HOW TO SURVIVE THE CULTURE WARS: CONFLICT OF LAWS POST-*DOBBS*

ROGER MICHALSKI*

*Abortion is the latest flashpoint in the culture wars. Post-*Dobbs*, red and blue states are hard at work codifying different approaches within their boundaries. However, pills, women, transactions, medical services, and information will cross those boundaries. Both sides already fight about who gets to regulate such boundary-crossing activity with each accusing the other of trespassing on the regulatory space of their disagreeing neighbors.*

This is dangerous terrain. A house divided against itself needs tools to mediate and constructively tackle conflict. Without such tools, divisions will deepen and provide an endless stream of incidents to further divide the country. The choice of how to harness interjurisdictional conflict will shape the next phase of the culture wars.

Thinking about interstate differences when it comes to abortion is not new. But the brunt of that scholarship has focused on constitutional defenses. In contrast, this Article focuses not on whether state laws pass constitutional muster, but how courts will mediate between newly valid but clashing state laws when constitutional defenses are unavailable or in doubt.

*The Article makes three contributions. First, it documents the many different types of interjurisdictional conflicts already on the horizon (horizontal, vertical, tribal, foreign, etc.). Sometimes lumped together, each type raises different issues and invokes different areas of conflict law. Second, the Article explains why conflict of laws doctrine in its various guises has little to say about the pressing issues raised by public law post-*Dobbs *interjurisdictional conflict. Existing conflict of laws doctrine is focused on private law disputes, designed with different concerns in mind, and built for another era; one that has passed. Third, the Article explains how conflict of laws could be adapted to the current era. What pathways does it offer to judges and legislators concerned with navigating through the treacherous post-*Dobbs *terrain? This Article provides*

* Professor of Law, *The University of Oklahoma College of Law.*

a map. It offers four different paths: confrontation, deflection, obfuscation, and facilitation. Each path has its own rewards, costs, and limitations. Which path to choose depends on one's normative commitments and general theory of democracy.

TABLE OF CONTENTS

INTRODUCTION

Abortions, guns, climate change, policing, Critical Race Theory, elections, sex. In all these categories, the states are increasingly at odds with each other.[1] Divisions run beyond policy disagreements because

1. *See, e.g.*, Shawn Hubler, *Newsom Raises His Profile with Hardball Tactics, Starting with a Gun Bill*, N.Y. TIMES (July 24, 2022), https://www.nytimes.com/2022/07/22/us/newsom-gun-bill-california.html [https://perma.cc/XS6E-CBH2] (noting that "[n]o piece of legislation better encapsulates Mr. Newsom's fight-fire-with-fire attitude than the bill co-

they touch intimate aspects of a person's identity, self-understanding, and way of life. Both sides see the other as a threat.[2] Opposing viewpoints are barely comprehensible. And there can only be two diametrically opposing sides. Moderation and compromise are passé.[3] Middle-of-the-road voters have few options. Both parties extol their shrillest champions. Everybody must pick a side. This sorting is geographic, with the nation increasingly divided into blue and red states,[4] each sneering at the perceived follies of the others.[5]

The most recent flashpoint concerns abortion.[6] About half of the states celebrate the *Dobbs v. Jackson Women's Health Organization*[7] decision; the other half is in mourning. The decision has indeed

---

opting a Texas anti-abortion tactic to enforce California bans on assault weapons and ghost guns," and that the American Civil Liberties Union "charged that the legislation would 'escalate an "arms race"' in creative legal attacks on politically sensitive issues including contraception, gender-affirming care and voting rights").

2. *See, e.g.*, Hannah Grossman, *Jan. 6 Is Not the Greatest Threat to America—It's the Democrat Party: Mark Levin*, FOX NEWS (Jan. 9, 2022), https://www.foxnews.com/media/mark-levin-comments-january-6-not-greatest-theat-america-its-democrat-party [https://perma.cc/6ZDU-U486]; Nate Cohn, *Why Political Sectarianism Is a Growing Threat to American Democracy*, N.Y. TIMES (Sept. 8, 2021), https://www.nytimes.com/2021/04/19/us/democracy-gop-democrats-sectarianism.html [https://perma.cc/2YFC-5H3P] ("The country is increasingly split into camps that don't just disagree on policy and politics—they see the other as alien, immoral, a threat.").

3. Just like this expression. Coincidentally.

4. *See, e.g.*, Jonathan Weisman, *Spurred by the Supreme Court, a Nation Divides Along a Red-Blue Axis*, N.Y. TIMES (July 2, 2022), https://www.nytimes.com/2022/07/02/us/politics/us-divided-political-party.html [https://perma.cc/6V9R-5D6P] ("Pressed by Supreme Court decisions diminishing rights that liberals hold dear and expanding those cherished by conservatives, the United States appears to be drifting apart into separate nations, with diametrically opposed social, environmental and health policies.").

5. *See generally* Jill Cowan, *Why We're Talking About the California-Texas Rivalry, Again*, N.Y. TIMES (Dec. 10, 2020), https://www.nytimes.com/2020/12/10/us/california-texas-elon-musk.html [https://perma.cc/G79G-FZHS] ("In 2013, Rick Perry, then Texas' governor, visited California and ran radio ads urging businesses to 'flee' the coast. His successor, Gov. Greg Abbott, has eagerly picked up the mantle."); KENNETH P. MILLER, TEXAS VS. CALIFORNIA: A HISTORY OF THEIR STRUGGLE FOR THE FUTURE OF AMERICA 4 (2020) (highlighting policy competition and tension between Texas and California); Virginia Chamlee, *Gov. Gavin Newsom Airs Ad in Florida Saying, 'Join Us in California, Where We Still Believe in Freedom'*, PEOPLE (July 5, 2022, 5:23 PM), https://people.com/politics/gavin-newsom-airs-ad-in-florida-targeting-ron-desantis [https://perma.cc/42KQ-AP83] (accusing Republican leaders of "criminalizing women and doctors").

6. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2228 (2022) (beginning the Court's opinion by acknowledging that "[a]bortion presents a profound moral issue on which Americans hold sharply conflicting views").

7. 142 S. Ct. 2228, 2228 (2022).

returned the issue of abortion to "each State," and both sides got busy quickly.[8] One side severely limited or banned abortions.[9] Many states probe additional ways to go beyond the immediate issue in *Dobbs*.[10] The other side moved to protect or even expand pre-*Dobbs* levels of access

---

8. *Id.* at 2284 ("The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives."). *See generally* David Landau & Rosalind Dixon, Dobbs, Democracy, and Dysfunction 1 (Aug. 9, 2022) (unpublished manuscript), https://ssrn.com/abstrac=4185324 [https://perma.cc/GXT2-RKZM] (describing *Dobbs*' claim to be "returning questions of abortion access to 'the people,' or to democracy" as "deeply problematic"); Glenn Cohen, Melissa Murray & Lawrence O. Gostin, *The End of* Roe v. Wade *and New Legal Frontiers on the Constitutional Right to Abortion*, 328 J. AM. MED. ASS'N 325, 325 (2022) ("The regulation of abortion will now be decided by the states.").

9. *See, e.g.*, Arleigh Rodgers, *Indiana Becomes 1st State to Approve Abortion Ban Post Roe*, A.P. NEWS (Aug. 5, 2022), https://apnews.com/article/abortion-us-supreme-court-health-indianapolis-indiana-83fe300188fcf15d8a3b4a36ceee7443 [https://perma.cc/C6UQ-ZZGV] ("Indiana on Friday became the first state in the nation to approve abortion restrictions since the U.S. Supreme Court overturned *Roe v. Wade*."); Eleanor Klibanoff, *New Texas Law Increasing Penalties for Abortion Providers Goes into Effect Aug. 25*, TEX. TRIB. (July 27, 2022), https://www.texastribune.org/2022/07/26/texas-abortion-ban-dobbs [https://perma.cc/ERL6-HPE5] (describing Texas's pre-*Roe* statutes and "trigger law"); Caroline Kitchener, Kevin Schaul, N. Kirkpatrick, Daniela Santamariña & Lauren Tierney, *Abortion Is Now Banned in These States. See Where Laws Have Changed*, WASH. POST (Oct. 10, 2022, 10:23 AM), https://www.washingtonpost.com/politics/2022/06/24/abortion-state-laws-criminalization-roe [https://perma.cc/2D8K-N6PQ] ("Thirteen states had 'trigger bans' designed to take effect shortly after *Roe* was struck down. At least eight states banned the procedure the day the ruling was released. Several others with antiabortion laws blocked by the courts have acted, with lawmakers moving to activate dormant legislation. A handful of states also have pre-*Roe* abortion bans that have been reactivated, and others moved immediately to introduce new legislation.").

10. *See, e.g.*, Planned Parenthood Great Nw. v. State, Nos. 49615, 49817 & 49899, 2022 WL 3335696, at *3 (Idaho Aug. 12, 2022) ("[E]ven if Petitioners have met the legal standard for demonstrating irreparable harm, the request for a preliminary stay of the Total Abortion Ban is denied because Petitioners have not demonstrated a substantial likelihood of success on the merits or a 'clear right' to the relief sought."); *see also* Isabella Grullón Paz, *Idaho Supreme Court Rules That Strict Abortion Ban Can Take Effect*, N.Y. TIMES (Aug. 13, 2022), https://www.nytimes.com/2022/08/13/us/idaho-abortion-ban.html [https://perma.cc/F6UX-SQM7] ("Idaho's near-total ban on abortion can go into effect at the end of August while legal challenges to the restrictions are reviewed, the Idaho Supreme Court said in a ruling late Friday.").

to abortion.[11] Multiple ballot measures sought to enshrine abortion access in state constitutions,[12] while many others seek the opposite.[13] Two Americas indeed. A long parade of interjurisdictional conflicts seems inevitable.[14]

One could hope for a federalism of choice where states are the great laboratories of democracy,[15] with people free to live and work in states that advance policies that suit them. Fed up with the draconian anti-abortion laws of your state? California welcomes you. Don't like the amoral pro-abortion laws of that other state? Texas is lovely this time of year. The hope is for a federalism where all states are in friendly competition about who can create the best policy, attract talent and capital, and create conditions for social, economic, and moral

---

11. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting) ("States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so."); *see also* Kitchener et al., *supra* note 9 ("Many states have passed laws that explicitly protect the right to abortion, with several adding those protections this year in anticipation of the Supreme Court's decision. Elsewhere, state courts have protected abortion access through state constitutions and past court decisions.").

12. *See e.g.*, Constitutional Right to Reproductive Freedom, Proposition 1 (Cal. 2022), https://ballotpedia.org/California_Proposition_1,_Right_to_Reproductive_Freedom_Amendment_(2022) [https://perma.cc/Q2L4-JYTG] (giving voters the opportunity to "expressly include an individual's fundamental right to reproductive freedom" in the California Constitution); Proposed Amendment to the Constitution of the State of Vermont, Proposal 5, § (2)–(3) (Vt. 2022).

13. *See, e.g.*, Proposed Initiative Measure 56 (Colo. 2022) (noting that the ballot initiative would have prohibited abortion in Colorado if it had been added to the ballot and voted for in November); H.B. 91, Reg. Sess. (Ky. 2021); Born-Alive Infant Protection Act, H.B. 167, 67th Leg., Reg. Sess. (Mont. 2021). *But cf.* Kyle Morris, *Kansas Abortion Constitutional Amendment Rejected by Voters*, FOX NEWS (Aug. 3, 2022), https://www.foxnews.com/politics/kansas-voters-reject-constitutional-amendment-granting-lawmakers-ability-regulate-abortion [https://perma.cc/KX2J-AVAS] (demonstrating that the purpose of the amendment was to restrict access to abortion, and that "[r]esidents of Kansas have voted against an amendment to the state's constitution that would have given lawmakers in the state the ability to regulate abortion"); H. Con. Res. 5003, 2021 Leg. (Kan. 2021) (proposing an amendment to the Kansas constitution that the state does not create or provide a right to abortion).

14. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2337 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) ("[T]he majority's ruling today invites a host of questions about interstate conflicts.").

15. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

flourishing.[16] Of course, this disregards the prohibitive costs, especially for the poor, of moving to a new state. But more fatally still, this fantasy of separate states with separate polices disregards that people, goods, transactions, and information cross state boundaries. States will bicker and fight viciously about who gets to regulate such boundary-crossing activity.[17] They already are pushing against and beyond their boundaries and trespassing on the regulatory space of their disagreeing neighbors.[18]

But we can't even agree on who is stepping on whose toes. For example, if a state creates penalties for companies that ship abortion pills from out-of-state into its territory, who is reaching across state boundaries?[19] Is it the state that allows its companies to send pills beyond its boundaries?[20] Or is it the state that interferes with the rights of another state's citizens to do business?[21] If a state licenses doctors to conduct telemedicine beyond its borders and prescribe abortion pills,

---

16. *See generally* Daniel J.H. Greenwood, *Democracy and Delaware: The Mysterious Race to the Bottom/Top*, 23 YALE L. & POL'Y REV. 381, 381 (2005) (using the different efforts made by states to attract corporate businesses as an example of federalism's classic story before arguing that the notion is "deeply implausible").

17. Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873, 876 (1993) (stating that "with disuniformity [in state laws], conflicts will arise, for states might try to regulate their citizens' activities abroad").

18. David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. (forthcoming 2023) (manuscript at i), https://ssrn.com/abstract=4032931 [https://perma.cc/6J4U-Q4R2] ("The interjurisdictional abortion wars are coming . . . .").

19. *See generally The Fallout from Overturning* Roe, ECONOMIST (June 26, 2022), https://www.economist.com/united-states/2022/06/26/the-fallout-from-overturning-roe [https://perma.cc/HLP2-JFQQ] ("Mississippi has passed a law to restrict access to mifepristone—one of the two drugs needed for medically induced abortions, which are now the most common type."); Dominique Mosbergen & Vibhuti Agarwal, *Websites Selling Unapproved Abortion Pills Are Booming*, WALL ST. J. (Aug. 21, 2022, 7:00 AM), https://www.wsj.com/articles/websites-selling-unapproved-abortion-pills-are-booming-11661079601 [https://perma.cc/6RUD-P9CE] ("A murky online market for abortion pills is thriving as some U.S. states tighten abortion restrictions. Dozens of websites state they ship abortion drugs anywhere in the U.S. without a prescription . . . .").

20. *See generally* Yvonne Lindgren, *When Patients Are Their Own Doctors:* Roe v. Wade *in an Era of Self-Managed Care*, 107 CORNELL L. REV. 151, 223 (2021) (explaining that state laws regulate advanced practice registered nurses to provide abortion pills).

21. *Id.* at 224–25 (noting that state prosecutors have begun criminalizing online purchases that include materials that can be used for abortions).

does that state overreach or does the state that seeks to sanction such doctors from afar?[22] If the state of the eventual parent upholds an abortion clause in a surrogacy contract, and the state of the surrogate does not, which one controls and which overreaches?[23] If one state grants fetuses legal personhood, when do other states have to recognize the fetus as a domiciliary of that state?[24] If a company fires an employee for having an abortion, which state's law governs: the place of employment, the place of the company's incorporation, or perhaps the law of the place where the abortion took place? Similarly, if one state disallows insurance companies from covering abortions and related medical services, and another state requires it, who trespasses onto the territory of their discordant neighbors?[25]

Quarreling between neighbors is not limited to states. The federal government and states will also clash on questions of privacy, employment discrimination, and insurance benefits, among many other issues.[26] Shortly after *Dobbs*, the federal Justice Department created a "reproductive rights task force" to "monitor and push back on state and local efforts to further restrict abortion."[27] The taskforce

---

22. *See generally* Christopher Rowland, Laurie McGinley & Jacob Bogage, *Abortion Pills by Mail Pose Challenge for Officials in Red States*, WASH. POST (May 4, 2022, 4:39 PM), https://www.washingtonpost.com/business/2022/05/04/abortion-pills-online-telemedicine [https://perma.cc/V892-X62G] (noting that at least nineteen states ban the use of telehealth for medication abortion while a bill in California "would protect the California licenses of abortion providers who offer care via telehealth in jurisdictions where the service is illegal").

23. *Infra* Section I.B.

24. *See infra* Section II.D. *See generally A Push to Recognise the Rights of the Unborn Is Growing in America*, ECONOMIST (July 7, 2022), https://www.economist.com/united-states/2022/07/07/a-push-to-recognise-the-rights-of-the-unborn-is-growing-in-america [https://perma.cc/4SYJ-9TGJ] ("[T]he push for legal recognition of the 'personhood' of fetuses is set to grow . . . . Before *Roe* was overturned dozens of states introduced bills that banned abortion by establishing fetal personhood . . . .").

25. *See infra* Section I.B.

26. *See infra* notes 127–137 and accompanying text.

27. Ann E. Marimow, Laurie McGinley & Caroline Kitchener, *Major Legal Fights Loom over Abortion Pills, Travel out of State*, WASH. POST (July 31, 2022, 6:42 PM), https://www.washingtonpost.com/politics/2022/07/31/abortion-medication-lawsuits [https://perma.cc/R8T8-5U78] ("The Justice Department has activated a 'reproductive rights task force' to monitor and push back on state and local efforts to further restrict abortion, but officials have not fully detailed their plans. Attorney General Merrick Garland said during Friday's White House event that 'when we learn that states are infringing on federal protections, we will consider every tool at our

has already began to sue states over their abortion restrictions.[28] Similarly, the 574 federally recognized tribes, as the third kind of sovereign besides states and the federal government, might well take a broad range of positions on abortion-related questions.[29] Predictably, some tribes will clash with states, the federal government, and other tribes.[30] In all of these variations, different sovereigns not only disagree on policy, but also on the legitimate reach of their policies.

Dobbs therefore does not mark the end of the culture wars but merely the beginning of a new chapter.[31] In this chapter, fundamental social, religious, and philosophical disagreements will not be focused on a handful of Supreme Court opinions. Instead, the Supreme Court's

---

disposal to affirm those protections—including filing affirmative suits, filing statements of interest, and intervening in private litigation."); Press Release, U.S. Dep't of Just., Office of Pub. Affs., Justice Department Announces Reproductive Rights Task Force (July 12, 2022), https://www.justice.gov/opa/pr/justice-department-announces-reproductive-rights-task-force [https://perma.cc/2AXX-ACUY].

28. *See* United States v. Idaho, No. 1:22-cv-00329-BLW, 2022 WL 3692618, at *7–8 (D. Idaho Aug. 24, 2022) (holding that the United States had authority to bring this action and awarding a preliminary injunction to the United States in its suit over Idaho's abortion restriction). *See generally* Charlie Savage, *Justice Dept. Sues Idaho over Its Abortion Restrictions*, N.Y. TIMES (Aug. 2, 2022), https://www.nytimes.com/2022/08/02/us/politics/biden-abortion-idaho-lawsuit.html [https://perma.cc/5CTR-TUZD] ("The Biden administration sued Idaho on Tuesday over a strict state abortion law set to take effect this month that the Justice Department said would inhibit emergency room doctors from performing abortions that are necessary to stabilize the health of women facing medical emergencies.").

29. *See generally* Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 555 (2021) ("[T]ribal law is vast, varied, and often innovative.").

30. *See, e.g.*, Brad Dress, *Oklahoma Governor Warns Tribes Not to Create Abortion Havens*, HILL (May 15, 2022, 11:07 AM), https://thehill.com/news/sunday-talk-shows/3488884-oklahoma-governor-warns-tribes-not-to-create-abortion-havens [https://perma.cc/4MQW-4H2U] (noting Oklahoma governor's acknowledgment of the "'possibility' that tribes could establish abortion [safe] havens" that conflict with the state's abortion laws); Nick Camper, *Cherokee Nation: Governor's Claim of 'Abortion On-Demand' on Tribal Lands Is 'Irresponsible'*, KFOR (May 20, 2022, 4:51 PM), https://kfor.com/news/oklahoma-legislature/chickasaw-nation-governors-claim-of-abortion-on-demand-on-tribal-lands-is-irresponsible [https://perma.cc/RX7B-5GJ4].

31. *See, e.g.*, Michelle Goldberg, *The Death of* Roe *Is Going to Tear America Apart*, N.Y. TIMES (May 6, 2022), https://www.nytimes.com/2022/05/06/opinion/roe-abortion-culture-war.html [https://perma.cc/WY6J-TX6P] ("[*Roe*'s end will not] bring détente. Instead, the demise of *Roe* will exacerbate America's antagonisms, creating more furious legal rifts between states than we've seen in modern times.").

recent decisions pit various sovereigns against each other.[32] The resulting questions about overstepping boundaries are unresolved, immensely important, and will be with us for as long as the ingenuity of fresh generations of lawyers can think of new permutations. Each new variation in this post-*Dobbs* interjurisdictional conflict landscape sets up judges to opine on the wisdom and legitimacy of disagreeing neighbors' views on abortion. Will the judges do so respectfully or confrontationally? We will know we are in deep trouble when state judges start acting and speaking like state governors.

A house divided against itself is dangerous terrain, and needs tools to mediate and constructively tackle conflict. Divisions will deepen and provide an endless stream of incidents to further divide the country absent such tools. Comity and mutual respect are the grease in the wheels of federalism. Without it, the machine will grind to a halt.

Initial indicators are not promising. Even before *Dobbs* was handed down, Missouri lawmakers introduced a bill that created a private right of action against anyone who assists a Missouri resident to obtain an out-of-state abortion.[33] Connecticut countered by passing a law to shield doctors and patients.[34] One of its measures allows for a claim to

---

32. *See* Dobbs v. Jackson Women's Health Org. 142 S. Ct. 2228, 2318 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting) (noting that "interstate restrictions will also soon be in the offing," and that the decision opens the doors for states to install restrictions on "traveling out of State to obtain abortions," potentially conflicting with the laws of another state or the Federal Government). *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that states cannot make the use of contraceptives by married couples illegal).

33. *See* Born-Alive Abortion Survivors Protection Act, H.R. 2012, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022) (creating personal civil liability for individuals providing or seeking abortions in the state of Missouri); Caroline Kitchener, *Missouri Lawmaker Seeks to Stop Residents from Obtaining Abortions out of State*, WASH. POST (Mar. 8, 2022, 2:21 PM), https://www.washingtonpost.com/politics/2022/03/08/missouri-abortion-ban-texas-supreme-court [https://perma.cc/HDH6-RNXA] (discussing the provision that would allow private citizens to sue).

34. Joe Hernandez, *Connecticut Looks to Expand Abortion Rights in Response to Out-of-State Restrictions,* NPR (May 1, 2022, 1:31 PM), https://www.npr.org/2022/05/01/1095813226/connecticut-abortion-bill-roe-v-wade [https://perma.cc/E8AL-KHPN] ("Lawmakers in Connecticut have approved a bill that would expand the types of medical professionals who can provide abortion services in the state and shield residents from facing penalties under other states' anti-abortion laws."); Reproductive Freedom Defense Act, Pub. Act No. 22-19, 2022 Conn. Acts (Reg. Sess.).

recover for costs resulting from actions in other states.[35] Texas allows private individuals to sue abortion providers.[36] Massachusetts passed a law blocking the recovery of attorney fees in such suits.[37] Tit for tat.

How long will it take until a court in a blue state refuses to enforce the (in its mind) reprehensible abortion-related judgment of a red state court?[38] What will that do to friendly relations between the states? Will the Supreme Court have sufficient legitimacy to defuse such a standoff? With frayed trust and respect, will courts continue to cooperate willingly in multi-district litigation cases, even though no statute or doctrine compels them to do so? What would modern litigation look like when states start to carve out judicial and statutory exceptions to the locally-enacted version of the Uniform Interstate Depositions and Discovery Act?[39] What would happen to family law if states revised the Uniform Interstate Family Support Act[40] to retaliate against each other?[41] The governor of Minnesota recently instructed state agencies to not cooperate with sister states in anti-abortion prosecutions.[42] What would criminal prosecutions look like when blue

35. Reproductive Freedom Defense Act § 1(b) ("Recoverable damages shall include: (1) Just damages created by the action that led to that judgment, including, but not limited to, money damages in the amount of the judgment in that other state and costs, expenses and reasonable attorney's fees spent in defending the action that resulted in the entry of a judgment in another state; and (2) costs, expenses and reasonable attorney's fees incurred in bringing an action under this section as may be allowed by the court.").

36. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)–(b) (West 2022).

37. 2022 Mass. Acts Chpt. 127 § 4.

38. *See generally* Diego Zambrano, Mariah Mastrodimos, Sergio Valente, *The Full Faith and Credit Clause and the Puzzle of Abortion Laws* (forthcoming 2023) ("[S]ome states like California have countered SB8 with legal provisions that seek to shield in-state residents from out-of-state claims and even prohibit the enforcement of SB8 award.").

39. *See* UNIF. INTERSTATE DEPOSITIONS & DISCOVERY ACT (UNIF. L. COMM'N, Draft 2007).

40. *See* UNIF. INTERSTATE FAM. SUPPORT ACT (UNIF. L. COMM'N 2008).

41. *See, e.g.*, Uniform Interstate Family Support Act, OKLA. STAT. ANN. tit. 43, § 601-101 (2022) (highlighting Oklahoma as a state which adopted the Uniform Interstate Family Support Act and could move to alter its provision in retaliation for its abortion laws not being reciprocated by its neighboring states).

42. Minn. Exec. Order No. 22-16 (June 25, 2022).

states refuse to extradite their residents to red states on felony charges for sending abortion pills through the mail?[43]

Dobbs created the engine for such interjurisdictional conflict. Will this engine be harnessed to enhance public deliberation and encourage difficult but fruitful dialogue across differences? Or will it chip away at the foundations of the Republic one nasty argument at a time, with battling court orders fueling viral outrage and providing endless ammunition for cable-news talking heads and politicians eager to deflect from their incompetence and lack of imagination?[44] This choice of how to harness interjurisdictional conflict will shape the next phase of the culture wars.

Awkwardly, the doctrine responsible for managing this delicate task is not designed for it. Conflict of laws doctrine picks governing law where regulatory schemes overlap.[45] Most commonly, the regulatory schemes in question are contracts, torts, property, and wills & trusts. For example, a prototypical conflict case involves an automobile accident where a driver from one state causes harm in another state;[46] or a contract case where contracting occurs in one state, performance in another, and breach in a third;[47] or an intestate question where movable property is located in one place and death occurred in

---

43. *See, e.g.*, Goldberg, *supra* note 31 ("Under a Texas law passed last year, people in other states sending abortion pills through the mail to Texas residents could be extradited to face felony charges, though the authorities in liberal states are unlikely to cooperate.")

44. *Id.* ("[T]he death of *Roe* will intensify our national animus, turning red states and blue into mutually hostile legal territories. You think we hate each other now? Just wait until the new round of lawsuits starts.").

45. *See generally* Roger Michalski, *Fractional Sovereignty*, U.C. IRVINE L. REV. (forthcoming 2023) (manuscript at 3), https://ssrn.com/abstract=4052801 [https://perma.cc/U6SA-APFV] ("[S]ometimes sovereigns clash. They try to regulate the same conduct. In an interconnected world where people, goods, and information cross borders nippily, this happens with increased frequency. When it does, conflict of laws doctrines allocate and prioritize sovereign power by determining which sovereign's rules will govern.").

46. *See, e.g.*, Allstate Ins. v. Hague, 449 U.S. 302, 315 (1981) (asserting that a fatal crash in Minnesota justifies the application of Minnesota law).

47. *See, e.g.*, Poole v. Perkins, 101 S.E. 240, 241–42 (Va. 1919) (stating that contracts issues serve as an example of important conflicts of law principles and that Virginia follows the notion that the place referenced in the contract is where the law is supplied from).

another.[48] In short, most conflict cases are private law cases, so much so that some call this area of law "private international law."[49] Public law cases exist, but they are rare.[50] Most cases are humdrum, important because of their numerosity, not heft. Conflict of laws doctrine, related statutes, and Restatements aim to provide guidance to pick governing law in these common cases.[51] They have little to say about outlier cases that touch upon thorny political questions in the context of heated culture wars.[52] Conflict of laws methodologies are tools built for speed, predictability, and stability, not diplomacy.[53] Similarly, many courts have little experience with conflict of laws doctrine at all, let alone complex and prickly interjurisdictional public law conflicts. For many of them, contentious questions related to *Dobbs* might be the first occasion where they grapple with government interest analysis, the Second Restatement of Conflicts, comparative impairment, characterization, renvoi, dépaçage, or any of the other byzantine conflict of laws methodologies, arcane terminology, escape devices, and logic puzzles. This is not an ideal training ground.

---

48. *See, e.g.*, Blackwell v. Lurie, 71 P.3d 509, 510–11 (N.M. Ct. App. 2003) (noting that death of a spouse raises a conflict of laws issue because of the variety of laws concerning tenancy, death, and property).

49. *See, e.g.*, PETER HAY, PATRICK J. BORCHERS & RICHARD D. FREER, CONFLICT OF LAWS: PRIVATE INTERNATIONAL LAW CASES AND MATERIALS (15th ed. 2017); Michael J. Whincop & Mary Keyes, *Towards an Economic Theory of Private International Law*, 25 AUSTRALASIAN J. LEGAL PHIL. 1, 14 (2000) (noting that many of these "private international law" cases seek to minimize the costs of overly opportunistic assertions of rights); *Private International Law*, U.S. DEP'T OF STATE (2017), https://2009-2017.state.gov/s/l/c3452.htm [https://perma.cc/J4VJ-DKQN] ("The "Office of the Assistant Legal Adviser for Private International Law (L/PIL) is responsible for the negotiation and conclusion of international conventions, model laws or rules, legislative guides, and other instruments governing private transactions that cross international borders. The Office is also responsible for providing advice on private international law matters, including when these matters arise in domestic litigation. Subject areas of private international law include matters relating to children and families; dispute resolution (including international arbitration); judicial cooperation (including the recognition and enforcement of foreign judgments); finance and banking; secured transactions; and wills, trusts, and estates.").

50. *See, e.g.*, Lab'y Corp. of Am. v. Hood, 911 A.2d 841, 842 (Md. 2006) (discussing a so-called "wrongful birth" conflict of laws case).

51. *See infra* notes 205–12 (highlighting important conflict of laws principles).

52. *See infra* Section II.A (explaining that conflict of laws commentary has failed to address public law disputes).

53. *Infra* notes 257–59.

This leaves the door wide open for a variety of use scenarios. Judges can and will utilize conflict of laws resources in many different ways when encountering post-*Dobbs* interjurisdictional conflicts. This Article provides a map to assist judges in this task. But judges are not the sole actors in this space. Legislators, journalists, casual commentators, and even the humble legal academic have an important role to play in enhancing rather than denigrating public discourse across fundamental differences.

This Article makes three contributions for members of these groups. First, it explains how conflict of laws methodologies, rather than constitutional law, provide the initial framework for post-*Dobbs* interjurisdictional conflict resolution. Thinking about interstate conflict when it comes to abortion is not new.[54] But the brunt of that scholarship has focused on constitutional defenses, most commonly interstate travel, interstate commerce, the Supremacy Clause,[55] and due process.[56] In contrast, this Article focuses not on whether state laws pass constitutional muster, but how courts will mediate between newly valid but clashing state laws when constitutional defenses are unavailable or in doubt. Part I documents the many different and often overlooked conflict scenarios that the post-*Dobbs* world invites, including horizontal conflict between states, enforcement actions against a sister state, state-federal conflict under *Erie* and maritime law,

---

54. *See, e.g.*, Brilmayer, *supra* note 17, at 873 ("To the extent that the Court decides to relegate control over abortion to the states, however, conflicts issues resurface.").

55. *See e.g.*, Cohen et al., *supra* note 18, at 41 (noting that "[t]he U.S Constitution's Supremacy Clause states that federal law is the 'supreme law of the land,' and trumps any state law to the contrary. Thus, federal law could be a sword to poke holes in state abortion bans . . . ."); Ouellette v. Mills, 91 F. Supp. 3d 1, 12 (D. Me. 2015) (holding that Maine could not amend the Maine Pharmacy Act because the "[a]mendments violate the Supremacy Clause and are therefore preempted").

56. *See, e.g.*, Brilmayer, *supra* note 17, at 875 (examining what kind of state regulations would be "constitutionally invalid"); 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, 451 (1992) (arguing that "the constitutional structure set in place by the framers of the Constitution and the fourteenth amendment did not contemplate extraterritorial state regulation" by focusing on "the citizenship clause of the fourteenth amendment, the commerce clause, and the privileges and immunities clause"); Richard H. Fallon, Jr., *If* Roe *Were Overruled: Abortion and the Constitution in a Post-*Roe *World*, 51 ST. LOUIS U. L.J. 611, 627–28 (2007) (focusing on the Due Process Clause, Full Faith and Credit Clause, the Privileges and Immunities Clause, and the Commerce Clause).

foreign conflicts under extraterritoriality, and conflict between state law and tribal law.

Second, the Article explains that while conflict of laws doctrine in all of these permutations must handle post-*Dobbs* interjurisdictional conflicts, it is not designed to do so. Whatever tools can be mustered, they must be cobbled together from bits and pieces that typically serve other purposes. Done wrong, things can easily and quickly go horribly awry. This is akin to giving somebody who asked for a steak-knife a 24-inch chainsaw. Yes, it can cut steak, but it can also cut the table and knees under it.

Third, the Article explains the four main ways conflict of laws doctrine can structure the next phase of the culture wars. It can be used to confront, deflect, obfuscate, or facilitate. Part III explains these choices and how each furthers a different understanding of how to enhance public deliberation.

The goal in all of this is not to resolve the culture wars. They reflect fundamental disagreements that go beyond quick persuasion; they cannot be wished away in one sweeping resolution that settles the issue for all time and declares one side triumphant and the other extinct. Instead, the goal must be to facilitate an architecture of law where states and people with fundamentally different approaches can live side-by-side, respect one another, and perhaps even create an environment for illuminating conversations. How can we have a dialogue in a structure that encourages engagement and empathy, not chest-thumping, tribalism, and Manichean fantasies?

This Article is a guide to this emerging branch of conflict of laws scholarship. It builds the foundation for what will hopefully be a tidal wave of fresh conflict scholarship. Beyond academia, the Article also maps a path for legislators and courts that will confront dicey cases, diametrically opposed statutory schemes, and complicated questions related to interjurisdictional conflicts and abortion.

My aim in this Article is not to further the aims of one side. At a time when people are quick to take sides and quicker still to dismiss the position of the other side, this Article is intentionally agnostic and non-partisan on substantive positions. It is addressed equally to those who support and reject abortion, think there are two or twenty genders, and

know what a SIG Fury is or not.[57] Instead of shrill partisan squabbling, I aim to facilitate radically moderate thinking and understanding about the nature of federalism, conflict of laws, and meaningful democratic dialogue in contentious times.[58]

I. THE INEVITABILITY OF CONFLICT OF LAWS

Many different types of interjurisdictional conflicts are already on the horizon post-*Dobbs*. Sometimes lumped together, each type raises different issues and invokes different areas of conflict doctrine. This Section maps this terrain and explains the tools that courts have available to pick governing law where the regulatory regimes of multiple sovereigns clash. It begins with different varieties of horizontal conflicts between states before turning to state-federal conflicts under *Erie* and maritime law, conflicts with foreign sovereigns under extraterritoriality, direct suits of one state against instrumentalities of a sister state, and conflict involving tribal law.

Constitutional law lurks behind all of these varieties of conflict law, but it is not the first line of defense. For example, imagine a pregnant woman who lives in a state that makes abortion illegal.[59] She travels to

---

57. *Cf.* Cohen et al., *supra* note 18, at 5 ("[We] conclude[] by highlighting how an abortion rights movement might pivot from defense to offense, from short game to long game, and capitalize on the same strategies that led to the antiabortion movement's success.").

58. This Article focuses on the civil side and leaves criminal aspects largely aside. For an example of the criminal aspects of this debate, see Rick Rojas, *Bill Classifying Abortion as Homicide Is Advanced by Louisiana Lawmakers*, N.Y. TIMES (May 5, 2022), https://www.nytimes.com/2022/05/05/us/louisiana-abortion-bill-homicide.html [https://perma.cc/AH5B-HAAU] (illustrating how far states may go with anti-abortion measures using Louisiana's proposal to classify abortion as homicide).

59. *See* Rachel Roubein & Brittany Shammas, *A Triumphant Antiabortion Movement Begins to Deal with Its Divisions*, WASH. POST (July 24, 2022), https://www.washingtonpost.com/politics/2022/07/24/antiabortion-movement-divisions [https://perma.cc/CV44-4ZDZ] (noting that antiabortion groups and legislators have proposed measures allowing private citizens to sue those who assist a resident of an antiabortion state in obtaining an abortion in a pro-abortion state); *cf.* Alan Howard, *Fundamental Rights Versus Fundamental Wrongs: What Does the U.S. Constitution Say About State Regulation of Out-of-State Abortions?*, 51 ST. LOUIS U. L.J. 797, 798 (2007) (speculating that the absence of these types of laws before *Roe* indicates that their adoption today is unlikely).

another state to obtain an abortion where it is legal to do so.[60] Her home state seeks to impose civil liability. If the adjudicating court chooses as governing law the law of the place where abortions are legal, there will be no need to invoke the constitutional defense of interstate travel.

This Part will puzzle through the conflict issues raised by abortion-related traveling and other likely situations where different sovereigns will clash. The topics span from abortion pills, telemedicine, in vitro fertilization (IVF), advertisement, employment discrimination, and privacy, to abortion clauses in surrogacy contracts.

The point of this Part is not to resolve the legal and conceptual issues raised by these complicated and charged situations (each deserves its own articles). Nor am I trying to predict how a specific court will rule in such cases. Rather, this Part illustrates the contours of the next phase of abortion litigation in a post-*Dobbs* world. It is a primer on conflict doctrine as applied to upcoming abortion litigation. As the various fact patterns show, conflict of laws doctrine in various forms and their application to a new set of circumstances will be the lens through which courts will confront the next phase of the culture wars.

A. Horizontal Conflicts

As the previous example illustrates, laws related to traveling come easily to mind in the post-*Dobbs* world—it certainly captured the attention of the media, in part because of legislative activity. A proposed bill in Missouri would create a private cause of action against anyone who helps a Missouri resident get an abortion out of state.[61] Closer at hand, the dissent in *Dobbs* explicitly raised the specter that "some States may block women from traveling out of State to obtain

60. *See generally* Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 856–57 (2002) (examining whether states can regulate their citizens even when they are out-of-state, allowing so-called "travel-evasion"); Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133, 1135–37 (2010) (discussing the strict extraterritoriality test under the dormant Commerce Clause, which restricts states' ability to regulate conduct beyond their borders).

61. *See* Marimow et al., *supra* note 27 (noting that South Dakota's governor and an Arkansas senator are interested in legislation like the failed Missouri bill that would have imposed civil liability for assisting a resident to travel out of state for an abortion); *see also* H.B. 2012, 101st Gen. Assemb., 2d Reg. Sess. Amend. 4488H03.21H (Mo. 2022).

abortions."[62] Justice Kavanaugh's concurrence similarly asked about the possibility that "a State [might] bar a resident of that State from traveling to another State to obtain an abortion."[63] However, he raised the possibility only as a "constitutional matter."[64] This stance presupposes that a lower court would apply the law of the state that bars the traveling rather than the law of the state where the abortion took place.[65] How would a court make such a choice? The short answer is by looking at its conflict of laws doctrine. Each state has an approach in place, often called a methodology, by which conflicts of law decisions are decided.[66] States are free, within generous constitutional limitations, to pick their own methodology.[67] They may also pick different methodologies for different subject areas, for example, the traditional approach for contract causes of action and government interest analysis for tort cases.[68]

The traditional approach is so named because it was the hegemonic methodology pre-1950.[69] It is also known as the territorial approach

---

62. Dobbs v. Jackson Women's Health Org., No. 142 S. Ct. 2228, 2317–18 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (warning about the far-reaching implications of the decision).

63. *Id.* at 2309 (Kavanaugh, J., concurring).

64. *Id. See also* Lydia Wheeler & Patricia Hurtado, *Abortion-Travel Bans Are `Next Frontier' with* Roe *Set to Topple,* BLOOMBERG L. (May 4, 2022), https://news.bloomberglaw.com/health-law-and-business/abortion-travel-bans-emerge-as-next-frontier-after-roes-end [https://perma.cc/SN36-N9LB] (predicting that the Supreme Court may allow states to exercise their laws extraterritorially).

65. This Section focuses on civil matters. For a discussion of criminal matters, see I. Glenn Cohen, *Circumvention Tourism*, 97 CORNELL L. REV. 1309, 1315 (2012) (discussing the extraterritorial application of domestic criminal law in the context of medical tourism).

66. *See generally* Symeon C. Symeonides, *Choice of Law in the American Courts in 2020: Thirty-Fourth Annual Survey*, 69 AM. J. COMPAR. L. 178, 188 (2021).

67. *See* Allstate Ins. v. Hague, 449 U.S. 302, 307(1981) ("It is not for this Court to say whether the choice-of-law analysis suggested by Professor Leflar is to be preferred or whether we would make the same choice-of-law decision if sitting as the Minnesota Supreme Court. Our sole function is to determine whether the Minnesota Supreme Court's choice of its own substantive law in this case exceeded federal constitutional limitations.")

68. Symeonides, *supra* note 66, at 195 (showing that numerous states have chosen different methodologies for different subject areas, as Oklahoma has for contracts as compared to torts cases).

69. *See generally* Jeffrey M. Shaman, *The Choice of Law Process: Territorialism and Functionalism*, 22 WM. & MARY L. REV. 227, 227–28 (1980) (discussing the traditional approach to choice-of-law).

because it attempts to locate all legal occurrences in the geographic territory of a single sovereign.[70] The sovereign who controls that piece of land is then given the authority to regulate the activity.[71] Each area of law has its own localizing principle to determine where a legal event took place.[72] For example, in torts, the traditional approach seeks to apply the *lex loci delicti*, the law of the place of wrong;[73] in contracts, the *lex loci contractus* provides governing law;[74] for property, it is the place where the property is located.[75] The key insight is that states that follow the traditional approach will try to localize the legal occurrence of someone traveling to another state to obtain an abortion in the territory of one of the two sovereigns. That event, as understood by non-lawyers, encompasses both elements. But the traditional approach would have to pick one key moment to localize this legal occurrence. Is the legal occurrence the traveling to the state boundaries of the anti-abortion state, or is it the traveling in the pro-abortion state? Torts can also be events that have elements in multiple jurisdictions (i.e., duty and breach in one state, causation and damages in another).[76] The last event necessary to complete the tort (damages) serves as the localizing

---

70. *See generally* JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935); Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448 (1999); Lea Brilmayer & Charles Seidell, *Jurisdictional Realism: Where Modern Theories of Choice of Law Went Wrong, and What Can Be Done to Fix Them*, 86 U. CHI. L. REV. 2033 (2019).

71. *See, e.g.*, BEALE, *supra* note 70, § 2.3, at 17–18 ("The law of a single legal unit must be one law, the one and undivided law of that territory."); Lea Brilmayer & Daniel B. Listwa, *A Common Law of Choice of Law*, 89 FORDHAM L. REV. 889, 898 (2020) ("Beale offered a detailed set of rules built on the territorial premise that a state's law was supreme within its own jurisdiction but powerless beyond those borders.").

72. *See, e.g.*, DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS 65 (1965) (explaining how Beale's First Restatement "allocate[d] each case to the legal system of a single state").

73. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (AM. L. INST. 1934) ("The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.").

74. *Id.* § 333 ("The law of the place of contracting determines the capacity to enter into a contract.").

75. *Id.* § 211 ("The original creation of property in a tangible thing is governed by the law of the state where the thing is at the time of the events which create the interests.").

76. Most famously in *Alabama Great Southern R.R. Co. v. Carroll*, 11 So. 803, 804 (Ala. 1892) (addressing a case where the breach that caused the injury occurred in Alabama, but the injury happened in Mississippi).

principle in such situations.[77] Applied to the situation at hand, the last event necessary to complete the abortion, or the travel to the abortion, is the last mile before arriving at the clinic and what happens at the clinic. Under the principles of the traditional approach, a court might thus choose the law of the clinic's location as governing.

Predictably, legislators in the anti-abortion state will attempt to craft a cause of action that does not lead courts to apply the law of the pro-abortion state. They might do so by defining the cause of action as: (a) the intent to obtain an abortion out of state and (b) the act of traveling to the state border.[78] This cause of action would be a bit awkward because the harm might never occur. In at least some situations, a woman might change her mind before or after reaching the border. In fact, many anti-abortion legislators and activists hope for exactly that outcome. I suspect few people would want to impose liability on such a person. This suggests that it is not the intent and the traveling that is the foundation of the cause of action, but rather, those elements combined with the ultimate accomplishment of an abortion. Since, in this hypothetical, the abortion took place in the neighboring pro-abortion state and is the last event necessary to complete the cause of action, that would put us right back to applying the pro-abortion state's law. The contours of the conflict fight in traditional approach jurisdictions would thus focus on characterization and localization.

In contrast to the traditional approach, the approaches developed after the "Conflicts Revolution"[79] in the 1950s incorporate or rely on policy considerations.[80] For example, the approach that kicked off the

---

77. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377.

78. *Cf.* Bigelow v. Virginia, 421 U.S. 809, 810 (1975) ("A state does not acquire power or supervision over another State's internal affairs merely because its own citizens' welfare and health may be affected when they travel to the other State.").

79. *See* Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1637–38 ("Nothing in the intellectual history of the American conflicts revolution was of greater moment than the publication of a law review article some still consider the greatest law review article ever written, Brainerd Currie's *Married Women's Contracts*. In the American conflicts revolution, this would be the shot heard round the world."); Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1588 (1985) ("[A] feat without parallel in the history of the common law.").

80. *See generally* Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2461 (1999) (noting how Currie, as the originator of the conflicts revolution, begins by re-characterizing law as a "tool of state policy").

conflicts revolution is "Government Interest Analysis,"[81] which categorizes the interests of the implicated sovereigns. Rather than weighing them, government interest analysis follows a binary categorization scheme: either a sovereign is interested, or it is not.[82] If only one sovereign is interested, a court will apply that sovereign's law to the dispute at hand. If neither is interested or both are interested, the court will apply forum law.[83] As applied to the issue of traveling for an out-of-state abortion, courts using this approach will likely find that both states are interested and therefore apply forum law. Since that means that the two states (one pro-abortion, one against) would apply their own law, the outcome of the conflicts analysis would depend on where the suit is filed. If it is filed in the pro-abortion state, the court using government interest analysis would apply pro-abortion law. If it is filed in the anti-abortion state, just the opposite will occur. This anticipated outcome of the conflicts analysis creates massive incentive to forum shop. Both sides have incentives not just to file first[84] but to reach judgment first in order to use the favorable judgment, obtained in the favorable forum, using favorable forum law, and prevent judgment in the unfavorable forum using regular res judicata principles. Thus, the contours of the conflict fight in government interest analysis jurisdictions would likely focus on forum selection, jurisdiction, and litigation delay tactics.

The Second Restatement of Conflict of Laws is the most widely adopted conflict of laws methodology in the United States.[85] It combines elements from the traditional approach and government interest analysis. At its core is section 6, which provides several factors courts should consider when making conflict determinations.[86] The factors are numerous and varied. This is the strength *and* weakness of

---

81. *See* David P. Currie, *Comments on* Reich v. Purcell, 15 UCLA L. REV. 595, 605 (1968) (Interest analysis "has the virtue of recognizing that laws are adopted in order to accomplish social goals and that they should be applied so as to carry out their purposes."); Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 RECUEIL DES COURS 9, 169 (1989) (Currie "consistently focused on the content of the conflicting laws as the beginning point of the choice of law analysis").

82. *See supra* note 81.

83. *See supra* note 81.

84. No constitutional provision, statute, or common law doctrine prevents parallel proceedings in separate state courts. This creates the possibility of a liability action in one state and a simultaneous contrary declaratory action in another state.

85. *See* Symeonides, *supra* note 66, at 195.

86. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (AM. L. INST. 1971).

the Second Restatement: it is flexible[87] but also unpredictable.[88] For example, one court applying the Second Restatement might look to section 6(2)(c) and focus on the "relevant policies of the forum" and "other interested states."[89] Another court might focus on "the protection of justified expectations."[90] And a third might look to subject specific guidance, for example section 145 for torts, to focus on "the place where the injury occurred."[91] From policy to territoriality and everything in between, the Second Restatement is a smorgasbord of possibilities and choice. This makes it difficult to predict how courts will utilize the Second Restatement to resolve interstate abortion conflicts post-*Dobbs*. Likely, courts in different states, though all using the Second Restatement, might come to very different conclusions. Perhaps over time the law will stabilize in this area, but in the meantime, the Second Restatement affords litigators ample opportunities to make creative and complex arguments.

Similarly, the "Better Rule" methodology provides significant flexibility. It consists of five "choice-influencing considerations," though the last one, the "better rule," has received the most attention and scorn.[92] The "better rule" consideration suggests that judges consider (or should consider) whether a law "make[s] good socio-economic sense for the time when the court speaks, whether they be its own or another state's rules."[93] Predictably, judges will disagree on whether traveling to another state to obtain an abortion "make[s] good socio-economic sense" or not.[94]

Few jurisdictions follow the "better law" methodology.[95] Perhaps the biggest contribution of this approach is to suggest or remind people that at least some judges indeed do consider which of two competing

---

87. *Id.* at intro. (extoling the virtues of "greater flexibility" over "rigid rules" and explaining how it utilizes "broad principles instead").

88. *See, e.g.*, SciGrip, Inc. v. Osae, 838 S.E.2d 334, 344 (N.C. 2020) (refusing to adopt the Restatement (Second) and noting the tradeoffs between "increased flexibility" and "the cost of introducing significant uncertainties into the process").

89. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(c).

90. *Id.* § 6(2)(d).

91. *Id.* § 145.

92. Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1587 (1966).

93. *Id.* at 1588.

94. *Id.*

95. *See* Symeonides, *supra* note 66, at 195 (highlighting that only five jurisdictions adopt the "better law" methodology).

laws is better before making a conflict of laws determination. They might do so implicitly, even where the forum's methodology does not explicitly provide for it. As such, savvy litigators will embed, subtly or openly, such arguments as part of another front in the post-*Dobbs* conflict of laws battlefields.

The newest methodology comes from the Third Restatement of Conflict of Laws.[96] It is currently being drafted but likely will not have a significant impact for some time to come.[97] Even if it was released tomorrow, it would take states some time to assess and decide whether to adopt it. Perhaps it will eventually become the dominant approach in the United States or perhaps only a distant also-ran. Either way, at least the early phases of the post-*Dobbs* conflict of laws determinations will be made without it. In its current form, its basic structure is in keeping with the First and Second Restatement that came before it. It also is heavily focused on torts, contracts, property, family law, and corporations, with no mention (as of yet) of public law matters.[98]

No matter which of these methodologies a state uses, the silence on public law matters in each creates significant wiggle room, and each presents rich litigation opportunities. That wiggle room is the next and imminent frontier of post-*Dobbs* abortion litigation.

B. Variations on a Horizontal Theme

Of course, traveling to other states in order to obtain an abortion is not the only horizontal conflict scenario. Many others are on the horizon, and some raise unique or novel issues.

Consider, for example, the world of assisted reproductive technology, which consists of a massive range of possibilities that support the full spectrum of humanity and families. Perhaps the best-known variety is in vitro fertilization (IVF) where, typically, an egg is

---

96. *See* Symeon C. Symeonides, *The Third Conflicts Restatement's First Draft on Tort Conflicts*, 92 TUL. L. REV. 1, 4 (2017); *see also* Lea Brilmayer & Daniel Listwa, *Continuity and Change in the Draft Restatement (Third) of Conflict of Laws: One Step Forward and Two Steps Back*, 128 YALE L.J.F. 267 (2018); Kermit Roosevelt III & Bethan R. Jones, *The Draft Restatement (Third) of Conflict of Laws: A Response to Brilmayer & Listwa*, 128 YALE L.J.F. 293, 295 (2018).

97. Tentative Draft No. 3 is available as of this writing with no final publication date yet announced.

98. *See generally* RESTATEMENT (THIRD) OF CONFLICT OF LAWS (AM. L. INST., Tentative Draft No. 2, 2021).

combined with sperm outside of the womb.[99] Each year, hundreds of thousands of single people, heterosexual couples, and same-sex couples attempt IVF to grow their family.[100] Various processes are in use, but often some fertilized eggs (zygotes) are not viable[101] and do not survive. This might happen before or after the egg is implanted in a uterus.[102] Post-*Dobbs*, some fear that states will consider this an abortion and outlaw such processes.[103]

This raises conflict issues because eggs, sperm, patients, zygotes, embryos, doctors, technicians, laboratory work, and the women who carry fertilized eggs to term can all cross state boundaries (with infinite variations and complexities). Once again, courts will likely be called upon to make conflict of laws determinations to ascertain which state's laws govern a situation where, for example, the donating happened in a state that is pro-abortion, the laboratory testing occurred in a state that is anti-abortion, and the decision to destroy the zygotes took place in a third state. Whose law controls? How could states not come into conflict with one another?

To make matters even more complicated, consider that the genetic mother might carry the fertilized egg to term, a mother might carry the egg of a donor, or a single person or a couple might hire a surrogate to carry the fertilized egg that shares their DNA or part of their DNA to term. Where the embryo is carried by a surrogate, a surrogacy contract structures the relationship between the surrogate and the eventual parent(s).[104] Some pro-abortion and anti-abortion

---

99. Bradley J. Van Voorhis, *In Vitro Fertilization*, 356 NEW ENG. J. MED. 379, 380 (2007).

100. *ART Success Rates*, CTRS. FOR DISEASE CONTROL & PREVENTION (2019), https://www.cdc.gov/art/artdata/index.html [https://perma.cc/E7JA-WW3S].

101. *See generally* Jan Hoffman, *Infertility Patients and Doctors Fear Abortion Bans Could Restrict I.V.F.*, N.Y. TIMES (July 5, 2022), https://www.nytimes.com/2022/07/05/health/ivf-embryos-roe-dobbs.html?smid=nytcore-ios-share [https://perma.cc/G57P-P46P]. Even that description hides massive normative and legal complexities. For example, if genetic testing shows that the DNA of the zygote indicates the presence of Tay-Sachs disease markers, is the zygote "not viable"? Predictably people and states will differ on their answers, and they might implement their different understandings in laws that reflect the disagreement.

102. *Id.*

103. *Id.*

104. *See generally* UNIFORM PARENTAGE ACT § 801(3) (UNIF. L. COMM'N 2017) (defining "surrogacy agreement" as "an agreement between one or more intended

states make all surrogacy contracts unenforceable.[105] But these contracts are enforceable in a range of pro-abortion and anti-abortion states.[106] These surrogacy contracts typically contain abortion clauses.[107] They can come in many varieties. A clause may provide that, for example, intended parents can force a termination of the pregnancy if, say, genetic testing reveals serious birth defects. Often, the clauses leave all termination decisions to the intended parents.[108] Alternatively or additionally, an abortion clause might also provide the surrogate with the ability to terminate the pregnancy when she faces substantial harm from continuing the pregnancy.[109]

More complicated still, some people hire a surrogate who lives in another country. This raises international conflict issues with an external sovereign.[110] In turn, international conflicts heighten strain on internal relationships because people and states will have different views regarding to what extent U.S. law should influence such surrogacies. For example, it does not take much to imagine a situation where a country that specializes in surrogacies is in a war.[111] With war

---

parents and a woman who is not an intended parent in which the woman agrees to become pregnant through assisted reproduction and which provides that each intended parent is a parent of a child conceived under the agreement").

105. *See, e.g.*, N.Y. DOM. REL. LAW § 122 (McKinney 2021) ("[S]urrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable."); MICH. COMP. LAWS. ANN. § 722.855(5) (2022) ("A surrogate parentage contract is void and unenforceable as contrary to public policy."); IND. CODE ANN. § 31-20-1-1 (2022).

106. *See, e.g.*, UNIFORM PARENTAGE ACT § 812 (approving "gestational agreements"); UTAH CODE ANN. § 78B-15-801 (LexisNexis 2022).

107. *See* Deborah L. Forman, *Abortion Clauses in Surrogacy Contracts: Insights from a Case Study*, 49 FAM. L.Q. 29, 31 (2015).

108. *Id.* at 33–44.

109. *Id.*; *see also* UNIFORM PARENTAGE ACT § 812(d) ("Specific performance is not a remedy available for breach by a gestational surrogate of a provision in the agreement that the gestational surrogate be impregnated, terminate or not terminate a pregnancy, or submit to medical procedures.")

110. *See generally* Xinran "Cara" Tang, Note, *Setting Norms: Protections for Surrogates in International Commercial Surrogacy*, 25 MINN. J. INT'L L. 193, 209–11 (2016) (highlighting the different approaches taken by countries in legislating surrogacy and suggesting the need for an international framework to deal with those differences).

111. *See, e.g.*, Isabel Coles, *Ukraine Is a World Leader in Surrogacy, but Babies Are Now Stranded in a War Zone*, WALL ST. J. (Mar. 12, 2022, 5:46 AM), https://www.wsj.com/articles/ukraine-is-a-world-leader-in-surrogacy-but-babies-are-now-stranded-in-war-zone-11647081997 [https://perma.cc/M5G7-34CP]; Susan

raging around them and hospitals under strain, surrogates in a war-torn country might worry that carrying a newly implanted embryo to term is no longer safe or feasible.[112] How will U.S. courts interpret surrogacy contracts in such situations, and how likely are conflicting decisions?

In some ways these are simple contract questions, and all conflict methodologies provide significant resources to resolve contract disputes.[113] A surrogacy contract, like any contract, can contain a choice-of-law clause. In such a clause, the parties agree that the contract shall be governed and interpreted under a specified substantive law.[114] The chosen law might be that of a U.S. state or of a foreign country.

Such clauses are intended to increase predictability and stabilize expectations. However, they are not self-enforcing. A court will still have to determine whether to give weight to the choice-of-law clause. Many U.S. states utilize the Second Restatement's framework to determine whether a choice-of-law clause will be enforced.[115] The Second Restatement gives parties significant leeway to choose applicable law.[116] However, that choice is not boundless. The full analysis has multiple steps, but the step with the most immanent consequence here is the one that asks a court to consider whether

---

Dominus, *It's a Terrible Thing When a Grown Person Does Not Belong to Herself*, N.Y. TIMES (May 3, 2022), https://www.nytimes.com/2022/05/03/magazine/surrogates-ukraine.html [https://perma.cc/QWN4-G9RV].

112. *See, e.g.*, Stephanie Hegarty & Eleanor Layhe, *Ukraine: Impossible Choices for Surrogate Mothers and Parents*, BBC (Mar. 22, 2022), https://www.bbc.com/news/world-europe-60824936 [https://perma.cc/G98W-BYES]; Alison Motluk, *Ukraine's Surrogacy Industry Has Put Women in Impossible Positions*, ATLANTIC (Mar. 1, 2022), https://www.theatlantic.com/health/archive/2022/03/russia-invasion-ukraine-surrogate-family/623327 [https://perma.cc/FJE2-GBSR] ("Nothing crystallizes the 'her body, my baby' conundrum of surrogacy quite like a war.").

113. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (AM. L. INST. 1971).

114. *See, e.g.*, NPR NEWS, SURROGACY CONTRACT SAMPLE 25 (2015), https://media.npr.org/documents/2015/july/Surrogacy_contract_sample_070215.pdf [https://perma.cc/P9RR-F4TK] ("All Parties agree that this Agreement will be governed and interpreted by Oregon law.").

115. *See* Symeonides, *supra* note 66, at 195. This is in addition, of course, to regular contract principles which could determine the enforceability of such a clause, such as those regarding fraud.

116. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 187. In contrast, for example, to the First Restatement that had no provisions for the enforcement of choice-of-law clauses.

"application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state" and is the state with the "most significant relationship" to the particular issue.[117] This is a litigator's land of milk and honey. The test is crammed full of squishy terms and escape hatches. Most notably, the test asks courts to ponder the "fundamental policy of a state" (their own or another) and which state has the "most significant relationship" to the issue.[118] Is that state the state where the recipient's future parents are domiciled? Or where the surrogate mother is domiciled?[119] Or where the laboratory work took place? Once again, interjurisdictional conflicts are not only present but also require contentious choices that are sure to infuriate one side or the other.[120]

Many other horizontal conflict of laws flashpoints are already visible on the horizon. For example, abortion medication, often self-administered, and perhaps soon nonprescribed,[121] is an increasingly common form of abortion in the United States.[122] The medication is

---

117. *Id.* §§ 6, 187.

118. *Id.* § 6, cmts. c, e, f; *id.* § 187.

119. *See* Kerry Abrams & Kathryn Barber, *Domicile Dismantled*, 92 IND. L.J. 387, 390, 392 (2017) ("Domicile has always been a legal fiction; it has never perfectly described how people actually live. But this Article argues that in the last fifty years, the legal fiction of domicile has become increasingly unmoored from the reality of people's lives" and therefore "the confusion over domicile that has emerged in the last fifty years makes it an increasingly unwieldy and unhelpful legal concept."); *see also* Susan Frelich Appleton, *Leaving Home? Domicile, Family, and Gender*, 47 U.C. DAVIS L. REV. 1453, 1456 (2014).

120. *See generally* Melissa Murray, *Family Law's Doctrines*, 163 U. PA. L. REV. 1985, 1987–88 (2015) ("When families depart from the marital and biological model on which [common law, statutes, model codes, and constitutional provisions] rest, the assurances and predictability of legal doctrine evaporate.").

121. *Cf.* Ahmed Aboulenein, *Analysis: Abortion Pills over the Counter? Experts See Big Hurdles in Widening U.S. Access*, REUTERS (June 24, 2022, 6:17 PM), https://www.reuters.com/business/healthcare-pharmaceuticals/abortion-pills-over-counter-experts-see-major-hurdles-widening-us-access-2022-06-23 [https://perma.cc/R82Y-RTG2] (discussing the potential paths and obstacles to FDA nonprescribed abortion pill approval).

122. *See generally* Rachel Rebouché, *The Public Health Turn in Reproductive Rights*, 78 WASH. & LEE L. REV. 1355, 1356, 1418 (2021) (describing the "confluence of regulation, funding, and evidence [that] has helped facilitate both telehealth for abortion and self-managed abortions, which can extend abortion access despite the evisceration of constitutional rights").

easily and commonly shipped from one state to another.[123] Predictably, after *Dobbs*, "some States may block women . . . from receiving abortion medications from out of State."[124] But before civil liability can be imposed on out-of-state pharmaceutical companies, courts must decide what law applies to them. Is it the law of the pro-abortion state from which they sent the medication, or is it the law of the state where the medication was received? The traditional approach again has little to say on this question; interest analysis tends to default to forum law, creating again a race to judgment, and the Second Restatement is as flexible and indeterminate as ever.

Or consider advertisements either for abortion medication or other abortion-related services and goods. Anti-abortion states might be inclined to regulate such advertisement using similar tools that states have used to prohibit tobacco product advertisement.[125] Regulating billboards along the highway of an anti-abortion state does not raise deep conflict issues. But what about advertisement that crosses state boundaries by mail, through airwaves, or electronically? A broad advertisement ban could implicate newspapers, magazines, radio, and virtually every webpage and social media platform. Such a ban in one state could thus affect how hundreds of media companies operate in all other states. Current conflict doctrine has little to say about whether a sovereign merely regulates activity within its territory through such a ban or whether it is an illegitimate attempt to regulate activity in all sister states.

Much the same could be said for telemedicine where one state authorizes doctors to prescribe medication and treatment for people elsewhere (or, a variation on the theme, whether the state permits doctors not to inquire too closely into where a telemedicine patient is

---

123. *Id.* at 1421. It does not require cumbersome or fancy packaging as was needed, for example, for some of the COVID-19 vaccines that required precise and massive refrigeration. CTRS. FOR DISEASE CONTROL & PREVENTION, VACCINE STORAGE AND HANDLING TOOLKIT 50 (2022) (describing the storage and handling requirements for COVID-19 vaccines).

124. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2318 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

125. *Cf.* Brilmayer, *supra* note 17, at 874 (raising the question "whether a state can prohibit advertising abortion services within its borders when the abortion itself would take place in a state where abortion is legal"); 21 C.F.R. § 1141.10(b) (2018) (setting out requirements for display in cigarette advertisements).

located).[126] Would a ban on such practices legitimately protect in-state domiciliaries or illegitimately overreach by regulating the practices of out-of-state doctors?[127]

Or consider what would happen if an anti-abortion state required insurance companies to take abortion-related medical history into account when setting premiums.[128] Pro-abortion states might respond by requiring insurance companies to provide equal coverage that is willfully blind to such behavior.[129] Similarly, a state might disallow insurance companies from covering abortions and related medical services. Can self-funded health plans continue to provide abortion coverage? Whose laws control?

As the previous examples illustrate, interjurisdictional abortion regulations not only affect individuals but also companies. We should expect more conflict scenarios involving companies, in part because companies have taken more explicit political stances in recent years. Supported by a growing body of permissive Supreme Court precedent,[130] many companies increasingly espouse an explicit agenda

---

126. *See, e.g.*, Pam Belluck & Sheryl Gay Stolberg, *Abortion Pills Stand to Become the Next Battleground in a Post-*Roe *America*, N.Y. TIMES (May 5, 2022), https://www.nytimes.com/2022/05/05/health/abortion-pills-roe-v-wade.html [https://perma.cc/E9BZ-DY8X] ("[P]atients can have a consultation with a physician via video or phone or by filling out online forms, and then receive the pills by mail."); Pam Belluck, *Abortion Pill Providers Experiment with Ways to Broaden Access,* N.Y. TIMES (Sept. 3, 2022), https://www.nytimes.com/2022/09/03/health/abortion-pill-access-roe-v-wade.html [https://perma.cc/8FNR-8X43] ("Some are using physician discretion to prescribe pills to patients further along in pregnancy than the 10-week limit set by the Food and Drug Administration. Some are making pills available to women who are not pregnant but feel they could need them someday. Some are employing a don't-ask-don't-tell approach, providing telemedicine consultations and prescriptions without verifying that patients are in states that permit abortion.").

127. *See* Katherine Shaw & Alex Stein, *Abortion, Informed Consent, and Regulatory Spillover*, 92 IND. L.J. 1, 1 (2016) ("This Article uncovers a previously unnoticed *horizontal* dimension of abortion regulation: the medical-malpractice penalties imposed upon doctors for failing to inform patients about abortion risks; the states' power to define those risks, along with doctors' informed-consent obligations and penalties; and, critically, the possibility that such standards might cross state lines.").

128. Or, taking the point further, imagine the state instructs insurance companies to deny coverage based on past abortion-related activity.

129. *See generally* 29 U.S.C. § 1182 (prohibiting discrimination based on health status).

130. *See* Citizens United v. Fed. Election Comm'n, 588 U.S. 310, 318, 341–43 (2010) (holding that the First Amendment prohibits restrictions on independent

or feel entitled, and perhaps required, to participate in political debates.[131] In the wake of *Dobbs*, some companies expanded abortion-related medical benefits for employees to travel out of state to abortion friendly jurisdictions.[132] Some companies thought it necessary to include the announcement in regulatory filings.[133] Others made it clear that they would not do so.[134] More complicated still, some companies might treat employees differently in the future depending on their abortion-related medical history. Would this amount to employment discrimination? Before this important question can be answered, a court would have to resolve which sovereign's employment law governs such a dispute. Is it the law of the place of incorporation,

---

expenditures for electioneering communications made by corporations); *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014) (finding that the Religious Freedom Restoration Act confers protection on corporations to elect employee health care programs that do not provide birth control, in accordance with their religious beliefs).

131. *Hobby Lobby*, 573 U.S. at 733 (forcing owners of certain closely-held corporations to provide health care coverage that impinges on their religious beliefs would exclude those people from "full[y] participat[ing] in the economic life of the Nation"); *see* Elizabeth Blair, *After Protests, Disney CEO Speaks out Against Florida's 'Don't Say Gay' Bill*, GPB NEWS (Mar. 10, 2022, 3:12 PM), https://www.gpb.org/news/2022/03/10/after-protests-disney-ceo-speaks-out-against-floridas-dont-say-gay-bill [https://perma.cc/ECA3-GS3W].

132. Emma Goldberg, Lora Kelley & Emily Flitter, *Here Are the Companies that Will Cover Travel Expenses for Employee Abortions*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/24/business/abortion-companies-travel-expenses.html [https://perma.cc/S965-LL36] ("After the Supreme Court's ruling ending federal abortion rights on Friday, several companies released statements reaffirming their commitment to helping employees access health care services they may not be able to obtain in their state." They include "Starbucks, Tesla, Yelp, Airbnb, Microsoft, Netflix, Patagonia, DoorDash, JPMorgan Chase, Levi Strauss & Co., PayPal and Reddit . . . Disney, Meta, Dick's Sporting Goods and Condé Nast.").

133. *See, e.g.*, CITIGROUP INC., CITIGROUP INC. 2022 NOTICE OF ANNUAL MEETING AND PROXY STATEMENT 20 (2022) https://www.sec.gov/Archives/edgar/data/0000831001/000120677422000697/citi3969751-def14a.htm [https://perma.cc/LHE7-DPJS] ("[B]eginning in 2022 we [will] provide travel benefits to facilitate access to adequate resources.").

134. *See, e.g.*, Anne D'Innocenzio & Haleluya Hadero, *Abortion Ruling Thrusts Companies into Divisive Area*, ASSOCIATED PRESS (June 25, 2022), https://apnews.com/article/company-stances-abortion-c70835ae2eedc71c36078ccaa81437b7 [https://perma.cc/BN49-F47G] (noting companies that did not announce policies supporting abortion access for employees in the wake of the *Dobbs* decision).

the place of employment, or perhaps the place where corporate decisions related to abortions were made?

Conflict cases and scholarship typically examine such questions using the internal affairs doctrine. The doctrine posits a division between the internal relationship within the corporation (governed by the *lex incorporationis*) and the external affairs of the corporation (governed by the law of the state where the act took place).[135] When a pro-abortion corporation is incorporated in an anti-abortion state, the corporation will likely argue that its decision to facilitate medical traveling for its employees is an external act, not peculiar to corporations, and thus governed by the pro-abortion law of the pro-abortion sovereign where the abortion took place. Anti-abortion litigants will counter that such acts structure the corporate to corporate-agent relationship and are thus peculiar to the corporation and should be governed by the laws of the anti-abortion state, regardless of where the abortion took place. For pro-abortion corporations incorporated in pro-abortion jurisdictions, the argumentative strategies are reversed (since they wish to be governed by the law of the state of incorporation). We can expect similar confusion and slippery arguments in the context of employment discrimination.

Companies also face a range of horizontal conflict questions in relation to data and privacy. Consider, for example, a state that wants to inquire into the abortion-related internet activities of one of its domiciliates. Perhaps this is in relation to a law that bans out-of-state travel for abortion purposes or perhaps it is in relation to receiving abortion medication from elsewhere. The state, or a private individual authorized under a new generation of private attorney general laws, seeks the internet search history of a person, location data showing a visit to an abortion clinic,[136] or perhaps information from a social

---

135. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 166 (AM. L. INST. 1934) ("The effect of an act directed to be done by a foreign corporation is governed by the law of the state where it is done.").

136. *See, e.g.*, Nico Grant, *Google Says It Will Delete Location Data When Users Visit Abortion Clinics*, N.Y. TIMES (July 1, 2022), https://www.nytimes.com/2022/07/01/technology/google-abortion-location-data.html [https://perma.cc/D9C4-3XEB] ("Google said on Friday that it would delete abortion clinic visits from the location history of its users, in the company's first effort to address how it will handle sensitive data in the wake of the Supreme Court overturning *Roe v. Wade*.").

media chat group or from a period tracker app.[137] The anti-abortion state authorizes or even requires disclosure of such information; the pro-abortion state either leaves it to the company or actively prohibits it. Conflict law again will have to decide which sovereign's commands the company needs to heed. And, as with many of these questions, conflict law either has little to say or can only provide muddled answers on questions of privacy, internet communication, and modern technology.

C. Vertical and Admiralty

The previous Section sketched a variety of horizontal conflicts between states. This Section will focus on vertical conflict of laws questions: those between state and federal regimes.

Some of these clashes are already occurring. For example, shortly after *Dobbs*, the Biden administration, through the Health and Human Services Department, promulgated guidance about emergency abortions.[138] It did not take long for Texas's state attorney general to sue.[139] For now, anti-abortion states are suing a pro-abortion federal government. However, that could quickly change.

The statutory regime is similarly changeable. Currently, there is no federal legislation that creates a statutory right to an abortion or a statutory prohibition. Each side in the abortion debate would like to

---

137. *See, e.g.*, Kashmir Hill, *Deleting Your Period Tracker Won't Protect Your Privacy*, N.Y. TIMES (June 30, 2022), https://www.nytimes.com/2022/06/30/technology/period-tracker-privacy-abortion.html [https://perma.cc/7CU7-3RY9] ("[T]hanks to the digital trails left behind in the modern technological age, it will be far harder to hide incriminating data about a decision to end a pregnancy.").

138. Letter from Xavier Becerra, Secretary, Dep't of Health & Hum. Servs., to health care providers (July 11, 2022), https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf [https://perma.cc/T39V-RGE7].

139. Texas v. Becerra, No. 22-CV-185-H, 2022 WL 3639525, at *1 (N.D. Tex. Aug. 23, 2022); State of Texas's Original Complaint at 2–3, *Becerra*, 2022 WL 3639525 (No. 22-CV-185-H), https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/20220714_1-0_Original%20Complaint%20Biden%20Admin.pdf [https://perma.cc/N68E-PV4G]. The Texas lawsuit challenged the federal government's guidance reiterating its longstanding interpretation of the Emergency Medical Treatment and Labor Act (EMTALA) as conflicting with Texas state law (on August 25, 2022, the Texas District court overseeing the case issued a preliminary injunction preventing the federal government from enforcing its interpretation that Texas abortion laws are preempted by the provisions of EMTALA).

change that and get its bill passed.[140] But it remains unclear whether there will be such a bill and what shape it might take. For example, the bill might outright establish a statutory federal right to abortion access at ten or forty weeks. Or it might turn out to be a federal nationwide prohibition of abortions (with more or fewer exceptions). Much depends on the vagaries of midterm elections and the art of coalition building. For the foreseeable future, it seems neither side will be able to muster sufficiently unified support in the House, the Senate, and from the President to pass a statutory federal abortion right or prohibition that could preempt contrary state law.[141]

State-federal conflicts in this space will thus take different forms. One type of conflict concerns federal laws that are not abortion bans or grants but that are still tangled up with state abortion regulation. For example, the Health Insurance Portability and Accountability Act (HIPAA)[142] includes privacy protections that shield medical information from disclosure.[143] However, HIPAA contains numerous exceptions. For example, certain disclosures can be obtained for law enforcement purposes.[144] Potentially, the federal government and the states will clash over the reach and applicability of HIPAA disclosure exceptions in the post-*Dobbs* abortion context where states extend their abortion-related regulations. Another example concerns health

---

140. *See* Ali Zaslav, *Republicans Block Taking Up Senate Bill to Guarantee Freedom to Travel Across States for Abortions*, CNN (July 14, 2022, 2:12 PM), https://www.cnn.com/2022/07/14/politics/republicans-block-senate-bill-abortion-travel-states/index.html [https://perma.cc/98JG-WDLR] (noting Republican Senators' objections to a proposed Democratic bill that would guarantee the right to travel across state lines for abortion care). *Compare* Women's Health Protection Act of 2021, H.R. 3755, 117th Cong. § 2(b) (2021) ("It is the purpose of this Act . . . to permit health care providers to provide abortion services without limitations or requirements that single out the provision of abortion services for restrictions that are more burdensome than those restrictions imposed on medically comparable procedures . . . ."), *with* Protecting Pain-Capable Unborn Children from Late-Term Abortions Act, S. 4840, 117th Cong. § 1532(a) (2022) (proposing to ban abortions after fifteen weeks of pregnancy with some exceptions).

141. *See generally* Annie Karnie, *Graham Proposes 15-Week Abortion Ban, Splitting Republicans*, N.Y. TIMES (Sept. 13, 2022), https://www.nytimes.com/2022/09/13/us/politics/lindsey-graham-abortion.html (describing how the Republican caucus is deadlocked over provisions in a proposed fifteen-week abortion ban).

142. Pub. L. No. 104-191, 110 Stat. 1936 (1996).

143. 42 U.S.C. § 1320d–6(a).

144. 45 C.F.R. § 164.512(f) (2002) (detailing the conditions that permit disclosure of protected health information to law enforcement).

coverage that originates under the federal Employee Retirement Income Security Act of 1974 (ERISA).[145] Imagine an employer makes ERISA funds available to employees to travel to another state to obtain abortion services, while a state allows suits against providers that facilitate abortions. Predictably, states and the federal government will differ to what extent a state can interfere with ERISA fund administration.[146]

Another type of state-federal conflict could arise based on the use of federal land. Imagine a watered-down federal statute that does not mandate abortion access throughout the country but merely allows for it on federal land. This would create enclaves, some small and some big, in the states where their regulatory regimes are interrupted. Just as anti-abortion states might seek to hinder traveling to pro-abortion states, they might also seek to interrupt traveling to such federal enclaves.

Another kind of conflict is not substantive but procedural in nature. It is created by friction between federal and state laws that do not explicitly address preemption, the post-*Dobbs* abortion regulation era, or land-use questions. State abortion laws in the past have included not just substantive provisions but also a range of procedural devices to enhance enforcement efforts.[147] Perhaps the best-known example pre-*Dobbs* is Texas's S.B.8.[148] It includes provisions on public

---

145. Pub. L. No. 93-406, 88 Stat. 829 (1974); 29 U.S.C. § 1144.

146. ERISA contains a strong preemption provision with numerous caveats. 29 U.S.C. § 1144(a). The statute and the cases interpreting it have not been tested against a post-*Roe* abortion litigation landscape. Sylvia A. Law & Barry Ensminger, *Negotiating Physicians' Fees: Individual Patients or Society? (A Case Study in Federalism)*, 61 N.Y.U. L. REV. 1, 81 (1986) ("[I]n this judicially construed Alice in Wonderland world, any state seeking to regulate insurers' arrangements with physicians or providers must be prepared to litigate claims of ERISA preemption."); *see also* Aetna Health Inc. v. Davila, 542 U.S. 200, 216–17 (2004) (finding ERISA's civil cause of action for breach of fiduciary duty by fiduciaries preempts any claim in state court); Mertens v. Hewitt Assocs., 508 U.S. 248, 261–63 (1993) (finding ERISA's civil cause of action for breach of fiduciary duty by nonfiduciary participants preempts any claim in state court). *But cf.* N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 649 (1995) (holding that provisions for surcharges in state law are not preempted by ERISA).

147. *See generally* Susan Frelich Appleton, *Gender, Abortion, and Travel After* Roe*'s End*, 51 ST. LOUIS U. L.J. 655, 677–82 (2007) (discussing pre-S.B.8 efforts of how a "restrictive state could prevent out-of-state terminations of its domiciliaries' pregnancies without resorting to criminal law").

148. Texas Heartbeat Act, S.B. No. 8, 87th Cong. (2021) [hereinafter S.B.8.]

enforcement,[149] remedies (including statutory damages),[150] unilateral costs and attorney's fees,[151] modification of the default statute of limitations,[152] res judicata,[153] venue,[154] and transfer limitations.[155]

S.B.8 was carefully crafted to defeat federal subject matter jurisdiction. However, future state laws might find their way into federal court based on diversity jurisdiction or supplemental jurisdiction. In such situations, federal courts apply the "substantive law of the states and the procedural law of the federal government."[156] Alas, the tricky bit is to determine which is which.

Federal courts negotiate conflicts between federal approaches and state approaches under the *Erie/Hanna* doctrine.[157] In a two-step approach, courts first examine whether there is a federal statute or rule that is constitutional, validly enacted, and directly on point.[158] If such a federal command exists, it will govern in a suit based on state law. But if there is no such federal command, courts examine the policy considerations behind the *Erie/Hanna* doctrine, including the inequitable administration of justice, incentives for forum shopping, the regulation of primary conduct, and overriding federal interests.[159]

To make this more concrete, imagine a state law that limits abortion access, provides for a private cause of action, and includes arguably procedural provisions that regulate the availability of juries in such suits, the manner and timing of service of process, the publicity of proceedings, the types and reach of discovery tools, and preclusion law.

---

149. *Id.* § 171.207.

150. *Id.* § 171.208(b) (providing for "statutory damages in an amount of not less than $10,000").

151. *Id.* §§ 171.208(b)(3), 171.208(i) ("Notwithstanding any other law, a court may not award costs or attorney's fees . . . to a defendant in an action brought under this section.").

152. *Id.* § 171.208(d).

153. *Id.* § 171.208(e)(5).

154. *Id.* § 171.210.

155. *Id.* § 171.210(b) ("[T]he action may not be transferred to a different venue without the written consent of all parties.").

156. Hanna v. Plumer, 380 U.S. 460, 465 (1965) ("[F]ederal courts are to apply state substantive law and federal procedural law.").

157. *See id.* at 465, 471–72; Erie R.R. v. Tompkins, 304 U.S. 64, 79–80 (1938).

158. The last prong is typically interpreted with much greater force than one might expect on first sight. *See, e.g.*, Gasperini v. Ctr. for Humans., Inc., 518 U.S. 415, 426, 436–37 (1996) (applying federal and state law on the standard of review on appeal for damages simultaneously).

159. *See id.* at 428, 432.

Each of these provisions might clash with how a federal court ordinarily handles matters. And for each provision the court would have to engage in a complex balancing test to mediate the conflict between state and federal interests.

Another way state-federal conflicts might arise is in the context of boats and ships, because of the unique history of admiralty law in this country. Put briefly, admiralty courts existed alongside courts of law and equity. Some of the distinctions between these courts have been swept aside,[160] but many remain.[161] Federal courts retain admiralty and maritime jurisdictions.[162] Determining when such jurisdiction exists is a complicated matter where courts examine indicia of jurisdiction, such as the presence of a maritime vessel,[163] navigable waters,[164] and

---

160. *See generally* FED. R. CIV. P. 2 ("There is one form of action—the civil action."); FED. R. CIV. P. Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (noting the unification of the rules of civil procedure and admiralty).

161. *See, e.g.*, FED. R. CIV. P. 9(h) (pleading admiralty or maritime claims); FED. R. CIV. P. 14(c) (impleader in admiralty or maritime suits). FED. R. CIV. P. 38(e) (unavailability of juries in admiralty or maritime suits).

162. U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity . . . [and] to all Cases of admiralty and maritime Jurisdiction."); 28 U.S.C. § 1333("The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction.").

163. *See* 1 U.S.C. § 3 ("The word 'vessel' includes every description of watercraft or other artificial contrivance used . . . as a means of transportation on water."); *see also* Stewart v. Dutra Constr. Co., 543 U.S. 481, 496 (2005) ("The question remains in all cases whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one.") (quoting 1 U.S.C. § 3); Lozman v. City of Riviera Beach, 568 U.S. 115, 118 (2013) (a structure does not fall within the scope of 1 U.S.C. § 3 unless a "reasonable observer, looking to the [structure's] physical characteristics and activities, would . . . consider it designed to a practical degree for carrying people or things over water").

164. *See* PPL Mont., LLC v. Montana, 565 U.S. 576, 592 (2012) (discussing various applications of the still valid *Daniel Ball* test); The Daniel Ball, 77 U.S. (11 Wall.) 557, 563 (1870) ("Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.")

maritime flavor/nexus.[165] Numerous cases demarcate the boundary between water and land. An abortion on a floating dry dock might not fall under federal maritime jurisdiction; an abortion on a motorless barge attached to the dry dock might. The two abortions, both on water just feet apart, could be adjudicated under different substantive law.[166]

Most relevant for the discussion at hand, the upshot of all of these jurisdictional boundaries is that admiralty and maritime jurisdiction does not exist solely on the oceans far from land but can reach inland from the beaches of the Atlantic or Pacific to internal waterways (like the Mississippi River) and lakes (like the Great Lakes). Many of these bodies of water are adjacent or within states, some of which are pro-abortion and some anti-abortion. Abortion providers who move their operations onto boats will thus be able to invoke federal court jurisdiction and create an entirely new batch of procedural and substantive conflicts between state and federal regimes.

D. Tribal Conflicts

Conflict of laws can occur whenever multiple sovereigns live side by side, and goods, people, and transactions cross their borders. The previous Sections focused on states and the federal government as sovereign. But they are not the only sovereigns in this country. There is a third kind: tribal governments. Of course, tribes do not possess all of the sovereign attributes. For example, the Arapaho cannot declare war on Belgium. But then again, neither can Oklahoma. We truly have

---

165. *See* Wilburn Boat Co. v. Fireman's Fund Ins., 348 U.S. 310, 323 (1955) (Frankfurter, J., concurring) (finding a connection between state insurance laws for vessels and commercial maritime endeavors); Tandon v. Captain's Cove Marina of Bridgeport, Inc., 752 F.3d 239, 245–46 (2d Cir. 2014).

166. *See generally* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 628 (1959) (noting that admiralty jurisdiction allows federal judges to create federal decisional law); S. Pac. Co. v. Jensen, 244 U.S. 205, 217 (1917) (same). *But cf.* The Hamilton, 207 U.S. 398, 403 (1907) (applying a state wrongful death statute to a claim for death on the high seas); Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 446 (1960) (finding the local action was not preempted by federal inspection legislation); David P. Currie, *The Choice Among State Laws in Maritime Death Cases*, 21 VAND. L. REV. 297, 298–99 (1968) (commenting on the "absurdity" of the traditional location test for admiralty jurisdiction in tort cases); David P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess"*, 1960 SUP. CT. REV. 158, 159 (1960) ("To the uninitiated it may seem somewhat difficult to understand why the fact that the accident occurred on water should make any difference.").

made a "hash of sovereignty" with multiple partial sovereigns living side-by-side, all within one country.[167] Since tribes are part of this shared-living arrangement, their laws, policies, and courts can also conflict with the positions of states and the federal government. Conflict of laws is one of the tools to mediate such a conflict.[168]

Currently, there are 574 federally recognized tribes and many additional state-recognized tribes.[169] As one would expect, tribes can, and likely will, take a broad range of stances when it comes to abortion questions, from permissive to restrictive. Conceivably, the extremes and diversity of their positions could exceed those of the mere fifty states,[170] creating a whole new world of potential conflicts. Tribes might clash with states, the federal government, or each other. Some of these conflicts will mirror the conflicts outlined above between states or between states and the federal government.[171]

But many of these conflicts have a different flavor because of the peculiar and unstable status of tribal sovereignty. Most notably, tribes have lived for decades under the sword of Damocles in the form of congressional threats to revoke tribal sovereignty, tribal competences, or financial support for tribes.[172] Perhaps the most extreme form of this threat occurred in the 1950s when Congress "terminated" various

---

167. Jack N. Rakove, *Making a Hash of Sovereignty, Part I*, 2 GREEN BAG 35, 35 (1998) ("[O]ur practice and theory alike have made a hash of the traditional concept of sovereignty.").

168. *See generally* Katherine J. Florey, *Choosing Tribal Law: Why State Choice-of-Law Principles Should Apply to Disputes with Tribal Contacts*, 55 AM. U. L. REV. 1627, 1629 (2006).

169. Tribal Leaders Directory, BUREAU OF INDIAN AFFS., https://www.bia.gov/service/tribal-leaders-directory [https://perma.cc/T8M9-D3XG].

170. *See generally* Reese, *supra* note 29, at 555 ("[T]ribal law is vast, varied, and often innovative.").

171. *See, e.g.*, Dress, *supra* note 30; Camper, *supra* note 30.

172. *See, e.g.*, United States v. Lara, 541 U.S. 193, 194 (2004) ("[T]he Constitution, through the Indian Commerce and Treaty Clauses, grants Congress 'plenary and exclusive' powers to legislate in respect to Indian tribes . . . Congress, with this Court's approval, has interpreted these plenary grants of power as authorizing it to enact legislation that both restricts tribal powers and, in turn, relaxes those restrictions") (citation omitted); *see also* United States v. Jicarilla Apache Nation, 564 U.S. 162, 175 (2011) (explaining the historical recognition of Congress' plenary authority over the sovereign Indian trust); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) (same); Talton v. Mayes, 163 U.S. 376, 379–80 (1896) (same). *See generally* Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 195–96 (1984).

tribes.[173] Currently, there is no talk of Congress doing something like this again. But it is important to recognize that states can clash with the federal government without having to worry that Congress might terminate Texas.

The unstable status of tribal sovereignty also plays out in the context of tribal jurisdiction. The Supreme Court continues to redraw the boundaries between state and tribal jurisdiction. For example, five days after the Supreme Court published the *Dobbs* decision, it handed down *Oklahoma v. Castro-Huerta*,[174] the latest in a long string of cases that attempt to define the boundaries and relationship between states and tribes.[175] The Supreme Court continues to use tribal membership of the involved parties in such jurisdictional determinations. This might raise novel conflict questions in the future when courts (tribal or otherwise) are asked to determine whether a fetus has tribal membership. Current case law indicates that tribes are free to determine tribal membership,[176] which suggests that tribes could indicate whether a fetus has tribal membership or not. However, the federal government has also proven keen to determine jurisdictional boundaries.[177] And, of course, Congress could step in at any moment and impose or deny tribal membership to fetuses.

E. Direct Suits

So far, the discussion has focused on situations where the laws of different sovereigns conflict (for example, one state allows for telemedicine, while the other does not). But there is also a more direct

---

173. *See, e.g.*, Menominee Indian Termination Act of 1954, 68 Stat. 250, *repealed by* 25 U.S.C. §§ 891–902; Ute Partition and Termination Act (Partition Act), 25 U.S.C. §§ 677–677aa (repealed); South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 508–09 (1986) (discussing effects of termination acts); United States v. Antelope, 430 U.S. 641, 646–47 & 646 n.7 (1977) (same); Affiliated Ute Citizens v. United States, 406 U.S. 128, 133–35 (1972) (same).

174. 142 S. Ct. 2486 (2022).

175. *See id.* at 2491; United States v. Cooley, 141 S. Ct. 1638, 1641 (2021); McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020) (affirming that a tribe maintains the authority to address adverse conduct that has a direct effect on the well-being of the tribe).

176. *Cooley*, 141 S. Ct. at 1642 (citing Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 327–28 (2008)).

177. *See Castro-Huerta*, 142 S. Ct. at 2503; *see also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978) (limiting the ability of Native Nations to punish non-Indians); United States v. Kagama, 118 U.S. 375, 375–76, 383 (1886) (upholding the Major Crimes Act).

conflict between sovereigns: suits in the courts of one state against the sovereign of another state.

The Supreme Court has provided a meandering range of approaches to the question of when suits may be entertained in state court against the instrumentalities of sister states.[178] The most recent articulation, from 2019, held that courts in one state may not entertain suits by private parties against the instrumentalities of a sister state.[179] This case is notable for destabilizing the previous criteria and creating doubt about the future direction of the doctrine.[180] It leaves open important questions about the extent of the kind of immunity provided. For example, it is unclear whether state officials (rather than the state agency itself) sued in their official capacity are similarly immune to suits in the courts of sister states or not.[181] Such uncertainty leaves open the possibility that private individuals who dislike the abortion-related policies of neighboring states will sue the state officials from such states in their home courts. For example, Oregon recently passed a bill that helps fund abortion costs and travel costs for

178. *See, e.g.*, Nevada v. Hall, 440 U.S. 410, 426–27 (1979) ("[I]f a federal court were to hold . . . that California is not free in this case to enforce its policy of full compensation, that holding would constitute the real intrusion on the sovereignty of the States . . . ."); Franchise Tax Bd. of Cal. V. Hyatt, 538 U.S. 488, 490, 499 (2003) (holding that Nevada's refusal to extend full faith and credit to a California statute did not violate the Constitution); Franchise Tax Bd. Of Cal. V. Hyatt, 578 U.S. 171,173–74 (2016) (setting aside as unconstitutional a Nevada court's decision to permit citizens to obtain greater damages than allowable under Nevada law).

179. Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1490 (2019) ("This case, now before us for the third time, requires us to decide whether the Constitution permits a State to be sued by a private party without its consent in the courts of a different State. We hold that it does not and overrule our decision to the contrary in *Nevada v. Hall*.").

180. *Federalism—State Sovereign Immunity—Structural Inferences*—Franchise Tax Board v. Hyatt, 133 HARV. L. REV. 362, 371 (2019).

181. The parallel doctrine concerning suits in federal court against state instrumentalities does not bar suits against state officials sued in their personal capacity. *See Franchise Tax Bd.*, 139 S. Ct. at 1490; *see also* Michael H. Hoffheimer, *The New Sister-State Sovereign Immunity*, 92 Wash. L. Rev. 1771, 1813 (2017) ("[The Court] missed the opportunity to recognize an exception for immunity targeted narrowly at those cases that emerged after traditional limits on state judicial power were relaxed and forum states began to exercise jurisdiction in personam over sister states based on injuries they caused through their agents in the forum's territory.").

non-Oregonians in anti-abortion states.[182] California intends to do likewise.[183] Some states might enact laws like Texas's S.B.8 that create liability for anyone who assists a Texan in obtaining an abortion. Could a private individual in Texas use Texas state courts to sue an Oregon state official in her official capacity for providing funds for an abortion? If a University of California medical official ships abortion medication to a student who has a summer internship in Texas, does that make the official amenable to suit there?[184] This creates a host of new and contentious conflict scenarios.[185]

F. Foreign Conflicts

Yet another type of conflict concerns clashes with foreign sovereigns.[186] Not only can federal, state, and tribal governments

---

182. *See* 2022 Or. Laws 34; Katherine Cook, *Oregon Funds Reproductive Health Care as Idaho Moves to Ban Abortions*, KGW (Mar. 15, 2022, 11:18 PM), https://www.kgw.com/article/news/local/idaho-abortion-ban-oregon-reproductive-funding/283-4c696054-7b49-48ea-b7e2-a9639d47d47e [https://perma.cc/8XNP-C53X] ("Oregon lawmakers [passed] a bill to . . . help cover abortion costs, travel and lodging for patients who need it, including many who will likely travel to Oregon from out of state."); Casey Parks, *States Pour Millions into Abortion Access*, WASH. POST (May 13, 2022, 12:22 PM), https://www.washingtonpost.com/dc-md-va/2022/05/13/oregon-new-york-funding-abortion [https://perma.cc/7TJ2-TXSG] ("Democratic-led states have begun allocating money to increase access to abortion—both for their own constituents and for people traveling from states where the procedure may soon become illegal.").

183. S.B. 1142, Reg. Sess. (Cal. 2022); Claire Rush & Adam Beam, *Democrats Vow to Help Women Who Must Travel for Abortions*, ASSOCIATED PRESS (June 24, 2022), https://apnews.com/article/abortion-us-supreme-court-health-oregon-california-5d1f758157dc463a407ec1b995be4844 [https://perma.cc/7PG6-Q2N3] ("[California's governor] said the state's budget will include $20 million over three years to help pay for women from other states to get abortions in California.").

184. *See* Anemona Hartocollis & Stephanie Saul, *Some Students Want Colleges to Provide the Abortion Pill. Schools Are Resisting*, N.Y. TIMES (July 19, 2022), https://www.nytimes.com/2022/07/19/us/colleges-abortion-pill.html [https://perma.cc/2WEE-9PSZ] ("In California, a new law requires all of the state's public universities to provide medication abortion on campus by January; some campuses, like in Berkeley, have already begun to do so.").

185. *See generally* Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 859–60 (2000).

186. The term "foreign" in the context of conflicts of laws doctrine and scholarship can be infuriatingly vague and variable. Often courts and scholars use that term to describe any other sovereign. For example, from Kansas's perspective, Oklahoma is a foreign sovereign. However, here I use the term in its more colloquial sense to designate a different country.

within the United States clash with each other, but they can also clash with foreign governments. Conflicts with other countries could arise because people might travel to another country to obtain an abortion. For example, someone in Texas might find it easier to travel to Mexico to get an abortion than to travel within the United States to a pro-abortion state.[187] Similarly, someone in the United States could receive telemedicine services from a doctor in a foreign country or receive abortion medication from abroad.[188] Just as these items can cross internal boundaries, they can also cross international boundaries.

This raises the specter of two distinct variants of U.S.-foreign conflicts. The first is a conflict between state law and foreign law. Conflict of laws doctrine in the United States generally[189] treats such conflicts the same way it treats conflicts between the states.[190] The second variant is a conflict between federal law and foreign law. Strictly speaking, the current doctrine does not treat this as a conflict that a conflict methodology could resolve. Instead, and quirkily, courts deal with such situations under a special branch of statutory interpretation.

Congress "has the authority to enforce its laws beyond the territorial boundaries of the United States."[191] However, whether it did exercise that authority is a question of statutory construction.[192] Because of the risk of "international discord," courts are wary of applying U.S. laws broadly to foreign conduct.[193] To counter that risk, the courts apply

---

187. *See generally* Lisa M. Kelly, *Abortion Travel and the Limits of Choice*, 12 FIU L. REV. 27, 27 (2016) (discussing how pre-*Roe* "[w]omen with the resources to do so travelled to Mexico, and even as far away as Japan, Sweden, and the United Kingdom, to terminate pregnancies").

188. Spencer Kimball, *Women in States that Ban Abortion Will Still Be Able to Get Abortion Pills Online from Overseas*, CNBC (June 27, 2022, 11:56 AM), https://www.cnbc.com/2022/06/27/women-in-states-that-ban-abortion-will-still-be-able-to-get-abortion-pills-online-from-overseas.html [https://perma.cc/F66U-EJGQ] (noting that doctors in foreign countries providing abortion access via telemedicine to women in the United States face little legal risk from state laws).

189. The two most notable exceptions are in the context of enforcing judgments and fewer constitutional barriers for states to refuse application of foreign law.

190. *See supra* Section I.A. and accompanying text.

191. Equal Emp. Opportunity Comm'n v. Arabian Am. Oil. Co., 499 U.S. 244, 248 (1991).

192. *Id.*

193. McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20–22 (1963).

the presumption that Congress legislates only for domestic conduct.[194] This presumption against extraterritoriality can be overcome, but the "affirmative intention" of Congress to apply a law to extraterritorial conduct must be "clearly expressed."[195]

For example, imagine that a few elections down the road, an anti-abortion coalition is elected to Congress and passes a bill that would prohibit companies from "sending abortion medicine in the mail." A company in Canada sends abortion medicine to Michigan. In this scenario, the Canadian company does not violate the U.S. law because the statutory language does not evince a clearly expressed intention to apply to a company outside of the United States.

Of course, one could argue that the statute, though not applying extraterritorially, does still apply to the domestic part of the interaction. After all, while the company might have put the abortion medicine into the mail in Canada, it still travelled the final miles in the mail in Michigan.[196] Courts ask about the "'focus' of congressional concern"[197]—which part of the relationship, transaction, or occurrences was Congress focused on when they passed the law? This question turns on the precise language of a given act.[198] Often, legislation is stubbornly silent on these questions. Perhaps legislators typically do not consider conduct abroad. They might have views about such things and might include provisions in bills if they had thought about it, but often, seemingly, they just don't. Or perhaps many bills are silent on these questions because of the fragility of coalition building. Perhaps drafters fear that explicitly identifying whether a statute covers foreign conduct is not sufficiently important to potentially upset or delay legislative log-rolling. Whatever the reason, legislation is often silent on extraterritorial applications. For example, gun-safety legislation has been a long-standing feature of the culture wars. Federal gun legislation is hotly contested by both sides. One

194. *E.g.*, Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) (courts must presume Congress "is primarily concerned with domestic conditions").

195. *See, e.g.*, Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 147 (1957).

196. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266 (2010) (allowing the assertion "that that presumption [against extraterritoriality] is not self-evidently dispositive, but its application requires further analysis").

197. *Id.* ("The Court concluded . . . that the territorial event . . . was [not] the 'focus' of congressional concern . . . but rather [of] domestic employment.").

198. *See id.* at 267 (examining the "prologue of the Exchange Act" to determine Congressional intent).

might imagine that legislators draft such legislation with extreme care and include all possible use-scenarios, including application to foreign conduct. Yet they do not.[199]

Conceivably, future federal pro-abortion or anti-abortion legislation will be similarly silent. This would allow the presumption against extraterritoriality to be applied in a new context with a result that scrambles typical allegiances. Traditionally, more conservative judges have favored a beefy presumption against extraterritoriality, and liberal judges have sought to apply U.S. law more widely abroad.[200] Abortion legislation might test these impulses with little in the current doctrinal framework to guide them.

II. THE MISMATCH OF A PRIVATE LAW SOLUTION FOR A PUBLIC LAW DEBATE

The previous Part explained why conflict of laws is an inevitable component of the next phase of the culture wars, where different sovereigns will clash about the reach of their regulatory power. That is the core function of conflict of laws: to pick governing law when sovereigns clash. However, the law typically in question concerns private law disputes firmly anchored in the 1L curriculum (torts, contracts, property) and popular private law upper-level courses (wills & trusts, corporations). The heart and meat of conflict of laws doctrine concerns small-scale private law disputes, not the large public law clashes of the post-*Dobbs* era. Conflict of laws is not designed with post-*Dobbs* squabbles in mind.

A. Conflict Methodology Focused on Private Law Cases

A quasi-quantitative look at the dominant conflict of laws methodologies suggests where the drafters of each focused their attention. For most methodologies, the brunt of the provisions, examples, and illustrations concern quotidian disputes. Most

199. *See, e.g.*, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., No. 21-11269-FDS, 2022 WL 4597526, at *13 (D. Mass. Sept. 30, 2022) (examining the unresolved question whether the Protection of Lawful Commerce in Arms Act (PLCAA) bars suits brought under foreign law).

200. Ryan C. Black, Ryan J. Owens & Jennifer L. Brookhart, *We Are the World: The U.S. Supreme Court's Use of Foreign Sources of Law*, 46 B.J. POL. S. 891, 892 (2014); Noah Feldman, *When Judges Make Foreign Policy*, N.Y. TIMES (Sept. 25, 2008), https://www.nytimes.com/2008/09/28/magazine/28law-t.html [https://perma.cc/84ZP-TGW4].

methodologies do not contain explicit provisions for how to deal with super contentious political issues. Anyone looking for ageless wisdom on how to deal with dicey political questions contained in the dominant conflict of laws methodologies will come up empty. They do not provide specific rules, helpful suggestions, tactful procedures, or explicit guidance for courts tasked with resolving thorny political disputes in the era of the culture wars.

This tradition[201] goes back to Joseph Story, associate justice on the Supreme Court and writer of one of the first treatises on conflict of laws in the United States.[202] The first edition of the treatise was published in 1834 and has earned Story the title, among some, as the "father of conflict of laws."[203] The treatise has proven massively influential.[204]

---

201. Conflict of laws scholarship has a deeply ingrained tendency towards the chronological. *See generally* LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 11 (1991) ("There are few other fields of law in which the history of the subject exerts as much fascination as conflicts."). For U.S. authors, the story often begins with Story. For non-U.S. authors, one might go back to Bodin, Grotius, Pufendorf, Huber, or Supreme Court favorite Emer de Vattel. *See, e.g.*, Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1493 (2019) (calling Vattel "the founding era's foremost expert on the law of nations").

202. JOSEPH STORY, CONFLICT OF LAWS iii (2nd ed. 2001) ("There exists no treatise upon [this topic] in the English language."); *see also* Kurt H. Nadelmann, Comment, *Joseph Story's Contribution to American Conflicts Law: A Comment*, 5 AM. J. LEGAL HIST. 230, 243 (1961) ("Before Story's *Commentaries*, no textbook existed in the English language on conflict of laws."); William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1374 (1997) ("Conflicts law in this country developed from Justice Story's magisterial treatise on the subject.").

203. ERNEST G. LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS 193–94, 202 (1947) ("Story's *Commentaries* were without question the most remarkable and outstanding work on the conflict of laws which had appeared since the thirteenth century in any country and in any language . . . In the United States and England, Story is revered today as the father of the conflict of laws."); *see also* ALBERT A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS § 2, at 4 (1962) ("American conflicts law, as we know it today, goes back to Joseph Story. When he wrote his Commentaries . . . American courts had not yet fully recognized the need for, nor the existence of, such a law."); ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICT OF LAWS 2 (1992) (describing Story as "the prime architect of nineteenth-century American conflicts law"); Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 RECUEIL DES COURS 11, 24 (1989) ("Story's influence, both in the United States and abroad, can hardly be overestimated.").

204. *See* Nadelmann, *supra* note 202, at 243; Reynolds, *supra* note 202, at 1374.

Story's *Commentaries on Conflict of Laws* has much to say on the capacity of persons,[205] marriage,[206] incidents to marriage,[207] divorces,[208] contracts,[209] personal property,[210] wills and testaments,[211] and probate matters.[212] But the commentary is entirely silent on public law disputes.

It is not that public law conflict of laws disputes did not arise during Story's time. After all, perhaps the greatest and most consequential conflict of laws dispute in the nation's history was the antebellum question addressing to what extent enslaver states could extend their laws beyond state boundaries into abolitionist or at least less-enslaver jurisdictions.[213] Perhaps if no enslaved person had ever crossed a state boundary or no transaction implicating slavery had ever touched upon multiple states, the Civil War would have not occurred or taken a different shape. But, of course, boundary-crossing happened frequently, and courts were called upon to enforce or not enforce, for example, an insurance contract for the "value" of an enslaved person. Easy for courts in enslaver states, less so for courts in abolitionist states. You might imagine Story's conflict of laws treatise would have something to say about such important and consequential matters. But no. Nothing at all. His treatise concerns only the far less controversial private law disputes. He provides helpful and influential guidance to courts to resolve common contract, tort, and family law disputes. For everything else judges are on their own and must forge a path through the morass without a map. Perhaps Story thought slavery-related disputes were *sui generis*, perhaps he did not have good solutions to offer, or perhaps he thought a treatise on conflict of laws was not the right place to debate slavery. Whatever the reason might be, he set the tone for conflict of laws treatises, including, most relevantly, the proper scope of conflict of laws doctrine and scholarship. Others would follow in his footsteps.

---

205. *See* STORY, *supra* note 202, at 55–169.
206. *Id.* at 170–205.
207. *Id.* at 206–61.
208. *Id.* at 262–306.
209. *Id.* at 307–547.
210. *Id.* at 548–608.
211. *Id.* at 668–704.
212. *Id.*
213. *See* Brilmayer, *supra* note 17, at 873 n.1 ("Another important moral issue that raised questions of the conflict of laws was slavery.").

The First Restatement on Conflict of Laws builds on Story's account. It is the "foundational" summary of the dominant conflict of laws methodology prior to the 1950s and is influential to this day.[214] Like Story's *Commentaries*, it too is filled to the brim with advice of how to handle private law disputes, and it too has little to say about public law disputes. For example, the brunt of the First Restatement's sections are devoted to domicile,[215] jurisdiction,[216] marriage,[217] legitimacy and adoption,[218] custodianship,[219] corporations,[220] property,[221] contracting,[222] torts[223] and a smattering of other topics. Professor Beale, the reporter for the First Restatement and the person most closely associated with it, even thought it necessary to include an explicit provision for governing law when marriage occurs in a nomadic tribe.[224] Professor Beale is to be commended for considering less-common types of marriage. But the inclusion of such a rare issue highlights that the First Restatement focused on private law disputes, even of the obscure variety, and disregarded public law disputes, even of the common variety.

There are sections in the First Restatement that seem, at first sight, to provide at least some guidance for judges who confront public law disputes. For example, section 610 concerns "Action on Foreign Public Right."[225] The short section explains that "[n]o action can be maintained on a right created by the law of a foreign state as a method of furthering its own governmental interests."[226] However, as the illustrative examples make clear, this section is concerned only with actions brought by a foreign sovereign who is trying to collect a "license

214. *See, e.g.*, Symeonides, *supra* note 66, at 187–88.
215. RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 9–41 (AM. L. INST. 1934).
216. *Id.* §§ 42–118.
217. *Id.* §§ 121–36.
218. *Id.* §§ 137–43.
219. *Id.* §§ 144–51.
220. *Id.* §§ 152–207.
221. *Id.* §§ 208–310.
222. *Id.* §§ 311–76.
223. *Id.* §§ 377–411.
224. *Id.* § 128 ("If one or both of the parties to a marriage is a member of a tribe governed by tribal law, and the marriage takes place where the tribe is at the time located, and in accordance with the tribal law, the marriage is valid everywhere.").
225. *Id.* § 610.
226. *Id.*

fee" or "forfeiture" of assets in the courts of another sovereign.[227] Not much help here.

The Second Restatement does not do better on this score. Once again, we get detailed instructions and guidance concerning domicile,[228] judicial jurisdiction,[229] court procedure,[230] torts,[231] contracts,[232] property,[233] trusts,[234] status (including marriage, legitimacy, and adoption),[235] agency and partnerships,[236] corporations,[237] and estates.[238] But like Justice Story shied away from the topic of slavery, the Second Restatement shies away from the big public law topics of its day. There is no mention of civil rights, women's rights, disability rights, or environmental protection. Again, it is not for lack of space or time. The drafters of the Second Restatement thought it necessary to include a section instructing courts on how to deal with conflicts involving the "time for converting foreign currency into local currency."[239] Again, commendable, but it raises the question as to why bigger public law questions did not receive the same attention and care.

The Third Restatement currently exists only in draft form.[240] The latest publicly available draft of the Third Restatement suggests that

---

227. *Id.* § 610, at illus. 1–2.
228. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 11–23 (AM. L. INST. 1971).
229. *Id.* §§ 24–91.
230. *Id.* §§ 122–44.
231. *Id.* §§ 145–85.
232. *Id.* §§ 186–221.
233. *Id.* §§ 222–66.
234. *Id.* §§ 267–82.
235. *Id.* §§ 283–90.
236. *Id.* §§ 291–95.
237. *Id.* §§ 296–313.
238. *Id.* §§ 314–423.
239. *Id.* § 144 ("When in a suit for the recovery of money damages the cause of action is governed by the local law of another state, the forum will convert the currency in which recovery would have been granted in the other state into local currency as of the date of the award.").
240. *See generally* Symeon C. Symeonides, *supra* note 96, at 4 (discussing the improvements in the first draft of the Third Conflicts of Law Restatement); Lea Brilmayer & Daniel Listwa, *Continuity and Change in the* Draft Restatement (Third) of Conflict of Laws*: One Step Forward and Two Steps Back?*, 128 YALE L.J.F. 266, 267 (2018) (critiquing the draft of the Third Restatement as creating continuities and changes that are incompatible with prior versions); Roosevelt III & Jones, *supra* note 96, at 293–95 (replying to Brilmayer and Listwa's criticism by noting that the Restatement relies on settled case law, and it therefore provides more than simple persuasive guidance).

the topics covered will mirror those of the Second and First Restatement: torts, property, marriage, contracts, trusts, estates, family law, and business entities.[241] There is time for the drafters of the Third Restatement to abandon tradition and help future judges puzzle their way through the thorny interjurisdictional issues related to the culture wars. But so far, they have done nothing to suggest that such a course-change is in the offering. Perhaps the drafters are worried that such a move would be too controversial, that there would be no hope of widespread acceptance, or that doing so would not "restate" the law but craft it. I sympathize with these concerns, but it does not change the fact that judges will find little help in the upcoming Restatement when dealing with public law disputes.

Some conflict of laws methodologies also eschew any substance-specific guidance. For example, government interest analysis does not provide for specific guidance when it comes to torts, contracts, or any specific subject matter. Similarly, comparative impairment analysis provides one methodology across all subject matters.[242] It is no surprise then that public law conflicts are not explicitly discussed. Proponents of this consciously subject-matter-blind approach can point out the consistent, even-handed features of their preferred approach.[243] Similarly, proponents of the Second Restatement could argue that public law conflicts can be managed using the general conflicts principles[244] even without subject-matter specific guidance.

But public law conflicts highlight the limitations of such broad approaches. After all, politically charged conflicts that implicate contentious issues like abortion are not the same as a quotidian car crash tort. By not raising the issue, thinking through the countervailing considerations, and adapting a methodology to this specific domain, these methodologies are of little help to well-meaning judges who are,

---

241. *See generally* RESTATEMENT (THIRD) OF CONFLICT OF LAWS (AM. L. INST., Tentative Draft No. 3, 2021) (the latest publicly available as of this writing).

242. *See generally* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 8–9 (1963) (discussing conflict resolution through the application of the affected party's laws over the laws of others); Richard A. Posner, *Introduction to Baxter Symposium*, 51 STAN. L. REV. 1007, 1007 (1999) (using an economic analysis for the resolution of conflicts of laws).

243. *See* Baxter, *supra* note 242, at 8.

244. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. L. INST. 1971) (stating guiding principles governing conflicts of laws and the accommodation of local state laws).

after all, "not dumb, just busy."[245] Judges crave assistance and guidance. The dominant conflict methodologies offer neither. Perhaps that is partially why many consider the field a "disaster,"[246] a "dismal swamp filled with quaking quagmires,"[247] and an "unmitigated nuisances for the judge and practitioner."[248]

One small exception to this rule is the "better rule" approach, followed by a very small number of states.[249] Most closely identified with Professor Leflar, this methodology begins by trying to honestly acknowledge the factors that courts actually consider, independent of what courts say they consider.[250] The last consideration, concerning the "Better Rule" is the most notorious element of this approach, which actually consists of five "Choice-Influencing Considerations."[251] Leflar mentions such considerations as predictability, simplicity of the judicial task, and the advancement of the forum's governmental interest.[252] The last consideration is "[m]aintenance of [i]nterstate and [i]nternational [o]rder."[253] Here, Professor Leflar points out the dangers of strife whenever "persons and things" cross boundaries, and the importance of "a minimum of mutual interference with claims or aspirations to sovereignty" as "essential to the very existence of the

245. *See* William Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1398 (1997) (quoting Russell J. Weintraub, *An Approach to Choice of Law That Focuses on Consequences*, 56 ALB. L. REV. 701, 704 (1993)) ("Judges are not dumb, just busy, and it is not fair to criticize their opinions without being mindful of that reality.").

246. *Id.* at 1371 ("Choice of law today, both the theory and practice of it, is universally said to be a disaster.").

247. William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953) ("The realm of conflict of laws is a dismal swamp filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.").

248. James E. Westbrook, *A Survey and Evaluation of Competing Choice-of-Law Methodologies: The Case for Eclecticism*, 40 MO. L. REV. 407, 410 (1975) ("To be blunt about it, choice-of-law problems are and will continue to be unmitigated nuisances for the judge and practitioner.").

249. *See* Symeonides, *supra* note 66, at 215–16.

250. Leflar, *supra* note 92, at 1585 (explaining "basic choice-influencing considerations that actually *lead, or should lead,* the courts to one result or another in a particular cases or types of cases") (emphasis added).

251. Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 296 (1966) ("Superiority of one rule of law over another, in terms of socio-economic jurisprudential standards, is far from being the whole basis for choice of law, yet it is without question one of the relevant considerations.").

252. Leflar, *supra* note 92, at 1586–87.

253. *Id.* at 1586.

federation."[254] Professor Leflar seems to take the first steps towards acknowledging the need for a public law conflict of laws doctrine. However, his discussion stays in the realm of the general; he merely reminds judges to be mindful of strains on the federation.[255] Nowhere does he offer concrete steps of how to resolve conflicts that tug at the very fabric of the federation.

B. Conflict of Laws Values Overlook Diplomacy

Perhaps the previous Section took too narrow a view. Perhaps we cannot find a concern with public law disputes reflected in specific provisions and the specific guidance in the common conflict methodologies. But, perhaps, if we take a step back and look at the larger values behind conflict of laws doctrine, we will find a concern for public law disputes. However, the commonly mentioned normative ideals behind conflict of laws doctrine also do not evince a concern with politically sensitive topics.

For example, numerous scholars have pointed out the value of creating conflict of laws doctrine that is predictable.[256] As courts and commentators have argued over the years, it is important that people can anticipate what law will govern their affairs so that they can plan ahead, avoid liability, and structure their lives and businesses in an orderly manner.[257] Perhaps most fundamentally, predictable conflict of laws determinations avoid unfair surprise. People and businesses should be able to reasonably foresee what actions will lead to litigation

---

254. *Id.*

255. *Id.*

256. *See* Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L. J. 271, 286 (1996) ("The policy justifying this—variously termed party expectations, avoidance of unfair surprise, or foreseeability—is well accepted in conflicts theory."); Max Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4, 17–23 (1944) (positing that law must be chosen to protect the "legitimate expectations of the parties" as a policy "basic for the entire legal order"); Leflar, *supra* note 92, at 1586 (explaining the value of predictability).

257. *E.g.*, Elliott E. Cheatham & Willis M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 970–71 (1952) ("A person's expectations are likely to be disappointed to the extent that choice of law rules do not lead to uniformity, certainty, and predictability of result. But in a deeper sense, this policy is one of the basic reasons of why we have choice of law rules at all.").

and, when in litigation, how to find common settlement space.[258] However laudable, predictability does not necessarily enhance diplomacy. After all, a conflict of laws resolution might be entirely predictable and still wreak havoc on the well-being of the Republic. For example, a conflict of laws rule might instruct the court to always apply the law of the forum or always apply the law of the state that comes last in the alphabet. Those approaches would lead to perfectly predictable results. But, alas, at the cost of neighborly relations. Perhaps "open-ended and endless soul-searching" does not lead to predictable results, but it may enhance post-*Dobbs* decision making.[259]

The same is true for other conflict of laws values such as simplicity,[260] fairness, uniformity, built on common understandings, and speed.[261] All these values are delightful, and it is difficult to object to any of them. However, tradeoffs must be made,[262] and it is difficult to weigh tradeoffs if some values are altogether neglected. Diplomacy cannot be the sole consideration, but it must be one of them. All too often it has not been included at all.

---

258. *See* Russell J. Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability Cases*, 46 OHIO ST. L.J. 493, 496 (1985) ("There are certain desirable attributes of any legal system. The characteristics most pertinent to the present discussion are predictability of results, just results, and accessibility . . . . Predictability is necessary to plan transactions and, when disputes arise, to facilitate settlement. Predictability also reduces the cost and complexity of litigation.").

259. *Cf.* P. John Kozyris, *Postscript: Interest Analysis Facing Its Critics—and, Incidentally, What Should Be Done About Choice of Law for Products Liability?*, 46 OHIO ST. L.J. 569, 580 (1985) ("The need for clarity and certainty is the greatest in this [conflicts of law] preliminary stage [to the resolution of the substantive controversy], and any system calling for open-ended and endless soul-searching on a case-by-case basis carries a high burden of persuasion. With centuries of experience and doctrinal elaboration behind us, we hardly need more lab testing and narrow findings. Rather, we need to make up our minds and make some sense out of the chaos.").

260. *See generally* CAVERS, *supra* note 72, at 65 (summarizing the First Restatement Method goal of "simplicity" and the "policy considerations supporting these rules" as "certainty, ease of application, facilitation of transactions" and "uniformity"); Robert A. Sedler, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1628, 1629–30 (1981) (praising interest analysis for "*simplifying* the choice-of-law process by focusing on the policies reflected in a state's rules of substantive law"); Leflar, *supra* note 92, at 1585 (explaining the value of simplicity).

261. *See* sources cited *supra* note 260.

262. *See* Roger Michalski, *The Clash of Procedural Values*, 22 LEWIS & CLARK L. REV. 61, 62–63 (2018) (analyzing empirical data on the preferences of system actors for various procedural safeguards in the civil litigation context).

C. A Permissive Constitutional Framework

The Constitution is another place to look for suggestions on how to deal with public law disputes within conflict of laws confines. States are free to experiment with different conflict of laws methodologies, but they must do so within constitutional limitations.[263] Perhaps it is there that we will find a concern with thorny political disputes?

The leading case on this question is *Allstate Insurance v. Hague*.[264] To be constitutionally compliant, a state's conflict of laws methodology must pick the law of a state that "had a significant aggregation of contacts with the parties and the occurrence, creating state interests, such that application of its law was neither arbitrary nor fundamentally unfair."[265] But briefly, in crafting this test, the Supreme Court combined two strands of jurisprudence: one concerning contacts that create state interests,[266] and one concerning due process concerns.[267] Rather than doubling the strength, this combination weakens the test to near irrelevance. True, there are a few situations where a state is blocked from applying its own laws.[268] Domicile alone might not be sufficient.[269] But even minimal contacts or indications that the parties could have foreseen that a state's laws would control is usually enough.[270] The *Allstate* test is, in short, not a big roadblock to apply any given law in most realistic situations. And whatever roadblock there is, it does not amount to meaningful guidance about how to make the choice; it is just a minimal floor. But it leaves open the possibility that one state just barely meets the test (for example, in an abortion case), and another state has far more numerous contacts and far greater state

---

263. *See, e.g.*, Allstate Ins. v. Hague, 449 U.S. 302, 307 (1981) ("It is not for this Court to say whether the choice-of-law analysis suggested by Professor Leflar is to be preferred or whether we would make the same choice-of-law decision if sitting as the Minnesota Supreme Court. Our sole function is to determine whether the Minnesota Supreme Court's choice of its own substantive law in this case exceeded federal constitutional limitations.").

264. 449 U.S. 302 (1981).

265. *Id.* at 320.

266. *See, e.g.*, Pac. Emps. Ins. v. Indus. Accident Comm'n, 306 U.S. 493, 502 (1939); Watson v. Emps. Liab. Assurance Corp., 348 U.S. 66, 72 (1954).

267. Clay v. Sun Ins. Off., 377 U.S. 179, 183 (1964).

268. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 823 (1985) (holding that Kansas could not apply Kansas law to oil leases that had no connection to Kansas).

269. *See, e.g.*, Home Ins. v. Dick, 281 U.S. 397, 408 (1930).

270. *Allstate*, 449 U.S. at 312–13.

interests, outweighing due process concerns, and the Allstate test *still* allows for application of the first state's laws.

Allstate also does not take political considerations into account. Its main work is to prevent applications of the laws of a state with little to no connection to a controversy.[271] In the abortion context, that is little help. Recall the situation of a woman traveling from an anti-abortion state to a pro-abortion state to obtain an abortion.[272] Clearly both states meet the *Allstate* requirements.

The anti-abortion state had sufficient contacts to the parties because the woman was domiciled there, and part of the pregnancy occurred there. It would be difficult to maintain that application of the anti-abortion state's laws would be "arbitrary" or "fundamentally unfair" in the *Allstate* sense.[273] That is where the pregnancy took place! However, the pro-abortion state's laws also fit. After all, the woman did travel in that state and did obtain the abortion in that state. The aggregation of those key contacts creates plenty of state interests for the pro-abortion state. Again, it would be silly to maintain that application of the pro-abortion state's laws would be "arbitrary" or "fundamentally unfair" in the *Allstate* sense.[274] That is where the abortion took place!

Allstate provides no meaningful guidance in this situation. It merely confirms that both states' laws may be applied to the controversy at hand. *Allstate*, like the attendant horizontal conflict of laws methodologies, simply has a massive blind-spot regarding public law disputes.[275]

D. Where is a Fetus Domiciled?

An example illustrates this point further. In some states, legislators are pushing forward with the legal recognition of personhood of

---

271. *See id.*

272. *See supra* Section I.B.

273. *Allstate*, 449 U.S. at 312–13.

274. *Id.*

275. Similarly, most conflict of laws Supreme Court cases concern quotidian disputes. For example, in *Allstate* it was a car crash. *Id.* at 305; *see also* Bibb v. Navajo Freight Lines, 359 U.S. 520, 523 (1959) (truck "mud flaps" regulation); South Carolina State, Highway Dept. v. Barnwell Bros., 303 U.S. 177, 180 (1938) (truck width and weight regulations); Southern Pac. Co. v. Arizona *ex rel* Sullivan, 325 U.S. 761, 763 (1945) (railroad regulations).

fetuses.[276] Litigation has already commenced on this issue.[277] Assume that legislators in at least one state succeed.[278] Many have recognized

---

276. *E.g.*, H.R. 481, 155th Gen. Assemb., Reg. Sess. (Ga. 2019) (enacted May 7, 2019) ("It shall be the policy of the State of Georgia to recognize unborn children as natural persons."). *See generally A Push to Recognise the Rights of the Unborn is Growing in America*, ECONOMIST (July 7, 2022), https://www.economist.com/united-states/2022/07/07/a-push-to-recognise-the-rights-of-the-unborn-is-growing-in-america [https://perma.cc/8ZEE-PLMY] ("[T]he push for legal recognition of the 'personhood' of fetuses is set to grow . . . . Before *Roe* was overturned dozens of states introduced bills that banned abortion by establishing fetal personhood."); Jeannie Suk Gersen, *How Fetal Personhood Emerged as the Next Stage of the Abortion Wars*, NEW YORKER (June 5, 2019), https://www.newyorker.com/news/our-columnists/how-fetal-personhood-emerged-as-the-next-stage-of-the-abortion-wars [https://perma.cc/U2MQ-BSC6] ("If the right to be free of discrimination on the basis of race, sex, or disability can be made relevant to a fetus, then fetuses are figured as entities with anti-discrimination rights—like people. This move imbues the fetus with rights that the pregnant person—and, by extension, the abortion provider—might violate. What is really at stake is an idea of fetal personhood."); Madeleine Carlisle, *Fetal Personhood Laws Are a New Frontier in the Battle over Reproductive Rights*, TIME (June 28, 2022, 4:40 PM), https://time.com/6191886/fetal-personhood-laws-roe-abortion [https://perma.cc/WE9Y-6DWF] ("[A]t least six states have also introduced legislation to ban abortion by establishing fetal personhood. . . ."); Kate Zernike, *Is a Fetus a Person? An Anti-Abortion Strategy Says Yes*, N.Y. TIMES (Aug. 21, 2022), https://www.nytimes.com/2022/08/21/us/abortion-anti-fetus-person.html [https://perma.cc/XJ5R-CPQJ] ("Even as roughly half the states have moved to enact near-total bans on abortion since the Supreme Court overturned Roe v. Wade in June, anti-abortion activists are pushing for a long-held and more absolute goal: laws that grant fetuses the same legal rights and protections as any person.").

277. *See, e.g.*, ARIZ. REV. STAT. ANN. § 1-219 (2021) ("The laws of this state shall be interpreted and construed to acknowledge, on behalf of an unborn child at every stage of development, all rights, privileges and immunities available to other persons, citizens and residents of this state, subject only to the Constitution of the United States and decisional interpretations thereof by the United States Supreme Court."); *Judge Blocks Arizona Law Recognizing 'Personhood' at Fertilization*, REUTERS (July 12, 2022, 12:18 PM), https://www.reuters.com/world/us/judge-blocks-arizona-law-recognizing-personhood-fertilization-2022-07-12 [https://perma.cc/5D82-J3TD]. *See generally* U.S. CONST. amend. XIV, § 1 ("All persons *born* or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.") (emphasis added).

278. Of course, there is also the possibility, though remote perhaps, that the Supreme Court imposes personhood for fetuses nationwide. *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2269 (2022) (discussing "personhood" in relation to fetuses at length).

the substantive law implications of such a move.[279] But how would conflict of laws doctrine deal with this issue?

This question is important because every methodology currently used in the United States makes something of the fact that somebody is or is not domiciled in the forum state.[280] That is why, for example, the Restatements hammer away at great detail on the question of who is domiciled where, and that is also why it is so important to conflict of laws doctrine that each person has one and only one domicile at any given point in time.[281] If a fetus has legal personhood, then it can be domiciled in a state. And that state then has interests that implicate conflict of laws methodologies and *Allstate*. But, of course, people can change their domicile.[282] Children too.[283] What must an expecting mother do to change the domicile of the fetus that she carries? Are we

---

279. For example, for criminal law purposes, census counts, taxation, and even traffic law. *See, e.g.*, Luke Vander Ploeg, *Can You Drive Alone in the H.O.V. Lane if You're Pregnant? A Post-*Roe *Quandary*, N.Y. TIMES (July 12, 2022), https://www.nytimes.com/2022/07/12/us/pregnant-woman-hov-lane-roe-wade.html [https://perma.cc/J683-JWTB]; *see also* Carliss N. Chatman, *If a Fetus Is a Person, It Should Get Child Support, Due Process and Citizenship*, 76 WASH. & LEE L. REV. ONLINE 91, 95–96 (2020); Ava Sasani, *Georgia Abortion Law Says a Fetus Is Tax Deductible*, N.Y. TIMES (Aug. 4, 2022), https://www.nytimes.com/2022/08/04/us/georgia-abortion-law-fetus-tax-dependent.html [https://perma.cc/7EQG-Y53M] ("Georgia's abortion ban counts a fetus as a person. And now, so does its tax code. . . . The state's Department of Revenue announced this week that 'any unborn child with a detectable human heartbeat' can be claimed as dependent, providing a $3,000 tax exemption for each pregnancy within a household, months before the child is born.").

280. For example, domicile is often used to anchor state interests in government interest analysis and derivative methodologies.

281. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 11 (AM. L. INST. 1934) ("One and only one domicil[e]"); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11(2) (AM. L. INST. 1971) ("Every person has a domicil[e] at all times and, at least for the same purpose, no person has more than one domicil[e] at a time."); RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 2.03(3) (AM. L. INST., Tentative Draft No. 2, 2021) ("A natural person has only one domicile at a time for the purpose of deciding a particular conflict-of-laws issue.").

282. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 15; RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 2.06 (Tentative Draft No. 2, 2021).

283. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 22 ("A minor has the same domicil[e] as the parent with whom he lives . . . Special rules are applied to determine the domicil[e] of a minor who does not live with a parent" and providing additional rules for illegitimate children, children of separated parents, abandoned children, emancipated children, adopted children, and children who have a legal guardian); RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 2.05 (Tentative Draft No. 2, 2021).

really willing to apply different law to a case based on whether this woman was sufficiently legally sophisticated to understand what hoops to jump through to acquire a new domicile for her fetus? What if she was not legally sophisticated, or otherwise occupied, or mistaken in her understanding of this obscure corner of legal trivia? What kind of inequities, such as between educated/rich women and those that are not, are we willing to tolerate as a result?

These are weighty questions—massively complex and consequential. And yet conflict of laws doctrine has nothing to say on this question.[284] Despite hundreds of pages on the nature of domicile,[285] the acquisition of domicile,[286] the change of domicile,[287] and the operation of law on domicile,[288] none of these methodologies help us think through the issue of domicile for fetuses. That observation is not meant as blame. The currently active methodologies just were not built for this question. They originate in a different era where legal personhood for fetuses was unthinkable or unlikely. But times have changed. Some think for the better, some for the worse. Either way, conflict of laws doctrine has not caught up.

E. Erie *as Well*

Much of the previous analysis in this Part focused on the horizontal conflict of laws. What about the vertical variety? Is this part of the doctrine a bit more attuned to high-stakes political strife in the era of culture wars? At first sight, there is reason for hope. After all, the *Erie* doctrine exists to mediate conflicts between the federal government

---

284. There are many more questions implicated by this theme and, similarly, there are no answers. For example, would a fetus in such a state have access to federal courts? *See generally* FED. R. CIV. PRO. 17(b)(3), (c). What citizenship would the fetus hold for diversity jurisdiction purposes? Could it be a citizenship different than the citizenship of the mother?

285. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 9; RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 11–12; RESTATEMENT (THIRD) OF CONFLICT OF LAWS (Tentative Draft No. 2, 2021) §§ 2.01–2.03.

286. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 14; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 14; RESTATEMENT (THIRD) OF CONFLICT OF LAWS (Tentative Draft No. 2, 2021) § 2.04.

287. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 15–20; RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 15–18; RESTATEMENT (THIRD) OF CONFLICT OF LAWS (Tentative Draft No. 2, 2021) § 2.06.

288. RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 26–41; RESTATEMENT (THIRD) OF CONFLICT OF LAWS (Tentative Draft No.2, 2021) § 2.07.

and the states.[289] It was carefully crafted and developed over many years and many Supreme Court opinions to strike a balance between the concerns of the states and the concerns of the federal government.[290] One might hope that this balance can bear the weight of post-*Dobbs* conflicts as well.

That hope is misplaced. *Erie* treats all vertical conflicts alike, whether the underlying suit concerns a dull contract dispute or abortion, or whether the issue is laches,[291] service of process,[292] or jury selection.[293] Nowhere does the doctrine allow the court to take cognizance of the fact that not all disputes are created equal. A suit about abortion access/restriction is more likely to inflame public passions and acrimony between the tiers of government than a car crash. But nothing in the doctrine recognizes such differences. Like horizontal conflict doctrine, vertical conflict doctrine in the form of *Erie* handles disputes with a public law component only accidentally, by reusing bits and pieces of a doctrine designed to handle very different kinds of cases.

Imagine a purposefully extreme example designed to highlight this point: an anti-abortion state passes an S.B.8-inspired statute that creates a private right of action against women traveling outside of the state to obtain an abortion. The statute includes a provision that jurors shall hold a picture of the aborted fetus in their hands during deliberation. The federal practice and local rules do not allow such pictures during deliberation. A federal court is tasked to apply "state substantive law and federal procedural law." Is the pictorial provision substantive or procedural for *Erie* purposes?

Courts would begin by examining whether there is a federal statute or rule that is constitutional, validly enacted, and directly on point.[294] Assume that none can be found. Next, courts examine the policy considerations behind *Erie*, including, most notably, incentives to

---

289. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 71, 73–74, 76–78 (1938) (analyzing how state and federal law are to coexist on a case-by-case basis, thus creating the *Erie* Doctrine).

290. *Id.*; *see infra* notes 291–293 (noting three Supreme Court cases analyzing the *Erie* Doctrine).

291. Guaranty Trust Co. v. York, 326 U.S. 99, 119 (1945).

292. Hanna v. Plumer, 380 U.S. 460, 461 (1965).

293. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 528 (1958).

294. *Erie*, 304 U.S. at 78.

forum shop and the inequitable administration of justice.[295] Given the absurd severity of the pictorial intervention, litigants would have significant incentives to forum shop if the pictures were allowed in state court but not federal court. Similarly, inequitable administration of justice concerns would abound if one woman would get one result in state court and another woman, solely because of the "accident of diversity," would get another result in federal court even though they did exactly the same thing. As such, both prongs suggest application of the state pictorial provision in federal court. The last step of the analysis would be for a federal court to consider whether there are "counter-vailing federal interests" that mandate application of the federal practice after all.[296] At first sight, this prong of the analysis seems to be mindful of broader forces that can be at play in some cases. Perhaps that is where federal courts can take larger public law considerations into account that typically don't show up during the more common private law disputes. However, little in the doctrine suggests that this is the case. Typically, "counter-vailing federal interests" concern court administration, not public law disputes.[297] For example, the Supreme Court found a counter-vailing federal interest where "state law did not accord claim-preclusive effect to dismissals for willful violation of discovery orders."[298] Hardly the stuff of public law litigation glory. Few movies will be made about such a case.

Vertical conflict of laws doctrine, like its horizontal sibling, has little to say about the pressing issues of post-*Dobbs* interjurisdictional conflict. Both are focused on different disputes, designed with different concerns in mind, built for another era. One that has passed.

III. A GUIDE TO TREACHEROUS TERRAIN

Part I argued that conflict of laws was unavoidable; Part II that conflict of laws doctrine was built for a different era and not up to the task. That mismatch leaves the question of how conflict of laws doctrine could be adapted to the current era. What pathways does it offer to judges and legislators concerned with navigating through the treacherous post-*Dobbs* terrain? This Part provides a map. It offers four different paths: confrontation, deflection, obfuscation, and

295. *Id.* at 76.
296. Gasperini v. Ctr. for Humans., Inc., 518 U.S. 415, 432 (1996).
297. *Id.*
298. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 509 (2001).

facilitation. Each path has its own rewards, costs, and limitations. Which path to choose depends on one's normative commitments and general theory of democracy.

A. Confront

One theory of democracy holds that the people "know what they want, and deserve to get it good and hard."[299] Under this theory, it is not the role of courts to cushion the blow, tweak the course, or second-guess elections. Alas, in a democracy, people might make horrible mistakes, vote for awful politicians, fail to display a basic understanding of civics and history, carelessly leave government unsupervised, and fail to show up for the simple act of voting. One can make excuses about the failure of public education, underfunded election offices,[300] long voting lines, or busy lives that leave little time to pick up a local newspaper. But, somehow, there is money for more fun projects, and there seems to be plenty of time not to vote but to complain about the results of voting. For many, another round of TikTok dance challenges is more worthy of attention than local government. If that is how people want to spend their time, money, and attention, then let them live with the consequences.

Under this theory of democracy, people can only be goaded into eventually paying attention, participating in politics, and caring about the dull intricacies of competing policy-proposals if they truly feel the results when things go awry.[301] Accountability runs in both directions in a democracy. The government must be accountable to the people, and the people must be responsible for the government that they choose. This includes both the beneficial and misguided policies of their government.

---

299. H.L. MENCKEN, A LITTLE BOOK IN C MAJOR 19 (1981).

300. *See generally* Roger Michalski & Joshua Sellers, *Democracy on a Shoestring*, 74 VAND. L. REV. 1079 (2021).

301. *See supra* notes 12–13 and accompanying text (discussing states that add abortion issues to ballot measures). For example, *Dobbs* encouraged ballots on various constitutional amendments (pro and con) in multiple states. *See, e.g.*, Laura Kusisto, Joe Barrett & Jenniffer Calfas, *Kansas Abortion Amendment is Closely Watched Ahead of Other State Referendums*, WALL ST. J. (July 23, 2022, 8:24 AM), https://www.wsj.com/articles/kansas-abortion-amendment-is-closely-watched-ahead-of-other-state-referendums-11658579068 [https://perma.cc/G5TH-KR2S] ("This year alone, some half-dozen states, including Michigan, California and Kentucky, all are likely to have measures on the ballot in November that propose either to weaken or enhance protections for abortion.").

Don't like the recent direction of abortion policy in the country? Time to vote and get organized. Worried about interjurisdictional strife between your anti-abortion state and the pro-abortion state next door? That is what your votes brought about. A different President, different Supreme Court nominees, and a different Senate, and we would have a different abortion landscape. Under this theory of democracy, all that is good and bad ultimately belongs to the people.[302]

The role of courts, then, is to face the people's choices head-on. This is as true for substantive questions as it is for arguably-procedural conflict of laws questions. If states differ on abortion policy and their laws clash, then the court's role is to confront that clash, throw it into relief, and make it clear and visible for the people whose votes led to this result.

For example, the First Restatement methodology provides numerous "escape devices" to escape the harsh application of its territorial approach. Among these escape devices is a "public policy" exception.[303] It provides that "[n]o action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum."[304] This can be read as an invitation to explain not only why a court will not apply the law of a sister state, but why that foreign law is awful. Courts here have occasion to elaborate why application of the law of a sister state "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[305] It is easy to imagine a pro-abortion judge in a pro-abortion state waxing on about the backwardness of an anti-abortion statute from a sister state. Conversely, anti-abortion judges in anti-

---

302. *See generally The Kansas Abortion Message*, WALL. ST. J. (Aug. 3, 2022, 2:54 PM), https://www.wsj.com/articles/the-kansas-abortion-message-referendum-constitution-supreme-court-11659536655 [https://perma.cc/A6RJ-W5T8] ("Democracy is working its will on the issue, as the Supreme Court said.").

303. RESTATEMENT (FIRST) OF THE CONFLICT OF LAWS § 612 (AM. L. INST. 1934). Other approaches also inquire, at times, into policy considerations. For example, when it comes to the enforceability of contractual choice-of-law clauses, numerous jurisdictions inquire whether "application of the law of the chosen state would be contrary to a *fundamental policy* of a state which has a materially greater interest than the chosen state . . . ." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (AM. L. INST. 1971) § (emphasis added).

304. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 612.

305. Loucks v. Standard Oil Co., 120 N.E. 198, 202 (N.Y. 1918).

abortion states might relish the opportunity to point out the moral depravity of pro-abortion sister states. Confrontation indeed.

Similarly, the Second Restatement asks courts to ponder which state has the "most significant relationship" to the parties and occurrence.[306] What element shows the most significant relationship when a state prohibits traveling to another state to obtain an abortion? Is it where a woman lives, works, conceived, traveled, or had the abortion? A confrontational court in an anti-abortion state could insist that what matters is where the woman is domiciled, perhaps even where the fetus is domiciled, and that the law of the state where the abortion took place is irrelevant. Conversely, a confrontational court in a pro-abortion state could insist that it is not the business of the domicile state to regulate abortions beyond its territory, domicile or not. Conflict of laws doctrine can be used to aggressively confront such differences in opinions, sharpen conflict, and opine antagonistically on the status and choices of sister states.

Even more explicit, Leflar's "Better Rule" methodology encourages judges to explain why one law, likely the one of the forum, is "demonstrably superior . . . [b]oth from the point of view of civil justice and economic efficiency,"[307] while the other is a "drag on the coattails of civilization."[308] In the context of abortion, it is not difficult to imagine how judges could use this invitation to highlight the differences between the states and confront them head-on.

But judges are not the sole actors who might use the tools of conflict of laws. Legislators, similarly, could rely on a confrontational view of democratic accountability and pass laws that intensify and, one hopes, clarify conflict. Didn't the pro-abortion electorate of New York elect their representatives to do just that? And didn't the anti-abortion

---

306. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 ("The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties . . . ."); *Id.* § 188 ("The rights and liabilities of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties . . . .").

307. McDaniel v. Ritter, 556 So. 2d 303, 316–17 (Miss. 1989); *see also* Milkovich v. Saari, 203 N.W.2d 408, 413 (Minn. 1973); Mitchell v. Craft, 211 So. 2d 509, 514 (Miss. 1968); Clark v. Clark, 222 A.2d 205, 207 (N.H. 1966); Conklin v. Horner, 157 N.W.2d 579, 590 (Wis. 1968) (Hallows, C.J., dissenting).

308. Cheatham & Reese, *supra* note 257, at 980 (discussing law that is a "drag on the coat tails of civilization").

electorate of Florida make it equally clear what it expects from its representatives? Such new post-*Dobbs* legislation could clearly state the territorial reach of its measures.[309] Why leave it to dusty conflict of laws doctrines to ascertain whether a travel ban applies to a woman who travels from here by plane to there? Just put it in the statute. *Allstate* made it clear that the constitution does not require application of the law with the most contacts to a dispute or the parties.[310] A significant aggregation of contacts is sufficient.[311] Why not then extend the reach of a state's laws as far as it can go, reach beyond the narrow confines of a state's territory, and exert as much force for good out there in the world? Likely, such a maximalist approach will upset the people of the state where the abortion is legal. But they would do the same anyway. Conflict of laws in this context does not plaster over differences but makes them explicit. This invites the electorate to notice the implications, both good and bad, of their choices. If tumultuous intergovernmental relations are to your liking, keep going. If not, then consider canvassing in other states or advocating for a unitary federal statutory or constitutional solution. Democracy ahoy.

B. Deflect

In some ways the opposite of confrontation is deflection. Perhaps the task of courts in post-*Dobbs* interjurisdictional disputes is to calm tempers, smooth the bumps on the road, add grease to the wheels of federalism, and soften the edges of confrontational laws. Instead of throwing conflict into relief through aggressive conflict of laws interpretations and statutes, perhaps democracy would be aided more by deflecting conflict. Under this theory of democracy, tempers can rise at any given moment, nasty arguments might break friendships, and disagreements tug at the bonds of federalism. The role of courts is to stay above the temporarily over-excited fray, take a broader perspective over a longer time-horizon, and cushion extreme sentiments and measures. Courts are well-suited to smooth the erratic highs and lows of political discourse and help us find sustainable middle ground.

---

309. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (AM. L. INST. 1971) ("A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.").

310. *See supra* notes 250–261 and accompanying text.

311. *See supra* note 265 and accompanying text.

One of the tools courts have available for that task is conflict of laws. For example, government interest analysis is built on the idea of evaluating different configurations of interests.[312] Courts are asked to determine whether more than one state is interested in the lawsuit.[313] Crucially, the task is not to evaluate which state is more or less interested. Instead, courts must determine whether a state is interested at all. If no state is interested, then forum law will apply.[314] If only one state is interested, that state's laws will apply. If both states are interested, forum law, again, will apply (a so called "true conflict").[315] This might sound like an invitation to heighten confrontation by simply having a court declare that the forum is interested and defaulting to forum law. But embedded in government interest analysis is a way to deflect away from such a clash. Courts willing to go the extra mile can examine whether a "true conflict" can be turned into an "apparent conflict."[316] Perhaps a more restrained approach will avoid a direct conflict. Perhaps there is a way to reexamine the interests of the involved governments and find a more moderate interpretation of the policies of one state that avoids a direct clash.[317] For example, in a case involving a surrogacy abortion clause, a court might initially find that both the state of the surrogate (to protect the health of the domiciled surrogate) and the state of the eventual family (to protect the egg donor and/or sperm donor) are interested. But perhaps it was not clear initially where the surrogate would be domiciled or, perhaps, she established a new and unexpected domicile during the surrogacy. In light of conflict of laws' aim "to protect the reasonable expectations of the parties,"[318] a court might find that this is enough to find that the

312. *See supra* text accompanying notes 81–83 for discussion of government interest analysis.

313. *Supra* note 83 and accompanying text.

314. *Supra* note 83 and accompanying text.

315. *See generally* James R. Ratner, *Using Currie's Interest Analysis to Resolve Conflicts Between State Regulation and the Sherman Act*, 30 WM. & MARY L. REV. 710, 732 (1989) ("defining a true conflict").

316. *See id.* (defining an "actual conflict").

317. *See, e.g.*, Bernkrant v. Fowler, 360 P.2d 906, 910 (Cal. 1961).

318. *See id.* at 910 ("Since there is thus no conflict between the law of California and the law of Nevada, we can give effect to the common policy of both states to enforce lawful contracts and sustain Nevada's interest in protecting its residents and their reasonable expectations growing out of a transaction substantially related to that state without subordinating any legitimate interest of this state.").

surrogate's state of domicile is not interested in the dispute after all, that this is an apparent conflict, not a true conflict.

Similarly, the public policy exception discussed above can be applied in a confrontational or deflecting manner. The exception only applies to laws that are contrary "to the *strong* public policy of the forum."[319] This leaves room for courts to find that a sister state's abortion-related policy, while contrary to forum policy, is not abhorrent.

Similarly, the Second Restatement's analysis concerning the enforceability of choice-of-law clauses in contracts relies, in part, on an evaluation of what is "contrary to . . . fundamental policy."[320] Courts can confrontationally insist that a sister state's policy is not just different but fundamentally so. Or they can deflect and uphold the choice-of-law clause as contrary to the policy of the forum but not contrary to the *fundamental* policy of the forum.

Additional room for deflection is provided in the general prohibition against applying a foreign sovereign's penal law.[321] Purely criminal statutes clearly qualify for the prohibition.[322] But what about civil laws that have a penal aura, say a civil statute that allows for punitive damages? Scholars and judges have long disagreed.[323] Such ambiguity is helpful in this context. It creates room for judges to deflect a direct conflict and blunt the edges of otherwise harsh blows.

C. Obfuscate

An effective way to bring any conversation to a dull halt is to mention the *Erie* doctrine. Eyes gloss over, awkward sips from empty drinks, furtive glances at watches. Similarly, this also occurs with the intricacies and arcane terminology of conflict of laws. Most people simply cannot find it in themselves to care about the difference between "remission of renvoi" and "transmission of renvoi." How many non-lawyers

---

319. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 612 (AM. L. INST. 1934) (emphasis added).

320. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. L. INST. 1971).

321. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 610–11 ("No action can be maintained to recover a penalty the right to which is given by the law of another state.").

322. *See, e.g.*, The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825) ("The courts of no country execute the penal laws of another.").

323. *See generally* Robert A. Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193, 194 (1932); Peter B. Kutner, *Judicial Identification of "Penal Laws" in the Conflict of Laws*, 31 OKLA. L. REV. 590, 590–92 (1978).

appreciate a deep dive into characterization of conflict of laws disputes? Where is the cable television personality that can turn the substance/procedure distinction into prime-time entertainment? How many politicians have successfully campaigned on a platform to treat foreign law not as law but as *fact* for proof of foreign law purposes?[324] Similarly, "dépaçage" strikes most as simply another pretentious French term. Only a soupçon of people have the savoir-faire to appreciate it as the crème de la crème of sophistication, really an objet d'art; they simply don't understand the raison d'être behind it. It is not de rigueur and, instead of frisson, it inspires froideur. Voilà, glossy eyes.

It is easy to bemoan how technical and abstract conflict of laws scholarship and doctrine can be. But what if we imagine the arcane features of conflict of laws as its most important tool? Perhaps conflict of laws is ideally suited to obfuscate real, substantive conflict behind endless layers of impenetrable lingo and logic puzzles. It is difficult to get upset by something you cannot begin to understand. People are busy, their lives filled with important questions and tasks. Conflict of laws terminology is not one of them. Perhaps people in an anti-abortion state would get upset by a court in a pro-abortion sister state refusing to apply the local anti-abortion travel ban. If only they understood that the court was doing that! The beauty of this approach is that it does not matter very much how a court rules—for the application of this law or that law—as long as the reasoning obscures what the court is doing and why it is doing it.

The theory of democracy undergirding this approach is based on grim realism. Democracy is messy, imperfect, and unresolvable. It is the worst form of government, except for all the others. If we make all disputes clear, crisp, and public, the Republic will tear itself apart. Our differences are beyond deliberation, negotiation, and accommodation. Sometimes more talking does not lead to resolution

---

324. *See* FED. R. CIV. P. 44.1 ("Determining Foreign Law[:] . . . In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law."); *see also* Roger Michalski, *Pleading and Proving Foreign Law in the Age of Plausibility Pleading*, 59 BUFF. L. REV. 1207 (2011).

but more and more bitterness.[325] Better to let sleeping dogs lie. Wake them and they will bark and bite. The role of courts, then, is to be a sedative. Having taught conflicts of laws many times, I can attest that it has tranquilizing powers beyond anything in the pharmaceutical toolchest. The Republic is saved, not by frank and bitter discussions, but by a collective nap every time another court issues an impenetrably dense, vexingly arcane-sounding, utterly dull conflict of laws decision.

D. Facilitate

Beyond confrontation, deflection, and obfuscation lies a fourth possibility: facilitation. This one is the most fragile, the most unlikely, the most difficult, yet the most important possibility. It relies on a theory of democracy built on humility and mutual respect, even and, in particular, when we disagree about important and fundamental issues. In this account of democracy, the role of judges and legislators in different states is to recognize each other as moral equals and offer reasonable and restrained positions that invite dialogue. No side should refrain from advocating for its views. But the manner and boundaries of this advocacy are important and defined, in part, by conflict of laws.

For example, just as legislators are authorized to draft pro-abortion or anti-abortion laws with impacts far beyond that state's borders, they can also adhere to self-imposed limitations. An anti-abortion state does not have to impose liability on women who travel to other states to obtain an abortion; they can focus on abortions within the boundaries of their state only. Similarly, a state can craft reasonable exceptions for tribal space and voluntarily avoid a direct clash with tribal governments. Conversely, a pro-abortion state can voluntarily restrict immunity shields for doctors who proscribe abortion medication to their own territory. Such steps would accept that federalism entails a gentle give and take. It would recognize the value of self-imposed limitations that step back from the full force of what the Constitution and conflict of laws doctrine allow.

Culture warriors might ask why anyone would want to do that. Why self-limit when the other side is abhorrent and won't do the same? The

---

325. *See generally* Lynn M. Sanders, *Against Deliberation*, 25 POL. THEORY 347, 348 (1997) (analyzing why deliberation is not always productive, and arguing for why deliberation in certain circumstances "should not necessarily and automatically appeal to democratic theorists").

answer begins with a commitment to humility. Everyone can be wrong. And other people have much to teach us. In the language of political philosophy, the other side possesses equality in "epistemological authority."[326] It might be difficult to recognize or remember in the heat of the argument, but there are arguments across the spectrum that are worthy of attention, time, and acknowledgement. It is not a weakness to recognize the other side as an interlocutor worthy of care. Speaking with such care across differences might help to loosen the trench-warfare mentality that many of us have, where each side fears that any suggestion of compromise would just be interpreted by the other side as weakness and invite ever more extreme measures.

Courts confronting conflict of laws cases can also help. For example, the Second Restatement combines territorial elements and government interest analysis elements.[327] Within the adaptable approach of the Second Restatement, courts have room to stress some elements more than others.[328] This gives them the flexibility to acknowledge the importance of, say, a state trying to look out for its domiciliaries while also acknowledging that those domiciliaries might travel to other states to obtain an abortion. Every conflict of laws case is an opportunity, not to offend, but to acknowledge shared concerns, difficult choices, and different regulatory schemes adopted by well-meaning people with whom we don't always agree. Similarly, government interest analysis provides an opportunity to point out how multiple governments might be interested in an occurrence.[329]

The key to successful facilitation is not only a difference in tone but a difference, occasionally, in outcome. Culture warriors expect that courts in anti-abortion states will apply anti-abortion laws no matter what, and courts in pro-abortion states must always apply pro-abortion laws. Disrupting this expectation, when appropriate, facilitates conversation. Sometimes an anti-abortion position might win in a pro-abortion state, and a pro-abortion position may sometimes carry the day in an anti-abortion state. Legislators, other courts, and the public need to be able to observe a give and take, courts acknowledging the

---

326. Sheelagh McGuinness & Michael Thomson, *Conscience, Abortion and Jurisdiction*, 40 OXFORD J. LEGAL STUD. 819, 828 (defining "epistemological authority").

327. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. L. INST. 1971).

328. *Id.* § 6(2).

329. *See supra* notes 79–81 and accompanying text (discussing how conflict resolution began with a government interest analysis, and how different responses from states were treated).

important concerns and positions of disagreeing neighbors, and the difficult joy of compromising.

CONCLUSION

The culture wars will be with us for some time to come. Likely, they will continue to take new forms and new issues will arise.[330] But throughout this evolution, many battles will have legal components.[331] Perhaps it is inevitable that the culture wars will enter courtrooms, but what happens once they do is not set in stone. This Article has shown how conflict of laws will play a role when the post-*Dobbs* interjurisdictional disputes enter courts. The resulting practical, philosophical, and doctrinal issues are massive and unresolved by a doctrine that is as outdated as it is varied and flexible. It is easy to cobble together bits and pieces from here and there for almost any purpose.[332] That is the strength and weakness of this area of law. It will take imagination and compassion to help courts and legislators find their way through the wilderness.

* * *

330. *See generally* Roubein & Shammas, *supra* note 59 ("Among the areas of disagreement are whether to try to prevent women in antiabortion states from being able to obtain the procedure or abortion pills across state lines, as well as whether to promote bans that include exceptions for rape and incest. There is also tension over whether the best way to enforce a ban is by letting private citizens bring civil cases like in Texas. A narrow slice of activists take a more extreme stance of imposing criminal penalties on patients who get abortions . . . .").

331. *See, e.g.*, Laura Kusisto, *Lawsuits to Test Whether State Constitutions Protect Abortion Rights*, WALL ST. J. (July 9, 2022, 10:00 AM) https://www.wsj.com/articles/lawsuits-to-test-whether-state-constitutions-protect-abortion-rights-11657375200 [https://perma.cc/KA7L-HC2S] ("Providers and legal advocacy groups so far have filed about a dozen lawsuits in state court that seek to head off broad abortion restrictions. The suits cite an array of provisions in state constitutions, including ones that offer privacy guarantees and protections against discrimination based on sex.").

332. *See* Joseph W. Dellapenna, *Abortion Across State Lines*, 2008 BYU L. REV. 1651, 1654 (2008) ("[Conflict of Law's] instability allows legal commentators to project their attitudes towards abortion (and many other matters) in analyzing and construing the relevant authorities to resolve choice of law issues.").