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Jurisdictional Haze: Indiana and Washington's Unconstitutional Extensions of the Postmortem Right of Publicity

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JURISDICTIONAL HAZE: INDIANA AND WASHINGTON'S UNCONSTITUTIONAL EXTENSIONS OF THE POSTMORTEM RIGHT OF PUBLICITY

Abstract: Long after they die, cultural icons such as Elvis Presley, Marilyn Monroe, and Jimi Hendrix continue to earn millions of dollars annually. Despite the tremendous amount of money earned by marketing the images of certain late celebrities, the laws conferring and governing the postmortem right of publicity are varied and often unpredictable. In most states, the right to profit from the image of a deceased person depends entirely upon the law of the jurisdiction in which the deceased was domiciled at the time of death. Certain state legislatures, however, have passed statutes conferring this right on persons domiciled outside of their respective borders, and these statutes may have potentially dramatic effects on businesses marketing products incorporating the images of celebrities. This Note argues that statutes of this nature are unconstitutional under the Due Process Clause, the Full Faith and Credit Clause, and the dormant Commerce Clause, and that the postmortem right of publicity should be governed in all states by the law of the jurisdiction in which the deceased was domiciled at the time of death.

INTRODUCTION

Jimi Hendrix, widely considered the greatest guitar player in the history of rock and roll, died on September 18, 1970, at the age of twenty-seven.[1] But more than four decades after his passing, his estate generates revenues of $7 million annually, as his image is still heavily marketed alongside those of contemporary entertainers born years after his death.[2] Hendrix's face appears on t-shirts, posters, and even drug paraphernalia.[3]

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[1] *See 100 Greatest Guitarists: Jimi Hendrix*, ROLLING STONE (Nov. 23, 2011), http://www.rollingstone.com/music/lists/100-greatest-guitarists-20111123/jimi-hendrix-20120705 [http://perma.cc/GUV6-AMVX] ("[H]is legacy is assured as the greatest guitar player of all time."); Todd McCormick & Mari Spears, *Purple Haze Lifted by Ninth Circuit Regarding Jimi Hendrix's Post-Mortem Publicity Rights*, MEDIA L. BULL., http://www.sedgwicklaw.com/purple-haze-lifted-by-ninth-circuit-regarding-jimi-hendrixs-post-mortem-publicity-rights-03-06-2014/ [http://perma.cc/MBB6-E8Z5] ("Jimi Hendrix, who is widely recognized as one of the best guitarists to ever strap on a Stratocaster, is famous for writing songs such as 'Purple Haze' and 'The Wind Cries Mary.'"); *The Jimi Hendrix Experience Biography*, ROCK & ROLL HALL OF FAME & MUSEUM, http://rockhall.com/inductees/the-jimi-hendrix-experience/bio/ [http://perma.cc/9F6M-N94N] ("Jimi Hendrix was arguably the greatest instrumentalist in the history of rock music.").

[2] *See How Much Is Jimi Hendrix's Estate Worth?*, FOX BUS. (Apr. 11, 2014), http://video.foxbusiness.com/v/3458604254001/how-much-is-jimi-hendrixs-estate-worth/#sp=show-clips [http://perma.cc/AUT5-FQG8] [hereinafter FOX BUS.] (reporting the value of Jimi Hendrix's estate to be $80

Because Hendrix died intestate at a young age, and because of his tremendous earning power, there have been many disputes among his family members and alleged heirs.[4] The disputes have not only thrown the marketability of his likeness into question, but those of all deceased individuals who leave behind a lucrative likeness.[5] In 2014, in *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd.*, the U.S. Court of Appeals for the Ninth Circuit issued an opinion with potentially dramatic implications for the lucrative business of marketing

million and discussing how the estate generated $7 million in revenue between October 2010 and October 2011); *Jimi Hendrix on the Cover of* Rolling Stone, ROLLING STONE, http://www.rollingstone.com/music/pictures/jimi-hendrix-on-the-cover-of-rolling-stone-20120702 [http://perma.cc/WWA4-PMLD] (depicting Jimi Hendrix's sixteen separate appearances on the cover of *Rolling Stone* magazine from 1968 through 2012); *Music*, ALLPOSTERS.COM, http://www.allposters.com/-st/Music-Posters_c122_.htm [http://perma.cc/D8NW-Z6X3] [hereinafter ALLPOSTERS.COM] (listing a poster featuring Jimi Hendrix's face on the first page of its music posters when sorted by best sellers); *Store*, AUTHENTIC HENDRIX, http://www.authentichendrix.com/store/ [http://perma.cc/AD9U-EZAL] [hereinafter AUTHENTIC HENDRIX] (providing hyperlinks for consumers to buy t-shirts and artwork featuring the likeness of Jimi Hendrix from Experience Hendrix LLC).

[3] *Purple Haze Unveils New Jimi Hendrix Lighters, Vaporizers*, L.A. BIZ (Nov. 30, 2015, 12:55 PM), http://www.bizjournals.com/losangeles/news/2015/11/30/purple-haze-unveils-new-jimi-hendrix-lighters.html [http://perma.cc/5HSL-KLCZ] (profiling companies marketing drug paraphernalia bearing Hendrix's image); ALLPOSTERS.COM, *supra* note 2; AUTHENTIC HENDRIX, *supra* note 2.

[4] *See* Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd. (*Experience Hendrix II*), 762 F.3d 829, 835–836 (9th Cir. 2014) (holding that a limited liability company founded by Hendrix's heir, his father, had authority under Washington law to prevent sales of merchandise bearing Hendrix's likeness within the state's boundaries); Experience Hendrix LLC v. James Marshall Hendrix Found., 240 F. App'x 739, 740 (9th Cir. 2007) (holding that a company founded by Hendrix's heir did not have authority to prevent the use of Hendrix's likeness by a foundation started by Hendrix's brother); *see also* Matt Whibley, Note, *Celebrity and Trademarks: Why Courts Should Recognize a Celebrity-Likeness-Mark*, 43 SW. L. REV. 121, 122 (2013) (noting that the estate of Jimi Hendrix has been extremely litigious against parties who use his image for commercial purposes without a license); McCormick & Spears, *supra* note 1; FOX BUS., *supra* note 2 (reporting that Janie Hendrix, sister of the late Jimi Hendrix, engaged in many legal battles in order to solidify the late guitarist's intellectual property and build an empire); *see also Intestate*, BLACK'S LAW DICTIONARY 898 (10th ed. 2014) (stating that a person who dies without a valid will is said to have died intestate).

[5] *See Experience Hendrix II*, 762 F.3d at 835–36 (overruling a lower court's determination that a statute granting individuals a postmortem right of publicity irrespective of their domicile at the time of death was unconstitutional); Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983, 1000 (9th Cir. 2012) (holding that Marilyn Monroe's estate was judicially estopped from arguing that her domicile at the time of death was California to capitalize on California postmortem publicity law); *James Marshall Hendrix Found.*, 240 F. App'x at 740 (holding that Jimi Hendrix died while domiciled in New York and therefore applying New York law in ruling that Hendrix did not have a postmortem right of publicity); Shaw Family Archives, Ltd. v. CMG Worldwide, Inc., 486 F. Supp. 2d 309, 314 (S.D.N.Y. 2007) (holding that Marilyn Monroe's estate had no exclusive right to profit from her likeness because that right extinguished at her death under New York law); Whibley, *supra* note 4, at 124–25 (observing that litigation initiated by the estates of Marilyn Monroe, Elvis Presley, and Jimi Hendrix occurs amidst debate about the existence of a postmortem right of publicity for those individuals); McCormick & Spears, *supra* note 1 (noting that the Ninth Circuit's overturning of a district court decision invalidating the conferral of a postmortem right of publicity to Jimi Hendrix was a popular decision among those who did not want postmortem rights of publicity determined by domicile).

dead celebrities.[6] In its opinion, the Ninth Circuit upheld the constitutionality of a Washington statute that grants every individual, living or dead, property rights in his or her name, voice, signature, photograph, or likeness, regardless of the individual's domicile at the time of death.[7]

The right of publicity is recognized in the majority of states as an individual's right to control the commercial exploitation of his or her likeness.[8] In certain cases, that right can be worth millions of dollars if it passes to a famous individual's estate at the time of his or her death.[9] Most courts have held that an individual's postmortem right of publicity, or lack thereof, is governed entirely by the law of the state in which the individual was domiciled at the time of his or her death.[10] By allowing Washington to confer a postmortem right of publicity onto any individual, regardless of where they were domiciled at death, the Ninth Circuit went directly against the established body of case law that governs the postmortem right of publicity.[11]

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[6] *See Experience Hendrix II*, 762 F.3d at 835–36 (upholding the constitutionality of a state statute that conferred a postmortem right of publicity onto an individual domiciled outside the state at the time of death); McCormick & Spears, *supra* note 1.

[7] WASH. REV. CODE § 63.60.010 (2014) (conferring a postmortem right of publicity onto all individuals regardless of their domicile at the time of death); *Experience Hendrix II*, 762 F.3d at 835–36 (upholding the constitutionality of the Washington Personality Rights Act ("WPRA") as applied to economic activities conducted entirely within Washington's borders).

[8] *See* William K. Ford & Raizel Liebler, *Games Are Not Coffee Mugs: Games and the Right of Publicity*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 10 (2013) (noting that the majority rule in the United States is that commercial uses of a person's identity require that person's consent); Michael Mullins, *New Fame in a New Ballgame: Right of Publicity in the Era of Instant Celebrity*, 45 IND. L. REV. 869, 869 (2012) (observing that the right of publicity grants an individual the exclusive right to profit from his or her likeness); Aubrie Hicks, Note, *The Right to Publicity After Death: Postmortem Personality Rights in Washington in the Wake of* Experience Hendrix v. Hendrixlicensing.com, 36 SEATTLE U. L. REV. 275, 275–76 (2012) (stating that each state has created its own legal protection for an individual to retain control over the commercial use of his or her likeness).

[9] *See Experience Hendrix II*, 762 F.3d at 844–45 (ordering a district court to vacate dismissal of over $1 million in damages); Whibley, *supra* note 4, at 121 (noting that the respective estates of three deceased celebrities combined to earn $400 million in one year).

[10] *See Milton H. Greene*, 692 F.3d at 1000 (holding that New York law governed the postmortem right of publicity for Marilyn Monroe because she was domiciled in New York at the time of death); Experience Hendrix, L.L.C. v. HendrixLicensing.com, Ltd. (*Experience Hendrix I*), 766 F. Supp. 2d 1122, 1139–40 (W.D. Wash. 2011), *rev'd en banc*, 762 F.3d 829 (ruling that New York law governed the postmortem right of publicity for Jimi Hendrix because he was domiciled in New York); *Shaw Family Archives*, 486 F. Supp. 2d at 314–15 (holding that Indiana law did not govern the postmortem right of publicity for Marilyn Monroe because she was not domiciled in Indiana); Ford & Liebler, *supra* note 8, at 12; Beth Seals, *Speaking from the Grave: Postmortem Rights of Publicity for the Dead*, LEXOLOGY (Oct. 15, 2014), http://www.lexology.com/library/detail.aspx?g=93910ea7-e973-446f-8e5e-88708087f4af [http://perma.cc/9TXE-GR54] (noting that almost all courts determine whether a postmortem right of publicity exists by following the law of the state in which an individual was domiciled at the time of death). *But see* Estate of Elvis Presley v. Russen, 513 F. Supp. 1339, 1354–55 (D.N.J. 1981) (holding that, under New Jersey law, Elvis Presley's right of publicity did not abate upon his passing, even though he was domiciled in Tennessee at the time of his death).

[11] *See Experience Hendrix I*, 766 F. Supp. 2d at 1140 (holding that Washington's conferral of postmortem rights of publicity to individuals not domiciled within the state at death was unconstitu-

This Note argues that state statutes that ignore the traditional choice-of-law rule and confer a postmortem right of publicity onto deceased individuals domiciled outside of the state at the time of death are unconstitutional.[12] Part I provides an overview of the postmortem right of publicity and relevant terminology, the constitutional provisions with which it is most associated, and its establishment or lack thereof in important jurisdictions.[13] Next, Part II examines recent developments in the case law surrounding the postmortem right of publicity of various dead celebrities as state legislatures have passed statutes attempting to modify the traditional choice-of-law rule governing that right.[14] Finally, Part III argues that statutes that ignore the traditional choice-of-law rule are unconstitutional and argues for uniform adherence to that rule so that businesses and estates can operate with predictability and certainty as to which jurisdiction's laws apply to any given individual's postmortem right of publicity.[15]

I. Forever Young (and Marketable): An Overview of the Postmortem Right of Publicity and Its Constitutional Implications

The jurisdictional issues implicated by the postmortem right of publicity are unsettled and often yield unpredictable results.[16] Thus, an understanding of the rights in dispute, the relevant constitutional provisions that govern their implementation, and the differences in the governing law in various jurisdictions is necessary to appreciate the current legal status of those issues.[17] Section A of this

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tional); *Shaw Family Archives*, 486 F. Supp. 2d at 314–15 (ruling that an Indiana statute granting a postmortem right of publicity to individuals not domiciled in the state did not apply to Marilyn Monroe because she was domiciled in a different state at death); Seals, *supra* note 10 (noting that the Ninth Circuit's reversal of the district court decision in the *Experience Hendrix* case, ruling the WPRA unconstitutional, was unprecedented).

[12] *See infra* notes 147–213 and accompanying text.

[13] *See infra* notes 16–94 and accompanying text.

[14] *See infra* notes 95–146 and accompanying text.

[15] *See infra* notes 147–213 and accompanying text.

[16] *See Milton H. Greene*, 692 F.3d at 999 (observing that the estate of Marilyn Monroe changed its stance regarding Monroe's domicile at death after changes in California's law); *Experience Hendrix I*, 766 F. Supp. 2d at 1140 (holding that amendments to the WPRA did not grant Jimi Hendrix a postmortem right of publicity); *Shaw Family Archives*, 486 F. Supp. 2d at 314 (ruling that an Indiana statute conferring a postmortem right of publicity on all individuals did not grant Marilyn Monroe a postmortem right of publicity because she did not have that right when she died); Whibley, *supra* note 4, at 124 (noting that the commercial use of a celebrity's name can be unpredictable for manufacturers); McCormick & Spears, *supra* note 1 (observing concern among some public figures that determining the status of a postmortem right of publicity by domicile contributed to a lack of predictability); Seals, *supra* note 10 (arguing that companies should be prepared for unanticipated litigation in Washington and Indiana due to those states' postmortem right of publicity statutes).

[17] *See Milton H. Greene*, 692 F.3d at 999–1000 (noting the existence of differences in California and New York publicity law); *James Marshall Hendrix Found.*, 240 F. App'x at 740 (holding that a Washington statute could not grant a right that New York law declined to recognize); *Experience Hendrix I*, 766 F. Supp. 2d at 1139–40 (observing that a Washington statute attempted to confer a

Part defines the postmortem right of publicity and relevant terminology and also explains the differences between the right of publicity, copyright, and trademark law.[18] Section B examines the history and scope of the three constitutional provisions most often implicated by postmortem right of publicity law: the Due Process Clause, the Full Faith and Credit Clause, and the dormant Commerce Clause.[19] Finally, section C explores the history of the postmortem right of publicity in the twentieth century and the evolution of the case law and statutes that established its lucrative value.[20]

A. Finally Famous: The Postmortem Right of Publicity

The right of publicity is the right of an individual to control the commercial use of his or her identity or persona.[21] This right protects an individual from unauthorized appropriations of his or her likeness in business activities by third parties without the individual's consent.[22] State law controls whether such a right exists and what protections such a right affords.[23]

The right of publicity is fundamentally distinct from the law of copyright and trademark.[24] Copyright protects the right to exclusively profit from individ-

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right that New York did not recognize); *Shaw Family Archives*, 486 F. Supp. 2d at 314 (ruling that an Indiana statute could not fill the void left by the absence of a postmortem right of publicity in New York); Whibley, *supra* note 4, at 125 (noting the continued debate as to the existence of a postmortem right of publicity for celebrities such as Marilyn Monroe, Elvis Presley, and Jimi Hendrix); Seals, *supra* note 10 (observing that companies would be best served by educating themselves on different jurisdictional approaches to postmortem right of publicity law).

[18] *See infra* notes 21–38 and accompanying text.

[19] *See infra* notes 39–74 and accompanying text.

[20] *See infra* notes 75–94 and accompanying text.

[21] *See* Thomas F. Cotter & Irina Y. Dmitrieva, *Integrating the Right of Publicity with First Amendment and Copyright Preemption Analysis*, 33 COLUM. J.L. & ARTS 165, 170 (2010) (noting that the right of publicity empowers a person to prevent certain unauthorized uses of his or her name); Ford & Liebler, *supra* note 8, at 10 (observing that the majority rule in the United States is that commercial uses of a person's likeness require that person's consent); Whibley, *supra* note 4, at 123 (stating that a violation of the right of publicity occurs when a person's identity is used without consent and to cause injury).

[22] *See* Cotter & Dmitrieva, *supra* note 21, at 170 (noting that the right of publicity allows a natural person to prohibit unauthorized commercial uses of his or her image); Ford & Liebler, *supra* note 8, at 10 (observing that the majority rule in the United States is that commercial uses of a person's image require that person's consent); Whibley, *supra* note 4, at 123; *see also* Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment, and the Right of Publicity*, 50 B.C. L. REV. 1345, 1351 (2009) (noting that the right of publicity allows a celebrity to control the use of his or her image in situations where the right of privacy would offer no legal protection).

[23] *See* Cotter & Dmitrieva, *supra* note 21, at 170 (noting that the right of publicity exists in about thirty states); Ford & Liebler, *supra* note 8, at 10 (observing that state law governs the right of publicity); Whibley, *supra* note 4, at 123 (stating that no federal right of publicity exists and that publicity rights differ significantly from state to state).

[24] *See* Mullins, *supra* note 8, at 878 (arguing that attempts to analogize the right of publicity to copyright and patent law are untenable); Lindsay Korotkin, Note, *Finding Reality in the Right of Publicity*, 2013 CARDOZO L. REV. DE NOVO 268, 303, http://www.cardozolawreview.com/content/de

ual works, such as recordings or films, and trademark protects the right to exclusively profit from a brand, such as a corporate logo.[25] The right of publicity protects an individual's right to profit not from intellectual property that he or she has created and that lives on independently of that individual, but rather from the individual's own appearance or likeness.[26] Additionally, and crucially, copyright and trademark law are both federally controlled, whereas the right of publicity remains governed entirely at the state level.[27]

The nature and classification of the right of publicity varies significantly among the jurisdictions that recognize it.[28] Some states recognize the right of publicity as a privacy right meant to protect individuals from the emotional and psychological damage inflicted by unauthorized commercial uses of their identities.[29] Other states consider the right of publicity a property right, similar to a copyright or trademark over one's own likeness.[30]

One crucial difference between the two views is whether that right passes from an individual to the individual's estate at the time of death.[31] This right is

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novo/KOROTKIN_2013_268.pdf [http://perma.cc/YM6V-V29M] (noting that trademark law protects consumers from confusion as to product brands, and publicity law protects individuals from having their likenesses incorporated into endorsements to which they did not consent).

[25] *See* Mullins, *supra* note 8, at 878 (stating that publicity rights do not protect the tangible product of a person's efforts); Korotkin, *supra* note 24, at 303 (observing that a justification for protecting the right of publicity is similar to trademark law's goal of protecting consumers from confusion).

[26] *See* Mullins, *supra* note 8, at 878 (stating that the right of publicity derives from an individual's "abstract right in the sanctity of his person"); Korotkin, *supra* note 24, at 303 (noting that the consumer protection justification for the right of publicity prevents the use of a celebrity's image to endorse a product without the celebrity's consent).

[27] *See* 15 U.S.C. §§ 1051–1129 (2012) (providing protection to trademarks); 17 U.S.C. §§ 101–805 (2012) (codifying the federal copyright scheme); David S. Welkowitz & Tyler T. Ochoa, *Teaching Rights of Publicity: Blending Copyright and Trademark, Common Law and Statutes, and Domestic and Foreign Law*, 52 ST. LOUIS U. L.J. 905, 906–07 (2008) (noting the absence of a federal right of publicity).

[28] *See* 2 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 11:15 at 710 (2d ed. 2014) (exploring statutory attempts to enforce statutorily-created postmortem rights of publicity in jurisdictions that do not recognize such rights for individuals domiciled there); Cotter & Dmitrieva, *supra* note 21, at 171 (noting that some jurisdictions view publicity as a privacy right and others view it as a property right); Hicks, *supra* note 8, at 279–80 (same); Whibley, *supra* note 4, at 124 (same).

[29] *See* Cotter & Dmitrieva, *supra* note 21, at 170 (noting that one strand of the right of publicity derives from privacy law); Hicks, *supra* note 8, at 279 (stating that courts have historically focused on the indignity or mental trauma associated with the unauthorized use of someone's identity); Whibley, *supra* note 4, at 124 (observing that some states consider the right of publicity as a privacy right). Most notable among these states is New York. *See* Cotter & Dmitrieva, *supra* note 21, at 172; Whibley, *supra* note 4, at 123.

[30] *See* Cotter & Dmitrieva, *supra* note 21, at 172 (observing that some states consider the right of publicity to be assignable and transferable); Hicks, *supra* note 8, at 280 (noting that the right of publicity is recognized in some states as a property right that encompasses the same rights and attributes as tangible property); Whibley, *supra* note 4, at 124 (commenting that some states consider the right of publicity to be an economic right).

[31] *See* Cotter & Dmitrieva, *supra* note 21, at 172 (observing that states that view publicity as a property right typically recognize a postmortem right of publicity); Shannon Flynn Smith, Comment,

commonly referred to as the postmortem right of publicity.[32] Under the "privacy right" view, the right of publicity is inherently tied to the individual and therefore cannot be passed to the estate any more than an individual's right of privacy could be left to his or her heirs.[33] Under the "property right" view, the right of publicity is intellectual property with commercial value that passes into the estate along with the individual's other tangible and intangible possessions.[34]

In determining which state's law to follow in cases involving the postmortem right of publicity, the vast majority of courts apply the law of the jurisdiction in which the deceased individual was domiciled at the time of death.[35] In estate law, when a person dies, courts generally apply the law of the deceased's domicile to all of the property in the estate, as this approach is the most convenient for the estate's administrator and ensures that a consistent body of law applies to the estate.[36] Therefore, whether an individual leaves behind a postmortem right

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If It Looks Like Tupac, Walks Like Tupac, and Raps Like Tupac, It's Probably Tupac: Virtual Cloning and Postmortem Right-of-Publicity Implications, 2013 MICH. ST. L. REV. 1719, 1733 (discussing how states that consider the right of publicity to be a property right tend to recognize a postmortem right of publicity); Whibley, *supra* note 4, at 125 (observing the continued debate as to the existence of postmortem rights of publicity for certain celebrities); Seals, *supra* note 10 (noting the jurisdictional differences in postmortem right of publicity law).

[32] *See* Smith, *supra* note 31, at 1733 (observing that states that recognize a postmortem right of publicity allow the postmortem rights holder to control the use of an artist's likeness even after the individual is dead); Seals, *supra* note 10 (noting that the majority of states in the United States that recognize a right of publicity extend the right postmortem).

[33] *See* Cotter & Dmitrieva, *supra* note 21, at 172 n.34 (observing that states that view publicity rights as part of privacy law do not recognize a postmortem right of publicity); Hicks, *supra* note 8, at 280 (noting that states that consider the right of publicity as a privacy right are less likely to recognize postmortem rights of publicity).

[34] *See* 2 MCCARTHY, *supra* note 28, § 11:15 at 708 (observing that because Florida law treated the right of publicity as personal property, Tennessee Williams's right of publicity passed to his estate because he was domiciled in Florida when he died); Cotter & Dmitrieva, *supra* note 21, at 172 (commenting that states that consider publicity a property right hold that it continues for a period after death); Hicks, *supra* note 8, at 280 (noting that states that consider the right of publicity to be personal property tend to view the right of publicity as transferrable to others, including heirs and entities after an individual's death).

[35] *See, e.g.*, Cairns v. Franklin Mint Co., 292 F.3d 1139, 1147 (9th Cir. 2002) (applying the law of the domicile of Princess Diana, which was Great Britain); Rogers v. Grimaldi, 875 F.2d 994, 1002 (2d Cir. 1989) (applying the law of the domicile of Ginger Rogers, which was Oregon); Acme Circus Operating Co. v. Kuperstock, 711 F.2d 1538, 1541 (11th Cir. 1983) (applying the law of the domicile of Clyde Beatty, which was California); *see also Milton H. Greene*, 692 F.3d at 1000 (holding that Marilyn Monroe's domicile at the time of her death determined her postmortem rights of publicity); *Experience Hendrix I*, 766 F. Supp. 2d at 1137 (noting that virtually all courts have applied the law of the deceased's domicile to determine whether a right of publicity descended); 2 MCCARTHY, *supra* note 28, § 11:15 at 701–02 (observing that most states apply the law of the deceased's domicile to determine whether the individual has a postmortem right of publicity); Ford & Liebler, *supra* note 8, at 12 (same); Smith, *supra* note 31, at 1740 (same); Seals, *supra* note 10 (same). *But see Russen*, 513 F. Supp. at 1354–55 (holding that, under New Jersey law, Elvis Presley's right of publicity did not abate upon his passing, even though he was domiciled in Tennessee at the time of his death).

[36] *See* 2 MCCARTHY, *supra* note 28, § 11:15 at 706 (providing examples of courts choosing to apply the law of the deceased's domicile in postmortem right of publicity disputes); Ford & Liebler,

of publicity is a function of whether his or her domicile state recognizes the right of publicity as a piece of property that passes into the deceased's estate at death.[37] Domicile usually means the one and only home to which a person always intends to return, irrespective of the number of residences he or she may maintain.[38]

B. Full Faith and Credit Due to the Eternally Dormant: How the Constitution Influences Postmortem Right of Publicity Choice of Law

Choice-of-law questions involving the postmortem right of publicity invoke possible constitutional concerns.[39] One major concern involves the predictability of the laws applied and invokes the Fourteenth Amendment's Due Process Clause as well as the Full Faith and Credit Clause.[40] Courts have consistently applied the law of the deceased's domicile state so that any person concerned with determining the existence or absence of a postmortem right of publicity has proper notice of how courts will make that determination.[41] Such notice, howev-

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supra note 8, at 12 (observing that the right of publicity is usually understood as a property right); Hicks, *supra* note 8, at 280 (noting that courts generally apply the law of the state in which the individual was domiciled in order to avoid conflict by applying different state laws to pieces of property belonging to the estate).

[37] *See* 2 MCCARTHY, *supra* note 28, § 11:15 at 701–02 (noting that almost all courts follow the rule that whether a postmortem right of publicity exists is determined by the law of the state of the individual's domicile at the time of death); Hicks, *supra* note 8, at 280 (observing that the traditional rule is for courts to look to the law of the state where the individual is domiciled at the time of death when deciding whether a postmortem right of publicity passes into the individual's estate); Whibley, *supra* note 4, at 124 (discussing how Marilyn Monroe's estate argued that she was domiciled in California, rather than New York, at the time of her death so that her right of publicity would have passed into her estate).

[38] *See* Kanter v. Warner-Lambert Co., 265 F.3d 853, 857 (9th Cir. 2001) (stating that a domicile is the permanent home where an individual lives with the intention to remain or return); Smith v. Smith, 288 P.2d 497, 499 (Cal. 1955) (noting that domicile is the place where a person has his or her "most settled or permanent connection"); 2 MCCARTHY, *supra* note 28, § 11:15 at 702 (discussing how a person's domicile is defined as the place he or she intends to return or remain, and that domicile is used for conflict-of-law purposes).

[39] *See Experience Hendrix II*, 762 F.3d at 835–36 (assessing whether a Washington statute conferring a postmortem right of publicity violated the Due Process and Full Faith and Credit Clauses and the dormant Commerce Clause); Ford & Liebler, *supra* note 8, at 12; Seals, *supra* note 10 (noting that the constitutionality of Washington's postmortem right of publicity statute is controversial).

[40] *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 320 (1981) (plurality opinion) (articulating a test for assessing the constitutionality of choice-of-law decisions under the Due Process Clause and Full Faith and Credit Clause); *Experience Hendrix II*, 762 F.3d at 835–37 (assessing whether a Washington statute conferring a postmortem right of publicity violated the Due Process and Full Faith and Credit Clauses and the dormant Commerce Clause); 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, 1076 (2009) (stating that the application of a state's law must not be arbitrary or fundamentally unfair).

[41] *See Experience Hendrix I*, 766 F. Supp. 2d at 1137 (noting that virtually all courts have applied the law of the deceased's domicile to determine whether a right of publicity descended); Florey, *supra*

er, assumes that forum states will honor the laws of other states in administering their decisions.[42] A second major concern implicates the dormant Commerce Clause.[43] Because the right of publicity is governed entirely by the states, postmortem right of publicity statutes and judicial decisions must not infringe on the federal government's exclusive power to regulate interstate commerce.[44] Subsection 1 explores the ways in which the U.S. Supreme Court has historically evaluated whether choice-of-law decisions violate the Due Process and Full Faith and Credit Clauses.[45] Subsection 2 examines the history of what is commonly referred to as the dormant Commerce Clause and how the U.S. Supreme Court assesses its potential violations.[46]

1. The Due Process and Full Faith and Credit Clauses

The Fourteenth Amendment's Due Process Clause provides that no state shall make any law that deprives any person of life, liberty, or property without due process of law.[47] The Full Faith and Credit Clause provides that a state must respect and, when justice demands, enforce the law of every other state.[48] When confronted with choice-of-law questions, courts must consider the limitations the Due Process and Full Faith and Credit Clauses impose.[49] In order to avoid due

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note 40, at 1077 (observing that the *Hague* plurality evaluated the constitutionality of a choice-of-law decision by considering whether it was arbitrary or fundamentally unfair).

[42] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985) (noting that the expectations of parties as to which jurisdiction's law will govern their transactions affects the constitutionality of the choice-of-law decision); *Hague*, 449 U.S. at 308; *Experience Hendrix I*, 766 F. Supp. 2d at 1137 (observing that the majority rule is to apply the rule of the deceased's domicile state in determining a postmortem right of publicity and that to do otherwise would likely be arbitrary or fundamentally unfair); Florey, *supra* note 40, at 1077 (commenting that because the *Hague* plurality stated that the choice-of-law decision did not violate the Due Process Clause it therefore did not violate the Full Faith and Credit Clause).

[43] *See Experience Hendrix II*, 762 F.3d at 837 (declining to rule on whether a Washington statute conferring a postmortem right of publicity violated the dormant Commerce Clause when implicating transactions taking place entirely outside Washington); *Experience Hendrix I*, 766 F. Supp. 2d at 1142–43 (holding that a Washington statute conferring a postmortem right of publicity violated the dormant Commerce Clause); Hicks, *supra* note 8, at 286 (noting that the WPRA raised dormant Commerce Clause concerns).

[44] *See Experience Hendrix II*, 762 F.3d at 837 (discussing whether a Washington statute affected transactions occurring outside Washington); *Experience Hendrix I*, 766 F. Supp. 2d at 1142–43 (holding that a Washington statute regulated interstate commerce because it affected the sale of goods outside of Washington); Hicks, *supra* note 8, at 286 (observing that right of publicity statutes that involve the use of a celebrity's likeness in interstate commerce implicate the Commerce Clause).

[45] *See infra* notes 47–61 and accompanying text.

[46] *See infra* notes 62–74 and accompanying text.

[47] *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."); *Hague*, 449 U.S. at 308.

[48] *See* U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); *Hague*, 449 U.S. at 308.

[49] *See* Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 496 (2003) (holding that the Full Faith and Credit Clause does not compel a state to substitute the statutes of another state for its own when deal-

process concerns, the parties involved must all have proper notice of which state's law will apply to the transaction, and to avoid violating the Full Faith and Credit Clause, the appropriate state law must apply.[50]

In 1981, in *Allstate Insurance Co. v. Hague*, the U.S. Supreme Court set forth a standard for assessing the constitutionality of choice-of-law decisions.[51] In that case, the Court upheld the application of Minnesota law to a dispute arising out of insurance coverage for an auto accident between Wisconsin residents in Wisconsin.[52] Although Minnesota's connection to the events giving rise to the suit was more limited than Wisconsin's, a plurality of the Court stated that the Minnesota Supreme Court's decision to apply Minnesota law was "neither arbitrary nor fundamentally unfair."[53] To determine whether a choice-of-law decision is arbitrary or fundamentally unfair, the plurality stated that courts should consider whether the state had a "significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction."[54]

The test articulated by the *Hague* plurality grants states broad authority to impose their own substantive law in disputes involving any parties over whom they can establish personal jurisdiction.[55] The "aggregation of contacts" test

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ing with subject matter concerning which it is competent to legislate); *Hague*, 449 U.S. at 308 (articulating a test evaluating whether a choice-of-law decision violates the Due Process Clause and the Full Faith and Credit Clause by determining if the law is arbitrary or fundamentally unfair); *Experience Hendrix I*, 766 F. Supp. 2d at 1140 (ruling that the postmortem right of publicity of Jimi Hendrix was not an area in which Washington was competent to legislate because he died domiciled in New York).

[50] *See Hague*, 449 U.S. at 308 (discussing how courts must determine the strength of a party's contacts with a state in determining whether the application of that state's law violates the Due Process Clause and the Full Faith and Credit Clause); *Experience Hendrix I*, 766 F. Supp. 2d at 1140 (holding that the WPRA's deviation from the majority rule in determining the existence of a postmortem right of publicity violated the due process clause).

[51] *See Hague*, 449 U.S. at 320 (holding that a choice-of-law decision was not unconstitutional if it was not arbitrary or fundamentally unfair); Florey, *supra* note 40, at 1076 (noting that the Supreme Court established the modern framework for assessing constitutional limits on choice of law in *Hague*). Justice Brennan authored the plurality opinion in which Justices Blackmun, Marshall, and White joined. *See generally Hague*, 449 U.S. 302. Justice Stevens filed a concurring opinion, Justice Powell filed a dissent in which Chief Justice Burger and Justice Rehnquist joined, and Justice Stewart did not take part in considering or deciding the case. *See id.*

[52] *Hague*, 449 U.S. at 320 (holding that the application of Minnesota law was constitutional because it was neither arbitrary nor fundamentally unfair); Florey, *supra* note 40, at 1076 (noting that the Court upheld the application of Minnesota law to a dispute to which Minnesota's connection was tenuous).

[53] *See Hague*, 449 U.S. at 320; *Experience Hendrix II*, 762 F.3d at 835–36 (applying the *Hague* test in reviewing a district court decision invalidating a Washington statute as violating the Full Faith and Credit Clause); Florey, *supra* note 40, at 1076 (noting that although contacts with Minnesota were incidental and unrelated to the subject matter of the suit, the plurality nonetheless stated that it would not disturb a state's choice of law provided it was neither arbitrary nor fundamentally unfair).

[54] *See Hague*, 449 U.S. at 308; Florey, *supra* note 40, at 1077 (noting that the *Hague* decision set the standard for determining whether a choice-of-law decision is constitutional).

[55] *See Hague*, 449 U.S. at 317 n.23. Florey, *supra* note 40, at 1077 (observing that the *Hague* "aggregation of contacts" test bears many similarities to the test for personal jurisdiction); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of*

evaluating whether a choice-of-law decision is "arbitrary or fundamentally unfair" is almost identical to the "minimum contacts" test used to evaluate whether the extension of a court's personal jurisdiction over a defendant would offend "traditional notions of fair play and justice."[56] But, the *Hague* plurality acknowledged that situations could arise in which contacts would be sufficient to satisfy personal jurisdiction, but would not justify the application of the forum state's law.[57]

In 1985, in *Phillips Petroleum Co. v. Shutts*, the U.S. Supreme Court adopted the *Hague* plurality test in a majority opinion and also found a situation in which contacts with the forum state justified personal jurisdiction, but not the application of the forum state's law.[58] *Shutts* involved a class action suit filed in Kansas by the plaintiffs due to its favorable substantive law.[59] The Court held that the contacts of both the defendant and the plaintiffs were insufficient to justify the application of Kansas substantive law to the dispute consistent with the Due Process and Full Faith and Credit Clauses.[60] Most importantly, *Shutts* identified two factors to evaluate whether a forum satisfies the *Hague* "aggregation of contacts" test: the parties' expectations as to which jurisdiction's law governs their dealings, and whether the subject of the dispute involves events taking place within the forum state's borders.[61]

Law, 92 COLUM. L. REV. 249, 257 (1992) (noting that the *Hague* plurality's decision marks "the apparent end of all meaningful limits" on state choice-of-law decisions).

[56] *See Hague*, 449 U.S. at 317 n.23 (discussing the similar inquiries courts undertake when evaluating personal jurisdiction and choice-of-law decisions); Florey, *supra* note 40, at 1077; Friedrich K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems*, 73 TUL. L. REV. 1309, 1333 (1999) ("Because of the 'minimum contacts'' requirement for judicial jurisdiction, a court will rarely lack the necessary 'significant contacts.'").

[57] *See Hague*, 449 U.S. at 317 n.23 (observing that a state's contacts with a transaction may justify that state exercising personal jurisdiction but not applying its own law to govern the transaction); Florey, *supra* note 40, at 1058–59 (noting that contacts sufficient to create personal jurisdiction in a state are usually, but not always, sufficient to justify application of that state's law); Juenger, *supra* note 56, at 1333.

[58] *See Shutts*, 472 U.S. at 823 (holding that Kansas did not satisfy the *Hague* "aggregation of contacts" test); *Hague*, 449 U.S. at 317 n.23 (noting that a state's contacts may satisfy the test for personal jurisdiction but not the "aggregation of contacts" test); Florey, *supra* note 40, at 1078 (stating that the class action is an example of when minimum contacts and aggregation of contacts tests may yield different results).

[59] *See Shutts*, 472 U.S. at 801 (observing that although a small fraction of the plaintiffs lived in Kansas and the defendant conducted some of its business operations in Kansas, the dispute underlying the lawsuit concerned events taking place almost entirely outside of Kansas's borders); Florey, *supra* note 40, at 1078 (noting that *Shutts* involved claims by 28,100 class members entitled to royalties on oil and gas leases, and that the large majority of the leases concerned property outside the state).

[60] *See Shutts*, 472 U.S. at 823 (holding that although the defendant's business operations in Kansas satisfied the minimum contacts personal jurisdiction test, they did not satisfy the aggregation of contacts test); Florey, *supra* note 40, at 1078 (noting that the state court could not, consistent with the Due Process and Full Faith and Credit Clauses, apply the forum state's law).

[61] *See Shutts*, 472 U.S. at 822–23 (ruling that the application of Kansas law on the facts at hand was unconstitutional under these two factors); Florey, *supra* note 40, at 1079.

2. The Dormant Commerce Clause

The Commerce Clause authorizes Congress to regulate commerce among the states.[62] Implicit in this authorization is the power to prevent state actions that affect interstate commerce.[63] This power is known as the "dormant Commerce Clause" and serves to prevent states from interfering with Congress' power to regulate interstate commerce.[64]

Courts use two different tests when considering dormant Commerce Clause challenges to state laws.[65] State laws that only incidentally burden interstate commerce are subject to a lower level of scrutiny.[66] Under this lower level of scrutiny, courts apply a balancing test first articulated in 1970 by the U.S. Supreme Court in *Pike v. Bruce Church, Inc.*[67] In contrast, laws that in effect regulate or discriminate against interstate commerce are subject to strict scrutiny, even if the state law is facially neutral.[68] To avoid review under strict scrutiny and its heightened probability of a finding of unconstitutionality, the challenged law must therefore not directly regulate or discriminate against interstate commerce.[69]

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[62] U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have Power . . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes . . . .").

[63] *See* Maine v. Taylor, 477 U.S. 131, 137–38 (1986) (observing that the Commerce Clause limits state power to regulate commerce); Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35 (1980) (same).

[64] *See Taylor*, 477 U.S. at 137–38 (stating that the Commerce Clause places a limit on states' power to pass laws that affect interstate commerce); *Lewis*, 447 U.S. at 35; Florey, *supra* note 40, at 1084 (noting that the dormant Commerce Clause has been consistently invoked to strike down state laws regulating economic activity outside a state's borders).

[65] *See Taylor*, 477 U.S. at 137–38 (ruling that the dormant Commerce Clause limits each state's ability to pass laws regulating interstate commerce independent of the intent of those laws); Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 573–74 (1997) (noting that the U.S. Supreme Court finds intent relevant but not dispositive in evaluating whether a state law discriminates against interstate commerce); Eric Hawkins, Note, *Great Beer, Good Intentions, Bad Law: The Unconstitutionality of New York's Farm Brewery License*, 56 B.C. L. REV. 313, 318–19 (2015) (same).

[66] *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (holding that a state regulation that only incidentally burdens interstate commerce will be upheld unless that burden is "clearly excessive in relation to the putative local benefits"); Hawkins, *supra* note 65, at 318–19 (discussing how state laws that merely burden interstate commerce are subject to a lower level of scrutiny).

[67] *See Pike*, 397 U.S. at 142 (introducing this lowered standard); Hawkins, *supra* note 65, at 318–19 (noting that *Pike* was the first case in which the Court articulated this lower level of scrutiny).

[68] *See Taylor*, 477 U.S. at 137–38 (applying heightened scrutiny in evaluating whether a Maine state statute prohibiting out-of-state bait fish violated the dormant Commerce Clause); O'Grady, *supra* note 65, at 573–74 (noting that courts apply heightened scrutiny to evaluate laws that discriminate against interstate commerce); Hawkins, *supra* note 65, at 318–19 (same).

[69] *See Pike*, 397 U.S. at 142 (articulating a balancing test to evaluate the constitutionality of state statutes); O'Grady, *supra* note 65, at 573–74 (explaining that the *Pike* test determines whether a state law's effect on interstate commerce violates the dormant Commerce Clause); Hawkins, *supra* note 65, at 318–19 (same).

Direct regulation and discrimination are similar concepts in terms of dormant Commerce Clause evaluations.[70] In fact, a state law is discriminatory if it regulates, either on its face or in effect, in-state and out-of-state economic activity differently.[71] For example, in 1989, in *Healy v. Beer Institute*, the U.S. Supreme Court found that a Connecticut statute regulating the interstate brewing and shipping of beer was discriminatory.[72] Because the statute allowed brewers and shippers more freedom in deciding what prices to charge within Connecticut if the brewers or shippers operated only within the borders of the state, it discriminated against brewers and shippers who also operated in other states.[73] The Court ruled that the statute effectively incentivized brewers and shippers not to engage in interstate commerce, and therefore violated the Commerce Clause.[74]

C. Long Live the King: The Estate of Elvis Presley and the Establishment of the Postmortem Right of Publicity

Elvis Presley was arguably the most famous and successful American rock and roll musician to ever live.[75] When he died in 1977, the marketplace was

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[70] *See* Healy v. Beer Inst., 491 U.S. 324, 339 (1989) (holding that state legislation violates the dormant Commerce Clause if it controls conduct taking place beyond the borders of the state); CTS Corp. v. Dynamics Corp., 481 U.S. 69, 88 (1987) (holding that a state statute may not inconsistently regulate economic activity so as to affect interstate commerce); Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982) (holding that a state statute may not regulate activity taking place entirely outside of the state); Florey, *supra* note 40, at 1085 (stating that a state statute that appears discriminatory on its face violates the dormant Commerce Clause); Hawkins, *supra* note 65, at 318 n.36 (discussing how a state law can discriminate against interstate commerce).

[71] *See Healy*, 491 U.S. at 339 (holding that a Connecticut statute that affects the pricing of a regulated product in neighboring states violates the Commerce Clause); *CTS Corp*., 481 U.S. at 88 (noting that state statutes that affect interstate commerce by inconsistently regulating activities violate the Commerce Clause); Florey, *supra* note 40, at 1085 (observing that discriminatory statutes are subject to strict scrutiny); Hawkins, *supra* note 65, at 318 n.36 (same).

[72] *See Healy*, 491 U.S. at 341 (invalidating a Connecticut statute that regulated conduct in neighboring states); Florey, *supra* note 40, at 1086 (discussing the Court's reasoning in the *Healy* case).

[73] *See Healy*, 491 U.S. at 341 (ruling that a Connecticut statute was facially discriminatory because it treated brewers and shippers differently based on whether they operated outside of Connecticut); Florey, *supra* note 40, at 1085 (noting the Court's focus on the extraterritorial effect of the statute).

[74] *See Healy*, 491 U.S. at 341 (holding that because the Connecticut statute effectively punished brewers and shippers for engaging in commerce across state lines, it was an unconstitutional regulation of interstate commerce); Florey, *supra* note 40, at 1085 (observing that the Court in *Healy* ruled that the statute was an unconstitutional control of commercial activity occurring wholly outside Connecticut).

[75] *See 10 Essential Elvis Presley Songs*, ROCK & ROLL HALL OF FAME & MUSEUM (Jan. 7, 2012, 12:00 PM), http://rockhall.com/blog/post/10-essential-elvis-presley-songs/ [http://perma.cc/YCH7-YWDG] [hereinafter ROCK & ROLL HALL OF FAME & MUSEUM] (calling Presley "the undisputed King of Rock and Roll"); Dorothy Pomerantz, *Michael Jackson Tops* Forbes *List of Top-Earning Dead Celebrities with $140 Million Haul*, FORBES (Oct. 15, 2014, 9:52 AM), http://www.forbes.com/sites/dorothypomerantz/2014/10/15/michael-jackson-tops-forbes-list-of-top-earning-dead-celebrities/ [https://perma.cc/84TG-9PT9] (referring to Presley as the King of Rock and Roll).

flooded with merchandise memorializing the late "King of Rock & Roll."[76] Presley's estate objected to many of the unlicensed tributes available for purchase at no profit to the late singer's heirs and initiated a flurry of lawsuits that eventually prompted the enactment of Tennessee's Personal Rights Protection Act of 1984 ("PRPA"), a statute codifying the postmortem right of publicity.[77]

One of the most notable cases that led to the passage of the PRPA involved a use of Elvis Presley's likeness for noncommercial purposes.[78] The U.S. District Court for the Western District of Tennessee held that Factors Etc. owned the exclusive right to exploit Presley's name and enjoined a nonprofit's efforts to construct a statute of the late singer.[79] On appeal in 1980, in *Memphis Development Foundation v. Factors Etc., Inc.*, the U.S. Court of Appeals for the Sixth Circuit ruled that Presley's exclusive right to his likeness extinguished upon his death.[80] The court held that upon death, an individual's likeness passes into the public domain and is free for appropriation by all.[81] The court identified the absence of any previously recognized postmortem right of publicity in Tennessee and declined to create this right as a judicial doctrine.[82] Instead, the court characterized fame and reputation as non-inheritable attributes from which other individuals could benefit but could never own.[83]

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[76] *See* Brittany Adkins, *Crying Out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through a Uniform Right of Publicity Act*, 40 CUMB. L. REV. 499, 513 n.85 (2010) (describing early postmortem right of publicity cases surrounding merchandise sales bearing Presley's likeness in the aftermath of his death); ROCK & ROLL HALL OF FAME & MUSEUM, *supra* note 75.

[77] *See* TENN. CODE ANN. §§ 47-25-1103 to -1104 (2013) (creating a postmortem right of publicity in the state of Tennessee without expiration); Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 959 (6th Cir. 1980) (ruling that Presley had no postmortem right of publicity under Tennessee common law); *see also* Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278, 283 (2d Cir. 1981) (following *Memphis Development Foundation* in refusing to enforce a postmortem right of publicity for Presley); Adkins, *supra* note 76, at 513 n.85 (listing cases that led to the passage of the PRPA).

[78] *Memphis Dev. Found.*, 616 F.2d at 957. After Presley's death, the Memphis Development Foundation, a nonprofit corporation, initiated plans to construct a memorial statue of the singer in downtown Memphis. *Id.* Prior to his death, Presley had signed away the right to commercially exploit his likeness to Boxcar Enterprises and the company believed that it still owned that right postmortem. *Id.* Two days after Presley's death, Boxcar licensed that right to Factors Etc., Inc., which sued the nonprofit corporation in order to enjoin the statue's construction. *Id.* The nonprofit argued that because its use of Presley's image was not for commercial gain, it did not infringe on Factors Etc.'s license. *Id.*

[79] *See id.* (ruling that at the time Boxcar contracted with Factors Etc., Boxcar did not have the rights to contract away Presley's publicity rights). The Memphis Development Foundation's fundraising efforts for construction of the statue consisted of soliciting donations from the public. *Id.* Anyone who donated more than twenty-five dollars would have received a miniature replica of the statue. *Id.*

[80] *See id.* at 959. The licensing agreement to Factors alone was worth $150,000. *Id.* at 957.

[81] *Id.* at 959. The court stated that protecting the exclusive commercial use of an individual's likeness beyond death would not increase the production or efficiency of the economy. *Id.*

[82] *Id.*; *see also Pro Arts*, 652 F.2d at 283 (applying Tennessee law in refusing to recognize a postmortem right of publicity for Presley because Tennessee did not recognize one at the time).

[83] *Memphis Dev. Found.*, 616 F.2d at 960. The court quoted John Rawls and described fame as an independent motivation from financial gain in cases of entertainers like Presley. *Id.* Therefore, by protecting the right of publicity beyond death, the court would not be continuously promoting creativi-

Four years after the Sixth Circuit's decision, and other similar decisions involving Presley's likeness in various jurisdictions, the Tennessee legislature responded with the PRPA.[84] The PRPA, also known as "the Elvis Law," protects the unauthorized commercial exploitation of the likeness of any individual domiciled in Tennessee at his or her time of death.[85] The Tennessee statute immediately extended protection to all individuals—living or deceased—in perpetuity, provided the protected likeness was continuously exploited for commercial gain.[86] The same year, California's legislature passed the Celebrities Rights Act ("CRA"), a similar statute conferring a postmortem right of publicity within the state.[87] In the years following, despite jurisdictional differences, more states began to recognize the right.[88]

New York, although home to many celebrities, chose not to recognize such a right.[89] New York does not have a common law right of publicity and limits its

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ty in the same way as protecting the right of publicity during an individual's lifetime, while he or she can still pursue "creative endeavors." *See id.* at 959.

[84] TENN. CODE ANN. §§ 47-25-1101 to -1108 (creating a right of publicity that does not expire upon death for an individual domiciled in Tennessee when he or she dies); *Memphis Dev. Found.*, 616 F.2d at 959 (holding that Elvis Presley did not pass a postmortem right of publicity onto his estate because Tennessee, his domicile state, did not recognize one at the time of his death); *see also Pro Arts*, 652 F.2d at 283 (same); Adkins, *supra* note 76, at 513 (discussing how the Tennessee legislature created a postmortem right of publicity in response to court cases ruling that the late Elvis Presley did not pass that right onto his estate).

[85] *See* TENN. CODE ANN. § 47-25-1104 (providing that as long as the commercial value of the likeness of a deceased person is exploited at least once every two years, the right will never extinguish and pass into the public domain); *see also* Adkins, *supra* note 76, at 513 (noting that Tennessee's statute differs in certain minor ways from the comparable California statute). The PRPA effectively empowers Presley's estate with the exclusive right to profit from his image and likeness for as long as it chooses to do so. *See* TENN. CODE ANN. § 47-25-1104.

[86] TENN. CODE ANN. § 47-25-1104; *see also* Adkins, *supra* note 76, at 513 (noting that the *Memphis Development Foundation* decision prompted creation of that right in Tennessee); Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, 28 COMM. LAW. 14, 16 (2011) (same).

[87] *See* CAL. CIV. CODE § 3344.1 (West, Westlaw through 2015 Reg. Sess.) (conferring a postmortem right of publicity onto all individuals domiciled in California at the time of death).

[88] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a) (West, Westlaw through 2015 Reg. Sess.) (conferring a postmortem right of publicity onto all individuals, regardless of domicile); TENN. CODE ANN. § 47-25-1104 (granting a postmortem right of publicity in the state of Tennessee); WASH. REV. CODE § 63.60.010 (establishing a postmortem right of publicity for all individuals, regardless of domicile); Adkins, *supra* note 76, at 505 (discussing the importance of New York, California, and Tennessee right of publicity law due to the prominent role of these states in the entertainment industry); Hicks, *supra* note 8, at 278 (noting that the postmortem right of publicity statutes of Washington, California, Tennessee, and Indiana were enacted to protect celebrities who lived in the respective states).

[89] *See Milton H. Greene*, 692 F.3d at 999 (holding that Marilyn Monroe had no postmortem right of publicity because she died domiciled in New York and New York does not recognize that right); *James Marshall Hendrix Found.*, 240 F. App'x at 740 (ruling that Jimi Hendrix did not have a postmortem right of publicity because he died in New York, which does not recognize such a right); *Shaw Family Archives*, 486 F. Supp. 2d at 314 (stating that New York does not recognize a postmortem right of publicity); Seals, *supra* note 10 (noting that the postmortem right of publicity does not exist for individuals domiciled in New York at death).

statutory publicity rights to living persons.[90] In New York, publicity rights are more akin to privacy rights than property rights, and thus cannot be transferred or assigned.[91] New York therefore does not recognize a postmortem right of publicity.[92] An individual domiciled in New York at the time of his or her death would have no postmortem right of publicity to pass onto his or her heirs regardless of the forum state of future litigation.[93] Because of this, whether New York law governs the postmortem right of publicity has proven to be the critical issue in litigation involving the potentially lucrative rights of deceased celebrities such as Marilyn Monroe and Jimi Hendrix.[94]

II. MARILYN MONROE NEVER WENT TO INDIANA: EXAMINING ATTEMPTS TO ENFORCE THE POSTMORTEM RIGHT OF PUBLICITY

Over the past fifty years, the estates of deceased celebrities have attempted to enforce their postmortem rights of publicity, with inconsistent results.[95] On

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[90] *Shaw Family Archives*, 486 F. Supp. 2d at 314 (holding that Marilyn Monroe did not have a postmortem right of publicity because she was domiciled in New York at the time of her death and New York did not recognize such a right at the time of her death); David Horton, *Indescendibility*, 102 CALIF. L. REV. 543, 544–45 (2014) (discussing the effect of a ruling that because Marilyn Monroe was domiciled in New York at the time of her death, she therefore did not have a postmortem right of publicity).

[91] *See* Cotter & Dmitrieva, *supra* note 21, at 172; Hicks, *supra* note 8, at 279–80 (noting that New York's right of publicity evolved from privacy, not property rights).

[92] *Shaw Family Archives*, 486 F. Supp. 2d at 314 (holding that Marilyn Monroe's estate did not inherit her right of publicity because New York did not recognize such a right when she died); Horton, *supra* note 90, at 544–45 (observing that Marilyn Monroe's estate argued that she did not die domiciled in New York so that the estate could potentially recognize a postmortem right of publicity).

[93] *See Milton H. Greene*, 692 F.3d at 1000 (ruling that Marilyn Monroe had no postmortem right of publicity because she died while domiciled in New York); *Experience Hendrix I*, 766 F. Supp. 2d at 1139–40 (holding that Jimi Hendrix had no postmortem right of publicity because he died while domiciled in New York); *James Marshall Hendrix Found.*, 240 F. App'x at 740 (holding that Jimi Hendrix had no postmortem right of publicity because he died while domiciled in New York); *Shaw Family Archives*, 486 F. Supp. 2d at 314 (ruling that Marilyn Monroe had no postmortem right of publicity because her domicile state did not recognize that right at the time she died); Seals, *supra* note 10 (noting that the estates of Marilyn Monroe and Jimi Hendrix have attempted to use Indiana and Washington statutes, respectively, to enforce a postmortem right of publicity despite that right not existing for individuals domiciled in New York at death).

[94] *See Milton H. Greene*, 692 F.3d at 999 (holding that New York law, not California law, governed the postmortem right of publicity for Marilyn Monroe because she died as a domiciliary of New York); *James Marshall Hendrix Found.*, 240 F. App'x at 740 (holding that New York law, not Washington law, governed the postmortem right of publicity for Jimi Hendrix because he died domiciled in New York); *Shaw Family Archives*, 486 F. Supp. 2d at 314 (ruling that an Indiana statute did not govern the postmortem rights of publicity for Marilyn Monroe because she died domiciled outside Indiana); Seals, *supra* note 10.

[95] *See* Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd. (*Experience Hendrix II*), 762 F.3d 829, 835–36 (9th Cir. 2014) (holding that the estate of Jimi Hendrix could enforce the postmortem right of publicity conferred by the WPRA despite Hendrix being domiciled in New York at the time of his death because the statute created a right for all individuals regardless of domicile); Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983, 999–1000 (9th Cir. 2012) (ruling

multiple occasions, state legislatures have enacted statutes creating or altering the enforceability of the postmortem right of publicity in response to judicial decisions concerning the issue.[96] Some of these statutes have clarified whether such a right exists within their respective jurisdictions, while others have prompted controversy and debate among courts and scholars.[97] Section A of this Part examines attempts by the estate of Marilyn Monroe to expand the accepted jurisdictional reach of a statutorily created postmortem right of publicity and why its multiple legal actions ended in defeat.[98] Next, section B explores the unprecedented decision in 2014 in *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd.* by the U.S. Court of Appeals for the Ninth Circuit to enforce a statutorily created post-

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that the estate of Marilyn Monroe could not change its argument as to her domicile at death in order to enforce California's postmortem right of publicity law instead of New York's law); Experience Hendrix LLC v. James Marshall Hendrix Found., 240 F. App'x 739, 740 (9th Cir. 2007) (holding that the estate of Jimi Hendrix could not enforce a postmortem right of publicity created by the WPRA because it did not apply to individuals not domiciled in Washington at death); Cairns v. Franklin Mint Co., 292 F.3d 1139, 1147 (9th Cir. 2002) (ruling that the estate of Princess Diana could not enforce California's postmortem right of publicity law because she was domiciled in the United Kingdom at death); Lugosi v. Universal Pictures, 603 P.2d 425, 430 (Cal. 1979) (holding that the right of publicity did not pass to Bela Lugosi's estate at common law because he had not exercised that right during his lifetime); *Nobody's Dead Anymore: Marketing Deceased Celebrities*, CBC RADIO (May 25, 2013), http://www.cbc.ca/radio/undertheinfluence/nobody-s-dead-anymore-br-marketing-deceased-celebrities-1.2801803 [http://perma.cc/XC4F-CXFM] [hereinafter CBC RADIO] (noting that postmortem right of publicity law is a continuously changing patchwork of state law).

[96] *See* CAL. CIV. CODE § 3344.1(b), (h), (p) (West, Westlaw through 2015 Reg. Sess.) (conferring a postmortem right of publicity onto all individuals domiciled in California who died before passage of the statute in response to a judicial decision declaring that Marilyn Monroe did not have a postmortem right of publicity under New York or California law at the time of her death); TENN. CODE ANN. § 47-25-1103 (2013) (creating a postmortem right of publicity in Tennessee in response to a judicial decision denying Elvis Presley that right); WASH. REV. CODE § 63.60.010 (2014) (conferring a postmortem right of publicity in Washington onto all individuals regardless of domicile in response to a judicial decision denying the estate of Jimi Hendrix protection under a Washington statute because he was domiciled in New York at death); *Experience Hendrix II*, 762 F.3d at 835–36 (upholding the constitutionality of amendments to the WPRA granting a postmortem right of publicity to individuals regardless of domicile); Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 957 (6th Cir. 1980) (denying Elvis Presley a postmortem right of publicity under Tennessee common law); Shaw Family Archives, Ltd. v. CMG Worldwide, Inc., 486 F. Supp. 2d 309, 314 (S.D.N.Y. 2007) (noting that Marilyn Monroe would not have had a postmortem right of publicity under California law even if she had been domiciled in California at death because that right did not exist at the time of her death).

[97] *See Experience Hendrix II*, 762 F.3d at 835–36 (upholding the constitutionality of an extraterritorial grant of a postmortem right of publicity for the first time); *Milton H. Greene*, 692 F.3d at 999–1000 (noting that a change in California state law prompted the estate of Marilyn Monroe to argue she was domiciled somewhere other than where they originally argued); Adkins, *supra* note 76, at 524 (arguing that the patchwork of state laws on the right of publicity conflict); Ford & Liebler, *supra* note 8, at 12 (describing Indiana and Washington's publicity statutes as constitutionally problematic); Seals, *supra* note 10 (warning businesses to take notice of jurisdictional differences in postmortem right of publicity law).

[98] *See infra* notes 100–125 and accompanying text.

mortem right of publicity granted to the estate of an individual domiciled outside of the relevant state at the time of death.[99]

A. A Picture's Worth: Marilyn Monroe's Photograph Defines Postmortem Right of Publicity Choice-of-Law Rules from Coast to Coast

Like Elvis Presley, Marilyn Monroe has remained one of the most famous and marketable individuals in the world since her death.[100] Product lines bearing her image or using her likeness in their promotional campaigns continue to generate millions of dollars annually in income for her estate.[101] Consequently, those in charge of Monroe's estate have engaged in significant efforts to expand the postmortem right of publicity and increase the revenue generating power of Monroe's likeness.[102] Monroe's estate initiated a two-part legal strategy in order to increase the potential income from licensing agreements.[103] First, the CEO of

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[99] *See infra* notes 126–146 and accompanying text.

[100] *See* Pomerantz, *supra* note 75 (noting that Marilyn Monroe earned $17 million between October 2013 and October 2014). The revenue-generating power of Marilyn Monroe's estate began with her decision to leave the bulk of it to her acting coach, Lee Strasberg. *See* Elizabeth Blair, *Monroe's Legacy Is Making Fortune, but for Whom?*, NPR (Aug. 3, 2012, 6:06 PM), http://www.npr.org/2012/08/03/157483945/monroes-legacy-is-making-fortune-but-for-whom [http://perma.cc/77MC-LC27]. Strasberg maintained control from 1962, the year of Marilyn Monroe's death, to 1982, the year of his own death. *Id.* Strasberg left his majority stake in Marilyn Monroe's estate to his wife, who contracted with CMG Worldwide to manage the estate. *Id.*

[101] *See* Blair, *supra* note 100; Rheana Murray, *Marilyn Monroe Line Hits Macy's*, N.Y. DAILY NEWS (Mar. 8, 2013, 12:15 PM), http://www.nydailynews.com/life-style/fashion/marilyn-monroe-line-hits-macy-article-1.1283155 [http://perma.cc/PEQ2-K99Q] (noting that Marilyn Monroe's likeness serves as the basis for the marketing of a line of clothing at Macy's); Pomerantz, *supra* note 75 (same). In fact, changes to the executor transformed the entity from one designed to execute the late actress's wishes into one primarily seeking profit. *See Milton H. Greene*, 692 F.3d at 999–1000 (observing that the estate had changed its position on Marilyn Monroe's domicile at death based on amendments in California law that made it more profitable for Monroe to have been domiciled in California); *Shaw Family Archives*, 486 F. Supp. 2d at 313 (noting that an action brought by Marilyn Monroe's estate arose out of the sales of images of Monroe to which the heirs of Sam Shaw, the late photographer, owned the copyright); Vick & Jassy, *supra* note 86, at 16 (observing the aggressive legal actions of Marilyn Monroe's estate in attempting to enforce her postmortem right of publicity); *About*, MARKROESLER.COM, http://www.markroesler.com/about/biography.html [https://perma.cc/VXX3-PYMJ] [hereinafter MARKROESLER.COM] (advertising the CEO of CMG's role in passing Indiana's right of publicity statute and vigorous legal tactics in enforcing CMG clients' postmortem rights of publicity).

[102] *See Milton H. Greene*, 692 F.3d at 999 (ruling that because Marilyn Monroe was not domiciled in California at the time of her death, her estate could not capitalize on California's postmortem right of publicity); *Shaw Family Archives*, 486 F. Supp. 2d at 313 (holding that Marilyn Monroe was domiciled in New York at the time of her death and therefore her estate did not receive her right of publicity when she died); Vick & Jassy, *supra* note 86, at 16 (discussing the Marilyn Monroe litigation); MARKROESLER.COM, *supra* note 101 (claiming that the company that managed Marilyn Monroe's estate lobbied for the passage of Indiana's publicity statute so that the company could better capitalize on the postmortem right of publicity of its clients).

[103] *See Milton H. Greene*, 692 F.3d at 992 (noting that Marilyn Monroe's estate filed suit after the passage of an amendment to California law that would grant her estate a postmortem right of publicity

CMG Worldwide, the company that controls Monroe's estate, authored a bill that provided broader protection for postmortem publicity rights than that available in any state at the time.[104]

In 1994, the Indiana state legislature passed CMG's proposed bill and thereby enacted what many scholars consider to be the broadest and most sweeping state statute governing publicity rights.[105] The statute defines the specific extent of what constitutes publicity and protects the right of publicity for one hundred years following the death of an individual.[106] Perhaps most controversially, the Indiana statute also purports to confer the postmortem right of publicity to all individuals, regardless of their domicile.[107]

Next, CMG used the statute to attempt to prevent other parties with otherwise valid rights to profit from items bearing Monroe's image.[108] Two cases in particular highlight the legal issues that CMG's actions have raised with regards

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if she was domiciled in California at death); *Shaw Family Archives*, 486 F. Supp. 2d at 314–15 (ruling that Marilyn Monroe's estate could not use an Indiana statute to enforce a postmortem right of publicity for Monroe because she was domiciled in a different state at death); Vick & Jassy, *supra* note 86, at 16 (describing Marilyn Monroe's estate's failed attempt to enforce a postmortem right of publicity); MARKROESLER.COM, *supra* note 101 (describing CMG's CEO as the primary author of Indiana's right of publicity statute); *see also Cairns*, 292 F.3d at 1147 (observing that CMG, which also managed the estate of Princess Diana, could not use California law to enforce a postmortem right of publicity for Princess Diana because she died domiciled in the United Kingdom).

[104] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a) (West, Westlaw through 2015 Reg. Sess.) (granting a postmortem right of publicity to all individuals, explicitly independent of domicile); *Shaw Family Archives*, 486 F. Supp. 2d at 314–15 (holding that Indiana's postmortem right of publicity law did not apply to Marilyn Monroe even though the text of the statute explicitly included all individuals); MARKROESLER.COM, *supra* note 101 (calling Indiana's right of publicity statute the most wide-sweeping in the country). CMG is headquartered in Indiana. *See* MARKROESLER.COM, *supra* note 101.

[105] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a) (making Indiana the first state to provide a postmortem right of publicity to individuals regardless of domicile); Adkins, *supra* note 76, at 518 (calling Indiana's right of publicity statute the most wide-sweeping in the country); MARKROESLER.COM, *supra* note 101.

[106] IND. CODE ANN. §§ 32-36-1-7, -8(a) (defining the right of publicity as an exclusive property interest in name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, and mannerisms that lasts throughout a person's lifetime and for one hundred years after the death of the person); Susannah M. Rooney, *Just Another Brown-Eyed Girl: Toward a Limited Federal Right of Publicity Under the Lanham Act in a Digital Age of Celebrity Dominance*, 86 S. CAL. L. REV. 921, 935 (2013) (discussing Indiana's conferral of a postmortem right of publicity).

[107] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a); Adkins, *supra* note 76, at 523 (noting that courts have refused to apply the statute to individuals not domiciled in Indiana at death); Ford & Liebler, *supra* note 8, at 12. The statute has served as an influence on similar statutes passed in other states. *See* Vick & Jassy, *supra* note 86, at 16; MARKROESLER.COM, *supra* note 101.

[108] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a); *Shaw Family Archives*, 486 F. Supp. 2d at 314 (noting that CMG's claims that the sale of shirts infringing on Marilyn Monroe's postmortem right of publicity under Indiana law was insufficient to justify application of Indiana law to determine her postmortem right of publicity); Vick & Jassy, *supra* note 86, at 16; MARKROESLER.COM, *supra* note 101.

to the postmortem right of publicity.[109] In 2007, in *Shaw Family Archives, Ltd. v. CMG Worldwide, Inc.*, the U.S. District Court for the Southern District of New York seriously questioned the enforceability of Indiana's statute.[110] The central issue was whether a postmortem right of publicity conferred by the Indiana statute was enforceable when the individual in question was not a domiciliary of Indiana.[111] The court held that an Indiana statute could not supersede the common law on the issue of Monroe's postmortem publicity rights because Indiana law had no authority to govern that right in the first place.[112] Indiana attempted to create not only a right, but also the authority to confer that right in other states, and in this case the attempt failed.[113]

The *Shaw Family Archives* decision also held that even if California was Monroe's domicile at the time of her death, CMG still did not inherit her postmortem right of publicity because California law did not recognize such a right in 1962.[114] In direct response to this ruling, the California state legislature amended the CRA so that it applied to any individual domiciled in California

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[109] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a) (granting a postmortem right of publicity regardless of an individual's domicile); *Milton H. Greene*, 692 F.3d at 1000 (holding that California's postmortem right of publicity only applied to individuals domiciled in California at death); *Shaw Family Archives*, 486 F. Supp. 2d at 314 (ruling that Indiana law did not govern Marilyn Monroe's publicity rights upon death because she died domiciled in New York).

[110] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a); *Shaw Family Archives*, 486 F. Supp. 2d at 314–15. Sam Shaw was a photographer who had taken many photographs of Marilyn Monroe and therefore owned the copyright to them. *Shaw Family Archives*, 486 F. Supp. 2d at 313. His estate engaged in the selling of memorabilia bearing the images of some of these photographs. *Id.*; *see also* Smith, *supra* note 31, at 1740 (describing lawsuits brought by Marilyn Monroe's estate against Shaw Family Archives for selling t-shirts and licenses to use photographs of Monroe, even though Shaw Family Archives owned the copyright to those images).

[111] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a); *Shaw Family Archives*, 486 F. Supp. 2d at 314–15. Traditionally, the common law instructed that the law of the jurisdiction in which an individual was domiciled at the time of death controlled any postmortem right of publicity. *See, e.g.*, *Cairns*, 292 F.3d at 1147 (applying the law of the domicile of Princess Diana, who died while domiciled in Great Britain); Rogers v. Grimaldi, 875 F.2d 994, 1002 (2d Cir. 1989) (enforcing the law of the domicile of Ginger Rogers, who died while domiciled in Oregon); Acme Circus Operating Co. v. Kuperstock, 711 F.2d 1538, 1541 (11th Cir. 1983) (applying the law of the domicile of Clyde Beatty, who died while domiciled in California). Indiana's statute explicitly states that it applies to all individuals regardless of domicile. IND. CODE ANN. § 32-36-1-1(a). The statute purports to be enforceable over sales of all goods coming into the state of Indiana. *Id.* § 32-36-1-9.

[112] *Shaw Family Archives*, 486 F. Supp. 2d at 314 (observing that at the time of her death in 1962 Marilyn Monroe did not have a postmortem right of publicity in any state, and therefore did not receive one at any later point despite contrary statutory language).

[113] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a); *Shaw Family Archives*, 486 F. Supp. 2d at 315 (holding that Indiana law could not govern Marilyn Monroe's postmortem right of publicity because she did not have any contacts with Indiana during her lifetime).

[114] *See Shaw Family Archives*, 486 F. Supp. 2d at 315; Smith, *supra* note 31, at 1740 n.58 (noting how because Marilyn Monroe died before California enacted the CRA, she could not receive any rights that the CRA created).

before January 1, 1985.[115] Monroe's estate was nevertheless subsequently unsuccessful in attempting to establish her postmortem right of publicity by claiming that California was her domicile at the time of her death.[116]

In 2012, in *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, the U.S. Court of Appeals for the Ninth Circuit ruled that the "retroactive" amendment to the CRA did not grant Monroe a postmortem right of publicity.[117] The amendment conferred the postmortem right of publicity to Monroe's estate only if Monroe was domiciled in California at the time of her death.[118] This caveat prevented Monroe's estate from enforcing the postmortem publicity right because decades earlier, Monroe's estate had gone through litigation to prove that Monroe was not a domiciliary of California at the time of her death, but rather of New York.[119] The doctrine of judicial estoppel prevented Monroe's estate from changing its stance on where Monroe died when changes in the law made it more profitable to do so.[120]

These two Marilyn Monroe cases illustrate many of the issues surrounding the postmortem right of publicity.[121] Courts have consistently held that the con-

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[115] *See* CAL. CIV. CODE § 3344.1(b), (h), (p) (granting a postmortem right of publicity to all individuals who died while domiciled in California); *Shaw Family Archives*, 486 F. Supp. 2d at 314 (ruling that a California statute did not apply to Marilyn Monroe regardless of her domicile because the statute did not apply to individuals who died before the statute was enacted); Adkins, *supra* note 76, at 509 n.56 (noting that the 2007 Amendment to the CRA deemed the right of publicity "to have existed at the time of death of any deceased personality who died prior to January 1, 1985").

[116] *See Milton H. Greene*, 692 F.3d at 1000 (holding that Marilyn Monroe's estate was estopped from arguing that she died domiciled in California because it had represented her as having died domiciled in New York in prior litigation); 2 MCCARTHY, *supra* note 28, § 11:15 at 705 (observing that the estate of Marilyn Monroe was judicially estopped from claiming that when she died she was domiciled in California, because in 1966 the executor and attorney of Marilyn Monroe's estate argued to the California inheritance tax appraiser that Marilyn Monroe died with her domicile in New York); CBC RADIO, *supra* note 95 (noting that when Marilyn Monroe died, her estate fought to prove she was domiciled in New York to avoid paying California state income tax).

[117] *See* CAL. CIV. CODE § 3344.1(b), (h), (p) (conferring a postmortem right of publicity onto all individuals domiciled in California at death); *Milton H. Greene*, 692 F.3d at 1000 (holding that Marilyn Monroe's estate was estopped from arguing that she died domiciled in California because it had represented her as domiciled in New York in prior litigation).

[118] *See* CAL. CIV. CODE § 3344.1(b), (h), (p); *Milton H. Greene*, 692 F.3d at 999; Whibley, *supra* note 4, at 124 ("Marilyn Monroe's estate argued that she was domiciled in California (instead of New York) in order to retain certain rights in her publicity.").

[119] *See Milton H. Greene*, 692 F.3d at 999 (noting that Marilyn Monroe's estate had argued that she was domiciled in New York when probating her estate in order to avoid paying tax in California); 2 MCCARTHY, *supra* note 28, § 11:15 at 705; CBC RADIO, *supra* note 95.

[120] *See Milton H. Greene*, 692 F.3d at 999–1000 (holding that the estate's arguments that Marilyn Monroe was domiciled in New York in prior litigation in order to avoid paying taxes in California estopped the estate from subsequently arguing that Monroe was domiciled in California after the passage of California's CRA); CBC RADIO, *supra* note 95.

[121] *See Milton H. Greene*, 692 F.3d at 999 (declining to reopen a factual inquiry as to the domicile of Marilyn Monroe); *Shaw Family Archives*, 486 F. Supp. 2d at 314 (declining to apply the postmortem right of publicity law of Indiana, a state that Marilyn Monroe had never visited during her lifetime); 2 MCCARTHY, *supra* note 28, § 11:15 at 704–05 (observing that the Marilyn Monroe cases are

trolling state law is that of the jurisdiction in which the deceased was domiciled at the time of death, even when economic activity allegedly infringing on that right takes place entirely out of the state.[122] State legislatures do appear to have the ability to confer a postmortem right of publicity onto an individual who died within the jurisdiction while that right did not exist.[123] Therefore, the universal test in all states for whether an estate had an enforceable postmortem right of publicity was a two-part inquiry: first, the court determined the domicile of the deceased at the time of death, and then, determined whether the jurisdiction conferred a postmortem right of publicity onto the individual as of the commencement of the litigation.[124] Recently, however, the Ninth Circuit seemed to contradict its own stance on this issue when it handed down a decision in a case involving yet another late celebrity.[125]

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the most well-known cases in which choice of law dictated the existence or absence of a postmortem right of publicity); Whibley, *supra* note 4, at 124 (noting that Indiana and Washington created statutes that recognized an individual's right of publicity action regardless of domicile to provide estates such as Marilyn Monroe's with greater publicity rights when the deceased's domicile state did not recognize them).

[122] *See Milton H. Greene*, 692 F.3d at 999 (noting that Marilyn Monroe's estate wished to argue that she was domiciled in California because such a finding would confer California's postmortem right of publicity protections onto her estate); *Shaw Family Archives*, 486 F. Supp. 2d at 314 (observing that the majority rule is to apply the law of the deceased's domicile, regardless of contrary statutory language); 2 MCCARTHY, *supra* note 28, § 11:15 at 701–02 (commenting that almost all courts determine the existence of a postmortem right of publicity by looking to the law of the deceased's domicile); Ford & Liebler, *supra* note 8, at 12 (discussing how most states apply the law of the deceased's domicile at death to determine the existence of a postmortem right of publicity).

[123] *See* CAL. CIV. CODE § 3344.1(b), (h), (p) (conferring a postmortem right of publicity onto any individuals domiciled in California at death); TENN. CODE ANN. § 47-25-1103 (creating a postmortem right of publicity for anyone who died as a domiciliary of Tennessee); *Milton H. Greene*, 692 F.3d at 1000 (recognizing that California's CRA did not apply to Marilyn Monroe only because she was not a California domiciliary); 2 MCCARTHY, *supra* note 28, § 11:15 at 705 (noting that California statutory amendments after Marilyn Monroe's death would have applied to her if she had been a domiciliary of California).

[124] *See* CAL. CIV. CODE § 3344.1(b), (h), (p); TENN. CODE ANN. § 47-25-1103 (conferring a postmortem right of publicity onto anyone who died as a domiciliary of Tennessee); *Milton H. Greene*, 692 F.3d at 1000 (holding that California's statutorily created postmortem right of publicity did not apply to Marilyn Monroe because she was not domiciled in California at the time of her death); 2 MCCARTHY, *supra* note 28, § 11:15 at 701–02 (discussing the Marilyn Monroe litigation involving California's postmortem right of publicity); Ford & Liebler, *supra* note 8, at 12 (same).

[125] *See Experience Hendrix II*, 762 F.3d at 835–36 (holding that Washington's postmortem right of publicity law governed a dispute involving the late Jimi Hendrix despite his being domiciled in New York at death). *But see Milton H. Greene*, 692 F.3d at 1000 (ruling that New York law governed the postmortem right of publicity for Marilyn Monroe because she was domiciled in New York at death).

B. The Ninth Circuit Experience: Washington's Personality Rights Act Sets the Rules on Fire

Washington's legislature enacted the Washington Personality Rights Act ("WPRA") in 1998.[126] The statute codified the right of publicity in Washington and provided that the right could be passed onto an individual's estate, establishing a postmortem right of publicity within the state's borders.[127] In 2005, the estate of Jimi Hendrix used the WPRA to bring a lawsuit seeking to enjoin the use of the late guitarist's image by a third party.[128]

On appeal in 2007, in *Experience Hendrix LLC v. James Marshall Hendrix Foundation*, the U.S. Court of Appeals for the Ninth Circuit held that the heirs of Jimi Hendrix did not inherit his right of publicity upon his death because he was domiciled in New York and New York law does not grant a postmortem right of publicity.[129] Just as the California legislature did for Marilyn Monroe's estate, the Washington legislature passed legislation intended to help Hendrix's estate reverse the decision.[130] Rather than amend dates, the Washington legislature amended the statute so that it purported to apply to all individuals, regardless of domicile at the time of death.[131] Shortly after the passage of the WPRA's

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[126] WASH. REV. CODE § 63.60.010.

[127] *See id.* (designating that every individual has a property right in the use of his or her name, voice, signature, photograph, or likeness that is freely transferable by any otherwise permissible form of inter vivos or testamentary transfer); Cotter & Dmitrieva, *supra* note 21, at 172 (noting that states that recognize publicity rights as property rights allow publicity rights to be transferred and passed into the estate); Hicks, *supra* note 8, at 280 (same).

[128] *See* WASH. REV. CODE ANN. § 63.60.010 (West 1998) (amended 2008) (granting a postmortem right of publicity in the state of Washington); *James Marshall Hendrix Found.*, 240 F. App'x at 740 (holding that a company founded by Hendrix's heir did not have authority to prevent the use of Hendrix's likeness by a foundation started by Hendrix's brother).

[129] *James Marshall Hendrix Found*., 240 F. App'x at 740.

[130] *See* CAL. CIV. CODE § 3344.1(b), (h), (p) (amended shortly after a ruling against the estate of Marilyn Monroe); WASH. REV. CODE § 63.60.010 (amended shortly after a ruling against the estate of Jimi Hendrix); *Experience Hendrix II*, 762 F.3d at 835–36 (upholding the constitutionality of WPRA amendments as applied to Hendrix's estate in the first case under the statute after the amendments passed); *Milton H. Greene*, 692 F.3d at 999 (noting that Marilyn Monroe's estate only sought to prove she was domiciled in California after amendments to the CRA); Hicks, *supra* note 8, at 282 (observing that the Washington legislature enacted amendments to the WPRA in response to an unfavorable ruling under the WPRA against Jimi Hendrix's estate).

[131] CAL. CIV. CODE § 3344.1(b), (h), (p) (amended to include individuals who died between 1935 and the statute's passage); WASH. REV. CODE § 63.60.010 (amending the WPRA to include all individuals regardless of domicile); *Experience Hendrix II*, 762 F.3d at 835–36 (noting that under the WPRA's amendments, Hendrix's domicile did not disqualify application of the statute); *Milton H. Greene*, 692 F.3d at 999 (observing that Marilyn Monroe's estate had argued against her being domiciled in California before amendments to the CRA); Hicks, *supra* note 8, at 282 (stating that the Washington state legislature amended the WPRA in response to the Ninth Circuit's holding that the WPRA did not apply to Hendrix).

amendments in 2008, Experience Hendrix LLC filed suit again in the Western District of Washington.[132]

In 2011, in *Experience Hendrix L.L.C. v. Hendrixlicensing.com, Ltd.* ("*Experience Hendrix I*"), the U.S. District Court for the Western District of Washington held that the WPRA's conferral of postmortem rights of publicity onto an individual not domiciled in Washington at the time of death was unconstitutional.[133] The court held that the WPRA violated the Due Process Clause because Washington did not have sufficient contacts to individuals domiciled outside of the state at the time of death in order to justify applying Washington law to determine whether that individual had a publicity right that survived death.[134] Similarly, the court ruled that the WPRA violated the Full Faith and Credit Clause because a different state, namely the state in which an individual was domiciled at the time of death, had a greater interest in regulating the issue of whether that individual had a postmortem right of publicity.[135] Lastly, the court held that the WPRA violated the dormant Commerce Clause because the statute purported to regulate economic activity taking place entirely outside Washington's borders.[136]

On appeal in 2014, in *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd.* ("*Experience Hendrix II*"), the Ninth Circuit reversed, holding that the statute was constitutional when applied to economic activity conducted strictly within Washington's borders.[137] The court held that, when applied to the dispute at hand, which involved the sale of goods within Washington, the statute did not violate the Due Process Clause or the Full Faith and Credit Clause because Washington had sufficiently significant contacts to justify applying its own law to that particular dispute.[138] Similarly, the court found that the WPRA did not

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[132] *See* Experience Hendrix, L.L.C. v. HendrixLicensing.com, Ltd. (*Experience Hendrix I*), 766 F. Supp. 2d 1122 (W.D. Wash. 2011), *rev'd en banc*, 762 F.3d 829.

[133] *See id.* at 1142–43 (holding that application of Washington postmortem right of publicity law to an individual without sufficient contacts to Washington violated the Due Process Clause and the Full Faith and Credit Clause, and burdened interstate commerce in violation of the dormant Commerce Clause).

[134] *See id.* at 1135 (observing that Experience Hendrix LLC did not even attempt to argue that Washington had sufficient contacts to Jimi Hendrix at the time of his death to warrant applying Washington law in determining whether he had a postmortem right of publicity).

[135] *See id.* (noting that, under the *Hague* standard, the Full Faith and Credit Clause requires that a sister state not have a greater interest in regulating a transaction than the state applying its own law, and that the WPRA violated this standard).

[136] *See id.* at 1142 (holding that, by granting a postmortem right of publicity to all individuals regardless of domicile, the WPRA purported to govern transactions involving that right, even when neither the individual nor the transaction had any connection to Washington).

[137] *Experience Hendrix II*, 762 F.3d at 836–37 (holding that regulation of economic activity within Washington sufficiently satisfied the aggregation of contacts test and did not burden interstate commerce).

[138] *See id.* at 836 (holding that the WPRA did not violate the Due Process Clause or the Full Faith and Credit Clause because the dispute before the court involved the sale of goods using Jimi Hendrix's likeness in Washington and therefore Washington had a sufficient interest in applying its own law to the issue of whether Hendrix's estate controls his postmortem right of publicity).

violate the dormant Commerce Clause because the dispute before the court did not involve transactions occurring entirely outside of Washington.[139] The Ninth Circuit declined to decide whether the application of the WPRA to transactions taking place wholly outside Washington would violate the Due Process Clause, the Full Faith and Credit Clause, or the dormant Commerce Clause.[140]

The Ninth Circuit's holding marked the first time that a court upheld and enforced a statute that conferred postmortem rights of publicity onto an individual domiciled outside a state's borders.[141] This view contrasts with the Ninth Circuit's own decision in *Milton H. Greene*.[142] In *Milton H. Greene*, the court seemed unwilling to even consider enforcing California's statute to any economic activity at all because Monroe was not domiciled there at the time of her death.[143] In *Experience Hendrix II*, the Ninth Circuit appeared to recognize a statutory exception to the traditional rule of enforcing the law of the deceased's domicile.[144]

If another state's legislature passes a statute similar to the WPRA, the Ninth Circuit's decision implies that if the economic activity in question occurs solely within the state purporting to grant a postmortem right restricting that activity, the statute can entirely negate the relevance of the deceased's domicile.[145] If other circuits adopt the Ninth Circuit's logic as applied to similar statutes already

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[139] *See id.* at 837 (ruling that use of the WPRA to resolve the controversy before the court did not violate the dormant Commerce Clause because the dispute involved the sale of goods within Washington).

[140] *Id.* at 836 (stating that although the WPRA raised difficult questions about whether other states must enforce the postmortem right of publicity the statute creates, the court need not answer those questions).

[141] *See id.* at 835–36 (noting that the constitutionality of the WPRA as applied to economic activity occurring outside Washington's borders was still uncertain); Ford & Liebler, *supra* note 8, at 12 (observing that the district court ruled the WPRA unconstitutional); Seals, *supra* note 10 (stating that the Ninth Circuit's ruling on the WPRA's constitutionality changed the landscape of postmortem right of publicity law).

[142] *See Experience Hendrix II*, 762 F.3d at 835–36 (allowing application of Washington postmortem right of publicity law to an individual domiciled outside Washington at the time of death); *Milton H. Greene*, 692 F.3d at 1000 (applying the postmortem right of publicity law of New York to an individual domiciled there at death).

[143] *Milton H. Greene*, 692 F.3d at 1000; 2 MCCARTHY, *supra* note 28, § 11:15 at 705; Smith, *supra* note 31, at 1740.

[144] *Experience Hendrix II*, 762 F.3d at 835–36 (holding that the application of Washington's postmortem right of publicity law did not violate constitutional principles when applied to economic activity taking place solely within Washington); *Milton H. Greene*, 692 F.3d at 1000 (applying the traditional rule of following the law of the domicile state of the deceased individual).

[145] *Experience Hendrix II*, 762 F.3d at 835–36 (holding that the WPRA applied to Jimi Hendrix in the case before the court, even though Hendrix did not die domiciled in Washington, because the relevant economic activity occurred entirely within Washington); McCormick & Spears, *supra* note 1 (noting that the Ninth Circuit upheld the WPRA as constitutional because the case before the court involved commerce that took place exclusively in Washington); Seals, *supra* note 10.

passed or passed in the future by other state legislatures, the implications could be dramatic.[146]

III. VOODOO PUBLICITY (AND ITS EFFECT ON RETURNS): THE UNCONSTITUTIONALITY OF INDIANA AND WASHINGTON'S POSTMORTEM RIGHT OF PUBLICITY STATUTES

For decades, courts and legislatures have struggled with the postmortem right of publicity.[147] Both have used their authority to create, alter, and restrict the postmortem right of publicity and the jurisdictional issues associated with it.[148] This Part identifies the problems arising out of this lack of uniformity and suggests how to solve the problem of confusion surrounding jurisdictional questions about postmortem right of publicity statutes.[149] Section A argues that Indiana's Rights of Publicity statute and Washington's Personality Rights Act violate the Due Process Clause, the Full Faith and Credit Clause, and the dormant Commerce Clause.[150] Then, section B examines why a federal statute preempting state law in this area is not the best solution.[151] Finally, section C argues that universally applying the postmortem rights of publicity according to the deceased's domicile state is the best solution to this problem and suggests certain jurisdictional guidelines for states to follow when designating that right to persons domiciled within their respective borders.[152]

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[146] *See Experience Hendrix II*, 762 F.3d at 835–36 (holding that Washington may grant a postmortem right of publicity onto a deceased individual domiciled outside the state if the relevant economic activity takes place primarily within state borders); Seals, *supra* note 10 (warning businesses to take precautions against unexpected lawsuits under the Indiana and Washington statutes).

[147] *See* CAL. CIV. CODE § 3344.1(b), (h), (p) (West, Westlaw through 2015 Reg. Sess.) (conferring a postmortem right of publicity to individuals who did not have it when they died); WASH. REV. CODE § 63.60.010 (2014) (attempting to counteract the traditional rule of only applying the postmortem right of publicity law of the deceased's domicile state); Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd. (*Experience Hendrix II*), 762 F.3d 829, 835–36 (9th Cir. 2014) (declining to follow the traditional rule of applying the domicile state's law); Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983, 1000 (9th Cir. 2012) (following the traditional rule); Lugosi v. Universal Pictures, 603 P.2d 425 (Cal. 1979) (declining to find the existence of a postmortem right of publicity at common law because the deceased had not exercised his right of publicity during his lifetime).

[148] *See* CAL. CIV. CODE § 3344.1(b), (h), (p) (amending the CRA to confer a postmortem right of publicity on individuals who did not have it when the statute was originally enacted); WASH. REV. CODE § 63.60.010 (extending a postmortem right of publicity to individuals not domiciled within the state at death); *Experience Hendrix II*, 762 F.3d at 835–36 (making the Ninth Circuit the first circuit court to decline to follow the traditional rule of applying the postmortem right of publicity law of the state of domicile); *Milton H. Greene*, 692 F.3d at 1000 (preventing application of California law to an individual domiciled outside California at death); *Lugosi*, 603 P.2d at 430 (declining to find a common law postmortem right of publicity for deceased individual domiciled in California).

[149] *See infra* notes 147–213 and accompanying text.

[150] *See infra* notes 153–190 and accompanying text.

[151] *See infra* notes 191–197 and accompanying text.

[152] *See infra* notes 198–213 and accompanying text.

A. Publicity Rights Made of Sand: Indiana and Washington's Statutes Violate the Due Process Clause, the Full Faith and Credit Clause, and the Dormant Commerce Clause

The conferral of a postmortem right of publicity to individuals who died domiciled outside the state's borders is directly contrary to the well-established rule that a person's postmortem right of publicity is governed entirely by the law of the jurisdiction in which he or she was domiciled at the time of death.[153] In attempting to counteract the traditional choice-of-law rule, Indiana and Washington's statutes fail the "aggregation of contacts" test set out in 1981 by the U.S. Supreme Court in *Allstate Insurance Co. v. Hague*, and they therefore violate the Due Process Clause and the Full Faith and Credit Clause.[154] In addition, by uniquely applying their own respective state laws to adjudicate disputes involving out-of-state interests, Indiana and Washington violate the dormant Commerce Clause because they regulate interstate commerce.[155] Subsection 1 shows

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[153] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a) (West, Westlaw through 2015 Reg. Sess.) (granting a postmortem right of publicity to all individuals regardless of domicile); WASH. REV. CODE § 63.60.010 (same); *Milton H. Greene*, 692 F.3d at 1000 (declining to apply California's postmortem right of publicity law to an individual not domiciled in California at death); Experience Hendrix, L.L.C. v. HendrixLicensing.com, Ltd. (*Experience Hendrix I*), 766 F. Supp. 2d 1122, 1137 (W.D. Wash. 2011), *rev'd en banc*, 762 F.3d 829 (noting that virtually all courts have applied the law of the domicile state to determine whether a right of publicity descended to the estate); Ford & Liebler, *supra* note 8, at 12 (describing Indiana and Washington's respective publicity statutes as constitutionally problematic); Seals, *supra* note 10 (observing that companies should be aware that they can be sued in Indiana and Washington under postmortem right of publicity statutes even if the deceased individual had no contact with either state); *see also* Groucho Marx Prods., Inc. v. Day & Night Co., 689 F.2d 317, 320 (2d Cir. 1982) (applying the law of the domicile of the Marx Brothers, which was California); Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278, 283 (2d Cir. 1981) (enforcing the law of the domicile of Elvis Presley, who was domiciled in Tennessee). *But see* Estate of Elvis Presley v. Russen, 513 F. Supp. 1339, 1354–55 (D.N.J. 1981) (holding that, under New Jersey law, Elvis Presley's right of publicity did not abate upon his passing, even though he was domiciled in Tennessee at the time of his death). The *Russen* case predates almost all other postmortem right of publicity litigation, including the development of the domicile rule, which until the *Experience Hendrix II* case was universally applied. *See Milton H. Greene*, 692 F.3d at 1000; *Groucho Marx*, 689 F.2d at 320.

[154] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a) (conferring a postmortem right of publicity independent of domicile); WASH. REV. CODE § 63.60.010 (same); Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981) (plurality opinion) (articulating the "aggregation of contacts" test to determine whether a choice-of-law decision is arbitrary or fundamentally unfair in violation of the Due Process Clause and the Full Faith and Credit Clause); *Experience Hendrix I*, 766 F. Supp. 2d at 1135, 1140 (holding that the WPRA fails the *Hague* test); Florey, *supra* note 40, at 1076 (noting that the *Hague* test is the standard for evaluating whether a choice-of-law decision violates the Due Process Clause and the Full Faith and Credit Clause); Ford & Liebler, *supra* note 8, at 12 (observing that the WPRA is constitutionally problematic).

[155] *See* IND. CODE ANN. § 32-36-1-9 (conferring a postmortem right of publicity that governs any commercial activity involving the state); WASH. REV. CODE § 63.60.010 (same); Maine v. Taylor, 477 U.S. 131, 137–38 (1986) (holding that laws that discriminate against out-of-state interests are subject to heightened scrutiny); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (articulating a balancing test for evaluating the constitutionality of laws that burden interstate commerce); *Experience Hendrix I*, 766 F. Supp. 2d at 1142–43 (holding that the WPRA violated the dormant Commerce Clause);

how Indiana and Washington's statutes both fail to satisfy the *Hague* "aggregation of contacts" test.[156] Subsection 2 explains why the statutes unconstitutionally burden interstate commerce.[157]

1. Indiana and Washington's Statutes Violate the Due Process Clause and the Full Faith and Credit Clause

The existence or absence of a postmortem right of publicity is a function of state law and according to the majority rule is determined at the time of an individual's death by the law of the jurisdiction in which the individual was domiciled.[158] Neither Indiana nor Washington has sufficient contacts with every single individual to whom their respective statutes purport to grant a postmortem right of publicity.[159] Both Indiana and Washington's statutes claim to bestow a postmortem right of publicity upon every individual who has ever lived, regardless of whether he or she has ever had any contact at all with the state.[160] The "aggregation of contacts" test instructs courts to incorporate all relevant parties and events into its evaluation.[161] But, for purposes of identifying the existence of a postmortem right of publicity, the only relevant contacts are those between the state and the deceased individual at the time of death.[162] Both Indiana and Wash-

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Hawkins, *supra* note 65, at 318–19 (describing the evolution of U.S. Supreme Court's dormant Commerce Clause jurisprudence); Hicks, *supra* note 8, at 294 (proposing ways the WPRA could be amended to avoid violating the dormant Commerce Clause).

[156] *See infra* notes 158–177 and accompanying text.

[157] *See infra* notes 178–190 and accompanying text.

[158] *See Milton H. Greene*, 692 F.3d at 1000 (holding that California's postmortem right of publicity did not apply to Marilyn Monroe because she was not domiciled in California at the time of her death); Shaw Family Archives, Ltd. v. CMG Worldwide, Inc., 486 F. Supp. 2d 309, 314–15 (S.D.N.Y. 2007) (ruling that New York law governed whether Marilyn Monroe had a postmortem right of publicity because she was domiciled there when she died); 2 MCCARTHY, *supra* note 28, § 11:15 at 701–02 (noting that the traditional rule is to apply the law of the deceased's domicile state at the time of death); Ford & Liebler, *supra* note 8, at 12 (same).

[159] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a) (granting a postmortem right of publicity to all individuals regardless of domicile); WASH. REV. CODE § 63.60.010 (same); *Experience Hendrix II*, 762 F.3d at 835–36 (refusing to rule on the constitutionality of the application of the WPRA to economic activity affecting out-of-state interests); *Shaw Family Archives*, 486 F. Supp. 2d at 314 (noting that Indiana's attempts to bestow a postmortem right of publicity onto Marilyn Monroe were unsuccessful because the law of Monroe's domicile state governed that right).

[160] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a) (implying that the postmortem right of publicity is granted to persons who never visit or in any way contact Indiana); WASH. REV. CODE § 63.60.010 (implying that the postmortem right of publicity is granted to persons who never visit or in any way contact Washington).

[161] *See Hague*, 449 U.S. at 308 (noting that the U.S. Supreme Court examines contacts with the state in evaluating whether to uphold the application of the state's law as constitutional); Florey, *supra* note 40, at 1068 (describing the "aggregation of contacts" test used to resolve conflict-of-law issues).

[162] *See Milton H. Greene*, 692 F.3d at 999 (holding that Marilyn Monroe's estate could not present a new argument as to her domicile at her time of death because it was judicially estopped); *Shaw Family Archives*, 486 F. Supp. 2d at 313, 314–15 (noting that whether Marilyn Monroe had a postmortem right of publicity was independent of any legislative or economic activity in Indiana, a state

ington's statutes ignore this completely and consequently fail to satisfy either of the factors the U.S. Supreme Court set forth in 1985 in *Phillips Petroleum v. Shutts* for conducting a *Hague* "aggregation of contacts" test.[163]

By bestowing a postmortem right of publicity upon individuals domiciled outside the state at the time of death, Indiana and Washington's statutes do not satisfy either of the *Shutts* factors.[164] Under *Shutts*, courts first consider the parties' expectations as to which law will govern their transactions when they engage in dealings that incorporate these rights for individuals domiciled outside the relevant state.[165] For the postmortem right of publicity, the traditional rule is that an individual's domicile state governs the right.[166] Courts across the country have applied this approach for decades.[167] Therefore, the only postmortem right of publicity law that parties can reasonably expect to govern their transactions is the law of the jurisdiction in which the relevant deceased person was domiciled at the time of death.[168]

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she never visited); 2 MCCARTHY, *supra* note 28, § 11:17 at 714 (observing that courts look only to the domicile of the deceased individual in evaluating whether a postmortem right of publicity exists).

[163] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822–23 (1985) (holding that whether the aggregation of contacts between the parties to the case and the state is sufficient to justify application of the forum state's laws is based on the parties' expectations as to which laws will govern their activities and how much of the relevant activity took place within the forum state); Florey, *supra* note 40, at 1078 (noting that the class action is an example of when parties' expectations and in-state activities are not sufficient to justify application of the forum state's law even if personal jurisdiction would be constitutional).

[164] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a), -16 (granting a postmortem right of publicity to an individual regardless of the individual's domicile at the time of death); WASH. REV. CODE § 63.60.010 (same); *Shutts*, 472 U.S. at 822–23 (describing two factors by which courts should judge whether the application of a state's law violates the Due Process Clause and the Full Faith and Credit Clause).

[165] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a), -16 (bestowing a postmortem right of publicity onto an individual without that individual's consent or notice to the estate); WASH. REV. CODE § 63.60.010 (same); *Shutts*, 472 U.S. at 822 (stating that the expectation of the relevant parties is an important factor when considering whether a choice-of-law decision is fair); *Milton H. Greene*, 692 F.3d at 999 (noting that Marilyn Monroe's estate spent years acting in a manner consistent with her having died domiciled in New York); *Experience Hendrix I*, 766 F. Supp. 2d at 1137 (observing that virtually all courts have applied the law of the domicile state to determine whether a right of publicity descended); Smith, *supra* note 31, at 1740 (noting the unpredictability of which jurisdiction's laws will govern disputes involving the postmortem rights of publicity for celebrities).

[166] 2 MCCARTHY, *supra* note 28, § 11:17 at 714 (noting that the traditional rule is for courts to apply the law of the domicile of the deceased individual); Ford & Liebler, *supra* note 8, at 12 (same).

[167] *See, e.g.*, Prima v. Darden Restaurants, Inc., 78 F. Supp. 2d 337, 348 (D.N.J. 2000) (holding that, although Louis Prima died in a hospital in Louisiana, his contacts there were "minuscule," that Louisiana had no governmental interest in the action, and that the law of Prima's domicile, New Jersey, would be applied); Joplin Enters. v. Allen, 795 F. Supp. 349, 350 (W.D. Wash. 1992) (enforcing the law of the domicile of Janis Joplin, California); Se. Bank, N.A. v. Lawrence, 489 N.E.2d 744 (N.Y. 1985) (applying the law of the domicile of Tennessee Williams, Florida).

[168] *See Milton H. Greene*, 692 F.3d at 1000 (enforcing the postmortem right of publicity law of the domicile of Marilyn Monroe at her death because of judicial estoppel); *Shaw Family Archives*, 486 F. Supp. 2d at 314–15 (refusing to alter the postmortem right of publicity applicable to the estate of

These types of statutes fail to satisfy the second *Shutts* factor, location, because the source of the dispute is an event that took place outside the forum state's borders.[169] Even if other events giving rise to litigation take place entirely within the forum state's borders, the forum state's law is irrelevant to determining whether an individual has a postmortem right of publicity.[170] The resolution of this dispute depends entirely on the law of the jurisdiction in which the deceased was domiciled at the time of death.[171] Contacts between a state and a third party, including the deceased's estate, after an individual's death do not alter where the deceased was domiciled at the time of death or whether he or she left a postmortem right of publicity to his or her estate.[172] Indiana and Washington's statutes substitute the parties' expected governing law with new rules that the parties had no reason to anticipate at the outset of their dealings.[173]

Marilyn Monroe); 2 MCCARTHY, *supra* note 28, § 11:17 at 714 (noting courts' consistent adherence to the rule of applying the law of the deceased's domicile); Ford & Liebler, *supra* note 8, at 12 (same).

[169] *See* IND. CODE ANN. § 32-36-1-9 (governing economic activity that at least partially takes place in the state); WASH. REV. CODE § 63.60.050 (same); *Shutts*, 472 U.S. at 822–23 (emphasizing the importance of the activity in question taking place within the forum state); *Experience Hendrix I*, 766 F. Supp. 2d at 1142–43 (holding that the application of the WPRA to the estate of Jimi Hendrix was unconstitutional because Hendrix died domiciled outside of Washington); *Shaw Family Archives*, 486 F. Supp. 2d at 313 (noting that Marilyn Monroe had no connection with Indiana, least of all domicile); Hicks, *supra* note 8, at 286–87 (observing that the WPRA was ruled an unconstitutional regulation of interstate commerce because the marketing of a dead celebrity's image takes place across state lines).

[170] *See Milton H. Greene*, 692 F.3d at 1000 (holding that the only issue in determining whether Marilyn Monroe had a postmortem right of publicity was her domicile at death); *Shaw Family Archives*, 486 F. Supp. 2d at 314–15 (same); 2 MCCARTHY, *supra* note 28, § 11:17 at 714 (implying that courts do not consider posthumous activity in evaluating whether an individual died with a descendible right of publicity).

[171] *See* 2 MCCARTHY, *supra* note 28, § 11:17 at 714 (discussing the traditional rule of applying the law of the domicile state of the individual at the time of death); Seals, *supra* note 10 (same).

[172] *See Milton H. Greene*, 692 F.3d at 999 (holding that Marilyn Monroe's estate was estopped from arguing that she died domiciled in California after the passage of the state's postmortem right of publicity statute because the estate had argued in previous litigation that Monroe was domiciled in New York at the time of her death); *Shaw Family Archives*, 486 F. Supp. 2d at 314–15 (ruling that an Indiana statute could not confer a postmortem right of publicity onto Marilyn Monroe because she died domiciled in New York).

[173] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a) (conferring upon enactment a postmortem right of publicity onto all individuals); WASH. REV. CODE § 63.60.010 (same); *Shaw Family Archives*, 486 F. Supp. 2d at 314 (holding that Marilyn Monroe's postmortem right of publicity or lack thereof was established at the moment of her death); 2 MCCARTHY, *supra* note 28, § 11:15 at 705–06 (discussing courts' reluctance to substitute one jurisdiction's postmortem right of publicity for another once the law governing the deceased's postmortem right of publicity is established); Seals, *supra* note 10 (noting the difficulty of predicting jurisdictional choices of the postmortem right of publicity for businesses in the wake of the enactment of Indiana and Washington's statutes). These new rules apply retroactively, based on actions that take place after the decedent's postmortem rights of publicity have been established by another state's law. *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a), -16 (providing that the postmortem right of publicity conferred under the statute is transferrable according to the laws of the state administering the deceased's estate even if that state does not recognize the rights conferred by

For these reasons, Indiana and Washington's statutes violate both the Due Process clause and the Full Faith and Credit Clause.[174] Indiana and Washington's statutes violate the Due Process Clause when they are applied to an individual lacking sufficient contacts with the state to justify that state applying its law to that individual.[175] Additionally, these statutes deprive defendants of fair notice because the defendants enter into transactions believing they only need to comply with the law of the deceased's domicile state and therefore violate the Due Process Clause.[176] Furthermore, the statutes attempt to supplant the valid law of other jurisdictions, attempts that violate the Full Faith and Credit Clause.[177]

Indiana statute); WASH. REV. CODE § 63.60.010 (conferring a postmortem right of publicity onto all persons, regardless of when they die or where they are domiciled at death).

[174] *See supra* notes 158–173 and accompanying text.

[175] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a), -16 (bestowing a postmortem right of publicity onto the estate of an individual regardless of that individual's contacts with the state); WASH. REV. CODE § 63.60.010 (same); *Shutts*, 472 U.S. at 823 (identifying factors for use in applying the "aggregation of contacts" test); *Hague*, 449 U.S. at 308 (articulating the "aggregation of contacts" test for evaluating the constitutionality of a choice-of-law decision under the Due Process Clause and the Full Faith and Credit Clause); *Milton H. Greene*, 692 F.3d at 999–1000 (holding that California law did not govern whether Marilyn Monroe had a postmortem right of publicity); *Experience Hendrix I*, 766 F. Supp. 2d at 1139–40 (ruling that the WPRA did not determine whether Jimi Hendrix had a postmortem right of publicity because he died domiciled in New York); *Shaw Family Archives*, 486 F. Supp. 2d at 314–15 (stating that whether Marilyn Monroe had a postmortem right of publicity was governed by New York law because she was domiciled there when she died); 2 MCCARTHY, *supra* note 28, § 11:17 at 714 (discussing how the majority of courts apply the law of the deceased's domicile state in determining the existence of a postmortem right of publicity); Ford & Liebler, *supra* note 8, at 12 (same); Hicks, *supra* note 8, at 289 (same).

[176] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a), -16 (bestowing a postmortem right of publicity onto the estate of an individual even if the state administering the estate does not recognize that right); WASH. REV. CODE § 63.60.010 (same); *Shutts*, 472 U.S. at 823 (identifying factors for use in applying the "aggregation of contacts" test); *Hague*, 449 U.S. at 308 (articulating the "aggregation of contacts" test for evaluating the constitutionality of a choice-of-law decision under the Due Process Clause and the Full Faith and Credit Clause); *Milton H. Greene*, 692 F.3d at 999–1000 (holding that the estate of Marilyn Monroe was judicially estopped from changing its argument as to where Marilyn Monroe was domiciled at death); *Experience Hendrix I*, 766 F. Supp. 2d at 1139–40 (ruling that the WPRA violated the Due Process Clause and the Full Faith and Credit Clause); *Shaw Family Archives*, 486 F. Supp. 2d at 314–15 (declining to apply Indiana's postmortem right of publicity law to Marilyn Monroe because she was not domiciled there at death); 2 MCCARTHY, *supra* note 28, § 11:17 at 714 (noting how courts uniformly apply the domicile rule); Ford & Liebler, *supra* note 8, at 12 (same); Hicks, *supra* note 8, at 289 (same).

[177] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a), -16 (granting a postmortem right of publicity onto all individuals, regardless of the publicity laws of the state administering the estate); WASH. REV. CODE § 63.60.010 (conferring a postmortem right of publicity onto all individuals independent of any contact by the deceased with Washington); *Shutts*, 472 U.S. at 823 (holding that the expectations of parties as to which state's laws will govern their transactions is a relevant factor in determining the constitutionality of a choice-of-law decision); *Hague*, 449 U.S. at 308 (articulating the "aggregation of contacts" test for evaluating whether a choice-of-law decision violates the Due Process Clause and the Full Faith and Credit Clause); *Milton H. Greene*, 692 F.3d at 999–1000 (holding that the law of the domicile state of Marilyn Monroe governed her postmortem right of publicity); *Experience Hendrix I*, 766 F. Supp. 2d at 1139–40 (ruling that the application of the WPRA to the estate of Jimi Hendrix violated the Due Process Clause and the Full Faith and Credit Clause); *Shaw Family Archives*, 486

2. Indiana and Washington's Statutes Violate the Dormant Commerce Clause

Indiana and Washington's statutes both violate the dormant Commerce Clause by regulating economic activity that takes place outside of each state's respective borders.[178] Both statutes purport to create a right of publicity for all individuals, regardless of where they are domiciled at the time of their death.[179] Each statute in turn regulates the economic activity arising from that right, such as the transfer and licensing of the person's likeness.[180] In this way, Indiana and Washington's statutes are state extraterritorial regulations that violate the dormant Commerce Clause.[181]

Indiana and Washington's statutes violate the dormant Commerce Clause under the discrimination prong, before even reaching the balancing test established by the U.S. Supreme Court in 1970 in *Pike v. Bruce Church, Inc.*[182] In 2014, in *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd.*, the U.S. Court of Appeals for the Ninth Circuit became the first, and to date only, court to uphold the constitutionality of the application of either statute to an individual

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F. Supp. 2d at 314–15 (declining to apply Indiana law to Marilyn Monroe's estate because she was not domiciled there at death); 2 MCCARTHY, *supra* note 28, § 11:17 at 714 (discussing how courts uniformly apply the domicile rule); Ford & Liebler, *supra* note 8, at 12 (same); Hicks, *supra* note 8, at 291 (same).

[178] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a), -16 (conferring a postmortem right of publicity onto persons who die domiciled outside of Indiana); WASH. REV. CODE § 63.60.050 (creating a postmortem right of publicity for persons who die domiciled outside of Washington); Healy v. Beer Inst., 491 U.S. 324, 339 (1989) (holding that legislation violates the dormant Commerce Clause if its practical effect is to control conduct beyond the boundaries of the state); *Experience Hendrix I*, 766 F. Supp. 2d at 1142–43.

[179] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a) (granting a postmortem right of publicity to persons regardless of their domicile at death); WASH. REV. CODE § 63.60.010 (same).

[180] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a), -16 (providing that the right of publicity and all its associated benefits survive an individual's death, regardless of where that individual is domiciled); WASH. REV. CODE § 63.60.010 (same); *Experience Hendrix I*, 766 F. Supp. 2d at 1142–43 (discussing how the plaintiffs sought to use the WPRA to prevent the defendants from selling goods bearing Jimi Hendrix's likeness).

[181] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a); WASH. REV. CODE § 63.60.010; *Healy*, 491 U.S. at 339; *Experience Hendrix I*, 766 F. Supp. 2d at 1142–43 (ruling that the conferral of a postmortem right of publicity to a non-Washington-domiciled individual unconstitutionally burdened interstate commerce); Ford & Liebler, *supra* note 8, at 12 (noting that the majority rule is to apply the law of the deceased's domicile to determine postmortem right of publicity).

[182] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a), -16 (granting a postmortem right of publicity that governs transactions involving the transportation of goods across state lines); WASH. REV. CODE § 63.60.010 (same); *Taylor*, 477 U.S. at 137–38; *Pike*, 397 U.S. at 142 (stating the balancing test that determines whether a state statute violates the dormant Commerce Clause); Florey, *supra* note 40, at 1085 (noting the application of heightened scrutiny to laws that amount to either direct regulation or discrimination); Ford & Liebler, *supra* note 8, at 12 (referring to Indiana and Washington's statutes as "constitutionally problematic").

domiciled outside the forum state at death.[183] In that decision, the court specifically declined to comment on the constitutionality of the application of Washington's statutes to disputes involving transactions not occurring entirely within Washington's borders.[184]

If the Ninth Circuit were to uphold the statute's reach to transactions taking place solely within Washington, the statute would in effect create two sets of distinct rules: one governing transactions in Washington and one governing transactions outside of Washington.[185] Applying a different set of rules to transactions based on whether any of the economic activity takes place outside of the state's borders is effectively discriminatory against out-of-state interests and, absent a compelling state interest, violates the dormant Commerce Clause.[186]

In addition, both statutes violate the dormant Commerce Clause under the *Pike* balancing test.[187] The *Pike* test instructs courts to balance the legitimate local interest regulated by the law in question against the incidental effects on interstate commerce that the law imposes.[188] The postmortem right of publicity of individuals not domiciled in a state at the time of death is not a legitimate lo-

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[183] *See Experience Hendrix II*, 762 F.3d at 835–36 (holding that a limited liability company founded by Hendrix's heir, his father, had authority under the WPRA to prevent sales of merchandise bearing Hendrix's likeness within the state's boundaries); *Recent Case:* Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd*, 762 F.3d 829 (9th Cir. 2014)*, 128 HARV. L. REV. 1842, 1842 (2015) (noting that the Ninth Circuit's decision is a departure from the traditional and previously predictable rule determining the existence of a postmortem right of publicity).

[184] *See Experience Hendrix II*, 762 F.3d at 835–36.

[185] *See id.*; Hawkins, *supra* note 65, at 339 (arguing that a New York law providing benefits to breweries that use specified quantities of in-state ingredients violates the dormant Commerce Clause); Hicks, *supra* note 8, at 294 (arguing that the WPRA violates the dormant Commerce Clause because it has no nexus requirement between the commercial use of an individual's likeness and the state of Washington).

[186] *See Healy*, 491 U.S. at 339 (holding that a Connecticut regulation that influenced beer prices in other states violated the dormant Commerce Clause); *Taylor*, 477 U.S. at 137–38 (holding that a Maine law discriminating against out-of-state economic interests was constitutional because it was narrowly tailored to meet the state interest of protecting local wildlife); *Experience Hendrix II*, 762 F.3d at 835 (declining to address the constitutionality of the application of the WPRA to activity taking place outside Washington's borders); Florey, *supra* note 40, at 1085 (noting that a state regulation that appears to discriminate against out-of-state interests on its face violates the dormant Commerce Clause); Hawkins, *supra* note 65, at 339.

[187] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a), -16 (granting a postmortem right of publicity to individuals who have no contact with Indiana during their respective lifetimes); WASH. REV. CODE § 63.60.010 (conferring a postmortem right of publicity onto persons who never step foot in the state of Washington); *Pike*, 397 U.S. at 142 (establishing a balancing test to evaluate the constitutionality of laws that burden interstate commerce); Hawkins, *supra* note 65, at 318–19 (discussing the implications of the *Pike* test).

[188] *Pike*, 397 U.S. at 142 (stating that a statute is unconstitutional if the burden it imposes on interstate commerce is clearly excessive in relation to the local benefits of the statute); O'Grady, *supra* note 65, at 573–74 (describing the *Pike* test's balancing of the burden on interstate commerce with local benefits); Hawkins, *supra* note 65, at 318–19 (same).

cal interest of that state.[189] Therefore, even the slightest effect on interstate commerce is enough to tip the scale and render the statutes unconstitutional.[190]

B. The Congressional Itch: Why a Federal Right of Publicity Statute Is Not the Best Solution

Some scholars have argued that the best solution to these jurisdictional conflicts is a federal statute governing all rights of publicity.[191] Such a statute would serve as a regulation of interstate commerce and therefore Congress would possess the authority to pass it through the Commerce Clause.[192] The touted benefits of a federal statute preempting all state right of publicity law would include uniformity, predictability, and an end to forum shopping in postmortem right of publicity cases.[193]

Upon closer examination, the argument for a federal right of publicity statute is primarily an argument against unconstitutional right of publicity statutes such as those passed by Indiana and Washington's respective legislatures.[194] Prior to the enactment of these two statutes, uniformity and predictability were not issues in postmortem rights of publicity disputes because courts had unanimous-

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[189] *See Milton H. Greene*, 692 F.3d at 999–1000 (holding that the CRA did not apply to Marilyn Monroe because she was not domiciled in California at death); *Shaw Family Archives*, 486 F. Supp. 2d at 313 (noting the absence of any connection between Marilyn Monroe and Indiana); 2 MCCARTHY, *supra* note 28, § 11:15 at 701–02 (observing that the majority rule is to apply the law of the deceased's domicile state in determining the existence of a postmortem right of publicity).

[190] *See Pike*, 397 U.S. at 142; *Experience Hendrix I*, 766 F. Supp. 2d at 1142–43 (holding the WPRA unconstitutional as a violation of the dormant Commerce Clause); *Shaw Family Archives*, 486 F. Supp. 2d at 314–15; Florey, *supra* note 40, at 1084 (noting violations of the dormant Commerce Clause through extraterritorial regulation by state laws); Hawkins, *supra* note 65, at 318–19.

[191] *See* Vick & Jassy, *supra* note 86, at 14 (arguing for a federal statute governing the right of publicity); Sean D. Whaley, *I'm a Highway Star: An Outline for a Federal Right of Publicity*, 31 HASTINGS COMM. & ENT. L.J. 257, 260 (2009) (same); Eric J. Goodman, Comment, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 227, 227 (1999) (same). Some scholars have also argued for a model uniform state statute governing all rights of publicity. *See* Adkins, *supra* note 76, at 528; Richard S. Robinson, *Preemption, the Right of Publicity, and a New Federal Statute*, 16 CARDOZO ARTS & ENT. L.J. 183, 204 (1998).

[192] *See* U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have Power . . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes"); Robinson, *supra* note 191, at 202 n.130 (noting that Congress's enumerated powers under Article I of the U.S. Constitution include the regulation of interstate commerce); Vick & Jassy, *supra* note 86, at 17 (same); Whaley, *supra* note 191, at 259 (same); Goodman, *supra* note 191, at 251 (same).

[193] *See* Adkins, *supra* note 76, at 528 (arguing for the adoption of a model uniform state statute); Vick & Jassy, *supra* note 86, at 14, 16 (using the estate of Marilyn Monroe as an example of forum shopping in Indiana in order to take advantage of Indiana's beneficial postmortem right of publicity law).

[194] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a) (granting a postmortem right of publicity in conflict with the established body of case law in the United States); WASH. REV. CODE § 63.60.010 (same); Adkins, *supra* note 76, at 524–25, 528 (arguing that a uniform right of publicity would create predictability); Robinson, *supra* note 191, at 204 (same); Vick & Jassy, *supra* note 86, at 14 (same); Whaley, *supra* note 191, at 273 (same); Goodman, *supra* note 191, at 251 (same).

ly applied the law of the domicile of the deceased at the time of death.[195] Likewise, without either of these statutes, forum shopping was a fruitless endeavor because the forum state would always apply the law of the deceased's domicile state.[196] Therefore, when compared to a U.S. Supreme Court ruling that the respective statutes' extraterritorial conferral of postmortem rights of publicity is unconstitutional, preempting these statutes with federal law would provide no added benefits.[197]

C. A Not-So Slight Return to Basics: The Law of a Person's Domicile Should Govern the Postmortem Right of Publicity

The only sufficient contact between an individual and a state to satisfy constitutional concerns with regards to conferring the postmortem right of publicity

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[195] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a); WASH. REV. CODE § 63.60.010; *Milton H. Greene*, 692 F.3d at 1000 (noting the established rule of applying the law of the domicile of the deceased individual); *Experience Hendrix I*, 766 F. Supp. 2d at 1137 (observing that virtually all courts have applied the law of the domicile state to determine whether a right of publicity descended); *Shaw Family Archives*, 486 F. Supp. 2d at 314 (stating that the majority of courts apply the law of the deceased's domicile); 2 MCCARTHY, *supra* note 28, § 11:17 at 714 (describing the uniformity and practicality of courts applying the law of the deceased's domicile in postmortem right of publicity disputes).

[196] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a) (purporting to grant all individuals a postmortem right of publicity regardless of domicile); WASH. REV. CODE § 63.60.010 (same); *Milton H. Greene*, 692 F.3d at 999 (noting that proving Marilyn Monroe's domicile was the only way of being able to enforce California's more favorable postmortem publicity law); *Experience Hendrix I*, 766 F. Supp. 2d at 1137 (observing that virtually all courts have applied the law of the domicile to determine whether a right of publicity descended); *Shaw Family Archives*, 486 F. Supp. 2d at 314–15 (stating that Indiana law was irrelevant in determining Marilyn Monroe's postmortem right of publicity because she was not domiciled there at death); 2 MCCARTHY, *supra* note 28, § 11:17 at 714 (discussing reasons in favor of applying the law of the deceased's domicile in choice-of-law disputes).

[197] *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a) (granting a postmortem right of publicity onto all individuals, regardless of domicile); WASH. REV. CODE § 63.60.010 (same); *Milton H. Greene*, 692 F.3d at 999–1000 (holding that the CRA did not apply to Marilyn Monroe because she was not domiciled in California at her death); *Experience Hendrix I*, 766 F. Supp. 2d at 1142–43 (ruling that the WPRA was unconstitutional because it violated the Due Process Clause, the Full Faith and Credit Clause, and the dormant Commerce Clause); *Shaw Family Archives*, 486 F. Supp. 2d at 314–15 (declining to apply Indiana law to the estate of Marilyn Monroe because she was not domiciled there at death); 2 MCCARTHY, *supra* note 28, § 11:17 at 714 (arguing that the majority rule of applying the law of the deceased individual's domicile state is the only practical rule); Seals, *supra* note 10 (noting the uniformity in application of the domicile state's postmortem right of publicity law prior to the passage of Indiana and Washington's statutes). A federal right of publicity would also present issues when the rights in question are those of an individual domiciled outside of the United States at the time of death. *See* Cairns v. Franklin Mint Co., 292 F.3d 1139, 1147 (9th Cir. 2002) (applying the postmortem right of publicity law of Great Britain because Princess Diana was domiciled in Great Britain when she died). Declining to cover individuals domiciled outside the United States would run counter to a federal statute's goals of uniformity and predictability, and granting the right under federal law with no concern for domicile would encourage forum shopping from individuals domiciled abroad even more so than either Indiana or Washington's statutes. *See* IND. CODE ANN. §§ 32-36-1-1(a), -8(a); WASH. REV. CODE § 63.60.010; 2 MCCARTHY, *supra* note 28, § 11:17 at 714 (arguing that applying the law of the deceased's domicile state is the most practical rule).

is domicile.[198] Universal enforcement of the law of the deceased's domicile state regardless of forum state provides adequate notice to all concerned parties and thereby satisfies potential concerns raised by the Due Process Clause and the Full Faith and Credit Clause.[199] Uniform adherence to this traditional rule also prevents extraterritorial commercial regulation and unequal treatment of in-state and out-of-state interests that potentially violate the dormant Commerce Clause.[200]

Consistent application of the law of the deceased's domicile state provides more benefits than a hypothetical federal publicity statute for all parties concerned.[201] Although a federal statute might ensure predictability for concerned parties as to which law will govern their transactions, adherence to the traditional rule allows the postmortem right of publicity to evolve while maintaining an established body of statutory and case law to guide businesspersons and lawmakers alike in navigating those changes.[202] As technological advances present

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[198] *See Shutts*, 472 U.S. at 822–23 (identifying the predictability of law and events taking place in the forum state as factors to use in order to evaluate the constitutionality of a law under the Due Process Clause and the Full Faith and Credit Clause); *Hague*, 449 U.S. at 308 (articulating the standard to judge whether a choice-of-law decision was so arbitrary or fundamentally unfair as to violate the Due Process Clause and the Full Faith and Credit Clause); *Milton H. Greene*, 692 F.3d at 1000 (holding that domicile determined the choice of postmortem right of publicity law); *Experience Hendrix I*, 766 F. Supp. 2d at 1139–40 (same); *Shaw Family Archives*, 486 F. Supp. 2d at 314–15 (same); 2 MCCARTHY, *supra* note 28, § 11:17 at 714 (noting that the majority of courts use the domicile state of the deceased to determine the existence of a postmortem right of publicity).

[199] *See Shutts*, 472 U.S. at 822–23 (holding that the application of Kansas law to a dispute with minimal contacts with Kansas violated the Due Process and Full Faith and Credit Clauses); *Hague*, 449 U.S. at 308 (stating that the application of a state's law must not deprive any party of fair notice); *Milton H. Greene*, 692 F.3d at 1000 (holding that the use of domicile to determine the choice of postmortem right of publicity law is the majority rule); *Experience Hendrix I*, 766 F. Supp. 2d at 1139–40 (same); *Shaw Family Archives*, 486 F. Supp. 2d at 314 (same); 2 MCCARTHY, *supra* note 28, § 11:17 at 714 (stating that the majority rule is for courts to use the deceased's domicile state when deciding which state's law governs the postmortem right of publicity).

[200] *See* CTS Corp. v. Dynamics Corp., 481 U.S. 69, 88 (1987) (holding that a state statute may not adversely affect interstate commerce by subjecting economic activities to inconsistent regulations); Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982) (holding that the Commerce Clause prohibits the application of a state statute to commerce that takes place entirely outside of that state's borders, regardless of whether the commerce has effects within the state); *Experience Hendrix I*, 766 F. Supp. 2d at 1142–43 (ruling that laws governing the postmortem right of publicity unduly burden interstate commerce when that right is applied to economic activities taking place out of state); Hawkins, *supra* note 65, at 318–19.

[201] *See Milton H. Greene*, 692 F.3d at 1000 (noting that the law of the domicile state determines whether a right of publicity descended); *Experience Hendrix I*, 766 F. Supp. 2d at 1140 (same); *Shaw Family Archives*, 486 F. Supp. 2d at 314 (same); 2 MCCARTHY, *supra* note 28, § 11:17 at 714 (same). *But see* Robinson, *supra* note 191, at 204 (arguing the benefits of a federal statutory right of publicity); Vick & Jassy, *supra* note 86, at 14 (same); Whaley, *supra* note 191, at 260 (same); Goodman, *supra* note 191, at 227 (same).

[202] *See, e.g.*, *Cairns*, 292 F.3d at 1147 (applying the law of the domicile of Princess Diana, Great Britain); Acme Circus Operating Co. v. Kuperstock, 711 F.2d 1538, 1541 (11th Cir. 1983) (enforcing the law of the domicile of Clyde Beatty, California); *Pro Arts*, 652 F.2d at 283 (applying the law of the domicile of Elvis Presley, Tennessee); *see also* Rooney, *supra* note 106, at 933 (stressing the im-

new challenges concerning the postmortem right of publicity, states should be allowed to experiment with novel solutions before imposing untested rules on the entire country.[203] In addition, each state will be free to adapt to these changes without imposition of federal rules that contradict a state's established legal interpretation of the right of publicity.[204]

Although substantive differences in the actual postmortem rights of publicity conferred in different jurisdictions do not undermine the effectiveness of the traditional rule, all states should offer certain protections to the laws of other jurisdictions.[205] First, in order for the traditional rule to retain effectiveness, all courts must consistently apply the same law to determine the postmortem right of publicity for the same individual.[206] For example, not only must courts always apply New York law to govern disputes surrounding the postmortem publicity rights of someone who died while domiciled in New York, but they also must respect prior courts' factual determinations of that individual's domicile as New York at the time of death.[207] Therefore, an ideal state statute governing the postmortem right of publicity would contain a provision requiring courts to enforce the law of the deceased's domicile state and prohibiting recognition of that indi-

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portance of predictability in the marketplace); Smith, *supra* note 31, at 1740 (arguing that a lack of uniformity in state laws governing the postmortem right of publicity causes uncertainty).

[203] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (noting that individual states may serve as laboratories to try original social and economic experiments without affecting the rest of the country); Smith, *supra* note 31, at 1741–42 (arguing that advances in technology may force changes in postmortem right of publicity law).

[204] *See New State Ice Co*., 285 U.S. at 311; Smith, *supra* note 31, at 1735 (noting that courts are divided as to the extent that other federal legislation, such as copyright law, preempts state publicity laws).

[205] *See Milton H. Greene*, 692 F.3d at 1000 (enforcing New York law in a California forum); *Experience Hendrix I*, 766 F. Supp. 2d at 1139–40 (applying New York law in a Washington forum); 2 MCCARTHY, *supra* note 28, § 11:17 at 714 (observing that applying the law of the deceased's domicile state is the only fair and practical rule).

[206] *See Milton H. Greene*, 692 F.3d at 1000 (refusing to overturn a previous judicial determination of Marilyn Monroe's domicile); *Experience Hendrix I*, 766 F. Supp. 2d at 1143 (declining to overturn a previous judicial determination of governing law for Jimi Hendrix's postmortem right of publicity); *Shaw Family Archives*, 486 F. Supp. 2d at 314 (refusing to enforce a different state law from that which was previously held to govern Marilyn Monroe's postmortem right of publicity); 2 MCCARTHY, *supra* note 28, § 11:17 at 714.

[207] *See Milton H. Greene*, 692 F.3d at 1000 (holding that Marilyn Monroe's estate was estopped from arguing that she was domiciled in California at death because the estate had previously argued that she was domiciled in New York at death); *Experience Hendrix I*, 766 F. Supp. 2d at 1143 (ruling that Jimi Hendrix was domiciled in New York at the time of his death); *Shaw Family Archives*, 486 F. Supp. 2d at 314–15 (determining that Marilyn Monroe's domicile was New York at the time of her death); 2 MCCARTHY, *supra* note 28, § 11:17 at 714 (discussing the traditional rule that the law of an individual's domicile state at the time of death governs whether that individual has a postmortem right of publicity).

vidual's domicile state if it would contradict a previous factual determination made by another court.[208]

An ideal state statute governing the postmortem right of publicity must also address changes in the substantive law of the domicile of a deceased individual.[209] For example, some state legislatures have responded to court decisions declining to recognize a postmortem right of publicity for individuals who died before a jurisdiction recognized such a right by passing laws retroactively conferring the right onto persons who died before a certain date.[210] In such situations, an estate may seek to enforce a deceased individual's new substantive postmortem right of publicity against persons engaged in previously permissible activities.[211]

Faced with this conflict, a court must balance the interests of the state in acting as a laboratory of democracy and responding to its citizens' desires against the expectations of persons engaged in what they correctly believe to be legal business activities.[212] In order to simultaneously protect both sets of inter-

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[208] *See Milton H. Greene*, 692 F.3d at 1000 (ruling that Marilyn Monroe's estate was estopped from arguing that she died domiciled in California after previously arguing that she died domiciled in New York); *Experience Hendrix I*, 766 F. Supp. 2d at 1143 (holding that the estate of Jimi Hendrix was estopped from arguing that he died domiciled in Washington because a court had previously ruled that Hendrix died domiciled in New York); 2 MCCARTHY, *supra* note 28, § 11:15 at 706–07 (emphasizing courts' willingness to enforce the laws of other states with regards to postmortem rights of publicity).

[209] *See Milton H. Greene*, 692 F.3d at 999 (noting the change in California law prompting Marilyn Monroe's estate to change its argument as to her domicile); *Experience Hendrix I*, 766 F. Supp. 2d at 1132–33 (observing that the Washington legislature attempted to change Washington's law so that it applied to Jimi Hendrix); 2 MCCARTHY, *supra* note 28, § 11:15 at 705, 710 (discussing these two changes).

[210] *See* CAL. CIV. CODE § 3344.1(b), (p) (amending the CRA to cover individuals previously uncovered at the time of the statute's passage); TENN. CODE ANN. § 47-25-1104 (2013) (providing that as long as the commercial value of the likeness of a deceased person is exploited at least once every two years, the right will never extinguish and pass into the public domain); *Milton H. Greene*, 692 F.3d at 999 (noting that Marilyn Monroe's estate sought to change its argument as to her domicile state after the California legislature amended the CRA to grant a postmortem right of publicity to persons who died before January 1, 1985); CBC RADIO, *supra* note 95 (observing that the California legislature amended the CRA so that it would apply to individuals who died before its passage).

[211] *See Milton H. Greene*, 692 F.3d at 1000 (noting that Marilyn Monroe's estate was attempting to use California law to enjoin the sale of photographs of Marilyn Monroe that were legal under New York law); *Experience Hendrix I*, 766 F. Supp. 2d at 1143 (declining to rule that a change in the WPRA supported an injunction of economic activity permitted by New York law); *Shaw Family Archives*, 486 F. Supp. 2d at 314–15 (declining to enjoin activity banned by an Indiana statute when that activity was protected under New York law); 2 MCCARTHY, *supra* note 28, § 11:15 at 705 (discussing how Marilyn Monroe's postmortem right of publicity would have changed under California statutory amendments had she been domiciled in the state at death).

[212] *See* CAL. CIV. CODE § 3344.1(b), (p) (conferring a postmortem right of publicity onto individuals domiciled in the state); TENN. CODE ANN. § 47-25-1103 (same); *New State Ice Co*., 285 U.S. at 311 (noting the importance of states as laboratories of democracy); *Experience Hendrix I*, 766 F. Supp. 2d at 1143 (holding that the application of the WPRA to Jimi Hendrix was unconstitutional because Hendrix died domiciled in New York).

ests, an ideal statute governing the postmortem right of publicity would require the recognition of changes in the relevant jurisdiction's substantive law after the individual's death, but prohibit application of those changes to agreements and activities commenced prior to the enactment of the changes in the law.[213]

CONCLUSION

A photographer of a world-famous actress finds his most profitable works under attack by a statute passed after her death in a state that she never visited. The brother of a famous rock star is prohibited from marketing artwork bearing the late guitarist's likeness by a statute amended specifically to do just that. With millions of dollars in the balance in these situations and others like them, all concerned parties deserve clarity when looking to the law governing their endeavors. To solve this problem, the traditional rule of following the law of the state in which the deceased was domiciled at time of death should apply in all situations. Statutes such as Indiana's and Washington's that purport to subvert this well-established principle should be discarded because they are unconstitutional. Consistent adherence to the traditional rule would bring predictability to this area of the law and would end the uncertainty and frivolous litigation currently wasting the time and resources of so many businesses and estates.

ROBERT ROSSI

[213] *See Experience Hendrix I*, 766 F. Supp. 2d at 1143 (refusing to enforce the WPRA's amendments that purported to apply Washington's postmortem right of publicity to all individuals, regardless of domicile); 2 MCCARTHY, *supra* note 28, § 11:17 at 714 (arguing for predictability in postmortem right of publicity law); Seals, *supra* note 10 (advising business people to exercise caution when engaging in transactions involving the likeness of deceased individuals due to the unpredictability of postmortem right of publicity law).