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The Choice-of-Law Revolution in the United States: Notes on Rereading von Mehren

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Introduction

Choice-of-law theory and practice have changed quite dramatically over the past forty or so years in the United States. The traditional methodology of place of wrong, place of making, and the like[1] has receded in importance, and new approaches and concepts such as governmental interest analysis,[2] most significant relationship,[3] and better rule of law[4] have taken over center stage.[5] Various conflicts scholars have played an important role in bringing about this so-called "revolution"[6] in choice of law, and few would dispute that Professor Arthur Taylor von Mehren ranks among the most influential.[7] In this Article, I would like to revisit two of von Mehren's principal writings on choice of law, both law review articles published in the 1970s. The two articles address various aspects of choice of law, and I

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1. *See* RESTATEMENT OF THE LAW OF CONFLICT OF LAWS (1934).

2. *See* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963) (collecting the series of articles in which Currie introduced and developed his highly influential governmental interest analysis approach).

3. *See* RESTATEMENT (SECOND) OF THE LAW OF CONFLICT OF LAWS §§ 145, 188 (1969) (setting forth the most-significant-relationship test for issues of tort and contract).

4. *See* Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 299-304 (1966) (calling for attention to better rule of law as one of five choice-influencing considerations).

5. For discussion of the continued, though much diminished, role of the traditional methodology in the courts, see GARY J. SIMSON, ISSUES AND PERSPECTIVES IN CONFLICT OF LAWS: CASES AND MATERIALS 14 (3d ed. 1997).

6. The term has been widely used by commentators both supportive and critical of these developments. *See, e.g.*, Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983); Robert A. Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181, 181 (1977).

7. *See, e.g.*, EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 2.11, at 43-44 (discussing von Mehren's place in the "scholastic revolution"); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 1.5, at 7, 11 (4th ed. 2001) (discussing von Mehren as one of the "small number" of scholars especially influential in stimulating the "revolution in approaches to choice-of-law").

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will highlight the importance, and analyze the implications, of several related ideas that the articles raise.

I. Selecting a Controlling Legal Order

At the outset of his wide-ranging 1975 article, "Recent Trends in Choice-of-Law Methodology,"[8] Professor von Mehren offers a basic framework for analyzing the operation and adequacy of the various approaches to choice of law developed over the years. According to von Mehren:

> The choice-of-law problem presents two different, though at times interrelated, questions: (1) What legal order ultimately controls—or should control—in a situation or transaction that has significant connections with more than one state; (2) How should a given legal order regulate a particular multistate situation or transaction.[9]

Von Mehren points out that while the traditional, territorially based rules focus on the first of these two questions,[10] newer approaches, such as governmental interest analysis, attend much more to the second.[11] Though critical of various aspects of the newer approaches, von Mehren clearly welcomes their attention to the second question as beginning to fill a void left by the traditional methodology.[12]

Few conflicts scholars today would deny the importance of addressing von Mehren's second question. Less obvious, however, is why the first question needs to be seriously addressed. Why cannot one simply assume that the answer to that "jurisdiction-selecting"[13] question is always the forum state?[14] In his article, von Mehren makes clear his belief that the question is not so easily answered, but he is less explicit as to why it calls for serious analysis. I explain below why, in my view, it does.

Most obviously, in courts in the United States, the question of selecting a controlling legal order cannot be answered simply by looking to the forum state if the federal Constitution requires otherwise; and it is hardly inconceivable that this document intended to bind together various independent-minded states would have a fair amount to say about one state's obligation to defer to another's preferences as to how multistate situations should be regulated. Indeed, the Full Faith and Credit Clause of Article IV[15] very plausibly may be interpreted as imposing a strong obligation of this sort.[16] Under governing Supreme Court precedent, however, neither

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8. Arthur Taylor von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927 (1975).

9. *Id.* at 928.

10. *See id.* at 930-33.

11. *See id.* at 933-41.

12. *See id.* at 932-33.

13. *Id.* at 932.

14. *See generally* WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942) (setting forth his local law theory).

15. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

16. *See* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 295-301 (1992); Gary J.

that clause nor any other constitutional provision imposes on courts more than a minimal obligation to think about how states other than the forum state would regulate the choice-of-law matter at hand.[17] State autonomy in choice of law is close to complete.[18]

Nonetheless, the absence of any strong obligation to defer to other legal orders and the choice-of-law solutions they would prefer hardly settles that such deference need not occur. A court still has considerable self-interest as an agent of the forum state in using such deference as a strategic device to maximize the forum state's ability in the long run to decide matters with which it is most concerned. By deferring to the choice-of-law solutions preferred by another legal order when that order has a greater interest, the court acts in a manner reasonably calculated to trigger reciprocal treatment and maximize the forum state's ability in the long run to decide matters in which it has the greatest stake.[19]

In calling for serious attention to the question of selecting a controlling legal order, von Mehren proposes that the question be "initially approached" by examining whether the various legal orders with some connection to the case "have, in view of the policies underlying their putatively applicable domestic rules, any reason to wish to regulate a given matter."[20] Later in the article von Mehren offers what appears to be the contemplated follow-up to this "initial" approach. In criticizing Currie's exclusive focus on the policies underlying states' domestic rules, von Mehren maintains that "still another range of policies—those implicated through the problems' multistate nature—deserve consideration in any effort to determine whether and how a legal order wishes to regulate a given multistate situation."[21]

I fully agree with von Mehren that a legal order's interest in regulating a matter is not adequately gauged by attention only to the policies underly-

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Simson, *State Autonomy in Choice of Law: A Suggested Approach*, 52 S. CAL. L. REV. 61, 66-80 (1978).

17. *See, e.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); Carroll v. Lanza, 349 U.S. 408 (1955).

18. *See* Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L.J. 271 (1996); Arthur T. von Mehren & Donald T. Trautman, *Constitutional Control of Choice of Law: Some Reflections on* Hague, 10 HOFSTRA L. REV. 35 (1981). The Supreme Court has not always regarded constitutional constraints as so marginal. Some early twentieth-century decisions appear to give constitutional force to the traditional place-of-making rule. *See, e.g.*, Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932); New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918). Subsequently, the Court in *Alaska Packers Association v. Industrial Accident Commission*, 294 U.S. 532 (1935), introduced a full faith and credit test that seemed to impose significant constraints in terms of governmental interests. For a summary of these and other developments leading up to the Court's noninterventionist approach in *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), see Simson, *supra* note 16, at 61-65. For the view that the Full Faith and Credit, Due Process, and Equal Protection Clauses should be seen as limiting state autonomy in choice of law much more than the Court recognizes, see *id.* at 66-87.

19. I developed this thesis previously in Gary J. Simson, *Plotting the Next "Revolution" in Choice of Law: A Proposed Approach*, 24 CORNELL INT'L L.J. 279, 280-84 (1991).

20. von Mehren, *supra* note 8, at 931.

21. *Id.* at 938.

ing its domestic rules. At times a jurisdiction has an interest in applying a policy (such as facilitating multistate activity) extrinsic to its domestic rules and in choosing a domestic rule other than its own. If its concern with regulating a matter is measured strictly in terms of its stake in applying the policies underlying its domestic rules, interests of that sort are overlooked.

I am troubled, however, by the manageability of an approach that depends so heavily on identifying policies both intrinsic and extrinsic to a state's domestic laws. As others have observed,[22] identification of the policies that lawmakers had in mind in adopting a law often entails considerable uncertainty. It is difficult enough to articulate with confidence the policies behind a rule of the forum state—a jurisdiction with whose history, culture, and values the court is intimately acquainted. To do so with an out-of-state rule is generally even harder. It can be, as one court irreverently put it, "like skeet shooting with a bow and arrow."[23]

Rather than measure a state's interest in regulating a matter by identifying potentially applicable policies and then asking whether the state has a stake in applying them to the matter at hand, it seems preferable to do so by focusing on the extent to which each of the states with some connection to the case will be affected by how the case comes out.[24] By focusing on a state's stake in determining outcome, this approach tacitly takes into account the full range of interests that von Mehren's approach purports to address.[25] Moreover, I suggest that it operates in a substantially more manageable way.

If it may be assumed that effect on a state is most sensibly measured in terms of impact on the welfare of people who make their home in the state,[26] then the parties' states of residence provide a strong indicator of relative state concern. If the parties reside in the same state, that state stands out as obviously affected by, and interested in, how the case comes out. If the plaintiff and defendant reside in different states, then the outcome clearly will affect two states; and with the plaintiff's standing to gain what the defendant stands to lose, the impact on the two states and the

22. *See, e.g.*, Willis L.M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 317-19 (1972); Max Rheinstein, *How to Review a Festschrift*, 11 AM. J. COMP. L. 632, 663 (1962) (book review).

23. Fisher v. Huck, 624 P.2d 177, 178 (Or. App. 1981).

24. In a prior article I set forth and explained at some length this approach to interests and to selecting a controlling legal order. *See* Simson, *supra* note 19, at 280-87. For discussion of the difference between the "outcome-determining interests" central to my approach and Currie-style interests, which depend upon whether application of a policy underlying a domestic rule would benefit the residents of the lawmaking state, see *id.* at 282-84.

25. *See id.* at 283, 291-94.

26. In designing his governmental interest analysis, Brainerd Currie assigned special importance to impact on local residents. *See, e.g.*, CURRIE, *supra* note 2, at 85-87. Although I am proposing a different conception of "interest" than Currie proposed, I agree with Currie that impact on local residents should be central to a definition of state interest and I do so on the view, apparently shared by Currie, that the people who make their home in a state are those most likely to benefit or burden its operation. *See* Simson, *supra* note 19, at 282-83 & n.9.

states' interests would appear to be essentially equivalent.[27]

Of course, the outcome of a case may affect the welfare of some people who are not parties. For example, whether or not a defendant is found liable for certain allegedly negligent behavior may affect the degree of care that persons similarly situated to the defendant exercise in the future. By the same token, whether or not an injured plaintiff recovers for loss may affect a doctor's ability to receive full and timely payment for treating the injuries. Measuring a state's interest in regulating the matter at hand therefore at times may appear to require attention to more than the parties and their states of residence.

As I have argued elsewhere,[28] however, non-party-related effects generally appear to be insubstantial by comparison to party-related ones or indeterminate in magnitude absent inquiries often quite demanding of limited judicial resources. If so, serious consideration of non-party-related effects may well be unwarranted. In any event, even if non-party-related effects are most reasonably viewed as warranting such consideration, gauging relative interests by the extent to which a state stands to be affected by the outcome of the case seems significantly more workable than doing so by an approach that requires ascertaining the policies on domestic and foreign lawmakers' minds.

II. Special Substantive Rules

In his innovative 1974 article, "Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology,"[29] von Mehren argues that the goals of choice of law at times are best served by the court's development and application of a special substantive rule. Rather than choose between the domestic rules of the jurisdictions with some connection to the facts of the case, the court in such circumstances should, in von Mehren's view, craft a new rule tailored to the situation at hand.

Von Mehren uses illustrations to demonstrate that in some instances judicial creation of a new rule may be cogently defended in terms of what he calls the goal of "aptness"—that is, "providing a solution which, from the perspective of the legal order in question, is the most appropriate (or

27. In keeping with the policy discussed above of maximizing the forum state's ability in the long run to decide matters with which it is most concerned, *see supra* text accompanying note 19, a court that determines that a particular state is the only interested jurisdiction would treat that state—whether the forum state or another state—as the controlling legal order and give effect to its views as to how the matter at hand should be regulated. If the court determines that two states have essentially equal interests, strategic pursuit of the above policy calls for identifying the controlling order differently depending on whether or not the forum state is one of the two interested jurisdictions. *See infra* note 39 and accompanying text.

28. *See* Simson, *supra* note 19, at 284-86.

29. Arthur Taylor von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974).

'apt') regulation for the situation that has arisen."[30] In such instances, none of the potentially applicable domestic rules—rules drafted with intrastate contexts primarily in mind—is well-tailored to regulate issues arising out of the multistate context at hand.

In addition, von Mehren maintains that on some occasions special substantive rules are warranted for reasons other than aptness and, indeed, even at the expense of the court's sense of aptness. In situations of this sort, two legal orders have "legitimate interests"[31] in resolving the choice of law, and they would choose different domestic rules as apt for the situation. According to von Mehren, "it seems worth considering whether agreement among various legal orders might be achieved in some of these cases by recourse to special substantive rules which would seek to adjust, on a basis of equality, the views of all legitimately concerned jurisdictions."[32] Assume, for example, that one interested jurisdiction would regard its domestic strict liability rule as apt to regulate the situation at hand and the other interested jurisdiction would choose its domestic negligence rule. Assume also that negligence cannot be shown. The court might "adjust" the two interested jurisdictions' views "on a basis of equality" by allowing the plaintiff to recover one-half of actual damages.[33] Although each jurisdiction would be sacrificing somewhat its view of aptness, the compromise would be warranted in von Mehren's view by its service to another key choice-of-law objective—achieving "decisional uniformity" or, as it is also commonly phrased, "avoiding forum shopping."[34]

I have no difficulty with von Mehren's argument for special substantive rules where judicial creation of such rules is defensible in terms of aptness. Although I am inclined to doubt that the pursuit of apt solutions justifies the creation of special substantive rules with any great frequency, I fully agree that courts should be alert to the possibility and be willing to act upon it. The fact that this type of judicial lawmaking has somewhat of a legislative flavor to it seems to me beside the point. Whether in common-law adjudication or statutory interpretation, courts commonly engage in lawmaking to fill gaps left by the legislature. In this instance, the gap is simply one left by two (or more) legislatures, rather than one.

I also find a great deal valuable in von Mehren's argument for special substantive rules as a means of achieving decisional uniformity, but here I am ultimately unpersuaded. I share von Mehren's view that decisional uniformity is an important goal in choice of law. Indeed, I have argued (with no discernible effect on the Supreme Court)[35] that the framers of the federal Constitution saw uniformity of result as so important between the courts of the various states that they sought to mandate it when they

30. *Id.* at 350.
31. *Id.* at 366.
32. *Id.*
33. *See id.*
34. *See id.* at 350-51, 365-67, 371.
35. *See supra* notes 17 & 18 and accompanying text.

adopted the Full Faith and Credit Clause of Article IV.[36]

The issue at hand, however, is not simply whether decisional uniformity is an important goal. An interested forum makes a substantial sacrifice in terms of implementing its conception of aptness when it crafts a special substantive rule that mediates between the domestic rule that it sees as apt and the domestic rule that the other interested jurisdiction would favor. For this loss in terms of aptness to be warranted by the gain in terms of decisional uniformity, decisional uniformity must be not only an important goal but also a goal that the proposed rulemaking approach effectively serves; and on that latter score, I have serious doubts.

The proposed approach effectively serves the goal of uniformity only if courts in other jurisdictions generally follow suit and opt for compromise rules in like situations. For a variety of reasons, however, it is doubtful that they would do so. First of all, the approach does not even come into play unless the court first engages in an analysis of the relative interests of two or more jurisdictions in imposing their views of aptness. There is no reason to believe, however, that courts that continue to adhere to the traditional territorial rules have any inclination to engage in an analysis of this sort. In addition, the various courts that purport to follow the Second Restatement but interpret its most-significant-relationship test as a mandate for little more than contact-counting[37] seem unlikely to pursue the requisite first step with any seriousness, if at all.

Second, even many courts willing to make a conscientious effort to gauge state interests may bridle at the thought of crafting compromise rules. Some may regard the enterprise as too unwieldy and complicated. Even assuming that von Mehren's proposal of splitting the difference in potential damage awards is a simple and effective compromise rule for cases in which the plaintiff is seeking monetary relief, not all cases fit that mold; and courts sensibly would worry that good compromise rules for those other cases might not be so easily devised. Courts also may shy away from the approach as too untraditional and unjudicial. For centuries courts have understood their role in choice-of-law cases as limited to choosing between the domestic rules of jurisdictions connected to the case. Whether out of innate conservatism or fear of a negative popular or legislative response, some courts will be unwilling to go outside the usual judicial bounds.

Third, even courts not troubled by the notion of crafting rules of this sort may be unwilling to devise such rules in order to promote uniformity at the expense of aptness. Such courts may not regard decisional uniformity as a sufficiently important objective to warrant the sacrifice in aptness

36. *See* Simson, *supra* note 16, at 66-69.

37. *See* William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 IND. L.J. 417, 430-32 (2000) (discussing the "disturbing frequency of decisions" that misapply the most-significant-relationship test and "perform a much cruder choice-of-law analysis [than the drafters of the test intended], similar to the grouping-of-contacts approach"). For more on the most-significant-relationship test, see Gary J. Simson, *Leave Bad Enough Alone*, 75 IND. L.J. 649 (2000).

entailed. Even more likely, cognizant of the various reasons why other courts might not engage in similar compromise rulemaking, they may regard the approach as promising too little in the way of uniformity to justify the sacrifice in aptness.

As a policy matter, I therefore think courts should not follow von Mehren's suggestion of crafting compromise rules that sacrifice aptness in pursuit of uniformity. If decisional uniformity were a constitutional mandate rather than a choice-of-law objective that each state is free to pursue as little or as much as it wishes, my reaction to his proposal would be very different. Indeed, when I argued a number of years ago that the Full Faith and Credit Clause should be interpreted as mandating uniformity of result among courts within the United States, I cited von Mehren's proposal as supplying the logical means of achieving uniformity when two states are equally interested in the matter at hand and would resolve it by different domestic rules.[38] Although von Mehren's approach has limited promise of achieving uniformity in a system in which courts in different states are under no enforceable obligation to reach the same result, it would have great value as a means of achieving uniformity if imposed from above by the Supreme Court.

Von Mehren's approach also holds special promise in some cases as a means of serving an important choice-of-law objective other than decisional uniformity. Assume that the forum state has no interest in regulating the matter at hand but that two other states have interests in doing so and their interests are essentially equal. Assume also that those two states would select different domestic laws as applicable. In such cases, von Mehren's proposal provides the optimum approach for maximizing the forum state's ability in the long run to decide matters with which it is most concerned. By devising a rule that mediates between the domestic laws that the two interested jurisdictions regard as apt, the forum respects the authority of both jurisdictions. It follows the strategy most likely to trigger respect for the now-forum state's interests in future cases brought in those two jurisdictions.[39]

Finally, having argued the difficulties of achieving decisional uniformity, I perhaps should underline that I do see value in courts' including this goal in their conception of aptness. Recognizing that some disuniformity

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38. *See* Simson, *supra* note 16, at 76 & n.71.

39. If not apparent, it should be noted that von Mehren's approach is not strategically sound (in terms of the goal of maximizing long-term ability to decide matters with which the forum state is most concerned) for a court faced with a situation in which the forum state is one of two equally interested jurisdictions. If the court follows von Mehren's approach and makes a choice of law that splits the difference between the law that the forum state would prefer and the law that the other interested jurisdiction would select, it essentially realizes one-half of an interest now and would only recoup the other half if the other jurisdiction were to return the favor in a similar case later brought in its courts. Rather than risk the other jurisdiction's not reciprocating, a forum intent on maximizing its long-term ability to decide matters with which it is most concerned would simply give full effect to its interest now. By following the von Mehren approach in situations of this sort, the court could not come out better in the long run as far as vindicating its interests and it might well come out worse.

is inevitable in a system in which courts in different states are not constrained to reach the same results, a court nonetheless may sensibly decide that some choices of law reward forumshopping in a way that is particularly unfair and therefore should be avoided even if defensible on other grounds.[40]

Conclusion

Having focused on only two of von Mehren's choice-of-law writings and on only some of the ideas that they present, I would like to emphasize in closing the broad scope of his work on choice of law. There are few issues in the area that he has not addressed either in his numerous articles or in his extraordinary 1965 casebook with Donald Trautman.[41] As indicated in this Article, I am not always in agreement with him, but it is rare when I am not, and even then I find that he has made a valuable contribution to the development of choice of law.

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40. I have argued elsewhere that a court's decision on aptness should be framed as follows:

> [A]pply forum law with regard to each issue in the case unless:
> a. The foreign elements in the case bring into play a policy that would not be materially implicated if the case were confined in its elements to the forum state;
> b. Such policy militates strongly in favor of a choice of nonforum law; and
> c. The policy preference expressed in the forum state's internal law is not so strong as to belie the possibility that the forum state's lawmakers could intend it to yield to another policy in a multistate case.

Simson, *supra* note 19, at 279. A policy against forumshopping between courts of different states is the type of policy contemplated by the above condition *a*. Whether or not in a particular case it supplies a cogent reason for departing from forum law depends on whether conditions *b* and *c* are met as well. For more on this approach to aptness, see *id.* at 287-94. Like von Mehren, *see* von Mehren, *supra* note 8, at 952-53 & n.70, I do not suggest that courts factor into their decision on aptness whether nonforum law is in some sense "better" than forum law. *See* Simson, *supra* note 19, at 296-97; Gary J. Simson, *Resisting the Allure of Better Rule of Law*, 52 ARK. L. REV. 141 (1999).

41. ARTHUR TAYLOR VON MEHREN & DONALD THEODORE TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON CONFLICT OF LAWS (1965).