Conflict of Laws--A Survey of Past and Contemporary Theory

John A. Gorfinkel
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By John A. Gorfinkel

[A] law of conflict of conflict of laws has been an essential part of our law of conflicts . . . .¹

For the last fifteen years the field of conflict of laws, particularly the part that is concerned with choice-of-law doctrines, has been in a state of evolutionary ferment.² The theoretical bases previously revered as dogma are being doubted and in many instances discarded. Choice-of-law rules previously regarded as required by constitutional mandate are being questioned; the very existence of any constitutional mandate is being denied.³ The nature of this ferment may be simply stated. After over one hundred years of assuming that a forum, in most cases, should or must adjudicate rights and duties arising out of a foreign based event in accordance with the laws of the place where the event took place,⁴ courts and writers are now asserting that a forum may and should adjudicate those rights and duties in accordance with its own law unless there is good reason to do otherwise. The major role in this development is being played by state courts, with the California Supreme Court one of the most prominent. Because its work has been so significant in the development of law in California

¹ Ehrenzweig, Conflict of Laws § 4, at 12 n.30 (1962).


³ See Ehrenzweig, Conflict of Laws § 9 (1962).

⁴ "I had supposed, before Hughes v. Fetter . . . that the Commonwealth of Pennsylvania could close its courts to trial of this case. But no one would have questioned, I should think, that if the cause were entertained it must be tried in accordance with the law of the place of the wrong." Wells v. Simonds Abrasive Co., 345 U.S. 514, 522-23 (1953) (dissenting opinion of Jackson, J., Black and Minton, JJ., concurring). (Emphasis added.) "It is the settled law in the United States that an action in tort is governed by the law of the jurisdiction where the tort was committed . . . ." Loranger v. Nadeau, 215 Cal. 362, 366, 10 P.2d 63, 65 (1932).
and in other jurisdictions, it is appropriate that an issue of this Journal be devoted to this subject. The later articles will discuss in depth the California decisions in selected areas of the subject. It is the purpose of this article to set the stage by providing a survey of past and contemporary theory as a basis for better understanding of what follows.

But first, three pleas by way of confession and avoidance. (1) This introductory article is admittedly only a survey and a synthesis. It does not purport to provide a scholarly or critical analysis of any doctrine or theory or to advance any doctrines or theories of its own. It is intended to depict what has happened and what is now happening rather than what one author may think should be happening. (2) In the task of depicting what is happening, within the limited space allotted, the treatment of the views of current scholars must, of necessity, be superficial. I trust that within those limits I do justice to those whose views I have attempted to state. If I err, I can only plead that I have attempted to state those views as they appear to me. (3) Again due to limitations of space it is impossible to do justice to all the recent scholarly writings on conflict of laws. The wealth of critical and analytical comment is overwhelming. To those who are uncited or unacknowledged I apologize.

American Choice of Law Theory in Historical Perspective.—"Comity" and Joseph Story

American choice of law theory starts with the writings of Joseph Story. Having little in the way of English precedents Story relied primarily on the continental jurists and scholars. In essence Story assumed that a forum adjudicating a matter arising out of a foreign based event would, as a matter of comity, look to and utilize the foreign law as its basis for decision. As thus expounded, comity was little more than "courtesy." A forum was expected, but not required, to look to foreign law. Why it should do so was never fully articulated. During the nineteenth century Story's views predominated in the American courts.


6 See generally Ehrenzweig, Conflict of Laws passim (1962).

Vested Rights and Imperative Rules—Holmes, Beale, and the Restatement

During the first half of the present century conflict of laws theory was dominated by the doctrine that the law of the place where an event occurred determined the rights and obligations arising out of that event, and any forum in which an action was brought was bound to apply that law. What Story had advocated as a matter of comity now became an obligation. In some instances this obligation to recognize the law of another state was said to be governed by conflict of laws rules; in other instances the obligation was elevated to a constitutional command under the due process and full faith and credit clauses.

Under this view the forum did not seek a rule of law to govern the case; it sought a jurisdiction whose rule, regardless of its content, governed the case. In this framework choice-of-law rules enjoyed the status of Euclidean axioms before the development of non-Euclidean geometry, and became unquestioned basic truths to be applied automatically in any given situation. All the forum had to do was find the place of the tort or the place of the making of the contract or whatever place it was told to find, and once that place had been located the law of that place controlled the effect and consequences of the act in issue.

On the bench this view is principally associated with the opinions of Mr. Justice Holmes. His first full exposition was in a tort case, *Slater v. Mexican Nat'l R.R.*, in 1904:

The theory of the foreign suit is that although the act complained

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8 See, e.g., Loranger v. Nadeau, 215 Cal. 362, 366, 10 P.2d 63, 65 (1932), But see Gray v. Gray, 87 N.H. 82, 174 Atl. 508 (1934), overruled by Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963), where the suit was between spouses domiciled in New Hampshire and involved an auto accident in Maine. In holding that the issue of interspousal immunity would be determined in accordance with Maine law, the court advanced the following hodgepodge of reasons: “The local law is that the foreign rights will be enforced. What those rights are depends upon the facts, and a part of the facts consists in the law under which the transactions took place.... We enforce the foreign law because it is our law that the foreign law shall govern the transactions in question.... The lex loci is applied because this is deemed to be the sensible course to pursue.... No rule or set of rules has yet been devised which will make the conflict of laws a logical whole. There are places where logic has to give way to evident facts. In these places horse sense has prevailed over the deductions of the schoolmen.” 87 N.H. at 87, 89, 174 Atl. at 510-12.

of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found. . . . But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation . . . but equally determines its extent.\textsuperscript{10}

In two decisions involving life insurance contracts, *New York Life Ins. Co. v. Dodge*\textsuperscript{11} in 1918 and *Mutual Life Ins. Co. v. Liebing*\textsuperscript{12} in 1922, a refusal of the forum to apply the law of the place of making of the contract was said to be a denial of due process of law. Thus, in the *Liebing* decision Mr. Justice Holmes, again speaking for the court, stated: "[T]he Constitution and the first principles of legal thinking allow the law of the place where a contract is made to determine the validity and the consequences of the act."\textsuperscript{13}

Although Mr. Justice Holmes asserted that there were "first principles" which required certain choices of law, there was considerable difficulty in determining what those first principles were, where they were to be found, and why, as a matter of any legal theory, they were so. Holmes had expressed the view that law is not a brooding omnipresence in the sky but the voice of an articulate sovereign,\textsuperscript{14} and had recognized that whatever else it might be, the law of one state was not "law" in a foreign forum.\textsuperscript{15} What then did the forum do when it decided that the rights of the parties had to be determined in accordance with the laws of another state?

The question posed is not a single question, but in fact two separate questions. First, why did the forum look to the law of the other state at all? Second, having looked and decided it governed, how did it apply this "foreign law" in its own courts?

The first of these two questions was answered by the concept of "legislative jurisdiction."\textsuperscript{16} Every state, it was declared, had the power to determine the legal consequences of an event taking place within its jurisdiction, to confer rights, privileges, and immunities, and impose duties and obligations on the parties to an event. Thus, the event


\textsuperscript{11} 246 U.S. 357 (1918).

\textsuperscript{12} 259 U.S. 209 (1922).

\textsuperscript{13} Id. at 214.

\textsuperscript{14} Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917).

\textsuperscript{15} See text accompanying note 10 *supra*.

\textsuperscript{16} See generally *Restatement, Conflict of Laws* §§ 59-70 (1934); 1 *Beale, Conflict of Laws* § 59.1 (1935).
plus the law of the place where the event took place created an obligation to be enforced wherever the action was tried. In fact this answer was no answer. The concept of “legislative jurisdiction” did not answer the question of why one state rather than another was to be accorded that power. To put an extremely simple case: if \( P \) and \( D \) start out on a motor trip from State \( X \), with \( P \) as guest and \( D \) as owner-driver, and while driving through State \( Y \), \( D \) learns that his brakes are defective, and this defect leads to a collision and \( P \)'s injury in State \( Z \), how does one determine whether State \( X \) or State \( Y \) or State \( Z \) has “legislative jurisdiction” to determine the rights and duties between \( P \) and \( D \)?  

The short answer is that one cannot, because, unless some further theoretical basis enables a forum to choose among \( X \), \( Y \), and \( Z \), or even to reject all of them, “legislative jurisdiction” rests on some unarticulated principle that makes it proper to look to one rather than another of the states concerned.

However, if this first hurdle of why the law of \( Z \) was to be selected rather than the law of \( X \) or \( Y \) or the forum was surmounted, the theoretical basis for the forum’s decision was simplified. It was no longer confronted with the theoretical impossibility of applying law that was not law because it was the law of a foreign sovereign. It was enforcing obligations—vested rights—of the parties. On the academic side the concepts of vested rights and legislative jurisdiction are principally associated with Professor Beale and these views became the dominant philosophy of the *Restatement of Conflict of Laws* when it was issued in 1934 and of Beale’s treatise which followed in 1935.  

Imperative rules were enunciated in the *Restatement*. The validity of a contract including capacity, form, mutual assent, and consideration were said to be governed by the law of the place of contracting, and elaborate rules were established to determine the place of contracting. In the field of torts the law of the place of wrong determined liability, causation, damages, and survival, and the place of wrong was established as the place where the last act necessary to impose liability took place. However, the imperative rules of the

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18 See note 16 supra.
19 *Restatement, Conflict of Laws* § 332 (1934).
20 *Id.* §§ 311-31.
21 *Id.* §§ 379, 391.
22 *Id.* § 383.
23 *Id.* § 412.
24 *Id.* § 390.
25 *Id.* § 377.
Restatement's vested rights theory recognized two exceptions: (1) a forum applied its own rules of procedure, and (2) no forum was required to enforce an obligation that offended its own "strong" public policy.

The vested rights doctrine brought in its wake the need for "characterization." Since a forum could apply its own law to a procedural issue in a case but was required to apply the law of some other state to a substantive issue, it was necessary to "characterize" the issue involved as "substance" or "procedure." And since on matters of substance the choice of law might differ depending on whether the cause of action sounded in tort or contract, a further characterization was required. This process of characterization was left to the forum. By use of one or another characterization device a forum was frequently enabled to select its own law on the grounds that the issue was procedural, or to select between the conflicting laws of two states depending upon whether it chose to call the issue one of tort or contract, or, in some instances, family law.

The Reaction Against the Vested Rights Approach
Act One—Local Law Theory

The vested rights view of Holmes, Beale, and the Restatement was not without its critics. What has generally been termed the "local law" theory emerged.

26 Id. § 585.
28 RESTATEMENT, CONFLICT OF LAWS § 584 (1934); see Robertson, A Survey of the Characterization Problem in the Conflict of Laws, 52 Harv. L. Rev. 747 (1939).
29 See, e.g., Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940), cert. denied, 310 U.S. 650 (1940) (burden of proof of contributory negligence characterized as procedural under Massachusetts law for choice-of-law purposes, but as substantive to the extent that the federal court in a diversity case must apply the state rule rather than its own rules of procedure).
The essential, if over-simplified, thesis of the “local law” theorists was that no court ever applies or enforces any law other than its own. Therefore, in any choice-of-law situation the forum applies its own law, but included in its own law is a body of doctrine that directs it to use the law of another state in fashioning its rule of decision in certain cases. As thus formulated, the underlying rationale of the local law theory was of inestimable significance to the break away from the imperative rules concept of Holmes, Beale, and the Restatement. Its strength lay in the concept that the forum was deciding the case according to its legal doctrines. When the forum, in its search for the rule of decision in a given case made use of the legal rules of another state, it did so as a matter of choice and not because of the supposed command of a higher body of first principles. Its weakness, however, was twofold. (1) As originally announced and applied it did little more than tell the forum to work out its own salvation; it gave the forum no guide lines to follow in seeking that salvation. (2) In the main the decisions that spoke in terms of the local law philosophy proceeded to reach the same results as those that spoke in terms of the imperatives of the Restatement. Thus, Judge Hand, a leading exponent of local law theory, in tort cases generally applied the law of the place of impact as the rule of decision because the local law directed the forum to fashion a rule “as nearly homologous as possible to that arising in the place where the tort occurs.” Thus far local law doctrine merely paved the theoretical way for a break-through; it did not immediately provide the break-through.

Two workmen’s compensation cases originating in California—Alaska Packers Ass’n v. Industrial Acc. Comm’n and Pacific Employers Ins. Co. v. Industrial Acc. Comm’n—are probably the key decisions in the growth and development of the local law theory. Admittedly, workmen’s compensation cases are in a class by themselves because of the complex private and public interests involved.

35 “Cook’s and Lorenzen’s ‘local law theory’ . . . has left us without a guide.” Ehrenzweig, Conflict of Laws § 4 at 15 (1962).
38 294 U.S. 532 (1935).
40 On the role played by Mr. Justice Stone, the author of the decisions in these cases, see Cheatham, Stone on Conflict of Laws, 46 Colum. L. Rev. 719 (1946); Freund, Chief Justice Stone and the Conflict of Laws, 59 Harv. L. Rev. 1210 (1946).
But the combination of the holdings and reasoning in these cases offered a new approach to the entire subject.

In Alaska Packers the United States Supreme Court held that California could apply its law to the case of an employee injured in Alaska, when the employment contract was entered into in California and the employee, upon termination of employment, was to be returned to California. The interest of California in the employee, said Mr. Justice Stone, was not inferior to the interest of Alaska, and hence California was not required to give full or any faith and credit to the provisions of the Alaska act which made that act the exclusive remedy for injuries received while employed in Alaska.

In the Pacific Employers case the Supreme Court again sustained California’s application of its law, this time to an employee injured in California, although the employment contract, the principal area of employment, and the place to which the employee would eventually return were all in Massachusetts.

The principal significance of these decisions lay in the fact that they recognized that the forum was not bound to apply the law of the place of injury or the place of contract, but was justified in invoking and applying its own internal law in a case with foreign contacts, when the parties, or any substantial aspect of the transaction, had a relation to or contact with the forum other than as forum.

The Reaction Against the Vested Rights Approach

Act Two—The Contemporary Views of Currie, Ehrenzweig, and Others

The vested rights approach of Holmes and the Restatement had said that the forum should, and in many instances must, apply the law of another state to determine rights and duties arising out of an event taking place in that other state. The early local law theorists had urged, as an intermediate step, that in such a case the forum applied its own law but fashioned recovery in accordance with the law of the other state. The current philosophy, principally identified with Professors Currie and Ehrenzweig, asserts that the starting


point for the forum (unless it be a forum wholly unrelated to the parties and the transaction) is its own internal law and the rule of decision is fashioned in accordance with that law, unless the forum, for good reason, chooses to do otherwise.

Within the confines of this article it is impossible to do more than sketch in the most general terms the views of Currie and Ehrenzweig, their areas of agreement and of disagreement. Each has written extensively and no summary can do them justice. Both start from essentially the same premise. Currie has stated: "Normally, even in cases involving foreign factors, a court should as a matter of course look to the law of the forum as the source of the rule of decision."\(^4\) Ehrenzweig has expressed a similar view: "It is my basic contention that all through the field of choice of law the *lex fori* must remain the starting point with some or most of our traditional conflicts rules functioning as exceptions."\(^4\)

It will be seen, therefore, that in this basic agreement they stand diametrically opposed to the views of the Restatement and the vested rights approach. It will also be seen that the local law theory of Hand and others has been substantially transformed; the forum no longer looks to the foreign law for any purpose unless the forum chooses to do so. It is at this point, namely the circumstances under which the forum may or should choose to do so, that the views of Currie and Ehrenzweig differ.

Currie has expressed what has come to be termed an “interest analysis” approach.\(^4\) His essential thesis is that in a cause involving foreign contacts the forum should consider the governmental interests of the forum which will be served in choosing between the law of the forum and that of another related state in deciding each issue. Ehrenzweig has denied the validity of an approach based on “governmental interests” and has advocated the recognition of what he has termed “true rules”\(^4\) derived from a critical analysis of the cases.

However, even with this difference in approach they are in substantial agreement in one matter which even further distinguishes their approach from that of the Restatement and most of the local law

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\(^4\) See Currie, supra note 43.

theorists. Both Currie and Ehrenzweig insist—and this, it is submitted, is the principal characteristic of the new theory—that when the forum does choose to use the law of another state, it does so with an eye to and because of the content of that law and its effect on the rights of the parties. Thus, Ehrenzweig's "true rules" are not merely another version of vested rights or legislative jurisdiction; they are not rules designed to direct the forum to a particular jurisdiction; they are rules for decision and direct the forum to chose the law that will effectuate a particular result. This is the basic philosophy: the court in a choice-of-law situation must not automatically apply the rule of a particular place merely because an event occurred there, without regard to the content of the rule. To the contrary, the forum before making its choice of law must be aware of the content of each of the possibly applicable rules, and make its choice with due regard to the effect of the content upon the rights of the contending parties.

There is another item of major significance in the current view. Under the Restatement vested rights approach there was a category of "torts" and a category of "contracts"—"a tort was a tort" and "a contract was a contract" without any significant attempt to differentiate among the various types of torts or the various types of contracts, or to differentiate among the several issues that might be involved in a tort case or a contract case. Under the views now being advocated there is clear recognition that all matters of tort liability cannot be put in the same category, that some tort liability is imposed for admonitory purposes and may call for a different treatment than tort liability that is imposed for compensatory purposes. Furthermore, the several issues that may be involved in a tort case may each require a different choice of law.

In the contract field there is the same recognition of differences depending in part on whether the contract is a so-called "adhesion contract" or a contract between parties of equal bargaining power and in part on the specific issue or issues in controversy. In short there is no longer the simple process of characterization as a "tort" or a "contract," but rather the complex analysis of the specific issues in-

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47 See authorities cited notes 41, 43 supra; EHRENZWEIG, CONFLICT OF LAWS §§ 175, 221 (1962).
48 "Slowly and against much resistance courts and writers are beginning to recognize and to admit that the law of contracts has ceased to be a unitary set of rules relating to a 'bargain' and a 'meeting of the minds,' just as the law of torts has ceased to be a unitary set of rules relating to a 'wrong.'" EHRENZWEIG, CONFLICT OF LAWS § 172 at 454 (1962).
49 See Id. § 212.
50 See Id. § 172.
volved, the interests protected or affected by the rules invoked, and a deliberate search for the substantive rules of law that will best determine each of the specific issues in controversy.

The Reaction Against the Vested Rights Approach

Act Three—The Courts and the Restatement

The reaction against the vested rights approach is not limited to the law writers. It is becoming increasingly manifest in the opinions of courts throughout the United States. The United States Supreme Court has given it its benediction in such cases as Richards v. United States,\(^5\) Van Dusen v. Barrack,\(^6\) and Clay v. Sun Ins. Office, Ltd.\(^7\) California, by its decisions in Emery v. Emery,\(^8\) Grant v. McAuliffe,\(^9\) and Bernkrant v. Fowler,\(^10\) and New York, by its decisions in Auten v. Auten,\(^11\) Kilberg v. Northeast Airlines, Inc.,\(^12\) and Babcock v. Jackson\(^13\) are currently in the forefront. Other states\(^14\) are veering away from the Restatement vested rights approach. It seems now to be conceded that the 1934 Restatement was in large part "wrong or at least so over-simplified as to be misleading."\(^15\)

Since 1952 a Restatement Second has been in the process of formulation. However, the tentative drafts that have thus far appeared have met with critical opposition.\(^16\) The present consensus appears to be

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\(^{51}\) 369 U.S. 1, 11-14 (1962).
\(^{52}\) 376 U.S. 612, 643-44 (1964).

\(^{54}\) 45 Cal. 2d 421, 289 P.2d 218 (1955).
\(^{55}\) 41 Cal. 2d 859, 264 P.2d 944 (1953).
\(^{56}\) 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961).


\(^{62}\) "Doubts have been expressed repeatedly as to the desirability of such endeavors at this time." Ehrenzweig, Conflict of Laws § 10 at 34 (1962). "At this stage we certainly do not need a new Restatement, although we are threatened with one." Currie, The Disinterested Third State, 28 Law & Contemp. Prob. 754, 755 (1963). See also the Ehrenzweig series Law and Reason Versus the Restatement Second: Miscigenation in the Conflict of Laws, 45 Cornell L.Q. 659 (1960); Restitution in the Conflict of Laws,
against a *Restatement Second* at this time. Justice Traynor has warned that "as we now finish one long servitude to categorical imperatives, we should be on guard against another," and although this warning was directed against any congressional attempt to enact choice-of-law rules, it is equally applicable to a new *Restatement* formulation. The general belief seems to be that courts must be allowed freedom to develop new approaches, and that the time is not yet ripe for any attempt at formulation or crystallization of new principles.

In short, at present *Restatement First* is generally obsolete and *Restatement Second* is not yet in sight.

**The Constitution, the Supreme Court, and Choice-of-Law Rules**

It has generally been accepted that a forum was subject to some constitutional limitations in formulating its choice-of-law rules, with four provisions of the Constitution potentially applicable: full faith and credit, privileges and immunities, due process, and equal protection.

Under the vested rights approach a proper choice of law was frequently declared to be a constitutional command and a forum's failure to apply the proper law was held to be a denial of due process of law or a denial of full faith and credit. This process was at one time carried to such an extent that it seemed as if choice-of-law rules would become a subdivision of constitutional law. In the light of current developments what is the present status of these constitutional limitations?

It is now clear that the Supreme Court, by recognizing that the

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64 Traynor, Is This Conflict Really Necessary?, 37 Texas L. Rev. 657, 675 (1959).


vested rights theory is not a constitutional mandate,⁶⁸ has greatly reduced the role that the Constitution will hereafter play in controlling a state's choice-of-law rules. But it must also be recognized that a forum in formulating its rules is not entirely free from constitutional limitations.⁶⁹ There is a balance to be struck, and an appreciation and understanding of that balance requires an historic analysis of the role that the Constitution has played in controlling a forum's choice of law, before considering the present and future potential.

As a preliminary basis for such historical analysis and evaluation of future potential, it is necessary to distinguish between the two roles that constitutional provisions may play. One role is that of a positive command requiring that the forum select the law of a particular jurisdiction as the rule of decision in a pending case. The other role is that of a negative restraint which merely forbids the forum to act in a certain manner, while leaving it free to select various other alternatives. Under the view that the Constitution imposes positive commands a forum would be required to apply the law of a particular jurisdiction no matter how much it conflicted with its own law and no matter how much the transaction related to or had contacts with the forum. Under the view that the Constitution imposes only negative restraints a related or interested forum would be free to select between its own law and the law of another jurisdiction so long as it did not discriminate between parties similarly situated, while an unrelated forum would not be free to apply its own law or policy but would still enjoy some freedom of choice among the laws of related states.

Positive Commands

The Constitution may provide the source for positive commands requiring a state to make a specific choice of law in two ways: (1) by furnishing the basis for congressional legislation under article I powers or full faith and credit; (2) by Supreme Court application of the full faith and credit and due process clauses to that end.

Congressional Legislation

There is no doubt that Congress could establish uniform choice-of-law rules in areas such as interstate and foreign commerce over which it has plenary legislative power.⁷⁰ Thus far it has not done so,
except in the Federal Tort Claims Act which subjects the United States to liability for negligence "in accordance with the law of the place where the act or omission occurred."\(^7\) This should be noted as a significant departure from the Restatement doctrine which generally made tort liability depend on the law of the place where the injury occurred.

Under the full faith and credit clause Congress is empowered to prescribe the manner in which the public "Acts, Records and Proceedings" of a state shall be proved, and "the Effect thereof" in each state. Prior to 1948 Congress had enacted implementing legislation only with respect to judicial records and proceedings. In 1948 the Judicial Code was amended to provide that public acts "shall have the same full faith and credit in every court . . . as they have in the courts [of the state] from which they are taken."\(^7\) Whether this amendment requires anything beyond that already required by the text of the full faith and credit clause remains to be seen. There is nothing in the legislative history of the 1948 amendment that sheds any light on its purpose\(^7\) and while the Supreme Court has alluded to this change, it has not considered its import.\(^7\)

**Due Process and Full Faith and Credit**

Beginning with *New York Life Ins. Co. v. Dodge*\(^7\) in 1918 the Supreme Court has frequently invoked the due process and full faith and credit clauses as requiring a forum to recognize and apply the law of another state as governing the rights of the parties,\(^7\) with *Mutual Life Ins. Co. v. Liebling*\(^7\) the extreme example of such an approach. However, by its decisions in the *Alaska Packers and Pacific Employers* cases,\(^7\) followed in 1941 by *Griffin v. McCoach*,\(^7\) a life insurance case, the Supreme Court has generally indicated that a forum having jurisdiction over a claim arising out of or related to activity in the forum state did not have to subordinate its policy to the policy of the sister state where the relationship was created or the contract entered into.

\(^7\) 28 U.S.C. § 1346(b) (1958). See also the discussion of this provision in Richards v. United States, 369 U.S. 1, 6-10 (1962).
\(^7\) The reviser's comment was merely: "This follows the language of Article IV, section 1 of the Constitution." *Ibid.*
\(^7\) See, e.g., *Hughes v. Fetter*, 341 U.S. 609, 613-14 n.16 (1951).
\(^7\) 246 U.S. 357 (1919).
\(^7\) See cases cited note 66 supra.
\(^7\) See text accompanying note 13 supra.
\(^7\) See text accompanying notes 38-40 supra.
\(^7\) 313 U.S. 498 (1941).
In 1947 the decision in *Order of United Commercial Travelers of America v. Wolfe*\(^8\) indicated a possible return to the principles of the *Dodge* and *Liebing* cases. This matter now appears to be settled by the 1964 decision in *Clay v. Sun Ins. Office, Ltd.*\(^8\) which followed the views of the *Alaska Packers and Pacific Employers* cases and clearly established the rule that in insurance cases the forum state, if it has substantial contact with the parties or transaction, need not subordinate its laws or policies to those of the state where the contract was made.

In tort cases the Supreme Court’s 1964 decision in *Van Dusen v. Barrack*\(^8\) has apparently refused to require that an interested forum in a wrongful death action subordinate its policy on damages to that of the state in which the act or omission or impact occurred.\(^8\) It would now seem settled that at least in tort, contract, and workmen’s compensation cases the due process clause does not prevent an interested and related forum applying its own law or policy to a transaction.

The current scope and applicability of the full faith and credit clause requires a further elaboration. In the main the decisions have used due process and full faith and credit interchangeably.\(^8\) Two comparatively recent decisions dealing specifically with full faith and credit, *Hughes v. Fetter*\(^8\) and *Pearson v. Northeast Airlines, Inc.*\(^8\) merit close attention.

In *Hughes v. Fetter* the Supreme Court held that if Wisconsin would entertain a wrongful death action arising out of an impact within its boundaries it must entertain a like action arising out of an accident in Illinois and said that this result was required by full faith and credit. At the same time and in the same case the Court suggested that the forum did not have to give full faith and credit to all of the Illinois law, but might use its own law for the purpose of measuring “the substantive rights involved.”\(^8\) Subsequently the decision in *Hughes v. Fetter* was explained on the grounds that “the crucial factor ... was that the forum laid an uneven hand on causes of action arising within and without the forum state,”\(^8\) language that is far more consistent with equal protection than with full faith and credit.

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\(^8\) 331 U.S. 586 (1947).
\(^8\) 377 U.S. 179 (1964).
\(^8\) 376 U.S. 612 (1964).
\(^8\) Compare 376 U.S. at 643-44, with 376 U.S. at 629 n.24.
\(^8\) See cases cited note 66 supra.
\(^8\) 341 U.S. 609 (1951).
\(^8\) 309 F.2d 553 (2d Cir. 1962), cert. denied, 372 U.S. 912 (1963).
\(^8\) 341 U.S. at 612 n.10.
In *Pearson v. Northeast Airlines, Inc.* the Second Circuit followed the decision of the New York Court of Appeals in *Kilberg v. Northeast Airlines, Inc.*, applying the New York policy on measure of damages to a wrongful death case arising out of a Massachusetts accident even though plaintiff pleaded his cause of action "under" the Massachusetts act, and held that full faith and credit did not require that the forum apply that portion of the Massachusetts act limiting the amount of recovery. The Supreme Court denied certiorari in *Pearson* and subsequently in *Van Dusen v. Barrack* (identical with *Pearson* except for the fact that the case originated in the federal district court in Pennsylvania) held that the Pennsylvania courts could "recognize the cause of action based on the Massachusetts Death Act but would not [have to] apply that statute's . . . damage limitation."90

These decisions, it is submitted, completely negate any substantial role for the full faith and credit clause in choice-of-law cases. To suggest as did *Hughes v. Fetter*, or to hold as did *Van Dusen v. Barrack*, that the forum is privileged to apply its own rule of damages is to require no more than partial faith and credit—a faith and credit to those policies that do not conflict with the policies of the forum—and the most that can be said is that the Supreme Court will determine when the forum is and when it is not justified in invoking its own policies.91 But the criteria for determining when the forum is or is not so justified simply cannot be found in or read into the full faith and credit clause.

As previously indicated the first problem in any given choice-of-law situation is the determination of whether the forum can or should apply its own law or whether it must look to the law of another jurisdiction. Before it can be said that full faith and credit must be given the law of another state, a preliminary determination must be made that the law of the state to which such faith and credit must be given is the *only* law that may constitutionally be applied to determine that issue. There is nothing in the concept of full faith and credit that furnishes a guide, let alone finally determines, the one jurisdiction to which the forum must turn. Therefore, unless and until some

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91 Id. at 644. But see: "The defendants, rejecting the view adopted by the Second Circuit in *Pearson v. Northeast Airlines, Inc.* . . . contend that the Full Faith and Credit Clause requires Pennsylvania courts to follow all the terms of the Massachusetts Death Act. We intimate no view concerning this contention." Id. at 629 n.24. (Emphasis added.)
authoritative legislation or some other constitutional command requires that the forum look to the law of another state, there is nothing to which full faith and credit must be given. Some of the decisions applying full faith and credit in the past, and most of the views of dissenting justices in cases where full faith and credit was not given, have proceeded on the assumption, express or implied, that some unarticulated "first principle" required the forum to apply the law of a particular state to the determination of the case. But if the imperative rules of Holmes, Beale, and the Restatement are no longer elevated to the status of constitutional commands, the "first principle" does not exist and full faith and credit has nothing on which to operate. To put it briefly and tersely, full faith and credit cannot determine a choice-of-law problem; it can only determine the scope and content of the law after the choice-of-law problem has been otherwise resolved.

**Negative Restraints**

In *Home Ins. Co. v. Dick* the Supreme Court held that Texas, as the forum state, violated due process of law by applying its own law to invalidate a clause in an insurance contract when it had no contact with or relation to the transaction or parties, other than as forum. There seems no reason to doubt the continued validity of the *Dick* decision. During the 1963 term it has been referred to by the Supreme Court with seeming approbation. It may be assumed that the due process clause is applicable to prevent an unreasonable or unrelated choice of law by a disinterested forum.

Thus far there has been little application of the two anti-discrimination clauses of the Constitution—privileges and immunities and equal protection. Both these clauses have the same ultimate objective—the prevention of discriminatory treatment through unreasonable classification. Although there are differences in their scope and impact, for the purposes of this discussion they can be considered together. It seems clear that there is a role for these clauses to play in requiring a state, whatever its choice-of-law rules may be, to apply those rules with an even hand to all similarly situated, and to justify on reasonable grounds the application of different rules to situations that appear similar but are in fact distinguishable.

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93 See, e.g., Mr. Justice Jackson's dissent in *Wells v. Simonds Abrasive Co.*, note 4 supra.

94 281 U.S. 397 (1930).

95 Since the transaction was centered in Mexico, full faith and credit was inapplicable.


97 See Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws*:
To the extent that courts in the future continue to depart from traditional views and apply forum law under an "interest analysis" approach, they will at times apply one rule when one (or both) of the parties resides in the forum state and a different rule when neither party is a resident. This is clearly a situation in which the party aggrieved by such a choice, particularly when that party is a non-resident receiving less favorable treatment than the resident, will invoke the equal protection and privileges and immunities clauses against such disparate rules. Those who advocate the interest analysis approach believe that such differences in result are justifiable and do not pose any serious problem under either clause. While there is much force to their argument all that can be said at this time is that no case has yet been presented which clearly raised this issue, and how the Supreme Court of the United States will decide it remains to be seen.

In Conclusion: Three Caveats for the Reader

Caveat Number One. The decisions of courts such as California and New York, which are questioning and repudiating the imperative rules of the Restatement, are not as yet establishing new rules. These courts are doing no more than deciding individual cases as they come before them. Thus, Professor Cheatham commenting on the New York Court of Appeals decision in Babcock v. Jackson, observed: "If I could ask my old colleague, Karl Llewellyn, what this case means, he would answer: 'As every case, it means what the lawyers and judges who come after have wit to make it mean.'"

It would appear to be the grossest error to suppose that California, in Grant v. McAuliffe, established either the rule that the cause of action survived the death of the tort feasor when the action was brought in California, or the rule that the action survived when the tort feasor was a resident of California. It would be equally wrong


89 See authorities cited note 97 supra.

to suppose that New York, in Kilberg, held that damages in wrongful death actions brought in New York will always be governed by New York law. To paraphrase Karl Llewellyn's statement, these cases will mean whatever the judges who come after decide to make them mean. For the moment all these decisions mean is that courts are viewing critically the Restatement rules and the assumptions on which they were based. Each decision must be carefully analyzed for the purpose of determining the techniques employed, the criteria deemed relevant, and the considerations ignored by the court in deciding any particular case. Eventually principles may emerge, but for the present the courts are obviously feeling their way along new paths and seem deliberately to be avoiding the establishment of new categorical rules.\footnote{See text accompanying note 64 supra.}

This will pose a new and difficult problem for the advocate in those jurisdictions which have abandoned total reliance on the Restatement. What arguments are to be made, what information is needed, and how is that information to be brought before the court to convince it that it should apply the law of one rather than another state to the resolution of the issue involved?\footnote{See Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961), 49 CALIF. L. REV. 962; Currie, Survival of Actions: Adjudication Versus Automation in the Conflict of Laws, 10 STAN. L. REV. 205 (1958), in Selected Essays on the Conflict of Laws 128 (1963).} These are matters that will at times tax the ingenuity and resources of counsel; there is no attempt here to suggest an answer or to do more than indicate the existence of one more problem in this area.

Caveat Number Two. Beware the language used to explain or justify the result reached in any given case. There is a great deal of new wine being poured into old bottles in the form of current decisions reaching results diametrically opposed to Restatement rules, but employing characterization devices to explain the result in traditional terms. The California decision in Grant v. McAuliffe is one of the clearest examples of this approach, justifying the result reached, at least in part, on the grounds that survival of tort actions is a matter of procedure to be governed under traditional Restatement doctrine by the lex fori. The New York decision in Kilberg did the same thing by characterizing the measure of damages in a wrongful death case as procedural and therefore governed by the law of the forum. This resort to a procedural characterization is nothing more than window dressing and must be recognized as such, just as it has been so recognized by the courts which have employed it. Justice Traynor, author of
the California court's opinion in Grant v. McAuliffe, has already made this clear in his speech before the Texas Bar Association when he said:

> It may not be amiss to add that although the opinion in the case is my own, I do not regard it as ideally articulated, developed as it had to be against the brooding background of a petrified forest. Yet I would make no more apology for it than that in reaching a rational result it was less deft than it might have been to quit itself of the familiar speech of choice of law.103

The New York Court of Appeals in Davenport v. Webb104 and Babcock v. Jackson105 has clearly indicated that the emphasis in Kilberg was not on a "procedural" rule of the forum but on the interest of New York in applying its own "policy" to determine the rights of the parties.

The use of characterization terminology has produced some unfortunate results. Some writers, taking the language of the decision at face value, have decried the results as erroneous in the light of what was traditionally regarded as governed by the lex fori. Other writers have recognized the decisions for what they were, but deplored the path followed and the assumed need of the courts to resort to what was in fact a fictional approach. Undoubtedly these decisions, by employing what are at best tenuous characterizations, will confuse courts and counsel who do not recognize them for what they are, namely, the mere pasting on of a label designed to convince the user that the result is more palatable than it would have been without the label.

Caveat Number Three. At present and for some time to come choice of forum may well determine choice of law and the outcome of the case. This sounds like the greatest of heresies to those who have so strongly urged the desirability for uniformity in conflict of laws rules to the end that, regardless of the forum, the outcome would be the same. To supporters of the Restatement position this potential for forum shopping is one of the most serious objections to the current

103 Traynor, Is This Conflict Really Necessary?, 37 Texas L. Rev. 657, 670 n.35 (1959).
105 "The emphasis in Kilberg was plainly that the merely fortuitous circumstance that the wrong and injury occurred in Massachusetts did not give that State a controlling concern or interest in the amount of the tort recovery as against the competing interest of New York in providing its residents or users of transportation facilities there originating with full compensation for wrongful death. Although the Kilberg case did not expressly adopt the 'center of gravity' theory, its weighing of the contacts or interests of the respective jurisdictions to determine their bearing on the issue of the extent of the recovery is consistent with that approach." 12 N.Y.2d at 480, 191 N.E.2d at 282-83, 240 N.Y.S.2d at 748.
trend. Concededly forum shopping is undesirable, but it must also be conceded that it has been with us in the past even though it may now be with us in more accentuated form.

This problem is dramatically illustrated by the numerous cases arising out of the crash of the commercial airliner in Boston on October 4, 1960 which have already given us the Kilberg, Pearson, and Van Dusen decisions. Suits in Massachusetts were governed by the Massachusetts statute limiting recovery to not more than 15,000 dollars. Suits in state and federal courts in New York on behalf of New York decedents were governed by the New York policy prohibiting any statutory limitation on recovery. Suits in federal court in Pennsylvania on behalf of Pennsylvania decedents were held to be governed by Pennsylvania's choice-of-law rule which could either follow its own policy against limitation of damages or apply the Massachusetts limitation.

Furthermore, in connection with such matters the Supreme Court in Van Dusen v. Barrack has held that if a suit is properly brought in an appropriate federal district court and the case is transferred to a district court in another state under section 1404(a) of the Judicial Code, the choice-of-law rules of the transferor forum "generally" will govern in the transferee court. The opinion in Van Dusen on this issue is replete with qualifications so that its full scope cannot as yet be determined, but it is a significant recognition of the fact that the plaintiff has considerable power to select the state or federal forum most favorable to his cause, provided only he selects a reasonable forum.

109 "We conclude, therefore, that in cases such as the present, where the defendants seek transfer, the transferee District Court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms. We, therefore, reject the plaintiffs' contention that the transfer was necessarily precluded by the likelihood that a prejudicial change of law would result. In so ruling, however, we do not and need not consider whether in all cases § 1404(a) would require the application of the law of the transferor, as opposed to the transferee, State. We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under § 1404(a) or if it was contended that the transferor State would simply have dismissed the action on the ground of forum non conveniens." 376 U.S. at 639-40. (Emphasis added.)