

Territoriality, Jurisdiction, and the Right(s) of Publicity

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When Professors Rothman and Ginsburg asked me to speak here on the issues surrounding territoriality, jurisdiction, choice of law, and the like in the law of publicity, I confessed that I knew little about the developing law of publicity rights. Having taught Copyright Law for many years, I had come across the well-known foundational publicity rights cases—the cases involving Tom Waits,¹ Vanna White,² and Bette Midler³—because of the problematic relationship between those decisions (under California state law) and federal copyright law. But I had not studied the publicity doctrine, or the main corpus of cases and statutes, with any great care.

I had, however, done some thinking over the years about territoriality and jurisdiction in other contexts.⁴ I was happy to have the opportunity to dive in and spend a couple of months immersing myself in the publicity cases and commentary to try to discover how those questions played themselves out in this particular corner of the legal universe. I found the results “alarming.” I use the term advisedly, so let me try to explain what I mean by it.

I recently purchased this coffee mug from a woman—we will call her “Ms. Seller”—operating a small souvenir cart on Flatbush Avenue in Brooklyn:

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1. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *abrogated by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

2. *White v. Samsung Elecs. Am. Inc.*, 971 F.2d 1395 (9th Cir. 1992).

3. *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

4. *See, e.g.*, DAVID G. POST, IN SEARCH OF JEFFERSON’S MOOSE: NOTES ON THE STATE OF CYBERSPACE (2009); David R. Johnson & David G. Post, “*Chaos Prevailing on Every Continent*”: *A New Theory of Decentralized Decision-Making in Complex Systems*, 73 CHI-KENT L. REV. 1055 (1998); David R. Johnson & David G. Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996).

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Figure 1. Photograph taken by author.

Suppose Ms. Seller were to ask us: “What are my legal obligations regarding the use of Martin Luther King, Jr.’s likeness,⁵ and the text referencing his life and work, on the mug? What, if anything, must I do, and whose permission, if anyone’s, do I need, in order to comply with those legal obligations?”⁶

How do we, as lawyers, begin to answer her questions?

Knowing that these “publicity rights” questions are governed almost entirely by state law, we can be sure that the answers to Ms. Seller’s questions will be complicated, confusing, and uncertain. Complexity, confusion, and uncertainty are inherent and inevitable consequences of attempting to apply fifty separate sets of state laws, embedded within a federal system, to events and transactions and people and goods and information that are whizzing constantly across state borders—to say nothing of any possible *international* complications. It will not *alarm* me to find complexity and uncertainty in this particular corner of the legal universe, because I fully expect them to be there.

But suppose we were to discover a system that can *never* produce answers to Ms. Seller’s questions, a Kafkaesque system in which the rules which apply to one’s conduct are completely invisible to, or determinable by, the affected parties *ex ante*. *That* would surely be alarming, or worse—“appalling.” In *that* system, it is *impossible* to conform one’s actions to the law, because one cannot tell in advance what the law is. *That* system, as Lon Fuller put it a half-century ago, “does not simply result in a bad system of law; it results in something that is not properly called a *legal* system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract.”⁷ The Rule of Law itself, whatever it may

5. As it happens, using an object that references the life of Dr. King is particularly apt for a conference on publicity rights, as it is well-known that the King estate has been quite emphatic in pursuing publicity rights claims. See Geoff Edgers, *Why No Major Martin Luther King, Jr. Artifacts Will Be at The New African-American Museum*, WASH. POST (Sept. 11, 2016), <https://perma.cc/R5VH-N28M>.

6. I will ignore, for purposes of this example and this talk, questions concerning possible copyright infringement claims that could arise out of her use of that particular photograph or that particular text.

7. LON L. FULLER, *THE MORALITY OF LAW* 39 (1964). Professor Fuller’s work has unfortunately fallen somewhat out of fashion in academic circles these days; I find it to be an especially rich source of ideas and clear thinking. Fuller discussed eight ways that a system of rules can “miscarry,” and cease to be something that can be fairly called a *legal* system: (1) A “failure to achieve rules at all”; (2) a “failure to publicize, or at least to make available to the affected party, the rules he is expected to observe”; (3)

encompass and however it may manifest itself, does depend in some most fundamental way on our ability, at least *some* of the time, to answer questions like Ms. Seller's *in advance* of deciding whether or not to act in a given situation.

If we could somehow measure the extent of this *ex ante* uncertainty, we might imagine placing entire legal systems, or individual sub-systems such as employment law, securities law, banking law, or defamation law, aligned along an Uncertainty Axis as follows:

Axis of *Ex Ante* Legal Uncertainty

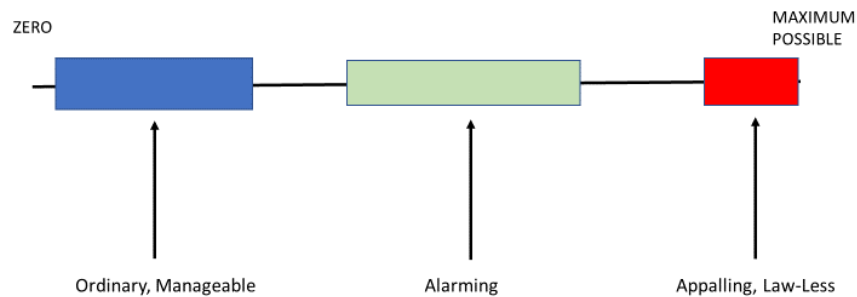


Figure 2. A hypothetical axis of legal uncertainty.

“Alarming” lies somewhere between ordinary (complicated, but manageable) on the one hand and “appalling and law-less” on the other. I am not at all sure where ordinary becomes alarming, or alarming becomes appalling, but these publicity cases certainly made me think more about those questions.

A good place to start our inquiry on Ms. Seller's behalf—given that publicity rights questions are governed by state law—is with the “choice of law” question. This is a matter of simple logic: I cannot know whether the law does or does not require her to obtain someone's permission—or, really, whether the law imposes *any* legal obligations on her—until I know: *What law—whose law—do I need to consult to determine the nature and scope of those obligations?*

“retroactive legislation”; (4) “a failure to make rules understandable”; (5) “contradictory rules”; (6) “rules that require conduct beyond the powers of the affected party”; (7) rules subject to “such frequent changes . . . that the subject cannot orient his action by them”; and (8) a lack of “congruence between the rules as announced and their actual administration.” *Id.* A “total failure in any one of these eight directions,” Fuller argues, destroys the moral claim that the system has on its subjects' obedience:

Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule, or commanded the impossible, or changed every minute.

Id. (emphasis added). The hypothetical I describe in this piece falls squarely within the second of Fuller's categories (and possibly the fourth as well).

Choice of law questions often require a complicated analysis, even for the simplest claims. Choice of law rules are themselves the creature of state law, and each state has its own algorithms to determine which body of substantive law applies in a given case. Given a single, common set of operative facts, such as where the mugs are manufactured, where Ms. Seller conducts business, where and from whom she obtains mugs for resale, where *those* individuals or entities do business, where our seller is domiciled, and where Dr. King was domiciled at the time of his death, etc., those algorithms may yield different outcomes, each pointing to a different body of substantive law.

That can be quite a powerful uncertainty-generator, right at the outset of our inquiry. Fortunately, though, for many types of claims, the different states apply similar or even identical choice of law rules. That is, there exists a rough consensus among them about the algorithm to be used for determining *which* law governs any specific claim. In the law of wills and trusts, or real property transactions, or conversion, or breach of contract, or tortious assault and battery, states are largely in agreement about how the initial choice of law analysis proceeds. Given a set of relevant facts out of which the claim is said to have arisen, they will—more or less—reach the same or similar conclusion regarding the law applicable to the claim. If the question is whether you had adequately disclosed something in a deed to real property located in New York, I am fairly certain New York law will be applied, whether a claim of inadequate disclosure is filed against you in New York (and New York choice of law rules apply), New Mexico (where New Mexico choice of law rules apply) or New Hampshire (where New Hampshire choice of law rules apply).⁸

This kind of rough consensus among states, where it exists, is wonderfully uncertainty-reducing. Provided states use roughly the same choice of law algorithm, we can predict with some certainty which body of substantive law would be applied *ex post* to Ms Seller's conduct wherever a claim against her might ultimately be brought, and therefore we can determine *ex ante* which body of substantive law we will need to consult to determine the obligations respecting the use of the King image that are imposed on her.

But alas, the law of publicity is *not* like that. Determining which body of state law applies to possible publicity claims arising out of our seller's activities turns out to be unusually problematic, because the states disagree quite substantially concerning the appropriate choice of law rules to apply to publicity actions.⁹ You

8. See Michael S. Finch, *Choice-of-Law and Property*, 26 STETSON L. REV. 257, 259 (1996) (“No choice-of-law rule has earlier vintage, or greater longevity, than the rule that issues directly pertaining to real property are governed by the law of the *situs* of the property” whereby “the law of the *situs* governs all issues pertaining to realty, including issues generated by the conveyance, encumbrance, or inheritance of realty.”).

9. Courts faced with the problem of aggregating publicity claims from different states have commented on the extreme variation in state choice of law principles applied to these claims. See *Dryer v. NFL*, No. 09-2182, 2013 U.S. Dist. LEXIS 156712, at *17–20 (D. Minn. Nov. 1, 2013) (describing the nature of the multi-state choice of law analysis for publicity claims as “exceedingly complex” and “extremely complex”). See also *Lightbourne v. Printroom Inc.*, 307 F.R.D. 593, 600 (C.D. Cal. 2015) (describing inter-state variation in choice of law rules for publicity claims); *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1146 (N.D. Cal. 2014) (same). See generally,

could do a serviceable survey of the many different approaches that jurisdictions can take to choice of law questions limiting yourself entirely to cases involving publicity claims.

To begin with, states do not even agree on whether publicity claims are *property* claims or *tort* claims, which can dramatically affect the choice of law principles that are applied to the claims.¹⁰ Some states apply the doctrine of *lex locus delicti* to the tort, applying the substantive law of the state where the tort was committed or to the place where the last event necessary to make an actor liable for the alleged tort took place. Some states look to the law of the place where the injury was suffered rather than the place where the act was committed, which will often be the plaintiff's domicile, or where the commercial value of one's persona is exploited. Other states treat publicity rights as intellectual property rights, and look to the law of the place where the property is situated. Still others follow the guidelines contained in the Restatement Second of Conflict of Law guidelines for the related tort of "invasion of privacy." This analysis requires looking to "the local law of the state where the invasion occurred . . . unless . . . some other state has a more significant relationship to the occurrence and the parties."¹¹ Others do an even more complex and idiosyncratic interest-balancing. California, for instance, applies a three-step "governmental interest" analysis to these choice of law questions, under which its courts apply "the law of the state whose interest would be most impaired if its law were not applied."¹² Minnesota's choice of law analysis involves consideration of five factors: (1) Predictability of result, (2) maintenance of interstate order, (3) simplification of the judicial task, (4) advancement of the forum's governmental interests, and (5) application of the better rule of law.¹³

And it gets worse—at least, from an uncertainty perspective. The choice of law rules in many jurisdictions look to the *plaintiff's domicile* as the source of governing law regarding publicity claims, on the grounds that it is where the purported rightsholder would have suffered the injury from the violation.¹⁴ But this only serves to heighten Ms. Seller's uncertainty, because *ex ante* we cannot determine the plaintiff's domicile given that there is as yet no "plaintiff." We are, remember, trying to help Ms. Seller comply with her legal obligations so as to avoid encountering a "plaintiff." We may have no idea—and, more importantly, no practical way to find out—who might be the relevant rightsholder, and where he or she or it is domiciled.

Melinda R. Eades, Note, *Choice of Law and the Right of Publicity: Domicile as An Essential First Step*, 66 BROOK. L. REV. 1301 (2001).

10. For an astute distillation of the problems inherent in the property versus tort claim split see *Dryer*, 2013 U.S. Dist. LEXIS 156712, at *16–20. See also JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 75–86 (2018) (discussing the property/tort distinction in publicity law).

11. Restatement (Second) of Conflict of Laws § 152 (1971).

12. *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1005–06 (9th Cir. 2001).

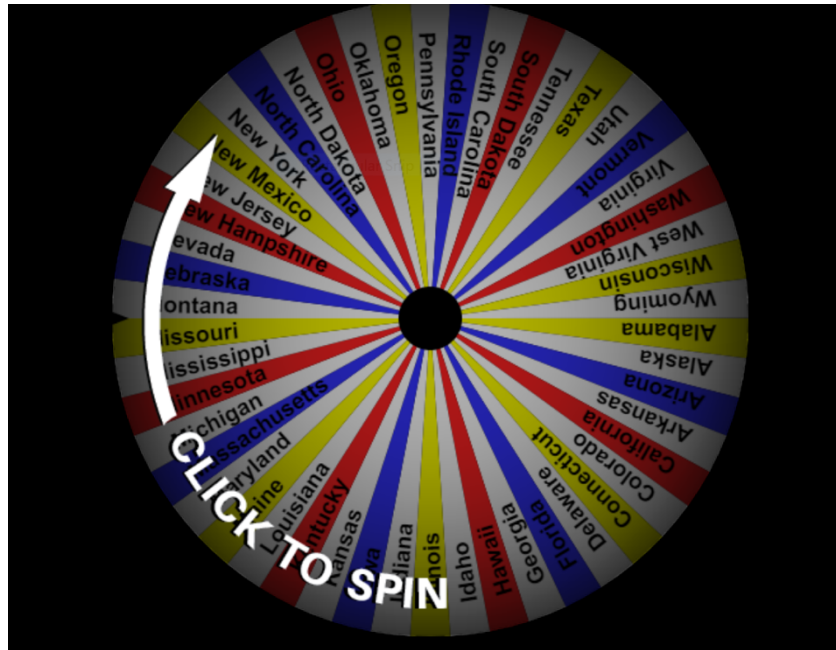
13. *Dryer*, 2013 U.S. Dist. LEXIS 156712, at *17.

14. See, e.g., *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1146 (N.D. Cal. 2014) (explaining that while many States "apply the law of plaintiff's domicile for right of publicity claims," it "does not represent a universal rule," and "[n]ot every jurisdiction follows this approach").

This is especially troublesome where, as here, the publicity rights attach to an individual who is deceased. In any lawsuit involving Martin Luther King Jr.'s publicity right, the plaintiff will obviously not be Reverend King himself, but claimants to whatever rights might have passed under his estate. These claimants might be domiciled (and injured by Ms. Seller's unlicensed sale) anywhere.

Determining whose right of publicity law applies to our seller's sale thus appears to be more difficult than in the ordinary case, because the states disagree whose law applies to these claims. So, we face substantial uncertainty at the outset—considerably more, I think, than in the ordinary case.

It is not exactly a roulette wheel, see Figure 3,¹⁵ . . .



. . . but it is certainly on the roulette-wheel side of the uncertainty spectrum.

That is my first point: With respect to publicity claims, our fifty-state choice of law system is unusually indeterminate as to *which* state's law Ms. Seller must look to *ex ante* in order to determine what her legal obligations are.

This sort of choice of law confusion and uncertainty is interesting, but, standing alone, it is not terribly alarming. *Ex ante* uncertainty about whether Georgia or New York or Oklahoma law is to be applied to our seller's transaction only really matters—to her, and therefore to her lawyer—if and to the extent that the substantive law involved also varies substantially across states. Even if the choice of law system

15. CHOICE OF LAW WHEEL, <https://perma.cc/W2EF-CGSU> (last visited Feb. 26, 2019).

for these publicity claims is a chaotic and unpredictable mess and it is virtually impossible to determine *ex ante* which State's law applies—even if it actually is a roulette wheel!—provided the *substantive* law involved is largely the same across all jurisdictions, Ms. Seller's obligations will be the same or similar *wherever* the roulette wheel stops and *whichever* law is applied. If there is little or no variability in the relevant *substantive* law across states, the choice of law uncertainty, however extreme it may be, will not significantly hinder our ability to determine her obligations *ex ante*.

Many bodies of state law operate in this fashion. Most common law contract claims, for instance, are basically the same in Illinois as they are in Colorado due in large part to the Uniform Commercial Code, a vast swath of contract law. There are differences at the margin, but in these legal domains, state law is, substantively, pretty uniform across the system as a whole.

But uniformity is not the norm for the right of publicity. With regard to *substantive* variation among states, the law of publicity is, again, a high-uncertainty outlier. The fifty states' right of publicity laws vary substantially from one state to another, and not just at the margins. Some states hardly recognize any form of publicity action at all; some states treat it as intellectual property; some treat it as a form of commercial misappropriation; some treat it as a tortious invasion of privacy. How and when the right accrues, to whom it accrues, which aspects of "identity" are protected and which are not, whether the right protects only against commercial uses of a plaintiff's or includes non-commercial uses, whether the claimant has to have commercially exploited his/her identity during his/her lifetime in order to have a claim—on *all* of these dimensions the law differs greatly from state to state. And also, of great pertinence to our seller, states do not agree on whether the rights are transferable as personal property, and whether they are descendible to one's heirs.¹⁶ So that is my second point: Publicity law is unusually indeterminate as a *substantive* matter across jurisdictions.

My third point is that it is this double indeterminacy—uncertainty first as to which law applies, and uncertainty second as to what that law might say—that makes publicity law so "alarming." It looks uncomfortably like spinning a roulette wheel in order to determine which one of the fifty differently-configured roulette wheels you will be allowed to play. Predicting the outcome of that process *ex ante* is no trivial matter. It may not be quite the "perfect storm" of legal uncertainty, but it does seem to be a little too close for comfort.

We do not, sadly, have any good way to measure these kinds of legal uncertainty and variability. If we did, we might be able to construct a graph along the lines of

16. See *Lightbourne v. Printroom Inc.*, 307 F.R.D. 593, 598–99 (C.D. Cal. 2015) (describing how the "states' right of publicity laws vary significantly"); see generally ROTHMAN, *supra* note 10, at 96–98 (summarizing the "chaos" and "confusion" in state publicity law). See, e.g., *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001) (applying California law); *Cummings v. Soul Train Holdings LLC*, 67 F. Supp. 3d 599, 602-03 (S.D.N.Y. 2014) (applying Illinois law); *Dillinger, LLC v. Elec. Arts Inc.*, 795 F. Supp. 2d 829 (S.D. Ind. 2011) (applying Indiana law); *Bullard v. MRA Holding, LLC*, 740 S.E.2d 622 (Ga. 2013) (applying Georgia law); *City of Grand Forks v. Grand Forks Herald, Inc.*, 307 N.W.2d 572 (N.D. 1981) (applying North Dakota law).

the hypothetical one shown in Figure 4, plotting the location of different state law regimes—trespass law, employment law, contract law, defamation law, publicity law, etc.—along these two uncertainty dimensions. My guess is that such a graph would look something like this:

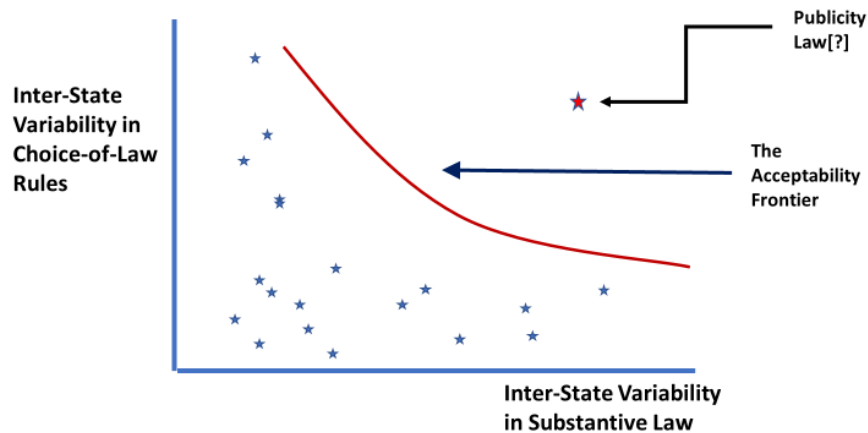


Figure 4. Hypothetical Mapping of State Law Regimes Based on Inter-State Jurisdictional and Substantive Variability.

Some bodies of law (defamation, perhaps, or intentional infliction of emotional distress) would end up in the “northwest” quadrant—high inter-state choice of law variability accompanied by relatively low inter-state substantive variability. Other legal domains (assault, perhaps, or trespass) might cluster down near the origin, in the “southwest” quadrant, due to their low variability on both dimensions. Some bodies of law (employment law, perhaps, or corporation law) might end up in the “southeast” quadrant, with (high inter-state *substantive* variability but relatively low *choice of law* variability).

The “northeast” quadrant—bodies of law with high variability on both dimensions—is where the trouble lies. We might imagine a line—what I have called the “acceptability frontier”—marking off the area of the graph where a body of law’s *combined* uncertainty regarding both choice of law *and* substantive law starts to set off our Rule of Law alarm bells. And publicity law may well occupy a space in that alarming zone.

What to make of all this? It did make me wonder: Even if I am correct in these speculations, and publicity law is indeed an outlier amongst all the other domains of state law when viewed in “uncertainty space,” out there across the Acceptability Frontier, is there a way to argue that such a system is not merely alarmingly uncertain but *unconstitutionally* uncertain? That is, if one believes, following Fuller, that the ability to determine one’s legal obligations in advance is a fundamental component of due process and the Rule of Law, is there not a point at which the fifty-state interlocking system of choice of law and substantive rules produces outcomes that

are so uncertain—so close to a roulette wheel—that the system as a whole constitutes a denial of constitutionally guaranteed due process?¹⁷

Though I would like to think that the Constitution protects against this kind of randomness and uncertainty, a little research and thinking on the question persuaded me that it does not. To begin with, there are some pretty difficult procedural questions: How would one even mount a constitutional challenge of this kind? The uncertainty is the product of fifty states acting without coordination; who is the defendant in a claim that it is unconstitutional? What kind of remedy could a court provide if it were?

Furthermore, while the Court has held that there are indeed due process constraints on a state's application of its choice of law rules, those constraints do not appear to include protection against this kind of systemic *ex ante* uncertainty. In order to satisfy due process, state choice of law decisions must be "neither arbitrary nor fundamentally unfair."¹⁸ To determine whether this is the case, the Court looks to "the contacts of the State whose law is being applied with the parties and with the occurrence or transaction giving rise to the litigation."¹⁹ Where the state lacks any "significant contact" with the parties, and the occurrence or transaction at issue, application of the state's law is unconstitutional.

The requirement that there be some "minimum contact" between the state whose law is applied and the parties or the occurrence/transaction that gave rise to the claim would presumably invalidate a state's use of an actual roulette wheel to decide applicable law in a publicity case, at least on those occasions where the wheel's pointer landed on a body of law—"Wyoming law, come on down!"—that had no connection whatsoever to the parties or the claim.

While that is comforting, I suppose, it will not alleviate the kind of uncertainty Ms. Seller faces. It will not, for instance, invalidate the use of "plaintiff's domicile" to determine the substantive publicity law to be applied *even if* plaintiff's domicile is unknowable in advance. That is, suppose a King heir, domiciled in Indiana, files suit against our seller in any state in which "plaintiff's domicile" is the governing choice of law rule for publicity claims. Even if the existence of a King heir domiciled in Indiana was both unknown to Ms. Seller and, as a practical matter, unknowable *ex ante* (without a terrifyingly complicated and expensive search of the public records of all fifty states), application of Indiana law to this claim satisfies the *Allstate* test because *ex post* it turns out that there is a connection between Indiana and the parties—Indiana is, after all, plaintiff's domicile. That this fact may have been effectively unknowable in advance to Ms. Seller does not—at least as I understand *Allstate* and its progeny—rise to the level of a constitutional violation.

And perhaps more to the point: The systemic uncertainty of the publicity rights system is, in a very real sense, the byproduct—the *inevitable* byproduct, one might even say—of a federal system under which each of the fifty states can select, for its own reasons, priorities and policies, its own choice of law rules and its own

17. FULLER, *supra* note 7. Whether this particular system—the fifty-state system of publicity rights—is at, or anywhere near, that point is, of course, an entirely separate question.

18. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307–08 (1981).

19. *Id.* at 308.

substantive rules governing particular claims. In a system like that, chaos—literally—may ensue. This uncertainty, in other words, is just the price we pay for our federal system and state sovereignty, and it will surely not be easy to craft an argument that the entirely predictable result of the federal system and state sovereignty—both solidly grounded, of course, in the Constitution itself—renders the system unconstitutional.

The truly interesting story here is not the existence of the chaos in publicity law but its *absence* in so many other areas of the law. In the past eighty years since *Erie Railroad* made these choice of law questions so important in the federal system, the system has settled down to produce a substantial degree of predictability and certainty.²⁰ Publicity law looks like an outlier, but only, perhaps, because it is so relatively new, and has not had enough time to settle down into more predictable and manageable patterns.

So, while the Due Process Clause may not offer Ms. Seller much in the way of possible relief, let me end by suggesting that the Constitution may constrain this system of publicity rights in another way. There is another feature of this system—closely related to systemic uncertainty but not entirely coextensive with it—that might well invoke constitutional protections. Judge Kozinski, in his dissenting opinion in the 9th Circuit’s well-known “Vanna White” case, summarized it this way:

[T]he right of publicity isn’t geographically limited. *A right of publicity created by one state applies to conduct everywhere, so long as it involves a celebrity domiciled in that state. If a Wyoming resident creates an ad that features a California domiciliary’s name or likeness, he [or she] will be subject to California right of publicity law even if he’s careful to keep the ad from [ever] being shown in California. . . .* The broader and more ill-defined one state’s right of publicity, the more it interferes with the legitimate interests of other states. . . . Under the majority’s approach, any time anybody in the United States—even somebody who lives in a state with a very narrow right of publicity—creates an ad, he takes the risk that it might remind some segment of the public of somebody, perhaps somebody with only a local reputation, somebody the advertiser has never heard of. So you made a commercial in Florida and one of the characters reminds Reno residents of their favorite local TV anchor (a California domiciliary)? Pay up.²¹

I believe that he is, descriptively speaking, correct; that is indeed how the law of publicity often works. Judge Kozinski’s hypothetical Wyoming resident can be violating California publicity law even though his transactions would appear to have nothing to do with California. Similarly, Ms. Seller could be violating Indiana law even though her transactions would appear to have nothing to do with Indiana, if—as

20. *Erie R.R. Co. v. Tompkins*, 304 U.S. 63 (1938).

21. *White v. Samsung*, 989 F.2d 1512, 1518–19 (9th Cir. 1993) (Kozinski, J. dissenting) (emphases added). Kozinski—correctly, in my view—described the majority opinion in the case, holding that Samsung’s use of a cartoon robot “in a wig, gown and jewelry reminiscent of Vanna White’s hair and dress . . . posed next to a Wheel-of-Fortune-like game board” infringed White’s publicity rights in her “identity,” as “a classic case of overprotection.” *Id.* at 1514. For another provocative dissent in the equally overprotective “Cheers” case authored by Judge Kozinski, see *Wendt v. Host Int’l, Inc.*, 197 F.3d 1284 (9th Cir. 1999).

is possible—one of the heirs to the King estate happens to be domiciled there. That is not the only possible outcome in Ms. Seller’s case, to be sure, but it is a perfectly plausible one under the system we have.

And if Indiana law applies to Ms. Seller, a Vermont resident transacting business in New York, then presumably it can apply to an Ohio resident conducting business in Pennsylvania, a California resident conducting business in Texas, etc. So, Judge Kozinski is correct: A “right of publicity created by one state”—Indiana—“applies to conduct everywhere.” And I think he is correct normatively speaking as well when he writes: “This is an intolerable result, as it gives each state far too much control over artists in other states.”²² Of course, “intolerable” does not equate to unconstitutional. But I do think there is an argument that can be constructed here that this kind of state regulation, namely Indiana or California reaching outside of its borders and imposing *its* law on conduct by a “foreign” seller taking place *entirely* in another state, may violate the restrictions on “extra-territorial regulation” stemming from the so-called Dormant Commerce Clause.

The idea that States cannot project their laws to control conduct beyond State borders—that the good citizens of Indiana cannot, through their laws, control what a Vermont resident does while she is in New York—has a long, dense, and fascinating history of which I can only scratch the surface here. Up until the early part of the twentieth century, it was taken for granted, a kind of truism derived ultimately from the inherent territorial limitations on state sovereignty; it does not expressly appear in the Constitution, but that is probably because, as Professor Douglas Laycock famously put it, it was “so obvious that the Founders neglected to state it.”²³ The classic formulation was set forth in *Pennoyer v. Neff* in 1877:

The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed, . . . an illegitimate assumption of power . . . [E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory, [and] no State can exercise direct jurisdiction and authority over persons and property without its territory.²⁴

This doctrine, with its tight linkage between territory and sovereignty, was largely discarded during the course of the twentieth century (though it was not until 1977 that *Pennoyer* itself was overruled²⁵), and replaced by our more modern, flexible notions of sovereignty and jurisdictional competence.

But the idea that States are prohibited from regulating extraterritorially continues to pop up periodically in the law. Intuitively, there is a common understanding that there are *some* things taking place outside Indiana that Indiana cannot interfere with, though courts and commentators have not been able to come up with a formulation

22. *White*, 989 F.2d at 1512, 1519.

23. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 251 (1992).

24. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877), *overruled by* *Shaffer v. Heitner*, 433 U.S. 186 (1977).

25. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

that crystallizes that understanding or articulates the line between extraterritorial regulation that is, and extraterritorial regulation that is not, constitutional.²⁶

In the 1980s, the Supreme Court, in a series of cases, stated the prohibition on state extraterritorial regulation as a virtual per se rule under the dormant Commerce Clause:

[A] state law that has the ‘practical effect’ of regulating commerce occurring wholly outside that State’s borders is invalid under the Commerce Clause. . . . [A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature.²⁷

When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.²⁸

The Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.²⁹

The “inherent limits” of state authority—it sounds like *Pennoyer v. Neff*! Taken literally, these cases would have swept a *great deal of law* swept aside and tossed it in the dustbin.³⁰ Among other things, we would have to jettison much of the choice of law edifice that has emerged in the wake of *Erie Railroad*, which involves applying one State law’s onto “commerce that takes place wholly outside of the State’s borders” *all the time*.³¹

26. Professor Donald Regan, in his influential 1987 article critiquing the Court’s “extraterritoriality” doctrine(s), sets up the following hypothetical:

Imagine that Michigan decides to prohibit cigarette smoking completely. It forbids the importation, sale, possession, or use of cigarettes in Michigan. Now, we know that if Michigan did this, it would immediately be faced with an enormous problem of smuggling and bootleg cigarettes. To deal with this problem, Michigan would have every incentive to prohibit cigarette manufacture in North Carolina, if it could do so. But it cannot. The fact that cigarette manufacture in North Carolina has bad effects in Michigan (and it will have bad effects even after Michigan has banned cigarettes, because of the inevitable smuggling) does not give Michigan even the shadow of a justification for prohibiting cigarette manufacture in North Carolina.

Donald H. Regan, *Siamese Essays: (I) Cts Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1899-00 (1987). Similarly, he writes: “If Arizona has a maximum speed limit on its freeways of sixty-five miles per hour, Maine should not be allowed to impose on Maine citizens driving through Arizona a speed limit of fifty-five miles per hour, even if that is the law of Maine.” *Id.* at 1908. Professor Regan demonstrates that while it is clear that Michigan and Maine cannot do these things, the reason *why* they cannot do these things is much less clear. Articulating the principle—of territoriality, or sovereignty, or federalism, or some combination thereof—that explains the matter is a difficult task indeed.

27. *Healy v. Beer Inst.*, 491 U.S. 324, 332, 336 (1989).

28. *Brown-Forman Distillers v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

29. *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982).

30. As Professor Regan succinctly put it: “It is clear that the Court cannot flatly prohibit all state laws that have extraterritorial effects, or even all state laws that have substantial extraterritorial effects. Such a prohibition would invalidate much too much legislation.” *See Regan, supra* note 26, at 1878.

31. *Healy*, 491 U.S. at 336.

Sometimes the Court means to sweep aside and to lay waste to entire systems of law and toss them in the dustbin. *Erie Railroad* itself is one of the better examples of that. But that was not the case here. The ensuing years have not been kind to the idea that extra-territorial application of state law is invalid per se under the Commerce Clause. As then-Judge Neil Gorsuch put it, extra-territoriality has become “the most dormant doctrine in dormant commerce clause jurisprudence.”³²

But the Commerce Clause does retain *some* power in the extraterritorial context, and some forms of extraterritorial regulation remain constitutionally suspect. One principle that I think is still alive: The idea that no one single state can create a nationwide standard for conduct, a legal regime with *nationwide* effect. That is for Congress alone to do. In practical effect, though, that is what often happens under the publicity system. It is precisely what Judge Kozinski was concerned about: “A right of publicity created by one state applies to conduct everywhere, so long as it involves a celebrity”—or, in the case of deceased celebrities, an heir to the publicity rights—“domiciled in that state.” If there is an Indiana-domiciled heir to Dr. King’s publicity rights, Indiana law may be applied to conduct taking place *anywhere*—including in those states (like, in our seller’s case, New York and Vermont) whose law would not support a claim on these facts. It is my guess that one could construct a reasonably strong argument that this extends Indiana’s jurisdictional competence beyond the lines that are compatible with the Commerce Clause. The scope and shape of such an argument are, however, beyond the confines of this piece.

32. *Energy & Env’t Legal Inst. v. Epel*, 793 F.3d 1169, 1170 (10th Cir 2015). The scholarly literature on the extraterritoriality strand of dormant commerce clause doctrine is quite vast. See, e.g., Chad DeVeaux, *One Toke Too Far: The Demise of the Dormant Commerce Clause’s Extraterritoriality Doctrine Threatens the Marijuana Legalization Experiment*, 58 B.C. L. REV. 953 (2017); Susan Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause is Not Dead*, 100 MARQ. L. REV. 497 (2016); Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979 (2013); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057 (2009); Allen Rostron, *The Supreme Court, the Gun Industry, and the Misguided Revival of Strict Territorial Limits on the Reach of State Law*, 2003 L. REV. MICH. ST. U. DET. C.L. 115 (2003).