Conflict of Abortion Laws

By Joseph William Singer[*]

* Bussey Professor of Law, Harvard Law School. Thanks and affection go to Martha Minow, Mira Singer, Susan Frelich Appleton, Rachel Rebouché, and Mary Ziegler. I am grateful to Harvard Law School for research support for this project. Thanks also to my outstanding research assistants Raine Kennedy, Abby Rubinshteyn, Hannah Stanhill, Sam Spurrell, and Ryan Sullivan.

TABLE OF CONTENTS

I. THE COMING CONFLICT BETWEEN THE STATES 320

II. THE "HISTORY AND TRADITIONS" OF CONFLICT OF LAWS 335

A. *Conflicts of Law at the Time of the Constitution* 335

1. The English Feudal Approach 337

2. The Medieval French-Italian Statutist Approach 339

3. The Dutch Comity Approach 341

B. *The "History and Tradition" of Slavery Law Conflicts* 346

C. *The "Historical" or "Traditional" Place of Injury Rule* 349

D. *The First Restatement's Place of Injury Rule and Its Exceptions* 352

1. Vested Rights and the "Place of the Wrong" 352

2. Exceptions to the Place of Injury Rule Based on Immunity Granted by the Place of Conduct 356

3. Public Policy Exception 360

E. *Summary: Abortion Conflicts in the Light of "History and Tradition"* 361

III. THE MODERN APPROACH TO CONFLICTS OF TORT LAW 365

A. *The Choice of Law Revolution* 365

B. *The Common Domicile Exception to the Place of Injury Rule* 369

C. *The "Conduct Regulating" Exception to the Modern Common Domicile Rule* 372

D. *What limits does the Constitution place on the power of a state to apply its law?* 375

IV. "COMMON-DOMICILE" V. "LONELY DOMICILE" ABORTION CASES 379

A. *Why Anti-Abortion States Cannot Regulate Abortions That Take Place in Pro-choice States* 379

1. Why the Issue Is on the Table 379

2. Why Modern Choice-of-Law Rules Do Not Allow an Anti-Abortion State to Apply Its Law to a Resident Who Obtains an Abortion in a Pro-Choice State 383

B. *Criminal Law* 398

1. Criminal Prosecution for Out-of-State Abortions 398

2. "Penal Laws" 406

V. Cross-Border Abortion Cases 408

A. *Can anti-abortion states regulate abortion providers that provide abortion medication to residents of anti-abortion states who return home to take the medicine?* 409

B. *Can anti-abortion states prohibit shipping abortion medication to people in their states?* 417

C. *Can anti-abortion states prevent pro-choice advocates from speaking about the availability of abortion in pro-choice states?* 418

D. *Does the right to travel protect the right to drive someone from an anti-abortion state to a pro-choice state?* 419

E. *Can anti-abortion states prevent people or companies from subsidizing residents' travel to pro-choice states to obtain abortions?* 421

F. *Can state actors rely on sovereign immunity to provide abortion services in anti-abortion states?* 423

G. *Can states impose their policies on other states by issuing final court judgments?* 426

VI. Conclusion 430

The world has never had a good definition of the word liberty. And the American people just now are much in want of one. We all declare for liberty; but in using the same word we do not mean the same thing. With some, the word liberty may mean for each man to do as he pleases with himself and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men's labor. Here are two, not only different, but incompatible things, called by the same name, liberty. And it follows that each of the things is by the respective parties called by two different and incompatible names, liberty and tyranny.[1]

~ Abraham Lincoln (1864)

Some of the most famous cases and commentary in the evolution of new choice-of-law approaches concerned rules that subordinated women and denied their agency. We should hope that new developments in choice of law do not depend on newly imposed forms of gender oppression.[2]

~ Susan Frelich Appleton (2007)

1 Abraham Lincoln, *Address at the Sanitary Fair* (Baltimore, Apr. 18, 1864), *reprinted in* Abraham Lincoln: His Speeches and Writings 748–49 (Roy P. Basler ed., 2d ed 2001).

2 Susan Frelich Appleton, *Gender, Abortion, and Travel after* Roe's *End*, 51 St. Louis U. L.J. 655, 683 (2007).

I. The Coming Conflict Between the States

Missouri law prohibits almost all abortions while Illinois law not only allows abortion but deems the freedom "to make autonomous decisions" about pregnancy a "fundamental right."[3] When a Missouri woman goes to Illinois to get an abortion, and the two states seek to apply their conflicting laws to her or to people aiding her, what happens?[4] Which law applies?[5] Justice Alito's opinion in *Dobbs v. Jackson Women's Health Organization* noted that some states want to allow abortion while others want to "impose tight restrictions" on it,[6] so the Court was leaving the issue to "the people's elected representatives."[7] But which people? Which representatives? Justice Kavanaugh answered that states may not bar their residents from "traveling to another State to obtain an abortion."[8] Is it really that simple? Is each state free to regulate what happens within their territory but not free to regulate what their citizens do in other states?[9]

3 *Compare* Right to Life of the Unborn Child Act, Mo. Ann. Stat. § 188.017 (2019), *with* Reproductive Health Act, 775 Ill. Comp. Stat. 55/1-15 (2019).

4 The current Missouri statute criminalizes the act of providing an abortion or helping someone to obtain an abortion, but appears to immunize the pregnant person themself from prosecution. Mo. Ann. Stat. § 188.017(2) (2019). Proposed legislation by the National Right to Life Committee also would impose criminal penalties on providers but not the person receiving the abortion. Memorandum from James Bopp, Jr., Courtney Turner Milbank, & Joseph D. Maughon on Nat'l Right to Life Comm. Post-*Roe* Model Abortion L. Version 2 to Nat'l Right to Life Comm. (July 4, 2022), https://www.nrlc.org/uploads/files/NRLCPost-RoeModelAbortionLaw.pdf [hereinafter NRLC Model Legislation]. Indeed, that law gives the pregnant person (as well as the father of the unborn child and the parents or guardians of a pregnant minor) a civil claim against the abortion provider for the "wrongful death" of the "unborn child." *Id.* at 8.

5 *See* Alice Miranda Ollstein & Megan Messerly, *Missouri Wants to Stop Out-of-State Abortions. Other States Could Follow.*, Politico (Mar. 19, 2022), https://www.politico.com/news/2022/03/19/travel-abortion-law-missouri-00018539 (describing proposed bill that would allow private citizens to sue anyone who helps a Missouri resident have an abortion, no matter where they act, and even if the abortion takes place in a state where it is legal); Caroline Kitchener, *Missouri Lawmaker Seeks to Stop Residents from Obtaining Abortions out of State*, Wash. Post (Mar. 8, 2022), https://www.washingtonpost.com/politics/2022/03/08/missouri-abortion-ban-texas-supreme-court/.

6 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 256 (2022).

7 *Id.* at 232.

8 *Id.* at 346 (Kavanaugh, J., concurring).

9 For a thoughtful comprehensive analyses of many of the cross-border issues that will emerge in the post-Dobbs world, *see* David S. Cohen et al., *The New Abortion*

It would be nice if things were that simple, but they are not.[10] State courts adopt choice-of-law rules that sometimes lead them to apply their own laws to events that take place in other states, especially when both parties are domiciled in the state whose law is being applied.[11] If the fetus is an "unborn child" that shares a domicile with the parent carrying them, does that "common domicile" rule apply when a resident of an anti-abortion state travels to a pro-choice state to take advantage of its laws? What if the anti-abortion state passes a statute that *mandates* that its laws apply to its citizens who travel to other states to evade domicile law? Does that violate the Due Process or Full Faith and Credit Clauses?

What happens if an abortion provider in a pro-choice state helps someone obtain abortion medication in an anti-abortion state? When conduct in one state causes injury in another state, courts typically apply the law of the place of injury.[12] But does that rule apply when the place of conduct does not view the conduct as causing injury at all? What happens if the pro-choice state adopts a shield law that immunizes the abortion provider from liability for conduct within the state or even imposes a *duty* on physicians to provide reproductive care services without regard to the domicile of the patient as a matter of medical ethics regulations?[13] What if a Native nation sets up an abortion clinic on tribal land within Indian country?[14] Aren't Indian tribes immune from liability given their sovereign immunity? Or does state law apply because a non-Native person is involved? And if a pro-choice state created a state abortion agency that provided services to people across the border in

---

Battleground, 123 Colum. L. Rev. 1 (2023); Richard H. Fallon, Jr., *If* Roe *Were Overruled: Abortion and the Constitution in a Post-*Roe *World,* 51 St. Louis U. L.J. 611 (2007); Paul Schiff Berman et al., *Conflicts of Law and the Abortion War Between the States*, 172 U. Pa. L. Rev. (forthcoming 2024).

10 *See* Ann Althouse, *Stepping Out of Professor Fallon's Puzzle Box: A Response to* "If Roe Were Overruled," 51 St. Louis U. L.J. 761, 766 (2007) (In the post-*Roe* world, "[W]e would trade one set of legal problems for another, and . . . the dream of excluding the courts from the abortion matter is just a dream . . . ."). On the role Congress might play in regulating state choice-of-law rules about abortion, *see* Susan Frelich Appleton, *Out of Bounds?: Abortion, Choice of Law, and a Modest Role for Congress*, 35 J. Am. Acad. Matrim. L. 461 (2023).

11 *See generally* Joseph William Singer, Choice of Law: Patterns, Arguments, Practices (2020); *id.* § 2.2.2, at 53–62 (discussing "common domicile" cases).

12 *Id.* § 2.1.4, at 30–32; *id.* § 2.3.2, at 113–16.

13 *See* David S. Cohen et al., *Abortion Shield Laws*, 2 N. Engl. J. Med. Evidence 1, 1 (2023).

14 *See generally* Lauren van Schilfgaarde et al., *Tribal Nations and Abortion Access: A Path Forward*, 46 Harv. J.L. & Gender 1 (2023).

an anti-abortion state, would it be immune from liability because it has sovereign immunity?[15]

The Justices who voted to overturn *Roe v. Wade* may not have been aware of the complex conflict-of-laws problems they were creating. Or perhaps they were aware and knew that *Dobbs* would not actually leave the issue to the states. Either way, state courts will need to grapple with these issues, and state legislatures may enter the fray by passing laws that mandate application of their favored policies to out-of-state conduct. When that happens, conflicts of abortion law will return to the Supreme Court for resolution under the Due Process and Full Faith and Credit Clauses. Those cases may also involve free speech rights under the First Amendment and the constitutional right to travel.[16] Far from resolving constitutional questions about abortion, the Supreme Court has (perhaps unwittingly) unleashed a firestorm of conflicts of law that courts will have to deal with for years to come.

So far, anti-abortion states have passed laws that outlaw abortions and provide both criminal and civil remedies against abortion providers and those who help people to obtain abortions.[17] For whatever reason, those states have (mostly) refrained from imposing sanctions on the people who actually get abortions.[18] That may be because anti-abortion states view women as the victims of the "abortion industry"[19] who are misled by abortion providers; it may be because they do not think women are competent to make decisions about their own bodies and have abortions only because others convince them to do so; it may be because the point of anti-abortion laws is to limit the autonomy of women by treating them as not fully responsible for their actions. Or it may just be

15 *See* Franchise Tax Bd. of Cal. v. Hyatt *(Hyatt III)*, 587 U.S. 230, 236 (2019) (states cannot be sued in the courts of other states without their consent).

16 There will also be a need to interpret the Commerce Clause and the Privileges and Immunities Clauses. This article focuses on the core constitutional and common law doctrines about conflict of laws and for those purposes, the Due Process and Full Faith and Credit Clauses are the focus on constitutional analysis.

17 *See, e.g.*, Mo. Ann. Stat. § 188.017(2) (2019) (criminalizing the act of helping someone obtain an abortion); Tex. Health & Safety Code § 171.208 (2023) (civil liability for anyone who helps another person obtain an abortion).

18 *See* Appleton, *supra* note 2, at 664–65 (the fact that anti-abortion laws target providers and not people who get abortions, the likely purpose of those laws is not to protect "unborn children" but to "deny women's agency and decision-making competence and, through paternalism, to perpetuate gender inequality.").

19 *See The Abortion Industry Overview*, Students for Life of Am., https://studentsforlife.org/learn/theabortionindustry/ (last visited Mar. 21, 2024).

that it is not politically popular to go after people who have abortions, perhaps because people worry about their own family members facing draconian sanctions.[20]

While anti-abortion states have, so far, been (mostly) reluctant to go after pregnant people who seek or have abortions, the logic of the anti-abortion position is that embryos and fetuses are "unborn persons," and that raises the possibility that abortion is a form of murder.[21] Taking that perspective seriously, I start with the question of what law would apply if a state authorized a tort survival lawsuit by the "victim" (the fetus or "unborn child") against the person who had the procedure (the "mother" or "parent") when the procedure takes place in a state where abortion is legal. Children take the domicile of their parents, so such a tort survival lawsuit would be between residents of the same state and would concern conduct (and "injury") that took place outside that state. The parties have a common domicile in an anti-abortion state while both conduct and "injury" have taken place in a pro-choice state. A similar case would obtain if a state passed a wrongful death statute authorizing a claim by a relative of the person who got the abortion and required that relative to be a domiciliary of the same state as the person who got the abortion.[22]

---

20 Bills have been introduced in several states to penalize people who get abortions. *See* Gen. Assemb. 7437, 2021 Leg., 244th Sess. (N.Y. 2021); Gen. Assemb. 1127, 2022 124th Sess. (S.C. 2022).

21 *See* Ga. Code Ann. § 1-2-1(b) (2024) ("'Natural person' means any human being including an unborn child."); *id.* § 1-2-1(e)(2) ("'Unborn child' means a member of the species Homo sapiens at any stage of development who is carried in the womb."); Mo. Ann. Stat. § 188.015(10) (2019) (defining an "'[u]nborn child', [as] the offspring of human beings from the moment of conception until birth and at every stage of its biological development, including the human conceptus, zygote, morula, blastocyst, embryo, and fetus[.]"); Alanna Vagianos, *Georgia Says a Fetus Is a Person. The Implications Are Terrifying*, Huffpost (Oct. 20, 2022,), https://www.huffpost.com/entry/georgia-says-a-fetus-is-a-person-the-implications-are-terrifying_n_634f09afe4b03e8038d8fbae; *see also* S. 603, 101st Gen. Assemb., Reg. Sess. (Mo. 2021) (would add new statute at Mo. Ann. Stat. § 188.550 and apply Mo. abortion laws to any abortion performed "outside this state" when it "involves a resident of this state, including an unborn child who is a resident of this state," *see* Mo. Ann. Stat. § 188.550(3)(c)). *See also* Maia Bond, *Missouri Republican Proposes Bill to Enable Murder Charges for Getting an Abortion*, Kan. City Star (May 3, 2023), https://news.yahoo.com/missouri-republican-proposes-bill-enable-173929449.html.

22 Idaho Code Ann. § 18-8807 (2024) (providing civil remedy for wrongful death to a person who receives an abortion or her close family members [father, grandparent, sibling, aunt or uncle of the "preborn child"] against abortion providers for

The anti-abortion state would view both the tort survival claim and the wrongful death claim to be "common domicile" cases, *but the pro-choice state would view these cases quite differently.*[23] Because abortion is a fundamental right in pro-choice states like Illinois, they would see, not a "common domicile" case, but a "lonely domicile" case. When a person goes to another state and causes injury there, all the contacts are in one state except for the domicile of the tortfeasor. In such cases, we *always*

performing an abortion but *not* granting a civil remedy against the person who had the abortion). Wrongful death bills have been introduced in other states and they also allow claims only against abortion providers or people who help a person get an abortion but not the person who actually gets the abortion. *See* H.B. 206, 32d Legis., Reg. Sess. (Alaska 2021); H.B. 1987, 101st Gen. Assemb. (Mo. 2022); S.B. 123, 134th Gen. Assemb. (Ohio 2021); S.B. 1372, 58th Legis. Sess. 1 (Okla. 2022); S.B. 1373, 124th Sess. (S.C. 2022); S.B. 212, 85th Legis. 2d Reg. Sess. (W. Va. 2022); S.B. 94, 85th Legis., 2d Reg. Sess. (W. Va. 2022); *see also* Erika L. Amarante & Laura Ann P. Keller, *Wrongful Death Before Birth*, Med. Liab. & Health Care L. 34–35 (May 2019), https://www.wiggin.com/wp-content/uploads/2019/05/ARTICLE-ONLY_DRI_Dramatically-Different-Thresholds_Wrongful-Death-Before-Birth_Amarante_Keller_May-2019.pdf; Debra Cassens Weiss, *Ex-Husband Is Allowed to Represent Embryo in Wrongful Death Suit Against Abortion Clinic*, ABA J. (July 18, 2022), https://www.abajournal.com/news/article/ex-husband-is-allowed-to-represent-embryo-in-wrongful-death-suit-against-abortion-clinic (man who accompanies his wife to clinic for her to get an abortion is authorized to sue abortion clinic on behalf of the embryo for failing to get informed consent from his wife); NRLC Model Legislation, *supra* note 4 (National Right to Life Committee model legislation would permit wrongful death suits by women who receive abortions, men who conceived the fetus, and the parents of pregnant minors).

23 Such a case also could be brought by the legal representative of the fetus or by a family member empowered to bring a wrongful death lawsuit against co-residents who aid someone in obtaining an abortion. *See, e.g.*, Michelle Goldberg, Opinion, *Abortion Opponents Want to Make Women Afraid to Get Help from Their Friends*, N.Y. Times (Mar. 13, 2023), https://www.nytimes.com/2023/03/13/opinion/abortion-lawsuit-texas.html (ex-husband sues friends of his ex-wife for wrongful death for helping his ex-wife get an abortion); Caroline Kitchener et al., *Texas Man Sues Women He Says Helped His Ex-Wife Obtain Abortion Pills*, Wash. Post (Mar. 10, 2023), https://www.washingtonpost.com/politics/2023/03/10/texas-abortion-lawsuit/; Eleanor Klibanoff, *Three Texas Women Are Sued for Wrongful Death After Allegedly Helping Friend Obtain Abortion Medication*, Tex. Trib. (Mar. 10, 2023), https://www.texastribune.org/2023/03/10/texas-abortion-lawsuit/. *But see* Giulia Heyward & Sophie Kasakove, *Texas Will Dismiss Murder Charge Against Woman Connected to 'Self-Induced Abortion*,' N.Y. Times (Apr. 10, 2022), https://www.nytimes.com/2022/04/10/us/texas-self-induced-abortion-charge-dismissed.html (murder charge against Texas woman for a self-induced abortion is dropped). *Cf.* Mary Ziegler, *The Latest Antiabortion Tactic: Asserting the Rights of Men*, Bos. Globe (Mar. 28, 2023), https://www.bostonglobe.com/2023/03/28/opinion/abortion-mens-rights-fetal-personhood/ (noting that Texas does not punish women who get abortions so how is an abortion a wrongful death?).

apply the law of the place of conduct and injury; indeed, it is (for the most part) *unconstitutional* to apply the law of the tortfeasor's domicile in such cases. And that is especially true if the state where the conduct occurs does not view the actions as tortious at all. Further, a state like Illinois not only denies that a person who voluntarily had an abortion engaged in tortious activity, but Illinois does not even think that those acts caused a *legally cognizable injury*. Illinois sees abortion cases in the same light as if you went from Louisiana to Nevada to gamble. You cannot be prosecuted in Louisiana for gambling when you were acting freely in Nevada based on Nevada's more-permissive laws.

Assuming pro-choice and anti-abortion states will see such cases very differently, what will happen? Since anti-abortion states like Missouri have general personal jurisdiction over their residents, there is no question that a lawsuit could be brought in Missouri against a Missouri resident for undergoing an abortion that took place in Illinois. Illinois courts would apply Illinois law if the case were brought in Illinois, but what will the Missouri courts do? Will they apply Missouri law? Can they? And what if the Missouri legislature *mandates* application of Missouri law? Does it have the constitutional authority to do so?

There are cases outside the abortion context where courts routinely apply the law of the common domicile in torts cases even though both conduct and injury occurred in another state. That rule, however, does not, and should not, apply in the abortion context. One purpose of this article is to explain why that is the case. Further, if an anti-abortion state passes a statute that requires application of the law of what it sees as the common domicile, the Supreme Court will need to determine whether application of that statute violates the Full Faith and Credit Clause of Article IV of the Constitution or the Fourteenth Amendment's Due Process Clause.[24] I will argue that it would violate both clauses for Missouri to apply its law in an extraterritorial manner when its resident acts in another state in reliance on its statutes that

24 A different type of common domicile case involves a claim by a resident of an anti-abortion state against co-residents who aided someone in obtaining prohibited abortion medication from another state. If a state makes a wrongful death claim available by one resident against another and both the conduct and injury occur in that same state, the place of conduct and injury has the constitutional authority to apply its law. Of course, that depends on the state defining the conduct as causing a wrongful death, an uncertain proposition in the absence of a clear statutory mandate. *See, e.g.*, Sarah McCammon, *Texas Man Sues Ex-Wife's Friends for Allegedly Helping Her Get Abortion Pills*, NPR (Mar. 11, 2023), https://www.npr.org/2023/03/11/1162805773/texas-man-sues-abortion-pills; *cf.* Ziegler, *supra* note 23.

define the conduct as comprising a fundamental right, at least when no part of the abortion procedure took place inside Missouri.

A second set of controversies involves "cross-border" torts. Such cases involve conduct in a pro-choice state that produces harmful consequences in an anti-abortion state. That may occur (1) when a doctor in a pro-choice state gives abortion medication to a pregnant person knowing they will take it back to their home in an anti-abortion state to ingest; (2) when a company ships abortion medication to a recipient in an anti-abortion state that bans the sale and use of that medication; (3) when a person in a pro-choice state communicates over phone or internet with a pregnant person in an anti-abortion state to provide information about abortion services legally provided at the place where the information provider is located but not across the border where the information is received (including telehealth services); (4) when a person helps transport a pregnant person across the border to obtain an abortion in another state. This list does not exhaust the types of cross-border conflicts we may see, but it provides a beginning lens with which to understand where lines will be drawn and how laws will be applied in these cross-border contexts.

Cross-border torts have traditionally been resolved by application of the law of the place of injury. The complication in the abortion context is that we are embroiled in a conflict over *whether there is any injury at all*. The anti-abortion state views the abortion as causing the death of a person, and if that "death" occurs in the anti-abortion state, it is the situs of the "injury." More controversially, the psychological harm to family members whose young relative was "killed" may be felt at their home, and if they live in the anti-abortion state, they may claim the abortion caused psychological injury there even if the abortion took place in another state. If relatives of the "unborn child" are given a wrongful death claim for the loss of their loved one, does their domicile have the constitutional authority to apply its law to an act that takes place outside the state? Again, the pro-choice state does not recognize the abortion as causing injury at all since the embryo is not a legally cognizable "person." What law should courts apply if the states cannot even agree on whether or not there was an injury? *Dobbs* pointedly refused to answer this question, but when conflicts of law like this arise, it may have no choice but to take a position on which state has the power to define when an "injury" occurs.

What happens if a pro-choice state grants immunity from prosecution or civil liability to the actor for helping someone else exercise what the pro-choice state views as a fundamental right? If medication is

given in a pro-choice state but ingested in an anti-abortion state, can the anti-abortion state apply its law even if the pro-choice state *authorizes* the provision of the medication? And what if medical ethics law in the pro-choice state *requires* the abortion provider to help a person end their pregnancy as a matter of medical ethics and physician licensing? Does it violate the Due Process Clause to penalize someone for doing something they are *legally required to do* by the law of the place where they are acting? Again, *Dobbs* left these issues on the table for future resolution.

In addition to common domicile cases and cross-border torts is a third type of case, which I have called the "lonely domicile" case. That occurs when all contacts (including conduct and "injury") are in one state, and the only contact with the other state is the fact that it is the domicile of one of the parties. Such cases are typically viewed as "false conflicts" with only one state legitimately interested in applying its law. In general, you do not carry the regulatory laws of your home state around with you when you go to other states. You cannot, for example, commit a tort in Missouri and claim immunity just because you come from Illinois where that conduct is not deemed tortious.[25] Nor do your home state's prohibitive regulations follow you around like a yoke on your shoulders, limiting your freedom when you go to a state where your actions are perfectly lawful. People go to Nevada to gamble and are not subject to prosecution when they return home to Louisiana. In such cases, only one state has a legitimate interest in applying its law in our federal system, and the courts will apply the law of the place of conduct and injury (which is also the domicile of one of the parties) rather than the law of the "lonely domicile" of one of the parties. If a court tries to apply the law of the "lonely domicile" state, the Supreme Court may well hold the chosen law violates the Due Process and Full Faith and Credit Clauses and is unconstitutional.[26]

Lonely domicile cases are easy until we remember that abortion laws make them problematic. Recall that the so-called "common

25 Recently, however, the Supreme Court allowed precisely that result by holding that states cannot be sued in the courts of other states without their consent. Franchise Tax Bd. of Cal. v. Hyatt (*Hyatt III*), 587 U.S. 230, 236 (2019). When a state employee in Illinois travels to Missouri on official business and commits a tort there, the state of Illinois is immune from liability if Illinois law has not abrogated the state's sovereign immunity.

26 *See, e.g.*, John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 182–83 (1936); Home Ins. Co. v. Dick, 281 U.S. 397, 407–08 (1930) (both holding that it may be unconstitutional to apply the law of a state merely because one of the parties is domiciled there).

domicile" abortion cases are actually *lonely domicile cases from the standpoint of pro-choice states.* When a Missouri woman goes to Illinois for an abortion, Missouri may see a tort by one Missouri resident against another (a "common domicile" case), but Illinois will see only a Missouri resident receiving medical treatment in Illinois from an Illinois provider (a "lonely domicile" case).[27] Whether the case is a common domicile case or a lonely domicile case depends on whether the fetus or embryo is a separate legal person, but *that is precisely what the two states disagree about.* The substantive disagreement among the states on the personhood of the fetus/unborn child makes it difficult to determine which fact/law pattern of conflict-of-law rules applies.[28]

In all three patterns of cases, we find areas for debate and disagreement, along with a need for interpretation of existing choice-of-law rules and constitutional standards for legislative jurisdiction.[29] Given the newness of the post-*Dobbs* abortion law landscape, and the fact that new laws are being introduced by legislatures in both anti-abortion and pro-choice states, we can conjecture how state courts and legislatures (and the Supreme Court) will respond to these emerging conflicts of law. Because both anti-abortion and pro-choice states feel strongly about the rights protected by their laws, they may well seek to

---

27 Gerald L. Neuman, *Conflict of Constitutions? No Thanks: A Response to Professors Brilmayer and Kreimer*, 91 Mich. L. Rev. 939, 952 (1993) (suit by a biological father against a woman for leaving the state to get an abortion only works if we view the "woman's termination of her pregnancy as an infliction of harm[.]").

28 Several states have statutes defining a fetus to be an "unborn child" or a "person" or "human being." *See, e.g.*, Ariz. Rev. Stat. Ann. § 36-2321(5) (2022) (defining "human being" as "an individual member of the species homo sapiens, from and after the point of conception[]" and establishing that the "state has an interest in protecting the right to life of the unborn."); Ga. Code Ann. § 1-2-1(b) (2020) ("'Natural person' means any human being including an unborn child."); *id.* § 1-2-1(e)(2) ("'Unborn child' means a member of the species Homo sapiens at any stage of development who is carried in the womb."); Idaho Code Ann. § 18-8802 (2022) ("The life of each human being begins at fertilization, and preborn children have interests in life, health, and well-being that should be protected."); Mo. Ann. Stat. § 188.015(10) (2019) (defining an "'[u]nborn child' [as] the offspring of human beings from the moment of conception until birth and at every stage of its biological development, including the human conceptus, zygote, morula, blastocyst, embryo, and fetus[.]").

29 "Legislative jurisdiction" as opposed to personal jurisdiction or subject matter jurisdiction is the constitutional power to apply a state's laws to a person, event, or transaction. It is subject to constitutional constraints under both the Full Faith and Credit Clause and the Due Process Clause. *See, e.g.*, Sun Oil Co. v. Wortman, 486 U.S. 717 (1988); Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).

extend the application of their laws as far as constitutionally possible, perhaps even mandating extraterritorial application of their standards to persons or events outside their boundaries. While some states may moderate their extraterritorial claims to avoid constitutional problems or to avoid retaliation by other states, the heated issue of abortion may push lawmakers to extremes rather than moderation. The Supreme Court will inevitably need to step in to define the constitutional limits on the powers of both anti-abortion and pro-choice states to apply their laws to events or persons outside their borders.

It is crucial to understand the way courts will analyze these conflicts of abortion law and to understand how the Constitution may (or may not) limit the power of states to apply their laws to events or persons with foreign contacts. We can approach that question using either a traditional or modern framework. *Dobbs* is based on a theory of constitutional interpretation that deems "this Nation's history and tradition" to be dispositive of the meaning of the Due Process Clause.[30] By an unfortunate coincidence, the Due Process Clause is also part of the basis for modern constitutional doctrine about the constitutionality of applying a state's law to a particular person, act, or occurrence.[31] So if the question of abortion rights must be settled by "history and tradition," does that mean the constitutional test for application of state law must *also* be based on "history and tradition"? That places on the table the issue of how conflict-of-laws questions would have been handled in 1791 when the Fifth Amendment was adopted or perhaps in 1868 when the Fourteenth Amendment was adopted.

On the other hand, consistency is not a hallmark of constitutional law for the current Supreme Court. The current constitutional test to determine whether application of a state's law is consistent with due process and full faith and credit is *not* based on original, historical, or traditional approaches to determining what law should apply in multistate cases. Rather, current rules determining when a state can constitutionally apply its law are a creature of *modern* choice-of-law doctrine and come from a Supreme Court ruling in 1981. *Allstate Insurance Co. v. Hague* requires analysis of both state interests and party rights to determine whether a state has legislative jurisdiction over a case (power to apply its law), and those factors were *not* part of the conflict-of-laws

30 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 260 (2022).

31 The test for legislation jurisdiction adopted by Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) rests on a combination of the Due Process clause and the Full Faith and Credit Clause.

doctrine in the eighteenth or nineteenth centuries.[32] While the Supreme Court is unlikely to overturn its holding in *Allstate*, its attachment to "originalism" and to "history and tradition" may push litigators to argue that the Constitution requires application of the conflict-of-law rules that were in place in the eighteenth or nineteenth centuries. It would therefore seem crucial to understand what the "history and tradition" of conflict of laws would require in the case of conflicts of abortion laws.

To further complicate matters, the field of conflict of laws has changed dramatically over time, and each state approaches these issues in a slightly different manner. Conflict of laws is a common law subject governed by state, not federal, common law. Not only have choice-of-law rules changed over time, but the states have adopted wildly different rules to answer choice-of-law questions. Nor has the subject reached a position of stasis. The Third Restatement of Conflict of Laws *is being developed right now*, and it will likely lead to major changes in state conflict-of-laws doctrine over time. Whether state courts will adopt the emerging Third Restatement rules, and how they will apply them, is something we will not know for quite some time, and that will be happening *at exactly the same time as the courts begin facing conflicts of abortion law.* That means that the entire field of conflict of laws may be shaped by the ways courts think about the territorial scope of abortion laws and how to resolve conflicts among them. We are not on a stable plain but a fast-moving train.

Conflict of laws is generally a sleepy subject of great importance to scholars in the field and to litigators, but, in general, it is viewed as technical and obscure by most lawyers, law students, and law professors. The majority of law students do not take a conflict-of-laws course and they learn little about it in the civil procedure classes. But we have had, in U.S. history, fundamental conflicts of state laws that have risen to center stage in the political world. The most recent of these involved same-sex marriage. What happens when a same-sex couple is married in Massachusetts and later moves to Michigan where their marriage is not recognized?[33] Married in one state and unmarried in another, the couple might be denied visitation rights in a hospital,[34] have conflicting

32 *Allstate*, 449 U.S. at 312–13 (defining the modern test for constitutionality of applying a state's law to an event, transaction, or person).

33 *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

34 *Lesbians Sue When Partners Die Alone*, ABC News (May 20, 2009), https://abcnews.go.com/Health/story?id=7633058&page=1; *see also* Tara Parker-Pope, *Kept From a Dying Partner's Bedside*, N.Y. Times (May 18, 2009), https://www.nytimes.com/2009/05/19/health/19well.html (same-sex partners not allowed to visit loved ones in hospital); Meredith Fileff, *Hospital Visitation: The Forgotten Gay Rights Struggle,* 45 J. Marshall L. Rev. 939 (2012).

property rights because of their uncertain marital status,[35] and be denied access to their own children when they are deemed strangers to their spouses and their parental rights are negated.

Congress got involved with the Defense of Marriage Act ("DOMA"), affirmatively empowering states to ignore marriages validly performed elsewhere.[36] Far from clarifying things, not only was it unclear whether DOMA was constitutional, but the fact that a couple married in Massachusetts was not married in Michigan did not necessarily answer peripheral legal questions arising out of the conflict between the laws of Michigan and Massachusetts. For example, if they moved to Michigan, does one of the spouses have to return to Massachusetts to file for divorce since subject matter jurisdiction for divorce is based on the domicile of the parties? Can a spouse living in Michigan ignore child support obligations under Massachusetts law because Michigan deems them to be a stranger to the children? While Michigan courts could adopt a simple domicile rule and refuse to recognize *any* rights or obligations arising under the law of the place of celebration (Massachusetts), Michigan choice-of-law rules might instead require *some* deference to Massachusetts law to avoid imposing conflicting obligations on the parties and conflicting assignment of property rights and custody obligations.

The older and even more painful issue that raised high-level political conflicts over choice of law was, of course, slavery. When Southerners traveled to the North with persons they held in servitude, what happened to their slavery status? Northern states (slowly) abolished slavery between 1800 and 1860,[37] but did that mean that a person was free immediately upon stepping over the border into a free state?[38] Or were enslavers empowered to travel through the North or even "sojourn" there temporarily without losing their property rights in the people they brought with them? While most Northern states allowed slave status to continue in cases of travel or short visits, over time they became less solicitous of slavery laws, and adopted the view that slavery

35 Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 Stan. J. C.R. & C.L. 1 (2005).

36 Defense of Marriage Act, 28 U.S.C. § 1738C (1996) (held unconstitutional in United States v. Windsor, 570 U.S 744 (2013)); *cf.* Obergefell v. Hodges, 576 U.S. 644 (2015) (state prohibition of same-sex marriage violates Equal Protection and Due Process Clauses).

37 *See When Did Slavery Really End in the North?*, Civil Discourse: A Civil War Blog (Jan. 9, 2017), http://civildiscourse-historyblog.com/blog/2017/1/3/when-did-slavery-really-end-in-the-north.

38 *See* Paul Finkelman, An Imperfect Union: Slavery, Federalism, and Comity (1981) (recounting this history).

could not survive once a human being trod on free soil.[39]

Conversely, did a person who was free under the law of Illinois retain that freedom upon returning to Alabama?[40] Could they inherit property in Alabama or did Alabama inheritance law apply to prevent that from happening? To what extent would slave states recognize the free status of Black people from other states that traveled to slave states? Could slave states enslave a free person who entered their territory, just because the person was Black and present within their borders, even though they were free under the law of the place of their birth and domicile?

Our experience with slavery and marriage cases shows that conflicts of abortion laws will be inevitable, emotional, and difficult (or impossible) to resolve in ways that satisfy both sides. And no solution to these choice-of-law issues will be possible without privileging the substantive policy of anti-abortion states or of pro-choice states in cases of conflict. There is simply no “neutral” or apolitical approach to conflict of laws that can command assent from people on all sides of a hotly contested issue. Recall that the states will not even agree on whether an “injury” occurred, much less where it occurred, when an abortion takes place. That means that views on the substantive legitimacy of abortion will inevitably affect the rules adopted to resolve conflicts of law in the abortion context.

Conflicts of abortion law will rest on determinations of what we are, and are not, willing to sacrifice to live with other states whose laws appear to us to be tyrannical. And the language we use will be politically and morally weighted. In the slavery context, we talked about free states and slave states. In the abortion context, we will not agree about which are which. To pro-choice advocates, their states will be the free states and anti-abortion states will be the slave states, forcing pregnant people to give birth against their will. To abortion opponents, the opposite will be true with some states protecting the security and liberty of unborn children and others allowing them to be slaughtered. Living together in a federal system facing such stark conflicts of morality and law will be difficult, and the conflicts of law we are now facing will not be resolved in ways that make everyone happy.

At the same time, we do have a rich tradition of conflict-of-laws doctrine that courts will use to address these issues. Understanding how these issues have been approached over time and analyzed under current

39 *Id.* at 46–181.
40 *Id.* at 236–312.

standards will enable us to see how debates in this area will proceed and how issues will be framed. It is the goal of this article to make both traditional and modern choice-of-law analyses accessible to nonexperts. While I believe Justice Kavanaugh is right when he assumes that people can travel from anti-abortion states to pro-choice states to obtain abortions, it is harder to explain why that is the case than it may seem. Nor do such cases exhaust the conflicts of law we are now experiencing. That is why it is important to understand how choice-of-law doctrine will apply in the abortion context, and why it is especially important to be aware of the arguments both sides will make in contested cases.

Part II considers the "original" or "traditional" or "historical" approaches to conflict of laws that were available and in use in the eighteenth and nineteenth centuries. I do so, despite the fact that no state today follows those approaches, because the *Dobbs* decision was premised on a constitutional interpretation of the Due Process Clause that focuses on "history and tradition." That may affect the way the Court sees the constitutional standards for the application of state law. When we focus on these historical methods, we find that the law that applies to an abortion is the law of the place where the abortion occurs. That outcome would result from any of the historical methods available in 1791 at the adoption of the Fifth Amendment or 1868 at the adoption of the Fourteenth Amendment, including: (a) the English feudal approach; (b) the French-Italian statutist approach; and (c) the Dutch comity approach championed by Justice Joseph Story that became the leading approach to conflict of law in the middle of the nineteenth century. The courts abandoned the comity method toward the end of the nineteenth century and switched to the *vested rights* approach. That approach was enshrined in the First Restatement in 1934 and persisted until the middle of the twentieth century. It turns out that the vested rights approach *also* requires application of the law of the place of conduct and injury such that an abortion that takes place in Illinois would be subject to the law of Illinois, not the law of Missouri, the domicile of the pregnant person.

Part III provides an overview of modern choice-of-law analysis with special emphasis on the development of both the "common-domicile rule" and the "conduct regulating" exception to that rule. That will be followed by a primer on constitutional limitations on the application of state law.

Parts IV and V apply modern choice-of-law theory to the most important fact/law patterns that will emerge in future litigation about conflict of abortion laws.

Part IV addresses the question of what law applies when someone

from an anti-abortion state goes to a pro-choice state to get an abortion and the anti-abortion state authorizes a claim against the person getting the abortion by a relative. Anti-abortion states may characterize such cases as "common domicile" cases whether styled as a tort survival case or a wrongful death case when the plaintiff-"victim" is domiciled in the same state as the person who got the abortion. In contrast, the pro-choice state will see such cases as "lonely domicile" cases if the claim is brought on behalf of the fetus in a tort survival suit. Conduct and injury are in the same state as the domicile of the defendant, and its immunizing rule will be applied when the only contact with the anti-abortion state is the domicile of what Missouri views as the plaintiff "unborn child" or their legal representative.

Conversely, if a wrongful death claim is granted to a relative of the person who got the abortion, we face a conflict between the states on whether the conduct caused an injury. The pro-choice state, where the conduct occurs, does not view it as causing injury at all while the domicile of the plaintiff does see an injury. Wrongful death claims did not originally exist in the common law system; they were created only by statute and have never been written to apply to conduct that takes place in another state. That form of extraterritorial regulation interferes with the sovereignty of the place of conduct and "injury," especially when the conduct is encouraged or privileged by the law of the place of conduct. Moreover, the common domicile rule has *never* applied when the law at the place of conduct is a conduct-regulating rule, as is the pro-choice law in Illinois. It may well violate the Due Process clause to subject an actor to the law of her home state when she relied on the law of the place of conduct that defined the action as based on a fundamental right and the immediate "injury" occurs there as well. In such cases, modern choice-of-law analysis requires application of the law of the pro-choice state. But this settled practice may not stop anti-abortion states from attempting to apply their laws to abortions that occur elsewhere, and the Supreme Court will need to determine whether that violates the Full Faith and Credit Clause or the Due Process Clause. Part IV concludes by asking whether a state can impose criminal penalties on its residents who go out of the state to obtain an abortion and whether the traditional rule that states do not apply the "penal laws" of other states places any limits on the power of a state to apply its law to extraterritorial conduct.

Part V deals with cross-border torts where conduct in a pro-choice state causes injury in an anti-abortion state or where some conduct occurs in both states. Courts have traditionally applied the law of the place of injury when the conduct and injury are in different states,

as long as it was reasonably foreseeable that the injury would occur there. That rule will be contentious in abortion cases where the states disagree about whether there is any injury at all. We may well see courts applying their own (forum) law in cases like this, regardless of what the other state would do in its own courts, given the strong state policies underlying the conflicting laws. The emerging Third Restatement requires application of the law of the place of injury if it was "reasonably foreseeable" that the injury could or would occur there, and the law of the place of conduct if it was not reasonably foreseeable that the injury might happen in another state.[41] How this rule will be applied when the states disagree about whether there was an injury at all is anyone's guess, and the Third Restatement pointedly does not answer this question.

The fact/law patterns likely to emerge in the context of cross-border torts include (a) when conduct in a pro-choice state causes "injury" in an anti-abortion state; (b) when providers in pro-choice states ship abortion medication to recipients in anti-abortion states; (c) when pro-choice advocates provide information about abortion services to people inside anti-abortion states; (d) when people transport others from anti-abortion states to pro-choice states to get abortion services; (e) when companies or individuals seek to subsidize or pay the costs of travel outside the state to get an abortion; and (f) when a state creates a public, state abortion facility that serves residents of anti-abortion states and confers absolute immunity on the facility's employees while conferring sovereign immunity on the facility itself.

The Conclusion offers final thoughts on the role that conflict of laws will play in an era of conflict over fundamental rights.

II. The "History and Tradition" of Conflict of Laws

A. *Conflicts of Law at the Time of the Constitution*

The Supreme Court currently waffles between four approaches to constitutional law: textualism, originalism, "history and tradition," and a "living Constitution." While the conservative Justices that formed the majority in *Dobbs* adamantly reject the "living Constitution" approach, they nonetheless enthusiastically embrace it when needed to protect rights they care about (like property) when other methods

41 Restatement (Third) of Conflict of Laws § 6.09 cmt. f (Am. L. Inst., Tentative Draft No. 4, 2023) (apply the law of the place of injury if it was "reasonably foreseeable" that the injury might occur there; otherwise, apply the law of the place of conduct).

would go against their normative commitments.[42] Moreover, the *Dobbs* opinion itself argued that the Constitution only protects rights that are "deeply rooted in this Nation's history and tradition."[43] That "history and tradition" approach sits uneasily between the originalist approach and the living Constitution approach. It suggests looking for the Constitution's original (traditional) meaning, but it also implicitly acknowledges deviation from original meaning of text because practice and precedent can become a "tradition" over time that becomes, as *Dobbs* put it, "deeply rooted."[44] So changing precedents may change the constitutional "tradition" while seeming to reflect an "historical" meaning that differentiates the approach from one that allows contemporary values, norms, and laws to affect constitutional interpretation. Since all the methods of interpretation (other than the seemingly rejected living Constitution model) are based on "original," "historical," or "traditional" practices, it may be relevant to understand how conflicts of law were resolved at the time the Fifth Amendment was adopted in 1791 or when the Fourteenth Amendment was adopted in 1868. And it may be important to understand how courts thought about and adjudicated conflicts of law at the end of the nineteenth century when the meaning the Fourteenth Amendment first began to crystallize.

Figuring out the "original" or "traditional" or "historical" approach to conflict of laws presents a fundamental problem. For one thing, English conflict-of-laws doctrine for torts cases was not only an undeveloped field in 1791; it was close to nonexistent.[45] Nor did the United States have case law creating a choice-of-law methodology in 1791.[46] To the extent that England had a choice-of-law methodology

42 For example, the Supreme Court has held that the Fourteenth Amendment prohibits taking of private property for public use without just compensation even though the Fourteenth Amendment copied the Fifth Amendment's Due Process Clause, added an Equal Protection Clause, and glaringly *omitted* the Takings Clause. *Compare* U.S. Const. amend. V, *with* U.S. Const. amend. XIV. In my view, that suggests that there is no strong textual or originalist argument for interpreting the Fourteenth Amendment's Due Process Clause to prohibit states from taking property without just compensation. And, of course, the Fourteenth Amendment has been interpreted to give equal rights for women — not something that would have been on the table in 1868.

43 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 230 (2022).

44 *Id.* at 237.

45 *See* Alan Watson, Joseph Story and the Comity of Errors: A Case Study in the Conflict of Laws (2012) (1992) (conflict of laws did not develop in England until the end of the 18th century and focused on issues of jurisdiction rather than choice of law).

46 *Id.* at 47.

for "wrongs" at that time, it was a feudal one that generally denied the possibility of applying foreign law.[47] But English law was not the only potential source of conflict-of-laws wisdom about torts or "wrongs" in 1791. Two competing continental traditions existed. That means that three methods were available in 1791 to determine what law to apply in a multistate case (a case that has contacts with more than one state). They were (1) the English feudal approach; (2) the medieval French-Italian statutist approach; and (3) the Dutch comity approach.

1. The English Feudal Approach

In 1791, there were no English legal treatises or common law treatment of conflict of laws involving torts (or "private wrongs").[48] Indeed, to the extent English courts addressed the issue at all, they tended to reject the idea of applying the law of other states to torts committed abroad. In general, English courts simply applied their own laws to tort cases in their own courts and viewed themselves as having no jurisdiction over injurious events that took place outside the territory of England.[49] This was a relic of the feudal system that defined power as territorially based and territorially limited. The Crown was the owner and ruler of all the realm and had power inside its territory but not outside. Lords had power over their manors but not outside them. And even when English courts eventually recognized jurisdiction over foreign-based tort claims, they "were able to dispense with conflicts rules by applying the law of England to the foreign tort."[50]

This meant that English law applied in English courts when a tort case involved persons and events inside England. If the event giving

47 *See* P.E. Nygh, *The Territorial Origin of English Private International Law*, 2 U. TASMANIA L. REV. 28, 28 (1964) (the British conflict-of-laws system was "the feudal tradition of a legal system territorially restricted in its operation.").

48 WATSON, *supra* note 45, at 48 (only in 1775 did Lord Mansfield declare "there was a duty to give effect to foreign law.").

49 Nygh, *supra* note 47, at 29 ("The law of the realm did not purport to extend beyond its borders nor did its courts venture to exercise jurisdiction in respect of matters which had occurred outside the realm. Likewise the courts had to deny effective operation within the realm to foreign laws and to rights created by foreign law."); *see also* WATSON, *supra* note 45, at 47 (arguing that "issues of jurisdiction hindered the development of conflict of laws" in England); Albert A. Ehrenzweig, *The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement*, 36 MINN. L. REV. 1, 6 (1951) ("For several centuries English courts had chosen generally to avoid foreign contacts by refusing to take jurisdiction as to any case involving a 'fait en une ustraunge terre.'").

50 Ehrenzweig, *supra* note 49, at 7.

rise to the tort claim occurred outside the territory of England, then not only would English law not apply, but the English courts would have no jurisdiction over the case. In this kind of feudal, territorial system, no occasion would arise for the application of a tort law other than forum tort law. That means that no tort conflict-of-laws legal regime existed in England at the time the Constitution was adopted. And the "forum law for forum wrongs" approach continued in England for decades, evolving to a different system only in the second half of the nineteenth century.[51] As early as 1775, English courts did recognize that property and contracts rights might arise under the laws of other nations and that it would be proper not to ignore those rights if the case were litigated in an English court even if English law would deny validity to the agreement.[52] Torts, in contrast, were local matters subject to local jurisdiction.

What would this mean for abortion law conflicts? It would mean that the courts in Missouri would have no jurisdiction over an abortion that took place in Illinois. Missouri could control abortions that take place in Missouri, but only Illinois courts could determine the legal consequences of abortions that take place in Illinois. Perhaps this is what Justice Kavanaugh was imagining when he suggested that people have a constitutional right to travel to a pro-choice state to take advantage of its laws.

The problem, however, is that the United States did *not* adopt English law wholesale. Instead, the courts adopted some parts of English law and rejected others. The rules that were rejected were rules that defined and preserved feudalism.[53] And since the English jurisdictional approach to conflict of laws was based on feudal practices, it was not a foregone conclusion that the states in the United States would embrace it. Indeed, the first American treatises to address the issue of conflict of laws *rejected* the English territorial approach, instead relying on rival continental theories, either the statutist approach or the comity approach.

51 *See* A.V. Dicey, A Digest of the Law of England with reference to the Conflict of Laws with Notes of American Cases (1896); Ernest G. Lorenzen, *Tort Liability and the Conflict of Laws*, 47 L.Q. Rev. 483, 485 (1931) (English courts eventually recognized a claim for damages based on the law of a foreign state where the wrong occurred but only if English law recognized the same claim).

52 Holman v. Johnson, 1 Cowp. 341, 98 Eng. Rep. 1120 (Ct. of King's Bench, 1775) (Lord Mansfield, C.J.).

53 *See, e.g.*, Brendan McConville, Those Daring Disturbers of the Public Peace: The Struggle for Property and Power in Early New Jersey (2003) (exploring the revolt against feudal property rights in New Jersey in the century before the Declaration of Independence).

2. The Medieval French-Italian Statutist Approach

The medieval approach to conflict of laws was based on classifying statutes as "real" or "personal."[54] A *real statute* applied to all property and contracts within a sovereign's territory while *personal statutes* were thought to be "universal" and would follow the person, affecting their status, rights, and obligations no matter where they went. In general, real statutes regulate property and market relations while personal statutes regulate marriage, legitimacy, majority, capacity, and nationality. Samuel Livermore's 1828 treatise entitled *Dissertations on the Questions which arise from The Contrariety of the Positive Laws of Different States and Nations*[55] argued in favor of the statutist approach.[56]

Despite Livermore's enthusiasm for the medieval approach, United States courts soundly rejected it. One reason, as Justice Joseph Story pointed out, was the inherent difficulty of classifying statutes as "real" or "personal."[57] His prime example was the problem of slavery; does it involve the status of a "person" or "property" rights? Story explained:

> Take, for example, two neighbouring states, one of which admits, and the other of which prohibits, the existence of slavery, and the rights of property growing out of it; what help would it be to either, in ascertaining its own duties and interests in regard to the other, to say, that their laws, so far as they regard the persons of the slaves, were of universal obligation; and, so far as they regard the property in slaves, they were real, and of no obligation beyond the territory of the lawgiver?[58]

Nor was the problem confined to the issue of slavery. When Theophilus Parsons published the first contracts treatise in the United States in 1853, it contained rules about all kinds of relationships, including bailor/bailee, master/servant, principal/agent, trustee/beneficiary,

---

54 Singer, *supra* note 11, § 1.3.1, at 5.

55 Samuel Livermore, Dissertations on the Questions which arise from the Contrariety of the Positive Laws of Different States and Nations (1828).

56 *See generally* Rodolfo de Nova, *The First American Book on Conflict of Laws*, 8 Am. J. Legal Hist. 136 (1964) (discussing Livermore's treatise).

57 *See* Joseph Story, Commentaries on the Conflict of Laws, Foreign and Domestic: 27–29 (1834) (explaining the difficulties of distinguishing real and personal statutes and the disagreement among scholars on how to classify statutes).

58 *Id.* at 28–29.

guardian/ward, parent/child, and husband/wife.[59] Some of these relationships might be thought to be regulated by "personal statutes," such as husband/wife or parent/child. Others might be viewed as regulated by "real statutes," such as bailor/bailee or principal/agent. But what about categories like master/servant? Real or personal?

If the United States had adopted the statutist approach, then we would have the difficult task of determining whether abortion regulations are "personal" laws or "real" laws. In general, real statutes affect "things" and personal statutes affect "persons."[60] Samuel Livermore, the only scholarly adherent to the statutist approach in the nineteenth century in the United States, defined "personal statutes" as those "which fix the general state and condition of persons, which determine their capacity for the performance of personal acts, which regard their personal rights and obligations, and which regulate those things which are attached to the person."[61] One might argue that the status of the pregnant person as a "mother" might be created by a Missouri "personal statute" that follows her to Illinois and might govern her rights and obligations as a mother and her capacity to assent to an abortion procedure.[62] Conversely, the status of a fetus as an "unborn child" would arguably be governed by the law of the child's domicile.

However, nowhere in his treatise does Livermore discuss torts. He does, however, discuss "[p]enal laws" or "police regulations" and firmly asserts that such laws do not extend to conduct in another state.[63] Those laws, according to him, are "necessarily local."[64] That would be all the more true if the Illinois statutes affirmatively provide that Illinois law applies to any person who provides, or receives, an abortion in Illinois.[65] It would be astonishing if the Missouri anti-abortion laws were thought

---

59 Theophilus Parsons, The Law of Contracts (1853–1855).

60 *See* Livermore, *supra* note 55, ¶ 28, at 13–14 ("The power of the legislator is to be considered with reference to the object to be affected. If the object to be affected, be the personal condition and capacities of men, the power of the legislator cannot extend so far, as to affect those persons, who are independent of his jurisdiction."); *id.* ¶ 99, at 78 ("To consider this matter abstractly, laws may be said to affect merely persons, or merely things, or both persons and things . . . .").

61 *Id.* ¶ 211, at 128.

62 *Id.* ¶ 177, at 112 (classifying capacity to contract as a "personal" attribute and concluding that the "capacity" to "personal act" extend to the "person beyond his domicil").

63 *Id.* ¶ 40, at 46.

64 *Id. See id.* ¶ 38, at 45 ("[e]ven strangers are subject to the penal laws of the place, in which they may temporarily abide, and in which they commit a crime.").

65 *Id.* ¶ 32, at 16–17 (legislatures have the power to deny claims incurred under the laws of other states).

to be personal statutes that prohibited conduct, not just inside Missouri, but anywhere Missouri residents would travel.

In the end, however, there is literally no support for the view that the statutist approach was the traditional or original or historical law of the United States at the time the Constitution was adopted or when the Fourteenth Amendment came into effect. Once U.S. courts began to confront conflict-of-law issues, they rejected the medieval statutist approach in favor of the Dutch comity theory of Ulrich Huber, as interpreted by Justice Joseph Story in his 1834 treatise on conflict of laws.

3. The Dutch Comity Approach

Dutch legal scholar Ulrich Huber rejected the medieval statutist theory. His *comity* approach embraced the territorial theory while identifying exceptions needed to protect rights acquired under the laws of other states and to prevent evasion of a nation's laws. He argued that a state's laws apply within its territory to all events and persons there.[66] However, "rights acquired" elsewhere should "retain their force everywhere so far as they do not cause prejudice to the power or rights of [a sovereign] or its subjects."[67] While states have no power to tell other states what to do within their borders, it is in the interest of sovereigns to respect each other's laws when they concern events that take place elsewhere. According to Huber, "the laws of one nation can have no force directly with another," yet it would be "inconvenient to commerce" if "transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law."[68] This meant that "all transactions and acts…rightly done according to the law of any particular place, are valid even where a different law prevails, and where, had they been so done, they would not have been valid."[69] "On the other hand, transactions and acts done in violation of the law of that place, since they are invalid from the beginning, cannot be valid anywhere…"[70]

Huber illustrated his basic principles by arguing that wills,

66 Ulrich Huber, *De Conflictu Legum Diversarum in Diversis Imperiis,* in De Jure Civitatis Part III (2d ed. 1684), *revised and included in* Praelectiones Juris Civilis (1700), *reprinted in* Ernest G. Lorenzen, *Huber's De Conflictu Legum,* 13 Ill. L. Rev. 375, 403 (1918).

67 *Id.*

68 *Id.*

69 *Id.* at 404.

70 *Id.*

contracts, and marriages made in another state should generally be held valid if valid by the law of the state where they were made.[71] Rights created by those transactions should be granted "comity" in other states. However, he argued for some exceptions to this principle.

First, the law of another state should *not* be applied if it violates the forum's public policy, as defined by *ius gentium,* the law of nations that is valid everywhere.[72] Incestuous marriages, for example, should not be recognized even if valid at the place the marriage was celebrated; foreign law cannot make something valid that is inherently invalid under natural law.[73]

Second, foreign law should not apply if the parties went to the other state for the purpose of *evading* the forum's regulatory laws. So underage persons should not be able to get married in another state that recognizes their marriage when that violates the law of their domicile.[74]

Third, some legal rules, according to Huber, *do* fit in the "personal" category and follow persons wherever they go. That helps explain, for example, the rule that an underage person cannot go abroad to get married; minority status is based on the law of the domicile and engaging in a marriage elsewhere cannot change that. Those who have a status that limits their legal rights or places them in the care of another cannot evade those limitations by going out of state. A minor or a "prodigal" cannot be burdened by obligations based on transactions in another state because their incapacity to contract follows them abroad. The same is true for married women.[75]

Huber's approach straddled the line between a rigid rule system and a flexible approach. On one hand, he adopted a set of rules to determine when to engage in comity and apply the law of another state, and that approach seemed to be mandated by the unwritten law of nations or *ius gentium,* the "law established by reason among all men and observed equally by all nations."[76] On the other hand, he justified the comity doctrine by noting the "inconvenience"[77] that would result from refusal to defer to the law of another state in appropriate cases. "Convenience" appears to require an assessment of what set of choice-of-law rules would best work to facilitate commerce, protect justified

71 *Id.* at 405–10.
72 *Id.*
73 *Id.* at 410.
74 *Id.* at 411.
75 *Id.* at 414–415.
76 *Id.* at 402; Watson *supra* note 45, at 3.
77 Huber, *supra* note 66, at 403.

expectations, and enable sovereigns to exercise their police powers within their territories.

Alan Watson argues that Huber is firmly on the rules side of this divide, and that his system left no discretion in the hands of judges.[78] But the American scholars who adopted his approach read Huber differently. Chancellor James Kent[79] and Justice Joseph Story[80] embraced the comity approach, and both believed that it meant that judges must exercise *discretion* in determining when it is appropriate to defer to the law of another state to govern a case.[81]

To the extent we can identify an "original" approach to conflict of laws in the late eighteenth or early nineteenth centuries, it would be the comity approach embraced by Kent and Story and adopted by the first courts to address conflicts of law in the United States. Story's embrace of Huber tracked the little case law on conflict of laws that had existed before he published his hugely influential *Commentaries on the Conflict of Laws* in 1834.[82] The rules Story proposed were similar to those in Huber's work on conflict of laws, although with the twist that deference to the law of another state was a matter of discretion rather than mandated by law.[83] Story's comity approach quickly became the

78 Watson, *supra* note 45, at 1–18. Watson argues that, even though the word "comity" connotes discretion, Huber's examples show that he thought the comity principle meant that foreign law was indirectly binding on other states unless one of the exceptions to his third axiom applied. *Id.* at 8–17.

79 *Id.* at 28 ("Every independent community will judge for itself how far the *comitas inter communitates* is to be permitted to interfere with its domestic interests and policy.") (citing 2 James Kent, Commentaries on American Law (2d ed. 1832)). For more on Kent's views, *see id.* at 44, 79–80, 87–89.

80 *Id.* at 18–27, 79–80; *see* Story, *supra* note 57, at 26 ("No nation can be justly required to yield up its own fundamental policy and institutions in favour of another; . . . or to enforce doctrines, which, in a moral, or political view, are incompatible with its own safety or happiness, or conscientious regard to justice and duty.").

81 Watson argues that they misunderstood or mispresented Huber but acknowledges that they did adopt the view that comity was a discretionary doctrine. *Id.* at 18–21.

82 Watson, *supra* note 45, at 56–57. Story approved of the reasoning of an 1827 state Louisiana Supreme Court ruling, *Saul v. His Creditors*, 5 Mart. (n.s.) 569 (La. 1827).

83 Story, *supra* note 57, at 33 ("Every nation must be the final judge for itself, not only of the nature and extent of the [moral] duty [to apply foreign law], but of the occasions, on which its exercise may be justly demanded. And, certainly, there can be no pretence to say, that any foreign nation has a right to require the full recognition and execution of its own laws in other territories, when those laws are deemed oppressive or injurious to the rights or interests of the inhabitants of the latter, or where their moral character is questionable, or their provisions impolitic."); *id.* at 34 ("The true foundation, on which the administration of international law must rest, is, that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconveniences, which

governing theory in the United States and became influential not only in Great Britain but in continental Europe as well.[84]

How do abortion laws fare under the comity approach? On one hand, acts valid when and where made are presumed to be valid elsewhere. That suggests that Illinois law should govern a person who obtains an abortion in Illinois and anyone who performs or aids in performing the procedure there. It also means that a person who sends abortion medication to a recipient in Missouri might well find themselves subject to Missouri law by engaging in an act within the state. On the other hand, comity may not be owed to the law of another state if a resident goes there to evade a state's law or when the law of the other state is "repugnant to the law and interests" of the state.[85]

Under the comity approach, Illinois courts would certainly apply Illinois law to an abortion procedure that takes place in Illinois, but would Missouri courts agree? They might refuse to apply Illinois law on the ground that comity is discretionary, its resident went to Illinois to evade Missouri law, and Illinois law violates Missouri public policy.[86] On the other hand, it is important to recall that the comity principle is an *exception* to two basic rules. Those rules (a) recognize the power of states over what happens in their own territory and (b) deny states power to regulate events outside their territory. Under those basic rules, Missouri courts cannot attach adverse legal consequences to actions in Illinois that are lawful there. While Missouri courts might be reluctant to grant comity to Illinois policy, they may conclude that they do not have jurisdiction over the events that occurred solely within the state of Illinois. All this means that the comity approach introduces a fair amount of ambiguity to the choice-of-law question. But clarity may be restored if we focus on the *reasons* underlying the evasion and public policy exceptions to the place of conduct rule.

The issue here is whether Missouri can *penalize* someone (or impose tort liability on them) for doing something in another state that was perfectly lawful there. The public policy doctrine has been used historically to refuse to recognize rights created by the law of another state; for example, a state might refuse to enforce a gambling

---

would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.").

84 Watson, *supra* note 45, at 58 (Story's approach to comity "was accepted very rapidly by the courts, in England as well as the United States.").

85 *See* Huber, *supra* note 66, at 406.

86 *See id.* at 410 (a state need not recognize a marriage celebrated elsewhere even if valid by the law of the place of celebration if it is "revolting" such as an "incestuous marriage.").

contract valid where made but invalid in the forum. The public policy doctrine was never historically used to *create a right* that would not be recognized at the place of conduct. Nevada, for example, would not enforce a gambling contract made in Louisiana that is unenforceable in Louisiana just because Nevada's public policy endorses enforcement of the agreement.

Similarly, the public policy doctrine might deny recognition to a marriage celebrated elsewhere in an evasion of the law of the parties' domicile, when recognizing rights based on marriage status violates the forum's public policy. Nor would a state count a couple as married if they did not comply with the procedural requirements of the place of celebration when they got "married." However, denying recognition to a marriage is quite different from subjecting a person to *liability* or *punishment* for an act in another state that was *lawful where done.* Louisiana does not punish its residents who engage in gambling in Nevada that is legal there. States do not apply the "penal laws" of other states, and they do not impose their penal laws on their own citizens who act in other states.

The comity principle is premised on the "inconvenience" that would result if a person could not *rely on the law of the place of conduct to determine whether their actions are lawful,* at least where the conduct has no immediate injurious effects across the border. While it may seem problematic to allow someone to evade a state's law by crossing the border to engage in an act prohibited at home, it would arguably deny a person equal protection of law to deny them the benefits of a state's laws simply because they are not domiciled at the place of conduct. Imagine Illinois police refusing to protect someone from attack in Chicago just because they are not an Illinois citizen, or a Nevada casino refusing to allow a California resident to gamble there just because they come from California. And recall that the benefits of the right to travel were one of the advantages of the change from the Articles of Confederation to the Constitution.

While an argument could be made that Missouri should refuse comity to the laws of Illinois when a Missouri resident goes there to evade Missouri protections for unborn children, it is likely that the territory or comity doctrine *requires deference to Illinois law* when a person engages in acts there that are not only lawful but deemed to be fundamental rights at the place of conduct. The "evasion" exception to the comity principle applies *only* when a state refuses to recognize rights created elsewhere;[87]

87 Restatement of Conflict of Laws § 612 (Am. L. Inst. 1934) ("No action can be

that exception *never* applied to allow a state to *create* obligations by imposing its regulations on conduct that was lawful in the place where it happened. If we read Huber's exceptions narrowly, then Missouri may be empowered to refuse recognition to, and enforcement of, a contract made in Illinois that violates Missouri public policy, but that does not give Missouri the power to *penalize* someone for doing something in Illinois that was perfectly lawful there.

If this is correct, then the comity approach would require Missouri courts to apply Illinois law to acts that take place in Illinois. It would be inconsistent with the notion that Illinois has sole territorial jurisdiction over events that take place in Illinois to allow Missouri to criminally prosecute a person for engaging in an action in Illinois that is lawful in Illinois. The same would be true of a civil lawsuit based on conduct in Illinois. That would violate both the territorial principle and the comity principle. When conduct and injury take place in the same state, and the case involves a tort issue, both Huber and Story would likely apply the law of the place of conduct to govern the case. Whether a court in Missouri could stomach that "revolting" outcome is another question.[88]

B. The "History and Tradition" of Slavery Law Conflicts

Before the Civil War, there were few conflicts involving tort law. That is because negligence was not a generally recognized basis for recovery, and most intentional torts involved conduct and injury in the same state, rendering the cases easy to resolve; they would apply the law of the place of conduct and injury regardless of the domicile of the parties. The main context in which courts confronted difficult choice-of-law issues about torts involved conflicts over slave status.[89]

Free states viewed the enslavement of a person as a tortious interference with the "right of personal liberty."[90] In 1827, Chancellor James Kent explained in his *Commentaries on American Law* that "[e]very

maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum.").

88 *See* Huber, *supra* note 66, at 410.

89 *See* Finkelman, *supra* note 38.

90 *See* 2 Kent, *supra* note 79 ("The right of personal liberty, is another absolute right of individuals, which has long been a favorite object of the English law. It is not only a constitutional principle . . . that no person shall be deprived of his liberty without due process of law, but effectual provision is made against the continuance of all unlawful restraint, or imprisonment, by the security of the privilege of the writ of *habeas corpus*.").

restraint upon a man's liberty is, in the eyes of the law, an imprisonment, wherever may be the place, or whatever may be the manner in which the restraint is effected."[91] Kent recognized that many states allowed slavery, but he embraced William Blackstone's view that slavery was "repugnant to reason, and the principles of natural law."[92] On the other hand, slave states would view acts to help free an enslaved person to be tortious interferences with "property" rights.[93] The difference between the two legal systems was based on the question of whether a person could or could not be "property." That, in turn, depended on whether an enslaved person was a "person" with rights of liberty and security.

Abortion conflicts are not the same as slavery conflicts—nothing is. At the same time, both contexts involved disputes about (a) who is a person entitled to liberty and security; (b) whether claims of liberty are legitimate or unjust; (c) how to specify the meaning and scope of rights of liberty and security; and (d) whether something can, or cannot, be treated as "property."

Northern states faced conflicts of laws over slavery when Southerners traveled into Northern states with people they had enslaved. Do property rights in a human being survive entry to a free state? The answer to that question changed over time up until the Civil War. At first, Northern states allowed Southerners to retain "ownership" of persons when they *traveled* through Northern states or lived their temporarily ("*sojourning*" there).[94] Eventually, Northern states adopted a version of the English rule in the *Somerset* case[95] and refused any solicitude to the institution of slavery, finding all persons free the moment they stepped across the border to a free state.[96]

Conversely, Southern states sometimes would defer to the law of free states to recognize the free status of a person emancipated under

91 *Id.* at 26.

92 *Id.* at 201. *See* 1 William Blackstone, Commentaries on the Laws of England 254 (1765) ("[P]ure and proper slavery does not, nay cannot, subsist in England: such I mean, whereby an absolute and unlimited power is given to the master of the life and fortune of the slave. And indeed it is repugnant to reason, and the principles of natural law, that such a state should subsist any where.").

93 *Id.* at 141 ("This duty of protecting every man's personal property, by means of just laws, promptly, uniformly, and impartially administered, is one of the strongest and most interesting of obligations on the part of government. . . ."); *see* Church v. Chambers, 33 Ky. (3 Dana) 274 (Ky. 1835).

94 Finkelman, *supra* note 38, at 46–100.

95 Somerset v. Stewart (1772) 98 Eng. Rep. 499 (KB).

96 Finkelman, *supra* note 38, at 101–81. An exception, of course was "fugitive slaves" or freedom seekers who were regulated by a federal statute and perhaps the Constitution itself.

the law of a Northern state. But again, as we get closer to the Civil War, attitudes hardened, and Southern states began to refuse any comity to Northern laws, even refusing to treat a free Black person from the North as free simply because that person was now in a state that did not recognize freedom for any Black person.[97]

If conflicts of abortion law follow the pattern of conflicts of slavery law, we may see some deference by anti-abortion states to the pro-choice laws of other states. They may agree with Justice Kavanaugh that a Missouri resident has a constitutional right to go to Illinois and take advantage of the protections of Illinois law while there. Returning to Missouri should not subject such a person (or anyone who helped them in Illinois) to civil liability or criminal penalty.

The problem is that we may not be in an analogous situation at all. Attitudes about slavery hardened over time; conflicts over the issue of abortion are *already* hardened.[98] If there is no solicitude for the laws of other states, then Missouri may well seek to apply its law to a Missouri resident who leaves the state to evade Missouri law. And it may certainly seek to apply its law to anyone in Missouri who helps someone travel out of state to obtain an abortion, despite the constitutional right to travel. Indeed, it may seize on *any* contact between an Illinois resident and a Missouri resident as a basis for recognizing jurisdiction in Missouri to extend its law to the nonresident who aids a Missouri resident to evade Missouri law.

Conversely, pro-choice states may apply conflict-of-law rules and defer to the law of anti-abortion states when they involve cases centered there. For example, if a Missouri court applies Missouri law to a Missouri woman who obtained an abortion in Illinois and imposes a damages judgment against her, an Illinois court may feel duty bound under the Full Faith and Credit Clause, as it has been interpreted by the Supreme Court, to enforce that judgment against her if she has moved to Illinois or has property that is subject to execution there.[99] But we may also see increasing resistance in pro-choice states to giving *any* support to anti-abortion policies. Illinois courts may refuse to give full faith and credit to the judgments of Missouri courts no matter what the Supreme

97 *Id.* at 181–235.

98 *See* Emily Bazelon, *Abortion Pills Are Medication/Contraband*, N.Y. Times Mag., Oct. 9, 2022, at 27; *see also* Emily Bazelon, *Risking Everything to Offer Abortions Across State Lines*, N.Y. Times (Oct. 4, 2022), https://www.nytimes.com/2022/10/04/magazine/abortion-interstate-travel-post-roe.html.

99 *See* Fauntleroy v. Lum, 210 U.S. 230 (1908) (courts are obligated under the Full Faith and Credit clause to enforce final judgments of courts in other states).

Court tells them the Full Faith and Credit Clause requires. They may seize on loopholes in the law that allow the law of Illinois to determine the available *methods* of enforcement of a final Missouri court judgment and use that loophole to deny relief.[100] And when they are overruled by the Supreme Court, we may see civil disobedience by state and federal judges or sheriffs asked to enforce the Missouri judgment by seizing the woman's property in Illinois. The law is only as effective as it is in practice, and state officials have occasionally declined to enforce laws they view as unjust or overreaching.

The Constitution changed a confederation of independent states into a single nation, and one of the methods of doing so was to allow the states to exercise police powers within their own territories using their own laws while obligating them to defer to other states to regulate their own affairs. But conflicts-of-law cases always involve a tension between applying what the forum views as the better or more just law and deferring to another sovereign to let it use its "inferior" norms to govern the parties. *The impetus to refuse comity is greatest when the difference between laws is the most intense.* This dynamic is not one we can easily avoid by abstract exhortations of "respect for our federal system." What do we learn from the history of conflict of laws over slavery? We learn that we are already on quite dangerous ground.

C. The "Historical" or "Traditional" Place of Injury Rule

Outside the slavery context, conflict of laws about torts were almost nonexistent from 1789 to the middle of the nineteenth century. Intentional torts involve conduct that causes injury, and the recognized "private wrongs" at that time involved situations where the conduct and injury would be in the same state. They involved, for example, trespass to land, nuisance, assault, battery, and defamation.[101] And when conduct and injury are in the same state, it would have been inconceivable in the nineteenth century to apply the law of any state other than the place where the tort occurred.[102] As the Ohio Supreme Court explained in

100 *See* Baker *ex rel.* Thomas v. General Motors Corp., 522 U.S. 222 (1998).

101 3 William Blackstone, Commentaries on the Laws of England 1, 14, 76, 129–139 (1768). While one can imagine defamation in England harming someone's reputation in France, those cases were not ones that came before English courts at the time.

102 *But see* Needham v. Grand Trunk Ry. Co., 38 Vt. 294 (Vt. 1865) (wrongful death claim created by statute is available at the plaintiff's domicile only if a statute at the domicile recognizes such a claim even if the conduct took place in a state that would allow the claim).

1848 in the case of *Thayer v. Brooks*:

> The actions of trespass and trespass on the case for injuries to land, are local, and in all cases where the act done and the injury sustained are wholly in a foreign jurisdiction, the place of the injury is the place of the trial. This doctrine is universally recognized as a rule of the common law.[103]

But what happens when the conduct and injury are in different states? *Thayer v. Brooks* held that a "case for nuisance" can be brought in the courts of the place of injury.[104] In *Thayer*, the Ohio court applied Ohio law when defendant's diversion of water in Pennsylvania caused injury to the plaintiff's mill in Ohio. In doing so, it applied its interpretation of the common law of property, making no effort to determine whether Pennsylvania courts would do things differently.[105]

Later cases also adopted the place of injury rule when conduct and injury were in different states. For example, in the 1890 case of *Cameron v. Vandegriff*,[106] a rock was blasted from a quarry in Indian Territory (later Oklahoma) and caused injury to the victim over the border in Arkansas. The Arkansas court confidently applied its own law. Justice Hemingway explained:

> The rock which occasioned the injury was put in motion by the appellants in the Indian Territory; but, by the same force, its motion was continued, and the injury done in this state. The cause of action arose here.[107]

Similar results obtained when railroads gave off sparks that harmed landowners across the border in another state,[108] when negligent conduct by a train worker in one state caused injury to another worker in another state,[109] and when a druggist negligently sold the wrong drug

103 Thayer v. Brooks, 17 Ohio 489, 492 (1848).
104 *Id.*
105 *Id.* at 494.
106 Cameron v. Vandgriff, 13 S.W. 1092, 1093 (Ark. 1890).
107 *Id.* at 1093; *accord* Dallas v. Whitney, 188 S.E. 766 (W. Va. 1936) (where blasting operations in West Virginia caused harming to an Ohio house, Ohio law applied).
108 Otey v. Midland Valley R.R. Co., 197 P. 203 (Kan. 1921) (when hay is burned in Oklahoma because of a spark from a train running on the Oklahoma-Kansas line, the law of Oklahoma applies whether the train was operating in Kansas or Oklahoma or on the border).
109 Kan. City, Fort Scott & Memphis R.R. Co. v. Becker, 53 S.W. 406 (Ark. 1899) (tort claim of fireman injured on the job while working on a train running from Missouri to Tennessee is governed by the law of Arkansas where the injury occurred even if the negligent conduct that caused the harm occurred in Missouri); Belt v. Gulf, Colo. & Santa Fe Ry. Co., 22 S.W. 1062 (Tex. Civ. App. 1893) (injury to train worker

to a patient in one state who ingested it and died in another state.[110]

The earliest precedents we have on the subject generally apply the law of the place of injury to determine whether a legal wrong has been committed, whether the conduct occurred in the same state or in a different state.[111] Why did both courts and scholars focus on the place of injury as opposed to the place of conduct? The answer is what I have called the "Hobbes argument."[112] The first job of government, according to Thomas Hobbes, was to create a power capable of protecting us from harm at the hands of other people. If our focus is on laws that protect us from harm, then the question is whether or not the place where a harm was experienced provides protection from that harm and a civil (or criminal) remedy for violation of that protective right.

This might suggest that Illinois law should apply to an abortion that takes place there when conduct and "injury" are in the same state, but that Missouri law should apply if conduct in Illinois causes injury in Missouri or both conduct and injury are in the state of Missouri. It turns out, however, that the place of injury rule has exceptions, and those exceptions require application of the law of the place of conduct in certain cases. Those exceptions apply (a) when the law of the place of conduct views it as wrongful and seeks to deter it or punish the actor for engaging in the wrongful actions[113] or (b) when the conduct takes place

in Indian Territory is governed by its law even if the conduct causing it occurred in Texas); Ala. Great S. R.R. Co. v. Carroll, 11 So. 803 (Ala. 1892) (when negligent conduct in Alabama causes injury in Mississippi to a fellow train worker, Mississippi law applies); Chi., St. Louis & New Orleans R.R. Co. v. Doyle, 60 Miss. 977 (1883) (the law of Tennessee as the place of injury applies even if the conduct causing it occurred in Mississippi).

110 *See also* Moore v. Pywell, 29 App. D.C. 312, 325 (D.C. Cir. 1907) (Maryland law applies to patient killed in Maryland by poisonous drug negligently substituted for a healthful one by a druggist in D.C.; "Where negligence… occurs in one State, and an accident resulting therefrom, causing the death or injury, occurs in another, it is the law of the latter State which governs.").

111 *Cf.* Ehrenzweig, *supra* note 49, at 5–6. Ehrenzweig argues that some courts chose the law of the place of conduct when the main purpose of that law is to punish or deter conduct that is viewed as wrongful rather than to provide compensation for the harm even if the conduct was not morally wrongful. He derived a rule from that observation — that the law of the place conduct should apply in the case of intentional torts, at least when it imposes liability. Our abortion example is the opposite, i.e., where the law of the place of conduct affirmatively *immunizes* the defendant and does *not* view the conduct as creating harm at all.

112 Joseph William Singer, *Hobbes & Hanging: Personal Jurisdiction v. Choice of Law*, 64 Ariz. L. Rev. 809, 846–48 (2022); *see* Thomas Hobbes, Leviathan 88–90 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651).

113 *See* Ehrenzweig, *supra* note 49, at 39–43 (a tortfeasor who commits fraud has

in a state that views the conduct as legitimate and immunizes the actor from liability.[114] The next Section explores the place of injury rule and its exceptions under the choice-of-law rules that prevailed from the mid-nineteenth century to the mid-twentieth century. It is important to note that roughly ten states retain this approach to conflict of laws today.

D. The First Restatement's Place of Injury Rule and Its Exceptions

1. Vested Rights and the "Place of the Wrong"

Joseph Story's comity approach, developed in his 1834 treatise, rested on the idea that states choose to defer to the laws of other states when it is appropriate or "convenient" to do so. Noah Webster's 1828 edition of his *Dictionary of the English Language* defines comity as "mildness and suavity of manners; courtesy; civility; good breeding. Wellbred people are characterized by *comity* of manners."[115] Of course, comity is not necessarily inconsistent with obligation; both moral obligations and the law of nations contain norms that prescribe right conduct—things we *ought to do*. But Story agreed with Huber that "the laws of one people cannot have any direct force among another people," and it is only "comity" and the "convenience and tacit consent of different people," that leads to the conclusion that "the laws of every people in force within its own limits, ought to have the same force every where, so far as they do not prejudice the power or rights of other governments, or of their citizens."[116]

In the early part of the twentieth century, Joseph Beale rejected the comity approach because it appeared to grant courts too much discretion to decide when to apply the law of another state. Writing during the *Lochner* era, he instead adopted the then-powerful normative concept of *vested rights*. His model was the law of contracts and property. In his 1935 *Treatise on the Conflict of Laws,* Beale noted, for example, that "[t]itle to personal property having vested in one state, it continues after the property has been brought into another state . . . ."[117]

---

never been allowed to escape the consequences of their actions just because the harm occurs in another state).

114 *See id.* at 31–32 (discussing § 382(2) of the Restatement (First) of Conflict of Laws, requiring application of the law of the place of conduct when it confers a privilege to do the acts that caused the harm).

115 Noah Webster, Dictionary of the English Language (1828), https://webstersdictionary1828.com/Dictionary/comity.

116 Story, *supra* note 57, at 30.

117 2 Joseph Henry Beale, Treatise on the Conflict of Laws 983 (Baker, Voorhis

On the topic of contracts, Beale focused on the "event [that] is the final one necessary to make a contract."[118] The place where the contract is "made" creates vested rights because a "contract is a promise or set of promises to which the law attaches legal obligation."[119] Beale considered, but rejected, the ideas that the courts should apply the law contemplated by the parties to the contract or the law of the place of performance to determine the validity of agreements.[120] The law of the place of making the agreement governs, according to Beale, because agreements create binding obligations "only when the law affixes to the promise a legal obligation of performance."[121] Beale explained: "If the law at [the] place [of making the contract] annexes an obligation to the acts of the parties, the promisee has a legal right which no other law has power to take away except as a result of new acts which change it."[122] The law of the place of contracting creates a vested right based on the acts of the parties, and no state has legitimate authority to ignore rights validly created and recognized by law.

We earlier noted the "protective" or Hobbesian theory of law. Beale adopted this protective theory in his work on conflict of laws after his appointment as a professor at Harvard Law School in 1892. That work culminated in his treatise in 1935, and the 1934 First Restatement of Conflict of Laws, which embraced his vested rights theory. Beale explained that a "wrong" can only exist if we can identify a "right which is injured by the wrong."[123] Primary rights, like the right to bodily security, are coupled with "protective" or "incidental" rights, which are legal protections from injury to the primary right, and "[t]he injury of one of these protective rights by any person other than the owner is a wrong."[124] Rights protect interests and when those rights are violated,

& Co. 1935). Unfortunately, Beale's example for this proposition involves slavery and property rights in a human being. As noted earlier, the Northern states did recognize vested rights in enslaved persons while traveling or sojourning there but changed their view closer to the Civil War and denied vested property rights in persons as repulsive to their public policy.

118 *Id.* at 1046.

119 *Id.* at 1045.

120 *Id.* at 1079–90. One exception was that a contract to an act in another state that is forbidden there would never be judged a valid obligation in the state where the contract was made. *Id.* at 1087. That argument harmonizes the laws of the two states although it does wind up preferring the law of the place of performance over the law of the place where the agreement was made.

121 *Id.* at 1090.

122 *Id.* at 1091.

123 2 Beale, *supra* note 117, at 1286.

124 *Id.* at 1287.

the law provides secondary and remedial rights to respond to violations of primary legal rights.[125]

Where is a tort "committed," according to Beale?[126] "The place where any tort is committed depends upon the place where [the] incidental right of protection is injured."[127] The question is whether the "place where the tort was committed" creates a right "to recover in tort," and torts are "committed" at the "place where the injurious event occurs."[128] The place of the injury is the "place of [the] wrong."[129] Moreover, "[t]his is true although both parties are elsewhere domiciled."[130] Beale explained:

> It is impossible for a plaintiff to recover in tort unless he has been given by some law a cause of action in tort; and this cause of action can be given only by the law of the place where the tort was committed. That is the place where the injurious event occurs, and its law is the law therefore which applies to it. If, therefore, there was no cause of action created at the place where the person or thing took harm, or if no cause of action there is proved to the court, there can be no recovery for tort.[131]

There is a lot wrong with Beale's reasoning, and it has generally been displaced by more-modern methods of analysis. But his core idea is worth understanding. The purpose of government is to protect people from harm, so the place where a harm occurs has the preeminent authority to determine whether a harm is worthy of legal protection. That, in turn, requires application of the law of the place of injury to determine whether an act was wrongful in a way that gives a right to civil recourse against the person who committed the wrong. That remains the case when the conduct occurred in a different jurisdiction. For that reason, Beale argued that the law of the place of injury should apply when it views the conduct as tortious and the cause of a harm that a person has a legal right to be protected from. That is because the function of a tortious remedy is to protect persons within the jurisdiction from harm or to provide recourse when the duty to avoid harm is violated.[132]

---

125 1 Joseph Henry Beale, Treatise on the Conflict of Laws 1, 63–67 (Baker, Voorhis & Co. 1935).

126 2 Beale, *supra* note 117, at 1287.

127 *Id.*

128 *Id.* at 1288.

129 *Id.* at 1287–88.

130 *Id.* at 1289–90.

131 *Id.* at 1288.

132 *Id.* at 1287–89. Beale adopts a public policy exception, however. A court will not

Conversely, if the place of injury does *not* recognize a tort claim, Beale's view was that no legal redress should be available *even if the act occurred in a state that would recognize a tort claim.* He explained that the place of injury does not grant the victim a "protective right" from that kind of conduct.[133] If the place of injury does *not* view that kind of harm as worthy of legal protection, then the victim is out of luck. Nor does it matter that the place of conduct would find liability; negligent conduct leads to liability only if it causes harm, and when the place of injury says that no harm was done, there can be no tort and no right to recover damages against the "tortfeasor" because one of the elements of a tort claim (legally cognizable harm) is missing.

Beale served as Reporter for the First Restatement of Conflict of Laws, and the American Law Institute adopted his approach to the subject. The 1934 Restatement embraced the place of injury rule.[134] It acknowledged that either state's law could constitutionally apply when conduct and injury are in different states. "[E]ach state in which any event in the series of act and consequences occurs may exercise legislative jurisdiction to create rights or other interests as a result thereof."[135] Nonetheless, the Restatement rules focus on the "last event necessary to make an actor liable," and in the tort context, that is the place of injury.[136]

Before the second half of the twentieth century, both case law and scholarly commentary generally chose the law of the place of injury to determine whether a tort had been committed.[137] Under that traditional approach, a tortious act causing harm creates a right of civil recourse under the law of the place of injury if it provides a remedy for the tort, while no remedy is available if the place of injury does not classify the conduct as wrongful or tortious. That means that, under the traditional place of injury rule, only Illinois law can apply to a "tort" that takes place inside Illinois when both the conduct and injury are in Illinois. Under that approach, Missouri cannot apply its anti-abortion laws to a person who gets or performs an abortion in Illinois; nor can

recognize a tort contained with the law of the place of injury if it violates forum public policy. *Id.* at 1290.

133 *Id.* at 1290–91.

134 RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (AM. L. INST. 1934).

135 *Id.* § 377 cmt. a.

136 *Id.* § 377; *see also* Cameron v. Vandergriff, 13 S.W. 1092 (Ark. 1890); El Paso & N.W. Ry. Co. v. McComas, 81 S.W. 760–61 (Tex. Civ. App. 1904) (both adopting the place of harm rule); Ehrenzweig, *supra* note 49, at 16 (describing the "last event" theory).

137 *But see* discussion *infra* Section II.D.2 for exceptions to the place of injury rule.

Missouri penalize an Illinois actor who provides assistance in obtaining the abortion.

When conduct and "injury" are in two different states, Beale applied the law of the place of injury if it recognized a claim. Thus, if an anti-abortion state created a tort survival or wrongful death claim by family members related to the "unborn child," it might create a tort remedy against the mother or the abortion provider, even if the conduct took place in Illinois, if we conceptualize the psychological harm to the family members as occurring at their domicile. However, Beale somewhat inconsistently argued that damages for the death of another person are governed by the law of the place "where the fatal injury was inflicted" and that means that a state statute giving a "cause of action for death" cannot apply to a death that takes place in another state.[138] The psychological harm is insufficient to constitute an "injury" that occurs in a different state than the place of conduct. Moreover, apparently over his objections,[139] the First Restatement identified *exceptions* to the place of injury rule when conduct and injury are in different states, and those exceptions are of particular importance for cross-border torts in the abortion context. They grant the defendant *immunity when the defendant acts in a state that refuses to recognize the conduct as tortious*, even if the harm occurs in a state that would allow a claim. We explore those exceptions to the place of injury rule in the next Section.[140]

2. Exceptions to the Place of Injury Rule Based on Immunity Granted by the Place of Conduct

Despite his confidence about the place of injury rule, Beale somewhat inconsistently argued for the *law of the place of conduct* to govern whether an act was negligent or violated a legal duty there.[141] The inconsistency arises because negligent conduct is an element of

138 2 Beale, *supra* note 117, § 391.1, at 1305–06.

139 *See* Ehrenzweig, *supra* note 49, at 31, 31 n.136.

140 *Cf.* Max Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 Tul. L. Rev. 165, 168–80 (1944) (discussing cases that Beale argued stand for the place-of-the-wrong rule and arguing that their support for that rule is much weaker than Beale argues and that some cases adopt or suggest application of the law of the place of conduct).

141 2 Beale, *supra* note 117, § 379.1, at 1293 ("The question whether conduct which caused damage was negligent, so as to make the one guilty of it liable for a wrong, is determined by the law of the place where the act or omission claimed to be the cause of the damage took place.").

the claim and if it is defined by the law of the place of conduct as non-negligent, then it should not matter that the place of injury defines the harm as a legally cognizable one. Oddly, all the cases Beale cites in his treatise to support the proposition that the place of conduct determines whether conduct is tortious involve situations where the conduct and injury were in the same state.[142] Those cases therefore provide *no precedential support* for a place of conduct rule when the injury is in another state. Moreover, despite asserting that the law of the place of conduct determines whether an act is negligent or violates a legal duty owed to someone else, Beale's treatise nonetheless staunchly adheres to the place of injury rule, whether the place of conduct recognizes a tort or does not recognize a tort. Beale argued that a victim cannot recover if the place of injury does not recognize the conduct as tortious, even if it was tortious under the law of the place of conduct.[143] He also argued that a claim recognized by the place of injury can be brought even if the conduct occurred in another state that would *not* count the conduct as tortious.[144]

However, as Reporter for the First Restatement of Conflict of Laws, Beale presided over a document that created four exceptions to the place of injury rule. One is the *public policy exception*, discussed below in the next Section. The other three were *immunity rules* protecting actors from liability when they act in a state in reliance on a law there that limits or denies liability or that creates a duty to engage in the conduct. Beale created ambiguity about the place of injury rule in his treatise when he declared that the place of conduct law determines whether conduct is negligent.[145] That thought may be what led to the three immunity rules

142 *Id.* at 1293 n.2; *see* St. Louis S.F. Ry. Co. v. Whitfield, 245 S.W. 323 (Ark. 1922) (applying Oklahoma law to collision between train and car because both conduct and injury took place there); St. Louis S.F. Ry. Co. v. Rogers, 290 S.W. 74 (Ark. 1927) (applying Missouri law to an accident in Missouri); Yazoo & M.V.R. Co. v. Littleton, 5 S.W.2d 930 (Ark. 1928) (Tennessee law applies to negligent failure to help in Tennessee); Hines v. Evitt, 103 S.E. 865 (Ga. Ct. App. 1920) (Tenn. law applies to accident in Tenn.); Hill v. Chattanooga Ry. & Light Co., 93 S.E. 1027 (Ga. Ct. App. 1917) (law of the place of conduct and injury applies to an accident); Wheeler v. S. Ry. Co., 71 So. 812 (Miss. 1916) (law of the place of conduct and injury applies); Morris v. Chi. R.I. & P. Ry., 251 S.W. 763 (Mo. Ct. App. 1923) (applying Iowa law as the place of the accident); Gersman v. Atchison T. & S.F. Ry., 229 S.W. 167 (Mo. 1921) (applying Kansas law where the accident occurred).

143 "If by the law of the place where the defendant caused an event to happen, this event created no right of action in tort, no action can be brought on account of the wrong in any other state." 2 BEALE, *supra* note 117, at 1298.

144 *Id.* at 1290.

145 *Id.* at 1293–96.

in the First Restatement—rules that are exceptions to the place of injury rule in the context of cross-border torts.

First, under Restatement (First) of Conflict of Laws § 380(2), where liability at the place of the wrong depends on a certain "standard of care" and the place of conduct defines "certain conduct, as specific acts or omissions, to be *or not to be* negligent,"[146] then the law of the place of conduct applies. This suggests that someone who gets an abortion in Illinois, where state law defines the act as an affirmative right without liability or penalty, should be able to rely on the law of the place of conduct to immunize them from liability. That rule would also protect an abortion provider from liability if they provide a patient with abortion medication in a state in which that is lawful, *even if the patient brings the medication back to an anti-abortion state to ingest.*

Second, under § 382, the law of the place of conduct applies if that state either grants a person *immunity* from liability for an action or legally imposes an *obligation to act* in the manner that the person did act.[147] The rule states that a "person who acts pursuant to a privilege conferred by the law of the place of acting will not be held liable for the results of his act in another state."[148] Again, if Illinois law gives a person a privilege to obtain an abortion (and specifically immunizes the provider from liability),[149] the First Restatement would require application of Illinois law *even if Missouri law finds a harmful consequence of that act inside Missouri.* Similarly, if a doctor acts in Illinois pursuant to a duty to provide medical care, and Illinois immunizes them from liability for their actions, the First Restatement requires application of the immunizing law of the place of conduct.[150]

146 Restatement (First) of Conflict of Laws § 380 cmt. b (Am. L. Inst. 1934) (italics added). However, if both states adopt a general negligence test, the forum applies its own procedures to determine, as a factual matter, whether the conduct was negligent. *Id.* § 380(1); *id.* § 380 cmt. a.

147 Restatement (First) of Conflict of Laws § 382(1)–(2) (Am. L. Inst. 1934). For thoughts on the inconsistency between § 382 and the place of injury rule, *see* Rheinstein, *supra* note 140.

148 Restatement (First) of Conflict of Laws § 382(2) (Am. L. Inst. 1934); *see* Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 Mich. L. Rev. 873, 892 (1993) ("[A] clear difference exists between the policy of indifference and the policy of license"); *cf.* Lorenzen, *supra* note 51, at 485 (English law in the 19th century would not recognize a claim under English law if no claim was available under the law of the place of conduct and injury).

149 Ehrenzweig, *supra* note 49, at 31–32 (noting that the First Restatement creates a place of conduct rule when a law confers a specific privilege to do an act rather than merely leaving conduct unregulated).

150 Restatement (First) of Conflict of Laws § 382(1) (Am. L. Inst. 1934);. *see* Katherine

Third, in § 387, a person is not liable for the acts of their agent if the agent has no authority to act in the state where the harmful conduct occurred. Once again, we see a rule that protects an actor from liability if their conduct causes harm in a state with which they have no connection and they could not foresee their conduct creating harm there because they did not authorize conduct in that jurisdiction. This vicarious liability rule generally applies only to the employer-employee relationship or other principal-agent relationships. But it supports the norms underlying the other two immunizing rules to protect a person from liability if the state in which they act affirmatively immunizes them from any adverse legal consequences for their actions, even if those harms occur in another state that would count the conduct as tortious.

In summary, under the "traditional" vested rights approach embraced by the First Restatement, the law of the place of injury generally applied both (a) when conduct and injury were in the same state and the parties were domiciled elsewhere and (b) when conduct and injury were in different states, whether the place of injury granted the plaintiff a claim or immunized the defendant from liability. But, under § 382 of the First Restatement, an immunizing law at the place of conduct *would* prevail to protect the defendant from liability if it was specifically structured to place a *duty* on the defendant to engage in the action (despite any resulting harm) or it conferred an *affirmative privilege* to engage in the action without liability (an immunity rule). That means that the First Restatement requires application, not of the law of the place of injury, but of the law of the place of conduct when conduct takes place in a state like Illinois that either authorizes the actions or mandates the provision of those medical services, even if an "injury" manifests in another state. That rule has even stronger justification when the place of conduct does not even recognize the resulting harm as a legal injury—and that describes Illinois' attitude toward lawful abortions.[151]

Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 Notre Dame L. Rev. 1057, 1114 (2009) ("inconsistent obligations" under the laws of two different states "raises obvious fairness concerns").

151 Under modern law, wrongful death or survival claims are sometime created under the law of the common domicile of the parties even if the law of the place of conduct and injury would not allow them, but that only occurs when the underlying conduct is unlawful where it occurs. For example, the California Supreme Court applied the law of California to allow the victim's tort claim to survive the death of the plaintiff even though the place of the accident (Arizona) did not allow tort claims to survive. Grant v. McAuliffe, 264 P.2d 944 (Cal. 1953). But the underlying conduct—negligent driving—was unlawful in Arizona where it took place. The

3. Public Policy Exception

Both Beale and the First Restatement embraced a general but limited *public policy* exception to otherwise applicable conflict-of-laws rules.[152] The First Restatement provides that "[n]o action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the *strong public policy of the forum*."[153] A claim for relief under the law of a state can be rejected in courts in another state if recognizing the right of action would violate the forum's strong public policy. However, a broad employment of this principle would lead back to the English feudal or territorial approach of denying any force to the laws of other states if they are contrary to forum law by refusing to hear claims based on those despised laws. For that reason, both Beale and the First Restatement defined the public policy exception as "extremely limited."[154] A foreign-created right will not be recognized *only* when the law it is premised on violates a "strong" forum policy.[155]

While the public policy exception has sometimes been wrongly used to create legally enforceable rights under the law of the place of conduct,[156] almost all relevant precedents only accept use of the public policy exception when doing so will *deny* recognition of a claim.[157] For example, suppose Missouri passes a wrongful death statute that allows a relative to sue a person for damages for having an abortion. Suppose further that the abortion took place in Illinois and suit is brought there. The public policy exception would allow Illinois courts to refuse

case would almost certainly have turned out differently if the conduct had been privileged in Arizona.

152 3 Joseph Henry Beale, Treatise on the Conflict of Laws, 1598, § 612.1, at 1647–51 (Baker, Voorhis & Co. 1935).

153 Restatement (First) of Conflict of Laws § 612 (Am. L. Inst. 1934) (emphasis added); 2 Beale, *supra* note 117, § 378.3, at 1290 (emphasis added) (a legal right based on the law of the place of injury cannot be enforced if enforcing the right "is against [the] public policy of the forum.").

154 3 Beale, *supra* note 152, at § 612.1, at 1651.

155 *Id.*

156 *See, e.g.*, Kilberg v. Ne. Airlines, Inc., 172 N.E.2d 526 (N.Y. 1961) (applying the forum damages law of New York to a Massachusetts accident, thereby increasing the damages owed for wrongful death).

157 *See* Joseph W. Dellapenna, *Abortion Across State Lines*, 2008 BYU L. Rev. 1651, 1698 (2008) ("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 [its] public policy, 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.").

to enforce rights under Missouri law even if the choice-of-law rules of Illinois would otherwise require application of Missouri law.[158] That kind of ruling would force the plaintiff to sue the defendant in Missouri, whose courts would have general jurisdiction over the defendant if they were domiciled there. Modern choice-of-law doctrine, discussed below, dispensed with the public policy exception because there was no need to have an escape device to a choice-of-law rule that the forum rejects. The forum, instead, simply determines that it has a stronger (and more legitimate) interest in applying its law than does the state with the revolting legal rule.

Under the First Restatement, the public policy exception does not apply when the law of the place of conduct and injury *denies* a claim.[159] When a case is brought in Missouri concerning an abortion that took place in Illinois, the First Restatement requires application of the law of Illinois (as the place of conduct and injury) even if Illinois law violates Missouri public policy. The public policy exception applies only to allow a court to refuse to grant a plaintiff relief by recognizing a claim the forum rejects. It is of course true that Illinois abortion law violates a strong public policy of the state of Missouri, but the public policy exception does not require or even allow application of Missouri law in this instance. Under the vested rights theory, only Illinois has legislative jurisdiction to apply its law; Missouri cannot create a cause of action that is not available in the state where the "injury" occurred. That would mean that both Missouri and Illinois courts would be obligated under the First Restatement to apply Illinois law even though the Illinois law violates Missouri public policy.

E. Summary: Abortion Conflicts in the Light of "History and Tradition"

In 1791, there were arguably three different approaches to conflict of laws available to American courts. The first was the English feudal territorial approach. After the Revolution, the states generally adopted English common law, except for its feudal aspects that were inconsistent with allodial (nonfeudal) property and the American abolition of titles of nobility. That approach would require Illinois courts to apply Illinois

158 I have explained that, under traditional rules, the law of Illinois would apply in this case since it is the place of both the conduct and the injury.

159 *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 612 cmt. a (AM. L. INST. 1934) (emphasis added) (public policy exception applies when "the entire basis of the *claim upon which suit is brought* is so contrary to the public policy of the forum that it will withhold altogether the use of its courts to enforce the claim.").

law to an abortion that takes place in Illinois. It would also deny Missouri courts jurisdiction over conduct that took place outside Missouri. That would mean that only Illinois law could apply to an abortion that took place inside Illinois.

The second possibility was the medieval statutist approach that distinguishes between statutes that affect "things" and statutes that affect "persons."[160] We saw that courts rejected this theory and that its one scholarly proponent, Samuel Livermore, would likely have classified Missouri's abortion laws as "penal laws" or "police regulations" that do not extend to conduct in another state.[161] Those laws, according to him, are "necessarily local."[162] It would be astonishing if the Missouri anti-abortion laws were thought to be personal statutes that prohibited conduct, not just inside Missouri, but anywhere Missouri residents would travel.

The third possibility is the Dutch comity approach that American courts adopted once they were forced to choose an approach to conflicts of law. Both Huber and Story would likely require application of the law of the place of the tort, not the domicile of the "mother" to determine liability for conduct. This is a prime example of a case where comity is given to the law of another state so it can govern events within its own territory.[163]

Any of the three approaches would result in the application of Illinois law to conduct that takes place in Illinois when the "injury" also occurs there. Under these "historical or traditional" choice-of-law rules, Missouri has no authority to apply its law to an act that was lawful where it happened. The converse is also true: if both conduct and injury occur in Missouri, its law will govern the event.

The middle case is more complicated. If conduct occurs in Illinois while the injury happens in Missouri, that cross-border tort engages

160 *See* Livermore, *supra* note 55, ¶ 28, at 13–14 (1828) ("The power of the legislator is to be considered with reference to the object to be affected. If the object to be affected, be the personal condition and capacities of men, the power of the legislator cannot extend so far, as to affect those persons, who are independent of his jurisdiction."); *id.* ¶ 99, at 78 ("To consider this matter abstractly, laws may be said to affect merely persons, or merely things, or both persons and things . . . .").

161 *Id.* ¶ 40, at 46.

162 *Id.*; *see id.* ¶ 38, at 45 ("[E]ven strangers are subject to the penal laws of the place, in which they may temporarily abide, and in which they commit a crime.").

163 *See* Seth F. Kreimer, "*But Whoever Treasures Freedom . . .": The Right to Travel and Extraterritorial Abortions*, 91 Mich. L. Rev. 907, 912 (1993) ("The Framers both of the Constitution and of the Fourteenth Amendment wove into the fabric of the Constitution the presumption that states' regulatory authority ended at their own boundaries.").

Missouri's territorial sovereignty. That is because the act disturbs the peace, is invasive of Missouri territory, and arguably harms a Missouri resident at home. That is not an act that the state of Missouri needs to tolerate. But if the actor could not foresee the injury occurring across the border, application of the law of the place of injury may be unfair to a person who relied on the law of the place of conduct in determining whether that conduct was lawful, especially if that law affirmatively authorizes or privileges the conduct. We should note, however, that before the Civil War, cross-border torts were virtually nonexistent (except, as we have seen, in the slavery context which presented issues of property and liberty, as well as tort). That means we have no precedents clearly on point to help us determine where "history and tradition" lead us in resolving cross-border torts.

Application of the traditional First Restatement approach would require application of Illinois law to an abortion that takes place in Illinois. This follows from the place of injury rule, especially when the conduct and injury take place in the same state. The same result would be obtained if there were conduct in Missouri (such as driving someone to Illinois) with resulting injury in Illinois; Illinois law applies when the injury occurs there. Nor have wrongful death statutes applied to deaths that occur in other states. Further, the exceptions to the place of injury rule paradoxically reinforces the appropriateness under the First Restatement of applying Illinois law because they require application of the law of place of conduct when it gives a person a privilege to act without liability or imposes a duty to act. The fact that conduct and injury take place in the same state thus strengthens the case for application of Illinois law.

While the issue is more uncertain if Missouri views the conduct in Illinois as causing harm in Missouri (psychological harm to family members of the "unborn child," for example), the exceptions to the place of injury rule would seem to apply to cases of that nature. An actor in Illinois performs an act authorized by the law of the place of conduct and in reliance on its immunizing rules; to subject that actor to the contrary law of another state would arguably be fundamentally unfair, even a violation of due process of law. That is why the First Restatement altered the place of injury rule in such cases, and that would mean that only Illinois law should apply to the person obtaining the abortion or to the provider even if the domicile state views the conduct as causing tortious injury to one of its residents.

The field of conflict of laws has changed dramatically over time. Modern iterations are more nuanced and have better resources to explain

why one state should defer to another than those available at the time of the Founding and for most of the nineteenth century. Moreover, current law includes a test for determining when it is constitutional to apply the law of another state, and that test is *not* one based on originalism or the text of the Constitution or even "history and tradition." Like the minimum contacts test for personal jurisdiction,[164] the constitutional standard for application of state law is based on *modern* conceptions of state interests and party rights. The test in the 1981 case of *Allstate Insurance Co. v. Hague*, requires analysis of the contacts with the state whose law is applied to determine whether it has a legitimate interest in applying its law, along with consideration of whether application of that law would be fundamentally unfair to any person.[165]

That means that the Constitution currently *requires* application of a modern approach to determine the legitimacy of applying the law of a state to a controversy. The Supreme Court, in its originalist and traditionalist fervor, could of course overrule *Allstate* and its progeny and embrace a "historical" approach to determine when a state has the constitutional power to apply its law to a case. But until it does so, we must use modern methods of analysis to adjudicate conflicts of abortion law to ensure that their application conforms to constitutional standards. In my view, the current Supreme Court is highly unlikely to adopt an "originalist" approach to legislative jurisdiction, partly because there were three competing "original" methods and because the conservative Justices on the Court are more likely to be more attracted to the rigid, rules-based vested rights approach embodied in the First Restatement than the historical comity approach, even though the vested rights approach was not invented until the end of the nineteenth century. Moreover, using originalism to determine the constitutionality of a choice of law would destabilize personal jurisdiction doctrine. The answer to conflicts of abortion law will likely come from application of *modern* theories of conflict of laws, not from "history and tradition."

We have nonetheless analyzed "historical" and "traditional" approaches to conflict of laws because the Supreme Court's opinion in *Dobbs insisted* that the Constitution be interpreted in light of "history and tradition." It is a striking observation that, under any version of the "original" approach to conflict of laws in effect either at the time of adoption of the Bill of Rights or the Fourteenth Amendment, Missouri would have no legitimate authority to regulate its residents who go out

164 *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351 (2021); Int'l Shoe Co. v. Wash., 326 U.S. 310 (1945).

165 Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).

of state to get an abortion, and much less would they have that authority over abortion providers lawfully providing abortions in a pro-choice state like Illinois.

But can we rely on anti-abortion activists (including state legislatures and state supreme courts) and the Supreme Court itself to embrace an originalist, historical, or traditional approach to conflict of laws? The answer is "no." Modern methods of analysis provide a path to apply state law to a tort that occurs in another jurisdiction, but only in appropriate cases. What is the modern approach, and why might it, at first impression, give an avenue to justify application of Missouri law to an abortion that takes place in Illinois? And why is that first impression mistaken and indefensible? That is where we turn next. Part III gives needed background on modern choice-of-law theory and doctrine, along with important background principles of constitutional law that impose constraints on the power of states to apply their laws to events that occur elsewhere. Parts IV and V address the most likely fact/law patterns for the coming conflicts of abortion law.

III. The Modern Approach to Conflicts of Tort Law

A. *The Choice of Law Revolution*

The mid-twentieth century saw a major breakthrough in conflict-of-laws theory and doctrine. The change was so large that it has been referred to as the "choice-of-law revolution."[166] Although Beale's vested rights theory had been under attack as early as the 1920s and 1930s by legal realists like Walter Wheeler Cook[167] and David Cavers,[168] it was not until Brainerd Currie invented "interest analysis" in an article in the 1950s that a new method of analysis was born.[169] The 1971 Restatement (Second) of Conflict of Laws rejected the vested rights approach, embraced interest analysis, and required application of the law of the state with the "*most significant relationship*" to the parties and the transaction or occurrence, taking into account a list of factors

166 *See* Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 Colum. L. Rev. 772 (1983); Howard M. Friedman, *Searching for a Blue Sky Remedy–A Forum Shopper's Guide*, 15 Wayne L. Rev. 1495, 1497 (1969) (referring to the "choice-of-law revolution").

167 *See* Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 Yale L.J. 457 (1924).

168 David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 Harv. L. Rev. 173 (1933).

169 Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. Chi. L. Rev. 227, 227 (1958).

including the *policies* underlying the conflicting state laws, the *relative strength of state interests* in applying those policies to the case, the *justified expectations* of the parties, and the goal of achieving *predictability* and *uniformity* in choice-of-law determinations.[170] Adopted in some form by most states, modern choice-of-law analysis made a host of important changes in choice-of-law doctrine. Several points bear mention here.

First, both scholars and courts embraced the notion that state sovereignty *overlaps*, and that more than one state may have the power under the Constitution to apply its law to a particular event.[171] The comity theory had acknowledged this, but Beale's vested rights approach embraced by the First Restatement had (mostly) denied it, insisting that only one state had the sovereign legislative power over a particular transaction or occurrence.[172] While we need rules of law to choose which state law to apply when they conflict and more than one state has the authority to apply its law, it is wrong to erase the concerns of the state whose law is not applied by pretending its contacts with the case are not as significant as they in fact are. The vested rights approach wrongly ignored the conflicting state policies and interests by arbitrarily siding with one state over the other without adequate justification.

Second, the modern approach focuses on the *reasons* state laws are adopted. Because it recognizes the concerns of *both* states and the rights of *both* parties, it also requires the decision-maker to give *reasons* why one state should prevail over the other and why one party's rights should prevail over the other's rights. The modern approach requires analysis of a variety of questions. What are the *goals* of the laws of the two states? What *policies* do they serve? What are their *purposes*? What *behavior* is being regulated? Who is being *protected*? What *interests* are being regulated or protected, and what *rights* does each law confer? Do the laws apply to persons or events outside the state or not? What "interests" do the states have in applying their laws to a multistate case that has contacts with more than one state? How strong are those interests? Which state has the *stronger or dominant interest* in applying its laws? What *reasons* can we give to choose the interests of one state and the rights of one party over the interests of the other state and the rights of the other party?

Third, the modern approach reintroduced *domicile* as a relevant

---

170 Restatement (Second) of Conflict of Laws §§ 6, 145 (Am. L. Inst. 1971) (emphasis added).

171 *See* Pac. Emps. Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 500–05 (1939) (holding that two states may have legislative jurisdiction over the same events).

172 Singer, *supra* note 11, § 2.1.1, at 17–19.

territorial contact in cases involving tort and contract issues. The comity approach had always allowed for that. Northern states recognized the servitude of enslaved persons traveling through free states. In such cases, the law of the domicile of the enslaver prevailed over the place where the imprisonment of the enslaved person was occurring. While the free state did not recognize property rights in human beings, the domicile of the enslaver did. But the First Restatement and the vested rights theory denied *any role* to domicile in torts, contracts, and real property cases. What mattered was the place where events occurred or property was located, not where people lived or were citizens. The modern approach brought domicile back into the analysis of torts and contracts cases (and, increasingly, real property cases), and sometimes even made domicile the determinative factor in choosing the applicable law in those cases.

The modern approach introduced by Brainerd Currie turned things on their head by arguing that state laws are mostly directed to people, not events, and that what most concerns a state is the people regulated or protected by its laws. That meant that a Massachusetts law that "protects" married women from contractual liability for agreements they have made extends only to those women domiciled in Massachusetts and does not extend to women domiciled in Maine even if they make a contract inside Massachusetts.[173]

This revolutionary change in choice-of-law doctrine meant that courts sometimes apply the tort or contract law of the common domicile of both the plaintiff and defendant rather than the law of the place where the conduct and injury occurred or where the contract was made. Viewing the domicile of the parties as relevant—and sometimes outcome-determinative in torts or contract cases—was a major shift in conflict-of-laws doctrine, and potentially relevant to the abortion context. The traditional approaches to conflict of laws would require application of Illinois law to an abortion that takes place in Illinois regardless of the domicile of the person receiving the abortion or the domicile of the "unborn child" or the "child's" relatives. But modern choice-of-law doctrine introduces, for the first time, the *possibility* that Missouri courts might view the "mother" and "unborn child" as having a common domicile in Missouri, and provide a reason to conclude that Missouri interests in regulating the parties' relationship outweighs the interests of Illinois in doing so. It is crucial to understand what that argument might be—and what is wrong with it.

173 Currie, *supra* note 169, at 277.

Fourth, the modern approach accepts the fact that only one of the two states may have a *real* interest in applying its law. Brainerd Currie invented the idea that a multistate case may be a "false conflict" either because one state's law applies only to conduct inside the state or because its law only affects the rights of its residents. He argued, for example, that a woman domiciled in Maine should be bound to a contract she signed in Massachusetts with a Maine creditor even if Massachusetts law denies married woman capacity to contract, at least when the contract is to be performed in Maine.[174] The common domicile of the parties has an interest in regulating their relationship to achieve justice, while the place where the contract was made has no interest (or no real interest) in regulating a contract made in Massachusetts that was to be performed in Maine when both parties are domiciled in Maine. Maine has no objection to a Maine woman assuming contractual obligations at home, and Maine has interests in ensuring that its creditor is paid. Massachusetts law is designed to protect *Massachusetts women* from being coerced by their husbands into giving up their property rights.[175] Since the Massachusetts law does not extend to Maine women, and the creditor would not have relied on Massachusetts law to make an invalid contract there, Massachusetts has no interest in applying its defendant-protecting, immunizing law while Maine does have an interest in requiring its residents to be bound by their promises.[176] When one state is interested in applying its law and the other is not, we have a "false conflict," and it would be irrational to apply the law of a state when its law does not extend to the case at hand.[177]

There are false conflicts in the abortion context. For example, an Illinois resident cannot go to Missouri and perform an abortion there and hope to be immune from Missouri law.[178] While her residence may view her actions as legitimate, it cannot force Missouri to apply Illinois law when all contacts are in Missouri other than the domicile of the defendant who has committed a tort in Missouri in violation of Missouri law. Conversely, I argue below that the reverse is also true. Missouri cannot legitimately apply its law to a Missouri resident who goes to

174 *Id.*

175 *Id.*

176 *Id.* at 239 (discussing this scenario under the rubric of "Case 6").

177 *Id.* at 255 (using the phrase "false problems" to describe what we currently call "false conflicts").

178 Again, as we will see below, a state actor *may* be able to do this since the Supreme Court has held that states are immune from liability in the courts of other states unless they have waived their sovereign immunity. Franchise Tax Bd. of Cal. v. Hyatt (*Hyatt III*), 587 U.S. 230 (2019).

Illinois to obtain an abortion because it has no right to regulate conduct in Illinois when (a) the effects of the conduct occur in Illinois; (b) Illinois law grants immunity from liability for the conduct; (c) Illinois does not recognize the conduct as resulting in legally cognizable harm; and (d) Illinois defines the conduct in question as a fundamental human right. However, such a case may well be viewed *by Missouri courts* as a true conflict rather than a false conflict, on the ground that Missouri has an interest in deterring its resident from leaving the state to harm another state resident and in providing a remedy for a Missouri resident against another Missouri resident who left the state to cause them harm. To explain why Missouri cannot legitimately regulate an abortion in Illinois we need a more extended analysis, which will be provided below in Part IV.

Fifth, when both states *are* interested in applying their laws, either to achieve their policy objectives or to protect party rights defined by state law, we have a "true conflict." Not only do the state laws differ, leading to contradictory outcomes, but both states have reasons to want their laws applied to the case. In such true conflict situations, there is no easy out. There is no theory that can magically convert a real conflict into an easy case. One state must sacrifice its concededly legitimate public policy goals. One party's rights will be subordinated to those of the other party. True conflicts are inherently hard cases, but that does not mean that we cannot develop rules to govern them. In fact, fifty years of litigation have led to new rules being developed right now in the Third Restatement of Conflict of Laws. To understand how these new rules will impact abortion conflicts, we need to learn how they emerged.

B. The Common Domicile Exception to the Place of Injury Rule

Until the 1960s, courts would generally apply the law of the place of injury in conflict-of-laws cases involving torts.[179] This rule was especially strong when the conduct causing the injury occurred in the same state as the injury. However, Brainerd Currie's interest analysis approach, and his theory of false conflicts, created a way to argue for application of the law of the common domicile of the parties over the law of the place of conduct and injury in a narrow set of cases.

Currie had argued in 1958 that a contract between Maine residents made in Massachusetts should be governed by Maine law if both

179 *See, e.g.*, Ala. Great S. R.R. Co. v. Carroll, 11 So. 803, 804–07 (Ala. 1892).

parties were domiciled in Maine and the contract was to be performed there.[180] The place of signing the agreement was wholly irrelevant because Massachusetts had no interest in regulating an agreement between Mainers to be performed in Maine while Maine has an interest in protecting the justified expectations of the promisee and requiring the promisor to abide by their promises.[181] How did this "false conflict" theory enter the realm of torts?

The opening salvo came in a 1959 Wisconsin case called *Haumschild v. Continental Casualty Co.*,[182] involving a married couple involved in an auto accident in California. The wife was the passenger in the car, and she sued her husband for negligent driving. California, but not Wisconsin, gave the husband interspousal immunity from suit by his wife. The First Restatement required application of the law of the place of injury,[183] but the Wisconsin Supreme Court (over a vigorous dissent) refused to do that. Instead, it classified the issue as one of status, rather than torts, because it concerned the "capacity to sue." Given that characterization of the issue, the court applied the law of the common domicile of the parties, and it allowed the suit to go forward in Wisconsin courts. Evading the First Restatement place of injury rule by reclassifying the case as involving an area of law other than torts gave no real reason why Wisconsin's interests in allowing the suit outweighed those of the place of conduct and injury.

That answer emerged only a few years later. The common domicile rule for tort cases was created in 1963 in the New York Court of Appeals case of *Babcock v. Jackson*.[184] That case adopted Brainerd Currie's theory of interest analysis and applied New York law to an Ontario auto accident when both parties were domiciled in the state of New York. *Babcock* involved an Ontario "guest statute" that prohibited lawsuits against automobile drivers by passengers present in the car at the time of the accident while New York had no such bar to a negligence suit by the passenger against the driver.

Speaking for the New York Court of Appeals, Judge Stanley Fuld argued that the purpose of the Ontario law was to protect Ontario insurance companies from fraud (and perhaps to protect Ontario

180 Currie, *supra* note 169, at 242–43.

181 *Id.* at 231 (contracts between Mainers are "no affair" of Massachusetts).

182 Haumschild v. Cont'l Cas. Co., 95 N.W.2d 814 (Wis. 1959).

183 Restatement (First) of Conflict of Laws § 377 (Am. L. Inst. 1934); *see Haumschild*, 95 N.W.2d at 818 (noting that application of the law of the common domicile "departs from the Rule of the Restatement").

184 Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963).

drivers from lawsuits brought by those to whom they gratuitously offered rides).[185] However, in this case, there was no Ontario insurance company to protect, since the driver had purchased insurance in New York from a New York company and the contract covered accidents no matter where they occurred. Nor was there an Ontario driver to protect. That meant that Ontario had no real interest in applying its law while New York did have an interest in making one of its residents compensate another for wrongful actions leading to harm. The fact that the conduct and injury occurred in another state, and the fact that that state's law would find the defendant immune from liability was deemed irrelevant.

Why was the New York driver not entitled to the immunity granted by the Ontario "guest statute" while driving there? Judge Fuld recognized that the driver is bound by rules of the road like speed limits. If a rule is based on a state's "interest in regulating conduct within its borders," then Ontario law would apply, as the place of conduct, not the law of New York (the common domicile of the parties).[186] Judge Fuld explained:

> It is hardly necessary to say that Ontario's interest is quite different from what it would have been had the issue related to the manner in which the defendant had been driving his car at the time of the accident. Where the defendant's exercise of due care in the operation of his automobile is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern. In such a case, it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place.[187]

The law of the place of conduct applies to "rules of the road" or "conduct regulating rules." But the Ontario law in *Babcock v. Jackson* was not a rule of the road. The Ontario host immunity statute neither prohibited wrongful conduct nor defined the negligent conduct as lawful and privileged. The purpose of the Ontario rule was not to give an incentive to hosts to drive negligently, or even to induce people to give other people rides, but to protect insurance companies from fraud.

185 *Id.* at 284.
186 *Id.*
187 *Id.*

The insurance company involved in the case did not set its premiums in reliance on the law of Ontario and did not claim the protection of its laws given that the accident could have occurred in New York. That meant that Ontario had no interest in applying its law.

On the other hand, New York did have an interest in applying its law. The consequences of the harmful conduct would be felt at home in New York by the New York victim, as would the consequences of non-compensation. Under New York standards of justice, the defendant had money in the bank that belonged to person he victimized. New York had an interest in providing civil recourse for a wrong committed by one New Yorker against another *even though it occurred in another state.* New York was interested in applying its law, and Ontario was not; the case was a false conflict, and it would be irrational to apply Ontario law. Even if we believe Ontario had *some* interest in extending its immunizing law to nonresidents driving there (perhaps to ensure that they are not being discriminated against just because they are nonresidents), New York's interest in applying its law is stronger than that of Ontario, and it makes sense to apply the "law of the jurisdiction which has the stronger interest in the resolution of the particular issue presented."[188]

Today, the *Babcock* case is viewed as a prime example of a false conflict where one state is interested in applying its law and the other has (little or) no interest in applying its law. It presents a fact/law pattern with the common domicile of the parties (plaintiff and defendant) in a plaintiff-protecting state that recognizes a tort claim with the place of conduct and injury in a defendant-protecting state that immunizes the defendant from liability. Importantly, it *also* rests on the belief that the Ontario rule of law (the law of the place of conduct) *is not designed to regulate conduct.* It is designed only to *allocate losses* from the event or to provide compensation for a wrong that was done when *both states view the conduct as wrongful and tortious.* But what happens if the law at the place of conduct is in fact a conduct-regulating rule? What happens if the states do not agree on whether the conduct was tortious or whether the injury is legally cognizable?

C. The "Conduct Regulating" Exception to the Modern Common Domicile Rule

We have seen that the court that adopted the common domicile rule *would not apply it* if the law at the place of conduct and injury was a

188 *Id.* at 284–85.

"conduct-regulating rule." While many state courts outside New York enthusiastically embraced the *Babcock* common domicile rule, they *also* firmly rejected it when the rule at the place of conduct was intended to regulate the conduct, such as a speed limit law.[189] In that type of case, the First, Second, and Third Restatements *all* require application of the law of the place of conduct and injury. The First Restatement has a rigid place of injury rule, but with exceptions that apply only when the place of conduct *authorizes* the conduct.[190] The Second Restatement adopts an even stronger presumption that the conduct-regulating laws of the place of conduct apply when the conduct and injury occur in the same state.[191] If anything, the emerging Third Restatement rule is even clearer on the matter: "When the injurious conduct and the resulting injury occur in the same state, the law of that state governs issues relating to conduct."[192] Even if the common domicile has an interest in providing a remedy for the victim because it views the out-of-state conduct as wrongful, that interest is outweighed by the sovereign interest of the place of conduct and injury in determining what conduct is lawful and privileged there.[193]

But can laws that *permit* conduct rather than prohibit or regulate it be viewed as "conduct regulating" laws? The answer is "yes."[194] Tentative Draft 4 of the Restatement of the Law (Third) Conflict of Laws was published in March of 2023, and it clearly states that legal "[i] ssues relating to conduct" include rules that define "whether conduct

189 *See id.*; *see also* John T. Cross, *The Conduct-Regulating Exception in Modern United States Choice-of-Law*, 36 Creighton L. Rev. 425, 438 n.54 (2003) (collecting cases).

190 Restatement (First) of Conflict of Laws § 377 (Am. L. Inst. 1934).

191 Restatement (Second) of Conflict of Laws § 145 cmt. e (Am. L. Inst. 1971) ("When the injury occurred in a single, clearly ascertainable state and when the conduct which caused the injury also occurred there, that state will usually be the state of the applicable law with respect to most issues involving the tort. This is particularly likely to be so with respect to issues involving standards of conduct, since the state of conduct and injury will have a natural concern in the determination of such issues.").

192 Restatement (Third) of Conflict of Laws § 6.06 (Am. L. Inst., Tentative Draft No. 4, 2023); *see* Cross, *supra* note 189, at 439–40 ("Once the court finds the law of [the place of conduct] to be conduct-regulating, it will automatically apply that law."); *id.* at 441 ("There are *no* states that have rejected the conduct-regulating exception.").

193 *See also* Ehrenzweig, *supra* note 49 (generally arguing for a place of conduct rule for intentional torts when the law prohibits the conduct or grants a specific privilege to act without liability).

194 *See* Cross, *supra* note 189, at 452–53 (2003) (explaining why a state with a "personal freedom concerns" may have a stronger interest in applying its law than a state that would regulate or prohibit the conduct if it occurred within its borders).

is tortious, including whether it is negligent, or whether an interest is entitled to legal protection," per § 6.04(a); "whether a duty is owed to the plaintiff," per § 6.04(d); "defenses that negate wrongfulness," per § 6.04(f); and laws that impose a "duty or privilege to act," per § 6.04(c).[195] Case law agrees, as seen when the Nebraska Supreme Court held in 2002 that, "in virtually all instances where the conduct and injury occur in the same state, that state has the dominant interest in regulating that conduct *and determining whether it is tortious in character,* and *whether the interest affected is entitled to legal protection.*"[196]

In the 2022 case of *Khalil v. Fox Corporation*,[197] for example, allegedly defamatory statements were made in New York about a Venezuelan businessman. The federal Southern District of New York noted that New York distinguishes between "conduct regulating" and "loss allocating" rules and that when a rule is conduct regulating, the law of the place of conduct applies.[198] The court applied New York law partly because the plaintiff did not seek application of Venezuelan law and partly because news media have a *First Amendment right to speak* unless their speech is defamatory as defined by state law.[199] The court noted "New York's interest in regulating the conduct of its media"[200] and that its defamation law is "subject to applicable First Amendment requirements."[201] The First Amendment is a "conduct regulating" rule in the sense that it *empowers* people to speak without fear of liability if they are exercising rights of free speech within the scope of their constitutional right. While there will be a debate about whether to apply the law of the place of conduct when it causes harm in a more plaintiff-favoring state, there is little question that the permissive law of a state applies when *both* the conduct and injury occur there if the permissive law affirmatively *authorizes* the conduct and *immunizes* the actor from liability.

This result follows in abortion cases as well. When someone goes to a state that permits abortion and takes advantage of its law, that person reasonably relies on the application of the law of the place of conduct. Illinois does not merely refuse to regulate abortions; indeed,

---

195 Restatement (Third) of Conflict of Laws § 6.04 (Am. L. Inst., Tentative Draft No. 4, 2023).

196 Malena v. Marriott Int'l, Inc., 651 N.W.2d 850, 858 (Neb. 2002) (emphasis added).

197 Khalil v. Fox Corp., 630 F. Supp. 3d 568 (S.D.N.Y. 2022).

198 *Id.* at 578.

199 *Id.* at 579 (noting that N.Y.'s defamation law is "subject to applicable first amendment requirements").

200 *Id.*

201 *Id.*

it does prohibit some abortions. But by allowing abortion, it does not simply deregulate the conduct; instead, it defines the right to receive reproductive health care (including an abortion) as a *fundamental right.*[202] That means that Illinois law regulates conduct by *empowering* people to make decisions about their own bodies. As Professor Lea Brilmayer has explained, "a clear difference exists between [a] policy of indifference and [a] policy of license."[203] When both the conduct and injury occur in a state that immunizes the defendant from liability, and that immunity is intended to affirmatively *authorize* the conduct, the modern approach to conflict of laws requires application of the conduct-regulating law of the place of conduct and injury, not the law of the common domicile,[204] meaning "the territorial state's freedom of choice trumps the residence state's restrictions."[205]

D. What limits does the Constitution place on the power of a state to apply its law?

The final piece of the modern approach to conflict of laws that we need to understand in the abortion context is the limits that the Constitution places on the power of any state to apply its law to an event or person. This issue can arise when two states' laws apply to the same event or person. It may also arise when one or both states *mandate* application of their law by including a choice-of-law provision in their state statutes. In general, states have the power to require application of their own law in their own courts (unless they have no legislative

202 775 Ill. Comp. Stat. 55/1-15 (2019) ("(a) Every individual has a fundamental right to make autonomous decisions about the individual's own reproductive health, including the fundamental right to use or refuse reproductive health care. (b) Every individual who becomes pregnant has a fundamental right to continue the pregnancy and give birth or to have an abortion, and to make autonomous decisions about how to exercise that right. (c) A fertilized egg, embryo, or fetus does not have independent rights under the laws of this State.").

203 Brilmayer, *supra* note 148, at 892.

204 Cross, *supra* note 189, at 457 ("[A] court should *automatically* select the law of [a conduct-regulating state] . . . when the standard of [that state] is more lenient and the actor can demonstrate that she actually knew that standard and justifiably relied on it when engaging in the actions that gave rise to the tort."); *accord* Brilmayer, *supra* note 148, at 875 (When "a prolife state's attempt to prohibit abortions extraterritorially clashes directly with the territorial state's desire to ensure freedom of choice[, s]uch regulation is constitutionally invalid because, in cases of direct conflict, territoriality (the place where the abortion is performed) trumps residence (the place where the woman resides)").

205 Brilmayer, *supra* note 148, at 906.

jurisdiction over the case), but they do not have the power to require courts in other states to follow those mandates when they have reason to believe that their state interests in applying their own laws outweigh those of the other state. The question is not whether a statute requires application of a state's law, but when the Constitution *prevents* a state from applying its law to a controversy.

The current test comes from the 1981 case of *Allstate Insurance v. Hague*.[206] That case interpreted the Due Process Clause and the Full Faith and Credit Clause to jointly limit the power of states to apply their laws to events or persons situated elsewhere.[207] Justice Brennan explained the constitutional test for applying state law:

> [F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.[208]

This test has three parts. First, for a state law to apply, there must be a *contact with that state* (or "aggregation of contacts"). Second, that contact or contacts must be sufficient to give the state a *legitimate interest* in applying its law. Third, application of that law must not be "*arbitrary* or *fundamentally unfair*" to any party. While the Court in *Allstate* split on whether the test was met in the factual circumstances presented in the *Allstate* case itself, the Court was unanimous in agreeing to that formulation of the test.[209]

Allstate involved a motorcycle accident in Wisconsin that resulted in the death of a Wisconsin resident who had purchased insurance in Wisconsin. The issue was whether the decedent's uninsured motorist coverage could be "stacked" since he had purchased insurance on three different vehicles, and each contract promised a $15,000 payment if the insured were injured by the driver of a vehicle who did not have insurance. Wisconsin law interpreted the three contracts to promise a single $15,000 payment while Minnesota law interpreted them as three separate promises to pay $15,000 amounting to a $45,000 payment.

The case was filed in Minnesota courts based on the personal

206 Allstate Ins. v. Hague, 449 U.S. 302 (1981).

207 *Id.* (interpreting U.S. Const. art. IV (Full Faith and Credit Clause) and U.S. Const. amend. XIV (Due Process Clause applicable to the states)).

208 *Id.* at 312–13.

209 Justice Stevens argued for a modified version of the test that differentiated between the test under the Due Process Clause and the Full Faith and Credit Clause. *Id.* at 320–32 (Stevens, J., concurring).

jurisdiction rules applicable at the time. The insurance company did business in every state, including Minnesota, so it was subject to general jurisdiction there. The plaintiff was the victim's widow, and she had moved to Minnesota after the accident and before filing suit. That meant the suit was between a domiciliary of Minnesota and a defendant that was a resident business in the same state. The only other contact with Minnesota was the fact that the decedent (the plaintiff's husband) had worked in Minnesota, and routinely commuted from Wisconsin to Minnesota for his employment. Minnesota adopted Robert Leflar's approach to conflict of laws which includes consideration of the "better rule of law."

The Minnesota Supreme Court considered Wisconsin law to be fundamentally unfair because it meant that the insured made three separate premium payments (for the three separate insurance contracts) but received nothing for two of the contracts. From the Minnesota standpoint, Wisconsin law allowed the insurance company to get away with fraud. Since the Minnesota court saw before it a company operating in Minnesota that had an agreement with the spouse of a current Minnesota domiciliary, it had an interest in applying its sense of justice to their relationship, despite the Wisconsin interest in regulating a contract made in Wisconsin with a Wisconsin domiciliary.

The *Allstate* case was controversial because many scholars believed that the Court was wrong to find that the Minnesota contacts were sufficient to give it a legitimate interest in applying its law.[210] And four dissenting Justices agreed with them. At the same time, the Court *unanimously* concluded that application of Minnesota law was *not unfair to the insurance company* because the accident could easily have happened in Minnesota, and thus the company could have anticipated Minnesota law applying.[211] The most controversial aspect of the case was the fact

210 For critiques of Allstate, *see generally* Linda Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints After* Allstate Insurance Co. v. Hague, 10 Hofstra L. Rev. 103 (1981); Aaron D. Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 Hofstra L. Rev. 149 (1981). For defenses, *see* Robert A. Leflar, *Choice-of-Law Theory After Allstate Insurance Co. v. Hague*, 10 Hofstra L. Rev. 203 (1981); Louise Weinberg, *Conflicts Cases and the Problem of Relevant Time: A Response to the Hague Symposium*, 10 Hofstra L. Rev. 1023 (1982).

211 My own view is the opposite. Minnesota had significant interests in regulating the parties' relationship to prevent fraud and of course Wisconsin also had interests in determining the correct interpretation of a contract made in Wisconsin between two Wisconsin residents that would be performed in Wisconsin. The issue that was troublesome was whether the insurance company relied on Wisconsin law

that the majority found the plaintiff's new domicile in Minnesota to be a relevant contact.[212] That raised the specter of victims moving to other states to take advantage of their more favorable laws and the potential unfairness that it might cause to defendants.

We have noted that the modern approach to conflict of laws recognizes that the domicile of the parties in both torts and contracts cases may have an interest in applying its law to such cases. But are there cases where the domicile is *not* legitimately relevant? The answer is "yes," and two Supreme Court cases have held that if the *only* contact with a state is the domicile of one of the parties, it may be unconstitutional to apply that state's law.

In *Home Insurance Co. v. Dick*,[213] a Mexican company issued an insurance policy to a Mexican citizen covering a boat in Mexican waters. The insured assigned his contract rights to a Texas domiciliary who was temporarily residing in Mexico. Under the personal jurisdiction rules at the time, suit on the contract was heard in Texas courts. The only contacts with Texas were the fact that it was the domicile of the assignee of the insured and the insurance company did unrelated business in Texas. The U.S. Supreme Court held that a Texas insurance rule allowing insurance claims to be brought within two years could not be applied to allow the claim to be heard when Mexican law would enforce a contract clause requiring suit within one year. The mere fact that the insured assigned his contract rights to a Texas domiciliary was not enough to give Texas a legitimate interest in applying its statute of limitations for insurance. The domicile of the plaintiff was not sufficient to give Texas an interest in applying its law to the Mexican agreement.

Similarly, the Supreme Court held in *John Hancock Mutual Life Insurance Co. v. Yates*[214] that Georgia law could not apply to an insurance contract made in New York to benefit a New York resident merely because the insurance beneficiary subsequently moved to Georgia.[215] *Dick* and *Yates* stand for the proposition that the fact that one of the

applying if the accident occurred in Wisconsin such that application of Minnesota law would cause unfair surprise. *See* SINGER, *supra* note 11, at 473–75.

212 Allstate Ins. v. Hague, 449 U.S. 302, 337 (1981) (Powell, J., dissenting) ("[T]he postaccident residence of the plaintiff-beneficiary is constitutionally irrelevant to the choice-of-law question.").

213 Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

214 John Hancock Mut. Ins. Co. v. Yates, 299 U.S. 178 (1936).

215 *Id.* at 182–83. The *Allstate* opinion stated that *Yates* stands for the proposition that a "postoccurrence change of residence to the forum State was insufficient in and of itself to confer power on the forum State to choose its law." *Allstate*, 449 U.S. at 319.

parties is domiciled in a state *may* not be enough to apply that state's law to adjudicate a civil controversy. The next question is how these modern common law and constitutional rules apply in the abortion context, which is the focus of Parts IV and V below.

IV. "COMMON DOMICILE" V. "LONELY DOMICILE" ABORTION CASES

A. Why Anti-Abortion States Cannot Regulate Abortions That Take Place in Pro-choice States

1. Why the Issue Is on the Table

A central question in the post-*Dobbs* era is whether an anti-abortion state can regulate one of its residents who goes to a pro-choice state to get an abortion. While anti-abortion states have so far limited their regulations to abortion providers and anyone who assists a person in getting an abortion, the logic of the "right to life" position suggests that anti-abortion laws may, at some point, extend to the very people who are choosing to undergo the procedure. Idaho has a "wrongful death" statute in place that allows claims against abortion providers;[216] it is conceivable that an anti-abortion state may want to extend such claims to the people who choose to undergo the procedure.[217]

Of course, anti-abortion states *may* worry about retaliatory laws passed by pro-choice states. After all, if a state seeks to regulate its citizens who cross the border, or if they try to regulate people across the border who interact with their citizens, and they can successfully argue that this is constitutional, then pro-choice states may pass reverse laws that target people and conduct in anti-abortion states. For example, a state may *itself* set up abortion clinics and thus make abortion providers state employees. Since a recent Supreme Court case[218] says that states cannot be sued in the courts of other states without their consent, a state like Illinois could even contemplate shipping abortion medication over state lines to Missouri residents and claim sovereign immunity from Missouri's regulatory laws about abortion. And if it is possible to create

216 IDAHO CODE ANN. § 18-8807 (2023) (providing civil remedy for wrongful death to a person who receives an abortion or her close family members [father, grandparent, sibling, aunt or uncle of the "preborn child"] against abortion providers for performing an abortion but *not* granting a civil remedy against the person who had the abortion).

217 *See* Bond, *supra* note 21.

218 Franchise Tax Bd. of Cal. v. Hyatt (*Hyatt III*), 587 U.S. 230 (2019).

wrongful death claims brought by family members against people who terminate pregnancies in another state, then why can't pro-choice states create tort claims for forced birth that can be brought as counterclaims by people who get abortions in pro-choice states and who are subject to bounty laws for doing so?

A cursory glance at both current laws and proposed laws shows that we need to consider the legality of applying anti-abortion laws to residents who cross the border to evade those laws. I have argued that the answer to that question is "no" if we apply the rules in force for the first century and a half of U.S. history, including the English jurisdictional approach, the medieval statutist approach, the comity approach, and the 1934 First Restatement.[219] That is also true of the Second Restatement (1971) given its presumption that the law of the place of injury applies to tort cases, especially when the conduct takes place in the same state.[220] While the Second Restatement allows that presumption to be rebutted if another state has a more significant relationship to the parties and the occurrence, there is no doubt that application of the Second Restatement's "most significant relationship" test would result in application of the pro-choice law of the place where the abortion took place.[221] The emerging Third Restatement also clearly mandates application of the law of the pro-choice state since the pro-choice law in Illinois is "relating to conduct" (it is a conduct-regulating rule) and both the conduct (and injury, if there was one at all) occurred there.[222] So why is there any issue at all?

The issue arises because we are in an era when attitudes about abortion are hardening and becoming more extreme on the part of those who oppose abortion and who have been newly empowered by the Supreme Court. Politicians are proposing a federal statute that would impose a nationwide ban on abortion or severe limits on it.[223] Legal strategists are thinking about litigating to get the Supreme Court to declare "unborn children" to be "persons" within the meaning of the Fourteenth Amendment.[224]

---

219 Restatement (First) of Conflict of Laws § 377 (Am. L. Inst. 1934).

220 Restatement (Second) of Conflict of Laws §§ 145 cmt. e, 146 cmt. d (Am. L. Inst. 1971).

221 Restatement (Second) of Conflict of Laws § 146 cmt. d (Am. L. Inst. 1971).

222 Restatement (Third) of Conflict of Laws §§ 6.04, 6.06 (Am. L. Inst., Tentative Draft No. 4, 2023).

223 Amy B. Wang & Caroline Kitchener, *Graham Introduces Bill to Ban Abortions Nationwide After 15 Weeks*, Wash. Post (Sept. 13, 2022), https://www.washingtonpost.com/politics/2022/09/13/abortion-graham-republicans-nationwide-ban/.

224 Brief Amicus Curiae for Mary Kay Bacallao Advocating for Unborn Children as

Further, and more importantly for our purposes here, legislation was introduced in the Missouri Senate that would extend Missouri's anti-abortion law to abortion providers in pro-choice states who provide abortion services to Missouri residents, on the ground that the fetus is an "unborn child" who is a resident of Missouri.[225] The theory is that the act in Illinois has a substantial effect inside Missouri because it results in the wrongful death of a Missouri resident.[226] Such a bill, if it passed, and if it were enforceable, would extend anti-abortion laws to actors in pro-choice states who refuse to deny services to patients based on their residence in an anti-abortion state. Given the ambitions of the anti-abortion movement, it is not hard to anticipate anti-abortion states seriously considering passing legislation like this that encompasses extraterritorial conduct. Nor is it inconceivable that a state supreme court might interpret an anti-abortion statute to allow civil remedies against its own residents who exit the state to "evade" its regulatory laws.[227]

If a state passes an anti-abortion law that imposes liability on a resident who obtains an abortion, will the law be interpreted to apply to out-of-state abortions? Regulatory laws like this are normally interpreted to apply *only* to in-state conduct. But many state supreme courts are comprised of elected judges who may follow political winds if they want to get reelected. If the statute does not limit its territorial scope to in-state abortions, a court that understands the legislative purpose to be stopping state residents from getting abortions may read those statutes to apply to state residents or those who aid them, no matter where the abortion procedure or the aid occurs.

Legislatures bent on exercising their sovereignty to the extremes allowed by the Constitution—or beyond—may even include choice-of-law provisions in their statutes to *mandate* application of their laws to their residents who obtain abortions in other states or to abortion providers

Persons on Behalf of Neither Party, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392), 2021 WL 3375841.

225 Ollstein & Messerly, *supra* note 5.

226 S. 603, 101st Gen. Assemb., First Reg. Sess. (Mo. 2021) (would add new statute at MO. ANN. STAT. § 188.550 (2019) and apply Mo. abortion laws to any abortion performed "outside this state" when it "involves a resident of this state, including an unborn child who is a resident of this state," *see* § 188.550(3)(c)).

227 Appleton, *supra* note 2, at 671 ("The woman's domicile alone would easily satisfy the very loose outer limits imposed by the Due Process and Full Faith and Credit Clauses on a restrictive state's application of its own law to the true conflict presented by an abortion performed on one of its domiciliaries in a permissive state." (footnotes omitted)).

themselves. When that happens, the Supreme Court will eventually need to determine whether it violates either the Due Process Clause or the Full Faith and Credit Clause (or both) to apply a Texas-style bounty law or a wrongful death statute or a tort survival claim against a resident who obtains an abortion in a pro-choice state or against others who aid them in doing so. The Supreme Court may also be forced to determine whether it violates the dormant Commerce Clause to create a civil claim against someone who goes to another state for a medical procedure[228] or whether doing so violates the constitutional right to travel.[229]

Importantly, an anti-abortion state determined to prevent its residents from evading its laws might pass a "wrongful death" statute giving a spouse or other family member the power to sue the "mother" for aborting her "unborn child." Or it might define the abortion as a tortious wrong, give the unborn child a right to sue, and then pass a "survival" statute that ensures that the unborn child's right to sue for tortious injury is inherited by a family member who is legally empowered to sue the "mother" to vindicate the child's rights. The "child" takes the domicile of the parent so any survival suit could be characterized as a common domicile case. The same would be true if a wrongful death claim is given to a family member and they reside in the same state as the "mother."

If an anti-abortion state recognizes the fetus as an "unborn child" and a "person" protected by law from the moment of conception, then it may view the abortion in another state as a harm inflicted by one

---

228 *ee* Robin Feldman & Gideon Schor, Lochner *Revenant: The Dormant Commerce Clause & Extraterritoriality*, 16 N.Y.U. J.L. & Lib. 208 (2022); 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, 1912 (1987) (addressing the scope of the Commerce Clause to determine that state do have the constitutional power to apply their laws to their residents who go out of state to evade the law of their domicile state so that "states would be free to forbid their citizens from having abortions elsewhere").

229 Dunn v. Blumstein, 405 U.S. 330, 338–39 (1972); United States v. Guest, 383 U.S. 745, 758 (1966); United States v. Wheeler, 254 U.S. 281, 297–98 (1920) (holding Art. IV, § 2 protects "the right[s] of citizens of the States to reside peacefully in, and to have free ingress into and egress from, the several States[.]"); Paul v. Virginia, 75 U.S. 168, 180 (1868), *overruled on other grounds by* United States v. Se. Underwriters Ass'n, 322 U.S. 533 (1944) (holding the Privileges and Immunities Clause gives citizens "the right of free ingress into other States, and egress from them[.]"); Ward v. Maryland, 79 U.S. 418, 430 (1871) (holding the Constitution "protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation[.]"); Crandall v. Nevada, 73 U.S. 35, 49 (1867) (holding tax on traveling outside the state unconstitutional).

resident against another—harm that results in death. If it has a justice-based conception that this wrong deserves a remedy, it may characterize the case as involving a common domicile in the anti-abortion state and find that this gives it a legitimate interest in applying its law even if the conduct (and injury) occurred elsewhere. After all, the only reason the resident went out of state was to evade the regulatory laws of their home state.

Given the strength of the anti-abortion state's interests in protecting the "life" of the "unborn child," it is not inconceivable to imagine a Missouri court determining that its interests in applying its law outweigh those of Illinois even though the procedure took place solely inside Illinois and even though Illinois law regulates the conduct by privileging it as a fundamental right. The modern approach to conflict of laws provides rhetorical resources to argue that the law of the "common domicile" should prevail even when the conduct and injury are in another state.

I have explained why the common domicile rule does not, and should not, apply in this context, but we cannot pretend that the argument cannot be made in good faith or that it has no chance of prevailing in the courts of an anti-abortion state. After all, the common domicile rule is not a secret. Once we understand what the argument would look like, we can analyze it *using modern methods* to see what is wrong with it. Not only does it violate contemporary choice-of-law rules and doctrine, as well as settled precedent, it would arguably amount to an unconstitutional exercise of state legislative power under the Due Process and Full Faith and Credit Clauses, at least where the abortion occurs in a state where it is legally protected as a fundamental right. The following Section provides the details of this argument.

2. Why Modern Choice-of-Law Rules Do Not Allow an Anti-Abortion State to Apply Its Law to a Resident Who Obtains an Abortion in a Pro-Choice State

Modern choice-of-law analysis requires consideration of (1) the *policies* underlying state laws, (2) the *relative strength of their state interests* and (3) the *rights and justified expectations* of the parties.[230] The field of conflict of laws has also had rules or presumptions to govern various classes of cases, and the emerging Third Restatement has a

230 Restatement (Second) of Conflict of Laws § 6 (Am. L. Inst. 1971); Restatement (Third) of Conflict of Laws § 5.01 cmt. a (Am. L. Inst., Tentative Draft No. 3, 2022).

goal of both modernizing those rules to be consistent with case law that developed over the last fifty years and making those rules into very strong presumptions. We have noted that the historical approaches to conflict of laws and all three Restatements require application of the law of a pro-choice state to an abortion that takes place there even if the pregnant person is a resident of a state that prohibits abortion. The Third Restatement clearly chooses the law of the place of conduct and injury if it has a conduct-regulating rule, even if the plaintiff and defendant are both domiciled in a state that has a different law.[231] Why is there such consensus on this issue? We can see why if we apply the core factors used in choice-of-law determinations. That analysis will show why the place of the abortion has the dominant interest in applying its law and why application of any other law would violate the reasonable expectations of the parties and be fundamentally unfair—so much so that it would arguably be unconstitutional.

What are the state policies here? Pro-choice states like Illinois protect the fundamental rights of persons to make decisions about their own bodies, including whether or not to undergo a medical procedure. This right is related to the right of privacy and the right of bodily autonomy.[232] It is a liberty interest to be free from state control over one's physical person. This right is founded on the value of freedom and independence from control either by the state or by a "master" or "lord." It also entails freedom from being forced to accept a particular religious answer to a contentious question about when life begins. We have the freedom to choose how to live our lives as long as our choices do not harm others in ways that can or should be prohibited by law. The fetus or embryo is not a "person" who is separate from the pregnant person, at least when it comes to decision-making authority over one's own body. This does not mean that fetal life is not valuable or precious, but that at the beginning of pregnancy, the fetus has no independent legal rights that limit the liberty of the pregnant person to have control over their own body. Pregnancy and childbirth are not simple processes; they involve discomforts and dangers and emotional roller coasters. Nor is it a simple matter to go through a pregnancy or to give up a child for adoption or to be assured of having the resources to raise the child. The

---

231 Restatement (Third) of Conflict of Laws § 6.06 (Am. L. Inst., Council Draft No. 7, 2022).

232 The fact that the Supreme Court may not find a privacy or autonomy interest to be constitutionally protected has no bearing on the fact that every state has state laws of some type that promote autonomy and protect privacy interests, and that is the basis of the choice-of-law analysis applicable to multistate cases.

right to choose is not like the right to decide on more frivolous matters; it implicates profound physical, psychological, and economic interests and personal values. That is why states like Illinois have statutes that characterize and protect the right to make medical decisions about one's own body—including the right to obtain an abortion—as a "fundamental right."[233]

Just as a state cannot force you to donate a kidney to someone else, it cannot force pregnant people to give birth against their will. Pregnant people are not social vessels for the incubation of the new generation; they are not *things* that can be enslaved by the state and forced to bear children against their will. Most pro-choice laws do limit the ability to obtain an abortion closer to birth when the fetus can survive as an independent person, but they always prioritize the life of the pregnant person over the life of the fetus unless the pregnant person makes a different choice.

Pro-choice laws are laws relating to conduct.[234] They define freedom to end a pregnancy as an *affirmative privilege* that people have that allows them to have autonomy and liberty over their own lives. Such laws do not merely lift restrictions, leaving action unregulated. They are not a refusal to take a position on the question of whether or not abortion should be legal. Pro-choice laws define the choice to continue—or to end—a pregnancy as a *fundamental right*, just as the First Amendment defines speech and religious liberty as fundamental rights. Pro-choice laws apply to acts that take place within those states, and they assign decision-making power over reproduction to people themselves. The Illinois Reproductive Health Act[235] protects the right of persons to make an "autonomous decision" about their health, including the right to have an abortion.[236] The law clearly applies to conduct that takes place inside Illinois, and the rights that it protects extend, not only to residents or domiciliaries of Illinois, but to any person present within its borders who exercises rights protected by that statute. Illinois does

233 775 Ill. Comp. Stat. 55/1-15 (2019) ("(a) Every individual has a fundamental right to make autonomous decisions about the individual's own reproductive health, including the fundamental right to use or refuse reproductive health care. (b) Every individual who becomes pregnant has a fundamental right to continue the pregnancy and give birth or to have an abortion, and to make autonomous decisions about how to exercise that right. (c) A fertilized egg, embryo, or fetus does not have independent rights under the laws of this State.").

234 Restatement (Third) of Conflict of Laws § 6.04 (Am. L. Inst., Council Draft No. 7, 2022).

235 775 Ill. Comp. Stat. 55/1-15 (2019).

236 *Id.*

not discriminate against nonresidents by denying them the benefits of Illinois law while they are there. That means that the policies underlying Illinois law apply to *all* abortions that take place inside Illinois. Illinois has the strongest possible interests in applying its law to people who choose to have abortions in Illinois.

The Third Restatement clearly states that legal "issues relating to conduct" include rules that define "whether conduct is tortious, including whether it is negligent, or whether an interest is entitled to legal protection," "whether a duty is owed to the plaintiff," "defenses that negate wrongfulness," and laws that impose a "duty or privilege to act."[237] Immunity laws designed to privilege conduct are focused on the place where the privileged conduct occurs, and states with such laws are indeed interested in promoting, encouraging, and protecting the freedom to engage in the privileged conduct. The Illinois rule *is designed to liberate people inside Illinois* to obtain medical care related to reproduction. It extends to all persons within its territory the "fundamental right" to "make autonomous decisions about the individual's own reproductive health" and includes the "fundamental right . . . to have an abortion."[238] And because the Illinois pro-choice law both defines a privilege and confers immunity from liability for exercising that privilege, it is a conduct-regulating rule.

Anti-abortion states like Missouri view the fetus as an "unborn child" and their laws are designed to protect the child from harm or "death" at the hands of the "mother," physician, or other third party. That protective policy is achieved by prohibiting abortions or providing for sanctions against those who engage in the prohibited activity or help others to do so; such laws may regulate the conduct of both pregnant persons and those who would aid them in obtaining an abortion. They may do so by criminal punishment of the "mother" or the abortion provider or helpers. They may deputize private persons to act as private attorneys general to enforce state policy by civil laws that give them a "bounty" for successfully suing a person who has gotten an abortion or helped another to get one. Both criminal laws and bounty laws regulate conduct. Civil anti-abortion laws that allow for compensation for wrongful death or survival of tort claims, on the other hand, are arguably "loss-allocating" or "justice-promoting" since they provide civil recourse for a wrongful act." But when they are attached to laws designed to prevent abortions from occurring, they should also be

237 Restatement (Third) of Conflict of Laws § 6.04 (Am. L. Inst., Tentative Draft No. 4, 2023).

238 775 Ill. Comp. Stat. 55/1-15 (2019) (defining abortion as a "fundamental right").

seen as conduct-regulating laws since they have a deterrent, as well as a compensatory, purpose.

Because current anti-abortion laws regulate abortion providers or those who help people obtain abortions while not regulating the people who get the abortions, it may be the case that anti-abortion laws cannot be reasonably interpreted as protecting "fetal life" at all. Rather, they may be geared toward regulating the conduct of women, especially in connection with their sexual lives.[239] If that is the case, then under modern approaches to conflict of laws, anti-abortion laws should not apply to the conduct of people in other states where abortions are lawful. Assuming for the moment that anti-abortion states *are* interested in protecting the "lives" of "unborn children," then, as with the Illinois reproductive health policy, the "pro-life" policy of Missouri is a strong one designed to protect the fundamental rights of the "unborn child" when the child is a resident of Missouri. But does the policy apply to residents who go out of the state to obtain an abortion? Traditionally, a statute that regulates conduct applies only to conduct within the state, and that would mean that the Missouri statute should *not* be interpreted to apply to a Missouri resident who leaves the state to get an abortion.

For example, *Thoring v. Bottonsek*[240] involved a bar in Montana that served liquor to a visibly intoxicated patron who subsequently caused an automobile accident resulting in the deaths of three people across the border in North Dakota. North Dakota, but not Montana, had an act that made bars liable for negligently serving liquor to patrons who subsequently harm others. The Supreme Court of North Dakota refused to apply the North Dakota statute to the Montana bar on the ground that *the statute did not regulate bars outside the state.* That was true even though North Dakota had an interest in preventing out-of-state actors from engaging in conduct that posed a foreseeable and substantial risk of causing harm inside the state. Statutes are presumed to regulate in-state activity alone unless they provide otherwise.[241] Under that traditional presumption against extraterritorial application of statutes, the Missouri abortion statute does *not* apply to conduct that occurred outside Missouri.[242]

239 Appleton, *supra* note 2, at 655 (explaining that anti-abortion states have a "purpose of controlling women" and "gender behavior"); *id.* at 660 ("[A]bortion bans principally aim to control women and to regulate gender behavior[.]").

240 Thoring v. Bottonsek, 350 N.W.2d 586 (N.D. 1984).

241 This is not true for common law negligence cases where states routinely apply the law of the place of injury to conduct outside the state that foreseeably harms someone inside the state.

242 If Missouri rewrites the law to make it applicable in an extraterritorial manner, we

If Illinois has a strong interest in applying its law and the Missouri law does not have an extraterritorial application to conduct in Illinois, then we have a false conflict. Illinois is interested in applying its law and Missouri is not; Illinois law applies. Indeed, if Missouri has no interest in applying its law, it would be unconstitutional to apply its law merely because the pregnant person is domiciled there.

But what happens if the Missouri statute is interpreted to apply to conduct that takes place in Illinois? Or if the legislature explicitly writes the statute in a way that makes it applicable to conduct outside the state of Missouri?[243] In that case, it is inconceivable for an Illinois court to choose Missouri law over Illinois law. Even if both states have (or claim) interests in applying their law, the Illinois court will find that Illinois interests outweigh those of Missouri. It will do so because the state legislature has defined the issue as a fundamental right, and Illinois has no obligation to choose another state's view of fundamental rights over its own. Moreover, when both conduct and injury take place in Illinois, the Illinois courts will legitimately view it as an overreach for Missouri to regulate the conduct of its residents inside Illinois when Illinois is interested in extending fundamental rights to all persons who act inside Illinois without regard to their domicile. But what would the Missouri courts do?

If the Missouri courts follow traditional principles of conflict of laws, they will also apply Illinois law. When conduct and injury take place in the same state, its conduct-regulating rules apply. That is the law under all three Restatements as well as the historical approaches. Nor could the Missouri courts legitimately cite the "common domicile rule" in this case. That rule, as developed in *Babcock v. Jackson* and other similar cases, applies *only* when the law at the place of conduct is *not a conduct-regulating rule.* And there is no doubt that Illinois pro-choice law *is* a conduct-regulating rule. As the Third Restatement explains, the Illinois rule "relat[es] to conduct" because it defines "whether [the]

---

then face the question of whether application of that law in a Missouri court to a Missouri resident who obtained an abortion in Illinois is constitutional under the Full Faith and Credit clause and the Due Process clause. I argue here that it would be unconstitutional to apply that law to an abortion obtained in a state where it is lawful.

243 *See* S. 603, 101st Gen. Assemb., First Reg. Sess. (Mo. 2021) (would add new statute at Mo. Ann. Stat. § 188.550 (2019) and apply Mo. abortion laws to any abortion performed "outside this state" when it "involves a resident of this state, including an unborn child who is a resident of this state," *see* § 188.550(3)(c)).

conduct is tortious";[244] it denies any "duty . . . owed to the plaintiff;"[245] and it confers both a "privilege to act" for the pregnant person and a medical ethical "duty . . . to act" for the abortion provider.[246]

Might the Missouri courts, nevertheless, seek to apply Missouri law under some other theory? First, they might argue that the injury *does* occur in Missouri because the relative empowered to bring the wrongful death is domiciled there.[247] We localize the harm at the domicile of the plaintiff in cases involving defamation, for example, because we have no other clear way to determine where an intangible injury (e.g., to reputation) occurs.[248] Similarly, the emotional distress felt by the family member plaintiff from the "death" of the "unborn child" arguably occurs in Missouri where that family member lives, and a Missouri wrongful death statute creating such a remedy would recognize as much by codifying the wrong as one experienced by the family members. If that is so, then even though the conduct (getting the abortion) occurred in Illinois, the Missouri legislature might define the injury as occurring at the domicile of the plaintiff in Missouri who is wronged by the loss of their loved one. That would make it a common domicile case and potentially give Missouri a legitimate interest in giving one of its residents a remedy for an injury committed by another resident.

One problem with such a statute is that the domicile of the plaintiff is, in general, not enough to justify application of the law of that state. And the fact that the plaintiff and defendant share a common domicile does not necessarily give the state the right to regulate conduct in another state when it has conflicting rules about that conduct and it has a strong interest in regulating the conduct that occurred there. The law of the place of conduct defines the conduct as a fundamental right and immunizes the actor from liability for actions protected by the law of that state. The pro-choice state has the authority—and possibly even the constitutional duty under the Equal Protection Clause, the Commerce Clause, and the Privileges and Immunities Clause—to extend its reproductive rights law to nonresidents who come to Illinois

244 RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 6.04(a) (AM. L. INST., Tentative Draft No. 4, 2023).

245 *Id.* at § 6.04(d).

246 *Id.* at § 6.04(c).

247 There is no argument I can see that would suggest that the injury to the fetus occurs in Missouri if the abortion procedure is confined to Illinois. Perhaps the anti-abortion state could pass a "trafficking" statute that penalizes taking someone outside the state to do harm to them; such a law would rest on the scope of the constitutional right to travel, addressed *infra* in Section V.D.

248 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 150(2) (AM. L. INST. 1971).

to receive medical care.

While it is true that the law of the place of injury has traditionally applied to cross-border torts,[249] that is not the case when the law at the place of conduct is a conduct-regulating rule that affirmatively *privileges* the actions that the plaintiff is complaining about and the defendant reasonably relies on the immunizing law of the place of conduct when they decide to engage in the conduct. Further, Illinois defines the case as a lonely domicile case because, in its view, there is no injury at all, and even if there is a legal "injury," it occurs in the state of Illinois, not the state of Missouri. When the conduct and injury take place in the same state as one of the parties (in this case, the defendant), courts apply the law of that state, not the law of the plaintiff's domicile. As noted earlier, it may well be unconstitutional to apply Missouri law in such a case.

Second, Missouri courts might disagree with the Illinois courts and hold that Missouri interests in applying its law outweigh those of Illinois. They might argue that Missouri has an interest in protecting its residents from harm, and those residents include its unborn children. While Illinois has the power to extend "medical freedoms" to anyone within its borders, so too does Missouri have the legitimate sovereign power and interest in protecting its residents from death at the hands of other residents. It also is interested in preventing its residents from evading the restrictions imposed by their home state's law by crossing the border to do something forbidden at home. Protection of children from harm is one of the highest goals of a state's laws, and that policy arguably outweighs Illinois' interest in reproductive autonomy.

Missouri courts might further argue that application of Illinois law substantially infringes on Missouri policies because Illinois gives Missouri residents a way to evade those Missouri regulations. Even Ulrich Huber argued that a state's law could apply if its citizen went abroad for the sole purpose of evading the home state law. To the extent Missouri residents can afford to travel out of state, or others are free to subsidize the costs of that travel, then Illinois law could go so far as eviscerate the Missouri policy and render it of no effect. That might mean that Missouri policies are more impaired if not applied to Missouri residents than Illinois policies are impaired if Illinois policies applied to Illinois residents but not to nonresidents. If that is true, then under the "comparative impairment" approach to weighing the relative strength of state interests, Missouri interests could be thought to outweigh those of Illinois. Nor is extraterritorial regulation something that is unknown

249 *See* discussion *infra* Part V.

in the United States. The United States, after all, criminally prosecutes Americans who go abroad to engage in sexual abuse of children.[250] And states routinely apply the law of the place of injury when conduct in another state foreseeably causes harm there.[251]

While it is true that all three Restatements point to Illinois law to govern a Missouri resident who gets an abortion in Illinois, the Second Restatement allows the presumption that the law of the place of conduct and injury applies to be overcome if another state has a "more significant relationship" to the parties and the issue.[252] Even the Third Restatement allows its rule to be ignored if another state has a "manifestly greater interest" in applying its law.[253] To the extent that Missouri views its law as protecting the "life" of its "unborn children," its courts could conclude that Missouri interests outweigh those of Illinois.

Alternatively, rather than arguing that Missouri has a stronger interest in applying its law than does Illinois, the Missouri court may simply declare that both states have interests in applying their law, and that neither state is obligated to give up its policies in preference to those of the other state. Such cases may be legitimately resolved by application of forum law. The forum law solution is the one offered by Brainerd Currie when he invented state interest analysis. "[I]f one state's policy must yield, should not the court prefer the policy of its own state?"[254] While almost all states reject the forum law approach, two states have embraced it (Michigan and Kentucky).[255]

Application of forum law will arguably not be fundamentally unfair to the defendant as long as the forum has personal jurisdiction over the defendant. In this case, a forum resident who evades forum law cannot be surprised at being subject to suit at home where the courts have general jurisdiction over them. At the same time, an abortion provider who has no contact with the forum would *not* be subject to suit there, and thus would never be subject to the anti-abortion law unless the provider engaged in a cross-border transaction that reached into the anti-abortion state or if the resident of the pro-choice state entered

---

250 18 U.S.C. § 2423(b)–(c) (criminalizing "illicit sexual conduct" in another nation), *upheld by* United States v. Rife, 33 F.4th 838 (6th Cir. 2022).

251 *See* Blamey v. Brown, 270 N.W.2d 884 (Minn. 1978).

252 Restatement (Second) of Conflict of Laws § 146 (Am. L. Inst. 1971).

253 Restatement (Third) of Conflict of Laws § 5.03 (Am. L. Inst., Preliminary Draft No. 7, 2021).

254 Currie, *supra* note 169, at 238.

255 Foster v. Leggett, 484 S.W.2d 827, 829 (Ky. 1972); Olmstead v. Anderson, 400 N.W.2d 292, 305 (Mich. 1987).

the anti-abortion state and were subject to tag jurisdiction there.[256] While the vast majority of courts and scholars reject the idea that courts should apply forum law to resolve true conflicts, the forum law rule is in effect in both Michigan and Kentucky and favored by a few scholars.[257]

I have carefully rehearsed the arguments that might be crafted to justify application of Missouri law to a Missouri resident who has an abortion in Illinois, but I conclude, nevertheless, that application of Missouri law here is not only inappropriate and contrary to both historical and contemporary approaches to conflict of laws, but may even rise to the level of being unconstitutional. Why is that?

First, while federal law prohibits traveling to other countries to engage in sexual abuse of minors, that statute criminalizes the conduct only if it is "illicit."[258] The statute defines that term by reference to federal (not foreign) law; it authorizes federal prosecution of someone acting in another country in a way that violates a federal criminal statute, and thus authorizes extraterritorial application of federal law.[259] That statute is unconstitutional unless Congress has the power to pass it. What constitutional clause gives Congress the power to criminalize acts by Americans in other countries?

In 2022, the United States Court of Appeals for the Sixth Circuit held in *United States v. Rife* that the statute is not a regulation of "commerce" and thus does not fall within the commerce clause but that the statute is a valid implementation of a treaty, specifically the *Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography,* ratified by the United States in 2002.[260] This "treaty" rests on the notion that it is a violation of international human rights law to abuse children sexually and that

256 Burnham v. Super. Ct. of Cali., Cnty. of Marin, 495 U.S. 604 (1990).

257 Louise Weinberg, *Against Comity*, 80 Geo. L.J. 53, 81 (1991); Louise Weinberg, *On Departing from Forum Law*, 35 Mercer L. Rev. 595 (1984); *see also* Singer, *supra* note 11, at 148–50; *cf.* Joseph William Singer, *Facing Real Conflicts,* 24 Cornell Int'l L.J. 197, 197–98 (1991) (approving a forum law solution to true conflicts but adopting exceptions when doing so interferes with the legitimate and overriding sovereign interests of another state or the rights of one of the parties).

258 18 U.S.C. § 2423(b).

259 *Id.* § 2423(c).

260 United States v. Rife, 33 F.4th 838, 845, 848 (6th Cir. 2022) (criminalizing "illicit sexual conduct" in another nation on the ground that the federal statute implemented a treaty); *accord* United States v. Frank, 486 F. Supp. 2d 1353, 1355 (S.D. Fla. 2007); United States v. Clark, 315 F. Supp. 2d 1127, 1136 (W.D. Wash. 2004), *aff'd*, 435 F.3d 1100 (9th Cir. 2006); *cf.* United States v. Pepe, 895 F.3d 679, 682 (9th Cir. 2018) (statute amended to include U.S. citizens residing abroad even if they do not "travel[] in interstate commerce").

right is enjoyed by children no matter where they are and regardless of the municipal law of the country where they live. That theory is similar to the eighteenth and nineteenth centuries' *ius gentium* or law of nations that identified certain rights as inherent in natural law or human reason. If that federal statute implements a treaty, Congress may have the power to enact it under the Necessary and Proper Clause as an appropriate way to implement a treaty designed to protect fundamental human rights recognized everywhere.

Here, in contrast, we have someone doing something that is illegal in Missouri but is not "illicit" under the law of the place of conduct. The right is not one recognized everywhere; nor is it a right about which there is any level of consensus. The place of conduct and injury deems the conduct to be part of the exercise of a "fundamental right." Again, we have a state that seeks to punish one of its citizens for going to Nevada to gamble. There is no support in precedent or theory to extend Missouri regulatory rules to conduct in Illinois that is authorized under Illinois law when the "injury" is not felt inside Missouri. Since the injury complained of is the "death" of the "unborn child," what matters is the place where that happens, not the domicile of the relatives who feel wronged by the abortion procedure. If the only contact with Missouri is the fact that it is the domicile of the plaintiff, then that is not enough under current interpretations of the Full Faith and Credit Clause to apply Missouri law.[261] And while a claim against the defendant may be a common domicile case from the point of view of Missouri courts, *the common domicile rule never applied when the law at the place of conduct was a conduct-regulating rule*, as is the case here.

Second, both the Due Process Clause and choice-of-law doctrine require us to consider the rights and justified expectations of the parties, as well as the state policies and relative strength of state interests.[262] Missouri may argue that a Missouri resident has no right to evade Missouri law in a way that results in the intentional death of another Missouri resident.[263] The rights of the "mother" to take advantage of Illinois law are outweighed by the rights of the "unborn child" to "life." When liberty and life clash, the right to life should prevail.

261 *See* John Hancock Mut. Ins. Co. v. Yates, 299 U.S. 178, 182–83 (1936); Home Ins. Co. v. Dick, 281 U.S. 397, 408 (1930) (both holding that the domicile of the plaintiff is not sufficient to allow it to apply its law).

262 Allstate Ins. Co. v. Hague, 449 U.S. 302, 308, 320 (1981).

263 *See* William Van Alstyne, *Closing the Circle of Constitutional Review from* Griswold v. Connecticut *to* Roe v. Wade: *An Outline of a Decision Merely Overruling* Roe, 1989 Duke L.J. 1677, 1685 (1989) (arguing that people will not be exempt from home state law if they travel to evade their home's anti-abortion law).

But the Constitution *does* protect the rights of Missouri residents to go to Illinois (under the constitutional right to travel), and it *does* protect the sovereign powers of Illinois to legalize abortion and to extend those liberties to nonresidents who come to Illinois. Indeed, it might violate the Privileges and Immunities Clause, the Equal Protection Clause, and the Commerce Clause if Illinois did not extend its liberating laws to nonresidents who go there for medical treatment. Recently, both Oregon and Vermont have extended their assisted suicide laws to nonresidents who come to those states to take advantage of those laws.[264] If the Constitution gives people the right to go to other states and take advantage of the laws there, then states like Illinois cannot deny medical treatment to nonresidents that they would extend to residents. If that is the case, we are within the First Restatement exception to the place of injury rule, which demands application of an immunizing rule of the place of conduct when it imposes a duty on the actor to engage in the actions about which the plaintiff is complaining.[265] It would violate the justified expectations of Illinois abortion providers to require them to serve Missouri residents but then to allow Missouri law to punish them for doing what Illinois requires them to do. That is even more true when the place of conduct does not recognize it as causing a legally cognizable injury. When the conduct and injury (if there is one) occur in the same state, the actor has a right to rely on the law of the place of conduct in determining whether her actions will lead them into legal peril, as long as the injury (if any) occurs in the same state as the place of conduct. It would violate the *Allstate* test to apply Missouri law to an Illinois abortion because doing so would be "fundamentally unfair" to the defendant.[266]

Things are different if the conduct foreseeably causes harm in another state which provides remedies for the conduct. But when the conduct and injury are in the same state, other states have no power to

264 *See* Lisa Rathke, *Vermont Allows Nonresidents to Use Its Assisted Suicide Law*, Bos. Globe (May 2, 2023), https://www.boston.com/news/health/2023/05/02/vermont-allows-nonresidents-to-use-its-assisted-suicide-law/; *see also* Settlement Agreement and Release of Claims, Gideonse v. Brown, No. 31 Civ. 01568 (D. Or. Mar. 28, 2022); Gene Johnson, *Oregon Ends Residency Rule for Medically Assisted Suicide*, News10 ABC (Mar. 28, 2022), https://www.news10.com/news/national/oregon-ends-residency-rule-for-medically-assisted-suicide/ (Oregon agreed to stop enforcing the residency requirement in the statute and to ask the legislature to remove it from the law on the ground that the residency requirement violated the Commerce Clause and the Privileges and Immunities Clause).

265 Restatement (First) of Conflict of Law § 382 (Am. L. Inst. 1934).

266 *Allstate*, 449 U.S. at 308–13.

punish an actor for doing something that was affirmatively privileged by law in that state. The rights of the Missouri resident to rely on Illinois law for their actions in Illinois should prevail over the rights of the fetus under Missouri law or the rights of relatives domiciled in Missouri.

Importantly, from the standpoint of Illinois law, this is *not* a common domicile case at all but a *lonely domicile case.* That is because the fetus is not a separate legal person under Illinois law for the purpose of analyzing reproductive health care. There is conduct in Illinois, *but no injury*, much less an injury in another state. Illinois has the power, after the *Dobbs* decision, to continue to legalize abortion. It also has the constitutional authority—and maybe even the *duty* under the Commerce Clause, the Equal Protection Clause, or the Privileges and Immunities Clause—to extend that liberty to nonresidents who come to Illinois. That means that Illinois has no obligation to defer to the Missouri view that an injury has occurred at all.

From the standpoint of Illinois, the *only* contact with Missouri is the fact that the pregnant person is domiciled there and the fact that the plaintiff who has been given a right to sue under Missouri law also lives there. Given the controversy over the holding in the *Allstate* case, where a significant minority of judges thought that Minnesota law could not apply just because it was the after-acquired domicile of the plaintiff, as well as the rulings in *Dick* and *Yates* that it is unconstitutional to apply a state's law just because one of the parties is domiciled in that state, it may well be unconstitutional to apply the law of the domicile of the pregnant person (or the domicile of one of her relatives) to an abortion that takes place in a pro-choice state that defines abortion as a privilege and a fundamental right.[267]

That is not to say that there is no argument for application of the law of the "common domicile" of the "mother" and the "unborn child" such that a statute allowing a family member to sue the "mother" on behalf of the child cannot claim that the common domicile has a legitimate interest in protecting one resident from another and preventing evasion of the home state's regulatory laws. Some scholars interpret the *Allstate* test to allow application of the law of the common domicile even when the abortion takes place in a state where it is lawful.[268] And it is because the "common domicile" argument has surface

267 *See Allstate*, 449 U.S. 302; John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936); Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

268 Appleton, *supra* note 2, at 671, 673 (Given the domicile of the person getting the abortion, "the Due Process and Full Faith and Credit Clauses [pose] no insurmountable obstacles to a restrictive state's law banning abortions performed

plausibility that I have given it such careful analysis here.

My conclusion, however, is that both historical and modern approaches to choice of law require application of the law of the place of conduct and injury when it has a conduct-regulating rule. It is true that this allows "evasion" of the home state's law, but that evasion is a consequence of our federal system.[269] It would be astounding if Louisiana could prosecute a Louisiana resident for gambling in Nevada on the ground that doing so violated Louisiana's laws against gambling.

Of course, the Supreme Court could always change the constitutional test for legislative jurisdiction, but it is unlikely to do that. It will not do that because it could not accept, and would not want to live with, the consequences of authorizing a state to confer rights and immunities on its residents when they go to other states. Doing so would substantially curtail the sovereignty of all states over harmful or lawful conduct within their own borders. Cross-border torts are different, but when conduct and injury take place in the same state, and the law there regulates or affirmatively privileges conduct, the fact that another state is the domicile of one of the parties does not give that state a legitimate interest in extending its law in an extraterritorial manner.[270]

We have traversed a lot of territory to come to a seemingly

---

elsewhere on its traveling domiciliaries.").

269 For a defense of the idea that people are subject to the laws of their home state's no matter where they go in order to prevent evasion of the home state's laws, *see* Mark D. Rosen, *"Hard" or "Soft" Pluralism?: Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers*, 51 St. Louis U. L.J. 713, 747 (2007) ("[T]he ready possibility of crossing a border to a more regulatorily relaxed state undermines the extent to which the more regulatorily-heavy states can, as a practical matter, regulate as they see fit."); *id.* at 745 (arguing that states have legitimate interests in preventing their citizens from evading their laws by going across the border to do something prohibited at home); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. Pa. L. Rev. 855, 939–40 (2002) ("Disallowing Home States from regulating their traveling citizens would undermine the principle of sovereign state equality insofar as it would allow Host States to interfere with the relationship between the Home State and its citizens by permitting Host States to serve as havens from restrictive Home State laws. This would significantly undermine the state sovereignty of certain types of states–in particular, those that favor government regulation and those states that are communitarian-minded–by preventing them from ensuring the efficacy of their policies.").

270 An exception to this principle might occur if a state-imposed liability on a resident who injures a resident of another state when it would have imposed liability had the plaintiff *also* been a forum resident. Such a ruling extends the same claim to a nonresident that would be provided to a resident. *See, e.g.*, Erwin v. Thomas, 506 P.2d 494, 496–97 (Or. 1973).

obvious conclusion. The Constitution protects our right to travel to another state. It protects the sovereign right of that state to regulate or privilege activity there. That state has the power, and perhaps even a duty under equality norms, to extend rights it views as fundamental to all persons within its borders, and that includes nonresidents who are traveling or living there. We do not saddle people with the regulatory laws of their home states when they go to other states to engage in activity that is lawful there. The anti-gambling laws of Alabama do not apply to Alabama residents who go to Nevada to gamble. Nor should the anti-abortion laws of Missouri apply to Missouri residents who go to Illinois for an abortion.

If the answer is so clear, why did we need to analyze this question so carefully? The answer is that case law in the field of conflict of laws created a "common domicile" rule in the second half of the twentieth century that *superficially* gives a basis for a lawsuit in Missouri by one Missouri resident against another Missouri resident on behalf of the "unborn child" for conduct that occurred across the border in Illinois where that conduct would not lead to liability. I have shown why the modern common domicile rule does *not* apply when the law at the place of conduct and injury is a law that regulates conduct. I have also argued that the domicile of the pregnant person is not sufficient under current constitutional standards to justify granting the domicile state the power to prevent its residents from taking advantage of liberties available to all in other states.

We have a lonely domicile case—not a common domicile case—when a Missouri resident gets an abortion in Illinois. The only state that can apply its laws, consistent with the Constitution, is the place where the abortion occurred. Despite the surface plausibility of applying the *Babcock v. Jackson* common domicile rule to a wrongful death suit in Missouri by one resident against another, Missouri cannot saddle its people with restrictions that follow them when they go to "free states" and exercise the liberties granted by the laws of those states. Such cases are "false conflicts" because only one state has *legitimate* authority to apply its law here. Despite its interest in doing so, Missouri cannot constitutionally impose a civil remedy on a Missouri resident who travels to Illinois to exercise a fundamental liberty right under Illinois law.

B. *Criminal Law*

1. Criminal Prosecution for Out-of-State Abortions

Since we have no common law crimes, any criminal prosecution must be based on a state statute that provides for criminal penalties and prosecution by the state for particular acts defined in that state's statute. States are free to criminalize conduct that touches their territory even if some of the elements of the claim occurred in another state. They cannot criminalize actions that have no contact with their territory, however.[271] States have "no jurisdiction to make an act or event a crime if the act is done or the event happens outside its territory."[272] For example, Oregon legalized assisted suicide in 1994 but limited its application to Oregon residents.[273] A litigation settlement agreement in 2022 altered the law to allow Oregon doctors to provide that service to people from other states.[274] An Oregon doctor who provided that service at their Oregon offices to a nonresident would not be subject to prosecution by the state where their patient is domiciled.[275]

A state may, however, prosecute someone for a crime if any

271 *See* State v. Dudley, 614 S.E.2d 623 (S.C. 2005) (holding that state lacked extraterritorial jurisdiction to prosecute nonresident defendant based on conduct that did not occur within the territorial borders of the state). However, states can prosecute out-of-state acts that are "intended to produce and [do] produc[e] detrimental effects within [the state]," Strassheim v. Daily, 221 U.S. 280, 285 (1911). *See also* Fund Tex. Choice v. Paxton, 658 F. Supp. 3d 377, 384 (W.D. Tex. 2023) (Texas statute providing for criminal prosecution for performing abortions does not apply to abortions performed outside Texas). For analyses of occasions where courts have partially allowed the extraterritorial application of state criminal law (mainly when there are effects in the state), *see* Emma Kaufman, *Territoriality in American Criminal Law*, 121 Mich. L. Rev. 353, 378 (2022); Jensen Lillquist, Comity & Federalism in Extraterritorial Abortion Regulation (Mar. 13, 2023) (unpublished manuscript) (on file with author).

272 Restatement (First) of Conflict of Laws § 425 (Am. L. Inst. 1934). On the question of extradition of criminal from other states, *see* Alejandra Caraballo et al., *Extradition in Post-*Roe *America*, 26 CUNY L. Rev. 1, 27–55 (2023).

273 *See* Gonzales v. Oregon, 546 U.S. 243, 249 (2006) (holding that federal Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.* does not prohibit Oregon from legalizing assisted suicide under the Oregon Death With Dignity Act, Or. Rev. Stat. § 127.800 *et seq.*).

274 *See* Settlement Agreement and Release of Claims, *supra* note 264; Johnson, *supra* note 264 (stating that Oregon agreed to stop enforcing the residency requirement in the statute and to ask the legislature to remove it from the law on the ground that the residency requirement violated the Commerce Clause and the Privileges and Immunities Clause).

275 Or. Rev. Stat. § 127.800 (1.01)(11) (2023); *see also* Rathke, *supra* note 264.

element of the crime occurred in that state.[276] For example, if someone fires a gun in Missouri and it kills someone in Illinois, we have conduct in one state and death in the other state.[277] If the crime of murder requires proof of an intent to engage in an act that may result in the death of another, then both states would be free to prosecute the person for murder. In the abortion context, these rules would *not* permit a murder prosecution of a Missouri person who goes to Illinois to get an abortion, but they might permit criminal prosecution of an Illinois doctor who ships abortion medication to a person at home in Missouri in violation of Missouri criminal statutes.

What happens if an anti-abortion state criminalizes acts *within* the state that help someone *leave the state* to get an abortion? Such acts might include (1) giving *information* about where and how to get an abortion in another state; (2) giving information about *how to import abortion medication* from another state or even another country; (3) *driving* someone to another state to get an abortion; or (4) giving someone *money* so they can afford to travel to another state to get an abortion. All these acts would occur partially within the anti-abortion state itself and might be seized on by the legislature as triggers for criminalization.

For example, if Missouri were to enact a statute (or interpret existing law) to criminalize "conspiracy to end the life of an unborn

---

276 RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 428(2) cmts. b, c, & e (AM. L. INST. 1934) ("b. . . . A state may by statute make criminal and punish any result happening within the state of an act done outside the state; c. . . . A state may also by statute make criminal and punish any act done within the state if it causes a certain event abroad.; e. . . . A common form of statute provides for punishing a crime if any part of the crime is committed within the state."); *see also* MODEL PENAL CODE § 1.03(1) (AM. L. INST. 1934) ("[A] person may be convicted under the law of this State of an offense committed by his own conduct or the conduct of another for which he is legally accountable if: (a) either the conduct that is an element of the offense or the result that is such an element occurs within this State . . . .").

277 *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 337, illus. 1 (AM. L. INST. 1934); Hanks v. State, 13 Tex. Ct. App. 289, 309 (1882) (finding that Texas prosecution of someone who forged a deed to Texas real estate even though the forgery took place in Louisiana); Hageseth v. Superior Court, 59 Cal. Rptr. 3d 385, 400–01 (Cal. Ct. App. 2007) (holding that California prosecution of Colorado doctor who gave medical care over the internet to a California resident guilty of the illegal practice of medicine in California); *cf.* Strassheim v. Daily, 221 U.S. 280, 285 (1911) (approving of criminal jurisdiction based on the effects of conduct in the forum) ("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.").

child," it could argue that the *planning* to get an abortion in Illinois took place inside Missouri, along with the aid of anyone who knowingly transported a Missouri resident out of the state to get an abortion in another state.[278] Missouri prosecutors could argue that the crime of conspiracy or "criminal transport" took place inside Missouri, and the fact that the abortion took place in a state where it is perfectly legal is beside the point if Missouri law protects the life of the unborn Missouri resident and criminalizes acts within Missouri that caused the loss of life.[279]

Further, protection of the life of a resident is a legitimate state interest. An anti-abortion state might assert that state's interest in protecting the life of a resident to justify a claim of extraterritorial jurisdiction over an Illinois abortion provider who helps a Missouri resident get an abortion in Illinois. Missouri's personhood statute, like the one in Georgia, defines a fetus as a "child" (technically an "unborn child") and thus perhaps a "person" under the law.[280] Interpreted literally, prosecutors could argue that planning with others to end the life of a Missouri resident is a crime if it is brought to fruition in another state. In that case, the state may claim an interest in prosecuting a resident who conspires to help a Missouri resident kill another Missouri resident when an act relevant to the crime occurred in Missouri.[281] The

278 Proposed legislation in Missouri would make it "unlawful for any person to perform or induce, or to attempt to perform or induce, an abortion on a resident or citizen of Missouri, or to aid or abet, or attempt to aid or abet, an abortion performed or induced on a resident or citizen of Missouri, regardless of where the abortion is or will be performed." H.B. 1854, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022) (proposed legislation for amending § 188.805(2)).

279 *See, e.g.*, Haw. Rev. Stat. § 705-520 (2023) ("A person is guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a crime: (1) He agrees with one or more persons that they or one or more of them will engage in or solicit the conduct or will cause or solicit the result specified by the definition of the offense; and (2) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy.").

280 Mo. Ann. Stat. § 188.015(10) (2019) (defining an "[u]nborn child" as "the offspring of human beings from the moment of conception until birth and at every stage of its biological development, including the human conceptus, zygote, morula, blastocyst, embryo, and fetus[.]"). *See also* Ga. Code Ann. § 1-2-1(b) (2020) ("'Natural person' means any human being including an unborn child"); *id.* § 1-2-1(e)(2) ("'Unborn child' means a member of the species Homo sapiens at any stage of development who is carried in the womb.").

281 *Compare* Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. Rev. 451, 519 (1992) ("The effort of any political subdivision of the nation to coerce its citizens into abjuring the opportunities offered by its neighbors is an affront not

state may even try to claim that the domicile of the "unborn child" is a sufficient contact to justify extraterritorial application of its criminal statutes to actors in Illinois.

Can a state criminalize acts in another state that are legal there? The Model Penal Code provides, at § 1.03(1)(f):

> [A] person may be convicted under the law of this State of an offense committed by his own conduct or the conduct of another for which he is legally accountable if: . . . (f) the offense is based on a statute of this State that expressly prohibits conduct outside the State, when the conduct bears a reasonable relation to a legitimate interest of this State and the actor knows or should know that his conduct is likely to affect that interest.[282]

If Missouri passed a statute explicitly criminalizing planning in Missouri that results in an out-of-state abortion,[283] then Missouri asserts criminal jurisdiction over what it views as a conspiracy in Missouri to kill a Missouri resident. The Model Penal Code provides that state's criminal laws can apply to acts inside the state even if the consequences occur outside the state if "a legislative purpose [to allow prosecution] appears to declare the conduct criminal regardless of the place of the result."[284]

---

only to the federal system, but to the rights that the citizens hold as members of the nation itself. The right to travel to more hospitable environs could not, after the fourteenth amendment, be denied to former slaves seeking a better life. Under the same principles, even if *Roe* continues to erode or is ultimately overruled, that right cannot be denied to women seeking to choose their future.") *with* Rosen, *supra* note 269, at 939–40 ("[d]isallowing Home States from regulating their traveling citizens would undermine the principle of sovereign state equality insofar as it would allow Host States to interfere with the relationship between the Home State and its citizens by permitting Host States to serve as havens from restrictive Home State laws. This would significantly undermine the state sovereignty of certain types of states–in particular, those that favor government regulation and those states that are communitarian-minded–by preventing them from ensuring the efficacy of their policies.").

282 Model Penal Code, § 1.03(1)(f) (Am. L. Inst. 1985).

283 Proposed legislation in Missouri would make it "unlawful for any person to . . . aid or abet, or attempt to aid or abet, an abortion performed or induced on a resident or citizen of Missouri, regardless of where the abortion is or will be performed," including "providing transportation" out of state to get an abortion, hosting a website that "encourages or facilitates efforts to obtain elective abortions," "[o]ffering or providing money" "knowing it will be used to obtain an abortion," or "[e]ngaging in any conduct that would make one an accomplice to abortion . . . ." H.B. 1854, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022) (proposed legislation for amending § 188.805(2)).

284 Model Penal Code, § 1.03(2) (Am. L. Inst. 1985). *See also* Appleton, *supra* note 2, at 655 ("criminal authority probably extends beyond state lines").

Under that formulation, Missouri might not only be able to criminalize acts in Missouri that aid a Missouri resident in obtaining an abortion in Illinois, but it may claim a right to prosecute an Illinois doctor for ending the life of a Missouri resident even though the doctor did no acts inside the state of Missouri. If Missouri has a "legitimate purpose" of protecting the life of an "unborn child," it could claim the authority to criminalize behavior outside Missouri that results in the death of a Missouri resident.

Such assertions of criminal jurisdiction seem extravagant and would certainly face a challenge under both the Full Faith and Credit Clause and the Due Process Clause. Some scholars argue that there are situations where states have criminalized—and have been allowed to criminalize—actions by their residents that take place in another state when the state's own interests are affected.[285] The Supreme Court held in 1859 that "every sovereignty has the right, subject to certain restrictions, to protect itself from, and to punish as crimes, certain acts which are particularly injurious to its rights or interests, or those of its citizens, *wherever committed.*"[286] While some sources suggest that states can bind their own citizens to state law no matter where they act as a general matter,[287] the more likely conclusion is that states can only assert extraterritorial criminal jurisdiction if they have a "demonstrable 'legitimate interest' in doing so."[288]

An anti-abortion state might try to pass a statute extending its criminal prohibitions on abortion to its residents who get abortions in another state and even to providers who perform the abortion or assist

285 Anthony J. Bellia Jr., *Federalism Doctrines and Abortion Cases: A Response to Professor Fallon*, 51 St. Louis Univ. L.J. 767, 772 (2007) ("If long established choice-of-law practices can operate to define the legislative competence of a state, there is an argument to be made that a state generally has legislative competence to regulate the activities of its citizens, instate or out-of-state–in some circumstances by criminal sanction."); *id.* at 774 ("If the Court were to identify a historical practice recognizing state authority to apply criminal laws extraterritorially to citizens, it could hold that a state may prohibit its citizens from seeking abortions in other states without assessing the strength of the state's interest in the prohibition.").

286 People v. Tyler, 7 Mich. 161, 221 (1859). *See also* Story, *supra* note 57, at 451 ("[N]ations generally assert a claim to regulate the rights, duties, obligations, and acts of their own citizens, wherever they may be domiciled. And, so far as these rights, duties, obligations, and acts afterwards come under the cognizance of the tribunals of the sovereign power of their own country, either for enforcement, or for protection, or for remedy, there may be no just ground to exclude this claim.").

287 Story, *supra* note 57, at 22 ("[E]very nation has a right to bind its own subjects by its own laws in every other place.").

288 Bellia Jr., *supra* note 285, at 774.

in doing so in a state where that is legal. Both the person getting the reproductive care services and the provider would argue that they are relying on the law of the place of conduct to protect them, and that it violates the Due Process Clause to subject them to the criminal law of another state. Even if the courts deem protection of the life of a resident "unborn child" sufficient to give a state an interest in applying its criminal statutes, the courts may step in and refuse to allow such prosecutions when all relevant conduct occurs in the pro-choice state.[289]

The problem with criminalizing an abortion that occurs in a state where it is legal is precisely the fact that abortion is *not a crime* in the pro-choice state where it occurs. Conspiring to do a legal act is not a crime.[290] The Model Penal Code explains, at § 1.03(2), that conduct outside the state cannot be prosecuted as a crime when "the result [of the conduct] occurs . . . only in another jurisdiction where the conduct charged *would not constitute an offense*."[291] That provision however, is limited by the exception in § 1.03(1)(f) that *does* authorize prosecution of out-of-state conduct and injury when they "bear[] a reasonable relation to a legitimate interest of this State."[292] Anti-abortion states can claim to have a legitimate interest in the life of the "unborn child" that is a resident of their state. Is that sufficient to justify criminal punishment of someone for doing something that is legal at the place where the conduct and injury occur?

The Supreme Court asserted in the 1975 case of *Bigelow v. Virginia* that a "State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."[293] That would mean that Missouri cannot criminally prosecute its citizens who leave the state to get an abortion. Nonetheless, it appears that the question of whether states can criminalize conduct in other states by reference

289 *But see* Dellapenna, *supra* note 157, at 1701 ("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. 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.").

290 *But see* C. Steven Bradford, *What Happens If* Roe *is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87, 107–08 (1993) (arguing that a small number of cases have upheld criminal convictions for conduct in other states "even though their action was legal where performed.").

291 MODEL PENAL CODE, § 1.03(2) (AM. L. INST. 1985) (emphasis added).

292 *Id.* § 1.03(1)(f).

293 Bigelow v. Virginia, 421 U.S. 809, 824 (1975).

to a state interest in the life of a resident is not one that has a clear answer in the case law or among scholars.[294] Whether *Bigelow v. Virginia* remains good precedent after *Dobbs* depends on the views of the current Justices, including their understanding of both state sovereignty and due process of law. On the other hand, *Bigelow* may well remain good law since "leaving abortion to the states" would have little meaning if states could not assert power to determine what acts are and are not crimes when they take place within their borders.[295]

Criminal jurisdiction rules are, of course, subject to the Full Faith and Credit Clause and the Due Process Clause. States typically do *not* make it a crime to go to another state to engage in activity that is lawful there. That is particularly apparent in the case of so-called victimless crimes, such as when someone goes to Nevada to gamble or to have a lawful relationship with a sex worker. I have argued that a statute declaring the "unborn child" to be a "person" and a legal resident is not sufficient to give the state an interest in regulating an abortion that takes place in a state where abortion is legal. For the same reasons, a state would have no authority to criminalize acts done in other states that are perfectly lawful in those other states when the consequences are also in the permissive state.[296] Some of these issues will require analysis of other provisions of the Constitution, including the right to travel, the First Amendment's free speech rights, the dormant Commerce Clause, and the Privileges and Immunities Clause.

The question is further complicated by the possibility that a Missouri resident may move to Illinois and *change their domicile* to Illinois before getting the abortion.[297] Traditional choice-of-law rules allow

294 *See* Cross, *supra* note 189, at 445–46. *Compare Bigelow*, 421 U.S. at 827–28 (1975) (stating in *dicta* that criminal jurisdiction ends at a state's borders), *with* Skiriotes v. Florida, 313 U.S. 69, 77 (1941) (a state can criminalize conduct that takes place in international waters).

295 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232 (2022) (abortion should be left to "the people's elected representatives").

296 Professor Bradford argues that a state can probably impose its anti-abortion laws on its residents who leave the state to get an abortion but probably cannot impose its laws on a nonresident provider who acts in accordance with the law of the place the conduct. Bradford, *supra* note 290, at 170 ("If *Roe* is overruled, a plausible case could be made that the application of an abortion statute to a resident woman who goes to another, more liberal jurisdiction to obtain an abortion would be constitutional."); *id.* ("[A] state probably could not constitutionally apply its criminal abortion law to a doctor performing abortions in another state, even if those abortions involve the state's residents.").

297 *See* Dellapenna, *supra* note 157, at 1701 ("[P]ersons who might be subjected to an abortion law that they are seeking to escape from can do so by establishing a new

domicile to be changed *in an instant* by nothing more than crossing a state border with the intent to make it your home.[298] While the First Restatement required proof that the person "establish[ed] a dwelling-place" in the new state and was "physically presen[t]" there,[299] the Second Restatement only requires a person's "physical presence" in the new state combined with the intent "to make that place his home for the time at least."[300] Establishment of a dwelling place is not necessary to change domicile, and the case law is quite clear that a change in domicile can happen instantly.[301]

However, the current draft of the Third Restatement defines domicile as the place where the person's "life is centered."[302] It is uncertain whether the Third Restatement allows this change to occur in an instant. Will this new test make it more difficult to declare a new domicile in another state? Will it be interpreted in line with precedent that allows domicile to change in an instant when one moves across state lines with the intent to make that state their home? Will state courts adopt the new Third Restatement test or reject it? All this matters because someone who moves to a pro-choice state and establishes domicile there is subject to the rules of their new domicile; their old home state would have no power to regulate their conduct at their new home. Of course, a change in domicile is generally only possible if one has the financial means to do so.

In conclusion, while some precedents suggest that states can impose criminal penalties on their citizens for acts that take place in other states, others hold that a person is entitled to engage in acts in a state that are lawful there without fear of criminal prosecution by one's home state. I have argued that it may violate the Constitution to penalize a person for exercising a fundamental right under Illinois law just because they come from Missouri, and criminal law should follow

residence at the place where they obtain the abortion—even if they resume their former residence subsequent to the abortion.").

298 White v. Tennant, 8 S.E. 596 (W. Va. 1888). *See also* Restatement (Third) of Conflict of Laws § 2.06 (Am. L. Inst., Tentative Draft No. 2, 2021) ("A natural person with legal capacity may change the place of that person's domicile.").

299 Restatement (First) of Conflict of Laws § 15 (Am. L. Inst. 1934).

300 Restatement (Second) of Conflict of Laws §§ 15–16, 18 (Am. L. Inst. 1971).

301 *White*, 8 S.E. at 596.

302 Restatement (Third) of Conflict of Laws § 2.03 (Am. L. Inst., Tentative Draft No. 2, 2021) (domicile is "(1) . . . the place where the person's life is centered and the person is physically present. (2) Determining where a natural person's life is centered depends on objective evidence of the person's domestic, familial, social, religious, economic, professional, and civic activities.").

the same pattern. If anything, it is an even greater imposition on the sovereignty of Illinois to punish someone for acts in Illinois that cause effects only in the state of Illinois than it is to allow for civil liability. Whether Missouri can punish acts in Missouri that help a Missouri resident leave the state to get an abortion will depend on the scope of the constitutional right to travel, discussed below in Section V(D).

2. "Penal Laws"

An issue related to criminal jurisdiction comes out of the tradition that states do not enforce the "penal laws" of other states. This means that the state of Illinois will not prosecute violations of Missouri criminal law; only the Missouri authorities can do that. It also means that the Constitution's Full Faith and Credit Clause does not require a state to enforce a final judgment of the courts of another state if that judgment is based on a "penal law[]."[303] The Supreme Court held in 1892 in the case of *Huntington v. Attrill*[304] that the "penal law" exception to full faith and credit applies only to statutes that punish offenses against the public, not laws that provide civil remedies for private persons against other wrongdoers.[305] The First Restatement agrees that "[n]o action can be maintained to recover a penalty the right to which is given by the law of another state."[306] It explains that a penalty is "a sum of money exacted as punishment for a civil wrong as distinguished from compensation for the loss suffered by the injured party."[307]

An Illinois court would decline to hear a case based on a Missouri bounty law (if it were interpreted to apply to conduct outside Missouri) since such laws are not geared to compensate for a wrong done to the plaintiff but to punish a wrong against the general public. An Illinois court will almost certainly view a Missouri bounty statute to be a civil substitute for criminal law enforcement. Such statutes do not provide

---

303 Nelson v. George, 399 U.S. 224, 229 (1970) ("[T]he Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment."); Antelope, 23 U.S. 66, 123 (1825) ("The Courts of no country execute the penal laws of another . . . .").

304 Huntington v. Attrill, 146 U.S. 657 (1892).

305 *Id.* at 683 (civil remedy for fraud is not a "penal law" since it is a "grant of a civil right to a private person" rather than a "punishment of an offense against the public").

306 Restatement (First) of Conflict of Laws § 611 (Am. L. Inst. 1934); Restatement (Second) of Conflict of Laws § 89 (Am. L. Inst. 1971) ("[n]o action will be entertained on a foreign penal cause of action.").

307 Restatement (First) of Conflict of Laws § 611 cmt. a (Am. L. Inst. 1934).

compensation to the plaintiff for wrongs done to the plaintiff; instead, they give incentives to private plaintiffs to act in the role of private attorneys general bringing actions to help enforce state criminal laws or state civil policy. Illinois courts would be well within their rights under the penal law exception to refuse to enforce a Missouri bounty statute. Such laws circumvent the heightened procedures characteristic of criminal law, such as prosecution by a state official rather than a private party, requirement of proof beyond a reasonable doubt, etc.[308]

Does the penal law exception apply to punitive damages?[309] They are certainly intended to punish, and yet they are not fines paid to the state for violation of criminal statutes but rather retained by private parties because the wrongful acts of the defendant caused harm to the plaintiff. If punitive damages are based on a "penal law," that would mean that, even if Illinois courts chose to apply Missouri tort law to an event that occurred in Missouri, they might refuse to allow a punitive damages judgment against the defendant, requiring that claim to be brought in Missouri courts. While that rule was sometimes invoked in the first half of the twentieth century during the First Restatement era, it has fallen by the wayside under modern approaches to conflict of laws.[310] Indeed, it is generally unconstitutional to refuse to hear a claim just because it is based on the law of another state.[311] It remains true that Illinois will not enforce Missouri criminal law, but the fact that one purpose of a civil remedy is punishment (as is the case with punitive damages) does not disable a court from applying the punitive damages law of another

308 *See, e.g.*, City of Oakland v. Desert Outdoor Advert., Inc., 267 P.3d 48, 51–54 (Nev. 2011) (civil statutory penalties against a private individual who violated a municipal ordinance that were awarded to California municipality under California law are based on a "penal law" and thus exempt from the Full Faith and Credit Clause and not enforceable in Nevada courts; because the purpose of the law was "not to 'afford a private remedy to a person injured by the wrongful act,' but... to 'to punish an offense against the public justice of the state," it was a penal law).

309 RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 611 cmt. b(3) (AM. L. INST. 1934).

310 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 89 cmt. a (AM. L. INST. 1971) (a "penal cause of action" applies only to actions by the state to recover a fine for violation of criminal law or an action by an informer to part of that fine); *id.* at § 89 Reporter's Note (c) (case law finds that "exemplary damages" are not penal laws and thus can be maintained); *see, e.g.*, Atchison v. Nichols, 264 U.S. 348, 350–52 (1924) (punitive damages claim arising under another state's law is not a "penal law" that states are disabled from enforcing).

311 Hughes v. Fetter, 341 U.S. 609, 613–14 (1951). There are potential interpretations of *Hughes v. Fetter* that make it stand for a much narrower proposition, but it is generally cited for the proposition stated above in the text. *See, e.g.*, Carroll v. Lanza, 349 U.S. 408, 413 (1955) (*Hughes v. Fetter* was a case "where the State of the forum seeks to exclude from its courts actions arising under a foreign statute").

state, and courts today routinely apply the punitive damages laws of other states.[312]

In any event, the "penal law" rule would *not* be the most important reason that an Illinois court would refuse to apply Missouri law to an Illinois abortion. It would do so because Illinois' strong interests in applying its law prevail over the interests of Missouri in imposing legal disabilities on its residents when they travel to other states and engage in conduct that is lawful and encouraged there. However, the penal law doctrine may be persuasive to a Missouri court asked to apply its bounty law to a person who got an abortion in Illinois; it might conclude that the bounty law has no extraterritorial application since it is a penal law. I have argued that the strongest argument for denying Missouri the right to regulate an abortion that occurs in Illinois is the fact that Illinois has a conduct-regulating rule and that it has the authority (and perhaps constitutional duty) to extend its privileges to nonresidents who come there to take advantage of its laws. Moreover, abortion providers have medical ethical duties to provide what Illinois sees as reproductive care services. It would arguably violate the Due Process Clause to impose liability on an Illinois actor for actions that they were obligated to engage in by Illinois law. Similarly, it might violate constitutional norms to penalize a state resident for leaving the state to do something that is lawful in the other state when the law there grants every person in the state the fundamental right to reproductive health services.

V. Cross-Border Abortion Cases

We now shift to cross-border torts with conduct in one state and injury in another state. One set of cases involves conduct wholly confined to a defendant-protecting state with an injury that foreseeably happens later across the border in a plaintiff-protecting state. That might be the case, for example, first, if an abortion provider in Illinois gives medication to a Missouri resident in Illinois knowing they will go back to Missouri to ingest the medication. A second issue involves conduct that straddles the border, taking place partially in the defendant-protecting state and partially in the plaintiff-protecting state. For example, an Illinois provider could ship abortion medication to a person in Missouri. A third issue is whether anti-abortion states can prohibit people from providing information about abortion services in

312 *See, e.g.*, Deutsch v. Novartis Pharms. Corp., 723 F. Supp. 2d 521 (E.D.N.Y. 2010) (N.Y. court applies punitive damages law of N.J.); Townsend v. Sears, Roebuck & Co., 879 N.E.2d 893 (Ill. 2007) (Ill. court applies Mich. punitive damages law).

pro-choice states to Missouri residents at home in Missouri. A fourth issue is whether the constitutional right to travel allows a person to drive a Missouri resident to Illinois to get an abortion. A fifth issue is whether Missouri can punish someone for subsidizing travel out of Missouri to get an abortion. Sixth, can a state establish a state abortion facility and be protected by sovereign immunity from suit by a Missouri resident for providing an abortion to a Missouri resident even if some part of the services occurs in Missouri? Can Illinois confer absolute immunity on the state employees of such a state abortion facility in connection with their carrying out their jobs? Seventh, can states impose their laws on other states by litigation resulting in final court judgments?[313]

A. *Can anti-abortion states regulate abortion providers that provide abortion medication to residents of anti-abortion states who return home to take the medicine?*

I have argued that Missouri anti-abortion law cannot apply to an abortion that takes place in Illinois. That means Missouri cannot charge an Illinois abortion provider with a crime under Missouri law, and Missouri cannot empower a Missouri resident to sue either the provider or the person getting the abortion for wrongful death based solely on the residence of the plaintiff in Missouri or even the common domicile of that person and the person who got the abortion. But what happens if an Illinois provider gives abortion medication to a Missouri resident who then returns to Missouri to ingest the medication? What law applies to the abortion provider in that case, and is it constitutional to apply the law of either state?[314]

313 Proposed legislation in Missouri, for example, would make it "unlawful for any person to . . . aid or abet, or attempt to aid or abet, an abortion performed or induced on a resident or citizen of Missouri, regardless of where the abortion is or will be performed," including "providing transportation" out of state to get an abortion, hosting a website that "encourages or facilitates efforts to obtain elective abortions," "[o]ffering or providing money" "knowing it will be used to obtain an abortion," or "[e]ngaging in any conduct that would make one an accomplice to abortion." H.B. 1854, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022) (proposed legislation for amending § 188.805(2)).

314 *See* Hanks v. State, 13 Tex. Ct. App. 289, 290–91 (1882) (Texas prosecution of someone who forged a deed to Texas real estate even though the forgery took place in Louisiana); Hageseth v. Superior Court, 59 Cal. Rptr. 3d 385, 400–01 (Cal. Ct. App. 2007) (California prosecution of Colorado doctor who gave medical care over the internet to a California resident guilty of the illegal practice of medicine in California); *cf.* Strassheim v. Daily, 221 U.S. 280, 285 (1911) (approving of criminal jurisdiction based on the effects of conduct in the forum) ("Acts done outside a

You might think, at first glance, that Illinois law would apply. Certainly, doctors I have spoken with assume they are regulated *solely* by the law of the state where they practice medicine, and they may argue that they have no control over where a patient takes their medication. The provider acted in Illinois, never left the state, and relied on application of the law of the place of conduct in deciding how to act. The fact that the conduct occurred in Illinois and is deemed privileged by Illinois law gives Illinois courts legislative authority under the Full Faith and Credit Clause to apply Illinois law. And it is possible that Illinois courts will see it exactly that way, even if the patient brings the medication back to Missouri and ingests it there. But a Missouri court might analyze the issue quite differently. They may seek to apply Missouri law as the place of the injury on the assumption that the Illinois provider knew, or should have known, that the patient would bring the medication back home and take it there.

Recall that, from the first cases involving cross-border torts, U.S. courts have generally chosen to apply the law of the place of injury, *not* the law of the place of conduct, when they are in different jurisdictions, and the place of injury provides a remedy for the harmful conduct.[315] That place of injury rule is compatible with all three Restatements if it was reasonably foreseeable that the defendant's conduct in Illinois would cause harm in Missouri.[316] In that instance, application of Missouri law may be viewed by the Supreme Court as neither "arbitrary" nor "fundamentally unfair" under the *Allstate* test. The Missouri courts might see the case as analogous to someone who negligently entrusts a weapon in one state to a person they know plans to travel to another state to murder their spouse. The entrustor cannot feign ignorance of the law of the place of injury if it recognizes the tort of negligent entrustment even if the place of conduct does not recognize that tort or would not find the defendant to be the proximate cause of the harm.[317]

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.").

315 Ala. Great S. R.R. Co. v. Carroll, 11 So. 803, 806 (Ala. 1892); *see* Restatement (First) of Conflict of Laws § 377 (Am. L. Inst. 1934); Restatement (Second) of Conflict of Laws § 146 (Am. L. Inst. 1971).

316 Restatement (Third) of Conflict of Laws § 6.09(b) (Am. L. Inst., Tentative Draft No. 4, 2023); Restatement (Second) of Conflict of Laws § 145 (Am. L. Inst. 1971); Restatement (First) of Conflict of Laws § 377 (Am. L. Inst. 1934).

317 *See generally* Hanley v. Forester, 903 F.2d 1030 (5th Cir. 1990) (applying the strict liability law of the place of injury rather than the negligence law of the place where the vehicle was entrusted to the driver). *But see* Mendonca v. Winckler, No. 12-5007-

The protective theory behind the place of injury rule focuses on the power of the state of Missouri to safeguard its people from harm. You cannot throw rocks over the border from Illinois into Missouri and expect to be immune from criminal punishment or civil liability in Missouri if you harm someone there.[318] As Thomas Hobbes taught us, the first job of government is protecting people from harm.[319] That means that under the modern approach to conflict of laws, Missouri law *might* seek to apply its law to a provider of abortion medication in Illinois if the medication is taken back to Missouri, ingested there, and the provider could or should have foreseen that that would happen.

What is the argument for application of Illinois law despite the weight of the traditional place of injury rule? The first argument for application of the law of the place of conduct relies on the "traditional" rules in the First Restatement. Recall that the First Restatement had an exception to the place of injury rule when the defendant acted in a state that either placed a *duty* on them to do what they did or conferred an *affirmative privilege* to do so without liability.[320] The First Restatement states:

> § 382. Duty or Privilege to Act
>
> (1) A person who is required by law to act or not to act in one state in a certain manner will not be held liable for the results of such action or failure to act which occur in another state.
>
> (2) A person who acts pursuant to a privilege conferred by the law of the place of acting will not be held liable for the results of his act in another state.[321]

An abortion provider in Illinois would argue that they are acting under a legal duty because they are required to provide standard medical care to patients, and abortion is not only an approved medical procedure, but is related to the health of the patient and is deemed a fundamental right under Illinois law. The legal and ethical rules

---

JLV, 2013 WL 6528854 (D.S.D. Dec. 11, 2013); Dunn v. Madera, No. 7:05-CV-041-R, 2006 WL 3734210 (N.D. Tex. Dec. 18, 2006); Sinnott v. Thompson, 32 A.3d 351 (Del. 2011); Coats v. Hertz Corp., 695 N.E.2d 76 (Ill. App. Ct. 1998) (all applying the law of the place of entrustment rather than the law of the place of injury).

318 Cameron v. Vandegriff, 13 S.W. 1092, 1093 (Ark. 1890).

319 *See* Singer, *supra* note 112.

320 RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 382 (AM. L. INST. 1934) (place of conduct law applies if it grants the actor a "privilege" to act or imposes on them a "duty to act" in the way they did); *see* Rheinstein, *supra* note 140, at 171–73 (discussing this exception).

321 RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 382 (AM. L. INST. 1934).

governing the conduct of doctors would seem to create a duty to act inside Illinois regardless of the personal views of the doctor.[322] It seems wrong, and potentially a violation of due process of law, to tell the doctor that they are *both* under a legal obligation (under Illinois law) to prescribe the abortion medication *and* under an obligation (under Missouri law) *not* to provide it. There is nothing more clearly a violation of "rule of law" norms than both requiring someone to do something and requiring them not do it at the same time. In such cases, the law that wins should be the law of the place of conduct, not the law of the place of injury. With contradictory commands, the place where someone acts breaks the tie.

It is a somewhat more complicated question whether the doctor can also take advantage of a "privilege" to act under the law of Illinois. On one hand, it would seem that Illinois law affirmatively grants individuals the fundamental right to seek medical care and that this necessarily means that doctors are privileged to provide that care without liability or penalty. But oddly, the First Restatement has a nonsensical interpretation of the word "privilege" in § 382. Comment "c" explains that § 382(2) does not give a person the power to act if the law of the place of conduct immunizes them from liability because it views the conduct as appropriate and nontortious. A "privilege" to act only means the liberty to act under "exceptional" circumstances that render conduct *normally viewed as tortious* to be nontortious.[323] Is the Illinois pro-choice rule based on the idea that it is normally tortious to kill another person but that an exception to that principle exists when the victim is an "unborn child"? Or is it based on the notion that abortions are not tortious at all when they take place within legally approved limits? The second interpretation is more likely, and that means the First Restatement would point to the law of Missouri to determine the wrongfulness of the conduct rather than the law of Illinois.

But that First Restatement rule is illogical, arbitrary, and counterintuitive.[324] It suggests that the place of conduct law should apply *only* when it provides an *exception* to a conduct-regulating rule, and that it should not apply when the place of conduct has *even stronger reasons*

322 This argument would be strengthened if Illinois statutes made it plain that a doctor providing reproductive care services, including abortion, has an obligation to provide those services to patients who seek their services, as long as they abide by current medical methods and have the capacity to provide the services.

323 Restatement (First) of Conflict of Laws § 382 cmt. c (Am. L. Inst. 1934); Rheinstein, *supra* note 140, at 174.

324 *See* Rheinstein, *supra* note 140, at 174–75.

for viewing the conduct as legitimate because it was never tortious to begin with. If the reason for replacing the usual place of injury rule with a place of conduct rule is to protect the interests of someone who acts in reliance on the law of the place of conduct or the sovereign interests of a state that both protects and promotes that conduct, then the place of conduct has stronger reasons for applying its law if it defines the act as a fundamental right than if the law of the place of conduct is an exception to a normally tortious action.

The second strategy for application of the law of the place of conduct can be found in the Second Restatement. The Second Restatement requires application of the law of the place of injury unless another state has a *more significant relationship* to the parties and to the occurrence.[325] That standard is not an easy one to apply in this context. Both states have extremely strong interests in applying their law. Illinois seeks to immunize doctors who provide medical care there while Missouri seeks to protect "unborn life."

The law that will be applied under the Second Restatement test is likely to differ depending on where the case is brought. An Illinois court may well apply Illinois law, either by looking to something like the First Restatement exceptions to the place of injury rule or by focusing on the "justified expectations" of the parties.[326] The doctor acted in reliance on Illinois law, and it would unfairly surprise the doctor to apply the law of Missouri. That is especially true if Illinois law obligates the doctor to provide the care as a matter of medical ethics. And the doctor has no power to force the patient to take the medication inside Illinois.

But the Missouri courts might find that the doctor's expectations are not "justified" since the doctor *knew* that the "harm" might take place in Missouri, that Missouri law defines an abortion as causing "harm" even though it is the patient's decision to ingest the medication at home in Missouri. The doctor did furnish the means to commit the act, and that fact may make the case similar to one where the doctor gives rocks to a friend knowing they are going to throw them over the border. In such a case, Missouri courts may argue that the doctor cannot be unfairly surprised by application of Missouri law.[327] But of course, that is the very issue in contention. Should a doctor be responsible for

---

325 Restatement (Second) of Conflict of Laws § 146 (Am. L. Inst. 1971).

326 *Id.* § 6.

327 *See* Singer, *supra* note 112, at 816 (arguing for application of the law of the place of injury when it is foreseeable the injury will occur there and further arguing that the courts at the place of injury should have personal jurisdiction over the defendant).

the actions of a patient who takes drugs that are legal where prescribed to a state where they are illegal?

Section 6.09(b) of the Third Restatement differs from the Second Restatement by requiring application of the law of the place of conduct in a cross-border tort, unless the plaintiff can overcome a burden of proving that the defendant could "reasonably foresee[]" the injury occurring in another state.[328] That rule, however, assumes that we are dealing with an "injury." Abortion cases, however, are an unusual context where the very existence of an injury (is there one or not?) is behind the conflicting internal laws of the two states. In such a case, an Illinois doctor may anticipate immunity from liability for practicing medicine in Illinois according to Illinois rules. Why should medical treatment differ depending on where the patient comes from? If an Illinois doctor would prescribe and give abortion medication to an Illinois resident to take at home, why should the doctor not be empowered to provide exactly the same care to someone from another state who comes to them for medical treatment? If the actions are deemed to be the provision of "reproductive health care" for patients that have a "fundamental right" to "make autonomous decisions about how to exercise that right,"[329] then perhaps the doctor cannot "reasonably foresee" an "injury" occurring elsewhere since Illinois considers the conduct to be protective rather than harmful.

In addition, the Third Restatement rules contain an overall exception for cases that involve "exceptional and unanticipated" circumstances where application of another law is "manifestly more appropriate."[330] Even if the doctor can foresee an "injury" taking place in Missouri (as Missouri law sees it), application of Missouri law may be unwarranted both because Illinois does not see the case as causing an injury at all, the doctor is helping someone exercise a fundamental right, and because the doctor is under an *ethical and legal obligation* to provide equal care for patients who come to them without discrimination against nonresidents. Further, the doctor is not in control of the patient's decision regarding where to take the medication.

If what matters is the patient's right to medical care, and the doctor's duty to provide it, *then the case is not a cross-border tort at all, but a lonely domicile case.* Missouri has no authority to tell Illinois how

328 Restatement (Third) of Conflict of Laws § 6.09(b) (Am. L. Inst., Tentative Draft No. 4, 2023).

329 *See* 775 Ill. Comp. Stat. 55/1-15 (2019).

330 Restatement (Third) of Conflict of Laws § 5.03 (Am. L. Inst., Preliminary Draft No. 7, 2021).

its doctors should give care for patients in Illinois. And it is not the provider's fault that the patient voluntarily brings the medication back to a state where it is illegal to ingest it. Massachusetts residents, after all, are free to buy and use fireworks in New Hampshire, even if it is illegal to bring them back to Massachusetts. The New Hampshire fireworks store cannot be prosecuted in Massachusetts courts for selling fireworks legally in New Hampshire to Massachusetts residents. If the customer *does* bring the fireworks back to Massachusetts and causes injury there, then Massachusetts tort law can apply to the New Hampshire store if it was foreseeable the injury could occur there. Both states agree that losing eyesight or fingers from misuse of fireworks is an injury. In the abortion context, by contrast, the states not only disagree about whether there is an injury but about whether it violates a doctor's ethical obligations to refuse to provide standard care to residents of other states who come to them for treatment. Of course, the Missouri courts are likely to use their own laws to determine whether an injury occurred in Missouri and those laws are quite clear that an abortion does cause a legally cognizable injury. Nor is it surprising to the Illinois doctor that Missouri views abortion as causing a harm. Missouri courts might therefore apply the place of injury rule and subject the doctor to a civil claim under a bounty law if the plaintiff can prove that the doctor knew that the patient was intending to take the medication back to Missouri to ingest.

Oddly, what may be of the greatest importance in cross-border tort cases like this are the rules of personal jurisdiction, *not* the rules of conflict of laws or legislative jurisdiction. The personal jurisdiction rules may well be the thing that protects Illinois doctors from liability in Missouri courts when they provide medication to a patient inside Illinois.[331] The doctor did not "purposefully avail" themself of the privilege of conducting activities inside Missouri and the Missouri courts may have no personal jurisdiction over them.[332] That would mean that

331 Of course, an Illinois doctor who advertises in Missouri to draw Missouri residents over the border may be said to have purposefully availed themselves of the privilege of conducting activities in Missouri that might subject them to Missouri law. It is unclear, however, under current standards, whether that is enough to sustain personal jurisdiction over the doctor in Missouri. *See* Singer, *supra* note 112, at 818–19. At the same time, *Bigelow v. Virginia* authorizes speech in Missouri about lawful abortion services in Illinois. Bigelow v. Virginia, 421 U.S. 809, 824–25 (1975).

332 Current law may prevent Missouri courts from taking personal jurisdiction over a nonresident doctor who does not operate inside Missouri and has no contacts there other than treating a resident of Missouri inside Illinois. *See* Singer, *supra* note 112, at 818–27 (discussing the "purposeful availment" test for personal

the case, if any, would have to be brought in the Illinois courts, and they would deviate from the place of injury rule, instead of applying the law of the place of conduct.

But suppose the Illinois provider has a website advertising the Illinois abortion services. Under current law, a passive (non-interactive) website created in Illinois does not constitute a contact in Missouri sufficient to create personal jurisdiction there over the doctor. Only *interactive* websites are sufficient.[333] However, we are in a new world, and when doctors know that Missouri counts the abortion as causing harm and prohibits the conduct, a doctor who acts in Illinois to facilitate an abortion that takes place in Missouri may be held by Missouri courts to have acted inside Missouri, and may, *for that very reason*, be deemed subject to personal jurisdiction there. Because the law of the place of injury often applies to conduct outside the state that foreseeably causes injury within it, that may be enough under some tests for personal jurisdiction to allow the case against the Illinois provider to be heard in Missouri courts.[334]

All this means that an abortion provider who conducts the procedure *wholly within a pro-choice state* should not be subject to the anti-abortion law of another state, but one who provides abortion medication to a patient who takes the medication back home to ingest *may* be vulnerable to suit in the anti-abortion state if personal jurisdiction laws are relaxed to accommodate such cases. On the other hand, current law appears to deny personal jurisdiction to the courts of states like Missouri who seek to bring Illinois doctors into court as defendants. Doctors who confine their conduct to Illinois may well be immune from suit in Missouri, *even if the "injury" manifests there.* In that case, the doctor could be sued only in Illinois and would undoubtedly be protected by Illinois pro-choice laws.

If the rules change, and Illinois doctors *are* subject to suit in Missouri courts when they provide Missouri residents with abortion medication, those doctors can defend those lawsuits by reference to Illinois laws that *mandate* the provision of those medical services as a matter of medical ethics. The place of injury rule should not apply in

---

jurisdiction).

333 An interactive website is one that does more than provide information but allows a customer to interact with the company by purchasing goods, making an agreement, setting up an appointment, etc.

334 Singer, *supra* note 112, at 818–27 (arguing that the place of injury courts should have personal jurisdiction over an out-of-state actor if the conduct foreseeably caused harm inside the forum).

that instance because it violates due process of law to subject the doctor to conflicting mandates. The law cannot both mandate an action and prohibit it at the same time. That may not be enough to stop the Missouri legislature from requiring application of Missouri law to such cases or to stop the Supreme Court of Missouri from choosing to apply Missouri law, but it should be.

Doctors who are worried about potential liability may protect themselves by insisting that the procedure take place wholly inside the borders of Illinois itself. States that want to protect their providers from legal vulnerability should clarify in their laws that abortion services for those who request them from doctors who provide those services *must* be provided regardless of the domicile of the patient. Such mandatory nondiscrimination public accommodation rules may be the best way to result in application of the law of the place of conduct if a case ever were to end up in the courts of the anti-abortion state.[335]

B. Can anti-abortion states prohibit shipping abortion medication to people in their states?

Under longstanding choice-of-law rules, abortion providers in Illinois cannot ship abortion medication through the mail or via a truck or car to Missouri without facing liability or penalty under Missouri laws. Missouri has the power to regulate conduct within Missouri, and if it lawfully bans a drug, it can criminalize and penalize its importation. In such a case, conduct is *not* confined to a state that immunizes the actor, and any entry to the regulatory state caused by the actor subjects that actor to its regulatory laws as well as personal jurisdiction. The fact that the conduct started in Illinois is irrelevant. What matters is the congruence of conduct and injury inside Missouri.

That also may mean that a telehealth visit of a Missouri patient by an Illinois doctor may constitute the practice of medicine inside Missouri, subjecting the physician to Missouri law.[336] The fact that the

335 I have been told that some doctors also require the patient to stay for some time in the pro-choice state so that any complications will be treated in hospitals there rather than in a hospital in the anti-abortion state.

336 David S. Cohen et al., *Abortion Pills*, (Feb. 1, 2023) (unpublished manuscript) (on file with author); *cf.* Greer Donley & Rachel Rebouché, *The Promise of Telehealth for Abortion, in* Digital Health Care Outside of Traditional Clinical Settings: Ethical, Legal, and Regulatory Challenges and Opportunities (Glenn Cohen et al. eds., forthcoming 2024). While an Illinois shield law might prevent Illinois courts from finding the doctor liable, it would not stop a Missouri court from applying Missouri law to acts that arguably take place inside Missouri. *Cf.* Cohen

doctor never physically left her home state does not mean that she had no contact with the state where her patient was situated during their consultation. While pro-choice states may pass "shield laws" protecting their providers from liability for such interstate telehealth visits, those laws cannot be imposed on anti-abortion states that have contrary rules. California, for example, has applied its laws to a person in Georgia who recorded a telephone conversation with a California person without their consent in violation of California law.[337] And a federal court in California applied California's public accommodation law prohibiting sexual orientation discrimination against an Arizona company that provided adoption referral services over the internet to a couple in California.[338] Under similar reasoning, an Illinois doctor is risking a lawsuit under Missouri law in Missouri courts if they conduct a telehealth visit over the internet with a Missouri resident at home in Missouri.

C. *Can anti-abortion states prevent pro-choice advocates from speaking about the availability of abortion in pro-choice states?*

The Constitution does not prohibit regulation of speech when that speech is in furtherance of a crime or is intended to enable or prompt another person to commit a crime.[339] But the First Amendment *does* protect our *freedom to convey information*, and information about the law of other states would seem to be within the core protections of the First Amendment.[340] The Supreme Court so held in *Bigelow v. Virginia*[341] in 1975, where it found that the First Amendment right to free speech meant that Virginia could not prosecute an editor of a newspaper published in Virginia for including an advertisement with information about legally available abortion services in New York. A state "may not,

et al., *supra* note 13; Pam Belluck & Emily Bazelon, *New York Passes Bill to Shield Abortion Providers Sending Pills Into States With Bans,* N.Y. Times (June 20, 2023), https://www.nytimes.com/2023/06/20/health/abortion-shield-law-new-york.html.

337 Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914, 917 (Cal. 2006).

338 Butler v. Adoption Media, LLC, 486 F. Supp. 2d 1022 (N.D. Cal. 2007).

339 *Cf.* Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (state can prohibit speech "teaching . . . the moral propriety or even moral necessity for a resort to force and violence" but only if that speech "is directed to inciting or producing imminent lawless action" (internal quotation omitted)).

340 Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011) ("[T]he creation and dissemination of information are speech within the meaning of the First Amendment.").

341 Bigelow v. Virginia, 421 U.S. 809 (1975).

under the guise of exercising internal police powers, bar a citizen from another State of disseminating information about an activity that is legal in that State."[342] It would seem to follow that people inside anti-abortion states have similar free speech rights since they too are conveying information about lawful conduct in another state.[343]

An anti-abortion state may argue that people there are not free to help residents evade the law of their home state by giving them information that would help them commit a crime. The problem, of course, is that abortion is *not* a crime in the pro-choice state. It is hard to see why it could be constitutional to prohibit or penalize dispensation of information about lawful procedures in other states. Nothing stops casinos in Nevada from advertising in other states to attract customers even if gambling is illegal elsewhere. And it appears that the ruling in *Bigelow* would have to be overruled before an anti-abortion state could punish or impose liability for speech that conveys information about lawful abortion services in other states.

D. Does the right to travel protect the right to drive someone from an anti-abortion state to a pro-choice state?

The *Bigelow* case just discussed states quite clearly that the right to travel includes the freedom to go to another state to get a legal abortion there: "Neither could Virginia prevent its residents from traveling to New York to obtain [legal abortion] services there, or, as the State conceded, prosecute them for going there."[344] Interstate travel is a constitutionally protected right and if one travels to a pro-choice state, you should be able to take advantage of its laws without liability.[345] That

342 *Id.* at 824–25.

343 *See* Jennifer Daskal, *Speech Across Borders*, 105 VA. L. REV. 1605, 1646 (2019) (analyzing issues involved in regulating speech over borders).

344 *Bigelow*, 421 U.S. at 824; *see also* Saenz v. Roe, 526 U.S. 489, 500 (1999) (both the Citizenship Clause and the Privileges and Immunities Clause in the Fourteenth Amendment protect the right to travel and require that travelers who become permanent residents of other states have "the right to be treated like other citizens of that State.").

345 *See* Kreimer, *supra* note 163, at 912–13 ("[W]here American citizens seek to take advantage of locally legal abortion options in sister states, the home state should not be permitted to enforce its conflicting criminal statutes extraterritorially."); *id.* at 938 ("American citizens do not carry the morality of their home states with them as they travel, like fleeing convicts dragging the shackles of their imprisonment. Rather, citizens who reside in each of the state of the Union have the right to travel to any of the other states in order to follow their consciences, and they are entitled to do so within the frameworks of law and morality that those

may not stop anti-abortion states from passing laws criminalizing the act of transporting someone out of state to get an abortion.[346]

It is true that part of the driving activity occurs in the anti-abortion state that may have a law that prohibits driving someone to an abortion clinic in another state. For that reason, the anti-abortion state may claim a right to regulate conduct that admittedly occurs in that state. Whether the right to travel limits the powers of anti-abortion states in this regard again depends on the willingness of the Supreme Court to reject the language in *Bigelow* or ignore it as mere dicta.

A helpful precedent is the 1867 case of *Crandall v. State of Nevada*.[347] In that case, the Supreme Court invalidated a state tax imposed on people leaving the state by railroad or stagecoach or other common carrier.[348] "The people of these United States constitute one nation," and citizens have the right "to come to the seat of [the federal] government," the "right to free access to its sea-ports," and to the "land offices, the revenue offices, and the courts of justice in the several States."[349] An unlimited power to tax could destroy the right to travel. "If one State can do this, so can every other State. And thus one or more States covering the only practicable routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other."[350] Justice Miller concluded on behalf of the Court: "We are

sister states provide."); Leslie Francis & John Francis, *Federalism and the Right to Travel: Medical Aid in Dying and Abortion*, 26 J. Health Care L. & Pol'y 49, 75–76 (2022) ("On the one hand, if the predicate conduct—travel for a legal abortion out-of-state—cannot be directly criminalized, the derivative conduct, aiding and abetting the (non-existent) crime, also cannot be criminal. Other statutes might try to address the aid indirectly, however. Examples might include new crimes such as abortion transit, abortion funding, or abortion procurement along the lines of the Missouri proposal to prohibit abortion trafficking. These are not direct prohibitions on travel by the woman, although they could make it harder for her to travel. The more indirect the burden is on the abortion travel itself, the more likely the strategy will survive constitutional scrutiny under Article IV.").

346 *See e.g.*, Alanna Vagianos, *Idaho Is About to Be the First State to Restrict Interstate Travel for Abortion Post-Roe*, Huffpost (Mar. 28, 2023), https://www.huffpost.com/entry/idaho-abortion-bill-trafficking-travel_n_641b62c3e4b00c3e6077c80b; Alanna Vagianos, *Idaho Passes Law to Restrict Interstate Travel for Abortion Care for Minors*, Huffpost (Apr. 5, 2023), https://www.huffpost.com/entry/idaho-law-restrict-interstate-travel-abortion-care_n_642aff1ae4b00c9517535cc3.

347 Crandall v. Nevada, 73 U.S. 35 (1867); *see also* Saenz v. Roe, 526 U.S. 489 (1999) (affirming constitutional right to travel).

348 *See Crandall*, 73 U.S. at 35.

349 *Id.* at 43–44.

350 *Id.* at 46.

all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States."[351] The right to travel is meaningless if Missouri and Texas can punish or impose civil liability on common carriers like trains, planes, and automobiles for transporting you out of the state. And it would be odd indeed if the states had no power to regulate common carriers but did have the power to regulate private transportation providers, like friends, family, or Lyft drivers.

The right to travel is a phantom if people can be punished for assisting you to actually take advantage of that opportunity by driving you to another state. We do not, in general, walk from state to state, and not all of us have cars or the ability to drive ourselves to another state. For that reason, it is unconstitutional to punish someone for helping another person to exercise their right to travel to another state to take advantage of its laws. While some bills have been introduced to penalize those who help people leave the state to get an abortion, those laws should fall as inconsistent with the constitutional right to travel.

Idaho has criminalized the act of transporting a minor out of Idaho to get an abortion if done without the consent of the minor's parents.[352] That issue is complicated by the fact that the statute effectively defines the act as interfering with the parent's right to custody over their child and Idaho does have the power to regulate child welfare in Idaho. Whether children have any independent rights before majority, including a right to travel or a right to medical care, depends on constitutional principles outside the field of conflict of laws.

E. Can anti-abortion states prevent people or companies from subsidizing residents' travel to pro-choice states to obtain abortions?

Some anti-abortion states prohibit "aiding and abetting" another person to get an abortion and may extend that prohibition to reimbursing someone for the costs of an abortion or the costs of traveling to get an abortion.[353] Can pro-choice activists create nonprofit funds to help people in anti-abortion states travel to pro-choice states?

351 *Id.* at 49.

352 *See* Idaho Code § 18-623 (2024) (effective May 5, 2023); Maea Lenei Buhre, *Idaho Criminalizes Helping Minors Travel Out of State to Get an Abortion,* PBS NewsHour (May 5, 2023), https://www.pbs.org/newshour/show/idaho-criminalizes-helping-minors-travel-out-of-state-to-get-an-abortion.

353 *See e.g.*, Tex. Health & Safety Code § 171.208 (2003) (civil liability for aiding or abetting an abortion, including reimbursing the costs of an abortion).

Can a national law firm provide funds to help women in anti-abortion states leave the state to get an abortion? Some law firms, like Sidley Austin, and some businesses, like Disney, Comcast, Nike, PayPal, and Netflix, had announced that they would subsidize travel to enable their employees to get an abortion in a pro-choice state.[354] They did so because they believed people should have a choice about pregnancy but also because they were worried that people will not want to live and work in their offices in Texas and Missouri and similar states without such an assurance. Can Texas and Missouri punish a business for doing this?

Let's first take a local business that operates solely within Missouri or a similar anti-abortion state. In general, conduct in Missouri is subject to Missouri law so a law regulating funding of certain activities would, in general, be within the legislature's police powers. But if the money is to enable an employee to travel, we confront an issue similar to the issue with Lyft drivers or friends who aid someone to travel outside the state to get an abortion. If the right to travel means that a train has the right to transport you across the border, doesn't that mean that someone can give you money so that you can afford a train ticket? Again, the act of leaving the state is to go somewhere to do something that is legal there. You have the constitutional right to leave the state, and if that means that people can help you by driving you, why can't they help you by giving you money to be able to afford to hire the driver?

An anti-abortion state might argue that acts inside Missouri are subject to Missouri law and Missouri has the power to stop someone *inside Missouri* from helping someone get an abortion since abortions are illegal acts inside Missouri. They can assert that this is not something that is preempted by the constitutional right to travel. No one stops you from leaving the state; they are just preventing another person from helping you to do so. That argument is inconsistent with the holding of *Crandall v. State of Nevada*[355] and violates the constitutional right to travel.

Would it make a difference if a business were a national business with offices in pro-choice states as well as anti-abortion states? Would it make a difference it the business *reimbursed* someone for travel out of

354 Rylee Wilson, *Texas Republicans Warn Dallas Law Firm That Paying for Abortion Travel Could Be Illegal*, Dallas Morning News (July 8, 2022), https://www.dallasnews.com/news/politics/2022/07/08/texas-republicans-warn-dallas-law-firm-that-paying-for-abortion-travel-could-be-illegal/; *see also* Jessica Taylor Price, *In an Uncertain Legal Landscape, Why Are Companies Offering to Pay for Abortion Travel?*, Ne. Glob. News (June 30, 2022), https://news.northeastern.edu/2022/06/30/company-abortion-travel/.

355 Crandall v. Nevada, 73 U.S. 35, 49 (1867).

state and did so in the pro-choice state rather than giving the employee the money in advance? These facts might localize the conduct in the pro-choice state and disable the domicile state from applying its anti-subsidy law to the out-of-state actor. Illinois law should apply when someone travels to Illinois and is reimbursed for the costs of travel by another person in Illinois. The act of the person providing the subsidy takes place in Illinois and is legal there even if the availability of the funds drew the person from Missouri to Illinois. Indeed, if that person has no contacts with Missouri, it is unconstitutional under current standards to apply Missouri law to the Illinois actor.

But someone who ships funds directly to someone in Missouri or has offices in Missouri may find themselves liable to suit in Missouri for violating a state law that prohibits helping someone to get an abortion. Whether liability for doing so violates the right to travel is something we cannot know until the Supreme Court gives us an answer. I have argued that the right to travel is meaningless if one is not able to use transportation facilities to actually leave the state. Under that line of reasoning, it violates the right to travel to prevent someone from aiding you to exercise that fundamental constitutional right.

F. Can state actors rely on sovereign immunity to provide abortion services in anti-abortion states?

The 1979 case of *Nevada v. Hall*[356] held that states that commit torts in other states are liable to tort claims there. You cannot carry the immunities granted by your home state with you when you go to another state and violate its laws and cause harm to one of its residents. Such cases are typical "lonely domicile" cases where all contacts are in one state other than the domicile of the defendant, and the defendant cannot carry an immunizing law with them when they go to a state where their conduct results in liability. But the Supreme Court overruled *Hall* in 2019 in the case of *Franchise Tax Board of California v. Hyatt (Hyatt III)*.[357] The Court held that states cannot be sued without their consent in the courts of other states for tortious actions that took place there. Such claims are barred by sovereign immunity under the Eleventh Amendment.[358] That means that states, unlike private persons or businesses, are *perfectly free to travel to other states and commit torts there with impunity* if their own laws preserve their sovereign immunity from

356 Nevada v. Hall, 440 U.S. 410 (1979).

357 Franchise Tax Bd. of Cal. v. Hyatt (*Hyatt III*), 587 U.S. 230 (2019).

358 *Id.* at 243.

such suits. Could the state of Illinois use this principle to further its pro-choice policy?

We have seen that a cross-border tort may subject an Illinois actor to Missouri tort law if an act in Illinois causes harm in Missouri, or if an actor in Illinois also acts in Missouri by shipping abortion medication there or engaging in a telehealth visit across state lines with someone in Missouri. We have also seen that acts in Missouri in violation of its laws may subject an actor to civil liability and criminal punishment. What if the help comes, not from a private actor, *but from the state of Illinois itself*?

Suppose the state of Illinois sets up its own abortion facilities and the doctors working there are state employees. Suppose further that the state subsidizes people who cannot afford either the abortion procedure itself or the cost of travel to Illinois to obtain the procedure. Suppose the state of Illinois hires people to go to Missouri and drive people from Missouri to Illinois to get an abortion. Suppose the state of Illinois ships abortion medication to people in Missouri. Under *Hyatt III*, it would not matter if the state of Illinois was acting in Illinois or in Missouri; the state of Illinois would be immune from suit in Missouri courts if Illinois law confers such sovereign immunity on the state government. That immunity could also extend to Illinois state employees if they are granted statutory immunity for actions within the scope of their employment.[359] Of course, Missouri courts might seek an injunction against an Illinois state employee providing abortion assistance ordering them to cease operations in Missouri through an *Ex parte Young* type of exception to sovereign immunity.[360] Or the state of Missouri might sue the state of Illinois in an original jurisdiction case in the Supreme Court seeking a ruling that Illinois cannot thwart Missouri law by operating an Illinois state abortion facility inside Missouri.[361] But if the Illinois abortion facility confined its conduct to the state of Illinois, it might well escape

359 *See, e.g.*, Currie v. Lao, 592 N.E.2d 977, 980 (Ill. 1992) (state employees share the state's sovereign immunity when they "breach[] a duty imposed on [them] solely by virtue of [their] State employment."); *accord* Kawaguchi v. Gainer, 835 N.E.2d 435, 447 (Ill. 2005) ("sovereign immunity applies [to a state employee] if the duty allegedly breached arose solely from that employment"); Healy v. Vaupel, 549 N.E.2d 1240, 1247 (Ill. 1990) (statutory immunity for a state employee applies unless "the State's agent acted in violation of statutory or constitutional law or in excess of his authority").

360 *Ex parte* Young, 209 U.S. 123 (1908); Kessinger v. Stevens, No. 40-20-0071, 2022 WL 884998, at *6 (Ill. App. Ct. Mar. 24, 2022) (public employees have immunity from suit when "the source of the duty defendant owed to plaintiff [did not] arise independently from his state employment").

361 U.S. Const. art. III, § 2 ("The judicial Power shall extend . . . to Controversies between two . . . States").

suit for either damages or injunctive relief in Missouri courts under the *Hyatt III* ruling even if its actions spilled across the border into Missouri.

I am a critic of the *Hyatt III* decision. I don't read the Constitution the way the current Supreme Court reads it, and I would not have overruled *Hall* if I had been on the Supreme Court.[362] But what's done is done, and the Supreme Court must live with the consequences of its capacious grant of sovereign immunity to the states. It seems that the state of Illinois is perfectly free, under current law, to immunize itself and its employees from suit in any court, whether in Illinois or Missouri, for actions arising out of the operation of a state abortion facility in Illinois. A bounty law in Missouri, in other words, that allows civil lawsuits for damages by private parties against those who help Missouri residents obtain an abortion could not be constitutionally applied to the state of Illinois or to an Illinois state employee acting in Illinois if Illinois granted the employee absolute immunity for carrying out core state functions.

The bounty laws were passed to avoid constitutional invalidation or even constitutional review. Because they are not enforceable by the state, and because of "standing" doctrine, no one can sue any state official to get a ruling that the state bounty law unconstitutionally infringes on constitutional rights. But since bounty suits are civil, not criminal, proceedings, the rule in *Hyatt III* applies, and Illinois could assist Missouri residents to obtain abortions in Illinois while being immune from suit for damages in Missouri courts. Oddly, under *Hyatt III*, that immunity would exist *even if the Illinois abortion facility acts inside Missouri.* There is no way to know whether the Supreme Court would extend the *Hyatt III* ruling to Illinois state employees who ship abortion medication to people in Missouri or who provide telehealth consultations across state lines to patients located in Missouri. The Supreme Court might also choose to treat Illinois state employees differently than the state of Illinois itself, allowing them to be subject to suit for damages for violating Missouri law.

If a state abortion facility confines its actions to Illinois, however, then under current law, Missouri courts would have no power to order Illinois officials to shut down an Illinois state agency even if that agency undermines Missouri public policy. That might also be true even if some of the state agency's conduct occurs inside Missouri. Bounty laws were

---

362 *Cf.* Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 Notre Dame L. Rev. 953, 953 (2000) ("The Court's Eleventh Amendment and sovereign immunity case law deserves the condemnation and resistance of scholars.").

enacted to escape constitutional invalidation; creating a state abortion facility might do the same thing for a pro-choice state. Moreover, an order by a Missouri court enjoining the Governor of Illinois to cease operating a state abortion clinic in Illinois would likely be ignored by the Illinois courts as beyond the authority of the state of Missouri under the Full Faith and Credit Clause. The issue of how the Full Faith and Credit Clause treats final state court judgments raises further complexities, and that is the subject of the next Section.

G. *Can states impose their policies on other states by issuing final court judgments?*

A peculiarity of the law is that the Full Faith and Credit Clause has been interpreted in opposite ways when it comes to applying state *law* and enforcing court *judgments.* The clause itself does not give lesser protection to one than the other. In fact, it says: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[363]

We have seen that the *Allstate* test does not require courts to apply the laws of other states unless the forum has no significant contact with the case giving it a legitimate reason to apply its law or because application of forum law would be fundamentally unfair to one of the parties. That means it is often possible to apply the law of more than one state and the courts are free to choose which law to apply with few constitutional constraints.

On the other hand, the Supreme Court held in *Fauntleroy v. Lum*[364] that courts *must* enforce final judgments of other states even if those judgments are based on laws that would violate forum public policy and even if those courts tried to apply forum law *and got it wrong*—as happened in *Fauntleroy* itself. Often called the "iron law" of full faith and credit, this difference between the constitutional tests for choice of law and for recognition of judgments raises the possibility that states could try to manipulate events to create "final judgments" on the theory that the Supreme Court will require other states to abide by them.[365]

363 U.S. Const. art. IV, § 1.

364 Fauntleroy v. Lum, 210 U.S. 230 (1908).

365 *But see* Lea Brilmayer, *Article IV Full Faith and Credit and the Jurisprudence of Article III: Does the Full Faith and Credit Clause Require Sister-State Enforcement of Anti-Abortion Judgments?* (Jan. 10, 2023) (unpublished manuscript) (on file with of author) (noting that the Uniform Enforcement of Foreign Judgments Act ("UEFJA") requires application of the judgments law of the state that is asked to enforce

Imagine the state of Illinois creating a fast-track procedure where a person getting an abortion in Illinois could choose to participate in Illinois state court proceedings where the court appoints a guardian *ad litem* for the "unborn child" who argues that the "child" has a right to life under either the law of Illinois or the law of its domicile in Missouri. The court rejects the claim based on the Illinois' Reproductive Health Act, found in Title 775 of the Illinois Compiled Statutes chapter 55/1-15 and the Illinois Constitution. The court affirms that that law confers complete immunity on the person who obtained the abortion in Illinois and those who assisted them. The case is appealed and affirmed by the Illinois Supreme Court two days later in a ministerial action. We have a "final judgment" that theoretically must be respected in Missouri courts. If *Fauntleroy v. Lum* has anything to say about it, Illinois has just bolstered its claim that abortions that take place in Illinois cannot result in legal liability in any other state.

The U.S. Supreme Court might reject this "sham" procedure because it does not grant the "unborn child" due process of law. But that would require there to *be* an unborn child rather than a fetus. *Dobbs* does *not* recognize the legal personhood of the fetus; it takes no stand on this issue, instead leaving that issue to the states. To find this fast-track procedure unconstitutional, the Supreme Court would have to extend *Dobbs* in ways that might nationalize abortion policy (finding fetuses to be persons) rather than simply overruling *Roe* and *Casey*. The Court might also see the procedure for what it is, that is, a ruse to get out of the permissive *Allstate* rule and get into the world of the restrictive *Fauntleroy* rule. But whether there is anything wrong with this depends on whether the Supreme Court embraces the view that the fetus is a legal person. The implications of doing so would be monumental and would contradict the *Dobbs* Court's view that each state gets to regulate abortion within their own territory. So maybe this fast-track final judgment stratagem would work, after all.

On the other hand, it may be unseemly or even a violation of due process of law to have a fast-track or collusive procedure like this. Of course, if the fetus is not a separate legal person under Illinois law, there is no one to whom process is due. While this fast-track judgment

---

a foreign judgment and arguing that this requirement may very well not be preempted by the Constitution's Full Faith and Credit Clause in Article IV); Diego A. Zambrano et al., *The Full Faith & Credit Clause and the Puzzle of Abortion Laws*, 98 N.Y.U. L. REV. ONLINE 382, 401 (2023) (manuscript on file with author) (courts need not enforce the penal judgments of other states, citing Huntington v. Atrill, 146 U.S. 657 (1892)).

mechanism appears to fit current doctrine, it is speculative to assume that the Supreme Court would endorse it, especially when it is easy to imagine retaliatory procedures by anti-abortion states. Moreover, adopting it might require Illinois to confer some legal status on the fetus that it is unwilling to recognize.

The more likely scenario is one where Missouri courts get personal jurisdiction over either a Missouri or an Illinois actor and reach a final judgment enforcing a bounty law or a wrongful death law. Can Illinois refuse to enforce that final Missouri court judgment, or is it bound by the "iron law of full faith and credit" to enforce it against persons or resources located in Illinois?

Three possibilities exist. First, Professor Lea Brilmayer argues that there are narrow exceptions to the constitutional full faith and credit owed to sister-state judgments and it is not inconceivable that the abortion context would provide a reason for a new exception, given the strong feelings people have on the issue, and perhaps the possibility that courts and other public officials would engage in civil disobedience and refuse to enforce judgments that punish people for exercising what the forum views as a fundamental right.[366]

Second, Brilmayer argues that the Uniform Enforcement of Foreign Judgments Act (adopted in almost all states)[367] requires application of the judgments law *of the state that is asked to enforce the foreign judgment*.[368] This counterintuitive conclusion rests on the fact that the federal full faith and credit statute looks to the law of the judgment-rendering state to determine whether a judgment is final,[369] while the same state has a statute that requires application of the law of the state that is asked to enforce a sister-state judgment to determine whether there are any "defenses" to enforcement of another state's final judgment.[370]

Third, Diego Zambrano, Mariah Mastrodimos, and Sergio Valente argue that the 1892 case of *Huntington v. Attrill* recognized

366 Brilmayer, *supra* note 365.

367 The exceptions are Vermont and California. *Id.* at 25. *See* Unif. Enf't Foreign Judgments Act § 2 (Nat'l Conf. of Comm'rs on Unif. State L.s 1964) ("A [foreign] judgment . . . has the same effect and is subject to the same . . . defenses and proceedings for reopening, vacating, or staying as a judgment" of the state asked to enforce the foreign judgment).

368 Brilmayer, *supra* note 365, at 25.

369 28 U.S.C. § 1738 ("[J]udicial proceedings . . . shall have the same full faith and credit in every court in the United States…as they have by law or usage in the courts of such State . . . from which they are taken.").

370 Brilmayer, *supra* note 365, at 25.

a "penal law" exception to the Full Faith and Credit Clause's iron obligation to enforce foreign judgments.[371] Penal laws encompass "breach and violation of public rights and duties, which affect the whole community" rather than "private wrongs" that concern "the private or civil rights belonging to individuals."[372] Bounty laws would seem to fit nicely into the penal law category,[373] while wrongful death or survival tort claims would more naturally fit in the private law category, as long as rights are granted only to close family members; if anyone, including a stranger, is entitled to bring a wrongful death claim, that would seem to move the claim to the penal side. Importantly, courts rarely apply the *Huntington* rule to civil cases and voice hesitation about its continued vitality.[374] At the same time, while the 1998 case of *Baker v. General Motors Corp*[375] clearly held that the Full Faith and Credit Clause does not include a public policy exception,[376] it also holds that the *manner* of enforcement is up to the forum being asked to enforce the judgment.[377] That "manner of enforcement" exception, however, requires forum law to be applied in an "evenhanded" manner, and that may prohibit exceptions for abortion law.

Uncertainties about the enforcement of foreign court judgments may lead states to adopt some version of a fast-track procedure to ensure that their courts are the first to reach a final judgment whose enforcement in the other state would be constitutionally mandated. That, in turn, means that both anti-abortion and pro-choice states may be motivated to rethink their appellate procedures to move abortion cases more quickly through the appellate process, all the better to win the race to announce a "final judgment."

371 Huntington v. Attrill, 146 U.S. 657 (1892); Zambrano et al., *supra* note 365, at 399–400, 405. *See also* Antelope, 23 U.S. 66, 123 (1825) ("The courts of no country execute the penal laws of another . . . . ").

372 *Huntington*, 146 U.S. at 668–69 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1765)).

373 *See* Brilmayer, *supra* note 365, at 22.

374 Zambrano et al., *supra* note 365, at 400–02.

375 Baker by Thomas v. Gen. Motors Corp., 522 U.S. 222 (1998).

376 *Id.* at 233 (emphasis removed) ("[O]ur decisions support no roving 'public policy exception' to the full faith and credit due judgments.").

377 *Id.* at 235 ("Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law.").

VI. Conclusion

Anti-abortion states have the authority under current law to regulate or prohibit abortions, but they have no power to extend their regulatory laws to persons who travel to pro-choice states to end their pregnancies. The only way to avoid this conclusion would be for the Supreme Court to abandon "history and tradition" and use modern interest analysis to craft a choice-of-law rule that no state has ever adopted and which cannot be defended by modern choice-of-law theory or practice. Assuming there is no appetite for restricting the constitutional right to travel, Justice Kavanaugh is correct that *Dobbs* does not stop people from traveling to other states to take advantage of their pro-choice laws. Explaining why that is the case is more complicated than it first appeared, but it is where we end up. Conversely, actors in pro-choice states whose conduct foreseeably causes "harm" in anti-abortion states or whose conduct spills over the border into those states by shipping drugs there may well find themselves vulnerable to whatever legal procedures the anti-abortion states have created to sanction them for causing harm there. The best protection for abortion providers is to limit their conduct to protective states, thereby escaping both personal and legislative jurisdiction in the courts of anti-abortion states.

The ability to evade anti-abortion laws by going to a pro-choice state is likely to prove frustrating to anti-abortion states who may complain that the federal system is allowing people to evade applicable regulatory laws simply by crossing the border. Of course, the ability to cross the border is not available to those who lack the resources to do so. And the under-resourced people who are locked into states that deny choice—and therefore force them to give birth—are more likely to be young, poor, rural, and nonwhite. They are the ones most likely to need assistance from people in pro-choice states, but providing such assistance is tricky. If abortion drugs are shipped to an anti-abortion state, that may bring the sender within the legislative and adjudicative jurisdiction of the anti-abortion state and subject the sender to civil liability or criminal penalty. If someone provides resources to leave the state, that may also constitute an act subjecting the person to legal peril, despite the constitutional right to travel. Underground networks may well emerge to aid people who are too poor to travel.

Because of the *Dobbs* decision, our political system is pushing states in extreme directions on both sides of the abortion issue. The more extreme anti-abortion laws become, the less willing pro-choice states will be to grant them comity. And if pro-choice states promote evasion

of anti-abortion laws by creating an above ground or underground railroad, then anti-abortion states may retaliate and attempt to engage in unprecedented extraterritorial application of their state laws. Whether or not they succeed depends on a Supreme Court that does not view abortion as a fundamental right and that is ready to overrule precedents that do not accord with its view of constitutional interpretation.

Laws mean little if officials will not—or cannot—enforce them. There is reason to expect new modes of civil disobedience as people help those who are desperate for health care that they need even when this violates some law.[378] Where this will go is hard to see. Conflict-of-laws doctrine seeks to limit conflict among the states by giving each state and each party their due. Abortion conflicts of law may do the exact opposite; they may promote, rather than resolve, social and individual conflict and interstate tensions. And they may undermine, rather than reinforce, the rule of law in a federal system wracked by disagreement over fundamental principles of justice and liberty.

378 *See* Caroline Kitchener, *Covert Network Provides Pills for Thousands of Abortions in U.S. Post* Roe, Wash. Post (Oct. 18, 2022), https://www.washingtonpost.com/politics/2022/10/18/illegal-abortion-pill-network/.