DOBBS AND THE CIVIL DIMENSION OF EXTRATERRITORIAL ABORTION REGULATION

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A large body of scholarship has debated the constitutionality of criminalizing travel to seek abortions—an issue with new salience in the wake of the Supreme Court's decision in Dobbs v. Jackson Women's Health Organization *to overrule* Roe v. Wade*. Increasingly, however, antiabortion activists are turning to civil remedies as a supplement or alternative to criminal prosecution in cases involving out-of-state abortions. In contrast to criminal jurisdiction, where the outer bounds of states' authority to punish out-of-state conduct is highly uncertain, the extraterritorial application of state law in civil litigation is a common, routine effect of choice-of-law analysis that is unlikely to raise constitutional difficulties. As a result, it is reasonable to expect that courts in antiabortion states may give broad geographical effect to abortion-restrictive laws and policies in at least some civil litigation. The resulting decisions are likely to create substantial friction between states, as abortion-permissive states try to protect their own citizens from liability even as the Full Faith and Credit Clause demands recognition of foreign-state judgments that courts may be reluctant to give. Similar clashes between state policies have, to be sure, happened before, and this Article explores their outcomes in the areas of divorce liberalization, cannabis legalization, and the enforceability of noncompete clauses. At the same time, abortion is likely to give rise to broader and more intractable conflicts than any other issue courts have confronted in the recent past. Although individual judges can reduce occasions for interstate friction by applying restrained, conduct-focused conflicts principles, the states' fundamental disunity on the underlying issue of abortion may prove to be a problem that our choice-of-law system is simply not equipped to resolve.*

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Introduction

In the wake of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*,[1] antiabortion states, even as they gain more power to restrict abortion within their borders, will immediately face the issue of how to prevent their citizens from evading their laws through travel.[2] A long-unresolved question is whether states may constitutionally criminalize their citizens' travel to another state to obtain an abortion.[3] For decades—long before *Roe*'s reversal seemed plausible[4]—legal scholars staked out divergent positions on this question,[5] and—despite Justice Kavanaugh's brief allusion in his *Dobbs*

[1] 142 S. Ct. 2228 (2022).

[2] *See* Lydia Wheeler & Patricia Hurtado, *Abortion-Travel Bans Are 'Next Frontier' with* Roe *Set to Topple*, Bloomberg News (May 4, 2022), https://www.bloomberg.com/news/articles/2022-05-04/abortion-travel-bans-are-next-frontier-with-roe-set-to-topple#xj4y7vzkg [https://perma.cc/PAB5-VGN2] (predicting that while some states will likely want to do more than prevent abortions within their own borders, it is unclear whether they will be able to enforce their laws extraterritorially).

[3] *See* David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 Colum. L. Rev. 1, 6 (2023) (noting that "[t]he interjurisdictional abortion wars are coming" and observing that "[o]ut-of-state and out-of-country providers could be guilty of state crimes" by helping people in restrictive states obtain abortions).

[4] *See* Mark D. Rosen, *"Hard" or "Soft" Pluralism?: Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers*, 51 St. Louis U. L.J. 713, 714 (2007) [hereinafter Rosen, *Pluralism*] (referring to the "unlikely event of *Roe*'s demise").

[5] *See id.* ("[C]ontrary to many people's strong intuitions, states in our country's federal union generally do have the power to regulate their citizens' out-of-state activities.");

concurrence to the right to travel[6]—it will likely take significant time for the Supreme Court to render a definitive answer.[7]

In part because of this uncertainty and in part because of its independent advantages, antiabortion states are likely to pursue another route in parallel: creating or extending various sorts of civil liability to reach out-of-state entities that provide abortions, whether medical, surgical, or both, to citizens of their states.[8] Such liability could be particularly appealing to antiabortion states because it offers a way to target providers rather than individual people seeking abortions—an approach that might be both more politically palatable[9] and more effective in achieving abortion-restriction goals.[10]

Richard H. Fallon Jr., *If* Roe *Were Overruled: Abortion and the Constitution in a Post-*Roe *World*, 51 ST. LOUIS U. L.J. 611, 614 (2007) (arguing that, if *Roe* were to be overruled, the Court would face a "new set of morally freighted questions" without clear answers); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 861–63 (2002) [hereinafter Rosen, *Extraterritoriality*] (making the case that "states have a presumptive power to regulate their citizens' extraterritorial conduct," including abortion); C. Steven Bradford, *What Happens if* Roe *Is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87, 170–71 (1993) (finding that "a plausible case could be made" for some extraterritorial applications of abortion restrictions); Seth F. Kreimer, *"But Whoever Treasures Freedom . . .": The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907, 912–13 (1993) [hereinafter Kreimer, *Freedom*] (arguing that, when people travel out of state to seek an abortion, "the home state should not be permitted to enforce its conflicting criminal statutes extraterritorially"); 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, 462 (1992) [hereinafter Kreimer, *Choice*] (noting "profound objections of constitutional practice and theory" to giving abortion laws extraterritorial reach).

[6] *See Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring) (suggesting that the constitutional right to interstate travel might protect those who travel to another state to have an abortion).

[7] *See* Cohen et al., *supra* note 3, at 30 (noting that "[i]t could take years before the litigation surrounding these [extraterritoriality cases] reaches the Court").

[8] *See id.* at 23–24 (discussing a Missouri statute that attempted to impose such civil liability); *see also* Memorandum from James Bopp Jr., Gen. Couns., Nat'l Right to Life Comm., Courtney Turner Milbank & Joseph D. Maughon, to Nat'l Right to Life Comm. 1–4 (June 15, 2022) [hereinafter NRLC Model Law] https://www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-FINAL-1.pdf [https://perma.cc/5SBH-6R2Y] (noting the various drawbacks to criminal prosecution and recommending civil liability for abortion providers as a supplement or alternative).

[9] *See* Mary Ziegler, *Some Form of Punishment: Penalizing Women for Abortion*, 26 WM. & MARY BILL RTS. J. 735, 760–63 (2018) (discussing how, in part because of popular opinion, the antiabortion movement came to adopt a "woman-protective rhetorical strategy" focusing on providers rather than pregnant women as responsible for what the movement saw as the harms of abortion).

[10] Civil liability might be more effective because it might force abortion providers to change their practices and deny abortions to those from out of state on a broad scale; prosecution of individuals might not have as widespread an effect. *See* Cohen et al., *supra* note 3, at 45 ("[Suits against providers] could be reported to the provider's licensing board . . . . [And b]eing named as a defendant too many times . . . could result in licensure suspension, high malpractice insurance costs, and reputational damage . . . .").

Notably, should states pursue this path, many of the extraterritoriality problems that arise in the criminal law domain would disappear. Although in theory constitutional right-to-travel principles and other doctrines limiting states' territorial reach might apply in this arena as well, in practice antiabortion states that embrace civil liability are likely to be able to evade significant constitutional scrutiny.[11] This is because the Court, especially in recent years, seems simply uninterested in the extraterritorial dimension of civil litigation.[12] State courts deciding civil cases routinely find that choice-of-law principles dictate the application of forum law to out-of-state conduct and could often do so in this arena as well.[13] Further, few constitutional obstacles exist to their doing so.[14] As a result, courts are likely to apply states' abortion-related laws extraterritorially at least some of the time, likely causing significant state conflict and reinvigorating debate about the muddled hodgepodge of doctrines that currently determines how far outside their borders states may permissibly regulate.[15]

This Article attempts to supplement the considerable literature on the extraterritorial application of criminal abortion laws[16] by looking specifically at what might happen in civil cases where conflicting abortion policy is at issue, such as suits against providers who serve out-of-state citizens of abortion-restrictive states. The first Part of this Article will discuss how the attachment of civil liability might play out in practice.

In its second Part, this Article will argue that the fact that most choice-of-law doctrines implicitly provide for some extraterritorial regulation is not necessarily an unmitigated boon for restrictive states, because access-friendly states would have the ability to use conflicts principles to fight back.

In the third Part, the Article will go on to consider how the problem of clashing state policies on abortion might play out by looking at past controversies about three otherwise disparate issues

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11 *See* Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1080–81 (2009) [hereinafter Florey, *Extraterritoriality Principle in Choice of Law*] (explaining that the modest constitutional limits on state courts' choice of law leave state courts with the de facto power to apply their state's law extraterritorially in most cases).

12 The Court's last major exploration of constitutional limits on states' ability to apply their own law to out-of-state events was several decades ago; in that case, *Sun Oil Co. v. Wortman*, the Court indicated its reluctance to "embark upon the enterprise of constitutionalizing choice-of-law rules." 486 U.S. 717, 727–28 (1988).

13 *See* Florey, *Extraterritoriality Principle in Choice of Law*, *supra* note 11, at 1125 (noting that extraterritorial application of state law is routine in litigation).

14 *See id.* at 1079 (suggesting that limits may apply only in fairly unusual situations).

15 *See id.* at 1062 (describing the law in this area as "contradictory" and "muddle[d]").

16 *See* sources cited *supra* note 5.

with variable outcomes—migratory divorce, cannabis legalization, and noncompete clauses—where states' ability to apply their laws beyond their borders has been at issue.

In light of this history, the last Part will make the case that conflicting abortion policies are likely to result in new and significant choice-of-law friction, putting pressure on the longstanding issue of how choice of law should accommodate extraterritoriality concerns. The Article suggests ways that courts can mitigate interstate conflict, including by embracing some of the principles of the draft Restatement (Third) of Conflict of Laws, while also recognizing the fundamental difficulty of accommodating sharply different state policies in a country where the outer territorial limits of state authority are not clearly defined.

I
Abortion, Extraterritoriality, and the Civil Liability Landscape

This Part considers the likely role that civil liability will play in upcoming interstate battles over abortion rights. It argues first that, for many reasons, antiabortion advocates will likely find civil remedies a valuable supplement to criminal prosecution. It goes on to argue that states will face few obstacles to implementing such remedies because the doctrines often proposed as limits on states' ability to regulate out-of-state conduct, including the right to travel and the Dormant Commerce Clause restrictions on extraterritoriality, are unlikely to have much force in this context. Finally, this Part explains that application of state law outside state borders is a routine result of the ordinary choice-of-law process and likely to be common in abortion litigation as well. Such extraterritorial extensions of abortion laws are likely to heighten tensions between states with conflicting abortion policies.

A. Why the Antiabortion Movement is Likely to Embrace Extraterritorial Civil Liability

Many prior explorations of the question of extraterritorial abortion regulation have focused on criminal law.[17] And to be sure, clashes between state abortion policies in the criminal arena have the potential to cause many significant problems. *Roe*'s reversal immediately breathed life into criminal abortion prohibitions in several states.[18] In

[17] *See* sources cited *supra* note 5.

[18] Although several abortion bans went into effect either immediately following the *Dobbs* decision or shortly thereafter, the situation remains in flux, with many abortion

some states, abortion providers or others assisting abortion seekers may share in criminal liability.[19] Because abortion will remain legal in much of the United States,[20] however, zealously antiabortion states are likely to endeavor not only to ban or restrict abortions within their borders but to prevent their citizens from traveling out of state to obtain abortions elsewhere. Abortion-restrictive states can make use of both criminal and civil remedies to achieve their goals.

If states attempt to test the outer limits of criminal jurisdiction in order to effectuate antiabortion rules, the most logical route for them to do so is to prohibit their citizens, on pain of criminal penalties, from traveling out of state to obtain an abortion.[21] Indeed, in some of the many states where abortion would immediately become illegal in a post-*Roe* era, either because of never-repealed pre-*Roe* prohibitions or newly adopted ones anticipating *Roe*'s demise,[22] existing law might be pressed into service to reach out-of-state abortions in some circumstances.[23] Other states might ban abortion-seeking travel directly.[24] Yet although such criminal laws might help deter patients from trav-

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prohibitions being challenged in court. *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (Jan. 6, 2023, 10:30 AM), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html [https://perma.cc/9QF9-SD3S].

19 *In States Banning Abortion, a Growing Rift Over Enforcement*, N.Y. TIMES (June 29, 2022), https://www.nytimes.com/2022/06/29/us/abortion-enforcement-prosecutors.html [https://perma.cc/A5JV-BRDE].

20 *See Tracking the States Where Abortion Is Now Banned*, *supra* note 18 (listing twenty-seven states where abortion is currently legal or legal but limited).

21 *See* Cohen et al., *supra* note 3, at 23 ("The antiabortion movement has been clear that the endgame is outlawing abortion nationwide. Since *Dobbs*, some in the movement have been explicit about their goal of ending abortion travel . . . .") (footnote omitted); *see also* Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients from Crossing State Lines*, WASH. POST (June 30, 2022), https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines [https://perma.cc/R6DN-XM4A] ("[One prominent antiabortion group] is drafting model legislation for state lawmakers that would allow private citizens to sue anyone who helps a resident of a state that has banned abortion from terminating a pregnancy outside of that state.").

22 *See Tracking the States Where Abortion Is Now Banned*, *supra* note 18 (analyzing the status of states' new or existing abortion bans); *see also* Howard M. Wasserman, *Zombie Laws*, 25 LEWIS & CLARK L. REV. 1047, 1064–65 (2022) (noting that, in recent years, states, anticipating a conservative turn by the Supreme Court, have "raced to enact laws prohibiting pre-viability abortions" that were almost certainly unconstitutional at the time of their enactment).

23 Cohen et al., *supra* note 3, at 30 ("An aggressive prosecutor or other state official would not need any specific law governing extraterritorial abortions if existing state law could be applied to legal, out-of-state abortions or to travel to obtain them."). For example, state criminal laws often provide for criminal jurisdiction when any element of the crime or a conspiracy to commit the crime occurs within the state, even if other aspects of the crime take place outside its borders. *Id.* at 32–33.

24 *See id.* at 23–24 (discussing a proposed Missouri law that would have directly criminalized out-of-state abortions in some circumstances).

eling out of state for abortions, they nonetheless have significant limitations.

The constitutionality of criminalizing out-of-state abortions is, to begin with, quite uncertain. The degree to which criminal law can be applied extraterritorially is a much-contested question that has only very rarely been tested in the courts,[25] especially in the specific context of abortion.[26] As a matter of practice and tradition, "[t]he usual basis for state criminal jurisdiction is territorial."[27] It is unclear, however, whether states could depart from this convention if they wished; the "source of th[e] [territorial] rule is unsettled and has not been ascribed to any particular constitutional provision."[28]

For decades, scholars have discussed and reached no consensus on the degree of contact with a state that a criminal prosecution requires nor on the constitutionality of criminalizing extraterritorial conduct. In a recently published article, Professors David S. Cohen, Greer Donley, and Rachel Rebouché discuss three positions commentators have taken on the issue,[29] with one group arguing that such criminal jurisdiction runs into difficulties under various constitutional principles,[30] another contending that widely accepted principles of leg-

[25] This is largely because states have for the most part declined to test the limits of their extraterritorial criminal jurisdiction. *See* Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 974–75 (2002) ("[W]hen citizens leave their home states, those states rarely seek to enforce their moral visions by criminally prosecuting their citizens' lawful activities in other states."); *see also* Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 NOTRE DAME L. REV. 1673, 1678–83 (2012) (explaining that historically both states and the federal government were reluctant to prosecute crimes taking place outside the United States).

[26] *See* Joseph W. Dellapenna, *Abortion Across State Lines*, 2008 BYU L. REV. 1651, 1684 ("There seem to be few, if any, cases in which a state has attempted to apply its criminal laws to prosecute someone based upon an abortion that occurred outside the state.").

[27] Gabriel J. Chin, *Policy, Preemption, and Pot: Extraterritorial Citizen Jurisdiction*, 58 B.C. L. REV. 929, 933 (2017).

[28] *In re* Vasquez, 705 N.E.2d 606, 610 (Mass. 1999); *see also* Bradford, *supra* note 5, at 136 ("[T]he Supreme Court has decided several cases that, while not conclusively indicating that an extraterritorial abortion statute would be constitutional, at least cast doubt on the unsupported assertions of some scholars that state criminal law may not be applied extraterritorially.").

[29] Cohen et al., *supra* note 3, at 34 (dividing scholars into "three different camps").

[30] *Id.* at 34–36 (summarizing the positions of Professors Seth Kreimer and Lea Brilmayer and placing them in the first camp); *see also* Kreimer, *Freedom*, *supra* note 5, at 914–15 (arguing that the right to travel entails the right to experiment with modes of living not sanctioned at home, and allowing states to punish such activity undercuts this right); Kreimer, *Choice*, *supra* note 5, at 463 ("[Federalism] should not be a system in which citizens carry home-state law with them as they travel, like escaped prisoners dragging a ball and chain."); Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873, 875 (1993) (contending that state laws regulating out-of-state abortions are unconstitutional if they conflict with another state's affirmative choice to grant that right within its own borders).

islative jurisdiction give states the right to regulate their citizens' out-of-state conduct,[31] and a third finding the question of constitutionality hopelessly unclear.[32] Although the first camp was likely the minority position among scholars pre-*Dobbs*, Justice Kavanaugh provided it some support by noting in his *Dobbs* concurrence that, on the question of whether "a State [may] bar a resident of that State from traveling to another State to obtain an abortion," it is likely that "the answer is no based on the constitutional right to interstate travel."[33] Justice Kavanaugh did not elaborate on these views, but his likely status as the decisive vote on many future abortion questions[34] may render them significant.

Even apart from constitutional problems with extraterritorial citizen jurisdiction in criminal cases, efforts to use criminal law to restrict out-of-state abortions will run into limitations. Should a state want to establish liability for out-of-state providers rather than abortion patients, criminal law may prove particularly unsatisfactory. The principal rationale for allowing prosecution of crimes with out-of-state elements rests on states' relationships to their citizens;[35] such logic

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[31] Cohen et al., *supra* note 3, at 36–37 (summarizing the positions of scholars in the second group, including Professors Joseph Dellapenna and Mark Rosen); *see also* Dellapenna, *supra* note 26, at 1654–55 ("[S]tates can apply their laws to their citizens when they travel out of the state in an effort to avoid abortion restrictions."); Rosen, *Extraterritoriality*, *supra* note 5, at 863 ("[C]onstitutional doctrines place important, but only modest, limitations on state power, and they leave ample room for Home States to regulate their citizens' out-of-state activities."); Rosen, *Pluralism*, *supra* note 4, at 714 (noting that states' extraterritorial regulatory power has been upheld by the Supreme Court). Professor I. Glenn Cohen extends a similar view to the international context. *See* I. Glenn Cohen, *Circumvention Tourism*, 97 CORNELL L. REV. 1309, 1373 (2012) (concluding that international law does not prevent nations that ban abortions domestically from prohibiting their citizens from seeking abortions abroad, and such nations should amend their laws to do so).

[32] Cohen et al., *supra* note 3, at 37 (describing Professor Richard Fallon's approach and placing him in the third camp); *see also* Fallon, *supra* note 5, at 614 (predicting that, rather than resolving the law, the end of *Roe* would present the Supreme Court with a "new set of morally freighted questions"). Professor C. Steven Bradford expressed similar uncertainty. *See* Bradford, *supra* note 5, at 170–71 (concluding that there is a reasonable case that states could prosecute one of its citizens who leaves the state to obtain an abortion but acknowledging many uncertainties).

[33] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

[34] *See* Kelsey Reichmann, *Kavanaugh Makes a Play for the High Court's Swing Vote*, COURTHOUSE NEWS SERV. (July 7, 2022), https://www.courthousenews.com/kavanaugh-makes-a-play-for-the-high-courts-swing-vote [https://perma.cc/E8NA-TQHF] ("Justice Brett Kavanaugh is positioning himself to hold the most important vote on the Supreme Court.").

[35] *See* Rosen, *Pluralism*, *supra* note 4, at 720 ("[L]ongstanding state practices [and] scholarly restatements of the law reflect the understanding that States have presumptive extraterritorial power to criminally and civilly regulate their citizens' out-of-state conduct.").

obviously does not extend to out-of-state abortion providers, potentially creating more acute constitutional difficulties.[36] Further, the practical problems in prosecuting a resident of a different state are significant, particularly if that state proves uncooperative.[37]

A second limitation is that, as a matter of state law and practice, available forums in which an action may be maintained tend to be much more limited in criminal jurisdiction, and judges have little choice about which state's law to apply. Criminal jurisdiction has traditionally required some act within the state,[38] and states do not enforce one another's penal laws,[39] so there is no choice of law as such in the criminal context. In the civil context, by contrast, jurisdiction, territory, and choice of law do not knit together so neatly.

In civil disputes, it is routinely true both that more than one state will have jurisdiction over a given case[40] and that state courts apply their own law to conduct that occurs entirely out of state.[41] Although exceptions might exist, courts in an antiabortion state would likely have personal jurisdiction over an out-of-state defendant who provided or assisted in an abortion for one of its residents.[42] Once courts

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[36] *See id*. at 718 ("I imagine that almost everyone would agree that Utah has a greater claim to regulate its own citizen's conduct in California than to regulate the conduct of a California citizen in California.").

[37] *See* Cohen et al., *supra* note 3, at 43–49 (noting various ways, including exemptions from extradition and witness subpoena laws, that states could protect abortion providers from prosecution elsewhere).

[38] Chin, *supra* note 27, at 933. Under customary international law, other bases of criminal jurisdiction include the defendant's citizenship, a threat to a nation's security, the heinous character of the crime under internationally agreed-upon principles, and (less universally accepted) the nationality of the victim. Goldberg v. UBS AG, 690 F. Supp. 2d 92, 109–10 (E.D.N.Y. 2010) (citing United States v. Clark, 315 F. Supp. 2d 1127, 1131 (W.D. Wash. 2004)). Some states have stretched the territorial principle in various ways. *See* Cohen et al., *supra* note 3, at 31 (describing a few examples of how states exploit gaps in the "general rule against extraterritorial application of criminal law" to prosecute a "wide variety of crimes").

[39] *See* State v. Hall, 19 S.E. 602, 602 (N.C. 1894) ("It is a general principle of universal acceptation that one state or sovereignty cannot enforce the penal or criminal laws of another, or punish crimes or offenses committed in and against another state or sovereignty.").

[40] *See* Plan. Grp. of Scottsdale v. Lake Mathews Min. Props., 246 P.3d 343, 349 (Ariz. 2011) (en banc) ("[P]ersonal jurisdiction is not a zero-sum game; a defendant may have the requisite minimum contacts allowing the exercise of personal jurisdiction by the courts of more than one state with respect to a particular claim.").

[41] For a famous example, see *Bernhard v. Harrah's Club*, 546 P.2d 719, 725 (1976), where the court applied California law to determine whether a Nevada tavern was liable for serving drinks to an intoxicated patron who later caused an accident in California. *See also infra* notes 137–38 and accompanying text.

[42] Courts may exercise personal jurisdiction, for example, when an intentional act in one state is aimed at another and causes effects there. *See* Calder v. Jones, 465 U.S. 783, 788–89 (1984) (finding that California courts could exercise jurisdiction over a defendant whose Florida activities had caused harm to the California-based plaintiff); Walden v.

in the antiabortion state have established personal jurisdiction over the nonresident defendant, they can—in almost all circumstances—apply forum law in the case without running into constitutional difficulties.[43] That is, while in theory the same limitations that might apply in the criminal context could also affect civil cases, the long history of allowing states to apply their own law to out-of-state conduct in many circumstances (as will be discussed later in this Part) suggests that the Court does not see this as a constitutional concern.[44] In contrast to the doubtful constitutionality of criminalizing extraterritorial conduct, particularly in light of Justice Kavanaugh's *Dobbs* concurrence,[45] it can be stated with confidence that at least some extraterritorial regulation is permissible in the civil context, simply because such a scenario happens all the time.[46]

The availability of civil suits might also make enforcement easier. Civil remedies would have the effect of multiplying the parties that may enforce abortion law, such as spouses or grandparents opposed to an abortion.[47] While civil suits by family members would constitute a severe infringement on the privacy and autonomy of those obtaining abortions,[48] such actions might be appealing to antiabortion advocates who worry that local prosecutors will not enforce laws that "do not

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Fiore, 571 U.S. 277, 287–88 (2014) (reaffirming the Court's analysis in *Calder*). It is also possible that abortion providers or those who help facilitate an abortion might have direct contacts with the forum state, such as phone calls or other communications or travel to the state.

[43] *See infra* Section I.C.

[44] *See infra* Section I.C.; Susan Frelich Appleton, *Gender, Abortion, and Travel After* Roe*'s End*, 51 ST. LOUIS U. L.J. 655, 677 (2007) ("If a restrictive state could prevent out-of-state terminations of its domiciliaries' pregnancies without resorting to criminal law, then some of the difficulties . . . might dissipate."); *see also* Jessica Berch, *Weed Wars: Winning the Fight Against Marijuana Spillover from Neighboring States*, 19 NEV. L.J. 1, 29 (2018) ("The extraterritorial application of criminal law has always been more problematic than similar application of civil law.").

[45] *See infra* notes 163–64 and accompanying text.

[46] *See* Florey, *Extraterritoriality Principle in Choice of Law*, *supra* note 11, at 1091–92 (noting that most choice-of-law principles frequently produce outcomes in which state law applies to out-of-state conduct); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1521 (2007) (noting that, even outside the choice-of-law context, states "exert regulatory control over each other all the time").

[47] Neil Steinberg, *After Your Abortion, Grandma Might Sue You*, CHI. SUN-TIMES (June 23, 2022, 2:35 PM), https://chicago.suntimes.com/columnists/2022/6/23/23179963/abortion-roe-wade-supreme-court-overturn-right-to-life-model-law-punish-enforce-steinberg [https://perma.cc/7SMA-HYPG] (explaining that this scenario could occur under the NRLC's model law).

[48] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 892–93 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (noting the "devastating forms of psychological abuse" as well as physical violence that may ensue as a result of a partner's efforts to interfere with a pregnant spouse's abortion).

meet their social-justice agenda."[49] By providing more potential theories of liability and more flexibility in choice of law, civil liability also provides more avenues for reaching conduct out of state—a particularly salient feature given that, with telemedicine and abortion-inducing drugs, it is much easier today than in the pre-*Roe* era for out-of-state actors to assist with abortion access from afar.[50]

Further, some state legislatures may prefer private remedies because they can craft those remedies to be more insulated from judicial review. Recently, Oklahoma rushed to imitate Texas's civil bounty-based scheme for prohibiting abortions,[51] despite the fact that Texas's initial purpose of creating an obstacle to judicial review[52] would seem to be less important given *Roe*'s reversal.[53] Nonetheless, states that wish to pass laws that are constitutionally questionable in other ways may embrace a private enforcement system on the belief that it makes constitutional challenges more difficult.[54]

There is evidence that antiabortion activists and legislators are already recognizing civil remedies' advantages. In a recent memo accompanying model language, the National Right to Life Coalition (NRLC) argues that "current realities require a much more robust enforcement regime than just reliance on criminal penalties," including "establishing civil remedies to be brought by appropriate state or local officials and by persons related to the pregnant woman."[55] Some state legislators are heeding these calls and plan to introduce legislation establishing civil liability for anyone who assists residents in obtaining an out-of-state abortion.[56] It is worth noting

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[49] NRLC Model Law, *supra* note 8, at 2.

[50] *See* Cohen et al., *supra* note 3, at 5–6 (discussing recent trend toward expanded access to medication abortion).

[51] *See* Kate Zernike, Mitch Smith & Luke Vander Ploeg, *Oklahoma Legislature Passes Bill Banning Almost All Abortions*, N.Y. TIMES (May 19, 2022), https://www.nytimes.com/2022/05/19/us/oklahoma-ban-abortions.html [https://perma.cc/GBH8-35ZQ] (discussing passage of law that "allows private individuals to sue abortion providers and anyone who 'aids or abets' an abortion" and noting that it is modeled on Texas's law).

[52] *See* Whole Woman's Health v. Jackson, No. 21–463, slip op. at 5–9 (Dec. 10, 2021) (explaining why the Texas scheme makes it difficult to find a proper *Ex parte Young* defendant).

[53] *See* Zernike et al., *supra* note 51 (noting that many states took action to restrict abortion following a leak of the draft opinion in *Dobbs* suggesting that the Court was planning to overrule *Roe*).

[54] *See* Kitchener & Barrett, *supra* note 21 (citing as a reason proponents embrace these schemes that "such a law is more difficult to challenge in court because abortion rights groups don't have a clear person to sue").

[55] *See* NRLC Model Law, *supra* note 8, at 2, 8.

[56] *See* Kitchener & Barrett, *supra* note 21 (noting that several Republican state representatives plan to propose legislation empowering private citizens to sue anyone who aids or abets an abortion by a resident).

that the deterrent effect of such measures on out-of-state practitioners could be considerable, given the consequences civil suits may have in medical licensing and on insurance premiums.[57] Indeed, if such litigation became widespread, its overall impact might be greater than the occasional headline-grabbing effort to prosecute a defendant for actions in another state.

In short, antiabortion advocates are urging states to look beyond the criminal context, and states appear to be paying attention to such suggestions. If criminal prosecution proves to be unpopular or to create constitutional problems, this trend may only accelerate.

B. The Limits of Extraterritoriality Restraints in the Civil Context

There is no necessary reason why prohibitions on extraterritorial legislation should not work similarly in the criminal and civil context. In practice, however, giving extraterritorial effect to state law is a common practice in civil litigation that rarely causes constitutional difficulties.[58] By contrast, efforts to prosecute out-of-state conduct have been relatively rare.[59]

At least two lines of cases[60] exist that appear to provide at least some potential limits on direct extraterritorial regulation—meaning a state law that is either explicitly extraterritorial or is otherwise clearly intended to have a direct effect on out-of-state conduct.[61] As the following Section will discuss, however, neither of these sources of doctrine is particularly robust or far-reaching. After considering some of the approaches to civil liability that states might pursue, the next Section explains why it is doubtful that any existing limit on extraterritorial regulation would pose much of a hurdle to the imposition of civil liability by antiabortion states.

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[57] *See* Cohen et al., *supra* note 3, at 44–45 (noting that, in the wake of Texas's legislation establishing a ten-thousand dollar bounty against those offering abortion services, "Texas abortion providers, many of whom also practice other areas of medicine or provide abortions in other states, also fear losing their medical licenses and facing cost-prohibitive malpractice insurance rates").

[58] *See infra* Section I.C.

[59] *See* Kreimer, *supra* note 25, at 974–75.

[60] The two lines of cases discussed here are 1) cases directly about extraterritoriality; 2) cases about travel that suggest some limits on states' ability to regulate citizens' extraterritorial conduct. Multiple sources have been proposed for the latter, but because they deal with an essentially similar right, this Article will discuss them together.

[61] These doctrines likely apply only to direct extraterritorial regulation, such as the passage of a statute that directly references out-of-state activities. Through the choice-of-law process, however, state courts apply state law indirectly with some frequency. Florey, *Extraterritoriality Principle in Choice of Law*, *supra* note 11, at 1125.

1. How States Could Try to Extend Their Laws

Before discussing possible limits on states' ability to regulate out-of-state conduct through civil litigation, it is worth noting the different routes by which a state could do so. The most aggressive means would be to pass a statute creating a cause of action explicitly imposing liability on either citizens who obtain an abortion out of state or people who perform or assist in such an abortion.[62] Such a law would be most likely to trigger extraterritoriality concerns, although it is by no means clear that those would be fatal.[63]

A subtler way of achieving the same ends would be to pass a similar law but with no geographically specific language—that is, one that simply prohibited some abortion-related conduct or empowered citizens to sue abortion providers with no direct indication that it was meant to apply outside the state. Texas's S.B.8, for example, which has already become a popular template for other abortion-restrictive states,[64] contains no geographical restrictions on who may sue, on the state citizenship of any named defendant, or where the prohibited conduct of aiding and abetting an abortion occurred.[65] Where a state's laws contain no territorial limitations, a plaintiff could bring suit in that state's court against an out-of-state defendant (or a citizen who had traveled out of state), arguing that forum law should govern the question of liability. In some cases, either by analyzing legislative intent or by applying ordinary choice-of-law principles, courts might

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[62] The National Right to Life Committee, for example, recommends that states create civil liability for abortion providers. *See* NRLC Model Law, *supra* note 8, at 1–3 (noting that the drawbacks to criminal penalties call for "a much more robust enforcement regime," including civil remedies).

[63] *See infra* Sections I.B & I.C.

[64] *See* Alison Durkee, *Idaho Enacts Law Copying Texas' Abortion Ban—And These States Might Be Next*, FORBES (Mar. 23, 2022), https://www.forbes.com/sites/alisondurkee/2022/03/23/idaho-enacts-law-copying-texas-abortion-ban---and-these-states-might-be-next/?sh=2086faa25c05 [https://perma.cc/6DUH-5RBS] (noting that, given the Supreme Court's failure to invalidate S.B.8, several other states are pursuing "copycat" laws).

[65] Texas's S.B.8 creates a private "bounty" system under which any individual may collect ten-thousand dollars in a suit against someone who provides or assists in an abortion after six weeks of gestation. *See* S.B.8, 87th Leg., Reg. Sess., TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West 2021). Although S.B.8 only purports to impose abortion-performing restrictions on physicians licensed to practice in Texas, *id.* § 171.201(4), other aspects of the statute are not geographically limited. The statute, for example, permits a cause of action to be brought against anyone who "knowingly engages in conduct that aids or abets the performance or inducement of an abortion," without specifying any geographical limits on who may sue, who may be sued, or where the conduct giving rise to suit took place. *Id.* § 171.208(2); *see also* Maggie Astor, *Here's What the Texas Abortion Law Says*, N.Y. TIMES (Sept. 9, 2021), https://www.nytimes.com/article/abortion-law-texas.html [https://perma.cc/D4A9-GQ6S] (noting lack of geographical limits and concluding that "[i]t is within the realm of possibility that a Wisconsinite could sue a Californian for abetting a Texan's abortion").

conclude that the statute applies to the out-of-state conduct in question.[66]

Another civil option for which some abortion opponents have advocated is to create a wrongful death action on behalf of the fetus against the abortion provider.[67] In recent years, many jurisdictions have increasingly made efforts to "attribute personhood to fetuses in criminal law, tort law, and state constitutional law,"[68] and some states "allow[] for compensation for wrongful death claims based upon the destruction of an unborn fetus."[69] Although pre-*Dobbs*, such actions were founded only on terminations that took place without the pregnant patient's consent,[70] it is easy to imagine that a state might extend them to allow an abortion patient or someone closely related to them, such as a spouse or parent, to sue in broader circumstances. Indeed, at least one such lawsuit—by an ex-husband against the clinic that provided his ex-wife's abortion—is currently pending in Arizona.[71] As with statutes providing for private causes of action against those who provide or assist in abortions, such extensions of wrongful death law could potentially be applied to out-of-state actors as well.[72]

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66 *See* William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389, 1431–33 (2020) (discussing instances in which state courts relied on presumptions against extraterritoriality, ordinary tools of statutory interpretation, or conflicts principles to determine the geographic scope of state statutes, sometimes finding that they apply to out-of-state transactions or conduct).

67 *E.g.*, NRLC Model Law, *supra* note 8, at 8–9.

68 Katherine Kubak, Shelby Martin, Natasha Mighell, Madison Winey & Rachel Wofford, *Abortion*, 20 GEO. J. GENDER & L. 265, 302 (2019). Some of Justice Alito's language in *Dobbs* may be interpreted to lend support to these efforts. *See* M. Cathleen Kaveny, Dobbs *and Fetal Personhood*, RELIGION & POL. (July 19, 2022), https://religionandpolitics.org/2022/07/19/dobbs-and-fetal-personhood [https://perma.cc/PQ3W-K3KV] (noting that *Dobbs* appears to take the stance that a fetus is "not *not* a person" under the Constitution and as a result may increase the political viability of fetal personhood arguments, while noting conceptual problems with this stance, such as its failure to grapple with questions about the bodily integrity of the prospective parent).

69 Kubak et al., *supra* note 68, at 308.

70 *Id.*

71 *See* Nicole Santa Cruz, *Her Ex-Husband Is Suing a Clinic over the Abortion She Had 4 Years Ago*, MD EDGE, OB. GYN. NEWS (July 19, 2022), https://www.mdedge.com/obgyn/article/256356/obstetrics/her-ex-husband-suing-clinic-over-abortion-she-had-4-years-ago [https://perma.cc/M2AP-WH94].

72 It is uncertain but possible that state choice-of-law principles could dictate that the law of the fetus-protecting state applies in these circumstances. In some tort cases involving family relations or the capacity to sue, courts have applied forum law or the law of one or both parties' domicile. *See* Erwin v. Thomas, 506 P.2d 494, 496–97 (Or. 1973) (applying Oregon law in split-domicile case to govern the availability of a loss of consortium action); Haumschild v. Cont'l Cas. Co., 95 N.W.2d 814, 816–17 (Wis. 1959) (collecting cases applying forum law or law of the parties' shared domicile to govern questions of interspousal immunity).

Finally, not all cases touching on abortion would necessarily rely on new or abortion-specific law. Although considerably more uncertainties exist in this area, existing tort law could in some cases be used to further a state's antiabortion policies. A possible scenario, for example, is that a patient from an antiabortion state travels to obtain an abortion in a permissive state and that the abortion results in complications. The patient then sues for malpractice in the antiabortion state. Although courts applying state conflicts principles in malpractice cases typically find that the law of the place of treatment applies,[73] they do not do so universally, with a handful of states applying forum law as a tiebreaker when relevant contacts occurred in multiple jurisdictions.[74] Suppose that in this case, the court concludes that forum law applies. If such a practice occurs frequently and malpractice standards make it easier for plaintiffs to recover in the antiabortion state,[75] out-of-state doctors could be additionally deterred from

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[73] *See* Jeffrey L. Rensberger, *Choice of Law, Medical Malpractice, and Telemedicine: The Present Diagnosis with a Prescription for the Future*, 55 U. MIA. L. REV. 31, 50–51 (2000) (noting that courts usually apply the place of treatment, not the place of injury, when the two events occurred in different states); *see, e.g.*, Dugan v. Mobile Med. Testing Servs., Inc., 830 A.2d 752, 761 (Conn. 2003) (applying New York law largely because the medical examinations at issue were administered in New York, even though the alleged injury occurred in Connecticut). It is worth noting that, in a case involving telemedicine or remote provision of abortion-inducing medication, questions might arise about where the treatment actually occurred. *See* Rensberger, *supra*, at 60 (arguing that, in a remote consultation, the better rule is to apply the law of the defendant's home state, while acknowledging uncertainties).

[74] *See* Rensberger, *supra* note 73, at 55 (noting that "[i]n contrast to the line of cases supporting a place of treatment rule, some cases take a fundamentally different approach by preferring forum law" in malpractice cases); *see also, e.g.*, Kaiser-Georgetown Cmty. Health Plan, Inc. v. Stutsman, 491 A.2d 502, 505 (D.C. 1985) (applying forum law rather than Virginia law despite the fact that treatment occurred in Virginia).

[75] Some state efforts to restrict abortion could conceivably result in additional malpractice risks. For example, in 2019, Georgia passed House Bill 481, which purported to ban all abortions after "embryonic or fetal cardiac activity" could be detected, generally about six weeks into pregnancy. *See* H.B. 481, 155th Gen. Assemb. § 4(a)(2), (b) (Ga. 2019); *Trial over Georgia Law Restricting Abortion to 6 Weeks to Begin*, PBS NEWSHOUR (Oct. 24, 2022, 10:52 AM), https://www.pbs.org/newshour/health/trial-over-georgia-law-restricting-abortion-to-six-weeks-to-begin [https://perma.cc/VL5K-EM2T]. Shortly after the *Dobbs* decision, the Eleventh Circuit lifted a previously imposed stay on the law's enforceability, although litigation over its constitutionality continues. *See id.* Among numerous other provisions, H.B. 481 permits someone "upon whom an abortion is performed in violation of this Code section [to] recover in a civil action from the person who engaged in such violation all damages available to her under Georgia law for any torts." *See* H.B. 481 § 4(g). The law also imposes new duties upon physicians, from providing medical aid in conducting an abortion to a fetus "capable of sustained life" to soliciting "voluntary and informed consent to abortion" by disclosing "[t]he particular medical risks to the individual patient" that could give rise to additional theories of malpractice. *See id.* at §§ 4(c), 7(1)(A).

treating such patients.[76] (It is worth noting that, although courts have typically preferred the law of the place of treatment in deciding malpractice choice-of-law questions, that is the case purely as a matter of state conflicts principles, which state courts could choose to change or apply differently in appropriate cases.[77])

The question of how courts, where abortion is illegal, would regard claims of abortion-related malpractice on the merits is an open one. On the one hand, it seems possible that courts and juries in states where abortion is illegal might be more inclined to regard the procedure as unnecessary or risky, perhaps bolstering a plaintiff's malpractice arguments.[78] Courts would also have to consider, however, the fact that a patient had sought out a procedure illegal in their home state, a situation that has sometimes been found to bar recovery.[79]

In short, while many uncertainties exist, depending on how antiabortion states choose to handle both choice-of-law and malpractice principles, such claims could be an additional source of risk for out-of-state providers.

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[76] *See supra* note 10.

[77] In other words, states are unlikely to face any constitutional limitation in applying their own law in these circumstances. *See infra* Section I.C.

[78] Some post-*Roe* abortion malpractice litigation has focused on the failure to disclose risks of the abortion. *See, e.g.*, Blackburn v. Blue Mountain Women's Clinic, 951 P.2d 1, 10 (Mont. 1997) (noting the "professional negligence on the part of these three defendants for their alleged failure to inform [the plaintiff] of the risks associated with the abortion procedure" before deciding the case on statute of limitations grounds).

[79] *See generally* Joseph H. King, Jr., *Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law*, 43 WM. & MARY L. REV. 1011 (2002) (describing how this bar operates in many areas of tort law, including abortion). Through the nineteenth and twentieth centuries, some courts held that patients who had sought illegal abortions could not recover against their abortion providers, *see, e.g.*, Hunter v. Wheate, 289 F. 604, 607 (D.C. Cir. 1923) (finding that, in seeking an illegal abortion, the plaintiff "engaged, not only in an unlawful act, but also in one which was immoral," thus necessitating a directed verdict for the defendant); *see also* Gail D. Hollister, *Tort Suits for Injuries Sustained During Illegal Abortions: The Effects of Judicial Bias*, 45 VILL. L. REV. 387, 403–06 (2000), and some post-*Roe* courts have continued to apply that rule, *see* King, *supra*, at 1073–74 (citing Symone T. v. Lieber, 613 N.Y.S.2d 404, 405–06 (App. Div. 1994)) (discussing *Symone T. v. Lieber* to show that some courts continue to apply the rule in this context); *see generally* Hollister, *supra* (exhaustively chronicling pre-*Roe* cases, finding that many courts barred malpractice suits arising out of unlawful abortions). Historically, however, other courts allowed patients to sue. *See* Leslie Reagan, *Victim or Accomplice?: Crime, Medical Malpractice, and the Construction of the Aborting Woman in American Case Law, 1860s–1970*, 10 COLUM. J. GENDER & L. 311, 320–23 (2001); *see also, e.g.*, Gunder v. Tibbitts, 55 N.E. 762, 767 (Ind. 1899) (sustaining a judgment in favor of a woman who had undergone two abortions, allegedly resulting in irreparable injury to her health, perhaps in part because the patient had been urged to undergo the abortion to conceal sexual intercourse).

2. *Choice of Law and Extraterritoriality*

Cases brought under the preceding theories but based on out-of-state events could effectively allow an antiabortion state's law to govern the consequences of actions within another state's borders. The risk of such a scenario, it is worth stressing, should not be overstated; in cases involving medical issues, conflicts principles most often dictate that the law of the place of treatment applies.[80] Yet it is imaginable that courts in zealously antiabortion states might depart from this general pattern in various circumstances or that legislatures might direct them to do so. If this were to occur, it would hardly be a departure from the norm; application of state law to out-of-state events is a routine choice-of-law scenario in litigation, and for that reason among others, the bar for finding that constitutional limits apply would likely be high.[81]

Sometimes, to be sure, courts choose restraint in interpreting state statutes' geographical reach.[82] Yet it is also common for choice-of-law decisions to involve the application of one state's statute to events that took place within another state's borders.[83] Some states have adopted a presumption against extraterritoriality for statutes that do not specify their geographic scope, but the majority have not,[84] and those that have such presumptions sometimes disregard them.[85]

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[80] *See* Rensberger, *supra* note 73.

[81] Concurring in *Dobbs*, Justice Kavanaugh suggested, without explanation or citation, that the "constitutional right to interstate travel" might prohibit states from "bar[ring] a resident of that State from traveling to another State to obtain an abortion." *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring). Even assuming that Justice Kavanaugh's position were adopted by a majority of the Court, he appeared to be referring to criminal prohibitions, not after-the-fact civil liability for extraterritorial actions. There, the only constitutional limits currently in effect are the exceptionally modest ones imposed by the Due Process and Full Faith and Credit clauses. *See infra* notes 185–95 and accompanying text.

[82] *See, e.g.*, Planned Parenthood of Kan. v. Nixon, 220 S.W.3d 732, 742 (Mo. 2007) (narrowly construing a state statute imposing liability for assisting a minor with an abortion to avoid application to out-of-state conduct).

[83] *See* Dodge, *supra* note 66, at 1405–06 (citing examples of some cases in which state courts found that state law applied to out-of-state events and some in which it did not); *see also* Sean A. Pager & Jenna C. Foos, *Laboratories of Extraterritoriality*, 29 GEO. MASON L. REV. 161, 169 (2021) (suggesting reliance on state unfair competition statutes in seeking redress for foreign harms because such statutes are well suited to "target[ing] a broad[] array of extraterritorial misconduct").

[84] *See* Dodge, *supra* note 66, at 1405 (surveying states to find that just twenty apply a clear presumption against extraterritoriality). These presumptions are put to service only "to determine the geographic scope of state statutes," as opposed to the scope of common law. *See id.* Further, they are both somewhat limited, with the vast majority not requiring a clear statement to overcome them, and flexible in the sense that they "do not turn mechanically on the location of the conduct." *Id.* at 1408.

[85] *See id.* at 1405–06 (noting that even states with presumptions sometimes ignore them in favor of their general choice-of-law analysis).

The scenario in which one state applies its common law (as opposed to statutory law) to govern conduct in another is even more common.[86] In such cases, state courts are generally even less attuned to problems of extraterritoriality in deciding choice-of-law issues. Because presumptions against extraterritoriality are no more than a means of gauging legislative intent, courts generally do not find them relevant if the law at issue is judge-made.[87] Further, although choice-of-law principles vary significantly from state to state, no major choice-of-law methodology used in the United States incorporates concern for extraterritoriality as such in its analysis.[88] Rather, choice-of-law analysis tends to rely on other factors, such as which state has an interest in or the most significant relationship to the dispute,[89] and frequently focuses on the parties' domiciles as well as the location of conduct.[90]

Making use of these methodologies, state courts commonly apply forum law to out-of-state events. For example, where a case concerns a car accident in one state (say, Oregon) between two parties who are both domiciled in another state (say, California), courts will frequently apply the law of the state of common domicile, even if the relevant conduct happened elsewhere.[91]

In cases involving abortion, such generally used conflicts methodologies could frequently result in the application of the law of a state other than the place in which the abortion is performed. Suppose, for example, that Idaho enacts the NRLC model ordinance, which permits the abortion patient, the fetus's other biological parent, and (if the patient is a minor) the patient's parents to sue for wrongful death

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[86] *See id.* at 1437 ("Although twenty states have adopted a presumption against extraterritoriality, none of them appears to apply that presumption to state common law.").

[87] *See id.* at 1411–12 (noting that, because presumptions against extraterritoriality are tools of statutory interpretation, although they "vary in some of their details, none of them applies to common law claims").

[88] *See* Katherine Florey, *Big Conflicts Little Conflicts*, 47 ARIZ. ST. L.J. 683, 691 (2015) [hereinafter Florey, *Conflicts*] ("Current conflicts principles give relatively little attention to issues of extraterritoriality and comity, and often fail to draw from doctrines that deal with similar issues in other contexts . . . .").

[89] *See id.* at 725–27 (describing the creation and use of the Restatement (Second) of Conflict of Laws).

[90] *See* John T. Cross, *The Conduct-Regulating Exception in Modern United States Choice-of-Law*, 36 CREIGHTON L. REV. 425, 425 (2003) ("[C]ourts applying the modern choice-of-law methods are much more likely to select the law of the jurisdiction where the parties reside than the law of the place of the tort.").

[91] This is particularly true for legal rules whose primary purpose is to allocate loss between the parties; many such rules, however, also have a secondary effect of regulating conduct. *See infra* notes 178–81.

of the fetus.[92] An individual domiciled in Idaho travels to California for an abortion. In tort actions, Idaho follows the Second Restatement,[93] which generally directs that courts apply the law of the jurisdiction with the "most significant relationship" to the case.[94] In tort cases, courts are directed to look at numerous factors in determining the state of most significant relationship, including those specific to tort cases[95] and those that apply to choice-of-law decisions overall.[96] Although for most causes of action, including wrongful death, the Second Restatement creates a presumption that "the local law of the state where the injury occurred" governs, this presumption can be overcome if "some other state has a more significant relationship" to the dispute.[97] Factors courts are directed to consider under this analysis include, among others, the place of injury, the place of conduct, the parties' domicile, the place where the parties' relationship is centered,[98] the "relevant policies of the forum" and of "other interested states," and "ease in the determination and application of the law to be applied."[99] In the example at hand, some of these factors might point toward the application of California law, where the alleged injury and much relevant conduct would have occurred. But the court could also take into consideration the plaintiff's Idaho domicile, any conduct that occurred in Idaho (such as arranging the abortion or post-procedure communications with the doctor), Idaho's substantive policies, and the familiarity of an Idaho court with applying Idaho law. Given that the Second Restatement has been said to provide judges with "virtually unlimited discretion" in weighing these factors,[100] it is easily imaginable that an Idaho court could conclude that Idaho law bears the most significant relationship to the case.

In contrast to situations in which state law is applied extraterritorially as the result of choice-of-law decisions, direct attempts by states to regulate conduct elsewhere—as by passing statutes explicitly

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92 *See* NRLC Model Law, *supra* note 8, at 8–9.

93 *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2020: Thirty-Fourth Annual Survey*, 69 AM. J. COMP. L. 177, 194–95 (2021).

94 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS (AM. L. INST. 1971) § 145 [hereinafter SECOND RESTATEMENT].

95 *See id.*

96 *See id.* § 6. For an Idaho case applying this methodology, see Johnson v. Pischke, 700 P.2d 19, 22 (Idaho 1985) (describing the application of the Second Restatement to Idaho torts cases).

97 *See* SECOND RESTATEMENT, *supra* note 94, § 175.

98 *See id.* § 145.

99 *See id.* § 6.

100 *See* Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1269–70 (1997).

prohibiting out-of-state abortion providers from performing abortions on their citizens—are uncommon.[101] It is therefore possible that the Court, even though it has not clearly articulated limits on such a practice in the past, might find constitutional problems in states' doing so in this context. To hold, however, that a state court cannot apply the statutory or common law of that state to out-of-state conduct would massively disrupt all sorts of litigation and would likely require overruling multiple cases.[102] In the abstract, it might seem that there is little functional distinction as to an individual's liability for prohibited conduct between a statute that explicitly purports to apply to out-of-state conduct and one that is silent on the matter but which courts apply without issue to reach extraterritorial conduct.[103] Nonetheless, the latter situation is so frequent that it seems far less likely to raise extraterritoriality red flags. The following Sections discuss why existing doctrines are unlikely to constrain judges in antiabortion states from applying their own states' laws to out-of-state events in court proceedings.

3. The Commerce Clause and Extraterritoriality

One possible limit on extraterritorial regulation is the Dormant Commerce Clause. In a series of cases decided in the 1980s, the Court indicated that the Dormant Commerce Clause limits the extent to which legislatures can regulate extraterritorially.[104] In light of the preceding discussion, it is notable that none of these cases involved the choice-of-law context in litigation; in fact, all involved statutes that either explicitly applied to out-of-state actions or had some obvious, necessary effect on them.[105]

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[101] *See* Symeon C. Symeonides, *Cruising in American Waters: Spector, Maritime Conflicts, and Choice of Law*, 37 J. MAR. L. & COM. 491, 505 (2006) (noting that most state statutes, like federal statutes, are either "silent on the question of their application to foreign cases" or contain general "boilerplate language" suggesting that they apply universally without specifying their exact territorial reach).

[102] The propriety of a state court's choice-of-law decision is assessed under the standard first put forth in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320 (1981), which approved the application of Minnesota law to out-of-state events. Greater scrutiny of extraterritorial applications of state law in litigation would seem incompatible with that standard. The same goes for cases like *Sun Oil Co. v. Wortman*, 486 U.S. 717, 728–29 (1988), which suggest that a state court has great freedom to apply the choice-of-law methodology of its preference. For a more detailed discussion, see *infra* Section I.C.

[103] *See* Florey, *Extraterritoriality Principle in Choice of Law*, *supra* note 11, at 1059–60 (noting that the two situations appear functionally equivalent but that courts have not treated them that way).

[104] *See, e.g.*, *infra* note 110 and accompanying text.

[105] *See* Am. Fuel & Petrochemical Mfrs. v. O'Keeffe, 134 F. Supp. 3d 1270, 1283–84 (D. Or. 2015) (noting that the Dormant Commerce Clause extraterritoriality cases have "been confined to three circumstances: price control statutes, statutes that link prices paid in-state

The Court first clearly articulated these Dormant Commerce Clause concerns in the 1982 case *Edgar v. MITE Corp.*,[106] which dealt with an Illinois statute under which the Secretary of State was authorized to hold hearings to determine the fairness of—and, in appropriate circumstances, deny registration to—a tender offer targeting a corporation that had certain enumerated links to Illinois.[107] The Court concluded that the statute "directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois"[108] and "prevents, unless its terms are satisfied, interstate tender offers which, in turn, would generate interstate transactions."[109] Because of the statute's "sweeping extraterritorial effect,"[110] the Court found it to be invalid, noting that the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[111]

The Court reaffirmed this position in invalidating another anti-takeover statute five years later in *CTS Corp. v. Dynamics Corp. of America*, raising the additional concern that such state legislation "may adversely affect interstate commerce by subjecting activities to inconsistent regulations."[112] Two other cases decided later in the 1980s, *Brown-Forman Distillers Corp. v. New York State Liquor Authority*[113] and *Healy v. Beer Institute*,[114] built on *Edgar* and *CTS Corp.*[115] in finding invalid two "price affirmation" statutes under which liquor merchants, as a condition of doing business in a state,

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with those paid out-of-state, and statutes that discriminate against out-of-state commerce").

106 457 U.S. 624 (1982).

107 *See id.* at 626–27. The statute applied when 10% of the target corporation's shareholders were Illinois residents or when it satisfied two of three conditions: "[T]he corporation has its principal executive office in Illinois, is organized under the laws of Illinois, or has at least 10% of its stated capital and paid-in surplus represented within the State." *Id.* at 626.

108 *Id.* at 641.

109 *Id.* at 640.

110 *Id.* at 642.

111 *Id.* at 642–43.

112 481 U.S. 69, 88 (1987).

113 476 U.S. 573 (1986).

114 491 U.S. 324 (1989).

115 These cases, which newly expanded the link between the Dormant Commerce Clause and extraterritorial regulation, built upon a much earlier one addressing extraterritoriality concerns, *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 519, 520–22 (1935), in which the Court invalidated a New York statute requiring New York milk sellers to pay out-of-state milk producers a minimum price.

were required to affirm that they were not offering lower prices in other jurisdictions.[116]

It was in *Healy*, the last of this line of cases, that the Court went the furthest, suggesting that the Commerce Clause's prohibition extended not merely to law facially regulating conduct outside state borders but also to legislation that had the "practical effect of . . . control[ling] conduct beyond the boundaries of the State" or that created a danger of "inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."[117]

This strong language from *Healy*, reinforcing points made in earlier cases, might suggest that the Court is both strongly concerned with overreaching regulation and willing to use the Commerce Clause to police states' attempts to step outside their proper boundaries of influence. In reality, however, the Court has simply not followed up on these expectations. Although the extraterritoriality principle advanced most broadly in the 1980s has gotten an occasional workout in lower courts,[118] the Supreme Court showed little interest in it during the subsequent decades.[119] Indeed, as a Tenth Circuit judge,

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116 *Brown-Forman* involved a New York price affirmation law applying to all alcohol sellers and forbidding them from charging higher prices than in any other state. 476 U.S. at 576. *Healy* concerned a narrower Connecticut statute that was limited to beer sellers and bordering states. 491 U.S. at 326–27.

117 *Healy*, 491 U.S. at 336–37.

118 *See, e.g.*, VIZIO, Inc. v. Klee, 886 F.3d 249, 254–55 (2d Cir. 2018) (rejecting an argument that a statute referencing national market share gave rise to a Dormant Commerce Clause claim); Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 373–76 (6th Cir. 2013) (finding a state's unique labelling requirement had an impermissible extraterritorial effect); IMS Health, Inc. v. Mills, 616 F.3d 7, 29–30 (1st Cir. 2010), *vacated on other grounds sub nom.* IMS Health Inc. v. Schneider, 564 U.S. 1051 (2011) (declining to apply the extraterritoriality doctrine to invalidate a state statute); Grand River Enters. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 170–72 (2d Cir. 2005) (finding the district court erred in dismissing a claim under the Dormant Commerce Clause).

119 The Court has cited *Healy*, the case in which it discussed the extraterritoriality principle in the most sweeping terms, in only a handful of cases since it was decided and has primarily relied on it for its discussion of the nondiscrimination aspect of the Dormant Commerce Clause, not the extraterritoriality principles it articulates. *See, e.g.*, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2470 (2019) (describing the centrality of the nondiscrimination principle); Granholm v. Heald, 544 U.S. 460, 488 (2005) (noting the *Healy* decision's reliance on the discriminatory character of the state statute in question). In *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644, 669 (2003), the Court suggested that the *Healy* standard did not apply to a Maine law because it was not a price affirmation statute, but its reasoning was not entirely clear. Interestingly, the Court did cite both *Healy* and *Edgar* in *BMW v. Gore*, 517 U.S. 559, 571–72 (1996), in which it recognized limits on state punitive damages in part rooted in concerns about penalizing conduct legal in other states, for the proposition that "one State's power to impose burdens on the interstate market for automobiles is . . . also constrained by the need to respect the interests of other States." *Id.* at 571. Nonetheless, the Court's grant of certiorari in *National Pork Producers Council v. Ross*, 6 F.4th 1021

now-Justice Gorsuch three times in one opinion referred to the *Healy* extraterritoriality doctrine disparagingly as the "most dormant" of Dormant Commerce Clause doctrines.[120] Many commentators have noted that many of the broad statements in *Healy* in particular can probably be characterized as dicta and that the current Court would likely not consider itself bound by them.[121]

Some clarity on this issue may emerge in the coming months. In March 2022, the Supreme Court granted certiorari in *National Pork Producers Council v. Ross*,[122] in which the Ninth Circuit sustained against a Dormant Commerce Clause extraterritoriality challenge a California law that prohibited pork, wherever produced, from being sold in the state if animals were not kept in accordance with California standards of humane treatment.[123] The Court's grant of certiorari may indicate some interest in reviving *Edgar* and *Healy* restrictions; its ultimate decision may bring more certainty to this much-debated area of law.[124]

(9th Cir. 2021), *cert. granted*, 142 S. Ct. 1413 (2022), may indicate some continuing interest in the doctrine. *See* Jack Goldsmith & Eugene Volokh, *State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation* (forthcoming draft), at 5 & n.23 (on file with author) (noting that "commentators and lower courts have doubted whether [the extraterritoriality strand of Dormant Commerce Clause doctrine] ha[s] much practical relevance" but that the Court "may soon revisit" the issue in *National Pork Producers*).

120 *See* Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1170, 1172, 1175 (10th Cir. 2015). The court in *Epel* ultimately held that, whatever the doctrinal status of the extraterritoriality cases, they were distinguishable from the case at hand. *Id.* at 1173.

121 *See* Florey, *Extraterritoriality Principle in Choice of Law*, *supra* note 11, at 1090 (noting various ways in which scholars have suggested a more limited reading of the extraterritoriality cases); Fallon, *supra* note 5, at 638 (suggesting that *Healy* and similar cases are likely concerned only with protectionist economic regulation); Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 992–93 (2013) (suggesting that courts have expressed extraterritoriality concerns in only three narrow contexts: price-regulation laws like those at issue in *Healy*, efforts by states to directly "control activities" outside their borders, and a handful of early internet cases). *But see* Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 MARQ. L. REV. 497, 526 (2016) (arguing that the doctrine is still applied and serves a valuable role in limiting state overreaching).

122 6 F.4th 1021 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 1413 (2022).

123 *Id.* at 1031–32.

124 *See* Jonathan H. Adler, *SCOTUS Agrees to Hear Significant Dormant Commerce Clause Case*, VOLOKH CONSPIRACY (Mar. 28, 2022), https://reason.com/volokh/2022/03/28/scotus-agrees-to-hear-significant-dormant-commerce-clause-case [https://perma.cc/2HK6-MSYQ] ("This case is . . . interesting because it is unclear where the current justices are on Dormant Commerce Clause questions."). At oral argument on Oct. 11, 2022, some Justices appeared "worried about the implications of states putting their own values above the promise of open national markets . . . ." *See* Robert Barnes, *Supreme Court Weighs Far-Reaching Effects of Calif. Pork Restrictions*, WASH. POST (Oct. 11, 2022), https://www.washingtonpost.com/politics/2022/10/11/supreme-court-california-pork-law [https://perma.cc/F2AS-G6L4].

Even if we assume, however, that cases like *Edgar* and *Healy* retain some vitality, they are not likely to stand in the way of the imposition of liability for providing or aiding out-of-state abortions. To begin with, even commentators who believe in the continuing force of *Edgar* and *Healy* tend to assume their reach is limited to the commercial context or even more narrowly to protectionist legislation, in keeping with the cases' roots in the Dormant Commerce Clause.[125] Prohibitions against obtaining, providing, or assisting in an abortion are not commercial in this sense and are clearly not animated by protectionist motives.[126]

Further, even if one does not view the extraterritoriality principle as so narrowly confined, it is clear that a primary concern of the Court in these cases is the danger of inconsistent mandates—conduct that is legal under one state's law but illegal under another's.[127] This problem is most acute when it requires actors to follow potentially conflicting directives, but may also arise if someone wishes to engage in conduct legal in one state without worrying about potential consequences in another state, a problem the Court has also flagged in finding that state courts may impose punitive damages only for in-state conduct.[128]

Neither concern, however, is likely to be implicated to a meaningful extent here. While it is conceivable that an abortion-supportive state like California might ultimately require providers to make abortions available to everyone seeking one, unless California does so, there is no inherent conflict in a California provider offering abortions to Californians while withholding them from Texans.[129] Likewise, the

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[125] *See* Fallon, *supra* note 5, at 638 (describing the restriction of condemnation of extraterritorial regulation to cases of economic protectionism); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 804 (2001) (observing that extraterritoriality analysis "must . . . distinguish between permissible and impermissible out-of-state costs that result from the regulation of cross-border externalities"); 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, 1903–05 (1987) (noting limitations on the extraterritoriality principle).

[126] *See* Fallon, *supra* note 5, at 638 (making this distinction); Bradford, *supra* note 5, at 157 (noting that the Court has distinguished between "health and safety regulation, on the one hand, and economic protectionism, on the other hand").

[127] *See* Healy v. Beer Inst., 491 U.S. 324, 337 (1989) (discussing the problem of inconsistent regulation).

[128] In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 421 (2003), for example, the Court considered this problem in the punitive damages context, holding that a "State cannot punish a defendant for conduct that may have been lawful where it occurred."

[129] *See* Bradford, *supra* note 5, at 150 (noting that, if a state were to prohibit its citizens from seeking an abortion elsewhere, "[n]o inconsistency results . . . [t]he more liberal state is not requiring the woman to obtain the abortion; thus, the application of her own state's prohibition of abortion does not subject her to inconsistent, irreconcilable obligations").

abortion situation is materially different from efforts to impose punitive damages for conduct in other states, where the Court has appeared concerned that a defendant not be punished for purely local conduct in other jurisdictions with little connection to the forum state.[130] By contrast, even if Texas attempted to impose liability as a means of deterring Californians from providing abortions to Texas citizens, California abortion providers could safely engage in what would presumably be the core activity protected by California law—that is, providing abortions to local residents. In this scenario, compensatory damages[131] would be imposed only for conduct in which, because a Texas citizen was involved, Texas could claim an interest that courts, under current doctrine, might regard as legitimate.

Finally, even if *Edgar* and *Healy* are still viable, not limited to commercial or protectionist contexts, and extend beyond cases involving clashing regulation, states would seem to have a potential workaround—passing geographically neutral laws creating a cause of action against anyone who assists in providing an abortion or employing existing law to the same end.[132] In a few outlier cases, mostly involving the Internet or other remote communications, such geographically neutral laws have not entirely escaped scrutiny under *Healy*'s framework.[133] Gun manufacturers in the early 2000s likewise endeavored—mostly unsuccessfully—to convince courts to apply *Edgar*/*Healy* principles in tort litigation.[134] But courts that are willing

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130 *See State Farm*, 538 U.S. at 421–22 ("Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction.").

131 *See id.* at 416 (discussing significant differences between punitive and compensatory damages).

132 *See* Metzger, *supra* note 46, at 1521 ("The prohibition on extraterritorial legislation is . . . understood only to constrain a state from formally asserting legal authority outside its borders. Even in this guise, however, the prohibition is hardly absolute.").

133 For example, *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 167 (S.D.N.Y. 1997), cited *Healy* in invalidating a New York criminal statute that prohibited sending pornographic material to minors over the Internet. The statute did not specify that it applied to conduct outside New York, but as the court noted, "Internet users have no way to determine the characteristics of their audience that are salient under the New York Act—age and geographic location," creating a risk of "haphazard, uncoordinated, and even outright inconsistent regulation." *Id.* at 167–68; *see also* Goldsmith & Sykes, *supra* note 125, at 792–94 (discussing *Am. Librs. Ass'n* and a few similar cases).

134 *See* Allen Rostron, *The Supreme Court, the Gun Industry, and the Misguided Revival of Strict Territorial Limits on the Reach of State Law*, 2003 L. REV. MICH. ST. DETROIT COLL. L. 115, 118 (2003) ("The gun companies' extraterritoriality argument has generally befuddled the courts that have considered it. There is no precedent that squarely supports the argument, but there is also a remarkable scarcity of precedent that specifically rejects it, because no one previously pressed the issue."). Gun manufacturers encountered "decidedly mixed" results in court, and the 2005 passage of the Protection of Lawful

to import extraterritoriality concerns into unfamiliar contexts have largely been concerned about inconsistent regulation or unforeseen consequences of conduct in a different jurisdiction.[135] These issues have little relevance in the abortion context, given that abortion providers could easily inquire about their patients' state of residence to avoid liability.

Further, state courts holding out-of-state abortion providers liable would have tradition on their side in applying geographically neutral law to out-of-state conduct. Indeed, such applications of state statutes happen all the time through the choice-of-law process, whether the statute in question is a dram shop act imposing liability on bars that serve intoxicated patrons[136] or a two-way consent requirement for recording phone calls.[137] At least one lower court has concluded that *Edgar*/*Healy* principles probably do not apply to choice-of-law decisions in private litigation at all, particularly in cases involving state common law.[138]

In short, even if the Supreme Court determines that the *Edgar*/*Healy* cases retain some force, courts are not likely to see decisions applying forum law to out-of-state conduct as implicating extraterritoriality concerns but rather to see them as a routine outcome of the choice-of-law process. Rather than have to face any scrutiny under the Dormant Commerce Clause, such applications of state law would be thrown into the essentially anything-goes regime that governs choice of law.[139]

4. The Right to Travel and Other Constitutional Provisions

In considering the more specific question of whether states may preclude their citizens from seeking abortions out of state, scholars

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Commerce in Arms Act, which gave gun manufacturers immunity from many lawsuits, largely mooted the issue. Denning, *supra* note 121, at 1001–02. Given the Court's general narrowing of Dormant Commerce Clause doctrine in the years following this development, Professor Denning regards "prospects for its future revival [as] unlikely." *Id.* at 1008.

135 *See* Rostron, *supra* note 134, at 122–23.

136 *See* Bernhard v. Harrah's Club, 546 P.2d 719, 725–26 (Cal. 1976) (holding that California law applied to the out-of-state sale of alcohol by defendant, a Nevada corporation).

137 *See* Kearney v. Salomon Smith Barney, 137 P.3d 914, 937 (Cal. 2006) (holding that Georgia parties to telephone calls with Californians were required to obtain the other party's consent, as required by California law, to record the call).

138 *See* Camden Cnty. Bd. of Chosen Freeholders v. Beretta U.S.A., 123 F. Supp. 2d 245, 254 (D.N.J. 2000) ("A case where a plaintiff seeks to prevent allegedly harmful consequences from occurring outside of its borders without respect to the citizenship of the defendant simply does not constitute the sort of state action contemplated by dormant commerce clause jurisprudence."), *aff'd*, 273 F.3d 536 (3d Cir. 2001).

139 *See infra* Section I.C.

have suggested that the right to travel or other constitutional provisions would apply in the civil as well as criminal context.[140] Although the law is arguably even less clear here than in Commerce Clause extraterritoriality doctrine, it seems unlikely that constitutional provisions would be found to preclude the imposition of liability for out-of-state conduct in most situations.

In general, citizens of the United States have three travel-related rights: "to enter and to leave another State, . . . to be treated as a welcome visitor rather than an unfriendly alien . . . and, for those travelers who elect to become permanent residents, . . . to be treated like other citizens of that State."[141] Although the right to travel clearly encompasses the ability to leave states as well as to enter them,[142] the Court has primarily applied the right to travel in striking down statutes that discriminate against nonresidents.[143] The constitutional source of the right to travel is unclear.[144] Some have argued that, no matter the derivation of the right, the Privileges and Immunities Clause and structural features of federalism reinforce the idea that citizens should be able to travel freely from state to state.[145]

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[140] *See, e.g.*, Rosen, *Pluralism*, *supra* note 4, at 731–38.

[141] Saenz v. Roe, 526 U.S. 489, 500 (1999); *see also* Bradford, *supra* note 5, at 158 (footnotes omitted) ("The Supreme Court has long recognized a constitutional right to travel among the states, although the textual source of that right is unclear.").

[142] As the Court put it forcefully in an 1867 case invalidating a Nevada tax on railroads for passengers carried out of the state, "as members of the same community [we] must have the right to pass and repass through every part of it without interruption, as freely as in our own States." Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 49 (1867) (quoting The Passenger Cases, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting)).

[143] In *Saenz*, for example, the Court relied on the right to travel to invalidate California's lengthy residency requirements for receiving welfare benefits. 526 U.S. at 510–11. *See also* Bradford, *supra* note 5, at 159 (arguing that cases protecting nonresidents are of particular concern because "[t]he non-residents burdened by the regulation had no voice in the political process through which the provision was enacted").

[144] *See* Kreimer, *Freedom*, *supra* note 5, at 917–24 (arguing that the source of the right is the Privileges and Immunities Clause).

[145] *See id.* at 917 ("When American citizens travel 'in the several states,' as is their right, they are 'entitled' to the privileges and immunities of local citizens."). Many scholars view the specific situation at hand—travel for the purpose of engaging in conduct illegal in one's home state—as distinct from many other right-to-travel scenarios, although they disagree on whether allowing such travel would enhance or undermine federalist values. Professor Kreimer has argued that a right to travel to other states even for the purpose of engaging in activity forbidden in one's home state is both constitutionally protected and fundamental to the values of American federalism. *See* Kreimer, *Choice*, *supra* note 5, at 462 (noting "profound objections of constitutional practice and theory" to punishing conduct legal in the state where it occurs and arguing that "[t]he tradition of American federalism stands squarely against [such] efforts."). Other commentators, such as Professor Mark Rosen, have reached nearly the opposite conclusion, suggesting that a genuinely pluralistic country requires that states be permitted to exert some control over their citizens' out-of-state conduct. *See* Rosen, *Pluralism*, *supra* note 4, at 749 ("[G]iven the diversity of political commitments held by people in our large country, it may be desirable

In the abortion context, the meaning of two cases in particular—*Doe v. Bolton*[146] and *Bigelow v. Virginia*[147]—has been sharply disputed.[148] Neither, however, seems to provide a strong foundation for applying the right to travel in the civil litigation context. In *Doe*, the Court relied on the right to travel to hold that Georgia could not deny in-state abortions to nonresidents, finding that the Privileges and Immunities Clause "protect[s] persons who enter Georgia seeking the medical services that are available there."[149] The Court did not, however, consider the somewhat different question of whether an abortion-restrictive state could prohibit its citizens from obtaining abortions elsewhere.[150] The Court also suggested that under other circumstances—for example, if the restriction applied to state-supported facilities alone or if it reflected limited availability of services within the state—it might be more likely to uphold such a measure.[151] *Doe* clearly fits the nonresident-discrimination template of the right to travel in a way that imposing liability based on an out-of-state abortion would not.

In *Bigelow*, the Court went somewhat further in a case involving a conviction under a Virginia law that made it a misdemeanor "by the sale or circulation of any publication, to encourage or prompt the procuring of an abortion."[152] In contrast to the Virginia state courts, the Court held that the First Amendment protected commercial advertising[153] and that Virginia's stated interests were inadequate to permit this infringement on speech.[154] In reaching this conclusion, the Court

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to allow the fullest possible political expression to those policies that federal law does not require national uniformity.").

146 410 U.S. 179 (1973).

147 421 U.S. 809 (1975).

148 *Compare* Rosen, *Pluralism*, *supra* note 4, at 725 ("[S]tates have presumptive extraterritorial regulatory authority [over their citizens] under the Due Process Clause, *Bigelow* notwithstanding."), *with* Chin, *supra* note 27, at 940 (acknowledging that contrary views of *Doe* and *Bigelow* exist but concluding that "[t]he more compelling argument is that States have very limited power to regulate conduct authorized in other states, even by their own citizens").

149 *Doe*, 410 U.S. at 200.

150 The Court appeared to have concerns about the discriminatory nature of Georgia's law, noting that "[a] contrary holding would mean that a State could limit to its own residents the general medical care available within its borders." *Id.* at 200; *see also* Bradford, *supra* note 5, at 163 (noting "strong differences" between *Doe* and the "mirror image" situation of a state attempting to restrict residents' ability to obtain an abortion out of state, including the fact that the Georgia regulation appeared discriminatory).

151 *See Doe*, 410 U.S. at 200 ("[The residence requirement] is not based on any policy of preserving state-supported facilities for Georgia residents . . . . There is no intimation, either, that Georgia facilities are utilized to capacity in caring for Georgia residents.").

152 *Bigelow*, 421 U.S. at 811.

153 *Id.* at 825.

154 *Id.* at 827–28.

noted that "[n]either could Virginia prevent its residents from traveling to New York to obtain those services or, as the State conceded, . . . prosecute them for going there."[155] Though Professor Seth F. Kreimer argues that if the Court adheres to precedent, *Bigelow* "seem[s] dispositive on the question of state interdiction or prosecution of women's travel to sympathetic jurisdictions."[156] Other commentators have differed, stressing that the statements in *Bigelow* are dicta,[157] that the case involved the First Amendment rather than the right to travel per se,[158] that the case was simply part of the Court's "early efforts at protecting . . . *Roe v. Wade* against subversion by the states" and "should be treated with caution as [a] source[] of general constitutional doctrine,"[159] that the membership and outlook of the Court have changed,[160] and that *Bigelow* was decided at a time when states were "generally denied . . . the right to prohibit abortions" in the immediate wake of *Roe*, meaning that the Court simply did not have to confront the question of legal differences between the states.[161]

In his solo *Dobbs* concurrence, Justice Kavanaugh provided new support to Professor Kreimer's view of the right to travel, suggesting that the right would preclude a state from "bar[ring] a resident of that State from traveling to another State to obtain an abortion."[162] Justice Kavanaugh, however, provided little explanation of how far such a prohibition might extend. Further, his statement is notably limited to one specific scenario that does not encompass such issues as whether states could impose liability on out-of-state providers. Indeed, Justice Kavanaugh's formulation may have been deliberately narrow,[163] and

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155 *Id.* at 824.

156 Kreimer, *Choice*, *supra* note 5, at 460.

157 *See* Bradford, *supra* note 5, at 164 (stating that *Bigelow*'s language on this point "is, of course, dictum").

158 *See* Berch, *supra* note 44, at 28 (noting that *Bigelow* was decided entirely on First Amendment grounds).

159 Regan, *supra* note 125, at 1907–08.

160 *See* Bradford, *supra* note 5, at 164–65 (stating that *Bigelow*'s statements about travel are "dictum from a Court that no longer exists" and "it is hard to believe that the modern Court would follow it"); Rosen, *Extraterritoriality*, *supra* note 5, at 892–94 (arguing that subsequent cases have undermined the force of *Bigelow*'s extraterritoriality discussion).

161 Bradford, *supra* note 5, at 164.

162 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

163 *See* Adam Liptak, *The Right to Travel in a Post-*Roe *World*, N.Y. TIMES (July 11, 2022), https://www.nytimes.com/2022/07/11/us/politics/the-right-to-travel-in-a-post-roe-world.html?action=click&module=well&pgtype=homepage&section=US%20Politics [https://perma.cc/HA5M-L7FZ] (quoting scholars who noted that Justice Kavanaugh's remarks may not exclude the possibility of imposing criminal sanctions or damages when someone returns to their home state after obtaining an abortion).

there is no indication that he was thinking beyond the criminal context at all.

Even if *Doe* and *Bigelow* were to be revived in some manner, it is highly doubtful that they would be applied to the litigation context for the same reason previously articulated in the *Edgar*/*Healy* discussion—that is, the fact that state courts impose liability on defendants for out-of-state conduct routinely. The case for their potential applicability may be even weaker because, unlike the *Edgar* and *Healy* cases, both *Doe* and *Bigelow* involved criminal statutes.[164] Although some commentators have suggested that the same doctrinal right-to-travel framework would apply to civil statutes that purport to regulate residents' out-of-state conduct,[165] this seems unlikely if the issue arises in the context of litigation rather than direct regulation.[166] Further, the right to travel would probably have limited relevance in the likely scenario that civil liability is aimed at those providing or assisting abortion (who would presumably be acting in their home states) instead of or in addition to abortion patients themselves.

C. Extraterritoriality in Choice of Law

It is worth reiterating that, even to the extent that direct extraterritorial regulation of citizen travel might raise constitutional issues, such concerns would probably not arise in the context of individual civil cases. This is simply because the Court has generally treated the extraterritorial application of forum law by state courts as an entirely different problem from the efforts of state legislatures to regulate extraterritorially.[167] For the past several decades, states' choice of law has been subject only to an extremely lenient test of constitutionality that rests solely on the Full Faith and Credit and Due Process

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164 *See* Doe v. Bolton, 410 U.S. 179, 181 (1973) (striking down parts of Georgia's criminal abortion statutes as unconstitutional); Bigelow v. Virginia, 421 U.S. 809, 811 (1975) (striking down a Virginia statute that made it a misdemeanor to sell or circulate a publication encouraging or prompting an abortion).

165 *See* Florey, *Extraterritoriality Principle in Choice of Law*, *supra* note 11, at 1061 n.23 ("[A] variety of commentators have long assumed that states enjoy approximately the same latitude to apply criminal laws to out-of-state conduct as they do to apply civil laws under *Hague*."); Fallon, *supra* note 5, at 630 (suggesting that the Court would likely use a similar "contacts-based framework" to gauge the permissibility of criminal prosecution for out-of-state conduct as it would in the civil context).

166 That is, litigation in which the court applies a geographically neutral statute or common-law principle would seem less likely to implicate the right to travel than a statute that explicitly applies to out-of-state conduct.

167 *See* Florey, *Extraterritoriality Principle in Choice of Law*, *supra* note 11, at 1068 ("[T]he Supreme Court has not developed a uniform standard for assessing the proper scope of state legislative jurisdiction. Rather, it has set forth two somewhat different standards that apply in different contexts . . . .").

Clauses.[168] The Supreme Court has never suggested that a state court's choice of law raises other constitutional concerns outside the narrow context of punitive damages.[169] Further, it seems highly unlikely to do so in the future, both for ideological reasons (the Court as currently constituted is likely to be sympathetic to the policies of antiabortion states) and historical and institutional ones (the Court signaled decades ago that, rather than take on the impossible task of policing state courts' routine choice of law, it would prefer to remain uninvolved).[170] Therefore, no simple template exists for imposing restrictions on choice of law beyond the limits the Court currently recognizes. These modest restraints are unlikely to prevent antiabortion states from holding that their law governs extraterritorial conduct.

What are the limits on state courts' choice of law and why do they rarely restrain state courts in practice? To think about this question, it is helpful to imagine a concrete scenario. Suppose that Texas, for example, creates a cause of action under which anyone who alleges harm from an abortion may obtain damages against someone who assisted in the abortion. California, where abortion is fully legal, imposes no such liability. A plaintiff—say, for example, a parent disappointed that her Texas-resident daughter did not carry a pregnancy to term—sues a California abortion provider in Texas court for providing the abortion. The court would then potentially be tasked with deciding whether Texas or California law applies in this situation.

The first thing to note about this process is that states have wildly different choice-of-law methodologies that often produce different results from each other, both in theory and in application.[171] Indeed, if state choice-of-law principles have one commonality, it is a preoccupation with fairness in individual cases rather than larger structural issues; this concern with retail justice tends to require principles that are flexible and give judges considerable discretion in their implementation.[172]

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168 *See infra* notes 187–93 and accompanying text.

169 *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003) (indicating that some territorial limits on punitive damages exist).

170 *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 727–28 (1988) (expressing hesitation to "embark upon the enterprise of constitutionalizing choice-of-law rules"). The Court also noted that "since the legislative jurisdictions of the States overlap, it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another." *Id.*

171 *See* Florey, *Conflicts*, *supra* note 88, at 686 ("State courts employ a bewilderingly diverse array of conflicts methodologies . . . .").

172 *See id.* at 727 (describing the widespread use of the Second Restatement approach, which affords judges significant discretion in choice-of-law disputes).

A second important aspect of choice-of-law decisionmaking is that most state courts, whatever methodology they employ, tend to be at least modestly biased toward forum law.[173] Coupled with the malleability of many choice-of-law principles, this means that which state's law applies is sometimes dependent on the forum in which litigation occurs. Texas courts, for example, follow the Restatement (Second) of Conflict of Laws,[174] which allows courts to juggle numerous ill-defined factors, from the "relevant policies of the forum" to the "basic policies underlying the particular field of law," among several others.[175] Given this multiplicity of considerations, the Second Restatement is generally understood to leave considerable discretion to judges in the choice-of-law determination.[176] All things being equal, then, there is a strong possibility that a Texas court, relying on the purported strengths of Texas's policies and interests, could find that Texas law applies in this situation.[177]

If a cause of action directly against the person obtaining the abortion were available, it is likely that courts in the abortion-restrictive state—assuming that both parties were domiciled there—would have even less difficulty finding that forum law applies. Many courts, regardless of which choice-of-law methodology they officially follow, tend to hold that when the parties share a domicile state and that state's decisional rule is "loss-allocating" rather than "conduct-regulating," such a rule should govern the case regardless of where the conduct in question occurred.[178] Loss-allocating rules have been described as those that "allocat[e] losses that result from admittedly tortious conduct," such as limitations on damages or rules governing who can be sued, while conduct-regulating rules, such as rules of the road, "involve the appropriate standards of conduct."[179] Although, as

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173 *See id.* at 725 (noting that different choice-of-law approaches share a concern for "state interests," resulting in common forum law bias).

174 *See, e.g.*, Hughes Wood Prods., Inc. v. Wagner, 18 S.W.3d 202, 205 (Tex. 2000).

175 SECOND RESTATEMENT, *supra* note 94, § 6.

176 *See* Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1269–70 (1997) (suggesting that the Second Restatement allows judges "virtually unlimited discretion").

177 This is particularly true given that many state courts are inclined to apply forum law when the choice-of-law analysis is close. *See* Florey, *Conflicts*, *supra* note 88, at 702 (noting a "common preference of state courts for forum law").

178 *See* Wendy Collins Perdue, *A Reexamination of the Distinction Between "Loss-Allocating" and "Conduct-Regulating Rules"*, 60 LA. L. REV. 1251, 1251 (2000). The draft Restatement (Third) of Conflict of Laws incorporates this distinction to some extent. *See* Luke Meier, *Simplifying Choice-of-Law Interest Analysis*, 74 OKLA. L. REV. 337, 350 (2022) (arguing that the Third Restatement "wholly adopts this framework (at least for torts)").

179 Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 684–85 (N.Y. 1985).

this Article later discusses,[180] many decisional rules that might be applied in abortion cases and could be characterized as conduct-regulating, the distinction is fluid enough that a court could easily determine that imposing liability for an abortion that has already occurred is a question of loss allocation.[181]

In any of these scenarios, it is highly unlikely that the Texas court would run into any difficulty in applying Texas law. Constitutional restraints on a court's choice-of-law decisions are modest at best. Although the Supreme Court for several decades flirted with more stringent limits,[182] the current standard is articulated by the plurality opinion in *Allstate Insurance Co. v. Hague*,[183] which merged what were previously separate analyses under the Due Process and Full Faith and Credit Clauses.[184] Under *Hague*, a court may apply any state's law to a dispute so long as the state possesses a "significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction."[185]

Although in the abstract a "significant aggregation" may sound like a meaningful hurdle, in reality the standard has, outside the class action context,[186] been applied extremely leniently.[187] In *Hague* itself, for example, the Court found that Minnesota had properly applied its own law to permit "stacking" of insurance policies in a case involving an accident in Wisconsin between two then-Wisconsin residents, based solely on the fact (1) that the plaintiff, a widow of the decedent in the accident, had moved to Minnesota after the accident; (2) that the decedent had been part of Minnesota's workforce; and (3) that the defendant insurance company did business throughout the country.[188]

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180 *See infra* notes 395–96 and accompanying text.

181 *See* Joseph William Singer, *Choice of Law Rules*, 50 CUMB. L. REV. 347, 373–74 (2020) (suggesting some fluidity in the distinction between loss-allocation and conduct-regulation).

182 *See* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 257 (1992) (noting that after "a long period of inconclusive decisions" on this point, the "modern Supreme Court has all but abandoned the field").

183 449 U.S. 302, 308 (1981) (plurality opinion). The Court later adopted this standard in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821–22 (1985).

184 *See Hague*, 449 U.S. at 308.

185 *Id.*

186 Class actions raise special issues because they may involve class members who have no connection to the forum state at all. *See Shutts*, 472 U.S. at 819–22 (noting that although Kansas had significant interests in applying its law to some class members, its "lack of 'interest' in claims unrelated to that State" rendered the "application of Kansas law to every claim in this case . . . arbitrary and unfair").

187 *See* Laycock, *supra* note 182, at 257–58 (suggesting that the *Hague* standard is so minimal as to be meaningless).

188 *See Hague*, 449 U.S. at 313–19.

In the post-*Hague* decades, lower courts have in many cases continued to apply forum law in situations where another state might have stronger claims that its law should apply.[189]

Because even what might appear to be fairly insignificant contacts with the forum suffice, it is almost inconceivable that the *Hague* standard would not be satisfied in any case where personal jurisdiction is based on minimum contacts.[190] Indeed, because *Hague* allows consideration of the plaintiff's contacts as well as the defendant's, it is in some respects easier to satisfy than the minimum contacts standard,[191] meaning that even in situations where personal jurisdiction is founded on some other basis than minimum contacts (such as corporate domicile or in-state service), the forum state may sometimes constitutionally apply its own law.[192]

Although the *Hague* standard has more teeth in class actions,[193] in virtually any conceivable litigation in antiabortion states—where one or more parties would undoubtedly be a citizen of that state, and where the state might be found to have additional interests, such as protecting "a fetus conceived within its borders"[194]—it seems clear that *Hague*'s requirements would be met. As Professor Harold P. Southerland has observed:

> As a practical matter, there is no reason that a court so inclined cannot decide a conflicts case pretty much as it pleases. Nothing—not the Constitution, the spectre of balkanization, game theory, or the myth of interstate order—really stands in the way. The only restraint is a court's sense of self-restraint.[195]

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189 *See* Harold P. Southerland, *Sovereignty, Value Judgments, and Choice of Law*, 38 BRANDEIS L.J. 451, 486 (1999–2000) (noting that, in the wake of *Hague*, Minnesota "has frequently chosen its own law when a good case could have been made for applying the law of another state").

190 *See* Florey, *Extraterritoriality Principle in Choice of Law*, *supra* note 11, at 1058–59 ("[*Hague*] resembles the 'minimum contacts' test for personal jurisdiction, and . . . so long as a state court has personal jurisdiction over the defendant, it probably has the power to apply forum law to her actions as well.").

191 *See id.* at 1059 n.5 ("[B]ecause the *Hague* test permits consideration of the plaintiff's contacts with the state as well as the defendant's, in most situations it is narrower than the test for personal jurisdiction.").

192 In theory, the *Hague* standard applies to the application of any state's law, not just forum law; in practice, state courts are most eager to give broad effect to their own state's law. *See* Southerland, *supra* note 189, at 486 (describing the lack of attention paid by state courts to *Hague*).

193 *See, e.g.*, *infra* note 211 and accompanying text.

194 *See* Fallon, *supra* note 5, at 629–30 ("In cases involving civil . . . law, the Supreme Court has said repeatedly that an important consideration . . . is whether one of its citizens was involved. . . . In addition, a state might assert a contact or interest involving a fetus conceived within its borders.").

195 *See* Southerland, *supra* note 189, at 486.

In short, existing law provides no obvious mechanism to prevent the courts in an antiabortion state from applying forum law to events outside that state's borders. In some cases, courts might decide on their own to refrain from doing so, either because state choice-of-law methodology clearly dictates a different outcome or because, for policy reasons, the court decides to exercise restraint.[196] It is also conceivable that the Supreme Court or lower federal courts will find that new or expanded constitutional limits apply to state-court action in this context. The latter possibility seems fairly remote, however, and—though courts in some such cases may decide to stay their hand in applying forum law extraterritorially—they will not do so universally.[197] As a result, antiabortion states are likely in some instances to be able to use litigation as a means of extending their law past their borders.

To be sure, it is worth considering that, in a different line of cases,[198] the Supreme Court has indirectly[199] imposed another source of limitations on states' ability to regulate conduct outside their borders. Under the Fourteenth Amendment's Due Process Clause, states may not consider out-of-state conduct in deciding the amount of punitive damages that can be imposed.[200] This prohibition is obviously directly relevant in cases in which a state seeks to subject an abortion seeker or provider to punitive damages, although it would not prevent states from imposing significant compensatory damages[201] or even punitive damages to the extent that some of the conduct at issue might have occurred in-state. Some of the Court's broader language, however, can be read to suggest a larger concern about extraterritorial regulation. In *State Farm v. Campbell*, for example, the Court notably cited the *Bigelow* right-to-travel case, baldly stating that "a State

196 *See id.* at 500–01 (applauding courts for sometimes engaging in restraint and subordinating their states' interests to those of other states with a closer connection to the dispute) *See also supra* note 82.

197 *See* Southerland, *supra* note 189, at 486 (noting that courts have sometimes failed to give way to the interests of other states).

198 *See* Florey, *Extraterritoriality Principle in Choice of Law*, *supra* note 11, at 1094–97 (describing how the Court in *BMW v. Gore* and *State Farm* limited states' power, through the Due Process Clause, from imposing punitive damages for out-of-state conduct).

199 This is indirect because the Court's ostensible concern in such cases has been excessiveness of punitive damages; whether the defendant is being assessed punitive damages for out-of-state conduct is relevant because it renders the damages excessive. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419–22 (2003) (explaining that, while reprehensibility of the defendant's conduct is a factor that can be considered in setting the punitive damages amounts, courts may not consider out-of-state conduct in determining reprehensibility).

200 *Id.* at 421–22.

201 *See id.* at 416 (explaining differences between compensatory and punitive damages and making clear that the limits at issue apply to the latter).

cannot punish a defendant for conduct that may have been lawful where it occurred" and further that "as a general rule, . . . a State [does not] have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction."[202] Indeed, the Court suggested that constitutional limits on choice of law would require that courts hearing cases involving out-of-state conduct would need "in the usual case . . . to apply the laws of their relevant jurisdiction."[203] Although the Court's reasoning in *Campbell* was clearly confined to punitive damages, it is possible that the Court could build on *Campbell*'s reasoning to find broader anti-extraterritoriality principles in the Due Process Clause. Nonetheless, it seems unlikely given both the Court's historically hands-off role in this area and its current ideological composition that it would do so in this context.[204]

Of course, state courts (and federal courts applying state choice-of-law principles) themselves are not always indifferent to extraterritoriality concerns—particularly in class actions or other litigation that will have an impact beyond the immediate parties.[205] In such cases, courts may hesitate to apply forum law to out-of-state events on the grounds that it may be disruptive or unfair.[206] Further, the constitutional standards for applying forum law (discussed below) have generally been applied more stringently in class actions, in part because of

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[202] *Id.* at 421.

[203] *Id.* at 421–22.

[204] Professor Brannon P. Denning, for example, argues that, while *BMW v. Gore* suggested a possible revival of the *Healy* extraterritoriality principle, *Campbell* backed away from this by locating restrictions clearly in the Fourteenth Amendment rather than the Commerce Clause. *See* Denning, *supra* note 121, at 1004. As a result, Denning suggests, extraterritoriality concerns have been "left . . . stranded" as "a doctrinal oxbow lake" and further that "prospects for an extraterritoriality revival [appear] rather bleak." *Id.* at 1004.

[205] *See, e.g.*, *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012, 1020 (7th Cir. 2002) (critiquing the "central planning model" of applying one state's law to far-flung claims in other jurisdictions); Phillips v. Consol. Supply Co., 895 P.2d 574, 577 (Idaho 1995) ("Absent a statute granting extraterritorial rights, '[s]tatutes are intended to apply and be confined in their operation to persons, property and rights which are within the territorial jurisdiction of the law-making power.'" (quoting Ore-Ida Potato Prod., Inc. v. United Pac. Ins. Co., 392 P.2d 191, 195 (Idaho 1964)).

[206] In *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 918 (Cal. 2006), for example, the California Supreme Court held that California law should be applied to claims for injunctive relief but not to damages for past conduct. There, the court concluded that "denying the recovery of damages for conduct that was undertaken in the past in ostensible reliance on the law of another state—and prior to our clarification of which state's law applies in this context—will not seriously impair California's interests." *Id.* at 938.

extraterritoriality-like concerns.[207] Despite some evidence of judicial restraint in this area, however, many judges still appear to prefer forum law in close cases.[208] It seems likely in particular that state court judges in strongly antiabortion states—who may be elected or otherwise tied to the political process[209]—might share the sympathies of other elected officials or the public on the abortion issue, making them particularly ready to apply forum law whenever it is a colorable option.

II
How Abortion-Supportive States Could Fight Back

The preceding Part argues that states wishing to use civil litigation as a means of applying antiabortion policies extraterritorially will in many cases be able to do so. It does not follow, however, that the previously described state of affairs will be an unmitigated boon for antiabortion states. Rather, choice-of-law permissiveness works both ways. Just as antiabortion states will have the opportunity to extend their law beyond state borders through their courts, so too will abortion-protective states be able, at least in some circumstances, to fight back on behalf of abortion providers or abortion-seeking travelers. The following Part explores ways in which this process might occur.

A. Choice of Law's Double Edge and the Full Faith and Credit Clause

An abortion-restrictive state and an abortion-protective one to which its residents travel will undoubtedly have concurrent jurisdic-

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[207] In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 815 (1985), the Court held that a Kansas court could not constitutionally apply Kansas law in a class action to recover interest on delayed natural gas royalty payments where "99% of the gas leases and some 97% of the plaintiffs . . . had no apparent connection to the State of Kansas except for this lawsuit." *Id.* at 815.

[208] *See infra* note 212.

[209] *See* Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 Va. L. Rev. 719, 733 (2010) (describing some of the "considerable evidence that judges subject to periodic elections decide cases in accordance with majority preferences more often than do judges who are appointed with life tenure"). In general, public sentiment in states that passed post-*Roe* trigger laws has tended to be in favor of abortion restrictions. *See* Jeff Diamant & Aleksandra Sandstrom, *Do State Laws on Abortion Reflect Public Opinion?*, Pew Rsch. Ctr. (Jan. 21, 2020), https://www.pewresearch.org/fact-tank/2020/01/21/do-state-laws-on-abortion-reflect-public-opinion [https://perma.cc/3NXH-4T5R] ("A new analysis by Pew Research Center shows that in . . . seven states [that passed trigger laws], as well as others that have enacted various other restrictions on abortion, public opinion tends to run much more against legal abortion than in states that have not passed these laws.").

tion in many cases,[210] allowing a potential defendant to sue in the permissive state for a declaratory judgment that they are not liable or even to state their own cause of action.[211] Because of both the diversity of choice-of-law methodologies used in the United States and the frequent bias toward forum law in close cases, it is likely that state courts in abortion-protective states will also frequently find that their law applies and in consequence hold that there is no cause of action against even those defendants, such as those who provide abortions to out-of-state residents, who might be liable under the law of the abortion-prohibiting state.[212] Such application of forum law should raise no constitutional issues;[213] indeed, because the conduct at issue will probably have occurred mostly or entirely in the abortion-protective state, extraterritoriality concerns are unlikely to be present at all.

If the issue can be litigated to judgment in the abortion-protective state prior to any other court decision on the matter, the restrictive state will be obliged to honor the result. Under the Full Faith and Credit Clause[214] and its implementing statute,[215] states have an extraordinarily strong obligation to recognize and enforce one another's judgments. (It is important to note that this obligation is entirely separate from the rather modest limits that the Full Faith and Credit Clause, along with the Due Process Clause, imposes on choice of law.[216]) In particular, neither an intense policy disagreement with the result[217] nor a belief that the judgment-rendering court was wrong

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210 *See supra* note 40 and accompanying text.

211 Professors Cohen, Donley, and Rebouché, for example, suggest that abortion-protective states could create their own cause of action against defendants who interfere with an abortion. *See* Cohen et al., *supra* note 3, at 49.

212 *See* Dellapenna, *supra* note 26, at 1699 (noting that, in cases involving conflicts of law over abortion, "the marked bias in favor of applying forum law probably means that each court would apply its own law and the plaintiff could effectively pick the law by picking the forum").

213 As previously discussed, the *Hague* standard is quite lenient and would surely permit application of forum law to in-state conduct likely involving one or more in-state parties. *See supra* note 185 and accompanying text.

214 U.S. CONST. art. IV, § 1.

215 28 U.S.C. § 1738.

216 *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981) (describing the modest Due Process and Full Faith and Credit Clause limits on choice of law).

217 *See* Fauntleroy v. Lum, 210 U.S. 230, 236 (1908) (holding that Mississippi must enforce a Missouri judgment misapplying Mississippi law regardless of the "illegality of the original cause of action" in Mississippi); *see also id.* at 239 (White, J., dissenting) (objecting that majority's holding "obliged the courts of Mississippi, in consequence of the action of the Mississippi court, to give efficacy to transactions in Mississippi which were criminal, and which were against the public policy of that state").

on the merits[218] provides an excuse not to apply full faith and credit. Even jurisdictional difficulties with the first court's judgment generally do not permit reexamination in another state's courts.[219]

In many respects, this constitutional and statutory obligation keeps the wheels of a federalist judicial system running smoothly.[220] If states could easily thwart each other's judgments from going into effect, constant friction could ensue. To this extent, the enforcement obligation is harmony-promoting, requiring states to give unconditional deference to the judicial determinations of their neighbors.

At the same time, such a strong principle of recognition and enforcement can itself create conflict in some circumstances, particularly when concurrent litigation occurs in the courts of different states.[221] When two proceedings take place at once, normally the one first to judgment is entitled to preclusive effect, creating an incentive for litigants and perhaps courts to speed proceedings to resolution.[222] Further, as strong as the full faith and credit obligation is when it applies, the details of what precisely it applies to can be uncertain. For example, in *Baker v. General Motors Corp.*, the Court held that a Michigan consent decree under which a witness agreed not to testify in other actions did not bar him from testifying in Missouri.[223] The Court explained that states need not "adopt the practices of other States regarding the time, manner, and mechanisms for enforcing

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[218] *See id.* at 237–38 (requiring enforcement of Missouri judgment in Mississippi while acknowledging that the Missouri court may have interpreted Mississippi law incorrectly).

[219] *See* Durfee v. Duke, 375 U.S. 106, 111 (1963) ("[A] judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment."). Default judgments may be challenged on the basis that the rendering court lacked personal jurisdiction over the defendant, but a defendant who does so and loses on the personal jurisdiction issue will be barred from relitigating issues of liability and damages. *See* Allen Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 76 & n.299 (2010).

[220] *See* Charles M. Yablon, *Madison's Full Faith and Credit Clause: A Historical Analysis*, 33 CARDOZO L. REV. 125, 132 (2011) ("[T]he Full Faith and Credit Clause was part of a broader plan by Madison and others to curb the ability of states to take acts that were harmful to one another or to the nation as a whole."); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 2002 (1997) ("Everyone agrees that requiring full faith and credit is supposed to reduce interstate conflict and foster an attitude of friendly cooperation among the states.").

[221] 18 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4404 (3d ed. 2022).

[222] *Id.* If two judgments have been entered, however, the last in time controls in most circumstances. *Id.*; *see also* Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798, 798 (1969) ("[L]ast in time controls in subsequent litigation.").

[223] Baker v. General Motors Corp., 522 U.S. 222, 226 (1998).

judgments" and that "such measures remain subject to the even-handed control of forum law."[224]

Full faith and credit obligations thus have the potential to introduce friction between states with significantly different abortion policies—particularly those in which judges are elected or otherwise susceptible to political pressures. It is readily imaginable that a state court in an abortion-prohibiting state might bristle at being required to apply a judgment that, for example, absolved out-of-state defendants from liability for assisting residents in obtaining one; likewise, courts in abortion-protective states may balk at enforcing liability against citizens engaging in conduct lawful where it occurred.

Despite states' nearly categorical obligation to recognize sister states' judgments, there is no clear roadmap for what would happen if a state unlawfully refused to do so. In *Parsons Steel v. First Alabama Bank*, plaintiffs filed parallel state and federal proceedings against a bank, arguing in the state proceeding that the bank's allegedly fraudulent conduct violated Alabama law and in the federal action that it also violated a federal statute.[225] The federal proceeding concluded first, but the Alabama court (likely improperly) rejected the res judicata defense the defendants then asserted based on the federal judgment.[226] Despite possible error on the part of the Alabama court in failing to give effect to the federal judgment, the Court held that the preclusion-denying state judgment was nonetheless entitled, according to full faith and credit principles, to be awarded the same preclusive effect it would have under Alabama law.[227]

Parsons Steel highlights a full faith and credit paradox: Because states generally may not reexamine each other's judgments, even a judgment that itself undermines full faith and credit principles may be entitled to recognition. It is, of course, possible that in a more blatant instance of nonenforcement on policy grounds, courts might reach a different conclusion. Moreover, the preclusion issue in *Parsons Steel* involved a state court recognizing a federal judgment, a situation that—while treated in a similar manner by courts in practice—is not directly addressed by the Full Faith and Credit Clause or its implementing statute.[228] Where questions of preclusion are concerned,

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[224] *Id.* at 235. Justice Kennedy, concurring in the judgment, criticized the majority's reasoning for its "potential for disrupting judgments." *Id.* at 243–44 (Kennedy, J., concurring in judgment).

[225] 474 U.S. 518, 520 (1986).

[226] *Id.*

[227] *Id.* at 525.

[228] *See* Gil Seinfeld, *Reflections on Comity in the Law of American Federalism*, 90 NOTRE DAME L. REV. 1309, 1320 n.45 (2015) ("[A]lthough nobody doubts that state courts

however, it seems clear that courts have at least some de facto latitude in the deference given to out-of-state judgments, and it is likely that some state courts will attempt to test these boundaries,[229] with perhaps unwelcome consequences.

State courts could also try to avoid full faith and credit effects by attempting to ensure that proceedings in other states do not reach judgment first, either by speeding their own parallel proceedings or attempting to enjoin litigants from proceeding elsewhere. Such efforts have occurred in other contexts. For example, in *Advanced Bionics Corp. v. Medtronic, Inc.*, courts in parallel proceedings in California and Minnesota over the enforceability of a noncompete clause issued dueling orders in which each court attempted to preclude the parties from litigating in the other,[230] a stalemate only resolved when the California Supreme Court reversed the lower court's order, in part on grounds of comity.[231] In the more fraught context of abortion, it is easy to imagine that in a similar case, neither state might be willing to give way. It seems plausible, therefore, that full faith and credit obligations may heighten rather than soothe interstate tensions in this context.

B. Obstructing Civil Litigation in Other States

Besides trying to turn full faith and credit obligations to their advantage, abortion-protective states have additional tools at their disposal to thwart courts in other states from imposing liability for conduct within their borders. Professors Cohen, Donley, and Rebouché discuss various measures that abortion-protective states could enact, including exemptions for abortion providers from interstate discovery, subpoenas, and extradition in criminal cases.[232] They also suggest that such states could "creat[e] a cause of action against anyone who interferes with lawful reproductive healthcare provision or support" that could be used against anyone who tried to enforce a judgment obtained in an antiabortion state against a state resident.[233] Indeed, abortion-protective states are already taking some of these

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are required to grant full faith and credit to federal court judgments, . . . the constitutional and statutory sources of this obligation are unclear.").

229 A historical parallel exists with the question of recognizing the validity of migratory divorces, a context in which many states resisted Full Faith and Credit obligations. *See infra* Section III.B.

230 59 P.3d 231, 234 (Cal. 2002).

231 *Id.* at 237–38.

232 Cohen et al., *supra* note 3, at 46–49.

233 *Id.* at 49.

actions.[234] To the extent that such measures could thwart or slow litigation in abortion-unfriendly states, they could not only prevent an unfavorable judgment against their residents for engaging in conduct legal where it occurred but also, in situations where there might be parallel proceedings in a court of the abortion-supportive state, potentially allow it to reach final judgment first.

Nonetheless, it is in some ways more difficult for states to insulate their citizens from civil liability than from criminal prosecution. The wider availability of personal jurisdiction in civil cases[235] and the uncertainties surrounding choice of law[236] would make civil proceedings harder to monitor and target. Private citizens bringing suit may be less inclined to exercise restraint or to care about values of interstate comity than state prosecutors,[237] meaning that civil cases might quickly multiply. Finally, the lower standard of proof for civil liability might make a judgment in an abortion-opposed state obtainable even without an abortion-supporting state's cooperation with discovery.

In any event, it seems likely that civil proceedings will at some point result in considerable friction between abortion-supportive and abortion-opposed states—whether conflict plays out while the suit is ongoing or afterward, when full faith and credit principles demand recognition of a final judgment. As the following Part discusses, although in some ways interstate differences over abortion present a new and unique situation, there are also historical parallels for how the attendant conflicts might unfold.

III
Past Extraterritorial Effects and Conflicts

This Part takes a historical perspective in an effort to understand what effect a patchwork of state abortion laws might have in litigation. It first discusses the general question of how federalism in the United States is sometimes benefited and sometimes strained by interstate policy differences with extraterritorial effects. It then considers three

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234 *Id.* at 46–50; *see* Maya Yang, *Pro-Choice States Rush to Pledge Legal Shield for Out-of-State Abortions*, The Guardian (May 11, 2022), https://www.theguardian.com/world/2022/may/11/abortion-pro-choice-states-safe-havens-funding-legal-protection [https://perma.cc/9D6A-G8YR] (describing some of these efforts).

235 *See supra* note 40 and accompanying text.

236 *See supra* note 171 and accompanying text.

237 *See, e.g.*, Isaac Stanley-Becker, *'A Responsibility to Say No': Prosecutors Vow Not to Bring Charges Under Severe Abortion Laws*, Wash. Post (May 21, 2019), https://www.washingtonpost.com/nation/2019/05/21/georgia-prosecutors-wont-enforce-abortion-ban-sim-gill-utah [https://perma.cc/4RU3-DVNN] (describing how several district attorneys in three southern states stated that they would not prosecute individuals under their respective states' fetal heartbeat laws).

instances of significant policy differences between states that caused or threatened to cause difficult extraterritoriality issues and explores their different outcomes. In the first case, the easily obtainable divorces offered in some jurisdictions initially caused friction between states but ultimately became the norm nationwide. In the second example, many commentators predicted that differing cannabis laws would create legal mayhem through interjurisdictional travel and spillover effects; instead, public attitudes nationwide changed so quickly that significant conflict failed to materialize. Finally, different state attitudes toward noncompete clauses and ambiguity about their geographical reach continue to generate considerable uncertainty and resultant litigation, with few signs of consensus or resolution. All of these examples have some potential parallels to the current abortion situation.

A. The General Problem

Commentators have identified recurring patterns of both interstate conflict and interstate convergence in legal developments.[238] The well-known theory of a "race to the bottom," for example, posits that states will vie to outdo each other in passing corporate-friendly legislation to attract businesses to their state, ultimately resulting in a universal degradation of standards.[239] This phenomenon has arguably occurred in certain areas of law, such as states' widespread abandonment of usury prohibitions in the wake of Delaware's and South Dakota's decisions to "attract lucrative financial services jobs . . . [by] eliminat[ing] their ancient usury laws."[240]

Another frequent pattern is that conduct allowed in one state may have spillover effects in a neighboring one.[241] This situation may lead, in some situations, to interstate friction—but surprisingly, in

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[238] In addition to such patterns of interstate influence, Congress may sometimes (and certainly could in the abortion context) choose to impose uniformity by preempting varying state-level regulation, as with the Clean Air Act. *See, e.g.*, Am. Auto. Mfrs. Ass'n v. Mass. Dep't. of Env't Prot., 163 F.3d 74, 82–83 (1st Cir. 1998) (holding that the state's environmental protection department's mandate requiring automakers to manufacture a certain number of zero-emission electric vehicles for sale within the state was presumptively preempted by the Clean Air Act).

[239] *See* Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 525–26 (2008) (discussing the negative consequences resulting from competition among states to attract businesses and other regulated entities).

[240] Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110, 1121–22 (2008).

[241] *See* Berch, *supra* note 44, at 4–5 (discussing spillovers in the context of marijuana regulation); Erbsen, *supra* note 239, at 523–24 (discussing problem of cross-border externalities such as pollutants that have cross-border effects).

others, to agreement on a general policy. One study, for example, found that states were more likely to adopt impaired driving laws if their neighbors did so[242] and hypothesized that this might be a response to spillover effects.[243]

This sort of convergence provides some support for the frequently articulated idea that states serve as laboratories of democracy, pioneering ideas that, if successful, may be adopted by their neighbors.[244] Although legislatures may be the most obvious bodies to notice and respond to regulatory innovations from other jurisdictions, there is some evidence that state courts may do so, too. One study found, for example, that in the area of education finance reform, citations to cases from other jurisdictions "allow[ed] state courts to transmit models of policy change and implementation from one to another."[245] Borrowing was more likely when state supreme courts had similar ideological makeups.[246]

Drivers of change in state law, such as economic pressures to adopt more lenient regulation and borrowing of proven ideas, may occur with or without the involvement of courts.[247] A state that repeals usury laws to attract businesses, for example, has reason to do so even if usury issues are litigated infrequently. Popular opinion, lobbying, or simply a desire to govern effectively may be a more decisive factor than court cases in convincing state legislators to borrow another state's regulatory innovation.[248] In other cases, however, courts may play a role—either because state courts choose to borrow

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242 *See* James Macinko & Diana Silver, *Diffusion of Impaired Driving Laws Among US States*, 105 AM. J. PUB. HEALTH 1893, 1899 (2015) (discussing factors indicating state adoption of policies aimed at reducing impaired driving).

243 *Id.* at 1894 ("We hypothesized that diffusion among neighboring states is likely to occur for policies that have potential spillover effects.").

244 *See* Katherine Florey, *Making It Work: Tribal Innovation, State Reaction, and the Future of Tribes as Regulatory Laboratories*, 92 WASH. L. REV. 713, 722–24 (2017) (discussing Justice Brandeis's initial formulation of the "laboratories of democracy" in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) and cataloging numerous examples of states adopting policies pioneered elsewhere).

245 Shane A. Gleason & Robert M. Howard, *State Supreme Courts and Shared Networking: The Diffusion of Education Policy*, 78 ALB. L. REV. 1485, 1511 (2014).

246 *Id.* at 1510.

247 *See* Florey, *supra* note 244 (describing various routes by which state innovations have spread from state to state); *see also* Katherine Florey & Andrew Doan, *A Successful Experiment: California's Local Laboratories of Regulatory Innovation*, 66 UCLA L. REV. DISCOURSE 80 (2018) (describing how the spread of specific approaches to electronic smoking device regulation among California localities "may have been influenced less by the experiences of neighboring jurisdictions than by an influential model ordinance").

248 *See, e.g.*, James A. Stimson, Michael B. Mackuen & Robert S. Erikson, *Dynamic Representation*, 89 AM. POL. SCI. REV. 543, 545 (1995) ("When politicians perceive public opinion change, they adapt their behavior to please their constituency and, accordingly, enhance their chances of reelection.").

from the precedents of other states or because difficult conflicts issues force courts to confront the law of other jurisdictions. The following Sections discuss how this may occur.

B. Migratory Divorces and the Full Faith and Credit Problem

That state-to-state differences in law may have an impact in court proceedings is perhaps most obvious in matters of personal status: It is clearly problematic, for example, if courts treat a person as married in one state and divorced in another.[249] The famously strict-territoriality-embracing personal jurisdiction case *Pennoyer v. Neff* nonetheless made an exception to territorial principles for questions of personal status, such as marriage and divorce, suggesting that a court could grant a divorce even if only one member of the couple was domiciled in the state.[250]

From a choice-of-law perspective, state courts generally treat marriage and divorce differently. Divorce results from a judicial decree to which states must give full faith and credit; by contrast, state courts apply their usual choice-of-law process to determine whether to recognize a marriage as valid, although in most cases states have a strong presumption toward recognition.[251] Despite these differences, both marriages and divorces can create problems of choice-of-law inconsistency. In the early 2000s, the differing status of same-sex marriage and same-sex marriage recognition[252] from state to state created numerous problems, from allocating responsibility for debt incurred

[249] Issues of inconsistent status also occurred in the era of slavery, where the status of a person as free in one state and enslaved in another had the obvious potential to create problems. Both because of slavery's unique moral horror and because doctrines of choice of law and jurisdiction have changed radically since the nineteenth century, there are reasons for great caution in attempting to draw parallels to today's events. Nonetheless, it is worth noting that slavery did prompt demands for the extraterritorial application of law by southern states that raised some issues also debated in contemporary discussions of extraterritoriality. For a thoughtful historical account, see Jeffrey M. Schmitt, *Constitutional Limitations on Extraterritorial State Power: State Regulation, Choice of Law, and Slavery*, 83 Miss. L.J. 59 (2014).

[250] 95 U.S. 714, 734 (1878) ("The jurisdiction which every State possesses to determine the civil *status* and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory."). For example, the Court suggested that a state would have the power to grant its resident an otherwise justified divorce even if their spouse had left the state. *Id.* at 735.

[251] *But see* Michael J. Higdon, *If You Grant It, They Will Come: The History and Enduring Legal Legacy of Migratory Divorce*, 2022 Utah L. Rev. 295, 346–47 (2022) (noting that this has been the traditional view but that some have more recently questioned it).

[252] Some states that did not allow same-sex marriage nonetheless recognized such marriages entered into in other states. *See* Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. Rev. 1669, 1671 n.12

by a spouse[253] to determining the parentage of children[254] to the frequent inability of same-sex couples to divorce if they lived in non-recognizing states.[255] In the case of same-sex marriage, however, the time of disunity was thankfully short. Massachusetts was the first state to permit same-sex marriages, starting in 2004;[256] the Supreme Court resolved the issue on a nationwide basis by affirming same-sex couples' right to marry in *Obergefell v. Hodges*, only eleven years later.[257]

By contrast, on another question of personal status—the grounds on which divorce could be granted—meaningful differences existed among the states for decades, even centuries. In the colonial era, northern states tended to permit divorce while southern states generally did not, at least formally.[258] Later, in the new United States, divorce policies were marked by "diversity and experimentation."[259] From the nineteenth through the early twentieth century, as explained by Professor Joanna Grossman, the competing forces of "anti-divorce moralists and the social demand for divorce tipped [states] in one direction or the other,"[260] leading to an "ebb-and-flow" under which "not only did the degree of variation among states change, but . . . their relative reputations for leniency rose and fell accordingly."[261] Despite these differences, migratory divorces—that is, the practice of traveling to another state to avail oneself of more liberal divorce laws—were fairly uncommon until some states with lenient divorce laws also began to loosen their residency requirements.[262]

Although other states with short residency periods had previously attracted divorce-seekers in some circumstances,[263] Nevada in the

(2011) (highlighting Maryland and New Mexico as states which recognized, but did not permit, same-sex marriages).

253 *See id.* at 1687 (discussing allocation of debt accumulated during marriage).

254 *See id.* at 1688 (discussing parentage of married persons).

255 *See id.* at 1670 (discussing issues faced by same-sex couples seeking divorce in non-recognizing states).

256 *See id.* at 1684 n.93.

257 576 U.S. 644 (2015).

258 *See* Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 383–84 (2007) (discussing the differences in treatment of divorce between northern and southern colonies).

259 *Id.* at 384.

260 Joanna L. Grossman, *Fear and Loathing in Massachusetts: Same-Sex Marriage and Some Lessons from the History of Marriage and Divorce*, 14 B.U. PUB. INT. L.J. 87, 90 (2004).

261 *Id.* at 91.

262 *See id.* ("[M]igratory divorce as a common and lamented practice did not really emerge until residency requirements began to vary as well.").

263 *See* Grossman, *supra* note 260, at 92 (discussing Utah and both North and South Dakota as states which attracted divorce-seekers due to short residency requirements).

early twentieth century emerged as the nation's "premier divorce haven"[264] because of its lax residency requirements coupled with the fact that Nevada had multiple, flexible grounds for divorce and demanded no evidence to prove them.[265] Although Nevada's appeal to divorce-seekers initially caused controversy among its citizens,[266] the state ultimately decided to "double[] down" on its reputation, shortening residency periods to six weeks in 1931.[267] In short order, Nevada's "divorce ranches," where discontented spouses could pass their waiting period, quickly sprang up and made an impact on popular culture, portrayed in movies such as *The Women*,[268] various books and memoirs,[269] and, more recently, in an episode of *Mad Men*.[270] Ultimately, divorce became a multimillion-dollar industry in Nevada, inspiring several other states to get in on the migratory divorce "business" by lowering their own residency requirements.[271]

Yet a grant of divorce following travel to another state was often just the start of a knotty choice-of-law problem. Prior to the explosion in migratory divorces, states had treated recognition of divorce as a question of comity, meaning that states had some discretion as to how much effect to grant them.[272] In the 1869 case *Cheever v. Wilson*,[273] however, the Court held that states were required to honor divorce decrees as a matter of full faith and credit.[274] At the same time, states predicated jurisdiction to grant a divorce on domicile and considered

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Nevada had historically had a short residency period, initially motivated by the wish to allow miners to quickly become state residents. *See* Higdon, *supra* note 251, at 309.

264 Grossman, *supra* note 260, at 92.

265 *See* Higdon, *supra* note 251, at 309–10 (contrasting Nevada, which provided various grounds for divorce, with New York, which allowed divorce only on the grounds of adultery).

266 *See id.* at 311–12 (discussing the controversy Nevada's flexible divorce laws caused amongst some Nevadans).

267 *Id.* at 314.

268 Taylor Simpson-Wood, *As Seen Through the Eye of the Camera: A Portrayal of How Cultural Changes, Societal Shifts, and the Fight for Gender Equality Transformed the Law of Divorce*, 42 WOMEN'S RTS. L. REP. 1, 21 (2020).

269 *See* Priya Jain, *Betty Goes Reno*, SLATE (July 21, 2010), https://slate.com/culture/2010/07/a-visit-to-the-glamorous-divorce-ranches-of-the-mad-men-era.html [https://perma.cc/7CW2-QLQ2] (discussing the growth of "divorce ranches" as business enterprises catering to divorce-seekers); *see also Mad Men: Shut the Door. Have a Seat.* (AMC television broadcast Nov. 8, 2009).

270 *See id.*

271 *See* Higdon, *supra* note 251, at 315 (discussing revenues the state of Nevada generated through divorce).

272 *See* Estin, *supra* note 258, at 385 (discussing states' discretion in recognizing migratory divorces).

273 76 U.S. 108, 123 (1869).

274 *See* Estin, *supra* note 258, at 385–86 (discussing the Supreme Court's reasoning for invoking the Full Faith and Credit clause in *Cheever*).

the legitimacy of another state's jurisdiction in deciding whether to recognize a divorce decree,[275] meaning that an unhappy couple in a restrictive state could not simply travel to a permissive one to dissolve their marriage.[276] State courts continued the practice of examining the rendering court's jurisdiction even after the Court clarified in *Cheever* that recognition was a matter not merely of comity but of constitutional obligation.[277]

Even as full faith and credit problems were brewing, states' divorce policies were growing increasingly far apart, with some states recognizing new no-fault grounds even as others held steadfastly to restrictive ones.[278] Meanwhile, the broader question of when divorces should be granted became a focal point of national debate, with many regarding migratory divorces as a "national scandal" and pressing for national legislation to standardize grounds for divorce,[279] a project that ultimately foundered on both women's rights and state sovereignty concerns.[280] As Professor Ann Laquer Estin has put it, "Because of the impasse over national or uniform divorce legislation and the Supreme Court's deference to the anti-divorce policies of a few states, matrimonial law through the first half of the twentieth century was a tangled and formalistic mess, largely preoccupied with conflict of laws."[281]

Unsurprisingly, as migratory divorce became popular, the jurisdictional prerequisite of domicile created significant problems for ex-spouses who, belying their claims of residency in the divorce-granting state, quickly returned to their original states following the expiration

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[275] *See* Michael M. O'Hear, *"Some of the Most Embarrassing Questions": Extraterritorial Divorces and the Problem of Jurisdiction Before* Pennoyer, 104 YALE L.J. 1507, 1521–22 (1995) (discussing early nineteenth-century courts' requirement of proper jurisdiction as requisite for recognizing sister-state divorce decrees).

[276] *See* Estin, *supra* note 258, at 386 (discussing state courts' incorporation of jurisdictional tests into full faith and credit analysis and its effects).

[277] *See id.* The Supreme Court further complicated the analysis by holding in *Haddock v. Haddock*, 201 U.S. 562, 628 (1906), that a state could decline to recognize a divorce based on marital fault (the case involved a husband's abandonment of his wife) even where one of the spouses was validly domiciled in the rendering state. This rule created additional confusion, and starting in the late 1930s the Court backtracked from it, finally explicitly overruling it in *Williams v. North Carolina* (*Williams I*), 317 U.S. 287, 288 (1942). For a discussion of this additional dimension of the full faith and credit problem, see Higdon, *supra* note 251, at 323–34.

[278] *See* Estin, *supra* note 258, at 394–95 (discussing the divergence of restrictions in state divorce laws).

[279] *See* Higdon, *supra* note 251, at 328–29 (discussing proposed amendments to the Constitution granting federal control of divorce law).

[280] *See id.* at 331–33 (discussing impediments to Constitutional amendments granting federal control of divorce law).

[281] Estin, *supra* note 258, at 394.

of the waiting period. In such situations, their home states were often reluctant to recognize their divorces, "balk[ing] at the idea that one of its resident citizens could have his or her marriage dissolved by a sister state simply because that person's spouse spent a certain amount of time in the sister state."[282] For spouses attempting to dissolve their marriages through this method, the consequences could be severe and unpredictable. This was vividly illustrated in the saga of O.B. Williams and Lillie Hendrix, twice taken up by the Supreme Court in the 1940s.[283]

The two *Williams* cases involved somewhat colorful facts: Williams, a shop owner in a small North Carolina town, who had been married for twenty-four years to a woman with whom he had four children, left town one day along with Hendrix, the wife of his employee.[284] It eventually emerged that they had traveled to Nevada, waited precisely the requisite six weeks, secured divorces from their prior spouses, and married each other.[285] Subsequently, they made the (perhaps foolhardy) decision to return to North Carolina, settling in a town neighboring the area they had left.[286] A few months thereafter, both spouses were indicted for and ultimately convicted of bigamy.[287]

In *Williams I*, the Supreme Court first held that—on the key assumption that both spouses were genuinely domiciled in Nevada at the time of their divorces—North Carolina would be obliged to give the Nevada divorce decree full faith and credit.[288] Undeterred, however, North Carolina commenced a second prosecution, this time instructing the jury to consider the validity of the spouses' Nevada domicile.[289] The case again made its way to the Supreme Court, which this time upheld the convictions.[290]

Although the Nevada court had granted a divorce decree based on its understanding that the defendants were domiciled there, the Court in *Williams II*, in an opinion authored by Justice Frankfurter, found that North Carolina was entitled to revisit that finding. As the Court explained: "[T]he fact that the Nevada court found that they

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[282] Higdon, *supra* note 251, at 318.

[283] Williams v. North Carolina (*Williams I*), 317 U.S. 287 (1942); Williams v. North Carolina (*Williams II*), 325 U.S. 226 (1945).

[284] *See* Lynn D. Wardle, Williams v. North Carolina*, Divorce Recognition, and Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187, 189–90 (1998).

[285] *Id.*

[286] *Id.*

[287] *Id.*

[288] 317 U.S. 287 at 302–03.

[289] *See* Estin, *supra* note 258, at 401 (discussing North Carolina's response to *Williams I*).

[290] Williams v. North Carolina (*Williams II*), 325 U.S. 226, 239 (1945).

were domiciled there is entitled to respect, and more . . . . But simply because the Nevada court found that it had power to award a divorce decree cannot, we have seen, foreclose reexamination by another State."[291] Indeed, despite the Court's suggestion that "[t]he burden of undermining the verity which the Nevada decrees import rests heavily upon the assailant,"[292] the Court appeared to consider the Nevada court's jurisdiction presumptively suspect, suggesting, for example, that the defendants "assumed the risk that this Court would find that North Carolina justifiably concluded that they had not been domiciled in Nevada."[293] The Court further seemed to sympathize with North Carolina's desire to limit the circumstances under which its citizens could end their marriages, finding that divorce "touches basic interests of society"[294] and that "[t]o permit the necessary finding of domicil by one State to foreclose all States in the protection of their social institutions would be intolerable."[295] Notably, this rule was in contrast to one the Court would soon solidify in ordinary full faith and credit practice—that the rule of no reexamination of the rendering court's findings extended to most jurisdictional determinations.[296]

The *Williams II* opinion produced questions and peculiarities. Why, for example, should North Carolina decide the question of domicile under its standards rather than allowing the Nevada court to apply its own?[297] How could a federalist system sustain a situation where two people were validly divorced and remarried in one state yet bigamous in another?[298] What would happen if the couple were to return to Nevada or move to a third state?[299]

Williams II received "mixed reviews" from commentators, many of whom had regarded *Williams I*'s entrenchment of full faith and credit obligations as a step in the right direction.[300] As Professor Estin notes, however, the post-*Williams I* and *II* landscape was overall more

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[291] *Id.* at 233–34.

[292] *Id.*

[293] *Id.* at 238.

[294] *Id.* at 230.

[295] *Id.* at 232.

[296] *See* Durfee v. Duke, 375 U.S. 108, 111 (1963) (holding that once a jurisdictional issue has been litigated in the court rendering a judgment, another state may not reopen the question).

[297] 325 U.S. at 249 (Rutledge, J., dissenting) (noting no articulated reason to respect the policy interests of North Carolina as opposed to Nevada).

[298] *See id.* at 253 (warning that, under the majority's approach, "every divorce granted a person who has come from another state is vulnerable wherever state policies differ").

[299] *See id.* at 246 (arguing the majority does not resolve the conundrum because the Nevada divorce decree would still be valid in Nevada and the majority's reasoning invites each state to apply its own divorce policy).

[300] *See* Estin, *supra* note 258, at 403–04 (noting scholarly criticism of the Court's general rule allowing the reexamination of jurisdiction underlying another state's judgment).

certain and predictable than what had come before; it was now the case, for example, that a "married individual who moved alone to a new state and made a home there" could count on that state's divorce decree being recognized nationwide.[301] Professor Laura Oren argues that *Williams II* did not change *Williams I*'s status as a "beachhead for 'no-fault' . . . in the law of jurisdiction."[302]

In 1948, the Court further eased the path for would-be divorced couples in *Sherrer v. Sherrer*,[303] holding that a spouse who had appeared in divorce proceedings was not entitled to later challenge the divorce decree on jurisdictional grounds. Three years later, the Court clarified in *Johnson v. Muelberger* that divorces in which both spouses appeared were entitled to full faith and credit as a general rule.[304] Following these results, couples began seeking divorces in jurisdictions, such as Mexico, that required residency periods of only a few days.[305]

This series of decisions provided new options for divorce-seekers stuck in states with stringent laws, making migratory divorces entirely feasible for couples who both appeared in court and ensuring that spouses who moved permanently to more permissive states no longer had to suffer the yoke of their old state's restrictive rules. After an era in which consensual and migratory divorces had been controversial, the post-*Johnson* era marked a "turning point,"[306] leading some previously restrictive states to scrutinize and liberalize their divorce laws.[307] As Professor Higdon explains, the public came to see divorce in general as "not so much an issue of state sovereignty but . . . one of individual rights."[308] The migratory divorce phenomenon had revealed a "percolating demand for easier, less costly, and more honest divorce."[309] In the end, despite misgivings from traditionalists,[310] no-fault divorce, pioneered in California in 1969, spread rapidly to all

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301 *Id.* at 404.

302 Laura Oren, *No-Fault Divorce Reform in the 1950s: The Lost History of the "Greatest Project" of the National Association of Women Lawyers*, 36 LAW & HIST. REV. 847, 872 (2018).

303 334 U.S. 343, 352 (1948).

304 340 U.S. 581, 589 (1951) ("When a divorce cannot be attacked for lack of jurisdiction by parties actually before the court or strangers in the rendering state, it cannot be attacked by them anywhere in the Union. The Full Faith and Credit Clause forbids.").

305 *See* Estin, *supra* note 258, at 409–10 (noting that state courts were generally willing to recognize these divorces if both spouses had appeared).

306 *Id.* at 410.

307 *See id.* (discussing how New York added several new grounds for divorce in the early 1960s, around ten years after *Johnson*); *see also* Grossman, *supra* note 260, at 97 (explaining how migratory divorce fueled demand for additional options even prior to *Johnson*).

308 Higdon, *supra* note 251, at 337.

309 Grossman, *supra* note 260, at 100.

fifty states.[311] It seems reasonable to conclude that the issue of migratory divorces and recognition speeded this process in two ways—by creating public pressure for more easily obtained divorces and, at the same time, by illustrating some of the downsides of state disuniformity on this issue.

C. Cannabis, Changing Attitudes, and Avoided Spillovers

As the preceding Section has discussed, the question of status is often a peculiarly disruptive one, given the incompatibility of full faith and credit requirements with strongly restrictive state policies. Another common scenario for interstate conflict occurs—as Professor Allan Erbsen has noted—when a handful of especially permissive states become "a haven for behavior that other states seek to restrain"[312] or when "a permissive majority of states provide a haven for refugees from a restrictive outlier."[313] The most obvious example of this situation is when a good such as cannabis, alcohol, or lottery tickets is illegal in one state but legal in a neighboring one; in such situations, citizens of the restrictive state can easily cross the border to obtain the forbidden item. A version of this scenario even more closely analogous to abortion arises when someone crosses a border to participate in an activity, such as gambling, that their home state does not allow.[314]

To the extent such differences in law create interstate conflict, historically one solution is for Congress to adopt a uniform national regulation or take other action to soothe the point of conflict,[315]

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[310] *See, e.g.*, Religious News Service, *Trend to 'No-Fault' Divorce Raises Some Serious Questions*, CATH. TRANSCRIPT (July 20, 1973), https://thecatholicnewsarchive.org/?a=&d=CTR19730720-01.2.73&e [https://perma.cc/79UJ-BM4P] ("Anxious questions are being raised about the possibility that the new 'instant divorce' laws may be burying far too many marriages prematurely."); *see also* Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79 (1991) (critiquing no-fault divorce on various grounds).

[311] *See* Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 1–2 (1987) (noting that less than twenty years after the first no-fault divorce law was enacted in California, all fifty states had adopted no-fault divorce).

[312] Erbsen, *supra* note 239, at 518.

[313] *Id.*

[314] It is interesting to note that, in the tribal context, some states have not objected to such oases of otherwise forbidden activity. Some tribal casinos are "islands of gaming permissiveness in an ocean of gaming intolerance" that state legislators have tolerated as long as they are strictly confined to tribal territories. Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 293–94 (2003).

[315] *See* Erbsen, *supra* note 239, at 518 (noting that Congress in the nineteenth century prohibited transporting lottery tickets across state lines in response to legal lottery tickets from Louisiana being transported to states where they were banned).

although this may not always be possible and, in the case of abortion, many obstacles to this resolution exist.[316] In other cases, however, a "haven" pattern has ultimately led to greater convergence in state law in various ways. When a permissive state proves not to be a lone outlier but a harbinger of a national trend, other states ultimately adopt similar policies, reducing the chance for conflict.[317]

This seems to have been the case with cannabis legalization. In 2012, Colorado legalized cannabis for recreational as well as medical use, joining only a handful of states that had done so for any purpose.[318] At the time, Colorado was surrounded by several conserva-

316 Despite widespread interest among Democrats in codifying *Roe*, efforts to do so to date have foundered on continuing debates about how broad federally enshrined abortion protections should be. *See* Rachel M. Cohen, *There's a Bipartisan Bill to Codify Roe—And Abortion Rights Groups Can't Stand It*, VOX (Aug. 22, 2022, 7:30 AM), https://www.vox.com/policy-and-politics/2022/8/22/23306142/kaine-collins-codify-roe-abortion-congress [https://perma.cc/8VJW-6CH3]. Republicans's recapture of the House in 2022 further dampens prospects for codification despite widespread support for abortion rights among 2022 voters. *See* Katie Keith, *What the 2022 Midterm Results Might Mean for Health Care*, HEALTH AFFS. (Nov. 10, 2022), https://www.healthaffairs.org/content/forefront/2022-midterm-results-might-mean-health-care [https://perma.cc/984Q-E77A] (noting a bill to codify *Roe* recently failed to be passed by the Senate). Even assuming that Congress is eventually able to enact some abortion protections, a significant risk exists that the current Supreme Court would find that Congress lacks constitutional power to do so. *See* William H. Hurd, *Does Congress Have the Constitutional Authority to Codify Roe?*, BLOOMBERG L. (May 17, 2022, 4:00 AM), https://news.bloomberglaw.com/us-law-week/does-congress-have-the-constitutional-authority-to-codify-roe [https://perma.cc/3R5E-Z94Y] (arguing that, under existing precedents, Congress does not have clear authority under either the Fourteenth Amendment or the Commerce Clause to enact such laws). Congress could conceivably take some more modest action, such as federal legislation protecting the right to travel to obtain an abortion, which would be more likely to be found constitutional. *See id.* Such a law would have to be sweepingly drafted, however, to encompass such questions as the imposition of civil liability under state tort law for alleged harms resulting from out-of-state abortions. Further, even if Congress were to successfully enact some sort of abortion protection, states could turn—as some sought to prior to the *Dobbs* decision—to private enforcement schemes modeled after Texas's S.B.8 that are designed to evade judicial review. *See* Meryl Kornfield, Caroline Anders & Audra Heinrichs, *Texas Created a Blueprint for Abortion Restrictions. Republican-Controlled States May Follow Suit*, WASH. POST (Sept. 3, 2021, 8:08 PM), https://www.washingtonpost.com/nation/2021/09/03/texas-abortion-ban-states [https://perma.cc/QH4P-NVKN] (reporting interest from Republican officials in seven states in replicating S.B.8).

317 Heather K. Gerken and Ari Holtzblatt describe various means by which states can influence each other in this way, for example, that "[s]pillovers . . . can help elicit majoritarian preferences" by spurring people and states to engage with an issue they had previously ignored. Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 92 (2014).

318 *See Where Marijuana Is Legal in the United States*, MJBIZ DAILY, https://mjbizdaily.com/map-of-us-marijuana-legalization-by-state [https://perma.cc/BBZ2-KRHK] (indicating that by 2012, sixteen states allowed marijuana for medical use and only Colorado and Washington legalized recreational use).

tive, anti-marijuana states, and fears about spillovers were rampant.[319] In the wake of early legalization, "[s]tatistics reflect[ed] an increase in marijuana use and possession in non-legalizing states that border legalizing ones and a resulting increase in the numbers of drug arrests, car accidents, and volume of drugs seized."[320] In 2014, neighboring Nebraska and Oklahoma attempted to invoke the Supreme Court's original jurisdiction by suing Colorado, complaining that Colorado marijuana was "flow[ing] into neighboring states, undermining plaintiff states' own marijuana bans, draining their treasuries, and placing stress on their criminal justice systems."[321]

The Supreme Court ultimately declined to hear the case without explanation in early 2016.[322] By that time, however, a legalization trend was already apparent, one that only gathered force over the next several years.[323] At the time of writing in 2022, thirty-nine states had legalized cannabis for medical purposes and eighteen for recreational use, with the District of Columbia also allowing both.[324] Oklahoma is among these states: In 2018, just four years after the state's attempted lawsuit against its neighbor, voters opted to legalize medical marijuana.[325] The state's loose regulation of the drug has led to a booming industry, to such an extent that Oklahoma has become "one of the easiest places in the United States to launch a weed business" with "more retail cannabis stores than Colorado, Oregon and Washington combined."[326] Although cannabis remains illegal in Nebraska, efforts to send a legal cannabis proposal to the voters there are ongoing.[327]

Even where cannabis continues to be illegal, states have apparently not felt it necessary to take legislative action to counter spillover

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319 *See* Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 77 (2015) ("The struggle over marijuana regulation is one of the most important federalism conflicts in a generation. . . . The ongoing clash . . . raises questions of tension and cooperation between state and federal governments.").

320 Berch, *supra* note 44, at 4.

321 Complaint at 3–4, Nebraska v. Colorado, 577 U.S. 1211 (2016) (No. 144).

322 Nebraska v. Colorado, 577 U.S. 1211 (2016).

323 *See Where Marijuana Is Legal in the United States*, *supra* note 318 (indicating that by the end of 2016, seven states and the District of Columbia legalized recreational marijuana use).

324 *Id.*

325 *Id.*

326 Simon Romero, *How Oklahoma Became a Marijuana Boom State*, N.Y. TIMES (Dec. 29, 2021), https://www.nytimes.com/2021/12/29/us/oklahoma-marijuana-boom.html [https://perma.cc/8SS3-GM6Z].

327 *See* NEBRASKANS FOR MEDICAL MARIJUANA, https://nebraskamarijuana.org [https://perma.cc/T8DE-GFAN] (indicating more than 90,000 Nebraskans signed a petition to place medical cannabis legalization on the ballot for the November 2022 elections).

effects. In the early days of legalization, some speculated, for example, that restrictive states might criminalize travel out of state to obtain cannabis.[328] No state has passed legislation to do so, however, and even in restrictive states, changes to criminal penalties have been predominantly in the direction of increased leniency rather than greater strictness.[329]

States have also apparently not felt much need to turn to civil remedies to combat spillover effects. Professor Jessica Berch suggested in the early days of cannabis legalization that restrictive states might wish to pass "gram shop acts" modeled on laws establishing liability for harm resulting from an establishment's continuing to serve alcohol to intoxicated patrons.[330] Such statutes, she suggested, would be primarily helpful in curbing harmful spillover effects in restrictive states from their permissive neighbors, deterring "entrepreneurs seeking to open new dispensaries [from locating] them near the borders of non-legalizing states . . . dispensaries [from] advertising in non-legalizing states or in media that easily cross state boundaries, . . . and . . . dispensaries [from] sell[ing] marijuana . . . to citizens from non-legalizing states."[331] The advantages of such laws for states concerned about impaired driving seem apparent, and at least two states, Nevada[332] and Michigan,[333] have indeed passed versions of them. But because both states have legalized cannabis for both medical[334] and

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328 *See* Chin, *supra* note 27, at 950–52 (speculating that states like Oklahoma and Nebraska might choose to regulate their citizens' extraterritorial use of cannabis either by adopting a broad understanding of the scope of existing criminal prohibitions or by enacting new ones).

329 *See* Michael Hartman, *Cannabis Overview*, NAT'L CONF. OF STATE LEGISLATURES (May 31, 2022), https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx [https://perma.cc/HGN3-7JT5] (noting a "trend to reduce adverse consequences of some marijuana crimes").

330 Jessica Berch, *Reefer Madness: How Non-Legalizing States Can Revamp Dram Shop Laws to Protect Themselves from Marijuana Spillover from Their Legalizing Neighbors*, 58 B.C. L. REV. 863, 872 (2017).

331 *Id.* at 885–86.

332 *See* John Savage, *From Dram Shop Law to "Gram" Shop Law: No Civil Liability for Licensed Establishments*, MONDAQ (Sept. 24, 2021), https://www.mondaq.com/unitedstates/cannabis-hemp/1114590/from-dram-shop-law-to-gram-shop-law-no-civil-liability-for-licensed-establishments [https://perma.cc/4ZNH-NNZX] (discussing recent legislation creating social host liability when the host's furnishing of cannabis on a third party causes injury).

333 Michigan's law creates a cause of action against a licensed seller of marijuana for damage or injury proximately caused by their sale to a minor or a person who was visibly intoxicated at the time of sale. MICH. COMP. LAWS § 333.27961a (2022).

334 *See* NEV. REV. STAT. §§ 678C.005–.860 (2022); MICH. COMP. LAWS §§ 333.2642–.26430 (2022).

recreational[335] purposes, the laws are likely aimed at in-state rather than extraterritorial conduct. Reinforcing this view is the fact that Nevada's law applies only to private "social hosts," whose activities can be assumed to be predominantly local.[336]

Ultimately, cannabis appears to have created less of a "haven" problem than some predicted. Rather, some research suggests that support for legalization has spread quickly, as the media has increasingly portrayed cannabis in a more positive light, focusing on medical uses rather than grouping it with more harmful drugs such as cocaine and heroin.[337] In contrast, spillover effects do not appear to have played a significant role in shaping attitudes toward cannabis, in part because cannabis legalization for the most part has not had the severe negative effects on neighboring states that initially seemed plausible.[338] Perhaps the absence of serious spillovers can be attributed in part to the continuing illegality of cannabis under federal law, creating a disincentive for cannabis users to transport the drug across state lines and for dispensaries to advertise out of state.[339] Another possible explanation is that, even in states where cannabis remains illegal, citizens have access to an illicit "legacy market" in the drug that may render it unnecessary to travel elsewhere.[340] In any event, it is notable that, at least in one study, proximity to a legal state did not appear to affect people's views on legalization.[341] Instead, a widespread swing in the mood of voters nationwide[342] seems to have driven many states to adopt similar policies all at once.

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335 *See* NEV. REV. STAT. §§ 678D.005–678D.510 (2022); MICH. COMP. LAWS §§ 333.27951–333.27967 (2022).

336 *See* Savage, *supra* note 332 ("[L]icensed consumption lounges will not need to worry about civil liability for injuries caused by the patrons while under the influence of cannabis consumed in their lounges."); A.B. 341, 81st Reg. Sess. (Nev. 2021).

337 Jacob Felson, Amy Adamczyk & Christopher Thomas, *How and Why Have Attitudes About Cannabis Legalization Changed So Much?*, 78 SOC. SCI. RSCH. 12, 24 (2019).

338 *See* Angela Dills, Sietse Goffard, Jeffrey Miron & Erin Partin, *The Effect of State Marijuana Legalizations: 2021 Update*, CATO INST. POL'Y ANALYSIS NO. 908 (Feb. 2, 2021), https://www.cato.org/policy-analysis/effect-state-marijuana-legalizations-2021-update [https://perma.cc/PNM4-8TUL] ("[T]he strong claims made by both advocates and critics of state-level marijuana legalization are substantially overstated and in some cases entirely without real-world support.").

339 *See* Gina Cherelus, *No, New Yorkers Aren't Flocking to New Jersey for Legal Weed*, N.Y. TIMES (Apr. 27, 2022), https://www.nytimes.com/2022/04/27/style/nj-ny-marijuana-sales.html [https://perma.cc/52LH-YPTR] (noting concerns among cannabis dispensary patrons about carrying cannabis across state lines).

340 *Id.*

341 *See* Felson et al., *supra* note 337, at 24.

342 *See* Gallup, *Support for Legal Marijuana Holds at Record High of 68%* (Nov. 4, 2021), https://news.gallup.com/poll/356939/support-legal-marijuana-holds-record-high.aspx [https://perma.cc/QSS6-KUR8] (presenting poll showing a gradual increase in support for marijuana legalization from 12% in 1969 to 68% in 2020 and 2021).

D. The Noncompete Stalemate

The foregoing examples are of initially divisive political issues that ended in some degree of consensus—albeit, in the case of migratory divorce, after decades of significant interstate friction. By contrast, some long-festering conflicts have simply remained unresolved. One example is the question of whether noncompete clauses in employment contracts should be enforced—an issue on which states differ significantly. California in particular has famously made such clauses unenforceable in an effort to promote worker mobility.[343] By contrast, other states have touted their willingness to uphold noncompetes, sometimes in an effort to retain large employers in the state.[344]

Because many cases in which noncompete clauses are at issue involve employees' out-of-state moves, questions often arise about which state has the final say in determining the clause's validity.[345] In some circumstances, this has led to states' laws being applied in a way that could be considered extraterritorial. For example, in *Application Group, Inc. v. Hunter Group, Inc.*, a California court declined to enforce a noncompete agreement between a company incorporated and headquartered in Maryland and its former employee, who had accepted a new job working remotely for a California-based company while physically remaining in Maryland.[346]

In other cases, state courts have clashed more directly about who has the right to pronounce on a noncompete's enforceability. In *Advanced Bionics Corp. v. Medtronic, Inc.*,[347] the same noncompete clause was at issue in parallel proceedings in Minnesota and California, with the Minnesota court upholding the clause and the California court rejecting it. Each court issued an injunction restraining the parties from proceeding in the other court.[348] Ultimately, the California Supreme Court stepped in and decided to give way, dissolving the Californian lower court's injunction.[349] Had it not done so, it is unclear how the situation would have been resolved.

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343 *See* CAL. BUS. & PROF. CODE § 16600 ("[E]very contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.").

344 *See infra* note 361 and accompanying text (describing Idaho's efforts in this regard).

345 *See* Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 374–77 (2003) (cataloguing hundreds of cases in which contractual choice-of-law issues had arisen and finding that nonenforcement was "concentrated" in noncompete cases).

346 61 Cal. App. 4th 881, 886–87, 905 (1998).

347 59 P.3d 231 (Cal. 2002).

348 *Id.* at 234.

349 *Id.* at 237–38; *see also* Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939, 960–63 (2012) (explicating the origins of the dueling California and Minnesota TROs and California's ultimate decision to dissolve its TRO).

Commentators have criticized the process and results in both cases. Mark Aaron Kahn has argued that the court in *Hunter Group* erred in its "refusal to respect or even consider" Maryland's policy toward noncompetes.[350] Professor Viva R. Moffat likewise notes that cases like *Advanced Bionics* "create[] another layer of unpredictability on top of the already fluid and difficult non-compete law within each state" and "[s]et[] up conflicts between the courts."[351] The fact that most noncompetes are coupled with choice-of-law clauses has complicated rather than simplified the problem, since the methodology courts apply to determine the enforceability of such clauses allows both judicial discretion and consideration of forum state policies.[352]

In the decades that have followed *Hunter Group* and *Advanced Bionics*, states have continued to disagree about the weight that should be given to noncompetes, with no clear trend on one side or the other.[353] Illustrating the national ambivalence on how to approach noncompetes, Idaho enacted perhaps the most noncompete-friendly law in the United States in 2016, seeking to protect the state's established employers,[354] then repealed it two years later after finding it was unpopular with startups wishing to recruit employees.[355] Forum choice continues to play a significant role in the outcome of litigation over noncompetes, with courts in noncompete-friendly states often reaching vastly different results from those in noncompete-hostile ones.[356] Although the open conflict between courts on display in cases like *Advanced Bionics* is thankfully relatively rare, the uncertainty and litigation-generating potential of the noncompete issue continues to have negative effects on both employers and employees.[357]

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350 Mark Aaron Kahn, *Application Group, Inc. v. Hunter Group, Inc.*, 14 BERKELEY TECH. L.J. 283, 298 (1998).

351 Moffat, *supra* note 349, at 960.

352 *See id.* at 959–60 (explaining how choice-of-law clauses are a complicating factor).

353 *See* Katherine Florey, *Substance-Targeted Choice-of-Law Clauses*, 106 VA. L. REV. 1107, 1113 (2020) (noting that state law continues to "var[y] significantly" on the enforceability of noncompetes).

354 *See* Conor Dougherty, *Noncompete Pacts, Under Siege, Find Haven in Idaho*, N.Y. TIMES (July 14, 2017), https://www.nytimes.com/2017/07/14/business/economy/boise-idaho-noncompete-law.html [https://perma.cc/49Z5-7K44] (noting that the 2016 law made Idaho "one of the hardest places in America for someone to quit a job for a better one").

355 *See* Nicole Snyder & A. Dean Bennett, *Idaho Legislature Repeals 2016 Changes to Non-Compete Law*, EMP. L. BLOG (Apr. 9, 2018), https://www.employerslawyersblog.com/2018/04/idaho-legislature-repeals-2016-changes-to-non-compete-law.html [https://perma.cc/A9QM-TSWG] (stating that, for startups, recruiting employees from existing companies is key, and that the 2016 Idaho non-compete law made doing so difficult).

356 *See* Florey, *supra* note 353, at 1109–12 (discussing divergent results in two seemingly similar cases).

357 *See id.* at 1152–55 (describing the problem).

IV
Implications for Abortion

Given the lack of clear constitutional backstops and a history of interstate friction over other politically charged issues, what does the future hold for abortion-related litigation? This Part considers this question, first focusing on the implications past controversies may have for litigation concerning abortion issues. This Part goes on to consider how judges might decide cases in a way that would minimize, even if it would not eliminate, the chaos that might otherwise arise if states and state courts compete to effectuate their divergent views of how abortion-related conduct should be regulated.

A. Abortion and Past Instances of Interstate Difference

It is possible to imagine discord over abortion playing out in ways that resemble any one of the three examples described in the last Section. Over time, as with liberal divorce, the de facto availability of "migratory abortions" could nudge more states toward a liberalizing direction. This scenario is perhaps unlikely in states that have staked out extreme positions,[358] but seemingly possible in states like Virginia, where the Republican governor has indicated willingness to keep abortion available up until twenty weeks in hopes of striking a compromise with the Democratic legislature.[359] Alternatively, in parallel with developments relating to cannabis, the public might shift toward a greater consensus on whether and when abortion should be permitted. Indeed, polling already suggests that public opinion on abortion is less divided than the diversity of state approaches might suggest.[360] Finally, the issue could become similar to the noncompete situation, in which employers and employees have simply learned to

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358 Several states have criminalized abortions with exceptions only for those necessary to save the life of the mother, including abortions of pregnancies which are the products of rape or incest. Caroline Kitchener, Kevin Schaul, N. Kirkpatrick, Daniela Santamariña & Lauren Tierney, *Abortion Is Now Banned or Under Threat in These States*, Wash. Post (Jun. 24, 2022), https://www.washingtonpost.com/politics/2022/06/24/abortion-state-laws-criminalization-roe [https://perma.cc/2CUG-PNHP].

359 Laura Vozzella, *On Abortion, Gov. Youngkin Says He'll Sign 'Any Bill . . . to Protect Life*,' Wash. Post (Jun. 29, 2022), https://www.washingtonpost.com/dc-md-va/2022/06/29/youngkin-abortion-life-conception [https://perma.cc/3PUC-GQLC].

360 *See* Jerusalem Demsas, *The Abortion Policy Most Americans Want*, The Atlantic (May 13, 2022), https://www.theatlantic.com/ideas/archive/2022/05/public-opinion-abortion-rights-overturn-roe/629840 [https://perma.cc/9AEJ-9JG9] (arguing that polls show that most Americans believe abortions should be available for "victims of rape or incest, if they have a serious health concern, or if the baby will be born with a disability" but are less sympathetic to abortion "in cases of economic hardship or personal preference," and that attitudes have not shifted greatly over time).

live with forum choice having an enormous impact on results in litigation.[361]

But there are also notable differences with these past scenarios, all of which seem to point in the direction of making overt clashes between states more likely in the abortion context. In contrast to the earlier proponents of strict divorce laws, who ultimately could do little to shore up the eroding status quo, antiabortion activists who have waited a half-century to enact restrictions seem completely disinclined to compromise or to accept substantial cross-border traffic to seek abortions.[362] If anything, they are moving in a more extremist direction.[363] The cannabis scenario seems unlikely, too. Despite a large middle ground in public opinion, the abortion issue, for the most part in contrast to cannabis,[364] is often dominated by those who feel strongly about it;[365] antiabortion legislators often enact restrictions even when they know them to be unpopular with the public.[366]

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361 *See supra* Section III.D.

362 *See* NRLC Model Law, *supra* note 8, at 5–7 (proposing several measures to prevent the use of telehealth and travel to evade abortion bans).

363 For example, some antiabortion activists in Wisconsin advocate removal of the exception for the life of the mother in the state's (currently not enforced) abortion ban, describing the existence of the exception as a "big concern." Shawn Johnson, *Anti-Abortion Groups Call for Tightening Wisconsin's 19th Century Ban on Abortions*, WPR (June 29, 2022), https://www.wpr.org/anti-abortion-groups-call-tightening-wisconsins-19th-century-ban-abortions [https://perma.cc/5E8H-89YW]; *see also* Mary Ziegler, *Opinion: How Abortion Became a War over Geography*, CNN (June 20, 2022), https://www.cnn.com/2022/05/23/opinions/anti-abortion-movement-geography-ziegler/index.html [https://perma.cc/PAM2-FCVJ] ("[M]uch of the movement has focused less on convincing voters to oppose abortion than on strategies that ban abortion regardless of what voters think.").

364 *See* Arjun Singh, *4/20: Weed's Journey Through Conservative Politics*, NAT'L REV. (Apr. 20, 2022), https://www.nationalreview.com/corner/4-20-weeds-journey-through-conservative-politics [https://perma.cc/BG6R-X9PB] (explaining that, with two-thirds of the population supporting legalization, "[n]o longer are open cannabis advocates just hippies or young leftists," while at the same time "Republicans . . . have undergone an evolution on the use of cannabis, from moral condemnation to a libertarian position of passive acceptance").

365 *See* Ziegler, *supra* note 363 (noting that "state politics have become far more polarized" on abortion); Hannah Hartig, *Wide Partisan Gaps in Abortion Attitudes, But Opinions in Both Parties Are Complicated*, PEW RSCH. CTR. (May 6, 2022), https://www.pewresearch.org/fact-tank/2022/05/06/wide-partisan-gaps-in-abortion-attitudes-but-opinions-in-both-parties-are-complicated [https://perma.cc/5EL9-92LQ] (stating that 80% of Democrats but only 38% of Republicans say that abortion should be legal in all or most cases). By contrast, though Democrats are slightly more favorable to cannabis legalization than Republicans, the difference is not large, and the issue has generally not been a highly partisan one. *See* Felson et al., *supra* note 337, at 21.

366 *See* Ziegler, *supra* note 363 ("The more the anti-abortion movement moves away from focusing on popular politics, the more states will feel free to pass increasingly divisive policies."); Demsas, *supra* note 360 (presenting evidence that abortion, while not salient to all voters, is often a defining issue for those who have strong opinions about it, and also noting that antiabortion legislatures have enacted restrictions "well outside the mainstream of public opinion"). Gerrymandering of state legislative districts in many states has also

Likewise, it seems improbable that abortion will settle into the stalemate that has come to characterize the noncompete issue, where forum choice matters but states have largely avoided open conflict.[367] This is because although some states' approaches to noncompetes are rooted in public policy, the concerns at issue are mostly economic, whether promoting innovation through allowing employee mobility or building employer-employee loyalty, rather than value-laden.[368] Moreover, the issue, while important to individual people wishing to change jobs, has not been the subject of widespread debate in national political campaigns. By contrast, abortion has for decades been a national flashpoint in which people holding diverse views regard themselves as being motivated by profound ethical or religious beliefs.[369]

Further impeding resolution may be the fact that abortion liability has the potential to be extremely complicated. The type of defendants who are named—doctors, friends, strangers joining established networks to help abortion seekers—may vary substantially and meaningfully from case to case.[370] Even in courts that attempt to follow their state's choice-of-law principles faithfully, different patterns of domicile and degrees of contact with the defendant's home state and the restrictive state may produce diverse results that may be unsettlingly unpredictable.[371]

A further twist is the important role of medication abortions and telehealth. Early pregnancies can be terminated with two prescription drugs, mifepristone and misoprostol.[372] This creates the possibility of

served to decrease the degree to which state lawmakers must be responsive to public opinion. *See* David A. Lieb, *Abortion Ruling Puts Spotlight on Gerrymandered Legislatures*, PBS (July 3, 2022), https://www.pbs.org/newshour/politics/abortion-ruling-puts-spotlight-on-gerrymandered-legislatures [https://perma.cc/TYZ6-XKZT] (presenting the case that gerrymandering has been a primary driver of extreme abortion restrictions).

367 *See supra* Section III.D.

368 *See supra* Section III.D.

369 *See* Khale Lenhart, *Abortion Ruling Underscores Need to Understand Each Other*, WyoFile (July 5, 2022), https://wyofile.com/abortion-ruling-underscores-need-to-understand-one-another [https://perma.cc/3E4D-NC6J] (noting that the *Dobbs* ruling has provoked "joyous celebration and desperate sorrow," attitudes that are "defined by deep-seated beliefs").

370 *See* Cohen et al., *supra* note 3, at 41–42 (noting that the complexities of parsing out and assessing potential defendants' in-state and out-of-state activities may result in criticisms that "any resulting standard is not workable").

371 *See* Florey, *Conflicts*, *supra* note 88, at 726–27 (noting many variables in a case that may influence courts' choice-of-law decisions). The potential for variable and surprising results is likely even greater in the abortion context than in others described in this article. Divorce proceedings and noncompete clauses, for example, have more predictable litigants (spouse v. spouse, employer v. employee) and may present a narrower range of issues relative to abortion litigation.

372 Cohen et al., *supra* note 3, at 14–15.

abortion "untethered to a clinical space," which patients can obtain "after meeting via telehealth with an abortion provider who prescribes abortion medication that they then take at the location of their choice."[373] Because such abortions are likely to be cheaper, easier to obtain, and perhaps more private than surgical abortions, their popularity in restrictive states is likely to rise still further.[374]

For multiple reasons, the role of telemedicine or other forms of remotely provided health care[375] is likely to further complicate choice-of-law analysis. Remote interactions pose well-known challenges for choice-of-law analysis in general by making it more difficult to tie the conduct at issue to a particular territorial jurisdiction.[376] If someone travels from Texas to California to obtain a surgical abortion, California can in most circumstances be fairly deemed the location of the relevant conduct. If, by contrast, a Texan communicates with a Californian who mails pills to Texas that are then used to induce an abortion, the location of the actions at issue for choice-of-law purposes is much harder to pin down.[377]

Moreover, the law regarding telemedicine differs from state to state. While all fifty states allow the use of telemedicine,[378] states

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373 *Id.* at 15. Notably, though the transport of medical marijuana across state lines in theory causes similar effects, such issues are far less likely to arise because of the federal prohibition on interstate commerce in marijuana. *See* Cherelus, *supra* note 339 (outlining that marijuana dispensary patrons are concerned about "smuggling" marijuana across state lines).

374 *See* Cohen et al., *supra* note 3, at 17–19 (describing advantages of telehealth and abortion medication for those seeking abortions in a post-*Dobbs* era).

375 Networks have formed, for example, to help people seeking abortions to obtain medication from foreign pharmacies. *See id.* at 18–19.

376 *See* Katherine Florey, *Resituating Territoriality*, 27 GEO. MASON L. REV. 141, 141 (2019) (noting that various types of remote interactions raise difficult extraterritoriality issues).

377 As early as 1958, for example, courts had difficulty with such problems as pinpointing the place of contracting for choice-of-law purposes where a deal had been made over the telephone. *See* Linn v. Emps. Reinsurance Corp., 139 A.2d 638, 640–41 (Pa. 1958) (addressing the novel issue of "the place where an acceptance spoken over the telephone is effective"). Similar issues have also arisen with respect to the question of when remote work constitutes the unauthorized practice of law across state lines. *See* David Cameron Carr, *Remote Practice: In California, the Big Question Remains Unanswered*, CAL. LEGAL ETHICS (Mar. 11, 2022), https://ethicslawyer.blog/2022/03/11/remote-practice-in-california-the-big-question-remains-unanswered [https://perma.cc/53FN-JJR9] (referencing *Birbrower, Montalbano, Condon & Frank P.C. v. Superior Court* and describing how the case leaves open issues relating to the intersection between remote legal work and unauthorized practice of law); Birbrower, Montalbano, Condon & Frank P.C. v. Super. Ct., 949 P.2d 1, 6 (Cal. 1998) (raising issues of unauthorized practice of law and remote legal work by "declin[ing] to provide a comprehensive list of what activities constitute sufficient contact with the state" and requiring that each case be decided "on its individual facts").

378 *See* Kelsie George, *Ensuring Patient Safety, Security and Quality of Care*, NAT'L CONF. OF STATE LEGISLATURES (July 2021), https://documents.ncsl.org/wwwncsl/Health/

differ in policies about informed consent, the prescription of controlled substances, and the applicable standard of care.[379] Even without adding differences in abortion law to the mix, this patchwork of standards creates uncertainty and may deter physicians from practicing telemedicine across state lines.[380] Differences in abortion law from state to state will add an additional variable—and one that is highly politically charged—to this already complex and difficult-to-navigate landscape. Already, many states, in addition to their general regulation of telemedicine, have specific rules about the use of telemedicine to obtain abortion-inducing medication, adding yet another consideration that must be taken into account in litigation.[381]

On the whole, it is difficult to imagine how a stable or coherent approach could emerge from this complex landscape. Rather, decentralized state courts with very different attitudes and pressures will have to apply complicated rules to diverse sets of facts on an issue likely to arouse intense public emotion with almost no constitutional guidance or restraint. The following Section considers how courts, faced with this impossible situation, might do their best to decide cases to promote stability as much as possible.

B. How Courts Should Respond

Ultimately, how courts treat abortion litigation involves basic questions about how to manage difference in a federalist society. In writing about interstate differences in cannabis regulation, Professor Mark Rosen has usefully distinguished between state "experimentation," which "typically presumes a future convergence when data reveals the objectively superior policy" and state "diversity," which "anticipates enduring policy divergences that reflect durable differences in political sensibilities across states."[382] As helpful as these categories may be, history suggests that the difference between pluralism and experimentation may not always be stable. As the previous Part

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Telehealth-ensuring_36242.pdf [https://perma.cc/K7WF-BC6E] ("[A]ll 50 states allow a patient-provider relationship to be established remotely.").

379 *Id.*

380 *See* Tyler D. Wolf, Note, *Telemedicine and Malpractice: Creating Uniformity at the National Level*, 61 WM. & MARY L. REV. 1505, 1535–36 (2020) (noting that "[t]he presence of numerous standards of care and jurisdictional differences in how the physician-patient relationship is formed" may disincentivize physicians from participating in telemedicine across state lines).

381 *See* Cohen et al., *supra* note 3, at 50 (noting that providers who mail medication to patients in states where abortion is illegal often face liability because states "define the location of care as where the patient is").

382 Mark D. Rosen, *Marijuana, State Extraterritoriality, and Congress*, 58 B.C. L. REV. 1013, 1014 (2017).

has described, Americans at one time held strong and divided views on whether divorce should be readily available and whether cannabis should be legal.[383] But even as states' differing positions on these issues seemed to reflect a genuine diversity of public opinion, the first states to allow easy divorce and legal cannabis also served as experiments of sorts, creating demand for change on the part of voters elsewhere and perhaps reassuring skeptics that such innovations could have tolerable results.

Where abortion is concerned, however, state diversity may be more intractable. Neither abortion access nor abortion bans are new to the United States. Because the past already provides numerous examples of abortion restrictions and protections,[384] it therefore seems unlikely that states will see much value in learning from their neighbors' experimentation with different abortion policies, particularly when states are ideologically opposed on the issue. Given that states are unlikely to move toward consensus naturally, state courts will encounter many situations in which more than one state's law could potentially apply to abortion-related events and will need to find some way to navigate the interstate friction that is likely to flow from that reality.

As this Article has argued, the patchwork of doctrines that touch on extraterritorial application of state law is unlikely to be of much help in this endeavor. Indeed, when geographically neutral state law is applied in the context of litigation, the only clear constitutional restraint on state courts is the minimal *Hague* standard. Although it is imaginable that courts might find the *Healy* view of extraterritoriality or even the constitutional right to travel to be relevant in the civil litigation context, applying either doctrine to limit state courts' autonomy in choice of law would be a step significantly beyond what current law appears to support.[385]

Nor do states' own choice-of-law methodologies necessarily provide much guidance. At the subconstitutional level, most state choice-

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383 *See supra* Sections III.B & III.C; *see also* Sarah Trumble & Nathan Kasai, *America's Marijuana Evolution*, THIRD WAY (Aug. 24, 2017), https://www.thirdway.org/report/americas-marijuana-evolution [https://perma.cc/BN6Y-Y8YB] (noting that "increase in support for marijuana legalization is happening across age groups and political parties," including among groups, such as Republicans, who historically strongly opposed legalization).

384 *See* Kreimer, *Choice*, *supra* note 5, at 453 (noting that "[i]n the years immediately preceding *Roe*, a similar patchwork of reproductive autonomy prevailed" and that "[i]n consequence, about 40% of all legal abortions performed in the United States in 1972 were performed on women outside of their state of residence").

385 *See* Florey, *Extraterritoriality Principle in Choice of Law*, *supra* note 11, at 1092 (explaining why the concerns of cases like *Edgar* and *Healy* are "hard to reconcile" with the choice-of-law process state courts follow).

of-law principles allow for the application of forum law to out-of-state conduct under certain conditions and, moreover, assign a great deal of latitude to state judges in deciding when those conditions are met.[386] Although existing conflicts principles might appear to dictate a more restrained approach in some circumstances,[387] conflicts methodologies are often flexible enough that state courts that find it appropriate to spread abortion-related forum law beyond their borders will have few constraints on their ability to do so.[388] Further, once a court has rendered a judgment in such a case, other states will be bound by full faith and credit obligations to recognize and enforce it, thus requiring courts to directly confront results that may profoundly offend their state's public policy.[389]

In short, the American conflicts system, with its diversity of methods, the power it gives to individual judges, and its absence of constitutional restraints on choice of law coupled with firm full faith and credit obligations, is poorly equipped to meet this moment of growing interstate divergence and friction. In the absence of clear constitutional guidance or limits, it will fall largely on individual judges to handle abortion litigation in a manner that promotes, rather than undermines, comity with other states. Not all judges, of course, will see this as the most important goal in resolving conflicts.[390] Indeed, it is likely that some judges will feel bound by individual conscience or political pressures to prioritize protection (or, in other states, deterrence) of out-of-state abortion providers, even if doing so leads to interstate clashes. Nonetheless, for judges who wish to decide abortion cases in a way that minimizes interstate friction, the draft Restatement (Third) of Conflict of Laws may be of some help.

In contrast to the two earlier conflicts Restatements, a primary focus of the Third Restatement is the distinction between loss-allocating and conduct-regulating rules—a "major breakthrough," in the words of Professor Symeon C. Symeonides, and one that draws on existing conflicts practice.[391] Conduct-regulating rules are those

386 *See* Southerland, *supra* note 189, at 486 (noting absence of restraints on judges' ability to apply whatever law they choose).

387 *See* Rensberger, *supra* note 73, at 50–51 (noting that state courts generally adhere to the practice of applying the law of the place of treatment in malpractice cases).

388 *See id.* (outlining medical malpractice cases in which courts determined their state law would apply even where treatment occurred, at least in part, in another state).

389 *See supra* notes 214–19 and accompanying text.

390 *See* Southerland, *supra* note 189, at 486 (noting that some state courts, such as Minnesota's, tend to apply forum law widely even when another state has a meaningful argument that its law should be applied).

391 *See* Symeon C. Symeonides, *The Third Conflicts Restatement's First Draft on Tort Conflicts*, 92 TUL. L. REV. 1, 7 (2017) (observing that many courts rely on a similar distinction, even though they may not use this "precise terminology").

"whose predominant purpose is to impose liability for conduct deemed socially undesirable or to absolve actors from liability on the ground that their conduct was not socially undesirable," including rules about punitive damages, standards of conduct, and the "tortious character" of certain conduct, among others.[392] Loss-allocating rules are those "whose predominant purpose is to assign loss among relevant parties on the basis of considerations other than the mere wrongfulness of the injurious conduct."[393] An organizing principle of the Third Restatement is that "conduct-regulating rules are territorially oriented, whereas loss-distribution rules are usually not territorially oriented," (emphasis omitted) with the latter normally focusing instead on the parties' domiciles rather than the location of conduct.[394]

In keeping with this principle of territoriality and in contrast to the two previous Restatements, the Third Restatement has a strong tilt toward applying the law of the place of conduct, especially in conduct-regulation cases,[395] but even in some loss-allocating scenarios where the parties do not share a common domicile.[396] Professor Joseph Singer summarizes this emphasis by explaining the Third Restatement's general philosophy in tort cases:

> When someone goes away from home and is involved in an accident elsewhere, apply the law of the place of conduct and injury, whether it is plaintiff-protecting or defendant-protecting, unless the parties have a relationship centered elsewhere and that state has a greater claim to govern the parties' relationship than does the place of conduct and injury.[397]

He argues that the Third Restatement "embraces this rule without providing any exception whatsoever."[398]

While Singer is somewhat critical of the Third Restatement's absolutism on this point, its place-of-conduct-focused approach could provide welcome guidance in abortion cases. To be sure, this approach would not eliminate all uncertainty and friction, and it might be of little help in cases involving medication abortion and other remotely provided care, where fixing one state as the place of conduct may prove an elusive goal. Still, a place-of-conduct-centered approach to

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392 RESTATEMENT (THIRD) OF CONFLICT OF LAWS §§ 6.01(1), 602 (AM. L. INST., Council Draft No. 4, 2020).

393 *Id.* § 6.01(2).

394 Symeonides, *supra* note 391, at 8.

395 *See* Singer, *supra* note 181, at 360 (noting that the Third Restatement "embraces" the idea that generally the law of the place of conduct should apply).

396 *Id.*

397 *Id.*

398 *Id.*

abortion cases—particularly if adopted as a firm general rule—would provide some degree of predictability, making it more likely that only one state's law at a time governs particular acts and allowing physicians, abortion seekers, and those assisting them to better understand which law will apply to their conduct in advance.[399]

Under such an approach, abortion-restrictive states might initially chafe at abortion seekers' ability to evade bans through travel to other states. Such evasion—either through travel or through remotely provided medications—will, however, be almost impossible to prevent entirely in any case.[400] Given that reality, a strong argument exists that clear rules serve the interests of all states better than haphazard clashes between the courts of restrictive states and those of permissive ones. In the absence of a uniform federal standard, restrictive states will simply have to accept some degree of leakiness in state bans as an inevitable part of a federalist system in which attitudes toward abortion vary sharply from state to state.[401]

In a 2007 article, Professor Mark Rosen weighed the effects of such leakiness in the then-hypothetical scenario in which *Roe* is overruled. He posits a distinction between "soft pluralism," in which states are not able to control their citizens' extraterritorial conduct, and "hard pluralism" in which they can. In a "soft pluralism" scenario, he argues, "the 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."[402] In contrast, under a hard pluralism regime, "states can establish efficacious regulations across the spectrum of policies with regard to which federal law does not demand nationwide uniformity."[403] Soft pluralism, according to Rosen, has a "systematic bias against efficacious regulation of matters about which there is not a national consensus."[404] This bias informs Rosen's sympathy for hard

399 *See* Brilmayer, *supra* note 30, at 884–87 (arguing, specifically in the abortion context, that a territorial conduct-based approach would bring more certainty to the law and would also allow each state to best effect its preferences). Some have also argued that, as a general matter, applying the law of the place where relevant conduct occurs best comports with people's general expectations. *See, e.g.*, Aaron D. Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQ. L. REV. 373, 382 (1971).

400 *See* Cohen et al., *supra* note 3, at 5 (noting that "abortion practice" including medication abortion and telehealth "has changed in ways that make borders less relevant").

401 Such leakiness, it is worth noting, existed in the years prior to *Roe*, when almost half of abortions were performed outside the patient's home state. Kreimer, *Choice*, *supra* note 5, at 453.

402 Rosen, *Pluralism*, *supra* note 4, at 747.

403 *Id.*

404 *Id.*

pluralism,[405] for which he sees three advantages: first, that "given the diversity of political commitments held by people in our large country," a variety of policies should have the "fullest possible political expression" where no federal law exists on the subject; second, that states should be able to experiment; and third, that it is democracy-promoting to "giv[e] room for people to participate in lawmaking in respect of matters about which people feel strongly."[406]

There are important arguments in favor of soft pluralism as well, as Rosen acknowledges, such as the idea that soft pluralism is more liberty-promoting and that "national citizenship today does and should supersede state citizenship."[407] In the specific context of abortion, it is also worth noting that an enforceable hard-pluralistic regime would likely demand severe intrusions into individual privacy. When West Germany's severe restrictions on abortion were still in effect, women who traveled to the Netherlands, where laws were more liberal, were subjected to "forced gynecological examinations upon . . . reentering Germany at the Dutch border in the search for evidence of extraterritorial abortions."[408] In the United States today, the prospect of legal consequences attaching to abortion travel raises additional privacy concerns, such as access to location tracking or even apps that monitor menstruation, both of which might be used as evidence against someone obtaining an abortion out of state.[409]

Even apart from the substantive merits of hard pluralism, however, such a system would be extremely difficult to implement in the context of civil litigation where a party's home state does not have exclusive jurisdiction or the sole right to apply its law to a particular set of events. If a provider in California, where abortion is legal, performs an abortion at the request of a patient from Texas, where it is not, both states' interests in regulating their own citizens lead to con-

405 *See id.* (noting that the author is "personally . . . sympathetic to 'hard' pluralism," though his aim in writing is simply to clarify what is at stake in choosing between hard and soft pluralistic views).

406 *Id.* at 749; *see also* Cohen, *Circumvention Tourism*, *supra* note 31, at 1373 (concluding that in the international context, "as a normative matter, assuming [restrictive] countries' domestic prohibitions [on abortion] are valid and lawful, there is a strong argument that these countries should alter their laws to criminalize abortions by their citizens abroad").

407 *See* Rosen, *Pluralism*, *supra* note 4, at 748 (considering, though ultimately rejecting, these arguments).

408 Kreimer, *Choice*, *supra* note 5, at 458.

409 *See* Alfred Ng, *'A Uniquely Dangerous Tool': How Google's Data Can Help States Track Abortions*, POLITICO (July 18, 2022), https://www.politico.com/news/2022/07/18/google-data-states-track-abortions-00045906 [https://perma.cc/EL7T-XYDN] (noting that location tracking and data from period-tracking apps are "center stage in the abortion debate" as tools that could be used to target those seeking an abortion).

flicting, irreconcilable results; California will wish to protect its citizen engaging in conduct legal within the state, just as Texas wants to prevent evasion of its abortion ban. Given that United States citizens cross borders and engage in activity with multijurisdictional dimensions routinely, courts must have some way of making decisions in such cases. The Third Restatement's focus on the location of conduct at least provides a relatively clear organizing principle to apply.[410]

The Third Restatement, to be sure, is not a complete or perfect remedy for the havoc abortion restrictions have the potential to cause in civil litigation. To begin with, it is still in draft form.[411] Given that states have notoriously failed to reach consensus on the best choice-of-law methodology, widespread adoption is not guaranteed. Even state courts that try to use the Third Restatement will encounter problems of application, especially given the document's novelty and consequent lack of a body of interpretive case law. Some have critiqued the conduct-regulation/loss-allocation line as murky;[412] certainly, it is entirely imaginable that some legal rules relevant to abortion cases might be found by courts to be loss-allocating rather than conduct-regulating. And even if a court finds them to be the latter, pinpointing the place of conduct may be difficult in situations involving telemedicine consultations, mailing of abortion-inducing medication, or other remote transactions and communications. More broadly, the highly partisan and strongly felt nature of beliefs about abortion may make some judges reluctant to adopt so restrained an approach to the applicability of forum law to out-of-state conduct. Nonetheless, removing one source of uncertainty would be helpful even if other ambiguities remain, and clear, precise conflicts principles might at least discourage judges from relying on outcome-driven reasoning. Given the lack of constitutional guidance, turning to choice-of-law principles that provide some curbs on extraterritorial application of state law as well as a measure of predictability may be the best of several imperfect options.

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410 Some courts and commentators have long favored an emphasis on place of conduct in choice of law more generally, believing that it best comports with people's intuitions. *See, e.g.*, Twerski, *supra* note 399, at 382 (noting that "[a] Delaware driver, on a trip in Delaware expects Delaware law to apply" and that "people have a right to expect a regularity and rhythm from the law").

411 *See Restatement (Third), Conflict of Laws*, A.L.I., https://www.ali.org/projects/show/conflict-laws [https://perma.cc/7BQU-TMG8] (outlining that the Restatement of the Law Third, Conflict of Laws is currently being drafted).

412 *See, e.g.*, Singer, *supra* note 181, at 373–74 (noting that the Third Restatement is "less than clear on the matter" of whether "California's lack of a damage limitation is a conduct-regulating rule or a loss-allocating one").

Conclusion

In the end, state-law differences on abortion issues are likely to strain choice-of-law principles' ability to provide clarity and broadly acceptable outcomes in civil litigation. The choice-of-law process involves many opportunities for courts to apply forum law extraterritorially, and few unambiguous constitutional constraints limit their ability to do so. At the same time, the Full Faith and Credit Clause and implementing statutes will bring courts face to face with potentially unpalatable decisions they must enforce.

Past experience suggests that persistent legal differences between states have the potential to cause significant disruption unless a national consensus ultimately develops on the issue in question. Because that seems unlikely to happen with abortion in the immediate future, civil litigation may bring diverse opportunities for friction: races to the courthouse, concurrent litigation in more than one state, dueling court orders, far-reaching extensions of one state's law to out-of-state conduct, and controversy over full faith and credit obligations. Courts may be able to reduce the resulting conflict by choosing to apply forum law with restraint, perhaps by relying on the principles of the new Third Restatement that direct courts to apply the law of the place of conduct in many cases. Nonetheless, the states' fundamental disunity on the underlying issue of abortion may prove to be a problem that our choice-of-law system is simply not equipped to resolve.