

**THE PLACE OF TRIAL AND THE LAW APPLIED:
OVERHAULING CONSTITUTIONAL THEORY***

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Much of the current dialogue on constitutional theory in the conflict of laws is centered on three questions: How can constitutional review of choice of law be strengthened? In ruling on jurisdiction, should courts take into account perceived unfairness in the probable choice of law? How can the Supreme Court rationalize the jurisprudence of jurisdiction in other ways? On each of these, let me venture a few tentative suggestions for further theoretical exploration.

Before I begin, I would like to say a brief preliminary word about the usually neglected but highly relevant subject of politics. I think we make a mistake addressing questions of jurisdiction and choice of law in an entirely abstract way. Isolated from the context of broad policy concerns, reflections on these interesting questions will lack coherence and lose all hope of wisdom. The context today, of course, is an alleged "liability crisis." A massive assault on the American private law system, under the banner of "tort reform," has scored impressive successes in over forty state legislatures, and continues to gather strength.¹ The consequent

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1. See *Forty Legislatures Act to Readjust Liability Rules*, N.Y. Times, July 14, 1986, at 1, col. 1. It should be noted that some of the new defenses are vulnerable to constitutional attack. See, e.g., *Boyd v. Bulala*, D. Va., Nov. 5, 1986, No. 83-0557-A-C (cap on recovery for medical malpractice). A similar challenge was made with some success in the liability insurance "crisis" of the mid-seventies. See, e.g., *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill.2d 313, 347 N.E.2d 736 (1976)(cap on recovery for medical malpractice). See *Generally*, F. BELLOTTI, J. VAN DE KAMP, L. THORNBURG, J. MATTOX, C. BROWN, B. LAFOLLETTE, AN ANALYSIS OF THE CAUSES OF THE CURRENT CRISIS OF

proliferation of new disuniform defenses will no doubt enliven the course in the conflict of laws. But I raise it to call your attention to the obvious vulnerability—once the tort reformers wake up to the situation—of those mechanisms of interstate litigation—the subjects of this writing—through which the Supreme Court has more or less put law at the plaintiff’s option. (1988) 59 U. COLO. L. REV. 68

The pendulum swings, and the luminous roster of Justices changes, but the fundamental outlines of the system remain. Ever since *International Shoe*,² a plaintiff in this country has enjoyed a wide choice of forums among which to shop for favorable law, venue, procedures. Ever since *Alaska Packers*³ and *Pacific Employers*,⁴ the interested forum has had power to give the plaintiff the benefit of its laws. Under American standards of full faith and credit,⁵ even a default judgment obtained under these rules will be enforced at the place where the

UNAVAILABILITY AND UNAFFORDABILITY OF LIABILITY INSURANCE (1986) (report of ad hoc committee of the National Association of Attorneys General).

2. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)(expanding the territorial basis of adjudicatory jurisdiction to include cases against defendants having contacts with the forum other than presence within forum territory). *International Shoe*, however, places limits of “fair play and substantial justice” upon otherwise legal assertions of personal jurisdiction. *Id.* at 324-25 (Black, J., concurring in the result: “I believe that the Federal Constitution leaves to each State, without any ‘ifs’ or ‘buts’ a power . . . to open the doors of its courts for its citizens to sue corporations whose agents do business in those States. . . . I think it a judicial deprivation to condition its exercise upon this Court’s notion of ‘fair play’ . . .”).

3. *Alaska Packers Ass’n v. Industrial Acc. Comm’n*, 294 U.S. 532 (1935) (place of employment contract has lawmaking power over tort to workman injured elsewhere: “*Prima facie* every state” (*id.* at 547) “with a legitimate public interest” (*id.* at 542) in governing a case “is entitled to enforce in its own courts its own statutes, lawfully enacted” (*id.* at 547)).

4. *Pacific Employers Ins. Co. v. Industrial Acc. Comm’n*, 306 U.S. 493 (1939) (place of injury as well as place of employment contract has power to apply its own law to worker’s tort case; forum not required to balance interest of sister state against its own).

5. *See* 28 U.S.C. § 1738 (1982) (requiring forum to give that faith and credit to judgment as would be given in courts of judgment-rendering state); *Fauntleroy v. Lum*, 210 U.S. 230 (1908) (full faith and credit must be given to judgment enforcing arbitral award on gambling contract illegal in state in which execution is sought); *York v. Texas*, 137 U.S. 15 (1890) (default judgment is entitled to full faith and credit, subject to right of collateral attack on the personal jurisdiction of the judgment-rendering court).

defendant has assets.⁶ If indeed there is a liability crisis, these features of American interstate litigation would seem to be implicated in it.

Those who have thought about conflicts cannot, at bottom, disagree with that assessment. We understand that American notions of adjudicatory and legislative jurisdiction have evolved as they have to serve shared governmental interests in enforcement of substantive law.⁷ Much substantive regulation in this country is left to state law. (1988) 59 U. COLO. L. REV. 69 For that reason, policies favoring law enforcement in cases on multistate facts—policies characterizable as multistate or even national ones⁸—cannot easily be given effect. The interstate litigational system today, however, seems to be functioning in part to give indirect effect to those multistate policies. Thus, the American forum-shopping system discourages evasion of responsibility or erosion of vested rights. While it allows for the diversity of state regulation, it strengthens our federalism by preserving the rights of those who can enforce them only by crossing state lines. The system, insofar as it reinforces defendant

6. A default judgment, however, may be collaterally attacked for lack of personal jurisdiction. *See* *York v. Texas*, 137 U.S. 15, 20 (1890) (enforcement of default judgment does not deny due process to the default debtor, since the debtor is entitled to a hearing in the enforcing court on the issue of personal jurisdiction).

7. This position is developed more fully in Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 463-68 (on “National Conflicts Policy”). *See, e.g.,* *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (White, J.: “. . . the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including . . . the shared interest of the several States in furthering fundamental substantive social policies. . . .”); *id.* at 311 (Brennan, J., dissenting: “People should understand that they are held responsible for the consequences of their actions and that in our society most actions have consequences affecting many States. When an action in fact causes injury in another State, the actor should be prepared to answer [sic] for it there. . . .”); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(e) (1971), *infra* note 75; Juenger, *Supreme Court Intervention in Jurisdiction and Choice of Law: A Dismal Prospect*, 13 U.C.D. L. REV. 841, 916 (1981) (“Supreme Court intervention in choice of law . . . could only . . . frustrate interstate support claimants, accident victims and policy-holders”); Cheatham and Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 978 (1952).

8. I mean here policies (for example) favoring security in interstate transactions, safety in interstate transportation, fairness and safety in interstate markets, and so forth, to the extent those concerns are not addressed under federal law.

responsibility, on a long view seems also to comport with American notions of the commercial value of better business.

In the remarks that follow I have tried to suggest ways in which the structure could be rationalized. But I freely own that these proposals would tend to further the goal of serving shared governmental interests in enforcement of substantive policies. I have sought to suggest ways of strengthening the system as we know it, rather than of attempting to curb litigation. But I would hope that what follows will be helpful, or at least interesting, even to those who would prefer to confine, rather than simply to rationalize, what American courts do.

I. STRENGTHENING CONSTITUTIONAL REVIEW OF CHOICE OF LAW

When courts today review a choice of law under the Constitution, they use what I have elsewhere identified as “minimal scrutiny”—that is, scrutiny for “some rational basis”⁹ for the choice. A state with a legitimate interest in governing an issue will have a “rational basis” for so doing. When an uninterested state applies its own law, the application will be unreasonable or arbitrary and irrational; it will be held to be “fundamentally unfair.”¹⁰ Thus, minimal scrutiny in conflicts cases is interest-analytic. (1988) 59 U. COLO. L. REV. 70

9. Weinberg, *Minimal Scrutiny*, *supra* note 7. Professor Sedler, while not developing the theory, has also taken the view of “constitutional generalism.” Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59 (1981). The point now appears well established. See R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 525 n. 55 (3d. ed. 1986).

10. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981). “Fundamental unfairness” and “unfairness” are two distinct terms of art in this jurisprudence. “Fundamental unfairness” is the technical equivalent of “unreasonableness” in the law of conflicts; that is, an assertion of power by a state without a legitimate public interest in the assertion—without a rational basis for the action taken—will be fundamentally unfair. See *Hague*, 449 U.S. at 313. “Fairness” in the law of conflicts, however, is synonymous with “foreseeability.”

Professor Peterson takes the view that *Hague* rested in part on the fact that defendant Allstate could have foreseen, as all the Justices conceded, an application of Minnesota law. See Peterson, *Jurisdiction and Choice of Law Revisited*, 59 U. COLO. L. REV. 37, 42 n. 27 (1988). But Justice Brennan’s plurality opinion in *Hague* dispensed with fairness (foreseeability) in a footnote. 449 U.S. at 318 n. 24. Justice Stevens, concurring, would have aligned “fundamental unfairness” with “unfairness.” He thought Minnesota law would

Although many writers have taken the position that more restrictive scrutiny ought to be afforded to choices of law,¹¹ few have concerned themselves with the anomalous fact that even minimal scrutiny is not consistently available.

A. *The Arbitrary and Irrational Bealeian Choice*

have been unconstitutional if it had frustrated the justifiable expectations of the parties. 449 U.S. at 327 (Stevens, J., concurring). Justice Powell, dissenting, would have *added* an inquiry for foreseeability to the plurality's inquiry for forum governmental interest. 449 U.S. at 333-34 (Powell, J., dissenting). Importantly, in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985), Justice Rehnquist, writing for the Court, stated that foreseeability *was* a component of constitutional review of choice of law. But it is revealing that in support of that proposition Justice Rehnquist could cite only Justice Powell's dissent in *Hague*. *Shutts* thus appears to reopen the question, and in view of recent personnel changes on the court, foreseeability may indeed reenter the Court's analysis. However, foreseeability does not seem to have been a feature of the Court's analysis in *Hague*. See also *infra* notes 121-129 and accompanying text.

11. See, e.g., Brilmayer, Carolene, *Conflicts, and the Fate of the "Inside-Outsider,"* 134 U. PA. L. REV. 1291 (1986); Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981); Kozyris, *Reflections on Allstate—The Lessening of Due Process in Choice of Law*, 14 U.C.D. L. REV. 889 (1981); Lowenfeld & Silberman, *Choice of Law and the Supreme Court: A Dialogue Inspired by Allstate Ins. Co. v. Hague*, 14 U.C.D. L. REV. 841 (1981) (remarks of Professor Silberman); Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872 (1980). "Restrictive scrutiny," the term I have used for conflicts cases (see Weinberg, *Minimal Scrutiny*, *supra* note 7) or "strict scrutiny," or "heightened scrutiny," as it is variously called, describes a level of review which would make it more difficult to sustain a given choice of law. That a state merely has a "rational basis" for choosing its law, that it has a "legitimate governmental interest" in doing so, would be insufficient. Even an interested state would not be allowed to govern by its laws if that governance would be surprising to the regulated party, or discriminatory. There are familiar examples outside the field of conflicts. Restrictive scrutiny is applied to strike down the law of even an interested state if, for example, application of the law would unduly burden interstate commerce. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). "Minimal scrutiny," on the other hand, is scrutiny for rational basis alone. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4. In a conflicts case, a state may apply its laws to regulate an issue if it has a rational basis for doing so, that is, if it has a legitimate governmental interest in applying its laws. See *supra* note 9 and accompanying text.

A virtual immunity from even minimal scrutiny, for example, seems to be enjoyed by the Bealeian choice,¹² however irrational. (1988) 59 U. COLO. L. REV. 71 When the law applied is the law of the place of injury, no one supposes that to be unconstitutional, even though the place of injury may be an uninterested state on the particular facts. Moreover, the immunity of the irrational Bealeian choice seems to have widespread academic support.¹³ It seems fair to say that most of us in the field take it for granted that a state connected to a case by a traditional connecting

12. By the “Bealeian” choice I mean, of course, a choice made through one of the traditional, generally territorialist, jurisdiction-selecting choice-of-law rules advocated by Professor Beale. Joseph H. Beale (1861-1943) was a Reporter for the 1934 RESTATEMENT OF THE CONFLICT OF LAWS. “The subject of Conflict of Laws was first given its modern content by Professor Joseph H. Beale of Harvard, who developed it as a law school course at the turn of the present century. His three-volume casebook, published in 1901 . . . included what are still today its standard topics, as well as a 99-section ‘Summary of the Conflict of Law,’ which . . . foretold the first RESTATEMENT. . . .” Leflar, *The Nature of Conflicts Law*, 81 COLUM. L. REV. 1080 n. 1 (1981). Beale’s 1935 TREATISE ON THE CONFLICT OF LAWS also elaborated his territorialist positions.

13. Apart from the genuine problem that would be presented in unprovided-for cases should irrational Bealeian choices become impermissible (*see infra* text accompanying notes 70-81) it is hard to see why the irrational Bealeian choice seems so uncontroversial on the constitutional level. Professor Weintraub’s indispensable COMMENTARY ON THE CONFLICT OF LAWS (3d ed. 1986) is substantially silent on the issue of the permissibility under the Due Process Clause of an application of the law of the uninterested place of injury. He suggests, at 505-06 (2d ed. 1980), that the uninterested place of injury has legislative jurisdiction over the injury. *See* Martin, *Personal Jurisdiction*, *supra* note 11; Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315 (1981). Although both these essays propose that a state be allowed to govern an issue only if the state’s contact with the case is sufficient, as sufficiency is defined by the authors, neither author exhibits concern that an *uninterested* place of injury might, in this way, be permitted to regulate the tort duties of nonresidents. *See also* Ely, *Choice of Law and the State’s Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 180 (1981). In *Methods and Objectives in the Conflict of Laws: A Challenge*, 35 MERCER L. REV. 555, 557 n. 9 (1984), Professor Brilmayer, stating a hypothetical involving an uninterested place of injury, writes, “I . . . feel that either state might apply its law. . . .” The question is raised thoughtfully in W. RICHMAN & W. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 244-45 (1984).

factor—place of injury, situs, place of contracting, and so forth—can always constitutionally govern the tort, property, or contract, respectively.

The immunity of the irrational Bealeian choice is quite at odds with the Court's own pronouncements. Even the three dissenters in *Hague* agreed with the plurality that “the forum State must have a legitimate interest in the outcome of the litigation before it. . . . The State has a legitimate interest in applying a rule of decision to the litigation only if the facts to which the rule will be applied have created effects within the State, toward which the State's public policy is directed. . . .”¹⁴

But the Supreme Court has never clearly struck down an application of unreasonable law reached through some traditional choice rule.¹⁵ Cases (to name only those most familiar) like *Carroll v. Alabama* (1988) 59 U. COLO. L. REV. 72 *Great Southern R.R. Co.*,¹⁶ and *In re Barrie's Estate*,¹⁷ are considered constitutional exercises of forum power. Yet in *Carroll* the law of the uninterested place of injury was applied, outrageously, to deprive the resident employee of local employers' liability law in an action against the resident employer. In *Barrie*, the law of the uninterested

14. 449 U.S. 322, 334 (Powell, J., dissenting).

15. It is true that in *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), the Court did refuse to allow the Texas courts to apply to a foreign contract Texas's period of limitation, longer than that provided by the contract, when Texas was found to have no rational basis for so doing. But that was not on a theory that the limitation of actions, even though ordinarily for the forum, was beyond the power of the uninterested forum. Rather, the issue was viewed as one of contract, the Court refusing to accept the Texas court's characterization of the issue as “procedural.” *Id.* at 405-407. The Court's position on this issue is more accurately reflected in such cases as *Watkins v. Conway*, 385 U.S. 188 (1966) and *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953), each of which sustained forum limitations law as customary.

16. 97 Ala. 126, 11 So. 803 (1892) (forum will not apply its employers' liability act to tort action by resident employee against resident employer, although forum is place of employment contract; law of place of injury is exclusively applicable, and bars the action). The Alabama statute was amended to overcome this judicial perversity, ALA. CODE § 7540 (1928) (statute applies to all workers under Alabama employment contracts), but in 1984 the Alabama Supreme Court rejected the argument for abandonment of the “place of injury” rule. *Norris v. Taylor*, 460 So.2d 151 (Ala. 1984).

17. 240 Iowa 431, 35 N.W.2d 658 (1949) (forum need not recognize judgment of decedent's domicile that decedent's revocation of her will was valid, insofar as revocation might affect title to land at forum; although neither legatee church nor heirs at law reside at forum, forum as situs has exclusive power to allocate land to one or the other party).

situs of realty was applied to nullify a revocation of a will, after the revocation had been held effective at the domicile of the decedent, thus awarding title to a nonresident charity to the detriment of the nonresident heirs at law. If only minimal scrutiny is provided by the Due Process Clause in conflicts cases, so that the only protection afforded is against the arbitrary and irrational, why not afford that minimal protection in cases like these?

It is true that the Court has never clearly *sustained* an irrational but traditional choice. It might be thought that an irrational but traditional choice of the law of the place of injury was sustained in *Carroll v. Lanza*,¹⁸ but that turns out not to have been the case. There, it will be recalled, the Court sustained forum law on the theory that the forum, as place of injury, might have had uncompensated medical creditors, even though there *were* no unpaid medical creditors.¹⁹ But the salient feature of *Lanza* was that the forum, as place of injury, *was* in fact an interested state. Its governmental interests as place of injury (in safety, compensating those injured on its territory²⁰ and in maintaining standards of workplace safety) quite clearly would have been advanced by application of its plaintiff-favoring rule. It is only where the law at the place of injury would bar or diminish plaintiff's recovery that the place of injury would have no interest *qua* place of injury in having its law applied.

The Court has come perilously close to sustaining the defendant-favoring rule of the place of injury. Recall that in *Day & Zimmerman v. Challoner*,²¹ the Court reversed, per curiam, the Fifth Circuit's (1988) **59 U. COLO. L. REV. 73** attempt to block application, under Texas choice rules, of the law of the uninterested place of injury. *Challoner* was an action by an American serviceman from Wisconsin who had been injured by a prematurely-exploding 105 mm. howitzer round. The defendant was the American manufacturer. Texas' connection with the case was as place of manufacture. The manufacturer argued that, under *Klaxon v. Stentor*,²²

18. 349 U.S. 408 (1955).

19. Justice Douglas' reluctance to rely on other general interests of the place of injury, like the interest in safety, can be understood on the facts of *Lanza* and need not concern us here. *See infra* text accompanying notes 53-55.

20. *See infra* note 56 and 57 and accompanying text.

21. 423 U.S. 3 (1975).

22. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941) (there are no federal commonlaw rules of choice-of-law for exclusive use in federal courts; federal court adjudicating state-law issue must apply law in conformity with

the federal diversity court was required to apply the choice-of-law rules of the state in which it sat, Texas. At that time, Texas law required application of the law of the place of injury, which in *Challoner* was Cambodia. Cambodian law allegedly would have required a showing of fault, a showing that the plaintiff could not make. Nevertheless, despite the Texas conflicts rule, the federal diversity court tried the case under Texas substantive law, imposing strict liability.²³ The Fifth Circuit affirmed, although not on the ground that application of the law of Cambodia would have been unconstitutional. Rather, the Fifth Circuit took a federal common-law position against application of the law of an uninterested sovereign in a false conflict case.²⁴ Without hearing argument, the Supreme Court summarily reversed and remanded, citing *Klaxon v. Stentor*.²⁵ Justice Blackmun filed a separate opinion; he was not convinced Texas *would* apply Cambodian law.²⁶

Had minimal scrutiny been consistently available, the Court would have had to require in *Challoner*, and indeed, in every conflicts case in which only one of the concerned states could be found to have a legitimate interest in applying its law (the classic “false conflict”²⁷), that the law of the only interested state be applied. There could have been no rational basis for application of Cambodian law in *Challoner* because, as place of injury, Cambodia could have had only safety compensatory concerns,²⁸ and perhaps interests in recoupment of cleanup costs or the reimbursement of unpaid medical creditors. Those interests could not be advanced by making plaintiff’s recovery less likely. **(1988) 59 U. COLO. L. REV. 74**

Not the least remarkable chapter of the *Challoner* story is the struggle of the Fifth Circuit. Its impressive grasp of the case was unnecessarily weakened by its own reluctance to go the constitutional limit. The Circuit Court lacked the courage of its convictions even—interestingly—on the level of federal common law. Its federal common-law rule was articulated

court of state in which federal court sits, and thus must choose law according to the choice rules of the forum state).

23. *Challoner v. Day & Zimmermann, Inc.*, 512 F.2d 77, 79 (5th Cir. 1975).

24. *Id.*, relying in part on *Lester v. Aetna Life Ins. Co.*, 433 F.2d 884 (5th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971).

25. 423 U.S. at 4 (1975) (without oral argument).

26. 423 U.S. at 5 (Blackmun, J., concurring).

27. *See generally* Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 Duke L. J. 171, reprinted in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 177-87 (1963).

28. *See infra* notes 53 and 56 and accompanying text.

as a rule of court, not as a rule of genuine federal common law, binding on the state courts under the Supremacy Clause.²⁹ The question whether a federal conflicts rule—for federal courts only—should be available on *Challoner* facts, is an independent question of some complexity, one that did not have to be imported into the case. But the circuit court felt more confident of a ruling using federal procedural lawmaking power than of a ruling under the Constitution.

Or consider the following variant on the facts of *Keeton v. Hustler Magazine, Inc.*³⁰ That case, it will be remembered, concerned an action of libel brought in New Hampshire, the only state at the time with an unexpired period of limitations. The Supreme Court sustained jurisdiction, in part on the theory that the forum had an interest in trying the libels communicated in New Hampshire.³¹ Now suppose that the defendant publisher, Hustler, had sold none of the offending magazines in New Hampshire. Suppose that it had never sold any magazines at all in New Hampshire, and no evidence could be found that anyone had ever read any issue of the magazine in New Hampshire. Suppose, further, that Hustler failed to object to personal jurisdiction, and that when it belatedly moved to dismiss it had to rely instead on the defense of limitation. Then suppose that the federal court sitting in New Hampshire denied Hustler's motion, rejecting Hustler's argument that any applicable statute of limitations had run. Suppose the trial court reasoned that, under *Klaxon v. Stentor*, it must follow New Hampshire's choice rules; New Hampshire would characterize the statute of limitations as "procedural," and therefore "for the forum."

The denial of the motion to dismiss would have the effect, of course, of reopening a case dead under the laws of all interested states, while advancing no relevant policy of the forum. If the purpose of New Hampshire's six-year period of limitation is to keep the doors of its courts open to libel cases, that door-opening rule rationally could not be applied where no New Hampshire tortfeasor, victim, or even reader, is involved. If the purpose of the statute is to advance policies of economy and efficiency in administration of New Hampshire (1988) 59 U. COLO. L. REV. 75 courts, by closing their doors to cases filed after the prescriptive period, no such interest could be advanced by New Hampshire's using the statute to *open* its courts' doors and crowd their dockets. It seems obvious that the only feature of American law standing in the way of a rational

29. *Challoner*, 512 F.2d at 79.

30. 465 U.S. 770 (1984).

31. 465 U.S. at 778.

result³² in this hypothetical is the Supreme Court's reluctance to strike down law reached by a traditional choice rule.³³

The choice of the nominally "procedural" law of the uninterested forum should be recognized not only as incorrect,³⁴ but also as unconstitutional. So also the law of the uninterested place of injury in a case like *Challoner*, and—a reform long overdue—so also the law of the uninterested situs.³⁵ It is time to recognize the difference between a "contact" and an "interest."

A state does not have an automatic "interest" in governing an issue by virtue of its being the place where an event occurred, or the place where a party resides. The relevant inquiry, as the Supreme Court has consistently made plain, is whether the particular occurrence or party is within the reasonably intended scope of the particular rule of law. The Supreme Court, indeed, has been strongly interest-analytic, and admirably clear about what interests are, in their relation to contacts. As Justice Brennan wrote for the plurality in *Hague*, a state's law may constitutionally govern an issue if that state's contact with the issue is *significant* in that it generates a legitimate governmental *interest* in the law's application, on the particular facts.³⁶

32. For an interesting example of a possibly unconstitutional decision in a case involving choice of limitations law, see *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979) (six-year period of limitations of Mississippi federal transferor court applied in action in Kansas federal transferee forum by Kansas plaintiff against a Wisconsin defendant for an injury occurring in Kansas).

33. See, e.g., the Court's habitual tolerance of the rule that limitations is "procedural" in *Watkins v. Conway*, 385 U.S. 188 (1966), and *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953). It is true that in *Watkins*, as in *Wells*, the forum's shorter limitations period barred the actions, and therefore the forums were interested ones. Nevertheless, the Court's acceptance of the rule was grounded, in both cases, on its being "the usual conflicts rule of the states." 345 U.S. 514, 517.

34. On limitations, see Professor Reese's proposal for revised Section 142 of RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971); the proposal was approved in principle by the American Law Institute in 1986, but action on the revision as submitted in 1987 was postponed by the Institute until 1988. See also Leflar, *The New Conflicts-Limitations Act*, 35 MERCER L. REV. 460 (1984); Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 ARIZ. ST. L. J. 1.

35. See *infra* note 66 and accompanying text.

36. 449 U.S. at 308.

Why, then do we remain so wedded to the notion that even the uninterested contact state has constitutional governmental power? This position becomes even more perplexing when one recalls that from time to time the Supreme Court has with few qualms struck down assertions of adjudicatory jurisdiction by the place of injury, or (1988) 59 U. COLO. L. REV. 76 of contracting. In *Worldwide Volkswagen v. Woodson*,³⁷ Oklahoma was denied power to adjudicate the tort resulting in injury on its territory. In *Helicopteros Nacionales de Colombia v. Hall*,³⁸ the place of negotiation of the transportation contract was denied power to adjudicate tortious misfeasance resulting in the deaths of four men furnished transportation under that contract.

Indeed, the place of transaction or occurrence is not infrequently held powerless to apply its laws in a variety of familiar contexts. The state of transaction or occurrence will not be permitted to regulate if, for example, the issue is governed by federal law,³⁹ or if federal law directs that another state's laws be applied.⁴⁰ In its 1987 term, the Supreme Court held that the law of the place of injury could not govern a case of interstate water pollution because, in its opinion, Congress had provided that only the law of the state of the pollution source could do so.⁴¹ The power of the transactional state is all the more vulnerable to constitutional review—indeed, often restrictive scrutiny—if the law that the state would apply would violate the Equal Protection Clause,⁴² or place an undue burden on interstate commerce.⁴³ That the police powers of even an *interested* contact state can be limited by the Constitution, then, is not some novel proposition. What is being argued here is that the right to be free of

37. 444 U.S. 286 (1980).

38. 468 U.S. 408 (1984).

39. *E.g.*, *Southern Pacific R.R. Co. v. Jensen*, 244 U.S. 205 (1917) (New York workers' compensation statute cannot constitutionally compensate widow of New York worker injured on navigable waters of New York, because federal law exclusively governs injuries on navigable water).

40. *E.g.*, the Federal Tort Claims Act, 28 U.S.C. § 1346, waiving United States immunity in actions for personal injury or death caused by negligence of a government employee, "in accordance with the law of the place where the act or omission occurred," rather than the then universal law of the place of injury. In *Richards v. United States*, 369 U.S. 1 (1962), the Supreme Court interpreted this passage to require reference to the choice rules of the place of wrongful conduct.

41. *Internat'l Paper Co. v. Ouellette*, 107 S.Ct. 805 (1987).

42. *E.g.*, *Zobel v. Williams*, 457 U.S. 55 (1982).

43. *E.g.*, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).

arbitrary and irrational governance is a constitutional right that can, and does, deny lawmaking power to an *uninterested* contact state.

The core protection afforded by the Due Process Clause, as an instrument of control of choice of law, is against the arbitrary and irrational. That is the essential principle of *Home Ins. Co. v. Dick*⁴⁴ and *Hague*.⁴⁵ Minimal scrutiny though that principle provides, it is all the constitutional review we have got for fundamental unfairness in choice of law. If the Bealeian choice results in application (1988) 59 U. COLO. L. REV. 77 of law to facts outside the reasonably intended scope of that law, the Bealeian choice, as measured by that essential principle, is unconstitutional.

Yet there are many who will continue to cling to the presumed police power of the contact state out of sheer nostalgia for the illusory certainties of territorialism.⁴⁶ Faced with the worldliness of modern analysis, they would rather adhere to “a creed outworn”.⁴⁷

1. General Interests

One cannot discuss the proposal to make minimal scrutiny of choice of law more consistently available without coming to an understanding about the level of generalization one is willing to see the Supreme Court import into its notion of state interest.⁴⁸ What should the Court mean by an “interest?”

An interest is clearly not established by the bare fact of contact. Nor would there be any advantage in going to the other extreme, and constructing elaborate definitions of what an interest is, based on *a priori*

44. 281 U.S. 397 (1930).

45. 449 U.S. 302 (1981).

46. See Kegel, *Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers*, 27 AM. J. COMP. L. 615 (1979).

47. Wordsworth, *Sonnet*, “The World Is Too Much With Us.” The quoted language seems fairly invited by characterizations of interest analysis as a “religion”. See Juenger, *What Now?* 46 OHIO ST. L. J. 509, nn. 1, 6 & 7 (1985) (gathering examples). It seems to this writer that a modernist’s “faith,” if any, is in reason, and not in some deification of Brainerd Currie. Nevertheless, sterile controversy persists over alleged defects in Brainerd Currie’s work, as though modern methods are wrong if heretical, or wrong because Currie made mistakes. See, e.g., Brilmayer, *Methods and Objectives*, *supra* note 13; Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L. J. 459 (1985).

48. See *supra* note 14 and accompanying text.

notions which somehow sound appealing;⁴⁹ that would inevitably result in disregard of some interests which the state ought to be allowed to act upon. But within those extremes, how far ought interest analysis to go, on the constitutional level? Should courts analyze cases in broadly generalized ways, as Justice Douglas did in *Carroll v. Lanza*, imputing interests to the forum *for that class of cases*, which are, not, in fact, forum interests in the very case?⁵⁰ Should a particularized analysis be permitted to identify “interests” having little to do with the reasons for the legal rules sought to be applied, like those identified by Justice Brennan in *Hague*?⁵¹ Should particularized analysis of forum (1988) 59 U. COLO. L. REV. 78 law in the Supreme Court be employed to defeat the forum’s *own* determination of its interest?⁵² It seems to me to comport with the realities of the adversary process to recognize that particularized arguments, intended either to support or to defeat the rule sought to be applied, are going to be made by counsel. The realistic course would be to leave untouched the availability of such arguments, and for courts to consider those arguments in a direct and practical way, without artificial *a priori* constraints. The freedom of courts to take a restrictive or expansive view

49. See *supra* note 11.

50. See *supra* notes 18-19 and accompanying text.

51. *E.g.*, Justice Brennan’s reliance on the fact that the insured decedent, Ralph Hague, had been employed in the forum state. *Hague*, 449 U.S. at 313-15. Of course Ralph’s employment at the forum was connected to the fact that Ralph commuted regularly to the forum, and to the resulting conclusion that his death by motor vehicle accident might have occurred there, foreseeably to the insurer. But Justice Brennan was also willing to rely in part on the fact of employment itself. For him, Ralph became Minnesota’s “worker,” just as he had been Wisconsin’s “resident.” *Id.* at 315 n. 21. But the relevance of Ralph Hague’s employment in Minnesota to Minnesota’s rule invalidating anti-stacking clauses in insurance policies is not immediately apparent. Compare with Professor Weintraub’s jocular characterization of Minnesota law as possibly applicable to a member of the Minnesota workforce as a “fringe benefit,” Weintraub, *Who’s Afraid of Constitutional Limitations on Choice of Law?*, 10 HOFSTRA L. REV. 17, 28 (1982), the view of Professor Brilmayer in *Legitimate Interests*, *supra* note 13, at 1341-47 (not clear that the employment contact should count in view of actual legislative history and inspection of analogous Minnesota laws). For an interest analysis, see Weinberg, *Conflicts Cases and the Problem of Relevant Time*, 10 HOFSTRA L. REV. 1023, 1029-1030 (1982).

52. Consider, *e.g.*, Professor Weintraub’s argument, *infra* text at note 58, that a deterrent interest ought not to be identified as grounding a chiefly compensatory rule.

of their own interests ought to be respected by the Supreme Court, and that will require the Court, on the whole, to take an expansive view.

A few additional remarks are in order.

The place of injury

Ordinarily the place of injury is thought to have interests in safety, deterrence, and recoupment of cleanup costs and medical expenses. Where it is argued that the purpose of the place of injury's particular legal scheme is compensatory only, a court might be persuaded to avoid applying compensatory law when to do so would have a deterrent rather than a purely compensatory effect. That is an argument that seems to have influenced Justice Douglas, in *Carroll v. Lanza*⁵³ (a workers' compensation case), to rely on a generalized interest in recoupment of medical expenses, when there were no unpaid medical creditors in the case.⁵⁴ Yet one might find the particularized argument about the absence of medical creditors in the case a more persuasive one against the law of the place of injury than any supposed absence of deterrent policies in workers' cases. Since the safety of the workplace is substantially confided to workers' compensation, except for such relatively ineffective mechanisms as state and federal occupational safety regulation, it is not irrational to recognize that the compensation system furnishes some deterrent to employers. That is so even where the employer's compensation carrier may recoup all compensation **(1988) 59 U. COLO. L. REV. 79** paid out of the proceeds of an employee's suit against a third party. Not all employees sue third parties, and not all those suits are won. Thus, although arguments intended to limit the scope of otherwise applicable law will always be made, and can have weight in some settings, they ought not to foreclose courts from recognizing that general deterrent policies in any event do "come into play"⁵⁵ at a place of injury.

But I would go further, and argue that the place of injury also has general compensatory interests. It is time to correct the discriminatory and impolitic view that the place of injury has no interest in applying its compensatory laws to those injured while temporarily within its territory.⁵⁶

53. 349 U.S. 408 (1955).

54. *Id.* at 413.

55. Trautman, *Two Views on Kell v. Henderson: A Comment*, 67 COLUM. L. REV. 465, 467 (1967).

56. *See, e.g.*, *Bryant v. Sun West Airlines*, 146 Ariz. 41, 45, 703 P.2d 1190, 1194 (1985); *Reich v. Purcell*, 67 Cal.2d 551, 556, 432 P.2d 727, 731, 63 Cal.

To the contrary, the place of injury has strong interests in furnishing a remedy for anyone injured there, not wholly a function of its deterrent policies. Failure to compensate torts to visitors would deter commerce on the territory—the state, as it were, having declared open season on visitors. It would also amount to a want of evenhandedness in effectuation of the state’s concomitant deterrent policies. It would also vitiate *pro tanto* the state’s ability to effectuate its deterrent policies. These interest alone—the place of injury’s interests in applying its remedial laws to injured nonresidents—ought to have sustained the result in *Carroll v. Lanza*.⁵⁷

Another area of controversy in the methodology of interest analysis has to do with the extent to which general tort policy ought to be brought to bear on particular torts or on particular facts. Importantly, Professor Weintraub has argued that the imposition of liability for negligence on the driver of a motor vehicle cannot rationally be based on a deterrence theory, because the tortfeasor in such cases is just as likely as the victim to be damaged by negligence.⁵⁸ The argument is a powerful one. Inescapably, however, it is a nihilistic one. On a given issue such an argument may seem especially persuasive; but often it will happen in the same case that equally inefficient rules are to be **(1988) 59 U. COLO. L. REV. 80** applied on every other issue. Very little of our personal injury law is the efficient deterrent we would like it to be. The common law system indulges certain policy presumptions, and to a large extent we simply have to take them on faith, or throw over the common law. Thus, although courts ought to be allowed to consider this sort of argument on particular facts, they ought also to be allowed to indulge the general policy

Rptr. 31, 35 (1967); *Griffith v. United Air Lines*, 46 Pa. 1, 21, 203 A.2d 796, 806 (1964); *see also* Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 Stan. L Rev. 205, 221 (1958), *reprinted in* B. CURRIE, *SELECTED ESSAYS*, *supra* note 27, at 144-45. *But see* Trautman, *Two Views*, *supra* note 55, at 467 n. 12, noting the place of injury’s “concern not to discriminate against nonresidents”. *See infra* text accompanying note 99.

57. *But see* *Schultz v. Boy Scouts of America, Inc.*, 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985) (state of injury declines to apply its liability rule to charity claiming immunity under nonforum law, on ground that state’s “deterrent interest is considerably less because none of the parties is a resident and the rule in conflict is loss-allocating rather than conduct-regulating,” *id.* at 200, 480 N.E.2d at 686, 491 N.Y.S.2d at 97-98).

58. R. Weintraub, *Commentary on the Conflict of Laws* 333-34 (3d ed. 1986).

presumptions underlying a particular field of law, in the teeth of such arguments.

On the other hand, the place of injury will generally not have an interest in barring relief for the plaintiff or in providing a lesser recovery, or in placing upon the plaintiff a more onerous burden of proof. There is an exception to this general proposition on the issue of contributory negligence. Deterrent interests might justify the place of injury even in barring a plaintiff who has been contributorily negligent in the territory, at least where the trier of fact finds that the plaintiff's negligence has been more responsible for the injury than the defendant's.

The place of contracting

The generally validating interests of the place of contracting need to be recognized.⁵⁹ Such interests exist, despite their notable omission from the calculus in Brainerd Currie's great essay, *Married Women's Contracts*.⁶⁰ We do not really doubt that Nevada, in its own courts, can validate a Nevada gambling contract illegal under the laws of New York, even when the parties are New Yorkers. But three important caveats need to be entered here.

First, when the parties stipulate for governing law, or select a forum, or when they stipulate that the contract is "made" in a certain place, courts need to be much more responsive than they have been to the problem of the contract of adhesion between parties of unequal bargaining power. In *Siegelman v. Cunard White Star Ltd.*,⁶¹ for example, the court enforced a stipulation for English law appearing in boilerplate on a passenger ticket, in an action for personal injuries by an American passenger, even with respect to the noncontractual question whether the company was estopped from asserting the contractual limitation period because its local agent had lied to the plaintiff's lawyer about the company's intention of waiving it. The rule of party (1988) 59 U. COLO. L. REV. 81 autonomy so freely endorsed by conflicts writers ought to be administered more guardedly.⁶²

59. *Accord*, Jeunger, *What Now?* 46 OHIO ST. L. J. 509, 520 (1985).

60. Currie, B., *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. Chi. L. Rev. 227 (1958), reprinted in B. CURRIE, *SELECTED ESSAYS*, *supra* note 27, at 77, 84; *see supra* comment in note 47.

61. 221 F.2d 189 (2d Cir. 1955).

62. The rule of party autonomy as it appears in RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 187 contains no qualification for contracts of adhesion, and contains no directive to consider the relative bargaining strengths

Secondly, the place of contracting can have no legitimate interest in invalidating the contract, not without further contact with the transaction than as place of contracting.⁶³

Finally, contractual *defenses* ought not to be attended by the same deference and concern for *validation* that attends contract claims. Traditionally, contractual defenses are in fact scrutinized rather carefully by courts, notably in the case of releases of personal injuries claims.⁶⁴ A stipulation in an agreement that renders a significant portion of it illusory for one of the parties is simply not as enforceable as other contract terms. Thus, the majority of states would not enforce the insurance policy term at issue in *Hague*. Not, that is, on the facts of *Hague* itself,⁶⁵ where the term unfairly limited paid-for coverage. In sum, it makes little sense to posit a strong interest at the place of contracting in validating an *invalidating* term. At the very least, the alleged validating interest in enforcing a term which *invalidates* the agreement ought to be weighed against the truly validating interests of the place of contracting. Courts should be free to discount or downplay the alleged invalidating interests.

A similar analysis should guide thinking about other sorts of state contacts with a case. The situs of real property, for example, has general interests in taxation, land use, and clarity of title; but, as Professor

of the parties. The commentary accompanying the rule is substantially silent on the issue. Arguably the rule of party autonomy embraced in U.C.C. § 1-105 can be subordinated to the rule of unconscionability stated in § 2-302, at least in cases coming within the sales chapter.

63. That is because the state has power to make laws for the general welfare of residents. By invalidating the agreements of those transacting in the territory, the state can only discourage transactions on the territory, thus not advancing the general welfare of residents. Of course, the state can render certain agreements invalid because of protective concerns for particular classes of residents. But the case under examination is one in which the law chosen is that of a state that is not the residence of either party, but the place of contracting only. I also assume the state can render certain agreements invalid if they call for illegal activity on the territory. But, again, the state will be the place of performance in such cases, and not merely the place of contracting.

64. *See, e.g.,* Garrett v. Moore McCormack, 317 U.S. 239, 242 (1942).

65. That is so because, as Justice Stevens points out, it seems consistent with the economics of the situation to require the insurer to give more than a single coverage when more than a single premium is paid by the insured. *See Hague*, 449 U.S. at 328 (Stevens, J., concurring). *See* Weinberg, *Conflicts Cases and the Problem of Relevant Time: A Response to the Hague Symposium*, 10 Hofstra L. Rev. 1023, 1035-38 (1982).

Weintraub has definitively argued,⁶⁶ the situs has no interest in invalidating (1988) 59 U. COLO. L. REV. 82 non-situs wills, for example, in order to determine which of two nondomiciliaries should take title.

Inconsiderable interests

From time to time it is suggested that the forum might have an interest in applying its own law by virtue of the fact that the forum is a justice-administering state,⁶⁷ and forum law seems more just,⁶⁸ or because it would be more evenhanded to bestow forum law on a nonresident. Iconoclasts like to suggest that the forum might have an interest in applying its law because that in itself is a policy goal of the forum.⁶⁹ These and like suggestions tend to miss the essential point of policy analysis. The point is not to select a jurisdiction that in some sense “can” or “ought to” govern, but to choose a *law*, based on purposive reasoning—construction and interpretation. The choice must depend upon an evaluation of the relevance of the law’s *content* to the facts of the case.

No one need take seriously the alleged forum interest in applying its own law. That formulation has never been used to determine a rational basis for government conduct in any other context. Rather, that formulation seems designed by critics of interest analysis to poke fun at those of us who recognize we are all positivists and realists now, and that we reason purposively. This alleged “interest,” no doubt, exists; but it is circular. Identifying this interest would only beg the question before the court, which is, precisely, can this rule reasonably be construed to apply on the particular facts? A state has police power to legislate for the general welfare of its residents, and, derivative from that, for the welfare of others on its territory. The state has no power to govern, on the theory that “it wants to,” unless within this sphere of legitimate governmental concern.

66. WEINTRAUB, *supra* note 58 at 412-60.

67. Cf. *Allstate Ins. Co. v. Hague*, 449 U.S. at 320 (1981) (Stevens, J., concurring).

68. See *Milkovich v. Saari*, 295 Minn. 144, 203 N.W.2d 408 (1973); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 Calif. L. Rev. 1584, 1587-88 (1966).

69. See, e.g., Brilmayer, *Governmental Interest Analysis*, *supra* note 47, at 472; Kozyris, *Interest Analysis Facing Its Critics*, 46 OHIO ST. L. J. 569, 573 (1985).

The attribution to the forum of an interest in choosing its law because to do so would be to choose “better law,” or to give a nonresident equal treatment, generally should be made only in support of an analysis based on more substantive interests. That is because these administrative interests can transform virtually every issue into what, in the traditional lexicon, we might call a “procedural” one. By all means let the forum take these policies of court into account; but of themselves, rarely should they be dispositive when the issue is what, in the traditional lexicon, we might call a “substantive” one. (1988) 59 U. COLO. L. REV. 83

2. The Problem of the Unprovided-For Case

What problems could be anticipated by applying the principle of *Dick* and *Hague* to the irrational Bealeian choice? A practical difficulty immediately suggests itself. How, if this were done, could courts administer the “unprovided-for” case,⁷⁰ a case in which *neither* state could be found to have an “interest?” (I use the term “interest” here in the sense in which all of the Justices used it in *Hague*.⁷¹) If neither state has an interest, then only the law of an uninterested state is available to the case. Under *Dick* and *Hague*, applying the law of an uninterested state would be constitutional.

The problem is a real one for my proposal. Clearly some exceptional rule of review would have to be devised for intractable unprovided-for cases.⁷² One pragmatic solution is available which has considerable

70. The term, of course, is Brainerd Currie’s. See B. CURRIE, SELECTED ESSAYS, at 152-53.

71. See *supra* note 14 and accompanying text. The problem is raised thoughtfully but inconclusively in Posniak, *Choice of Law: A Very Well-Curried Leflar Approach*, 34 MERCER L. REV. 731, 742 n. 53, 758 n. 142 (1983).

72. *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), was probably “intractable” in the sense I intend. That is, it was an unprovided-for case that could not readily be re-cast in the mold of a case in which one of the states involved was perceived to have an interest. *Neumeier* was an action for the wrongful death, in Ontario, of an Ontario passenger, against the estate of the New York driver. Ontario law required proof of gross negligence in guest cases, while the law of the forum did not. It would be a strain to argue that the forum, New York, had any interest in monitoring the driving conduct of its resident defendant elsewhere, or in furnishing a remedy to the plaintiff, whose own state would not do so. It would be an equal strain to argue that Ontario had any interest in preserving a New York insurer from a friendly lawsuit in New York, or in punishing the Ontario passenger for

appeal. Given that, at first blush, neither state's laws could constitutionally apply in an unprovided-for case, but given also that the dispute of the parties needs to be resolved,⁷³ it would seem that that rule should be chosen which gives effect at least to some generalized policy in either state, rather than a rule which advances no policy *84 at all.⁷⁴ All states share the fundamental remedial, deterrent, or risk-spreading policies underlying tort law generally, as well as the policies favoring security of

ingratitude to a New Yorker. (The result reached in *Neumeier*, applying the law of the place of injury to deny recovery, probably met New York's rather compelling need to unburden its courts of guest statute cases. New York had become a magnet forum for those cases.)

Other seemingly "unprovided-for" cases have been resolved through such imaginative means as were employed, for example, in *Intercontinental Planning, Ltd., v. Daystrom, Inc.*, 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969). There, a New York broker brought an action in New York for a finder's fee against a New Jersey customer. Under the New York statute of frauds, but not the New Jersey statute, the alleged oral modification of the brokerage agreement, entered into in New Jersey, was unenforceable. Although the case appears to be "unprovided-for," and although a possible resolution was available by finding a validating interest in New Jersey, as the place of contracting, the New York Court of Appeals held that New York law would be applied to benefit the New Jersey customer. New York had an interest, after all, in close regulation of its brokerage agreements. All who dealt with New York brokers would know that they need not pay for brokerage services without their own written authorization; thus, outsiders could have greater confidence in New York brokers.

73. "The judge still must find a principled solution. . . ." Symeonides, *Revolution and Counter-Revolution in American Conflicts Law: Is There a Middle Ground?*, 46 OHIO ST. L. J. 549, 565 (1985).

74. When, for example, the forum applies the pro-defendant rule of an uninterested place of injury, no policy of the place of injury is advanced, since the defendant is a nonresident. But the general remedial and deterrent concerns of both the forum and the place of injury will be frustrated *pro tanto*. The solution proposed in the text is the constitutional-level analog of Professor Sedler's "common policy" approach. Specifically to resolve the problem of the unprovided-for case, Professor Sedler suggests that courts focus narrowly on the problem of the rule relied on by the defendant. Since by hypothesis neither state will have an interest in applying that rule, the rule is irrelevant to decision of the case and should be disregarded. What remains is the underlying cause of action, usually reflecting policies that are shared by all states. See Sedler, *Interstate Accidents and the Unprovided For Case: Reflections on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 125, 138 (1973).

transactions underlying the law of contracts. On this reasoning, the forum with a plaintiff-favoring or validating rule not only should,⁷⁵ but probably must, apply its own rule in an unprovided-for case. That rule will be less arbitrary, less irrational—in short, *less unconstitutional*, than the alternative.

But what we have said thus far does not exhaust the problem. What if there is defendant-favoring law at the forum? When there is a defense at the uninterested forum, applying plaintiff-favoring non-forum law as the residual choice would continue to advance shared substantive policy, no doubt. But a departure from forum law can generate grave dysfunctions at the forum.⁷⁶ A choice of nonforum law could create a discriminatory classification between the resident plaintiff in a wholly domestic case and the resident plaintiff in the unprovided-for case.⁷⁷ Moreover, a departure from forum law may be perceived, in the next, wholly domestic, case to have diminished the force of policy underlying the local rule. Courts ought to be free to weigh these conflicting considerations on the facts of particular cases. But taking into account that such dysfunctions do attend departures from forum law, the true residual choice for unprovided-for cases is probably forum law,⁷⁸ rather than plaintiff-favoring or validating law.

Justice Stevens' discussion in the *Hague* case gives some support for forum law, plaintiff-favoring or not, as the residual choice in unprovided-for cases. Justice Stevens thought that the forum could always (1988) 59 U. COLO. L. REV. 85 be found to have an interest in application of its

75. The intellectual foundations of this view are laid in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971) ("RESTATEMENT"): ". . . [T]he factors relevant to the choice of the applicable rule of law include . . . (e) the basic policies underlying the particular field of law." The reasoning is that it is better to choose law that will effectuate policies shared by both states than to choose law that would frustrate those policies. See Cheatham and Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952). Examples given in the *Comment* to RESTATEMENT § 6 are examples in which the differences between the concerned jurisdictions are matters of detail only; but the reasoning is persuasive in the situation of the unprovided-for case. *But see infra* note 78 and accompanying text.

76. See generally Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595 (1984).

77. *Id.* at 612-14; see *infra* note 100 and accompanying text.

78. The preferred resolution is a modification of local law to conform to current perception of policy. *E.g.*, *Pevoski v. Pevosk*, 371 Mass. 358, 358 N.E.2d 416 (1976). See *supra* note 76.

laws. The forum's interest arose from its role in the administration of justice.⁷⁹ Although Justice Stevens argued the point to demonstrate the inutility, in his opinion, of interest-analytic review, the argument has some resonance for the problem before us, lending a color of justification to a residual choice of forum law for unprovided-for cases.

On the other hand, we have Justice Rehnquist's recent pronouncement in *Phillips Petroleum Co. v. Shutts* on forum law as residual choice. There, the Kansas court below had taken the view that the law of the forum should be applied unless compelling reasons exist for applying a different law. Justice Rehnquist pointed out that such a view could bootstrap any multi-claim action into a class action by creating "common issues of law" where no such common issues existed. Rather, the resort to Kansas law on issues as to which Kansas had no interest was "arbitrary and unfair."⁸⁰

But if the Court's disapproval of forum law in class actions were extended to ordinary unprovided-for cases, courts could be put in an impossible bind. In unprovided-for cases, the nonforum contact state is by hypothesis as uninterested as is the forum. Assuming, as is likely, that the plaintiff has shopped for favorable law at the forum, the nonforum contact state has defendant-favoring or invalidating law, yet the defendant does not reside there, nor are transactions to which it objects to be performed there. There is simply no case for defendant-favoring or invalidating nonforum law in the unprovided-for case. Choice of that law, the irrational Bealeian choice, will yield resolutions even more arbitrary in such cases than forum law. That is so, whether on Justice Stevens' analysis or that discussed earlier in this essay. The irrational Bealian choice is the least constitutionally plausible choice.⁸¹ Justice Rehnquist's

79. 449 U.S. 302, 326 (Stevens, J., concurring: "I question whether a judge's decision to apply the law of his own State could ever be described as wholly irrational. . . . The forum State's interest in the fair and efficient administration of justice is . . . sufficient, in my judgment, to attach a presumption of validity to a forum State's decision to apply its own law to a dispute over which it has jurisdiction"). For reasons stated *supra* in text at notes 67-69, this analysis is not a generally useful one.

80. *Shutts*, 472 U.S. 797, 822 (1985).

81. It should be pointed out that when Justice Rehnquist argues that residual resort to the law of the uninterested forum is constitutionally forbidden, by implication he is arguing that residual resort to the law of the other contact state is constitutionally mandated. In other words, the argument against residual forum law is inevitably an argument for return to the mandatory determinate choice, an unadministrable position the Court relinquished half a century ago.

suggestion that forum law is not a permissible residual choice cannot be taken as sound, and certainly ought not to be given scope outside the special context of the class action. (1988) 59 U. COLO. L. REV. 86

I suspect that, should the Court decide to submit to due process scrutiny the irrational Bealeian choice, the Court would manage to deny review—as often as convenient—in the intractable unprovided-for case. But some such guidelines as those here proposed should be useful for the guidance of courts below.

B. The Discriminatory Bealeian Choice

The Bealeian choice, when an irrational one, may be vulnerable not only to the principle of the *Dick* case, but also to the equal protection principle. When a state denies the benefit of home law to those of its resident litigants whose cases have pointless or fortuitous contacts with other states, instead applying the laws of those uninterested contact states, the state creates two classes of forum residents: those afforded the benefit of forum law, and those from whom the benefit of forum law is withheld. It is hornbook law that such a classification will withstand scrutiny only if it has a rational basis. But to the state whose law is intended to benefit residents, what difference can it make if a particular resident is hurt away from home, if the resident must return home to suffer the deleterious effects of the injury? In other words, lack of a rational basis for, or governmental interest in, choice of law, will not only evoke the concerns underlying the due process clause, but also those underlying the equal protection clause.⁸²

See supra cases notes 3 and 4; *see generally* Weinberg, *Minimal Scrutiny*, *supra* note 7 at 470-78 (structural and doctrinal constraints on Supreme Court supervision of choice of law).

82. This would appear to be the true meaning of the Supreme Court's ruling in *Hughes v. Fetter*, 341 U.S. 609 (1951), as later explained in *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953). A court may not lay "an uneven hand" on the resident litigant on the ground that that resident's injury was outside the state. To do so would be to deprive that resident of the equal protection of forum law. *Wells*, 345 U.S. at 518. *See generally* Currie, *The Constitution and the "Transitory" Cause of Action* (pts. 1 & 2), 73 HARV. L. REV. 36 (1959), 73 HARV. L. REV. 268 (1959), reprinted in B. CURRIE, *SELECTED ESSAYS*, *supra* note 27, at 283. It should also be pointed out that choice of an *interested* state's law also will evoke these concerns, when the forum has no interest in departing from its own law.

Blind application of the law of the place of transaction or occurrence, then, is a recipe for the maladministration of justice. When, in *Neumeier v. Keuhner*,⁸³ the New York Court of Appeals discarded forum law as the presumptively residual choice in certain conflicts cases, opting instead for the neo-territorialists' preferred "law of the place of injury," undoubtedly some of the appeal of the new rule for the court would have been its appearance of nonparochialism. Yet only a little reflection would have shown that the court was creating, for all cases by New York plaintiffs against non-resident defendants,⁸⁴ (1988) 59 U. COLO. L. REV. 87 two classes of New York plaintiffs in such cases, for only one of which the benefits of their own state's laws would be available. This classification would lack any rational basis, in a case in which the forum was the only interested state. The classification would remain at least discriminatory, if not unconstitutionally so, in a case in which both states were interested ones.⁸⁵ The fact that another state might have an interest in governing an

83. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

84. In *Neumeier* itself, the defendant New Yorker was being sued for the death of a resident of Ontario. Departures from the law of an uninterested forum, on *Neumeier* facts, will not produce the dysfunctions noted in the text. Only where the forum has a specific interest in regulating the resident defendant would a departure from forum law discriminate against the defendant in the domestic case, or significantly undermine local policy. However, departure from a local liability rule would frustrate shared general policy concerns.

85. I am suggesting that even where the forum is not the only interested state, the propriety of a departure from forum law would be problematical. The interested forum ought not, and perhaps cannot constitutionally, defer to another state's interest—unless its *own* interests in deferring can furnish a rational basis for the classification between residents in successive cases which the particular departure may entail. Thus, well-known proposals for resolution of true conflict cases through consideration of administrative policies of comity, evenhandedness, or choosing the better law, or through consideration of "functional" policies of facilitating interstate transactions, or advancing multistate remedial and validating concerns, may be infeasible. See generally A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 206-311, 376-400 (1965); R. LEFLAR, *AMERICAN CONFLICTS LAWS* § 96 (3d ed. 1977); R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 355, 387 (3d ed. 1986); *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 6 (1971). It should also be noted that the undercutting of local policy inevitably entailed by the creation of an "exception" in enforcement for conflicts cases may make such proposals for comity seem unrealistic at the forum. See generally Weinberg, *On Departing*, *supra* note 76. Compare, e.g., *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979) (comity in the international case requires balancing of

issue might not comprise a rational basis for discrimination by New York between two groups of its own residents: that a New Yorker's accident occurred where the tortfeasor resides under law favorable to the tortfeasor is of no logical consequence to New York's remedial policies.⁸⁶

Thus, the persistent argument that the residual choice of the transactional state is less discriminatory than the residual choice of forum law is simply naive.

C. *Discrimination against Nonresidents?*

This brings us to the question whether there ought to be restrictive scrutiny for cases in which the interested forum gives the benefit of its own laws to its residents, but not to nonresidents. Amusingly, the same sorts of writers—that is, the anti-modernists—who assure us today that interest analysis yields discriminatory results,⁸⁷ and who (1988) 59 U. COLO. L. REV. 88 are emphatic that the law of the place of injury, or other event-connected territory, will save courts from parochial applications of forum law,⁸⁸ are the very same sorts of writers who insist that the great

interests of foreign nation against United States interest in enforcement of act of Congress) *with* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 951-53 (D.C. Cir. 1984) (courts cannot balance interests of foreign nation against an act of Congress which they must enforce).

86. Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526 (1961); Rosenthal v. Warren, 475 F.2d 438 (2d Cir. 1973); O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir. 1978), *cert. denied*, 439 U.S. 1034 (1978).

87. E.g., Ely, Choice of Law and the State's Interest in Protecting Its Own, 23 WM. & MARY L. REV. 173 (1981). See also Legitimate Interests, *supra* note 13, at 1315, 1318 n. 16; Simson, State Authority and Choice of Law: A Suggested Approach, 52 SO. CAL. L. REV. 61, 86-87 (1978). The suggestion that modern analysis might raise problems of discrimination against nonresidents has its chief source in a pair of articles by Currie and Schreter (now Kay), Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities, 69 YALE L. J. 1320 (1960), and Unconstitutional Discrimination in the Conflict of Laws: Equal Protection, 28 U. CHI. L. REV. 1 (1960), both reprinted in B. CURRIE, SELECTED ESSAYS, *supra* note 27, at 445, 526 (1963). See also Currie, Married Women's Contracts, *supra* note 59; Wengler, The Significance of the Principle of Equality in the Conflict of Laws, 28 LAW & CONTEMP. PROBS. 822 (1963).

88. E.g., Ely, *supra* note 87, at 177; Martin, *The Constitution and Legislative Jurisdiction*, 10 HOFSTRA L. REV. 133, 142-46 (1981) (a state has lawmaking power over events occurring on, or property within, its territory, but

danger is that the forum will *withhold* the benefit of its laws from a nonresident.⁸⁹ The set of beliefs the anti-modernists share here is breathtaking in its manifold irrationality.

They demand the benefit of forum law for all, while insisting that it is parochial if the forum in fact applies forum law.⁹⁰ They demand the benefit of forum law for all, while deploring forum shopping.⁹¹ They demand the benefit of forum law for all, while insisting that only the law of the place of injury (or other “neutral,” event-based, territorially chosen law) be applied.⁹² They demand the benefit of forum law for all while deploring the “export” of burdensome forum law to nonresidents acting abroad—even though the forum may *be* the place of injury in such cases.⁹³ These positions, taken together, are so entertaining one almost hopes the anti-modernists will go on insisting on them.

But perhaps the anti-modernists intend not that the forum should share with the nonresident its liability rules, but rather that the forum should bestow upon the nonresident its *defenses*. Their concern about discrimination is a selective one. There can be no respectable intellectual (1988) 59 U. COLO. L. REV. 89 basis for such views; rather, the common threads seem to be faith in the blind justice dispensed by formalisms, a

lacks lawmaking power over its residents!); *but see* Weinberg, *Relevant Time*, *supra* note 51 at 1026 n. 16, 1027 n. 18 (replying to Martin).

89. *E.g.*, Ely, *supra* note 87, at 180-191; Brilmayer, *Carolene*, *supra* note 11; Brilmayer, *Legitimate Interests*, *supra* note 13, at 1316 n. 9 (denial of benefit of forum law to nonresident termed “underreaching,” citing as relevant *Hicklin v. Orbeck*, 437 U.S. 518 (1978)). Professor Brilmayer has now recognized that in order to have resonance for conflicts, such an analysis must deal with facially neutral law, rather than the sort of law that was involved in *Hicklin v. Orbeck*; *see* Brilmayer, *Carolene*, *supra* note 11, at 1311.

90. *E.g.*, Brilmayer, *Legitimate Interests*, *supra* note 13, at 1325; Kozyris, *Reflections on Allstate*, *supra* note 11, at 896 (“overreaching”); Silberman, *Can the State of Minnesota Bind the Nation? Federal Choice-of-Law Constraints after Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 59, 74 (1981).

91. *E.g.*, Hay, *The Interrelation of Jurisdiction and Choice-of-Law [sic] in United States Conflicts Law*, 28 INT’L & COMP. L. Q. 161, 161-66, 182-83 (1979).

92. *E.g.*, Martin, *Legislative Jurisdiction*, *supra* note 88.

93. *E.g.*, L. BRILMAYER, *AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM* 308 (1986) (use of law of U.S. forum/place of injury in international antitrust cases as “impact territorialism”); Brilmayer, *Legitimate Interests*, *supra* note 13, at 1316 n. 9 (“overreaching”). *See generally* A. V. LOWE, *EXTRATERRITORIAL JURISDICTION* (1983).

mental bogging down in territorialism, nostalgia for old-country codes, an inability to master interest analysis, or, at the worst, a depressing political bias favoring evasion by defendants of responsibility for wrongs.

Recently it has been pointed out that the “discrimination” against nonresidents which so perturbs these writers is not unconstitutional.⁹⁴ If one must state the obvious, there are rational bases on which a state may make law for the welfare of its own voters and taxpayers. Thus, writers worried about the alleged problem of discrimination increasingly demand *restrictive* scrutiny of choices of law. Up to now, restrictive scrutiny has been available only for law threatening fundamental rights, or for law making inherently suspect classifications (classifications affecting those to whom Justice Stone famously referred as “discrete and insular minorities”⁹⁵). The anti-modernists, then, argue for extension of restrictive scrutiny to rulings denying a nonresident the benefit of forum law.⁹⁶ “Why,” the argument seems to go, “should a Massachusetts corporation have Massachusetts law, and a California corporation in Massachusetts courts be denied it?” To which it seems sufficient to reply, “Why not?”

Of course there will be cases when the nonresident should be treated evenhandedly by the forum, although the Constitution may not require that result. When the nonresident plaintiff complains of conduct by a resident in whom the forum has a regulatory interest, the forum should not and perhaps cannot constitutionally deny that it has an interest in benefiting the nonresident. Thus, in *Hellenic Lines, Inc. v. Rhoditis*,⁹⁷ the Supreme Court quite correctly sustained United States maritime law in an action by

94. Weinberg, *On Departing*, *supra* note 76, at 596-97 n. 4-6.

A court does not unconstitutionally discriminate in determining on rational grounds that a nonresident is not within the intended scope of a local rule. . . .

[D]enials of forum law favorable to a nonresident [could] present problems of constitutional discrimination only when the forum [has] . . . a regulatory interest that would justify imposing liability on a resident defendant, or when there is a procedural interest that would justify giving a nonresident defendant the benefit of a forum defense. In other cases, the nonresident is generally distinguishable from the resident, as being beyond the scope of the legislation.”)

95. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n. 4 (1938).

96. Indeed, Professor Brilmayer has recently taken precisely this tack, arguing that Justice Stone’s formulation was under-inclusive. Brilmayer, *Carolene*, *supra* note 11.

97. 398 U.S. 306 (1970).

a foreign seaman against a shipowner otherwise subject to American maritime regulatory power.⁹⁸ **(1988) 59 U. COLO. L. REV. 90**

When the nonresident plaintiff enters forum territory and the operative facts occur there, the forum has a remedial interest because, although the safety of the territory is ultimately secured for the benefit of those living there, that cannot rationally be accomplished without extending the benefit to all present on the territory. In these classes of cases, both the resident and the nonresident can be seen to be within the reasonably intended scope of forum policy.⁹⁹

Finally, there is the “unprovided-for case”—that is, one in which neither of the concerned states can be said to have a governmental interest. In such cases the nonresident plaintiff should be given the benefit of forum law, as we have seen; a rule to the contrary, preferring the invalidating or defendant-favoring law of the contact state, would require the court to treat the nonresident plaintiff with a patent want of evenhandedness. On the other hand, a court considering bestowing the benefit of a forum *defense* on the nonresident must weigh the desired advancement of the forum’s policies of evenhandedness against the frustration of a choice of forum law would entail of shared substantive policies of deterrence, compensation, risk-spreading, or validation.¹⁰⁰

D. Instances of Creeping Restrictive Scrutiny

The Supreme Court should also clear away those isolated and sporadic suggestions of restrictive scrutiny cluttering recent cases yet

98. The Court held for the foreign plaintiff after determining that the defendant was as a practical matter a domestic shipowner, who ought to share the burdens maritime law places on other domestic shipowners. The extension of the benefits of American law to the foreign plaintiff was not dealt with as an independent question; apparently identification of the American regulatory interest in the defendant was perceived as sufficient for application of American law. It is worth pausing to point out, since the questions are intimately related, that a similar analysis may be appropriate for the analogous question of access to American courts for foreigners. Courts today are probably wrong to dismiss on *forum non conveniens* grounds a nonresident’s action against a local defendant, notwithstanding that in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), the Supreme Court, under unidentified law, left discretion to do so with the trial court.

99. *See supra* notes 55-57 and accompanying text.

100. *See supra* notes 76-81 and accompanying text; Weinberg, *On Departing*, *supra* note 76, at 614.

mysteriously unnoticed by commentators. If the following propositions are true:

- (1) there is review for fundamental unfairness in choice of law under the due process clause; and
- (2) choice of the law of a state with legitimate governmental interests in its application will not be fundamentally unfair;

then it makes scant sense to strike down the law of an interested state anyway, whenever some preconceived notion about the *nature* of a state's contact with a case make us unwilling to grant the state freedom to exercise its power. Consider the following examples. **(1988) 59 U. COLO. L. REV. 91**

1. Disregard of the Interests of the After-Acquired Residence of a Party

The law of the state of post-occurrence residence of a party should be given far more thoughtful consideration than was afforded in *Hague*. There, it will be recalled, the plurality thought that, while the bona fide post-occurrence forum residence of the plaintiff was not constitutionally irrelevant, it was insufficient, without other contacts between the forum and the case, to justify application of forum law.¹⁰¹ Do we have to believe that?

If the post-occurrence residence, on the particular facts of a case, has a live interest in regulating the particular issue, there is nothing especially principled or high-minded about disregarding that interest. It will be recalled that in *Hague*, the plaintiff insurance beneficiary became a resident of the forum, Minnesota, only after the insured-against risk had occurred. Yet as a bona fide resident at the time of trial, surely she was entitled to the protections of forum law regulating insurance companies. Lavinia Hague lived in the real world, not on some beautiful chart of neutral principles.

Indeed, it might well have been unconstitutional for Minnesota to withhold the protections of its legislation from a later-arrived resident on the ground that only those living in the state at the time of contracting with an insurer, or at the time of occurrence of the insured-against risk, could

101. *Hague*, 449 U.S. at 319 (citing *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936)); *but see* Weinberg, *Minimal Scrutiny*, *supra* n. 7, at 551 (*Yates* obsolete). [The text originally read, "profoundly obsolete," but was improved by editors.]

be entitled to those protections. It cannot matter to the protective concerns of Minnesota whether either of those events took place in Minnesota or (as they had) in Wisconsin. In all such cases, the resident widow Hague would still seek to unlock the proceeds of three paid-up coverages, and in all such instances she would suffer the deleterious effects of the insurer's recalcitrance at home, in Minnesota. Thus, from Minnesota's viewpoint, there would be no rational basis for discriminating between a Lavinia with a Minnesota contract or accident, and a Lavinia with only a Wisconsin contract or accident.¹⁰²

Interestingly, in 1985 the Supreme Court, in *Hooper v. Bernalillo County Assessor*,¹⁰³ considered a similar question. The question was whether, under the Equal Protection Clause, a Vietnam veteran, a resident of New Mexico since 1981, was entitled to New Mexico veterans' benefits, when the New Mexico legislation in terms applied only to **(1988) 59 U. COLO. L. REV. 92** veterans residing in New Mexico prior to 1976. The Court could find no rational basis on which to deny the after-arrived resident the benefit of the New Mexico law. If the purpose of the classification between two groups of New Mexico residents was to encourage veterans to move to New Mexico, the classification was irrational, because there was no way to encourage veterans today to move to New Mexico before 1976. If the purpose was to favor prior residents, that purpose was illegitimate. Bona fide new residents are entitled to equal protection of their new state's laws. The fact that in 1983, when the legislation was enacted, some of these late arrivals were not yet living in New Mexico, and may have had other entitlements under other states' laws, could make no difference.¹⁰⁴

There would seem to be a fair analogy between the newly-arrived veteran in *Bernalillo* and Lavinia Hague. The *Bernalillo* case is, indeed, a harder one, since the New Mexico legislature had expressed a policy clearly excluding the new arrival, while in *Hague*, no such policy could be made out.

But it is not necessary to perceive the unconstitutionality of withholding forum law from one in the position of Lavinia Hague to perceive the constitutionality of allowing her the benefit of it. On the

102. I am building here on work done in Weinberg, *Relevant Time*, *supra* note 65.

103. 472 U.S. 612 (1985).

104. See also *Zobel v. Williams*, 457 U.S. 55 (1982) (under Equal Protection Clause, state may not distribute lesser surplus monies to later-arrived residents than it distributes to longer-settled residents).

peculiar facts of the *Hague* case, Lavinia's right to rely on her own state's law ought to have been considered more carefully by the Supreme Court. As the designated beneficiary, in an action seeking a declaration of the extent of the insurer's obligation to her, it seems reasonable to suppose that her own state's laws could define the extent of that obligation in her own state's courts.¹⁰⁵ Under Minnesota law an insurance beneficiary could not be bilked of her entitlement to all paid-for coverages, even if the insured had signed a contract of adhesion purporting to waive the beneficiary's entitlement. It was within the power of the Minnesota court to apply Minnesota law to that obligation, especially since the Minnesota embodiment of Allstate was being sued. Conversely, it should be obvious that Wisconsin had little or no interest in the Hague case at the time of trial.¹⁰⁶

Similarly, when there is a post-occurrence but pre-decision **(1988) 59 U. COLO. L. REV. 93** change in law, one would hope that the Court would recognize that a proper analysis will take into account the current governmental interests of the sovereign, on the particular facts, suggested by the post-occurrence change in law. Also relevant, of course, would be the existence of any continuing interest in application of the *prior* rule, despite its subsequent rejection or modification. No one argues that a tax payable in 1984 should be paid under the laws of the year in which a tardy taxpayer finally pays it. But reflexive invocation of phrases about "all relevant times," and "vested rights," and "expectations of the parties," is no substitute for the rational analysis that these post-occurrence changes require.

"Retroactivity" in law is dealt with in this country, on the constitutional level, through minimal scrutiny. Whether a state may apply a post-transaction repeal or law depends only on whether the state has a

105. Lavinia Hague had been appointed administratrix of her husband's estate in Minnesota, *id.* at 319, and was thus "legal representative" within the terms of the policy. She was also a beneficiary of the estate being administered in Minnesota.

106. In *Hague*, not only had the joint domicile of the parties changed from Wisconsin to Minnesota, but the law of Wisconsin was in the process of evolving to conform to Minnesota's on the validity of the policy term in question. *See Landvatter v. Globe Sec. Ins. Co.*, 100 Wis. 2d 21, 300 N.W.2d 875 (Wis. Ct. App. 1980), *review denied*, 99 Wis. 2d 810, 306 N.W.2d 251 (1981). For a perverse example of application of the defendant-favoring rule of a state in which the defendants no longer resided, undercutting the liability rule at the place of injury, *see Schultz v. Boy Scouts of America, Inc.*, 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985).

legitimate governmental interest in doing so. That is true, for example, under the Due Process Clause,¹⁰⁷ and under the Abrogation of Contract Clause.¹⁰⁸ Distinguished authorities have long recognized the power of the forum to apply law and policy current at the time of trial, rather than to have recourse to vanished law presumed to have “vested” the rights of the parties at the time of the transaction.¹⁰⁹

2. Disregard of the Interests of the State with General Jurisdiction over the Defendant

The state that has general jurisdiction over the defendant should also be receiving far more functional consideration than was afforded in *Shutts*,¹¹⁰ or in *Hague*,¹¹¹ for that matter.

In *Shutts*, Kansas was not permitted to apply its laws in a unitary way to issues in a nationwide class action involving chiefly non-Kansas class members and non-Kansas transactions. But the defendant was doing a great deal of business in Kansas—business of the very sort at issue in the case.¹¹² It would seem that Kansas would have had some **(1988) 59 U. COLO. L. REV. 94** interest in regulating the conduct of such a company. Even where the gas-lands involved, and the leases thereof, and the parties thereto, were all foreign, Kansas could have regulated a company doing business in Kansas in ways that affected those out-of-state elements. For example, Kansas could have imposed a “unitary tax,” so-called, on the

107. *E.g.* *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

108. *E.g.* *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983).

109. *E.g.*, R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 339 (3d ed. 1986) (true conflict disappears when one of the rules thought to be in conflict has since been changed); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1586-87 (1966) (state’s interest is to be viewed as of the time the question is presented).

110. 472 U.S. 797 (1985) (state may take adjudicatory jurisdiction over nationwide plaintiff class but may not apply its own law to those claims of individual class members which have no connection with state, although state has general jurisdiction over the defendant).

111. 449 U.S. at 317-18, 320 n. 29 (“We express no view whether [the forum’s general jurisdiction over the defendant] would have sufficed to sustain the choice of [forum] law,” *id.* at 320 n. 29).

112. *See Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 819 (1985).

out-of-state activity of such a company, at least under some reasonable apportionment formula.¹¹³

Had Kansas been the place of incorporation, or principal place of business, it could have imposed regulations on the company for its nationwide dealings. But a company might have more than one principal place of business. The place where the offices of its corporate headquarters are located is not always the place of manufacture, or of distribution.¹¹⁴ There can be no doubt that Kansas was a principal place of business for Phillips. Perhaps the regulatory interest of such a state is weaker than the state of corporate headquarters; again, we would like to be able to identify, functionally, the ways in which the regulatory interests are weaker. The state of incorporation has an interest in maintaining clear books and records of the corporation, and in establishing ground rules for the internal affairs of the corporation. The state of incorporation would have an interest in imposing liability, under its laws, for mismanagement of the corporation by its officers or directors.¹¹⁵ The state where the corporation maintains its headquarters would seem to have somewhat different concerns. As the seat of the corporation's operational decisionmaking, presumably the headquarters state could seek to impose liability for irresponsible corporate decisions made there.¹¹⁶ This sort of functional reasoning seems wanting in Justice Rehnquist's *Shutts* opinion. There is an inattentiveness in *Shutts* to the forum's interests, whatever their extent. Under the rule of *Dick* and *Hague*, the Court needed to go through the motions of minimal scrutiny. There should have been a functional examination of the facts before the Court concluded that the forum lacked a rational basis for the application of its laws.

Moreover, *Shutts* is hard to square with *Keeton*. In deciding that New Hampshire had specific jurisdiction over the publisher in that case,¹¹⁷ the Court seemed quite prepared to assume New Hampshire (1988) 59 U. COLO. L. REV. 95 would have constitutional power to try the whole case.

113. *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983).

114. See DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 LAW & COMTEMP. PROBS. 161, 162 (“[W]hen the subject matter of the litigation concerns some matter *other than* the corporation's internal affairs, the site of incorporation fades from insignificance to complete irrelevance”).

115. Cf. *Shaffer v. Heitner*, 433 U.S. 186, 214 (1977).

116. See Weinberg, *Insights and Ironies: The American Bhopal Cases*, 20 TEX. INT'L. L. J. 307, 307 n. 1, 309, 315 (1985).

117. *Keeton*, 465 U.S. at 778 (1984).

Justice Rehnquist's opinion seems remarkably optimistic about the power of New Hampshire to combine its long "procedural" period of limitations with the single publication rule, so as to govern the out-of-state libels along with the in-state ones.¹¹⁸ Yet New Hampshire was held to have jurisdiction only because it had an interest in remedying the libels that were communicated in New Hampshire. In other words, New Hampshire had specific, not general, jurisdiction. A state with general jurisdiction would seem, logically, to have more power over the out-of-state torts caused by "its" resident corporation, than would a state with jurisdiction only over a specified in-state tort. Kansas probably had *more* extraterritorial power in *Shutts* than New Hampshire had in *Keeton*.

The forum with general jurisdiction over the defendant was even more obviously empowered to act, it seems to me, in *Hague*. While leaving the question open, the *Hague* plurality treated this feature of the case very much as it had treated the feature of after-acquired residence of the plaintiff: as not irrelevant, but as needing to be "aggregated" with

118. *Id.* at 778-81. Indeed, Justice Rehnquist's language on this point would have sustained forum law for the extraterritorial transactions in *Shutts*, since the single publication rule and the class action rules share features of efficiency to which Rehnquist refers: "New Hampshire also has a substantial interest in cooperating with other States, through the "single publication rule," to provide a forum for efficiently litigating all issues and damage claims arising out of a libel in a unitary proceeding." *Id.* at 777.

I note in passing that, in *Shutts*, the nonresidents whose due process rights the Court so zealously guarded were not objecting to forum law; their class representatives waived any such objections. Just as the nonresident members of the plaintiff class were held in *Shutts* to have consented to jurisdiction by not opting out of the class, they could have been held to have consented to forum law. Indeed, parties frequently limit the choice-of-law inquiry. E.g., *Schultz v. Boy Scouts of America*, 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985) (defendant made no claim for law of Ohio, its place of incorporation); *Bryant v. Silverman*, 146 Ariz. 41, 703 P.2d 1190 (1985) (New Mexico and Texas plaintiffs waived reliance on domiciliary law and relied only on law of Arizona, where other plaintiffs resided).

It also should be noted that on the crucial issue of the pre-judgment interest rate owed by Phillips, Kansas did not apply forum law, but used a Federal Power Commission rate. *Shutts*, 472 U.S. at 797. On remand the Kansas Supreme Court has insisted on this choice of law, holding that all concerned states would apply the federal rate. Thus, only post-judgment interest would vary under divergent state rules. *Sutts v. Phillips Petroleum Co.*, 240 Kan. 764, 732 P.2d 1286 (1987).

other contacts between the forum and the case.¹¹⁹ Of course, not all instances of general jurisdiction over the defendant are going to generate governmental interests on the part of the forum. But in *Hague*, the defendant insurer, within the general jurisdiction of the forum, was properly subject to the forum's declaratory judgment that it could not refuse to give the full value of the policy's protections, in the forum state, to a (then) forum resident, the designated (1988) 59 U. COLO. L. REV. 95 beneficiary. Whatever formalism is obscuring that reality should be hastily cast off.¹²⁰

3. Foreseeability Review

Recently, Professor Kozyris has convincingly argued that the foreseeability alone of forum law to a defendant doing business at the forum ought not to constitutionalize application of forum law.¹²¹ I agree with the argument, but it does not exhaust the discussion. Foreseeability, in fact, is not a critical feature of constitutional review of conflicts

119. 449 U.S. at 317-18 n. 23.

120. *But see* Peterson, *Jurisdiction and Choice of Law Revisited*, *supra* note 10, at 37 n. 5, 59 n. 98. Professor Peterson takes the view, shared by most authorities, that Wisconsin rights and obligations must have "vested" in the *Hague* case either when the insurance was obtained in Wisconsin, or when Ralph Hague's fatal accident occurred, also in Wisconsin. The insurance contract was formally executed, however, in Illinois, at Allstate's home office. *Hague*, 449 U.S. at 315 n. 21. Yet these writers disregard Illinois law on the validity of the anti-stacking boilerplate in the policy, an issue on which surely Illinois, as the headquarters state, and formal place of execution of the agreement, could speak in its own courts. Just as surely, Wisconsin could speak on this issue in its courts. But just as Illinois' legislative jurisdiction over the issue could not affect Wisconsin's, so Wisconsin's could not affect Minnesota's.

Hague was an action for a declaration of the obligation of a Minnesota insurer to a Minnesota resident. Minnesota's interest in governing this issue should have been obvious. Indeed, it might well have been unconstitutional for Minnesota, in an action between joint residents of Minnesota, to *withhold* forum law on the ground that the underlying events occurred outside the forum. *Cf.* *Hughes v. Fetter*, 341 U.S. 609 (1951). *See supra* notes 82-86 and accompanying text. *See generally* Weinberg, *Conflicts Cases and the Problem of Relevant Time*, 10 HOFSTRA L. REV. 1023 (1982).

121. Kozyris, *Justified Party Expectations in Choice-of-Law [sic] and Jurisdiction: Constitutional Significance or Bootstrapping?*, 19 SAN DIEGO L. REV. 313 (1982).

cases,¹²² although of course it furnishes a helpful buttressing argument. The Supreme Court reviews not for “fairness,” but for “fundamental fairness,” two very different concepts.¹²³ Thus, the *Hague* plurality substantially confined its discussion of foreseeability/fairness to a footnote.¹²⁴ Justice Powell, dissenting, would have added to the Court’s minimal scrutiny for rational basis a further inquiry going to foreseeability/fairness.¹²⁵ Justice Stevens’ concurrence, fairly read, would import a similar test.¹²⁶ But the majority of Justices have not seemed to accept the suggestion in any formal way. What the Court is focusing on, in constitutional review of conflicts cases, is not the expectation of the parties, but rather the reasonableness of the state’s exercise of law-making power. It is only the interest of the forum in governing the particular issue that can furnish the “rational basis” for governance that the Court is looking for.

The one exception seems to be the rather casual introduction of (1988) 59 U. COLO. L. REV. 97 foreseeability review in *Shutts*.¹²⁷ There, Justice Rehnquist, writing for the Court, stated, “When considering fairness in this context, an important element is the expectation of the parties.” The only authority he could cite for this proposition, however, was the dissent of Justice Powell in *Hague*.¹²⁸

It remains to be seen whether the Court as newly constituted will take up this suggestion, until now rejected by the Court, for separate scrutiny of “foreseeability.” That would be to require courts reviewing a choice of law to examine foreseeability *beyond* the foreseeability that the regulated party’s impingement on the relevant sovereign’s interest imports. And that, it must be understood, is to require an apparatus of tests, something in the nature, perhaps, of “minimum contacts.” We can fairly suppose that any such development would inject fresh confusion and litigation into conflicts cases.¹²⁹

122. *See supra* note 10 and accompanying text.

123. *Id.*

124. 449 U.S. at 318 n. 24.

125. *Id.* at 333 (Powell, J., dissenting).

126. *Id.* at 327 (Stevens, J., concurring).

127. 472 U.S. at 822.

128. *Id.*, citing *Hague*, 449 U.S. at 333, 336-37 (Powell, J., dissenting).

129. *See generally* Weinberg, *Minimal Scrutiny*, *supra* note 7, at 474-76 (restrictive scrutiny for foreseeability would be unworkable); *id.* at 478-82 (replying to Martin, *supra* note 11).

In sum, then, the Supreme Court's review of conflicts cases has been both under-inclusive, as in the cases in which a traditionalist choice is made of irrational law, and over-inclusive, as in cases disparaging the interests of the interested state on unreasoned grounds, or suggesting that a choice of law that is not arbitrary (and is therefore reasonably foreseeable) requires review for even more "foreseeability" than that.

II. CONSIDERING CHOICE OF LAW ON THE JURISDICTIONAL ISSUE

It is often suggested that, since little else of importance seems to be involved in a taking of adjudicatory jurisdiction, the probable choice of forum law ought to be taken into account by the Supreme Court, when it is ruling on the propriety of such a taking.¹³⁰

Although the proposition has obvious appeal, my feeling is that it would be awkward to administer in a principled way. Take, for example, the facts of the *World-Wide Volkswagen* case.¹³¹ It is difficult to say why the place of injury in that case was not allowed to take jurisdiction. **(1988) 59 U. COLO. L. REV. 98** Surely it is reasonable for the place of injury to try a tort that has occurred on its territory.¹³² Nor would the choice of forum law have been unconstitutional. All of us, traditionalists and modernists alike, can rally 'round a choice of the law of the *interested* place of injury, even on the apparently key issue, in *World-Wide Volkswagen*, of contributory negligence.¹³³ But suppose defense counsel had made the following argument:

130. See, e.g., *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 310 n. 15 (1980) (Brennan, J., dissenting); *Shaffer v. Heitner*, 433 U.S. 186, 226 (1977) (Brennan, J., concurring in part and dissenting in part); Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960, 988-89 (1981); von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U. L. REV. 279, 289 (1983). For the argument that rigid avoidance of the issue of unfairness in choice of law would be as counterproductive as a forced consideration of the issue, see Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485, 525 (1984).

131. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) (action by nonresident plaintiff at the place of injury against nonresident defendants; the defendants before the Supreme Court were the nonresident automobile retailer and regional distributor, but not the manufacturer).

132. See *id.* at 310 n. 15 (Brennan, J., dissenting).

133. See Lowenfeld and Silberman, *Dialogue*, *supra* note 11, at 851 n. 36.

“Strict products liability for sellers of goods is inherently unfair. It is one thing to impose liability upon a manufacturer of a defective thing, even without negligence. There is fault in some sense. But whenever liability is placed on an innocent seller, a mere link in the chain of distribution, our legal system comes close to unfairness. And to do such a thing extraterritorially ought to be unimaginable. To impose strict liability under Oklahoma law upon one who does not vote there, pay taxes there, has never been there, and had no way of knowing that an injury caused by the product sold would in fact occur there, upon one without any fault in relation to the product sold, would be utterly wrong. Yet it is inevitable that Oklahoma here will apply its own law, and that it would not be unconstitutional for it to do so. After all, Oklahoma is an interested place of injury. Therefore,” defense counsel winds up, “this perceivable unfairness in the certain choice of forum law should establish that the exercise of adjudicatory jurisdiction by Oklahoma on these facts violates the due process clause.”¹³⁴

A very similar argument was made in *Keeton*.¹³⁵ For New Hampshire to apply its door-opening rule to its “own” libel cases would not have been inappropriate; but for New Hampshire to apply its long period of limitations, on the ground that limitation of actions was “procedural,” to open its doors to nonforum claims dead everywhere else, would have been—as I have tried to argue—unconstitutional. But the choice of forum law was inevitable under the forum’s “traditional” choice rule. And given the persistent failure of the Supreme Court to control the irrational Bealeian choice, the choice was not likely to be perceived as unconstitutional. Thus, it was argued,¹³⁶ and the First Circuit agreed,¹³⁷ that the taking of adjudicatory jurisdiction under such circumstances was unconstitutional. **(1988) 59 U. COLO. L. REV. 99**

In both cases, the argument seeks to attack *constitutionally permissible* law, under the guise of reviewing an assertion of jurisdiction to adjudicate. That is an extremely awkward thing to try to do. I am here tempted to paraphrase the old saw: *If you can hold unconstitutional a thing, because it threatens to accomplish another thing which is perfectly*

134. See, e.g., Lowenfeld and Silberman, *Dialogue*, *supra* note 11, at 852 (remarks of Professor Silberman: “I think the *Volkswagen* opinion should have been written about choice of law”).

135. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

136. *Id.* at 778.

137. 682 F.2d 33, 36 (1st Cir. 1982) (Breyer, J.).

*constitutional, without holding unconstitutional the perfectly constitutional thing—then you have the legal mind.*¹³⁸

There is an additional awkwardness. The choice of law that is not unconstitutional does not raise a federal question. The scope of Oklahoma tort law or of New Hampshire limitations law is a question of the law of the respective states. To strike down constitutionally permissible law without adjudicating a federal question in regard to it might as well be done under the old pre-*Erie* “general federal common law.” That is not to say that to “consider” on the jurisdictional issue a perceived threat of unfair law would actually involve a violation of *Erie v. Tompkins*;¹³⁹ doubtless the federal question presented by the taking of jurisdiction sufficiently authorizes judges to tie up their brains in these sorts of knots. But the pre-*Erie* resonance seems to me to be *there*, and to drain the suggestion of its appeal.

It is often argue that, where *nonforum* law is to be applied, the forum ought not to take the case. But we do not need to make room for that argument in our jurisdictional law; that is what we do on motion to dismiss for *forum non conveniens*.

Despite all of the foregoing, it nevertheless remains generally true, and Professor Peterson points out,¹⁴⁰ that as a practical matter, jurisdiction does control choice of law. Indeed, I suspect that something very like my hypothetical argument for the *Volkswagen* defense may have had an unarticulated influence on the outcome in that case, controlling extraterritorial application of strict products liability to a seller. But is the only remaining question whether the control should be made express rather than covert? Or does there remain a question whether barriers to jurisdiction on this ground, covert or overt, are appropriate at all? And that brings me to my final subject. **(1988) 59 U. Colo. L. Rev. 100**

138. “If you think you can think about something which is attached to something else without thinking about what it is attached to, then you have what is called a legal mind.” T. R. Powell. Professor Peterson takes this quotation from Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L. J. 53, 58 (1930). See Peterson, *Particularism in the Conflict of Laws*, 10 HOFSTRA L. REV. 973, 977 n. 8 (1982).

139. *Erie R. R. Co. v. Tompkins*, 304 U.S. 64 (1938) (Congress and therefore federal courts lack power to revise a single state’s rules of decision; nation has lawmaking power over identified federal law, not state law as such).

140. Peterson, *Proposals of Marriage Between Jurisdiction and Choice of Law*, 14 U.C.D. L. REV. 869, 872-75 (1981).

III. RATIONALIZING THE JURISPRUDENCE OF JURISDICTION

The suggestion that it is time for a thorough overhaul of the jurisprudence of jurisdiction is enormously compelling. There is simply too much litigation on what “minimum contacts” is. It is not unusual to see cases in which, after full trial on the merits, an appellate court, over vigorous dissent, reverses a judgment on a jury verdict, all because the court disagrees with the trial judge and the dissent about the legal sufficiency of the defendant’s conceded contacts with the forum.¹⁴¹ No one can view these as models of efficiency and wisdom in the administration of justice. Jurisdiction is rightly required to be clear at the outset of litigation.

141. *E.g.*, *Fidelity and Casualty Co. v. Philadelphia Resins Corp.*, 766 F.2d 440 (10th Cir. 1985) (vacating and dismissing judgment on a verdict finding the defendant “88%” at fault for \$120,000 in property damage, *held*, over dissent, *id.* at 447-49, Utah federal district court lacked *in personam* jurisdiction over Pennsylvania seller of defective cable for use in helicopter load-hauling, where seller advertised the cable in national aviation trade publication, helicopter operator contacted seller and explained to seller that he would be using the cable in aerial load-hauling in the Rocky Mountain region, seller shipped the cable to the helicopter operator in Arkansas, and operator later carried the cable to Utah for use in performing his load-hauling contract with the plaintiff; the defendant had nationwide cable sales, and advertised cables nationally; the cables were intended for use variously including in “aerial hoists,” and had been specially selected by the defendant in this case for the plaintiff’s use in the mountainous region including Utah). The circuit court in *Philadelphia Resins* relied on “a subtle distinction” between leading cases on “stream of commerce” theory. *Id.* at 446.

Helicopteros, of course, was another unedifying example. *Helicopteros Nacionales de Colombia v. Hall*, 468 U.S. 408 (1984). There, a jury verdict for American widows and children was reversed, over sharp dissent, in the interest of “fairness” to the multinational corporation whose negligence in transporting the American decedents at their foreign worksite was responsible for their deaths; although the defendant had negotiated the underlying transportation contract at the forum, and had numerous and substantial aggregate contacts with the United States, the Supreme Court focused on its extensive purchasing operations in the forum state and held that mere purchases were insufficient to ground jurisdiction when the cause of action, although related to the purchases, did not arise out of them. For full discussion of this embarrassment, *see* Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 SO. CAL. L. REV. 913 (1985).

I pause here to ask: Why is the Supreme Court taking these cases?¹⁴² None of the recent jurisdiction cases has presented an opportunity for a fresh start or a thorough reformulation. Instead, with Ptolemaic care, the Court sets each errant notion spinning in some fresh epicycle around “minimum contacts.” When the Court grants review in yet another jurisdiction case, as it has now done in *Asahi Metal*¹⁴³ and, more recently, in the *Omni*¹⁴⁴ case, those of us who (1988) 59 U. COLO. L. REV. 101 think about conflicts feel somewhat like tourists led unexpectedly to the rim of a volcano—a volcano that only recently has begun to emit periodic rumblings. We are peering anxiously over the rim, fearful of any sign of activity.

A. *The Bankruptcy of Minimum Contacts Theory*

The trouble is, as even the Court concedes, the cases do not turn on the articulated purposes of the jurisprudence. The Court talks about

142. Professor Casad raised the same question in R. CASAD, JURISDICTION IN CIVIL ACTIONS S2-20 (Supp. 1986).

143. *Asahi Metal Indus. Co. v. Superior Court*, 39 Cal.3d 35, 702 P.2d 543, 216 Cal.Rptr. 385 (1985), *cert. granted*, 475 U.S. 1044 (1986) (plaintiff having settled case against alien defendant, in remaining claim between alien defendant and alien third-party defendant, forum may assert jurisdiction over alien manufacturer of component part sold only abroad to manufacturer of motorcycle inner tubes whose product was sold extensively in forum state).

[Note in press: This essay is written as of the time of the oral remarks on which it is based. Because of the importance of the case, however, I note here that *Asahi* was decided five months later, 107 S.Ct. 1026 (1987). The Court struck down the state’s assertion of jurisdiction. My comments on *Asahi* appear in Weinberg, *A Theory of Jurisdiction* (forthcoming).]

144. *Point Landing, Inc. v. Omni Capital International, Ltd.*, 795 F.2d 415 (5th Cir. 1986), *cert. granted sub nom. Omni Capital Int’l v. Rudolf Wolff & Co., Ltd.*, 107 S.Ct. 946 (1987) (affirming dismissal, *held*, in federal question case in federal court, where service on an alien defendant must be had under Rule 4 in absence of a statutory provision for nationwide service of process, contacts between the defendant and forum state may not be aggregated with contacts between the defendant and the nation as a whole for purpose of determining sufficiency of defendant’s contacts with the forum). Six dissenting judges in *Omni* expressed the view that “the effect of the majority’s decision is to grant jurisdictional immunity to alien defendants who have done business in this country thereby destroying any real possibility of holding them accountable for their violation of federal statutes.” *Id.* at 427 (Wisdom, J., concurring in part and dissenting in part).

convenience, fairness, reasonableness, and comity, but the Court has detached the cases from these moorings, one by one, each time assuring us that the alleged concern could not be a deciding factor. Fairness/foreseeability? No, says the (1988) 59 U. COLO. L. REV. 102 Court in *World-Wide Volkswagen*, that cannot be the test.¹⁴⁵ Convenience? No, says the Court in *Burger King*¹⁴⁶ and in *Volkswagen*,¹⁴⁷ that is not the issue. How about comity/federalism/state sovereignty? No, says the Court in *Bauxites*,¹⁴⁸ and again in *Burger King*,¹⁴⁹ that cannot be a component of the personal liberty interest protected by the Due Process Clause. Reasonableness (as a function of state governmental interest)? No—in case after case the Court has struck down an interested state’s

145. 444 U.S. at 296. Justice White was referring here, narrowly, to foreseeability of the place of trial, and not merely, as might be supposed from the preceding remarks, *id.* at 295, to foreseeability of the place of injury: “If foreseeability were the criterion, . . . [e]very seller of chattels would in effect appoint the chattel his agent for service of process.” *Id.* (White, J.) That is what makes the utterance so subversive of the Court’s iterations that the defendant should be able reasonably to anticipate being “haled” into the forum, appearing not only in *World-Wide Volkswagen*, *id.* at 297, but in cases both before and after it, *e.g.*, *Calder v. Jones*, 465 U.S. 783, 790 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984); *Kulko v. Superior Court*, 436 U.S. 84, 97-98 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 216, 218 (1977). *See generally* Weinberg, *The Helicopter Case*, *supra* note 141 at 921-23, 932-35.

146. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (Brennan, J.: “[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that . . . some other consideration would render jurisdiction unreasonable. . . . [A] defendant claiming substantial inconvenience may seek a change of venue”). Since change of venue is available only intrastate or in federal court, the quoted passage would strip substantial numbers of longarm defendants of due process rights if convenience of place of trial were a constitutional requirement. But, as Justice Brennan points out, “modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.” *Id.* at 474, quoting from *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957); *see also* *World-Wide Volkswagen*, 444 U.S. at 311-12 (1980) (Brennan, J., dissenting).

147. 444 U.S. at 294 (White, J.) (jurisdiction may be unconstitutional even “if the defendant would suffer . . . no inconvenience”).

148. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 n.10 (1982); *see generally* Weinberg, *The Helicopter Case*, *supra* note 141 at 923-925.

149. 471 U.S. at 471 n. 13.

exercise of adjudicatory jurisdiction: *Kulko*;¹⁵⁰ *Shaffer v. Heitner*;¹⁵¹ *World-Wide Volkswagen*.¹⁵² And the Court has always expressly distanced jurisdictional review from such unarticulated policy concerns as perceived unfairness in the threatened choice of forum law.¹⁵³

So, quite obviously we now have a body of rules without reasons. The Court is requiring minimum contacts for their own sakes. No wonder there is litigation.

Of course, convenience, fairness, comity, reasonableness, sound choice of law—all these things *matter*. But the rules have become arbitrary precisely because none of these concerns matter today on the level of *International Shoe*. Given the availability of *forum non conveniens*, and independent review of choice of law for fundamental fairness, defendants simply do not need all of the constitutional protection from the choice of the forum itself that the Supreme Court keeps lavishing on them.¹⁵⁴

Clearly, it is time to jettison minimum contacts. *International Shoe* is bankrupt.

B. The Alternatives

It might be supposed that the desirable alternative would be minimal scrutiny. Although it is increasingly urged that constitutional standards governing choice of law should be strengthened to conform to the policies

150. *Kulko v. Superior Court*, 436 U.S. 84 (1978) (state where parent seeking greater support for children resides with children may not take jurisdiction over nonresident breadwinner parent); *see generally* Weinberg, *The Helicopter Case*, *supra* note 141, at 925-28.

151. 433 U.S. 186 (1977) (state of incorporation of company may not take jurisdiction over nonresident directors of company in action by shareholders alleging corporate mismanagement).

152. 444 U.S. 286 (1980) (place of injury may not take jurisdiction over nonresident distributors of product causing injury there).

153. *See, e.g., Keeton*, 465 U.S. at 778; *Kulko*, 436 U.S. at 98; *Shaffer*, 433 U.S. at 216; *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). *See supra* notes 130-140 and accompanying text.

154. *See World-Wide Volkswagen*, 444 U.S. at 309-312 (Brennan, J., dissenting: “[C]onstitutional concepts of fairness no longer require the extreme concern for defendants that was once necessary. . . . I do not think the Due Process Clause is offended merely because the defendant has to board a plane to get to the site of the trial”)

undergirding jurisdictional law,¹⁵⁵ that suggestion becomes (1988) 59 U. COLO. L. REV. 103 absurd when it is perceived that no strong policies underly our jurisdictional law.¹⁵⁶ The question becomes, rather, how to rationalize our jurisdictional law to make it conform to the realism and flexibility of our choice-of-law standard. Minimal scrutiny naturally suggests itself.

Once, while I was writing the essay on minimal scrutiny of choice of law to which I have already referred,¹⁵⁷ it occurred to me in my green enthusiasm that it would be nicely symmetrical if there were also minimal scrutiny of adjudicatory jurisdiction. I mortgaged my future and grandly announced in a footnote that an article on “Jurisdiction and Minimal Scrutiny” would be forthcoming.¹⁵⁸ Alas, that article was never written. Minimal scrutiny will not work for jurisdiction. The trouble is not only that there is so much shared interest in forum-furnishing that minimal scrutiny—interest analysis—would yield almost universal jurisdiction (although that is true). The trouble, rather, is that even a state with a legitimate governmental interest in trying a case can be an abusively-selected forum. Restrictive scrutiny of some kind is a necessity.

Another alternative, suggested by Professor Weintraub, might be to inquire in every case whether the taking of jurisdiction was “reasonable in the circumstances.”¹⁵⁹ With the greatest respect, however, I am unenthusiastic about the idea. I do not know what is reasonable in the circumstances. But I think we already have too much litigation on the essentially ad hoc parameters of minimum contacts theory. Jurisdiction ought to be clearer than that, and at the outset of litigation.

The better alternative, it seems to me, is to identify, as they arise, those few cases in which the defendant really does need due process protection from the choice of forum. One thinks, for example, of the hypothetical case recently posed by Justice Brennan in *Burger King*,¹⁶⁰ in

155. E.g., Kozyris, *Reflections on Allstate*, *supra* note 11; Martin, *Personal Jurisdiction*, *supra* note 11; Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978); Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 87-88 (1978).

156. See generally Weinberg, *The Helicopter Case*, *supra* note 141; and see *supra* notes 145-153 and accompanying text.

157. Weinberg, *Minimal Scrutiny*, *supra* note 7.

158. *Id.* at 455 n. 72.

159. See Weintraub, *Due Process Limitations*, *supra* note 130.

160. 471 U.S. at 486.

which a mail-order seller sues a remote customer for an amount of money too small to defend, essentially depriving the customer of a day in court.

But the parade of such horrors, up to now, has been thought to justify the whole “minimum contacts” enterprise. By all means, let us protect against the horrors. But let us put an end to the more arbitrary (1988) 59 U. COLO. L. REV. 104 interferences with an interested state’s otherwise legal takings of jurisdiction.

I believe that it is possible to identify features of a taking of jurisdiction which, in a very few rare cases, would compel scrutiny under the Due Process Clause. The carrying out of this interesting inquiry, however, is the subject of another essay.¹⁶¹

Would the pragmatic and minimalist approach suggested here invite more crowded dockets? I do not think so. Courts are not very eager to hear disputes only marginal to their concerns, or to put defendants or witnesses to considerable inconvenience. Courts are already quite freely granting motions to dismiss for *forum non conveniens*. They are in control of their own dockets. And, of course, state legislatures can limit the longarm power of state courts. Such examples of the “magnet” forum as we have observed seem, like the common cold, to be self-limiting.

CONCLUSION

If, then, we can make more uniformly available in conflicts cases constitutional scrutiny under the rational basis test employed in *Home Ins. Co. v. Dick* and *Allstate Ins. Co. v. Hague*, and if we can permit the non-abusively selected forum with a legitimate interest in taking jurisdiction to do so, subject always to the flexible administration of *forum non conveniens*, it seems to me we will have done much to strengthen constitutional review in cases raising problems of interstate litigation.

The goal should be to rationalize, without significantly altering, the matchless powers of our world-envied courts.

161. Weinberg, *A Theory of Jurisdiction* (forthcoming). *But see supra* text accompanying note 158.