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Reflections on Conflict-of-Laws Methodology

By Robert A. Sedler*

Choice of Law

Question 1

A Tenable Approach for Deciding Choice-of-Law Issues

I have long held the view that the interest analysis regimen, as developed by the late Brainerd Currie,1 is the preferred approach to resolving conflict of laws because it will provide functionally sound solutions to the choice-of-law issues that arise in actual cases.2 I also maintain that, in practice, the courts that have abandoned the traditional approach generally employ interest analysis to resolve choice-of-law issues regardless of which “modern” approach to choice of law they are purportedly following.4 Moreover, in the case of what Professor Currie terms the “true” conflict—the situation in which both the forum and the other involved state each has a real interest in applying its own law in order to implement the policy reflected in that law—the forum, again regardless of its purported method for dealing with the true conflict, will gen-

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1. Professor Currie’s major articles have been collected in B. Currie, Selected Essays on the Conflict of Laws (1963). The basic elements of Professor Currie’s approach are summarized in R. Cramton, B. Currie & H. Kay, Conflict of Laws 221-24 (2d ed. 1975).


3. Florida is the latest state to have abandoned the traditional approach. See Bishop v. Florida Specialty Paint Co., 49 U.S.L.W. 2315 (Fla. 1980). With this addition, the current breakdown among the 50 states and the District of Columbia appears to be as follows: 30 states have abandoned the traditional approach, 15 have adhered to the traditional approach, and 6 have not yet passed on the question. See Sedler, On Choice of Law and the Great Quest: A Critique of Special Multistate Solutions to Choice-of-Law Problems, 7 Hofstra L. Rev. 807, 807 n.1 (1979).

4. See Sedler, supra note 2, at 227-33.
erally apply its own law. The validity of any approach of law must be tested against the results that it produces in actual litigation. Academic commentators generally agree that the results reached by the courts when dealing with choice-of-law issues are for the most part functionally sound and fair. The disagreement is over which approach the courts should adopt, and the criticism tends to focus much more on the rationale of the courts' decisions than on the decisions themselves. If it is conceded that the courts generally do reach functionally sound results, and if in practice the courts generally are employing interest analysis regardless of their formal pronouncements, then the validity of interest analysis as an approach to choice of law, I would submit, has been empirically demonstrated.

I have always believed that academic commentators tend to take an unduly complex view of the choice-of-law process, and this view sometimes carries over to the courts when they try to provide a rationale for their choice-of-law decisions. Interest analysis has the effect of simplifying the choice-of-law process by focusing on

5. See id. at 231-33. As this discussion indicates, while the California Supreme Court purportedly resolves the “true conflict” by looking to the “comparative impairment” of the states’ respective policies, I question how seriously the court engages in “comparative impairment” when California has a real interest in applying its own substantive law. In Bernhard v. Harrah’s Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, cert. denied, 429 U.S. 859 (1976), California clearly had such an interest, and not surprisingly the court concluded that California’s policy would be “more impaired” if it were required to yield. It is highly doubtful whether Nevada would have reached the same conclusion if it had been using the “comparative impairment” analysis. In Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 585 P.2d 721, 148 Cal. Rptr. 867 (1979), the California court could afford to be “generous” in yielding to Louisiana's interest, because it was questionable whether California law itself would recognize the plaintiff’s “unusual and outmoded” substantive claim. Id. at 165, 168, 583 P.2d at 724, 728, 148 Cal. Rptr. at 870, 874. By yielding to Louisiana’s interest in this “throwaway” case, the California court could appear to be applying “comparative impairment” evenhandedly while insuring that California law would apply in the next case in which the court found that California had a real interest in the application of its law. See also Kanowitz, Comparative Impairment and the Better Law: Grand Illusions in the Conflict of Laws, 30 Hastings L.J. 255, 294-300 (1978); Kay, The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience, 68 Calif. L. Rev. 577, 586-91 (1980).


8. Opinions in conflicts cases often tend to be written as if each case were a “landmark” decision.
the policies reflected in a state's rules of substantive law. This is
the same focus a court must have when dealing with the appli-
cation of a rule of substantive law in a domestic case.

The simplifying effect of interest analysis may explain the
courts' practical preference for its approach. Courts tend to see a
conflicts case as essentially a domestic case with a foreign element
added, and a state's interest in applying its law in order to imple-
ment the policy reflected in that law seems to the courts to be a rational
approach to deciding whether that state's law should be
applied. Thus, when the application of the forum's law in the
particular case will not advance the policy reflected in that law, and
the application of the law of the other involved state will ad-
vance the policy reflected in that state's law, it seems logical to the
court to apply the law of the only interested state. Similarly,
when the reasons that call for the application of the forum's law in
a domestic case are equally present in a conflicts case, it seems
logical to the forum court to apply its own law. The courts do not
view their function in a conflicts case to be that of "policing the
interstate and international order" and are not disposed to
subordinate the policy underlying their own law in favor of sup-
posed "multistate policies."

It is my contention, therefore, that interest analysis is a tena-

9. According to one of its critics, the "simplicity" of interest analysis is its primary vice. Twerski, To Where Does One Attach the Horses?, 61 Ky. L.J. 393, 404-12 (1972).
10. It will be recalled that the underlying justification for interest analysis as devel-
oped by Professor Currie was that it would provide rational solutions to choice-of-law
problems. Currie, Notes on Methods and Objectives in the Conflicts of Laws, 1959 Duke
11. Totally apart from the choice-of-law context, a court must decide this question
whenever it is determining the reach of the forum's statute to a situation containing a for-
eign element. When the application of the statute to the particular situation will not ad-
vance the statute's policy, the court will hold it inapplicable. See, e.g., People v. One 1953
Ford Victoria, 48 Cal. 2d 595, 311 P.2d 480 (1957). In my opinion, Ford Victoria did not
present a choice of law problem. Its result was premised on the California statute's inappli-
cability to out-of-state automobile dealers. See id. at 598, 311 P.2d at 482. See also id. at
599-600, 311 P.2d at 483 (Schauer, J., concurring).
12. In the classical "false conflict," there is general agreement that the court should
apply the law of the only interested state. See Sedler, supra note 2, at 186-87.
13. This is true in the "false conflict" in which the forum is the only interested state
and in the "true conflict." If, for example, the plaintiff is from a recovery state, the interest
of the plaintiff's home state in applying its law allowing recovery is the same irrespective of
where the accident occurs and irrespective of whether the defendant is from a recovery state
or a nonrecovery state.
15. Id.
ble approach for deciding choice-of-law issues because it works. It simplifies the choice-of-law process by carrying over the considerations applicable to the resolution of domestic cases to the resolution of conflicts cases. In practice, it is not difficult to apply, and it produces functionally sound and fair results. While most academic commentators disagree with the view that in the case of the true conflict the forum should apply its own law in order to implement the policies reflected in that law, it nevertheless cannot be demonstrated that the application of the forum's law in the true conflict produces results that are functionally unsound or fundamentally unfair to the parties.

So long as interest analysis and the application of the forum's own law in the case of the true conflict generally produce functionally sound and fair results, Professor Currie's version of interest analysis must indeed be considered the most tenable approach for deciding choice-of-law issues.

Question 2

The Matter of Identifying Underlying Policies and Interests

I disagree emphatically with the contention that the courts are not equipped to determine the policies underlying a state's law and the interest of a state in having its law applied in order to implement those policies in a particular case. When the court is following an interest analysis, particularly as I have reformulated it for use in the day-to-day process of deciding actual cases, the policy with which it is primarily concerned is the policy embodied in its own law. This is because the court will apply its own law to implement that policy whenever it has a real interest is doing so. The court must determine the policy underlying a law when applying it


17. See Sedler, supra note 2, at 228-31.

18. See id. at 220-22.

19. See id. at 221.
in a domestic case, and the process is no different when the court
is deciding upon the law's application to a situation containing a
foreign element.20

The alleged difficulty in determining the policies underlying a
law often results from confusing legislative purpose with legislative
motivation.21 The distinction between the two is well understood
by constitutional commentators; generally, legislative motivation is
irrelevant in constitutional analysis,22 while legislative purpose is
central to the determination of a law's constitutionality.23 If that
distinction were equally well understood by conflicts commentators, they would recognize that there is no great difficulty in deter-
mining the policies underlying rules of substantive law.24

Legislative purpose refers to the objectives that a law is
designed to accomplish, while legislative motivation may be de-
defined as the factors stimulating the enactment of a law. Motivation
may vary between legislators, and there may be mixed motives for
enacting a particular law. Thus, a collective motivation cannot be
ascribed to the legislature, but a collective purpose can be so

21. See Sedler, supra note 2, at 197.
23. Legislative purpose identifies the governmental interest that the law is designed to
advance. Constitutional analysis proceeds in terms of the validity of the asserted govern-
mental interest and the relationship between the law's provisions and the advancement of
that interest. See generally J. Nowak, R. Rotunda & J. Young, Constitutional Law 522-27
(1978).
24. In a recent article, Professor Brilmayer contends that interest analysis is based on
constructive legislative intent, or as she states it, "on a theory that a rational legislature
would, upon reflection, prefer the results of interest analysis to those of competing conflicts
L. Rev. 392, 393 (1980). I strongly dispute this proposition. While Professor Currie did place
a great deal of emphasis on legislative intent, it was in regard to implementing the policies
reflected in particular legislative acts. I do not think it is correct to say, as Professor
Brilmayer does, that interest analysis is based on the theory that the legislature would "pre-
fer the results of interest analysis." Rather, it is that a state's interest in applying its law
in order to implement the policies reflected in that law is a rational way of making choice-of-
law decisions in disputes involving private litigants. Interest analysis is an equally rational
way of making such decisions whether the court is dealing with legislation or judge-made
laws. In any event, there is a clear distinction between determining the policies underlying
rules of substantive law and determining whether the legislature "intended" to have those
rules apply to particular cases containing a foreign element. Although Professor Brilmayer
contends that "domestic interpretation and conflicts interpretation are different enterprises
altogether," id. at 417, the process in determining the policy underlying a law is the same in
both contexts. How the court makes the choice of law decision once that policy has been
determined is, of course, another matter.
ascribed. This is done by considering what objectives the law was designed to accomplish. These objectives can be determined from the provisions of the law itself, viewed both functionally and in relation to other laws of the state dealing with the same subject. Once the focus is on legislative purpose rather than on legislative motivation, determining the policies underlying a rule of substantive law is not difficult.

Another reason for the alleged difficulty in determining the policies underlying a rule of substantive law is the purported necessity of identifying a single or primary policy that is embodied in the law. For the purposes of interest analysis, a rule of substantive law should be presumed to reflect all legitimate policies that it could possibly serve. When multiple policies are presumed, they will usually support the same conclusion as to which is the interested state.

Thus, if the objectives that the law is designed to accomplish are examined and if multiple policies are assumed, there will be no real difficulty in determining the policies underlying that law. In addition, identifying the policies reflected in one state’s rule of substantive law is also likely to serve to identify the policies of the state having the opposite rule. Once those policies are determined, there is little difficulty in determining the interests of the forum and of the other state in having their laws applied in order to implement those underlying policies.

Let us consider a few examples of the matter of identifying underlying policies and interests. Consider first the guest statute. Because a guest statute makes it more difficult for a guest-passenger to recover against a host-driver by requiring a showing of something more than ordinary negligence, it advances the following objectives: (1) to give the host some protection from suits by ungrateful guests; (2) to protect insurers from collusion between guest-passengers and host-drivers; and (3) to reduce the insurer’s liability for passenger claims. The state interested in applying a guest statute to implement any or all of these policies is the defendant’s home state, which is also the state in which the vehicle is insured, and the state in which the consequences of imposing lia-

25. See Sedler, supra note 2, at 197-98.
26. Id. at 199-200.
27. Id. at 200-01.
28. Id. at 201-04.
bility, including the charging of the accident for the purpose of the insurer's loss, will be felt.\textsuperscript{29} The state that does not have a guest statute has a policy of allowing all accident victims to recover for ordinary negligence, including guest-passengers injured by the negligence of a host-driver. When the accident victim resides in a state that has not adopted a guest statute, that state has a strong interest in applying its law allowing guest-passengers to recover against host-drivers for ordinary negligence, because the consequences of the accident will be felt in the victim's home state.\textsuperscript{30}

Next, consider the example of a conflict between a rule of comparative negligence and a rule of contributory negligence. The policy underlying a rule of comparative negligence is to protect accident victims by permitting recovery, but reduced in some proportion to the victim's own negligence. A rule of contributory negligence, by contrast, furthers a policy of protecting defendants in circumstances in which the negligence of the plaintiff contributed to the accident in any way.\textsuperscript{31} As in the guest statute situation, if the plaintiff's home state has a rule of comparative negligence, it has a real interest in applying that rule, while if the defendant's home state has a rule of contributory negligence, it has a similar interest in applying its rule.

Finally, consider the dram shop act situation. The policies underlying a dram shop act are to raise standards of conduct by imposing liability for harm caused to third parties by intoxicated patrons and to provide a financially responsible party in the case of alcohol-related accidents. A state that has not adopted a dram shop act has a policy of protecting dispensers of alcoholic beverages from this kind of liability. The state in which a dispenser of alcoholic beverages carries on its activity has a real interest in applying its dram shop act in order to implement the admonitory

\textsuperscript{29} Id. at 200.

\textsuperscript{30} Id. at 202.

\textsuperscript{31} It could be contended that making contributory negligence a complete bar to tort recovery also represents an admonitory policy, that is, it is designed to encourage a higher standard of conduct by completely barring recovery to a party who is even slightly at fault. In practice, however, the question of whether a contributory negligence rule also represents an admonitory policy could only arise when the forum is a contributory negligence state and both the plaintiff and the defendant are from comparative negligence states. If the defendant is a resident of the forum, the forum's real interest is predicated on enabling the defendant to avoid liability. Such a case is extremely unlikely to arise because in this situation the plaintiff will almost certainly bring suit in the home state, which will apply its comparative negligence rule. See, e.g., Mitchell v. Craft, 211 So.2d 509 (Miss. 1968).
policy reflected in that law. The state without a dram shop act has a similar interest in applying its law in order to protect the defendant from the imposition of such liability. When serving alcoholic beverages in a state without a dram shop act foreseeably can and in fact does cause harm to a resident of an adjacent state that has enacted a dram shop act, the latter state has a real interest in applying its law in order to implement both its admonitory and compensatory objectives.

The courts generally have had no difficulty in identifying the policies and interests of the involved states. This experience is the best answer to the contention that the courts are not equipped to determine policies underlying a state's law and the interest of a state in having its law applied in order to implement those policies in a particular case.

**Question 3**

*False Conflicts, Apparent Conflicts, and True Conflicts*

Several years ago, I proposed that the methodology of Professor Currie's governmental interest approach be reformulated for more effective use by the courts in the day-to-day process of deciding actual cases. Under this reformulation, the forum court's primary inquiry would be whether it had a real interest in applying its own law in order to implement the policy reflected in that law. I see no utility in a court's distinguishing between the false conflict in which the forum is the only interested state, and the true conflict, because in both instances Professor Currie and I advocate the application of the forum's law. Similarly, once the forum has decided that it does have a real interest in applying its own law, it has necessarily determined that any conflict between its policy and interest and that of the other involved state cannot be avoided by a "more moderate and restrained interpretation" of its own policy or interest. Only when the forum has concluded that it has no real

32. Gaither v. Myers, 404 F.2d 216, 223 (D.C. Cir. 1968) (noting that the District of Columbia's strong policy of deterring auto thefts, reflected in a statute requiring the removal of the key from the ignition of a parked car, would be furthered by a rule holding the owner of a car who violates the statute liable for an intermeddler's negligence).


34. Id. at 318-23, 546 P.2d at 722-25, 128 Cal. Rptr. at 219-22. See also Blamey v. Brown, 270 N.W.2d 884 (Minn. 1978), cert. denied, 414 U.S. 1070 (1980).

35. See Sedler, supra note 2, at 220-22.
interest in applying its own law should it be concerned about the policy and interest of the other state.  

In practice, the courts are applying the concept of "real interest," as advocated in the reformulation of the governmental interest approach. They have had no difficulty in determining when the forum does have a real interest in applying its own law in order to implement the policies reflected in that law, and they have determined the scope of the forum's policy and interest with "restraint and moderation." The concept of "real interest," in my view, enables the courts to apply interest analysis effectively in the day to day process of deciding actual conflicts cases.

**Question 4**

**Legislative Solutions**

A legislature may be concerned with the application of particular legislation to situations containing a foreign element, and, if so, it should impose legislative directives as to when the legislation should and should not apply. But the utility of legislative efforts to control choice-of-law decisions generally is most dubious. These efforts would inevitably take the form of choice-of-law rules and would suffer the same vice as judicially imposed choice-of-law rules. The courts that have abandoned the traditional approach have on the whole reached functionally sound and fair results in the cases coming before them for decision; thus, there is no need whatsoever for legislatively imposed solutions in the choice of law area.

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36. Professor Kay disagrees with this aspect of the reformulation that would eliminate the initial consideration of the policy and interest of the other involved state. Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CALIF. L. REV. 577, 613-14 (1980).

37. Sedler, *supra* note 2, at 221-22. This reformulation would not affect the "unprovided for case," which I maintain should be resolved by a consideration of the common policies of the involved states. Id. at 233-36.

38. *Id.* at 222-27.


40. For my criticism of a "rules approach," see Sedler, *supra* note 2, at 208-16.
Jurisdiction

Question 5

The Significance of Recent Supreme Court Decisions in the Area of Jurisdiction

I do not think that recent Supreme Court decisions in the area of jurisdiction “signal a retrenchment” of the Court’s view of the permissible limits for the exercise of judicial jurisdiction. The “minimum contacts and fundamental fairness” test of International Shoe Co. v. Washington\(^4\) has broadened the circumstances in which a state can exercise jurisdiction on the basis of its interest in providing a forum for the plaintiff. The decisions in World-Wide Volkswagen Corp. v. Woodson\(^4\) and Kulko v. Superior Court\(^4\) saw the Court imposing limitations at the outer reaches of the permissible exercise of jurisdiction.\(^4\) Kulko involved the exercise of jurisdiction over an individual who was sought to be held subject to suit for increased support payments in California on the sole ground that, with his acquiescence, his children resided with their mother in that state. In World-Wide Volkswagen, a retailer and a regional distributor were sought to be held subject to suit in Oklahoma on the ground that a vehicle sold by the retailer to a customer in New York was involved in an accident in Oklahoma. While the retailer and the distributor were held not subject to suit in Oklahoma, there was no question that the manufacturer and importer could constitutionally be made subject to suit in the state in which the accident occurred. So long as there is some “voluntary and foreseeable” contact between a party and a state, at least of a commercial nature, there is no doubt that a party can constitutionally be made subject to suit in that state for any harm arising out of that “voluntary and foreseeable” contact.\(^4\) We can probably expect more litigation concerning the outer reaches of the permissi-

\(^{41}\) 326 U.S. 310 (1945).
\(^{42}\) 444 U.S. 286 (1980).
\(^{43}\) 436 U.S. 84 (1978).
\(^{44}\) One of the reasons why the Supreme Court may be concerned with imposing limitations at the outer reaches of the permissible exercise of jurisdiction is that in a number of states the courts are directed by statute to exercise jurisdiction “on any basis not inconsistent with the Constitution,” see, e.g., Cal. CIV. PROC. CODE § 410.10 (West 1973), and courts are tending more and more to exercise jurisdiction to the maximum extent constitutionally permitted.

\(^{45}\) See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980).
ble exercise of jurisdiction, but the Supreme Court is in no way retreating from the broadening of jurisdiction reflected in the "minimum contacts and fundamental fairness" test of *International Shoe*.

**Question 6**

*Stricter Jurisdictional Requirements as a Means of Avoiding Resolution of Difficult Choice-of-Law Issues*

I do not think that in practice there is a strong correlation between the "difficult" jurisdictional case and the "difficult" choice-of-law case. In *Kulko*, there probably was no difference between New York law and California law on the issue of increased child support. In *World-Wide Volkswagen*, there was no indication that the Oklahoma law of products liability was more favorable to the plaintiff than the New York law. On the other hand, in *Allstate Insurance Co. v. Hague*, there was no question that Minnesota could constitutionally exercise jurisdiction over the Wisconsin insurer, who was doing business in that state, but the Court was divided over whether Minnesota could constitutionally apply its own law in deciding the substantive issues of the case.

The one circumstance in which stricter jurisdictional requirements will avoid resolution of a "difficult choice-of-law issue," if this is how it is perceived, is the accident case presenting a true conflict, in which there are neither contacts between the plaintiff's home state and the defendant nor contacts between the transaction and the plaintiff's home state. If the plaintiff's home state had

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46. The Court noted that California was a signatory to the Uniform Reciprocal Enforcement of Support Act of 1968, while New York was a party to a similar Act, the Uniform Reciprocal Enforcement Act of 1950, as amended. 436 U.S. at 98-99, 99 n.14.


48. The Court held by a vote of five to three with Justice Stewart not participating, that Minnesota could apply its law on the question of whether "stacking" would be permitted in the case of separate insurance policies providing for uninsured motorist coverage. *Id.* at 644. The plurality opinion of Justice Brennan found a "sufficient aggregation of contacts" with Minnesota, based on the insured's regular employment in that state, the insurer's doing business there, and the post-occurrence change of residence by the insured's widow to Minnesota. *Id.* at 640-43. Justice Stevens, concurring, found the choice of Minnesota law consistent with full faith and credit because it did not interfere with any "sovereignty interest" of Wisconsin and consistent with due process, because it was not "fundamentally unfair" to the insurer. *Id.* at 647 (Stevens, J., concurring). The dissenting opinion of Justice Powell accepted the test formulated by the plurality opinion, *id.* at 650 (Powell, J., dissenting), but disagreed with its application to the facts of the present case, *id.* at 652.
been disposed to exercise the *Seider v. Roth* 49 jurisdictional mechanism, suit could be brought in the plaintiff's home state, and that state could apply its own law, enabling the plaintiff to recover. 50 With the invalidation of the *Seider v. Roth* jurisdictional mechanism in *Rush v. Savchuk*, 51 this possibility is now foreclosed. If the defendant is doing business in the plaintiff's home state, however, suit can be brought there for harm suffered in an out-of-state accident, and the plaintiff's home state can apply its law allowing recovery. 52

For the most part, then, the cases that present a "difficult" jurisdictional question will not necessarily present a "difficult" choice-of-law question, that is, a true conflict between the policy of the forum and that of the other involved state. So, too, true conflicts will be presented in many cases in which there can be no serious question about the permissibility of the forum's exercise of jurisdiction, either on the basis of contacts between the forum and the defendant or between the forum and the transaction. 53 Thus, the application of stricter jurisdictional requirements as such, is not likely to have much effect on the avoidance of "difficult" choice-of-law issues.

**Question 7**

*The Interrelationship of the Policies Underlying the Jurisdiction and Choice of Law Areas*

I believe that the policies underlying the permissible exercise of jurisdiction and the application of the forum's substantive law are highly interrelated. 54 When the basis for the exercise of jurisdiction is the connection between the underlying transaction and the forum, that is, the forum is exercising jurisdiction under a

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52. See Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974); Schwartz v. Consolidated Freightways Corp., 300 Minn. 487, 221 N.W.2d 665 (1974). *Hague* makes it clear that the plaintiff's home state can apply its law to allow recovery where the plaintiff is injured in an out-of-state accident having no factual connection with the forum. See notes 56-57 & accompanying text infra.
53. See, e.g., Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972); *Consequences*, supra note 50, at 1035-36.
54. See *Consequences*, supra note 50, at 1031-34.
long-arm statute, it is clear that the same factors making it reason-
able, and hence constitutional, for the forum to exercise jurisdic-
tion also make it reasonable, and hence constitutional, for the fo-
rum to apply its substantive law on any of the issues arising in the
case. The classic example of this proposition is the exercise of ju-
risdiction under a tort long-arm statute over an out-of-state manu-
facturer whose product “in the ordinary stream of commerce” finds
its way into the forum state, where it causes injury. Because the
manufacturer could foresee that its product, if defectively made,
could cause injury in the forum, under the “minimum contacts and
fundamental fairness” test of International Shoe, the manufac-
turer constitutionally may be made subject to suit in the forum on
a claim arising out of the defect in the product. For the same
reasons, the forum may apply its own substantive law on any of
the issues arising in the case.

The interrelationship between the policies underlying the per-
missible exercise of jurisdiction and the application of the forum’s
substantive law is further borne out by the constitutional test for
the application of a state’s substantive law that the Court formu-
lated in Allstate Insurance Co. v. Hague. The Court stated:
“[F]or a state’s substantive law to be selected in a constitutionally
permissible manner, that state must have a significant contact or
significant aggregation of contacts, creating state interests, such
that choice of law is neither arbitrary nor fundamentally unfair.”
This test fully parallels the “minimum contacts and fundamental
fairness” test of International Shoe for the permissible exercise of
judicial jurisdiction.

The Court also made it clear in Hague that under this test the
plaintiff’s home state can apply its law to allow recovery when the
plaintiff is injured in an out-of-state accident having no factual
connection with the forum, when it stated that “an automobile ac-
cident need not occur within a particular jurisdiction to be con-
ected to the occurrence. The injury or death of a resident of State
A in State B is a contact of State A with the occurrence in State

55. See, e.g., Gray v. American Radiator & Standard Sanitary Corp., 22 Ill.2d 432, 176
56. Id.
57. Consequences, supra note 50, at 1032.
59. Id. at 640.
I have long maintained this position\(^{60}\) and am pleased to see its endorsement by the Supreme Court. In this situation, jurisdiction generally must be based on contacts between the defendant and the forum rather than contacts between the forum and the underlying transaction.\(^{62}\) However, the defendant's contacts with the forum, which make reasonable the exercise of jurisdiction on that basis, are also relevant to make reasonable the application of that state's substantive law despite the fact that the accident itself was not connected to the forum.\(^{63}\)

Jurisdiction and choice of law, however, are not completely co-extensive. In some circumstances, jurisdiction may be predicated on the basis of contacts between the defendant and the forum, but if the transaction has no connection with the forum and the forum otherwise has no interest in applying its own law, the application of the forum's law would be unreasonable and, hence, unconstitutional.\(^{64}\) Conversely, in certain circumstances it would not be unreasonable or fundamentally unfair to apply a state's substantive law against a particular party, although the party could not be subject to suit in that state. For example, in *World-Wide Volkswagen*, if suit had been brought against the retailer and regional distributor in New York, the application of Oklahoma law on the substantive issues arising in the case would not have been unconstitutional. This is because (1) the accident occurred in Oklahoma, and (2) as in most accident cases, the defendant did not conform its conduct to the law of a particular state, so the application of any other state's law to determine the liability of the defendant would not be "fundamentally unfair."\(^{65}\)

In summary, the policies underlying jurisdictional and choice-
of-law principles are interrelated in the sense that, from a constitutional standpoint, due process notions of "fundamental fairness" impose certain limitations both on the exercise of jurisdiction and on the application of a state's substantive law. The policies are also interrelated in the sense that a state's contact with a transaction may give rise to an interest both in providing a forum for a suit on that transaction and in applying that state's substantive law to regulate rights and liabilities arising out of that transaction. The same factors making it reasonable, hence constitutional, for the forum to exercise jurisdiction under a long-arm statute also make it reasonable and hence constitutional, for the forum to apply its substantive law to the issues in the case. When the sole basis for the exercise of jurisdiction is the existence of contacts between the defendant and the forum, however, the absence of contacts between the forum and the transaction may render the application of the forum's substantive law to the issues involved unreasonable and, hence, unconstitutional. Conversely, in certain circumstances there would be no fundamental unfairness resulting from the application of a state's substantive law against a particular party, although that party could not constitutionally be subject to jurisdiction in that state. Very often, however, the permissibility of the exercise of jurisdiction and the permissibility of the application of a state's substantive law will be coextensive, and in this sense the policies underlying the jurisdiction and choice-of-law areas are interrelated.66

66. I have previously stated that when a state cannot constitutionally exercise jurisdiction under a long-arm statute, its substantive law also cannot constitutionally be applied to the transaction. Consequences, supra note 50, at 1032-34. In retrospect, the statement is not correct, and when it was made it was not consistent with my position that the plaintiff's home state, assuming that it can otherwise obtain jurisdiction over the defendant, can apply its law to allow recovery when the plaintiff is injured in an out-of-state accident having no connection with the forum. See note 61 supra. Similarly, as in World-Wide Volkswagen, so long as a state could exercise long-arm jurisdiction against some party in the case (there it was not disputed that Oklahoma could constitutionally exercise long-arm jurisdiction against the manufacturer and importer of the vehicle), its substantive law could be applied in a suit against another party who was not subject to long-arm jurisdiction in the state. See note 64 & accompanying text supra. A correct statement of my position would be that when a state cannot constitutionally exercise jurisdiction under a long-arm statute over any party in the case or over the particular defendant on the basis of contacts between the defendant and the forum, its substantive law cannot be applied against the defendant in that case. The earlier statement was formulated with reference to the situation existing in Shaffer v. Heitner, 433 U.S. 186 (1977), in which the Court held that long-arm jurisdiction could not be exercised against the nonresident directors of a Delaware corporation. My submission is that the same factors that would make the exercise of jurisdiction under the long-arm statute
unconstitutional in that case would also render the application of that state's substantive law unconstitutional as well. I am not sure that the Delaware incorporation of the company, without more, would constitute a "significant contact or significant aggregation of contacts creating state interests" so as to justify the application of Delaware law on the issue of the directors' liability for breach of their fiduciary duty. If it did, however, I would submit that there would be no "fundamental unfairness" in subjecting the directors to suit in Delaware for breach of their fiduciary duty. Consequences, supra note 50, at 1033-34.