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## **CHOOSING LAW: THE LIMITATIONS DEBATES**

1991 U. Ill. L. Rev. 683

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*In this article, Professor Weinberg discusses the recent Supreme Court case of Sun Oil Co. v. Wortman and the problems facing courts confronted with conflicting statutes of limitations. She uses the modern choice-of-law technique of interest analysis. In exploring Wortman, she identifies an unnoticed problem of interest analysis, the problem of “the fractional interest,” and examines recent class suits and Commerce Clause cases raising that problem. She concludes that the Wortman Court correctly rejected the “substantive” model of choice of limitations law and correctly decided that the forum should be allowed to apply its own longer statute of limitations even if its only connections with a case are jurisdictional. But she believes that courts should not use the “procedural” model simply because it yields this result. Rather, courts should employ the same analytic reasoning in choosing limitations law as in other conflicts problems.*

### I. INTRODUCTION: THE LIMITATIONS PROBLEM

#### A. A Conflicts Litigation Explosion

It is interesting that within the last three years the Supreme Court has decided a striking number of cases on statutes of limitations,<sup>1</sup> among

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\* *Andrews & Kurth Professor of Law, The University of Texas. I would like to thank Charles Alan Wright for valuable insights. For useful background I would like to acknowledge the generous help of Gordon Penny, of Medicine Lodge, Kansas, who argued the case for the Wortmans in the Supreme Court in Sun Oil Co. v. Wortman, and Gerald Sawatzky, of Wichita, Kansas, who argued the case for Sun Oil Co., and their associates.*

1. See, e.g., *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S.Ct. 2773 (1991) (holding limitations period for § 10(b) actions is one-and-three year provision found in both Securities and Exchange Act and Securities Act for certain causes of action; equitable tolling unavailable); *Stevens v. Department of*

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the Treasury, 111 S.Ct. 1562 (1991) (holding federal employee's notice of intent to sue must be filed with EEOC within 180 days of alleged age discrimination, and not less than 30 days before suit); *Irwin v. Veterans Admin.*, 111 S.Ct. 453 (1990) (holding EEOC right-to-sue letter starts running of 30-day limitations period and rejecting argument that on facts period should be equitably tolled); *United States v. Dalm*, 494 U.S. 596 (1990) (holding action to recover paid gift tax barred by running of filing period); *Lorance v. A.T. & T. Technologies, Inc.*, 490 U.S. 900 (1989) (holding claim of discrimination based on facially neutral seniority system begins to run at time of adoption of the system); *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989) (holding 60-day filing period for statutory citizen suit under Resource Conservation and Recovery Act mandatory); *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988) (holding differential tolling of statute for nonresidents puts undue burden on interstate commerce), *but see G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982) (holding differential tolling for nonresidents does not violate Equal Protection Clause); *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988) (holding state free to apply its own statute, even if statute provides longer period for suit than available in other interested states); *Clark v. Jeter*, 486 U.S. 456 (1988) (holding that Pennsylvania's six-year statute for paternity suits violated Equal Protection Clause); *Immigration & Naturalization Serv. v. Pangilinan*, 486 U.S. 875 (1988) (rejecting challenge under Due Process Clause to statute of limitations for filing naturalization petition); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) (setting forth standards for application of three-year special statute for wilful violations of Fair Labor Standards Act); *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988) (holding due process requires actual notice to reasonably ascertainable creditors of estate that relevant statute had begun to run).

For cases involving federal/state conflicts, see *Reed v. United Transp. Union*, 488 U.S. 319 (1989) (holding that state general or personal injury statutes of limitation govern period in which to file suit under Labor-Management Reporting and Disclosure Act); *Hardin v. Straub*, 490 U.S. 536 (1989) (holding that state tolling statute was applicable in action under Civil Rights Act); *Owens v. Okure*, 488 U.S. 235 (1989) (holding that state general or personal injury statutes of limitation govern period in which to file suit under Civil Rights Act). For recent discussion of these and earlier cases, see Harold S. Bloomenthal, *The Statute of Limitations and Rule 10b-5 Claims: A Study in Judicial Lassitude*, 60 U.COLO.L.REV. 235 (1989); Donna A. Boswell, *The Parameters of Federal Common Law: The Case of Time Limitations on Federal Causes of Action*, 136 U.PA.L.REV. 1447 (1988); Michael B. Brennan, *Okure v. Owens: Choosing Among Personal Injury Statutes of Limitations for Section 1983*, 82 NW.U.L.REV. 1306 (1988); Carl T. Grasso, *The Statute of Limitations as Applied to Medical Malpractice Actions Brought Under the Federal Tort Claims Act*, 117 MIL.L.REV. 1 (1987); Edwin S. Hackenberg, *All the Myriad Ways: Accrual of*

(1991) U. Ill. L. Rev. 684 them cases presenting multistate problems.<sup>2</sup> The activity in the Court mirrors a heavy volume of litigation over conflicting state statutes of limitations.<sup>3</sup>

This activity seems to arise in a confluence of cross currents. (1991) U. Ill. L. Rev. 685 Against a strong current of litigation,<sup>4</sup> two distinct

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*Civil Rico Claims in the Wake of Agency Holding Corp. v. Malley-Duff*, 48 LA.L.REV. 1411 (1988); Cathy H. Herndon & Monroe Hill, Jr., *In re Data Access Systems Securities Litigation: Finally, A Step Towards Uniformity in 10b-5 Statute of Limitations Disputes*, 40 MERCER L.REV. 1045 (1989); Paul Rathburn, *Amending a Statute of Limitations for 42 U.S.C. § 1983: More than 'A Half Measure of Uniformity,'* 73 MINN.L.REV. 85 (1988); Cynthia Reed, Note, *Time Limits for Federal Employees Under Title VII: Jurisdictional Prerequisites or Statutes of Limitation?*, 74 MINN.L.REV. 1371 (1990); David Reisman, Comment, *The Move Toward Uniformity: The Statute of Limitations for Rule 10b-5*, 51 LA.L.REV. 667 (1991).

There are some notable federal statutory developments. For state law personal injury or property damage actions arising from exposure to hazardous substances, federal law now preempts state statutes of limitations that are briefer than those mandated in federal legislation on toxic substances. 42 U.S.C. § 9658 (Supp.IV 1986). For states without a "discovery rule," federal law imposes one for hazardous substance litigation. *Id.* § 9658(b). For federal statutory claims, Congress has now enacted a four-year general statute of limitations; the new period is applicable only to federal statutes subsequently enacted:

1658. Time limitations on the commencement of civil actions arising under Acts of Congress.

Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of enactment of this section may not be commenced later than 4 years after the cause of action accrues.

Judicial Improvements Act of 1990, Pub.L. No. 101-650, 104 Stat. 5089, 5115 (codified at 28 U.S.C.A. § 1658 (1991)).

2. *E.g.*, *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988) (holding differential tolling of statute for nonresidents puts undue burden on interstate commerce); *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988) (holding state is free to apply its own statute, even if statute provides longer period for suit than available in other interested states).

3. *See generally* Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CAL.L.REV. 965 (1988); P. John Kozyris, *Choice of Law in the American Courts in 1987: An Overview*, 36 AM.J.COMP.L. 547, 556 (1988); P. John Kozyris & Symeon C. Symeonides, *Choice of Law in the American Courts in 1989: An Overview*, 38 AM.J.COMP.L. 601, 627-36 (1990); Symeon C. Symeonides, *Choice of Law in the American Courts in 1988*, 37 AM.J.COMP.L. 457, 474-78 (1989).

waves of tort reform legislation appeared in the 1970s and 1980s.<sup>5</sup> These imposed nonuniform new defenses, creating their own eddies of litigation.<sup>6</sup> Statutes of limitation were a chief item of “reform” in each wave.<sup>7</sup> State legislatures abolished, or tried to abolish, the “discovery” rule of accrual of actions, so that an injured plaintiff might be barred before she knew she had been injured.<sup>8</sup> They enacted special brief limitations periods for medical malpractice and for products cases.<sup>9</sup> They

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4. See GENERAL ACCOUNTING OFFICE, PRODUCT LIABILITY: EXTENT OF “LITIGATION EXPLOSION” IN FEDERAL COURTS QUESTIONED (1988) (Briefing Report to the Chairman, Sub-comm. on Commerce, Consumer Protection and Competitiveness, House Comm. on Energy and Commerce); DEBORAH R. HENSLER ET AL., THE RAND CORPORATION INSTITUTE FOR CIVIL JUSTICE, TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS (Report R-3583-ICJ 1987); Deborah R. Hensler, *Trends in Tort Litigation: Findings from the Institute for Civil Justice’s Research*, 48 OHIO ST. L.J. 479 (1987).

5. See generally PETER W. HUBER, LIABILITY; THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988); Eliot Martin Blake, *Rumors of Crisis: Considering the Insurance Crisis and Tort Reform in an Information Vacuum*, 37 EMORY L.J. 401 (1988).

6. Cf. Nancy L. Manzer, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 CORNELL L.REV. 628 (1988).

7. E.g., ALA.CODE § 6-5-482 (1975) (all actions against medical personnel or institutions, in tort or in contract, must be brought within two years); OHIO REV.CODE ANN. § 2305.10 (Page Supp.1991) (all asbestos, chromium, or Agent Orange claims must be brought within two years from discovery). See generally Green, *supra* note 3.

8. See, e.g., *Kenyon v. Hammer*, 688 P.2d 961 (Ariz.1984) (reinstating “discovery” rule); *Cassidy v. Firestone Tire & Rubber Co.*, 495 So.2d 801 (Fla.Dist.Ct.App.), *appeal dismissed*, 484 U.S. 802 (1987) (sustaining state’s 12-year statute for products liability, under *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla.1985) (reversing former contrary decision, despite statute’s abolition of “discovery” rule)). For abolition of the “discovery” rule in the United Kingdom, see *D.W. Moore & Co. v. Ferrier*, 1 All E.R. 400 (CA) (1988) (affirming judgment of dismissal on ground that under Limitation Act of 1980 and Latent Damage Act of 1986, action for negligence in drafting covenant accrues at time of execution of contract rather than when defect is discovered). See generally Steven L. White, Note, *Toward a Time-of-Discovery Rule for the Statute of Limitations in Latent Injury Cases in New York State*, 13 FORDHAM URB.L.J. 113 (1985).

9. See, e.g., *Jewson v. Mayo Clinic*, 691 F.2d 405 (8th Cir.1982) (sustaining constitutionality of shorter statute to bar claims against medical care providers).

gave architects and engineers the benefit of new statutes of “repose,” which characteristically operate to block litigation for a fixed term after the completion of a transaction, without regard to the date of the occurrence or of discoverable harm.<sup>10</sup>

*B. A Universal But Disfavored Defense: The Awkwardnesses of  
Statutory Limitation of Actions*

The problems of choosing limitations law are complex because statutes of limitations, though probably necessary, can seem both unfair and subversive. It is assumed that courts need protection from stale claims.<sup>11</sup> (1991) U. Ill. L. Rev. 686 Limitation of actions also seems necessary to allow defendants to wind up their liabilities at some point and start afresh. Construction contractors and administrators of estates need the encouragement of knowing just how long they may be vulnerable to lawsuits arising out of their assumption of task responsibility. Business planners need to know how long businesses may remain liable following an event or transaction. Industries need to be able to write off calculable liabilities and buy reasonable insurance, matters thought to be influenced by statutes of limitations. Investors argue that past corporate decisions should not affect values held by innocent successors in interest.

At the same time, statutes of limitations are demonstrably arbitrary.<sup>12</sup> Only a legislature could be so arbitrary. The statute will say “within two years.” Why not three or one? Why not two years and a day? In one state a claimant may sue on a tort for a longer time than on a contract, in another state the contract claimant may have the longer time. In either state the claimant may plead both contract and tort theories in the

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10. See, e.g., *Dighton v. Federal Pac. Elec. Co.*, 506 N.E.2d 509 (Mass.), cert. denied, 484 U.S. 953 (1987) (sustaining constitutionality of selective statute of repose for architects, engineers, and contractors; denying benefit to defendant). A statute of repose measures the period of limitation from the date of specified activity on the part of a defendant, without reference to possible injury. A statute of limitations, on the other hand, generally begins to run when a cause of action accrues.

11. See *Jewson*, 691 F.2d at 405 (holding that state had rational basis for application of its statute to bar stale claims); *Owen v. White*, 380 F.2d 310, 315 (9th Cir.1967) (stating that purpose of statutes of limitations is to prevent trumped up or stale actions).

12. See, e.g., Jeffrey J. Fleming, *Statute of Limitations: Five, Three or Two Years*, 27-50-202 ARMY LAW. 14 (1989).

alternative to remedy the identical wrong. Inadvertency will cut off some meritorious claims; the plaintiff's filing mistake will allow the defendant to escape responsibility. Especially short periods of limitation or periods set without regard to the plaintiff's state of knowledge might be seen as undermining the policies supporting the right sued on, undercutting general policies supporting the whole field of law, or negating procedural policies favoring access to courts, trial by jury, rights to notice and hearing, and so forth.

### *C. Legislative Hedging and Judicial Attacks*

For the reasons given, ameliorative legislation tends to spring up around statutes of limitation. There are tolling statutes and borrowing statutes.<sup>13</sup> At common law, statutes of limitations, while not perhaps disfavored,<sup>14</sup> often are construed narrowly, or equitably tolled.<sup>15</sup> Courts tend to find ways of avoiding the statute,<sup>16</sup> or at least to find unresolved

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13. See generally Margaret R. Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 ARIZ.ST.L.J. 1; David H. Vernon, *Statutes of Limitation in the Conflict of Laws: Borrowing Statutes*, 32 ROCKY MT.L.REV. 287 (1960); Ibrahim J. Wani, *Borrowing Statutes, Statutes of Limitations and Modern Choice of Law*, 57 UMKC L.REV. 681 (1989).

14. Anciently, the statute was said to be disfavored at common law. Cf. *M'Cluny v. Silliman*, 28 U.S. (3 Pet.) 270, 278-79 (1830) (McLean, J.) ("Of late years the courts in England, and in this country, have considered statutes of limitations more favourably than formerly. . . . The courts do not now, unless compelled by the force of former decisions, give a strained construction, to evade the effect of those statutes.").

15. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (holding that where Congress requires exhaustion of state remedies, period of limitation must be tolled during process of exhaustion); but see *Irwin v. Veterans Admin.*, 111 S.Ct. 453 (1990) (holding 30-day limitations period in which right to sue starts running with EEOC right-to-sue letter, and rejecting argument that on particular facts statute should be equitably tolled).

16. See, e.g., *Held v. Manufacturers Hanover Leasing Corp.*, 912 F.2d 1197 (10th Cir.1990) (holding that New York rather than Colorado limitations law applied, and that New York's three-year statute barred employee's claim for injunctive relief, but sua sponte on appeal after briefing and oral argument, and over dissent, holding that action for benefits and damages would remain available under New York six-year statute, and not foreclosed by judgment below because that judgment not rendered on the whole case); see also *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196 (8th Cir.1990) (reversing dismissal at transferee

(1991) U. Ill. L. Rev. 687 issues of fact precluding summary judgment.<sup>17</sup> Left to their own devices, without any fixed statutory period to get in the way, courts happily will declare themselves without power to create fixed periods. They ring in the equitable principles of laches: Was the plaintiff unreasonably dilatory? Was there cause for the delay? Is the defense prejudiced by the delay? The cost of all this is uncertainty, no doubt, but the benefit is that reasoned decision seems restored. As for the putative need of courts for protection from stale claims, a court can shrug that off, content to let the trier of fact evaluate late blooming claims and long memories.

Against this background, courts have not been entirely inhospitable to constitutional attacks on that part of tort reform represented by newly restrictive limitations law.<sup>18</sup> Of course, a state must have constitutional power<sup>19</sup> to strike a balance between the plaintiff's need for a reasonable time in which to become aware of the claim and the defendant's need for repose. The tort reformers sought to strike policy balances responsive to current conditions. They wanted to restrict times for suit more narrowly than had been done in the past because they wanted to deal with a perceived litigation explosion and a perceived crisis in the availability and affordability of insurance.<sup>20</sup> But a legislature can deal with a need only in

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federal court of case transferred for lack of jurisdiction because jurisdiction was found after all at transferor state); *Scott v. First State Ins. Co.*, 456 N.W.2d 152 (Wis.1990) (holding that, although Alberta period of limitation was applicable, Wisconsin tolling statute applied to extend Alberta period).

17. *E.g.*, *Financial Timing Publications, Inc. v. Compugraphic Corp.*, 893 F.2d 936 (8th Cir.1990) (holding issues of fact existed on whether contract limitations period barred fraud claim); *Perry v. Aggregate Plant Prods. Co.*, 786 S.W.2d 21 (Tex.Ct.App.1990) (holding summary judgment precluded because issues of fact existed as to applicability of Indiana law including statute of repose that would bar action against manufacturer).

18. *See infra* notes 21-24 and accompanying text.

19. *Cf.*, *e.g.*, *Brubaker v. Cavanaugh*, 741 F.2d 318 (10th Cir.1984) (Kansas' four-year statute of repose rationally based on state interests notwithstanding that it might bar claim before it was discovered).

20. *See The Liability Insurance Crisis: Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation*, 99th Cong., 2d Sess. 43 (1986); TORT POLICY WORKING GROUP, U.S. DEP'T OF JUSTICE, REPORT ON THE CAUSES, EXTENT, AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986); Kenneth S. Abraham, *Making Sense of the Liability*

an evenhanded way, with means tailored to the ends, and without unreasonable impact on notice and opportunity to be heard. Constitutional challenges to restrictive limitation of actions have succeeded under the federal Due Process<sup>21</sup> and Equal Protection Clauses.<sup>22</sup> (There has also **(1991) U. Ill. L. Rev. 688** been some review of overly generous limitations law under the Commerce Clause.)<sup>23</sup> Challenges to limitations law also have succeeded under state constitutional “open courts” provisions, “access to courts” provisions, right to trial by jury, and equal protection principles.<sup>24</sup>

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*Insurance Crisis*, 48 OHIO ST.L.J. 399 (1987); Blake, *supra* note 5; Marc Galanter, *The Day After the Litigation Explosion*, 46 MD.L.REV. 3 (1986).

21. *E.g.*, *Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. 478 (1988) (holding due process requires actual notice to reasonably ascertainable creditors of estate that relevant statute had begun to run).

22. *E.g.*, *Clark v. Jeter*, 486 U.S. 456 (1988) (holding that Pennsylvania’s six-year statute for paternity suits violated Equal Protection Clause); *Carson v. Maurer*, 424 A.2d 825 (N.H.1980) (striking down under Equal Protection Clause statute of repose requiring infants under age 8 to commence action by 10th birthday).

23. *E.g.*, *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988) (holding differential tolling of statute for nonresidents puts undue burden on interstate commerce).

24. Cases striking down limitations law reforms under state constitutional principles include: *Beard v. J.I. Case Co.*, 823 F.2d 1095 (7th Cir.1987) (under Wisconsin constitutional guaranty of remedy for all wrongs, holding state could not borrow sister state’s 10-year statute of repose); *Kenyon v. Hammer*, 688 P.2d 961 (Ariz.1984) (under Arizona equal protection clause striking down abolition of “discovery” rule for medical malpractice claims, citing cases); *Austin v. Litvak*, 682 P.2d 41 (Colo.1984) (under Colorado “access to courts,” equal protection, and due process guarantees, striking down three-year statute of repose for medical malpractice cases); *Hardy v. VerMeulen*, 512 N.E.2d 626 (Ohio 1987) (holding abolition of discovery rule deprives plaintiff of access to courts); *Kennedy v. Cumberland Eng’g Co.*, 471 A.2d 195 (R.I.1984) (under Rhode Island “access to courts” clause, striking down statute of repose for products claims); *see also* Richard C. Turkington, *Constitutional Limitations on Tort Reform: Have the State Courts Placed Insurmountable Obstacles in the Path of Legislative Responses to the Perceived Liability Insurance Crisis?*, 32 VILL.L.REV. 1265, 1318-20, 1331 (1987) (collecting cases). *But see, e.g.*, *Hill v. Fitzgerald*, 501 A.2d 27 (Md.1985) (sustaining constitutionality, under Maryland “access to courts” clause, of statute of repose for medical malpractice claims allowing five years from date of injury without regard to date of discovery by patient).



#### D. The Conflicts Angle

Conflicts attacks on limitations periods can be as potent, if not as far-reaching, as constitutional attacks. In some cases a rule of alternative reference is beginning to emerge, under which courts will apply the longer,<sup>25</sup> rather than the traditionally preferred shorter,<sup>26</sup> of two limitations periods. We find a surprising judicial tolerance, not shared by legislatures, for forum shopping for longer limitations law.<sup>27</sup> Much litigation (1991) U.

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25. *E.g.*, *Reed v. United Transp. Union*, 488 U.S. 319 (1989) (choosing longer state statute rather than the six-month period provided by National Labor Relations Act for actions under the Act); *Ledesma v. Jack Stewart Produce, Inc.*, 816 F.2d 482 (9th Cir.1987) (holding, in true conflict of limitations law, California would apply longer foreign statute to benefit its plaintiff); *Marshall v. Kleppe*, 637 F.2d 1217, 1224 (9th Cir.1981) (holding that longer of two forum state statutes should govern because “if a substantial question exists about which of two conflicting statutes of limitations to apply, the court should apply the longer as a matter of policy” (quoting *DeMalherbe v. International Union of Elevator Constructors*, 449 F.Supp. 1335, 1341 (N.D.Cal.1978))); *Celotex Corp. v. Meehan*, 523 So.2d 141 (Fla.1988) (holding, in reversing and remanding consolidated asbestos cases, under borrowing statute state would borrow current law of another state so as to revive claim barred under earlier law of that state).

26. The chief modification of statutory limitations periods is the so-called “borrowing” statute. The typical borrowing statute bars an action if the place where the cause of action accrued bars it. *See generally* Grossman, *supra* note 13, at 14; Vernon, *supra* note 13, at 287. It is common, however, to make an exception that will give a resident plaintiff the benefit of the forum’s longer statute. *See Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 562 (1920) (sustaining borrowing statute’s discrimination against nonresidents).

27. Mississippi gained particular notoriety with its former generous six-year catchall statute, which it characterized as “procedural;” the general inapplicability of its borrowing statute; and its conditioning of dismissals forum non conveniens on waiver of the defense of limitations. The statutory background and case materials are cited, and controversy aired, in the interesting clash of opinions in *Shewbrooks v. A.C. & S., Inc.*, 529 So.2d 557 (Miss.1988). The Mississippi legislature overturned the *Shewbrooks* result as well as the statute in 1989. Act of March 2, 1989, ch. 311, 1989 Miss. Laws 19 (codified as amended in scattered sections of MISS.CODE ANN. § 15 (Supp.1990)). *See generally* Jeffrey Jackson, *Legislative Reform of Statutes of Limitations in Mississippi: Proposed Interpretations, Possible Problems*, 9 MISS.L.REV. 231 (1989). For the Mississippi history and the similar history in New Hampshire, *see* Sam Walker, *Forum Shopping for Stale Claims: Statutes of Limitations and Conflict of Laws*, 23 AKRON L.REV. 19 (1989).

**III. L. Rev. 689** over conflicting laws on timeliness also takes place on motions to dismiss for forum non conveniens.<sup>28</sup> Courts increasingly want to be sure that they do not refer a suit timely when filed to a state with a closed courthouse door.

In an attempt to take hold of widespread litigation of the conflicts issue, the American Law Institute<sup>29</sup> and the Commissioners on Uniform State Laws<sup>30</sup> have weighed in with proposals codifying rules for choosing limitations law. Most recently, the Reporters of the ALI Complex Litigation Project, after offering some suggestions on limitations law for complex cases, have come up with a preliminary draft proposal.<sup>31</sup> Finally, the Supreme Court has handed down a major case on the constitutional power of a state without substantial contact with a case to use its own statute of limitations to revive that case.<sup>32</sup> These developments raise new theoretical issues for what used to seem a rather simple methodological controversy.

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28. *See, e.g.*, *Delfosse v. C.A.C.I., Inc.-Federal*, 267 Cal.Rptr. 224 (1990) (California wrongful discharge case could not be dismissed for forum non conveniens based on determination that Virginia was more appropriate forum, where statute of limitations had run in Virginia); *Johnson v. G.D. Searle & Co.*, 552 A.2d 29, 37 (Md.1989) (holding that lower court abused its discretion by unconditionally dismissing actions on forum non conveniens grounds when statute of limitations had likely run in alternative forum); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 cmt. c(2) (1971).

29. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, 1986 Revisions (Supp.1988) (amended and approved, May 19, 1988). The Appendix, *infra*, contains Revised § 142, along with excerpts from the *Comments*. For criticism of the *Comments*, *see infra* notes 131-55 and accompanying text.

30. UNIF. CONFLICT OF LAWS LIMITATIONS ACT, 12 U.L.A. 59-62 (1982 & Supp.1991). Arkansas, Colorado, North Dakota, Oregon and Washington have adopted the Act. For criticism of the Act, *see infra* notes 112-30 and accompanying text. The Appendix, *infra*, contains excerpts from the Act.

31. AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT, PRELIMINARY DRAFT NO. 4, ch. 6, "Choice of Law," § 6.5, "Statutes of Limitations" 112 (Sept. 19, 1991) [hereinafter DRAFT NO. 4]. For the earlier proposal, *see* AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT, PRELIMINARY DRAFT NO. 3, ch. 6, "Choice of Law," § 6.5, "Statutes of Limitations" 55 (Sept. 19, 1990) [hereinafter DRAFT NO. 3]; *see also* AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT, REPORTER'S MEMORANDUM TO THE COUNCIL, ch. 6, "Choice of Law," Introductory Note 1-23 (Jan. 25, 1991) [hereinafter REPORTER'S MEMORANDUM].

32. *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988).

### *E. Road Map*

In this paper I examine these issues from the perspective of an interest analyst. Interest analysis, by and large, is simply traditional purposive reasoning. The analyst looks for the reasons behind the conflicting rules to help determine whether those rules ought to apply on extraterritorial facts. I explore the three currently leading models for choosing limitations law, commenting on those and critiquing interesting current cases illustrative of each of them. **(1991) U. Ill. L. Rev. 690**

In Part I, I deal with the traditional approach to the problem, the characterization of limitations as “procedural,” and therefore “for the forum.” This approach is exemplified by the recent Supreme Court case of *Sun Oil Co. v. Wortman*.<sup>33</sup> I argue that the result in *Wortman* may only seem irrational, but that if *Wortman* was right, more careful interest analysis is needed to lay an intellectual foundation for it.

In Part II, I return to *Wortman* and the “substantive” model the defendant argued for in that case under the Full Faith and Credit Clause. I explore the similarly “substantive” approach of the Uniform Act, which ties limitations law to the source of the right sued upon. I compare the Uniform Act with revised section 142 of the *Restatement (Second) of the Conflict of Laws*, and critique new cases employing these approaches. I argue that the “substantive” formula is without persuasive power, and can lead to irrational or discriminatory results.

In Part III, I revisit *Wortman* to apply the methods of ordinary purposive legal reasoning to the problem it presented. In working through an interest analysis of the case, I identify the special problem of “the fractional interest.” I discuss relevant recent Commerce Clause cases bearing on extraterritorial applications of forum law when the forum may have only a “fractional interest” in applying its law. I also consider the bearing on this problem of the colloquy among the Justices in the recent Supreme Court case of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*<sup>34</sup> dealing with limitations law having apparently discriminatory extraterritorial impact. I find that it was open to the Supreme Court in *Wortman* to reach the *Wortman* result on more rational grounds than those relied on.

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33. *Id.*

34. 486 U.S. 888 (1988) (holding differential tolling of statute for nonresidents puts undue burden on interstate commerce).

I conclude that courts should choose limitations law without formulaic contrivances, employing ordinary purposive reasoning; and that they should choose limitations law independent of the law governing other issues in a case.

## II. THE “PROCEDURAL” MODEL

### A. *Three Candidates*

It might be supposed that I am about to round up the two usual suspects in any commentary on conflicts. We are used to two contending models for choices of law: an eclectic, modern approach relying on reasoned analysis, and a so-called “traditional” approach, relying on clear and easily applied formalisms. But it is essential to one’s grasp of today’s limitations debates to see that what we have here are not two, but three contending models. The first of these is indeed the familiar “traditional” one, under which the limitations issue is characterized as “procedural,” (1991) U. Ill. L. Rev. 691 and therefore for the forum to govern. This was the position of the first *Restatement of the Conflict of Laws* and its Reporter, Professor Beale. I begin with this model because it seems to raise the most acute theoretical questions. At the close of this paper I do deal with the modern method. But in between, I will deal with the third view, the view of those who regard the question of limitations as “substantive,” and therefore governed by the law of the place that governs the claim.

### B. *The “Procedural” Approach: The Puzzling Persistence of Principles Past*

Only a dwindling group of courts in this country remain traditionalist in their choice-of-law arrangements.<sup>35</sup> Yet most courts will apply their own limitations law as “procedural.” What we have here is a perplexing

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35. See Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA.L.REV. 49, 92 (1989). See generally Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L.REV. 521 (1983); Kozyris & Symeonides, *supra* note 3, at 601; George E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041 (1987); Symeonides, *supra* note 3, at 457.

persistence in otherwise modernist courts of this one counter-modernist choice.<sup>36</sup>

This persistence is especially puzzling in view of the seeming dangers of the approach. No problem arises when the forum has the shorter statute. Every court has presumptive power to preserve itself from having to try stale claims, even if it has scant connection with the parties or their dispute. Although some writers might downplay this protective interest,<sup>37</sup> litigators will recognize the administrative exigencies of courts with crowded dockets (operating, on the criminal side, under an imperative speedy trial rule). When the forum has scant connection with the parties and the underlying events in suit, that is all the more reason why the court will not want to expend its costly and scarce resources on an old dispute. So the forum has power to apply its own shorter statute to the case. The difficulty arises when the forum insists on applying, because “procedural,” its own longer statute. When the forum has scant connection with the parties or their dispute, commentators persuasively argue that the forum should not use its longer statute to revive the case.<sup>38</sup> When the forum has no meaningful connection with the claim, and the **(1991) U. Ill. L. Rev. 692** claim is time-barred in a state that does have meaningful connections with it, it seems unreasonable for the forum to open its doors, because no interest of the forum would be served by doing so. The forum would have no reason to help the nonresident plaintiff or to monitor out-of-state activities. No concern of judicial efficiency would be served by trial instead of dismissal.

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36. As the Court put this proposition in *Wortman*, the “procedural” characterization of the limitations issue is “traditional” and “subsisting.” See *infra* text accompanying note 71. Thus, until the revision of § 142 approved in May 1988, *Restatement (Second) of Conflict of Laws*, while generally departing from the “traditional” approach to the conflict of laws, made an exception in § 142 and retained the “procedural” characterization and consequent forum reference for the limitation of actions.

37. Joseph W. Singer has suggested that this interest is overemphasized (January 1991 meeting of the Section on Conflict of Laws of the Association of American Law Schools).

38. See, e.g., Grossman, *supra* note 13; James A. Martin, *Statutes of Limitations and Rationality in the Conflict of Laws*, 19 WASHBURN L.J. 405 (1980); Gary L. Milhollin, *Interest Analysis and Conflicts Between Statutes of Limitation*, 27 HASTINGS L.J. 1 (1975). For a suggestion to the contrary, see *infra* notes 97-102, 199-206 and accompanying text; see also *infra* notes 160-65 and accompanying text (on federal diversity cases).

### C. *The Schreiber Gimmick*

The best-known worst instance is probably the case of *Schreiber v. Allis-Chalmers Corp.*,<sup>39</sup> which arose after an earlier wave of tort reform in the 1970s. In *Schreiber* and the cases that follow it,<sup>40</sup> the plaintiff brings suit in a court located in a state that meets the following requirements: its statute of limitations has not yet run; it will characterize the limitations issue as “procedural” and will therefore apply its own longer statute; it will interpret its “borrowing statute,” if any, as not covering most cases, and thus will not borrow the shorter statute of any of the states with some connection to the case; the defendant is amenable to process there; and it is a federal diversity court.

Now the plot thickens. The inevitable transfer is effected under the federal transfer statute for inconvenient venue.<sup>41</sup> At the transferee court, the defendant moves to dismiss because the statute of limitations has run. What limitations law should the transferee court apply? There is a federal common law rule to deal with such situations, the rule of *Van Dusen v. Barrack*,<sup>42</sup> recently extended by the Supreme Court in *Ferens v. John Deere Co.*<sup>43</sup> The law that applies in cases of transfer for inconvenient forum is the law of the transferor forum state, including that state’s conflicts rules. That is so whether transfer is on motion of defendant or plaintiff.<sup>44</sup> The original reason for the rule was to preserve the plaintiff’s

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39. 611 F.2d 790 (10th Cir.1979) (Mississippi transferor state). For the Mississippi legislature’s ultimate response to *Schreiber*, see *supra* note 27.

40. See, e.g., *Goad v. Celotex Corp.*, 831 F.2d 508 (4th Cir.1987), *cert. denied*, 487 U.S. 1218 (1988); *McVicar v. Standard Insulations, Inc.*, 824 F.2d 920 (11th Cir.1987). *But see* *Ferens v. Deere & Co.*, 819 F.2d 423 (3d Cir.1987), *vacated*, 487 U.S. 1212 (1988). See generally Walker, *supra* note 27.

41. 28 U.S.C. § 1404(a) (1988).

42. 376 U.S. 612 (1964).

43. 110 S.Ct. 1274 (1990) (holding that rule of *Van Dusen* applies in cases of transfer on plaintiff’s as well as defendant’s motion).

44. The *Van Dusen* court left open the question whether the choice rules of the transferor forum would also govern issues in a case transferred on the plaintiff’s motion. The Supreme Court decided in *Ferens* that *Van Dusen* applied in this latter situation. *Id.* at 1280. A doubt may still remain about cases transferred under § 1406 or § 1407. Although cases could be found on both sides of the question, including cases that choose law without explanation, the broad tendency is to apply the *Van Dusen* rules. E.g., *In re “Agent Orange” Prod.Liab.Litig.*, 580 F.Supp. 690, 692, 695 (E.D.N.Y.1984) (*Van Dusen* applied

law-shopping advantage.<sup>45</sup> Since, in our hypothetical case on *Schreiber* facts, the transferor state would characterize the limitations issue as **(1991) U. Ill. L. Rev. 693** “procedural” and apply its own statute, the transferee court must apply that state’s statute too.

The upshot may be comfortable to the legal mind schooled in the metaphysics of *Klaxon v. Stentor*,<sup>46</sup> but it seems irrational.<sup>47</sup> Recall that in *Guaranty Trust v. York*,<sup>48</sup> federal equitable principles of limitation were in conflict with the state statute of limitations. The Supreme Court held that the federal court could not call its limitations law “procedural” and thus apply it. The Court mandated a *Klaxon* reference to the law of the state in which the federal court sat. But state limitations law is intended to protect the courts of that state - not the courts of the nation - from stale claims.<sup>49</sup>

The *Schreiber* variation on *Van Dusen* makes even less sense. The statute the transferee federal court must apply emanates from a state that not only lacks contact with the parties or their dispute, but also will not even be the forum for their dispute (as it would be in the typical *Klaxon* situation, in which a federal court is adjudicating an ordinary diversity case). In transferred forum non conveniens cases, the transferee court is the final destination of the suit. So the legislature of the transferor state winds up unwittingly protecting not only a federal court from stale claims, but one in another state. A further anomaly is that the transferee court borrows the sister-state statute of limitations because the sister state would

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in class action consisting of consolidated cases originally transferred for pretrial litigation under 28 U.S.C. § 1407).

45. *Van Dusen*, 376 U.S. 612, 633.

46. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (holding that law applied on state-law issue in federal court is whole law of state in which court sits, including state conflicts law).

47. See generally Martin, *supra* note 38; Grossman, *supra* note 13; Milhollin, *supra* note 38.

48. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) (holding that in state-law cases, federal courts must apply state law on limitation of actions, because issue is outcome determinative).

49. In oral argument in the recent case of *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), Justice Scalia raised the question whether a federal court would apply a state statute of limitations that, according to the legislative history, was enacted solely for the purpose of protecting the *state* courts from stale litigation. Counsel justified his affirmative response on grounds of *Erie* policy. 56 U.S.L.W. 3635, 3635-36 (1989) (summarizing oral argument of Feb. 29, 1988). *Ricoh* involved the duty of a federal transferor court confronted with a forum selection clause in a contract between the parties.

characterize the issue as “procedural,” and thus apply it itself. Yet the forum that reasons in a “traditional” way borrows sister-state law because the sister state would characterize limitations as “substantive,” conditioning the right sued on.<sup>50</sup>

*D. Prelude to Wortman: The Constitutionality of the Longer Statute of the Uninterested State*

Under *Klaxon* and *Guaranty Trust*, we have become accustomed to treating an issue as “substantive” for “*Erie*” purposes and “procedural” for *Klaxon* purposes.<sup>51</sup> But *Schreiber* (holding that a federal transferee (1991) U. Ill. L. Rev. 694 court must apply the statute of limitations that the transferor forum’s state would apply, even though that state’s only contact with the case was the amenability of the defendant to process there) seemed to be not only irrational and anomalous, but also unconstitutional.<sup>52</sup>

The constitutionality of choices of law is governed by the tests laid down in *Home Insurance Co. v. Dick*<sup>53</sup> and *Allstate Insurance Co. v. Hague*.<sup>54</sup> These cases hold, under the Due Process Clause, that an uninterested state may not apply its law if the law of an interested state is available. Conversely, a state with a legitimate interest in governing an issue by its laws is constitutionally free to do so. The interested forum is under no full faith and credit obligation to weigh the interests of some other, arguably more concerned state.<sup>55</sup>

To put this in more general terms, the Supreme Court provides minimal scrutiny of choices of law. The Court looks for a *rational basis*

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50. See, e.g., *Schreiber v. Allis-Chalmers Corp.*, 448 F.Supp. 1079 (D.Kan.1978), *rev’d*, 611 F.2d 790 (10th Cir.1979).

51. Cf. *Sampson v. Channell*, 110 F.2d 754 (1st Cir.1940) (holding, pre-*Klaxon*, that burden of proof of contributory fault was substantive under federal law for *Erie* purposes and procedural under forum state’s law for purposes of choosing which state’s law to apply).

52. Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U.COLO.L.REV. 67, 74-75 (1988) [hereinafter Weinberg, *The Place of Trial*].

53. 281 U.S. 397 (1930).

54. 449 U.S. 302 (1981).

55. *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493 (1939).



for the choice.<sup>56</sup> The state whose law a court applies must have a rational basis for - or as the Court says, an interest in - governing the particular issue under its particular law. It is an easy test, no doubt, but nonetheless one that *Schreiber* seems to flunk.

So how right it seemed, and how overdue, when the Third Circuit in *Ferens v. Deere & Co.*<sup>57</sup> struck down under the Due Process Clause the limitations statute of an uninterested transferor court. Judge Gibbons' *Ferens* opinion was sketchy, but gratifying to a rationalist. Nevertheless, the Supreme Court vacated and remanded *Ferens*<sup>58</sup> in the wake of *Sun Oil Co. v. Wortman*; the *Schreiber* gimmick remains good law.

#### E. Sun Oil Co. v. Wortman

On the constitutional level, the "procedural" model for choice of limitations law is exemplified by *Sun Oil Co. v. Wortman*.<sup>59</sup> *Wortman* was a multistate class suit in which the forum, Kansas, had applied its (1991) U. Ill. L. Rev. 695 own law to every issue. The named class representative was a Kansan, but most of the claims were claims of nonresident class members on out-of-state transactions concerning out-of-state gas lands. Nevertheless, the Kansas court chose to apply its own statute of limitations, longer than that of any concerned state, to open its doors to out-of-state claims. In Kansas' view, the issue of limitations was "procedural."

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56. Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U.CHI.L.REV. 440 (1982) (arguing that Supreme Court review of choices of law is not for fairness or federalism concerns but for rational basis; developing minimal scrutiny model) [hereinafter Weinberg, *Choice of Law and Minimal Scrutiny*]. The Court itself has not used the "rational basis" or "minimal scrutiny" formulations explicitly.

57. 819 F.2d 423 (3d Cir.1987).

58. 487 U.S. 1212 (1988) (vacating judgment in *Ferens* and remanding for reconsideration in light of *Wortman*). On the current availability of the *Schreiber* gimmick in Mississippi, see *supra* note 27.

59. 486 U.S. 717 (1988) (holding that forum in multistate class suit may apply its own longer statute of limitations to hear even out-of-state claims barred in more concerned states, because forum used traditional characterization of issue of limitations as "procedural"). For late comment on *Wortman*, see Bruce Posnak, *The Court Doesn't Know Its Asahi from Its Wortman: A Critical View of the Constitutional Constraints on Jurisdiction and Choice of Law*, 41 SYRACUSE L.REV. 875 (1990).

In the United States Supreme Court,<sup>60</sup> Sun Oil's constitutional challenge to Kansas' longer limitations period relied on the 1985 case of *Phillips Petroleum Co. v. Shutts*.<sup>61</sup> *Shutts* was the only modern case in which the Court had struck down a choice of law. The Court had held in *Shutts* that states can take jurisdiction over nationwide class suits. But the Court also had held that a state could not apply its own law to the out-of-state claims of the nationwide class. Instead, courts must find and apply the laws of the respective states that do have contacts with those claims.<sup>62</sup> What *Shutts* amounts to, for the mass case, is a *Van Dusen*-like mandatory reference, for each issue in the case, to sister-state law, and probably also to sister-state choice rules. There is this difference: Under *Van Dusen*, the law of the *state of the transferor forum* is a clearly designated initial reference. Under *Shutts*, the forum must choose as the initial reference<sup>63</sup> *some state that has significant contact* with the particular issue. After the Supreme Court decided *Shutts*, it had vacated and remanded the first *Wortman* case for reconsideration.<sup>64</sup>

On remand in *Wortman*, the Kansas courts, in the teeth of *Shutts*, stuck to their guns, again applying the local statute of limitations.<sup>65</sup> The Kansas Supreme Court distinguished *Shutts* as governing only substantive choices; limitations was a "procedural" issue.<sup>66</sup>

Kansas' connection with most of these claims was little more substantial than its general jurisdiction over the defendant. Where the period of limitations had run in the concerned jurisdictions, the argument

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60. *Wortman* had been before the Supreme Court before. On *Wortman I*, see *infra* note 62.

61. 472 U.S. 797 (1985).

62. After the decision in *Shutts*, the Supreme Court vacated the Kansas Supreme Court's first judgment in *Wortman* and remanded for reconsideration in light of *Shutts*. See *Sun Oil Co. v. Wortman*, 474 U.S. 806 (1985) (*Wortman I*).

63. In *Wortman*, 486 U.S. at 729 n. 3, five of the Justices referred to the necessity of considering the choice rules at the state of initial reference. In a separate opinion, two of the five majority Justices reiterated the question. *Id.* at 743 (O'Connor, J., joined by Rehnquist, C.J., concurring in part and dissenting in part). These queries could be overread to suggest that full faith and credit might be owing to the statute of limitations of a sister state which characterized its statute as "substantive." *Id.* at 741 (Brennan, J., concurring in part and concurring in the judgment).

64. 474 U.S. 806 (1985) (vacating *Wortman I* for reconsideration in light of *Shutts*).

65. 755 P.2d 488, 493 (Kan.1987).

66. *Id.*

could be made that Kansas lacked a rational basis for opening its doors to those claims. That Kansas had general jurisdiction over the defendant did not seem to help. Assuming the purpose of the Kansas statute of limitations, though providing a somewhat longer period than elsewhere, was to furnish repose to defendants, Kansas had no interest in applying (1991) U. Ill. L. Rev. 696 its statute so as to defeat the repose of a defendant doing business there. On this view, the choice of Kansas's limitations law could be said to lack a rational basis, and so to fail to satisfy the minimal scrutiny the Supreme Court provides under the Due Process Clause.

An irony of this familiar analysis is that when the forum has the longer of two statutes of limitations, the supposed conflict of limitations law may be illusory.<sup>67</sup> The sister state also may have little or no interest in having its statute applied. The shorter statute of the sister state cannot preserve the sister state from stale claims because the sister state is not the forum. Unless the defendant resides at the sister state, that place has no interest in seeing the plaintiff's claim cut off in some other state. The case would be an "unprovided for" case - that is, one in which neither state had an "interest." In this situation, the apparently uninterested forum with the longer statute would probably dismiss for forum non conveniens. If the forum has enough concern about the case so that the case survives the motion to dismiss for forum non conveniens, the forum might well apply its own statute to allow the plaintiff to go forward. There would be no particular reason to depart from the local statute. But *Wortman* was not such a case. In *Wortman*, to the extent that the claim states were places where Sun Oil transacted substantial business, those states would have a defendant-protective interest pro tanto in barring the claim under their shorter statutes.

The Court's grant of review in *Wortman* seemed to present a challenge to irrational traditional choices of law generally, not just to

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67. The fact that, as all of the opinions note, the concerned sister states did not characterize their statutes as "substantive" - that is, as applicable outside the state - suggests that *Wortman* may have been a false problem. 486 U.S. at 729 n. 3 (Scalia, J.); *id.* at 742 (Brennan, J.); *id.* at 743 (O'Connor, J.). (As Justice Brennan pointed out, however, many states apply forum limitations law without exception for limitations periods considered substantive by the foreign state. *Id.* at 741 (Brennan, J.)) To the extent this was so, it suggests that any conflict of laws on the issue was illusory, because none of the nonforum states had asserted any interest in the issue, and therefore none had claims to governance superior to those of Kansas.

choices of longer limitations law by the uninterested forum.<sup>68</sup> The Court had only once previously granted review to hear a challenge to a choice of law arrived at through a “traditional,” *First Restatement*, jurisdiction-selecting rule, and, after granting review, had sidestepped the issue. That was the well-known case of *Day & Zimmerman, Inc. v. Challoner*,<sup>69</sup> a challenge to an irrational choice of the law of the uninterested place of injury. So, until *Wortman*, the irrational traditional choice had enjoyed a perverse immunity from even minimal constitutional scrutiny. It might have been hoped that, with *Wortman*, the Court was at last prepared to scrutinize irrational but traditional choices of law.

From this perspective, the decision in *Wortman*, sustaining application(1991) U. Ill. L. Rev. 697 of the forum’s longer statute under the Due Process and Full Faith and Credit Clauses, was a disappointment.<sup>70</sup> The basic rationale was that the choice of forum limitations law was constitutional *because* it was traditional.<sup>71</sup>

*Wortman* was not well supported by the cases it cited.<sup>72</sup> The Supreme Court had decided the cited cases sustaining the forum’s longer statute<sup>73</sup> at a time when the courts did not generally perceive the possible irrationality of such a choice.<sup>74</sup> Even if a rule subsisting at the time of the Framers and in use ever since is presumptively constitutional, the lack of Supreme Court authority supporting the presumption on the facts presented invited fresh consideration. A showing of arbitrariness and irrationality ought to have overcome the presumption.

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68. See generally Weinberg, *Choice of Law and Minimal Scrutiny*, *supra* note 56.

69. 423 U.S. 3, 3-4 (1975) (per curiam) (holding that court of appeals erroneously disregarded rule of *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), in refusing to apply law of uninterested place of injury in false conflict case). For discussion of the case, see Weinberg, *The Place of Trial*, *supra* note 52, at 72-75.

70. *Wortman*, 486 U.S. at 729 (full faith and credit), 730 (due process).

71. *Id.* at 728.

72. E.g., *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953); *Townsend v. Jemison*, 50 U.S. (9 How.) 407 (1850); *M’Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312 (1839).

73. Of the cases cited *supra* note 72, only *Townsend* sustained the forum’s longer statute, and the challenge appears to have been exclusively under principles of the general federal common law. *Townsend*, 50 U.S. at 412, 419.

74. *But see* *Le Roy v. Crowninshield*, 15 F.Cas. 362, 368 (C.C.D.Mass.1820) (No. 8,269) (Story, J.).

What is disturbing about *Wortman* is not so much its willingness to immunize the “traditional” choice from constitutional scrutiny, as its virtual abandonment of reason. Justice Scalia’s opinion for the Court, joined by five other Justices on this issue,<sup>75</sup> scarcely broached the rational basis scrutiny<sup>76</sup> which *Dick*<sup>77</sup> and *Hague*<sup>78</sup> made obligatory - while purporting to rule under the Due Process Clause. The opinion for the Court contains only one footnote reference to *Hague*.<sup>79</sup> *Pacific Employers*,<sup>80</sup> another minimal scrutiny classic, is cited in support of the circular remark that the forum is free to choose its own law if “competent to legislate” on the subject.<sup>81</sup> Justice Scalia, it is probably fair to speculate, does not *like* the *Hague* plurality opinion, which has been the subject of controversy since the Court handed it down.<sup>82</sup> But he understood that an (1991) U. Ill. L. Rev. 698 interest analysis was required; in a truncated discussion of due process he stated, “A State’s interest in regulating the work load of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative

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75. Justice Brennan, joined by Justices Marshall and Blackmun, took issue only with the Court’s interest analysis of the limitations issue. 486 U.S. 717, 734-35 (Brennan, J., concurring).

76. See generally Weinberg, *Choice of Law and Minimal Scrutiny*, *supra* note 56.

77. *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (holding that, under Due Process Clause, state with only nominal contact with parties cannot modify parties’ contract).

78. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (Brennan, J.) (holding that interested forum may apply its law so as to modify contract made elsewhere, sustaining forum law where forum was only the after-acquired residence of plaintiff, place of employment of her decedent, and place where defendant was doing business). Justice Brennan speaking for the plurality stated: “[T]he State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” *Id.* at 313.

79. 486 U.S. at 728 n. 2 (Scalia, J.).

80. *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493 (1939).

81. 486 U.S. at 722.

82. See generally Symposium, *Choice-of-Law Theory After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L.REV. 1 (1981); Symposium, *A Response to the Hague Symposium*, 10 HOFSTRA L.REV. 973 (1982); Weinberg, *Choice of Law and Minimal Scrutiny*, *supra* note 56; Louise Weinberg, *Conflicts Cases and the Problem of Relevant Time*, 35 HOFSTRA L.REV. 1023 (1982).

jurisdiction to control the remedies available in its courts by imposing statutes of limitations.”<sup>83</sup> That is Justice Scalia’s entire due process analysis.<sup>84</sup> With respect, this analysis was not only brief but also unconvincing. Justice Scalia identified an interest that would support a state’s *shorter* statute, not its longer one.

I pause to note that today an argument for limiting *Wortman* could be based on Sun Oil’s failure to argue the due process issue.<sup>85</sup> Sun Oil placed little weight on rational basis scrutiny of limitations law. The company pitched its argument (I return to this point later)<sup>86</sup> on a far more radical position, looking to the Full Faith and Credit Clause. Justice Scalia seemed determined, in writing for the Court, to stick narrowly to Sun Oil’s radical contention, referring expressly to Sun Oil’s fixation on that contention.<sup>87</sup>

Justice Brennan, concurring, did attempt a rational basis scrutiny, testing in a general way the forum’s governmental interests in applying its own limitations law.<sup>88</sup> But he found that the forum’s choice of its own limitations law always passes the test.<sup>89</sup> Justice Brennan reasoned, vaguely, that the issue of limitations is sufficiently complex to invoke *some* forum interest.<sup>90</sup> He also stumbled into saying that the state’s longer statute implicated the “strong procedural interest any forum State has in

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83. 486 U.S. at 730.

84. Justice Scalia’s interest analysis is contained in a single sentence: “A State’s interest in regulating the work load of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations.” *Id.*

85. *See generally* Brief for Petitioner, *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988) (No. 87-352) (Dec. 1, 1987) [hereinafter Brief for Petitioner]; Transcript of Argument, *Sun Oil Co.* (No. 87-352) (Mar. 22, 1988) [hereinafter Transcript of Argument]. *See infra* note 107 and accompanying text.

86. *See infra* note 107 and accompanying text.

87. Justice Scalia wrote: “petitioner . . . devotes much less argument to [the due process] issue.” 486 U.S. at 729 n. 3.

88. *Id.* at 736 (Brennan, J., concurring in part and concurring in the judgment).

89. “In light of . . . the inherent ambiguity of any more refined inquiry . . . , there is some force to the conclusion that the forum State’s contacts give it sufficient procedural interests to make it ‘neither arbitrary nor fundamentally unfair,’ . . . for the State to have a *per se* rule of applying its own limitations period to out-of-state claims. . . .” *Id.* at 738-39.

90. *Id.* at 738.

having administrable choice-of-law rules.”<sup>91</sup> With respect, this view seems unfortunate. The trouble is that it would immunize from constitutional scrutiny the whole panoply of “traditional” choice rules. That Justice Brennan himself could not have approved such a course is plain; he criticized the majority for an opinion which “on its face” would apply to “substantive” as well as “procedural” choices.<sup>92</sup> **(1991) U. Ill. L. Rev. 699**

*F. In the Wake of Wortman*

How slippery is the slope now? The Court’s unanimous<sup>93</sup> refusal to distinguish between the forum’s power to apply a shorter and a longer statute theoretically could immunize from even minimal scrutiny all irrational traditional choices - just as Justice Brennan argued. To so apply *Wortman* would not even require overruling *Hague* and the great number of cases supporting interest-analytic review of state choices of law.<sup>94</sup> It would mean only that the “traditional” choice always would be deemed to pass the rational basis test.

Nor is this threatened post-*Wortman* scenario in any way inconsistent with *Shutts*. The obligation of the uninterested forum in a class suit to apply the law of an interested state would remain. But a state chosen through a “traditional” rule always would be deemed to have an interest.

Yet this worst case scenario would only rubber stamp an existing situation. In fact, the Court does not strike down traditional choices, however irrational. And extending *Wortman* to all “traditional” choices

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91. *Id.*

92. “Even more troublesome is the Court’s sweeping dicta that any choice-of-law practice that is ‘long established and still subsisting’ is constitutional. . . . This statement on its face seems to encompass choice-of-law doctrines on purely substantive issues.” *Id.* at 740.

93. Justice Brennan, with whom Justices Marshall and Blackmun joined, concurred in the result on the limitations issue, writing separately only to distance himself from the Court’s analysis: “The Court’s technique of avoiding close examination of the relevant interests by wrapping itself in the mantle of tradition is as troublesome as it is conclusory.” *Id.* at 739. Justice Kennedy took no part in the case.

94. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Nevada v. Hall*, 440 U.S. 410 (1979); *Clay v. Sun Ins. Office Ltd.*, 377 U.S. 179 (1964); *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954); *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 294 U.S. 532 (1935); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

would spare the Court from embarking on a new program of distinguishing “substance” from “procedure.” It is hard to believe the Court would welcome any such mission. On the other hand, a program of distinguishing sufficiently “traditional” rules from insufficiently “traditional” ones seems equally uninviting.<sup>95</sup> Imagine two courts making identical choices of law, one through a “traditional” choice, and the other through some modern methodology. For the Supreme Court to scrutinize the latter, while immunizing the former, would be to constitutionalize the “traditional” methodology all over again. For very good reasons, the Court got out of that business over half a century ago.<sup>96</sup>

Yet the unanimity of the Court on the limitations issue is understandable. **(1991) U. Ill. L. Rev. 700** It is hard to saddle a court with another state’s access rules. If a current function of the “procedural” model is, in fact, to enable courts to let cases go forward, the question arises: Is broader access to an “uninterested” forum really a system failure? Or has the system failed only to provide an intellectual basis for it?

As we have seen, even in this docket-clearing era some courts remain unwilling to enforce limitations law rigorously.<sup>97</sup> It also seems relevant that both new codified “solutions,” that of the American Law Institute and that of the Conference of Commissioners on Uniform State Laws, share the curious feature of new loopholes. Revised section 142 of the

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95. Justice Scalia’s attempt in *Wortman* to distinguish, as insufficiently traditional, *Milwaukee County v. M.E. White Co.*, 296 U.S. 265 (1935), is an ominous harbinger. 486 U.S. at 723-24 n. 1.

96. *See Alaska Packers Ass’n v. Industrial Accident Comm’n*, 294 U.S. 532 (1935) (holding that each interested state was entitled to apply its own laws in its own courts). For a discussion of policies supporting this abrupt termination of the Court’s earlier regime of forced territorialist choices, *see* Weinberg, *Choice of Law and Minimal Scrutiny*, *supra* note 56, at 470-78. *Cf.* *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 (1981) (plurality opinion) (Brennan, J.). The Court stated:

It is not for this Court to say whether the choice-of-law analysis suggested by Professor Leflar is to be preferred or whether we would make the same choice-of-law decision if sitting as the Minnesota Supreme Court. Our sole function is to determine whether the Minnesota Supreme Court’s choice of its own substantive law in this case exceeded federal constitutional limitations.

*Id.* at 307.

97. *See supra* notes 15-28 and accompanying text.



*Restatement (Second)*,<sup>98</sup> approved (as amended)<sup>99</sup> on May 1, 1988, includes a loophole for “exceptional circumstances,” one which the *Comment* extends to cover cases of serious “inconvenience.” The new Uniform Act,<sup>100</sup> for its part, contains an equally new escape hatch for “unfairness.”

The “longer-of-the-two-statutes” rule emerging from some of the case law<sup>101</sup> seems related to these developments; it is a rule of alternative reference which carries with it a presumption in favor of access, the way the “higher-of-the-two interest rates” rule for usury cases carries with it a presumption in favor of validity of the loan.<sup>102</sup>

The unanimity of the *Wortman* Court on availability of the forum’s longer statute thus seems part of a larger pattern. That Justices Brennan, Marshall, and Blackmun concurred with the conservatives on the availability of the forum’s longer statute, quite apart from the attractiveness of an access rule to the liberal mind, suggests the force of the argument that, after all, the forum might have an interest in furnishing access. Before we consider the possible policies supporting these patterns it will be convenient to consider the alternative models of choice of limitations law.

The obvious alternative to the “procedural” model might seem to be that offered by the modernists’ analytic,<sup>103</sup> if eclectic,<sup>104</sup> approach to conflicts questions - an approach that on the constitutional level becomes

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98. The Reporter for this project, continuing in the *Restatement (Second)* role with which he was intimately associated, was the late Willis Reese.

99. A successful floor amendment offered by the author made the “exceptional circumstances” loophole described in the text available to the forum seeking to apply its own longer statute as well as the forum seeking to apply a sister state’s longer statute. Section 142 (as amended, 1988) appears *infra*, in the Appendix.

100. 12 U.L.A. § 4 (Supp.1991). The guiding hand in this project was that of Professor Leflar. See Robert A. Leflar, *The New Conflicts-Limitation Act*, 35 MERCER L.REV. 461 (1984). The Uniform Act appears in pertinent part *infra* in the Appendix.

101. See *supra* note 25 and accompanying text.

102. The classic case remains *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927); see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 (1971).

103. See *infra* notes 166-212 and accompanying text.

104. See Robert A. Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP.PROBS. 10 (1977).

(1991) U. Ill. L. Rev. 701 minimal rational-basis scrutiny.<sup>105</sup> Certainly, all that Sun Oil had to argue in *Wortman*, citing *Dick*, *Hague*, and the recent reiteration of the position in *Shutts*,<sup>106</sup> was that Kansas lacked power to revive claims in which Kansas had no interest - at least when an interested state had already extinguished those claims. Oddly, Sun Oil failed to seize this opportunity. Instead, Sun Oil argued that the limitations issue was “substantive.”

## II. THE “SUBSTANTIVE” MODEL

### A. Sun Oil Co. v. Wortman

In *Wortman*, Sun Oil swung a full 180 degrees around from the “procedural” model relied on by the Wortmans, and, ignoring the rational basis/governmental interest test, argued instead that the limitations issue was “substantive.”<sup>107</sup> In other words, Sun Oil argued that the forum owed full faith and credit to the limitations law of “the claim state.” Sun Oil thus hoped the Supreme Court would accept a third approach, the “substantive” model.

Under this model, the limitations issue is invariably characterized as “substantive,” instead of “procedural.” The effect of the characterization is to postpone choice of limitations law until after the forum chooses the place that will govern the substantive issues. Then, that state’s limitations law is picked up too. Sun Oil argued that this process was constitutionally required.

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105. That is because the necessary rational basis for an application of a state’s law will be found in the state’s legitimate governmental interest. Thus, rational-basis scrutiny is always interest-analytic. *See generally* Weinberg, *Choice of Law and Minimal Scrutiny*, *supra* note 56.

106. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985).

107. *See* Transcript of Argument, *supra* note 85. This argument falls naturally under the Full Faith and Credit Clause, as the *Wortman* Court assumed. At oral argument, counsel for Sun Oil spent substantially all his time on this argument, prompting one of the Justices to attempt to change the subject to the Due Process Clause. *Id.* at 9. Counsel, however, reverted to the full faith and credit argument shortly thereafter. *Id.* at 12. Indeed, in the closing minutes of his allotted time the Court reminded him of the other issue in the case, the choice of interest rate:

The Court unanimously rejected the “substantive” model Sun Oil urged upon it.<sup>108</sup> As Justice Scalia put it, the Court declined to “constitutionalize” conflicts law by forcing states to recharacterize their statutes of limitation as “substantive.”<sup>109</sup> (1991) U. Ill. L. Rev. 702

### *B. The Uniform Conflict of Laws Limitations Act*

The “substantive” approach was taken in a preliminary, and now discarded, tentative draft on choice of law by the Reporters of the current ALI Project on Complex Litigation.<sup>110</sup> That draft proposed that the complex litigation forum should choose the law under which the substantive rights of the plaintiffs arise, including that state’s limitations law. The categorical reason offered in the accompanying *Comment* was that limitations is invariably substantive.<sup>111</sup> The Uniform Act also employs the “substantive” approach.<sup>112</sup> Under the Uniform Act, the forum chooses, under its usual choice of law method, the place of substantive governance. The forum then applies that place’s limitations law.<sup>113</sup> The question arises, how is it possible to choose, under any of the modern

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QUESTION: Is there an interest argument here, what rate of interest?

Mr. Sawatzky: Yes, there is.

Question: Are you going to leave that to your brief?

Mr. Sawatzky: I am going to argue that right now, Your Honor.  
(General laughter.)

*Id.* at 21.

The Brief for Petitioner similarly focused on the “substantive model” argument on the choice of limitations law. *See* Brief for Petitioner, *supra* note 85.

108. All of the sitting Justices concurred in Justice Scalia’s opinion on this point. *See* 486 U.S. 717, 723 (Scalia, J.); *id.* at 734-35 (Brennan, J., concurring in part and concurring in the judgment, joined by Marshall & Blackmun, J.J.); *id.* at 744 (O’Connor, J., concurring in Pt. II of the Court’s opinion, joined by Rehnquist, C.J.).

109. *Id.* at 727-28.

110. *See* DRAFT NO. 3, *supra* note 31.

111. “Limitations laws are inextricably yoked to liability.” *Id.* at 55.

112. UNIF. CONFLICT OF LAWS LIMITATIONS ACT §§ 1-10, 12 U.L.A. 60-61 (Supp.1991). The Act is given, in pertinent part, in the Appendix to this article. The United Kingdom has adopted a “substantive” model approach as well. Foreign Limitation Periods Act, 1984, ch. 16, § 1(1) (Eng.).

113. UNIF. CONFLICT OF LAWS LIMITATIONS ACT §§ 2(a)(1)-(2), 12 U.L.A. 60 (Supp.1991).

approaches, one place of substantive governance? Modernist courts apply law issue by issue; different laws may apply to different issues. Even the otherwise retrograde tentative proposals of the Complex Litigation Project would break a case down into issues for choice of law purposes. The intention of the Commissioners was that the forum make a single choice, under the forum's own choice rules, and that the forum itself solve the problem of *which* issue to link to limitations.<sup>114</sup>

The Uniform Act is not in effect a borrowing statute. It is true that, under a typical borrowing statute, the initial reference would be to the law of the place where the cause of action "accrued." Of course, it is not unlikely that this place would continue to strike judges as the place that substantively ought to govern a case. Borrowing statutes, however, typically borrow only shorter limitations law, except perhaps when the plaintiff is a resident of the forum.<sup>115</sup> Under the Uniform Act, courts will **(1991) U. Ill. L. Rev. 703** apply the law of the place of substantive governance regardless of whether cases are cut off or revived in consequence. In its way, the approach is as detached from reason as its

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114. See Leflar, *supra* note 100, at 465. See generally John W. Ester, *Borrowing Statutes of Limitations and Conflict of Laws*, 15 U.FLA.L.REV. 33 (1962); Grossman, *supra* note 13, at 36; Vernon, *supra* note 13.

115. The exception in favor of the local plaintiff has been challenged as discriminatory. See *Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 562 (1920) (sustaining exception in favor of resident plaintiffs). However, the exception in favor of the local plaintiff actually would seem to be necessary to *avoid* discrimination. On the assumption that the state has an interest in providing a forum for its residents for the longer period the local legislature has provided, the state could justify denying access to a class of resident plaintiffs whose actions are time-barred where they accrued only if the fact of out-of-state accrual could furnish a rational basis for doing so. Out-of-state accrual, however, where relevant at all, would seem to support application, rather than withholding, of the forum's longer statute; it might have taken time, for example, for the plaintiff to return home after the occurrence, or it might have been difficult to obtain facts about the occurrence from the home base. The general interests of the state of occurrence would also favor adjudication; because it will not be the forum, it retains no interest in subordinating its general interest in adjudication of claims accrued on its territory to its interest in preserving its courts from stale claims. Finally, the forum's interest in giving access to its residents would seem wholly independent of the place where its residents sustain losses.

opposite, the “procedural” model. The same lottery-like effect was also a feature of the abandoned ALI draft.<sup>116</sup>

Analogues of the “substantive” model can be seen in such cases as *Shutts, Van Dusen v. Barrack, Guaranty Trust*,<sup>117</sup> and *Klaxon v. Stentor*. In all of these instances, the forum is forced to make an initial reference to the law of some nonforum sovereign.<sup>118</sup> There is one important difference between the Uniform Limitations Act and the “substantive” model in these cases. Under *Van Dusen v. Barrack*, federal transferee courts adjudicating state law questions must defer to the choice rules of the transferor court. Under *Klaxon* and *Guaranty*, federal courts adjudicating state law questions must defer to the choice rules of the forum state. *Shutts* was silent on the point, but courts after *Shutts* are confronted with the question whether the contact state *would* apply its own law, just as they are under *Van Dusen*. All of the sitting Justices in *Wortman* raised the point that none of the other states involved in *Wortman* considered their own statutes “substantive,” and therefore applicable to actions in Kansas.<sup>119</sup> That unanimous attention to what the other states “would” do furnishes strong authority for the view that the *Shutts* reference is to the *whole* law of the relevant nonforum state, including its choice rules. The Uniform Act (and the initial ALI proposal) work differently, avoiding renvoi, and opting for the limitations law of the chosen state whether that state “would” apply it or not. Thus, that state’s borrowing statute must be ignored, although its tolling and accrual rules will be adopted with its statute of limitations.<sup>120</sup>

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116. The latest draft provides an option, *see infra* note 158 and accompanying text (discussing DRAFT NO. 4, *supra* note 31). *See* Mary Kay Kane, *Drafting Choice of Law Rules for Complex Litigation: Some Preliminary Thoughts*, 10 REV.LIT. 309, 321-32 (1991). Professor Kane is the Associate Reporter for the Project.

117. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) (holding that in federal cases as to which state law would provide substantive rules of decision, courts must follow state rules, including choice rules governing limitation of actions, because issue is outcome determinative).

118. Of course, under the Uniform Act, the forum may choose itself as the place of substantive governance.

119. *See supra* notes 63 & 67 and accompanying text.

120. UNIF. CONFLICT OF LAWS LIMITATIONS ACT § 2(a), 12 U.L.A. 60 (Supp.1991). The current ALI proposal for limitation of complex cases would import borrowing, tolling, and accrual rules along with the chosen limitations law. DRAFT NO. 4, *supra* note 31, § 6.05(a) provides: “The law selected under this section will govern all matters involving the application of the limitations period chosen.”

The “substantive” model must have seemed a fine idea for the Uniform Act. The Commissioners clearly thought it well worth rejecting not only the old “procedural” model, but also the analytic model preferred by modernist writers. The reasoning might well have been that if limitations law is governed by the place that would govern the substantive issues in a case, the choice could not be wholly irrational. At the same (1991) U. Ill. L. Rev. 704 time, most American courts working under the Act would choose the state “of most significant contact” with the case, and this was likely to be the same state in all such courts. Thus, the substantive model would seem to furnish a measure not only of rationality, but also of uniformity.<sup>121</sup> Unfortunately, as Brainerd Currie once famously and conclusively demonstrated, it is not possible for most choices of law to be both rational and uniform at the same time.<sup>122</sup> Courts have reluctantly jettisoned uniformity as a goal of conflicts method; its price - the abandonment of reason - is too high. So alas for their bright hopes, the Commissioners were heeding the song of the Sirens. That they were headed toward reefs and shoals is demonstrated by the Eighth Circuit’s case of *Perkins v. Clark Equipment Co.*<sup>123</sup>

*Perkins* was a product liability suit in a federal diversity court in North Dakota. North Dakota was the place of manufacture of the allegedly defective product. In affirming a judgment dismissing the suit, the Eighth Circuit reasoned that North Dakota, under its “place of most significant contacts” approach, would hold that Iowa, the plaintiff’s residence, where the injury occurred, was the “place of most significant contact.”<sup>124</sup> This conclusion has a plausible ring: surely the state where the plaintiff resides and where the injury occurred is the place of most significant contact in a products suit. Certainly it is a place of more significant contact than the place of manufacture, the forum. The *Perkins* court then turned its attention to Iowa’s statute, and noting that Iowa’s statute had run, held for the defendant.<sup>125</sup> The circuit court pointed out

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121. See Grossman, *supra* note 13; Leflar, *supra* note 104.

122. Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U.CHI.L.REV. 227, 246 (1958), reprinted in BRAINED CURRIE, *SELECTED ESSAYS ON CONFLICT OF LAWS* 77, 101 (1963).

123. 823 F.2d 207 (8th Cir.1987).

124. *Id.* at 209.

125. *Id.* at 208.

that the result would be the same under the new Uniform Act, recently adopted by the North Dakota legislature.<sup>126</sup>

As any rookie interest analyst can see, the *Perkins* result is simply an embarrassment. One has no doubt that North Dakota would reach that result, and that the law that the court applied was the law of the place of most significant contact - or at least of most contact. But the decision remains an embarrassment. *Perkins* was a false conflict - that is, a case in which only one state had a legitimate governmental interest. In such cases, the only rational solution is to apply the law of the only interested state. In *Perkins*, the forum state was "interested"; North Dakota, as the place of manufacture, had sufficient legislative jurisdiction to furnish a forum for adjudication of an allegation of a defect in manufacturing there. On the other hand, neither as the plaintiff's domicile nor as the place of injury could Iowa have had any interest in protecting the (1991) U. Ill. L. Rev. 705 forum from stale claims, because Iowa was not the forum. Iowa's general interests, both as plaintiff's domicile and as place of injury, were real enough, but they would have been interests in adjudicating the injury, not in barring adjudication - interests Iowa shares with the place of manufacture, North Dakota. Application of Iowa's shorter statute to turn the plaintiff out of court could not advance those general interests. As Justice Brennan remarked in his *Wortman* concurrence, "The claim State does not, after all, have any substantive interest in *not* vindicating rights it has created."<sup>127</sup> I might add that when the forum irrationally deprives a nonresident of the benefit of law it has an interest in applying, the action may well be not only irrational, but also discriminatory.<sup>128</sup>

The example makes plain the methodological mistake of the "substantive" approach. The substantive approach is roughly like *Restatement (Second)* without section 6.<sup>129</sup> Under that approach, the

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126. *Id.* at 208-10; *see also* *Hein v. Taco Bell, Inc.*, 803 P.2d 329 (Wash.Ct.App.1991) (resident barred under statute of place of injury under Uniform Act).

127. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 737 (1988) (Brennan, J., concurring in part and concurring in the judgment).

128. *See generally* Louise Weinberg, *Against Comity*, 80 GEO.L.J. 53, 87-93 (1991) [hereinafter Weinberg, *Against Comity*]; Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L.REV. 595, 597 and *passim* (1984) [hereinafter Weinberg, *On Departing from Forum Law*].

129. For the novice, one should explain that the characteristic mechanism of *Restatement (Second)* is to direct the reader to the place of most significant contact (with respect to the particular issue) with the parties and occurrence; but

forum does not choose law - it only selects a state. It does so without considering its own interests, the interests of sister states, or the needs of the interstate system. The forum chooses law by listing contacts and then making an arbitrary ranking of the enumerated contacts. Although many courts, purporting to apply *Restatement (Second)*, do choose limitations law in just this unreasoning way, few observers today believe justice has to be this blind. Like the abortive first ALI draft proposal, the Uniform Act should have been recognized as a wrong turn. Unfortunately, at last count five states have adopted the Act: Arkansas, Colorado, North Dakota, Oregon, and Washington. The United Kingdom adopted a similar statute in 1984.<sup>130</sup>

C. “Substantive Model” Commentary in Revised Restatement  
(Second) Section 142

The new revision of *Restatement* section 142 is somewhat more adroit.<sup>131</sup> The intention of revised section 142 seems to be that limitations law be chosen rationally. To that end, section 142 makes a radical departure from the usual *Restatement* mechanism. The drafter might have invited the reader, as is done virtually everywhere else in *Restatement (1991) U. Ill. L. Rev. 706 (Second)*, to choose the law of the place of most significant contact with the parties and the occurrence with respect to the issue (of limitations). But consider the experience under the Uniform Act. A reference to “the place of most significant contact with the parties and occurrence” might have misled courts into doing what the *Perkins* court did, failing to choose limitations law directly and independently. *Restatement* moves the reader at once to section 6, opening up for immediate consideration the functional desiderata enumerated there. Courts choosing limitations law this way can proceed straightforwardly to

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this will be accompanied by a reminder that the court chooses that place with reference to the policies enumerated in § 6. Turning to § 6, the reader discovers that an informed choice of law will take into account the interests of the forum, the interests of other concerned states, and the needs of the interstate system, among other things. Section 6, then, makes *Restatement (Second)* a workable modern approach.

130. Foreign Limitation Periods Act, 1984, ch. 16, § 1(1) (Eng.).

131. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1988). Revised § 142 is reprinted in the Appendix, *infra*, together with excerpts from the accompanying Comments.



the essential task of exploring the interests of the forum and of the other concerned states.

In *Tomlin v. Boeing Co.*,<sup>132</sup> a federal appeals court held that Washington would use this more direct and analytic method of choosing limitations law. The court rejected the “substantive model” counterargument, that Washington would employ interest analysis only to choose the governing state, and then would apply the limitations law of that state.<sup>133</sup>

Unfortunately, *Restatement* is going to get courts into trouble despite its advantages. Not content with the reference to section 6, the Institute sought to furnish “guidance” with a set of sweeping black letter rules about what the forum will do “ordinarily.”<sup>134</sup> Courts tend to follow these mechanically without referring to section 6. Equally disturbing, there are mistakes of analysis in the accompanying *Comments*. Reasoning more appropriate to the “substantive” model lingers on and infects the *Comments* in a variety of ways.

*Comment g*,<sup>135</sup> for example, would give irrational tie-breaking power to the place of injury in certain true conflicts of limitations law. Where the plaintiff resides at the forum, the forum having a longer statute, and the defendant resides at the place of injury, that state having a shorter statute, *Restatement* takes the position that the forum ordinarily should not entertain the claim. That view may appeal to confirmed contact-counters, but will puzzle rationalists. The place where the defendant resides does retain an interest in having its shorter statute applied, in order to protect “its” defendant; thus, the result is not utterly insupportable, as is the result in *Perkins*.<sup>136</sup> But there is no magic tie-breaking power in the place of injury. The defendant’s state cannot pick up any more interest, as the place of injury, in barring the suit, than it already has as the place where

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132. *Tomlin v. Boeing Co.*, 650 F.2d 1065 (9th Cir.1981).

133. *Id.* at 1070.

134. See revised § 142 in the Appendix, *infra*.

135. Comment g provides:

[Where the] forum has the longer statute . . . [and] where the domicile of the plaintiff is in the state of the forum and that of the defendant is in the other state with the most significant relationship to important issues in the case . . . the forum should only entertain the claim in extreme and unusual circumstances.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 cmt. g, ¶ 5 (1988); see also *infra* Appendix.

136. See *supra* notes 123-29 and accompanying text.

the defendant resides. The general interest of the (1991) U. Ill. L. Rev. 707 place of injury is in adjudicating the injury, not in barring adjudication. Recall again Justice Brennan's observation to this effect in *Wortman*.<sup>137</sup> The plaintiff's state can indeed pick up some further interest in entertaining the claim if it is also the place of injury, but it already has an interest.

The Reporter here may have had the common but erroneous notion that the place where the plaintiff resides cannot, on the strength of that fact alone, give the benefit of its law to its resident. Perhaps he thought that for the forum to benefit "its own" would be parochial, and perhaps discriminatory vis-a-vis the nonresident party.<sup>138</sup> Or he may have over-read the case of *Home Insurance Co. v. Dick*.<sup>139</sup> The late Professor Martin, too, read *Dick* to hold that the place of plaintiff's residence, without more, cannot apply its law to benefit the plaintiff.<sup>140</sup> The Supreme Court once said as much, in 1934, in the *Delta & Pine* case.<sup>141</sup> In *Hague*, however, the Court remarked of *Delta & Pine*, "That case, however, has scant relevance for today."<sup>142</sup> *Dick* is better understood as standing for the proposition for which the Court cites it today, that a state without significant contact with a case cannot govern it.<sup>143</sup> Today, the Court shrugs off as "nominal" *Dick*'s residence at the forum state.<sup>144</sup> *Dick*'s local residence was not a found fact, but only a naked allegation of the complaint; the parties agreed that at all relevant times *Dick* was a resident

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137. See *supra* notes 123-29 and accompanying text.

138. For a much-cited exposition of this concern, see John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L.REV. 173 (1981). But see Weinberg, *On Departing from Foreign Law*, *supra* note 128, at 596-97 nn. 4, 6 (replying to Professor Ely).

139. 281 U.S. 397 (1930).

140. James A. Martin, *The Constitution and Legislative Jurisdiction*, 10 HOFSTRA L.REV. 133, 142-46 (1981). But see Louise Weinberg, *Conflicts Cases and the Problem of Relevant Time: A Response to the Hague Symposium*, 10 HOFSTRA L.REV. 1023, 1026-27 nn. 16, 18 (1982) (replying to Professor Martin) [hereinafter Weinberg, *Relevant Time*].

141. *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934).

142. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 309 n. 11 (1981).

143. "*Dick* concluded that nominal residence - standing alone - was inadequate." *Id.* at 311 (Brennan, J.). "*Dick* . . . held squarely that *Dick*'s postaccident move to the forum State was 'without significance'". *Id.* at 337 (Powell, J., dissenting).

144. *Id.* at 311 (Brennan, J.).

of Mexico. But the Court has never denied the power of the actual bona fide residence of the plaintiff to legislate in the plaintiff's behalf. In *Hague*, the Court treated even the *after-acquired* residence of the plaintiff as relevant, aggregating it with other contacts in the case to sustain forum power.<sup>145</sup> In any event, the Court has sustained forum law applied to benefit residents.<sup>146</sup> **(1991) U. Ill. L. Rev. 708**

What has been lost sight of here is the fundamental concept of empowerment. We require states to have a governmental interest not as a limit on their power to act, but because governmental interest is the *source* of state power.<sup>147</sup> It is a commonplace that when the sovereign interest requires it, courts will imply power and fashion law. The sovereign's sphere of governmental interest is, precisely, to provide for the general welfare of *residents*. Derived from that, the sovereign will have power to provide for the welfare of others on the territory, and to provide for the security of things there, the facilitation of beneficial activity there, and the prevention or deterrence of harmful activity there. The sovereign will also have powers over extraterritorial persons, things, and events, to the extent those overlap its sphere of interest in the welfare of its residents.

By all means, let us guard against discrimination. But discrimination against nonresidents in these cases is a nonissue. The forum is not empowered to provide directly for their general welfare, and thus nonresidents are often significantly distinguishable from residents.

It might be discriminatory, on the other hand, for the forum to deny the benefit of its laws to some *residents* on the ground that events in their cases occurred elsewhere, or that things in their cases were located

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145. *Id.* at 319.

146. *See, e.g.,* G.D. Searle & Co. v. Cohn, 455 U.S. 404 (1982) (holding differential tolling for nonresidents does not violate Equal Protection Clause because nonresidents are distinguishable from residents as being harder to sue); Canadian N. Ry. Co. v. Eggen, 252 U.S. 553, 562 (1920) (sustaining borrowing statute's discriminatory exception in favor of residents). The extreme example, because available *ex parte*, even on patently sham allegations of residency, is probably the power of the state to give its resident the right to remarry. *See* Williams v. North Carolina, 317 U.S. 287 (1942) (*Williams I*). The divorce decree in such circumstances is open to collateral attack on the ground that the allegation of residency was a sham. Williams v. North Carolina, 325 U.S. 226 (1945) (*Williams II*).

147. I am building here on Weinberg, *Relevant Time*, *supra* note 140, at 1026-27, and on Weinberg, *Choice of Law and Minimal Scrutiny*, *supra* note 56, at 444.

elsewhere.<sup>148</sup> It is unlikely that the forum could identify a rational basis for a classification removing from the protections of its laws residents who have been injured or who have transacted business outside the state, when the deleterious effects of the transaction or occurrence can be felt back home in the forum state.<sup>149</sup>

*Restatement's* concern may have been a somewhat subtler one. The Reporter may have reasoned that the statute of limitations is a door-closing law. As such, it is always a strain to apply it in such a way as to open the door to litigation, even when the door-opening is on behalf of a resident plaintiff. But that reasoning seems overly restrictive. The state where the plaintiff resides would have a legitimate interest in giving its resident the full benefit of whatever period the legislature has provided. There is a nice example of accommodating that interest in the 1987 Third Circuit case of *Warner v. Auberge Gray Rocks Inn, Ltee.*<sup>150</sup> *Warner* was an action by a New Jersey skier for personal injuries sustained at a Quebec ski resort. The action was timely under New Jersey law, but would have been barred under the law of Quebec. The circuit court held that (1991) **U. Ill. L. Rev. 709** New Jersey would apply its longer statute to entertain the claim. The court duly considered *Restatement's Comment g* to the contrary, but held that New Jersey would reject *Comment g*. Judge Pollak, sitting by designation, wrote with the lack of enthusiasm characteristic of those who somehow doubt the propriety of the plaintiff's state's power to benefit the plaintiff.<sup>151</sup> But the result is correct, and not only because New Jersey famously does take such positions.<sup>152</sup>

The *Comments* show other unfortunate effects of "substantive" model thinking. For example, the *Comments* recognize insufficient door-opening power at the forum that is the place of injury, and credit with too much

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148. See *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 518-19 (1953) (explaining *Hughes v. Fetter*, 341 U.S. 609 (1951), on this ground).

149. See generally Weinberg, *On Departing from Forum Law*, *supra* note 128. But see *Guertin v. Harbour Assurance Co. of Bermuda*, 415 N.W.2d 831 (Wis.1987) (sustaining state borrowing statute under Equal Protection Clause where shorter statute of place of injury barred action; no exception was made for resident plaintiff). It seems obvious that cases like *Guertin* apply the law of an uninterested state in a false conflict. For discussion see *supra* text at notes 123-28.

150. 827 F.2d 938 (3d Cir.1987).

151. *Id.* at 942-43.

152. See Marc S. Klein, *A Critical Analysis of New Jersey's Domicile-Driven Choice of Law Methodology*, 17 SETON HALL L.REV. 204 (1987).

door-closing power the sister state that is the joint domicile of the parties.<sup>153</sup> Where the joint domicile would not open its doors to settle the dispute between its residents, and where the forum is the place of injury, it is a fundamental mistake to imagine that the place of injury lacks a legitimate interest in opening its doors.<sup>154</sup> Moreover, the general interests of the joint domicile would support letting the adjudication go forward at the forum. It is true that the joint domicile with a shorter statute will apply the shorter statute in its own courts, thus subordinating its general remedial concerns. But because, in this hypothetical case, the proposed forum is not at the joint domicile, but rather at the place of injury, the joint domicile's views on stale claims are irrelevant. The forum, as the place of injury, has an interest in adjudicating the injury that occurred there.

That interest must extend to furnishing a forum to the nonresident plaintiff injured there.<sup>155</sup> The forum can hardly prosper by declaring open season on visitors; nor can it maintain the safety of the territory for locals by leaving the territory unsafe for visitors. The forum's interest in making the territory safe for the particular transaction benefits its own residents, but the forum cannot administer that interest with reliability for local residents unless it administers it evenhandedly for all. That interest supports equal access to the forum for nonresidents injured there. Thus, the forum acts irrationally and therefore discriminatorily if it closes its courthouse doors to nonresidents injured there. And so the **(1991) U. III. L. Rev. 710** forum that is the place of injury should not and probably cannot apply the shorter statute of the joint domicile.

The threat of discrimination from denial of equal access gains emphasis when one appreciates that in some of these cases the forum

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153. "[T]he claim should not be entertained when the forum has only a slight contact with the case and the parties are both domiciled in the alternative forum under whose statute of limitations the claim would be barred." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 cmt. g, ¶ 6 (1988); *see also infra* Appendix. In this Comment, Restatement (Second) apparently makes the old mistake of assuming that all cases in which the parties are from the same state are false conflicts. That position fails to recognize the legitimate interests of the place of transaction or occurrence. As Professor Trautman has pointed out, deterrence interests do "come into play" at the forum as place of occurrence. Donald T. Trautman, *Two Views on Kell v. Henderson, A Comment*, 67 COLUM.L.REV. 465, 467 (1967).

154. I argue this also in Weinberg, *The Place of Trial*, *supra* note 52, at 79; Weinberg, *Against Comity*, *supra* note 128, at 87.

155. *See* Weinberg, *The Place of Trial*, *supra* note 52, at 78.

denying access to the nonresident discriminates not only against the nonresident plaintiff, but also in favor of “its own” defendant. Even though the defendant does not “reside” at the forum in such a case, the forum does have personal jurisdiction over the defendant. Discrimination does not occur when the defendant merely ships unrelated goods into the forum. But what of the case where the defendant is “doing business” in the state? Depending on the nature and volume of that business, realistically, the defendant’s corporate presence in the state would tend to make the defendant the state’s “own.” The place of incorporation, the principal place of business, or the corporate headquarters may all be elsewhere, but an employer of hundreds of people in the state is very much the state’s “own” defendant.

#### *D. Mass Litigation Disaster: Shutts and Van Dusen*

There is one context in which something very like the “substantive” model has had particularly unfortunate effects: mass disaster litigation. *Van Dusen*, for consolidated cases in federal court, and *Shutts*, for class litigation in all courts, have produced what writers today quite rightly call “mass litigation disaster.”<sup>156</sup> *Van Dusen* and *Shutts* share the “substantive model” feature of shunting the choice of law away from the forum - individual claim by claim, piecemeal issue by issue - imposing upon the trial courts an enormous burden of detailed and repeated examinations of sister-state law. Courts today cannot administer complex cases in a coherent way. A now withdrawn draft of the ALI Project on Complex Litigation argued for a codified, single choice rule for limiting consolidated actions.<sup>157</sup> The danger of this recommendation was that, however flexible the eventual single rule, it would spring a trap upon plaintiffs who filed timely claims back home, only to see their meritorious

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156. *E.g.*, Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 GA.L.REV. 429 (1986); Jeffrey D. Steinhardt, *Mass Toxic Torts May Be Hazardous to Your Courts*, 20 U.C.DAVIS L.REV. 657 (1987) (reviewing PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986)); Matthew K. Phillips, *Comment, Mandatory Mass Tort Class Actions: Litigating Catastrophes without Creating Litigation Catastrophe*, 19 J.MARSHALL L.REV. 91 (1985); *see also* Friedrich K. Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U.ILL.L.REV. 105; Russell J. Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U.ILL.L.REV. 129.

157. *See supra* note 31.

claims foreclosed at the consolidation forum. What was needed was a simple rule that a claim is timely if timely where filed. Despite the Reporters' continuing concerns about forum shopping, a new draft, submitted in September of 1991, adopts this option.<sup>158</sup> I will return to the (1991) U. Ill. L. Rev. 711 problem of mass litigation below.<sup>159</sup>

#### E. Guaranty Trust Co. v. York

For the limitations issue, the "substantive" model employed by federal courts under *Guaranty Trust Co. v. York*<sup>160</sup> is familiar, and by now may be too established for reexamination. But the constitutional power of a court to say what its own access rules are was recognized by all of the Justices in *Wortman*. Moreover, federal courts increasingly insist that federal law governs forum non conveniens in diversity cases.<sup>161</sup> Nevertheless, *Guaranty Trust* remains at least plausible. The modern reasoning would be that the nation has no interest either in barring or in hearing an action under state law independent of the interests of the forum

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158. DRAFT NO. 4, *supra* note 31, at 112. This was the option I suggested in a set of comments on the earlier draft, which I submitted to the Advisory Group and Members' Consultative Group of the Complex Litigation Project.

159. *See infra* notes 188-97 and accompanying text.

160. 326 U.S. 99 (1945) (holding that in state-law case, federal courts must apply state limitations law, because issue of limitations is "outcome determinative" and therefore substantive for Erie purposes; it is immaterial that courts generally characterize issue as procedural for choice-of-law purposes).

161. *See, e.g., In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147 (5th Cir.1987) (en banc), *judgment vacated on other grounds sub nom.* Pan Am. World Airways, Inc. v. Lopez, 490 U.S. 1032 (1989); *Sibaja v. Dow Chem. Corp.*, 757 F.2d 1215 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985); *see also Stewart Org., Inc. v. Ricoh*, 487 U.S. 22 (1988) (holding transferor court bound to consider parties' forum selection clause notwithstanding unenforceability of clause in transferor court's state); *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir.1987) (state courts bound in maritime cases in Fifth Circuit by federal doctrines of forum non conveniens), *reversed on other grounds*, 486 U.S. 140 (1988). In oral argument in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), Justice Scalia raised the question whether a federal court would apply a state statute of limitations that, according to the legislative history, was enacted solely for the purpose of protecting the state courts from old litigation. 56 U.S.L.W. 3635 (1988) (summarizing oral argument).

state.<sup>162</sup> An attractive alternative view might be that the interests of the nation in forum-furnishing for diversity cases support a general preference for the longer of two statutes. The technique of choosing among state laws so as to accommodate relevant federal policy is well known.<sup>163</sup> For example, the former federal rule of civil procedure which governed **(1991) U. Ill. L. Rev. 712** the reception of evidence prior to enactment of the Federal Rules of Evidence provided that either state or federal law could govern the admissibility of evidence, *whichever favored reception of the evidence*.<sup>164</sup> This sort of policy directive attached to a principle of alternative reference is a familiar technique of choosing limitations law when enforcing national substantive rights as well.<sup>165</sup> Admittedly, in diversity cases one must argue this to a federal judiciary increasingly hostile to the burden of diversity jurisdiction, and thus probably inhospitable to any general rule favoring access.

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162. *But see In re New Orleans Air Crash*, 821 F.2d at 1159-60 (federal courts in Fifth Circuit will not follow forum non conveniens rules of states in which they sit because exigencies of federal docket differ from exigencies of state dockets).

163. Probably the best-known analogous example of the technique was former Rule 43(a) of the Federal Rules of Civil Procedure, which provided that either state or federal evidence rules were applicable in federal court, whichever favored admissibility. Fed.R.Civ.P. 43(a) (abrogated by *The Federal Rules of Evidence* effective July 1, 1973). On limitation of actions, recent analogies and examples include *Felder v. Casey*, 487 U.S. 131, 140 (1988) (holding in § 1983 action that state's longer statute of limitations for personal injuries must govern rather than its shorter statute of limitations for civil rights actions and that state's notice-of-claims provision for such actions was preempted in actions in state courts, as inconsistent with remedial purposes of § 1983 (citing *Wilson v. Garcia*, 471 U.S. 261 (1975))), and *Marshall v. Kleppe*, 637 F.2d 1217 (9th Cir.1981) (holding federal trial courts should select longer of two possible forum state statutes of limitation to vindicate federal civil rights policy in action under Fifth Amendment). *See also Kellermeyer v. Blue Flame Gas Corp.*, 797 F.2d 983 (Temp.Emer.Ct.App.), *cert. denied*, 479 U.S. 985 (1987) (holding, in action under Federal Emergency Petroleum Allocations Act, that, where time difference was substantial, shorter of two conflicting states' limitations laws should apply, in order to vindicate winding-up policy of Act).

164. Fed.R.Civ.P. 43(a) (abrogated by *The Federal Rules of Evidence*, effective July 1, 1973).

165. *See generally* PAUL M. BATOR ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1695-70 (3d ed. 1988).



#### IV. THE “ANALYTIC” MODEL: REASON, SWEET REASON

This brings us to “interest analysis,” the third, and more analytic, model of choice of limitations law. The 1990 Sixth Circuit case of *Mahne v. Ford Motor Co.*<sup>166</sup> furnishes an example of the usefulness of interest analysis in making a direct and independent choice of limitations law. There, a Florida resident was injured in an auto accident in Florida, but went to Michigan to bring a products liability action against the Michigan manufacturer. The Michigan trial court held that a Florida statute of repose for products cases barred the action.<sup>167</sup> Under statutes of repose, the plaintiff must bring suit within a fixed term from completion of a contract; the statutes make no reference to the time of injury. The Sixth Circuit reversed. Applying Michigan’s choice-of-law methodology, the court reasoned that Florida had no interest in barring the suit, because Florida was neither the forum nor the residence of the defendant.<sup>168</sup> Therefore, Michigan, with its substantive interest in regulating the manufacturer, could furnish access to its courts under its own law, from which there was no reason to depart.

##### A. *The Analytic Model and the Supreme Court*

The constitutional analogue of the analytic approach, of course, is the “minimal scrutiny” principle<sup>169</sup> of the *Dick* and *Hague* cases. As we have seen, under those cases the Court will scrutinize a choice of law for rational basis. The Court will allow the state with a legitimate governmental interest in applying its law on a particular issue to do so, notwithstanding the fact that another state might also have a legitimate interest in governance of the same issue - or, indeed, a weightier interest.<sup>170</sup> That **(1991) U. Ill. L. Rev. 713** only three of the Justices in *Wortman* saw fit to perform the required scrutiny for rational basis seems

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166. 900 F.2d 83 (6th Cir.1990).

167. *Id.* at 85.

168. *Id.* at 88.

169. The Court itself does not use this terminology. It is introduced in Weinberg, Choice of Law and Minimal Scrutiny, *supra* note 56.

170. *See, e.g., Nevada v. Hall*, 440 U.S. 410 (1979) (sustaining legislative jurisdiction of California, as place of injury and place of plaintiff’s residence, to govern issue of extent of Nevada’s sovereign immunity, notwithstanding Nevada’s own very limited waiver). The position in fact has been settled since *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493 (1939).

the most regrettable feature of *Wortman*. How should the Court have dealt with the case?

### *B. The “Fractional Interest”*

As soon as one begins to consider the problem in *Wortman*, an overwhelming difficulty appears. Only a small part of the claims in this multistate class suit had any connection with the Kansas forum. How does one perform an interest analysis in this situation? Nothing in the literature has come to grips with this problem, and thus it has no name. In default of a better name, let us call it the problem of “the fractional interest.”<sup>171</sup> How can a state rationally apply its own law when it has only some fractional interest in a case?

The *Wortman* Court dealt with the problem by the simple expedient of writing it out of the case. The court treated Kansas as a state having no significant contact with the case, notwithstanding the facts that the named representative of the class was a resident of Kansas, that Kansas had general jurisdiction over the defendant, and that Kansas had served as the forum in related litigation.<sup>172</sup> It was as if the issue were too intractable to be mentioned, much less dealt with. The very similar *Shutts* case has the same unreal quality.<sup>173</sup>

The Supreme Court has dealt reasonably well with the problem of the fractional interest in another context: the power-to-tax cases. Consider the power of a state to tax the worldwide activities of a corporation doing business in the state. Whatever one may think of the fairness of “unitary taxation,” *Container Corp. v. Franchise Tax Board*<sup>174</sup> is a reasonable late effort to answer the question about state power. The fractional interest of the state will support a tax only to the extent the contact state employs some reasonable apportionment formula.

The Court has not been able to do as plausible a job under the more general Commerce Clause cases. When may a state govern the affairs of a corporation doing business in other states, with shareholders scattered among many states? How can a state govern a corporation doing business

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171. My remarks on the problem of the fractional interest in my coauthored casebook are based on an earlier draft of this paper. See DAVID H. VERNON ET AL., *CONFLICT OF LAWS: CASES, MATERIALS AND PROBLEMS* § 5.05, at 448, 459 (1990).

172. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

173. *Id.*

174. 463 U.S. 159 (1983).

there, but with its principal place of business elsewhere, or with a formal or even natural place of incorporation elsewhere? Commentators are beginning to come to grips with this sort of problem. We are increasingly schizophrenic about the place of incorporation; even if it is a “flag of convenience,” we would generally concede its power to govern, in its (1991) U. Ill. L. Rev. 714 own courts, the internal affairs of the corporation.<sup>175</sup> Today, though, there is also an increasing feeling that the place of corporate decision making ought to have power, in its own courts, to govern the propriety of corporate decisions taken in that state.<sup>176</sup> The place of manufacture ought to have similar power over allegedly defective products made there.<sup>177</sup>

In the mid-Eighties, the Court passed on two state antitakeover statutes under the Commerce Clause. The cases, *Edgar v. MITE*<sup>178</sup> and *CTS v. Dynamics Corp.*,<sup>179</sup> remain the subject of considerable discussion. The problem of fractional interest in *CTS* and *MITE* is an even more difficult problem than the one posed in *Wortman* and *Shutts*. If a state undertakes to encourage the continuance of corporate activity within the state on the basis of 10% of the corporate assets, 10% of shareholders, or 10% of shares located in the state, *MITE* (which struck down Illinois’ antitakeover law) seems to say that that is impermissible. Would 20% be enough? Would 50% be enough? No convenient “reasonable apportionment formula” seems to be available, yet legislative power must arise at some point. In *CTS*, the Court let Indiana’s antitakeover law

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175. See, e.g., P. John Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1.

176. See, e.g., Willis L.M. Reese, *Conflict of Laws*, 38 SYRACUSE L.REV. 195, 208 (1987) (finding interests at place of corporate decision-making of defendant Union Carbide Co., in action in this country by Bhopal claimants); Louise Weinberg, *Insights and Ironies: The American Bhopal Cases*, 20 TEX.INT’L L.J. 307, 315 (1985) (same).

177. See, e.g., Deborah A. De Mott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 LAW & CONTEMP.PROBS. 161, 162 (1985).

178. *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (striking down Illinois takeover statute which purported to protect shareholders of corporation scattered nationwide if only 10% of shareholders of that corporation resided in Illinois). For my further views on *MITE*, see Weinberg, *Against Comity*, *supra* note 128, at 77-80.

179. *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69 (1987) (sustaining Indiana’s takeover statute under Commerce Clause because statute applies only when Indiana is place of incorporation). For my further views on *CTS*, see Weinberg, *Against Comity*, *supra* note 128, at 77-80.

stand.<sup>180</sup> Yet in both cases the state was the place of incorporation of the target company; and in both cases the statutory “trigger” was some fractional jurisdictional threshold.

It might be helpful here to consider another recent Commerce Clause case, one bearing more directly on statutes of limitations. In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*,<sup>181</sup> the Supreme Court had to pass on the constitutionality, under the Commerce Clause, of the state’s differential tolling of its statute of limitations against nonresidents. The Court struck down the differential tolling as an undue burden on commerce, while conceding the arrangement would withstand scrutiny under the Equal Protection Clause.<sup>182</sup> Justice Rehnquist remarked in a (1991) U. Ill. L. Rev. 715 dissenting opinion that a state must have power to govern that part of even interstate activity which occurs intrastate,<sup>183</sup> and that indirect extraterritorial resonances of such reasonable governance should not raise a constitutional question. It is hard to disagree with him. The Commerce Clause cases suggest that the Court ought not to try to impose territorial restrictions on the governmental power of an interested state. Absent discrimination that would violate the equal protection principle, restrictions on the law of an interested state will tend to be arbitrary or irrational. Incantations about “undue burden on interstate commerce” do not supply a reason.

At least for class suits, in conflicts cases like *Wortman* and *Shutts*, a resolution is available. It was open to the Court to do a more thoughtful job with *Wortman*. A helpful suggestion may be found - again in a remark by Justice Rehnquist - in his opinion in the case of *Keeton v. Hustler Magazine, Inc.*<sup>184</sup> Of course, *Keeton* was a case about long-arm

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180. *Id.* at 94.

181. 486 U.S. 888 (1988) (holding that selective tolling of limitations laws against nonresidents violates Commerce Clause).

182. *See* G.D. Searle & Co. v. Cohn, 455 U.S. 404 (1982) (holding differential tolling of statute of limitations against nonresidents did not violate Equal Protection Clause because nonresidents distinguishable from residents as being harder to sue; remanding for further consideration of Commerce Clause issue). Before the district court could rule, the New Jersey Supreme Court declared its tolling statute unconstitutional under the Commerce Clause as a forced licensure, a decision the Supreme Court declined to review. *Coons v. American Honda Motor Co.*, 463 A.2d 921 (N.J.1983), cert. denied, 469 U.S. 1123 (1985).

183. 486 U.S. 888, 898 (Rehnquist, C.J., dissenting).

184. 465 U.S. 770 (1984).

jurisdiction. But it should be recalled that in *Keeton* the forum's threatened resort to its own limitations law was a major factor inducing the court of appeals<sup>185</sup> to hold for the defendant on the jurisdictional issue. In reversing, Justice Rehnquist thought it useful, although the jurisdiction cases do not require it, to refer to the forum's adjudicatory interests. He identified an interest New Hampshire shared reciprocally with all states, an interest in furnishing unitary administration of a multi-state libel under the single publication rule.<sup>186</sup>

Perhaps *Keeton* should have controlled *Shutts*, on the thinking that states do share reciprocal interests in unitary administration of multistate cases. In *Shutts*, the Court struck down forum law as applied to a nationwide class, most of whose members had little or no connection with the forum. It is puzzling that Chief Justice Rehnquist, the author of *Keeton*, apparently did not see that his *Shutts* opinion is inconsistent with *Keeton*. Under the reasoning of *Keeton*, the forum in *Shutts* had an interest, reciprocally shared with other states, in furnishing unitary law for administration of a multistate suit, at least when the claims of a named representative were forum based, and when class members with out-of-state claims made no objection. It is also odd that the *Shutts* Court would not recognize forum power to govern all of the claims of the members of a multistate class, when it had already conceded that the **(1991) U. Ill. L. Rev. 716** class had consented to forum jurisdiction by not opting out, and the defendant, rather than the class, was complaining. Justice Rehnquist's view in *Shutts* that the plaintiff's preferences of law were ordinarily of no significance does not comport with reality. Plaintiffs plead relying on particular law, and will often choose to go to the jury under one law rather than another. Where the defendant has no ground of objection, courts habitually defer to these preferences.<sup>187</sup> Forum law already governed Phillips Petroleum in similar transactions, indeed in

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185. *Keeton v. Hustler Magazine, Inc.*, 682 F.2d 33, 35-36 (1st Cir.1982), rev'd, 465 U.S. 770 (1984).

186. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777 (1984). On subsequent certification of the question, 828 F.2d 64 (1st Cir.1987), the New Hampshire court did say it would apply its own longer statute - despite its subsequent repeal - over a fine analytic dissent by then Judge Souter. 549 A.2d 1187, 1197 (N.H.1988) (Souter, J., dissenting).

187. *E.g.*, *Bryant v. Silverman*, 703 P.2d 1190, 1193 n. 2 (Ariz.1985) (court accepted waivers of domiciliary law by plaintiffs from New Mexico and Texas, permitting them to rely on law of Arizona, where other plaintiffs resided).

parallel litigation. *Shutts* would have done better to accord with these realities.

### *C. Mass Litigation Disaster Revisited*

It would not be too soon for the Court to consider departing from *Shutts*. A further prudential factor makes reconsideration of *Shutts* attractive, and invites clarification that *Van Dusen v. Barrack* is not mandatory in consolidated complex multistate litigation.<sup>188</sup> I refer to the unseemly evasiveness of courts faced with the Byzantine choice rules of *Van Dusen* and *Shutts*. In *Agent Orange*,<sup>189</sup> when the Second Circuit Court of Appeals held that federalization of the tort claim was unavailable,<sup>190</sup> an exasperated Judge Weinstein invented “national consensus law” - that is, federal common law which all states “would” choose.<sup>191</sup> Similarly, in both *Shutts*<sup>192</sup> and *Wortman*<sup>193</sup> on remand, the Kansas courts insisted on applying the interest rate that they had chosen previously for the suspended royalties in those cases. Their reasoning - for which there was no support in the case law - was that all of the concerned states “would” choose that same rate. Their choice of Kansas limitations law seemed especially disingenuous given Kansas’ own borrowing statute,<sup>194</sup> which ought to have compelled a reference to the limitations law of the state where each claim arose, even if *Shutts* did not compel such a reference. The Kansas Supreme Court shrugged off the borrowing statute, remarking that “these claims arose in Kansas as well

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188. See AMERICAN LAW INSTITUTE, PRELIMINARY REPORT ON CHAPTER 6 (1989) (recommending study of feasibility of federal choice-of-law rule that would make possible selection of unitary governing law, or manageable number of different laws, to apply to common questions in complex litigations).

189. In re “Agent Orange” Prod.Liab.Litig., 635 F.2d 987, 995 (2d Cir.1980).

190. *Id.*

191. In re “Agent Orange” Prod.Liab.Litig., 580 F.Supp. 690, 703 (E.D.N.Y.1984). Interestingly, in the CTS case, it might be said that the Court similarly created a fair degree of unitary governance in state antitakeover law, to the extent that corporations like to incorporate in Delaware. See *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69 (1987); see also Richard M. Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 CAL.L.REV. 29 (1987).

192. *Shutts v. Phillips Petroleum Co.*, 732 P.2d 1286 (Kan.1987).

193. *Wortman v. Sun Oil Co.*, 734 P.2d 1190 (Kan.1987).

194. KAN.STAT.ANN. §§ 60-516 (Supp.1991) (providing that Kansas will not entertain an action barred in state in which it arises).

(1991) U. Ill. L. Rev. 717 as in Texas, Oklahoma, Louisiana, New Mexico, and Mississippi.”<sup>195</sup>

The Supreme Court cannot effectively police such tactics. Justice O’Connor, dissenting in *Wortman*, joined only by Chief Justice Rehnquist, would have made the attempt.<sup>196</sup> But it is hard to see a substantial federal question; a court is free to misinterpret law, as Justice O’Connor acknowledged.<sup>197</sup> Nothing in the Constitution requires a state, in applying sister state law, to get it *right*. The sensible thing for the Court to do would be to relieve American courts of the burden of *Shutts*. I am also comfortable with the notion of empowering federal courts in multistate cases to choose law free of *Van Dusen*. But, as one can see in the current struggle of the Reporters for the ALI Project on Complex Litigation,<sup>198</sup> the problems of federalizing choice of law in complex cases remain considerable.

#### *D. Applying the Uninterested Forum’s Longer Statute*

Turning from the preliminary problem of the fractional interest to the central inquiry, what does the analytic model offer to resolution of conflicts of limitation law? The core question here is the power of the *uninterested* forum with the longer statute - the question the Court saw itself as addressing in *Wortman*.<sup>199</sup>

At this point it would be helpful to pause to consider what we mean by “the uninterested forum.” The most likely case, of course, is one in which nonresident parties try out-of-state facts. But can we really say that the forum has *no* connection even with that case? In every case, after all, there will be jurisdiction over the defendant, under the requirements of the Due Process Clause. There will be “minimum contacts.” The defendant, then, is at least to be found at the forum. Possibly it is doing business there, but at least it is to be found there. If it is doing business there, its

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195. *Wortman*, 734 P.2d at 1192-93 (on remand).

196. 486 U.S. 717, 743 (O’Connor, J., dissenting).

197. *Id.* at 744.

198. An extensive draft chapter on choice of law, *see supra* note 31, was aborted after a meeting of an advisory committee. It was decided to put only a draft preliminary statement to the vote of the full membership in the 1991 Annual Meeting of the Institute. A new “preliminary” draft of September 19, 1991, has not yet been submitted to the membership. *See supra* note 158.

199. For discussion of the power of the forum as place where the plaintiff resides or as place of occurrence, *see supra* notes 136-49 and accompanying text.

connection with the forum may be even more intimate than if it is incorporated there in a merely formal way. Along a spectrum of possibilities, the defendant will take on increasing color as the forum's "own."<sup>200</sup> These days, after *Shaffer*,<sup>201</sup> *Helicopteros*,<sup>202</sup> and *Asahi*(1991) U. Ill. L. Rev. 718 *Metal*,<sup>203</sup> - all tightening up due process requirements

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200. Professor Juenger took this position in the 1986 floor debate in the American Law Institute over the proposed revision of § 142:

I Think the issue is a non-issue . . . that the totally unconnected forum will apply its own longer statute of limitations. In fact, it is hard to envisage nowadays . . . a forum that has no contact whatsoever, contact insufficient to apply its own statute of limitations. This was the case when the first Restatement was drafted because there was quasi-in-rem jurisdiction and Pennoyer type of jurisdiction, and these rules no longer exist.

*Discussion of Restatement of the Law, Second, Conflict of Laws (1986 Revisions)*, 1986 A.L.I. PROC. 52, 57. Professors von Mehren and Trautman suggest that the interstate system requires one state in which it is always fair to sue a defendant, and conclude that that is the home state, or state of incorporation. Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV.L.REV. 1601, 1637 (1968). They also argue, however, that jurisdictional law should respond to considerations that increasingly make it fair to bring the defendant to the plaintiff. *Id.* at 1616.

201. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

202. *Helicopteros Nacionales de Colom. v. Hall*, 466 U.S. 408 (1984) (holding that general jurisdiction over alien defendant could not be obtained by plaintiffs nonresident in forum state on strength of defendant's unrelated purchasing activity in forum state). *Helicopteros* was a poorly reasoned opinion, but more importantly, an impolitic one, insulating sophisticated multinational corporations from having to defend in this country actions for personal injuries caused by them to Americans unable to litigate elsewhere. See Louise Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S.CAL.L.REV. 913 (1985).

203. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (holding in product liability indemnity action between settling defendant and supplier of defective component part, where both parties were alien corporations, that forum could not obtain jurisdiction over supplier on "stream of commerce" theory if supplier had no contact with forum but knew that finished products containing its parts were sold in great numbers at the forum). In general, comment on *Asahi* has been critical. See, e.g., RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 3-15 (3d ed. Supp.1987).



for jurisdiction - a defendant is more likely to look like the forum's "own" than ever before.

To the extent the defendant is maintaining a presence at the forum, it seems intuitively correct that the forum's general interests vis-a-vis the defendant would be protective ones. So the intriguing question arises: Why does the forum, contrary to its generally protective concerns toward defendants present there, always furnish a forum for claims against those defendants? What interest of the state supports that universal fact? The question suggests the answer that there may be an interest all states share, because it is reciprocal, in making a place of trial available for claims against defendants where they can be found. I raise this possibility because of its implications for the forum's longer statute of limitations. Arguably, the policies sustaining the forum's long-arm statute also sustain choice of its longer statute of limitations. The interest of the forum becomes a shared reciprocal interest in providing access for claims against the defendant where the defendant can be found for whatever period of time that state's legislature has provided.

If that speculation has any validity, the result reached in *Wortman*, surprisingly, is correct.<sup>204</sup> It may well be constitutional for a state to apply its longer statute of limitations, as well as its shorter statute, in all cases. What was wanting in *Wortman* was only an intellectual foundation for the result reached.

#### *E. Applying the Uninterested Transferor Court's Longer Statute*

If indeed there is general forum power to apply the forum's longer (1991) U. Ill. L. Rev. 719 statute, are there any limits on it? Should the Court have taken a different view in the first *Ferens*<sup>205</sup> case from the view that it took in *Wortman*? In the *Ferens/Schreiber* situation, the transferee court does not apply its own longer statute, but that of another state. Would the general interest of the diversity court in furnishing access, coupled with the putative shared interest of all states in furnishing a forum for claims against the defendant where the defendant can be found,

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204. See Winton D. Woods, *Carnival Cruise Lines v. Shutts: An Amicus Inquiry into the Future of "Purposeful Availment,"* 36 WAYNE L.REV. 1393, 1394-95 (1990) (arguing that decision in *Wortman* was correct because it steered clear of imposing indeterminate constitutional standards on courts).

205. *Ferens v. Deere & Co.*, 487 U.S. 1212 (1988) (vacating and remanding judgment below for reconsideration in light of *Wortman*). See *supra* note 57 and accompanying text.

support application of the transferor state's statute? The answer would seem to be "yes." In *Ferens v. John Deere Co.*, of course, the Supreme Court, without analysis, simply construed the transfer statute to require that result.<sup>206</sup>

#### *F. Borrowing a Longer Statute*

Given the rigors of tort reform legislation and the chronic narrow construction of statutes of limitation, perhaps the truly difficult limitations question for a court is whether it always must apply its *shorter* statute. Even if one is willing to conclude, with the Supreme Court, that the forum can always apply its own longer, as well as its shorter, statute of limitations, it is quite another matter to say that the plaintiff's home forum can give the plaintiff the benefit of *another* state's longer statute. That, it seems to me, is a very questionable proposition.

Courts are on pretty safe ground, in conflicts cases, if they stick by and large to their own law.<sup>207</sup> But they get into trouble "choosing" other law and departing from their own. A state without interest in governing a particular issue by its specific law on that issue can - indeed must - apply the law of an interested state for that issue. But an *interested* forum cannot apply the law of another interested state without discriminatory results. Once the state's interest in applying its law is identified, the state must have a rational basis for withholding the benefit of its law from a class within the law's reasonably intended scope. Assuming the legislature seeks to protect the forum from stale claims, that the events in suit occurred out of state would not furnish a rational basis for forcing the defendant to defend the stale claim in the state, when a defendant need not defend a stale *local* claim. In other words, because the forum is always interested in applying its own shorter statute to avoid having to try stale claims, it would be difficult to justify a departure from its statute to benefit its resident plaintiff at the expense of a defendant within its jurisdiction. No such option exists, of course, in a wholly domestic case. Why should a foreign place of injury make a difference? Can such a distinction support a discrimination between the two classes of defendants, those who need not defend under the period of limitation at the forum, and those who are forced to defend notwithstanding the statute? **(1991) U. Ill. L. Rev. 720**

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206. 110 S.Ct. 1274, 1280 (1990).

207. The argument is spelled out in Weinberg, *On Departing from Forum Law*, *supra* note 128, at 595.

So I have doubts about the propriety of the recent Ninth Circuit case of *Ledesma v. Jack Stewart Produce, Inc.*<sup>208</sup> There, the court of appeals reversed a judgment of dismissal and held that California would borrow the longer statute of the place of injury to benefit the California plaintiff. *Ledesma* was an ordinary action for personal injuries. All of the defendants were nonresidents, and the place of injury was Arizona. The court saw that Arizona, as the place of injury, would have an interest in having its longer statute apply. That would advance Arizona's general deterrence policies as place of injury. As to California's interests, the court found California's interest in protecting its courts from stale claims to be "at least equally balanced by its interest in allowing its residents to recover for injuries sustained in a state that would recognize their claim as timely."<sup>209</sup>

Now, the expression "legitimate governmental interest" is a term of art which delimits the sphere of applicability of a sovereign's law. There is no "interest" in the abstract. Of course California would have a legitimate interest in benefiting its plaintiff by applying its own longer statute, if it had a longer statute. But "interest" as a term of art is a justification for governance, not for escape from governance. In this sense there is no governmental interest in "benefiting" the local plaintiff by withholding local law.

General policy concerns do exist in every state. Ensuring that residents recover for their injuries is surely among those general policies. But when the application of local law cannot vindicate those policies, we say the state *lacks* an interest - not that it has an interest in applying another state's laws.

What, then, does the state do in a case like *Ledesma*, when the legislature subordinates the state's general interest in giving its residents their day in court to a narrow policy concern protecting courts from having to try cases after a certain period of time? Do courts have discretion to disregard the legislation?

Here we are at the crux of an important theoretical controversy, not just for the true conflict of limitations law but for all true conflict cases. In the last decades a distinguished school of "better law" theorists has lit up the path of accommodation<sup>210</sup> for true conflicts, with recommendations

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208. 816 F.2d 482 (9th Cir.1987) (applying longer statute of place of injury to benefit local plaintiff).

209. *Id.* at 485.

210. *Kossick v. United Fruit Co.*, 365 U.S. 731, 739 (1961) (Harlan, J.) ("But the process is surely rather one of accommodation, entirely familiar . . . to the

that sound thoughtful and wise.<sup>211</sup> For these illustrious writers, a (1991) **U. Ill. L. Rev. 721** true conflict is an opportunity for such accommodation, and each state has policies in favor of comity and accommodation, under which it can administer the proposed wise choices. But also there is a strand of mundane analytic thinking that urges caution in departures from forum law.<sup>212</sup> The wise policies adverted to, on this cautious view, seem to emanate from some detached superlaw, beyond the authority of the legislature. For analytic courts and writers, the wise accommodations proposed by the “better-law” theorists remain tantalizing but beyond the reach of courts adjudicating as voices of state sovereignty. To the “better-law” theorists, *Ledesma* is a thoughtful piece of policy analysis; to more skeptical analysts it is simply discriminatory.

Of course a statute of limitations is, in its nature, arbitrary. That is why courts construe statutes of limitations narrowly, and undoubtedly why they sometimes seize upon a conflict of laws to escape from it. When the forum has general remedial, deterrent, or validating interests, application of its shorter statute may seem harsh. The temptation will inevitably arise to give access under the law of another concerned state.<sup>213</sup> But caution

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normal conflict of laws situation where two sovereignties assert their divergent interests in a transaction as to which both have some concern.”).

211. See ARTHUR T. VON MEHREN & DONALD T. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 206-311, 376-400 (1965); RUSSELL WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 371 (2d ed. 1980); Robert A. Leflar, *The Nature of Conflicts Law*, 81 *COLUM.L.REV.* 1080, 1090 n. 52 (1981); Elliot E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 *COLUM.L.REV.* 959 (1952). These ideas inform *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 6 (1971). See ROBERT A. LEFLAR, *AMERICAN CONFLICTS LAW* 96 (3d ed. 1977).

212. See generally Weinberg, *Against Comity*, *supra* note 128, at 65; Weinberg, *On Departing from Forum Law*, *supra* note 128, at 598.

213. Cf. *Davis v. Furlong*, 328 N.W.2d 150 (Minn.1983) (holding forum not permitted to borrow foreign joinder rule to benefit resident plaintiff). The revised Restatement would allow the forum to borrow longer law only in exceptional circumstances. Ironically, but for a successful floor amendment offered by the author, Restatement would have permitted the forum to borrow a sister state’s longer statute under exceptional circumstances, but never, under any circumstances, to apply its own. For the language changed by the floor amendment, see bracketed language of § 142 in the Appendix, *infra*. A typical case warranting the borrowing of longer law would be one in which the plaintiff has been unable to obtain jurisdiction over the defendant in a more interested state or when trial at the sister state itself would be “extremely inconvenient for

needs to be exercised here; the forum will need to consider the rationality of the classifications its departures from forum limitations law may entail. (1991) U. Ill. L. Rev. 722

### G. *Forum Non Conveniens*

What is the bearing of forum non conveniens on this analysis? American courts increasingly do seek congruence between the three fields of court access law: jurisdiction, forum non conveniens, and limitation of actions. Courts increasingly condition dismissal on waiver of jurisdictional or timeliness defects in the alternative forum.<sup>214</sup> Thus, where the forum has jurisdiction over a suit timely under local law,

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the parties.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 cmt. f; *see also infra* Appendix. The forum is encouraged to dismiss under its own shorter statute instead, if it has a substantial relationship with the parties or occurrence, and the sister state statute is much longer. *Id.* When the two statutes differ substantially, the Comment suggests that the forum is bound to apply its shorter statute in any event. *Id.* Finally, the Comment would permit the forum to depart from its own shorter statute when the statute represents no policy against trial of stale claims, but has been enacted exclusively to give repose to the defendant, and then only if there was “no great difference” between the two statutory periods. *Id.* These materials can be seen in the Appendix, *infra*.

The Uniform Act fails wholly to grasp the problem of the longer sister-state statute. The general thrust of the Act, it will be recalled, is to mandate the sister state’s statute, shorter or longer, in all cases not governed by the substantive law of the forum. Thus, as the Comments accompanying the Uniform Act suggest, when the drafters included the “escape clause” for “unfairness,” they were thinking about the problem faced by the forum under pressure of “strong public policy” to apply its own longer statute. The Act attempts to restrict its escape clause to “rare” and “extreme cases,” and permits no escape through *renvoi*. Thus, the Uniform Act stands the statute of limitations on its head. The Uniform Act encourages the forum to give access under another state’s law - a process for which we have been able to find scant justification - but rarely under its own law - an avoidance of legislative mandate for which we also have been able to find scant justification. The Uniform Act is excerpted in the Appendix, *infra*.

214. For an interesting state-court example, with a strong debate in the state supreme court sitting en banc, *see* *Shewbrooks v. A.C. & S. Inc.*, 529 So.2d 557 (Miss.1988).

dismissal for forum non conveniens should probably be conditional wherever possible.

Indeed, for some courts, a question may arise about the legitimacy of forum non conveniens. The doctrine, lodged within the inherent discretion of courts, gives courts the power of balancing pressures toward access against their need to control their dockets and to protect scarce judicial resources from being expended on matters of negligible concern to the state. This “balancing” is characteristic of forum non conveniens.<sup>215</sup> The great difficulty is that if one views a statute, even a jurisdictional statute, as a balance struck by the legislature, it is hard to see how a court can “balance” away the legislation. This may help to explain the rather surprising volume of current disapproval of forum non conveniens among the state courts.<sup>216</sup> A similar “balancing” is increasingly to be seen in the judge-made doctrine of “subject matter [legislative] jurisdiction,” under which federal courts attempt to narrow their power over Sherman Act violations having intended effects in this country;<sup>217</sup> and corresponding doubts have arisen about the propriety of “balancing” away this or any other act of Congress.<sup>218</sup>

On the other hand, legislatures are aware of the doctrine of forum non conveniens, and generally have not sought to revise it. The doctrine remains in the inherent discretion of trial courts. Forum non conveniens is a final control mechanism at the threshold. The availability of forum non conveniens, then, must imply that there is very little discretion in the application of forum jurisdictional statutes, or statutes establishing the limitation of actions. The place for balancing the interests of the court in controlling access against the interest of the state in furnishing it becomes, precisely, forum non conveniens. A further “balancing” analysis on the issue of limitations law might, in its very redundancy, tend to tip **(1991) U.**

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215. *See generally* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

216. *See* In re Air Crash Disaster Near New Orleans, 821 F.2d 1147 (5th Cir.1987) (en banc), judgment vacated on other grounds sub nom. Pan Am. World Airways, Inc. v. Lopez, 490 U.S. 1032 (1989) (Louisiana); David W. Robertson & Paula K. Speck, Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions, 68 TEX.L.REV. 937 (1990) (Louisiana, Florida, Texas).

217. *E.g.*, Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir.1979); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1986).

218. *E.g.*, Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 951-53 (D.C.Cir.1984).

**III. L. Rev. 723** the scales against access and toward discriminatory denials of otherwise available tribunals.

## V. CONCLUSION

The Supreme Court in *Sun Oil v. Wortman* was quite right in its unanimous rejection of the “substantive” model of choice of limitations law. The Uniform Act’s resort to the “substantive” model of choice of limitations law was profoundly unfortunate. Lingered “substantive”-model thinking also infects some of the *Comments* to newly revised *Restatement* section 142.

The *Wortman* Court may even have been right on the merits of the issue before it: that the forum ought to be allowed to apply its own longer statute of limitations even if its only connections with a case are jurisdictional. But if the “procedural” model for choice of limitations law happens to work here, that does not mean it is the model of choice.

The true moral of the story is the old realist message: There is no substitute for reason. Formalisms and contact-counting may seem to persuade; but they simply conceal the major premise of decision.<sup>219</sup> Formulae about “substance” or “procedure” are, as we always knew, ways of stating questions rather than providing answers. The application of legal rules should depend on a rational appreciation of their reach, given their purposes. So sound legal reasoning requires objective thinking about the reasons for the rules for which the parties are arguing. In conflicts cases we call this process “interest analysis,” but it is still ordinary purposive reasoning. Nothing justifies treating the issue of limitation of actions as somehow exempt from this necessary process. I say this acknowledging that there are intractable problems interest analysts have not considered and that on given facts can be very hard to resolve - like the problem of the “fractional interest.” There are stumbling-blocks. But the path of reason remains the high road of the common law. (1991) U. III. L. Rev. 724

## APPENDIX

### ALI, *RESTATEMENT OF THE LAW (SECOND)* *CONFLICT OF LAWS*

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219. Walter W. Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 488 (1924) (attributing the insight to Holmes).

[The following Revision was approved by the membership, as amended,\* May 19, 1988:]

§ 142. Statute of Limitations

Whether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated in § 6. In general [, unless the exceptional circumstances of the case make such a result unreasonable\* a]:

- (1) The forum will apply its own statute of limitations barring the claim.
- (2) The forum will apply its own statute of limitations permitting the claim unless:
  - (a) maintenance of the claim would serve no significant interest of the forum; and
  - (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.

From the *Comment*:

“f. Forum has the shorter statute.

“[S]ubject to rare exceptions, the forum will dismiss a claim that is barred by its statute of limitations. . . . [D]ismissal of a claim under these circumstances does not constitute a judgment on the merits. . . .

“There will be rare situations . . . where the forum will entertain a claim . . . barred by its own statute of limitations. . . . Thus, the suit will be entertained when the forum believes that under the special circumstances of the case dismissal of the claim would be unjust. This may be so when through no fault of the plaintiff an alternative forum is not available. . . .

“There will also be situations where suit in the alternative forum, although not impossible, would be extremely inconvenient for the parties. Here again the forum may entertain the claim . . . if it finds that . . . no significant forum policy would be infringed. . . . [Two] factors should be considered. The . . . extent . . . to which the parties and the occurrence are

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\* *The author offered an amendment from the floor, which carried, adding the substance of the bracketed language, and deleting similar language from subsection (1).*



related to the . . . forum [and the] difference between the length of the forum's own statute . . . and that of the other state. Where this difference is great, the forum policy against the enforcement of stale claims probably would require application of the forum's own statute. But where this difference is small, say one or two years, there is a greater **(1991) U. III. L. Rev. 725** likelihood that the forum will disregard the small difference in policy . . . and permit the suit. . . .

“g. Forum has the longer statute.

“[W]here the domicile of the plaintiff is in the state of the forum and that of the defendant is in the other state with the most significant relationship to important issues in the case . . . the forum should only entertain the claim in extreme and unusual circumstances.

“[T]he claim should not be entertained when the . . . forum has only a slight contact with the case and the parties are both domiciled in the alternative forum under whose statute . . . the claim would be barred. Similarly, the claim should not be entertained when the forum has no contact with the case and the parties except that the defendant does unrelated business in the state and has designated an agent to receive service of process there.”

*UNIFORM CONFLICT OF LAWS LIMITATIONS ACT*  
12 U.L.A. 46-49 (Supp.1983)

§ 2. Conflict of Laws: Limitations Periods

- (a) Except as provided by Section 4, if a claim is substantively based:
  - (1) upon the law of one other state, the limitation period of that state applies or
  - (2) upon the law of more than one state, the limitation period of one of those states, chosen by the law of conflict of laws of this State, applies.
- (b) The limitation period of this State applies to all other claims.

. . . .

§ 4. Unfairness

If the court determines that the [applicable limitations period of another state] is substantially different from the limitation period of this State and has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against, the claim, the limitation period of this State applies.

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[“The Monroe Mystery Solved: Beyond the ‘Unhappy History’ Theory of Civil Rights Litigation](#) [Federal Courts Symposium],” 1991 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 737.

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[“Choice of Law and Minimal Scrutiny,”](#) 49 UNIVERSITY OF CHICAGO LAW REVIEW 440 (1982). [Anthologized in A CONFLICT-OF-LAWS ANTHOLOGY 339 (Gene R. Shreve ed.; Cincinnati: Anderson Publishing Co., 1997).]

[“The New Judicial Federalism,”](#) 29 STANFORD LAW REVIEW 1191 (1977). [Indexed in CONCEPTS OF FEDERALISM (William Stewart ed.; Lanham, MD: University Press of America, 1984).]