Full Faith, Credit, and Collision: Examining the Jurisdictional Reach of Extraterritorial Abortion Laws

REMY A. CARREIRO*

I. INTRODUCTION 140
II. THE IMPENDING COLLISION 142
A. Extraterritorial Abortion Restrictions and Protective Responses 142
B. The FFC's Judgment Enforcement Provision 151
III. PERSONAL JURISDICTION AND EXTRATERRITORIALITY 158
A. Doctrinal Beginnings 160
B. Regulation of Extraterritorial Power Through Jurisdiction 166
1. The Court's Return to Horizontal Federalism 167
2. Regulating the "Effects" of Out-of-State Conduct 173
IV. AVOIDING THE COLLISION: PERSONAL JURISDICTION AS A LIMIT ON EXTRATERRITORIAL ABORTION REGULATION 180
V. CONCLUSION 186

* Remy Carreiro: J.D. 2024, Berkeley Law; B.S. 2019, Northeastern University. I am deeply grateful to Andrew Bradt for his guidance and encouragement throughout the writing process. I am further indebted to the editors at the *Memphis Law Review* for their hard work and patience. Finally, I thank Nicole Antonuccio, Emma Rodríguez, and Halyna Svitlynets MacEwen for countless eye-opening conversations. This Article neither contains legal advice nor establishes an attorney-client relationship in any form. The opinions expressed herein are attributable to the author alone.

I. INTRODUCTION

In 2021, Texas made headlines when it passed antiabortion law Senate Bill 8 ("SB 8"). Although *Roe* was still the law of the land, SB 8 banned most abortions as early as six weeks into pregnancy, long before many people know they are pregnant. The ensuing uproar primarily centered on the law's unique ability to maneuver outside the reach of courts. Because SB 8 outsourced its enforcement authority exclusively to citizens, it effectively circumvented judicial review by eliminating valid targets for a pre-enforcement suit. Many were justifiably concerned that the law created a playbook for state legislatures to nullify other constitutional rights through similar procedural machinations.

But SB 8's distinct procedural structure raised a second alarm amongst reproductive justice activists and academics alike. The law utilized vague, sweeping language, and included minimal geographical limitations. In this vagueness lay the potential that private citizens could be deputized to extend state power far beyond Texas' border. Unsurprisingly, other states quickly responded to this prospect. In the years since the Texas legislature passed SB 8, some states have embraced the use of private enforcement-based civil schemes as a means to regulate abortion beyond their borders. Other states have enacted "shield laws" to protect against such a sister state's overreach.

These extraterritorial civil abortion laws—both restrictive and protective—create a regulatory scheme that puts state laws on a collision course. This is because the Full Faith and Credit Clause ("FFC") of the United States Constitution firmly requires states to recognize each other's judgments, with few, if any, viable exceptions. The purpose of the FFC's judgment recognition provision is to both promote comity between co-equal states and facilitate repose, rather than endless scores of litigation.

But the impending abortion law conflict threatens the FFC's ability to effectuate this very purpose. If two states enter conflicting judgments under SB 8-style schemes and the corresponding shield protections, the FFC's judgment enforcement provision will be severely strained. It is unlikely that either state will be willing to bend

to the other's will, given the stark differences in state abortion policies. Normally, this is where the FFC would come in, to act as a neutral moderator. But the unique nature of these laws makes that solution insufficient. First, the very potential of requiring an abortion-protective state to recognize the judgment of an abortion-restrictive state has incentivized the former to create additional causes of actions to allow their citizens to seek redress—damaging the FFC's call for repose. If courts require one state to recognize the judgment of the other in this context, it is quite likely they will refuse to do so—injuring the call for comity as well. Thus, to allow the FFC to function as intended, as a pseudo-treaty knitting together the states, the abortion law conflict must be dealt with at early stages of litigation, rather than after a judgment is entered.

In this Article, I suggest the appropriate mechanism for addressing this conflict is the personal jurisdiction doctrine. First, this Article explores the scope and nature of the impending conflict, explaining why a traditional application of the FFC's judgment provision is inadequate in this circumstance. This Article then argues that the guiding principles of the FFC will be acutely damaged if states are required to follow the ironclad law of FFC judgment enforcement in this particular circumstance. At the judgment stage of these abortion suits, there will no longer be an ability to maintain interstate comity. Suits to require enforcement will further divide the states, rather than unite them. The path to avoid recognition of judgments is counter-litigation, removing all hopes of repose and finality. Put plainly, an ex-ante mechanism is needed.

Next, this Article turns to personal jurisdiction to explore the role this doctrine can play in addressing the abortion law conflict. This Article then examines the extent to which historical and modern case law can guide us in determining the reach of extraterritorial abortion laws. Next, this Article argues that there are two relevant takeaways from the Roberts Court's treatment of personal jurisdiction. First, the modern personal jurisdiction doctrine is animated significantly, if not primarily, by horizontal federalism concerns. The modern Court has demonstrated a growing desire to consider the relationship between sister states when analyzing whether a court's exercise of personal jurisdiction is appropriate. Second, the current doctrine provides insufficient instruction for how to determine when a court has personal jurisdiction over nonresident defendants sued under abortion bounty

laws. Although the Court has reestablished interstate federalism as a driving concern, it has not expressed much guidance as to *how* courts should analyze interstate relationships, something that will certainly prove pivotal in abortion lawsuits involving residents of multiple states.

Finally, I discuss how personal jurisdiction can be used to avoid the impending abortion law conflict by acting as a limit on extraterritorial state regulation. In particular, this Article explores how the FFC itself provides principles that can help us better articulate what courts are looking at when they consider horizontal federalism during litigation over personal jurisdiction. If the FFC values of comity and repose are considered ex-ante and used to support a more restrained view of jurisdiction in cases arising under extraterritorial civil abortion laws, then the described judgment enforcement problems need never arise. In sum, this Article attempts to show how well-established procedural mechanisms can be used to prevent further Balkanization resulting from states' attempts to regulate abortion beyond their borders.

II. THE IMPENDING COLLISION

To grasp the scope of the impending collision, it is necessary to understand both the various laws at play, and the larger procedural universe in which these laws sit. States have reacted to SB 8 in a myriad of ways. This section first explores the two main types of legislation states passed after the Supreme Court allowed SB 8 to stand, categorized broadly as abortion-restrictive and abortion-protective laws. It then situates these laws in the broader world of the Full Faith and Credit Clause—namely, the FFC's "ironclad" judgment provision.

A. Extraterritorial Abortion Restrictions and Protective Responses

Just under a year before the Supreme Court struck down *Roe v. Wade* and *Planned Parenthood v. Casey*, Texas effectively banned abortions for all its residents.[1] It did so by enacting SB 8, commonly known as the Texas Heartbeat Bill.[2]

1. Neelam Bohra, *Texas Law Banning Abortion as Early as Six Weeks Goes into Effect as the U.S. Supreme Court Takes No Action*, TEX. TRIB. (Sept. 1, 2021), https://www.texastribune.org/2021/08/31/texas-abortion-law-supreme-court.

2. TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–12.

SB 8 bans most abortions once a fetal heartbeat is detected.[3] The bill defines fetal heartbeat—which is not a clinical term—as "cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac."[4] This definition includes activity that begins at around six weeks' of gestation.[5] This is both before a heart has actually developed and before many people know they are pregnant.[6] As a result, SB 8 effectively halted abortions in Texas, although the right to an abortion was constitutionally protected at the time of the law's enactment.

SB 8 primarily made headlines because of its unique enforcement regime.[7] To circumvent the constitutional protections of *Roe* and *Casey*, it employed a private bounty system.[8] Instead of state actors enforcing the law, SB 8 delegates enforcement exclusively to ordinary citizens.[9] Under the law, private individuals can sue anyone who performed a prohibited abortion, or aided and abetted in the performance or inducement of such an abortion.[10] There is no requirement that the plaintiff have any connection or personal stake in the performed abortion. Private actors are incentivized to bring suit by the promise of a bounty of, at minimum, $10,000.[11]

The law was structured to "eliminate valid targets for abortion providers or patients to sue to challenge the law's constitutionality," and indeed, the law succeeded on this point.[12] In *Whole Woman's Health v. Jackson*, the Supreme Court allowed SB 8 to remain in place––despite the protections of *Roe* and *Casey*—by ruling that abortion

3. *Id.* § 171.204(a).

4. *Id.* § 171.201(1).

5. Maggie Astor, *Here's What the Texas Abortion Law Says*, N.Y. TIMES (Sept. 9, 2021), https://www.nytimes.com/article/abortion-law-texas.html.

6. *Id.*; *see also* Christina Caron, *What Does It Really Mean to be 6 Weeks Pregnant?*, N.Y. TIMES (May 18, 2019), https://www.nytimes.com/2019/05/18/parenting/abortion-six-weeks-pregnant.html.

7. *See* Robert Barnes, *Supreme Court Seems Willing to Allow Challenge of Texas's Restrictive Abortion Law*, WASH. POST (Nov. 1, 2021, 7:05 PM), https://www.washingtonpost.com/politics/courts_law/texas-abortion-supreme-court/2021/11/01/548c7ea2-3b0c-11ec-bfad-8283439871ec_story.html.

8. TEX. HEALTH & SAFETY CODE ANN. § 171.207.

9. *Id.* § 171.207–08.

10. *Id.* § 171.208(a).

11. *Id.* § 171.208(b)(2).

12. Astor, *supra* note 5.

providers could not challenge the validity of the law by suing state judges, clerks, or the state attorney general.[13]

SB 8's evasion of judicial review commanded the greatest attention in the months following its enactment, for understandable reasons.[14] Although the core idea at the heart of SB 8 had been floated in an academic paper published years earlier by Jonathan Mitchell,[15] the eventual architect of the Texas law, outright nullification of a constitutional right through creative statute-making seemed a thing of years past.[16] The right to an abortion had been chipped away at since the 1970s, but it was still, at least in theory, constitutionally guaranteed.[17]

Yet Texas was able to ban the procedure and close the courtroom doors to those hoping to challenge the law preemptively, and the effect was devastating.[18] "Data released in February 2022

13. Whole Woman's Health v. Jackson, 595 U.S. 30, 51 (2021).

14. *See, e.g.*, Jordan Smith, *Texas Admits Its Abortion Law Scheme Puts All Rights Up for Grabs*, INTERCEPT (Nov. 2, 2021, 12:50 PM), https://theintercept.com/2021/11/02/abortion-texas-sb8-supreme-court; Jon D. Michaels & David Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187, 1222–27 (2021).

15. *See generally* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018).

16. *See Whole Woman's Health*, 595 U.S. at 71 (Sotomayor J., concurring in part and dissenting in part) ("This is a brazen challenge to our federal structure. It echoes the philosophy of John C. Calhoun, a virulent defender of the slaveholding South who insisted that States had the right to 'veto' or 'nullif[y]' any federal law with which they disagreed."); *see also* Cooper v. Aaron, 358 U.S. 1, 17 (1958) ("In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'"); *see also* Lauren Moxley Beatty, *The Resurrection of State Nullification—and the Degradation of Constitutional Rights: SB8 and the Blueprint for State Copycat Laws*, 111 GEO. L.J. ONLINE 18, 18 (2022).

17. *See* Melissa Murray, *Race-Ing* Roe: *Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2050 (2021). *See generally* Gonzales v. Carhart, 550 U.S. 124, 146 (2007). *Gonzales* is part of a line of cases permitting restrictions that slowly chipped away at abortion access. It is also important to the note that the right to an abortion was never fully available to all.

18. Mimi Swartz, *For Texas's Antiabortion Movement, the Chilling Effect Is Working*, TEX. MONTHLY (Apr. 25, 2023), https://www.texasmonthly.com/news-politics/texas-antiabortion-chilling-effect-lawsuits.

showed that [SB 8] cut the number of abortions performed in [Texas] by 60 percent."[19] A lawsuit[20] filed on behalf of five Texas women in Texas state court detailed the substantial health crisis the abortion prohibitions created for pregnant people.[21] Taken together, this created a pressing fear that SB 8 would pave the way for nullification of other long-standing constitutional rights, a concern that remains to this day.[22]

However, one might think the fall of the constitutional right to an abortion might moot the need for laws fashioned like SB 8—at least in the context of abortion. But in the years since SB 8's enactment, a flurry of states have copied the bill's structure.[23] Perhaps this is, in part, the result of a desire to keep potentially unpopular laws insulated

19. Kate Zernike & Adam Liptak, *Texas Supreme Court Shuts Down Final Challenge to Abortion Law*, N.Y. TIMES (Mar. 11, 2022, 11:07 PM), https://www.nytimes.com/2022/03/11/us/texas-abortion-law.html.

20. Plaintiffs' Original Petition for Declaratory Judgment and Application for Permanent Injunction at 1, Zurawski v. State, No. D-1-GN-23-000968, 2023 WL 2403722, at *1 (Tex. Dist. Ct. Mar. 6, 2023).

21. It is beyond the scope of this Article to discuss in detail the general ramifications of abortion bans, but a few points bear mentioning. The *Dobbs* decision catapulted the U.S. into what the Human Rights Watch has described as an "unprecedented human rights crisis." *Human Rights Crisis: Abortion in the United States After* Dobbs, HUM. RTS. WATCH (Apr. 18, 2023, 12:01 AM), https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs. This crisis includes "increased maternal mortality," "criminalization of healthcare," "infringement of privacy rights [via] digital surveillance," and restrictions on freedom of religion. *Id*. Importantly, this crisis is not felt equally among all people. *Id*. It is well documented that the harms of abortion restrictions "fall disproportionately on marginalized populations including Black, indigenous, and people of color; people with disabilities; immigrants; and those living in poverty." *Id.*; *see also* Zara Abrams, *Abortion Bans Cause Outsized Harm for People of Color*, 54 AM. PSYCH. ASS'N 24 (June 1, 2023), https://www.apa.org/monitor/2023/06/abortion-bans-harm-people-of-color; Bekah McNeel, *Texas Abortion Law Complicates San Antonio Group's Mission to Help Undocumented Immigrants — Even Those Raped En Route to the U.S.*, TEX. TRIB. (Nov. 12, 2021, 5:00 AM), https://www.texastribune.org/2021/11/12/texas-abortion-law-undocumented-immigrants.

22. *See* Michaels & Noll, *supra* note 14, at 1122–24.

23. Sophia Iemola, *Copycat Bans Follow After Texas SB 8*, AUSTIN WOMEN'S HEALTH CTR. (May 20, 2022), https://www.austinwomenshealth.com/copycat-bans-follow-after-texas-sb-8.

from challenge, given the strong public opposition to restrictions on abortion access.[24]

There are other procedural elements of SB 8's structure that have gone under-discussed and may contribute to the continued implementation of copycat bills even after the fall of *Roe*. Indeed, SB 8 was structured to stack the procedural deck in favor of plaintiffs by imposing overwhelming litigation costs on defendants. SB 8 gives plaintiffs ultimate choice over venue with no possibility of transfer.[25] Even if defendants prevail under the law, they are barred from using issue or claim preclusion as a defense to subsequent suits.[26] Nor can they recover attorney's fees.[27] The manifest point of SB 8 is to chill activity by imposing unbearable costs upon those most unable to pay.

This activity that the Texas legislature sought to chill through the imposition of litigation cost is not limited to the state of Texas. On its face, SB 8 appears to offer a blueprint for how to deputize private citizens to exercise state power over out-of-state actors.[28] This is because the majority of SB 8's text contains no geographical

24. Sarah McCammon, *Poll: One Year After SB 8, Texans Express Strong Support for Abortion Rights*, NPR (Sept. 1, 2022, 10:59 AM), https://www.npr.org/2022/09/01/1120472842/poll-one-year-after-sb-8-texans-express-strong-support-for-abortion-rights; Adriel Bettelheim, *Exclusive Poll: Americans Strongly Back Abortion Pill Access, FDA Drug Powers*, AXIOS (Mar. 29, 2024), https://www.axios.com/2024/03/29/abortion-pill-supreme-court-case-poll.

25. TEX. HEALTH & SAFETY CODE ANN. § 171.210.

26. *Id.* § 171.208(e)(5).

27. *Id.* § 171.208(i).

28. *See* Katherine Florey, Dobbs *and the Civil Dimension of Extraterritorial Abortion Regulation*, 98 N.Y.U. L. REV. 485, 497 (2023).

> A subtler way of achieving the same ends would be to pass a similar law but with no geographically specific language—that is, one that simply prohibited some abortion-related conduct or empowered citizens to sue abortion providers with no direct indication that it was meant to apply outside the state. Texas's S.B.8, for example, which has already become a popular template for other abortion-restrictive states, contains no geographical restrictions on who may sue, on the state citizenship of any named defendant, or where the prohibited conduct of aiding and abetting an abortion occurred.

Id.

limitations.[29] Rather, the law creates a cause of action against anyone who "knowingly engages in conduct that aids or abets the performance or inducement of an abortion," with no specifications on the location of either who may bring the suit or who may be sued.[30] Thus, an out-of-state individual who assists a Texas resident in obtaining an abortion may be sued, despite never setting foot in the state themselves.[31] Jonathan Mitchell, himself, recently argued in defense of using the laws this way to target people who help others pay for abortions.[32]

This is a likely explanation for why states have continued to propose or adopt SB 8-style laws after the *Dobbs* decision.[33] The combination of the vague language and lack of geographical limits with a unique private enforcement scheme offers states an opportunity to extend their power in a constitutionally questionable manner, without a clear path for pre-enforcement challenge.[34] The plaintiff-friendly protections, high price of a bounty, and lack of defenses, like issue preclusion, makes it unlikely that people would be willing to violate the law to create test cases. When all of these procedural machinations are taken together, SB 8's structure appears to create a potentially viable way to extend civil battles over abortion far beyond state borders.

29. *See generally* TEX. HEALTH & SAFETY CODE ANN. § 171.208-10; *see also* Astor, *supra* note 5 ("But the law contains no geographic limit and gives plaintiffs multiple options for counties in which to sue.").

30. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)(2).

31. *See* Whole Woman's Health v. Jackson, 595 U.S. 30, 63 (2021) (Sotomayor, J., concurring in part and dissenting in part) ("Those vulnerable to suit might include a medical provider, a receptionist, a friend who books an appointment, or a ride-share driver who takes a woman to a clinic.").

32. *See* Christopher Rowland, *Groups That Aid Abortion Patients Pull Back, Fearing Legal Liability*, WASH. POST (July 15, 2022, 6:00 AM), https://www.washingtonpost.com/business/2022/07/15/abortion-aid-drying-up.

33. *See* Florey, *supra* note 28, at 495 ("Some state legislators are heeding these calls and plan to introduce legislation establishing civil liability for anyone who assists residents in obtaining an out-of-state abortion.").

34. *See id.* ("Nonetheless, states that wish to pass laws that are constitutionally questionable in other ways may embrace a private enforcement system on the belief that it makes constitutional challenges more difficult.").

Antiabortion advocates have recognized this potential.[35] In a 2022 memo, the National Right to Life Coalition proposed a model law banning abortion that relied on civil schemes as a "necessary" enforcement measure.[36] Professor Katherine Florey notes that antiabortion states may favor civil abortion laws in part to avoid extraterritorial constraints of criminal regulations:

> Notably, should states pursue this path, many of the extraterritoriality problems that arise in the criminal law domain would disappear. Although in theory constitutional right-to-travel principles and other doctrines limiting states' territorial reach might apply in this arena as well, in practice antiabortion states that embrace civil liability are likely to be able to evade significant constitutional scrutiny. This is because the Court, especially in recent years, seems simply uninterested in the extraterritorial dimension of civil litigation.[37]

Even if the Supreme Court was particularly interested in the "extraterritorial dimension of civil litigation," SB 8's ability to evade judicial review would make direct challenges of an out-of-state application of the law difficult, if not impossible. Indeed, in *Fund Texas Choice v. Paxton*, a group of Texas abortion funds sued the Texas Attorney General Ken Paxton, requesting, among other things, injunctive relief against the imposition of criminal or civil penalties

35. *See, e.g.*, Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients from Crossing State Lines*, WASH. POST (June 30, 2022, 8:30 AM), https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines.

36. *See* Memorandum from James Bopp Jr., Gen. Couns., Nat'l Right to Life Comm., to Nat'l Right to Life Comm. 1–4 (June 15, 2022), https://www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-FINAL-1.pdf ("As a result, to effectively enforce pro-life laws, a wide variety of enforcement measures will need to be adopted to supplement criminal enforcement, including licensing penalties, civil remedies, and criminal enforcement by State officials."). Relevant to the overall argument of this Article, it is interesting to note that the model abortion law presented in this memo includes a provision creating a long-arm statute that extends state court personal jurisdiction to the extent the Fourteenth Amendment allows.

37. *See* Florey, *supra* note 28, at 488.

under Texas law for abortions obtained out of the state.[38] However, a federal judge dismissed these claims for lack of subject-matter jurisdiction.[39] Because neither of the defendants sued in that case—Attorney General Paxton nor local prosecutors—had any enforcement authority under SB 8, the plaintiffs had not established standing.[40]

Since 2021, antiabortion states have indeed followed Texas' path and embraced civil regulatory schemes. After SB 8 was upheld, legislatures in Missouri, Arkansas, South Dakota, and Indiana rapidly announced their intent to introduce similar legislation.[41] In April 2022, Idaho Governor Brad Little signed into law a near-total abortion ban modeled on SB 8.[42] Oklahoma passed SB 1503, a citizen-enforced six-week abortion ban that authorized suit against anyone who aided and abetted in an abortion, including "paying for or reimbursing the costs of an abortion through insurance or otherwise."[43] It later passed a similarly structured total abortion ban, HB 4327.[44] Both Oklahoma laws contained no geographic restrictions, just like SB 8.

Some states have attempted to go even further than the Texas law, crafting civil schemes explicitly designed to regulate beyond their borders. In 2022, Missouri legislators introduced a proposal that would have made it illegal for anyone to perform or "aid or abet" an abortion for a Missouri resident, regardless of whether the abortion took place

38. 658 F. Supp. 3d 377, 384 (W.D. Tex. 2023).

39. *Id.* at 402.

40. *Id.*

41. Caroline Kitchener, *Lawmakers Are Racing to Mimic the Texas Abortion Law in Their Own States. They Say the Bills Will Fly Through*, WASH. POST (Oct. 19, 2021, 12:13 PM), https://www.washingtonpost.com/gender-identity/lawmakers-are-racing-to-mimic-the-texas-abortion-law-in-their-own-states-they-say-the-bills-will-fly-through.

42. Oren Oppenheim, *Which States' Lawmakers Have Said They Might Copy Texas' Abortion Law*, ABC NEWS (Sept. 3, 2021, 3:10 PM), https://abcnews.go.com/Politics/states-lawmakers-copy-texas-abortion-law/story?id=79818701.

43. S.B. 1503, 58th Leg., 2d Reg. Sess. (Okla. 2022).

44. *Id.* In May 2023, the Oklahoma Supreme Court struck down both the six-week and total abortion bans as unconstitutional under the state's Constitution. Okla. Call for Reproductive Justice v. Okla., 531 P.3d 117 (Okla. 2023). Despite this, they bear mentioning to show that abortion-restrictive states are affirmatively pursuing privately enforced civil regulatory schemes as a tool to restrict abortion access. *See id.*

in or out of state.[45] The amendment failed in the state house, but the desire for its creation highlights a disturbing trend. Many antiabortion advocates hope to expand the reach of their laws beyond territorial borders. Missouri state Representative Mary Elizabeth Coleman, sponsor of the Missouri amendment, put it succinctly: "[i]f you believe as I do that every person deserves dignity and respect and protection whether they're born or unborn, then of course you want to protect your citizens, no matter where they are."[46]

Of course, antiabortion state legislatures are not the only ones concerned with what happens beyond their borders. Abortion-protective states have responded to SB 8 and its progeny with countermeasures, like shield laws.[47] For example, in 2023 Washington state passed HB 1469.[48] Among other things, HB 1469 prohibits Washington courts from applying the law of a state that bans abortions in cases in Washington courts.[49] It also creates a cause of action for individuals harmed by out-of-state lawsuits based on healthcare services that are legal in Washington.[50] This private right allows individuals sued under a law like SB 8 to file a countersuit in Washington for damages and recover their costs and attorneys' fees.[51]

45. Tessa Weinberg, *Missouri House Blocks Effort to Limit Access to Out-of-State Abortions*, MO. INDEP. (Mar. 29, 2022, 8:58 PM), https://missouriindependent.com/2022/03/29/missouri-house-blocks-effort-to-limit-access-to-out-of-state-abortions.

46. Alice Miranda Ollstein & Megan Messerly, *Missouri Wants to Stop Out-of-State Abortions. Other States Could Follow*, POLITICO (Mar. 19, 2022, 7:00 AM), https://www.politico.com/news/2022/03/19/travel-abortion-law-missouri-00018539.

47. *Id.* ("The conservative effort has also led legislators in Democrat-controlled states to draft countermeasures aimed at protecting in-state physicians who provide abortions and those who help people cross state lines.").

48. H.R. 1469, 68th Leg., 2023 Reg. Sess. (Wash. 2023).

49. *Id.*

50. *Id.*

51. *Id.* In April 2022, Connecticut passed a similar bill, known as the Reproductive Freedom Defense Act. *See* H.R. 5414, 2022 Gen. Assemb. (Conn. 2022). This Act allows anyone sued under an SB 8-style law which allows anyone sued under the Texas law, or others like it, to countersue for the equivalent amount of damages, plus attorney's fees in Connecticut courts. *Id.* The law was passed, in part, out of concerns about the extraterritorial application of SB 8. *Id.*; Caroline Kitchener, *Conn. Lawmakers Pass Bill to be 'Place of Refuge' for Abortion Patients*, WASH. POST (May 3, 2022, 8:30 AM), https://www.washingtonpost.com/politics/2022/04/30/connecticut-abortion-rights.

California also responded to SB 8 and similar laws by passing AB 1666, which protects in-state medical providers from out-of-state claims.[52] AB 1666 includes three main provisions: (1) an explicit statement that SB 8-style laws are contrary to California's public policy, (2) a prohibition on California courts serving as a venue for SB 8 claims, and (3) a bar on the recognition of any judgments entered under SB 8 or similar laws.[53] There lies the rub. Consider what would occur if a Texas resident sued a California resident under SB 8 for aiding and abetting a Texan in accessing an abortion. One likely scenario is that the California resident would seek protection under AB 1666, setting the stage for simultaneous, conflicting litigation playing out in respective state courts.

It is unknown how our federalist system would respond to such contradicting litigation and the resulting irreconcilable judgments. As discussed below, the Full Faith and Credit Clause of the Constitution requires sister states to recognize each other's judgments.[54] This is intended to maintain comity between the states, effectively knitting together a system of co-equal sovereigns into some sort of national coalition, at least when it comes to the judicial system.[55] But what happens when, as the above regulatory scheme lays out, states have legislated in such a way as to make clear their intent to effectively refuse judgment recognition? The conflict awaits.

B. The FFC's Judgment Enforcement Provision

Under the Full Faith and Credit Clause ("FFC") of Article IV, Section 1 of the U.S. Constitution, states are required to give full faith and credit "to the public Acts, Records, and judicial Proceedings of

52. CAL. HEALTH & SAFETY CODE § 123467.5.

53. *Id.* Illinois and Massachusetts have similar judgment enforcement bars. *See* David S. Cohen et al., *Understanding Shield Laws*, 51 J. LAW. MED. ETHICS 584 (2023), https://www.cambridge.org/core/product/identifier/S1073110523001031/type/journal_article (last visited Mar 8, 2024). Illinois and Massachusetts' shield laws bar their courts from recognizing judgments rendered without jurisdiction—a narrower prohibition than California's law.

54. *See* Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998).

55. *See* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 386 (1996).

every other State."[56] The FFC's implementing statute similarly provides that these acts, records, and judicial proceedings "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."[57]

In effect, the FFC is a "nationally unifying force."[58] It imposes "mandatory comity" on the states by requiring sister-state enforcement of judgments.[59] Its purpose was to shift the status of the states from independent, foreign sovereigns, to "integral parts of a single nation."[60] This served practical needs—such as preventing a debtor from avoiding their debts by simply crossing a state border[61]—as well as political ones. Deference to sister-state judicial proceedings allows for the unification our Constitutional structure requires.[62] And it serves two policy goals, by facilitating "comity and repose."[63]

The Supreme Court has differentiated between credit owed to laws, and credit owed to final judgments.[64] States are not required to apply out-of-state laws to a dispute when those laws would violate the forum state's public policy.[65] Nor does the FFC compel a state "to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."[66]

56. U.S. CONST. art. IV, § 1.

57. 28 U.S.C. § 1738.

58. Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943).

59. William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412, 413 (1994).

60. Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268, 277 (1935).

61. *See generally* Pennoyer v. Neff, 95 U.S. 714, 731 (1877).

62. *See* Estin v. Estin, 334 U.S. 541, 546 (1948); *see also* Sherrer v. Sherrer, 334 U.S. 343, 355 (1948) ("The full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation.").

63. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 386 (1996).

64. *See* Baker v. Gen. Motors Corp., 522 U.S. 222, 232 (1998).

65. *See* Nevada v. Hall, 440 U.S. 410, 422 (1979). This is why AB 1666 includes a statement making clear SB 8 is contrary to California's public policy. *See* CAL. HEALTH & SAFETY CODE § 123467.5.

66. Pac. Emps. Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 501 (1939).

Judgments are different. The full faith and credit obligation is "exacting" when it comes to judgments.[67] No public policy exception exists.[68] Rather, "[a] final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land."[69]

This principle was initially articulated in *Fauntleroy v. Lum.*[70] *Fauntleroy* dealt with a futures gambling contract that was illegal under Mississippi law.[71] The two parties to this contract disputed its terms and entered into arbitration.[72] The prevailing party then sued in Mississippi state court to enforce their arbitration award.[73] When the court became aware of the illegality of the underlying contract, the plaintiff dismissed the suit and refiled in Missouri.[74] The Missouri court rejected the defendant's argument that the contract was illegal, and entered judgment for the plaintiff based on the arbitrator's award.[75] The plaintiff then returned to Mississippi, seeking enforcement of the Missouri judgment.[76] The Mississippi Supreme Court refused to give the judgment full faith and credit because the contract was void under the state's law.[77]

The Supreme Court decisively reversed, holding the Missouri judgment was owed full faith and credit even if it was based on "a mistake of law."[78] Even though the Missouri court erred on a question of Mississippi law, rather than its own, the Mississippi courts were required to defer to Missouri's judgment.[79] The national policy goal of

67. *See Baker*, 522 U.S. at 233.

68. *Id.* at 233–34.

69. *Id.* at 222–24.

70. *See generally* Fauntleroy v. Lum, 210 U.S. 230 (1908).

71. *Id.* at 233–34.

72. *Id.*

73. *Id.* at 234.

74. *Id.*

75. *Id.* at 239 (White, J., dissenting).

76. *Id.*

77. *Id.*

78. *Id.* at 237 ("A judgment is conclusive as to all the media concluded, [] and it needs no authority to show that it cannot be impeached either in or out of the state by showing that it was based upon a mistake of law.").

79. *See id.*

promoting sister-state comity took precedence over Mississippi's social policy. Thus, the Court placed its thumb on the scale in favor of interstate harmony and finality of litigation, over any individual state's policy goals, through an exacting interpretation of the FFC's judgment enforcement provision. The Court reiterated the "exacting" nature of the FFC's judgment provision in *Baker by Thomas v. General Motors*.[80] *Baker* made clear that there was no "roving 'public policy exception' to the full faith and credit due *judgments*."[81]

Although it is clear that the FFC's judgment provision is exacting and cannot be trumped by public policy, there is one potential exception that bears mentioning. In the late 1800s, the Supreme Court suggested penal judgments need not be given full faith and credit.[82] This stems from a general principle of international law that countries need not enforce the penal laws of another.[83] The Court in *Huntington* explained that the test of whether a law is penal is not whether it is labeled "criminal."[84] Rather, the question is whether the law focuses on redressing "a wrong to the public" or "a wrong to the individual."[85]

Because of *Huntington*, some scholars have suggested that the penal judgment may apply to solve the conflict of extraterritorial abortion laws.[86] The argument generally proceeds as follows. A statute like SB 8, although civil in name, may be considered penal because of its unique procedural structure. It has no personal injury requirement and thus can't be said to be redressing a wrong to the individual. The law is not aimed at a private right held by a harmed individual. Rather,

80. *Baker*, 522 U.S. at 233.

81. *Id.*

82. *See* Huntington v. Attrill, 146 U.S. 657, 671 (1892).

83. *Id.* at 666 ("In order to determine this question, it will be necessary, in the first place, to consider the true scope and meaning of the fundamental maxim of international law stated by Chief Justice Marshall in the fewest possible words: 'The courts of no country execute the penal laws of another.'").

84. *Id.* at 668.

85. *Id.*

86. *See* Diego A. Zambrano et al., *The Full Faith and Credit Clause and the Puzzle of Abortion Laws*, 98 N.Y.U. L. REV. ONLINE 382, 398–404 (2023), https://www.nyulawreview.org/wp-content/uploads/2023/10/98-NYU-L-Rev-Online-382.pdf [hereinafter *The Full Faith and Credit Clause and the Puzzle of Abortion Laws*]; *see generally* Walker McKusick, Comment, *The Penal Judgment Exception to Full Faith and Credit: How to Bind the Bounty Laws*, 99 WASH. L. REV. 649 (2024).

it focuses on a harm against the state itself. As a result, it is penal in nature and not owed full faith and credit.[87] It is currently unknown whether this argument would hold water in litigation. As some scholars have noted, state and federal courts have recognized the existence of a penal law exception to the FFC but have rarely applied it to civil cases.[88]

So where does this leave us in terms of conflicting abortion laws? There are a few takeaways when the above discussion is considered in the context of the emerging abortion law conflict. First, the basic command of the FFC makes clear that our nation's very structure requires the recognition of judgments.[89] Second, a state cannot avoid the FFC's command by pointing to its own policy goals and initiatives.[90] Third, the one relevant exception to the judgment provision is untested in this area of law, and while it certainly is not foreclosed as a legal strategy, prevailing on it would be an uphill battle.[91]

Thus, to return to the hypothetical, the FFC doctrine as it currently stands does not solve the abortion conflict. Under a strict reading of the FFC's animating principles, a judgment entered in Texas courts finding a California defendant liable under SB 8, would have to be enforced in California courts as a matter of comity. But in this context, invoking "comity" is rather ironic. California has explicitly evinced its intent to refuse to enforce out-of-state SB 8 awards.[92] Requiring enforcement would not further unify the states as members of one nation but rather suggest favoring one state's policy over another on a highly politicized subject.[93] In this way, it would go even further

87. *See The Full Faith and Credit Clause and the Puzzle of Abortion Laws*, *supra* note 86. This is a gross oversimplification of the argument, which is developed in full in the cited article.

88. *Id.* at 400.

89. *See* Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268, 277 (1935).

90. *See* Baker v. Gen. Motors Corp., 522 U.S. 222, 233–34 (1998).

91. *See The Full Faith and Credit Clause and the Puzzle of Abortion Laws*, *supra* note 86, at 407–08.

92. *See* CAL. HEALTH & SAFETY CODE § 123467.5.

93. In *Full Faith and Credit and the Equity Conflict*, Professor Polly Price discusses the context of abortion as one of the issues that has created "potentially discordant" state policies, potentially impacting FFC concerns. Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747, 754 (1998). At this time, the abortion conflict had not produced "constitutional crises" at the hands of the

than *Fauntleroy*. *Fauntleroy* may have paid short shrift to Mississippi's policy goals of stopping gambling, but it did not do so by elevating, say, a Missouri law that created a financial punishment for anyone who refused to gamble.

Perhaps one would attempt to justify this as respecting the rights of the litigant who diligently pursued their rights.[94] But is it sufficient to explain why Texas' policy should win out by simply arguing that a Texas plaintiff sought the relief of their courts before a California defendant sought the protection of theirs? This justification again runs counter to the rationale behind the FFC. If the clause is intended to prevent Balkanization and knit together states, is the winner of a race to the courthouse enough to justify an end that will certainly further fracture interstate comity?[95]

Moreover, this justification, even if one finds it compelling, does not resolve the issue of how to handle the potential of endless, ongoing litigation brought about by conflicting abortion laws. This is made clear by a slight change to our hypothetical suits. Imagine the SB 8 defendant is now a Washington citizen. Washington's shield law provides a countersuit cause of action against laws like SB 8.[96] Suppose when the Texas plaintiff (P) sued the Washington defendant (D), D refused to appear in Texas and default judgment was entered against them. D, knowing that a Texas judgment might be due full faith and credit if P seeks to collect, begins a new lawsuit in Washington state court to recover damages against P and erase the practical effect of such a judgment.

But now, the second rationale of the FFC—encouraging finality and repose—has also disappeared. Rather, the FFC's ironclad judgment provision has created a need for D to engage in further litigation. If either party attempted to recover on their judgments by bringing suit against some asset in a third forum, the prevailing rule

full faith and credit clause. However, as discussed above, the new regulatory scheme SB 8 paved the path for, catapults this area of law into a crisis area that demands judicial action.

94. *See* Reynolds, *supra* note 59, at 415 n.20 (discussing how a litigant who waits too long to pursue litigation may be estopped from pursuing their cause at all).

95. *See* Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798, 817 (1969) (noting that state interest does not justify "balkanization.").

96. H.B. 1469, 68th Leg., 2023 Reg. Sess. (Wash. 2023).

that the last judgment rendered would have preclusive effect would similarly fail to effectuate the goals of the FFC, for reasons similar to those described above.[97] In any of these situations, the exacting requirement that states enforce each other's judgment without exception will both fail to foster sister-state comity, and increase the amount of litigation, rather than creating a natural rest to it.

What this reveals is that there are two problems with looking to the FFC doctrine on its own to solve the abortion law conflict. First, this area of the law seems particularly settled. The Court has not returned the FFC's judgment provision in the 26 years since *Baker*. The base principle *Fauntleroy* articulated has not been questioned by the Court in any meaningful way. It further seems unlikely that the current composition of the Court would be interested in reopening a relatively settled area of the law to restrict the ability of states to apply abortion prohibitions beyond their borders.[98]

Second, and perhaps more importantly, the FFC's judgment provision can, by its very nature, only address conflicts ex-post. But, as described above, if this conflict is dealt with ex-post, the result does damage to the underlying principles of the FFC. If two courts in states with diametrically opposed abortion laws enter conflicting judgments, it is unlikely that either state will be willing to fold first to honor the "exacting" nature of the FFC's judgment provision.[99]

Indeed, one need only to look at how states are currently responding to the *potential* of a conflict to recognize the hard line states are taking. In March 2024, sixteen attorneys general from Republican states threatened to sue Maine over its pending shield law legislation.[100] The prosecutors specifically argued the shield law would violate the FFC and create a "a rapid tit-for-tat escalation that tears apart our Republic."[101] Democratic Representative Anne Perry, who proposed

97. Ginsburg, *supra* note 95, at 817.

98. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232 (2022) (explaining that abortion law should be returned to the states).

99. Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998).

100. Tyler Vazquez, *Why Florida Might Sue Maine Over Abortion, Transgender Healthcare Shield Law*, FLA. TODAY (Mar. 15, 2024, 11:47 AM), https://www.floridatoday.com/story/news/2024/03/15/florida-sue-maine-abortion-transgender-shield-law-lgbtq-rights/72984818007.

101. *See* Letter from Jonathan Skremeti et al., Att'ys Gen., to Governor Mills et al., (Mar. 11, 2024),

the Maine bill, argued instead that the bill represented the principle of "state sovereignty."[102] Thus, although the Constitution provides no answer as to what would happen if states refused to recognize each other's judgments,[103] it is a fair guess that the result would not include interstate comity. Consequently, this is a conflict that must be dealt with *ex ante* if we are to effectuate the goals of the FFC. There must be some other mechanism by which the conflict is addressed to continue to breathe life into the FFC and its "nationally unifying force."[104]

In the following section, I suggest that personal jurisdiction may have a role to play. Unlike the FFC's judgment provision, personal jurisdiction inquiries occur at the early stages of litigation. Personal jurisdiction, therefore, seems a natural contender for a mechanism to address conflicts that necessitate an ex-ante resolution. The Supreme Court, at least in recent years, has demonstrated a desire to consider the relationship between sister states when analyzing whether a court's exercise of personal jurisdiction is appropriate.

III. PERSONAL JURISDICTION AND EXTRATERRITORIALITY

"This opinion, by contrast, resolves these cases by proceeding as the Court has done for the last 75 years—applying the standards set out in *International Shoe* and its progeny, with attention to their underlying values of ensuring fairness and protecting interstate federalism."[105]

Every day, lawyers confront the foundational, practical question of whether a court may exercise personal jurisdiction over a party. Yet, the Supreme Court's personal jurisdiction jurisprudence has been

https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2024/pr24-26MaineLetter.pdf.

102. Michael Shepherd, *Republican States Threaten to Sue Maine Over Abortion and Transgender Care Bill*, BANGOR DAILY NEWS (Mar. 11, 2024), http://www.bangordailynews.com/2024/03/11/politics/state-politics/republican-states-threaten-sue-maine-abortion-transgender-care-bill.

103. *See supra* notes 93–94 and accompanying text.

104. Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943).

105. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 360 n.2 (2021).

anything but practical.[106] Forests have been felled attempting to disentangle the doctrine, but little has been written about the role personal jurisdiction may play in the impending conflict of abortion laws.

This section examines the extent to which our current personal jurisdiction case law can guide us in determining the reach of extraterritorial abortion laws. It first explores the doctrine's beginnings to determine its conceptual foundations: (1) restricting the reach of state power and (2) protecting individual liberty concerns.[107] These two concepts have been emphasized and de-emphasized over time as the Supreme Court has oscillated between which rationale it finds most compelling.[108]

Next, I argue that, although the stated rationale for what personal jurisdiction is trying to do has shifted over the years,[109] modern case law suggests the doctrine is currently motivated by concerns about interstate relations, rather than individual liberty. Two separate lines of case law recognize personal jurisdiction as limiting a state's ability to regulate extraterritorially. The first expressly places horizontal federalism back into the personal jurisdiction inquiry.[110] The second, although relevant to conceptualizing personal jurisdiction as a check on extraterritorial state regulation, does not cleanly apply to the above-described abortion laws.[111]

Taken together, these cases suggest that personal jurisdiction has a role to play in the impending abortion law conflict because the current doctrine inherently recognizes interstate relationships as integral to the exercise of jurisdiction. However, to use the doctrine effectively to resolve the conflict, a clearer articulation of the role horizontal federalism plays is necessary, which I explain in Part IV.

106. *See* Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 3 (2010) ("Deciphering the Supreme Court's personal jurisdiction jurisprudence requires navigating inconsistent precedents that obscure vexing constitutional questions behind catchphrases and buzzwords, such as 'minimum contacts,' 'substantial justice,' 'fair warning,' 'purposeful availment,' and 'reasonableness.' These terms are pregnant with meaning but hollow in substance.") [hereinafter *Impersonal Jurisdiction*].

107. *See* discussion *infra* Section III.A.

108. *See Impersonal Jurisdiction*, *supra* note 106, at 4–5.

109. *See id.*

110. *See* discussion *infra* Section III.B.1.

111. *See* discussion *infra* Section III.B.2.

A. Doctrinal Beginnings

"Jurisdiction is power to declare the law."[112] It is common sense that for a court to bind parties to its judgment, it must have some legal power to exercise over them. This power may come from statutory or constitutional authorization for a court to hear a certain type of case.[113] These sources of authority place limits on a court's adjudicative reach.[114] These limits are important—if all courts could decide all cases, it would open the door to a classic parade of horribles: never-ending conflicts of laws, inconsistent judgments, a general eradication of trust in the system.

Personal jurisdiction is one such limit. At its most basic, personal jurisdiction is the power of a court to exercise its adjudicative authority over parties.[115] In its various iterations, it has been referred to as the "power over the defendant's person,"[116] the ability to "hale" a defendant into court,[117] or the exposure of a defendant "to the State's coercive power."[118] Although most aspects of the doctrine are debated, it is clear that without personal jurisdiction, a court cannot exercise its judicial power over a litigant.[119] Thus, for a judgment to stand, it must have been entered by a court that had personal jurisdiction over the parties before it.

This type of jurisdiction also asks the question broadly at the heart of this Article: when may a court exercise its power to declare the law over a party that has limited or tenuous connections with it?[120]

112. *Ex parte* McCardle, 74 U.S. 506, 514 (1868).

113. 4A Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1069 (4th ed. Supp. 2017).

114. *See* Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1178 (2018).

115. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) (stating that personal jurisdiction "represents a restriction on judicial power").

116. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

117. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985).

118. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 918 (2011).

119. *See* Hanson v. Denckla, 357 U.S. 235, 250 (1958) ("Since a State is forbidden to enter a judgment attempting to bind a person over whom it has no jurisdiction, it has even less right to enter a judgment purporting to extinguish the interest of such a person in property over which the court has no jurisdiction.").

120. *See Int'l Shoe Co.*, 326 U.S. at 316–17.

Because the forum a dispute takes place in impacts the law applied to the dispute, this question has high stakes when dealing with vastly disparate state abortion laws.[121]

Over the years, the personal jurisdiction doctrine has developed into what can charitably be referred to as a mess. This is because there is very little agreement as to what the personal jurisdiction doctrine, at its core, is trying to do.[122] Scholars and judges alike debate whether the doctrine protects solely individual rights, focuses on issues of convenience regarding litigation forums, or centers state sovereignty in a federalist system.[123] The Supreme Court has failed to clarify the issue. Since 1945, it has issued conflicting statements about the doctrine's focus. In some cases, federalism is a driving force, while others explicitly repudiate centering sister-state sovereignty.[124] The local effect of a defendant's actions may take center stage or may be relegated to the wings.[125]

The incoherence relevant to this discussion stems from the Court's inconsistency in describing personal jurisdiction as protecting solely an individual right, or as a doctrine that considers sister-state relations, also known as "horizontal federalism."[126] To properly explain this inconsistency, it is appropriate to briefly sketch out the development of the modern doctrine.

For many years, personal jurisdiction was governed by the territorial approach of *Pennoyer v. Neff*.[127] *Pennoyer* focused on the

121. States apply their own choice of law rules in determining what law governs a dispute between parties of different citizenships. Federal courts, sitting in diversity, apply the choice of law rule of the state in which they sit. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496–47 (1941).

122. *See Impersonal Jurisdiction*, *supra* note 106, at 3 ("A fair and efficient system for resolving civil disputes therefore requires clear and coherent rules governing personal jurisdiction. Unfortunately, the rules in the United States are neither clear nor coherent.").

123. *See id.* at 4.

124. *Compare* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703–04 (1982) *with* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 359–60 (2021).

125. *Compare* Calder v. Jones, 465 U.S. 783 (1984) *with* World-Wide Volkswagen Corp. v. Woodson, 444 U. S. 286 (1980).

126. *See Impersonal Jurisdiction*, *supra* note 106, at 7.

127. *See generally* 95 U.S. 714 (1877), *overruled by* Shaffer v. Heitner, 433 U.S. 186 (1977).

power of a state to subject those within its borders to the jurisdiction of its courts and held "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."[128] But beyond its borders, a state was jurisdictionally powerless.[129] Jurisdiction, thus, for many years, was congruent with territorial power.

In an important dictum, *Pennoyer* situated these limitations on state court jurisdiction as a matter of constitutional law.[130] It did not have to go so far. The question before the Court in *Pennoyer* was what effect to give the judgment in question.[131] The Court could have determined jurisdiction was lacking and resolved the case by holding that a judgment rendered without jurisdiction was not entitled to full faith and credit.[132] But instead, Justice Field invoked the newly adopted Fourteenth Amendment as the source of the decision's principles.[133] Although its territorial approach was formally abandoned in 1945,[134] *Pennoyer* still lays the groundwork for understanding personal jurisdiction as constitutionally controlled by the Due Process Clause.[135]

The 70 years or so following *Pennoyer* saw its reasoning slowly, but surely, soften. Its strict approach was a poor fit for the rapidly changing business world. As interstate activity increased, a rigid adherence to territorial borders made less and less sense as a premise for jurisdictional inquiries. The Court formally abandoned the *Pennoyer* approach with *International Shoe Company v. Washington* in 1945.[136]

International Shoe involved the State of Washington's attempt to recover taxes from the Missouri-based International Shoe Company

128. *Id.* at 722.

129. *Id.* (noting that it follows from the first principle that "no State can exercise direct jurisdiction and authority over persons or property without its territory").

130. *Id.* at 733.

131. *Id.* at 719 ("The case turns upon the validity of this judgment.").

132. *See* Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998) (noting judgments are recognized when a court with proper adjudicatory jurisdiction rendered them).

133. *See Pennoyer*, 95 U.S. at 733.

134. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 310 (1945).

135. *See Impersonal Jurisdiction*, *supra* note 105, at 59.

136. 326 U.S. 310.

based on commissions paid to the company's Washington salesmen.[137] The question of whether the fictional entity of the company was "present" under the *Pennoyer* framework was difficult to answer, as *International Shoe* had maneuvered its business structure to distinctly avoid Washington's jurisdiction.[138] The Court in turn, changed course. It held that due process in jurisdictional inquiries did not turn on whether a defendant was "present," but whether it was fair to subject the defendant to suit based on their contacts with the forum.[139] It issued the now-famous language, stating that:

> due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[140]

Thus, *International Shoe* shifted from conceptualizing state power strictly as a function of borders to determining the reach of state power by balancing variables. Its framework laid out a guide for thinking about jurisdiction, and by extent, the bounds of state power, in terms of reasonableness and fairness.[141] In doing so, it interrogated the meaning of due process in relation to personal jurisdiction with greater depth than *Pennoyer*. Justice Stone, in discussing due process, said:

> [w]hether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or

137. *Id.* at 313.

138. *See id.* at 313, 316.

139. *See id.* at 316.

140. *Id.* (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

141. *See id.* at 317, 319; *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478 (1985).

> corporate defendant with which the state has no contacts, ties, or relations.[142]

International Shoe's emphasis on fairness and reasonableness to the defendant did not entirely remove considerations of state territorial boundaries from the jurisdictional inquiry. The minimum contacts analysis refers to minimum contacts with the forum in question—the state. The opinion, however, did not answer why fairness, in that circumstance, turns on contacts with that forum. For example, why might it be fair to subject a defendant to suit in an in-state forum hundreds of miles away from their home, but unfair to subject them to suit in a forum that is just across the state line?[143]

In the years since *International Shoe*, the Supreme Court has attempted to clarify the doctrine. In doing so, it has oscillated between explicitly rejecting or promoting horizontal federalism as a part of the personal jurisdiction inquiry. In *World-Wide Volkswagen*, the Court held that one function of the minimum contacts analysis was to "ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[144] It further noted that because of fundamental transformations in the American economy, the need for jurisdictional limitations to prevent inconvenient litigation had lessened; however, this did not make state borders irrelevant.[145] Rather, the Court remained committed to the view that the Constitutional structure—including that of the Fourteenth Amendment—required deference to "principles of interstate federalism."[146] Thus, the "reasonableness of asserting jurisdiction" had to be analyzed "in the context of our federal system of government."[147]

142. *Int'l Shoe Co.*, 326 U.S. at 319.

143. *See* Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Elist Erectors, Inc., 212 F.3d 1031, 1036 (7th Cir. 2000) ("Kentucky's proximity to southern Indiana (Louisville would be more convenient for residents of New Albany than tribunals in Indianapolis) does not permit Kentucky to adjudicate the rights of people who have never visited that state or done business there; its sovereignty stops at the border.").

144. World-Wide Volkswagen Corp. v. Woodson, 444 U. S. 292 (1980).

145. *Id.* at 293.

146. *Id.*

147. *Id.* (quoting *Int'l Shoe Co.*, 326 U.S. at 317).

However, two years later, the Court seemed to walk back this emphasis on horizontal federalism. In *Insurance Corporation of Ireland*, the Court held that personal jurisdiction recognized "first of all an individual right."[148] According to the Court, the restriction personal jurisdiction placed on state sovereign power was solely a "function of the individual liberty interest preserved by the Due Process Clause," rather than some theory of horizontal federalism or limits on extraterritorial state overreach.[149] In a statement that stands out for its clarity in an otherwise unclear body of law, the Court stated that the Due Process "Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns."[150]

In recent years, the Court has appeared to have swung the other way by re-embracing horizontal federalism as a key part of the personal jurisdiction inquiry. As discussed in greater detail below, the 2021 *Ford Motor Company* cases explicitly included "interstate federalism" in their analysis of whether Montana and Minnesota could properly exercise jurisdiction over Ford.[151] The Court held that the rules governing specific personal jurisdiction reflect "two sets of values—treating defendants fairly and protecting 'interstate federalism.'"[152] Jurisdiction was upheld, in part, because "principles of 'interstate federalism'" supported it.[153]

Whether horizontal federalism plays a role in personal jurisdiction inquiries is fundamental to understanding the role personal jurisdiction can play in minimizing the collision of conflicting abortion laws and effectuating the goals of the FFC. Bounty laws like SB 8 and its progeny implicate the same questions that Justice Field and Justice Stone were grappling with in their landmark opinions. How do we regulate a country composed of co-equal sovereigns that citizens may travel freely between, bringing with them all the disputes and conflicts

148. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982).

149. *Id.* at 702 n.10.

150. *Id.*

151. Ford Motor Co. v. Mont. Eighth Judicial Dist. Court, 592 U.S. 351, 360 (2021) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U. S. 286, 293 (1980)).

152. *Id.*

153. *Id.* at 368.

humanity is wanting to create?[154] And how do modern developments that make interstate relationships between individuals so much easier impact our understanding of what is fair, reasonable, and a proper exercise of state power?[155]

As in *Pennoyer* and *International Shoe*, it seems impossible to answer these questions without some exploration of interstate relations. Because the regulatory scheme at issue here involves deeply divided states expressly trying to extend their legislative power as far as they can, on a politically controversial issue, the stakes are higher than before.[156] If there was ever a time where a clear articulation of the principles jurisdiction purportedly protects, it is now. It is in the context of abortion law, where drastically conflicting laws are staring down a collision course that implicates some of the most intimate (although no longer constitutionally protected) individual rights.

B. Regulation of Extraterritorial Power Through Jurisdiction

To begin the search for some guiding principle, this Article turns now to two lines of case law that explore jurisdictional inquiries in cases regulating extraterritorial activity. The first section explores two recent cases that reinvigorate the value of considering horizontal federalism in the personal jurisdiction inquiry. These cases reveal two things: First, the Court has returned to horizontal federalism as a principal concern underlying the personal jurisdiction inquiry; and second, the Court has not yet articulated a clear framework for *how* federalism should be considered in this inquiry. Consequently, although horizontal federalism is clearly a part of the Court's current personal jurisdiction jurisprudence, further development is needed to effectively use it as means for addressing the abortion law conflict.

The second section discusses the intentional tort cases, and the effects test for personal direction of out-of-state activity into the forum state. These cases articulate one rationale for allowing regulation of out-of-state conflict via adjudicatory jurisdiction and thus are a potential path for understanding how personal jurisdiction inquiries might be answered in cases applying state abortion law

154. *See* Pennoyer v. Neff, 95 U.S. 714 (1877).

155. *See World-Wide Volkswagen Corp.*, 444 U.S. at 292–93.

156. *See* discussion *supra* Part II.

extraterritorially. However, these "effects cases" do not sufficiently map onto the abortion law conflict. This is because the abortion laws in question tend to remove the traditional nexus between a legal claim and a personal injury, by empowering private citizens disconnected from the abortion to bring suit. Thus, these cases also do not satisfyingly answer how personal jurisdiction could regulate the impending conflict.

1. The Court's Return to Horizontal Federalism

In two of the most recently decided personal jurisdiction cases, the Supreme Court addressed extraterritorial state reach by considering horizontal federalism in its analysis. At the ten-thousand-foot view, returning to an emphasis on sister-state relationships makes sense. Questions of convenience do not arise in the same way today as they did in the days of *International Shoe* or even *Insurance Corp*. Interstate travel is fairly common-place, and many court proceedings now take place on Zoom.[157] Indeed, in at least one of the cases discussed below, jurisdiction was rejected even though all questions of convenience counseled in favor of upholding jurisdiction.[158]

In 2017, the Court decided *Bristol-Myers Squibb Co. v. Superior Court*.[159] *Bristol-Myers* was an 8-1 decision holding that in a product-liability mass action, nonresident plaintiffs had to show a specific connection between their claims and the forum state.[160] Because there was no connection between California (the forum) and the specific claims at issue, the Court denied personal jurisdiction.[161]

The litigation arose because 678 individuals brought eight separate complaints against Bristol-Myers, an international

157. Allie Reed, *Virtual Court Hearings Earn Permanent Spot After Pandemic's End*, BLOOMBERG L. (May 18, 2023, 3:45 AM), https://news.bloomberglaw.com/us-law-week/virtual-court-hearings-earn-permanent-spot-after-pandemics-end.

158. *See* Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 BOS. COLL. L. REV. 1251, 1254 (2018).

159. Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cnty., 582 U.S. 255 (2017).

160. *Id.* at 265 ("What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.").

161. *Id.*

pharmaceutical company, in California state court.[162] Bristol-Myers had manufactured a wildly successful blood-thinning drug.[163] The suits alleged that this drug, Plavix, caused severe side-effects that had damaged the plaintiffs' health.[164] Of the plaintiffs, only 86 were from California.[165] The cases were structured in such a way to avoid removal under either traditional rules, or under the minimal diversity requirement of the Class Action Fairness Act ("CAFA").[166] Bristol-Myers was stuck in state court, facing what it perceived to be unfavorable, plaintiff-friendly law.[167]

In response, the company moved to dismiss all non-California resident plaintiffs' claims for lack of jurisdiction.[168] The only states with general jurisdiction over it were Delaware and New York.[169] The Supreme Court had recently done away with general "doing business" jurisdiction for corporations,[170] so the scope of Bristol-Myers contacts through its business and sales in California could not establish general jurisdiction.[171] Without this rule, the California court would need specific jurisdiction over the nonresident plaintiffs' claims to proceed.[172]

162. *Id.* at 259.

163. *Id.*

164. *Id.*

165. *Id.*

166. *See* Bradt & Rave, *supra* note 158, at 1275. It is impossible to read *Bristol-Myers* outside of the context of class action politics, but this is beyond the scope of this Article.

167. Petition for Writ of Certiorari at 30, *Bristol-Myers Squibb Co.*, 582 U.S. 255 (2017) (No. 16-466), 2016 U.S. S. Ct. Briefs LEXIS 3648, at *60.

168. *Bristol-Myers Squibb Co.*, 582 U.S. at 259.

169. *Id.* at 258.

170. Prior to *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) and *Daimler AG v. Bauman*, 571 U.S. 117 (2014), courts viewed general jurisdiction over corporations broadly, allowing jurisdiction to be found wherever the corporation was "doing business." *Goodyear* and *Daimler* rejected this broad conception and restricted general jurisdiction to states where the corporation was essentially at home. *See also* Maggie Gardner Gardner et al., *The False Promise of General Jurisdiction*, 73 ALA. L. REV. 455, 478 (2022) [hereinafter *False Promise of General Jurisdiction*].

171. *Id.* at 259–60.

172. *Id.*

The Supreme Court found there was no specific jurisdiction, because the nonresident claims were missing a "connection between the forum and the specific claims at issue."[173] It did not matter that there was little inconvenient about requiring Bristol-Myers to litigate these clams in California.[174] All cases arose from plaintiffs taking the same drug, and Bristol-Myers would be in California state courts either way, because of the resident plaintiffs' claims. Yet, the Court held that "[t]he mere fact that other plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents" was not sufficient to support specific jurisdiction over the nonresidents' claims.[175]

Instead, the Court emphasized that personal jurisdiction is not only about convenience or distance. Rather, "restrictions on personal jurisdiction 'are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.'"[176] According to the Court, personal jurisdiction limits state overreach, or extraterritorial regulation, by acting "as an instrument of interstate federalism."[177] Thus, horizontal federalism concerns, the Court said, could be "decisive" in questions of jurisdiction.[178] Notably, three Justices who had previously expressed doubts "about the role of interstate federalism in personal jurisdiction analysis" joined this opinion.[179]

The Court did not elaborate beyond this. It did not explain why California's exercise of jurisdiction over the nonresident claims would offend interstate federalism. However, sister-state relations must provide the foundation for the Court's decision. Even if we are to set aside the above-cited proclamations about federalism, the Court clearly did not rely on a convenience/burden framework to deny jurisdiction.

173. *Id.* at 265.

174. *Id.* at 263.

175. *Id.* at 265.

176. *Id.* at 263 (quoting Hanson v. Denckla, 357 U.S. 235, 251 (1958)).

177. *Id.*

178. *Id.*

179. Richard D. Freer, *From Contacts to Relatedness: Invigorating the Promise of "Fair Play and Substantial Justice" in Personal Jurisdiction Doctrine*, 73 ALA. L. REV. 583, 597 (2022) ("Surprisingly, Justices Ginsburg, Breyer, and Kagan joined the majority's opinion despite having express doubts (in other cases) about the role of interstate federalism in personal jurisdiction analysis.").

Indeed, Bristol-Myers never asserted that there were "practical problems resulting from litigating in the forum," likely because it was already litigating other conceptually identical claims in that very forum.[180] So although there is an unexplained gap between the Court's statement that horizontal federalism animates the personal jurisdiction inquiry and the conclusion that there are insufficient contacts to support jurisdiction in this case, the holding must logically rely on concerns for sister-state relationships. In her lone dissent, Justice Sotomayor agreed: "The majority's animating concern, in the end, appears to be federalism."[181]

Another thread of *Bristol-Myers*' litigation history lends support to this conclusion. In its brief at the Supreme Court, Bristol-Myers embraced the filing of suit against them in federal court.[182] If the suits had been filed in federal court, they would have been consolidated for pretrial proceedings in a federal multi-district litigation ("MDL").[183] An MDL could have been located virtually anywhere in the country, including in a state whose courts would have had no specific jurisdiction over *any* of the claims, or even California itself.[184] Thus, convenience or fairness cannot be the deciding factors here. Clearly, if Bristol-Myers would have had a fair opportunity to defend itself in a California district court, the same opportunity would exist in "a State court a block away."[185]

Perhaps what makes jurisdiction appropriate in one court but not the other is not either's geographic location, but rather the difference

180. *Bristol-Myers Squibb Co.*, 582 U.S. at 263.

181. *Id.* at 276 (Sotomayor J., dissenting).

182. Brief for Petitioner at 90, *Bristol-Myers Squibb Co.*, 582 U.S. 255 (2017) (No. 16-466), 2017 U.S. S. Ct. Briefs LEXIS 801, at *90 ("Respondents also could have sued Bristol-Myers in federal court in the States just mentioned and participated in the process that Congress designed to handle disputes of this kind: federal multi-district litigation (MDL)").

183. *See* 28 U.S.C. § 1407(a) (stating that "[w]hen civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings").

184. *See* Bradt, *supra* note 114, at 1169.

185. *See* Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 109 (1945). Of course, this inconsistency in Bristol-Myers' argument stemmed from a desire to avail themselves of more favorable federal courts. *See* Brief for Petitioner, *supra* note 182, at 90. But the argument itself makes clear that the case does not turn on concerns that the defendant would be subject to inconvenient or burdensome litigation.

in how far each can stretch its adjudicatory power. If federal courts are constrained by federal borders—a question the majority in *Bristol-Myers* left open—and these borders allow federal courts to reach their adjudicatory power further than the states, state borders create jurisdictional restraints based on something more than just geography. The holding of *Bristol-Myers* suggests that this "something more" is horizontal federalism.

The Supreme Court reaffirmed the role of federalism in the personal jurisdiction framework in *Ford Motor Company v. Montana Eighth Judicial District Court*.[186] *Ford* involved two products-liability cases brought against Ford Motor Company, one from Montana and one from Minnesota.[187] In both cases, plaintiffs had been killed or injured allegedly because of their Ford cars' defectiveness.[188] Both plaintiffs sued in their home states, which was where the accidents had occurred, but not where the cars were originally sold.[189] Ford moved to dismiss for lack of personal jurisdiction, arguing that each state court only had jurisdiction if there was a causal connection between the company's conduct in the state and plaintiff's claims.[190] This, Ford argued, would only occur if the car that caused the accident was "designed, manufactured, or—most likely—sold in the State the particular vehicle involved in the accident."[191] Neither of the plaintiffs could make that showing.[192]

The Court rejected this strict causal test.[193] It found jurisdiction was appropriate because the "relationship among the defendant, the forum[s], and the litigation" was sufficient to support specific jurisdiction.[194] The decision had much to say about personal jurisdiction doctrine, which is unsurprising given that Justice Kagan, a former civil procedure professor, authored it. The Court held that specific jurisdiction was derived from two sets of values: "treating

186. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351 (2021).
187. *Id.* at 356.
188. *Id.*
189. *Id.*
190. *Id.* at 356–57.
191. *Id.* at 356.
192. *Id.*
193. *Id.* at 355.
194. *Id.* at 371.

defendants fairly and protecting 'interstate federalism.'"[195] Further, the defendants' interests must be considered alongside the states in relation to each other.[196] A function of specific personal jurisdiction, according to the Court, was to ensure that states do not overreach beyond what is appropriate given the balance of power in our federalist system.[197]

As to the first value, the Court also found that subjecting Ford to the jurisdiction of these courts was not unfair because it was both "reasonable" and "predictable."[198] It further held that principles of "interstate federalism" supported jurisdiction.[199] In this case, the interests of Montana and Minnesota were strong, while the interests of the states in which the cars were initially sold were comparatively weak. Montana and Minnesota would therefore not be upsetting any balance of horizontal federalism by exercising jurisdiction over the claims.[200]

It would be an overstatement to call either of these cases *clear*, on the whole.[201] But what both *Bristol-Myers* and *Ford* reveal is that the Roberts Court has placed horizontal federalism back into the personal jurisdiction inquiry. Setting aside *Insurance Corp.*'s admonitions, the Court is taking into account the relationships between the states that have a stake in the game, and in some cases, the interests of those states may be the "decisive" factor.[202]

Still, there is much to be desired in terms of the Court's reckoning with horizontal federalism in *Bristol-Myers* and *Ford*. In both cases, the Court addressed federalism concerns in terms of the

195. *Id.* at 360.

196. *Id.*

197. *Id.* ("One State's 'sovereign power to try' a suit, we have recognized, may prevent 'sister States' from exercising their like authority. The law of specific jurisdiction thus seeks to ensure that States with 'little legitimate interest' in a suit do not encroach on States more affected by the controversy.").

198. *Id.* at 368.

199. *Id.*

200. *Id.*

201. *Id.* at 384 (Gorsuch, J., concurring) ("On those scores, I readily admit that I finish these cases with even more questions than I had at the start. Hopefully, future litigants and lower courts will help us face these tangles and sort out a responsible way to address the challenges posed by our changing economy in light of the Constitution's text and the lessons of history.").

202. *See* Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cnty., 582 U.S. 255, 263 (2017).

minimum contacts inquiry.[203] Yet, neither case explains how this inquiry gauges the interests of other states beyond that of the forum state in question. In *Ford*, for example, the Court implied that the states the cars were originally sold had less interest in the litigation than Montana and Minnesota.[204] It gave minimal explanation for this, beyond suggesting these states have a "less significant 'relationship among the defendant, the forum, and the litigation.'"[205] But this tripartite formulation only truly reveals the interest that the forum state has. It does not speak to the interest of other states, or how the exercise of jurisdiction would impact the relationship *between* states.[206]

Similarly, in *Bristol-Myers*, the Court never explained why California's exercise of jurisdiction would be overreaching. One could argue that the Court's opinion implies an inherent concern with California tort law governing the country. Indeed, such an argument would counsel against an expansive view of jurisdiction in cases arising under extraterritorial abortion laws like SB 8. But this justification still leaves lower courts with very little guidance about how to appropriately balance conflicting state interests—something sure to arise in any litigation arising out of the abortion law conflict. Thus, although a main takeaway from these cases is that the Roberts Court has returned to prioritizing horizontal federalism,[207] it has not yet defined this inquiry in a way that gives practical guidance to lower courts.

2. Regulating the "Effects" of Out-of-State Conduct

Another area where the Supreme Court has explored extraterritorial regulation through jurisdiction is in the context of intentional out-of-state conduct directed at a forum state. The Court has held that there may be personal jurisdiction over an out-of-state defendant when they have engaged in an intentional act aimed at the forum state that caused effects there.[208] Some scholars have suggested

203. *See id.* at 262; *see also* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 367 (2021).

204. *Ford Motor Co.*, 592 U.S. at 368.

205. *Id.*

206. *See False Promise of General Jurisdiction*, *supra* note 170, at 478.

207. *See* Charles W. Rhodes et al., Ford*'s Jurisdictional Crossroads*, 109 GEO. L.J. ONLINE 102 (2020).

208. *See* Calder v. Jones, 465 U.S. 783, 788–89 (1984).

that this test could support jurisdiction in an antiabortion state over out-of-state defendants who assisted a forum state resident in obtaining an abortion.[209] Because this "effects test" addresses actions that occurred entirely outside the forum state, it has potential relevance for laws like SB 8, which intend to capture such activity.

The Supreme Court laid out the "effects test" in *Calder v. Jones*.[210] In *Calder*, actress Shirley Jones sued the *National Enquirer* for libel in California state court.[211] Jones lived and worked in California.[212] The *National Enquirer* was a Florida corporation with its principal place of business also in Florida.[213] It had a nationwide distribution with large California circulation. The allegedly libelous article was written and edited in Florida by Florida journalists.[214] The writer of the article was a Florida resident who traveled to California multiple times per year for business.[215] He researched the article entirely in Florida, though he did draw on California sources.[216] Calder, the other defendant and president of the *Enquirer*, was a Florida resident who had only been to California twice, both for unrelated matters.[217]

The Court held that jurisdiction over the Florida defendants was proper because of the "effects" of "their Florida conduct in California."[218] Central to the Court's analysis was the conclusion that the defendants knew the injury that their article would cause would be experienced in California.[219] The defendants expressly aimed their "intentional, and allegedly tortious, actions" at California.[220] Thus,

209. *See* Florey, *supra* note 28, at 493; *see also* Paul Schiff Berman et al., *Conflicts of Law and the Abortion War Between the States*, 172 U. PA L. REV. 1, 58 (2024).

210. 465 U.S. at 788–89.

211. *Id.* at 784.

212. *Id.* at 785.

213. *Id.*

214. *Id.* at 784–85.

215. *Id.* at 785.

216. *Id.*

217. *Id.* at 786.

218. *Id.* at 789.

219. *Id.* at 789–90.

220. *Id.* at 789.

California was the "focal point" of both the story and the injury—the harm Jones allegedly suffered—itself.[221]

Calder suggests a three-part test for establishing jurisdiction based on the purposeful direction of intentional torts over state borders. First, the defendant must have committed an intentional act. *Calder* rejected the defendants' arguments that they were akin to a "welder employed in Florida who works on a boiler which subsequently explodes in California."[222] The welder in that analogy could only be charged with "untargeted negligence."[223] Thus, an intentional action is necessary under the *Calder* test. Mere negligence will not suffice.[224]

Second, the intentional act must have been expressly aimed at the forum state.[225] In *Calder*, the defendants aimed their conduct at California when they wrote and edited an article they knew would impact Jones in California, the state in which the *National Enquirer* had the largest circulation.[226] This overlaps with the third factor—the act must have caused harm, which the defendant knew would primarily be felt in the forum state.[227]

The Court supported its creation of this test by explicitly acknowledging the propriety of the extraterritorial regulation through jurisdiction in this class of case: "An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California."[228] The Court applied the effects test to deny jurisdiction in *Walden v. Fiore*.[229] The plaintiffs in *Walden* were professional gamblers who were stopped by DEA agents while flying from Puerto Rico to Nevada, by way of Georgia.[230] At the Atlanta airport, defendant Anthony Walden, a local police officer who was a deputized DEA agent, seized approximately $97,000 in cash from the plaintiffs.[231] When the plaintiffs returned

221. *Id.*
222. *Id.* at 789.
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.* at 789–90.
227. *Id.* at 790.
228. *Id.*
229. Walden v. Fiore, 571 U.S. at 277, 289 (2014).
230. *Id.* at 280.
231. *Id.*

home, they sought the prompt return of their money.[232] They later sought money damages in a *Bivens* action alleging the seizure violated the Fourth Amendment rights, filed in the District of Nevada.[233]

In a unanimous holding, the Supreme Court held there was no personal jurisdiction over Walden in Nevada.[234] In so doing, it focused on the minimum contacts inquiry.[235] It found that this analysis looked to the "defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there."[236] In the context of intentional torts, jurisdiction over an out-of-state defendant must be based on intentional conduct that defendant created with the forum state.[237] Applying the principles articulated in *Calder*, the Court found that Walden had "no jurisdictionally relevant contacts with Nevada."[238]

Neither *Calder* nor *Walden* expressly focused on principles of horizontal federalism. Indeed, *Walden* articulated the minimum contacts inquiry as serving to protect a defendant's liberty interests.[239] But both cases address when jurisdiction is appropriate over an out-of-state defendant who has tenuous contacts with a potential forum state because they have rarely, if ever, crossed the state's borders. It is easy to see why some have suggested the effects test may govern litigation brought under the abortion laws described in Part II. These laws intend to cover conduct engaged in by an out-of-state defendant that had some kind of impact in the forum state.[240]

But there are two material distinctions between the conduct in *Calder* and *Walden* and a law like SB 8. First, these cases only address intentional conduct. The threshold question of the effects test requires

232. *Id.* The facts of this case, as presented in the Supreme Court opinion, leave many common-sense questions unanswered. *See* Allan Erbsen, *Personal Jurisdiction Based on the Local Effects of Intentional Misconduct*, 57 WM. & MARY L. REV. 385 (2015) [hereinafter *Personal Jurisdiction Based on the Local Effects of Intentional Misconduct*].

233. *Walden*, 571 U.S. at 281.

234. *Id.* at 282.

235. *Id.* at 284.

236. *Id.* at 285.

237. *Id.* at 286.

238. *Id.* at 289.

239. *Id.* at 284.

240. *See* Berman et al., *supra* note 209, at 61.

an act to be intentional for the rest of the inquiry to apply.[241] SB 8's aiding and abetting provision (the provision that is most relevant to this discussion because of its ability to be applied beyond state borders) applies "regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of [the law]."[242] This language could further be read to not include conduct "expressly aimed" at Texas—i.e. general donations to abortion funds that eventually end up assisting a patient in Texas. Thus, by its terms, SB 8 includes actions beyond the realm of intentional conduct that cannot be governed by the effects test.

More importantly, SB 8 and its progeny sever the connection between a legal claim and a personal injury. SB 8 empowers an unrelated third party to sue an individual who helps someone get an unlawful abortion.[243] It does not require there be "harm" in the traditional sense.[244] To an SB 8 plaintiff, perhaps the very thought of an abortion occurring causes them some sort of psychic harm. But to the individual who wanted the abortion and was assisted by the SB 8 defendant, no harm was done.

Calder required a much more predictable understanding of harm. The *Calder* defendants "knew that the brunt of [the] injury would be felt by [Jones] in" California.[245] The hypothetical SB 8 defendant cannot possess this requisite knowledge, such that they should "reasonably anticipate being haled into" Texas court.[246] This is because there is no way to predict whether assisting someone in accessing a desired abortion would cause an injury to an unknown, unrelated individual with anything close to the certainty required by *Calder* and *Walden*. A generalized idea of harm to the public at large does not fall within the confines of the effects test.

241. *See* Calder v. Jones, 465 U.S. 783, 789 (1984).

242. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a).

243. *See generally id.*

244. Diego A. Zambrano, *Maneuvering Around the Court: Stanford's Civil Procedure Expert Diego Zambrano on the Texas Abortion Law*, STAN. L. SCH. (2021), https://law.stanford.edu/2021/09/08/maneuvering-around-the-court-stanfords-civil-procedure-expert-diego-zambrano-on-the-texas-abortion-law [hereinafter *Maneuvering Around the Court*].

245. *See Calder*, 465 U.S. at 789–90.

246. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U. S. 286, 297 (1980).

The usual route for addressing that kind of diffused harm is through a public nuisance suit. A public nuisance is defined as "an unreasonable interference with a right common to the general public."[247] The common law tort has often been used to bring suits challenging pollution abatement,[248] the blocking of public thoroughfares,[249] and public health hazards.[250] Public nuisance suits—when enforced by public actors—recognize a state's interest in vindicating its own social policy by protecting its citizens' public rights. This interest may apply regarding extraterritorial activity.[251] For example, a factory that sits on the border of two states polluting the air can harm citizens across the border. When such harm is dispersed amongst a citizenry, a suit may be authorized to stop the interference with the public right.

It is challenging to fit abortion laws into the context of public nuisance suits. There is not a defined public right to be free from someone else receiving a medical procedure, even in abortion-restrictive states. A state could supposedly attempt to define abortion as a public harm in its statutory laws, but any plaintiff would certainly face challenges proving that a single medical procedure creates a harm felt in a tangible way by the general public such that the power of state to vindicate its interest in protecting particular plaintiffs is activated.

Courts have recognized public nuisances in cases where individuals practiced medicine without a license, or engaged in such incompetence practice that it threatened the health of the general

247. RESTATEMENT (SECOND) OF TORTS § 821B (1979).

248. State, Dep't of Env't Prot. v. Exxon Corp., 151 N.J. Super. 464 (Ch. Div. 1977).

249. Newcastle v. Grubbs, 171 Ind. 482 (1908).

250. Mills v. Hall & Richards, 9 Wend. 315 (N.Y. Sup. Ct. 1832).

251. Illinois v. City of Milwaukee, Wis., 406 U.S. 91, 107 (1972), *disapproved in later proceedings sub nom*. City of Milwaukee v. Illinois & Michigan, 451 U.S. 304 (1981). It is also important to note that in 2010, the Supreme Court held that the Clean Air Act displaced federal public nuisance law. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424 (2011). However, state public nuisance claims may still be available for such interstate pollution cases. *See* Kate Markey, *Air Pollution as Public Nuisance: Comparing Modern-Day Greenhouse Gas Abatement with Nineteenth-Century Smoke Abatemen*t, 120 MICH. L. REV. 1535 (2022).

public.[252] In both situations, the harm the state attempted to protect against was something that was shared by all citizens.[253] Setting aside the fact that these cases were enforced by state actors, they are also distinct from SB 8-styled laws because they focused on protecting the public from an injury that all had the potential to face. All will likely need to access medical care at some point in their life, and an unlicensed practitioner therefore presents a threat to the general public who may seek their services without knowing of the danger. Those opposed to abortion have no similar likelihood of accidentally accessing an abortion.[254]

But even if a law like SB 8 were to be understood in this way, this theory of vindication of social interest does create the linkage necessary between an SB 8 plaintiff and out-of-state defendant to support jurisdiction under the effects test. Cases that rest on an effects-based theory of jurisdiction are not availment cases. There was no argument that Walden availed himself of the economic benefit of Nevada such that fairness requires he be haled into court there.[255] Rather, these cases rest on whether a defendant's express actions caused foreseeable harm to a specific plaintiff in the forum state.[256] When this specific, tangible connection exists, there is significant

252. *See, e.g.*, Mich. State Chiropractic Ass'n v. Kelley, 79 Mich. App. 789 (Mich. Ct. App. 1977); State ex rel. Marron v. Compere, 103 P.2d 273, 279 (N.M. 1940).

253. *See Mich. State Chiropractic Ass'n*, 79 Mich. App. at 789; *State ex rel. Marron*, 103 P.2d at 279.

254. This is why many of the SB 8-styled laws would not survive a federal standing challenge. *See Maneuvering Around the Court*, *supra* note 244 ("Most scholars would agree that an SB 8 claim by a random member of the public against an abortion clinic would be dismissed in federal court for lack of Article III standing.").

255. *See generally* Walden v. Fiore, 571 U.S. at 277, 289 (2014) ("[Walden's] actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at plaintiffs whom he knew had Nevada connections.").

256. *See* Calder v. Jones, 465 U.S. 783, 789–90 (1984) (discussing the defendant reporters availing themselves in another state via their journal publication); *Walden*, 571 U.S. at 291 (discussing Walden's lack of contacts with the plaintiff's forum state).

linkage between the "defendant, the forum, and the litigation."[257] If this linkage is lacking, so is jurisdiction.

A suit brought against an out-of-state actor for aiding in an abortion, under a theory that this action created generalized harm to all members of the forum state, cannot justify jurisdiction under the effects test. Shirley Jones' neighbor could not sue the *National Enquirer* and base their jurisdictional arguments on the theory that they do not like living around defamation. Such diffused harm, even if it were somehow actionable under state law, lacks the "jurisdictionally relevant contacts" the effects test requires.[258]

So where does all this leave us? First, as discussed in Section II.B.1, modern personal jurisdiction doctrine is animated significantly, if not primarily by horizontal federalism concerns. If personal jurisdiction is recognized as focused on regulating and maintaining sister-state relationships, then this, combined with its inherently ex-ante inquiry, makes the doctrine a powerful candidate for addressing the impending abortion law conflict.

However, the current doctrine provides insufficient instruction for how to determine when there is personal jurisdiction over nonresident defendants sued under abortion bounty laws. The recent cases reestablishing interstate federalism as a driving concern have not articulated a clear framework for *how* to consider sister-state relations when analyzing jurisdiction. *Calder* and *Walden*, on the other hand, express a general framework for understanding how personal jurisdiction can be analyzed in a narrow class of cases regulating out-of-state conduct. But this narrow grouping does not cover many of the potential factual scenarios that could arise under conflicting abortion laws. Accordingly, further guidance is needed.

IV. AVOIDING THE COLLISION: PERSONAL JURISDICTION AS A LIMIT ON EXTRATERRITORIAL ABORTION REGULATION

By returning the "issue of abortion" to the states, the Supreme Court has set this country on a path of colliding state laws.[259] These

257. *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 371 (2021) (citing Helicopteros Nacionales de Colombia, S. A. v. Hall, 466 U. S. 408, 414 (1984)).

258. *See Walden*, 571 U.S. at 289.

259. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232 (2022).

laws are structured in such a way that the traditional approach to sister-state regulatory conflict will certainly prove insufficient.[260] As abortion-restrictive states seek to reach their social policy beyond their borders through civil litigation, and abortion-protective states respond in kind, the problem of this conflict will become more difficult to ignore.

A two-step solution is needed. First, courts must find an ex-ante mechanism designed to facilitate the same principles of comity and repose that the FFC's judgment provision does ex-post. Second, there must be clear articulation of how that mechanism is to be employed to give lower courts the guidance necessary to handle the litigation likely to arise from this impending conflict. The path to accomplish both these steps requires an examination of personal jurisdiction and the FFC in tandem.

Boiled down to their core, both the FFC and personal jurisdiction address the same problem, with one focused at the beginning of litigation and one at the end. The doctrines are about preventing states from grasping at too much power. The tensions described in Part II are the same tensions that arise in all cases where states attempt to see how far they can grasp beyond their borders using adjudicatory jurisdiction. Indeed, the impending abortion conflict arises out of this common trend of tension between co-equal sovereigns. What makes this conflict different from past examples of state overreach is that it arises from a political project that explicitly seeks to disregard the value of interstate comity in favor of exporting the social policy of certain states into others.[261] Put bluntly, it is an explicit attack on the very concept of horizontal federalism, as well as the goals of the FFC's "nationally unifying force."[262]

The Supreme Court's decisions in *Bristol-Meyers* and *Ford* rejected such approaches to lawmaking. The Court in *Bristol-Meyers* effectively held that California could not govern the whole country in tort law through the use of adjudicatory jurisdiction over the non-California plaintiffs' claims.[263] The Court rationalized this by

260. *See supra* Section II.B (discussing the Full Faith and Credit Clause).

261. *See supra* Section II.A (discussing the statements of state legislators which indicate their desire to extend the reach of their laws beyond state borders).

262. Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943).

263. *See generally* Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cnty., 582 U.S. 255 (2017).

emphasizing values of federalism, notably because the defendants in that case (as in *Ford*) had conceded jurisdiction would be reasonable.[264] Thus, California could not grasp beyond its borders and effectuate its social policy through the deterrence consequences of its tort law.

This result can be explained by recognizing that the Court is implicitly importing FFC values into the personal jurisdiction inquiry. In *Bristol-Meyers*, when the Court explained personal jurisdiction "as an instrument of interstate federalism," it effectively acknowledged that the reach of a state's ability to vindicate its social power is limited when it is done through an exercise of adjudicatory jurisdiction over out-of-state defendants.[265] These limits are necessitated by the structure of horizontal federalism. Because each state retains co-equal sovereignty with its sister states, any exercise of jurisdiction that operates as an extraterritorial extension of power must be carefully analyzed within this structure.

In *Bristol-Meyers*, the Court did just that. It found that the exercise of jurisdiction over the claims from non-California plaintiffs would essentially be an overreach of California's state power.[266] Implicit in the Court's reasoning was an unstated fear that allowing jurisdiction would give California the go ahead to effectively govern the country with its own tort law. In contrast, in *Ford*, the Court recognized that allowing Montana and Minnesota to exert their state power through jurisdiction would not trample on the interests of any sister states.[267] Jurisdiction was acceptable because its exercise would not harm the national unity that must exist between states.[268] There was no overreach, no grasping at inappropriate extraterritorial power, and thus comity was upheld.

If personal jurisdiction under the current Court is animated by balancing interstate interests to maintain the identity of states as "integral parts of a single nation,"[269] it is an appropriate mechanism to solve the impending abortion conflict. Courts cannot effectuate the goals of the FFC—comity and repose—by waiting to address conflicts

264. *See id.* at 263.

265. *Bristol-Myers Squibb Co.*, 582 U.S. at 263.

266. *See id.*

267. *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 368 (2021).

268. *See id.*

269. Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268, 277 (1935).

between extraterritorial abortion laws at the judgment stage. At the judgment stage, there will no longer be an ability to maintain interstate comity, because states have explicitly stated their intent to not recognize each other's judgments in this area.[270] Suits to require enforcement will further divide the states, not unite them. The path to avoid recognition of judgments is counter-litigation, removing all hopes of repose and finality. But if the Supreme Court has already blessed, at least implicitly, consideration of the values at the jurisdictional inquiry stage, then these judgment enforcement challenges never have to arise.

This becomes clear when one considers *Bristol-Meyers* through the lens of SB 8. A non-California plaintiff wants to take advantage of California's more favorable tort law, so they sue an out-of-state defendant in California. Setting aside the standing problems with this hypothetical,[271] suppose the Court finds allowing jurisdiction would be an inappropriate overreach of California's regulatory power. Other states may have a stronger, or at least somewhat conflicting, interest in vindicating their own social policy through the exercise of jurisdiction in such a case. Allowing California to extend its social policy through this litigation would infringe the ability of those states to accomplish their goals. This would negatively impact interstate relationships and damage the comity necessary for a robust horizontal federalist structure. Thus, regardless of whether it is convenient or fair for the defendant to litigate in California courts, horizontal federalism counsels against upholding jurisdiction.[272]

Viewing *Bristol-Meyers* in this framing appears to create a clear framework for what personal jurisdiction inquiries might look like if aiding and abetting lawsuits are brought against out-of-state defendants under SB 8 and its progeny. If horizontal federalism concerns limit California's ability to extend the reach of its tort law extraterritorially at the jurisdictional stage of litigation, similar, if not stronger, concerns

270. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 123467.5 (bar on recognition of judgments in suits under SB 8-styled laws).

271. *See* Eleanor Klibanoff, *Texas State Court Throws out Lawsuit Against Doctor Who Violated Abortion Law*, TEX. TRIB. (Dec. 8, 2022, 4:00 PM), https://www.texastribune.org/2022/12/08/texas-abortion-provider-lawsuit.

272. *See* Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cnty., 582 U.S. 255, 276 (2017) (Sotomayor, J., dissenting) ("The majority's animating concern, in the end, appears to be federalism[.]").

should prohibit Texas from applying its abortion policy beyond its borders through private, civil litigation.

To give lower courts guidance, this framework should be made explicit. As noted above, considering horizontal federalism in terms of the minimum contacts leaves open significant questions as to how courts should balance conflicting interests between states.[273] How are these interests weighed? Why is Montana's interest in ensuring the safety of the cars driven by its citizens more important than another state's interest in facilitating desirable conditions for business?[274] None of these questions are answered by analyzing exclusively the connections a defendant has with a potential forum state.

If, however, courts explicitly stated they were considering comity and repose between sister states during the jurisdictional inquiry, a more coherent doctrine might develop. Undeveloped principles of horizontal federalism—gestured at vaguely in cases like *Ford* and even *World-Wide Volkswagen*—could be grounded in values already explained in a long line of FFC cases.

Of course, these values would have to be adapted to fit in the early stages of litigation, rather than at the end. As seen in both *Ford* and *Bristol-Meyers*, such considerations are already taking place. The Court is using personal jurisdiction to balance the disparate interests that arise when more than one state is interested in vindicating social policy through a particular instance of litigation. Lower courts should follow suit when confronted with cases where one state attempts to extend its power to regulate abortion beyond its borders by crafting vague statutes unmoored by geographical limitations.

Such an approach is desirable for a variety of reasons. First, it avoids leaving the resolution of conflicting state interests until the judgment enforcement stage. Doing so, as described in Section II.B, does damage to the very values the FFC intends to protect. Handling the conflict upfront would stem the need for conflicting litigation to even be brought, thereby actually effectuating the goals of comity and repose. Further, it would effectuate these goals without requiring any

273. *See False Promise of General Jurisdiction*, *supra* note 170, at 478.

274. *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 368 (2021).

restructuring of the FFC doctrine—an area of law the Supreme Court seems uninterested in wading into.[275]

Second, the effect of explicitly considering horizontal federalism concerns when analyzing personal jurisdiction under a law like SB 8, would naturally have the effect of restricting the reach of extraterritorial abortion laws. This is most consistent with the structure of a nation composed of coequal sovereigns. If the states are truly coequal, the policy of one cannot be elevated over another through procedural machinations.[276] This requires a delicate balancing act, and that balancing act is constitutionally required.

Limiting extraterritorial reach of abortion laws through restrictions on jurisdiction would engage in this balancing in a way that avoids encroaching on the rights of states to vindicate their own social policy. It would instead simply limit their ability to impose that social policy on another state through litigation between private citizens. Such cases, which are not justified by a theory of dispersed harm to the general public of an entire state, are an inappropriate mechanism for the vindication of state interests.[277] They are untethered from a state's need to protect a particularly harmed individual.[278] As mentioned, an SB 8 plaintiff can be entirely unconnected from the person who received the abortion or the person who assisted in their access.[279] Indeed, SB 8's explicit prohibition on public enforcement severs reliance on any such theory.[280]

Lastly, clarifying how jurisdictional inquiries will be conducted under these laws will allow people to govern their conduct in a predictable manner. One of the many problems with the vague abortion statutes many states are currently enacting is that people have very little guidance as to what actions are actually prohibited. That confusion is part and parcel of these laws. The goal is to chill conduct, such that

275. *See supra* Section II.B.

276. *See* Baker v. Gen. Motors Corp., 522 U.S. 222, 232 (1998) ("The Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'") (quoting *Pac. Emp. Ins. Co.*, 306 U.S. at 501).

277. *See supra* Section III.B.

278. *See supra* Section III.B.2.

279. *See generally* TEX. HEALTH & SAFETY CODE §171.207–208.

280. *Id.* § 171.208(h).

sanctions via litigation are actually a secondary tool.[281] Individuals instead overcompensate for fear of being haled into court under a statute that may or may not apply to them. Indeed, many out-of-state abortion funders ceased donations post *Dobbs* in states with SB styled bans, for fear the law could reach them.[282] If courts could, in the cases that do arise under these laws, clearly establish the principles that would govern any jurisdictional inquiries, people could structure their conduct accordingly. This itself serves the goals of the FFC by minimizing the scope of litigation at the pre-merits stage.

In sum, there is a clear framework for how to avoid the impending abortion law conflict that is supported by the modern Court's current moves, which requires no restructuring of settled areas of law and vindicates, rather than damages, the constitutional value of interstate comity. When out-of-state defendants are sued under extraterritorial abortion laws, courts should primarily consider interstate relations and horizontal federalism when deciding whether there is personal jurisdiction. In doing so, courts should explicitly articulate that they are engaging in these inquiries in services of the requirements of interstate comity that the FFC imposes.

V. CONCLUSION

One of the most unsettled areas of law in America currently is state abortion law. Since the fall of *Roe*, abortion-restrictive states have sought to stretch their regulatory reach beyond their borders through procedural machinations. It is likely that this trend will continue, as abortion-protective states respond to this overreach with their own shield laws. The impending conflict of these laws threatens to do irreparable damage to the very structure of our horizontal federalist system if left unaddressed. The current doctrine for addressing conflicting judgments between states is not a sufficient mechanism for handling the impending abortion law conflict because it applies too late

281. Jonathan Mitchell, the architect of SB 8, admitted that the goal of SB 8 was to force compliance with the law through threat of bounty litigation, whether or not that litigation actually materialized. *See* Jeannie Suk Gersen, *The Conservative Who Wants to Bring Down the Supreme Court*, NEW YORKER (Jan. 5, 2023), https://www.newyorker.com/news/annals-of-inquiry/the-conservative-who-wants-to-bring-down-the-supreme-court.

282. *See* Rowland, *supra* note 32.

in the game. But a practical look at how the current Supreme Court has analyzed personal jurisdiction reveals that it may be key to maintaining sister-state comity and effectuating constitutional values in this time of quasi-Balkanization. This conflict might be new, but the solution is not. It simply requires a creative vision of procedure.