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### Razing Conflicts Facades to Build Better Jurisdiction Theory: The Foundation—There is No Law but Forum Law

Stanley E. Cox

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## Articles

### RAZING CONFLICTS FACADES TO BUILD BETTER JURISDICTION THEORY: THE FOUNDATION—THERE IS NO LAW BUT FORUM LAW

STANLEY E. COX\*

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*But—and this is the important thing—  
inadequate theory leads sooner or  
later to unfortunate decisions . . . .*<sup>1</sup>

I. INTRODUCTION: CONFLICTS THEORY MUST BE OVERHAULED  
BECAUSE IT ASSUMES THE IMPOSSIBLE—THAT A FORUM  
CAN APPLY ANOTHER’S LAW

My thesis is that courts exist only to interpret, create and apply their own government’s laws. If my thesis is true, most conflicts theory needs to be overhauled. In the usual conflicts situation, a court improperly assumes it has the ability to choose from among several potentially interested sovereigns’ laws. A court in Massachusetts, for example, mistakenly assumes that once a defendant is before it, it is *then* faced with the choice of what law will apply to the litigation. The Massachusetts court also improperly believes, in a case involving multi-state contacts with, for example, Rhode Island, Connecticut, and Massachusetts, that the Massachusetts court can apply the law of Rhode Island or Connecticut as easily or fairly as if the case had been brought in Rhode Island or Connecticut. The Massachusetts court may even mistakenly believe that it has a duty, under our federal system, to provide adjudication for cases involving application of Rhode Island or Connecticut law. All of these assumptions are wrong. In reality, a state can only create and apply its own law. This truth was partially recognized by Walter Wheeler Cook, the main contemporary critic of vestedness,<sup>2</sup> but has been largely ignored or considered of little importance by modern conflicts scholars. Cook, however, was precisely on target. His

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1. WALTER W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 186 (1942) [hereinafter COOK, LOGICAL & LEGAL].

2. *See id.* Under vested rights, the occurrence of a key event in a jurisdiction meant that a state’s law was applied to govern the cause of action. *See also infra* note 18.

mistake was that he did not carry his own thesis through to its full and logical conclusion. In this Article I re-explore the full implications of the truth that a court may create or interpret the substantive law only of its own state.

The implications of the truth that courts exist only to apply the law of their own state are both structurally descriptive but necessarily also practically prescriptive. At the structurally descriptive level, the nature of sovereign power is such that it is not possible<sup>3</sup> for courts adjudicating cases to do anything other than apply their own law to those cases. Whatever the court says it is doing, it is in reality applying its own law. I spend some time in this Article establishing this truth (that regardless of what the court says it is doing, it always applies its own law), because the implications of this truth are largely ignored, inevitably leading to bad results. On the prescriptive side, such bad results should be avoided. Thus, even if courts incorrectly believe that they are able to apply another state's laws, they should not attempt to do so. If the court could not conscionably have applied its own substantive law to the case, it should never have had the case to begin with. If the court can conscionably apply its own law, it should do so straightforwardly, without the smoke and mirrors of choice of law "rules."

As implied in the immediately preceding paragraph, several important subtruths logically follow from the proposition that courts can and should apply only their own substantive laws. I discuss in this Article three implications of the truth that courts exist only to apply their own sovereign's laws, the first two of which receive primary attention in this work.<sup>4</sup> These three implications are: 1) a court only has valid jurisdiction when it conscionably can apply its own substantive law to the litigation before it; 2) a court that has jurisdiction to apply its own law should always straightforwardly do so, ignoring and/or discarding choice of law rules whenever possible; and 3) a court cannot create shared sovereignty between governments, and should only construe the existence of shared sovereignty when the interested sovereigns unequivocally have negotiated for shared sovereignty. To briefly elaborate on these three subtruths further:

The first implication of the truth that a court never applies or is able to apply another's law is that courts always should be able to tell, *at the front end*

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3. As I explain *infra* (see notes 220-26 and accompanying text), only via treaties or other explicit intergovernmental arrangements which rearrange sovereignty between states may a court apply another's laws. The law is then no longer really another's since it is incorporated in the sovereign's own laws. In the U.S. federalism context, I do *not* believe that the Full Faith and Credit Clause was designed to enable sister states to apply other sister states' laws. I plan to develop this point in greater detail in a future work.

4. I plan in a future work to focus on the U.S. experience under the Full Faith and Credit Clause to expand on the idea that only via explicitly shared sovereignty may courts apply others' laws. See *supra* note 3.

of the litigation, whether the court will be able to bind the defendant by its judgment. Courts should only be able to bind when they are able to apply their own law. In other words, if a court is capable only of applying its own law, regardless of what it says it is doing, it makes no sense to focus on the shape or color of that law (especially of another sovereign) at the back end of the litigation, in an attempt to justify the court's power. The court should instead *only* be allowed to bind the defendant when it legitimately has a right to apply *its* law to the conduct. When there is no jurisdiction to apply forum law, there is no jurisdiction, period.

Defendants are not jurisdictionally present in some abstract sense but only so that a court may bind them by *its* law. The threshold test, therefore, for jurisdiction is whether the forum state has such connection to the defendant, for purposes of the proposed litigation, that it would be fair for the forum state to bind the defendant by the forum state's law, without regard to that law's shape.<sup>5</sup> In short, the defendant's contacts with the forum, and not what law the forum purports to apply, are the threshold measure of whether the forum court may legitimately apply law to the defendant's conduct.<sup>6</sup> This means there is no meaningful distinction between the constitutional limits which should be placed on personal jurisdiction and on the ability to apply forum law.<sup>7</sup> Recognizing

5. As I emphasize later (*see infra* notes 193-95 and accompanying text), the fact that a state may have connectedness with the defendant sufficient to preliminarily adjudicate his claims hardly exempts the shape of law it fashions to govern his conduct from further scrutiny under other constitutional or fairness principles. Proper (meaning in the U.S. system, constitutional) jurisdiction means only that the state is not prohibited from attempting to fashion substantive law to bind the parties through the proposed litigation. In other words, jurisdiction is a preliminary and negative test on the court's legitimacy. If the state does not have proper jurisdiction, it may not attempt to shape law regarding the proposed litigation; if the court does have proper jurisdiction, this does *not* mean that the law it shapes is immune from further attack.

6. As the immediately preceding note indicates, the "legitimacy" referred to is only a preliminary and negative kind of legitimacy to bind the parties. I am not saying jurisdiction, in the form of judgment ultimately issued, *should* be honored, especially internationally, just because contacts exist. I am saying there is no reason even to consider enforcing a judgment, *unless* contacts existed or the defendant consented to judgment. Contacts-based jurisdiction is a necessary but not sufficient condition for ultimate recognition of the court's judgment.

7. The purposes served by legislative and adjudicative jurisdiction are the same, which point I constantly, if perhaps more obliquely, have argued in previous works. *See* Stanley E. Cox, *Would that Burnham Had Not Come to Be Done Insane! A Critique of Recent Supreme Court Personal Jurisdiction Reasoning, An Explanation of Why Transient Presence Jurisdiction Is Unconstitutional, and Some Thoughts About Divorce Jurisdiction in a Minimum Contacts World*, 58 TENN. L. REV. 497 (1991) [hereinafter Cox, *Burnham Insane*]; Stanley E. Cox, *Jurisdiction, Venue, and Aggregation of Contacts: The Real Minimum Contacts and Federalism Questions Raised by Omni Capital, International v. Rudolf Wolff & Co.*, 42 ARK. L. REV. 211 (1989) [hereinafter Cox, *Jurisdiction, Venue & Aggregation*]; Stanley E. Cox, *The Interrelationship of Personal Jurisdiction and Choice of Law: Forging New Theory through Asahi Metal Industry Co. v. Superior Court*, 49 U. PITT. L. REV. 189 (1987) [hereinafter Cox, *Forging New Theory*]; Stanley E. Cox, Comment, *Giving the Boot to the Long-Arm: Analysis of Post-International Shoe Supreme Court Personal*

this interrelation means it is impossible for a court to purport to cure jurisdictional defects through the ruse and fiction that it will apply another sovereign's law. Instead, jurisdiction only exists if the forum may apply its own law.

The second implication of the truth that a court always applies only its own law is that most conflicts rules are a deceptive myth. If a court legitimately takes jurisdiction of a case, the forum court should always frankly and directly pursue its own state interests, never pretending that it has the ability to accurately weigh the conflicting concerns of several states also interested in the underlying controversy. A court's function, as recognized by original and most modern proponents of interest analysis, is to implement its own government policy, not to create international law or exceptions to government policy. Accordingly, so far as the adjudicating court is concerned, there is never a conflict between competing laws of different sovereigns, but only the single question: what type of law will the forum, based on *its* policies and interests, fashion to govern the defendant's conduct.

Finally, the third implication of the truth that the forum always applies its own law is that only explicit intergovernmental agreements can alter the court's function as implementer of (solely) sovereign law. Only by giving up sovereignty through an agreement that creates a new merged sovereignty does a government gain power to apply "another's" laws.<sup>8</sup> Although I set forth the

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*Jurisdiction Decisions, Emphasizing Unrealized Implications of the Minimum Contacts Test*, 75 KY. L.J. 885 (1986-87) [hereinafter Cox, *Unrealized Implications*].

The Court unfortunately and mistakenly has usually dichotomized personal jurisdiction and choice of law theory. See, e.g., Cox, *Forging New Theory*, *supra*, at 190 n.1. My effort in this, as in previous articles, is to criticize the Court's illogic in this area and suggest alternative approaches which would put jurisdiction theory back on the right track. For other views on the interrelation or lack thereof between personal jurisdiction and choice of law doctrine, cf. Alfred Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960 (1981); Harold Maier & Thomas McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249 (1991); Earl Maltz, *Visions of Fairness-The Relationship Between Jurisdiction and Choice of Law*, 30 ARIZ. L. REV. 751 (1988); James Martin, *Personal Jurisdiction and Choice-of-Law*, 78 MICH. L. REV. 872 (1980); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529 (1991) [hereinafter Perdue, *Personal Jurisdiction*]; Courtland Peterson, *Jurisdiction and Choice of Law Revisited*, 59 U. COLO. L. REV. 37 (1988); Bruce Posnak, *The Court Doesn't Know its Asahi From Its Wortman: A Critical View of the Constitutional Constraints on Jurisdiction and Choice of Law*, 41 SYRACUSE L. REV. 875 (1990); Robert Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of Shaffer v. Heitner*, 63 IOWA L. REV. 1031 (1978); Patricia Youngblood, *Constitutional Constraints on Choice of Law: The Nexus Between World-Wide Volkswagen Corp. v. Woodson and Allstate Insurance Co. v. Hague*, 50 ALB. L. REV. 1 (1985).

8. In reality the "otherness" disappears for purposes covered by the agreement, since the agreement is the preempting law of both sovereigns. It is now sovereign law; i.e., the forum is still applying only its own law.

broad outline of this third insight in this Article, I do not explore here any of the U.S. full faith and credit issues, intending to pursue these matters in greater detail in a separate article.<sup>9</sup>

In this Article I do not attempt to persuade legislators who are devising statutory law or courts who are fashioning common law as to the shape of the state's substantive law, or how that law should be influenced by the presence of multi-state contacts. Instead, my goal in this Article is more modest and more radical. I insist that courts should not pretend they are doing anything other than applying their own law when they deal with multi-state situations. The body of the Article proceeds in three parts. In Part II, I present and analyze variations of a simple personal injury hypothetical to demonstrate that the defendant should always be able to determine at the front end of litigation whether the court in which suit has been filed will have potentially<sup>10</sup> legitimate power to apply law to his conduct. I also preliminarily explain in Part II why sovereigns should not attempt to apply others' laws under a mistaken view that such actions promote international cooperation.

In Part III, I offer an analysis and synthesis of the key insights of two of vested rights' main critics, Walter Wheeler Cook and Brainerd Currie. Walter Wheeler Cook persuasively used vested rights logic against itself. His key local law insight was that even vested rights advocates realized that no state can compel extraterritorial application of its own law.<sup>11</sup> Brainerd Currie built on Cook's analysis by demonstrating the emptiness of the First Restatement choice of law rules as a matter of sound public policy. His key correct motivating insight was insistence that law should only be applied when the government that generated the law has legitimate substantive interest in the underlying dispute.<sup>12</sup>

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9. In the U.S. context, I conclude this means specifically that the Full Faith and Credit Clause has no prospective application in the modern jurisdictional world. Under my view, the Full Faith and Credit Clause was not designed to compel a state to apply another state's law, but only to require enforcement of judgments already obtained in sister states. This idea is to be developed in greater detail in a future work. See *supra* note 3.

10. The power is only potentially legitimate because jurisdiction is a negative test. True legitimacy includes value and policy factors apart from defendant connectedness. See also *supra* notes 5-6 and *infra* notes 193-95 and accompanying text; cf. *infra* notes 227-37 and accompanying text.

11. This was part of vested rights' foundational counterattack to the comity theory that states could act as surrogates to exercise other states' power. Walter Wheeler Cook objected to vestedness' rules as arbitrary and indefensible in light of vestedness' own concession that no sovereign could compel extraterritorial application of its own law. See *infra* notes 66-68, 71-75 and accompanying text.

12. Both vestedness and interest analysis failed to stick with and pursue their key foundational insights through to the logical conclusion that limitations on jurisdiction must be tied to ability to apply forum law. Accordingly, both theories properly have been indicted. See *infra* notes 71-169 and accompanying text.

My argument in Part III is that these foundational insights were never fully combined as complementary principles. Combined they mean that a court only has power over a defendant when it has a legitimate interest in applying its law to his conduct.<sup>13</sup> Vestedness, local law, and interest analysis theorists all foundered in their common failure to indict the illogical personal jurisdiction “realities” of their time. Courts were then (and still are now) impermissibly taking jurisdiction of cases in which they could not legitimately apply their own law—cases in which their own government had no legitimate interest. Conflicts “rules” improperly reinforced this jurisdictional malaise by purporting to empower forums neutrally and objectively to “choose” from among competing sovereigns’ laws. The rejection of territorial jurisdictional principles, however, should have cleared the way for every state to apply through its own courts its own law. I argue that no state has a right to claim jurisdiction in any other situations. When courts purport to take jurisdiction and apply or interpret another’s law, confusion, frustration of legislative policy, and outright discrimination are predictable and unfortunate results.

In Part IV, I preliminarily defend against potential charges that restricting adjudication only to those states that may apply their own substantive law is somehow bad policy, either in a practical or in a moral sense. I insist that the sole purpose of obtaining jurisdiction is to apply one’s own law. In the modern jurisdictional world, there is no need for states to serve as proxies for others’ interests. Such “jurisdiction grabbing” may in fact constitute interference rather than assistance. If a state chooses to take jurisdiction of litigation also involving others’ interests, the state must always recognize this is not being done for the others’ sake, but rather to promote some home state policy. Pretending that jurisdiction is required to foster cooperation or mutual respect masks the jurisdictional reality that several sovereigns often have sufficient connectedness to a controversy to apply their laws to the dispute, and that these interested sovereigns have different views of how the litigation should come out.

Nor is there anything discriminatory or parochial about always applying forum law when the forum has legitimate connectedness to the controversy. In fact, since all attempts to apply non-forum law are masking myths, when the

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13. I thus insist even more strongly than interest analysis on “*lex fori*” as the only defensible approach to application of law. I defend against charges of parochialism later and insist that it is only the “half loaf” *lex fori* approach adopted by interest analysis which is indefensibly parochial. See *infra* notes 170-237 and accompanying text. To give a hint of what is to come, however, and as the immediately following text indicates, the problem with interest analysis parochialism is that it sometimes could be demonstrated to be arbitrary in situations where the forum court lacked interest in the underlying controversy. Once this jurisdictional nonsequitur is cured by recognizing that a court cannot have jurisdiction of a case unless it has interest in the underlying controversy, so called “parochialism” loses any taint of arbitrariness and instead becomes by definition the manifestation of legitimate government interest.

forum straightforwardly acknowledges that it is applying its own law, two related side benefits occur. First, any defects in the forum law that would otherwise be masked are starkly revealed so that the forum law can be consistently and justly applied. Second, the forum, since forced out of the pretense that it is doing another's duty or following a higher mandate, must adjudicate conscientiously rather than mechanically and accept responsibility for its decisions. Accordingly, given this reality of forum law, I reject in Part IV modern comity based theories, including applications of game theory, as continued choice of law myths which mask the truth that no forum can apply law for another. Substantive conflicts about what law should apply<sup>14</sup> can never be resolved by pretending that neutral rules will be developed or neutral jurisdiction has been obtained, but will only be resolved when disputes are frankly recognized as implicating substantive policy differences, and the affected sovereigns then directly negotiate about their differences.

I conclude by suggesting that recognizing the interrelation of jurisdiction and ability to apply forum law is the foundational starting place for construction of sensible jurisdictional theory, and concede that many more details of the theory remain to be worked out. This work is meant to emphasize and identify the foundational building blocks for the larger jurisdictional edifice that needs to be constructed on a razed choice of law site.

## II. A COURT SHOULD HAVE JURISDICTION ONLY IF IT HAS A RIGHT TO APPLY ITS OWN LAW: THE CASE OF THE PERIPATETIC TORTFEASOR

### *Hypothetical #1*

Consider the following hypothetical: Joker Joe, world traveler, is driving his rental vehicle in country Z when he collides with Plaintiff Paula. Plaintiff Paula obtains a one million dollar judgment against Joe in country Q and seeks collection of this judgment in Joe's home state, Anystate, located in the United States. Should the Anystate court honor the judgment?

#### Additional Factual Information:

Country Q is a country through which Joe traverses several weeks after colliding with Paula in country Z, and four days before Joe returns to the United

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14. In reality, the question of what law shall be applied is always answered by the question of *who* gets to apply law. Recognizing the grant of jurisdiction is recognizing the validity of the substantive law in most situations. The only legitimate "exception" is treaty-like situations, which may occasionally empower a forum to apply law of a co-signer. See *infra* notes 220-26 and accompanying text.

States. Country *Q* is not the site where Joe rented the vehicle involved in the *Z* accident; it is not a country with which Joe maintains normal relations, ties, or connections; and it is not a country which had any particular significance regarding Joe's foreign travels. Joe does not answer the country *Q* complaint, and a one million dollar default judgment is entered against him.<sup>15</sup>

*A. Examples Where Q Law Cannot Be Applied Under Any Credible Choice of Law Theory*

Subvariation (a):

In country *Z*, vehicles drive on the left-hand side of the road. At the time of the accident, Joe was driving on the left-hand side of the road, while Paula was driving on the right-hand ("wrong") side of the road. In country *Q*, as in Joe's home state, vehicles drive on the right-hand side of the road. The country *Q* court, believing as its conflicts policy that it has power to apply only forum law,<sup>16</sup> rule that Joe was driving on the "wrong" side of the road and that the accident therefore was his fault.

In this subvariation of the main hypothetical, I have attempted to describe a fact situation that conflicts scholars of any persuasion would agree violates Joe's due process rights under the Fourteenth Amendment.<sup>17</sup> Under this subvariation, a defendant could not reasonably expect to have *Q* law applied to his conduct of driving a car in country *Z* when the *Q* law is opposite to the conduct that is required in country *Z* where the driving took place. Under vested rights analysis, the event which caused rights to vest had no connection to *Q*.<sup>18</sup> Interest analysts hopefully would concede that country *Q* has no

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15. I explain later why there should be no difference between a default judgment and a fully litigated judgment in which Joe raises defenses of lack of jurisdiction, which arguments are rejected by the *Q* court. See *infra* notes 55-56 and accompanying text.

16. This could be, for example, via a misinterpretation of my own (Cox's) theories as set forth in this article, or under local law theory without the connectedness limits which I advocate.

17. Although the U.S. Supreme Court continues to talk about both the Full Faith and Credit Clause and the Due Process Clause together serving to limit choice of law, no modern court majority draws distinctions between the two clauses' impact on choice of law scrutiny. See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.10 (1981). It is my position, to be elaborated in greater detail elsewhere, that the Full Faith and Credit Clause does not operate to restrict a state's choice of applicable law. Acceptance of this proposition, however, is not necessary for accepting the argument in text that the hypothetical situations described violate whatever constitutional rights that the defendant can oppose to the state assertion of jurisdiction to apply law. I use the due process terminology because I believe it is accurate. Cf. *Home Insurance Company v. Dick*, 281 U.S. 397 (1930) (deciding that the Due Process Clause alone effectively constrains choice of law abuse).

18. Under the First Restatement, only *Z*'s laws, as place of injury, could be applied to this tort action. See, e.g., *RESTATEMENT (FIRST) OF CONFLICT OF LAWS*, § 377 (place of wrong defined to usually equal place of injury), § 378 (existence of cause of action determined under law of place

interest in regulating driving conduct in country Z.<sup>19</sup> Under what I elsewhere have termed the “*Skiriotes* principle,” country Q has no legitimate ability to export its regulatory law to country Z, when country Z has expressed a particular regulatory stance regarding conduct of this type.<sup>20</sup> Under any theory, it would be unfair for country Q to apply its left-hand side driving law opposite to the conduct expected in country Z.

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of wrong), § 381 (defendant’s standard of care), § 383 (causation), § 388 (defenses), § 412 (amount of damages). For more detail on the workings of vested rights, see generally ROGER CRAMTON ET AL., *CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS 5-89* (1993). Under more modern “neo-vestedness” theories, Q would still have acquired no territorially related connection to this litigation sufficient to sustain application of its laws. For contemporary discussion of neo-vestedness, see, e.g., Perry Dane, *Vested Rights, “Vestedness,” and Choice of Law*, 96 YALE L.J. 1191 (1987). Cf. Lea Brilmayer, *Consent, Contract and Territory*, 74 MINN. L. REV. 1 (1989); Lea Brilmayer, *Rights, Fairness and Choice of Law*, 98 YALE L.J. 1277 (1989); John Corr, *Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes*, 39 U. MIAMI L. REV. 647 (1985); John Ely, *Choice of Law and the State’s Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992).

19. Original interest analysis identified domiciliary connectedness as the sole indicator of legitimate governmental interest. See, e.g., BRAINERD CURRIE, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 77 (1963) [hereinafter CURRIE, *SELECTED ESSAYS*]. More modern interest analysts recognize that a state might have legitimate interest to apply its laws, even when its own citizens are not directly involved in the litigation, under a regulatory conduct exception. See, e.g., Robert A. Sedler, *Professor Juenger’s Challenge to the Interest Analysis Approach to Choice-of-Law: An Appreciation and a Response*, 23 U.C. DAVIS L. REV. 865 (1990) [hereinafter Sedler, *Appreciation & Response*]; Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the “New Critics,”* 34 MERCER L. REV. 593 (1983); Russell J. Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability Cases*, 46 OHIO ST. L.J. 493 (1985); cf. Joseph William Singer, *Facing Real Conflicts*, 24 CORNELL INT’L. L.J. 197 (1991); Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1 (1989) [hereinafter Singer, *Real Conflicts*]. Most modern interest analysts apparently do not dispute the holding in *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), that plaintiff’s residence, standing alone, is insufficient to support jurisdiction to apply forum law, and thus would apparently not insist on application of Q law under the hypothetical facts in text. But cf. Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595, 623-25 (1984) [hereinafter Weinberg, *Forum Law*] (containing a snow shoveling example, where forum is encouraged to apply its law when the only contact is plaintiff’s domicile). I criticize original and continued overemphasis of the domiciliary connectedness aspects of interest analysis at *infra* notes 96-144 and accompanying text.

20. See Cox, *Forging New Theory*, *supra* note 7. To the extent that portions of this earlier article can be read to encourage a forum to apply another’s law, I repent that implication and now insist that the “*Skiriotes* principle” should only be used by a court which unfortunately feels compelled to take jurisdiction of parts of cases where it can not apply its own law. In such situations, the court is faced with the inherently unmanageable dilemma of what it should do with a case about which it should not care. What I previously labelled the “*Skiriotes* principle” as applied to “mixed specific jurisdiction” situations was designed to give guidance through this quagmire (or should I say dismal swamp). But if one accepts the notion that a court never should take jurisdiction over cases it does not care about, there is no quagmire. This better and simpler solution, as advocated in this article, is to never take jurisdiction unless one can unashamedly apply forum law.

From Joe's perspective, the due process unfairness results from country *Q* attempting to meddle in an affair which seems primarily Joe's, Paula's, and country *Z*'s business. As some succeeding hypothetical subvariations should make clear, this meddling occurs *regardless of what law* country *Q* chooses to apply. The unfairness is *manifest* when country *Q* chooses the "wrong" law, but Joe should not have to wait around in country *Q* until the wrong law is applied in order to assert the unfairness of country *Q*'s jurisdiction over him. At the time Joe chooses to default, he cannot know what law country *Q* will apply to his conduct. He does know, however, *by reading the complaint* that in the proposed litigation country *Q* will attempt to adjudicate matters which are none of country *Q*'s business (a car accident in country *Z*). It is this fundamental unfairness that enables the courts of Anywhere, U.S.A., Joe's hometown, to reject enforcement of the country *Q* judgment.<sup>21</sup>

#### Subvariation (b)

Paula is a resident of country *Q*, where drivers drive on the left-hand side of the road. The law in country *Z*, as in the U.S.A., is that drivers should drive on the right-hand side of the road. At the time of the accident, Joe was driving on the right side of the road, Paula on the left. The *Q* court applies *Q* law and finds that Joe was driving on the "wrong" side of the road.

Making Paula a resident or domiciliary of country *Q* does not decrease the unfairness to Joe of having country *Q* law applied to conduct that is specifically

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21. Unfortunately, in *Burnham v. Superior Court*, 495 U.S. 604 (1990), the United States Supreme Court refused to shut the door to just such unfairness, by approving transient jurisdiction, the quintessential example of a forum taking jurisdiction of a case when it has no legitimate regulatory interest in the underlying litigation. I have critiqued the *Burnham* illogic in detail elsewhere. See Cox, *Burnham Insane*, *supra* note 7. By placing its imprimatur on transient jurisdiction, the Court approves of forums taking jurisdiction when they cannot or should not apply their own law. The predictable result will be unfairness to litigants, plus misinterpretation and manipulation of forum and other state law. A forum should only take jurisdiction when it conscionably can apply its own law, and it should always apply its own law when it takes jurisdiction.

For a diversity of reaction to the *Burnham* opinion, see Symposium, *The Future of Personal Jurisdiction: A Symposium on Burnham v. Superior Court*, 22 RUTGERS L.J. 559 (1991) (containing articles by Linda Silberman, Martin Redish, Russell Weintraub, Mary Twitchell, Allan Stein, and Earl Maltz); Patrick Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19 (1990); Peter Hay, *Transient Jurisdiction, Especially Over International Defendants: Critical Comments on Burnham v. Superior Court of California*, 1990 U. ILL. L. REV. 593; Winton Woods, *Burnham v. Superior Court: New Wine, Old Bottles*, 13 GEO. MASON U. L. REV. 199 (1990); Robert Taylor-Manning, Note, *An Easy Case Makes Bad Law—Burnham v. Superior Court of California*, 66 WASH. L. REV. 623 (1991); Barbara Goto, Note, *International Shoe Gets the Boot: Burnham v. Superior Court Resurrects the Physical Power Theory*, 24 LOY. L.A. L. REV. 851 (1991); Paul Wilson, Note, *A Pedigree for Due Process?*, 56 MO. L. REV. 353 (1991).

and non-controversially regulated by the country (e.g., Z) in which the conduct occurred. Even staunch interest analysts, although acknowledging that country Q has an interest in compensating its domiciliaries for injuries they receive elsewhere, would not seriously argue that this interest justifies application of regulatory law when there is specific and non-offensive Z regulatory law on point.<sup>22</sup> From Joe's perspective, although he might expect or not expect to run into the domiciliaries of any number of nations while traversing country Z, the residence of the person he hits tells him nothing about how he should drive his car. Joe's Anytown, U.S.A., court would properly reject enforcement of a country Q judgment that applied Q law.

Subvariation (c):

Assume there is no law in Z regarding who should drive on which side of the road. If this assumption strains credulity, assume that country Z prohibits driving a vehicle through its forests but that Joe and Paula nevertheless rent all-terrain vehicles which they proceed to take into country Z's forest. Joe hits Paula's parked car when he rounds the bend of a logging road. Assume that under country Q law, a vehicle approaching a narrow bend is required to honk its horn to warn those on the other side of its approach. Assume that under Anystate law (Joe's home state), no such warning is required; instead, vehicles under Anystate law are presumed negligent when parked in locations that oncoming drivers cannot see.

Under this subvariation, a Q court applying Q law would violate Joe's due process expectations just as seriously as in any of the previous subvariation hypotheticals. Whatever Joe is expected to do on the logging roads of Z (including not drive there at all), he cannot be expected to measure that conduct against law which applies primarily in country Q or which is designed to regulate the conduct of country Q residents. Due process, being in the conflicts context a synonym for reasonable person expectations,<sup>23</sup> compels the Anywhere, U.S.A., court to reject a Q judgment applying Q law as violative of Joe's due process rights.

*B. Problems Inherent in Q Attempting to Apply Z Law*

1. Misinterpretation of Z Law—Subvariations (b) & (c) Reconsidered

The main point of subvariations (b) & (c) is that defendant's litigation-

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22. *But cf.* Louise Weinberg's snow shoveling hypothetical referred to earlier; Weinberg, *Forum Law*, *supra* note 19.

23. *Cf.* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985) (deciding that fairness in choice of law includes assessing reasonable expectations of parties).

related contacts with the adjudicating forum must always form the basis for any due process analysis of jurisdiction to apply law.<sup>24</sup> A serious failing of current choice of law and jurisdictional constitutional theory is that courts assume that one can have contacts solely for abstract jurisdictional purposes. To phrase this differently, courts assume that they can retain jurisdiction to apply law so long as they measure contacts against a sovereign with which the defendant did have jurisdictionally significant contacts for choice of law purposes. Assume for example, that the *Q* court on subvariation (c)'s facts recognized it could not constitutionally apply *Q* law. The *Q* court therefore *purports* to apply *Z* law. The *Q* court reasons that the law of *Z* prohibiting driving through a forest applies only to moving vehicles. Since only Joe's vehicle was moving at the time of the accident, the *Q* court rules that Joe has violated *Z* law and is negligent *per se*, whereas Paula, since stationary, has not violated *Z* law and is entitled to recovery.

Joe legitimately might claim that the *Q* court has misinterpreted *Z* law. Suppose, for example, that under *Z* law a driver is presumed negligent when he stops his vehicle over the rise of a hill or around the bend of a road on which he is legally permitted to travel. Suppose additionally that this law has been applied by the *Z* courts to situations involving accidents on property where the *Z* traffic laws do not apply by their explicit statutory terms (e.g., farms, shopping malls). Assume, furthermore, that in another context (say ship or air travel), the *Z* courts have held that *Z* ship or air traffic rules apply even when the operator is piloting his boat or plane "illegally" (i.e., in an area where he is not authorized to operate the vehicle), and that such "illegal" operation does not necessarily preclude tort damage recovery. Suppose, modifying the original hypothetical, Joe vigorously argues these cases to the *Q* court, both at the trial and the appellate level, but that the *Q* court sticks with its (mis)interpretation of *Z* law and awards Paula the one million dollar judgment.

When enforcement of this judgment is sought against Joe and his Anystate assets, Joe should be able to argue that application of the law as interpreted by the *Q* courts to Joe's *Z* conduct violates fundamental fairness, and that the Anystate courts accordingly should reject the *Q* judgment. One can imagine Anystate lawyers hired by both Paula and Joe thoroughly briefing the Anystate court on what *Z* law actually is or should be. While such wasteful paper propagation might have been necessary in the pre-*International Shoe/pre-Alaska*

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24. When confronting personal jurisdiction issues, the Court has insisted that all measures of jurisdictional reach be measured against defendant contacts. See, e.g., *Burger King Corp v. Rudzewicz*, 471 U.S. 462, 474, 481-82 (1985); see also Cox, *Unrealized Implications*, *supra* note 7, at 898-909. In the choice of law context, although the Court test is phrased in terms of *state* contacts, any unfairness or arbitrariness is measured against reasonable *party* expectations, which translates to reasonable expectations of the party (defendant) against whom the law will be applied.

*Packers* territorial world, it is no longer required. While Joe might legitimately phrase his objection in terms of misapplication or improper choice of law, his legitimate objection is in fact more basic. The issue is not what *Z* law is, but whether *Q* courts have the authority to bind Joe.

Joe's correct contention essentially is that the *Q* courts have no legitimate authority to apply *Z*, *Q*, or any other law to his conduct that occurred in country *Z*. The situations of due process violations described in hypotheticals (a) through (c) are *symptoms* of this fundamental unfairness. The fundamental unfairness revealed by the hypotheticals is that the country *Q* court has no business litigating the matter that Paula attempts to bring before it. This fundamental unfairness should not be split off (characterized) as personal jurisdiction at the front end of litigation and choice of law at the tail end, for it is in reality a single unfairness of having a court without legitimate connection to the attempted litigation exercise its state judicial power over Joe.<sup>25</sup>

The question should be whether state *Q* has sufficient connectedness to Joe and/or the facts of the litigation such that state *Q*'s regulatory interests are implicated. This single inquiry is the test for both personal jurisdiction and choice of law in the modern world. This question can and should be answered before one knows the exact shape of the law a *Q* court will apply. The unfairness particularly and egregiously reveals itself when blatantly unfair law is applied by a *Q* court, but the unfairness is more fundamental: the *Q* court does not have regulatory authority over Joe. The reason, in other words, that Joe's due process choice of law argument has validity is not because of the particular content of the forum law, but rather because the forum lacks connectedness to apply law to the conduct at issue.

The United States Supreme Court's formulation of its due process choice of law test properly does not purport to strike down applications of law because the laws are bad, but rather because the state lacks sufficient ties, connections etc., to the defendant and/or the litigation at hand.<sup>26</sup> Accordingly, although

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25. I am aware my arguments contradict long held assumptions about not only personal jurisdiction but also *res adjudicata* law. The potential arguments, however, for giving *res adjudicata* effect to actually litigated though erroneous judgments could proceed on a slightly different theoretical basis from the arguments in favor of granting jurisdiction without considering whether there is ability to apply forum law. My primary focus in this article is upon the jurisdiction rationales rather than *res adjudicata* considerations. *But see infra* notes 55-56 and accompanying text (stating that judgments that are actually litigated without personal jurisdiction should not necessarily be given preclusive effect).

26. As the Court formulated its test in *Allstate Ins. Co. v. Hague*:

[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 the choice of its law is neither arbitrary more fundamentally unfair.

sub-variations (a) and (b) above more obviously demonstrate the unfairness that can result when a court without legitimate authority attempts to act, subvariation (c) is not less a violation of Joe's legitimate expectations. As the next subvariation explores, even a court that purportedly reaches the right result should not be permitted to exercise authority over Joe if the state which gives that court power cannot legitimately regulate Joe's conduct at issue in the litigation.

## 2. Supposed Similarity of Law and the Problems of Default Judgment

### Subvariation (d):

The law of countries Z, Q, and Anystate is that vehicles should drive on the right-hand side of the road and that plaintiffs with pre-existing conditions may recover only for that damage exacerbated or caused by new injury; furthermore, all three jurisdictions recognize the seat belt defense. The accident occurred near the center of the road, each driver claiming that the other crossed the center line. Joe additionally claims that Paula admitted to him at the time of the accident that she recently had aggravated her already bad back by moving heavy trunks and that she was sorry she had forgotten to wear her seat belt. Paula, before the Q court, presents only her version of what factually took place, which is opposite Joe's claim. Assume that credible expert testimony (e.g., medical) could be presented on either side regarding the extent of Paula's pre-existing condition and whether seat belt use would have contributed to her injuries. Joe, when served with papers in transit in country Q, ignores the summons, and a one million dollar default judgment ensues.

The default judgment situation traditionally has been recognized as one in which the defendant may legitimately raise claims of lack of personal jurisdiction to void the judgment.<sup>27</sup> What I emphasize here is that these claims of lack of personal jurisdiction should not relate in some abstract sense to power over the defendant, but rather mean that the adjudicating court lacks legitimate power to bind the defendant by its law concerning the litigation that was presented to that court. Country Q has de facto power over Joe whenever and wherever its police may bring him into physical custody. The question, however, is the legitimacy of this assertion of power.<sup>28</sup> The fact that country Q could have locked Joe up

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449 U.S. 302, 312-13 (1981). The focus is not upon the content of the law but rather upon the state's connection to the litigation. See also *infra* notes 153-59 and accompanying text.

27. See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 732 (1878).

28. Cf. *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (holding that the U.S. courts may exercise criminal jurisdiction powers over a Mexican defendant kidnapped out of Mexico and taken to the U.S.). It is beyond the scope of this article to analyze the correctness or incorrectness of the *Alvarez* holding and the rationales by which the holding was reached. The focus for such

while he was traveling through country *Q* is no argument that country *Q* has a *right* to incarcerate him. The fact that country *Q* could have physically detained Joe at the time he was served with summons does not legitimize what otherwise would be a naked assertion of power.<sup>29</sup> The question Joe, the international community, and the Anystate courts have a duty to ask is: What did Joe do to obligate him to answer to country *Q* (by requiring him to appear before its courts)? On the facts set forth in hypothetical one, including subvariation (d), the correct reply is “nothing.” Country *Q* has no legitimate right to force Joe to submit to its judicial power.<sup>30</sup>

The default judgment situation illustrates that Joe’s due process objections are to the state’s (namely, its court’s) jurisdictional legitimacy regardless of what law it purports to apply. Arguments about inconvenience, availability of witnesses, etc. are secondary considerations,<sup>31</sup> which, if offered as the main argument against court *Q*’s jurisdiction, in fact mask the real truth of *Q*’s lack of legitimate authority to act.<sup>32</sup> The question is whether the *Q* court has authority to act, not whether it would be inconvenient to Joe if that authority

discussion, however, surely would not be upon the literal power of the U.S. agents, obviously manifested in this case, but rather whether such power was legitimately exercised. Territorially exercised power similarly must be justified on some basis other than the fact that it can be exercised; that is the gist of the argument in text.

29. *Cf.* *Shaffer v. Heitner*, 433 U.S. 186, 203-04 (1977) (stating that fairness is focus of jurisdictional legitimacy rather than power).

30. Unfortunately, the United States Supreme Court in *Burnham* misguidedly has ruled otherwise. *See supra* note 21.

31. As the Court explained in *Burger King*: “Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors . . . .” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (emphasis added); *see also* Cox, *Unrealized Implications*, *supra* note 7, at 906-08. In *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 116 (1987), four members of the Court applied this second stage test to defeat jurisdiction which had passed the first stage threshold. *Cf. also* Cox, *Jurisdiction, Venue, & Aggregation*, *supra* note 7 (arguing that these second stage fairness concerns are similar to venue considerations and arguing that there are therefore constitutional restrictions on a state’s ability to set venue wherever it wishes).

32. I similarly elsewhere have critiqued Justice Brennan’s deceptive arguments that any unfairness in original grants of jurisdiction can be ameliorated by procedural “fixes” applied at a later stage of the litigation. *See* Cox, *Burnham Insane*, *supra* note 7, at 547-54. I accordingly agree with attacks on procedural fixes, such as *forum non conveniens*, which mask the reality of jurisdictional disease by treating symptoms rather than the root disease. *Cf.* Allan Stein, *Forum non Conveniens and the Redundancy of Court Access Doctrine*, 133 U. PA. L. REV. 781 (1985); Margaret G. Stewart, *Forum non Conveniens: A Doctrine in Search of a Role*, 74 CAL. L. REV. 1258 (1986). All attempts to shift the focus away from the central and initial concern—whether this forum has legitimate interest in applying its power via its law to the proposed litigation—easily can mask the unfairness of the grant of jurisdiction, and accordingly should be resisted.

was exercised.<sup>33</sup>

### 3. Preliminary Explanation of Why Forums Should Not Pursue Others' Interests

Although I shall counter potential parochialism charges in more detail later in this Article,<sup>34</sup> it is appropriate here to preliminarily counter the argument that states should take jurisdiction of cases involving others' interests to foster comity and international cooperation.

#### a. Every Forum Can Directly Assert Jurisdiction to Further Its Own Interests

Any claims that country *Q* is obligated or that it would be desirable for country *Q* to take jurisdiction of suits involving others' laws in order to foster international harmony are wide of the mark. The incorrect assumption behind such claims is that countries like *Q* have authorization and interest in applying other countries' laws. In reality, every country applies only its own law. There may be superficial and historical appeal to the notion that one state can and should directly impose obligations created by another state when the state which is the source of those obligations is unable directly to impose them.<sup>35</sup> However, even were this jurisdictionally what is taking place, which it is not,<sup>36</sup> in the modern jurisdictional world there is no longer a need or justification for such regulation by proxy.

To put matters simply, the deficiencies created by the territorial mode of jurisdiction disappear once it is recognized that territoriality can be (and often has been) discarded. The interested state, in the modern jurisdictional world,

33. Of course, as hypothetical subvariations (a), (b), and (c) demonstrate, the particular unfairness of bad substantive results may serve as symptomatic evidence that the court lacks authority. Similarly, the blatant unfairness/inconvenience of attempting jurisdiction over Joe in a forum with which he has *no* ties, contacts or relations (e.g., attempted jurisdiction in Madagascar, which even globe-trotting Joe has never in his life visited) may symptomatically be evidence of the court's lack of authority. But the real reason Joe is not subject to court *Q*'s or Madagascar's jurisdiction is not because it would be inconvenient for him to appear there (since in these days of modern travel etc., virtually no site is unattainable); the real reason is lack of legitimacy to bind Joe by a *Q* court judgment. Because Joe lacks ties, connections, or relations to court *Q* (or Madagascar) that court may not assert its authority over him.

34. See *infra* notes 174-237 and accompanying text.

35. But see *infra* notes 178-92 and accompanying text (stating that the inadequacies of personal jurisdiction law should be made manifest in the forum whose substantive law is to be applied).

36. See *infra* notes 177-92 and accompanying text.

can always assert jurisdiction.<sup>37</sup> Once territoriality is rejected, it does not make sense to preserve escape devices that only had superficial appeal because they shored up weaknesses and limitations inherent in the territorial theory of jurisdiction. To return to the hypothetical facts, only under a territorial theory does country Z lose jurisdiction and power to directly impose obligations arising under its laws when Joe departs Z's boundaries.<sup>38</sup> Only under a territorial theory does country Q gain plenary jurisdiction over Joe once he sets foot within its boundaries. As I and numerous commentators have set forth at length elsewhere,<sup>39</sup> these aspects of territorial thinking have been severely and specifically discredited. We should not pretend for choice of law purposes that Z and Q are bound by discredited territorial theory. In the modern minimum contacts world, since Z can assert jurisdiction in its own behalf, there is no need for Q to assist.

## b. Jurisdiction Elsewhere to Vindicate Z's Rights Proves Too Much

### 1. Territoriality Means a Defendant Is Subject to Too Many States' Power

Additionally, a jurisdictional theory that makes Joe potentially subject to the plenary authority of all courts through which he traverses for a Z-related action proves too much. This is true both from Joe's perspective and from other countries' perspectives. First, consider that globe-trotter Joe, because he is a globe-trotter, would inevitably be subject to numerous courts' supposed plenary jurisdiction. Although the territorialists thought it a logical impossibility that

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37. See, e.g., *Shaffer*, 433 U.S. at 204-05 (minimum contacts rationale produces extended jurisdictional reach); Cox, *Unrealized Implications*, *supra* note 7, at 914-15 (courts properly construe away restrictions in "short arm" statutes); David S. Welkowitz, *Going to the Limits of Due Process: Myth, Mystery and Meaning*, 28 DUQUESNE L. REV. 233 (1990); cf. Harold S. Lewis, Jr., *The "Forum State Interest" Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts*, 33 MERCER L. REV. 769, 843-46 & nn.406-08 (1982) (collecting examples of courts construing away restrictions in jurisdictional statutes).

38. As set forth in *Pennoyer*, "[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . . [N]o state can exercise direct jurisdiction and authority over persons or property without its territory." 95 U.S. at 722. This territorial view of jurisdiction was analyzed, criticized, and abandoned in *Shaffer*. See 433 U.S. at 196-206.

39. See, e.g., Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77 [hereinafter Brilmayer, *How Contacts Count*]; Cox, *Burnham Insane*, *supra* note 7; Geoffrey Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241; Graham C. Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85 (1983); Arthur Taylor von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U. L. REV. 279 (1983); Arthur Taylor von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485 (1984) [hereinafter Weintraub, *Due Process Limitations*]; cf. Daan Braveman, *Interstate Federalism and Personal Jurisdiction*, 33 SYRACUSE L. REV. 533 (1982).

more than one sovereign could exercise simultaneous jurisdiction over a person, in reality the myth of exclusive plenary territorial jurisdiction subjects Joe to potentially more numerous conflicting judgments than does a contacts jurisdictional approach. Joe is subject to receive a summons from Paula's attorneys in any country through which he traverses; every such country is at liberty under a territorial theory to adjudicate *all* of Joe's rights regarding any and all causes of action, including the Z accident. If served with summons in more than one state through which he traverses, Joe is "simultaneously"<sup>40</sup> fully jurisdictionally present in all such states.

While it might have seemed illogical to a territorial theorist that Joe could be jurisdictionally present in sovereign Z where he was no longer physically present, it should seem more absurd to a modern court or conflicts scholar that Joe can be fully and simultaneously jurisdictionally present in potentially an infinite number of states.<sup>41</sup> Under a territorial theory, every court in the world potentially can determine Joe's rights and obligations regarding everything, so long as it can sink the most thin of hooks into him. The only potential palliative to such obvious overreaching is some form of vestedness requiring deference to the law of a more interested jurisdiction. It is no surprise therefore that vestedness accompanied territorial jurisdictional thinking.<sup>42</sup> Such relief was

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40. At least so long as the litigations are at liberty to proceed independently of each other before any *res adjudicata* preclusion "kicks in."

41. Even the most liberal readings of *International Shoe* and *Allstate* assume that there are some limitations on a state's ability to assert adjudicatory/legislative power. See, e.g., Harold S. Lewis, Jr., *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1 (1984); Mary Twitchell, *A Rejoinder to Professor Brilmayer*, 101 HARV. L. REV. 1465 (1988); Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440 (1982) [hereinafter Weinberg, *Minimal Scrutiny*]; Russell J. Weintraub, *Asahi Sends Personal Jurisdiction Down the Tubes*, 23 TEX. INT'L. L.J. 55 (1988); Weintraub, *Due Process Limitations*, *supra* note 39.

As I elsewhere have argued, the reality of modern jurisdiction should always be *limited* jurisdictional reach based on the sovereign's true direct substantive interest in the underlying controversy. See, e.g., Cox, *Burnham Insane*, *supra* note 7.

42. In a similar vein, as I explain elsewhere, the constitutional compulsion of forum access, for which cases like *Hughes v. Fetter*, 341 U.S. 609 (1951), and *Bank of Chicago v. United Air Lines*, 342 U.S. 396 (1952), are sometimes read to stand, makes sense theoretically, if it makes sense at all, *only* when a forum whose interests are actually implicated cannot exercise jurisdiction. But in reality every forum can assert its own interests. See sources cited in *supra* note 39. Both vested rights and compelled forum access doctrines are therefore properly discarded in the modern world as attempts to cover over the inequities and inabilities of territorial doctrine.

It is beyond the scope of this article to explore why, in a sociological or historical sense, the illogic of territoriality was allowed to hold sway for so long, or whether the doctrine was well- or ill-suited to the social or political realities of any time period. For purposes of this piece it does not matter whether territoriality was always absurd or only has become so because of changed political or social context; it should be discarded on either ground. For works which have explored the social, historical and/or political context of jurisdiction doctrines and come to varying conclusions about why different theories persist or have changed, see, e.g., Joseph Kalo, *Jurisdiction as an*

and is largely illusory, however, since no foreign court truly applied or can apply Z law. As the courts through their practice have demonstrated, as Joe intuitively would know, and as we shall explore in greater detail throughout this Article, every court actually applies its own law.<sup>43</sup> Thus persists Joe's fundamental objection to the Q court's authority: This tribunal has no right to bind him by its law.

## 2. Territoriality Means States Are Subject to Too Much Loss of Sovereignty

Similarly, from other countries' perspectives, vestedness with real teeth, vestedness that would impose on other countries the obligation *properly* and in all circumstances to apply Z law, is more than sovereignty should allow. Although the traffic accident hypothetical may not be the best illustration,<sup>44</sup> the whole point of conflicts law is that in many contexts, sovereigns legitimately may differ as to what is the appropriate policy regarding particular actions or relations. Vestedness with a vengeance makes other countries the enforcers and the interpreters of Z law, even contrary to strong conflicting sovereign policy. Vestedness in practice, therefore, almost always included escape devices that allowed the adjudicating sovereign to retain its sovereignty. Such retained sovereignty means the supposed deference "required" by vestedness was always a myth. The further implication is that no sovereign, absent treaties or other explicit state-to-state arrangements for shared judicial power, is required to apply another sovereign's law against its own policy. These matters shall receive additional treatment later.<sup>45</sup> First, however, consider two additional hypotheticals which reinforce the point that Joe's legitimate objection to court Q's authority is not in regard to application of particular substantive law but rather more fundamentally to court Q's power to apply any law which Paula might attempt to bring before the Q tribunal in the proposed litigation.

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*Evolutionary Process: The Development of Quasi In Rem and In Personam Principles*, 1978 DUKE L.J. 1147 (1978); Terry Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257 (1990); John McDermott, *Personal Jurisdiction: The Hidden Agendas in the Supreme Court Decisions*, 10 VT. L. REV. 1 (1985); Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 82 WASH. L. REV. 478 (1987); Hayward D. Reynolds, *The Concept of Jurisdiction: Conflicting Legal Ideologies and Persistent Formalist Subversion*, 18 HASTINGS CONST. L.Q. 819 (1991); Louise Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. CAL. L. REV. 913 (1985).

43. See, e.g., *infra* notes 66, 84-86, 145-69 and accompanying text.

44. When all sovereigns agree that Joe should drive his auto in a certain manner, there will appear to be no conflict between sovereigns, and this lack of disagreement may mask the fact that each sovereign is determining the appropriateness of Joe's conduct under its own laws. I pursue these points in greater detail *infra* at notes 66, 84-86 and accompanying text.

45. See *infra* notes 220-26 and accompanying text.

### C. Doctrines That Improperly Encourage Q to Apply Z Law

#### 1. Res Adjudicata and Misinterpretation of Anystate Law in a Wholly Domestic Situation

##### *Hypothetical #2*

Joe and Paula have a wreck in Anystate. At the time of the collision, at the time of the litigation, and at all other relevant times Joe and Paula are citizens and domiciliaries of Anystate. For reasons best known to herself,<sup>46</sup> Paula has Joe served with a summons while he is traversing country Q and asks country Q's courts to award one million dollars in damages. Country Q purports to apply Anystate law and grants Paula judgment against Joe for one million dollars. When Paula seeks enforcement of this judgment against Joe's Anystate assets, Joe asserts that the Q court did not have power to bind him by its or Anystate's law.<sup>47</sup>

Joe's contention is correct, regardless of whether the Q court correctly or incorrectly interprets Anystate substantive law.<sup>48</sup> It should strike even conflicts scholars well aware of the *Fauntleroy* fact pattern<sup>49</sup> as anomalous and troublesome that an Anystate court would be faced with even the possibility that it might have to enforce a judgment that misinterprets its own state law. Like the abuses identified in hypotheticals 1(a), (b), and (c) above, substantive law abuse such as occurred in *Fauntleroy* is symptomatic of a more fundamental jurisdictional malaise.<sup>50</sup> The Anystate court quite naturally and legitimately

46. These could include the hope that country Q would apply its own law, would misinterpret Anystate's law, provide a favorable jury panel, provide sympathetic procedural rulings, etc. A longer statute of limitations is considered in the next hypothetical. See *infra* notes 56-61 and accompanying text.

47. My point throughout this article is that the Q court has power to apply only its own law. On the hypothetical facts, the Q court, being without legitimate connectedness to Joe to apply its own law, may not apply any law to his conduct.

48. Joe should not have to wait around to find out what the ruling on the merits will be before he can determine whether the suit is being brought in the right place. Joe's objections are more fundamental and jurisdictional.

49. *Fauntleroy v. Lum*, 210 U.S. 230 (1908) (finding that a Missouri judgment misapplying Mississippi law to uphold a gambling debt which was illegal under Mississippi law must nevertheless be enforced in Mississippi against a Mississippi defendant). The solution to this paradox is not to force Missouri properly to apply Mississippi law; instead, Missouri should not be allowed to apply any law but its own. The problem in *Fauntleroy*, as in jurisdiction/conflicts theory generally, was that personal jurisdiction was considered independently of ability to apply law. I have previously critiqued this aspect of *Fauntleroy* in Cox, *Forging New Theory*, *supra* note 7, at 194-95.

50. The more basic message of *Fauntleroy* is that the losing defendant in the Missouri litigation should have appealed his judgment so that it would not have become final and (therefore) enforceable under the Full Faith and Credit Clause in sister states. However, from the defendant's practical perspective, the likelihood of appeal to a higher tribunal, especially the United States Supreme

might ask Paula, "Why in the world didn't you sue Joe here in Anystate?" More pertinently, the court legitimately could also ask, "How could you sue anywhere else in the world?" For under the facts as stated in this hypothetical, and arguably distinguishable from *Fauntleroy*,<sup>51</sup> the hypothetical is designed to describe a wholly domestic dispute. In such situations Anystate is the *only* sovereign which has regulatory interest in this litigation and arguably the only state which has a right to determine the rights and obligations of the parties arising out of this controversy.

The Anystate court does not require other states' assistance to enforce its own laws in wholly domestic situations.<sup>52</sup> In fact, given the potential that other states will misinterpret Anystate's laws, or the more pertinent reality that other states, purporting to apply Anystate law, will in fact apply their own version of law to the disputed conduct,<sup>53</sup> it would as a matter of comity be more appropriate for other states to refrain from poking their noses into a matter which is only Anystate's business. Because state *Q* has no significant ties, relations, or connections to the underlying litigation, or to Joe, it has no jurisdiction to adjudicate this controversy.<sup>54</sup>

Court, being guaranteed to "straighten out" errors of interpretation of another state's law may be very slight. *See, e.g.,* DAVID VERNON ET AL., CONFLICT OF LAWS: CASES, MATERIALS AND PROBLEMS 609 (1990) (stating that it is unrealistic to expect the Court to review errors of law) [hereinafter VERNON ET AL., CASE BOOK].

Perversely, it is also well accepted Court dogma that:

To constitute a violation of the Full Faith and Credit Clause or the Due Process Clause, it is not enough that a state court misconstrue the law of another State. Rather, our cases make plain that the misconstruction must contradict law of the other state that is clearly established and that has been brought to the court's attention . . . .

*Sun Oil Co. v. Wortman*, 486 U.S. 717, 730-31 (1988). The defendant in a forum which purports to construe others' laws thus may have to "eat" judgments that are actually erroneous but not clearly so. *Cf. id.* at 744 (O'Connor, J., dissenting). The way to remove from defendants the risk of such erroneous judgments is to recognize that there is no legitimate power to adjudicate in the first place.

51. In *Fauntleroy*, if the cotton on which the futures contract had been placed was to be grown in or delivered to Missouri, Missouri arguably would have had sufficient state interest so that it could have applied its own laws to the transaction.

52. Nor does Anystate require other states' assistance for original adjudication against absent defendants. *See supra* note 39 for sources documenting the demise of territoriality and increased reach under minimum contacts jurisdiction. All Anystate requires in such situations is recognition of its valid judgments for enforcement purposes.

53. *See, e.g., infra* notes 104-09 and accompanying text.

54. *Fauntleroy* incorrectly assumed that "the jurisdiction of the Missouri court is not open to dispute," although the only asserted basis for jurisdiction in *Fauntleroy* was transient presence. *Burnham* continues this particular error and the more general mistake of assuming that jurisdiction can ever be appropriate without examining what the underlying litigation or controversy is about. (*See supra* note 21 for criticism of *Burnham*.) Accordingly, for the foreseeable future, courts bound by this unthinking precedent will have to attempt to do indirectly what they should directly do by recognizing that there is no jurisdiction.

Assume, however, that Joe, although he objects to court *Q*'s jurisdiction, nevertheless appears there and fully litigates on the merits. Should this make any difference as to whether the Anystate court should enforce the million dollar judgment? I think not. The legitimacy of court *Q*'s attempted coercion is not increased because it has successfully scared Joe into appearing, when all the while he continues to cry that the court lacks legitimate power to bind him.<sup>55</sup> Accordingly, I reject the line of cases that draws a meaningful distinction between cases actually litigated and default judgment situations when the defendant in both situations asserts or tries to assert that the adjudicating tribunal lacked power to bind him by its judgment.<sup>56</sup>

## 2. Statutes of Limitations' Relation to Substantive Law

### *Hypothetical #3*

Joe and Paula have a car accident anywhere but in country *Q*. Neither Joe

55. Given absurdities such as *Burnham* (see *supra* note 21 for criticism of *Burnham*) and oppressive European Community member nation methods of jurisdiction against non-member domiciliaries (see, e.g., Henry deVries & Andreas Lowenfeld, *Jurisdiction in Personal Actions—A Comparison of Civil Law Views*, 44 IOWA L. REV. 306 (1959); Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 566-69 (1989); Arthur Taylor von Mehren, *Recognition and Enforcement of Sister-State Judgments: Reflections on General Theory and Current Practice in the European Economic Community and the United States*, 81 COLUM. L. REV. 1044 (1981) [hereinafter von Mehren, *Recognition & Enforcement*]), Joe would be foolishly advised to stay out of the *Q* litigation in the hopes that an enforcing forum might recognize lack of personal jurisdiction under current doctrine. The practical necessity to defend against a million dollar claim justifies Joe's presence in the *Q* courtroom, but it does not legitimize *Q*'s authority over him.

56. A different result might be indicated if Joe does not raise the issue of jurisdiction before the adjudicating tribunal, since in such a situation Joe might meaningfully be said to have waived his arguments about being subject to application of forum law. I re-emphasize that my main argument in this article is against the foolishness of allowing courts without legitimate interest in a controversy to bind a defendant by purported application of another's laws. *Res adjudicata* is a symptom of this larger disease when it permits courts without power to apply their own laws nevertheless to keep the defendant within their own court system all the way through final appeal when the defendant asserts from the beginning that this court is without power to bind him. I recognize, accordingly, that I am drawing a different policy balance than staunch defenders of *res adjudicata*, who presumably emphasize the policy harms of allowing defendants potentially two bites at the merits of a controversy. For such *res adjudicata* advocates, the presumed emphasis is upon actual litigation. Once a court, for whatever reason, ends up with a defendant before it who participates in actually litigating a case, this need for finality presumably is felt. But under my proposed system it is never possible for the defendant to litigate a claim *except under forum law*. In every situation where forum law legitimately can be applied, the judgment is necessarily binding. I do not advocate the defendant being able to void the power of a court which legitimately may apply its law to his conduct, and I certainly do not insist that only one such court exists for any particular cause of action. There would be binding *res adjudicata* effect, under my regime, in any other court where the action legitimately could have been initiated, even though that court would have reached a different substantive result.

nor Paula is a resident or domiciliary of country *Q*. The statute of limitations for car accidents in the state where the accident occurred and in every state with which Paula and Joe are affiliated is two years. The statute of limitations in country *Q* for car accidents is six years. Paula sues Joe in *Q*, five years after the accident. Country *Q* characterizes its statute of limitation as procedural, accepts the suit, and purports to apply the substantive law of the state where the accident occurred to the merits, awarding Paula a one million dollar judgment. When enforcement is attempted against Joe's Anystate assets, he contends that the *Q* court lacked authority to bind him by its judgment.

Joe is again correct. The jurisdictional situation is no different from the hypothetical 1 variations or hypothetical 2. Court *Q* lacks significant contacts to the litigation or to Joe sufficient to justify adjudicating this particular dispute. Statutes of limitation do not exist in the abstract but only in reference to specific litigation, the underlying facts of which are the measure of the appropriateness of jurisdiction. Lacking contacts, the *Q* court should dismiss the case, regardless of its statute of limitations.

This hypothetical is specifically designed to critique the jurisdictional situation presented in *Ferens v. Deere & Co.*<sup>57</sup> Because Mississippi has a long statute of limitations for matters legitimately within its own regulatory sphere of interest does not mean that it can legitimately become the haven for preserving suits that would otherwise be dead where they should have been brought.

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57. 494 U.S. 516 (1990). In *Ferens*, Pennsylvania plaintiffs brought a tort suit in Mississippi for an injury which arose in Pennsylvania and for which they had filed warranty and contract claims in Pennsylvania. Plaintiffs' only reason for suing in Mississippi was that the statute of limitations for torts had not run there, and the defendant, John Deere & Co., was thought amenable to service of process there. Once the tort diversity suit was initiated in the Mississippi federal district court, plaintiffs moved to transfer under § 1404(a) to Pennsylvania; this motion was granted. Defendant argued that the action was time barred; plaintiffs argued that under *Van Dusen v. Barrack*, 376 U.S. 612 (1964), the Pennsylvania Court was bound to apply the Mississippi statute of limitations as part of the transferor system's choice of law rules, which should not change, under *Erie* principles, with transfer of forum. The U.S. Supreme Court, in a 5-4 ruling, held that plaintiffs' arguments were correct.

The Third Circuit more properly initially recognized that application of Mississippi substantive law to the underlying dispute would be unconstitutional, and that therefore application of the Mississippi statute of limitations should also be unconstitutional. *Ferens v. Deere & Co.*, 819 F.2d 423 (1987). However, the United States Supreme Court foreclosed this rationale when it ruled, in *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), that a forum may always apply its statute of limitation to an action initiated there. This basic Court misanalysis of how statutes of limitation should be treated for choice of law purposes was necessarily incorporated into the *Ferens* illogic since already settled precedent. My quarrel with the Court, therefore, is primarily with its illogic in *Wortman*, more so than with the particular outworkings of that illogic in *Ferens*. The real reason the *Ferens* action should not have carried Mississippi's statutes of limitation with it to Pennsylvania is that there was no Mississippi action to transfer, Mississippi being unable to apply its law to the underlying controversy.

Mississippi's statute of limitations for torts is only triggered when *its* tort interests are implicated. Thus, all talk about whether statutes of limitation are substantive or procedural<sup>58</sup> obscures and masks the more fundamental unfairness involved in the *Ferens* case. The more basic unfairness is allowing suit to be brought in a jurisdiction with no interest in the controversy. Arguments that it might not offend another sovereign for country *Q* to hear actions that would be barred where they arose are wide of the mark.<sup>59</sup> The question Joe (or John Deere) deserves to have answered is why country *Q* (or Mississippi) has power to bind him by any form of its substantive law.<sup>60</sup> The fact that other states such as country *Z* (or Pennsylvania) do have an interest in the underlying facts of litigation cannot confer such interest upon country *Q*.<sup>61</sup> Discussion of the procedural nature of statutes of limitation is a red herring regarding the legitimacy of court power. If country *Q* has no business hearing the suit in the first place, it does not matter how long or short its statute of limitation is; there is simply no case to hear or to transfer.

### III. SYNTHESIZING THE HALF-TRUTHS OF COMPETING CONFLICTS THEORIES YIELDS THE CONCLUSION THAT EVERY COURT CAN APPLY ONLY ITS OWN SUBSTANTIVE LAW

My purpose through the above hypotheticals has been to demonstrate situations in which a court has no legitimate interest in hearing the dispute that a plaintiff attempts to bring before it. In each such instance, the defendant legitimately may object that country *Q*, because it lacks significant connection to him or to the proposed litigation, has no legitimate power to apply law to his conduct. This determination should be made without regard to what particular form of law shall be applied. In other words, the determination of whether the court has personal jurisdiction or legislative jurisdiction is in reality the same determination.

Throughout the above hypotheticals, I also very deliberately have used the word "purports" when describing what a court does in regard to the original application of another's laws. I have used this terminology to emphasize my belief that a court never has the ability to apply any but its own laws. This point now deserves additional treatment. This section on conflicts theories

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58. Cf., e.g., *Wortman*, 486 U.S. at 736-38 (Brennan, J., dissenting).

59. This is apparently part of Justice Brennan's argument in *Wortman*. See *id.* at 738.

60. If country *Q* (Mississippi) has legitimate connectedness to regulate Joe, then problems only arise if country *Q* (Mississippi) does not directly recognize its power to regulate and instead deviates from application of its substantive law. See, e.g., *infra* notes 97-144 and accompanying text.

61. For other analyses criticizing the *Ferens/Wortman* illogic, see, e.g., Posnak, *supra* note 7; David E. Seidelson, *1 (Wortman) + 1 (Ferens) = 6 (years): That Can't Be Right—Can it? Statutes of Limitations and Supreme Court Inconsistency*, 57 BROOK. L. REV. 787 (1991); Louise Weinberg, *Choosing Law: The Limitations Debates*, 1991 U. ILL. L. REV. 683.

demonstrates how my theory (that courts exist only to apply their own substantive law) is consistent with the half-truths of the two major competing conflicts theories, vestedness and interest analysis. Relying and building upon the work of Walter Wheeler Cook,<sup>62</sup> I emphasize that vestedness always at least half-heartedly recognized that it was never applying another sovereign's law as the other sovereign would have applied it. The reality is that no court can apply any law but its own.<sup>63</sup> My argument above and herein is that if courts only have the authority to apply their own law, then it is a masquerading deception to determine that a defendant's contacts with *another* state can justify jurisdiction in the forum for the forum state to apply the other state's law to the defendant's conduct.<sup>64</sup> Additionally, if courts only have authority to apply their own law, it is always a mistake for courts to use *their* connectedness with the litigation to justify application of another sovereign's law. Both vestedness and interest analysis perpetuated the conflicts myth that forums can apply others' laws. Perhaps these fictions historically persisted because of the mistaken belief that a forum whose regulatory interests were most at stake lacked ability directly to adjudicate the merits of the controversy. In the modern world of non-territorial minimum contacts jurisdiction, such excuses have been eradicated.<sup>65</sup> There was never theoretical justification for pretending that a forum was actually applying another's law or that it should ever depart from applying forum law; this section elaborates these points.

A. *Vestedness and Local Law Are Flip Sides of the Same Conflicts Coin Because Vestedness Never Meant Foreign Law Exactly as the Foreign Court Would Apply It*

1. The Possibility of Universal Law (Idealism vs. Relativism)

From my vantage point, the primary strength of Walter Wheeler Cook's assault on the First Restatement was his emphasis that the Restatement, even according to its own lights, recognized that its rules were a *choice* made by the adjudicating court to conform its law with what were understood to be universal principles. Rights "vested" *under the law of the adjudicating state* when a significant event occurred elsewhere that locked in the parties' rights. As Cook emphasized, citing Beale's own writings:

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62. See COOK, LOGICAL & LEGAL, *supra* note 1; Walter W. Cook, *An Unpublished Chapter of the Logical and Legal Bases of the Conflict of Laws*, 37 U. ILL. L. REV. 418 (1943).

63. Some consider this a truism, others an irrelevance. See, e.g., Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979 (1991) (truism) [hereinafter Kramer, *Renvoi*]; VERNON, ET AL., CASE BOOK, *supra* note 50, at 217 (irrelevance). The implications of this truth have been at most half-heartedly realized and applied.

64. The unfairness persists and is just as real regardless of whether the forum court *purports* to apply another's law or whether it more explicitly acknowledges that its own law is being applied.

65. See *supra* note 39.

[T]he forum, when confronted by a case involving foreign elements, always applies its own law to the case, but in doing so adopts and enforces as its own law a rule of decision identical, or at least highly similar though not identical, in scope with a rule of decision found in the system of law in force in another state or country with which some or all of the foreign elements are connected . . . .

[E]ven in . . . exceptional cases [where the forum result is identical to the foreign result] it is not the foreign 'law' or 'right' that is enforced, but that the law of the forum adopts as its law a rule of decision reaching the same, or at least a highly similar, result to that reached by the foreign law.<sup>66</sup>

For Cook, the fact that even in vestedness itself there was no support for the notion that foreign law applies of its own force meant that the forum was free to ignore vestedness' rules as arbitrary.<sup>67</sup> The correct vestedness counter should have been to insist on universal as opposed to local law. In principle, vestedness, thus more largely conceived, was not required to conform exactly to the law of the state in which the significant events occurred, but was more akin to the universal law principles reflected in *Swift v. Tyson*.<sup>68</sup>

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66. COOK, LOGICAL & LEGAL, *supra* note 1, at 20-22. Cook offers the following passage from Beale's treatise to support his view that Beale properly recognized that local law rather than foreign law *per se* was always being applied:

If by the national law the validity of a contract depends upon the place where the contract was made, then that law is applied for determining the validity of a contract made abroad, not because the foreign law has any force in the nation, nor because of any constraint exercised by an international principle, but because the national law determines the question of the validity of a contract by the *lex loci contractus*. If it were really a case of conflicting laws, and the foreign law prevailed in the case in question, the decision would be handed over bodily to the foreign law. By the national doctrine, the national law provides for a decision according to certain provisions of the foreign law; in the case considered, according to the foreign contract law. The provisions of this law having been proved as a fact, the question is solved by the national law, the foreign factor in the solution—i.e., the foreign contract law—being present as mere fact, one of the facts upon which the decision is to be based. To explain the territorial theory in other terms, all that has happened outside the territory, including the foreign laws which have in some way or other become involved in the problem, is regarded merely as fact to be considered by the national law in arriving at its decision, and to be given such weight in determining the decision as the national law may choose to give it.

*Id.* at 22 (quoting JOSEPH BEALE, TREATISE ON THE CONFLICT OF LAWS 106 (1916)).

67. *See, e.g.*, COOK, LOGICAL & LEGAL, *supra* note 1, at 44-45, 222-23, 233-35, 332, 340-41, 369-72, 387-88.

68. 41 U.S. 1 (1842) (holding that federal courts may interpret common law independently from state courts); *see also, e.g.*, Guaranty Trust Co. v. York, 326 U.S. 99, 102-03 (1945) (concluding that federal courts under *Swift* are free to disregard state opinions in the search for true "Reason" underlying common law principles). In fact, Beale explicitly viewed his conflicts principles as being a required outgrowth from what he viewed as the true principles underlying the common law of interstate relations. *See, e.g.*, 1 JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS 20-24

Consider, for example, hypothetical 1(c) above. In this sub-variation of the basic car crash hypothetical, we assumed that no Z law was directly applicable to Joe's and Paula's conduct. What I originally asked us to assume, and now insist upon, is not only no Z law directly on point but the impossibility of Z law existing that could govern Joe's and Paula's conduct—in other words, no Z law. For example, what if Joe's and Paula's actions occurred on the high seas, on an uncharted and unclaimed desert island, or on another planet? Despite the nonexistence of local law, Anystate, country Q, or other sovereigns might desire to regulate Joe's and Paula's conduct. The absence of territorially applicable local law does not necessarily prevent Paula from bringing suit. Suppose Joe tortured and raped Paula in (now non-) country Z and then chopped off one of her arms and legs just because he was bored that afternoon. Would anyone seriously contend that Paula is not entitled to recover somewhere for this atrocious conduct?

What the atrocity hypothetical is designed to illustrate, in the context of current discussion regarding vestedness, is that vestedness, properly understood, does not mean that the physical "jurisdiction" in which events occurred has exclusive power and legitimacy to determine the significance of those events. Vestedness, more largely conceived, could mean that because events occurred in such a way, and in such places, the parties involved have rights and

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(1935). Modern neo-territorialists, while rejecting the particulars of Beale's vision, similarly ground their theories in some "shared" view of superlaw principles that are urged as requiring allegiance beyond the particular local law substantive requirements of individual states. See sources cited in *supra* note 18; see also LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 191-230 (1991) [hereinafter BRILMAYER, FOUNDATIONS].

As my argument immediately following in text indicates, I am *not* arguing against moral or normative bases for a state deciding that it has a legitimate interest in adjudicating cases; why else should a government exist except to attempt to do right and act justly! What I *am* arguing for is recognition that all value and normative arguments about jurisdiction to apply law have meaning only in the context of the particular sovereign who is thinking about applying law. Disputes among sovereigns are about the content of law. "Choice" of law theories mask these substantive law disputes and should be discarded. While there may well be ideals or superlaw which should influence all states in deciding what is right conduct, it makes no sense to claim, as conflicts theorists (perhaps unwittingly) do, that this superlaw exists at the level of deciding whose law should apply without regard to whose law is better. The real dispute among sovereigns, under vestedness/idealist/rights based, etc. theories is and always should be about whose substantive law best reflects the superlaw principles. The trouble with choice of law theories which ignore substantive law content and pretend that neutral rules can be developed apart from substantive content is that this process inevitably either masks the substantive preferences imbedded in the rules, or frustrates the real purpose for the sovereign taking jurisdiction of the case (i.e., to apply its law).

Obviously, completely relativist readers who believe there are no superlaw, idealist, rights-based, etc., principles should have no objection to a theory which limits each state to declaring and adjudicating only its "truth."

obligations capable of enforcement.<sup>69</sup> The true theoretical underpinnings of vestedness therefore are not territoriality, but some form of idealism as reflected in *Swift v. Tyson* or the Nuremberg trials.

Although it is an over-simplification, it is nevertheless a helpful over-simplification to characterize the dispute between the legal realists and the proponents of the First Restatement as a conflict between relativists and idealists. Under an idealist's perspective, the emphasis is on the vitality of the rights rather than the place of their adjudication. Any court can recognize and give effect to these rights because the rights exist apart from the particular adjudicator. To adapt the well-worn platonic imagery, when a court reads by its particular "lights" these shadows of rights and duties created by Paula's and Joe's conduct, this does not create the rights but merely makes them manifest. Or to switch to Holmes' indicting imagery in his retrospective critique of *Swift v. Tyson*, the common law is a brooding omnipresence which is the true source of rights and obligations created by Joe's and Paula's conduct.<sup>70</sup>

Holmes' pejorative characterization emphasizes the typical failing of any idealist's particular application of the larger philosophy. To return to the platonic imagery, the common mistake idealists make is to confuse the shadows on the wall of the cave with the substance which is meant to be interpreted and apprehended.<sup>71</sup> Walter Wheeler Cook was able to thoroughly discredit the intellectual product of one man as much as one can another's,<sup>72</sup> because Beale, vestedness' chief advocate, focused too much on the shadows of last event vestedness.

What I am more interested in for purposes of this Article, however, is Beale's and Cook's seemingly *shared* theoretical and philosophical recognition that the adjudicating court was not really applying another's law as that other court would have, but its own interpretation of what the substance of the law

69. This view is more explicitly acknowledged by some of the neo-vestedness proponents. See, e.g., sources cited in *supra* note 18.

70. See *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370-72 (1910) (Holmes, J., dissenting); *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 532-36 (1928) (Holmes, J., dissenting). It is a great irony that Holmes was both the enemy of *Swift v. Tyson* and the staunchest defender of First Restatement-type restrictions on choice of law being constitutionally required. See, e.g., *Slater v. Mexican Nat'l Ry. Co.*, 194 U.S. 120 (1904). Holmes apparently failed to see the inherent contradiction of his positions that there could be no superlaw in the general common law field but that choice of law decisions were compelled by superlaw of choice principles.

71. See 7 PLATO, *THE REPUBLIC* (parable of the cave); cf. Apostle Paul, 1 CORINTHIANS 13:12 ("For now we see in a mirror, dimly, but then face to face.")

72. See *On the Displacement of the Law of the Forum*, in CURRIE, *SELECTED ESSAYS*, *supra* note 19, at 3, 6.

is.<sup>73</sup> Hypothetical 1(c) is designed to emphasize this point, for under that hypothetical it is impossible for the adjudicating court to apply the “law” of the sovereign in which the vesting event occurred.<sup>74</sup> In such circumstances, the adjudicating court “makes up” or, if you prefer the idealist perspective, “discerns” or interprets what is the governing law. The obvious point that I nevertheless emphasize (because its implications are not normally conceded) is that, as Cook correctly proclaimed, it is *forum* law that is being applied. From my perspective it does not matter whether the adjudicating court claims that it is interpreting a universally applicable common law (*Swift v. Tyson*— idealist) or merely carrying out the will of those who created the governing body (legal realists and relativists). What is clear is that whatever law is being applied does not have its source of legitimacy in the place where the conduct occurred.

Since it is always the adjudicating forum that must legitimize its power, this reality of forum law should be specifically acknowledged, even emphasized, rather than masked. My most basic indictment of vestedness is not that it rests on universal and natural law rather than positivist and relativist foundations.<sup>75</sup> For example, on no-Z-law facts, an Anystate court might legitimately adjudicate Joe’s conduct.<sup>76</sup> If Joe tortured, raped, and dismembered Paula in Z, the

73. See *supra* note 66 and accompanying text.

74. This is so in the sense that the territory in which conduct occurred has no law to govern the conduct, either because no literal government exists there, or because the sovereign which does exist there has no interest in regulating the conduct. As should become clear in text, under such situations, I am *not* advocating that no law can be applied. The question instead becomes which sovereigns *can* legitimately apply their law(s) outside their physical territory(ies) to govern the conduct.

75. Although Beale claimed to be a positivist, his theories were in reality based on deduction from first principles. See, e.g., BRILMAYER, FOUNDATIONS, *supra* note 68, at 18-19. As should be clear from the text, I do not fault conflicts theorists (who do so) for believing in universal or absolute truths, but rather for believing that whatever universal truths exist can have any bearing on “choosing” among substantive laws without considering the merits of the substantive laws themselves. I believe that the state has power only to choose its own law. It is a related but different issue whether a state should attempt to impose its truth on all, or claim only the limited right to enforce/adjudicate truth for those sufficiently connected to the state. I believe that states should exercise and claim only the limited power, but I certainly do *not* believe this is so because the states believe others’ laws are better or need to be applied. Recognizing that one’s own laws should not be applied hardly requires one to impose another’s laws; the more sensible stance might be to do nothing. I do not in this article develop the dimensions or underlying rationales of the connectedness test that I think a state should be required to use before it claims a right to apply its law. What I argue in this article is merely that states recognize they have no business applying others’ laws.

76. Joe, as an Anystate resident, is subject to Anystate governing his conduct, regardless of where he acts. As I intend to pursue in more detail in a future work, this is what general jurisdiction means. Thus, whatever Anystate chooses to call the law it applies in “general jurisdiction situations, the reason the law is binding on Joe is because Anystate has a right to apply *its* law to his conduct. Cf. Cox, *Burnham Insane*, *supra* note 7, at 528 (stating that general jurisdiction means the ability to apply forum law); Maier & McCoy, *supra* note 7 (stating that general jurisdiction

Anystate court might legitimately claim a right to apply God's law, universal law, common law, or whatever terminology it wished to employ to describe the phenomenon of a court filling the vacuum when there is no local law on point but nevertheless connectedness to the defendant and/or the litigation.<sup>77</sup>

The important issue becomes whether the connectedness to Anystate is strong enough that Anystate is justified in attempting to apply its law. What is disturbing, therefore, is when the Anystate court is allowed to get around questions of whether *it* has legitimacy to act by the subterfuge of a claim that the law being applied is no different from that which would be applied by a sovereign with conceded threshold connectedness to the controversy. It is one thing to claim that the court's moral legitimacy is derived from the fact that it is striving to correctly interpret shadows truly projected onto the wall of the cave. It is another claim, and one to be rejected, that the court derives its legitimacy from the fact that some of the shadows it interprets are supposedly like the shadows that others claim to see projected on the wall of the cave. The evil of First Restatement vestedness is that it allows the *Q* court to avoid inquiries whether the *Q* court has legitimacy to apply *Q* law by allowing the *Q* court to claim that it is applying *Z* law.

## 2. The Use of Foreign Law Facts in the Formulation of Forum Law

The threshold jurisdictional legitimacy of the *Q* or Anystate court must be determined by consulting only *Q*'s or Anystate's policies. The Anystate court, on a no-*Z*-law fact pattern, would try to determine whether it has a right to govern Joe's conduct,<sup>78</sup> and, if so, what Joe should be expected to do under the particular facts and circumstances of the case. *Assuming* the Anystate court does feel that it has a right or obligation to govern Joe's *Z* conduct,<sup>79</sup> the method for determining what Joe should be expected to do does not essentially change when *Z* law is also available as part of the fact pattern. For example, although what makes hypothetical 1(b) patently offensive<sup>80</sup> is that the *Q* court ignores the existence of *Z* law in its calculation of what the defendant ought to have done, this does not mean, however, that the *Q* court has power to apply *Z* law as if it were a *Z* court. The *Q* court can only take into account the existence of *Z* law when, *under Q* law, the presence of *Z* law ought to influence Joe's

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should be limited because of choice of law problems).

77. *Cf. Skiriotes v. Florida*, 313 U.S. 69 (1941) (finding that a Florida domiciliary may be prosecuted by Florida under Florida law for actions that occurred in international waters). *See also supra* note 20 (explaining my prior use of the "*Skiriotes* principle").

78. Although this first question is certainly worth inquiry, I do not pursue it in this article. *See infra* notes 243-45 and accompanying text.

79. *See, e.g., supra* note 76.

80. *See supra* notes 21-22 and accompanying text.

conduct. When the law in *Z* is that all drivers should drive on the right-hand side of the road, it might be difficult for a *Q* court to legitimately insist that anyone, even its own citizens, should drive on the left-hand side of the road while in country *Z*. But this is not because *Z* law of its own force requires right side driving; rather, it is because the *Q* court has determined, taking into account what the *Z* law is, that right-side driving is what should reasonably be expected in *Z*. In other words, *Q* substantive law dictates this result, not *Z* substantive law.

The reason we and a *Q* court would reject application of *Q* local law to Joe's right side driving conduct in *Z*<sup>81</sup> is that we intuitively realize that *Q* law is broader than rigid application of the local conduct rule. One can easily imagine wholly domestic situations in which a *Q* court would not insist on application of the drive-on-the-left rule. For example, if a clearly marked detour redirected left lane traffic via an overpass or underpass so that it travelled temporarily in the right-hand lane, where temporarily constructed road signs constantly warned travellers to stay on the right-hand side of the road through this area of road construction, one can hardly imagine that Paula as a local plaintiff would get much mileage out of the argument that Joe was negligent per se for driving on the right-hand side of the road. Similarly, if a *Q* police officer directed traffic to drive along the right-hand side of the road, it would likely be a violation of *Q* law for Paula to ignore the officer's directives and proceed along in a left-hand lane into the path of Joe's oncoming vehicle. The broader principle or policy of *Q* law is not that drivers always drive on the left, but that drivers should obey local *Q* traffic rules, which in most situations require drivers to drive on the left. A *Q* court, on *Z* facts, if it has jurisdiction to bind Joe by its law,<sup>82</sup> in applying *Q* law that drivers should obey reasonable local traffic rules, should hold that both Joe and Paula should drive on the right-hand side of the road, absent exigent circumstances. As Beale explained, the foreign local law is datum that the *Q* court includes in its analysis of how *Q* law should be applied to the defendant's conduct.<sup>83</sup>

### 3. The Public Policy Exception as Proof that Forum Law Always Is Applied

In situations where all sovereigns agree on the reasonableness of the local regulatory law, and the fact that it should be taken into account, whether we speak of *Q* or *Z* law being applied, may appear to be largely a matter of semantics. But the key qualifier in the preceding sentence is reasonableness. One proof that it is *Q* law that is being applied is the public policy exception to

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81. See hypotheticals 1-a & 1-b, *supra* notes 15-22 and accompanying text.

82. See *supra* note 76.

83. See *supra* note 66.

vested rights. Under the public policy exception, a forum may apply its own law rather than that of the sovereign under which rights supposedly vested, if the forum finds the foreign law obnoxious or unreasonable. If the adjudicating court may *always* consider whether the foreign local law is reasonable, this is proof that the Z law has no *inherent* right to be applied. The adjudicating court is in reality fashioning or applying its own law to the Z conduct.

Accordingly, when the foreign local law is *unreasonable* in the eyes of the Q court, it is not included in the mixture of facts and rules that the Q court blends together when it applies and formulates Q law. For example, assume as in hypothetical 1(d) above that Paula was not wearing her seat belt at the time of the Z collision. Z law is that all operators and passengers of motor vehicles must wear their seat belts while the vehicle is being operated, and Z law is explicit that failure to wear a seat belt is a complete bar to recover any damages resulting from a motor vehicle accident. In Anystate, where Paula sues Joe, no such seat belt law exists. In fact, several years ago when the Anystate governor attempted to impose by regulation a requirement that all state employees wear seat belts when travelling in state-owned vehicles, the Anystate courts declared this action unconstitutional as against the "God given right of any individual to do as he wishes with his own body." The Anystate legislature then passed preemptive state legislation prohibiting any local authority or cabinet department from requiring motor vehicle occupants to wear seat belts. Under these facts, the Anystate court may well conclude that its law should not take into account the country Z seat belt rules.<sup>84</sup>

Although the Anystate court might characterize its actions as determining

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84. If the hypothetical in the text does not strike the reader as justifying Anystate to ignore Z local law, consider the following: Z law requires all persons, whether residents or visitors, to identify to inquiring police authorities any redheads in a building where a person is staying. Penalty for failure to inform is a \$5.00 fine. The country Z authorities detest redheads, believing them to be witches, and all redheads apprehended are either executed or maimed and expelled from the country. Joe learns that Paula is a redhead, when he sees her dyeing her hair brown. When the police authorities visit and question Joe in the hotel where he is staying, he identifies Paula as a redhead, knowing that the authorities will harm her when he so informs. She subsequently is tortured, severely mutilated, and expelled from country Z. She thereafter sues Joe in Anystate under an intentional or negligent tort theory which the Anystate court normally would recognize. Under such facts, it would not be surprising if the Anystate courts allowed the case to go to trial, despite Joe's protestations that he could not be sued under Z law. *Cf.*, e.g. *Kalmich v. Bruno*, 553 F.2d 549 (7th Cir. 1977) (applying post-incident law of Yugoslavian government not in existence at time incidents occurred to Nazi sympathizer defendant's conduct in Serbia); *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 14 N.E.2d 798 (N.Y. 1938) (allowing claim based on plaintiff's discharge from service because Jewish to proceed to trial despite the legality of dismissal under then operative Nazi law).

if a public policy exception applies,<sup>85</sup> it would in reality only be ignoring Z law in determining what Joe should or should not take into account. My point is that the Anystate court, whether it includes or excludes Z law in its calculations of what Joe should have done,<sup>86</sup> is fashioning its *own* law as to what Joe's conduct should be. The Anystate court is giving effect to its own policies, as reflected in the purposes underlying its own laws, to adjudicate matters that implicate its own regulatory interests.

Under vested rights, it has always been true that a forum may resist otherwise applicable foreign law when that foreign law is against fundamental forum public policy. The implication is that the forum should only hear cases that do not conflict with its policies. My different emphasis of this same point is to insist that the forum *only* hear cases that implicate its own substantive policies. As applied to vestedness, my point is that the public policy exception swallows any notion that the forum is applying another's law. The forum should frankly acknowledge that it is always giving effect to its own public policy, regardless of the label it attaches to the law. It is a myth, a mistake, and a masking mystification for the forum to purport to interpret or apply another sovereign's law. The only relevant question is whether the adjudicating forum has sufficient ties, connections, and relations to the proposed litigation such that it would be fair for that forum to apply *its* law to the controversy. Whatever the forum claims it is doing, it is in reality applying its law to the controversy. This subsection's argument has been that vestedness always at least half-heartedly was aware of this underlying truth. It is now time to similarly critique interest analysis for providing mixed blessings of insight and confusion to conflicts theory.

### *B. Interest Analysis' Only Value Is to Justify Application of Forum Law*

The motivating insight of interest analysis is that no law should be applied unless the government which formulated that law has a true interest in the underlying litigation. Thus, interest analysis validly critiqued mechanically applied vestedness for its failure to consider what the underlying litigation was

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85. See, e.g., *Mertz v. Mertz*, 3 N.E.2d 597 (N.Y. 1936) (interspousal immunity); *The Casanova Club v. Bisharat*, 458 A.2d 1 (1983) (gambling on credit); cf. Monrad Paulsen & Michael Sovern, "Public Policy" in the Conflict of Laws, 56 COLUM. L. REV. 969 (1956) (finding that public policy exception masks connections with forum which independently justify application of forum law).

86. To the extent I am accused of failing to provide the adjudicating forum with guidance as to what its substantive law should be, I plead guilty. Determining what substantive law should look like is a laudable goal, but my purpose in this article is more limited, and more basic.

really about. Escape devices such as characterization<sup>87</sup> revealed that uniformity of results was not achievable under vestedness.<sup>88</sup> More importantly, from the interest analysis perspective, vested rights escape devices showed that courts cannot legitimately decide whether law applies based on single factor analysis. Interest analysts correctly insisted that courts must always evaluate what the litigation as a whole means before deciding what law applies, i.e., courts must consider what underlying policies are implicated by a suit.<sup>89</sup> These insights and indictments of mechanically applied formalist jurisdiction theory are as persuasive today as when they were first formulated.

Working from the foundational insight that only the law of a legitimately interested government should be applied to a controversy, interest analysis offered two additional "principles" to help courts decide whose law should apply in particular multi-state disputes. First, although correctly recognizing that vestedness sometimes resulted in application of law of a government that had questionable interest in the underlying controversy,<sup>90</sup> interest analysis mistakenly and myopically focused upon domicile as the primary light to illumine whether or not government interest exists.<sup>91</sup> By using domicile to determine government interest, interest analysis claimed to identify "false conflict" situations where only one government purportedly had interest in having its laws applied to the underlying litigation.<sup>92</sup> This approach was mistaken, as we shall see below, because it both obscured real conflicts and sometimes created improper interest.

87. See, e.g., cases collected in: LEA BRILMAYER & JAMES MARTIN, *CONFLICT OF LAWS: CASES AND MATERIALS* 120-35 (3d ed. 1990); ROBERT LEFLAR ET AL., *AMERICAN CONFLICTS LAW* 256-61 (4th ed. 1986); VERNON ET AL., *CASE BOOK*, *supra* note 50, at 247-70.

88. See, e.g., *Western Union Tel. Co. v. Flannagan*, 167 S.W. 701 (Ark. 1914) (action characterized as contract); *Western Union Tel. Co. v. Chilton*, 140 S.W. 26 (Ark. 1911) (action characterized as tort). In these, and six other Arkansas telegraph cases decided in the space of five years, opposite substantive results on basically similar facts were achieved by characterizing an action as a contract or tort, depending on which law would allow recovery for miscommunication which produced mental anguish. For more discussion regarding the cases, see LEFLAR ET AL., *supra* note 87, at 258.

89. See, e.g., CURRIE, *SELECTED ESSAYS*, *supra* note 19.

90. Cf. *Alabama G.S.R. Co. v. Carroll*, 11 So. 803 (Ala. 1892) (applying law of place of injury although negligence occurred elsewhere, employment centered elsewhere, and injured employee and defendant domiciliaries were citizens of another state). The key word in the text is "questionable." In most situations, as I shall demonstrate in greater detail in the text, interest analysis' real virtue was not to point out the inapplicability of other law, but rather the applicability of forum law that could not be applied if vested rights were followed. Cf. also Paulsen & Sovern, *supra* note 85.

91. E.g., CURRIE, *SELECTED ESSAYS*, *supra* note 19, at 61, 85-87, 89-90, 103, 445-47, 450-51, 566-67; cf. Laycock, *supra* note 18 (stating that modern interest analysts still insist on the purpose of law being to protect people, not territory). For sources critiquing interest analysis's myopic focus, see *infra* note 100.

92. See, e.g., CURRIE, *SELECTED ESSAYS*, *supra* note 19, at 107-10, 163, 582.

Interest analysis' second insight was more sound. In true conflict situations, interest analysis' most fundamental principle for resolving multi-state disputes was that the forum should apply its own law. The interest analysts rightly reasoned that a court, as the arm of its government, cannot, or at least should not, substitute another government's interest for that of its own, once it has concluded that the government interest exists.<sup>93</sup> Accordingly, the court always applies its own law in true conflict situations.

This sound insight—that the forum should apply its own law in the face of conflicting demands that another sovereign also has interest in the controversy—was weakened by interest analysis' insistence that it could resolve many conflicts between sovereigns. Perhaps at inception unnecessarily sensitive to the criticisms of *lex fori* that would later cause Currie to retreat somewhat from his view that the forum should apply its own law,<sup>94</sup> interest analysis unconvincingly insisted that many supposed conflicts were not conflicts at all, because only one sovereign had interest in regulating the matter at hand. Interest analysis thus pretended that the forum could objectively assess non-forum interests, a myth that appeared to make *lex fori* less selfish.

Rather than a source of potential consternation or embarrassment, *lex fori*, however, should have been embraced as the only defensible jurisdictional reality, selfish or not.<sup>95</sup> Interest analysis' problem was that it applied too little *lex fori*, not too much. Whenever interest analysis purported to interpret another sovereign's law, this usually masked the reality that forum law was being applied without regard to the other sovereign's real interests. Whenever interest analysis retained jurisdiction of a case where it did not or could not apply its own law, the forum was serving no useful judicial function and violating defendant rights. Accordingly, my ultimate conclusion regarding interest analysis, after examining its failure in more detail in the immediately following subsections, is that only those aspects of the doctrine which justify application of forum law should be retained.

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93. *Id.* at 181-83.

94. See Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754 (1963) [hereinafter Currie, *Disinterested Third State*] (advocating a moderate and restrained forum approach under which a forum might sometimes defer to application of a more interested jurisdiction's laws, even though forum had Currie defined interest in applying its law).

95. I address charges of selfishness at *infra* notes 195-211 and accompanying text.

1. Dubious Domicile and State Interest<sup>96</sup>

One fundamental failing<sup>97</sup> of interest analysis is that it largely equated government interest with government's desire to benefit or protect domiciliaries. This linking is both too limiting and too broad. On the limiting side, interest analysis' emphasis on party domiciliaries would prohibit a state from exercising its power through its laws in many situations where it nevertheless has a legitimate interest in the controversy the plaintiff brings to it. On the too broad side, it may well be unconstitutional for a state to exercise its power solely on the basis that its plaintiff domiciliaries will be benefitted by proposed litigation.<sup>98</sup>

First, consider the under-inclusiveness of domiciliary benefit as the primary test of whether a government has legitimate interest in underlying litigation. In a typical tort case, the interest analyst assumes that the primary purpose of a recovery limiting law is to benefit the state's defendant domiciliaries, whereas the primary purpose of a recovery maximizing law is to benefit the state's plaintiff domiciliaries.<sup>99</sup> Critics of interest analysis correctly have pointed out that this characterization of tort law is artificially arbitrary.<sup>100</sup> The state should be allowed to assert its interest based on regulation of conduct, regardless

96. Cf. John B. Corr, *Interest Analysis and Choice of Law: The Dubious Dominance of Domicile*, 1983 UTAH L. REV. 651 [hereinafter Corr, *Dubious Dominance*].

97. The more basic jurisdictional failing of interest analysis is that it incorrectly assumed disinterested states could take jurisdiction of cases. See *infra* notes 160-69 and accompanying text.

98. See *infra* notes 120-44 and accompanying text.

99. See, e.g., *Married Women's Contract*, in CURRIE, *SELECTED ESSAYS*, *supra* note 19, at 85-87; see also Herma H. Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 RECUEIL DES COURS 13 (1989); cf. Sedler, *Appreciation & Response*, *supra* note 19 (despite acknowledging regulatory interest as also permissible, main and primary emphasis on recovery/protection in tort context); Robert A. Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181 (1977) [hereinafter Sedler, *Gov't Approach*].

100. See, e.g., Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459 (1985); Lea Brilmayer, *Methods and Objectives in the Conflict of Laws: A Challenge*, 35 MERCER L. REV. 555 (1984); Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980) [hereinafter Brilmayer, *Myth of Legislative Intent*]; Alfred Hill, *After the Big Bang: Professor Sedler's Remaining Dilemma*, 30 WAYNE L. REV. 1471 (1992); Alfred Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463 (1960); Friedrich K. Juenger, *Governmental Interests—Real and Spurious—in Multistate Disputes*, 21 U.C. DAVIS L. REV. 515 (1988); Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AMER. J. COMP. LAW 1 (1984); cf. Larry Kramer, *More Notes on Methods and Objectives in the Conflict of Laws*, 24 CORNELL INT'L L.J. 245 (1991) [hereinafter Kramer, *More Notes*]; Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277 (1990) [hereinafter Kramer, *Rethinking*]; Singer, *supra* note 19; Jack Goldsmith, III, Note, *Interest Analysis Applied to Corporations: The Unprincipled Use of a Choice of Law Method*, 98 YALE L.J. 597 (1989).

of who is a domiciliary.<sup>101</sup> But suppose that the court does not wish to assert the state's legitimate regulatory interest.<sup>102</sup> Overemphasis on domiciliary connectedness potentially allows the court to convert a case in which the state should apply its own law to one in which the court "finds" a false conflict such that foreign law purportedly can be applied.

Consider, for example, a variation on the seat belt use facts of hypothetical 1(d):<sup>103</sup> Joe is a resident of Anystate, which does not have a required seat belt use statute. The Anystate legislature has neither made policy statements regarding freedom not to wear seat belts nor enacted any related legislation—there is simply silence on this issue. Z's legislature has passed measures requiring seat belt use by all who travel Z's highways. Joe and Paula collide in Z. Joe was wearing his seat belt; Paula was not wearing her seat belt. Although it is contested who caused the collision, it is not contested that had Paula worn her seat belt, she would have experienced no significant injury. If both parties were from Z, the Z courts would allow Joe to interpose a seat belt defense. Paula seeks full recovery; Joe attempts to interpose a seat belt defense.

Under traditional interest analysis, Z's government interest in applying a seat belt defense is only implicated when domiciliary defendants are sued by those who do not wear seat belts. Accordingly, under traditional interest analysis, since Joe is a non-domiciliary from Anystate, which does not have a required seat belt use law, a suit against him brought in Z, which has such a seat belt law, might nevertheless result in recovery. This could occur even if Paula is a domiciliary of Z and is in fact aware of the existence of the Z seat belt use law.<sup>104</sup>

An interest analysis court in Z might reach this questionable result by reasoning that the sole legitimate purpose of a required seat belt use statute is to protect defendant domiciliaries. Accordingly, the statute has no application when a defendant domiciliary is not involved. The statute simply disappears and what might have been viewed as a true conflict or at least an unprovided for case, becomes in effect a false conflict. The court might note, for example, that the usual purpose of forum tort law is to enable recovery when a tortfeasor is

101. See *infra* notes 134-44 and accompanying text regarding discrimination arguments, i.e., that the state should or must assert its interest regardless of who is domiciliary.

102. This could be because the judge disagrees with the substantive law. See also *infra* notes 115-19 and accompanying text.

103. See *supra* notes 27-33 and accompanying text.

104. Although a contrary result was reached in *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972), interest analysts criticized the case on grounds similar to those set forth in text. See, e.g., Robert Sedler, *Interstate Accidents and the Unprovided For Case: Reflections on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 125 (1973). Cf. also Weinberg, *Forum Law*, *supra* note 19.

at fault, and that the legitimate purpose of such forum tort law is well served when a plaintiff domiciliary like Paula stands to recover. Thus the seat belt law, not implicated by a defendant domiciliary, is replaced by forum tort law favoring plaintiff domiciliaries like Paula. The court might counter Joe's objections that application of plaintiff-favoring law would violate his due process expectations by suggesting that it would be a practical absurdity for Joe to claim that he could not expect application of his own state's law to his own conduct.<sup>105</sup> If the court further purported to weigh the interests of Anystate and Z under comparative impairment or the Second Restatement or some other mishmash version of interest analysis,<sup>106</sup> the court might note that since the defendant's home state, Anystate, has by its law chosen to impose liability on the defendant for conduct such as is at issue here, the case is either a false conflict or the defendant's state interest is weak in comparison to the forum state's, Z's, usual interest in providing recovery for its domiciliaries who otherwise would become a burden upon the state.

The fallacies of this type of reasoning should be apparent.<sup>107</sup> The Z court fails to be faithful either to Z or Anystate law. First, the Z court may well misinterpret Anystate's law regarding this controversy.<sup>108</sup> Anystate might consider adopting as its own common law a seat belt defense if it was presented with this case. It might feel that its law is that all persons should obey local traffic regulations so long as these are posted, and view the Z local law as fulfilling this criteria and creating a presumption of comparative negligence when Paula did not follow that local law.

105. This is true, but it is not a reason for the Z court to purport to apply Anystate law or to ignore major portions of its own Z tort law.

106. Cf. William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645 (1983). For works that have attempted to catalogue what choice of law systems the courts of the various states have adopted, see Patrick Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357 (1992); Herma H. Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983); Gregory Smith, *Choice of Law in the United States*, 38 HAST. L.J. 1041 (1987); Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49 (1989). The indication from these works is that courts often apply their own laws, even when they purportedly have adopted choice of law systems which would point elsewhere. Such data would be in line with my argument in this article that courts usually do, and always should, apply only their own substantive laws.

I do not rest my argument, however, on empirical grounds. Even if courts for the most part "choose" or manipulate their systems to apply their own law to controversies, the situations where the courts purport to apply others' laws, and the situations where the courts feel that they have power to apply others' laws, are objectionable. Courts should abandon these myths rather than attempt to "tweak" a failed system in efforts to make it work better.

107. See also *supra* note 100.

108. Even though defendant state has no seat belt use law, its general policy of protecting those who act in accord with local law could be implicated by an accident elsewhere, such as in the plaintiff's forum.

But whatever Anystate's law is, unless the Anystate court views the purposes of Anystate law and Z law in exactly the same interest analysis fashion as does the Z court, it will reach a different result from that attributed to it by the Z court. Even if the Anystate courts emphasize domiciliary connectedness, a different result is likely. The Z court attributes to Anystate an interpretation of its law that Anystate likely would not make of its own law if confronted with a similar fact pattern. For example, if the seat belt case was brought in Anystate, an interest analysis court *there* might well reason that because Paula is not a plaintiff domiciliary, the normal compensatory purposes served by Anystate tort law are not strongly implicated. Such a court might further reason that defendant Joe legitimately would expect local law to apply to local conduct. This court might additionally claim that it would be a logical absurdity for plaintiff Paula to expect other than application of her state's law to her own conduct in her own state. Accordingly, the seat belt defense might be recognized.<sup>109</sup>

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109. As further support for the arguments against misinterpretation and manipulation of others' laws, consider the debacles of *Thomas v. Washington Gas Light*, 448 U.S. 261 (1980); and *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 690 (E.D.N.Y. 1984). In the *Thomas* case, a plurality of the Court, in determining whether the District of Columbia had failed to give full faith and credit to a worker's compensation judgment from Virginia, applied a version of interest analysis that misinterpreted Virginia law so as to produce a false conflict. *Cf. Thomas*, 448 U.S. at 280, 284-85 (majority emphasizing compensation aspects of Virginia law) *with id.* at 292-93 (dissent pointing out how majority undercounted Virginia's interests). For additional criticisms of the *Thomas* case, see, e.g., Stewart Sterk, *Full Faith and Credit, More or Less, to Judgments: Doubts about Thomas v. Washington Gas Light Co.*, 69 GEO. L.J. 1329 (1981).

In the *Agent Orange* case, Judge Weinstein similarly blurred distinctions between choice of law theories to produce apparent false conflict and national consensus law as the decision that would have been made under each state's choice of law regime. 580 F. Supp. at 699-713. It strains credulity, however, to believe that all individual states, if left to hear only the claims which could have been brought as original actions in their state courts, would all have developed and applied the national consensus law that Judge Weinstein fashions for the consolidated litigation before him. The reality is that Judge Weinstein misinterpreted the laws of the sovereigns he was supposed to construe in order to reach a result he found more palatable.

Although many commentators have sympathized with the dilemma posed by multistate/multiparty tort litigation such as *Agent Orange*, and advocated solutions similar to Judge Weinstein's, these solutions have been with the recognition that the suggested resolutions significantly bend, if they do not break, the Court's requirements that federal courts sitting in diversity apply the same law states would. See, e.g., Barbara Atwood, *The Choice of Law Dilemma in Mass Tort Litigation: Kicking Around Erie, Klaxon, and Van Dusen*, 19 CONN. L. REV. 9 (1986); Georgene M. Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?*, 54 FORDHAM L. REV. 167 (1985); Jeffrey Steinhart, Note, *Agent Orange and National Consensus Law: Trespass on Erie or Free Ride for Federal Common Law?*, 19 U.C. DAVIS L. REV. 201 (1985). My position, which cannot be sufficiently elaborated here, is that there is no particular need to revamp federal common or substantive law to try to get around the strictures of *Van Dusen*. Instead, the problem is a jurisdictional one of having improperly granted jurisdiction in one court for a "consolidated" action which in reality *cannot* be brought under one sovereign's laws. I hope to develop these points in greater detail in a future work.

It is not disturbing that courts of separate sovereigns can reach opposite results on the same facts; by definition, conflicts law treats situations where separate sovereigns disagree on the appropriate rules or standards governing the same conduct. But it is disturbing that two courts can purport to apply the same rule of interpretation, interest analysis (in a forum emphasizing domiciliary connectedness), to the same substantive laws and come up with opposite results regarding the purposes of those laws. Via its exclusive focus on domiciliary benefit, interest analysis inevitably produces such contradictory results depending on where suit is brought. Instead of revealing "false conflicts," interest analysis in reality operates as justification for the forum to apply its own law when its own domiciliaries are involved. There is nothing necessarily wrong with this,<sup>110</sup> but interest analysis should frankly acknowledge that it cannot do more.

Interest analysis is especially suspect, as are all choice of law systems, when it purports to interpret the legislative intent of another sovereign. The interest analysts are simply wrong when they purport to conclude that another sovereign is not interested. One cannot state for another sovereign whether interest exists. The sole question worth asking is whether the forum state has legitimate interest. Interest analysis' strength is that it provides a forum with ammunition to apply its own law in many situations where the forum's interests truly are implicated. But where the forum purports to interpret another's laws, it is suspect. In short, interest analysis resolves no conflicts, but it does allow a forum legitimately to pursue its own policies.<sup>111</sup>

It is hopefully clear from the above that I do not fault interest analysis for failing to resolve conflicts, but for pretending to be able to do so. Under my thesis a court can never interpret another sovereign's law.<sup>112</sup> At most, a court can determine only whether it has an interest based on its own substantive policies in adjudicating the dispute presented to it and determine what shape *its* law should take based on the fact that the dispute involves multi-state elements.

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110. There is certainly nothing wrong with applying forum law when forum interests are implicated. Whether the benefits of forum law should be extended *only* to domiciliaries or whether benefits of forum law can be extended only on the basis of plaintiff domicile are different questions. There may indeed be something wrong with doing these things. See *infra* notes 120-44 and accompanying text.

111. In other words, interest analysis properly indicted the First Restatement's slavish subservience to other sovereign's purported interests; this subservience led to absurd results. See, e.g., CURRIE, *SELECTED ESSAYS*, *supra* note 19, at 180-81.

112. Although the argument cannot be made in detail here, a different result is *not* occurring in *Erie* situations. Under the federalism created by partially merged sovereignty of states into the federal union, federal district courts sitting in diversity are not applying *another* sovereign's law when they apply state substantive law, but rather are exercising the sovereignty they share with states for diversity purposes. See also Cox, *Jurisdiction, Venue & Aggregation*, *supra* note 7, at 217-23.

Accordingly, there are no false conflicts, real conflicts, or conflicts of any kind. There is instead only the single question whether the forum state has sufficient connectedness to the defendant and/or the litigation such that it may fashion law to govern the dispute. But if there are no false conflicts nor any disinterested third states,<sup>113</sup> interest analysis always goes awry when it authorizes the forum court to subserve its government's own legitimate substantive policies, under the ruse of false conflict.<sup>114</sup>

The going awry could be inadvertent because the interest analyst judge simply fails to see that the forum has a legitimate interest, or it could be a manipulative subversion of the state's policies. Either way, when state interest is under-counted<sup>115</sup> to include only situations involving domiciliaries, interest analysis creates the distinct possibility that a state's courts will subvert the state's legislative purpose. In the above seat belt use hypothetical, for example, it is certainly possible, if not likely, that the legislature's intent in passing the no-recovery rule was to regulate conduct rather than adjust compensation.<sup>116</sup> An interest analysis judge who thought the seat belt use statute barbaric could nevertheless circumvent its effect in multi-state situations by purporting to apply foreign law under the benefit-to-domiciliary logic detailed above.

Since conflicts of law rules are usually common law (judicially made) rather than statutory, the forum decision to apply foreign law is not perceived as a direct affront to the forum state legislature. But because purportedly *foreign* law is applied, the judicial decision regarding the true meaning of the foreign law is not "correctable" by that legislature either. So long as courts mistakenly believe that they possess choice of law power to interpret others' laws, the decision to apply foreign law is essentially unreviewable by either state's legislature.

113. See *infra* notes 160-69 and accompanying text for a more detailed criticism of Currie's notion that what he termed a "disinterested third state" should be able to apply law to a controversy.

114. It is of course galling and wrongheaded when an interest analysis court misinterprets foreign law and concludes "false conflict" when a true conflict exists, but in "false conflict" situations where the court applies its own law, the court still is true to its own state's legitimate policies. The "harm" of failure to see the true conflict is minimal systematically if in true conflict situations the forum always applies its own law. By masking its *lex fori* effect, however, interest analysis encourages courts to believe they can find solutions to choice of law problems outside of application of forum law. There is irony in interest analysis, thus potentially leading to subversion of forum policy, because the more basic mandate of interest analysis is that the forum should pursue forum policy.

115. The under-counting could either be of the state interest of the adjudicating forum or of the interest of the other state whose laws the forum mistakenly believes it has power to interpret and apply.

116. If compensation motives figured into the enactment at all, they may have been intended to apply regardless of the state to which the victim "belongs." The insurance lobby, being largely behind seat belt use statutes, would desire to benefit from all limitations on recovery, not just limitations for domiciliaries.

Certainly the legislature of the state whose law purportedly is being applied has no ability to influence the adjudicating court. And the adjudicating court, by purporting to apply *foreign* law, removes itself from direct supervision of its own legislature.<sup>117</sup> The court essentially is acting without any checks on its power to fashion or create law that it feels is appropriate to govern the parties' conduct. I do not necessarily claim that courts have no rights to fashion free-wheeling common law,<sup>118</sup> but I do strenuously object to interest analysis *masking* this unbridled court power to fashion common law under the guise that another sovereign's stronger policy interests are being given effect. If interest analysis means that courts may fashion law opposite to what its legislature desires, then let that theory be put forward directly rather than obliquely, so that its merits and demerits may be frankly evaluated.<sup>119</sup>

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117. Whether legislatures can or should directly legislate choice of law rules is a different question from the point addressed in the text. As I explain in greater detail in *infra* notes 193-95 and accompanying text, choice of law rules purporting to indicate or limit territorial reach of substantive law must be measured against all other fairness principles (e.g., constitutional requirements against discrimination, arbitrariness, etc.) binding on the forum. This same process would be required for legislative enactments regarding choice of law. Thus in the debate between, on the one side, Professors Brilmayer and Kramer, who apparently believe all legislative pronouncements about choice of law must be given effect, against, on the other side, modern proponents of interest analysis, many of whom believe such legislative pronouncements may be ignored or significantly downplayed, neither side has it quite right. It is the entire myth of the choice of law process itself which should be eradicated. The interest analysts are partly correct to insist that legislatures should only identify true policies rather than try to decide how conflicts rules should operate, but the critics of interest analysis are also right to insist that interest analysts cannot substitute their judgment for a legislature's and still claim that interest analysis is founded in legal realism rather than metaphysical (and potentially arbitrary) abstraction. The solution to this dilemma is to recognize that courts can never determine how other states' policies are to be implemented, but are always limited to applying only their own substantive laws.

For examples of the dispute about the supposed importance or unimportance of legislative intent regarding choice of law, compare, e.g., Brilmayer, *Myth of Legislative Intent*, *supra* note 100 and Kramer, *More Notes*, *supra* note 100 with Kay, *supra* note 99; cf. Bruce Posnak, *Interest Analysis and Its "New Critics"*, 36 AM. J. COMP. LAW 681 (1988).

118. Some choice of law theorists do advocate fairly free-wheeling power in the courts to fashion law independent of their legislatures. See, e.g., Friedrich K. Juenger, *Governmental Interests and Interstate Justice: A Reply to Professor Sedler*, 24 U.C. DAVIS L. REV. 227 (1990) (stating that judges should develop an international or interstate common law for multi-state/multi-sovereign litigation); Mary Jane Morrison, *Death of Conflicts*, 29 VILL. L. REV. 313 (1984) (embracing better law approach empowers courts to make law which goes beyond limited vision of own legislature).

119. See *supra* note 118 for examples of theories which more directly advocate independent court power.

Such theories would appear to run contrary to some of interest analysis' foundational insights and motivations. When critiquing Professor Juenger's apologia for judicial discretion to fashion special conflicts rules, for example, Professor Sedler, as a modern proponent of interest analysis, insists, rightly I think, that interest analysis and *Erie's* insight on the limitation of courts to fashion common law go together, and that courts cannot have policies that deviate from their states' legislatures. See Sedler, *Appreciation & Response*, *supra* note 19. Currie's writing generally seems

## 2. Dubious Domicile and Party Unfairness

### a. The Insufficiency of Plaintiff Connectedness

Using party domicile as the indicator of legitimate state interest not only undercounts or miscounts state interest, it also may lead to the assertion of state interest that violates a defendant's due process rights. The United States Supreme Court correctly ruled in *Home Insurance Co. v. Dick* that plaintiff's residence, standing alone, provides an insufficient basis for allowing the forum to apply its law to the defendant's conduct.<sup>120</sup> *Allstate Insurance Co. v. Hague* confirms this point. Whether *Allstate* was correctly or incorrectly decided,<sup>121</sup> the plurality, concurrence, and dissent all recognized that *defendant* connectedness to the state whose law was attempting to be applied was required if the defendant's due process rights were not to be violated.

Although the *Allstate* plurality's requirement of "significant contacts or significant aggregation of contacts, creating state interests" links contacts to the state and does not explicitly mention the individual defendant, the remainder of the test emphasizes that the choice of the law of the state with contacts must be "neither arbitrary nor fundamentally unfair."<sup>122</sup> As the Court in *Phillips Petroleum Co. v. Shutts*<sup>123</sup> stated, when one is considering whether choice of law is arbitrary or unfair, "an important element is the expectation of the parties."<sup>124</sup> Similarly, Justice Stevens' *Allstate* concurrence<sup>125</sup> notes that

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in the same vein despite occasional fomentings that courts should "adjudicate" cases. At any rate, for purposes of the point made in the text, it does not matter whether proponents of interest analysis want courts to be unfettered and enlightened interpreters and fashioners of better law or implementors of their own state's policies as reflected in its constitution and statutes. The important thing is that we recognize that courts cannot implement *other* states' policies and statutes. Any pretenses regarding ability to do that are just that—pretenses—which should be unmasked.

120. See *Allstate*, 449 U.S. at 309-11 (explaining this aspect of *Dick*).

121. The *Allstate* decision has been heavily criticized. See, e.g., John Kozyris, *The Lessening of Due Process in Choice of Law*, 14 U.C. DAVIS L. REV. 889 (1981); Linda Silberman, *Can the State of Minnesota Bind the Nation? Federal Choice-of-Law Constraints After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 103 (1981); Aaron D. Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 HOFSTRA L. REV. 149 (1981); Arthur T. von Mehren & Donald T. Trautman, *Constitutional Control of Choice of Law: Some Reflections on Hague*, 10 HOFSTRA L. REV. 35 (1981). But cf. Weinberg, *Minimal Scrutiny*, *supra* note 41; Louise Weinberg, *Conflicts Cases and the Problem of Relevant Time: A Response to the Hague Symposium*, 10 HOFSTRA L. REV. 1023 (1982) [hereinafter Weinberg, *Relevant Time*]; Robert A. Leflar, *Choice of Law: States' Rights*, 10 HOFSTRA L. REV. 203 (1981).

122. 449 U.S. at 312-13.

123. 472 U.S. 797 (1985).

124. 472 U.S. at 822.

choice of law that "frustrates the justifiable expectations of the parties can be fundamentally unfair" and that "this desire to prevent unfair surprise to a litigant has been the central concern in this Court's review of choice of law decisions under the Due Process Clause."<sup>126</sup> The defendant has a right to expect that only law of a state with legitimate regulatory interest in the matter being litigated will be applied to his conduct.

As the *Shutts* case pointedly makes clear, the plaintiff's desire for forum law cannot constitute the significant connection for state interest that would satisfy due process.<sup>127</sup> Additionally, "party expectations" does not necessarily mean what the parties subjectively thought (if they had any prior thoughts) about what law would govern their conduct. As conflicts cases such as *Alaska Packers* and *Pacific Employers*<sup>128</sup> make clear, even when parties explicitly formulate what law they desire or expect to govern their conduct, this formulation does not necessarily defeat application of other law to their conduct when the state has legitimate interest.<sup>129</sup> In other words, the parties'

125. It is interesting to note the *Allstate* dissent's conclusion that there was no frustration of the reasonable expectations of the parties on the *Allstate* facts. See 449 U.S. at 336. This may be an indirect indication that the *Allstate* result actually was correct. The narrow issue in *Allstate* was whether the insurer should be required to pay compensation under multiple policies whose coverage would be triggered by automobile accidents involving uninsured motorists. See *id.* at 305. The *Allstate* case is thus distinguishable from situations where a foreign court attempts to apply its fault-determining law outside its sphere of regulatory interest. Arguably, in *Allstate*, the presence of the insurer and the beneficiary within the forum created a legitimate state regulatory interest. In other words, while it would have violated *Allstate's* legitimate expectations if the Minnesota court had applied a Minnesota rule-of-the-road law, expected to govern by all parties when travelling in Wisconsin, it would not necessarily frustrate party expectations to conclude that an event occurring outside Minnesota might affect how much compensation a Minnesota resident was entitled to from an insurance company which had obligated itself to compensate Minnesota victims. Cf. also Weinberg, *Minimal Scrutiny*, *supra* note 41; Weinberg, *Relevant Time*, *supra* note 121.

I emphasize that I am not saying that the *Allstate* plurality's reasoning was sound or even that the holding of *Allstate* was correct. I am instead emphasizing that the key issue of defendant's expectations can lead to different answers depending on which defendant is involved and what is the precise issue for which the defendant had an expectation. I therefore quarrel with the *Allstate* dissent's splitting-off of legitimate state interest from the issue of reasonable party expectations. These are not separate concerns but the same issue of whether the state has sufficient regulatory connectedness to bind a particular defendant. The defendant's reasonable expectation is that only states with legitimate state interest will apply their law to his conduct.

126. 449 U.S. at 327.

127. See 472 U.S. at 820.

128. *Alaska Packers Ass'n v. Industrial Accident Comm'n of Cal.*, 294 U.S. 532 (1935); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939).

129. In *Alaska Packers*, employer and employee entered into a contract in California that specifically required Alaska workers compensation law to be applied to employment related injuries that occurred in Alaska. The *Alaska Packers* court upheld California's right to ignore both the employment contract language and Alaska's interest in applying its law to injuries occurring in its territory; California could apply its law despite both these interests. In *Pacific Employers*, the

expectations must always include the possibility that a legitimately interested state's laws will apply to their conduct.

Because the constitutional test for application of state law (meaning choice of law) arises under due process,<sup>130</sup> it is a personal and waivable right. This implies that the focus upon significant state contact or significant aggregation of state contacts creating state interest<sup>131</sup> does not arise unless one of the parties objects to the power of the court to apply its law to her conduct. As a practical matter, because the plaintiff chooses the forum (usually with the expectation that forum law will apply), it is the defendant's reasonable expectations about choice of law that are evaluated under the Due Process Clause.

The *Dick*, *Allstate*, and *Shutts* cases make clear that the plaintiff's connection to the forum, standing alone, is insufficient to empower the forum to apply its law. No matter how many contacts or aggregation of contacts a state has with the party who desires application of forum law (usually the plaintiff), these will be insufficient to allow the forum to apply its law. The contacts that count<sup>132</sup> are those which tie the defendant (the person objecting to application of forum law) to the forum. The plaintiff's residence or domicile becomes relevant only by the defendant's purposeful action. When the defendant aims his conduct at a plaintiff whom he knows to be tied to a particular forum, the plaintiff's connection with the forum becomes relevant. This is not because the forum always has a right to protect its own regardless of what has occurred where, but rather because the defendant can reasonably expect that when he targets activity at persons connected with certain sovereigns, he can reasonably expect that those sovereigns might wish to regulate that

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employee and employer, both from Massachusetts, entered into an employment contract in Massachusetts which anticipated that Massachusetts' exclusive workers compensation remedy would govern any injuries arising out of the employment. The employee, injured while working for his employer in California, sought recovery under California's more liberal workers compensation law. The *Pacific Employers* court upheld California's right to apply its law.

130. See *supra* note 17. Cf. BRILMAYER, FOUNDATIONS, *supra* note 68, at 127-28 (stating that application of one state's law means no full faith and credit can be given to competing states' laws); Weinberg, *Minimal Scrutiny*, *supra* note 41 (all that is required under constitutionality test is a rational basis for application of the state's laws).

131. 449 U.S. at 312-13; 472 U.S. at 818.

132. Cf. Brilmayer, *How Contacts Count*, *supra* note 39; Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988). Despite recognizing, as reflected in these two pieces, that litigation-related contacts are the only relevant contacts for personal jurisdiction, Professor Brilmayer apparently fails to recognize that the only valid reason for asserting personal jurisdiction is to apply forum law to the litigation which arises from those forum related contacts. The contacts which count, however, to justify the forum's so called "personal jurisdiction" interest, are the same contacts which validate both personal jurisdiction and choice of forum law. In reality there is just one issue—the forum's interest—not two separate issues of personal jurisdiction or choice of law.

conduct.<sup>133</sup> Similarly, when the defendant acts toward or in a state without regard to what persons therein he might injure, the plaintiffs/victims who later sue are significantly tied to the state through this conduct such that both parties, the plaintiff and the defendant, reasonably should expect application of forum law.

b. Unfairness Towards Similarly Situated Plaintiffs

This last example exposes additional infirmity with interest analysis that focuses solely on the plaintiff's domicile as the measure of state law legitimacy. Such focus may lead to discrimination against similarly situated plaintiffs. May a state prohibit non-citizens or non-domiciliaries from invoking the benefits and protections of its laws? For example, assume that under Anystate law it would be a crime and also prima facie evidence of tortious conduct for an adult to sexually exploit a child.<sup>134</sup> Assume further that Jamie, an eight-year-old from state V, is visiting in Anystate with her parents, who are also V residents and domiciliaries. While in the restroom of an Anystate amusement park, Jamie is sodomized by the defendant.

Assume that the criminal perpetrator is a resident of Anystate. Assume further that the V substantive law prohibits monetary recovery in civil suit for sexual abuse, under the theory that rehabilitation or incarceration is the proper way for society to address these type of actions. If Anystate is a traditional interest analysis jurisdiction that measures government interest based on party domicile, the Anystate sodomization presents an unprovided for case. Anystate's compensatory tort law is seen as designed to allow Anystate plaintiffs to recover, whereas state V's compensation denying tort law is seen as designed to protect state V defendants. Since we do not have an Anystate plaintiff or a state V defendant in this case, it would be traditionally viewed as an unprovided for case, and the forum would apply its own (in this case plaintiff-favoring) law.

I agree with this result, but I disagree strongly with the rationale by which it is reached. The implication of exclusive focus upon party domicile is that Anystate has no strong (legitimate) governmental interest in seeing that its law

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133. Whether the defendant's conduct must be intentionally or deliberately aimed at a forum resident, or whether a more lenient reasonable man or reasonable expectation standard should apply (i.e., that persons in the forum state would be affected or injured by defendant's conduct) is an interesting but different issue from the point I am making in the text. Regardless of what standard is used, the focus must be upon the defendant's actions rather than upon the plaintiff's plight. It is no mistake that the test articulated in the text is synonymous with the due process test for personal jurisdiction, with its focus upon defendant rather than plaintiff contacts.

134. I have, of course, chosen morally reprehensible action in an effort to stir the sympathies of the reader, but the legal argument would be no different for a garden variety tort, since all tort law reflects the public policy of the state applying it.

is applied on the above facts. Yet as argued above,<sup>135</sup> the purpose of the Anystate tort law may be to deter defendant conduct as much or more than simply to compensate injured plaintiffs. Accordingly, some modern interest analysts have recognized a regulatory conduct exception to the interest analysis emphasis on party domicile.<sup>136</sup> Yet, once one acknowledges that a legitimate government purpose might relate more to conduct than to people, it is hard to retain the emphasis upon domicile as being the true justification for even those situations where the parties' "own" are involved.

This becomes especially evident when the parties' "own" are not involved. Assume, for example, that child victim Jamie is from state V and that the perpetrator is from state W, which allows a civil suit for sexual abuse only after a criminal trial on the merits has been concluded. The criminal/tortious actions occur in Anystate, and Jamie's parents wish to bring a civil suit only, which is permissible under Anystate law. Is this an unprovided for case?<sup>137</sup> A false conflict?<sup>138</sup> An example of a disinterested third state?<sup>139</sup> These inquiries

135. See *supra* notes 105-07 and accompanying text.

136. See, e.g., *supra* note 19 and sources cited therein.

137. An unprovided for case is one in which the laws of none of the supposedly connected forums should apply, because the connections which would normally invoke application of those laws are absent. Under traditional interest analysis, an unprovided for case is one where the defendant is from a state with plaintiff favoring law and the plaintiff is from a state with defendant favoring law. See, e.g., RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 6.23 at 333 (3d ed. 1986). As I explain in more detail *infra* at notes 160-69 accompanying text, there are no unprovided for cases which can be heard on the merits; if the case is truly unprovided for, there is no jurisdiction to hear it. This truth has also been partly realized by Professor Kramer. See Larry Kramer, *The Myth of the "Unprovided For" Case*, 75 VA. L. REV. 1045 (1989) [hereinafter Kramer, *Myth*]. Professor Kramer's apparent "solution" to the unprovided for case, however, is not always to dismiss it, but rather to first seek some underlying state interest outside of the forum that would convert the unprovided for case into one for which law could be applied. See, e.g., *id.* at 1063; Kramer, *Rethinking*, *supra* note 100, at 309-15; Kramer, *Renvoi*, *supra* note 63. I criticize this sometimes abandonment of forum law throughout this article and specifically criticize some of Professor Kramer's analysis at *infra* notes 208-25 and accompanying text.

138. The case could conceivably be considered a false conflict under the theory that both Anystate and state W allow civil recovery with the intention of deterring defendant conduct. Since Jamie's parents elected to sue in Anystate, that state and the defendant's home state could be considered the only interested states for purposes of conflict analysis.

139. A disinterested third state is one that, lacking legitimate governmental interest, cannot apply its own laws to the case but recognizes that the case presents a true conflict between the interests of other jurisdictions. See, e.g., Currie, *Disinterested Third State*, *supra* note 94, at 764-65. The case in text would be so considered under traditional interest analysis, since Anystate is the "home state" of neither plaintiff nor defendant. Accordingly, the fact that the molestation occurred in Anystate is considered a mere fortuity for purposes of determining what Jamie or her parents should recover. Cf., e.g., *Kilberg v. Northeast Airlines, Inc.*, 172 N.E.2d 526, 527 (N.Y. 1961) ("The place of injury becomes entirely fortuitous."). See *infra* notes 160-69 and accompanying text for more detailed criticism of the notion that there should ever be a disinterested third state adjudicating a case.

only have relevance if one assumes that the residence of those who commit actions in Anystate is relevant to determining whether Anystate law applies. If one instead assumes that the purpose of Anystate law is to deter a type of conduct, regardless of who commits it, or who is hurt by it, then these questions become moot.<sup>140</sup>

Interest analysis based on party domicile has been specifically attacked for producing opposite results when seemingly identical conduct occurs in the forum.<sup>141</sup> I largely agree with this criticism and believe that it is valid even in those situations where interest analysts can make the best case for disparate treatment—the reverse *Babcock* fact situation.<sup>142</sup> For example, assume that the criminal perpetrator in our child abuse hypothetical is also from state V. Since the parties are both from the same state, traditional interest analysts would term this case a false conflict and apply state V's law. Such result was reached in *Shultz v. Boy Scouts of America*.<sup>143</sup> The *Shultz* decision has received mixed reviews. Observers should intuitively be disturbed by reverse *Babcock* decisions

140. Interest analysts may argue that forum law only has application when the forums' "own" are involved, but that "own" is a much broader concept than affiliation by domicile. Under such a view, conduct is deterred because it either directly or indirectly leads to increased safety for those who must live and work in proximity to the conduct, presumably primarily forum domiciliaries. Cf., e.g., Sedler, *Appreciation & Response*, *supra* note 19; Sedler, *Gov't Approach*, *supra* note 99; Weinberg, *Forum Law*, *supra* note 19. I find it equally plausible, however, to justify application of forum law under the theory that the forum state simply finds the conduct morally reprehensible and wishes it to stop wherever the state constitutionally may exert its influence.

141. See, e.g., Brilmayer, *Myth of Legislative Intent*, *supra* note 100; Corr, *Dubious Domicil*, *supra* note 96; Ely, *supra* note 18; Douglas Laycock, *Equality and the Citizens of Sister States*, 15 FLA. ST. U. L. REV. 431 (1987); Gerald L. Neumann, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261 (1987); Peter D. Isakoff, Note, *Unconstitutional Discrimination in Choice of Law*, 77 COLUM. L. REV. 272 (1977).

142. In *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963), a New York driver and New York passenger drove to Canada, where the passenger was injured, arguably as a result of the driver's negligence. The *Babcock* court rejected the rule of the place of injury in favor of interest analysis and reasoned that New York, being the domicile of both parties to the action, had the only interest in having its law applied (false conflicts rationale). A reverse *Babcock* fact situation would be one where the parties' common domicile would deny recovery, whereas place of injury law would permit recovery. Interest analysis based on party domicile should continue to treat this as a false conflict. The case results, however, are mixed. Compare, e.g., *Milkovich v. Saari*, 203 N.W.2d 408 (Minn. 1973) with *Gagne v. Berry*, 290 A.2d 624 (N.H. 1972) and *Maryland Casualty Co. v. Jacek*, 156 F. Supp. 43 (D.N.J. 1957).

143. 480 N.E.2d 679 (N.Y. 1985). *Schultz* involved suit by New Jersey parents against a New Jersey scoutmaster and the Boy Scouts of America for alleged molestation of their son which occurred on a camping trip in New York. New Jersey had a charitable immunity law which protected the Boy Scouts; New York did not have protective charitable immunity. The New York court applied New Jersey law under the theory that the purposes of New York law were compensatory rather than regulatory and therefore the case was a false conflict.

which depart from forum law.<sup>144</sup> Reverse *Babcock* cases such as *Shultz* poignantly demonstrate the truth of this Article's central thesis that the forum court with jurisdiction always applies its own law and explicitly should acknowledge that reality when it renders its decisions. I expand on this point in the next subsection.

### 3. The Reality of Forum Law

#### a. Choice of Law Rhetoric Masks the Reality of Substantive Forum Law

A court that purports not to apply its own law, but the law of another sovereign, is primarily a court applying law of its own choosing. Implicit in arguments such as those made by Professor Ely that a forum should not and/or may not prefer its own<sup>145</sup> is that the court has power to apply its own substantive law when non-forum residents are plaintiffs. This power exists not just when the forum's own are beneficiaries, but for all situations and people affected by the forum-touching activity. Even more pertinently, implicit in arguments by Professor Weinberg and others that the forum should not depart from forum law<sup>146</sup> is the correct assumption that the forum may constitutionally apply its own law without regard to the interest of other sovereigns in the same controversy.<sup>147</sup> But if the forum is under no obligation to apply another's laws, what are we realistically to make of the forum's purported decision to defer to and to apply the laws of another sovereign? In reality, this is masking rhetoric or misguided (and outdated) interpretation of the Full Faith and Credit Clause.

So long as the forum (and the sovereign represented by it) still retains jurisdiction of the case, the forum has deferred to no one. The *only* way a forum in the modern minimum contacts world may truly defer to the interests of another interested sovereign is to hand over jurisdiction of the case to that sovereign. So long as the forum retains jurisdiction, it is not applying another's law to promote that other's interests but is instead using its own resources to promote its own interests. In other words, regardless of what the forum says it is doing, the only reason its decisions are entitled to respect within our federal system<sup>148</sup> is because the forum had legitimate power to apply its own law.

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144. Cf. Weinberg, *Forum Law*, *supra* note 19; Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53 (1991) [hereinafter Weinberg, *Against Comity*].

145. See *supra* note 141 (Ely and other commentators' arguments that interest analysis impermissibly discriminates).

146. See *supra* note 144.

147. This has been the Court's position regarding constitutional limits on choice of law since *Pacific Employers*. See *Allstate*, 449 U.S. at 308 n.10. See also *supra* notes 126-29 and accompanying text.

148. *I.e.*, obligatory enforcement under the Full Faith and Credit Clause.

The *Challoner*<sup>149</sup> case demonstrates both the weakness and strength of interest analysis attacks on vested rights, and the Supreme Court's partially correct response to those attacks. Much criticized by interest analysts, *Challoner* is actually a sound constitutional decision on one level, once it is recognized that the Texas courts, regardless of what they said they were doing, were actually applying their own substantive law. On another level, however, by refusing to explicitly state that it was forum substantive law that was being applied, the Court's *Challoner* decision can be misused to uphold arbitrary and mythical choice of law rules.

In *Challoner*, the defendant was an ammunitions company that manufactured 105 millimeter howitzer rounds in Texas for the U.S. military.<sup>150</sup> During the Vietnam war, one of the defendant's rounds prematurely exploded in Cambodia, killing two U.S. servicemen while they were fighting the North Vietnamese. The lower courts assumed that Texas' choice of law rule would require the application of Cambodian substantive law.<sup>151</sup> The Fifth Circuit ruled that the federal courts were permitted to apply a federal choice of law rule when state choice of law rules pointed to a jurisdiction without real interest in the controversy, i.e., only an interested jurisdiction's substantive law should be applied under federal law.<sup>152</sup> Interest analysts applauded this result and thus hoped that *Challoner* would provide the Supreme Court the vehicle to constitutionalize interest analysis methodology of looking to the policy reasons behind laws and permitting application of the substantive law only of truly interested sovereigns to multistate facts.<sup>153</sup>

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149. *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975).

150. *Challoner v. Day & Zimmerman*, 512 F.2d. 77, 78 (5th Cir. 1975). Although the defendant manufactured the rounds in Texas, it was incorporated in Maryland, with its principal place of business in Pennsylvania. Place of manufacture would be sufficient connection to Texas for Texas to apply its law to incidents arising out of the manufacture, even though plaintiffs' descendants were from Wisconsin and Tennessee rather than from Texas.

151. See *Challoner*, 512 F.2d at 79-80.

152. The spirit of the Fifth Circuit's reasoning is captured in the following excerpt:

This is a case in which the policies of all jurisdictions having an interest in the dispute will be carried out through application of Texas law. No jurisdiction will have any policy frustrated by application of that law. In such a situation, *Lester* dictates that as a matter of federal choice of law, we apply the law of the jurisdiction having a legitimate interest in the contest, any state conflict of law rule to the contrary notwithstanding. However controlling state law may be in most diversity cases, it does not extend so far as to bind a federal court to the law of a wholly disinterested jurisdiction.

*Id.* at 80-81.

153. The belief was that under the *Challoner* facts, Cambodia would be seen as a sovereign with no legitimate interest in the controversy. For post-*Challoner* arguments that interest analysis is still and should be incorporated into the Court's constitutional analysis of choice of law decisions, see, e.g., Gene Shreve, *Interest Analysis as Constitutional Law*, 48 OHIO ST. L.J. 51 (1987).

Nevertheless, the *Challoner* Court correctly and easily ruled that it was not the business of the United States Supreme Court to straighten out a state court as to what should be the *shape* of its substantive law. Although couched in *Erie/Klaxon* terms of the obligation to apply state choice of law rules in all situations where a federal court sits in diversity, the decision more broadly reaffirms the *Pacific Employers/Allstate* rule that no federal constitutional searching for best applicable substantive law is mandated under the Full Faith and Credit Clause or under the Due Process Clause.<sup>154</sup> Implicit in the per curiam quick disposal of the *Challoner* case and more explicitly stated in Justice Blackmun's concurrence is the message that *Texas* was a state with sufficient contacts to apply its own law to this controversy. *Because* Texas had sufficient connection to the litigation to apply its law to the controversy, the Court would not criticize or reverse the application of Texas' application of its law—that is the real message of *Challoner*.

In other words, application of Texas conflicts rules was really application of Texas substantive law. While that message had been delivered also in *Klaxon* and *VanDusen*, neither of those cases had demonstrated this truth as dramatically as *Challoner*. The effect of treating conflicts rules as substantive rather than procedural for *Erie* purposes is to recognize that there is no constitutionally significant difference between a court purporting to apply another sovereign's substantive law and a court directly applying its own substantive law. If Texas makes the decision in *Challoner*-type situations that what Texas calls "the law of Cambodia (place of injury)" will be applied to determine liability, this decision is entitled to respect *as a decision by Texas* of what *its* substantive law of liability will be for these type situations. As Justice Blackmun's concurrence makes clear, this particular policy decision by Texas is *not* constitutionally compelled.<sup>155</sup> Once made, however, it is entitled to respect.<sup>156</sup> The decision is entitled to respect not because Cambodia had sufficient connection to the litigation to apply its own law to the controversy, but *rather because Texas had sufficient connection* to the litigation to fashion substantive law to determine parties' rights and responsibilities.

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154. See *supra* note 147.

155. 423 U.S. at 5 (Blackmun, J., concurring). See also *supra* notes 26, 127-29 and accompanying text (describing the modern *Allstate* test for application of state law). As *Allstate* makes clear, decisions under what was formerly thought to be a constitutionally required version of vested rights (requiring application of a specific state's law to a controversy) have been discredited and abandoned by the Court.

156. The decision is entitled to respect only on the issue of whether Texas has sufficient interest to fashion law. Whether the particular law fashioned violates other constitutional provisions is an entirely different issue. See also *infra* notes 193-95 and accompanying text.

Recognizing that choice of law decisions are in fact substantive law decisions is in line with interest analysis' foundational insight that only the law of an interested state may be applied to a controversy. Interest analysts properly criticized arbitrary or mechanical applications of choice of law (i.e., treating choice of law as if it were procedural and non-policy reflective) for ignoring the reality that choice of law decisions are actually decisions about how and whether a state's substantive law policies will be furthered. When courts recognize that their choices of what law will apply *always* are substantive decisions, they must engage in a policy analysis to defend or reach their decisions. To this extent, interest analysis criticisms of *Challoner* were right to press the Texas courts about whether Texas really wants to make a substantive decision that *its* law will be an approximation of the law of the place of injury, even when only American defendants and victims are involved.

Once Texas makes a decision, however, of what its substantive law will be in such situations, the only constitutional grounds for challenging the validity of that decision are that the policy balance struck was irrational or discriminatory. Such challenges certainly may have force,<sup>157</sup> but they are different order challenges than the claim that Texas has no right to fashion law governing the disputed action. Once it is conceded that Texas does have a right to fashion substantive law for the claim, as in *Challoner*, it does not matter for "connectedness" purposes of constitutional review whether the substantive issue is masked as choice of law or more directly called fashioning Texas substantive law for torts that occur outside of Texas; in either case the United States Supreme Court will not go behind the decision to second guess or make what might have been a better policy balancing. This is the message of *Pacific Employers* and the first level message of *Challoner*.

It is nevertheless a necessary and strong critique of choice of law rules to emphasize that the entire choice of law vocabulary masks the reality that the only law being applied is forum substantive law. At this level *Challoner* was a failure for not elaborating on the implications of Justice Blackmun's concurrence. As long as the Texas courts or the *Challoner* litigants think that Cambodian rather than Texas law is being applied, policy arguments on what the shape of Texas law should be will be misdirected or unmade. Only if Texas recognizes that *it* has created a substantive law that varies depending on where injury occurs, can arguments like Ely's be heard and found persuasive.<sup>158</sup>

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157. These can be real challenges, especially if the court unthinkingly or mechanically applies conflicts rules, since the court which treats choice of law as procedural may have no defensible policy rationale for its substantive decision. See also *infra* notes 193-95 and accompanying text.

158. See *infra* notes 177-95 and accompanying text for more detailed treatment of this argument.

Courts should not pretend that they are doing anything other than fashioning their own substantive law when they apply law to cases that have multi-state elements. Accordingly, courts should drop entirely the rhetoric of "choice" of law and simply straightforwardly consider whether they have power to reach the conduct at issue and what the shape of forum substantive law should be when such power is found. Interest analysis' criticisms of vestedness for failing to do this when the rendering forum had power to apply its own law were valid for this reason.<sup>159</sup> Interest analysis, however, only partly realized the truth of its own foundational attacks. It was not just true that only the law of an interested jurisdiction can be applied. The more complete truth was that only an interested jurisdiction can apply law. Interest analysis' failure to recognize and address this point is illustrated in its unsatisfactory creation and treatment of the disinterested third state.

#### b. Discarding the Disinterested Third State

The idea that a state can have no governmental interest in the outcome of litigation that it nevertheless has a right to adjudicate was a concept twice improperly incorporated into Currie's interest analysis system. In the "unprovided for" case, Currie incorrectly conceded that, because of improper emphasis upon domicile as the sole measure of legitimate state interest, a state might have before it litigation that does not implicate a state policy of either party's domiciliary state.<sup>160</sup> Logically, in such situations, there is no law to be applied. The case should properly be dismissed for failure to state a cause of action for which relief can be granted.<sup>161</sup> This was *not* Currie's solution. Instead, with correct intuition, although incorrect analysis, Currie advocated that the forum should apply its own law. The intuition was correct because in reality the state where underlying actions occurred usually does have a legitimate interest in the underlying controversy. As demonstrated previously, and as many modern interest analysts readily, if only partially, concede, regulatory interest can legitimize state law as strongly as party domicile.<sup>162</sup> Finding such legitimate regulatory interest is still a popular way of resolving unprovided for cases.<sup>163</sup>

The problem with Currie's application of forum law in the unprovided for situation is that it is theoretically arbitrary. Modern justifications of forum law

159. See *supra* notes 86-89 and accompanying text.

160. See Currie, *Disinterested Third State*, *supra* note 94.

161. See *supra* note 137.

162. See *supra* note 19 and accompanying text.

163. VERNON ET AL., CASE BOOK, *supra* note 50, at 361; *cf.*, *e.g.*, Donald Trautman, Kell v. Henderson: A Comment, 67 COLUM. L. REV. 465 (1967) (advocating legitimacy of deterrent policies of injury state).

on the grounds that forum interest exists *eliminate* the unprovided for case rather than resolve it. Currie's basic mistake was conceding that the unprovided for case could exist at all. To repeat, if the case is truly unprovided for, there is no law to be applied. Traditional interest analysts' failure to realize this point stemmed from their unthinking dichotomization of jurisdiction from ability to apply forum law. The problem is even more pronounced in the situation of what Currie labelled the "disinterested third state."<sup>164</sup>

By definition, the disinterested third state cannot have a legitimate regulatory interest in the underlying litigation;<sup>165</sup> accordingly, no post facto rationalization for applying forum law exists. To his credit, Currie recognized that the disinterested third state posed a significant problem for the interest analysis choice of law theory.<sup>166</sup> Assuming a true conflict between the laws of other jurisdictions which do have a legitimate interest in the underlying controversy, by what criteria could or should the disinterested third state resolve the conflict? Any choice between the competing systems is necessarily arbitrary. The real problem with the disinterested third state is that it should never have jurisdiction of the case. One of the solutions Currie proposed partially recognized this problem. Currie's other proposed solution ignored the dilemma.

Currie's tie-breaker of allowing the forum to apply its own law to the extent that the forum law is in accord with the law of an interested jurisdiction<sup>167</sup> ignores the problem of why the disinterested third state should be adjudicating the case in the first place. At first glance, applying an interested forum's law seems to address defendants' due process concerns under the purported rationale that the same result would have prevailed in a truly interested jurisdiction—one which concededly would have had constitutional power to apply its law to their conduct. But as I have insisted throughout this Article, this illusion of objective application of another's law is always a masking myth for the forum doing what it wishes. There is no guarantee that the forum will accurately interpret and apply the foreign law; there is no appeal on grounds of misinterpretation of foreign law once jurisdiction is conceded. From the defendant's perspective, the forum may pretend to call its law foreign or forum; she is stuck with what the forum adjudicates. This is wrong. The short and simple comeback to

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164. See Currie, *Disinterested Third State*, *supra* note 94, at 764.

165. *Id.*

166. See *id.* at 764-67; 772-85.

167. See *id.* at 780. Currie also offered, with quondam equanimity, the possibility that the disinterested third state should consider the interests of other truly interested states (according to some undefined criteria) and apply law that would best accord with the court's sense of what would be the preferred national policy. See *id.* at 778, 780. As Currie correctly noted, such unfettered judicial power is a "heady wine" which is best confined. *Id.* at 779. I agree with Currie, however, that if such power is exercised, it should always be frankly acknowledged rather than masked. See *id.* at 778 (Currie's "First Reservation").

arguments that the forum is merely doing what a truly interested forum would do is to insist that the case be tried in that other forum.

Currie more properly recognized this truth in his alternative solution to the problem of the disinterested third state—forum non conveniens dismissal. Forum non conveniens dismissal at least partially admits that the forum has no business hearing a case in which its laws (i.e., its governmental interests) are not implicated. The problem with forum non conveniens dismissal of cases from disinterested third states, however, is that forum non conveniens presupposes what was never true—that such cases were properly before the court to begin with. If applied to a whole class of cases—those brought in disinterested third states—forum non conveniens masks the reality of lack of jurisdiction for such cases. This is so because forum non conveniens doctrine normally supposes its application will be discretionary with the court and granted according to a flexible standard.<sup>168</sup> If the doctrine always applies in a particular class of cases—those brought in disinterested third states—it is no longer discretionary. One must question the legitimacy of jurisdiction that *always* is required to be removed once the nature of the case is recognized. If such cases are always to be dismissed, how can one convincingly claim that jurisdiction was ever proper? Courts should eliminate the pretense and recognize at the front end of the litigation that if the state is truly disinterested, there is no jurisdiction.

The disinterested third state cases are the quintessential example of interest analysis' failure to recognize that courts should only have jurisdiction over matters when they can apply their own laws to those matters. Interest analysis' inability to properly address the problem of the disinterested third state is symptomatic of interest analysis' more general failure to recognize that its insights only have power to justify the application of forum law. When interest analysts claim more for their theory, they flounder theoretically and in practice. Interest analysis' supposed objectivity to apply only the law of the interested jurisdiction falsely presupposes that any court can determine what that law should be. As previously demonstrated,<sup>169</sup> this is a deceptive myth that allows courts to pretend to apply others' laws, when only their own interests should be (and most of the time actually are being) furthered. The solution is to discard all parts of interest analysis which purport to resolve conflicts, keeping only the truth that a forum should not be able to apply law unless it has legitimate

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168. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 & n.6 (1981). I elsewhere have criticized forum non conveniens doctrine for masking the impropriety of granting jurisdiction in the first place. See Cox, *Burnham Insane*, *supra* note 7, at 553-54. The doctrine should *not* be offered as palliative to mask the sickness of current jurisdictional doctrine. For more detailed cogent criticisms along similar lines, see Stein, *supra* note 32; Stewart, *supra* note 32.

169. See *supra* notes 91-119 and accompanying text

governmental interest in the underlying controversy.

#### IV. PROPER LAW MEANS FORUM LAW: DEFENDING AGAINST CHARGES OF PAROCHIALISM

My argument in the previous two sections has been that courts have no power to apply anything but their own sovereign's laws, and that when courts pretend they are doing anything but applying their own laws, this leads to confusion, if not deception, about the nature of the decisions reached. I therefore have suggested that all pretense about choice of law doctrine and choice of law rules be abandoned and that courts focus instead on the jurisdictional issue in conflict of laws (does this court have power to apply law to this case?) before any attention is directed to the question of exactly what should be the shape of law applied to proposed litigation. Unless the forum has legitimate (meaning in the U.S. system, constitutional) power to apply its *own* substantive law to the conduct at issue, then it has no power to apply law. In other words, no court can borrow power by pretending it is doing another sovereign's business; jurisdiction must exist or fail solely on the test of whether the forum's own government's policies will be furthered.

While I do not mean that the forum must always apply strictly local law to the parties' conduct, I do mean that it is solely the forum's ability to regulate which is the test of valid jurisdiction. When the forum decides that under *its* law persons in country Z should drive on the left-hand side of the road or that under *its* law persons committing torts on the high seas or in foreign countries will or will not be subject to forum tort rules of liability that otherwise would apply, these are substantive forum law decisions about matters which the forum had power to regulate differently.<sup>170</sup> The forum cannot and should not duck the responsibility of consciously and deliberately deciding what its policy is regarding such matters under the ruse that it is compelled by neutral choice of law rules or principles to assist in international cooperation or promote comity. Instead, the forum must recognize that when it has power to apply its own law, this means that whatever disposition of the case it makes is its substantive law regarding such matters.<sup>171</sup>

There is no constitutional or overarching rule of governments that *compels* sovereign nations to defer to the interests of other sovereigns when their own

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170. See *supra* notes 73-83 and accompanying text.

171. See *supra* notes 147-58 and accompanying text.

interests are legitimately implicated.<sup>172</sup> Decisions to defer or not to defer to another nation are probably not for courts to make since such decisions should be explicitly based on *political* intergovernmental relations criteria and not masked behind supposedly neutral choice of laws rules.<sup>173</sup> And if, having weighed the political pros and cons, a nation with legitimate interest chooses to assert that interest contrary to what other sovereigns might wish, is such action not simply inherent in the nature of sovereign nations? Attempts to eliminate conflicts by manufacturing rules requiring deference do not eliminate conflicts, but instead eliminate the sovereignty that produces conflicts. Sovereigns and their courts should instead recognize the responsibility that comes concomitantly with knowing all nations have power to attempt to do only their own will.

Because I insist that the forum cannot (and therefore should not attempt to try to) apply another sovereign's laws, my theory means that the forum always will apply only its own law when it applies any law at all.<sup>174</sup> If even Currie felt compelled by criticism to back away somewhat from *lex fori*,<sup>175</sup> is not my insistence on *lex fori* doomed to derision as parochial and against the interests of the international community (or at the U.S. level, contrary to policies of cooperative federalism)? Because, however, *lex fori* is *descriptive* of what courts actually can and cannot legitimately do, I could not back away from *lex fori* even if I desired. In fact, however, I believe *lex fori* promotes rather than discourages proper resolution of cases.

This section anticipates and defends against three arguments which can be expected to be raised against my theory that jurisdiction only can be exercised when the forum legitimately applies forum law. First, some might think that such jurisdiction unnecessarily limits a state from helping out other sovereigns. In response to claims that jurisdiction to apply another sovereign's law might

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172. See, e.g., GEORGE F. KENNAN, REALITIES OF AMERICAN FOREIGN POLICY (1954); MICHAEL J. SMITH, REALIST THOUGHT FROM WEBER TO KISSINGER (1986). Although the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) sometimes asserts that international law principles exist independently of the government which implements them, these assertions are no more compelling than were Beale's assertions in the FIRST RESTATEMENT. Cf. *Laker Airways v. Sabena*, 731 F.2d 909, 950-51 (1984). One need not accept international realism to appreciate the point made in the text that no universally accepted principle of international law compels deference to others' interests. The dispute between international realists and traditionalists is itself proof of this truth. The dispute is about what nations ought to do, not what they must do.

173. I.e., such decisions should be made only by the appropriate political branch of government. See also *infra* notes 208-25 and accompanying text.

174. This is not a choice, but rather descriptive of what the forum can do—i.e., my theory is not an option for the courts, but an explanation to the courts of what they are really doing. The only choice the courts make is what should be the *shape* of their substantive law.

175. See Currie, *Disinterested Third State*, *supra* note 94 (Currie's adoption of restrained forum approach).

sometimes be needed because the sovereign most interested cannot itself assert jurisdiction, I contend this assumption of inability to exercise jurisdiction is always false in the modern minimum contacts world. Worse, a grant of jurisdiction "by proxy" may actually frustrate the other sovereign's intentions as reflected in its laws. A second anticipated argument is that *lex fori* encourages discrimination against outsiders. In fact, since *lex fori* means that discrimination cannot be hidden behind choice of law rules, *lex fori* forces the forum to justify any discrimination occurring in multistate situations by the same standards it applies to wholly domestic substantive laws.

Finally, a third series of arguments is anticipated to the effect that courts are better able to have their forum policy implemented in situations most important to the sovereign, or better able to develop their *own* common law, when they address multi-state conflicts from the perspective of all interested states and sometimes apply non-forum law. My response is that granting jurisdiction only when there is ability to apply forum law does not require an adjudicating forum to develop deviant or inhumane laws and policies. The forum may adopt as cooperative, humane, or sensitive a set of policies as it desires, so long as the forum recognizes that this is *its* law regarding multistate controversies. But forums cannot eliminate "conflicts" except by eliminating sovereignty. Additionally, my faith is that squarely shouldering responsibility for decisions better promotes true sensitivity and tolerance than does pretending that deference is compelled by external rules or principles, in reality devised according to the promoter's subjective biases. When the forum recognizes that it is always applying its own law, it must straightforwardly develop and declare its policies.<sup>176</sup>

A. *Countering the Myth of the "Helpful" Forum—A State Cannot Help Another Better Than That State Wishes to Help Itself*

One of the implications of the truth that a court may apply only its law is the realization that *only* the sovereign can entertain lawsuits implementing its own policies. The law of state Z will be applied and interpreted *only* by the courts of state Z.<sup>177</sup> Some readers might question whether courts and governments do not also exist to assist other sovereigns in implementing the other sovereigns' policies. Shouldn't courts help out their sister sovereigns by

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176. A fourth anticipated argument is to the effect that our increasingly global world requires consolidated litigation where disputes are efficiently resolved. My response is that these needs can be addressed only within the framework of sovereign nations. A court which purports to take more jurisdiction than exists through its sources of sovereignty inevitably will frustrate rather than assist international (or federal) cooperation. I intend to develop these ideas in more detail in a future work.

177. *Cf. supra* note 112 (federal diversity situation).

allowing suits to be brought on others' laws? The myth of the "helpful" sovereign should be discarded for at least two reasons. First, under modern jurisdictional minimum contacts principles, there is never a need for another sovereign to take jurisdiction of a case; the forum whose regulatory interests are directly implicated can always entertain the suit itself.<sup>178</sup> Second, and worse, if a sister sovereign does take jurisdiction, when the forum with supposed real regulatory interest cannot or chooses not to take such jurisdiction, this means that the sister sovereign is acting contrary to, rather than in conformity with, the desires of the sovereign whose regulatory interests are directly implicated. The forum that takes jurisdiction should do so only when *its* interests are properly implicated.

Return, for example, to Paula and Joe's traffic tort occurring in country Z.<sup>179</sup> Assume that country Z still labors under the misconception that jurisdiction may be exercised only according to territorial principles. Z courts refuse to exercise jurisdiction unless the defendant is physically present in Z at the time suit is brought, under the mistaken belief that no court may exercise power over persons or property outside its territory.<sup>180</sup> Assume that this territorial thinking has even been codified in the Z long-arm statute, which requires personal service within Z as prerequisite to a case being allowed to be tried before a Z judge or jury. Assume that Joe has long since left country Z and has no intention of returning. Shouldn't Paula be allowed to attempt to bring suit in Q, through which Joe currently is travelling, to vindicate her rights under Z law? As I previously have indicated, the answer is "no."<sup>181</sup> The unavailability of a Z forum to vindicate Paula's claims does not increase her argument that jurisdiction should be allowed in a forum without legitimate right to apply *its* law to the litigation being brought.

Let me emphasize that I am extremely sympathetic to Paula's plight. Assuming that Joe was the wrongdoer under Z law, it does not make sense that he should be able to avoid liability by absconding from the physical territory of Z. But this is an argument for changing the illogical personal jurisdiction law of Z, rather than an argument for importing illogic into the jurisdictional law of Q. *Pennoyer* should be and has been discarded by most sovereigns. The problem is that Z has not yet discarded it. What should Paula do?

In a previous work, I have argued that when the state long-arm statute does

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178. See *supra* notes 37-39 and accompanying text (modern minimum contacts reach). The only cooperation a sovereign needs of other sovereigns is assistance in enforcing any judgment rendered by the first forum.

179. See *supra* notes 16-23 and accompanying text.

180. Cf. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877); see also *supra* note 38.

181. See *supra* notes 21-45 and accompanying text.

not reach to the full limits of due process, this failure to reach is itself a violation of either due process or equal protection, since the state has no permissible basis for prohibiting recovery when defendants are absent.<sup>182</sup> State tort law is grounded on conduct rather than the identity and current location of the tortfeasor. Accordingly, I have argued that a court should always ignore what I label “short-arm” statutes and always reach to the full limits of jurisdiction as reflected in the substantive law policies of the state.<sup>183</sup> In answer to the question of what Paula should do, therefore, my first response is that she should continue to appeal the dismissal of her suit in *Z* in an effort to get the jurisdictional law of *Z* declared unconstitutional or otherwise changed.<sup>184</sup> If the issue is really whether *Z* tort law should be given effect, then the place to pursue that claim is in *Z*, not *Q*.

But suppose I am wrong about the *Z* “short-arm” statute being unconstitutional, or suppose that the *Z* courts otherwise persist in holding to their territorial views.<sup>185</sup> Paula under such circumstances is absolutely without a *Z* forum in which to pursue her *Z*-based claim. Doesn’t this increase the case for the “helpful” forum? In fact, rather than increasing the strength of argument for help, the lack of a *Z* forum in which to pursue *Z* claims strengthens the argument *against Q* interference in *Z* internal affairs. *Z*, as a matter of its own sovereign law, by refusing to provide a forum, has quite clearly stated that it believes Paula’s claim is without merit, i.e., that it should be dismissed.<sup>186</sup> When *Q* entertains the claim which *Z* has declared should be dismissed, this runs exactly counter to *Z*’s expressed governmental policy about Paula’s claim.<sup>187</sup>

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182. See Cox, *Unrealized Implications*, *supra* note 7, at 923-32; see also Cox, *Jurisdiction, Venue & Aggregation*, *supra* note 7, at 225-39 (applying this argument to federally based causes of action when they attempt to incorporate short-arm statutes that do not reach to the full limits of due process).

183. *Id.*

184. The “otherwise changed” could be to construe away any limitations in the short-arm statute, as has been done in a plethora of U.S. jurisdictions. See, e.g., Cox, *Unrealized Implications*, *supra* note 7, at 914-15 and sources there cited. See also *supra* note 37.

185. Perhaps the *Z* constitution is very unlike ours and grounded in very different notions of what should be the equivalent of due process. Accordingly, *Z* decides (by its own terms) to interpret its law (by our terms) irrationally and unfairly.

186. I again emphasize my view that this is not how “short-arm” situations should be construed. See sources cited in *supra* note 182. We are here assuming, however, that the *Z* courts decide such irrationality was intended and that this intention would not violate some *Z* constitutional standard.

187. There is some similarity here to recent indictments by Professor Brilmayer and Professor Kramer of interest analysis attempts to avoid the “whole” law of the purportedly interested jurisdiction and apply only that jurisdiction’s substantive law. See Lea Brilmayer, *The Other State’s Interests*, 24 CORNELL INT’L L.J. 233 (1991); Kramer, *Renvoi*, *supra* note 63. If the interested foreign jurisdiction in fact would *not* have applied its substantive law to the controversy (since its conflict rules dictated otherwise) how can an interest analysis court properly (or sensibly) speak of the foreign government having a real interest in having its law applied? This is, for me, again a problem of failing to link jurisdiction to legitimate ability to apply forum law. The interest analysis

I emphasize that *Q* judges are certainly entitled to have very strong opinions about the “rightness” of *Z* law. A *Q* judge may be outraged that *Z* does not provide a forum for entertaining claims otherwise properly arising under *Z* law. But if the *Z* law really is that suits such as Paula’s should be dismissed,<sup>188</sup> then the fact that a *Q* judge does not like this *Z* law hardly is grounds for the *Q* court taking jurisdiction so that it purportedly may apply *Z* law. The only proper justification for the *Q* court taking jurisdiction of Paula’s case is if the *Q* court’s outrage properly invokes *Q*’s regulatory concerns. If we in *Q* feel that Paula needs a remedy for what Joe did to her in *Z*, do we in *Q* have enough connectedness to this litigation to apply *our* law to Joe’s conduct? This is the real question that the *Q* court must ask. When there is no *Z* forum available, this means that no one can apply *Z* law. The question should not be how we can pretend to apply nonexistent *Z* law, but rather whether *other* law exists that straightforwardly can be applied because of another forum’s legitimate connectedness to the controversy.

Phrasing the question in this latter way properly puts the emphasis upon the legitimacy of public policy concerns which are always the underlying justification for jurisdiction. Significantly, unlike the hypothetical situation described above, where no *Z* law can be applied, in many cases where the forum offers as purported justification for jurisdiction the need to provide a forum which *Z* cannot, it is even more obvious that the objection is to the content and quality of *Z* law rather than to its inability to be applied.

Consider, for example, an air crash in which U.S. citizens are killed or

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court is out of line when it attempts to interpret for the foreign state what is that state’s public policy; the interest analysis court has no business applying another state’s laws. The fact that the interest analysis court’s interpretation of the other state’s law may be contrary to that other state’s application is symptomatic proof of the impropriety of attempting to take jurisdiction for the purpose of applying another state’s law.

Yet I also have sympathy with the interest analysis indictment of the other state’s conflict rules. The other state should *not* mechanically apply an arbitrary conflicts rule when the other state has legitimate interest in applying its own substantive law to the dispute. The interest analyst is probably even right in saying that the other state should ignore its conflict rule and instead decide whether it should apply its substantive law to the dispute. See, e.g., Kay, *supra* note 99, at 53-54. But these interest analysis arguments only have force when the litigation is before the other state’s courts. As in the case of the short-arm statute (see *supra* notes 182-84 and accompanying text), the issue of whether and how the foreign law should be applied is solely an issue of foreign state substantive law in which the interest analysis court has no right to meddle. Cf. also Challoner discussion, *supra* notes 154-58 and accompanying text (holding that the Supreme Court cannot review Texas substantive law choice on choice of law grounds since Texas has sufficient connection to controversy to apply its own law; only permissible challenges would be under other constitutional grounds such as due process arbitrariness/lack of rational basis or equal protection violations).

188. I.e., assuming that such dismissal does not violate other *Z* constitutional law principles. See *supra* notes 5, 157; *infra* notes 193-95 and accompanying text.

injured in country Z. The crash involves alleged negligence of a Z government-owned or subsidized company.<sup>189</sup> Plaintiffs desire to sue the Z company plus one or more U.S. defendants whose actions are tied to the Z company.<sup>190</sup> Assume that the law in Z is defendant favoring for all defendants, for example by capping damages for airline crashes or preventing strict liability suits.

Plaintiffs naturally would *not* want Z law applied to the U.S. defendants. When it is questionable whether personal jurisdiction can be asserted over the Z company in the U.S. (whether U.S. law can reach the Z company's actions in Z<sup>191</sup>), the plaintiffs should not, however, be allowed to argue that this "problem" necessitates that suit be heard in the U.S. against all defendants. Nevertheless, such arguments for so called "jurisdiction by necessity" have sometimes been made.<sup>192</sup> The "necessity" for which plaintiffs in reality are arguing is the "necessity" of being able to have all defendants in the same suit and still be able to apply U.S. law to the U.S. defendants. In other words, if the U.S. defendants could be brought to Z to defend plaintiffs' claims, the "necessity" of having a forum for all defendants disappears.

The real issue is of course substantive law. Plaintiffs can, regardless of Z's or the U.S.'s personal jurisdiction law, probably sue each of the defendants in a forum somewhere. If this means that the suit must be split and Z law can only be applied against the Z defendant in a Z court, whereas Anystate law is applied against the U.S. defendants in an Anystate suit, this result does nothing more than support the sovereignty of each state. And if, on the other hand, Anystate law conscionably and legitimately may be applied against all the defendants, then jurisdiction should be asserted on that basis and forum law unapologetically applied.

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189. The hypothetical in text is roughly based on *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Ciprari v. Servicios Aeroeos Cruziero*, 359 F.2d 855 (2d Cir. 1966); *Tramontana v. S.A. Empresa de Viacao Aerea Rio Grandense*, 350 F.2d 468 (D.C. Cir. 1965); *Cohen v. Varig Airlines*, 405 N.Y.S.2d 44 (N.Y. App. Div. 1978); and *Darby v. Compaigne Nat. Air France*, 735 F.Supp 555 (S.D.N.Y. 1990). Cf. also Terry Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness Over Comity*, 62 N.Y.U. L. REV. 651 (1987).

190. For example, the U.S. company arranges for ticketing for the flight (see, e.g., *Cohen*, 405 N.Y.S.2d at 44) or helps put together the foreign airline project (*Helicopteros*, 466 U.S. at 408) or provides components which are incorporated in the foreign airline's planes (*Piper*, 454 U.S. at 235).

191. I.e., these are always the same inquiry under my theory.

192. See, e.g., *Helicopteros*, 466 U.S. at 419 n.13; cf. George Fraser, Jr., *Jurisdiction by Necessity—An Analysis of the Mullane Case*, 100 U. PA. L. REV. 305 (1951).

*B. Countering the Myth that Lex Fori Encourages Discrimination—Lex Fori in Fact Unmasks Discrimination That Might Otherwise Persist*

The potential charge against my theory of *lex fori* most easily dispensed with is that it encourages forums to favor their own and discriminate against non-residents. This criticism has been validly raised against Currie's original promulgation of interest analysis, which focused exclusively upon domicile as the proof of valid governmental interest. As previously set forth in Section II.B of this Article, I share the view that interest analysis, as originally promulgated, impermissibly and myopically focused upon domiciliary connectedness to the state as the sole measure of governmental interest. My *lex fori* theory works directly *counter* to this type of discrimination.

At one level, my view that a forum is able to apply only its own law neither encourages nor discourages a state to discriminate against non-residents. My theory focuses upon the ability to obtain jurisdiction at the front end of a suit rather than upon the shape of forum law that will be applied. Claims of discrimination go to the shape of the forum law. At another level, however, my *lex fori* theory discourages discrimination by always unmasking it. My emphasis that the forum may apply only its own law means that focus for discrimination claims is always upon forum law as substantive rather than procedural law. In other words, *if* the forum choice of law rule, so called, is that local law will be applied only to benefit domiciliaries, then this means the forum *substantive* law should be read as incorporating these discriminatory provisions within its substantive terms.

If *Q*, for example, only allows unlimited recovery when its own plaintiffs are involved,<sup>193</sup> this means that *all* substantive *Q* tort law incorporates disparate recovery standards based on who is bringing suit against whom. *Q* product liability tort law, for example, means that when a *Q* plaintiff is injured in *Q* by a *Q* manufacturer, the plaintiff may fully recover. When, however, a *Z* plaintiff is injured in *Q* by a *Q* manufacturer, the *Q* substantive law is that the *Z* plaintiff may only recover up to the limits that would apply if the accident occurred in *Z*. I believe this is a bad and unconstitutional result. *Q* law is discriminating against non-*Q* residents on a seemingly arbitrary basis and in violation of the Privileges and Immunity Clause or the Equal Protection Clause of the Constitution. These objections can and should be raised against the *Q* tort law so that the discriminatory portion of the law may be struck.

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193. Cf. *Tooker v. Lopez*, 249 N.E.2d 294 (N.Y. 1969) (discussing New York's justification to apply its own law to allow its own domiciliary to recover); MINN. STAT. ANN. § 303.13 (1969) (allowing long-arm jurisdiction and recovery only when Minnesota domiciliaries are plaintiffs).

At the first level, however, it is a different and more preliminary question whether *Q* has enough connectedness to the controversy so that it can apply a non-discriminatory law to the litigation. When I am insisting that forums only be allowed to take jurisdiction of cases to which they may apply their own law, I by no means am saying that this grant of jurisdiction to apply forum law means that the content of that law is immune from further scrutiny. Every law a state enacts or applies through its courts is subject to potential criticism and invalidation if it violates the religious balances, opportunity for freedoms of speech and publication, interests of interstate commerce, or other values protected by other provisions of our Constitution. *Q* may have sufficient connectedness to a controversy to apply its law to it, but the *Q* law applied must also fulfill fairness standards enshrined in other constitutional provisions.<sup>194</sup>

At the second level, my insistence that courts always view forum choice of law rules as decisions about the content of forum substantive law makes it *less* easy for forums to discriminate. Under my theory, conflicts rules can never mask the reality that the forum is always making substantive law decisions under its own law. Any differences in result when different persons are involved can no longer be rationalized under the false rubric that another sovereign's laws are being given effect. Since the forum can only apply its own law to any controversy properly before it, the forum must directly justify its disparate treatment of similarly situated individuals. *Q* tort law that grants different recovery to different plaintiffs is potentially as suspect as gender discrimination. If discrimination is not justified under the forum's *own* standards,<sup>195</sup> then it cannot stand.

To summarize, Currie's *lex fori* created the incentive for discrimination precisely because it permitted forums to pretend that they could weigh another sovereign's interests and apply another forum's law. In reality, since no forum can apply another's law, all discrimination must be justified under the forum's own law, including constitutional restraints and standards. The *lex fori* for which I argue, which demands that the forum always acknowledge it is applying its own substantive law in a multistate situation, prevents a forum from masking discrimination, and requires instead that the forum directly justify differences of

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194. In the domestic federation context, the U.S. Constitution sets substantive threshold requirements (e.g., Equal Protection Clause, Dormant Commerce Clause) which all sister state judgments must meet. Since *all* these federal constitutional requirements must be met by all state judgments, other states are required to enforce these judgments even though obnoxious to state (but not federal) policy. In other words, full faith and credit is allowed to override state interests *because* there are other constitutional guarantees which protect the federal interest and because the policy balance struck cannot therefore be too obnoxious to overall national policy. I hope to explore these ideas in greater detail in a future work.

195. This would include, of course, in the U.S. system, *federal* constitutional standards, since every U.S. state exercises and is bound by constraints of dual sovereignty.

treatment.

*C. Countering the Myth that Lex Fori is Narrow-Minded—A State that Fashions Its Own Substantive Law Has the Freedom and Responsibility to Act Humanely*

If, as I believe and have argued throughout this Article, *lex fori* is descriptive of what courts can and cannot do, then it does not matter if the fact that every court can apply only its own law is desirable or not—it is simply a fact that must be lived with. However, in this case I believe my truth is also good. I have therefore also insisted throughout this Article that every court being able only to apply its own law is a more desirable way to deal with interstate “conflicts” than for a court to attempt to act as surrogate for another sovereign and attempt to apply that other sovereigns’ law. The two previous subsections have emphasized: 1) that it is always a mistake and/or masking deception for a jurisdiction to attempt to “help” another achieve its substantive law policies when the other is not able to or does not want to see the policies enforced; and 2) that supposedly neutral choice of law rules often mask discrimination which would be directly revealed if incorporated into forum substantive law. In this subsection, I continue unmasking notions that conflicts rules can ever impartially balance the interests of competing sovereigns. The *lex fori* for which I argue properly recognizes that the forum can make policy only for itself.

1. Parochialism or Legitimate State Policy?—*Lex Fori* Is Not a Four-Letter Phrase

It is one thing to argue that *lex fori* is not discriminatory, another to claim that it is not selfish. If the forum always applies only its own law, does not this mean that the forum always gets its own way when disputes are brought before it? Of course it does, but I do not necessarily see anything wrong with this. In this subsection, I emphasize that conflicts between sovereigns are unavoidable because they represent policy judgments about what is the better law. In the succeeding two subsections I counter notions that cooperative international law principles, self interest, or enlightened policy ever counsel departing from what the forum perceives to be its own substantive policies.

The incorrect assumption behind characterizing *lex fori* as parochial is to assume that the forum is applying its own law when it could apply someone else’s. The forum is hardly compelled, if even able, to fashion its substantive law in a vacuum, unaware of what is going on in the rest of the world and to what extent forum law fits in with majority or minority trends. But country *Q* cannot develop policy for country *Z*—*Q* can develop only its own policy. To the extent *Q* wishes, as a matter of its own policy, to treat multistate events

differently than it would wholly domestic actions, this may even run afoul of *Q* constitutional provisions which require that out-of-staters be granted the same rights as in-staters, or that all who come before the *Q* courts receive approximately the same application of law on significantly similar facts. This is one point of the immediately preceding subsection's argument that *lex fori* never allows discrimination arguments to be hidden behind the ruse that a forum can apply another's law.<sup>196</sup>

Accordingly, since *Q* law itself, through its constitutional provisions, may require that *Q* ignore other states' policies when fashioning its law for multistate situations, I readily concede that *Q* courts sometimes, perhaps often, are required to act, from other states' perspectives, selfishly in applying their law to situations within *Q*'s regulatory sphere of interest. This, however, is the ultimate point of conflicts law. There are real disputes<sup>197</sup> among sovereigns as to how the same fact situation should be governed. Former territorial jurisdiction theory and vested rights choice of law theory masked relativist reality by purporting to allow only one state to take jurisdiction of a suit<sup>198</sup> and only one state's laws to be applied.<sup>199</sup>

Once it is conceded, as in the modern jurisdictional world, that more than one state's laws legitimately<sup>200</sup> may be applied to the same controversy,<sup>201</sup> then one state will always "win" and the other "lose" so far as having its policy implemented in any particular case. I contend, however, that this is a necessary by-product of sovereignty. If different states truly have made different policy judgments about what is good law (or justice) on the same facts, they must each be entitled to make those judgments within their respective spheres of influence. The reality of modern conflicts/jurisdiction law, however, is that spheres of influence constantly overlap. More than one nation may have sufficient connectedness to the same controversy so as to claim that it has a right to apply its own law. When the forum does have such connectedness, and therefore does apply its own law, the other government's policy obviously is not implemented.

196. Cf. also *supra* notes 134-44 and accompanying text for additional arguments against interest analysis discrimination. See also Trautman, *supra* note 163.

197. I could call them real conflicts (cf. Singer, *Real Conflicts*, *supra* note 19), but this terminology again misassumes that the forum can choose among conflicting laws. It cannot. It instead can implement only its own policy.

198. But, depending on the emphasis, the reality was all states were able to take jurisdiction. See *supra* notes 40-43 and accompanying text.

199. But, because of escape devices, all states actually applied only law with which they somewhat agreed. See also *supra* notes 84-86 and accompanying text.

200. I mean here legitimately from the point of view both of connectedness and also without offense to whatever minimum threshold standards of fairness prevent laws from being applied (e.g., due process arbitrariness, equal protection, etc.). See, e.g., *supra* note 5.

201. Cf., e.g., *supra* notes 127-29 (discussing *Alaska Packers* and *Pacific Employers*).

In the international context, this is not necessarily a severe problem because every country is at liberty to develop judgment rules that promote only domestic public policy. For example, if a foreign nation judgment violates domestic public policy, it need not be enforced. Great Britain need not enforce Ireland's abortion decisions. Or, to give an opposite example, the domestic forum is free to adopt as its judgments policy a rule that allows recognition and enforcement of foreign nation judgments even when the foreign nation would not recognize the domestic nation's judgments.<sup>202</sup> New York may give res adjudicata effect to French judgments despite lack of reciprocity. In either case, the potentially obnoxious foreign nation judgment that has been "won" is only enforceable in countries that agree that the judgment should be enforced.<sup>203</sup> A judgment "won" in a foreign nation is enforced in the domestic country only when the domestic country decides as a matter of *its* domestic law that this would be good policy regarding the particular foreign nation judgment. Nevertheless, I concede that even in the international context, this potential for inconsistent judgments obviously puts defendants with global or international assets at considerable risk of having to comply with potentially antagonistic sets of law, each claiming valid power to be applied to the same facts.

In the U.S. domestic context, the Full Faith and Credit Clause may<sup>204</sup>

202. The opposite *Hilton v. Guyot* rule (159 U.S. 113 (1895)) (stating that a forum should give only as much credit to foreign nation judgments as foreign nation would give to forum judgments) is probably illogical because it does not promote domestic policy and also attempts to involve the courts in establishing foreign policy—a matter which is better left to the executive and/or legislative branches.

203. True, the foreign nation may enforce against domestic country assets under the foreign nation's control. But this fact of physical power does not legitimize or validate the rightness of the foreign nation's decision or make it enforceable in any other country where assets lie.

204. The counterargument is that in the U.S. domestic context, there is not nearly the range of antagonism between state policies as is possible in the international scene. *Cf., e.g.,* von Mehren, *Recognition & Enforcement*, *supra* note 55. Although I intend to pursue the point in greater detail in a future work, I agree with this argument of lack of real antagonism more for governmental structural reasons rather than because of belief in shared local or law school culture. *Cf. id.* at 1046.

The reason that U.S. individual state laws cannot be so fundamentally antagonistic to each other as is possible in the international context is because of federally preemptive law, both congressionally passed and constitutional. Whenever there is such basic fundamental disagreement between states about public policy matters that the dispute threatens to rip the union apart, the federal government is capable of stepping in to preempt and formulate a compromised national policy. Additionally, since all state policies must conform to the shared national threshold standards as embodied in federal constitutional provisions, these shared notions of liberty and justice are binding on all the states in a way impossible in the international context absent ratified and internationally binding (e.g., treaty) law.

Nevertheless, having agreed with some international commentators that U.S. "conflicts" are more homogenous than international "conflicts," I readily admit that the differences of U.S. state policy can be very pronounced and have serious effects. It would be a serious mistake to assume that the *relatively* more homogenous nature of U.S. state substantive laws means the differences in

dramatically escalate the inconsistency stakes, since the Full Faith and Credit Clause *compels* that judgments of sister states with sufficient connectedness be fully enforced by and in the domestic forum. Yet I do not see how this fact of full faith and credit enforcement in any way undercuts the power of the argument that the forum can and should apply only its own law. If the forum government has made a policy judgment that it really does believe abortion is wrong and that doctors who assist in abortion are subject to tort liability,<sup>205</sup> or alternatively that medical insurance rates are out of control and therefore that medical malpractice plaintiffs shall not be able to recover for pain and suffering,<sup>206</sup> or alternatively that dramshop liability should be imposed on those who serve intoxicated customers beverages and then allow them to travel the highways,<sup>207</sup> then I do not see on what principled basis we can say that the forum government should not be allowed to pursue this government policy in situations where it has sufficient connectedness to apply its law.

The fundamental problem of conflicts theories that ask the forum to defer to another's policy is that the theories discount away, according to the authors' preferences, the significance of the forum governmental policy. Professor Kramer, for instance, asks us to apply forum law only in situations that the forum really cares about.<sup>208</sup> I believe that Professor Weinberg has the better of this argument when she insists that forums care about all of their substantive policies, otherwise they do not have them.<sup>209</sup> When the forum ceases to care about its *former* policy, then it changes that policy by modifying its common law or limiting the effect of the prior law.<sup>210</sup> In all other situations the policy is

state policy are not real and have potentially serious consequences for citizens who will inevitably be subject to conflicting state policy judgments about what is justice on the same facts. And, since all U.S. citizens have and are encouraged to exercise rights of freedom of movement among the states, these policy differences are more likely to be triggered within a single nation than sometimes might occur in the international context. My position is that to the extent the states are allowed to exercise their sovereignty, such differences cannot be avoided.

205. Cf., e.g., Lea Brilmayer, *Interstate Preemption: The Right to Travel, The Right to Life, and the Right to Die*, 91 MICH. L. REV. 873 (1993).

206. See, e.g., Frank Grad, *The Legal Implications of Health Care Cost Containment: A Symposium: Medical Malpractice and the Crisis of Insurance Availability: The Waning Options*, 36 CASE W. RES. L. REV. 1058, 1083 n.95 (1986) (citing state statutes); Geri O'Brien, Note, *Medical Malpractice—\$250,000 Cap on Pain and Suffering Cal. Civ. Code Section 333.2—Does the Statute Meet Its Constitutional Burden and Legislative Goals?*, 8 WHITTER L. REV. 601 (1986) (discussing California statute).

207. See, e.g., *Bernhard v. Harah's Club*, 546 P.2d 719 (Cal. 1976); *Blamey v. Brown*, 270 N.W.2d 884 (Minn. 1978).

208. See sources cited in *supra* notes 63, 100, 137. Professor Kramer fails to give us any real principles by which we can distinguish those policies the forum cares about from those about which it does not care so much. See also *infra* note 211.

209. See Weinberg, *Against Comity*, *supra* note 144.

210. See, e.g., Singer, *Real Conflicts*, *supra* note 19 (citing Weinberg and others for this proposition and discussing).

real and should be implemented. Any attempts to rank the importance of substantive policies<sup>211</sup> truly held by a government as reflected in its laws are doomed to subjectivity and betray that the commentator's real objection is to the

211. The procedure/substance dichotomy is the *only* specific example offered by Professor Kramer of policies that the forum does not care deeply about. See Kramer, *Renvoi*, *supra* note 63, at 1020-21; cf. Kramer, *Rethinking*, *supra* note 100, at 323-38 (setting forth other bases by which a court could choose laws, but without identifying or emphasizing what specific policies the forum prefers). Procedure, however, is an arguably atypical example of implementation of forum policies, since stronger conflicts are usually found on substantive matters. Even regarding this supposed relative unimportance of procedure, however, I believe Professor Kramer is misfocused if not mistaken.

The procedure example has surface appeal because we are used to, in the *Erie* context, the notion that two different court systems can both administer the same law, although their internal court procedures are different. Alternatively, in the administrative law context, we accept the notion that substantive rules can sometimes be implemented without the full formalities associated with court litigation. But it is a mistake to assume that forums do not care about procedural matters. Forums may feel strongly about "procedural" matters, e.g., the right to a jury trial or admissibility of certain types of evidence. In the administrative law context the forum government has struck what it feels is an appropriate balance on procedural protection; this internal balancing does not necessarily mean the forum would feel free with a different government's balancing of the amount of procedural protections needed. Suppose, for example, one sovereign's procedural law is that the person alleging injury and desiring compensation need only present a *prima facie* case before the defendant will be required to compensate. Another forum which places on plaintiff the burden of proof on the merits likely would *not* concede that this procedural balance is less important to it than many substantive rules. It is arguably only non-outcome affecting procedural rules (I am saying merely outcome-affecting, not outcome-determinative) for which Professor Kramer has good argument. That collection of creatures is a small menagerie.

The procedure example is more fundamentally flawed because it assumes generally what is true only in our federal diversity and concurrent jurisdiction context: that two "sovereigns" may both have jurisdiction under a single government's authority to apply the same substantive law. When state and federal courts are both given concurrent jurisdiction of federal question cases, both court systems are presumed competent to apply federal law. Both act as federal courts to apply the federal substantive law. The state court rules of procedure are presumed adequate for purposes of implementing the federal law; this is what concurrent jurisdiction and state courts acting as federal courts means. In the rare situation where states must adopt "federal" procedures when administering as federal courts, this is because the grant of federal question jurisdiction contains as a condition of its exercise this limitation on otherwise applicable law. *E.g.*, *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952) (Supremacy Clause requires jury trial because this requirement was intended by Congress when FELA cause of action was created). The federal procedure is required by the substantive law being administered and is binding on *any* court that applies the federal law. The usual grant of federal question jurisdiction attaches no such conditions; either state or federal procedures are presumed adequate to administer or enforce the federal rights.

In "conflicts" situations we are assuming precisely the opposite of these shared jurisdiction situations. In conflicts situations, each government exists independently of the other government and exists for the purpose of applying its own law rather than to administer shared law. Professor Kramer's basic jurisdictional mistake is the same as almost all other conflicts theorists. He mistakenly assumes that a court can exist to apply another government's substantive law. If such situation could exist, the substantive law government might well desire its substantive law applied over its procedural law, but if the situation itself is never allowed jurisdictionally to exist, the talk of relative importance of substantive versus procedural law becomes meaningless.

substance of the forum law itself.

## 2. The Problem with Prisoner Riddles and Other Unilateral Quests for “Shared” Self Interest—*Lex Fori* Properly Recognizes That the Forum Can Answer Questions Only for Itself

Another variant of this doomed subjective approach is sometimes offered under the guise of rational self interest. The overall argument is that it might be better in the long run for forums to sometimes apply another sovereign’s laws, only if other forums would reciprocate. Analogy is made to the prisoner’s dilemma, and argument proceeds along the following lines: Sovereigns in conflict situations are like prisoners kept in isolation from each other who are able to be manipulated by a shrewd prosecutor into plea bargaining against their collective self interest.<sup>212</sup> The solution, for those who believe that sovereigns “share” a policy in having their more important policies implemented more often, is that the forum should adopt rules that force it to apply other sovereigns’ laws more often, in the hope that repeated playings out of this message of shared self interest will lead to more of the important policies of the forum being implemented by other forums more of the time.<sup>213</sup>

Such reciprocity arguments should be rejected for two main reasons. First, the arguments improperly assume “shared” policies that do not usually exist. Second, even if “shared” policies could be identified, blind reciprocity is not the best way to promote “shared” self interest; direct negotiation more effectively ensures shared interests will be achieved. Turning to the first point, the prisoner’s dilemma is *not* a fair analogy to conflicts situations. The prison riddle assumes two criminals both subject to the same judicial system’s sanctions for failure to cooperate and further assumes that the prisoners share a common desire and common ability to lessen sanctions imposed by the common prosecutor. None of these assumptions is like an intergovernmental conflicts situation. Only by re- or mis-characterizing real disputes as sharing the “common” concern that both states want their policies implemented, do proponents of the prisoner analogy make it seem that both states want the other to succeed. Real dispute, meaning conflict, always means that there is no shared substantive policy.<sup>214</sup> The states are more like two accused criminal

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212. See, e.g., BRILMAYER, FOUNDATIONS, *supra* note 68, at 155-79; Kramer, *Renvoi*, *supra* note 63, at 1021-28. For additional arguments against the applicability of the game theory and the prisoners dilemma to conflicts law, see Weinberg, *Against Comity*, *supra* note 144.

213. See, e.g., sources cited in *supra* note 212.

214. The state always wants its own substantive policy in place of the opposite conflicting policy of another state, nor can it sensibly categorize any of these substantive disputes as minor. See *supra* notes 208-11 and accompanying text.

defendants,<sup>215</sup> either of whom can and will avoid sanctions only if the other goes to jail. In such situations, there can be no plea bargaining in common interest; both *want* the other to take all the rap.

Second, even in situations where some overarching common interest could be identified, but dispute about less crucial issues persists,<sup>216</sup> blindly and *unilaterally* engaging in so-called “reciprocity” cannot maximize what is important to both states. First, it bears reemphasizing that if there really is a shared policy about substantive matters (vs. a “shared” wish that one’s contrary substantive policy be implemented), then there is no conflict. If both states believe that the purpose of tort law is to compensate to the maximum, then both states’ laws will allow compensation to the maximum. When commentators, however, attempt to characterize both states’ real tort policies as allowing compensation to the maximum, this is quite a different thing and is simply another example of the interpreter (conflicts scholar or judge) reading away by virtue of his or her subjective bias real differences in the laws of two potentially interested states.<sup>217</sup> If the forum law really is basically the same as non-forum law, then why not just apply forum law?<sup>218</sup> Or if forum law needs to be changed because non-forum law appears to exhibit a wiser policy balancing, then why not just change forum law so that it is more enlightened in *all* situations, not just those with multi-state elements?<sup>219</sup> If the answer to these questions is a version of “forum law cannot be made to be what I would like to see applied to these facts,” then this proves that there is no shared substantive policy and that attempts to manufacture one based on reciprocity principles amount to deception.

Assuming, however, that in some situations a shared policy could be identified that was larger than the particular substantive variations in either sovereign, *unilateral* deference<sup>220</sup> is not a good way to achieve *interstate* balancing of interests. To stick with and modify the inapt prisoners’ dilemma

215. I emphasize that I reject the prisoner analogy to conflicts situations entirely. Nevertheless, if the analogy must be used because it is the current fad, this modification of the analogy more accurately describes conflict situations.

216. For a potential example of this rare situation, see *infra* note 224 and accompanying text.

217. See also *supra* notes 108-19 and accompanying text.

218. If the other state would be offended by application of forum law, isn’t this proof of the real conflict?

219. See, e.g., Singer, *Real Conflicts*, *supra* note 19 (discussing Weinberg and others).

220. In reality such so-called deference may amount to a misreading of the other state’s interests and policies to downplay conflicts where they really exist. See *supra* notes 108-19 and accompanying text (stating that a forum creates false conflict by discounting other state’s interest). If, on the other hand, the deference is true and the state applies another state’s policies contrary to its own, the forum has subverted its legislature’s or executive’s desires concerning this very matter. *Id.*

model, the problem that creates the prisoners' dilemma is that each prisoner is isolated from the other and cannot share with the other information about their shared condition, which would help both of them achieve a better condition. The obvious solution to the dilemma is to break down the prison walls and let the two prisoners talk to each other. In the international or interstate context, nothing exists to prevent sovereigns from negotiating with each other regarding when and how each sovereign will give up part of its independence to do as it wishes, on the condition that the other sovereign will sometimes further the negotiating sovereign's potentially contrary policies. Uniform acts are such offers of treaty every time they include within their provisions the condition that their provisions shall apply to other states that also have adopted a substantially similar form of the uniform act.<sup>221</sup>

True reciprocity and furthering of multi-state "shared" interests is ensured only when the reciprocity is part of both sovereigns' laws. Treaties and uniform acts that offer mutually beneficial provisions to co-adopters create shared multi-sovereign law. Of course, once the same law is in place in both sovereigns, there is no longer a conflict. This is obviously true if the negotiated provisions modify each sovereign's local law so that substantive provisions are now the same in both states, but it is also true even if the negotiated shared law is primarily a jurisdiction selecting law, for example, a choice of law or extradition type rule.<sup>222</sup>

Lest I be misunderstood as encouraging the promulgation of generically applicable choice of law rules, which I vigorously oppose, let me emphasize that negotiated agreements between sovereigns as to exactly how cases shall be decided are of a different order from unilaterally adopted and generically

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221. Even if there are no reciprocal requirements in an adopted uniform act, this does not run contrary to the argument in text. First, the uniform act may be seen by the adopting state as an improvement over existing substantive law without regard to whether other states adopt the act or not. To this extent adopting a uniform act is no different from modifying extant common law. Second, even if the uniform act is adopted with the expectation that other states also will adopt it, and that most of the perceived benefits only will occur because other states also adopt the act, these perceived benefits arise because of uniform *substantive* content of the new law, not because the adopting states are willing sometimes to have another state's law applied so that sometimes their law will be applied, as the conflicts game theorists advocate. In other words, the compromises reached by uniform acts are perceived by the states adopting the acts as real compromises on important substantive law issues that the adopting state can "live with." The content of the law adopted is therefore always important to the adopting state. This point is reinforced by the fact of non-uniform variations in the "uniform" act adopted by a particular state; for the particular issue addressed, the state did not agree with the substantive balance struck.

222. Cf. *infra* note 224 and accompanying text.

designed choice of law rules.<sup>223</sup> Choice of law rules negotiated between sovereigns rather than adopted unilaterally mean that both sovereigns know what they are getting substantively, since the provisions of the rules apply only to the negotiating parties rather than generally and abstractly. When state *A* agrees with state *B* that in child support situations the laws of the state in which the provider is domiciled shall apply,<sup>224</sup> this is an explicit decision by both states that, for the purposes of the type of litigation covered by the interstate agreement, both states agree to give up part of their sovereignty and allow the other state to administer law on their joint behalf. Implicit in this giving up of independence and sovereignty is the giving up of the ability to object to the local law substantive policy balance struck by the other sovereign. For purposes of the scope of subject matter governed by the agreement between the two states, there is no other sovereign; the agreement creates a merged sovereign so far as the material governed by it is concerned. The point of entering into a binding agreement between the two states is so that neither state can raise public policy objections to the application of laws that both have agreed should apply.<sup>225</sup>

Only by explicitly modifying otherwise independent sovereignty do states incorporate other sovereigns' laws into their own substantive law system. Because the agreement becomes the law of both sovereigns and directly modifies their relationship to each other, it creates a level of binding seriousness that unilateral judicial attempts to make international law, for example, conflicts choice of law rules, can never achieve. Comparing the two situations un masks the fact that conflicts rules are always unilateral and therefore always amount only to forum law being misapplied under the guise that something outside the forum compels this. If interstate or international harmony and cooperation compels a change in otherwise applicable forum law, the way to effect this is through an interstate or international agreement that modifies sovereignty, so that the executive, the legislature, and the courts can be clear about who is

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223. Similarly, although this is not the place where the argument can be made in sufficient detail, I am skeptical in the U.S. context about the wisdom and even the ability of the federal government to decree so-called choice of law rules for state law governed situations. While the federal government clearly has the power to preempt state *substantive* law in any situations within federal regulatory power, it is quite a different question whether the federal government *prospectively* may tell the states whose law shall apply when both states have equally constitutionally sufficient connection to the litigation to apply their own law. I intend to explore this rather fundamental question of the limits and extent of federal full faith and credit rule-making power in a future work.

224. *Cf., e.g.,* Uniform Reciprocal Enforcement of Support Act (URES A). For more detail on the workings of URES A, see, e.g., William F. Fox, *The Uniform Reciprocal Enforcement of Support Act*, 4 FAM. LAW REP. 4017 (1978). For criticism of the choice of law balance struck by URES A, see Cox, *Burnham Insane*, *supra* note 7, at 561-71; RUSSELL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 5.2E4 (3d ed. 1986).

225. Of course neither state waives any constitutional limitations which might restrict substantive law content of either state. See also *supra* notes 5, 157, 193-95 and accompanying text.

attempting to make the international law and exactly what its content is. So long as courts are incapable of negotiating or entering into such agreements, I strongly insist they are necessarily, therefore, incapable of decreeing situations (i.e., via choice of law "rules") in which purportedly non-forum law shall be applied.

### 3. Intolerance or Better Law—*Lex Fori* Means Taking Law-Making Responsibility Seriously

A possible third variant of the subjective approach would be to attack *lex fori* from what at first look appears to be the moral high ground. If the forum always applies its own law, does this not show lack of tolerance for other cultures and other legal systems *even according to the forum's own moral standards of tolerance and mutual respect*. The argument would be that the *forum* value of tolerance means other legal systems deserve sometimes to have their law applied in preference to the forum's law.<sup>226</sup> This is comity not for the sake of international harmony per se, but rather comity because the forum itself believes in comity as a high moral principle. For instance, in a pluralistic and/or culturally relativistic society such as is arguably the United States,<sup>227</sup> forum policy is to allow, perhaps guarantee, diverse cultural or religious groups to act in accordance with their cultural or religious mandates when this action would be contrary to the more generic national substantive law policy. Should not this same respect for the rights of others different from the majority be extended to foreigners whose actions implicate our governmental regulatory interests, but also obviously implicate their home country or home culture interests? In reality, because the value of tolerance is forum-based, the tolerance is always extended only on the forum's own terms to individuals rather than governments, and the forum never, therefore, departs from forum law.

This is most strongly revealed in the case of morally repugnant foreign law. When the foreign law is most foreign to our sense of what is right, it is rejected. This variation of the public policy exception properly undermines any purported universality of claimed tolerance for different legal systems qua systems.<sup>228</sup> Those arguing for tolerance do not presumably argue for tolerance of any and all foreign actions, systems, and laws. Atrocities of the Adolph Hitler or Idi

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226. Cf. Singer, *Real Conflicts*, *supra* note 19 (stating that deference to other states is encouraged as part of forum state's sense of fairness).

227. Or arguably as the United States should be, according to commentators who contend our society and legal system is intolerant. For my textual points, it does not matter how tolerant the U.S. actually is, since the argument is being made at a theoretical level as if the policy of tolerance was relatively strongly in place.

228. Cf. *supra* notes 84-86 and accompanying text (stating that public policy exception undercuts the foundation of vested rights logic).

Amin type presumably are not tolerated.<sup>229</sup> Even at the purely domestic level, guarantees of religious freedom do not allow practices inimical to the moral values deemed fundamental to the society that otherwise guarantees religious freedom.<sup>230</sup> Although there will be strong disagreement from individual to individual and culture to culture about where the line should be drawn, there nevertheless always does come a point under any individual or cultural standard

229. The act of state doctrine does not run counter to this point. *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (holding that the propriety of a foreign government's actions within its own territory is a matter of federal foreign relations law regarding which the states can have no governing policy.) The specific holding of *Sabbatino*—that acts of a foreign nation within its territory must be substantively respected—was later reversed by Congressional action. *See Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967). The act of state doctrine is premised not on respect for the quality of the actions of foreign governments, but rather on the belief that because the actions of foreign governments directly involve foreign relations of governments *qua* governments, these issues can only be addressed by the federal government rather than left to the individual states.

230. *See, e.g.*, *Reynolds v. United States*, 98 U.S. 145 (1878) (holding that the prosecution of a Mormon for bigamy does not violate the Free Exercise Clause); *cf.* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993). I cite *Reynolds* not for the correctness of its holding, which I doubt (*cf.* Justice Murphy's dissent in *Cleveland v. United States*, 329 U.S. 12, 25-29 (1946), regarding prosecution for bigamy under the Mann Act), but rather I cite *Reynolds* for the principle of required intolerance that Chief Justice Waite justifies via answer to rhetorical questions:

Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice . . . . So here . . . it is provided that plural marriages shall not be allowed. Can a man exercise his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

*Reynolds*, 98 U.S. at 166-67.

In this regard, it is worth noting that in the Court's most recent free exercise case (*Lukumi Babalu Aye*) the supposed most liberal member of the Court emphasized that:

A harder case would be presented if petitioners were requesting an exemption from a generally applicable anticruelty law. The result in the case before the Court today, and the fact that every Member of the Court concurs in that result, does not necessarily reflect this court's views of the strength of a State's interest in prohibiting cruelty to animals. This case does not present, and I therefore decline to reach, the question whether the Free Exercise Clause would require a religious exemption from a law that sincerely pursued the goal of protecting animals from cruel treatment. The number of organizations that have filed amicus briefs on behalf of this interest, however, demonstrates that it is not a concern to be treated lightly.

113 S. Ct. at 2251 (footnote omitted) (Blackmun, J., concurring).

In light of this statement from Justice Blackmun, perhaps I overstate the case in text by referring to "values deemed fundamental," or at least leave open the probability that the key word is "deemed" rather than "fundamental." I emphasize, at any rate, that it is not my purpose here to identify the type of conduct which society should be allowed to prohibit over religious tolerance objections, but instead to underscore that such situations clearly exist. Presumably, for example, Justice Waite's human sacrifice hypothetical still has force, regardless of how one feels about animal sacrifice.

where the individual or culture concedes<sup>231</sup> that it is proper for government to say to one who desires to act despicably, "We will not allow you to act significantly differently from the rest of us by doing this thing."

Tolerance of others' values, then, is never promoted as a forum value absolutely and without reservation. The promoter always implicitly reserves the right to judge whether the other culture or value system is worthy of respect. This reality of government self righteousness should not be denied, nor excessively regretted,<sup>232</sup> but acknowledged as part of the reason why governments exist. If governments exist partly to fashion and implement the best laws possible, we may attempt through the government to which we belong to create the best laws possible. At this *forum* level of what should be the shape of forum law, I have no serious quarrel with those who wish to see incorporated into forum law significant tolerance for diverse lifestyles and values.<sup>233</sup> What I insist upon, however, is that the debate be recognized as one that takes place only upon the forum's terms and is embodied only in the forum's laws.

What this means for "conflicts" situations is that the forum is always evaluating, under the forum value system, rather than the other country's value system, whether exceptions should be granted to normally prevailing rules. The matter of what *forum* law shall be applied, in other words, is a purely domestic dispute rather than a conflict between sovereigns. If the forum applies an exception to its substantive law, this is because another "trumping" part of the *forum* legal system requires this. And because we are talking about forum values of tolerance (versus international relations<sup>234</sup>), this trumping part of forum law cannot be designed for solely multi-sovereign fact patterns. In fact, something closer to the reverse is true. If the forum value of tolerance exists, it is designed to apply primarily to purely domestic situations, and only includes foreign based situations if their facts are consistent with the domestic exception. The foreigner conceivably is permitted an exemption from forum law not because he belongs to a different government, but rather because he belongs to a different culture similar in kind to the divergent domestic cultures also

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231. More accurately, the culture or individual insists that the government not permit the offensive conduct and the offensiveness of the conduct cannot be constitutionally protected.

232. Thus, even nihilists and individualists may work to better their governments. Cf. HENRY DAVID THOREAU, *Civil Disobedience*, in WALDEN AND OTHER WRITINGS 636 (Mod. College Library ed. 1950): "But, to speak practically and as a citizen, unlike those who call themselves no-government men, I ask for, not at once no government, but *at once* a better government." (emphasis in original).

233. Of course, the line of where tolerance stops will be drawn differently according to our sense of moral values. See text accompanying *supra* note 230.

234. My objections to courts fashioning international relations policy are previously set forth *supra* at notes 220-26 and accompanying text.

protected by the same provisions of forum law.<sup>235</sup> The forum value protected may be religious tolerance or multiculturalism, but it is not international relations. No interest of another sovereign is ever weighed, but only the competing *forum* interests of tolerance for divergent values versus uniformity of application of law.

This means that in most situations, the foreigner will not be entitled to an exemption, because his usual argument is not that something about his culture requires him to act differently from what regular forum law would require, but rather that it would be more convenient to him if he did not have to be put under the forum's regulatory control. A corporation, even a Saudi-based one that is in the habit of discriminating against Jews on its home soil, can hardly claim that it *must* similarly discriminate against Jews when doing business in the United States.<sup>236</sup> Such conduct is outside the range of permitted variations protected by the forum's premium on tolerance and is not behavior the actor in good faith can claim he must engage in because his culture requires it in order to protect his cultural identity. If we exercise jurisdiction over the Saudi company, we then are required to apply our law to its conduct. The forum value of tolerance, in short, never defeats otherwise valid jurisdiction. Tolerance is a *forum* value which when exercised makes clear that *forum* law provides a different standard of conduct or recovery under the particular facts of the case.<sup>237</sup> As a relatively rare domestic exception from normal application of more generic forum law, it cannot serve as the foundation upon which to build "conflicts" principles. It is instead a particular application of forum law.

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235. Application of the exemption is also subject to all the domestic constitutional attacks regarding preferential treatment, reverse discrimination, etc., that would apply in a wholly domestic context. Cf. *supra* notes 5, 157, 193-95 and accompanying text. In other words this *is* forum law, not international or neutral conflicts law that is being applied.

236. Cf. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (deciding that U.S. civil rights law should not be applied "extraterritorially" to actions of U.S. companies abroad). For criticisms of the extraterritorial aspects of this case, see, e.g., Kramer, *Myth*, *supra* note 137; Weinberg, *Against Comity*, *supra* note 144.

237. A variation on the tensions of tolerance for other cultural norms and fundamental protections uniformly guaranteed all under forum law is provided in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), where the Court refused to apply constitutional equal protection provisions to invalidate Indian tribal membership requirements that favored males over females, even though the female tribe members involved *desired* the constitutional protections.

V. CONCLUSION: ABANDON "CHOICE" OF LAW MYTHS AND BUILD  
ON THE FOUNDATION THAT JURISDICTION MEANS  
ABILITY TO APPLY FORUM LAW

In this article and previous jurisdictional/conflicts works,<sup>238</sup> I have demanded that we re-evaluate and attempt to resolve very fundamental questions about court power as reflected in doctrines about court jurisdiction: i.e., the ability to bind a defendant by law the court applies to his case.<sup>239</sup> Most conflicts doctrines seem to take for granted things which upon closer scrutiny are not true. My goal in this Article is the very limited one of exploring the assumption, inherent in all conflicts and jurisdiction doctrines talking about weighing interests of competing states, that a court can apply another's law. I have attempted to demonstrate in this Article that courts have power only to apply their own law and that they get into trouble when they pretend they can do more.<sup>240</sup>

Such trouble is an inevitable result of bad theory, as the epigraph at the beginning of this Article emphasizes.<sup>241</sup> If courts are in fact capable of applying only their own law, then it is always improper, and therefore potentially destructive or deceptive theory, to assume that any neutral rules for resolving conflicts can be developed. Most conflicts theory accordingly has been misguided and should be scrapped. Instead, courts and commentators should focus upon the reality that courts always will apply only their own law. Efforts to make the forum law more responsive to international concerns accordingly should be directed to the forum sovereign directly, rather than through the guise of mythical external (and therefore ignorable) constraints on court power. Similarly, whatever restrictions are placed on court authority to apply law, whether called personal jurisdiction, subject matter jurisdiction, or choice of law, should be explicitly acknowledged and applied at the front end

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238. See sources cited in *supra* note 7.

239. Recently, Professor Perdue engaged in similar inquiry by asking what is the purpose of personal jurisdiction. See Perdue, *Personal Jurisdiction*, *supra* note 7. Her tentative conclusion that personal jurisdiction serves as a first order check on whether the forum can apply its law against the defendant is certainly consistent with my larger thesis that the forum should never have jurisdiction unless it can apply its substantive law to the case. My larger point, however, is that the forum never can have jurisdiction to apply anything but forum law to a controversy which is brought before it, regardless of what it says it is doing. It is unclear to me whether Professor Perdue believes that a forum with jurisdiction to apply its own law nevertheless might have power to apply another state's law; obviously I would disagree with her if this is her position.

240. The trouble may take the form of subverting legislative intent of their own sovereign by failing to apply law when legitimate state interest is present; it may take the form of misinterpreting other sovereign intent when purporting to apply other sovereign law; but it more basically involves violation of the due process rights of the defendant who has been swindled of the right to make sure that only a sovereign with connectedness to him can apply its law to his conduct.

241. See *supra* note 1 and accompanying text.

of litigation to prevent courts from acting when they have no legitimate authority to bind by their own law. There are no cures for bad law once jurisdiction is (mis)conceded.<sup>242</sup>

I have not elaborated in this Article on how much connectedness must exist before a court has threshold legitimacy to bind by its law.<sup>243</sup> I sympathize with readers who might feel frustration that this crucial issue does not receive attention in this work. I also acknowledge that this work might seem largely circular because of this failure to describe in more detail what should be the precise shape of limits on jurisdiction. In close breaths, I insist both that there is no jurisdiction unless there is ability to apply forum law and also that the sole test for threshold validity of jurisdiction is the ability to apply forum law. Readers certainly have a right to insist that a future work or works more completely describe when the forum will be allowed to bind the defendant by its own law, especially in the U.S. federal system where the constitutional constraints on choice of law have been subject to intense criticism for laxity.<sup>244</sup>

My apology for this significant and intended omission is twofold. First, I believe that regardless of what should be the exact shape of limitations on ability to bind by forum law, the more fundamental point of this Article is valid and needs to be established. One does not need to know how much connectedness is required for application of forum law in order to yet insist that no law can be applied unless there is forum connectedness of the sort usually associated with ability to apply forum law. When personal and/or subject matter jurisdiction are

242. I therefore also insist that all jurisdictional doctrines not be compartmentalized into separate pigeonholes, but recognized as the single question of whether the court has power to bind the defendant. Compartmentalization gives the false illusion that inadequacies in one part of the system are being addressed in other parts of the system. In other words, they mask the inadequacy of the jurisdictional system by preventing inquiry into the jurisdictional system as a whole, pretending that the problems are only with a small part of the system rather than with the overall theory of jurisdiction. If the problem instead is with the jurisdictional system itself (e.g., as argued throughout this article, if the main failing of the jurisdiction system is allowing jurisdiction when there is no ability to apply forum law), the inquiry should be focused on this more basic inadequacy rather than on the symptoms of the jurisdictional disease. *See also supra* note 32 and sources cited therein.

243. I do give some examples where due process is violated in Part II (*see* text accompanying *supra* notes 15-60), but I admit that the focus of this work is not upon the particulars of the test for connectedness, but rather upon the need for a test of connectedness.

244. *See, e.g., supra* note 121 and sources cited therein. Perhaps some conflicts theorists have accepted bad personal jurisdictional theory, because they are apparently convinced there will be no meaningful constraints on choice of law. *See, e.g.,* Silberman, *Reflections on Burnham v. Superior Court: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569 (1991). I still believe it is more productive to address the whole jurisdiction theory rather than tinker with disease symptoms in isolation—not because the Court is likely to soon reverse its recent misdecisions, but because in the long run overhauls must be soundly based theoretically or they will result in bad decisions because of inherent internal inconsistencies.

evaluated independently of the ability to apply forum law, jurisdiction will inevitably be granted in some situations where the forum *cannot* apply its own law, regardless of where the connectedness line is drawn. Similarly, as long as courts believe they can apply others' laws, they will do so to the detriment of their own and other states' interests. Recognizing that the sole reason for granting jurisdiction is to apply forum law will do much toward putting conflicts/jurisdictional theory back on the right track.

In a similar vein, my second reason for not burdening this already lengthy piece with a detailed treatment of what should be the connectedness test is that the building of new theory is an incremental process where it may be important to identify which stones are foundational and which are matters of taste and style important to the overall building, but not essential to whether it stands or falls. The exact shape of the connectedness test is not foundational in the same way that recognizing the interrelation between jurisdictional doctrines is foundational. There can be legitimate disagreement about how much connection between the state and the defendant should be required before a system will potentially recognize judgments rendered by the forum.<sup>245</sup> The exact size of certain rooms in a house relative to each other can be adjusted without requiring that the entire foundation be dug up or re-poured. But there should not be disagreement about what purpose is served by placing limits on jurisdiction in the first instance. This issue is foundational. My argument in this Article is limited to the contention that there can be no sensible building of further jurisdiction/choice of law structure until we first recognize that the purpose of jurisdictional limits is to ensure that the right forum is applying the right law.<sup>246</sup> My thesis that courts only exist to apply their own substantive law is offered as a starting place for further construction of a sensible jurisdiction doctrine.

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245. This issue is of course of crucial importance in the U.S. federal system, where states are required by the Full Faith and Credit Clause to enforce judgments as their own once the connectedness hurdle is cleared.

246. Cf. Albert Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the lex fori Approach*, 18 OKLA. L. REV. 340 (1965). See also Albert Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377 (1966). Professor Ehrenzweig apparently recognized but did not entirely embrace the logic of applying forum substantive law as a result of obtaining jurisdiction only in situations that implicate forum regulatory interests. For example, in criticizing Professor Currie for backing away from the *lex fori* mandated by interest analysis, Professor Ehrenzweig emphasized that this was the main predictive and logical strength of interest analysis and that Currie was unwilling to "pay the price" associated with his own theory by sticking with it. *Id.* at 393-94. My attempt in this and other conflicts/jurisdiction articles is to stick with the soundness of insights offered by Currie and others and pursue the insights through to all of their logical conclusions, regardless of what accepted canons must fall. In this article, my emphasis is that the reality of forum law means the facade and myth of "choice" of law should be razed/abandoned, even though it is at the heart of most conflicts theories.