Reflections on Conflict-of-Laws Methodology

Peter Hay

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol32/iss6/7

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.
Reflections on Conflict-of-Laws Methodology

By Peter Hay*

I am glad to participate in the Hastings Law Journal’s dialogue on current problems in conflict of laws. The questions posed are both interesting and timely. I did find it difficult, however, simply to address them seriatim. Instead, I have treated them in the context of a loosely structured and very summary essay; the footnotes contain more detailed analysis and documentation.

Constitutional Limitations on Jurisdiction and Choice of Law

Statements in the case law and in the literature frequently equate choice of law and jurisdiction. In his partial dissent in Shaffer v. Heitner,1 Justice Brennan wrote:

I believe that practical considerations argue in favor of seeking to bridge the distance between the choice-of-law and jurisdictional inquiries. Even when a court would apply the law of a different forum, as a general rule it will feel less knowledgeable and comfortable in interpretation, and less interested in fostering the policies of that foreign jurisdiction, than would the courts established by the State that provides the applicable law. . . . [W]hen a suitor seeks to lodge a suit in a State with a substantial interest in seeing its own law applied to the transaction in question, we could wisely act to minimize conflicts, confusion, and uncertainty by adopting a liberal view of jurisdiction, unless considerations of fairness or efficiency strongly point in the opposite direction.2

* Dean and Professor of Law, University of Illinois. B.A., 1958; J.D., 1958, University of Michigan.


2. Id. at 225-26 (Brennan, J., concurring in part and dissenting in part) (footnote omitted). For further discussion regarding some of the thoughts expressed here, see Hay, The Interrelation of Jurisdiction and Choice-of-Law in United States Conflicts Law, 28 INT'L & COMP. L.Q. 161 (1979) [hereinafter cited as Hay].

[1644]
Of course, it is easier to apply local law. Familiarity with local law may also make it appear to be superior to, and more just than, foreign law, a circumstance that invariably leads courts adhering to the “better law” approach to apply the law of the forum. Courts thus may apply local law in true conflicts cases just because there is local jurisdiction, or they may derive jurisdiction from the applicability of, or the right to apply, local law. An example of the former is Clay v. Sun Insurance Office in which one reason for the Supreme Court’s decision allowing Florida to apply its law to the out-of-state insurance contract was that the defendant company, licensed to do business in Florida, “must have . . . known that it


4. See, e.g., Tiernan v. Westext Transp., Inc., 295 F. Supp. 1256 (D.R.I. 1969); Myers v. Government Employees Ins. Co., 302 Minn. 359, 225 N.W.2d 238 (1974); Schwartz v. Consolidated Freightways Corp., 300 Minn. 487, 221 N.W.2d 665 (1974); Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973); Schneider v. Nichols, 280 Minn. 139, 158 N.W.2d 254 (1968); Mitchell v. Crafts, 211 So. 2d 509 (Miss. 1968); Maguire v. Exeter & Hampton Elec. Co., 114 N.H. 589, 325 A.2d 778 (1974); Gagne v. Berry, 112 N.H. 125, 290 A.2d 624 (1972); Taylor v. Bullock, 111 N.H. 214, 279 A.2d 585 (1971); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Woodward v. Stewart, 104 R.I. 290, 243 A.2d 917, cert. dismissed, 393 U.S. 957 (1968); Hunker v. Royal Indem. Co., 57 Wis. 2d 588, 204 N.W.2d 897 (1973); Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968); Zellinger v. State Sand & Gravel Co., 38 Wis. 2d 98, 156 N.W.2d 466 (1968); Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1967). But see Lichter v. Fritsch, 77 Wis. 2d 178, 252 N.W.2d 360 (1977). It is interesting to note that virtually all cases adopting the better-law approach have been tort or tort-related (wrongful death) actions. Even in Hague v. Allstate Ins. Co., 289 N.W.2d 43 (Minn. 1978), aff’d on rehearing, 289 N.W.2d 50 (Minn. 1979), aff’d, 101 S. Ct. 633 (1981), which involved the question of “stacking” insurance coverage, the lower court carefully noted that this was not an “ordinary contract case” but arose in the context of indemnity for a tortious injury. Id. at 47. For further discussion of Hague, see notes 71-88 & accompanying text infra. See also Hime v. State Farm Fire & Cas. Co., 284 N.W.2d 829 (Minn. 1979), cert. denied, 444 U.S. 1032 (1980). The only exceptions to the general trend towards applying the lex fori under the better-law approach are Hunker v. Royal Indem. Co., 57 Wis. 2d 588, 204 N.W.2d 897 (1973) and Lichter v. Fritsch, 77 Wis. 2d 178, 252 N.W.2d 360 (1977). Hunker applied foreign law as more consistent with the policy of worker’s compensation, while in Lichter, only the application of foreign law permitted recovery. Higher compensation levels thus provided the “governmental interest” for the application of the lex fori in all cases except Lichter and Maguire and therefore also made it the “better law.” The only exception to this pattern is Maguire v. Exeter & Hampton Elec. Co., 114 N.H. 589, 325 A.2d 778 (1974), in which there was an interest in limiting the local defendant’s liability.

5. For a discussion of some constitutional limitations on choice of law, see notes 15-58 & accompanying text infra. The question still remains whether the right (or power) to apply local law makes the choice of that law appropriate.

might be sued there." The result may well have been correct, because "Florida [for regulatory reasons] had sufficient interest in the case to justify application of its law." Florida's interest, however, is a necessary conceptual link. Without this element, it does not follow that amenability to suit also should result in the application of local law. Indeed, if the link—the state's interest—is lacking, the application of local law may be unconstitutional, especially when it imposes or extends liability as in Clay. For this reason, the jurisdictional issue quite apart, Rosenthal v. Warren represents not only a poor choice of law, but it may represent an unconstitutional application of New York law. Plaintiff's domicile alone is not enough to justify applying forum law. As in the case of jurisdiction, there must be a nexus of defendant, litigation, and forum, at least as long as the continued validity of transient jurisdiction remains unclear.

9. Jurisdiction in Rosenthal was based on the attachment of an insurance policy, as in Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). This basis of jurisdiction—when the defendant's only contact with the forum state is the fact that its insurer does business in that state—was later held to be unconstitutional. See Rush v. Savchuk, 444 U.S. 320 (1980).
10. 475 F.2d 438 (2d Cir.), cert. denied, 414 U.S. 856 (1973). In Warren, a New York resident went to Boston to seek the help of a world-renowned surgeon and died after the operation. In a wrongful death action brought in New York, the court applied New York law with respect to damages rather than Massachusetts law, which imposes a $50,000 limit on wrongful death recoveries. The majority's stated reasons for the decision—the interstate nature of the transaction and that the hospital and the surgeon treated patients from all over the world—would seem to apply equally if the two states had different standards of care. In those circumstances, the application of New York law should clearly be unconstitutional. See also Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964).
11. See Reese, supra note 8, at 605. See also note 51 infra.
13. See notes 15-52 & accompanying text infra.
Judicial jurisdiction is the flip side of the coin. *Shaffer v. Heitner,*18 *Kulko v. Superior Court,*16 and *World-Wide Volkswagen Corp. v. Woodson*17 all demonstrate that the applicability of local law18 does not justify, without more, jurisdiction over out-of-state defendants. Relying on *Hanson v. Denckla,*19 Justice Marshall wrote in *Shaffer:* “[W]e have rejected the argument that if a State’s law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute.”20 This language rejects Professor Silberman’s suggestion that, “if a court has the power to apply its own law, it should have the power to exercise jurisdiction over the action.”21 Power to apply local law existed in all three cases,22 but jurisdiction did not automatically follow; once again, one element of the nexus trilogy—defendant, litigation, and forum—was lacking.

Similarly, I find no support in the case law for the second aspect of a suggestion by Professor Sedler. He argues that “when the connection between a party's activities and a State are such that the state constitutionally can exercise jurisdiction over that party under its long-arm act, the State constitutionally can apply its own substantive law to determine the liability of that party.”23 So far, so good:24 the facts giving rise to long-arm jurisdiction typically do relate both the defendant and the cause of action to the forum.

15. *Id.*
18. In *Shaffer,* the majority and the dissent agreed that Delaware law might be applicable. 433 U.S. at 216 (majority); *id.* at 225 n.3 (Brennan, J., concurring in part and dissenting in part). See also *Restatement (Second) of Conflict of Laws* § 309 (1971). In *Kulko,* Justice Marshall conceded that “California may be the ‘center of gravity’ for choice of law purposes . . . .” 436 U.S. at 98. In *World-Wide Volkswagen,* Oklahoma law arguably could have been applied to the issue of products liability under the modern trend that looks to the law most favorable to the plaintiff. See *R. Leflar,* AMERICAN CONFLICTS LAW 274–75 (3d ed. 1977); Kühne, *Choice of Law in Products Liability,* 60 CALIF. L. REV. 1, 2–4 (1972).
19. 357 U.S. 235 (1958). “[The state] does not acquire . . . jurisdiction by being the ‘center of gravity’ of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law.” *Id.* at 254.
22. See note 18 supra.
24. Nevertheless, and contrary to Professor Sedler’s suggestion, it is still open to question whether a state not only “can” but should apply local law, for instance to further the forum’s governmental interests or because it is the “better law.” *Id.* at 1034.
The proffered corollary, however, that "when a state may not constitutionally exercise long-arm jurisdiction over a nonresident party its substantive law should not be constitutionally applicable to determine the liability of the nonresident party either," does not necessarily follow. Often, of course, the statement will be true, but again, at times it will not. Apart from questions about its desirability, is the First Restatement's place-of-injury rule always unconstitutional, in the sense that a New York court could not have applied Oklahoma's products liability law in a case like World-Wide Volkswagen? If Ms. Kulko had sought support modification in New York, could not New York have considered and applied California standards? Or, if Mr. Kulko had moved to a third jurisdiction and if Ms. Kulko had sued there, would that court have been restricted to forum or New York law, or could it also have resorted to California law and practice?

Is not "foreseeability" as desirable a test in choice of law as it is for jurisdiction? Professor Martin argues forcefully and convincingly that it "turns things on their head" to require minimum contacts with the forum state merely to hale... [the defendant] into the forum's court while allowing more tenuous contacts to upset the very outcome of the case. Simple fairness seems to demand that when the forum's intrusion is much more destructive of his interests, as when it applies its own law, the forum be held to at least as high a standard as is exacted in the jurisdiction cases.

Professor Martin acknowledges that the argument might be reversed if the matter were viewed from the perspective of the forum having little interest in trying minimally connected cases, but a great interest, when it has jurisdiction, advancing forum policies by

25. Id. at 1039 (emphasis in original).
26. RESTATEMENT OF CONFLICT OF LAWS § 377 (1934).
27. There may be instances in which application of that rule should be impermissible. For instance, I would have no difficulty accepting the conclusion that application of Cambodian law in the circumstances of Challoner v. Day & Zimmerman, 512 F.2d 77 (5th Cir.), rev'd, 423 U.S. 3' (1975), should have been unconstitutional. The Fifth Circuit reached the same result—inapplicability of Cambodian law—through interest analysis, but was reversed by the Supreme Court. See note 107 infra.
applying forum law.\textsuperscript{31} He would strike the balance in favor of the defendant, however, both because of the constitutional demands for fairness\textsuperscript{32} for the defendant and because of the legitimate concerns of the other jurisdiction, which, \textit{a fortiori}, is more substantially connected to the defendant and the cause of action than is the minimally connected forum. I agree.

While the new jurisdictional decisions continue to use the “minimum contacts” language, originally established by \textit{International Shoe Co. v. Washington},\textsuperscript{33} they go beyond previous doctrine, for instance, through the introduction of the “foreseeability” test of \textit{World-Wide Volkswagen}.\textsuperscript{34} I do not see the “foreseeability” criterion as the substitution of a new, vague, and general test for the earlier “minimum contacts . . . [so that maintenance of the action would not] offend ‘traditional notions of fair play and substantial justice.’”\textsuperscript{35} Instead, while \textit{International Shoe} and subsequent cases\textsuperscript{36} had expanded state court jurisdiction to afford a local forum to the plaintiff, subject only to outer-limits protection for the defendant, the new cases seek to restore greater balance to the pendulum that had swung too far. They are more defendant-oriented. The defendant is not to be haled into court when he or she has not set foot in the jurisdiction even though that state has some interest in regulating him or her,\textsuperscript{37} or when it was not “foreseeable” that the defendant would be haled into court even though it may have been foreseeable, or not unforeseeable, that the defendant’s product \textit{might} cause injury in the forum.\textsuperscript{38} The defendant must have direct contacts,\textsuperscript{39} or have derived a direct benefit\textsuperscript{40} from

\textsuperscript{31} Id. at 880.
\textsuperscript{33} 326 U.S. 310 (1945).
\textsuperscript{34} World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).
\textsuperscript{35} 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
the forum state, or the nature of the defendant's business must be such—for example, nationwide—that the exercise of jurisdiction may be based on the benefits theory or may be considered the price exacted for doing nationwide business—both of which also make for foreseeability.

The jurisdictional decisions thus limit the available fora. Indeed, jurisdictional decisions, such as Hanson v. Denckla, will often shift the focus from choice of law to judicial jurisdiction and, by addressing the latter, avoid considering the former. Nevertheless, multiple fora will still often be available. They should be; concerns for fairness to the defendant must not go entirely at the expense of the plaintiff who, within the constraints discussed, should be able to resort to a convenient forum. If this freedom is pre-

41. See Oswalt v. Scripto, Inc., 616 F.2d 191 (5th Cir. 1980). In Oswalt, a foreign manufacturer utilized a national distributor subject to jurisdiction in the state in which the injury occurred. The court held that the nature of the business activity made the suit "foreseeable." Id. at 199-200. See also Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

42. "This case does not raise, and we therefore do not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff." Shaffer v. Heitner, 433 U.S. 186, 211 n.37 (1977). I have argued elsewhere that this suggestion may preserve quasi-in-rem jurisdiction over some foreign-country defendants. Hay, supra note 2, at 175-76. Another reason the Shaffer/World-Wide Volkswagen line of cases should not be read unduly narrowly is that procedural requirements—for instance, the joinder of multiple parties—may warrant a wider jurisdictional reach.

served in some measure, however, the question about limitations on choice of law again looms large. Only a parallel development—"minimum contacts" (at least) and "foreseeability"—in choice of law will protect the defendant's substantive rights when a minimally connected forum is allowed to exercise jurisdiction.

"Minimum contacts" analysis for jurisdiction and for choice of law should not be the same. The former serve to relate the defendant to the forum state; the latter should do the same for the cause of action. Forum law should not be applied to an unrelated cause of action as against a defendant with minimal jurisdictional connections. This view is a modification of the late Professor Ehrenzweig's goal for the application of the "proper law in the proper forum."43

43. Ehrenzweig, A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach," 18 OKLA. L. REV. 340 (1965). Professor Ehrenzweig pleaded for a limitation of the available fora and the concomitant application of the lex fori in most cases. At the time, his view was unrealistic because the assertion of jurisdiction was then expanding rather than contracting. A severe limitation of jurisdiction that would make the application of the lex fori reasonable in all cases—for instance, jurisdiction limited to the defendant's domicile or principal place of business, advocated by Justice O'Connell in his dissent in State ex rel. White Lumber Sales, Inc. v. Sulmonetti, 252 Or. 121, 128-40, 448 P.2d 571, 574-80 (1968)—is not to be expected, nor would this be desirable. See note 42 & accompanying text supra. As a consequence, the "proper law in the proper forum" requires limitations on the choice of law.

One useful test has recently been suggested with respect to judicial jurisdiction: "Substantive relevance provides a natural test. A contact is related to the controversy if it is the geographical qualification of a fact relevant to the merits. A forum occurrence which would ordinarily be alleged as part of a comparable domestic complaint is a related contact. In contrast, an occurrence in the forum State of no relevance to a totally domestic cause of action is an unrelated contact, a purely jurisdictional allegation with no substantive purpose. If a fact is irrelevant in a purely domestic dispute, it does not suddenly become related to the controversy simply because there are multi-state elements." Brilmayer, How Contacts Count: Due Process Limitations on State Court Jurisdiction, 1980 Sup. Cr. Rev. 77, 82-83. See also id. at 101-102. Thus, "forum/litigation contacts do not automatically suffice to afford jurisdiction." Id. at 101. These ideas obviously also lend themselves to application with respect to choice of law. Professor Brilmayer suggests as much when she urges that the focus be on a state's "legitimate interests" as a precondition to the right to apply the lex fori: "Whether a contact justifies application of a rule depends . . . upon whether there is a
“Foreseeability” in choice of law also may have to work differently from the way it does in jurisdiction. That injury might occur in Oklahoma was foreseeable or, at least, not unforeseeable in World-Wide Volkswagen. On the other hand, in the Court’s view, the New York local dealer could not foresee or expect that it would be haled into court in Oklahoma, but, given the nation-wide nature of its business, Volkswagen of America, Inc. could foresee such an event. The importer and national distributor therefore could be sued where the injury occurred, either on a benefits or a price-of-doing business theory, while the local dealer could not. To both sets of defendants, however, forum law or the law of the place of injury could constitutionally be applied. Similarly, in Kulko, California law could have been applied to the support modification, as the Court acknowledged, but jurisdiction did not lie because of a lack of defendant contacts with California. Finally, after the demise of the Seider v. Roth jurisdictional mechanism, both the exercise of jurisdiction and the application of local law by the New York court in Rosenthal v. Warren may be considered constitutionally improper. The doctor had not solicited business in New York; whatever other connections he might have had with that state were unrelated to the cause of action; and the place of injury was not fortuitous (indeed the place of injury could only be Massachusetts). Application of the plaintiff’s domiciliary law therefore was surely not foreseeable. In Rosenthal, then, the fac-

---

regulatory nexus between the rule and the event comprising the contact. The regulatory explanation linking the contact to the issue must be a bona fide internal law policy. Policies that serve no domestic regulatory function but only conflict-of-laws purposes are not entitled to constitutional recognition. They beg the constitutional question and are the product of decision making processes that do not adequately reflect the interests of other states and the federal system.” Brilmayer, “Legitimate Interests” in Multistate Problems: As Between State and Federal Law, 79 Mich. L. Rev. — (June 1981).

45. The same was true of the national distributor in Oswalt v. Scripto, Inc., 616 F.2d 191 (5th Cir. 1980). Accord, Poyner v. Erma Werke GMBH, 618 F.2d 1186 (6th Cir. 1980); Le Manufacture Francaise des Pneumatiques Michelin v. District Court, 620 P.2d 1040 (Colo. 1980).
46. See note 18 supra.
48. See notes 18, 28 supra.
49. See note 9 supra.
50. See note 10 supra.
tors that make for lack of foreseeability for both jurisdiction and choice of law converge.

These considerations go to Professor Martin's emphasis on constitutionally required fairness to the defendant. They apply, in choice-of-law determinations, to federal concerns as well.

[T]he balance that is being struck is not simply between the forum state and the defendant resisting the application of the forum's law. In any case in which the contacts with the forum state are less than "minimum contacts," the contacts with some other state must be more substantial. Thus the balance is between the plaintiff and the forum state—whose contacts are slight—on one side and the defendant and the state whose law he invokes—whose contacts are substantial—on the other. . . . The alternative to a system of federal law requiring a particular choice of law [in view of the states' inability thus far to evolve common approaches] is to provide for limitations on the states' choice of law.52

This suggestion goes a long way towards achieving a federal balance, which the Supreme Court's decisions under the full faith and credit clause53 have not yet provided.54 I differ with Professor

to some defendants, the court found personal jurisdiction under the Illinois long-arm statute but held that proper venue was in Texas rather than in Illinois: "The operation, the allegedly deficient surgical and post-operative care, and the alleged lack of disclosure to the plaintiff all occurred in Texas. Indeed, although plaintiff was a ward of Illinois, it appears that all events having 'operative significance' in the case are centered in Texas." 501 F. Supp. at 1006. The court thus sustained the venue objections but stated that it was prepared to order a transfer to Texas under 28 U.S.C. § 1406 (1976). 501 F. Supp. at 1006.

52. Martin, supra note 30, at 881. For a discussion of state approaches, see notes 89-
136 & accompanying text infra.
53. U.S. CONsT. art. 4, § 2.
54. In the early, pre-Erie decision in Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932), a full-faith-and-credit case, the Court announced a choice-of-law rule, based on a finding that New Hampshire lacked the requisite interests to apply its own law. The Court stated that a sister state's law must be applied unless doing so would be "obnoxious" to the forum state's law and policy. In subsequent cases, the "obnoxiousness" test was used to permit the application of local law. See Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935). The distinction between due process and full faith and credit had seemed to disappear in Carroll v. Lanza, 349 U.S. 40 (1955); yet the "obnoxiousness" test, which, if satisfied, dispenses with the full-faith-and-credit requirement, reappeared in Nevada v. Hall, 440 U.S. 410 (1979). The balancing that inheres in the "obnoxiousness" test was finally carried over to the recognition of worker's compensation awards, and possibly to judgments, by the plurality in Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980), a deplorable opinion that can only add to the existing confusion and uncertainty. See notes 158-59 & accompanying text infra. See also Allstate Ins. Co. v. Hague, 101 S. Ct. 633 (1981) (discussed at notes 71-88 & accompanying text infra).
Martin’s analysis only as follows. In the passage quoted, Professor Martin contrasts the forum state that has “less than ‘minimum contacts’” with another state whose contacts must necessarily be more substantial. The same is true, it seems to me, when the forum state does have minimum contacts: the contacts of another state may still be more substantial. If the focus is only on due process to the defendant, minimum contacts may indeed suffice in that they may meet the foreseeability test in choice of law discussed above. However, “[t]he minimum contacts approach to legislative jurisdiction also has obvious benefits for interstate relations.” Federalism should require that states not “push [the] application of their laws to the limits” at the expense of sister states—a thought that evokes the old, but lost, distinction between due process and full faith and credit in the choice-of-law process. Federal concerns may require more than the most minimal (foreseeable) contacts of the defendant and the cause of action to the forum state. This is another reason why minimum contacts for jurisdiction and choice of law are not, and should not be, the same, even though they may overlap factually in a particular case.

My second disagreement with Professor Martin’s analysis concerns his exclusion of the substance-procedure characterization from the minimum-contacts requirement for the application of forum law. Surely, however, a state should not be able to bootstrap itself into the position to apply any part of its law by simply characterizing an issue as “procedural,” no matter how universally the particular characterization has been accepted. To put it differently: a universally accepted characterization—for instance, that general statutes of limitation are “procedural”—may appear to be “reasonable” at first blush. I suggest that the inquiry must go beyond this. Both Home Insurance Co. v. Dick and John Hancock Mutual

55. See notes 45-51 & accompanying text supra.
56. Martin, supra note 30, at 881 (footnote omitted).
57. Id. See also World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980) (express reference to the “principles of interstate federalism”).
58. See note 54 supra.
59. “A forum state may always apply its own ‘procedural’ law to a case no matter how minimal its contacts with the defendant.” Martin, supra note 30, at 883. “A state should be able to label an issue ‘procedural’ and apply its own law as long as that label appears reasonable.” Id. at 885.
60. 281 U.S. 397 (1930) (Texas could not constitutionally apply its law to invalidate a contractual time limitation in an insurance contract, made in Mexico and covering the insured boat in Mexican waters only, when the insured was domiciled in Texas, but at all
Life Insurance Co. v. Yates pointed the way, and Clay v. Sun Insurance Office is distinguishable. Even Wells v. Simonds Abrasive Co. and the early decision in McElmoyle v. Cohen are distinguishable because the dismissal on the basis of the forum's shorter statute of limitations was not on the merits. But what if a forum with jurisdiction but no contacts with the transaction applies its longer "procedural" statute of limitations to a cause of action barred by the only law to which it has a connection? Justice Brandeis's dictum in Home Insurance saw no difference between this and cases like Wells and McElmoyle. Why should the "procedural" characterization in the area of limitations be treated differently from the attempted, but impermissible, procedural characterization in Yates? To put the distinction solely on the basis that the latter affected the outcome while the former merely relates to the remedy, and not the substance, is too facile. The longer limitation of the unconnected forum prolongs the defendant's exposure, does not advance any interests of the forum, and may well frustrate policies of the connected state or states. Schreiber v. Allis-Chalmers

relevant times was a resident of Mexico.)

61. 299 U.S. 178 (1936) (reversal of Georgia court's characterization of materiality of misrepresentation as a matter of "procedure," to be governed by local law).

62. Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964). In Clay, the longer Florida statute of limitation extended liability but did not create it—admittedly, a highly debatable distinction. See note 67 & accompanying text infra. In addition, the contract of insurance by its own terms provided world-wide coverage and contained no choice-of-law clause in favor of Illinois where it was issued and where the time limitation may have been valid, the loss had occurred in the forum, and the company "knew" that the insured property had been removed to Florida. 377 U.S. at 181-82.


64. 38 U.S. (13 Pet.) 312 (1839) (Georgia permitted to apply its own shorter statute of limitations to bar enforcement of a South Carolina judgment).

65. See generally R. J. Weintraub, Commentary on the Conflict of Laws 515 (2d ed. 1980).

66. "[I]n the absence of a contractual provision, the local statute of limitation may be applied to a right created in another jurisdiction even where the remedy in the latter is barred." 281 U.S. at 409.

67. "A 'hog-wild' characterization which results in application of the law of a state that has no substantial relation to the facts violates the federal due process clause." R. A. Leflar, American Conflicts Law 177 n.9 (3d ed. 1977) (citing Home Ins. Co. v. Dick, 281 U.S. 347 (1930)). "Home Insurance . . . and . . . Yates warn us that a forum's procedural characterization can go too far. It goes too far not because of any technical rule of characterization, but for the same 'fair play and substantial justice' reasons that make it unconstitutional when any court deprives any person of his life, liberty, or property by applying a law which has so little substantial connection with the issues in his case as to make the appli-
Corp.\textsuperscript{69} is a good example. As Professor Martin noted elsewhere,\textsuperscript{69} the decision quite arguably reached an unconstitutional result. Thus, whether or not an issue has traditionally been characterized as procedural, the automatic application of local law does not and should not follow. The minimum contacts test should also encompass characterization, for the sake of both due process to the defendant and responsibility to the “federal concerns” to which I referred earlier and will do so again below.\textsuperscript{70}

The United States Supreme Court’s most recent conflict-of-laws decision, in \textit{Allstate Insurance Co. v. Hague},\textsuperscript{71} requires separate comment. In brief, the Court upheld Minnesota’s application of forum law, which permitted “stacking” of uninsured motorist insurance benefits, to a claim arising from the accidental death of a Wisconsin resident in Wisconsin.\textsuperscript{72} The uninsured operator of the other vehicle was also a Wisconsin resident. Writing for the plurality, Justice Brennan—as he had in his partial dissent in \textit{Shaffer}\textsuperscript{73}—identified three “contacts” with the case, which, in the aggregate, satisfy the newly announced test “that for 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 its law is neither arbitrary nor fundamentally unfair.”\textsuperscript{74}

First, the fact that the decedent had worked in Minnesota on a commuting basis for fifteen years and was thus a member of the Minnesota work force gave Minnesota an “interest.” “While employment status may implicate a state interest less substantial than does resident status, that interest is nevertheless important...”\textsuperscript{75}

\textsuperscript{69} R. A. LEFLAR, AMERICAN CONFLICTS LAW 120 (3d ed. 1977).
\textsuperscript{68} 448 F. Supp. 1079 (D. Kan. 1978), rev’d, 611 F.2d 790 (10th Cir. 1979). Upon federal transfer from Mississippi, the Kansas trial court in \textit{Schreiber} had refused to apply the longer Mississippi statute of limitation to a cause of action brought by a Kansas plaintiff for injuries suffered in Kansas, reasoning that the Mississippi transferor court itself could not have entertained the action for lack of jurisdiction, or, alternatively, that Mississippi would not apply its statute to an unrelated claim. The Tenth Circuit reversed. For a recently suggested test which would have led to a different result, see note 43 \textit{supra}.
\textsuperscript{69} Martin, \textit{Statutes of Limitations and Rationality in the Conflict of Laws}, 19 WASHBURN L.J. 405 (1980). For further comment, see note 107 \textit{infra}.
\textsuperscript{70} See text accompanying notes 102, 114, 148-52, 161-63 \textit{infra}.
\textsuperscript{71} 101 S. Ct. 633 (1981).
\textsuperscript{72} Id. at 636, 640.
\textsuperscript{73} \textit{Shaffer v. Heitner}, 433 U.S. 186, 223 (1977) (Brennan, J., concurring in part and dissenting in part). For a criticism of this approach, see Hay, \textit{supra} note 1, at 173-74.
\textsuperscript{74} 101 S. Ct. at 640.
The State of employment has police power responsibilities towards the non-resident employee. . . . Such employees use state services and amenities and may call upon state facilities in appropriate circumstances." Justice Brennan summarizes: "Employment status is not a sufficiently less important status than residence . . . when combined with [the decedent's] daily commute . . . and the other Minnesota contacts . . . to prohibit the choice-of-law result . . . " I agree that one type of status is not necessarily less important than another, but its importance depends on the purpose for which one asks the question. That employment status in Minnesota should give that state "police power responsibilities" and an interest in what happens between two Wisconsin residents in Wisconsin and in the insurance obligations entered into in Wisconsin is a jump in logic that I fail to follow. It would be stretching it to apply this reasoning even if the accident had occurred while the decedent was commuting to or from work in Minnesota; however, even that had not been the case.

The second contact—Allstate's doing business in Minnesota—is said to be important for the same reason that it was in Clay. I quoted Clay's language earlier and attempted to show why that reasoning does not follow. A further important distinction is that, in Clay, the loss was incurred in Florida. This difference, however, is not noted by the Court.

The third contact—the plaintiff's move to Minnesota and appointment there as the estate's personal representative following the accident—is equally irrelevant. Surely both the subjective determination that "[t]here is no suggestion that [the plaintiff] moved to Minnesota in anticipation of . . . litigation or for the purpose of finding a legal climate especially hospitable to her claim" and the conclusion that Minnesota has an interest in the administration of a local estate and, with it, in a recovery by the personal representative, are bootstrap arguments. A postaccident change of domicile ordinarily should not be enough because of

75. Id. at 640-41.
76. Id. at 642.
77. Id. at 642-43.
78. See text accompanying notes 6-7 supra.
79. 101 S. Ct. at 643.
80. Id. at 643-44.
81. "[T]he post-accident residence of the plaintiff-beneficiary is constitutionally irrelevant to the choice-of-law question." Id. at 653 (Powell, J., dissenting) (citing John Hancock
the potential for forum shopping; administration of a Minnesota estate occurred only because the plaintiff, after her postaccident change of domicile, chose to press the insurance claims in Minnesota.

In sum, the plurality presents no analytical framework. After positing a requirement of "significant" contacts (presumably for due process purposes), three contacts are addressed of which only the first is real. That contact, the Minnesota-based employment relation of the decedent, unconnected as it is with the occurrence, is too slim a reed on which to hang the choice-of-law decision. Justice Stevens's concurrence distinguishes between the full faith and credit aspect of the case—infringement on Wisconsin's sovereignty—and due process to the defendant. I agree that the two provisions address different concerns and, moreover, that a state's interest in not having its sovereignty infringed may properly be kept out of private transactions and occurrences. I find troublesome Justice Stevens's conclusion that due process was satisfied simply because the parties' expectations were not frustrated and there was no element of unfair surprise, both findings resulting from the 


82. While the decedent worked in Minnesota and the insurer had insured against losses in Minnesota, "the fact remains that the accident actually took place in Wisconsin, that Minnesota therefore lacked any meaningful contact with the case, and that Wisconsin substantive law must therefore apply where it conflicts with that of Minnesota. By analogy, the fact that the airplane accident may take place anywhere within several hundred miles of the scheduled route, and that the airline will be subject to the laws of the place of the accident wherever it occurs, has never given nearby states carte blanche to apply their own laws in favor of the survivors of their residents." Martin, supra note 30, at 887-88. In a comprehensive study of the employment factor as a contact creating a "legitimate interest" on the part of Minnesota in the application of the lex fori, Professor Brilmayer arrives at the same result. Brilmayer, "Legitimate Interests" in Multistate Problems: As Between State and Federal Law, 79 Mich. L. Rev. — (June 1981).

83. 101 S. Ct. at 644-45 (Stevens, J., concurring).

84. See notes 94-95 & accompanying text infra. Apart from Wisconsin's sovereignty, there is another consideration: "The Full Faith and Credit Clause is one of several provisions in the Federal Constitution designed to transform the several States from independent sovereignties into a single, unified Nation. . . . [T]he fact that a choice-of-law decision may be unsound as a matter of conflicts law does not necessarily implicate the federal concerns embodied in the Full Faith and Credit Clause." 101 S. Ct. at 645-46 (Stevens, J., concurring). I cannot agree that the conclusion follows from the basic principle. See notes 52-54 & accompanying text supra; note 152 infra.
from the facts that the decedent had paid three uninsured motor-
ist premiums, covering his three vehicles, and that "stacking" is
the more usual rule of substantive law. Thus, while I find the
analytic framework appropriate, the analysis individualizes too
much with respect to the particular case and provides no test
based on, for instance, the "significance" of the required contacts.
Justice Powell's dissent, while accepting the plurality's basic test
of "significance," correctly finds significant contacts lacking: "The
Court's opinion is understandably vague in explaining how trebling
the benefits to be paid to the estate of a nonresident employee fur-
thers any substantial state interest relating to employment. Min-
nesota does not wish its workers to die in automobile accidents,
but permitting stacking will not further this interest."86

The plurality of four and the single concurrence thus attempt
to state a test. The plurality largely ignores its own test and manu-
factures "contacts," while the single concurrence accepts a most
minimal connection—rather than a more-than-minimum contact,
as I have argued87—for the application of forum law. The four-one-
three decision88 is thus less than helpful in addressing our growing
fragmentation.

Choice of Law in State Courts

"Governmental-interest" and "functional" analysis conceives of conflicts law as adjective law, that is, the mechanism for reaching the right result in substantive law terms. The analysis under these approaches thus places emphasis on the goals, policies,

85. 101 S. Ct. 648-49 (Stevens, J., concurring).
86. Id. at 654 (Powell, J., dissenting).
87. See text accompanying notes 42-69 supra.
88. Justice Stewart did not participate in the decision of the case.
89. See B. Currie, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963); Currie, Notes
   on Methods and Objectives in the Conflict of Laws, 1959 DUKE L.J. 171; Sedler, The
   Governmental Interest Approach to Choice of Law: An Analysis and Reformulation, 25
   U.C.L.A. L. Rev. 181 (1977). For an extensive critique of Professor Currie's approach, see
   Brilmayer, Interest Analysis and the Myth of Legislative Intent, 78 Mich. L. Rev. 392
   (1980).
90. See A.T. von Mehren, Recent Trends in Choice-of-Law Methodology, 60 CORNELL
    L.Q. 927 (1975); A.T. von Mehren, Special Substantive Rules for Multistate Problems:
    Their Role and Significance in Contemporary Choice of Law Methodology, 88 HARV. L.
    PROBLEMS 341-75 (1965); R.J. Weintraub, COMMENTARY ON THE CONFLICT OF LAWS (2d ed.
    1980).
value content, and ultimate result of the substantive laws available for application. Other legal systems assign an ordering function to conflicts law and thus view it as a separate body of law (private international law), which determines the applicable law in a neutral and objective fashion without regard to the substantive result, a point to which I return below. The difference in conception of the nature and function of conflicts law—or more accurately perhaps, the misunderstanding of this difference—has led to much criticism of the new American approaches. Some of it is unjustified. Nevertheless, it is true that governmental interest analysis often tends to be parochial if the forum is an "interested" state. Moreover, it tends to inject public law notions into essentially private transactions and disputes. "Comparative impairment" analysis does no better because its focus also is on "governmental," rather than on a party's, interests.

91. See notes 100-02 & accompanying text infra.
92. See, e.g., Neuhaus, Legal Certainty versus Equity in the Conflict of Laws, 28 LAW & CONTEMP. PROB. 795, 802 (1963): "In a democratic and pluralistic society, the standards for judgment cannot be purely personal or irrational; the judge must be guided by generally recognized standards capable of rational cognition. This is the essential difference between a democratic legal order and so-called Khadi justice which decides individual cases in accordance with the judge's sense of equity and without reliance on any objective standards." See also Kegel, The Crisis of Conflict of Laws, 112 HAGUE ACADEMY OF INTERNATIONAL LAW, RECUEIL DES COURS 91 (1984-II).
93. See Kahn-Freund, General Problems of Private International Law, 143 HAGUE ACADEMY OF INTERNATIONAL LAW, RECUEIL DES COURS 139, 264 (1974-III): "Only . . . in the court of what Brainerd Currie in his peculiar language called the 'disinterested third state' has the notion of a 'false conflict' an intelligible meaning." This assessment is an overstatement. See note 103 & accompanying text infra. Similarly, Professor Ehrenzweig's lex fori orientation drew sharp criticism. Professor Evrigenis called the approach "anti-conflicts law" (anti-mati&re). Evrigenis, Book Review, REVUE HELLENIQUE DE DROIT INTERNATIONAL 471, 473 (1965). Professor Kahn-Freund thought that Professor Ehrenzweig's approach "is perhaps no more than a very considerable expansion of the French doctrine of the vocation subsidiaire and the German doctrine of the Verlegenheitsanwendung of the lex fori, [that is, the] application [of forum law] where for some reason no other law can be applied. . . . These doctrines are intended to fill gaps, to remove an exceptional 'embarrassment' (this is what the German word really means). Ehrenzweig elevated this counsel of despair to a rule of virtue. . . ." Kahn-Freund, General Problems of Private International Law, 143 HAGUE ACADEMY OF INTERNATIONAL LAW, RECUEIL DES COURS 139, 247 (1974-III) (footnote omitted).
94. Kegel, The Crisis of Conflict of Laws, 112 HAGUE ACADEMY OF INTERNATIONAL LAW, RECUEIL DES COURS 91, 207 (1984-II); A. ANTON, PRIVATE INTERNATIONAL LAW 41-42 (1967). The criticism is especially valid in cases not involving personal injury or wrongful death. In the latter, there may well be a governmental interest in compensating the victim which, in turn, may lead to the application of a law favoring the plaintiff. See note 4 supra. See also R. J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 345-46 (2d ed. 1980).
A major problem with these approaches is ascertainment of the "governmental interests" or legislative "policies." As Judge Breitel observed in Tooker v. Lopez:96 "Intra-mural speculation on the policies of other states has obvious limitations because of restricted information and wisdom. It is difficult enough to interpret the statutes and decisional rules of one's own state."97 Even if the policies could be discerned more clearly and with more assurance, the question arises whether it is right to inject them into the choice-of-law process in areas in which there is no regulatory concern.98 In substantive law, courts always will attempt to achieve justice in the particular case when established rules would wreak havoc or when their application would be outrageous.99 After all, that is the origin of equity jurisprudence. The exceptional, outrageous case apart, however, the development of substantive law, whether by case law or statutory reform, has been concerned with the integrity of the system—its stability and predictability. Car-

97. Id. at 597, 249 N.E.2d at 411, 301 N.Y.S.2d at 543 (Breitel, J., dissenting) (emphasis added). Similarly, "[i]t is one thing . . . to identify the social interests which substantive rules of law seek to further in internal situations and quite another to project these interests into situations with a foreign element." A. ANTON, PRIVATE INTERNATIONAL LAW 39 (1967). Professor Currie opposed the weighing of policies and interests, among other reasons, because "[n]ot even a very ponderous Brandeis brief could marshal the relevant considerations . . . ." B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 182 (1963).
99. See Neuhaus, Entwicklungen im Allgemeinen Teil des Internationalen Privatrechts, in INTERNATIONALES PRIVATRECHT UND RECHTSVERGLEICHUNG IM AUSGANG DES 20. JAHRHUNDERTS—FESTSCHRIFT FÜR GERHARD KEGEL 23, 25 (A. Lüderitz & J. Schröder eds. 1977) (author's translation: "It is a healthy principle of classic conflicts law that the judge, as a rule, simply applies the law of that jurisdiction to which the facts of the case have the closest connection and that he corrects, by means of the public policy defense, only those substantive results that are manifestly and unacceptably unjust [offensichtlich unerträglich]." See also Bodenheimer, The Need for a Reorientation in American Conflicts Law, in INTERNATIONALES RECHT UND WIRTSCHAFTSPRÜFUNG—FESTSCHRIFT FÜR F.A. MANN 123, 140 (W. Flume, H. Hahn, G. Kegel & K. Simmonds eds. 1977).
ried over to conflicts law, this is what the German scholar Kegel calls "conflicts justice," as opposed to case-by-case attempts to achieve justice in substantive terms. What he means is that conflicts law is also a "system" and that its internal integrity is important. "Conflicts justice" means that such important goals as predictability and uniformity of result should not have to yield to the inward-looking results often reached by the governmental-interest, comparative-impairment, and better-law approaches. In the United States context, I might add that the federal concerns, mentioned earlier, call as much for "integrity" in the choice-of-law process as do the concerns of the parties or of the particular forum. Of course, the states of the Union, just as states internationally, do have legitimate regulatory concerns. However, all conflicts systems have been able to accommodate legitimate local regulatory concerns (ius cogens) and party expectations, including their protection against outrageous results. Our federal structure does not justify the elevation of state law, in general, to the position of a forum's overriding "governmental interest."

To be sure, the state of the law allows professors of conflict of laws to devote much class time and a great deal of scholarly ink to the dissection of cases and hypothetical facts to identify, argue, and balance "interests," "policies," and the "concerns" of connected and "interested" states, or to seek out obvious or hidden "false conflicts." Given the present state of the law, we must do

102. See note 4 & accompanying text supra.
103. The identification of "false conflicts" is indeed helpful for it will often permit conflict avoidance and lead to the legitimate application of forum law or to the application of the law of one of two other states in cases in which the forum is disinterested. The classic examples of "false conflicts" are identity of the potentially applicable laws, difference in laws but identity of result, and the "disinterest" of the other jurisdiction. There are other variations. Professor Cavers lists four kinds of false conflicts. D. CAVERS, THE CHOICE-OF-LAW PROCESS 89 (1965). At least three additional false-conflict situations have been identified. See Comment, False Conflicts, 55 CALIF. L. REV. 74, 76 (1967). All but the most obvious (identity of law or of result) require the determination of the "interests" of the states involved. This will be possible in the few cases of "self-limiting" laws, a concept frequently discussed in the international literature. See, e.g., Kegel, Die selbstgerechte Sachnorm, in GEDÄCHTNISCHRIFT FÜR ALBERT A. EHRENZWEIG 51 (E. Jayme & G. Kegel eds. 1976) (with references to the literature); De Nova, An Australian Case on the Application of Spatially Conditioned Internal Rules, 22 REVUE HELLENIQUE DE DROIT INTERNATIONAL 25 (1969). See also Sedler, Functionally Restrictive Substantive Rules in American Conflicts Law, 50 S. CAL. L. REV. 27 (1976). The disinterest of the foreign jurisdiction may also appear from its
so in order to give our students the necessary equipment, at least

conflicts rule referring to the forum (renvoi), a short-cut in the inquiry of whether a false conflict is present of which American courts as a rule, and without much justification, do not avail themselves. See Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 96 N.W.2d 814 (1959). But see Restatement (Second) Conflict of Laws § 8, Comment k (1971).

Other than in the few circumstances discussed, identifying “false conflicts” is as difficult as determining governmental interests in “true conflicts.” See note 97 & accompanying text supra. The recent decision in Bing v. Halstead, 495 F. Supp. 517 (S.D.N.Y. 1980) may serve to illustrate the difficulty. In Bing, an Arizona domiciliary had sent a letter to a New York domiciliary which was forwarded to the latter’s long-term residence in Costa Rica. The plaintiff-recipient suffered mental distress in Costa Rica and instituted an action for damages in New York. No jurisdictional issue was raised, but summary judgment dismissing the complaint was granted because Costa Rican law did not recognize the alleged tort (negligent or intentional infliction of mental distress), although both New York and Arizona did. Id. at 520. The court concluded that when “interest analysis does not point clearly to the law of any jurisdiction, the law of the place where the tort occurred prevails.” Id. (citing the third rule of Neumeier v. Kuehner, 31 N.Y.2d 121, 128, 286 N.E.2d 454, 458, 335 N.Y.S.2d 64, 70 (1972), and Cousins v. Instrument Flyers, Inc., 44 N.Y.2d 698, 699, 376 N.E.2d 914, 915, 405 N.Y.S.2d 441, 442 (1978)). See note 123 infra. The court found that neither New York nor Arizona had an interest. 495 F. Supp. at 520.

The result is questionable. On interest analysis alone, it is not clear that the alleged intentional tort occurred in Costa Rica where the letter was read. It might instead be concluded that the alleged tort occurred in Arizona where the conduct occurred, thereby giving Arizona an “interest” in the regulation of the conduct. Cf. Marra v. Bushee, 317 F. Supp. 972 (D. Vt. 1970) (in intentional tort context, state where defendant principally acts is state of dominant interest); 2 E. Rabel, The Conflict of Laws 334 (2d ed. 1960) (same). Restatement (Second) Conflict of Laws § 154, Comment c (1971) (same). See also Ley Organica del Poder Judicial, art. 184 (1977) (Costa Rica) (jurisdiction for tort claims lies at the place where the wrongful conduct or act took place). Is it clear, moreover, that New York has only a general interest in compensating its domiciliary “but not when neither conduct nor injury occurred within its borders and when the party seeking protection of its laws is a long-time resident of another jurisdiction”? 495 F. Supp. at 520. Is it clear, without specific inquiry into Arizona substantive and conflicts law, that Arizona would not have applied its law in favor of a New York plaintiff in Arizona when the conduct occurred in Arizona? Furthermore, what is Costa Rica’s interest in shielding one American from liability and denying compensation to another? Finally, is the whole thing not very possibly a “false conflict”? First, it is at least arguable that Costa Rica does recognize this tort if intent can be proved (similar to the French domage morale). See Costa Rica Código Civil art. 701 (1975). Second, the Neumeier rules preserve the “place of the tort” rule (whatever that “place” may be) when other connecting factors do not predominate. See note 123 infra. Under Neumeier Rule 1, the common domicile of the parties is one such exception. In Bing, the parties did not have the same domicile but both of their domiciles recognized the alleged tort. 495 F. Supp. at 520. Had the action arisen in Costa Rica, it might have applied the law of the parties’ common nationality (here, their two respective domiciles), for which there is precedent elsewhere. Compare Decision of the Cour d’appel de Nimes, Conflicts de Lois, 62 Revue Critique de Droit International Privé 51, 80 (1973) (French law as law of common nationality) with Cass. civ., Conflicts de Lois, 56 Revue Critique de Droit International Privé 705, 728 (1967) (German law applied to car accident of two Frenchmen in Germany); and compare Regulation of Dec. 7, 1942, § 1 [1942] Reichsgesetzblatt I 706 (Germany) with BGHZ 57, 265 (Nov. 23, 1971). See also Heller, “Wirkungsstatut” als Anknupfungs begriff? 10 Zeitschrift für Rechtsvergleichung 1, 12 (1969) (Austrian OGH,
the vocabulary, to handle choice-of-law issues encountered in practice. But do we contribute to the task of the courts? I doubt that we do much more than reinforce Judge Breitel’s conclusion in the minds of judges facing true conflicts problems, thereby either driving them to apply local law whenever they may constitutionally do so or to count contacts mechanically. Both subvert the goals of proper interest analysis. What is worse, in elaborating our theories and approaches, we often reinvent the wheel. Little conflicts writing, with such notable exceptions as those of the late Professor Ehrenzweig and of Professors Juenger, von Mehren, and Nadelmann, considers the study of conflicts abroad. If it did, we would see that many of our theories have been previously advocated, tried, and largely abandoned.

The foregoing is not to assert that the decision in Bing was wrong. I do mean to suggest, however, that a broad view of false-conflicts analysis might easily have led to a different result, that such a view of false-conflicts analysis indeed underlies the first of the Neumeier rules, and that even straight interest analysis (assuming a true conflict) would have permitted the application of either New York law or Arizona law. I therefore conclude that the identification of a false conflict, beyond the simple cases, is no easier for the courts than interest analysis in true conflicts. A straightforward rule approach is often helpful. Given the choice, I would not have applied Costa Rican law just because the letter happened to have been opened there rather than in New York to where it had been sent, but would have read Neumeier Rule I as providing for the application of local law whenever liability exists under the law of the common domicile of the parties or under the law of both their individual domiciles.

104. See text accompanying note 97 supra.


106. For instance, as Professor Nadelmann has pointed out, governmental-interest analysis is not new nor is severe criticism of it any more novel. Nadelmann, Internationales Privatrecht: A Sourcebook on Conflicts Theory Analyzed and Reviewed, 17 HARV. INT’L L.J. 657, 672 (1976) (citing De la Morandiére, Preface in H. Battifol, LA CAPACITE DES ETRANGERS EN FRANCE i, ii-xi (1929)). For a discussion of the social purpose of laws, see Nadelmann, Internationales Privatrecht: A Sourcebook on Conflicts Theory Analyzed and Reviewed, 17 HARV. INT’L L.J. 657, 669-70 (1976). For the creation of special forum rules for cases with foreign law elements, see R. Ago, TEORIA DEL DIRITTO INTERNAZIONALE PRIVATO (1934). The concept of “the most real connection” resembling the “most significant relation-
The state of our "individual state conflicts law" has been, is, and continues to be fragmented. Professor Ehrenzweig’s call for the "proper law in the proper forum" presupposed such stringent jurisdictional limitations that the application of the lex fori would then no longer be a problem. We have indeed moved closer to a limitation of available fora. However, our federal structure will not—and should not—get us to the narrow limits envisioned by Professor Ehrenzweig or Justice O’Connell. Similarly, constitutional limits on choice of law are, and will probably remain, outer limits at best. Different fora thus are available, and forum shopping, for choice-of-law purposes, will continue, given the often permissible and locally preferred application of the lex fori. To reiterate, even if permissible within the still too wide constitutional


107. Confusion and fragmentation also reign in federal courts. As Professor Weintraub noted, the goal of the Erie-Klaxon doctrine—intrastate uniformity—may be endangered when federal courts must adhere to state law precedents that are vulnerable to change in the wake of the conflicts revolution. R. Weintraub, Commentary on the Conflict of Laws 569-72 (2d ed. 1980). In Lester v. Aetna Life Ins. Co., 433 F.2d 884 (5th Cir. 1970), cert. denied, 402 U.S. 909 (1971), the court attempted to apply the modern approach in holding that it was not required to apply the state’s choice-of-law rule when the state had no interest in the matter. 433 F.2d at 890. In Challoner v. Day & Zimmermann, Inc., 512 F.2d 77 (5th Cir.), vacated, 423 U.S. 3 (1975), the court tried the same technique but was reversed for departing from the principle set forth in Klaxon. Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3 (1975). In Schreiber v. Allis-Chalmers Corp., 448 F. Supp. 1079 (D. Kan. 1978), rev’d 611 F.2d 790 (10th Cir. 1979), see notes 68-69 supra, the Tenth Circuit required the trial court to apply the statute of limitations of the transferor state which, on the facts of the case, may well have violated due process. In McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657 (3d Cir. 1980), the Pennsylvania trial court had correctly applied Pennsylvania’s borrowing statute but was reversed for its reading of the applicable Ohio statute. Against clear evidence that the Ohio statute of limitations commenced to run with the injury’s occurrence, id. at 669-72 (Higgenbotham, J., dissenting), the court held that Ohio would no longer adhere to this view in the future but would adopt the more widely used discovery-of-injury test. Id. at 666-67. Challoner thus endangers intrastate uniformity, and Schreiber and McKenna permit, each in a different way, interstate forum-shopping.

108. See note 43 & accompanying text supra.

109. See note 42 supra.

110. See note 43 supra.
limits, this is not in the interest of the litigation at hand, of the legal system, or of our federal structure.

Lest some readers (or all) have by now concluded that the author is a dinosaur of the First Restatement era, I plead that I am not. The First Restatement was condemned as too territorial and too mechanistic. It may have provided "conflicts justice," in the sense mentioned above, but it achieved this goal by means of provisions that were oversimplified or over-general and therefore tended to lead to more than the usual share of hard cases. The tension between "conflicts justice" and "substantive justice" grew too large. We recognized this in the Second Restatement, as have other legal systems with similarly fixed and inflexible rules.

The answer to our disenchantment with the First Restatement, however, should not be to do what the market will bear constitutionally by way of the admittedly easier application of local law. This neither helps the parties nor serves our federalism. Internationally, we stand isolated, except for the growing use of choice-of-court and choice-of-law clauses. Instead, we should attempt the formulation of new principled rules on the basis of the Second Restatement approach.

111. Many of the concrete, definite rules did work and, for that reason, have been retained in the Second Restatement, sometimes in modified form. This is particularly true with respect to issues affecting interests in land. Restatement (Second) of Conflict of Laws §§ 223-224, 226-236, 238-239, 241-243 (1971). See also id. § 191 (sale of chattels: "where under the terms of the contract the seller is to deliver the chattel"); § 193 (principal location of the insured risk); § 195 (law of the place where the promissory note is payable); § 196 (where services are to be rendered); § 197 (transportation: place of dispatch or departure).

112. See note 132 infra.


114. See notes 52-58 & accompanying text supra. "Federalism" in my sense is not "territorialism"; nor do I understand the Supreme Court's reference to "interstate federalism" in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980), as resurrecting old notions of territorial sovereignty. "Federalism" rather addresses the coordination of the legal systems of the states, whereby the reach and applicability of a state's law may or may not be territorially limited. See P. Hay, Federalism and Supranational Organizations 80-87 (1966).


117. See Reese, Choice of Law in Torts and Contracts and Directions for the Future, 16 Colum. J. Transnat'L L. 1, 39-42 (1977); Reese, Choice of Law: Rules or Approach, 57
The Second Restatement, with its generalities and lack of priorities, lends itself to all comers: First-Restatement adherents, governmental-interest proponents, and even better-law advocates can all be accommodated in the “Dream Home.”

We can all profess the same, and continue to act differently. However, in a series of increasingly concerned articles, Professor Reese, the Reporter for the Second Restatement, has taken the position that the Restatement’s approach indeed was not intended for continuous ad hoc decisionmaking, encompassing all existing and future approaches. Instead, he sees the Second Restatement as providing an approach towards the elaboration of new rules for choice

118. The connecting factors in provisions such as §§ 145 and 188 (tort and contract) are expressly “to be evaluated according to their relative importance with respect to the particular issue.” Restatement (Second) Conflict of Laws §§ 145(2), 188(2) (1971) (emphasis added). The incorporation, by reference, of the general policies and objectives contained in § 6 will, of necessity, often point in different directions in a particular case and thus will give little concrete guidance to the court. See Battifol, Le pluralisme des méthodes en droit international privé, 139 HAGUE ACADEMY OF INTERNATIONAL LAW, RECUEIL DES COURS 75, 106 (1973-II). Vagueness and uncertainty may continue in this area unless courts are willing to elaborate rules, based on the Restatement’s approach, giving them the force of precedent. Some are not willing: “It is undesirable to lay down prematurely major premises based on shifting ideologies in the choice of law.” Neumeier v. Kuehner, 31 N.Y.2d 121, 130, 286 N.E.2d 454, 459, 335 N.Y.S.2d 64, 71 (1972) (Breitel, J., concurring). With respect to the Restatement’s issue-by-issue approach, compare Reese, Choice of Law in Torts and Contracts and Directions for the Future, 16 COLUM. J. TRANSNAT’L L. 1, 42-43, (1977), with Hay, Unjust Enrichment in the Conflict of Laws: A Comparative View of German Law and the American Restatement 2d, 26 AM. J. COMP. L. 1-49 passim, particularly at 48-49 (1978).


120. Cheatham & Reese, Choice of the Applicable Law, 52 COLUM. L. REV. 959 (1952), provided the background and source for § 6 of the Second Restatement. See Restatement (Second) Conflict of Laws § 6(2), Reporter’s Note (1971); Reese, Conflict of Laws and the Restatement Second, 28 LAW & CONTEMP. PROBL. 679, 682 (1963). The article suggested two additional policies: the desirability of applying forum law unless there is a good reason for not doing so, and the application of the law that would do justice in the individual case. Cheatham & Reese, Choice of the Applicable Law, 52 COLUM. L. REV. 959, 964-65, 980-81 (1952). Professor Reese reiterated the first policy in 1984. Discussion of Major Areas of Choice of Law, 111 HAGUE ACADEMY OF INTERNATIONAL LAW, RECUEIL DES COURS 311, 342 (1964-I). The second policy comes close to a “better-law,” result-selective approach. Neither policy was ultimately adopted by the American Law Institute in the formulation of § 6 of the Second Restatement. Nevertheless, the general policies of § 6 continue to enable a court to inject better law considerations into its decisions, while § 6(2)(b)—“relevant policies of the forum”—fairly invites governmental interest analysis and also allows consideration of forum law as being the “better law.”

of law. The New York Court of Appeals's decision in Neumeier v. Kuehner did just that after many years of struggle and vacillation. It has found followers, but also critics who would perhaps reject anything but the new found flexibility—"Khadi justice" as a European commentator uncharitably calls it—and has not even received consistent application in its state of origin.

This is not the place to debate the pros and cons of Neumeier; that decision simply stands as an example, much to the New York court's credit, of an attempt to fashion rules from chaos and "approaches." It is interesting to note—although we have scarcely done so, let alone tried to learn from it—that the American "conflicts revolution" has stirred significant debate in Europe and so far has resulted in three significant developments: the Austrian

122. Reese, Choice of Law in Torts and Contracts and Directions for the Future, 16 COLUM. J. TRANSNAT'L L. 1, 39-42 (1977); Reese, Choice of Law: Rules or Approach, 57 CORNELL L. REV. 315 (1972); see also Reed, supra note 8.

123. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972). The "Rules" adopted by the decision are as follows: (1) the law of common domicile of guest passenger and host driver determines the standard of care owed; (2) there is no liability if the driver acts in the state of his or her domicile and the law of that state does not provide for liability; there is liability if the guest is injured in the state of his or her domicile and that law does permit recovery; (3) in other cases, "normally" the law to be applied is the law of the place of the accident, subject to displacement. Id. at 128, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 69-70.


127. See Rosenthal v. Warren, 475 F.2d 438 (2d Cir.), cert. denied, 414 U.S. 856, (1973); Bing v. Halstead, 495 F. Supp. 517 (S.D.N.Y. 1980). Contrary to Professor Leflar, see note 125 supra, I believe that the Neumeier rules can be extended and applied beyond host-guest cases. See also Reed, Choice of Law in Torts and Contracts and Directions for the Future, 16 COLUM. J. TRANSNAT'L L. 1, 16 (1977). Thus, both Rosenthal (Neumeier Rule 2) and Bing (Neumeier Rule 1, modified) are examples. For discussion of these two cases, see text accompanying notes 50-51 supra. Arguably and by analogy, the Neumeier rules can even be generalized beyond tort. For instance, both the most-significant-relationship test and Neumeier Rule 2 (second part) point to the application of California law in Lilienthal v. Kaufman, 239 Or. 1, 395 P.2d 543 (1964). See note 12 supra.
conflicts law and the Swiss and Common Market draft laws. All reflect our experience, and some provisions, in my opinion, are distinct improvements over the Second Restatement. The European statutes reverse the Restatement’s approach. Rather than emphasizing factors of equal weight, which might lead to a determination of the most significant relationship, the provisions set out concrete rules, for particular situations, to be supplemented, by a reference to the most closely connected jurisdiction. The most


“closely connected” law is not a new idea in Europe, but the emphasis on particular facts is. For us, it is a way to fill in the Second Restatement’s approach; for the Europeans, it is the starting point, with the general test to help with the cases not specifically addressed in the particular rules. Whether a particular set of rules is considered to be “territorial” or intended to strike a different balance, the point is that some concrete rules come first, subject to gap-filling or displacement by a more general test, such as the proviso to Neumeier’s Rule Three. In the interests of “conflicts justice,” without sacrifice of concerns for “substantive justice,” this seems to me the way to go.

Future Directions

The goal of predictability and fairness can be achieved in a number of ways: elaborating special rules for multistate problems; uniform state legislation; federal common law; federal legislation; federal treaty. I fear, however, that none provides a solution, either because it is not practicable, because it is undesirable, or both.

Special multistate rules are neither practicable nor desirable:

with id. art. 120(1) (“closest connection”) and id. art. 129 (concrete rules for tort); Convention on the Law Applicable to Contractual Obligations, 23 O.J. Eur. Comm. (No. L266) 1 (1980), art. 4 (“closest connection” with presumptions as to the place of the closest connection) in connection with id. arts. 5-6 (special rules for certain consumer contracts and individual employment contracts, respectively) and id. arts. 8-14 (material validity, formal validity, scope of provisions, capacity, assignment, subrogation, burden of proof). See also the earlier EEC Preliminary Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations, Commission Doc. No. XIV/397/72, Rev. 1, art. 10 reprinted in 21 Am. J. Comp. L. 587, 588-89 (1973) (tort governed by the law of the place of injury, to be displaced, in certain circumstances, by the law of the state having a “closer connection” to the case).

133. See note 106 supra.
135. Neumeier v. Kuehner, 31 N.Y.2d 121, 128, 286 N.E.2d 454, 458, 335 N.Y.S.2d 64, 70 (1972): “Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multistate system or producing great uncertainty for litigants."
136. See notes 100-102 & accompanying text supra.
137. See note 90 supra.
the former for the reasons stated subsequently with respect to state or federal legislation,\textsuperscript{139} and the latter because the introduction of “multistate rules” into state law, even if practicable, would create interstate differences in substantive rules (“what is the reach of statute x compared to y?”) or conflicts rules, the difference—no doubt, and cynically assumed—to be resolved in favor of the \textit{lex fori}. “Governmental interests” previously assumed, in most instances, to exist in favor of the forum would be \textit{codified}, the “obnoxiousness” \textsuperscript{140} test would automatically be met, and the \textit{lex fori} would reign supreme. What, however, makes local lawmakers more system or federal-conscious than a court? What, except academic desire and proper academic concern, will make a legislature or a court produce rules for “multistate” transactions different from intrastate transactions, in recognition of the parties’ interests? Such a “global” view is not to be expected. This improbability apart, “multistate” rules, if individual state law, would also be undesirable because resulting differences in state law would now surely meet a constitutional test for their applicability.\textsuperscript{141} Diversity and fragmentation may increase or, at least, go unabated.

I will not waste the reader’s time on the practicability—yes, it would be desirable—of uniform state legislation. If, as I had occasion to show over ten years ago, substantive uniform legislation relative to multistate problems has had a low record of adoption,\textsuperscript{142} then the adoption of state conflicts legislation, even if proposed as a uniform law,\textsuperscript{143} is a utopian dream. Saddled with no-win budget

\begin{footnotes}
\item 139. See notes 142-43 & accompanying text \textit{infra}.
\item 140. See note 54 \textit{supra}.
\item 141. See notes 54, 140 & accompanying text \textit{supra}.
\item 143. The National Conference of Commissioners on Uniform State Laws has adopted criteria for the determination of whether action on a particular subject is “desirable and practicable.” Criteria indicating that the development of uniform laws in a particular area is desirable include: “obvious reason and demand for the act,” “reasonable probability” of adoption by a “substantial number of states,” and great prejudice and inconvenience from the lack of uniformity. Criteria indicating that the development of uniform laws in a particular area would not be desirable include: absence of “prior legislative [or] administrative experience” and that the subject matter may be “controversial because of differing social, economic, or political policies or philosophies among the states.” \textit{Handbook of the National Conference of Commissioners on Uniform State Laws} 196-98 (1967). Beyond the efforts of the American Law Institute to “restate” conflicts law, there has not been “obvious . . . demand for [a uniform] act.” Given the current fragmentation, moreover, there is also
\end{footnotes}
battles, and school and welfare issues, legislatures will not turn to conflicts law for "rest and relaxation."

To some, the time is not "ripe"\(^\text{144}\) to legislate conflicts rules. This is a sentiment heard through the ages,\(^\text{145}\) and yet it has not stopped countries from adopting conflicts codes in the past\(^\text{146}\) or from attempting major codifications in modern times.\(^\text{147}\) The codifications were not necessarily perfect nor may they prove to be in the future. In my view, however, they are more useful starting points than are approaches advising or condoning ad-hoc determinations.

If revision cannot be done successfully on the state level, then how? The Supreme Court could overturn Klaxon;\(^\text{148}\) the decision does not rest on constitutional principles.\(^\text{149}\) But the Court very recently has made it quite clear that it will not do so.\(^\text{150}\) In stating its position, the Court addressed neither whether use of the state choice-of-law rules might be unconstitutional under the circumstances\(^\text{151}\) nor whether there was not some federal court responsi-


\(^\text{145.} \)F. VON SAVIGNY, VOM BERUF UNSERER ZEIT FÜR GESETZGEbung UND RECHTswissensCHAFT 49 (Berlin 1814).

\(^\text{146.} \)Thus, Germany adopted an incomplete conflicts code as the introductory law (Einführungsgesetz) to its Civil Code as early as 1896. It has been supplemented by a number of individual statutes and a sizeable body of case law. See note 103 supra.

\(^\text{147.} \)See note 128 supra.


\(^\text{149.} \)The Court did state that "the prohibition declared in Erie . . . extends to the field of conflict of laws. . . . Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side." 313 U.S. at 496. The statement assumes that in rendering conflicts decisions, federal courts are indeed "coordinate." However, the constitutional underpinnings of Erie originate with the statement that "federal courts assumed . . . the power to declare rules of decision which Congress was confessedly without power to enact as statutes" and led to the conclusion that "except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." Erie R.R. v. Tompkins, 304 U.S. 64, 72, 78 (1938). Without going into the many problems raised by Erie with respect to the remaining appropriateness for federal common law, it appears that federal power exists in choice of law, see note 152 infra, and that Klaxon turns on policy considerations which now bear reexamination.


\(^\text{151.} \)See notes 68-69, 107 & accompanying text supra.
bility in ordering interstate or state-foreign country relationships. That view, unfortunate as it may be, is the law. If there is one thing the federal courts are uniquely qualified—and, in my view, called upon—to do, it is to order the relation between and among the states and between and among them and foreign nations.

If ever there is room for “federal common law,” it is here. This is not to say that some problems would not remain, especially in a diversity jurisdiction, for instance with respect to the relationship of the Federal Rules of Civil Procedure to state law, but choice of law could be federal law, not only in federal courts but, 152. “Responsibility for allocating spheres of legal control among member states of a federal system cannot sensibly be placed elsewhere than with the federal government.” Baxter, Choice of Law and the Federal System, 16 STAN. L. REV. 1, 29 (1963). See also Hay, International versus Interstate Conflicts Law in the United States, 36 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 585 (1970); Horowitz, Toward a Federal Common Law of Choice of Law, 14 U.C.L.A. L. REV. 1191, 1194 (1967); Maier, Coordination of Law in a National Federal State: An Analysis of the Writings of Elliott Evans Cheatham, 26 VAND. L. REV. 209, 235 (1973). It is unfortunate that Justice Stevens, in his concurrence, and, by neccessary implication, the plurality in Allstate Ins. Co. v. Hague, 101 S. Ct. 633, 650 (1981), disagree: “It is not this Court’s function to establish and impose upon state courts a federal choice-of-law rule . . . .”

153. See Walker v. Armco Steel Corp., 446 U.S. 740 (1980) (restrictive reading of Rule 3 results in lack of conflict with state rule and consequent application of the latter; concern for uniformity of federal procedure may also have supported the contrary result). See also Edelson v. Soricelli, 610 F.2d 131 (3d Cir. 1979). In Edelson, the court held that, under the Erie doctrine, the federal district court, acting under its diversity of citizenship jurisdiction, was precluded from entertaining a Pennsylvania medical malpractice claim until the claimant had first sought arbitration before a panel created by the Pennsylvania Health Care Services Malpractice Act of 1975. The court found that there were no countervailing considerations, see Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958), that would require a contrary result. 610 F.2d at 139. The arbitration panels created by the Pennsylvania statute have extensive powers to make findings of fact, to determine liability and to award damages. Their determinations may be appealed for a trial de novo to the state court of common pleas where they may be introduced as evidence. The dissent by Judge Rosenn thus concluded that by “creating a separate judicial forum, Pennsylvania has attempted to limit the right of access of residents and non-residents, at least in the first instance, to a Pennsylvania court.” Id. at 145 (Rosenn, J., dissenting). However, “the issue of judicial function for diversity purposes is a question of federal, not state, law.” Id. at 143-44 (quoting Baltimore Bank for Cooper. v. Farmers Cheese Coop., 583 F.2d 104, 112 (3d Cir. 1978)) (“Congress adopted the policy of opening the doors of the federal courts to all diversity cases involving the jurisdictional amount to assure suitors from a foreign state of an impartial and neutral forum.”). Judge Rosenn thus concluded that “this court has a duty to provide that independent forum.” 610 F.2d at 142. The case may be compared with Wheeler v. Shoemaker, 78 F.R.D. 218 (D.R.I. 1978), where the court found that a similar statute did not oust federal jurisdiction because a contrary result would run counter to the federal interest to allow full and fair litigation before a jury. Id. at 226. The Pennsylvania Statute in Edelson was subsequently overturned on state constitutional grounds: Mattos v. Thompson, 421 A.2d 190 (Pa. 1980).
through the Supremacy Clause, in state courts as well. This means towards a unified approach has been missed so far.

Federal legislation and the exercise of federal treaty-making power are also possible, but, I am afraid, are equally utopian ways of ordering choice of law. The power to implement the Full Faith and Credit Clause remains largely unexercised, and our record of participation in international efforts to unify substantive or even conflicts law is pitiful. The task, once again, falls upon the courts, if it is to be achieved at all.

_Thomas v. Washington Gas Light Co._ and _Allstate Insurance Co. v. Hague_ show us a Supreme Court out of touch with conflicts law, in theory or in practice. In _Thomas_, choice of law and


Congress recently attempted to implement the full faith and credit clause with respect to the scandalous and growing problem of child-snatching by the noncustodial parent. In an amendment to the Pneumococcal Vaccine Medicare Coverage Act, Pub. L. No. 96-611, 94 Stat. 3566 (1980), Congress amended chapter 115 of title 28, United States Code, by inserting a new § 1738A, which requires full faith and credit to "any child custody determination made consistently with the provisions of this section by a court of another State." The section details when a determination is "consistent" and includes such jurisdictional bases as that the state is the "home state" of the child (six months' residence with one parent), or has a significant connection with the child and at least one parent, or the child is physically present and an emergency exists. _Id._ § 8(a). The section does not, and could not, deal with the jurisdictional issues raised by _May v. Anderson_, 345 U.S. 528 (1953), which, in analogy to the divisible divorce concept of _Estin v. Estin_, 334 U.S. 541 (1948), held that a court could not cut off the custody rights of an absent parent without personal jurisdiction over that parent. See R. Weintraub, _Commentary on the Conflict of Laws_ 248-50 (2d ed. 1980). Congress cannot legislate full faith and credit for determinations rendered without jurisdiction or, put differently, legislate deprivation of due process (if that is what underlies _May_). The new section may therefore be useful only in those cases in which the rendering court has personal jurisdiction over the noncustodial parent and custody modification is left to the court rendering the initial custody decision.

156. 448 U.S. 261 (1980).


158. _Supra_.

159. _Supra_.
recognition of worker’s compensation awards (why not judgments?\textsuperscript{158}) get intermingled, and the plurality endorses a balancing test, which creates uncertainty with respect to established principles of full faith and credit.\textsuperscript{159} Hague, which in essence adopts Justice Brennan’s position in Shaffer with which I began this essay,\textsuperscript{160} opens the floodgates to the application of the \textit{lex fori} whenever jurisdiction exists. This is not “interstate federalism”\textsuperscript{161} indeed, the fragmentation it sanctions runs counter to that goal. Why jurisdiction requires limits in the interest of “interstate federalism” while conflict of laws, the more important question, does not require limits or receives only lip service,\textsuperscript{162} escapes me. The problem is thus once again in the lap of the state courts and legislatures. But, as I hope I have shown, it should not be there. So long as it is there, subject only to the outer limits of \textit{constitutional} control, a great deal of parochialism will continue to prevail. The Court has the power and the authority for activism in choice of law.\textsuperscript{163} I wish it would use it.

Short of federal initiative, judicial or legislative, state courts or legislatures could do more than suffer or perpetuate current ad-hoc approaches that leave domestic litigants baffled, afraid, or unwilling—for reasons of fruitless expense—to invoke foreign, including sister-state, law, and that leave foreign-country contracting partners to the vagaries of choice-of-court and choice-of-law clauses. What could state courts do?

We should recognize, first of all, that many of our “theories” and “approaches” have their origin in conflicts relative to statutes, and the arguably regulatory interests they advance. Our theories, however, generalize beyond these regulatory interests and thus unnecessarily involve purely private spheres.\textsuperscript{164} Second, with governmental-interest analysis properly restricted to areas of regulatory concern, the many available international conventions, ranging
from agency to adoption to international sales,\textsuperscript{165} provide ready-made models for uniform legislation. Absent such legislation, courts should turn to the elaboration of principled and generally applicable rules on the basis of the decades of insights gained from experimentation and the great amount of effort and learning represented by the Second Restatement. This will not end fragmentation, however. Many individual states will continue to go their separate ways. However we turn, the choice-of-law process as an ordering device seems to have been “led into a dead-end alley.”\textsuperscript{166} I thus come full circle to the need for federal direction. The present definition of outer limits of what is constitutional—“minimum contacts”—is fine for judical jurisdiction when party convenience is the main consideration at stake. The same minimum-contacts standards are not enough for legislative jurisdiction that affects a defendant’s substantive liability.

I thus end on a pessimistic note. Among federal systems in the world, we are among the few without a national body of substantive law. Even Switzerland, which divides some substantive law-making between the Federation and the Cantons, considers conflicts law to be a federal concern, as do both East and West Germany.\textsuperscript{167} In their cases, federal conflicts law primarily serves international concerns. We do not even address international concerns through federal action,\textsuperscript{168} and, faced with much greater diversity internally, eschew all federal “ordering” in the private sphere of choice of law, deigning to act only when an issue rises to the level of constitutional (usually due process) importance or touches upon “federal interests” of some importance.\textsuperscript{169} It has been

\textsuperscript{165} See note 155 supra. See also the 1980 Draft Convention Prescribing a Uniform Law for the International Sale of Goods (prepared by UNCITRAL), 19 INTL LEG. MAT. 671 (May 1980).


\textsuperscript{167} See notes 129-130 supra.


\textsuperscript{169} For the “test” which seems to emerge from the case law, see Hay, Unification of Law in the United States: Uniform State Laws, Treaties and Judicially Declared Federal Common Law, in LEGAL THOUGHT IN THE UNITED STATES OF AMERICA UNDER CONTEMPORARY
thirty-four years since the Supreme Court mandated a choice-of-law rule;¹⁷⁰ that decision is now largely regarded as an anomaly.¹⁷¹ This may or may not be a proper judgment; it may also be that the Court's record in mandating choice-of-law rules was not good when it was active in the field, up to perhaps the turn of the century,¹⁷² and in only isolated cases since then.¹⁷³ None of this, given the state of choice of law today, should preclude another try.


¹⁷¹. See R. Weintraub, Commentary on the Conflict of Laws 526-30 (2d ed. 1980).
