public authorities are sympathetic to abortion rights. In another case, for example, parents in Pennsylvania sued a school district after a school's guidance counselor arranged for high school girls to travel to New Jersey for abortions without informing their parents.<sup>12</sup> The New Jersey Supreme Court had declared the state's parental notice law unconstitutional.<sup>13</sup> West Virginia, another state bordering

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5. McCullough, *Woman Convicted*, *supra* note 4, at A1. Despite Hartford's efforts, the son faced a jail sentence of up to thirty months. *Id.* (reporting that the son pleaded guilty to statutory rape and was serving a sentence of 12 to 30 months).

6. *Id.* (reporting that the son pleaded guilty to statutory rape and was serving a sentence of 12 to 30 months).

7. See David E. Rosenbaum, *House Passes Bill to Restrict Minors' Abortions*, N.Y. TIMES, July 1, 1999, at A17. While the proposed statute was not simply a response to the Hartford case, that case was discussed in the debates over the proposal; efforts to enact such a statute have foundered on the failure of the House and Senate to agree on the precise terms of the statute, although such statutes have now passed both houses of Congress. See Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1470, 1536–37 (2007).

8. Marie McCullough, *Abortion Case Appeal Poses Conflict of Rights*, PHILA. INQUIRER, June 12, 1997, at B1.

9. 18 PA. CONS. STAT. ANN. § 3206 (West 2000).

10. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 899 (1992).

11. Delaware, Maryland, and New York do not require parental notice and consent.

12. Vanessa Dea, *Abortion Debate: Do the Schools Have a Role in Counseling Girls?*, EDUC. WEEK, Mar. 7, 2001, at 1.

13. *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 638 (N.J. 2000).

Pennsylvania, has a strong parental notice and consent statute,<sup>14</sup> yet there might even have been similar evasions of Pennsylvania law there as well. The lack of published reports of such incidents might merely mean that those involved have not been caught.

The Pennsylvania stories present what on its face is a fairly narrow, technical legal question: Can a state like Pennsylvania apply its laws to abortions involving the state's citizens that take place outside the state? This question is likely to become more prominent in the future if the Supreme Court loosens the federal constitutional standards for abortion laws.<sup>15</sup> While most readers will immediately think in terms of a possible criminal prosecution, as in the Hartford case, the question also implicates questions of civil litigation. Supporters or opponents of abortion might seek injunctions<sup>16</sup> or the appointment of a guardian for the mother or the child, or even to bring suit for damages against the abortion provider or others involved in procuring the out-of-state abortion, whether for negligence in performing the abortion<sup>17</sup> or for injuring a legal right recognized in one state but not in another.<sup>18</sup>

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14. W. VA. CODE § 16-2F-3 (2001) (requiring parental notification). On the constitutionality of such statutes under the federal constitution, see *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 326–27 (2006).

15. See *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding a federal statute prohibiting partial-birth abortions and distinguishing *Stenberg v. Carhart*); *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) (invalidating a Nebraska statute banning partial-birth abortions for unduly burdening the right to choose abortion); *Casey*, 505 U.S. at 846 (adopting an undue burden standard for abortion regulations under which laws restricting abortion after viability must include exceptions for pregnancies that endanger the life or health of the mother). See generally JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 932–37 (2006).

16. See, e.g., MO. ANN. STAT. § 188.250(5) (West 2008) (authorizing an injunction against a person seeking to aid a minor in obtaining an abortion without parental consent). The constitutionality of this provision was upheld in *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 745 (Mo. 2007).

17. For examples of malpractice actions arising from an abortion, albeit not necessarily involving travel across a state line, see *Gaydar v. Sociedad Instituto Gineco-Quirurgico*, 345 F.3d 15 (1st Cir. 2003); *Arnold v. Board of Educ. of Escambia Cnty.*, 880 F.2d 305 (11th Cir. 1989); *Boykin v. Magnolia Bay, Inc.*, 570 So. 2d 639 (Ala. 1990); *Perguson v. Tamis*, 937 P.2d 347 (Ariz. Ct. App. 1996); *Vuitch v. Furr*, 482 A.2d 811 (D.C. 1984); *Adams v. Family Planning Ass'n Medical Group*, 733 N.E.2d 766 (Ill. App. Ct. 2000), *appeal denied*, 744 N.E.2d 283 (Ill. 2001); *Blair v. Hutzell Hospital*, 552 N.W.2d 507 (Mich. Ct. App. 1996), *rev'd mem.*, 569 N.W.2d 167 (Mich. 1997); *Kiddy v. Lipscomb*, 628 So. 2d 1355 (Miss. 1993); *Eidson v. Reproductive Health Services*, 863 S.W.2d 621 (Mo. Ct. App. 1993); *Blackburn v. Blue Mountain Women's Clinic*, 951 P.2d 1 (Mont. 1997); *Ferrara v. Bernstein*, 613 N.E.2d 542 (N.Y. 1993); *Phillips v. A Triangle Women's Health Clinic*, 573 S.E.2d 600 (N.C. Ct. App. 2002); *Hunte v. Hinkley*, 731 S.W.2d 570 (Tex. Ct. App. 1987); *Senesac v. Associates in Obstetrics & Gynecology*, 449 A.2d 900 (Vt. 1982); *Lake v. Northern Virginia Women's Medical Center, Inc.*, 483 S.E.2d 220 (Va. 1997). See generally Thomas Eller, *Informed*

In this article, I propose to analyze conflicts of law precedents and theory to explore the extent to which a state can apply its law on abortion to abortions performed outside the state but bearing a significant connection to the state. In attempting to resolve such questions, we enter into the domain of choice of law, part of the field of conflicts of law. This domain is notoriously unstable and contested.<sup>19</sup> This instability allows legal commentators to project their attitudes towards abortion (and many other matters) analyzing and construing the relevant authorities to resolve choice of law issues. I shall strive to avoid doing that, but it is for others to decide whether I succeed.<sup>20</sup> I begin in Part I by examining why differences among states regarding abortion policy arise and why those differences are likely to persist. I then proceed in Part II by describing choice of law theory generally. In Part III, I examine the application of choice of law theory to litigation involving differing abortion laws in different states. I conclude in Part IV that states can apply their laws to their citizens when they travel out of the state in an effort to avoid abortion restrictions.

#### I. THE NATIONAL AND INTERNATIONAL CONFLICT OVER ABORTION

Until sometime in the nineteenth or twentieth century, abortion was tantamount to suicide for the mother, and thus, there was little controversy about prohibiting it.<sup>21</sup> When changing medical technologies—the

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*Consent Civil Actions for Post-Abortion Psychological Trauma*, 71 NOTRE DAME L. REV. 639 (1996); Tamar Lewin, *Malpractice Lawyers' New Target*, MED. ECON., June 26, 1995, at 53;

18. See, e.g., MO. ANN. STAT. § 188.250(2), (3) (West 2008) (imposing civil liability on persons who aid a minor in obtaining an abortion without parental consent). The constitutionality of this provision was upheld in *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732 (Mo. 2007). See also *Broemmer v. Abortion Serv. of Phoenix, Ltd.*, 840 P.2d 1013 (Ariz. 1992) (holding that a woman cannot be bound to arbitrate an abortion-malpractice claim); *Bickham v. Selcke*, 576 N.E.2d 975 (Ill. App. Ct. 1991) (upholding professional sanctions against a physician because of the negligent performance of an abortion); *Sherman v. Ambassador Ins. Co.*, 670 F.2d 251 (D.C. Cir. 1981) (a physician's suit against a malpractice insurer). Products liability claims might also arise in some circumstances. For example, press reports have indicated that the Chinese pharmaceutical company that manufactures mifepristone (RU-486), an abortion-inducing drug used in the first two months of pregnancy, has a record of producing lethally defective versions of other drugs. Jake Hooker & Walt Bogdanich, *Tainted Drugs Linked to Maker of Abortion Pills*, N.Y. TIMES, Jan. 31, 2008, at A1. While there is no evidence of such failures in the manufacture of mifepristone, if it were to happen, the question would arise whether a products liability claim could be maintained under a state's laws and against any of several possible defendants.

19. See generally EUGENE F. SCOLES ET AL., CONFLICTS OF LAW (3d ed. 2000); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICTS OF LAW (5th ed. 2006).

20. I discuss my personal attitudes towards abortion, and the bases for my personal attitudes, in a "personal aside" in my book on the history of abortion. DELLAPENNA, *supra* note 15, at ix–xi.

21. See generally DELLAPENNA, *supra* note 15, at 29–56.

development of analgesics, anesthetics, antibiotics, and antiseptics—made abortion less dangerous for the mother and more difficult to detect,<sup>22</sup> societies around the world responded to the resulting challenges to social mores and legal doctrine from increasing resort to abortion. In the nineteenth century, nearly everyone—led by feminists, physicians, and religious leaders—responded by treating abortion as a legal issue, with legislatures around the world enacting statutes to repress or prohibit abortion.<sup>23</sup> In the second half of the twentieth century, as the medical profession perfected techniques for doing abortions, and as many men and women found their personal goals to be best served by reducing or even eliminating the role of children in their lives, many came to prefer to treat abortion as a medical problem rather than to prohibit it as a legal problem. Legislatures in many nations, particularly industrialized nations, remolded their abortion statutes to facilitate the choices of women (and often of their men) to abort pregnancies.<sup>24</sup>

Yet the perceived interests of society in unborn children were also changing as a result of new medical information and technologies focused on human reproduction.<sup>25</sup> This shift began early in the nineteenth century with the realization that a fundamental genetic transformation occurred at conception.<sup>26</sup> We now know that limited fetal brain waves can be detected at eight weeks of gestation.<sup>27</sup> Experimentation during abortions has shown that fetal brains react to morphine, scopolamine, and thiopental in characteristic human patterns as early as ten weeks of gestation, indicating that the early fetal brain already has drug receptors and synaptic transmitters capable of reacting to stimuli and of transmitting those reactions throughout the still immature nervous system.<sup>28</sup> While fetal brains admittedly are physiologically immature, so are all human brains until puberty.

Moreover, our ability to interact directly with a fetus has also advanced dramatically in recent years. Physicians now can diagnose and

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22. *Id.* at 333–34, 350, 367, 454–59, 481–82.

23. *Id.* at 232–62, 268–370, 372–409, 412–16, 419–51.

24. *See id.* at 575–629, 722–49.

25. *See id.* at 749–69.

26. *See id.* at 256–62. *See also* HAROLD MOROWITZ & JAMES TREFIL, *THE FACTS OF LIFE: SCIENCE AND THE ABORTION CONTROVERSY* 43–58 (1992).

27. Hannibal Hamlin, *Life or Death by EEG*, 190 *JAMA*, 112, 113 (1964). *See also* Joseph W. Dellapenna, *Nor Piety Nor Wit: The Supreme Court on Abortion*, 6 *COLUM. HUM. RTS. L. REV.* 379, 401–09 (1974) [hereinafter Dellapenna, *Nor Piety Nor Wit*].

28. Nils Petter Jorgenson & Karel Marshall, *Influence of Thiopental Anaesthesia on Fetal Motor Behaviour in Early Pregnancy*, 17 *EARLY HUM. DEV.* 71, 77 (1988).

treat unborn children independently of the mother.<sup>29</sup> A fetologist can remove a child from the womb for surgery and then return it to the womb to complete gestation, or the fetologist can perform a medical procedure inside the womb.<sup>30</sup> Physicians have even observed fetuses as early as nine weeks in gestation covering their eyes to shield them from the bright lights of surgery and covering their ears to avoid loud noises in the operating room.<sup>31</sup> In its most extreme form, physicians can sustain a woman's body after her brain has died in order to produce a healthy child.<sup>32</sup>

Amniocentesis, amniography, embryoscopy, fetography, fetoscopy, radiography, ultrasound, and other techniques almost compel us to think about the fetus as an independent being.<sup>33</sup> Even such apparently innocuous technical developments as the ability to picture the unborn infant by a sonogram or to hear the child's heart beating (today a ubiquitous experience fairly early in pregnancy) alter our relationship to the fetus and thus our concept of the being with which we deal.<sup>34</sup> The effects of fetal medicine and fetal imaging on the meaning of pregnancy are, of course, not objective, yet such images have a peculiar power, as noted by rhetorician Celeste Condit:

Visual forms of persuasion present special problems of analysis. Visual

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29. JUDITH BOSS, *THE BIRTH LOTTERY: PRENATAL DIAGNOSIS AND SELECTIVE ABORTION* 71–76 (1993); *GENETIC DISORDERS AND THE FETUS: DIAGNOSIS, PREVENTION AND TREATMENT* (Aubrey Milunsky ed., 4th ed. 1998); *THE UNBORN PATIENT: THE ART AND SCIENCE OF FETAL DEVELOPMENT* (Michael Harrison ed. 2001)

30. N. Scott Adzick & Michael R. Harrison, *Fetal Surgical Therapy*, 343 *LANCET* 897, 900–901 (1994); Mitchell S. Golbus et al., *In Utero Treatment of Urinary Tract Obstruction*, 142 *AM. J. OBSTET. & GYNECOLOGY* 383 (1982); M.T. Longaker et al., *Maternal Outcome after Open Fetal Surgery*, 265 *JAMA* 737 (1991); Sandra Blakeslee, *Fetus Returned to Womb Following Surgery*, *N.Y. TIMES*, Oct. 7, 1986, at C1.

31. THOMAS VERNEY & JOHN KELLY, *THE SECRET LIFE OF THE UNBORN CHILD* 36–42 (1981). See also A.W. Liley, *The Fetus as a Personality*, 6 *AUSTL. & N.Z. J. PSYCHIATRY* 99 (1972), reprinted in 1 *FETAL THERAPY* 8, 10, 13 (1986) (describing fetal behaviors, including movement and thumbsucking as early as 8 weeks of gestation).

32. David R. Field et al., *Maternal Brain Death during Pregnancy: Medical and Ethical Issues*, 260 *JAMA* 816, 816–17 (1988).

33. N. Caccia et al., *Impact of Prenatal Testing on Maternal-Fetal Bonding: Chorionic Villus Sampling Versus Amniocentesis*, 165 *AM. J. OBSTET. GYNECOLOGY* 1122, 1124–25 (1991). See generally Randi Hutter Epstein, *Advances, and Angst, in a New Era of Ultrasound*, *N.Y. TIMES*, May 9, 2000, at F7; E. Albert Reece et al., *Embryoscopy: A Closer Look at First-Trimester Diagnosis and Treatment*, 166 *AM. J. OBSTET. & GYNECOLOGY* 775 (1992).

34. For examples of such images, see LANGMAN'S *MEDICAL EMBRYOLOGY* 80, 82–83 (T.W. Sadler ed., 5th ed. 1985); Lennart Nilsson, *The First Days of Creation*, *LIFE*, Aug. 1990, at 26, 40–43. For discussions of the power of such images, see, e.g., BOSS, *supra* note 29, at 65–68, 119 (1993); DELLAPENNA, *supra* note 15, at 758–63, 767–69; ANN OAKLEY, *THE CAPTURED WOMB* 155–86 (1984); John C. Fletcher & Mark I. Evans, *Sounding Boards: Maternal Bonding in Early Fetal Ultrasound Examinations*, 308 *NEW ENG. J. MED.* 392, 392–93 (1983).

images seduce our attention and demand our assent in a peculiar and gripping fashion. Many audiences are leery of verbal constructions, which only “represent” reality, but because we humans tend to trust our own senses, we take what we *see* to be true. Therefore our trust in what we see gives visual images particular rhetorical potency . . . It is in the translation of visual images into verbal meanings that the rhetoric of images operates most powerfully.<sup>35</sup>

Thus, when *Life* magazine published photos by Lennart Nilsson in 1965 documenting fetal development through all major stages,<sup>36</sup> just when the abortion reform movement was picking up steam, it spread the image of a fetus as a “little person” to the general public and helped fuel the anti-abortion movement.<sup>37</sup>

In the United States, supporters of abortion rights grew impatient with the slow, difficult, and uncertain legislative process. Whereas abortion laws around the world were altered legislatively, abortion supporters in the U.S. turned to the courts to establish a constitutional right to choose.<sup>38</sup> Unlike the legislative solutions embraced in other countries, however, the American solution generated enormous controversy and even violence.<sup>39</sup> This eventually led to the Supreme Court disavowing judicial micromanagement of abortion rights.<sup>40</sup> Yet ultimately, the majority on the Court could not keep their hands off the abortion controversy.<sup>41</sup> This in turn generated even more controversy and a subsequent Supreme Court decision that left only confusion about the possible direction abortion laws would or could take in the near future.<sup>42</sup>

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35. CELESTE MICHELLE CONDIT, *DECODING ABORTION RHETORIC: COMMUNICATING SOCIAL CHANGE* 81 (1990).

36. *The Drama of Life Before Birth*, *LIFE*, Apr. 30, 1965, at 54.

37. KAREN NEWMAN, *FETAL POSITIONS: INDIVIDUALS, SCIENCE, VISUALITY* 8–16 (1996). Claims, such as Susan Appleton made recently, that abortion laws are not about fetuses but about keeping women in their place present an ideological belief, but do not comport with the experiences or beliefs of those opposed to the legalization of abortion; this becomes particularly apparent when one examines the attitudes of nineteenth-century feminists and of nineteenth-century women physicians. For Appleton’s argument, see Susan Frelich Appleton, *Gender, Abortion, and Travel After Roe’s End*, 51 *ST. LOUIS U. L.J.* 655, 660–67 (2007). See also DELLAPENNA, *supra* note 15, at 373–406.

38. See *Roe v. Wade*, 410 U.S. 113 (1973) (overruled in part); *Doe v. Bolton*, 410 U.S. 179 (1973). See generally DELLAPENNA, *supra* note 15, at 672–95.

39. DELLAPENNA, *supra* note 15, at 771–819.

40. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). See generally DELLAPENNA, *supra* note 15, at 838–85.

41. See *Stenberg v. Carhart*, 530 U.S. 914 (2000); DELLAPENNA, *supra* note 15, at 932–37.

42. See, e.g., *Gonzalez v. Carhart*, 550 U.S. 124 (2007).



In the current legal and social context, the struggle over abortion will likely continue. The increasingly uncertain posture of the Supreme Court leaves growing room for divergence among states in their laws regulating abortion. States have already enacted diverse laws regarding certain aspects of abortion,<sup>43</sup> and these differences are only likely to increase.<sup>44</sup> These differences will then lead to the choice of law issues considered in the following section.

## II. CHOICE OF LAW GENERALLY

We begin with the legal principles used to determine the outcome of civil litigation. These principles will be used to resolve civil claims relating to abortions with significant connection to more than one state. These principles are a convenient starting point, both because they are better known among lawyers and judges and because they will inform to a significant degree the comparable principles applied in criminal cases. Today, choice of law in the United States for the most part remains a matter of state law. As a result, three different choice of law theories compete for acceptance: (1) a rule-centered “vested rights” approach aimed at coordinating competing sovereignties; (2) a methodology-centered “interest analysis” aimed at coordinating social policies; and (3) a new rule-centered “neoterritorialist” approach aimed at coordinating the parties’ expectations.

In the following subsections, I briefly describe each theory and then discuss whether these theories should be applied in criminal prosecutions and the constitutional limitations on choice of law.

### A. *The Vested Rights Approach to Choice of Law*

The first Restatement of Conflicts<sup>45</sup> summarizes the vested rights system of choice of law. Under this system, courts first characterize the nature of the suit and then select the jurisdiction under whose law rights of that type “vest.” For example for torts, rights vest at the place where the injury occurred;<sup>46</sup> for contracts, at the place where the contract was made, or where the contract was to be performed;<sup>47</sup> and for property

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43. On the range of legislative responses to abortion, see EVA RUBIN, ABORTION, POLITICS, AND THE COURTS 126–49 (rev. ed. 1987). See also *supra* pp. 101–03.

44. DELLAPENNA, *supra* note 15, at 976–94.

45. RESTATEMENT OF CONFLICT OF LAWS (1934).

46. *Id.* §§ 377–378.

47. *Id.* §§ 332, 358.

rights, the location of the property at the time the rights in question vested.<sup>48</sup>

Vested rights suffer from apparent rigidity from its formal reliance on a single factor—the state with sovereign authority over a transaction or event<sup>49</sup>—to select the law for every aspect of a suit. Courts developed a plethora of escape devices (characterization, *renvoi*, public policy, etc.) to avoid the ostensibly inexorable commands of these apparently simple rules in order make the system far less certain than it appears on the surface, and perhaps more just.<sup>50</sup>

### B. Interest Analysis

Over the past seventy years, American legal scholars have developed choice of law techniques that are both multifactoral and policy sensitive.<sup>51</sup> The resulting approach is termed interest analysis. Arguably better suited to coordinating policies of states within a federal union, it appears predominant in the United States today.<sup>52</sup> Interest analysis comes in many different guises, the best known of which are Brainerd Currie’s “governmental interest analysis”,<sup>53</sup> Robert Leflar’s “choice influencing

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48. *Id.* § 208.

49. *See, e.g.*, *Alabama G.S.R. Co. v. Carroll*, 11 So. 803, 808–09 (Ala. 1892) (“[E]ach sovereignty, state or nation, has the exclusive power to finally determine and declare what act or omissions in the conduct of one to another . . . shall impose a liability in damages for the consequent injury, and the courts of no other sovereignty can impute a damnifying quality to an act or omission which afforded no cause of action where it transpired.”).

50. *See generally* SCOLES ET AL., *supra* note 19, at 119–45, 697–701; WEINTRAUB, *supra* note 19, at 52–116, 400–08; Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2455–61, 2471–76 (1999).

51. *See, e.g.*, David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

52. SCOLES ET AL., *supra* note 19, at 68–102, 701–60; WEINTRAUB, *supra* note 19, at 408–22.

53. BRAINERD CURRIE, *SELECTED ESSAYS ON CONFLICTS OF LAWS* (1963). All modern choice of law theories are deeply indebted to Professor Currie. *See, e.g.*, *Tooker v. Lopez*, 249 N.E.2d 394 (N.Y. 1969); *Lilienthal v. Kaufman*, 395 P.2d 543 (Or. 1964). For approaches described after Currie’s death as derived from him, see *Bernhard v. Harrah’s Club*, 546 P.2d 719 (Cal. 1976) *cert. denied*, 429 U.S. 859 (1976) (overruled by statute ([Business and Professions Code section 25602](#))), Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980) [hereinafter Brilmayer, *Interest Analysis*] and Herma Hill Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 577 (1980). *See generally* SCOLES ET AL., *supra* note 19, at 100–01, 701–25; WEINTRAUB, *supra* note 19, at 8–9, 408–21; Roosevelt, *supra* note 50, at 2461–65, 2467–71, 2477–81; Gary J. Simson, *New Directions in Choice of Law: Alternatives to Interest Analysis*, 24 CORNELL INT’L L.J. 195 (1991)

considerations” (also known as the “better law” approach),<sup>54</sup> Willis Reese’s “most significant relationship” test (also known as the “Second Restatement” approach),<sup>55</sup> and Russell Weintraub’s approach, often referred to as a “functional analysis.”<sup>56</sup> While scholars debate the fine points of the differences between these analyses, often with great vehemence,<sup>57</sup> in broad outline the various forms of interest analysis are actually quite similar.

Each approach focuses on selecting the governing rule of law for a particular issue, and not, as under vested rights, the governing jurisdiction for the entire litigation.<sup>58</sup> Each asks a court to begin by examining the potentially relevant formal rules of law to see if they are in fact different or if they would lead to different results in the case. If they are not different or would produce the same result if applied to the case, there simply is *no conflict*. If the formal rules of law are different or would lead to different results (an *apparent conflict*), a court then examines the policies underlying the formal rules.<sup>59</sup> If the policy of only one formal rule would be affected by its application, there is a *false conflict*, and the court should apply the only relevant rule of law, described as the law of the only state with an interest in having its law applied.<sup>60</sup> If the policies of more than one formal rule will be affected, there is a *true conflict*. On the other hand, if the policies underlying every potentially relevant rule of law would not be affected by non-application, there is what

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54. ROBERT A. LEFLAR, LUTHER L. MCDUGAL III, & ROBERT L. FELIX, *AMERICAN CONFLICTS LAW* (4th ed. 1986). This approach is best known for recommending application of the “better rule of law.” *Id.* at 297–300. *See, e.g.*, *Turcotte v. Ford Motor Co.*, 494 F.2d 173 (1st Cir. 1974); *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43 (Minn. 1978), *aff’d on other grounds*, 449 U.S. 302 (1981). *See generally* SCOLES ET AL., *supra* note 19, at 101, 725–31; WEINTRAUB, *supra* note 19, at 11–12, 444–48.

55. Willis Reese was the Reporter for the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). Many courts have purported to apply this method. *See, e.g.*, *Dym v. Gordon*, 209 N.E.2d 792 (N.Y. 1965); *Casey v. Manson Constr. & Eng’g Co.*, 428 P.2d 898 (Or. 1967); *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex. 1979); *Johnson v. Spider Staging Corp.*, 555 P.2d 997 (Wash. 1976). *See generally* SCOLES ET AL., *supra* note 19, at 58–68, 95–100, 732–41; WEINTRAUB, *supra* note 19, at 7–8, 382–93.

56. *See* Weintraub, *supra* note 19, at 373–75, 522–41. *See also* SCOLES ET AL., *supra* note 19, at 43–47.

57. *See, e.g.*, David E. Seidelson, *Interest Analysis or the Restatement Second of Conflicts: Which is the Preferable Approach to Resolving Choice-of-Law Problems?*, 27 DUQ. L. REV. 73 (1988).

58. *See, e.g.*, *Caruolo v. John Crane, Inc.*, 226 F.3d 46, 59 (2d Cir. 2000).

59. *See, e.g.*, *Dym*, 209 N.E.2d at 794, overruled on other grounds *Tooker v. Lopez*, 249 N.E.2d 394 (N.Y. 1969).

60. *Tooker v. Lopez*, 249 N.E.2d 394, 395–96, 398–99 (N.Y. 1969).

has come to be called an *unprovided-for case*.<sup>61</sup> Only for true conflicts or unprovided-for cases do the several theories posit widely differing ways to resolve the conflict.

With a few exceptions, courts have not concerned themselves with the fine points of these various systems. Rather, courts have preferred to synthesize elements of the several analyses in an attempt to find the most relevant law for a particular issue in a case.<sup>62</sup> Because the modern approaches depend on virtually unanswerable questions about the nature and weight of competing state policies, the synthesis in most courts features a pronounced bias in favor of plaintiffs in torts—or at least a pronounced bias in favor of the forum’s law, which amounts to the same thing if plaintiffs choose a forum because of its favorable law.<sup>63</sup> In contracts cases, the synthesis favored by the courts generally seeks to effectuate the intent of the parties.<sup>64</sup> Courts are particularly likely to follow the law chosen in an express choice-of-law clause.<sup>65</sup>

Depending as it does on imponderables, interest analysis at best is complex, confusing, and highly unpredictable. In an occasional, surprising case, a court has favored a foreign, anti-plaintiff law for a tort despite

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61. It is not at all clear that there is such a thing as an “unprovided-for case,” but the phrase is widely used in conflicts scholarship. See Larry Kramer, *The Myth of the “Unprovided-for” Case*, 75 VA. L. REV. 1045 (1989); Roosevelt, *supra* note 50, at 2520–25.

62. See, e.g., *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 932 (2d Cir. 1998); *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 167–68 (3d Cir. 1980), *rev’d on other grounds*, 454 U.S. 235 (1981). See generally SCOLES ET AL., *supra* note 19, at 79–84, 755–59; Roosevelt, *supra* note 50, at 2463.

63. See, e.g., *O’Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194 (2d Cir. 1978); *Fisher v. Huck*, 624 P.2d 177 (Or. Ct. App. 1981); see also Brilmayer, *Interest Analysis*, *supra* note 53; Willis L.M. Reese, *American Trends in Private International Law: Academic and Judicial Manipulation of Choice of Law Rules in Tort Cases*, 33 VAND. L. REV. 717, 727–29, 734–37 (1980); Roosevelt, *supra* note 50, at 2464–65.

64. See, e.g., *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. Kommanditgesellschaft v. Republic of Romania*, 123 F. Supp. 2d 174, 184–85 (S.D.N.Y. 2000); *Falcoal, Inc. v. Turkiye Komur Isletmeleri Kurumu*, 660 F. Supp. 1536, 1542 (S.D. Tex. 1987); *Bernkrant v. Fowler*, 360 P.2d 906 (Cal. 1961). See generally SCOLES ET AL., *supra* note 19, at 857–80; WEINTRAUB, *supra* note 19, at 481–98, 523; Reese, *supra* note 63, at 737.

65. *Wallace Hardware Co. v. Abrams*, 223 F.3d 382, 397–400 (6th Cir. 2000); *Fina, Inc. v. Arco*, 200 F.3d 266, 269–70 (5th Cir. 2000); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971); Inter-American Convention on the Law Applicable to Contractual Obligations, OAS Doc. OEA/Ser. K/XXI.5, art. 7, reprinted in 33 INT’L LEGAL MATERIALS 732, 734 (1994). But see *Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir. 1996); *J.S. Alberici Const. Co. v. Mid-West Conveyor Co.*, 750 A.2d 518, 521 (Del. 2000). See generally Patrick J. Borchers, *The Internationalization of Contractual Conflicts Law*, 28 VAND. J. TRANSNAT’L L. 421 (1995); Philip A. Buhler, *Forum Selection and Choice of Law Clauses in International Contracts: A United States Viewpoint with Particular Reference to Maritime Contracts and Bills of Lading*, 27 U. MIAMI INTER-AM. L. REV. 1 (1995).

apparent general preference for a plaintiff-favoring, forum-favoring interest analysis.<sup>66</sup> Similarly, courts have held contracts invalid on dubious grounds in an occasional case despite the usual preference for validity.<sup>67</sup> Some courts have applied interest analysis to such areas as property or family law, although for these areas, courts tend more strongly to stay with the traditional system for choice of law.<sup>68</sup> The complexity and uncertainty of interest analysis makes it an ideal escape device. A court can justify using any law it wants without resort to traditional escape devices,<sup>69</sup> and thus the traditional escape devices have tended to atrophy or even disappear under interest analysis in favor of result-oriented application of interest analysis—essentially, interest analysis is an *ad hoc* approach to each case.<sup>70</sup>

### C. The Neoterritorialist Approach

Some state courts have rejected interest analysis because of its inherent uncertainty.<sup>71</sup> They have continued to apply the vested rights or “territorialist” approach despite the rigidities and other difficulties in that system.<sup>72</sup> Some courts and scholars, disillusioned with both vested rights (too rigid) and interest analysis (too whimsical), have attempted to develop yet a third approach that attempts to combine what are arguably the

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66. See, e.g., *Offshore Rental Co. v. Cont'l Oil Co.*, 583 P.2d 721, 729 (Cal. 1978); *Dym v. Gordon*, 209 N.E.2d 792 (N.Y. 1965); *Casey v. Manson Constr. Co.*, 428 P.2d 898 (Or. 1967).

67. See, e.g., *Barnes Group, Inc. v. C & C Prods., Inc.*, 716 F.2d 1023 (4th Cir. 1983); *Lilienthal v. Kaufman*, 395 P.2d 543 (Or. 1964).

68. See, e.g., *Carter v. Sandberg*, 458 A.2d 924 (N.J. Super. 1983) (property); *In re Lenherr's Estate*, 314 A.2d 255 (Pa. 1974) (marriage).

69. Compare *Tomlin v. Boeing Co.*, 650 F.2d 1065 (9th Cir. 1981) (applying Washington's statute of limitations to a case brought in a Washington court), with *Henry v. Richardson-Merrell Co.*, 508 F.2d 28 (3d Cir. 1975) (applying Quebec's statute of limitations to a case brought in a New Jersey court), and *Heavner v. Uniroyal, Inc.*, 305 A.2d 412 (N.J. 1973) (applying North Carolina's statute of limitations to a case brought in a New Jersey court). Compare *Martineau v. Guertin*, 751 A.2d 776 (Vt. 2000) (applying Vermont law to case brought in a Vermont court), with *Myers v. Langlois*, 721 A.2d 129 (Vt. 1998) (using a “most significant relationship” test to apply Quebec law to a case brought in a Vermont court).

70. *SCOLES ET AL.*, *supra* note 19, at 755–60; *WEINTRAUB*, *supra* note 19, at 373–74, 421–33; *Reese*, *supra* note 63, at 720–30; *Simson*, *supra* note 53, at 195.

71. See, e.g., *Braxton v. Anco Elec., Inc.*, 409 S.E.2d 914, 915 (N.C. 1991); *Boudreau v. Baughman*, 368 S.E.2d 849, 853–54 (N.C. 1988).

72. See, e.g., *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 844–45 (7th Cir. 1999); *Philip Morris Inc. v. Angeletti*, 752 A.2d 200, 231 (Md. 2000); *BHP Petrol. (Americas), Inc. v. Texaco Exploration & Prod., Inc.*, 1 P.3d 1253 (Wyo. 2000).

best points of both systems.<sup>73</sup> This new approach is the “neoterritorialist” approach.

Under the neoterritorialist approach, courts are expected to work out territorially centered rules that are more narrowly drawn than the rules for vested rights. As the rules are more narrowly drawn, they, like interest analysis, are more sensitive to the policies at stake for particular issues and therefore presumably are more just. Yet, being based on territorially sensitive rules, the approach is expected to be more predictable than interest analysis has proven to be. Furthermore, neoterritorialism stresses the expectations of the parties, even in torts cases, rather than guessing about the policies underlying competing laws.<sup>74</sup> Neoterritorialism localizes these expectations differently for rules meant to regulate conduct (“admonitory rules,” which turn on where the regulated conduct occurs) and rules meant to allocate the financial consequences of an act or event (“compensatory rules,” which turn the relation of the act or event to the domiciles of the parties).<sup>75</sup>

Specific neoterritorialist rules have not been accepted outside the forum that created them.<sup>76</sup> Thus, consensus exists only at a high level of generality, particularly as so many rules of law are simultaneously both admonitory and compensatory, as those terms are used in neoterritorialism. Supporters of “neoterritorialism” have felt obliged to accept the possibility of displacing their rules in unspecified cases. A residual interest analysis remains their major escape device.<sup>77</sup>

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73. See *Chila v. Owens*, 348 F. Supp. 1207, 1209 (S.D.N.Y. 1972); *First Nat’l Bank in Fort Collins v. Rostek*, 514 P.2d 314, 320 (Colo. 1973); *Cipolla v. Shaposka*, 267 A.2d 854, 856–57 (Pa. 1970). See generally David Cavers, *The Choice of Law Process* 47 HARV. L. REV. 173 (1965); SCOLES ET AL., *supra* note 19, at 761–97; WEINTRAUB, *supra* note 19, at 426–48; Reese, *supra* note 63, at 730–34.

74. See *Rostek*, 514 P.2d at 320; *Neumeier v. Kuehner*, 286 N.E.2d 454, 457–58 (N.Y. 1972); *Cipolla*, 267 A.2d at 856–57. See also SCOLES ET AL., *supra* note 19, at 761–97; WEINTRAUB, *supra* note 19, at 426–32; Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151 (2000). The relevance of the parties’ expectations in torts cases is emphatically denied under interest analysis. *Tooker v. Lopez*, 249 N.E.2d 394, 399 (N.Y. 1969).

75. See *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 685, 692–94 (N.Y. 1985). See generally SCOLES ET AL., *supra* note 19, at 761–66; WEINTRAUB, *supra* note 19, at 471–73; John T. Cross, *The Conduct-Regulating Exception in Modern United States Choice-of-Law*, 36 CREIGHTON L. REV. 425 (2003).

76. See WEINTRAUB, *supra* note 19, at 426–33; Reese, *supra* note 63, at 734–37.

77. See *Anderson v. SAM Airlines*, 939 F. Supp. 167 (E.D.N.Y. 1996); *Towley v. King Arthur Rinks, Inc.*, 351 N.E.2d 728 (N.Y. 1976); *Neumeier v. Kuehner*, 286 N.E.2d 454, 457–58 (N.Y. 1972).

*D. Choice of Law in Criminal Matters*

The foregoing discussion of the so-called conflicts revolution on its face has little to do with laws making abortion a crime. It is commonly believed that choice of law theory does not apply to criminal matters. This view likely arose because a criminal court will always apply its own substantive law of crimes, and if it does not have legislative jurisdiction to apply its own law to a criminal case, it will dismiss the case for lack of subject matter jurisdiction.<sup>78</sup> So strong is this tradition that foreign laws or judgments that are deemed to be penal “in the international sense” will not be recognized or enforced in the United States.<sup>79</sup>

While this is true, it begs the question of whether a state or nation has legislative jurisdiction, that is, jurisdiction to prescribe the law applicable to an action or an event.<sup>80</sup> This is a question that choice of law theory seeks to resolve in the several approaches to civil litigation. It is also a question that, as regards the application of public law such as criminal law, has been addressed more pointedly in international conflicts of law than in the interstate conflicts of law on which most courts and scholars have focused their attention. Many scholars have asserted over the years that limitations under international litigation regarding legislative jurisdiction (“jurisdiction to prescribe”)<sup>81</sup> are fundamentally different from the limitations applied in wholly domestic contexts.<sup>82</sup>

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78. See *In re Palliser*, 136 U.S. 257, 267–68 (1890); *State v. Harvey*, 730 S.W.2d 271, 278–79 (Mo. Ct. App. 1987); *People v. Fuller*, 586 N.Y.S.2d 366, 367–68 (App. Div.), *appeal denied*, 605 N.E.2d 880 (N.Y. 1992). See generally 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* 180 (1986). The criminal cases do not seem to use the phrase “legislative jurisdiction,” but it has been used in civil cases. See *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 156 (1932). The phrase seems to explain the point of the criminal cases. See Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1892–95 (1987).

79. See, e.g., *Huntington v. Attrill*, 146 U.S. 657, 682–683 (1892).

80. See Appleton, *supra* note 37, at 667 (“Despite our intuitive resistance to the notion that a state can stretch its criminal prohibitions beyond its borders to reach conduct that is lawful where performed, legal authority does not conclusively bear out the underlying intuitions.”). On the reach of legislative jurisdiction, see *infra* pp. 1666–73.

81. The phrase “legislative jurisdiction” is used in the *Restatement of Conflicts*, while the phrase “jurisdiction to prescribe” is used in the *Restatement of Foreign Relations Law*. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 9 cmt. b (1971); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 401 (1987); see also Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1587 (1978).

82. See SCOLLES ET AL., *supra* note 19, at 307–09 (discussing “jurisdictional reasonableness” in denying jurisdiction in foreign cases); WEINTRAUB, *supra* note 19, at 120–21; Frederick K. Juenger, *Judicial Jurisdiction in the United States and the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1203, 1210–1211 (1984).

Yet the fact remains that for the most part, the entire field of conflicts of law—including choice of law theory—developed in the United States through the application of principles borrowed from international law to the interstate context.<sup>83</sup> Today, there is a good deal of controversy over recourse to international legal sources for interpreting the U.S. Constitution.<sup>84</sup> Justice Antonin Scalia has led the charge against recourse to international legal sources, yet even Justice Scalia relies on principles of international law to decide choice of law questions.<sup>85</sup>

The different vocabulary used in international law makes recourse to the relevant body of international legal principles more difficult. That vocabulary has largely been reserved for diplomacy and other international discourse, appearing in American judicial opinions only in occasional and rare criminal cases or in quasi-criminal proceedings such as antitrust, and then only when the central events occurred outside the United States.<sup>86</sup> A close look reveals the utility of the international prin-

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83. See, e.g., *Haddock v. Haddock*, 201 U.S. 562, 579–82 (1906) (applying international law to determine whether there is an obligation to recognize a foreign divorce); *Huntington v. Attrill*, 146 U.S. 657, 683 (1892) (holding that the question of what laws or judgments are “penal” is “not one of local, but of international law”); *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (“[E]xcept as restrained and limited by [the Constitution, States] possess and exercise the authority of independent States, and the principles of public law...are applicable...to them.”); *D’Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 174–76 (1850) (applying the “well established rules of international law” to determine when a judgment is entitled to full faith and credit). See generally Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 50–54 (2006); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1971–1972 (1997).

84. See *Roper v. Simmons*, 543 U.S. 551, 622–28 (2005) (Scalia, J., with Rehnquist, C.J. & Thomas, J., dissenting) (denouncing recourse to international legal sources as a device for interpreting the U.S. Constitution). See also Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57 (2004); Joan L. Larsen, *Importing Constitutional Norms from a “Wider Civilization”*: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation, 65 OHIO ST. L.J. 1283 (2004); Richard A. Posner, *The Supreme Court, 2004 Term: Forward: A Political Court*, 119 HARV. L. REV. 31, 90 (2005).

85. *Sun Oil Co. v. Wortman*, 486 U.S. 2117, 2123–25 (1988).

86. *Crimes*: *United States v. Pizzarusso*, 338 F.2d 8 (2d Cir.), cert. denied, 392 U.S. 936 (1968); *Rivard v. United States*, 375 F.2d 882 (5th Cir. 1967), cert. denied sub nom. *Groleau v. United States*, 389 U.S. 884 (1968). *Antitrust*: *Continental Ore Co. v. Union Carbide Co.*, 370 U.S. 690 (1962); *Laker Airways Ltd. v. SABENA*, 731 F.2d 909 (D.C. Cir. 1984); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). Australian Gillian Triggs has expressed considerable doubt about whether international standards apply to civil matters. Gillian Triggs, *An International Convention on Sovereign Immunity? Some Problems in Application of the Restrictive Rule*, 9 MONASH U. L. REV. 74, 96–98 (1982). But see *von Dardel v. USSR*, 623 F. Supp. 246, 254 (D.D.C. 1985) (applying the principles of international jurisdiction to a civil case), vacated on other grounds, 736 F. Supp. 1 (D.D.C. 1990); 5 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 216–19 (many vols. 1967–1985); 6 WHITEMAN, *supra*, at 88–183; Andrew L. Strauss, *Beyond* 1665



ciples in interstate conflicts of legislative jurisdiction (“jurisdiction to prescribe”) over possible crime.

The four traditional headings of jurisdiction to prescribe recognized in international law are:<sup>87</sup> the territorial principle; the personality (or nationality) principle;<sup>88</sup> the protective principle; and the universality principle.

*The Territorial Principle:* When the territorial principle is invoked because the subject of the action in question (in the grammatical sense of the word “subject”) is located within the state at the time of the action, jurisdiction to prescribe is accepted everywhere; in fact, “subjective territorial jurisdiction” is considered the primary form of jurisdiction to prescribe in public law.<sup>89</sup> In contrast, claims of jurisdiction to prescribe because the object of the action (in the grammatical sense of the word “object”) is located in the state—that is, when the act occurs outside the state but causes a significant effect within the state—are often controversial.<sup>90</sup> “Objective territorial jurisdiction” has nonetheless been applied broadly, evoking the greater part of international jurisdictional controversies.<sup>91</sup>

These controversies are not actually over the basic concept of objective territorial jurisdiction, but rather over a narrower class of claims to exercise jurisdiction to prescribe. No state disputes a claim of jurisdiction when an action abroad causes a serious tangible effect in the state claim-

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*National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT’L L.J. 373 (1995).

87. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402, 404, 423 (1987).

88. This principle is usually referred to as the nationality principle, but in order to make the import of this principle clear, I prefer the term “personality principle.” Phrasing it this way makes it unnecessary to develop a supposedly separate principle known as the “passive personality” principle and shows how this principle actually relates to other principles of legislative jurisdiction. For cases listing the passive personality principle as a separate principle, see *Pizzarusso*, 388 F.2d at 10 n.5; *Rivard*, 375 F.2d at 885. See *infra* pp.1669-71.

89. See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (“But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(1) (1987); Gerhard Kegel & Ignaz Seidl-Hohenveldern (Joseph J. Darby trans.), *On the Territorial Principle in Public International Law*, 5 HASTINGS INT’L & COMP. L. REV. 245 (1982).

90. See *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (*dictum*); *United States v. Ricardo*, 619 F.2d 1124 (5th Cir.), *cert. denied*, 449 U.S. 1063 (1980); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 rep. note 3 (1987).

91. See, e.g., M.A. Blythe, *The Extraterritorial Impact of the Anti-trust Laws: Protecting British Trading Interests*, 31 AM. J. COMP. L. 99 (1983); Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL’Y IN INT’L BUS. 1 (1992); Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a “Choice-of-Law” Approach*, 70 TEX. L. REV. 1799 (1992).

ing legislative jurisdiction.<sup>92</sup> When the effect in the forum is intangible or insubstantial, however, other states sometimes go to extreme lengths to block the claim of jurisdiction.<sup>93</sup> Attempts to ameliorate controversy by asserting objective territorial jurisdiction only if an effect was intended by the actor<sup>94</sup> have failed to solve the problem because they misconstrue its nature. The controversy only partly concerns fairness to the defendant; it centers on the clash of important social policies between the nation where the action occurred and the nation where the effect was felt, and—on the propriety of applying the forum state’s substantive law to the act.<sup>95</sup> Recently, a bare majority of the Supreme Court has tended towards asserting national interest without regard to the concerns of or effects on other nations.<sup>96</sup> Other nations, naturally, protest this approach.<sup>97</sup> Whether, or the extent to which, the Supreme Court of the United States would accept such a unilateralist attitude in assertions of jurisdiction between states of the United States is at the least an open question.<sup>98</sup>

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92. See, e.g., *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983); *United States v. Columba-Colella*, 604 F.2d 356, 358–59 (5th Cir. 1979).

93. See, e.g., Protection of Trading Interests Act, 1980, c. 11 s. 8 (UK) (barring cooperation with the exercise of jurisdiction by American courts in anti-trust cases); Kay Bushman, *The British Protection of Trading Interests Act of 1980: An Analysis*, 14 J. INT’L L. & ECON. 253 (1980). Despite the objections of the British government to U.S. claims to apply objective territorial jurisdiction to anti-trust claims, the British have applied their criminal law to crimes no more tangible than attempted fraud where the targeted property was located in England. *Dir. of Public Prosecutions v. Stonehouse*, [1978] A.C. 55 (H.L. 1977); *Regina v. Baxter*, [1972] 1 Q.B. 1; see also *Diamond v. Bank of London & Montreal Ltd.*, [1979] 1 Q.B. 333. British courts also have refused to apply their law to fraud in England if the targeted property was located abroad. *Regina v. Governor of Pentonville Prison*, 71 Crim. App. 241 (1980). See also Juenger, *supra* note 82.

94. See *Ricardo*, 619 F.2d 1124, 1128–29; *Aluminum Co. of America*, 148 F.2d 416, 429–30.

95. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403, 414, 415, 416 (1987); see also *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798–99 (1993). Compare *Laker Airways Ltd. v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984) with *British Airways Bd. v. Laker Airways Ltd.*, [1983] 1 Q.B. 142, *vacated*, [1984] 3 W.L.R. 413 (H.L.). See generally Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT’L L. 301, 316–19 (2007) (discussing the clash of policies involved in conflicts between applicable laws and judgments in the international legal system, with particular emphasis on the conflicts created by differing laws and policies applicable to the internet).

96. See e.g., *Hartford Fire*, 509 U.S. at 798–99. (“We have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.”)

97. For example, Prime Minister Margaret Thatcher repeatedly and personally intervened with President Ronald Reagan about the case of *Laker Airways*, 731 F.2d 909, until the US government brokered a settlement. See GEOFFREY SMITH, REAGAN AND THATCHER 141–44, 164–65 (1991). See generally Hannah L. Buxbaum, *Jurisdictional Conflict in Global Antitrust Enforcement*, 16 LOY. CONSUMER L. REV. 365 (2004); Alexander Layton & Angharad M. Parry, *Extraterritorial Jurisdiction: European Responses*, 26 HOUS. J. INT’L L. 309 (2004).

98. See *infra* the pp. 1672–82.

*The Nationality/Personality Principle:* Jurisdiction to prescribe based on the nationality of the actor (the “active personality”) has long been recognized everywhere.<sup>99</sup> American courts have occasionally applied this principle in state and federal prosecutions.<sup>100</sup> If the claim of jurisdiction is based upon the nationality of the person acted upon (the “passive personality principle”), the claim clearly crosses the line beyond which a claim of jurisdiction becomes insupportable. Such claims are almost universally rejected.<sup>101</sup> Even countries, like France, that routinely assert passive personality jurisdiction object vehemently when other countries assert this jurisdiction against them.<sup>102</sup>

For at least a century, the U.S. government consistently opposed the passive personality theory.<sup>103</sup> One federal court expressly rejected the

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99. See, e.g., *State v. Bacon*, 112 A. 682, 683 (Del. 1920) (finding a defendant guilty in the state of Delaware for a bigamous marriage performed in another state); *Hanks v. State*, 13 Tex. Ct. App. 289, 305 (1882) (“We can see no valid reason why the Legislature of the State of Texas could not assert . . . her jurisdiction over wrongs and crimes . . . no matter whether the perpetrator of the crime was at the time of its consummation within or without her territorial limits.”); *Commonwealth v. Gaines*, 4 Va. (2 Va. Cas.) 172, 173 (1819) (conferring jurisdiction for treason committed out of the state); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(2) (1987); MODEL PENAL CODE § 1.03(1)(f), (2) (1962); SCOLES ET AL., *supra* note 19, at 336–39; WEINTRAUB, *supra* note 19, at 209–11; Mark D. Rosen, “Hard” or “Soft” Pluralism?: Positive, Normative, and Institutional Considerations of States’ Extraterritorial Powers, 51 ST. L.U.L.J. 713, 719–22 (2007) (“[C]itizenship on its own has virtually sufficed to give the home state sufficient interest to regulate its citizens’ out-of-state activities for purposes of the Due Process Clause.”) [hereinafter Rosen, “Hard” or “Soft” Pluralism?]; Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 871–76 (2002) (“This is not to suggest that citizenship on its own justifies regulation.”) [hereinafter Rosen, *Extraterritoriality*].

100. For cases applying federal law to U.S. citizens while abroad, see *Steele v. Bulova Watch Co.*, 344 U.S. 280, 282 (1952); *Blackmer v. United States*, 284 U.S. 421, 433–34 (1932). See also Stephen Labaton, *Fischer Is Indicted over Chess Match*, N.Y. TIMES, Dec. 16, 1992, at A3. For cases applying state law to the state’s citizens while outside the state, see *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941); *Felton v. Hodges*, 374 F.2d 337, 339–40 (5th Cir. 1967); *F/V American Eagle v. State*, 620 P.2d 657, 662–63 (Alaska 1980); *People v. Weeren*, 607 P.2d 1279, 666–67 (Cal. 1980).

101. See generally *The SS Lotus* (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. e (1987); HOWARD S. LEVIE, *TERRORISM IN WAR: THE LAW OF WAR CRIMES* 231 (1993) (noting that passive personality has “long been an extremely controversial principle”); Juenger, *supra* note 82, at 1204–05, 1210–11.

102. See generally Eric Cafritz & Omar Tene, *Article 113-7 of the French Penal Code: The Passive Personality Principle*, 41 COLUM. J. TRANSNAT’L L. 585 (2003).

103. See *The Cutting Case*, 1887 FOR. REL. 751 (1888), reported in 2 JOHN BASSETT MOORE, DIGEST OF INTERNATIONAL LAW 228 (1906) (asserting that Mexico does not have jurisdiction over authors publishing criticisms in U.S. newspapers); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987); Christopher L. Blakesley, *A Conceptual Framework for Extradition and Jurisdiction over Extraterritorial Crime*, 4 UTAH L. REV. 685, 715 (1984) [hereinafter Blakesley, *Conceptual Framework*] (“The passive personality theory of jurisdiction is generally considered to be anathematic to United States law.”); Christopher L. Blakesley, *United States Jurisdiction over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1114–17 (1982) [hereinafter Blakesley, 1668

principle as applicable in the United States.<sup>104</sup> In response to the growing problem of international terrorism, however, the executive branch embraced the theory of passive personality in the mid-1980s.<sup>105</sup> Subsequently, Congress enacted anti-terrorism statutes that appear to be based on the passive personality principle.<sup>106</sup>

Changing executive and legislative attitudes toward the passive personality principle have led U.S. courts to apply the passive personality principle where authorized by statute.<sup>107</sup> Several federal courts have recently accepted the legitimacy of the passive personality principle in dicta.<sup>108</sup> Whether those courts will apply the principle in other contexts or

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ley, *Extraterritorial Crime*]; Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT'L L.J. 1, 4-9 (1993) (discussing the evolution of the passive personality principle in the United States).

104. *United States v. Columba-Colella*, 604 F.2d 356, 360 (5th Cir. 1979) (“[T]hat an act affects the citizen of a state is not a sufficient basis for that state to assert jurisdiction over the act.”); see also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1179 n.38 (E.D. Pa. 1980), *aff’d on other grounds*, 723 F.2d 319 (3d Cir. 1983), *rev’d on other grounds*, 475 U.S. 574 (1986).

105. Watson, *supra* note 103, at 9-10 (“During the 1980s the United States continued to inch toward passive personality jurisdiction over terrorist crimes.”); see also Abraham D. Sofaer, *Fighting Terrorism through Law*, 85 STATE DEP’T BULL. 38, 41-42 (1985) (arguing for greater enforcement measures to be taken against terrorism). See generally Elizabeth Bowen, Comment, *Jurisdiction over Terrorists Who Take Hostages: Efforts to Stop Terror-Violence against United States Citizens*, 2 AM. U. J. INT’L L. & POL’Y 153, 179-87 (1987).

106. See 18 U.S.C. § 32 (2008) (the Sabotage Act); 18 U.S.C. § 1203 (2008) (the Hostage Taking Act); 18 U.S.C. § 2331 (2008) (the Anti-Terrorism Act); 28 U.S.C. § 1605(a)(7) (2008) (the Foreign Sovereign Immunities Act). See generally S. Jason Baletsa, Comment, *The Cost of Closure: A Reexamination of the Theory and Practice of the 1996 Amendments to the Foreign Sovereign Immunities Act*, 148 U. PA. L. REV. 1247, 1264-77 (2000); Bowen, *supra* note 105, at 198-202 (“The willingness of Congress to include the passive personality principle of jurisdiction indicates the increasing acceptability of the principle’s application to international terrorist attacks on civilians because of their nationality.”). The war on terror has generated more support for the application of the passive personality principle. See, e.g., Christopher C. Joyner, *Countering Nuclear Terrorism: A Conventional Response*, 18 EUR. J. INT’L L. 225, 239 (2007) (“Though passive personality remains controversial, as a jurisdictional principle it applies to terrorism and other organized attacks against a state’s nationals by reason of their nationality.”).

107. *United States v. Rezaq*, 134 F.3d 1121, 1133 (D.C. Cir.), *cert. denied*, 525 U.S. 834 (1998); *United States v. Morin*, 80 F.3d 124, 126 (4th Cir. 1996). See generally Abraham Abramovsky, *Extraterritorial Jurisdiction: The United States’ Unwarranted Attempt to Alter International Law in United States v. Yunis*, 15 YALE J. INT’L L. 121 (1990); Joshua Robinson, Note, *United States Practice Penalizing International Terrorists Needlessly Undercuts Its Opposition to the Passive Personality Principle*, 16 B.U. INT’L L.J. 487, 500-04 (1998).

108. See *United States v. Neil*, 312 F.3d 419, 422 (9th Cir. 2002) (discussing in the alternative that jurisdiction lay over a non-citizen accused of having sex with an underage American citizen even while on a foreign-flag ship on the high seas); *United States v. MacAllister*, 160 F.3d 1304, 1308 n.9 (11th Cir. 1998), *cert. denied*, 528 U.S. 853 (1999) (discussing the passive personality as a possible alternative ground, but applying territorial jurisdiction); *United States v. Bin Laden*, 92 F. Supp. 2d 189, 221-22 (S.D.N.Y. 2000) (discussing passive personality an alternate holding of juris-

whether the executive branch will accept its application against the United States remains unclear.<sup>109</sup> The presumption that, absent express language to the contrary, acts of Congress are intended to have effect only within the territory of the United States is perhaps enough to answer the question in the negative.<sup>110</sup> In international terms, the different treatment given acts where a claim of jurisdiction is based on the location of the effect or on the person affected reflects both the greater likelihood of a defendant being surprised by application of the law of the victim's state (suppose one is involved in a traffic accident in the United States with a car that turns out to be driven by a French citizen), and the lesser degree of intrusion into the interests of a state by an act affecting an absent national compared to an act intruding into the territory of the state and thereby threatening to affect the whole community.

*The Protective and Universality Principles:* The last two headings of jurisdiction to prescribe—the protective principle and the universality principle—turn upon the nature of the act in question rather than on the location of the action or its effect or citizenship of the persons involved. In other words, when an act strongly affects significant interests of a state, the act itself justifies a state in exercising jurisdiction regardless of where the act occurs or by whom it is done. The protective principle allows jurisdiction over acts that threaten the integrity or security of the state itself; examples include espionage, counterfeiting, perjury, or interference with governmental operations.<sup>111</sup> The universality principle al-

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dition over a non-citizen accused of bombing U.S. embassies in Kenya and Tanzania); *United States v. Roberts*, 1 F. Supp. 2d 601, 606–07 (E.D. La. 1998) (discussing in the alternative that jurisdiction lay over a non-citizen accused of having sex with an underage American citizen even while on a foreign-flag ship on the high seas); *United States v. Layton*, 509 F. Supp. 212, 216 n.5 (N.D. Cal. 1981) (discussing in the alternative that jurisdiction lay over a non-citizen for the murder of U.S. congressman at Jonestown, Guyana), *appeal dismissed*, 645 F.2d 681, *cert. denied*, 452 U.S. 972 (1981).

109. *Neely v. Club Med Mgmt. Serv., Inc.*, 63 F.3d 166, 185 n.17 (3d Cir. 1995) (acknowledging that the passive personality principle has not been accepted for ordinary torts or crimes); *United States v. Vasquez-Velasco*, 15 F.3d 833, 841 n.7 (9th Cir. 1994) (same); *In re Ahmad*, 726 F. Supp. 389, 398–99 (E.D.N.Y. 1989), *aff'd on other grounds*, 910 F.2d 1063 (2d Cir. 1990) (accepting application of the passive personality principle when asserted by a foreign state as a basis for extradition); *In re Extradition of Demjanjuck*, 612 F. Supp. 544, 558 (N.D. Ohio 1985) (alternative holding). See Wade Estey, Note, *The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption against Extraterritoriality*, 21 HASTINGS INT'L & COMP. L. REV. 177, 204–07 (1997).

110. See *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 440–41 (1989).

111. Estey, *supra* note 109, at 199–204; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(3) (1987); see also, e.g., *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (“Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.”); *United States v. Birch*, 470 F.2d 808, 811–812 (4th Cir. 1972) (ap-  
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lows jurisdiction over acts so universally viewed as heinous that the actor is subject to punishment by any state that obtains custody of the actor, although arguably the law to be applied is international law rather than the law of any particular state.<sup>112</sup> Controversy is also characteristic of such claims of jurisdiction. In accepting or opposing these extraterritorial forms of jurisdiction, a state must balance the achievement of its own or other states' substantive policies against the risk of surprise in exercising jurisdiction over people acting abroad in the reasonable belief that they can be held accountable only under the law of the state where they act or of which they are citizens, in a forum to which they have significant ties.<sup>113</sup>

The principles that delineate jurisdiction to prescribe in the international arena have been applied in U.S. courts in appropriate cases.<sup>114</sup> There is little precedent for applying these principles to resolve the legislative jurisdiction of state courts intent on enforcing their criminal laws. Yet the fact is that most traditional rules and principles of conflicts of

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plying the protective principle to uphold jurisdiction over a person who falsified official documents outside the prosecuting jurisdiction); *United States v. Pizzarusso*, 388 F.2d 8, 9–10 (2d Cir. 1968) (holding that the perjurious statements by an alien before a United States consular officer in a foreign country constitutes a punishable crime). See IAIN CAMERON, *THE PROTECTIVE PRINCIPLE OF INTERNATIONAL CRIMINAL JURISDICTION* *passim* (1994).

112. *War crimes, crimes against humanity, or crimes against peace*: Convention on the Prevention and Punishment of Genocide, 78 UNTS 277 (1948); Charter of the International Military Tribunals, 59 STAT. 1544 (1945); *In re Yamashita*, 327 U.S. 1, 12–14 (1946); *Daliberti v. Iraq*, 97 F. Supp. 2d 38, 53–54 (D.D.C. 2000); *Attorney-General v. Eichmann*, 36 I.L.R. 277, 287–98 (Israel 1962). *Air or sea piracy*: 49 U.S.C. §§ 1301(38), 1472; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, *opened for signature* Sept. 23, 1971, *entered into force for the U.S.* Jan. 26, 1973, 24 UST 564, TIAS no. 7570 (1973); Convention for the Suppression of Unlawful Seizure of Aircraft, *opened for signature* Dec. 16, 1970, *entered into force for the U.S.* Oct. 14, 1971, 22 UST 1641, TIAS no. 7192 (1971); Convention on the High Seas, arts. 14–22, *opened for signature* April 29, 1958, *entered into force for the U.S.* Sept. 30, 1962, 13 UST 2312, TIAS no. 5200, 450 UNTS 82 (1962). *Attacks on diplomats*: 18 U.S.C. §§ 1116, 1201 (2008); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, *opened for signature* Dec. 14, 1973, *entered into force for the U.S.* Feb. 20, 1977, 28 UST 1975, TIAS no. 8532 (1977); *Von Dardel v. USSR*, 623 F. Supp. 246, 254 (D.D.C. 1985), *vacated on other grounds*, 736 F. Supp. 1 (D.D.C. 1990); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 307–08 (5th ed. 1998); Estey, *supra* note 109, at 195–99. See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987); STEPHEN MACEDO *et al.*, *THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION* (2001); Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*, 9 MICH. ST. U.-DET. C.L. J. INT'L L. 1 (2000).

113. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–95 (1980); *Kulko v. Superior Ct.*, 436 U.S. 84, 92–98 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 207–09, 214–16 (1977). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 403, 421(1), 431(1) (1987).

114. See *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir. 1968); *Rivard v. United States*, 375 F.2d 882, 885 (5th Cir. 1967).

law applied in interstate settings in the United States were derived from the analogous rules and principles applied internationally.<sup>115</sup> These principles directly address whether a court has jurisdiction to apply its own law to an alleged crime—precisely the problem courts confront in determining whether to try a criminal case that has significant extraterritorial elements. Instead of relying on these principles, American courts have sought to resolve these questions through application of various provisions of the Constitution of the United States.<sup>116</sup> These international principles could be used even more widely because they do not contradict the holdings of the interstate cases, but supplement them in a way that could clarify the often confusing and uncertain language of such decisions.

#### *E. Constitutional Limits on Choice of Law*

Several constitutional provisions play a role in shaping or limiting state (and possibly other) choice of law rules or principles. The primary constitutional provisions that limit state choices of law are the Full Faith and Credit Clause,<sup>117</sup> the Due Process Clause,<sup>118</sup> and the Commerce Clause.<sup>119</sup> Space does not allow an extended analysis of these provisions, but one must have some minimal familiarity with these provisions to understand whether a state could apply its laws in civil or criminal litigation to abortions that occur outside the state.

If a choice must be made between the laws of different states in the United States, the Constitution appears to address the problem directly in the Full Faith and Credit Clause: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and

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115. See SCOLES ET AL., *supra* note 19, at 18–22. Compare Justice Holmes’ discussion of the theory of “*obligatio*” in *Slater v. Mexican Nat’l R.R.*, 194 U.S. 120, 126 (1904), with the theories in *Alabama Great S. R.R. v. Carroll*, 11 So. 803, 805–09 (Ala. 1892). Compare also *Home Ins. Co. v. Dick*, 281 U.S. 397, 405–07 (1930); with *N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357, 375–77 (1918). See generally Cavers, *supra* note 51, at 177; Harold P. Southerland, *Sovereignty, Value Judgments, and Choice of Law*, 38 BRANDEIS L.J. 451 (2000) (explaining the gradual changes from more independent sovereign states that based relationships on more international principles, to the more interdependent states of today with, but with the same relationship structure).

116. See *infra* pp. 1672–82.

117. See *infra* pp. 1674–79.

118. See *infra* pp. 1679–82.

119. See *infra* pp. 1688, 1691–93.

the Effect thereof.”<sup>120</sup> The Full Faith and Credit Clause does little to constrain the free-wheeling choice of law process as a matter of state law. Today, the clause rarely will dictate a choice among the laws of those states or prohibit certain choices of law.

Early in the twentieth century, after more than a century of neglect, the Supreme Court did begin to find particular choices mandated by the Full Faith and Credit Clause.<sup>121</sup> The Court construed the command to give each state “full faith and credit” to the “public acts” of every other state as a requirement that state courts must apply the law of the state that the Court deemed appropriate. Despite recurring challenges to the historical accuracy of the theory, the Court continues to accept it.<sup>122</sup> Yet the Court is divided over when states are compelled to apply the law of other states, and how to select the appropriate state law which must be applied.

The early cases seemed to enshrine the vested rights approach<sup>123</sup> in the Constitution, the proper application of which would be assured by the Supreme Court’s supervision of state choices of law. Contracts were held

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120. U.S. CONST. art. IV, § 1. Congress has implemented this provision through 28 U.S.C. § 1738 (2008). When the choice is between state or federal law, the governing provision is the supremacy clause: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI.

121. See *Supreme Council of Royal Arcanum v. Green*, 237 U.S. 531, 540–47 (1915); *Western Un. Tel. Co. v. Brown*, 234 U.S. 542, 547 (1914); *Converse v. Hamilton*, 224 U.S. 243, 258–61 (1912). *But see Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927); *Union Trust Co. v. Grosman*, 245 U.S. 412, 417 (1918); *Kryger v. Wilson*, 242 U.S. 171, 176 (1916) (treating choice of law as a question purely of state law).

122. All eight participating Justices endorsed this proposition in both *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818 (1985) and in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981). For historical criticism, see ARTHUR TAYLOR VON MEHREN & DONALD P. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 1223–30 (1965); Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 MICH. L. REV. 33, 55–80 (1957). Bill Crosskey asserted that the requirement of “full faith and credit” to “records” is the source of the obligation of each state to apply the law of another state. WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 545–47 (1953). Others challenge the historical accuracy of this view. See Nadelmann, *supra*, at 44, 66. Crosskey’s view at least deals with the problem of how a mandate to respect the “public acts” (apparently statutes) of another state comes to be a mandate to respect another state’s common law. This last problem has never been dealt with adequately by proponents of the “public acts” theory. See Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 MEMPHIS ST. L. REV. 1, 56–60 (1981); VON MEHREN & TRAUTMAN, *supra*, at 1243–44; Robert H. Jackson, *Full Faith and Credit—The Lawyer’s Clause of the Constitution*, 45 COLUM. L. REV. 1, 12 (1945); Nadelmann, *supra*, at 71–80.

123. See *supra* pp. 1658–59.



to be governed by the law of the state in which they were made;<sup>124</sup> torts by the law of the state where the injury occurred;<sup>125</sup> and the internal affairs of corporations by the law of the place of incorporation.<sup>126</sup> These decisions evoked scathing criticism from many as overly rigid and arbitrary,<sup>127</sup> and this approach the Court eventually abandoned this approach.

The vested rights approach to full faith and credit was predicated on the assumption that for any given transaction or event there was one, and only one, body of law that could properly be applied. If this assumption had continued, none of the modern experiments in choice of law theories could have been possible. The Supreme Court repudiated this assumption in two cases in the 1930s.<sup>128</sup> The Court, in opinions by Justice Harlan Fiske Stone, decided that worker's compensation could be governed both by the law of the state where the contract of employment was made and by the law of the state where the employee was injured. Through these cases, the Supreme Court made it clear that the law of any significantly interested state could be applied regardless of whether it was the most significantly interested.<sup>129</sup> In other words, full faith and credit serves only to prohibit a court from applying the law of a state that has "no legitimate interest in its application."<sup>130</sup>

Because of the Supreme Court's current narrow construction of the Full Faith and Credit clause, choice among the laws of several interested states is left to each state to decide for itself. In short order, the Court swept aside virtually all the older cases announcing a constitutionally compelled choice of a particular state's law were swept aside.<sup>131</sup> The on-

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124. See *John Hancock Mut. Ins. Co. v. Yates*, 299 U.S. 178, 182–83 (1936); *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 154–55 (1932).

125. See *Western Union Tel. Co. v. Brown*, 234 U.S. 542, 546–47 (1914).

126. See *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586, 606–08 (1947); *Broderick v. Rosner*, 294 U.S. 629, 642–45 (1935); *Supreme Council of Royal Arcanum v. Green*, 237 U.S. 531, 543–44 (1915); *Converse v. Hamilton*, 224 U.S. 243, 260–61 (1912); *Finney v. Guy*, 189 U.S. 335, 340–42 (1903).

127. See *SCOLES ET AL.*, *supra* note 19, at 145–69; *WEINTRAUB*, *supra* note 19, at 290; *Jackson*, *supra* note 122, at 26–28.

128. See *Pac. Employers Ins. Co. v. Indus. Acc. Comm'n*, 306 U.S. 493, 500–01 (1939), *overruling* *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932); *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 544, 550 (1935).

129. See also *Carroll v. Lanza*, 349 U.S. 408, 412–13 (1955); *Watson v. Employers' Liab. Assurance Corp.*, 348 U.S. 66, 72–74 (1954).

130. *CURRIE*, *supra* note 53, at 271.

131. See *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, 181 (1964); *Carroll*, 349 U.S. at 408; *Watson*, 348 U.S. at 66; *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947); *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313 (1942).

ly state choice of law decision reversed by the Supreme Court between 1939 and 1985 involved the internal affairs of a fraternal benefit society,<sup>132</sup> and even this reversal has been questioned by well regarded scholars.<sup>133</sup> Even an apparent attempt by Congress to restore the pre-1939 view that full faith and credit mandated application of the single “proper law” to any given case<sup>134</sup> failed to reverse the Supreme Court’s abandonment of responsibility for policing state choices of law.

In *Allstate Insurance Co. v. Hague*,<sup>135</sup> the Court surprised nearly everyone by agreeing to hear its first full faith and credit challenge to a state choice of law in seventeen years. Although all eight of the participating Justices agreed that full faith and credit continued to constrain state-to-state choice of law, they split three ways on the appropriate standards and on whether the standards, whatever they were, had been violated. The Minnesota Supreme Court had applied its own law to the suit because it was the “better rule”—even though no substantial interest of Minnesota was implicated, and even though no relevant policy of Minne-

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132. See *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586, 624–25 (1947). One might add the escheat cases, but these involved original actions in the Supreme Court between states for which federal common law better explains the outcome than full faith and credit. See also *Pennsylvania v. New York*, 407 U.S. 206 (1972); *Texas v. New Jersey*, 379 U.S. 674 (1965); SCOLES ET AL., *supra* note 19, at 159 n.18; Willis L.M. Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. CHI. L. REV. 339, 342 (1952); WEINTRAUB, *supra* note 19, at 637 n.73, 665.

133. See, e.g., WEINTRAUB, *supra* note 19, at 665–68. Many critics attempt to limit the decision by viewing it as applying only to fraternal benefit societies rather than to all corporations. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS introductory note to Ch. 13 (1971); SCOLES ET AL., *supra* note 19, at 159 n.18, 1102–03 n.1; Willis L.M. Reese & Edmund M. Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 COLUM. L. REV. 1118, 1131 (1958). Some have challenged the view that there is a broader “internal affairs” rule applicable to all corporations. See *Wilson v. La.-Pac. Res., Inc.*, 187 Cal. Rptr. 852, 859–60 (Cal. App. 3d 1982); VON MEHREN & TRAUTMAN, *supra* note 122, at 1248–52; WEINTRAUB, *supra*, at 670–71 n.228; Elvin Latty, *Pseudo-Foreign Corporations*, 65 YALE L.J. 137, 143–45 (1955). See generally John Hugh Newman, Note, *The Pseudo-Foreign Corporation in California*, 28 HASTINGS L.J. 119 (1976). The Supreme Court, however, has reconfirmed the “internal affairs” rule at least in dictum. See *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982); Regan, *supra* note 78, at 1875–76.

134. Congress added “public acts” to the statute prescribing the manner and effect of full faith and credit in 1948. 62 STAT. 947, codified at 28 U.S.C. § 1738 (1948). Before 1948, the statute required full faith and credit only for “records and judicial proceedings.” See 28 U.S.C. § 687 (1940). Some have suggested this addition is controlling. See *Carroll*, 349 U.S. at 422 (Frankfurter, J., dissenting); *Hughes v. Fetter*, 341 U.S. 609, 613–14 n.16 (1951). Note that the majority in *Carroll* simply disregarded Justice Frankfurter’s argument. Generally the addition has been viewed as both vague and more or less accidental. See WEINTRAUB, *supra* note 19, at 680–82; Herbert F. Goodrich, *Yielding Place to New: Rest Versus Motion in the Conflict of Laws*, 50 COLUM. L. REV. 881, 891 (1950); Whitten, *supra* note 122, at 60–62.

135. 449 U.S. 302 (1981).

sota law would be advanced through its application.<sup>136</sup> Only three Justices were persuaded, however, that Minnesota had applied the law of a state with no substantial interest.<sup>137</sup> A plurality of four Justices apparently renounced the requirement of a substantial interest in the state whose law was chosen.<sup>138</sup> Rather they found it adequate that Minnesota had “substantial contacts” with the litigation even though those contacts did not relate to the policies of the law that was applied. Most troubling about this plurality opinion was that the four Justices themselves noted that each of the contacts by itself was essentially irrelevant to choice of the proper law.<sup>139</sup> Justice Brennan, writing for the plurality, did not even attempt to explain how three individually irrelevant contacts add up to a “significant aggregation of contacts.”<sup>140</sup>

Justice John Paul Stevens, in an individual concurrence, found no violation of full faith and credit because he saw no attack on Wisconsin’s sovereignty from application of Minnesota law to the case—although he expressly declared that Minnesota’s use of its own law was wrong as a matter of sound choice of law theory.<sup>141</sup> Just how far Stevens’ approach could take a court is illustrated in *Nevada v. Hall*,<sup>142</sup> where California was not only allowed to apply its own law to determine the extent, if any, of Nevada’s sovereign immunity for an accident in California involving an employee of the state of Nevada, but the Court dismissed in a footnote any restraint derived from the mutual respect due between coequal sovereigns.

Fairness to the defendant hardly seemed to count for more in the approaches supported by the majority Justices. They were content to dismiss claims of unfairness by the question begging observation that a de-

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136. *Allstate Ins. Co. v. Hague*, 289 N.W.2d 43, 48–49 (Minn. 1978), *aff’d*, 449 U.S. 302 (1981).

137. *See Allstate*, 449 U.S. at 332–40 (Powell, J., dissenting with Berger, C.J., & Rehnquist, J.).

138. *See id.* at 305–20 (Brennan, J., plurality opinion with Blackmun, Marshall, & White, JJ.).

139. *See id.* at 313–20.

140. *Id.* at 320. This deficiency was noted by the dissent. *See id.* at 339–40 (Powell, J. dissenting dissenting with Berger, C.J., & Rehnquist, J.). It also explains the generally hostile reception the opinion received among conflicts scholars. *See, e.g.*, SCOLES ET AL., *supra* note 19, at 150–54; WEINTRAUB, *supra* note 19, at 626–31, 635–37; Lea Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315, 1315 (1981); Roosevelt, *supra* note 50, at 2505–16, 2528–34; W. Clark Williams, Jr., *The Impact of Allstate Insurance Co. v. Hague on Constitutional Limitations on Choice of Law*, 17 U. RICH. L. REV. 489, 503–06 (1983).

141. *See Allstate*, 449 U.S. at 324 (Stevens, J., concurring).

142. 440 U.S. 410, 424 n.24 (1979). *See also* *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 279–86 (1980); Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 456–60 (1982).

fendant doing business in a forum cannot be surprised by application of the forum's law given modern choice of law theories.<sup>143</sup> This observation not only assumes the general acceptance of the standard being challenged, it also assumes unfair surprise is the only unfairness to be considered. One might almost conclude, therefore, that fairness is simply irrelevant to full faith and credit analysis.

Only four years later, the Supreme Court, by a seven-to-one vote, resurrected full faith and credit as a limit on permissible state choice of law without, however, providing any greater certainty about its application. In *Phillips Petroleum Co. v. Shutts*,<sup>144</sup> in an opinion by Justice William Rehnquist, the Court held that Kansas' decision to apply its own law to a class action in which ninety-seven percent of the class members were neither residents of Kansas, nor had any contact with Kansas, was a violation of full faith and credit and due process. Perhaps in order to avoid fractionalizing the Court as happened in *Allstate*, Justice Rehnquist provided no more precise explanation for his decision than that it was "arbitrary" or "fundamentally unfair."<sup>145</sup> His only attempt to define "fairness" was to note that an "important element is the expectations of the parties."<sup>146</sup> Justice Stevens dissented on the same grounds as he concurred in *Allstate*.<sup>147</sup> The Kansas Supreme Court then somewhat implausibly found that the law of the other interested states was the same as that of Kansas, and so applied its own law.<sup>148</sup> Curiously, when that case reached the Supreme Court under the name of *Sun Oil Co. v. Wortman*,<sup>149</sup> only Justice O'Connor and Chief Justice Rehnquist found a willful distortion of the laws of other states to be a violation of the Full Faith and Credit Clause.<sup>150</sup>

Justice Robert Jackson, sixty years ago, best summarized where these cases leave us: "[W]e [the Supreme Court] will adopt no rule, permit a good deal of overlapping and confusion, but interfere now and then, without imparting to the bar any reason by which the one or the

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143. See *Allstate*, 449 U.S. at 317–18 (Brennan, J., plurality opinion, with Blackmun, Marshall, & White, JJ.), 322–26 (Stevens, J., concurring).

144. 472 U.S. 797, 815, 818 (1985).

145. *Id.* at 818 (quoting *Allstate*, 449 U.S. at 312–13).

146. *Id.* at 822.

147. See *id.* at 823–45.

148. *Wortman v. Sun Oil Co.*, 755 P.2d 488, 490–93 (Kan. 1987), *aff'd*, 486 U.S. 717, 722–30 (1988).

149. 486 U.S. 717 (1988).

150. *Id.* at 743–49 (O'Connor, J., dissenting, with Rehnquist, C.J.).

other course is to be guided or predicted.”<sup>151</sup> After *Allstate, Nevada v. Hall*, and *Sun Oil Co. v. Wortman*, it is difficult to imagine a case in which a state court’s decision to apply the forum’s law could be held unconstitutional, and yet lower courts continue to do so,<sup>152</sup> at least occasionally, and scholars continue to ponder what it all means, with little success.<sup>153</sup>

The major alternative to full faith and credit on choice of law is the Due Process Clauses.<sup>154</sup> Due process as a constraint on choice of law exactly parallels full faith and credit. For a time, Justice John Paul Stevens campaigned to develop a distinction between due process and full faith and credit as limitations on choice of law.<sup>155</sup> He argued that due process is a question of fairness, while full faith and credit is concerned with the mutual respect due between coequal sovereigns (federalism).<sup>156</sup> His theory has had considerable appeal to scholars.<sup>157</sup> A few lower courts even picked up this distinction.<sup>158</sup> Yet every other sitting justice has rejected it.<sup>159</sup> In recent years, Stevens has not had the opportunity to review his

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151. Jackson, *supra* note 122, at 27. At the time, Jackson apparently thought this state of affairs was about the best we could hope for. *See id.* at 26–28 (discussing various options for Supreme Court choice-of-law jurisprudence, none of the options providing clear guidance). Jackson did have second thoughts and later advocated a more aggressive role for the Supreme Court in policing state choice-of-law. ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 41–44 (1955).

152. *See, e.g.*, *McCluney v. Jos. Schlitz Brewing Co.*, 649 F.2d 578 (8th Cir.), *aff’d mem.*, 454 U.S. 1071 (1981); *de Roburt v. Gannett Co.*, 83 F.R.D. 574, 581–83 (D. Haw. 1979), *dismissed on other grounds*, 548 F. Supp. 1370 (D. Haw. 1982), *dismissal rev’d*, 733 F.2d 701 (9th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985). *See also* *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 570–72 (1996) (*dictum*).

153. *See generally* SCOLES ET AL., *supra* note 19, at 145–69; WEINTRAUB, *supra* note 19, at 656–82; Brilmayer, *supra* note 140; Roosevelt, *supra* note 50, at 2509–10; Symposium, *supra* note 53; Weinberg, *supra* note 142; Whitten, *supra* note 122.

154. U.S. CONST. amends. V, XIV, § 1.

155. *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 837–45 (1985) (Stevens, J., dissenting); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320–32 (1981) (Stevens, J., concurring). *See also* *Hughes v. Fetter*, 341 U.S. 609, 611–13 (1951).

156. 449 U.S. at 320–23.

157. *See, e.g.*, Roosevelt, *supra* note 50, at 2506–07; Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Due Process*, 9 HASTINGS CONST. L.Q. 851, 906–10 (1982).

158. *Wilson v. Louisiana-Pacific Resources, Inc.*, 187 Cal. Rptr. 852, 856–58, 861–62 (App. 1982); *Harlow v. Emery-Waterhouse Co.*, 184 A.2d 1002, 1005 (Me. 1984); *Severine v. Ford Aerospace and Commc’ns Corp.*, 325 N.W.2d 572, 575–76 (*dictum*) (Mich. Ct. App. 1982).

159. Seven of eight participating justices agreed that the standards for due process for choice of law are the same as the standards for full faith and credit: *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 814–822 (1985), and in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.10, 333 (1981). *See also* *Sun Oil Co. v. Wortman*, 486 U.S. 717, 729–30 n.3 (1988); *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, 181 (1964).

position. There appears to be no basis for challenging the continued equivalence of the two major constitutional constraints on choice of law.

Due process as a constitutional command applies to both state and federal exercises of power.<sup>160</sup> Unlike full faith and credit, due process is not limited to incorrect choices of law among states of the United States, but rather seeks to limit arbitrary or irrational applications of government power. Due process thus can require the application of the law of a foreign nation just as it might require the application of the law of a state of the United States.<sup>161</sup> As *Allstate* shows, the Supreme Court has consistently considered fairness and federalism under both due process and full faith and credit. The Court, in announcing due process limits in other contexts, has also been concerned about both fairness and federalism, although it now seems to discount federalism as a concern in judicial jurisdiction cases.<sup>162</sup>

Due process precludes a state from choosing a law not based on legislative jurisdiction over the transaction or event<sup>163</sup> in much the same manner as it precludes a state from trying a case if the court does not have judicial jurisdiction (jurisdiction to adjudicate) over the case.<sup>164</sup> The Supreme Court initially gave content to legislative jurisdiction by resorting to the vested rights approach to choice of law.<sup>165</sup> As most of the early cases involved insurance contracts, some saw in this the mere application of now discredited notions of economic substantive due process.<sup>166</sup> That view was not accurate. Consistent opponents of eco-

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160. U.S. CONST. amends. V (the federal government), XIV, § 1 (state governments).

161. *Home Ins. Co. v. Dick*, 281 U.S. 397, 407-08 (1930) (the law of Mexico); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (the law of Costa Rica); *Slater v. Mexican Nat'l RR*, 194 U.S. 120 (1904) (the law of Mexico).

162. *Insurance Corp. of Ireland v. Cie. des Bauxites*, 456 U.S. 694, 702-03 (1982). *But see* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985); *Rush v. Savchuk*, 444 U.S. 320, 332 (1980).

163. *See* *Home Ins. Co. v. Dick*, 281 U.S. 397, 407-08 (1930); *Gerling Global Reinsurance Corp. v. Gallagher*, 267 F.3d 1228, 1236-40 (11th Cir. 2001). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 4 (1987). *See generally* SCOLES ET AL., *supra* note 19, at 147-55, 160-68; WEINTRAUB, *supra* note 19, at 631-35; Reese, *supra* note 81.

164. *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102 (1987); *Helicopteros Nacionales de Colombia, SA v. Hall*, 466 U.S. 408 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

165. *See supra* p. 1659.

166. The very first economic substantive due process case was in fact a choice of law case. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). *See also* *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930); *Mut. Life Ins. Co. v. Liebong*, 259 U.S. 209 (1922); *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149 (1914); *N.Y. Life Ins. Co. v. Cravens*, 178 U.S. 389 (1900).

conomic substantive due process wrote many of the due process cases on choice of law.<sup>167</sup> Furthermore, the Supreme Court never fully repudiated the due process limits on choice of law long after it repudiated economic substantive due process.<sup>168</sup> But with the standard for due process being the same as for full faith and credit, the standard has eroded to the point of virtual insignificance.<sup>169</sup> Due process as a limitation on choice of law, like full faith and credit, has practically died, and its use is likely to be similarly intermittent and unpredictable. Only a reversal of field by the Supreme Court to begin aggressive policing of the choices of law made by lower courts could make either due process or full faith and credit into an important limitation on choice of law. While several other clauses in the Constitution might also shape choices made under state law,<sup>170</sup> those other clauses have only rarely been used in litigation, and their use has usually been subsumed within the more commonly used clauses.<sup>171</sup>

### III. ABORTION AND CHOICE OF LAW

The Supreme Court, in *Planned Parenthood of Southeast Pennsylvania v. Casey*,<sup>172</sup> adopted an “undue burden” standard that promised to allow, for the first time in twenty years, major variations among the states in their laws regarding abortion. Several conflicts scholars soon

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167. Justice Oliver Wendall Holmes, Jr., well known for his dissent from economic substantive due process in *Lochner v. New York*, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting), wrote the Court’s opinion in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). Similarly, Justice Louis Brandeis wrote the Court’s opinions in *Home Ins. Co v. Dick*, 281 U.S. 397 (1930) and *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 155–60 (1932), applying full faith and credit, in contrast to his views on economic substantive due process that he expressed as early as *Kryger v. Wilson*, 242 U.S. 171, 176 (1916) (Brandeis, J., dissenting).

168. Contrast the reaffirmation of due process as a check on choice of law in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814–22, 837–42 (1985); and *Allstate Ins. Co v Hague* 449 U.S. at 307–20, 326–31, 333–36 (1981); with the final, formal, final repudiation of economic substantive due process in *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

169. *But see* *Gerling Global Reinsurance Corp. v. Gallagher*, 267 F.3d 1228, 1236–40 (11th Cir. 2001) (finding that Florida’s attempt to regulate European insurance companies violates due process because of a lack of legislative jurisdiction).

170. For examples under the Commerce Clause, U.S. CONST. art. I, § 8, c1. 3, see *Edgar v. MITE Corp.*, 457 U.S. 624 (1982); *Black Diamond SS Corp. v. Rob’t Stewart & Sons, Ltd.*, 336 U.S. 386 (1949). For an example under the Equal Protection Clause, U.S. CONST. amend. XIV, § 1, see *Skahill v. Capitol Airlines*, 234 F. Supp. 906 (S.D.N.Y. 1964), *cert. denied* 382 U.S. 878 (1965). For an example under the Privileges and Immunities Clause, U.S. CONST. art. IV, § 2 & amend. XIV, see *Grovey v. Washington Nat’l Ins. Co.*, 119 S.W.2d 503 (Ark. 1938). Although corporations are “persons” under the 14th Amendment, they are not “citizens” and thus are not protected by the Privileges and Immunities Clause. *Asbury Hosp. v. Cass County*. 326 U.S. 207, 211–13 (1945).

171. See SCOLES ET AL., *supra* note 19, at 169–76. See generally WEINTRAUB, *supra* note 19, at 682–86.

172. 505 U.S. 833, 837 (1992).

began to address how courts should resolve the conflicts that were now predicted between the laws of different states.<sup>173</sup> Conflicts can arise between the laws of different states in as many different ways as the laws regarding abortion are allowed to vary—and they are being allowed to vary in ever greater ways.

We are not yet to the point where abortion might be prohibited in one state (with few or no exceptions) and allowed virtually at the demand of a pregnant woman in another, but further legal developments could make that possible. Such a stark difference will present a conflict in the criminal laws should a state that prohibits abortion seek to preclude its citizens (meaning its residents<sup>174</sup>) by prosecuting them upon their return from an abortion in a permissive state.<sup>175</sup> It would also pose a conflict in the civil laws should the state seek to enjoin a woman or girl or those aiding the woman or girl from going to a more permissive state to obtain an abortion,<sup>176</sup> or should interested persons (such as the father) seek to recover damages from abortion providers in the permissive state. Leaving a state to obtain an abortion has been called abortion tourism.<sup>177</sup>

While the conflicts are perhaps less severe, the same questions can arise when differences are more subtle; for example, where one state requires parental notice or consent for a minor seeking an abortion and the

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173. C. Steven Bradford, *What Happens if Roe is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87 (1993); Seth F. Kreimer, “*But Whoever Treasures Freedom . . .*” *The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907 (1993) [hereinafter Kreimer, *Right to Travel*]; Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 NYU L. REV. 451 (1992) [hereinafter Kreimer, *The Law of Choice*].

174. U.S. CONST. amend. XIV, § 1.

175. See *supra* pp. 1651-53. The German government has taken steps to enforce its fairly restrictive abortion laws against German women who travel to the Netherlands to obtain an abortion that would have been illegal in Germany, even including gynecological exams for women returning from trips to the Netherlands. Nina Bernstein, *Germany Still Divided on Abortion*, NEWSDAY, Mar. 11, 1991, at 5; Karen Y. Crabbs, *The German Abortion Debate: Stumbling Block to Unity*, 6 FLA. J. INT’L L. 213, 222-23 (1991); Kreimer, *Right to Travel*, *supra* note 170, at 908 n.5.

176. See *supra* pp. 1651-52.

177. See Gerald L. Neuman, *Conflict of Constitutions? No Thanks: A Response to Professors Brilmayer and Kreimer*, 91 Mich. L. Rev. 939, 942 (1993). Professor Neuman would distinguish between a state citizen who travels solely for the purpose of obtaining an abortion and a state citizen who has a prolonged presence in another state (perhaps as a student) and who becomes pregnant and has an abortion while in the second state. *Id.* It is possible that courts would make a similar distinction. Abortion tourism in the strict sense has a long history. See DELLAPENNA, *supra* note 15, at 572-73, 585, 596-97, 624, 626, 710, 725. Abortion tourism is a subset of the broader phenomenon of medical tourism. See generally Nicolas P. Terry, *Under-Regulated Health Care Phenomena in a Flat World: Medical Tourism and Outsourcing*, 29 W. NEW ENG. L. REV. 421 (2007).



other state does not.<sup>178</sup> One can multiply the potential conflicts with many other examples. In the remainder of this section, I shall examine the conflicts in the starkest terms—prohibition of abortion versus legalized abortion. I do so because such a stark conflict serves to clarify the issues, and because lesser levels of conflict will be resolved according to the same legal principles.

#### A. *Criminal Conflicts*

There seem to be few, if any, cases in which a state has attempted to apply its criminal laws to prosecute someone based upon an abortion that occurred outside the state. Even the Rose Marie Hartford case discussed at the opening of this article did not involve prosecuting Ms. Hartford for the abortion as such, but for interfering with the custody of a child by transporting a girl out of the state without the permission of the parent or guardian of the minor.<sup>179</sup> The interference occurred, at least initially, within Pennsylvania—the state that prosecuted and convicted Ms. Hartford. New Jersey is not likely to extradite the physician who performed the abortion or other persons working in the abortion clinic where the abortion was performed. It is possible that the physician or other staff could simply be arrested upon entering Pennsylvania or another state seeking to apply its criminal law to an abortion in another state,<sup>180</sup> although this would suppose a level of scrutiny of persons who enter or leave a state that is unlikely in practice.

If a prosecution is to be brought for an abortion in another state, it is not likely to be against the abortion tourist herself—a woman resident in the state who has gone to another state to obtain an abortion that would have been illegal if performed within the state.<sup>181</sup> Instead, the prosecution would likely be against another person (like Ms. Hartford) who facilitated the out-of-state abortion and who therefore might be indicted as an accomplice to the crime of, or committed against, the abortion tourist.<sup>182</sup> A state could avoid many of the arguments about the extraterrito-

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178. See *supra* pp. 1652-53.

179. See *supra* pp. 1651-52.

180. In one very old case, the state court rejected an attempt to do so. *Edge v. State*, 99 S.W. 1098, 1099 (Tenn. 1907).

181. Traditionally a woman who underwent an illegal abortion was not guilty of a crime even under the most restrictive abortion laws. See DELLAPENNA, *supra* note 15, at 240-41, 299-302, 327, 544-45. Whether this would continue to be true if *Roe* were overruled remains to be seen.

182. *But see* *People v. Buffum*, 256 P.2d 317, 321 (Cal. 1953) (rejecting an attempt to prosecute a person who aided women in California to find Mexican abortionists on grounds that the relevant statute required at least an attempt to commit the crime within the state. See Bradford, *supra* note 173, at 99-100.

rial application of its laws by making it a crime for a woman resident in a state to leave the state in order to obtain an abortion, or to facilitate such a woman's leaving the state in order to obtain an abortion. As with Ms. Hartford, the crime would occur within the state and there would be no question about criminal jurisdiction.<sup>183</sup>

The troubling question lurking in all of this is whether prosecuting someone for an abortion that occurred in another state under an expansive reading of the territorial principle or of the personality (nationality) principle would violate constitutional limitations on choice of law. This is not a question that can be answered simply by applying cases decided regarding choice of law in civil litigation, although several commentators have attempted to apply those precedents to the criminal law question.<sup>184</sup> One must instead consider precedents regarding criminal prosecutions, and there are only a few.

The case most nearly on point regarding doctors who perform abortions in pro-choice states on residents from pro-life states is *Nielsen v. Oregon*.<sup>185</sup> In this case, now nearly a century old, the Supreme Court overturned a conviction for fishing in the Columbia River in violation of an Oregon statute. The Columbia River, at the point in question, forms the boundary of Oregon and Washington, and Congress had enacted that the two states should each have concurrent jurisdiction over all crimes committed anywhere on the river.<sup>186</sup> The defendant was a Washington resident who was arrested by Oregon officers while fishing on the Washington side of the river in a manner that was not only legal under the laws of Washington, but had in fact been licensed by the state of Washington. The Supreme Court acknowledged that either state could, pursuant to the act of Congress, prosecute a crime prohibited by the law of both states regardless of the citizenship of the defendant and regardless of where the crime was committed,<sup>187</sup> but held that Oregon could not

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183. See Bradford, *supra* note 173, at 97–98. On criminal jurisdiction based on the commission of a crime (the territorial principle) or the citizenship of the culprit (the personality principle); see *supra* pp. 1667–71.

184. See generally Appleton, *supra* note 37, at 667–77; Anthony J. Bellia, Jr., *Federalism Doctrines and Abortion Cases: A Response to Professor Fallon*, 51 ST. LOUIS U. L.J. 767, 771–75, 791–95 (2007); Bradford, *supra* note 173, at 109–26, 129–30; Richard H. Fallon, Jr., *If Roe were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 626–32; Kreimer, *The Law of Choice*, *supra* note 173, at 477–87; Neuman, *supra* note 177, at 940–52; Rosen, “Hard” or “Soft” Pluralism?, *supra* note 99, at 728–29.

185. 212 U.S. 315 (1909).

186. *Id.* at 316.

187. *Id.* at 320.

prosecute an act committed in Washington under a license from that state.<sup>188</sup> The Court did not indicate the precise basis for its holding. Presumably, the Court reached its decision because Oregon lacks legislative jurisdiction over the act in question.<sup>189</sup>

*Nielsen v. Oregon* precludes prosecution of a physician or other person licensed by the state where the abortion occurs to perform or facilitate an abortion in a different state where abortion is a crime. It does not, however, reach the question of whether a state could prosecute one of its citizens who obtains, or facilitates another citizen of the state in obtaining, an abortion in another state. The question is not whether an allegedly criminal act takes place within a state, but whether it takes place within the jurisdiction of the state. For residents of the state, the active personality principle alone would be sufficient to justify a state in applying its criminal law.<sup>190</sup> And, lest we forget, citizens of the United States are citizens of the state in which they reside.<sup>191</sup>

Lea Brilmayer has argued that when there is such a conflict, the law of the state where the act or event occurs must trump the law of the person's residency.<sup>192</sup> It is not clear if Brilmayer understands that in this context residency means citizenship, which arguably is a stronger contact than mere residence in a narrower sense<sup>193</sup>—even though she herself has argued for a communitarian understanding of the authority of a state to apply its laws to members of its community.<sup>194</sup> There is, in fact, no pre-

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188. *Id.* at 321.

189. *See* *Home Ins. Co. v. Dick*, 281 U.S. 397, 407–08 (1930); *Gerling Global Reinsurance Corp. of Am. v. Gallagher*, 267 F.3d 1228, 1235–40 (11th Cir. 2001). *see also supra* pp. 114–22, 129; RESTATEMENT (SECOND) OF CONFLICTS OF LAW §§ 2, 4 (1971); SCOLES ET AL. *supra* note 19, at 147–55, 160–68; WEINTRAUB, *supra* note 19, at 631–35; Reese, *supra* note 81.

190. *See supra* pp. 1668–71.

191. U.S. CONST. amend. XIV, § 1.

192. Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873, 880–89 (1993); *see also* Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973 (2002); Kreimer, *Right to Travel*, *supra* note 173; Kreimer, *The Law of Choice*, *supra* note 173.

193. Brilmayer, *supra* note 192, at 877–80.

194. Lea Brilmayer, *Liberalism, Community, and State Borders*, 41 DUKE L.J. 1, 9–10 (1991); *see also* Kreimer, *Right to Travel*, *supra* note 173, at 924–38 (similarly dismissing the obligation of a state's citizen to obey the state's law outside the state despite a recognition, in part, of a communitarian argument for obedience); Kreimer, *The Law of Choice*, *supra* note 173, at 506, 517 (arguing for the primacy of the national community over the local (state) community; this begs the question of whether a national community can exist regarding abortion policy if there are no national standards—as must be the case if states are free to have different abortion laws. *But see* Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053 (1998) (arguing for more nuanced study of the limits of a community as a source of law within a larger community).

mise in either international law<sup>195</sup> or in the Supreme Court's interpretation of the Full Faith and Credit Clause or the Due Process Clause of the U.S. Constitution to support an invariant preference for the territorial principle over the personality principle.<sup>196</sup> In fact, in one of the few (perhaps the only) apparently hard and fast rules of choice of law that are constitutionally mandated, the "internal affairs rule" for corporate law, prefers the law of the "citizenship" of the corporation to the territorial principle.<sup>197</sup> No wonder Walter Wheeler Cook, a founder of modern conflicts theory, could write that "only a blind following of unsound territorial notions would lead to the conclusion" that the application of a state's criminal law extraterritorially would be unconstitutional.<sup>198</sup>

Brilmayer recognizes that for several states to have concurrent legislative jurisdiction is routine, but argues that this is impermissible in the criminal context because it would expose persons to the risk of uncertainty in the law applicable to their conduct and to double jeopardy in

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195. There is a presumption in U.S. law against the extraterritorial application of U.S. law, but that is all it is—a presumption. *See, e.g.*, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). Such a presumption does not preclude the application of U.S. law extraterritorially when the law was meant to apply extraterritorially. The decision in *EEOC v. Arabian Am. Oil Co.* has been roundly criticized as a matter of American law. *See, e.g.*, Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 180-84, 198-203.

196. *See* *Pacific Employers Ins. Co. v. Indus. Acc. Comm'n*, 306 U.S. 493, 500-04 (1939) (approving application of the law of the place of the accident—the territorial principle—to a workers' compensation claim while expressly approving the *Alaska Packers* case); *Alaska Packers Ass'n v. Indus. Acc. Comm'n*, 294 U.S. 532, 539-43 (1935) (approving application of the law of the residence of an injured worker when the injury occurred during seasonal employment in Alaska—the personality principle); Mark P. Gergen, *Territoriality and the Perils of Formalism*, 86 MICH. L. REV. 1735 (1988); Rosen, "Hard" or "Soft" Pluralism?, *supra* note 99, at 714-25; Rosen, *Extraterritoriality*, *supra* note 99. Brilmayer discussed the *Alaska Packers* case, but she did not mention *Pacific Employers*; she did not consider this line of cases dispositive. Brilmayer, *supra* note 192, at 882-83; Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992). *See also* Regan, *supra* note 78, for argument in favor of the priority of the territorial principle. Regan does acknowledge the legitimacy of a state in regulating its citizens who seek abortions out of the state. *Id.* at 1908-09, 1912-13.

197. *See supra* p. 1675; *see also* *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 70-71 (1987) (upholding the application of Indiana's Control Share Acquisition law that is conditioned on the residence of the stockholders); *Edgar v. MITE Corp.*, 457 U.S. 624, 625 (1982) (striking down Illinois' Business Takeover Act regulating hostile tender offers that would apply to a company with a connection to Illinois even if no shareholders resided in Illinois). *See generally* Regan, *supra* note 78, at 1876-80 (discussing the several opinions in *Edgar v. MITE Corp.*).

198. WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 16 (1949). Kreimer cited this language and dismissed it in a footnote, merely stating that his disagreement with Cook "should not trouble us unduly" because Brainerd Currie also disagreed with Cook in some circumstances. Kreimer, *The Law of Choice*, *supra* note 173, at 484 n.105. *But see* Roosevelt, *supra* note 50, at 2458-61 (analyzing Cook's work and its importance in conflicts theory).

that they could be prosecuted in more than one jurisdiction.<sup>199</sup> Yet the law accepts many situations when more than one body of criminal law applies to the same conduct,<sup>200</sup> creating the very risks that Brilmayer believes the legal system cannot accept. Brilmayer ultimately offers no reason, other than the possibility of conflicting laws being applicable to a single act in a single location to prefer the territorial principle except that she prefers it for abortion tourism—apparently because it leads to the decision she prefers.<sup>201</sup> So weak is such an argument under choice of law theory that those, like Brilmayer, who seek to argue against state authority to apply its criminal law to its citizens who become abortion tourists have turned instead to other possible constitutional provisions (most often the right to travel) that normally have little or nothing to do with choice of law in an attempt to bar such an application of a state's law.<sup>202</sup>

The Supreme Court has embraced a constitutional right to travel.<sup>203</sup> The right to travel to some extent derives from the Commerce Clause,<sup>204</sup> but also more directly from the Privileges and Immunities Clause of Article IV<sup>205</sup> and the Fourteenth Amendment<sup>206</sup> and the Due Process

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199. Brilmayer, *supra* note 194, at 884–86.

200. As even Brilmayer acknowledges. *Id.* at 884 (citing *Heath v. Alabama*, 474 U.S. 82, 87–93 (1985)). Brilmayer seeks to distinguish cases involving two states each prosecuting for an act that is criminal in both states—which she sees as not problematic—from a state prosecuting for an act that is not criminal in the state where the act was performed—which she sees as unconstitutional.

201. She builds her argument on the assumption that the law of only one state could be applied, an assumption the correctness of which she simply does not demonstrate. *See id.* at 884–89.

202. Brilmayer invokes the right to travel. *Id.* at 883; *see also* Kreimer, *Right to Travel*, *supra* note 173; Kreimer, *The Law of Choice*, *supra* note 173.

203. *Saenz v. Roe*, 526 U.S. 489, 502–05 (1999) (denying welfare assistance to persons moving from other states is barred by a component of the right to travel); *Edwards v. California*, 314 U.S. 160, 174 (1941) (striking down, under the commerce clause, a statute prohibiting the transportation of “paupers” into the state); *see* Bradford, *supra* note 173, at 158–65; Rosen, “Hard” or “Soft” Pluralism?, *supra* note 99, at 736–37. *But see* *Evansville-Vanderburgh Airport Auth’y Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 714 (1972) (a tax on persons enplaning at an airport does not violate the right to travel because it does not discriminate between interstate and intrastate travel).

204. U.S. CONST., art. I, § 8, cl. 3. On the link between the right to travel and the commerce clause, *see* Bradford, *supra* note 170, at 156; Kreimer, *The Law of Choice*, *supra* note 173, at 488–97; Regan, *supra* note 78, at 1888–89; Rosen, “Hard” or “Soft” Pluralism?, *supra* note 99, at 736–38.

205. U.S. CONST., art. IV, § 2; *see* *United States v. Guest*, 383 U.S. 745, 764–67 (1966) (Harlan, J., with Warren, C.J., & Douglas & Brennan, JJ., dissenting); *see also* Brilmayer, *supra* note 192, at 881–83; *see also* Kreimer, *Right to Travel*, *supra* note 173, at 914–15, 917–18; Kreimer, *The Law of Choice*, *supra* note 170, at 464–68, 497–519; Metzger, *supra* note 7, at 1529–31, 1538–41; Rosen, “Hard” or “Soft” Pluralism?, *supra* note 99, at 732–37. *But see* Regan, *supra* note 78, at 1889 (arguing that the Privilege and Immunities Clause does not impact right to travel for residents).

206. U.S. CONST., amend. XIV, § 1; *see* *Twining v. New Jersey*, 211 U.S. 78, 97 (1908), *overruled on other grounds by* *Malloy v. Hogan*, 378 U.S. 1 (1964) (listing the right to pass freely from state to state as among the privileges of national citizenship); *see also* Kreimer, *Right to Travel*, *supra* note 173, at 1686.

Clause of the Fifth and Fourteenth Amendments.<sup>207</sup> Just how far a state can go in interfering with the right to travel is unclear. Impassioned assertions that to allow the law of the state of citizenship to apply its law to a citizen while traveling would impair the viability of the union of states at best beg the question of constitutionality.<sup>208</sup> Sometimes the law of one's citizenship (residence) and the law of the location of an act or event will both be applicable.<sup>209</sup> That is simply one consequence of living in a federal, rather than a unitary, legal system.

The Supreme Court decisions do not resolve the question of the limits imposed on the application of state law by the right to travel. In *Jones v. Helms*,<sup>210</sup> the Supreme Court upheld, against a challenge based on the right to travel, a statute making a person who abandons a dependent child guilty of a felony if the person leaves the state, but only a misdemeanor if the person remains within the state. The Court indicated that at the least a state could prohibit travel for a criminal purpose so long as the restriction on travel is rationally related to the crime.<sup>211</sup> This would seem to cover abortion tourism.

On the other hand, the Supreme Court in *Zablocki v. Redhail*<sup>212</sup> struck down the extraterritorial enforcement of a state statute prohibiting remarriage if a the person was not current with child support obligations ordered by a court in that state. The court based its conclusion, however, on a finding that the right to marry (not the right to travel<sup>213</sup>) was “of fundamental importance” as an aspect of the right to privacy implicit in the Fourteenth Amendment.<sup>214</sup> Even with that holding, however, the

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*pra* note 173, at 915, 920; Kreimer, *The Law of Choice*, *supra* note 173, at 504–06; Rosen, “Hard” or “Soft” Pluralism?, *supra* note 99, at 737–40.

207. U.S. CONST., amends. V, XIV § 1.

208. This is the line of argument developed by Seth Kreimer. Kreimer, *Right to Travel*, *supra* note 170, at 914–24. The argument is refuted in Rosen, *Extraterritoriality*, *supra* note 99, at 933–45; Rosen, “Hard” or “Soft” Pluralism?, *supra* note 99, at 744–59.

209. Examples are innumerable. Consider, e.g., *Heath v. Alabama*, 474 U.S. 82, 92–93 (1985) (upholding a conviction in Alabama under Alabama law for kidnapping and murder when the kidnapping was in Alabama but the murder was in Georgia; the Court indicated that the defendant could also have been convicted in Georgia under Georgia law). See generally Rosen, *Extraterritoriality*, *supra* note 99, at 946–63.

210. 452 U.S. 412 (1981); see Bradford, *supra* note 173, at 159–60.

211. *Jones*, 452 U.S. at 421–23; see generally Rosen, “Hard” or “Soft” Pluralism?, *supra* note 99, at 741–43.

212. 434 U.S. 374 (1978).

213. This is a distinction that Bradford missed. Bradford, *supra* note 170, at 158 (discussing the right to travel, but not mentioning the right to marry).

214. *Zablocki*, 434 U.S. at 384.

Court was careful to indicate that not every regulation of marriage would be subject to a strict scrutiny standard of review.<sup>215</sup> Today, the right to an abortion is not a fundamental right.<sup>216</sup> It seems unlikely that a future Supreme Court that would loosen *Roe v. Wade* sufficiently to give rise to such a conflict would find that the right to travel prevents a state from enforcing its laws against its citizens.<sup>217</sup>

The Supreme Court has, on at least two occasions, addressed the right to travel in the context of abortion. In *Doe v. Bolton*,<sup>218</sup> the majority struck down, as an impairment of the right to travel, the section of a statute that mandated abortions only be performed on residents of the state. This provision amounted to discrimination against non-residents of the state in accessing medical services in the state,<sup>219</sup> while a prohibition of a resident obtaining an abortion in another state does not work any such discrimination. *Doe* also arose at a time when the right to an abortion was held to be a fundamental right.<sup>220</sup> Arguably, the import of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in substituting an undue burden standard for the former strict scrutiny, is to indicate that abortion is not a fundamental right.<sup>221</sup> That position was taken explicitly in the concurring and dissenting opinion delivered by Chief Justice William Rehnquist.<sup>222</sup> If the right to abortion is still a fundamental right, a state can hardly argue that it has a compelling interest in preventing non-residents from obtaining an abortion that it allows to residents, but it might have a compelling interest in protecting fetuses within the state from abortions wherever they occur.<sup>223</sup> The closest we come to a case on

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215. *Id.* at 386. See generally Rosen, "Hard" or "Soft" Pluralism?, *supra* note 99, at 742–44.

216. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874–79 (1992).

217. See Fallon, *supra* note 184, at 638–40 (discussing the potential impact of the right to travel on abortion laws).

218. 410 U.S. 179, 200 (1973).

219. Bradford, *supra* note 170, at 163.

220. *Id.*

221. 505 U.S. 833, 874–87, 895, 901 (plurality opinion, per O'Connor, Kennedy, & Souter, JJ.), 920–22 (Stevens, J., concurring in part and dissenting in part).

222. *Id.* at 950–54, 964 (Rehnquist, C.J., with Scalia, Thomas, & White, JJ., concurring in the judgment in part and dissenting in part).

223. *But see* *Virginia v. Bigelow*, 421 U.S. 809, 811–12, 824 (1975) (stating in *dictum*, in a case striking down a statute prohibiting the advertising of out-of-state abortions, that a state could not prevent its residents from traveling to another state to obtain an abortion). Most scholars have concluded that the statement in *Bigelow* is *dictum*. See generally Bradford, *supra* note 173, at 163–65; Fallon, *supra* note 184, at 629; Regan, *supra* note 78, at 1907–08; Rosen, *Extraterritoriality*, *supra* note 99, at 891, 969–72; Rosen, "Hard" or "Soft" Pluralism?, *supra* note 99, at 723–25. *Contra*: Kreimer, *The Law of Choice*, *supra* note 173, at 459 n.27. On a state's interest in preventing abortions, see *Planned Parenthood*, 505 U.S. at 833, 869–79 (1992) (plurality opinion per O'Connor, 1688

point is *Bray v. Alexandria Women's Health Clinic*,<sup>224</sup> in which a majority of the Court declined to find a violation of the right to travel when the purpose of the interference was to prevent abortions and not to interfere with travel as such. Justice John Paul Stevens, in dissent, asserted that a woman's right to travel to obtain an abortion is protected by the Constitution, but only Justice [Harry Blackmun](#) joined this opinion.<sup>225</sup>

Apart from the right to travel, the Commerce Clause itself could have an effect on the application of abortion statutes to acts in another state. The so-called dormant commerce clause will bar the application of state laws that discriminate against or improperly burden interstate commerce.<sup>226</sup> A prohibition of a state's citizens obtaining an abortion regardless of where it occurs is not likely to be held to discriminate against interstate commerce.<sup>227</sup> So long as an abortion statute does not discriminate against interstate commerce, it will be upheld as a statute directed at legitimate local concerns so long as the benefits to the state's interests clearly outweigh the incidental effects the statute might have on interstate commerce.<sup>228</sup> Special weight is given to state regulations when the regulations are designed to protect the health or safety of its citizens.<sup>229</sup>

As Chief Justice John Roberts wrote on behalf of a majority of the Supreme Court in 2007, the Commerce Clause "is not a roving license for federal courts to decide what activities are appropriate for state and local governments to undertake, and what activities must be the province of private market competition."<sup>230</sup> Substitute "personal choice" for the

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Kennedy, & Souter, JJ.); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 519 (1989) (plurality opinion per Rehnquist, C.J., with White & Kennedy, JJ.).

224. 506 U.S. 263, 274–78 (1993).

225. *Id.* at 332 (Stevens, J., with Blackmun, J., dissenting).

226. *United Haulers Ass'n, v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S.Ct. 1786, 1792–93 (2007). See generally Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785 (2001).

227. Bradford, *supra* note 173, at 156–57; Fallon, *supra* note 184, at 636–38; Rosen, "Hard" or "Soft" Pluralism?, *supra* note 99, at 726–30.

228. *United Haulers Ass'n*, 550 U.S. at 12 (Roberts, C.J., with Souter, Ginsberg, & Beyer, JJ.; Thomas J., concurring in the judgment) (citing *Pike v. Bruce Church, Incl.* 397 U.S. 137, 142 (1970)); see also *Nw. Cent. Pipeline Co. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 525–26 (1989); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). See generally Bellia, *supra* note 184, at 775–76; Bradford, *supra* note 173, at 148–57; Rosen, "Hard" or "Soft" Pluralism?, *supra* note 99, at 727–30. For an extended argument against balancing, see Regan, *supra* note 78, at 1866–68.

229. *Sporhase v. Nebraska ex rel Douglas*, 458 U.S. 941, 956 (1982); *City of Philadelphia*, 437 U.S. at 623–24.

230. *United Haulers Ass'n*, 127 S.Ct. at 1796.



phrase “private market competition,” and there seems to be little problem with a state applying its abortion laws to its own citizens under the Commerce Clause.<sup>231</sup> The Commerce Clause by itself might preclude the application of a state’s abortion statute to non-residents who do not act within the state.<sup>232</sup> Just how far this last limitation extends is not clear,<sup>233</sup> but combine it with the holding in *Nielsen*<sup>234</sup> (old as it is), and the conclusion that a state cannot apply its abortion statute to a person who performs or facilitates an abortion outside the state while performing no act within the state becomes pretty firm.<sup>235</sup>

In searching for a constitutional basis for denying the legislative jurisdiction of the state of citizenship, Steven Bradford has even argued that states cannot charge someone with a crime committed within another state because it would be impossible to empanel a jury drawn from the vicinage of the crime.<sup>236</sup> That might be true in states that have embedded a right to a jury from the vicinage in their constitutions.<sup>237</sup> For those states, the question is how strictly they will construe the definition of the crime being prosecuted.<sup>238</sup> After all, while the U.S. Constitution requires

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231. Bradford, *supra* note 173, at 149–53; cf. *Riis v. Commonwealth*, 418 S.W.2d 396, 397–98 (Ky. 1967) (upholding, against a commerce clause challenge, a statute prohibiting transporting a person out of state against her will).

232. See Kreimer, *The Law of Choice*, *supra* note 173, at 492–94; Rosen, *Extraterritoriality*, *supra* note 99, at 919–30; Rosen, “Hard” or “Soft” Pluralism?, *supra* note 99, at 726–27; cf. *Quill Corp. v. North Dakota*, 504 U.S. 298, 310–11 (1992) (barring a state from imposing a tax on an out-of-state vendor who does nothing within the state except send products through the mail); *Healy v. Beer Institute*, 491 U.S. 324, 335–36 (1989) (striking down a statute that applied to pricing outside the state’s border). Whether Congress could authorize such state regulation of out-of-state conduct is another question. See Rosen, “Hard” or “Soft” Pluralism?, *supra*, at 727.

233. See generally Bradford, *supra* note 170, at 153–57; Kreimer, *The Law of Choice*, *supra* note 170, at 488–97.

234. See *supra* pp. 1685–86.

235. This is the point that Brilmayer seeks to make the basis of her argument that the territorial state must always prevail in a conflict with the laws of the state of residence. Brilmayer, *supra* note 192, at 889–903. She goes too far in seeking to apply it in contexts where the state has not affirmatively licensed the conduct in question. See also Appleton, *supra* note 38, at 673.

236. See Bradford, *supra* note 173, at 137–47; see also Kreimer, *Right to Travel*, *supra* note 170, at 921–24 (arguing for the application of strictly territorial jurisdiction over criminal matters based on various grounds related to the need to try the case where it arose); Kreimer, *The Law of Choice*, *supra* note 173, at 466 (citing the local jury requirement as a limitation on state criminal jurisdiction). Gerald Neuman, however, has expressed considerable skepticism about the relevance of the vicinage principle. Neuman, *supra* note 177, at 941.

237. According to Bradford, at least fourteen states have no such provision. Bradford, *supra* note 173, at 141. The states that Bradford lists are Alaska, Connecticut, Delaware, Idaho, Iowa, Michigan, Nevada, New Jersey, New York, North Carolina, North Dakota, Rhode Island, Texas, and West Virginia. *Id.*

238. Depending on how the crime is defined, usually at least part of the crime will have occurred in the state, and thus there in fact might be no problem under the vicinage requirement. Cf.

a jury of the vicinage,<sup>239</sup> it also expressly provides for the trial of federal crimes occurring outside of any state<sup>240</sup>—effectively, outside the United States. Moreover, every court but one that has considered the question has concluded that the Sixth Amendment’s requirement of a jury of the vicinage does not apply to the states.<sup>241</sup>

The possibility of a state applying its law to an abortion tourist or to a resident who facilitates the efforts of an abortion tourist can easily be evaded by simply taking up residence in the state where the abortion is sought.<sup>242</sup> This, of course, is not as easy as it sounds. Such a change of residence could be challenged in the state of prior residence as a sham, leaving the defendant exposed to the risk of conviction there.<sup>243</sup> Thus, while a change of residence can be instantaneous,<sup>244</sup> to make certain that it will not be held to be a sham, any purported change of residence will require living there for some time and at least going through the motions of starting a new life there—establishing an address, looking for or taking a job, enrolling in school, securing a new driver’s license, etc. Such things are possible, of course, but they will raise the price beyond the means of many, or perhaps most, women who would like to be an abor-

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Heath v. Alabama, 474 U.S. 82, 94 (1985) (upholding a conviction in Alabama under Alabama law for kidnapping and murder when the kidnapping was in Alabama but the murder was in Georgia); United States v. Cores, 356 U.S. 405, 408–09 (1958) (holding that an alien charged with overstaying his landing permit committed the crime in each district in which he stayed after his permit expired). A few lower court cases have found that venue lay in the district with the more substantial contacts, but this is not a holding that only the most interested district has jurisdiction. See United States v. Goldberg, 830 F.2d 459, 466 (3d Cir. 1987); United States v. Williams, 788 F.2d 1213, 1215 (6th Cir. 1986). Bradford disregards the limited import of these decisions. Bradford, *supra* note 170, at 146–47.

239. U.S. CONST., amend. VI.

240. *Id.* art. III, § 2.

241. Caudill v. Scott, 857 F.2d 344, 345 (6th Cir. 1988); Cook v. Morrill, 783 F.2d 593, 595 (5th Cir. 1986); Wheat v. State, 734 P.2d 1007, 1008 (Alaska Ct. App. 1987); Trindle v. State, 602 A.2d 1232, 1238–39 (Md. 1992) (Eldridge, J., dissenting in part), overturned on other grounds; Commonwealth v. Duteau, 424 N.E.2d 1119, 1126 (Mass. 1981) (*dictum*); State v. Darroch, 287 S.E.2d 856, 859–60 (N.C. 1982); State v. Beuke, 526 N.E.2d 274, 288 (Ohio 1988); State v. Paiz, 817 S.W.2d 84, 85–86 (Tex. Ct. Crim. App. 1991); see Fallon, *supra* note 184, at 635–36. *Contra*: Mississippi Publishers Corp. v. Coleman, 515 So.2d 1163, 1165 (Miss. 1987).

242. Williams v. North Carolina, 317 U.S. 287, 302–03 (1942); see Fallon, *supra* note 182, at 639–40; Regan, *supra* note 78, at 1909.

243. Williams v. North Carolina, 325 U.S. 226, 239 (1945) (upholding a conviction for bigamy after the state court found that the purported Nevada residence was a sham).

244. A change of residence (or domicile) occurs when physical presence is combined with the intent to make the place one’s home. See, e.g., *In re Jones’ Estate*, 182 N.W. 227, 234 (Iowa 1921); White v. Tennant, 8 S.E. 596, 597 (W. Va. 1888).

tion tourist.<sup>245</sup> And even for women who could afford to do so, it would be a significant burden.<sup>246</sup>

### B. Civil Conflicts

Apart from possible criminal prosecutions regarding out-of-state abortions, significant civil litigation concerning abortion could arise if the Supreme Court continues to loosen its standards regarding the permissible scope for different state laws. Civil litigation could involve suits for an injunction against an abortion or the appointment of a guardian for the fetus to approve or prevent an abortion. Or someone who has undergone an abortion could later seek to recover for injuries for malpractice in the performance of the abortion. Each of these suits would require its own distinct analysis under choice of law theory.

Injunctions could be sought either by a public officer or by an interested private person. Perhaps the best known example of such an injunction is *Attorney General v. X*,<sup>247</sup> a case brought in Ireland to enjoin an adolescent girl from going to England for an abortion. Such a suit, although technically on the civil side of a court docket, really is a matter of public law and implicates the same policy concerns that arise in criminal litigation.<sup>248</sup> A suit by the father or other relative of the fetus to enjoin an abortion,<sup>249</sup> however, is a form of private litigation and the applicable

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245. Brillmayer, *supra* note 192, at 879. On the effects of costs on the ability of women to obtain abortions, see Carol Joffe, *Physician Provision of Abortion before Roe v. Wade*, 9 RES. SOC. HEALTH CARE 21, 28–30 (1991); Steven Polgar & Ellen S. Fried, *The Bad Old Days: Clandestine Abortions among the Poor in New York City before Liberalization of the Abortion Law*, 8 FAMILY PLANNING PERSPECTIVES 125, 126 (1976).

246. The burden might be so significant as to be an “undue burden.” *Gonzales v. Carhart*, 127 S.Ct. 1610, 1626–27 (2007).

247. [1992] 1 I.R. 1; see generally *THE ATTORNEY GENERAL V. X AND OTHERS: JUDGMENTS OF THE HIGH COURT AND SUPREME COURT WITH SUBMISSIONS MADE BY COUNSEL TO THE SUPREME COURT* (S. McDonough ed. 1992); Marie Fox & Therese Murphy, *Irish Abortion: Seeking Refuge in a Jurisprudence of Doubt and Delegation*, 19 J. LAW & SOC’Y 454, 455 (1992); Ailbhe Smyth, *The “X” Case: Women and Abortion in the Republic of Ireland, 1992*, 1 FEMINIST LEGAL STUDIES 163 (1993); Paul Ward, *Ireland: Abortion: “X” + “Y” = ?!*, 33 U. LOUISVILLE J. FAM. L. 385 (1995).

248. See Bradford, *supra* note 170, at 92–95; Kreimer, *The Law of Choice*, *supra* note 173, at 457–58.

249. Such suits thus far have been rejected by courts. See, e.g., *Doe v. Smith*, 486 U.S. 1308, 1308–09 (1988); *Conn v. Conn*, 525 N.E.2d 612, 616 (Ind. Ct. App. 1988), *aff’d mem.*, 526 N.E.2d 958 (Ind. 1988), *cert. denied*, 488 U.S. 955 (1988); see also Robin Powers Morris, Note, *The Corneau Case, Furthering the Trends of Fetal Rights and Religious Freedom*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 89, 91–98 (discussing a case in which a woman was kept in custody in a hospital because she declined to have medical assistance with her pregnancy because of her religious views).

law would be determined by the usual choice of law approaches applicable to civil litigation.

Injunctions or other equitable relief depend entirely on personal jurisdiction over the person (natural or artificial) subject to the court order.<sup>250</sup> Even the restrictive view of personal jurisdiction in *Pennoyer v. Neff*<sup>251</sup> allowed a court exercising equitable powers to order a person subject to the court's jurisdiction to do or to refrain from doing something in another jurisdiction. Thus so long as the abortion tourist or someone aiding the abortion tourist is still within the state, a court could order the person not to leave the state and not to have, or facilitate, an abortion in another state so long as the law of the forum would allow such an order. Generally speaking, the person subject to the order from a state court could leave the state and ignore the order, for generally such orders will not be recognized or enforced in another state.<sup>252</sup> If one can obtain the injunction from a federal court, the evasion problem is largely avoided because federal court injunctions have nationwide effect, even if the injunction is issued based upon state law grounds.<sup>253</sup> The person subject to the order could not return to the state without being subject to punishment for contempt of court.<sup>254</sup>

Suits for damages could arise in highly varied circumstances, many of which would run contrary to the policy of a state with a different approach to abortion than the state in which the suit is brought. A father or other relative could seek damages from the mother, the abortionist, or

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250. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 53 (1971). See generally DAN B. DOBBS, LAW OF REMEDIES § 1.3 (abridged ed. 1993); SCOLES ET AL., *supra* note 19, at 1155–59; Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747 (1998).

251. 95 U.S. 714, 723 (1877).

252. State court equitable orders are not entitled to full faith and credit in another state, if only because the orders are modifiable in the state where they originated. See, e.g., *Fall v. Eastin*, 215 U.S. 1, 6–10 (1909); *Meenach v. General Motors Corp.*, 891 S.W.2d 398, 401 (Ky. 1995). The majority in *Baker v. General Motors Corp.*, 522 U.S. 222, 234, 239 (1998), declared in *dictum* that equitable decrees were entitled to full faith and credit between the actual parties to the litigation in which the decree was entered, but did not require the court in another state to enforce the injunction when important interests in that other state would be impaired. See SCOLES ET AL., *supra* note 19, at 1156; Price, *supra* note 250, at 761–81, 791–92; Kaleen S. Hasegawa, Casenote, *Re-Evaluating the Limits of the Full Faith and Credit Clause after Baker v. General Motors Corporation*, 21 U. HAW. L. REV. 747, 754–60 (1999).

253. See, e.g., *Deere & Co. v. MTD Prods. Inc.*, 41 F.3d 39, 46 (2d Cir. 1994) (trademark dilution claims); see generally Price, *supra* note 248, at 786–91 (same). *Contra*: *Ciba-Geigy Corp. v. Bolar Pharm. Co.*, 747 F.2d 844, 854 n.6 (3d Cir. 1984), *cert. denied*, 471 U.S. 1137 (1985). Such orders could still be evaded by departing for another country.

254. *Burt v. Dodge*, 599 N.E.2d 693, 695 (Ohio 1992); see DOBBS, *supra* note 248, § 1.1 at 5, 1.4, at 13–14.

anyone who facilitated the abortion.<sup>255</sup> A pro-life or pro-choice activist could sue for defamation by someone on the other side of the abortion controversy.<sup>256</sup> A child born with injuries from an unsuccessful abortion could sue the abortionist or others involved in the attempt.<sup>257</sup> Perhaps less policy diversity would confront suits where a woman who underwent an abortion was injured through malpractice by the abortionist.<sup>258</sup> In delineating the types of suits possible, imagination is the only limit.

In contrast to the uncertain enforceability of an equitable order, a judgment for money damages must be enforced in every state under the Full Faith and Credit Clause.<sup>259</sup> The conflicts problems arise only before a judgment is entered—when the court chooses the law to be applied in the litigation. That in turn depends upon which of the three different approaches to choice of law the court follows.<sup>260</sup>

The vested rights approach would generally preclude a damages award against persons involved in abortion tourism. The court would have to characterize the claim according to whether it was one for tort, contract, property, or status, but generally for any of these characterizations, the court would apply the law of the place where the abortion took

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255. *Cf. Doe v. Smith* 486 U.S. 1308 (1988) (rejecting a father's suit to enjoin an abortion); *see also* MO. REV. STAT. § 188.250 (Supp. 2007) (authorizing the parents to recover damages against any person who causes, aids, or assists a minor in obtaining an out-of-state abortion).

256. *See, e.g.,* *Horsley v. Feldt*, 128 F. Supp. 2d 1374, 1376 (N.D. Ga. 2000); *cf. Appleton*, *supra* note 38, at 680–81 (discussing free speech concerns in attempts to ban advertising for out-of-state abortions); *Fallon*, *supra* note 182, at 641–46 (same).

257. *See, e.g.,* *Chery v. Borsman*, 75 D.L.R.4th 668 (B.C. S. Ct. 1991); *see* DELLAPENNA, *supra* note 15, at 668.

258. *See, e.g.,* *Gaydar v. Sociedad Instituto Gineco-Quirurgico*, 345 F.3d 15, 18–19 (1st Cir. 2003); *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc); *Perguson v. Tamis*, 937 P.2d 347 (Ariz. Ct. App. 1996); *Vuitch v. Furr*, 482 A.2d 811 (D.C. 1984); *Atlanta Obstetrics v. Coleman*, 398 S.E.2d 16 (Ga. 1990); *Adams v. Family Planning Assocs. Med. Group*, 733 N.E.2d 766 (Ill. App. Ct. 2000); *Collins v. Thakkar*, 552 N.E.2d 507 (Ind. Ct. App. 1990); *Kiddy v. Lipscomb*, 628 So. 2d 1355 (Miss. 1993); *Eidson v. Reproductive Health Servs.*, 863 S.W.2d 621 (Mo. Ct. App. 1993); *Blackburn v. Blue Mt. Women's Clinic*, 951 P.2d 1 (Mont. 1997); *Ferrara v. Bernstein*, 613 N.E.2d 542 (N.Y. 1993); *Phillips v. Triangle Women's Health Clinic*, 573 S.E.2d 600 (N.C. Ct. App. 2002); *Davis v. Fieker*, 952 P.2d 505 (Okla. 1997); *Hunte v. Hinkley*, 731 S.W.2d 570 (Tex. Ct. App. 1987); *Lake v. Northern Va. Women's Med. Ctr.*, 483 S.E.2d 220 (Va. 1997); *see also* 18 U.S.C. § 1531(c) (Supp. IV 2004) (authorizing suit for damages on behalf of the father or, under some circumstances, of the maternal grandparents for the loss of a child through a partial-birth abortion; the statute does not indicate whether the suit is to be against the mother, the abortionist, or both).

259. U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”); *see* SCOLES ET AL., *supra* note 19, at 1159–87; WEINTRAUB, *supra* note 19, at 737–46; William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412, 412–13 (1994) (“This basic rule is so clear and so strong that it might be called the ‘Iron Law’ of Full Faith and Credit.”).

260. *See supra* pp. 1658–64.

place.<sup>261</sup> A court in the resident state of the abortion tourist might decline to follow the law of the place of the abortion on grounds that to do so would violate public policy,<sup>262</sup> but that would not allow the state to substitute its own law in the suit—at least in the classic formulation of the public policy rule.<sup>263</sup> Other escape devices are no more likely to be effective.

Courts adhering to one or another form of interest analysis have more possibilities open to them. Courts would have to analyze the policies involved in the competing laws and determine whether there is no conflict, a false conflict, or a true conflict.<sup>264</sup> If there is no conflict or a false conflict, the resolution of the choice of law problem is easy.<sup>265</sup> For true conflicts, the court would select one or another of the proffered bases for resolving true conflicts.<sup>266</sup>

The resident state of the abortion tourist has an interest in protecting and regulating its citizen<sup>267</sup> and also in fostering respect for life in the form of unborn children located, at least for a time, within its borders.<sup>268</sup> Similarly, the state where the abortion takes place has an interest in regulating or allowing abortions and in protecting persons who seek or pro-

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261. Defamation suits would be more difficult to localize. *See, e.g.*, *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481, 483–85 (3rd Cir. 1956); *Schumann v. Loew's Inc.*, 135 N.Y.S.2d 361, 354–68 (N.Y. Sup. Ct. 1954); *see* RESTATEMENT (SECOND) OF TORTS § 577A reporter's note (1977); *SCOLES ET AL.*, *supra* note 19, at 802–03; *WEINTRAUB*, *supra* note 19, at 457–61; Albert E. Ehrenzweig, *The Place of Acting in Intentional Multistate Torts: Law and Reason versus the Restatement*, 36 MINN. L. REV. 1, 33–35 (1951).

262. *See, e.g.*, *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (1918) (“[Courts] do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”); *see also* *SCOLES ET AL.*, *supra* note 19, at 139–41; *WEINTRAUB*, *supra* note 19, at 106–12.

263. *See, e.g.*, *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 14 N.E.2d 798, 799–800 (N.Y. 1938) (disallowing public policy as a basis for applying the forum's law when nothing connected with the case occurred within the forum state). *But see* *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553, 560–61 (2nd Cir. 1962); *Kilberg v. Northeast Airlines, Inc.*, 172 N.E.2d 526, 527–29 (N.Y. 1961). *See generally* *SCOLES ET AL.*, *supra* note 19, at 140; *WEINTRAUB*, *supra* note 19, at 100–01, 109–11, 683–84.

264. *See supra* p 1661.

265. *See, e.g.*, *Babcock v. Jackson*, 191 N.E.2d 279, 284–85 (N.Y. 1963).

266. *See supra* p. 1661. I leave aside the question of whether “the unprovided for case” should be treated the same way as a false conflict of a true conflict.

267. *See* *Rosen*, “Hard” or “Soft” Pluralism?, *supra* note 99, at 718–25; *cf.* *Tooker v. Lopez*, 249 N.E.2d 394, 399–403 (N.Y. 1969) (applying New York law to an accident in Michigan involving a New York domiciliary riding in a vehicle registered in New York and driven by another New York domiciliary). This interest exists even if, as Susan Appleton argues, abortion is about enforcing gender roles rather than about protecting fetuses. *Appleton*, *supra* note 37, at 660–67.

268. *Gonzalez v. Carhart*, 127 S. Ct. 1610, 1626 (2007); *see also* *Morris*, *supra* note 247, at 99–100.

vide abortions within its borders.<sup>269</sup> So long as the abortion statutes can be fairly construed as expressing policies that promote these interests,<sup>270</sup> the resulting conflict will be a true conflict—even in suits against persons who did no relevant act within the jurisdiction of the particular state.<sup>271</sup> However a court resolves these often contentious questions, the marked bias in favor of applying forum law<sup>272</sup> probably means that each court would apply its own law and the plaintiff could effectively pick the law by picking the forum. This conclusion might be different, however, if the defendant were, for example, a student from an pro-life state who has been studying for several years in a pro-choice state, and who became pregnant and had the abortion there even while retaining a technical domicile in the pro-life state.<sup>273</sup>

Professors Brilmayer and Kreimer have argued that all courts must choose the law most favorable to freedom of choice for abortion.<sup>274</sup> While a court might reach that conclusion, particularly a court in a state whose policy favors freedom of choice, their view is too optimistic if suit is brought in a state that disfavors freedom of choice. Brilmayer (a conflicts scholar) at least sought to develop some sort of interest analysis to support her conclusion.<sup>275</sup> As Gerald Neuman noted, a view such as Brilmayer's "gives excessive attention to the power of territorial states based on the location of particular acts while neglecting the jurisdictional implications of the relationships among those involved in the acts."<sup>276</sup> Kreimer (who repeatedly noted that he is not a conflicts scholar) simply asserted that the interest analysis cases "acknowledge the power of the law of the place where primary conduct occurs to determine its basic

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269. See *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (summary reversal without argument of an injunction against enforcement of Montana's requirement that abortions be performed by a licensed physician); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000) (upholding state regulations of abortion clinics), *cert. denied*, 531 U.S. 1191 (2001), *further appeal*, 317 F.3d 357 (4th Cir. 2002), *cert. denied*, 538 U.S. 1008 (2003). See also DELLAPENNA, *supra* note 15, at 716.

270. See, e.g., *Appleton*, *supra* note 37, at 678–82. See generally Caitlin E. Borgmann, *Legislative Arrogance and Constitutional Accountability*, 79 S. CAL. L. REV. 753 (2006).

271. Cf. *Rosenthal v. Warren*, 475 F.2d 438, 443–47 (2d Cir. 1973) (applying New York law against a Massachusetts physician who did no relevant act in New York). This leaves aside the question of whether the court can obtain personal jurisdiction over the person who did no relevant act within the state.

272. See *supra* pp. 1661.

273. This possibility was first pointed out by Professor Neuman. Neuman, *supra* note 177, at 942.

274. Brilmayer, *supra* note 194, at 897–903; Kreimer, *Right to Travel*, *supra* note 173, at 913–24; Kreimer, *The Law of Choice*, *supra* note 170.

275. Brilmayer, *supra* note 194, at 897–903.

276. Neuman, *supra* note 177, at 950–51.

permissibility or wrongfulness.”<sup>277</sup> Nothing could be further from the truth.

Neoterritorialism puts greater emphasis on the place where the conduct in question occurred, but not absolutely so.<sup>278</sup> Where the parties share the same domicile and the basis of the suit implicates compensatory policies rather than admonitory rules, the court will apply the law of the common domicile.<sup>279</sup> For most of the possible suits arising out of abortions, courts are likely to conclude that the rules are admonitory,<sup>280</sup> but one can hardly be certain.

Finally, the constitutional limitations on choice of law are simply not likely to affect a court’s decision in these matters.<sup>281</sup> Unless the court chooses the law of a state without substantial contact with the parties or the acts or events, the constitutional limitations simply have no role to play.<sup>282</sup> Both the state that is the location of the act in question<sup>283</sup> and the state that is the residence of one or more of the persons involved in the litigation have a substantial connection with the litigation.<sup>284</sup> Thus a court would be justified, even as against non-residents, in applying its own law to resolve a suit for damages.<sup>285</sup> Even if a court were to choose to apply a law unrelated to the parties, the act, or the forum, the choice can only be challenged on direct appeal to the Supreme Court of the United States, and not collaterally attacked in resisting enforcement of the judgment in another state.<sup>286</sup>

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277. Kreimer, *The Law of Choice*, *supra* note 173, at 482. He developed his analysis at length in *id.* at 472–87.

278. *See supra* pp. 1663–64.

279. *First Nat’l Bank v. Rostek*, 514 P.2d 314, 319 (Colo. 1973); *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 685–87 (N.Y. 1985). *See supra* p. 1663–64.

280. *See Cross*, *supra* note 75 (discussing how courts determine whether a law is admonitory—conduct regulating).

281. *See supra* pp. 1673–82.

282. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 735 (1988) (Brennan, J., concurring); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985).

283. *Watson v. Employers’ Liab. Assur. Corp.*, 348 U.S. 66, 71–73 (1954); *P.V. ex rel. T.V. v. Camp Jaycee*, 922 A.2d 761, 765–66 (N.J. App. Div. 2007), *cert. granted*, 927 A.2d 1293 (N.J. 2007).

284. *Cf. Carroll v. Lanza*, 349 U.S. 408, 412–14 (1955); *Pac. Employers Ins. Co. v. Industrial Acc. Comm’n*, 306 U.S. 493, 497–501 (1939). *See generally* Appleton, *supra* note 37, at 671–72; Rosen, *Extraterritoriality*, *supra* note 99, at 871–76.

285. Rosen, “*Hard*” or “*Soft*” *Pluralism?*, *supra* note 99, at 718–25.

286. *Treines v. Sunshine Mining Co.*, 308 U.S. 66, 77–78 (1939). *See* SCOLES ET AL., *supra* note 19, at 1143–46; WEINTRAUB, *supra* note 19, at 741–46.



## IV. CONCLUSION

To the extent that the Supreme Court backs off from being the supreme medical review board for abortion policy and allows states to enact divergent statutes regulating, restricting, or perhaps even prohibiting abortion, conflicts between state laws are bound to arise. So long as some states have less restrictive laws than other states, there will be women willing and able to become abortion tourists<sup>287</sup>—and even in the unlikely event that all states in the United States were to prohibit abortion, there will be abortion tourists going to other countries.<sup>288</sup> The resulting conflicts of law will focus primarily on efforts to apply the law of the state of her residence to the abortion tourist or, more likely, to a person who facilitates the abortion tourist in obtaining an abortion given the unlikelihood that states will treat a woman who obtains an abortion as a criminal.<sup>289</sup>

While the matter is not entirely free from doubt, the state of the abortion tourist's residence most likely will be able to apply its criminal law even though the abortion is legal in the state where it is performed.<sup>290</sup> The resident state of the abortion tourist cannot apply its criminal law to persons who reside outside the state for actions lawful at the place of performance.<sup>291</sup> Furthermore, the resident state of the abortion tourist may apply its civil law even to residents of other states.<sup>292</sup> On the other hand, the persons who might be subjected to an abortion law that they are seeking to escape from can do so by establishing a new residence at the place where they obtain the abortion—even if they resume their former residence subsequent to the abortion.<sup>293</sup> If these conclusions are correct, legislators in states that seek to restrict access to abortion should consider carefully whether to extend its laws extraterritorially to activities involving its residents.

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287. See DELLAPENNA, *supra* note 15, at 572–73, 585, 596–97, 624, 626, 710, 725.

288. One of the major incidents that fueled the abortion reform movement was the well-publicized trip of Sherri Finkbine—the “teacher” on a then well-known television program directed at pre-school children called “Romper Room”—to Sweden to obtain an abortion of a thalidomide baby. DELLAPENNA, *supra* note 15, at 596–97.

289. See *id.* at 240–41, 299–302, 327, 544–45.

290. See *supra* pp. 1682–94.

291. See *supra* pp. 1683–84.

292. See *supra* pp. 1685–91.

293. See *supra* pp. 1694.