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CONSTITUTIONAL LIMITATIONS ON CHOICE OF LAW*

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I

THE ROLE OF DUE PROCESS AND FULL FAITH AND CREDIT

A discrete body of Supreme Court case law that has been generally ignored by constitutional law experts¹ has placed constitutional limits on choice of law. Perhaps because of this isolation, substantive due process, which died in the late 1930's for the rest of the world,² has emerged as the chief doctrinal basis for constitutional conflict-of-law decisions. Although conflicts authors have written a fair amount on this subject, none has addressed himself squarely to the seeming inconsistencies among leading cases. Discussing the cases on a one-by-one basis, commentators have explained over-all results with such general standards as "reasonableness" and "unfair surprise."³

Other clauses of the Constitution have been used or suggested to provide limitations on a state's choice of law. These include the commerce clause,⁴ the privileges and immunities clause of article

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¹ See, e.g., W. LOCKHART, Y. KAMISAR, & J. CHOPER, *CONSTITUTIONAL LAW, CASES—COMMENTS—QUESTIONS* 456 n.c (1967).

² Substantive due process seems to have found new life, however. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); see also Ely, *The Wages of Crying Wolf—A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 937-43 (1973).

³ E.g., R. LEFLAR, *AMERICAN CONFLICTS LAW* 136 (1968); Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 *IOWA L. REV.* 449, 455-62 (1959).

⁴ E.g., *Western Union Tel. Co. v. Brown*, 234 U.S. 542 (1914).

IV,⁵ and the equal protection clause.⁶ However, the only provisions successfully invoked with any regularity are the due process⁷ and the full faith and credit clauses.⁸ There are obvious distinctions between the two. While due process has vast influence outside the choice-of-law area, full faith and credit seems to be the exclusive authority to enforce sister-state judgments. When the question is limited to choice of law in cases not yet reduced to judgment, however, the only apparent significant distinction between the two clauses is that due process may require adherence to the law of another country, whereas full faith and credit is limited to interstate applications. Yet, because it incorporates established concepts of mutual respect among sovereigns, the full faith and credit clause provides a better analytical aid than reference to due process concepts in analyzing and understanding leading decisions. It can also help to determine normative and predictive rules for constitutional conflicts problems not yet examined by the Supreme Court.

A. *Full Faith and Credit versus Due Process—
Home Insurance Co. v. Dick*

*Home Insurance Co. v. Dick*⁹ illustrates the different implications of due process and full faith and credit. A Mexican insurance company had issued an insurance policy to a Mexican in Mexico to indemnify against the loss of the *Waverly R.*, a tug located in Mexican waters. The policy originally ran in favor of Bonner, of

⁵ *E.g.*, *Quong Ham Wah Co. v. Industrial Accident Comm.*, 184 Cal. 26, 192 P. 1021 (1920), in which the Supreme Court of California determined that the privileges and immunities clause is violated if workmen's compensation is denied to nonresidents working outside the state (but employed under a contract made within the state) while residents are covered. See also B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 445-525 (1963).

⁶ To cite such cases as *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*, 262 U.S. 544 (1923), one has to stretch the definition of "choice of law." Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1, 9, 15 (1960).

⁷ *E.g.*, *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). For a general introduction to the use of the due process and full faith and credit clauses in choice-of-law determinations, see, *e.g.*, B. CURRIE, *supra* note 5, at 193, 196.

⁸ *E.g.*, *Order of Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947); *Bradford Elect. Light Co. v. Clapper*, 286 U.S. 145 (1932). The text of the full faith and credit clause reads: Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. CONST. art. IV, § 1. 28 U.S.C. § 1738 (1970) provides in part,

Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

⁹ 281 U.S. 397 (1930).

Tampico, Mexico. Bonner transferred the policy to Turner, who transferred it to Dick. Dick was a resident of Mexico but a domiciliary of Texas¹⁰ at the time of transfer. He was also a resident of Mexico when the Waverly R. burned and sank in the harbor of Tampico Bay on July 27, 1921. A few days after the loss, Dick resumed his Texas residency. Dick brought an action more than a year later in the Texas state court, in which he sought to collect under the insurance policy that Turner had assigned to him.¹¹

¹⁰ The Court stated that Dick was not a resident of Mexico until after the loss and that his "permanent residence" was in Texas. He was also identified as a citizen of Texas. 281 U.S. at 408. Accepted terminology identifies domicile with state citizenship (as applied to citizens of the United States) and recognizes residence separate from domicile. See RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 20, comments *a-c* (1969); cf. B. CURRIE, *supra* note 5, at 445, 482; Currie & Schreter, *supra* note 6, at 6. I have attempted to translate the Court's terminology into that of standard usage.

¹¹ Jurisdiction over the Mexican insurance company was obtained by a quasi-in-rem attachment of the obligation of two American insurance companies to the Mexican company. The American companies had acted as reinsurers on the policy. This garnishment was similar to that in the controversial New York decision of *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). In *Seider*, the contingent liability of an insurer to a defendant was garnished to provide quasi-in-rem jurisdiction over the defendant's assets. The liability of the insurer to the insured was contingent on the existence of a judgment covered by the policy. The case has been criticized because the judgment depended on the validity of the quasi-in-rem jurisdiction, and the validity of the jurisdiction depended on the validity of the judgment. The quasi-in-rem attachment in *Dick* differs in that Dick's insurance was loss rather than liability insurance. Thus, the debt was arguably not contingent: the loss had already occurred. The compelling quality of the distinction dissipates when it is noted that the debt was contingent on the main issue in *Dick*—the one-year limitation on actions. If the limitation was valid, there was no debt and the court lacked quasi-in-rem jurisdiction. The Supreme Court did not consider the matter at any length in *Dick*.

The author cannot resist plaguing the reader with a bit of his own legal doggerel, but pledges that this example, unlike most published legal verse, scans:

HOW SEIDER'S LAWYER EARNED HIS FEE

New York lures hungry litigants As candles lure a moth And that explains the greater part Of <i>Seider versus Roth</i> .	The jurisdiction he would need To let him bring the case. (Now "res" is just a term of art To which the purists cling. It sounds obscure but lawyers know That all it means is "thing.")
The <i>Seider</i> facts are simply put: A driver named Lemieux Ran into Roth and Seider's car; The latter pledged he'd sue.	An "obligation to defend" Was what the lawyer found. You must have seen them here and there— In Gotham they abound.
The locus of Lemieux's delict Alas! was in Vermont Where plaintiffs find that verdicts are Much less than what they want.	With this bright thought his fee was earned, And who can doubt it's fair When courts make use of fictions and They seize what isn't there?
So Seider's lawyer tried to find A New York <i>res</i> to base	

The American companies defended on the ground that a contract provision prohibited suit more than one year after the loss. Alternatively, they argued that the Mexican one-year statute of limitations barred the suit. Dick sought to apply a Texas statute invalidating contractual limitations periods of less than two years. The Texas Supreme Court concluded that the one-year limitation was contrary to both the statutory law and the public policy of Texas.¹² It acknowledged that the Mexican statute purported to be more than a limitation on the opportunity to seek a remedy (*i.e.*, the right to sue) but rather was designed to extinguish the underlying contractual right after the lapse of a year. Concluding that the characterization of limitations matters was for the forum, however, the court held that, irrespective of the intent of the Mexican statute, the issue was procedural. In reversing the Texas decision, the United States Supreme Court held that the limitations period was a substantive matter¹³ and that application of Texas substantive law to a case with which Texas had no contacts¹⁴ deprived the defendant of the property without due process of law.¹⁵ Although the result has intuitive appeal, neither of the ordinary meanings of due process—substantive and procedural fairness—seems to be involved in *Dick*.

The Texas legislature must have determined when it passed the statute in question that it was unfair to deprive a contracting party of his day in court simply because of the passage of a short period of time, even if that party had agreed to such a limitation. It is important to note that there is nothing inherently local in the scope of this principle. Although it may be subject to implied

¹² 15 S.W.2d 1028 (Tex. 1929), *aff'g* 8 S.W.2d 354 (Tex. Ct. Civ. App. 1928).

¹³ The Court rejected nitpicking distinctions between conditions precedent and subsequent as unimportant to deciding whether the limitation issue was substantive. However, it attached great importance to the fact that the parties had agreed to the limitation, and that it was not merely statutory. It would have been interesting to present the Court with a case like *Dick* but with two variations: having the limitation unexpressed in the contract but having the evidence show that the parties had failed to include a limitations provision only because they had relied on the applicability of Mexican law. These facts should have produced the same result.

¹⁴ It is not literally true that Texas had no contact with the case, since it was both the forum and the domicile of the plaintiff. The late Professor Ehrenzweig expressed his attitude toward the Court's no-contact assertion with picturesque punctuation: "a Texas court [was] said to lack any substantial contact with the case despite the plaintiff's permanent residence in Texas (!). . . ." A. EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* 34 (1972) (footnote omitted).

¹⁵ Commentators have generally approved of the *Dick* decision. See, e.g., B. CURRIE, *supra* note 5, at 232-33, 271; Lefflar, *Constitutional Limits on Free Choice of Law*, 28 *LAW AND CONTEMP. PROB.* 706, 717 (1963) ("No one suggests that the *Dick* case is wrong or is likely to be overruled"); but see note 14 *supra*.

limitations, it is *prima facie* a universal statement. It is true, of course, as Professor Currie once observed, that legislatures often speak in generalities while thinking of particulars.¹⁶ Perhaps, then, even though the statute was worded in universal terms the Texas legislature believed only that Texas contracts, however defined, should be prevented from imposing limitations of less than two years. That view, however, is a misreading of Currie and of the truth. With respect to the limitations issue, it is unlikely that the Texas legislature recognized objective differences between Texas contracts and contracts identifiable with other jurisdictions. The most likely basis for concluding otherwise is the fear that parties have relied to their detriment on foreign law, and that, as a simple matter of fairness, this reliance, if justified,¹⁷ calls for different treatment of Texas and non-Texas contracts. For example, voiding the cancellation of an Illinois life insurance contract for nonpayment of premiums because the insurance company had failed to supply the notice required by Texas law would clearly be unfair if Illinois law did not require such notice and if Illinois were the only state with any contacts with the case.¹⁸ The company's justified reliance would make this true even if the Texas legislature firmly believed that requiring notice was the fairer approach to cancellation questions. In contrast, any reliance by the insurance company in the *Dick* case on the one-year limitations period was probably *not* detrimental. Extending the period of potential liability may prolong the defendant's discomfort, but it would not ordinarily subject him to loss that could have been avoided had he known that the law he "relied on" would not be applied.

A given legislature *cares more* about applying its universal notions of fairness to local contracts.¹⁹ The welfare of others is a noble goal often pursued, but the chief duty of any legislature is to provide for the welfare of its own constituency. However, barring factors which objectively distinguish domestic from conflicts situations (such as reliance on foreign law), our universal notions of

¹⁶ B. CURRIE, *supra* note 5, at 83-84.

¹⁷ "Justified reliance" is a slippery concept. Is reliance on the applicability of a particular state's law justified if a given court would apply it only as a concession to such reliance? In other words, when is a party justified in relying on the applicability of one body of law or another? When the question is cast in these terms, it resembles the subject under consideration. A party is certainly justified in relying on the nonapplicability of a law whose application is forbidden by the Constitution. See text accompanying notes 22-24 *infra*.

¹⁸ This hypothetical is very similar to the facts in *Lester v. Aetna Life Ins. Co.*, 433 F.2d 884 (5th Cir. 1970).

¹⁹ Cf. B. CURRIE, *supra* note 5, at 81-82.

fairness are simply extensions of our treatment of our own citizens in purely domestic disputes. The Texas court in *Dick* probably was faithful to the moral view of the Texas legislature even if non-Texas contracts were not its chief concern. Moreover, since *Dick* was a Texas domiciliary, Texas had an interest in protecting him from his improvidence even with respect to a contract entered outside the state.²⁰

The Supreme Court's opinion did not attempt to comment on the merits of the Texas statute. It would, after all, be quite surprising if the Court were to conclude in a purely domestic Texas case that such a statute violated due process.²¹ Yet the application by Texas of a rule that expressed its notions of fairness was struck down on due process grounds even though the substance of the rule was not unfair and even though no peculiar facts (such as detrimental reliance on foreign law) made application of a generally fair law unfair under the circumstances.

Some factor other than simple fairness must explain why, in the absence of justified detrimental reliance by the parties, the application of a "fair" rule was inappropriate. Several attempts have been made to formulate such a standard under the banner of due process. Some are simply conclusory, such as Professor Leflar's proposed borrowing of the "fair play and substantial justice" standard from *International Shoe*.²² Somewhat more descriptive are the two most commonly proposed tests, "arbitrariness,"²³ and "unfair surprise"²⁴ (also known under the catchphrase of "justifiable expectations" of the parties). Yet even these formulas fail to pin-

²⁰ Cf. *Lilienthal v. Kaufman*, 239 Ore. 1, 10-16, 395 P.2d 543, 547-49 (1964), in which the Oregon court, applying interest analysis, voided the contract of an Oregon spendthrift entered into in San Francisco with a Californian who lacked notice of the trust. The contract was to be performed in California and was valid under the laws of that state.

²¹ The Court almost said as much in its *Dick* opinion:

A State may, of course, prohibit and declare invalid the making of certain contracts within its borders. . . . But, in the case at bar, nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas.

281 U.S. at 407-08.

²² *International Shoe Co. v. Washington*, 321 U.S. 310 (1945). See R. LEFLAR, *supra* note 3, at 136; Leflar, *supra* note 15, at 706-07.

²³ See, e.g., Overton, *State Decisions in Conflict of Laws and Review by the United States Supreme Court Under the Due-Process Clause*, 22 ORE. L. REV. 109, 170 (1943):

So long as the state decisions, in conflict of laws, are not so manifestly erroneous in their application of governing principles as to amount to an arbitrary and capricious application of laws that have no fair or decent connection with the transaction, they do not amount to a denial of due process of law.

²⁴ See, e.g., Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449, 457-62 (1959).

point the error of the Texas court. From the viewpoint of the Texas court, there was a clear connection between the facts of the *Dick* case and the Texas law applied: the Texas law represented the fair resolution to the problem. Surely a fair resolution cannot be an arbitrary one, unless a previously unidentified consideration intervenes. If such a consideration exists, it should be able to stand on its own, unassisted by the concept of arbitrariness.

"Unfair surprise" is a slightly more complicated potential explanation of the *Dick* holding. Surprise per se is not enough; it must be "unfair." In the words of the alternative catchphrase, the expectation of the parties, to be worthy of protection, must be "justifiable." What makes surprise unfair or expectations justifiable? Like the arbitrariness formulation, these qualifiers seem excessively conclusory. If expectations are justifiable only when a court may not properly frustrate them, we are remitted to the question of when the Texas court may "properly" frustrate the expectations of the Mexican insurer. It cannot merely be when it would be "fair" to do so. As claimed above, fairness itself is not violated by the lower courts' decisions in *Dick*. The same comments are true for the "unfair surprise" formula. I do not suggest in attacking these formulas that they are meaningless. All legal formulas of significance rely on words that are somewhat imprecise, and sometimes we must be satisfied with highly imprecise formulas like "fair play and substantial justice" or "all deliberate speed." Nonetheless, either these formulas are simply restatements of the fairness standard, or they stand for something that seems terribly elusive.

Other constitutional provisions do not apply for a variety of reasons. Since the facts of the *Dick* case are centered almost entirely in Mexico, the commerce clause is inapplicable. There is no question of article IV privileges and immunities, since Texas applied its law as it would have in a domestic case; moreover, none of the defendants was a citizen.²⁵ Similarly, the equal protection clause of the fourteenth amendment is inapplicable for lack of some kind of discrimination. Full faith and credit was ruled out by the Court

²⁵ The principal defendant, Compañía General Anglo-Mexicana de Seguros S.A., was a Mexican corporation. The reinsurers of the Mexican insurance contract, the Home Insurance Co. and Franklin Insurance Co., were New York corporations. 281 U.S. at 402. Courts have consistently held that corporations are not "citizens" within the meaning of the privileges and immunities clause (U.S. CONST. art. IV, § 2, cl. 1). *E.g.*, *Blake v. McClung*, 172 U.S. 239 (1898); *Lebowitz v. Forbes Leasing & Finance Corp.*, 326 F. Supp. 1335, 1353-54 n. 77 (E.D. Pa. 1971), *aff'd*, 456 F.2d 979 (3d Cir.), *cert. denied*, 409 U.S. 843 (1972) (collecting authorities).

itself in *Dick*²⁶ because it applies only to the laws of other states. For the moment, however, let us put aside that limitation and see whether the full faith and credit clause might otherwise be applicable.

Just as due process primarily looks toward the relationship between the state and the individual, full faith and credit regulates relations among the states. By its own terms the due process clause refers to "any State" and "any person," while the full faith and credit clause speaks of "each State" giving proper respect to the official acts of "every other State." Analytically, the full faith and credit clause invites consideration of the interests of other jurisdictions. A policy concentrating on the interests of other jurisdictions would rationalize the result in *Dick* and avoid the problem posed by a substantive due process analysis: Texas may view enforcement of a one-year limitation clause in an insurance contract as unfair. But the observation made earlier²⁷—that Texas has a stronger legitimate concern about such unfairness when the contract has close Texas connections than when it does not—serves as the basis for distinguishing *Dick* from domestic Texas contracts cases that also discuss similar notions of fairness. Mexico's interests in the *Dick* case were almost overwhelming in comparison to those of Texas. The negotiations for insurance, transfers of the policy, the original insured party, the location of the insured risk, the permanent location of the defendant and the temporary location of the plaintiff were all in Mexico. Mexican contract law upholding the one-year limitation clause protected parties contracting in Mexico, and in this case protected a Mexican defendant dealing with a Mexican insured, neither of whom had ever engaged in any activity related to the contract outside of Mexico. Thus, under the Mexican statute of limitations, a Mexican litigant who had not operated outside the country was protected from suit after the passage of what Mexico deemed to be a reasonable amount of time. In contrast, the more limited interest of Texas was to protect its domiciliary from his own improvidence undertaken outside the state. Under such circumstances, respect among sovereigns for their respective rights to govern essentially domestic transactions called for Texas to submerge its feelings as to the "right" way to decide the case and yield to Mexico's claims. The deference is to the sovereignty of Mexico and not to the personal rights of the parties.

²⁶ 281 U.S. at 410-11.

²⁷ See text accompanying notes 19-20 *supra*.

This proposition is more easily analyzed if we assume that Dick was a domiciliary of Montana instead of Texas, and that the insurance policy was never assigned to the American companies which were defendants in *Dick*. Texas would then have a moral judgment on the proper resolution of the dispute between Dick and the insurance companies, but a minimal interest in the successful application of its moral judgment. If the role of Montana in this hypothetical is ignored and only Texas and Mexico are considered, it would take a certain degree of self-righteousness on the part of Texas to impose its own solution, even if it is the fair or moral solution as Texas sees it, when a different view was held by an interested jurisdiction.

This analysis is essentially unchanged when we add the fact that the Mexican insurance company reinsured with the New York companies named in the Texas suit (unless we wish to burden such assignments with changes of applicable law). The more difficult factor to consider is the Texas domicile of Dick. That domicile seems to give Texas an interest as strong as that of Mexico in the achievement of a fair resolution of the case. Indeed, Professor Ehrenzweig apparently concluded that the domicile of Dick justified application of the Texas limitations statute.²⁸ The remaining important element of full faith and credit is the "legitimacy" of such an interest. We intuitively feel that the overwhelming Mexican contacts with the *Dick* case as compared to the solitary Texas contact of Dick's domicile make the Mexican interests legitimate to assert and do not legitimize the Texas interests. A strong element of this intuitive feeling is the principle of territoriality. If the events in the *Dick* case had occurred in Texas, and if the domiciles of all parties were unchanged we could probably justify the application of Texas law on constitutional grounds (even though we might not choose to apply it for nonconstitutional reasons).

Territoriality serves a function that is not absolutely necessary in the conflict of laws. If Texas had been free of constitutional restraints from applying its own law in the *Dick* case, it would happily have done so despite the absence of physical contacts. The need for a principle such as territoriality arises only if one is dissatisfied with a totally fragmented approach whereby each jurisdiction simply pursues its own interests.

Since the purpose of the full faith and credit clause was

²⁸ A. EHRENZWEIG, TREATISE ON THE CONFLICT OF LAWS 142 (1962). He also argued that *Dick* was severely limited by subsequent cases. *Id.*

precisely to control such excessive provincialism,²⁹ however, it is necessary somehow to accommodate these conflicting interests. One approach that has emerged recently is the "better-law" approach of Professor Leflar.³⁰ In the case of a true conflict between state interests, he urges the forum to consider, among other factors, which is the better of two competing rules. Thus Texas in the *Dick* case undoubtedly found its own rule superior to that of Mexico.³¹ There are two important difficulties, however, in fashioning this approach into a rule of constitutional law.³² The first is that of administration. It seems unrealistic to expect states to choose objectively between two laws, on the merits, when one of those laws is that of the forum. Even though one can perceive an emerging trend in certain cases,³³ the determination of the better law has not proven so clear as to induce the state with the worse law to change it. Workable rules, especially constitutional rules designed to deal with provincialism, should not be so susceptible to local interests. A second objection to the "better-law" approach as a constitutional standard is that it requires federal courts to make a decision, based on federal law, as to which is the substantively better state rule. Choosing between substantive rules by judging their respective merits constitutes an act of substantive lawmaking in itself. Although such lawmaking is not as extensive or intrusive as a general federal common law, it runs counter to the spirit of federalism inherent in *Erie R.R. v. Tompkins*.³⁴ Thus, even if the "better-law" approach is useful within the bounds of constitutional limitations on choice of law, it cannot define those limitations.

Professor Baxter has proposed a comparative-impairment approach as a means of accommodating conflicting state interests.³⁵ This technique resolves true conflicts by determining not which state has the better rule, but which state's interest is less quantitatively or qualitatively impaired by the application of the other state's rule.³⁶ This approach avoids some difficulties of the better-

²⁹ B. CURRIE, *supra* note 5, at 199-200; see also Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 34-41 (1963).

³⁰ See, e.g., Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966).

³¹ See text accompanying note 18 *supra*.

³² The proponents of this "better-law" approach have not advanced it as a constitutional rule.

³³ See, e.g., *Clark v. Clark*, 107 N.H. 351, 355-57, 222 A.2d 205, 209-10 (1966).

³⁴ 304 U.S. 64 (1938).

³⁵ Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

³⁶ Professor Baxter provides the example of an automobile accident occurring in State X, which has a rule making speeding negligent per se. One of the drivers is guilty of

law approach by avoiding an examination of the particular law's merits. To a certain extent it may also avoid biased application, because it does not ask the states to consider disfavoring their own rules on the merits. The chief difficulty with using this approach as a general principle of constitutional limitation is that in too many cases it simply does not yield an answer. In the *Dick* case, for example, it is not clear that Texas's interest in protecting Dick from what Texas saw as an unjustly short limitation period would be any less important than Mexico's interest in protecting its insurer from a suit that it viewed as stale and that was forbidden by a contract clause valid under Mexican law.

Professor Currie once playfully suggested that the law of the state coming first in alphabetical order be used to resolve some conflicts.³⁷ That principle would certainly always yield a result and would avoid biased application, but it lacks affirmative virtues.

Thus, territoriality emerges as a useful principle almost by default. It works well in a significant number of cases³⁸ and avoids the value-laden aspects of the better-law approach, while providing two advantages. First, territoriality provides continuity with the past. It was an important—too important—factor during the reign of the first *Restatement of the Conflict of Laws*. Its retention thus provides some stability in the law. Second, territoriality is congruent with our notions of sovereignty. The principle that a sovereign has the right to control events within its own borders can theoretically justify either of the possible results in *Dick*. Since all of the "significant" events happened in Mexico, the political principle of sovereignty could give Mexico the right to determine the outcome. It could also be concluded that since the trial took place in Texas, Texas has the right to determine the results. The trial, however, is an appendage; it has no independent existence or *raison d'être* save for the events that took place in Mexico. In terms of political sovereignty, Mexico has greater (but not absolute) claim

speeding when the accident occurs. If both drivers are from State Y, which has no such rule, there is a true conflict between the policies of State X and State Y. His suggested accommodation is to apply the law of State Y even though the law of State X has a deterrence policy. This solution will satisfy the policies of State Y and impair those of State X very little because in general, a driver from State Y, speeding in State X, cannot assume that someone he might hit will also be from State Y. *Id.* at 12.

³⁷ B. CURRIE, *supra* note 5, at 609.

³⁸ It forbids a state without substantial connection from applying its own law in cases like *Dick*; it resolves the true conflict case covered by Judge Fuld's second rule in *Neumeier v. Kuehner*, 31 N.Y.2d 121, 128, 286 N.E.2d 454, 457-58, 335 N.Y.S.2d 64, 70 (1972); and it resolves the actual facts of the *Neumeier* case, covered by the third rule.

to govern the determination of a dispute arising out of those events.

By hypothesis we are not seeking a rule which is "correct," or moral, or fair. The discussion of fairness simply demonstrates that fairness is not available to resolve cases like *Dick*. In considering various approaches to the placement of limitations on state provincialism, the arguments should be judged not by whether they seem to produce the right answer, but by whether they produce the expedient answer. Territoriality, especially in the absence of successful competition, satisfies this criterion and has the added virtue of intuitive appeal.

This inspection of fairness, territoriality, and sovereignty leads to the conclusion that full faith and credit principles (or their equivalent in conflicts cases involving other countries), rather than due process principles, should control in determining constitutional limitations on choice of law. One may concede that cases of blatant overstepping by a state may evoke feelings that the state is behaving unfairly, despite any argument made above about unfairness. However, such feelings may derive from notions of inter-sovereign relations, and not directly from fundamental notions of fairness. An analogy to another area of law is useful. Assume that *A* contracts with *B* to provide services for *C*. Since *C* is a lazy good-for-nothing and does not "deserve" such services, *A* decides not to perform. *A* is not behaving unfairly toward *C* in the fundamental sense of the relationship between *A* and *C*. Nonetheless, one feels that *A*'s obligation to *B* makes it unfair to *C* (as well as to *B*) for *A* to renege. In a similar way, the litigants in a constitutional conflicts case represent state interests and feel that they have the right to require the forum to honor its obligations to other jurisdictions which they as litigants represent. Seen in this light, unfair surprise is no longer a bootstrapping concept since the unfairness of the surprise is attributable to the state's failure to give proper deference to the interests of other states.

The primary importance of deference to the interests of other sovereigns, as opposed to fairness, is supported by two lines of case authority on the fringes of the law of conflicts. One is the rule established in *Skiriotes v. Florida*,³⁹ the other is the act-of-state doctrine. The defendant in *Skiriotes* was convicted of violating a Florida statute by using diving gear in gathering natural sponges out of waters adjoining Florida but more than three

³⁹ 313 U.S. 69 (1941).

miles from shore. The Florida courts emphasized the issue of whether Florida's boundaries extended past the three-mile limit.⁴⁰ The United States Supreme Court, however, found it unnecessary to assess Florida's undersea rights. It concluded that Florida could criminalize the activities of its own citizens occurring beyond its borders if those activities affected state interests and if the claim of authority did not infringe the rights of other governments or their citizens. Two of these three conditions—that the defendant be a Florida citizen and that the rights of other governments not be infringed—are oriented toward mutual respect among sovereigns. Action by the defendant in or out of the territorial waters of Florida was not the talisman; in other words, there appears to be no due process type of right to be free from control by a state when one is outside its borders. Instead, the limiting principles are the interests of other states, whether they are generalized interests or interests that are specifically present because the defendant is the citizen of another jurisdiction. Only the third requirement—that the forbidden activity affect the interests of Florida—suggests that some personal right of the defendant, perhaps due process, is involved. This requirement, however, is not absolute. In cases of a state punishing piracy on the high seas, it is either not present or is present in the attenuated form of any state's generalized interest in freeing all seafaring commerce of piracy.⁴¹ The latter interest seems little more than a desire to see justice prevail—an interest which all states presumably share. Thus, *Skiriotes* and piracy cases, by dealing with activity outside the forum but not within the border of another sovereign, eliminate the foreign contacts present in *Dick* without adding significant domestic contacts. That these cases allow the application of domestic law while *Dick* did not suggests that the interests of the foreign state, rather than the remoteness of domestic interests, dictated the result in *Dick*.

Lending support to the analysis suggested here, is the act-of-state doctrine, which arose in the well-known case of *Banco Nacional de Cuba v. Sabbatino*.⁴² The issue was whether an agency of the Cuban government could recover in a United States federal court the proceeds from the sale of a shipload of sugar that the Cuban government had seized from a Cuban corporation owned chiefly

⁴⁰ *Skiriotes v. State*, 144 Fla. 220, 221-25, 197 So. 736, 737-38 (1940). The Florida constitution had historically claimed greater geographical limits, and the state argued that Congress had approved such claims by its admission of Florida into the Union.

⁴¹ See *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 40-41 (1826) (dictum).

⁴² 376 U.S. 398 (1964).

by Americans. The seizure was essentially an uncompensated one directed at American-owned companies in Cuba in retaliation against congressional changes in the Cuban sugar quota. Had the United States seized the ship, its act would certainly have violated the due process clause of the fifth amendment. A seizure by Cuba in American waters would have constituted conversion. However, the seizure was by and in Cuba. The Supreme Court stressed that the seizure was legal where it occurred. While disclaiming any recognition of its validity, the Court gave effect to the seizure. Justice Harlan's opinion for the majority explained the pitfalls of a judicial holding that the act of another sovereign, within its own territory, was void or valid. Such a course, he indicated, would unacceptably hinder the Executive in dealing with this nation's foreign policy.

Sabbatino has produced scholarly⁴³ and congressional⁴⁴ reaction. It is not my purpose here to consider the merits of the precise holding. It is sufficient to note that application of Cuban law actually worked a deprivation of property without due process of law. Since the deprivation was by Cuba, the due process clause of the United States Constitution was not violated. Yet the due process clause simply embodies our preexisting notions of what due process is; it does not create them. An act that would violate the clause but for the perpetrator and place of the act runs counter to the "spirit" of due process. Thus, it perverts the concept of due process to hold that the fifth amendment's due process clause actually *required* the holding in *Sabbatino* on the ground that Cuba was the only country with the requisite contacts. If the holding of *Sabbatino* is justifiable, it must rest on a consideration for inter-sovereign relations. *Sabbatino* focused on the Executive's right to control our international affairs, which is chiefly a separation-of-powers issue, rather than on the appropriate judicial response to seizures of American property by foreign governments. A necessary implication of the *Sabbatino* holding, however, is the proposition that the interests of another sovereign may be as important as, or more important than, our notions of fundamental fairness.⁴⁵

⁴³ E.g., Collinson, *Sabbatino: The Treatment of International Law in United States Courts*, 3 COLUM. J. TRANSNAT. L. 27 (1964); Domke, *Act of State: Sabbatino in the Courts and in Congress*, 3 COLUM. J. TRANSNAT. L. 99 (1964); Spiro, *Foreign Acts of State and the Conflict of Laws*, 16 INT. & COMP. L.Q. 145 (1967).

⁴⁴ 22 U.S.C. § 2370(e) (2) (1970), known as the Hickenlooper Amendment.

⁴⁵ If limited to the proposition that the right of the Executive to control international relations is sufficient to deny Americans their fundamental rights, *Sabbatino* presents the anomaly that what the Executive does not have power to do directly may be accomplished indirectly by deference to its powers.

Despite the existence of the public-policy doctrine, few interstate (as opposed to international) cases involve a truly fundamental split as to notions of basic fairness. A sufficient aberration by one state or the other is controlled by a direct application of due process to strike down the law on the merits, rather than by some choice-of-law doctrine.⁴⁶ Similarly, the delicacy with which the courts must treat the foreign interest will rarely be as strong as in *Sabbatino*, since interstate squabbles rarely have the potential for harm that inheres in international disputes. *Sabbatino* nonetheless illustrates that the key to federal limitations on choice of law is not found solely in considerations of fairness to the individual litigant or in related concepts that have been suggested as tests for due process.

Dick does not yield to a due process analysis and cannot be supported directly by the full faith and credit clause because Mexico is not a state. Representing an exercise in the development of federal common law, *Sabbatino* not only establishes the failure of due process to account for the holding of *Dick*, but also provides a basis for the federal lawmaking power exercised in *Dick*. The Court denied that its decision was constitutionally compelled, but indicated that the decision merely had constitutional "underpinnings."⁴⁷ It has also stated in other contexts that federal law ultimately controls our relations with other countries.⁴⁸ A slight extension of this principle brings conflicts questions involving other countries under the umbrella of "relations" and thus makes them a matter of federal law.

To supply a federal-common-law theory appropriate to international cases like *Dick*, it is not necessary to create a general federal common law of conflicts of law.⁴⁹ The federal conflicts rule could be patterned almost precisely upon the operation of the full faith and credit clause among the states (as it applies to claims not yet reduced to judgment). The considerations giving rise to the

⁴⁶ Paulsen & Govern, "Public Policy" in the *Conflict of Laws*, 56 COLUM. L. REV. 969, 1015-16 (1956).

⁴⁷ 376 U.S. at 423.

⁴⁸ "Plainly, the external powers of the United States are to be exercised without regard to state laws or policies." *United States v. Belmont*, 301 U.S. 324, 331 (1937).

⁴⁹ The need for a federal common law of conflicts of law has been suggested by some commentators. See Baxter, *supra* note 35, at 23-42; Hart, *The Relation Between State and Federal Law*, 54 COLUM. L. REV. 489, 513-15, 541-42 (1954) (apparently in favor of allowing federal courts to develop choice-of-law doctrines that would not be binding on state courts); Horowitz, *Toward a Federal Common Law of Choice of Law*, 14 U.C.L.A.L. REV. 1191 (1967); Randall, *The Erie Doctrine and State Conflict of Laws*, 17 S. CAR. L. REV. 494 (1965) (limited to proposition that federal courts should depart from state conflicts rules when there are "affirmative countervailing considerations at work").

interstate role presently shared by due process and full faith and credit are not peculiar to interstate problems. In contrast to an interstate situation, however, there is no guaranty in international cases that due process will limit the substance of another jurisdiction's law. The suggested federal rule applying interstate policies to international situations should include an exception for cases of extremely unacceptable foreign law. *Sabbatino* weakens this caveat, however, by protecting a foreign act that would have violated the due process clause had the United States been the perpetrator.

Although the full faith and credit clause provides authority to strike down various abuses of state choice of law,⁵⁰ an analysis balancing the competing interests of the states has never fully emerged. In *Pacific Employers Insurance Co. v. Industrial Accident Commission*,⁵¹ the Court said that it would "determine for itself how far the full faith and credit clause compels the qualification or denial of rights asserted under the laws of one state, that of the forum, by the statute of another state."⁵² After seemingly upholding a balancing test, the Court followed this assertion with a gutting qualification:

But there would seem to be little room for the exercise of that function when the statute of the forum is the expression of domestic policy, in terms declared to be exclusive in its application to persons and events within the state.⁵³

This pronouncement illustrates the Court's strong forum-oriented bias when there are critical "events within the state." The absolute presumption in favor of the forum does not operate when there are no such events. The arguments made thus far—that full faith and credit principles better explain the holding in *Dick* than due process principles—seem consistent with the importance attached to events within the state by *Pacific Employers*. Attaching importance to the physical location of events is more clearly connected with state sovereignty over events (full faith and credit) than with the right of the state, as against the individual, to regulate the event (due process). The distinction may not be fundamental in cases like *Pacific Employers*, but it was critical in *Watson v. Employers Liability Insurance Co.*⁵⁴ and *Clay v. Sun Insurance Office, Ltd.*,⁵⁵ wherein the

⁵⁰ See text accompanying note 8 *supra*.

⁵¹ 306 U.S. 493 (1939).

⁵² *Id.* at 502.

⁵³ *Id.* at 502-03.

⁵⁴ 348 U.S. 66 (1954). See Part C *infra*.

⁵⁵ 377 U.S. 179 (1964). See Part C *infra*.

process of locating "events within the state" became much more difficult. When the location of a critical event within the state is questionable, it becomes far more important to examine the competing interests of the states through some kind of balancing process—despite the language used in *Pacific Employers*. The balance may retain a bias toward the forum, but the result will not be absolute, as it is when a critical event taking place within the forum is undisputed.

Several kinds of possible interest-balancing thus emerge. One can attempt to balance the "legitimacy" of two states' interests, to balance their relative strengths, to balance the degree to which each over-all interest would be impaired by nonapplication in the particular case,⁵⁶ and finally to balance their merits. *Pacific Employers* illustrates that the Supreme Court's present approach involves only "legitimacy." The location of an event within the state legitimizes the state's preference for its own policy, even if that policy is weaker than that of a competing state (as long as it is not nonexistent), even though it would be impaired less than another state's interest by nonapplication and even though it is not the "better" policy. A better rule results, however, if the "legitimacy" balance is confined to cases in which there is a clear critical event within the state whose law is being applied, as in *Pacific Employers*. When the presence of critical events within the forum is less clear, a weighing of the strengths of the states' interests, as well as their legitimacy, may be appropriate.⁵⁷

B. *A Comparison with the Rules of In Personam Jurisdiction*

Rejection of a due process analysis for choice-of-law questions (*i.e.*, legislative jurisdiction) does not entail rejection of a due process approach to judicial jurisdiction. If "specific" jurisdiction⁵⁸ is considered apart from "general" jurisdiction,⁵⁹ transient jurisdiction,⁶⁰ and quasi-in-rem jurisdiction, the "contacts" requirements

⁵⁶ Dubbed "comparative impairment" by Professor Baxter, this third kind of weighing differs greatly from present practice. See notes 35-36 and accompanying text *supra*.

⁵⁷ This point is developed more fully in connection with the discussion of *Watson and Clay* in Part C *infra*.

⁵⁸ The term is used here in the sense of von Mehren and Trautman to indicate jurisdiction limited to the right to try issues related to the forum, and not all claims against the defendant. Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144-45 (1966).

⁵⁹ "General" jurisdiction is the right to try any issue related to the defendant. *Id.* at 1136.

⁶⁰ The term indicates jurisdiction obtained by casual service on the defendant within the forum and unsupported by other contacts between the defendant and the forum.

for legislative and judicial jurisdiction are remarkably similar. Commentators⁶¹ have unsuccessfully sought a unified limitations theory. Although the limits of both forms of jurisdiction are defined by roughly equal requirements of contact,⁶² judicial attitudes toward the two are different. Legislatures⁶³ and judges⁶⁴ often indicate a desire to pursue the judicial jurisdiction of their state to "the limits of due process." The clear implication is that such a course is socially desirable. Choice-of-law decisions that barely pass constitutional muster, however, are not generally greeted with enthusiasm. Commentators often note that constitutional limitations exist to curb excesses in state choice-of-law doctrine.⁶⁵ A major reason for this difference in attitudes is the general absence of full faith and credit considerations in cases involving judicial jurisdiction. For example, a state which exercises transient jurisdiction and whose only connection with a case is the presence of the parties is unlikely to insist on the application of its own law to the merits of the dispute. Thus, the only arguable infringement by the forum on the interests of other states having greater connections with the case is the act of depriving them of the right to try it. In those cases in which they prefer to keep litigation at home, states generally seek to assure application of state law or protection for a class of litigants.⁶⁶ The majority of cases, however, do not entail such considerations, and "depriving" an interested state of the right to be a forum simply lightens the docket burdens of that state.

A fine but clear distinction exists between the offensiveness of asserting judicial jurisdiction and the offensiveness that arises through the imposition of forum law. The latter does not violate due process when the disinterested state applies those beliefs to a case that is properly before it. That state is acting somewhat like an arbitrator who does not insist on deciding a case, but insists that if he must decide the case, he be permitted to dispense justice as he sees it. On the other hand, there are constitutional limitations on

⁶¹ E.g., R. LEFLAR, *supra* note 3, at 121-25; Ehrenzweig, *The Transient Rule of Personal Jurisdiction*, 65 YALE L.J. 289, 292 (1956); von Mehren & Trautman, *supra* note 58, at 1164-79.

⁶² R. LEFLAR, *supra* note 3, at 122.

⁶³ See, e.g., R.I. GEN. LAWS ANN. § 9-5-33 (1969) (asserting jurisdiction "in every case not contrary to the provisions of the constitution or laws of the United States").

⁶⁴ See, e.g., *Gelineau v. New York Univ. Hosp.*, 375 F. Supp. 661, 666 (D.N.J. 1974) (characterizing New Jersey law).

⁶⁵ E.g., H. GOODRICH & E. SCOLES, *CONFLICT OF LAWS* 19-23 (4th ed. 1964); R. LEFLAR, *supra* note 3, at 144-45.

⁶⁶ See *Tennessee Coal, Iron, & R.R. v. George*, 233 U.S. 354 (1914).

the state's power to localize litigation.⁶⁷ Litigants have a personal right to be free from required participation in distant and inconvenient litigation and from the officiousness of a disinterested state. Such meddling imposes a burden of participating in the litigation or losing the judgment, and it does so without advancing the interests of either forum or litigants. Such action can reasonably be deemed arbitrary and should thus be forbidden by traditional due process notions. In contrast, the litigant's right to the "proper" choice of law is often the right of a state other than the forum, which, for purposes of practicality and convenience, he is allowed to represent. Freedom from an improper assertion of judicial jurisdiction, however, is almost always the litigant's personal right. The similarity between the case-developed rules governing the two problems is thus not fortuitous, but stops short of yielding identical analysis.

C. *Later Supreme Court Decisions*

Let us inspect subsequent Supreme Court decisions in light of the full faith and credit thesis developed above. *Watson v. Employers Liability Insurance Co.*⁶⁸ is discussed at great length below because it poses the most significant challenge to the ideas I have proposed and because it proves useful in refining those ideas into a specific formula for determining when a state may constitutionally apply its own law to a case. This discussion will also examine *Clay v. Sun Insurance Office, Ltd.*⁶⁹ because it is the most recent Supreme Court pronouncement that tests my analysis.

Mr. and Mrs. Watson sued in a Louisiana state court for damages arising from Mrs. Watson's use of Toni Home Permanent. The product had been bought and used in Louisiana. Under the authority of the Louisiana direct-action statute, suit was brought directly against Employers Liability Insurance Company, the insurer of the Toni Company, a subsidiary of Gillette. A subsequent amendment to the plaintiff's pleadings to add Gillette as a defendant was disallowed.⁷⁰

Employers became the insurer for Gillette through a contract that had been written in Massachusetts and delivered in Illinois. Although Employers was doing business in Louisiana—the basis for exercising personal jurisdiction over the company—the busi-

⁶⁷ *Id.*

⁶⁸ 348 U.S. 66 (1954).

⁶⁹ 377 U.S. 179 (1964).

⁷⁰ See note 81 *infra*.

ness conducted in Louisiana was apparently unrelated to the contract between Employers and Gillette. The contract declared that there would be no liability on the part of Employers until there was a judgment of liability against Gillette or until a written agreement among Gillette, the claimant, and Employers was reached. That provision was valid under Massachusetts and Illinois law, but was invalid under the Louisiana direct-action statute. After removal of the case from state court, the federal district court declared that, as applied to the facts of *Watson*, the Louisiana direct-action statute was unconstitutional. The Fifth Circuit agreed,⁷¹ but the Supreme Court reversed in an opinion written by Justice Black.

Two facts distinguish the *Watson* and *Dick* cases, which are otherwise similar to a remarkable degree. First, the forum had personal jurisdiction over the defendant in *Watson*, whereas in *Dick* the case proceeded quasi in rem. Second, the insured-against event did not take place within the forum in *Dick*, while it did in *Watson*.

The Court in *Watson* rejected the proposition that Louisiana could regulate the obligation between Gillette and its insurer simply because the insurer carried on presumably unrelated business activities within the state.⁷² It would be hard to make such an agreement convincingly, although Justice Frankfurter made an unsuccessful effort in his concurring opinion.⁷³ The majority wished

⁷¹ 202 F.2d 407 (5th Cir. 1953).

⁷² *Labruzzo v. State Wide Ins. Co.*, 77 Misc. 2d 455, 353 N.Y.S.2d 98 (Sup. Ct. 1974), involved the same issues as those in *Watson*, except that the insurer was not doing business in Louisiana. The action was to enforce a default judgment entered in Louisiana against the insurance company for an automobile accident involving the company's insured. The Louisiana direct-action statute imposed substantive liability, and its long-arm statute was used to obtain jurisdiction over the company. Asked to enforce the judgment, the New York court first looked to the jurisdictional question. It held that the act of insuring one who entered Louisiana, in connection with the company's expectation that the insured might do so, supplied "minimum contact." On the basis of *Watson*, the Louisiana statute was found to satisfy the "fair play and substantial justice" jurisdictional test of *International Shoe*. The court then assessed the reasonableness of maintaining such an action, with particular reference to the merits of the direct-action statute. An examination of the merits would ordinarily have been foreclosed: once it is determined that the state court rendering the original judgment had personal jurisdiction over the defendant, errors—even constitutional errors—are irrelevant. *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

The *Labruzzo* court upheld Louisiana jurisdiction on the ground that the contacts were no more tenuous and casual than in *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). The whole controversy about *Seider* stems from the tortfeasor's lack of "minimum contacts" with New York; the case proceeds on a quasi-in-rem theory. If there had been enough contacts in *Seider* to satisfy *International Shoe*, the quasi-in-rem theory would have been at most a curiosity of New York law, and not the focus of a dispute about its constitutionality. See, e.g., Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550 (1967).

⁷³ 348 U.S. at 74. Justice Frankfurter argued that the state had the right to exclude the

to establish a broader rule. The opinion gives no indication that the defendant's business activities in the state had any effect beyond providing the state with general personal jurisdiction over the defendant. On the other hand, the majority found it significant (if not controlling) that the accident took place in Louisiana.

In *Pacific Employers*, an earlier case, a Massachusetts employee who had entered into an employment contract in Massachusetts had been sent temporarily to California, where he was then injured. He sued under the California Worker Compensation Act. The Court in *Pacific Employers* indicated that forum interests plus "events within the state"⁷⁴ justified application of forum law. That the *Watson* Court did not simply rely on *Pacific Employers* after its recitation of in-state contacts⁷⁵ and state interests⁷⁶ indicates that the "in-state events" of *Watson* were less significant than those of *Pacific Employers*. To a certain extent, however, the *Watson* opinion obscured the weakness of Louisiana contacts in *Watson* by its

company from doing business in the state, and could therefore condition entry into the state with its direct-action statute. The appeal of the Frankfurter theory is that it translates the unsolved problem of the case into the familiar legal concept of consent. However, it does so by using a favorite legal device: weasel words. Justice Frankfurter stated that the Louisiana law met constitutional requirements "because the conditions imposed are fairly related to the interests which Louisiana may appropriately protect." *Id.* at 82 (emphasis supplied). The main problem is solved by the "consent" idea, but a new problem is created by having to decide whether the exaction of consent is fair. The original purpose of Justice Frankfurter's approach was to avoid the difficult constitutional issues raised by the majority opinion when "less doubtful ground" was available. *Id.* at 74. However, this use of "fairly" and "appropriately" creates its own doubt. Resolving the doubt presumably involves difficult constitutional issues, and leaves the Court with a test applicable only to those cases in which the party against whom local law is applied does business in the forum state.

⁷⁴ 306 U.S. at 502-03.

⁷⁵ Although this insurance contract was issued in Massachusetts, it was to protect Gillette and its Illinois subsidiary from damages on account of personal injuries that might be suffered by users of Toni Home Permanents anywhere in the United States, its territories, or in Canada. . . . [T]his Court has . . . held that more states than one . . . may regulate to protect interests of its own people. . . .

348 U.S. at 71-72.

⁷⁶ Louisiana's direct action statute is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers. Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call upon friends, relatives, or the public for help. Louisiana has manifested its natural interest in the injured by providing remedies for recovery of damages. It has a similar interest in policies of insurance which are designed to assure ultimate payment of such damages. Moreover, Louisiana courts in most instances provide the most convenient forum for trial of these cases. . . . What has been said is enough to show Louisiana's legitimate interest in safeguarding the rights of persons injured there. In view of that interest, the direct action provisions here challenged do not violate due process.

Id. at 72-73.

characterization of the *Dick* case: "But this Court carefully pointed out [in *Dick*] that its decision might have been different had activities relating to the contract taken place in Texas upon which the State could properly lay hold as a basis for regulation."⁷⁷ The clear implication is that the location of an insured-against risk in the forum state was the kind of activity "relating to the contract" that the *Dick* court would have found sufficient. However, *Watson* fails to note that the *Dick* opinion makes clear after the quoted language that it was referring to two significant activities that traditionally would have justified the application of Texas law: the contract had been made, or was to be performed, in Texas. If the *Dick* opinion had suggested that location within the forum of the insured-against risk justified application of forum law, it would clearly have gone beyond traditional concepts. Formation and performance seem to be all the *Dick* Court had in mind.

When are events within the forum sufficient to justify application of the forum's law? At a minimum the events should be significant—part of, or related to, the plaintiff's cause of action—and they should provide some significant connection between the forum and the defendant.⁷⁸ In both *Watson* and *Pacific Employers* the in-forum events were significant to the cause of action being asserted against the defendants, but the degree of contact they provided between the forum and the defendant in *Pacific Employers* seems greater than in *Watson*. An entire cause of action could be built from the events that took place in California (employment plus employment-related injury). In *Watson* only the loss occurred in Louisiana, and the liability of the company was predicated on an out-of-state insurance contract. But that distinction is not enough: the contract establishing the employment relationship in *Pacific Employers* was made in Massachusetts not in California.

The existence of an out-of-state contract between the parties and an in-state event which is the subject of the contract does not always warrant application of the forum's law. If two persons from Ann Arbor bet on whether Chairman Mao will swim the Yangtze River this year, that is not enough to make Chinese law applicable, even if one of the parties happens to be visiting China when the blessed event occurs. The party visiting China does not carry the

⁷⁷ *Id.* at 71. The Court recited almost a litany on the importance of an in-state contact (see note 75 *supra*), but proceeded to discuss the question in terms of state interest, and not chiefly contacts (see note 76 *supra*). This ambiguity toward contacts and interest makes *Watson* a hard case to accept completely at face value.

⁷⁸ "Defendant" is used here to signify the person who resists the application of a particular state's law. A different procedural stance could make that person the plaintiff, etc.

“wagering relationship” with him, making it a Chinese relationship. In contrast, in *Pacific Employers* the employee was carrying on activities in the state of California for his employer. No matter where the relationship was originally formed, it was ongoing and active in California. Under such circumstances, California had an interest in the relationship to pit against that of Massachusetts.

Relationships, however, are legal fictions and not physical entities. Trying to ascribe physical locations to legal fictions is a process doomed to failure unless it can be translated into other terms. A useful formulation is to locate a relationship in a state if the parties benefit from activities related to their relationship in that state. Our hypothetical wagerers derived no benefit related to the wager from the visit to China, but the litigants in *Pacific Employers* both presumably benefited from the presence of the employee working in California.⁷⁹ How does the above test apply to *Watson*? The insurance company in *Watson* did not directly benefit from Louisiana. Premiums presumably were not sent from each of the fifty states, prorated according to the sales volume of Gillette in each state. Even though they were not so paid, one could attribute the premiums to individual states. However, the benefit that is thus attributed to the insurance company in *Watson* is far more at-

⁷⁹ A similar derivation-of-benefit theory proves useful in squaring the results of *Hanson v. Denckla*, 357 U.S. 235 (1958), and *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). These cases involved the issue of personal jurisdiction, an area closely related to choice of law. In *Hanson* a trust was arranged with a Delaware trustee while the settlor lived in Pennsylvania. After moving to Florida, the settlor exercised a power of appointment and died. The Supreme Court held that Florida did not have jurisdiction over the trustee, since the trustee had not purposely availed itself “of the privilege of conducting activities within the forum State” (357 U.S. at 253) and therefore had not invoked the benefits and protections of the forum’s law. In contrast to *Hanson*, the Court, only a year earlier in *McGee*, had allowed California to exercise jurisdiction over the insurer of a California resident even though the court found no evidence that the company had ever solicited or done any other business in California. The most rational distinction between the cases is the privilege concept noted from the *Hanson* opinion: the *Hanson* trustee was not deriving any benefit from Florida by virtue of the activities of the settlor in Florida (though it continued to earn fees), but the insurance company in *McGee* continuously benefited from California as premiums were paid. Other commentators do not view this distinction as critical. For example, Professor Green says: “The crucial distinction between the two cases seems to be that in *McGee* the contacts, such as they were, were initiated by the defendant, whereas in *Hanson* they were not.” M. GREEN, BASIC CIVIL PROCEDURE 32 (1972) (footnote omitted). Disparaging the importance of the “unilateral activity of those who claim some relationship with a nonresident defendant” (357 U.S. at 253), the language Professor Green cites from *Hanson* fails to support his point. It contains no indication that the party who initiated contact is more subject to forum jurisdiction than the one who did not. Moreover, letters presumably flowed between decedent and defendant in both cases. Something must therefore allow the Court to downplay the importance of this activity on the defendant’s part in *Hanson* but not in *McGee*. The benefit theory does so.

tenuated than the benefit running directly to the employer in *Pacific Employers* from services performed for it by its employee in California. The degree of connectedness between the defendant and the forum state was substantially greater in *Pacific Employers* than in *Watson*. The court in *Watson* therefore concentrated on forum interests rather than contacts. In other words, *Watson* and *Pacific Employers* together stand for the proposition that when contacts are ample the mere existence of some forum interest is sufficient, but when contacts are marginal, much more attention must be paid to state interests.

Let us compare the interests attributed by the Court to Louisiana in *Watson* with the facts that produced an opposite result in *Dick*. The stated interests of Louisiana may be summarized as follows:

- (1) Persons killed or injured in Louisiana are most likely Louisiana residents.
- (2) Even if they are not Louisiana residents, Louisiana may have to care for them.
- (3) Local medical care may create local creditors.
- (4) Louisiana's "natural interest" in the injured is expressed in its laws providing remedies and in its regulation of insurance, which often funds the remedies.
- (5) Louisiana is usually the most convenient forum for cases in which the injury occurs in Louisiana.

The first item takes as a factual basis the occurrence of a loss in Louisiana, but the justifying interest of the state is the residence of the plaintiff in the forum. This is not the interest that distinguishes *Watson* from *Dick*, since *Dick* was a resident of Texas. Because the second item is significant only when the first is not satisfied, it is inapplicable to *Watson* itself. The third item is not so obviously applicable to the *Dick* situation—*Dick* was not physically injured, thereby creating a class of medical creditors in Texas. However, the financial loss that *Dick* suffered was most likely to affect Texas creditors adversely if his own assets were unable to sustain the loss. If *Dick* had borrowed money to buy the *Waverly R.*, and had counted on the earnings from the tug or, in case of loss, their equivalent in insurance, to allow him to repay his debts, the economic injury to Texas creditors might have been significant. From the standpoint of the forum's interest in protecting local creditors, the cases are thus quite similar.⁸⁰

⁸⁰ A possible elaboration of the creditor problem, not limited merely to the state's concern for local creditors, was recently suggested by one of my students: the real interest

For the moment, I will pass over the fourth and most difficult item. The fifth reason provided by the Court for a Louisiana interest in the application for its statute is that Louisiana is the most convenient forum for cases arising in Louisiana. This statement is true, but irrelevant. The case would have been tried in Louisiana, even without application of the direct-action statute, if the tortfeasor had been the person sued.⁸¹ Thus, the Supreme Court's justification of the application of the direct-action statute on the ground that Louisiana was the convenient place for trial overlooks the fact that the direct-action statute was totally unnecessary to have trial in Louisiana. Even if one assumes that the district court could not obtain statutory personal jurisdiction over the Gillette Company, it seems reasonably clear—in this post-*International Shoe* case—that the problem was one of state law. A statute authorizing such jurisdiction would almost certainly have been constitutional. In this light, the fifth interest identified by the Court seems to boil down to the following: the trial should take place in Louisiana, but Louisiana has not provided itself with a service-of-process statute sufficient to assure that result; consequently, Louisiana is justified in voiding an otherwise valid contract term, entered into by nondomiciliaries outside the state, because that is the only remaining method to assure that the case is tried within the state. The state's interest in having a local trial clearly distinguishes *Watson* from *Dick* (where trial in Texas was assured on other grounds and was probably not as convenient as trial in Mexico), but the method chosen to implement the interest simply does not seem legitimate.

The fourth interest listed above is evasive. It is a paraphrase of the Court's language: "Louisiana has manifested its natural interest

relating to creditors is not to protect doctors, hospitals, and the like after they have performed their services, but to assure payment so as to encourage them to provide those services. That interpretation sufficiently distinguishes *Dick*, but in their quest for financial security, doctors and hospitals are unlikely to inquire where a trial is to be held. Instead, such matters as Blue Cross coverage will be examined. A general pattern—whereby doctors know that they are more likely to be paid after the direct-action statute has been in effect for a few years, even though they do not know why—seems unlikely. The direct-action statute was available at the time of the *Watson* decision only when the insurer was doing business in Louisiana. All in all, the state's interest in the well-being of the plaintiff's creditors is not a plausible distinction from *Dick*.

⁸¹ The plaintiff tried to add Gillette as a party defendant, but violated the Federal Rules of Civil Procedure by attempting to amend its complaint without leave of court. Moreover, the district judge determined that Rule 21 of the Federal Rules did not allow this amendment after the dismissal of the complaint against the insurance company had terminated the case. 202 F.2d 407, 410 (1953).

in the injured by providing remedies for recovery of damages."⁸² That is, the existence of Louisiana's substantive tort law shows an interest in the injured, which justifies application of its direct-action statute. Presumably the same could be said about the Texas statute of limitations in the *Dick* case. The underlying contract law of Texas, the limitations statute itself, and the plaintiff's domicile show a Texas concern for the injured. The distinction between the two situations is that Texas would probably have applied Mexican substantive law to the remaining contractual questions in *Dick* (apart from the limitations issue), whereas the Louisiana federal district court would have applied Louisiana substantive law to the tort issues if the *Watson* case had proceeded to the merits before reaching the Supreme Court. Texas substantive law could not have been applied in *Dick* for the same reason that the Texas limitations statute could not be applied: insufficient contact between the case and the forum. The corresponding reason that Louisiana presumably could apply its own substantive law to the tort in *Watson* is the location of the injury in Louisiana. The subject of regulation by the Louisiana direct-action statute, however, was the contract of the insurer, and not the tort of the insured. The contract clause, unlike the tort, has no firm physical relationship to Louisiana. Thus, the fourth interest identified by the Court distinguishes *Dick* on the basis of where the injury occurred, but it is not clear that the distinction is significant.

A somewhat unrealistic hypothetical⁸³ might test the significance of this distinction between *Dick* and *Watson*. Suppose that insurance companies disliked the result in *Watson* sufficiently to exclude coverage in Louisiana from insurance contracts for the nationwide sale of goods. Coverage in Louisiana would fall to local companies charging Louisiana rates. Suppose further that the Louisiana legislature passed a statute declaring that whenever an insurance company does business in Louisiana and also insures a company against liability elsewhere in connection with products that are distributed in Louisiana and in other states, any clause of the insurance contract extending coverage to other states but excluding Louisiana shall be interpreted as if it did not exclude Louisiana coverage. To avoid any claims of unfair surprise, the state mails notice of the law to all insurance companies doing

⁸² 348 U.S. at 72.

⁸³ The issues presented in this hypothetical are similar to those raised by the recently enacted New York no-fault insurance law. N.Y. INS. LAW §§ 670-77 (McKinney Supp. 1975). See Part II-C *infra*.

business within its borders and makes the law applicable only to policies issued or renewed after notice. Suppose finally that a case otherwise identical to *Watson* arises. Could an action be maintained against the insurance company under the Louisiana direct-action statute and nondiscrimination (against Louisiana) statute? No case law is directly on point, but of the five interests cited by the *Watson* Court apparently each applies with equal force. There is little doubt, however, that the hypothetical nondiscrimination statute would be struck down. The interests of Illinois and Massachusetts in protecting the rights and duties established by contracts entered there by people and corporations doing business there would suffer a far more massive intrusion in the hypothetical than in the actual *Watson* case, where only the place of trial was at stake.⁸⁴ If upheld, the hypothetical Louisiana statute would impose substantive liability in the face of contrary law in the states where all relevant events took place.

Thus, the five factors listed in *Watson* must be accompanied by the *caveat* that a forum is justified in applying its own law to marginally related foreign events only when the *Watson* conditions are satisfied *and* when the offense to the interests of states with closer connection to the issues is not terribly serious. To generalize, a forum may apply its law to a case whenever (a) the party resisting application of that law has acted in the state or derived relatively direct benefits from the forum, or (b) there is some weaker connection between the defendant and the forum, and the forum's interests are relatively strong compared to the interests of other states that would be disserved by the application of forum law. *Watson* falls into the second category. The interests of Louisiana in the compensation of its domiciliary outweigh the "procedural" interest of Massachusetts or Illinois to uphold the contract clause barring direct actions. Unlike the interests of Mexico in *Dick*, these

⁸⁴ The "real" issue was whether the insurance company could be made a defendant. Since the insurer was liable for any judgment against Gillette, the insurance company's substantive rights were not affected. Nor would the size of the verdict likely increase if the presence of the insurer were made known to the jury. A jury would probably not consider a large and well-known company like Gillette any less solvent than its insurer.

Even if the tortfeasor defendant were small and the jury's knowledge of insurance thus potentially significant, Louisiana's insistence on its own approach is reasonable. Under their direct-action statute, the jury is informed that insurance is involved; this presumably incorporates the assumption that potential bias can nonetheless be avoided by its courts. In rejecting the other state's approach toward insurers, Louisiana is *not* trying to accomplish a different result (*i.e.*, a bigger verdict)—it believes that the result will be the same under its system even if the other states have less confidence.

procedural interests involve only the place of trial and are not particularly important.

The chief weakness in arguing this analysis as the "true" rationale for *Watson* is that it was not the Court's rationale. The Court focused only on the sufficiency of the forum's interests, and did not even consider the nature or importance of the interests of other related states. However, the proposed rationale avoids undue deference to the interests of a forum with no more than weak contacts with an issue.

Another insurance case,⁸⁵ *Clay v. Sun Insurance Office, Ltd.*,⁸⁶ was decided in a rather off-hand opinion by Justice Douglas. Clay had insured against the loss of personal property. The contract was entered, the policy issued, and lump-sum payment made⁸⁷ in Chicago in April of 1953. Clay was then a resident of

⁸⁵ A balanced perspective of general constitutional limitations on choice of law may not emerge from an analysis of such a limited type of case. However, the fields of workmen's compensation and insurance swallow almost the entirety of significant Supreme Court decisions dealing with due process or full faith and credit limitations on choice of law. Only one workmen's compensation case, *Bradford Elect. Light Co. v. Clapper*, 286 U.S. 145 (1932), restricted a state's choice of law, and it has been "departed from." See *Carroll v. Lanza*, 349 U.S. 408 (1955). Few workmen's compensation cases in which the forum has only borderline interest are likely, since worker compensation boards usually deal only with accidents that occur within the state or in connection with an employment relationship existing within the state. The state in which employment is seated or in which injury occurs may apply its law to the compensation for the injured employee, whether that law is of statutory or common-law origin. *Id.* (accident in forum with common-law recovery system, state of employment with purportedly exclusive statutory system); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939) (accident in forum, statutory compensation systems); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935) (employment relation seated in forum, accident elsewhere).

Are lessons derived from insurance cases applicable to other kinds of cases in which the constitutionality of the forum's choice of law is in serious question? When an insurance company complains about the forum's choice of law, the likelihood of reversing the forum's decision is decreased. The nationwide (or even international) scope of insurance companies with the largest number of clients, and thus probably the largest number of cases, may reduce the state's interest in protecting the interests of the company, at least when the company was not centered in the state where the contract was formed. Insurance companies are not pariahs. The various states may give them less protection than is given to individuals, but that does not make insurance cases useless for the present analysis. The range of issues that can arise in an insurance case combine with the underlying similarity of relationships to tend somewhat more toward "laboratory conditions" than is possible in many areas. Moreover, the combination of tort and contractual issues in a case like *Watson* or one under New York's new no-fault insurance law (N.Y. INS. LAW §§ 670-77 (McKinney Supp. 1975)) provide opportunities to assess distinctions between the two issues.

⁸⁶ 377 U.S. 179 (1964).

⁸⁷ The Supreme Court opinion does not mention that the payment was lump-sum; this information is found in the court of appeals' decision. 265 F.2d 522, 524 (5th Cir. 1959). The point is significant because a course of periodic payments, some made from Florida, would have provided some contacts to justify the application of Florida law. Similarly, the

Illinois. Sun Insurance, a British company, was doing business in both Illinois and Florida. In July or August of 1953, Clay and his wife moved to Florida. Two years later Clay's wife took or destroyed some personal property covered by the insurance policy. For reasons not disclosed in any of the opinions, Clay did not bring suit until more than a year later. A contract provision, valid under Illinois law, limited suit to one year after loss. All of the courts considering this clause assumed that an Illinois court would have honored it. But suit was brought in a Florida federal district court, where a jury awarded Clay \$6,800.

On appeal two issues were presented: whether a Florida statute voiding contractual limitations periods shorter than the applicable statute of limitations applied, and whether the statute, if applicable, deprived the defendant insurance company of property without due process of law.⁸⁸ In upholding the jury verdict for

payment of premiums in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), provides a critical distinction, for jurisdiction purposes, from *Hanson v. Denckla*, 357 U.S. 235 (1958), discussed in note 79 *supra*. Cf. R. LEFLAR, *supra* note 3, at 136, which discusses similar distinctions between *McGee* and *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934), a case striking down a forum's choice of law on constitutional grounds.

⁸⁸ A third issue was whether the policy covered theft and destruction by the insured's spouse. The court of appeals answered the due process question in favor of the insurance company (265 F.2d at 525-28), thereby avoiding the necessity of answering the others. In the court's view, the path pointed out by *Dick* and *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934), also an insurance case, was clear. (*Delta & Pine* struck down an application of Mississippi law to a contract having what were termed "slight contacts" with that state. It is discussed in notes 87 *supra* and 98 *infra*.) The court also concluded that *Watson*, which applied to direct-action statutes, was not controlling. Thus, the court found that there was no reason to avoid a decision on the constitutional issue.

The Supreme Court, in an opinion by Justice Frankfurter, disagreed. 363 U.S. 207 (1960). It declined to address the constitutional issues because they would be rendered moot by a disposition in favor of the defendant of either of the two state law questions. Noting that under Florida law (FLA. STAT. ANN. § 25.031 (1957)) questions of state law could be certified to the state supreme court, the Court suggested that course of action on remand. Justices Black (363 U.S. at 213) and Douglas (*id.* at 227) thought the case ripe for decision, and Justice Black wrote at some length on the propriety of applying Florida law (*id.* at 216-27).

Apparently in response to this suggestion, the Florida Supreme Court implemented the statutory certification procedure. FLA. APPELLATE RULES 4.61 (1961). The matter was then certified to the Florida court, which ruled in favor of Clay both on the policy's coverage of spouse-caused losses and on the applicability of the statute voiding contractual limitations periods of less than five years. 133 So. 2d 735 (Fla. 1961). In a passage that mystified the Fifth Circuit panel considering the case after certification (319 F.2d 505 (1963)), the Florida Supreme Court said that the statute applied to a contract "when Florida's contact therewith, existing at the time of its execution or occurring thereafter, is sufficient to give a court of this state jurisdiction of a suit thereon." 133 So. 2d at 738. The federal court mused whether this language literally meant that whenever the defendant could be served with process in Florida the statute would apply, or whether it contained an implied limitation that there be

Clay, Justice Douglas did not probe deeply into the principles under discussion. He stated that the two mainstays of the court of appeals' position, *Dick* and *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*,⁸⁹ "were cases where the activities in the State of the forum were thought to be too slight and too casual, as in the *Delta & Pine Land Co.* case . . . , to make the application of local law consistent with due process, or wholly lacking, as in the *Dick* case."⁹⁰ After quoting Justice Black's dissent from the Court's first encounter with *Clay*,⁹¹ Justice Douglas concluded by distinguishing *Order of Commercial Travelers v. Wolfe*:⁹² "We do not extend that rule nor apply it here, for Florida has ample contacts with the present transaction and the parties to satisfy any conceivable requirement of full faith and credit or of due process."⁹³ One can criticize the opinion for its brevity and conclusory nature, but the emphatic nature of the second sentence quoted, and the fact that it was part of a unanimous opinion, means that *Clay* must not be shrugged off as a mere aberration.

Has *Dick* been overruled by *Clay* and *Watson*?⁹⁴ Because it involved only a procedural interest, *Watson* is distinguishable from *Dick*.⁹⁵ *Clay*, however, is not open to the same explanation. Both it and *Dick* address an identical issue: may the forum's statute forbidding short contractual limitations, valid in the state where the contract was made, be enforced? Despite such similarity, *Clay* as well as *Watson* cited with approval both *Dick* and principles that supported the *Dick* holding. Moreover, Justices Brennan and Douglas, who are probably as philosophically dedicated to "states' rights" in the conflicts area as any other Justices,⁹⁶ recently indi-

sufficient contacts, otherwise defined, between Florida and the contract. 319 F.2d at 509-10. No answer to the question was necessary since the Florida court found that the statute was applicable. Relying on *Dick*, *Delta & Pine*, and the first panel decision, and once more distinguishing *Watson*, the second federal appellate panel declared the statute unconstitutional. *Id.* at 512.

⁸⁹ 292 U.S. 143 (1934); See note 88 *supra*.

⁹⁰ 377 U.S. 179, 181-82. Justices Douglas and Brennan recently indicated their continuing support of *Dick* in a dissent to a denial of certiorari in an international conflicts case. *Confederation Life Ins. Co. v. De Lara*, 409 U.S. 953 (1972).

⁹¹ Justice Black had noted in his dissent that insurance companies tend to be nationwide and to protect against events in distant states. He observed that the "contract was described on its face as 'Personal Property Floater Policy (World Wide).'" 363 U.S. 207, 221 (1960).

⁹² 331 U.S. 586 (1947).

⁹³ 377 U.S. at 183.

⁹⁴ See note 28 *supra*.

⁹⁵ See text accompanying notes 82-83 *supra*.

⁹⁶ The term "states' rights" is borrowed from R. LEFLAR, *supra* note 3, at 122.

cated their continuing support of *Dick* in a dissent to the denial of certiorari in an international conflicts case.⁹⁷

Three elements of the *Clay* opinion seemed to receive special emphasis. First, the language contrasting *Clay* with *Dick* and *Delta & Pine* makes it explicit that the latter cases involved far less contact between case and forum than was present in *Clay*. Concerning the occurrence of the insured-against loss in Florida, this point seems insufficient to remove this case from the *Watson* and *Dick*⁹⁸ category into the *Pacific Employers* category. The issue in *Clay* (applicability of a no-limitations statute) is the same as the issue in *Dick* and the contacts are the same as those in *Watson* (resident plaintiff and occurrence of the loss within the state). A second important aspect of the *Clay* opinion emphasized the ephemeral contact between the contract and Illinois law (the company's activity was nationwide, it knew the property might be moved elsewhere, and it did not insist on Illinois law in the contract). This point seems a clear but unacknowledged measuring of the strength of the interests held by the nonforum as well as the forum state. A third point is that the company learned of the insured's move to Florida—although after it was too late to change the situation. That the company was therefore on notice is irrelevant to any analysis of *Clay*. It comes closest to being an answer to the possibility of "unfair surprise," a factor that some have suggested should limit a state's legislative jurisdiction.⁹⁹ But after the contract was signed, the company could do nothing to protect itself by use of its knowledge of the insured's move. For example, it could not cancel the contract. Thus, the surprise is no greater than that experienced by the insurance companies in *Dick*.¹⁰⁰ In sum, the significant distinctions that the Court itself pointed out between *Clay* and cases decided differently do not support the "ample contacts" view that the Court espouses. Rather, they support the proposal for balancing the strengths of the various state interests.

The validity of a contractual limitations period is not the most

⁹⁷ *Confederation Life Ins. Co. v. De Lara*, 409 U.S. 953 (1972).

⁹⁸ *Delta & Pine* involved more substantial contacts than did *Dick*, but its authority is questionable. Dissenting from the Court's refusal to decide the substantive issue when *Clay* was first before the Court, Justice Black said: "I, myself, have grave doubts that the *Delta & Pine Land Co.* case would be treated the same way today on its facts." *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 220 (1960) (dissenting opinion, Black, J.).

⁹⁹ See note 24 *supra*.

¹⁰⁰ See text accompanying note 18 *supra*.

important substantive question that can arise in a contract case (even though it was important enough to merit protection in *Dick*). When the question is raised, the validity of the limitations period is outcome-determinative. But in terms of altering the rights of the parties, it does not create liability as much as extend the period of liability. Thus *Clay* contrasts with the hypothetical discussed in connection with *Watson*.¹⁰¹ At issue in that hypothetical was the right of Louisiana to create substantive liability when the contract disavowed it altogether. The same kind of issue in the *Clay* setting might produce a different result. Even though the factors connecting Illinois with the case would be equally weak, the issue itself would be more important to Illinois, and the balancing of the strengths of the Florida and Illinois interests would tilt more heavily toward Illinois. Happily enough, this same balancing process removes public policy from the "exception" category and makes it simply another application of the rule. Insofar as it expresses a strong moral position, the forum's public policy strengthens the balance in favor of the forum and thus the forum's right to apply its own law.

A balancing test based on full faith and credit cannot absolutely predict the result in *Clay* or any other case. Like any balancing test, the analysis entails an inherently uncertain weighing of competing state interests, both in terms of quantity and importance. Nonetheless, this balancing test accounts for the differences and similarities among the cases, and for the elements of the case to which the Court has assigned importance. It is more accurate than an "unfair surprise" standard, the Court's recent emphasis merely on "contacts," or the ultra-vague "reasonableness" standard. Thus, a balancing test should offer better, even if not perfect, means for prediction.

II

SOME APPLICATIONS

A. *The Statute of Limitations and the Obligation to Provide a Forum*

The present constitutional limits on choice of law are unsatisfactory with respect to statutes of limitations. The leading case on the subject is *Wells v. Simons Abrasive Co.*,¹⁰² a 1953 Supreme Court

¹⁰¹ See text accompanying note 83 *supra*.

¹⁰² 345 U.S. 514 (1953). *Dick* probably should have been treated as a minor variation on

case. It upheld the constitutionality of the forum's application of its own statute of limitations to bar a claim based on foreign law. The plaintiff had brought an action in federal district court in Pennsylvania as administrator of the estate of Cheek Wells, who was killed when a grinding wheel manufactured by the defendant burst. The cause of action was based on the wrongful-death provision of the Alabama Code, which barred an action unless maintained within two years of death. The corresponding Pennsylvania statute provided a one-year limitation. The district court felt bound by Pennsylvania law (not an issue before the Supreme Court) and found that the Pennsylvania conflicts rule called for application of the shorter Pennsylvania limitation. The court of appeals¹⁰³ and the Supreme Court affirmed. Since the forum's right to apply its own "procedural law" was well established at common law, and since statutes of limitations had generally been characterized as procedural,¹⁰⁴ the Court's decision was not surprising. However, a common-law exception denied the application of the forum's statute of limitations in cases where the foreign statute of limitations was so closely connected with the foreign cause of action that it acquired a substantive character.¹⁰⁵ To the suggestion that this principle be made a constitutional mandate, the Court responded that "[d]ifferences based upon whether the foreign right was known to the common law or upon the arrangement of the code of the foreign state are too unsubstantial to form the basis for constitutional distinctions under the Full Faith and Credit Clause."¹⁰⁶

Much can be said for the Court's unwillingness to scrutinize wrongful death statutes in determining whether their limitations were intended to destroy rights or prevent suits after a certain time.¹⁰⁷ However, the logic behind the common-law rule lay in the proposition that one state could not revive a cause of action dead under the law of another state, at least if the latter supplied the only "applicable" substantive law. *Simons* did not represent an

the statute-of-limitations case, but the Court chose instead to emphasize the contractual nature of the limitation. See 281 U.S. at 407.

¹⁰³ 195 F.2d 814 (3d Cir. 1952).

¹⁰⁴ See, e.g., *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312 (1839); *In re Mays*, 38 F. Supp. 958 (W.D. Ark. 1941).

¹⁰⁵ See the discussion of Judge (later Justice) Harlan in *Bournias v. Atlantic Maritime Co.*, 220 F.2d 152 (2d Cir. 1955). Justice Harlan did not gain his well-deserved reputation as a result of his conflicts decisions. Cf. *Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189 (2d Cir. 1955), also a Harlan opinion.

¹⁰⁶ 345 U.S. at 518.

¹⁰⁷ The foolishness of similar attempts to dissect statutes of fraud should have been apparent. See, e.g., *Marie v. Garrison*, 13 Abb. N. Cas. 210 (N.Y. Super. Ct. 1883).

attempt to revive a dead cause of action; the lower court killed a cause of action still alive in Alabama, the state which had created it. The former would be forbidden by a vested rights theory, since the plaintiff would have no rights to prosecute in the forum. In the *Simons*-type case, the plaintiff still possessed the "vested right" supplied by Alabama, but was denied enforcement of that right in Pennsylvania. It is not logically impossible to deny enforcement to an existing right in the same sense that it is impossible to enforce a nonexistent right. Thus, even in traditional terms the question should have been whether Pennsylvania had adequate justification to deny enforcement of the plaintiff's right. The Court should have addressed that question in its attempt to distinguish *Hughes v. Fetter*.¹⁰⁸

Hughes questioned whether Wisconsin could deny enforcement, on policy grounds,¹⁰⁹ of the Illinois Wrongful Death Act. The case involved a Wisconsin plaintiff and Wisconsin defendant in a dispute about an Illinois accident. Requiring enforcement of the Illinois Act, the *Hughes* Court determined that Wisconsin had to "give way" to Illinois, even though the Wisconsin statute—similar to that of Illinois—had been interpreted to bar all Wisconsin litigation over deaths occurring outside the state. Presumably that was another way of saying that the Wisconsin policy was not sufficiently weighty to overcome the Illinois policy. The possibility of extending the *Hughes* approach to *Simons* was clear. What policy of Pennsylvania would be weighty enough to deny a forum for litigation under the Alabama act? The Court avoided analysis in these terms by pointing out that in *Hughes* Wisconsin had discriminated against Wisconsinites involved in out-of-state accidents, while in *Simons* Pennsylvania had applied its one-year limitation equally to all. If that was the sole relevant distinction between *Hughes* and *Simons*, the *Hughes* case was right in result only, for it spoke specifically in terms of full faith and credit and not in terms of equal protection.¹¹⁰

Brainerd Currie criticized *Hughes* because it appeared to stand for two inconsistent propositions: first, the holding that Wisconsin could not refuse to entertain the Illinois cause of action; and, second, the clear import of footnote ten¹¹¹ that Wisconsin, having

¹⁰⁸ 341 U.S. 609 (1951).

¹⁰⁹ For a Machiavellian psychoanalysis of the Illinois legislature and its intent with respect to its own statute, see B. CURRIE, *supra* note 5, at 302-05.

¹¹⁰ An equal protection interpretation has been espoused by Brainerd Currie. See text accompanying note 111-12 *infra*.

¹¹¹ 341 U.S. at 612 n.10.

accepted the lawsuit, had the right to apply its own law. He found it ironic and inconsistent with a reasonable interpretation of full faith and credit that a forum could be required, by its full faith and credit obligation to a sister state, to entertain a lawsuit which it could then decide under its own law. He concluded that the true basis for the *Hughes* decision must have been the equal protection clause, and found support for that decision in *Simons*. *Simons* had condemned "discrimination"¹¹² against out-of-state claims, and, Currie noted, nondiscrimination was a concept irrelevant to full faith and credit but at the heart of equal protection.¹¹³

Professor Currie, I believe, made a silent, erroneous assumption about the holding of *Hughes*. The conjunction of the opinion proper and the footnote did not indicate that Wisconsin could be required to entertain the case even when it would thereupon apply its own law rather than that of Illinois. The text and footnote speak to two different situations, the first in which Wisconsin has no policy and the second in which it does. If Wisconsin does have a substantive policy contrary to that of Illinois, it is not compelled to hear the case, although the desire to implement that policy will usually lead it to do so. If it does not have a policy with regard to the dispute, it must entertain the lawsuit and may not impose its own law.¹¹⁴ So viewed, *Hughes* makes eminent sense as a full faith and credit case.¹¹⁵ When all the relevant parties are from Wiscon-

¹¹² 345 U.S. at 518-19.

¹¹³ B. CURRIE, *supra* note 5, at 306.

¹¹⁴ Wisconsin's rule against entertaining suits such as *Hughes* was not based on hostility to the cause of action, as the Illinois statute was substantially similar to that of Wisconsin. The rule was based upon a misinterpretation of the Wisconsin statute—a misinterpretation that led the Wisconsin court not to search further for Wisconsin policy. *Id.* at 296-97.

¹¹⁵ *Hughes* can probably be sustained on an equal protection theory. My quarrel with Professor Currie concerns his proposition that it cannot be sustained by a full faith and credit theory. Distinguishing *Hughes* because it involved "discrimination" against causes of action arising in other states, the *Simons* opinion did not necessarily reflect a belief that *Hughes* was based partially on equal protection. The *Simons* opinion does not use the phrase "equal protection" in speaking of *Hughes*. Its "discrimination" comment is equally consistent with a full faith and credit analysis that allows a significant forum interest to prevail over a sister state interest, even if the latter is stronger. A reasonable interpretation of the "discrimination" argument in *Simons* seems to be not that Wisconsin was wrong because it discriminated, but rather that Pennsylvania, in treating its own cases as harshly as those arising in other states, demonstrated the strength and legitimacy of its own interests in limiting the time in which wrongful death actions may be brought. In other words, Pennsylvania's willingness to snuff out Pennsylvania causes of action indicated that its statute incorporated some genuine policy, and that it was not merely an exercise in favoring local over foreign interests.

Even if the "discrimination" language of *Simons* is "equal protection" language which explains the holding of *Hughes*, an equal protection theory cannot possibly explain the holding in *Simons*. The mere fact that Pennsylvania did not discriminate cannot save its action

sin, Wisconsin can balance any existing policy against that of Illinois. When Wisconsin disavows any policy (and attempting not to entertain the suit must mean at least that), it has nothing to balance against the Illinois policy and the latter must therefore prevail.¹¹⁶

Similar observations may be made about *Simons*. Neither the Supreme Court's nor the lower courts' opinions¹¹⁷ indicate where the grinding wheel that caused Wells's death was manufactured. Pennsylvania was the defendant's chief place of business. Manufacture of the wheel in Pennsylvania would have given Pennsylvania the right to apply its own substantive tort law,¹¹⁸ and a fortiori its "procedural" statute of limitations. The Court's failure to seize on this obvious *ratio decidendi* implies that the wheel was not actually manufactured in Pennsylvania, or that the Court found some other reason to conclude that Pennsylvania had no interest sufficient to justify application of its substantive law. If a Pennsylvania interest justified the application of the Pennsylvania statute of limitations, it must have been a procedural rather than a substantive interest. One of the many purposes of statutes of limitations is to protect courts from stale litigation and the need to decide disputes on the basis of faulty memories.¹¹⁹ Such a purpose is as relevant to a foreign cause of action as to a domestic one. It can be weighed legitimately against whatever substantive interest the foreign jurisdiction has in allowing maintenance of the suit. Given bias in favor of upholding a forum's choice of law, this procedural interest should generally be sufficient.

In the final analysis, *Simons* does not represent a satisfactory

from full faith and credit (or due process) attack; otherwise, the application of Texas law in *Dick* would have been upheld if the Texas court had attempted to apply a contractual limitations statute equally to all cases.

¹¹⁶ This observation is consistent with another Supreme Court case, *Broderick v. Rosner*, 294 U.S. 629 (1935). In imposing insuperable procedural barriers to maintaining bank stock assessment cases, New Jersey may have sought to protect its residents from bank assessments altogether. However, the policy was effectively hidden in a procedural requirement that made no procedural sense. The only *apparent* interests were a New York substantive interest and an irrational New Jersey procedural interest. Even given a bias for the forum, the balance was not hard to strike. The Court required New Jersey to dismantle its procedural barriers against a suit based on New York law. B. CURRIE, *supra* note 5, at 346.

¹¹⁷ 102 F. Supp. 519 (E.D. Pa. 1951), *aff'd and petition for rehearing denied*, 195 F.2d 814 (3d Cir. 1952).

¹¹⁸ Even the first *Restatement* allowed the law of "the place of the actor's conduct" to control such questions as standard of care. RESTATEMENT OF THE CONFLICT OF LAWS § 380 (2) (1934).

¹¹⁹ See, e.g., *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); *Baron v. Kurn*, 349 Mo. 1202, 164 S.W.2d 310 (1942).

approach to the problem of the application of the forum's statutes of limitations. Although the case involved only a refusal by the forum to apply the foreign jurisdiction's longer statute of limitations, little of the Court's language reflects any awareness that the issues might be different when the forum rejects the foreign jurisdiction's *shorter* statute of limitations.¹²⁰ The procedural interest that can justify Pennsylvania in giving a shorter lifetime than Alabama affords to an Alabama cause of action cannot possibly justify Pennsylvania in giving it a longer life. Realistic situations in which the interest of a state are served by sustaining a cause of action longer than the state which created it are highly unlikely. One might therefore suggest a simple constitutional rule with respect to the statutes of limitations in cases where the forum has no substantive interests: The forum may be justified in using its own statute of limitations to bar a cause of action that is still good in the state which created it, but a state should be forbidden from entertaining a cause of action after it is dead in the state which created it.¹²¹

The circumstances under which the disinterested forum may appropriately apply its own shorter statute of limitations are determined by initial reference to the purposes of statutes of limitations. Often-mentioned purposes of such statutes are to allow repose to defendants after a reasonable time for the plaintiff to present his claim, to serve as a screening device against unmeritorious litigation (on the assumption that there will be a tendency to bring meritorious litigation early), to serve as a screening device to reduce docket congestion, to allow the defendant to preserve evidence, and to avoid the necessity of basing decisions on stale evidence. Most of these reasons involve protection of the parties' interests. Some, such as protection from unreliable deci-

¹²⁰ The Court in *Simons* noted only: "Our prevailing rule is that the Full Faith and Credit Clause does not compel the forum state to use the period of limitation of a foreign state." 345 U.S. at 517.

¹²¹ One minor problem with this rule arises if the state creating a given cause of action has a statute whose procedural interests outweigh substantive interests—because it has crowded dockets it wishes to control, for example—it may have a statute of limitations of two years for a particular type of case even though the statute would otherwise have been for four years if "procedural" pressures had not been present. Another jurisdiction, with less court congestion, would honor both the procedural and substantive policies of the statute by entertaining the case after the expiration of two years but before the end of four years. Since the likelihood of such a gap between procedural and substantive interests is low, and since the likelihood of detecting it when it exists is almost nil, the importance of this possibility is only theoretical. Thus, the proposed rule does not need an exception and can remain: A disinterested forum should apply the statute of limitations of the interested jurisdiction if it is shorter than that of the forum.

sions, not only safeguard the rights of litigants, but also assist the courts to function efficiently and to command respect. Any given statute of limitations represents a combination of these factors, but statutes limiting some actions are more heavily weighted toward one purpose than another. Some statutes emphasize the function of screening unmeritorious litigation because the cause of action involved is disfavored or subject to abuse. Others emphasize the function of docket-clearing. Let us label the policies that are designed to protect the courts as "procedural" (while recognizing that most will be mixed). In most cases where the state has no substantive interest in the actual subject matter of the case, the substantive policies behind its statute of limitations will be of lesser importance. Procedural policies are important to any case litigated within the forum, however, whether the forum is interested or not.

Associated with each of these components is a time period that serves its interests. The shorter of these periods is usually chosen for the particular statute of limitations as a whole.¹²² Thus, any given statute of limitations owes its duration to a policy that may be either procedural or substantive. If a disinterested forum's statutory period in a particular case is one year, and the procedural interests behind the statute would have allowed a four-year limitation, application of the forum's statute would be inappropriate if the foreign jurisdiction has a statute longer than one year. Since the forum is disinterested, it has no legitimate interest in applying its substantive policies to the case—that would be contrary to the mandate of full faith and credit.

Realistically, however, the substantive and procedural components of any given statute of limitations cannot be separated. Legislatures rarely indicate a list of interests with a time period attached to each, such that we can "rewrite" the statute in any conflicts case in which one interest but not another is present. Moreover, the whole legislative process of establishing limitations is guesswork and arbitrary line drawing. If there is clearly a significant difference between the time periods dictated by the substantive and procedural components of a limitations statute, the statute probably deals with a fairly narrow problem in which the legislature feared harassment of defendants. Libel and slander might be such areas. If a state had a one-year libel or slander

¹²² In a few cases the legislature may deliberately choose a longer limitation period for substantive reasons (favoring the cause of action) even though procedural considerations for similar causes of action resulted in briefer periods.

limitation but a general four-year tort limitation statute, substantive rather than procedural interests probably dictated the shorter period.¹²³ In most cases, however, even such guesses cannot be supported.

These questions are sufficiently inseparable that any reasonable deference to the decision reached by the forum should keep the Supreme Court from overturning the forum's application of its own shorter statute. In terms of the analysis suggested earlier for cases like *Watson* and *Clay*, the forum has the right to impose its own statute of limitations when a significant factual element, sufficient to justify application of forum substantive law, occurs within the forum. When the factual connections between the case and the forum are more tenuous, or when they are nonexistent (but for the fact that the case is being tried within the forum), the forum may apply its own shorter statute of limitations, but not its own longer statute.¹²⁴

B. *Wrongful Death Limitations*

A full faith and credit challenge to the rationale of *Kilberg v. Northeast Airlines, Inc.*¹²⁵ was inevitable. Kilberg had been a passenger on a flight that began in New York City and crashed in Massachusetts. Massachusetts at that time had a \$20,000 wrongful

¹²³ However, one must consider the possibility that the legislature thought that slander involved peculiar procedural problems such as preservation of evidence.

¹²⁴ This is the rule of the UNIFORM STATUTE OF LIMITATIONS ON FOREIGN CLAIMS ACT § 2, which has been adopted in Michigan (MICH. STAT. ANN. § 27A.5861(2) (1962)) and West Virginia (W. VA. CODE ANN. § 55-2A-2 (1966)), and the rule of many other state "borrowing" statutes (See, e.g., N.Y. CIV. PRAC. LAW § 202 (McKinney 1972)). A final challenge to this as a constitutional requirement might arise from the general trend in constitutional limitations on choice of law to uphold entrenched common-law rules even when they are not supportable by developing analysis. R. LEFLAR, *supra* note 3, at 140. Thus, a state that is the locus of a tort will probably be allowed to apply its own law even if all parties are from another state and none of the issues bear on local policies. See, e.g., *Abendschein v. Farrell*, 382 Mich. 510, 170 N.W.2d 137 (1969). This trend is probably healthy, since cases from early in this century illustrate the danger of a premature willingness to enshrine present beliefs in constitutional rules. E.g., *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918); cf. also *Mutual Life Ins. Co. v. Liebong*, 259 U.S. 209 (1922) (virtually identical to *Dodge* but with the opposite result, turning on a very dubious technicality). Nonetheless, there is more reason to put constitutional muscle behind statute-of-limitations rules, as the arguments seem far more clearcut. Many persons still find that the concept of territoriality has sufficient content in the conflicts field to justify blanket constitutional approval of the old *lex loci* rules. E.g., Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQ. L. REV. 373 (1971). However, it is hard to justify the forum's entertainment of a case that would be barred by the only substantively interested jurisdiction, even if the common law would justify the result by calling the limitations rule a "procedural" one.

¹²⁵ 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

death limitation; New York had no limitation. Kilberg had bought his ticket in New York, where the airline maintained an office and did a substantial amount of business. When his estate sued in New York, it attempted to characterize the case as one sounding in contract. Traditional rules indicated that the contract of passage had been completed in New York (where the ticket was bought) and that the law of New York would thus apply under the rule of *lex loci contractus*. The New York Court of Appeals, on an interlocutory appeal from dismissal of the count incorporating the contract theory, rejected the theory. New York precedent held that when death resulted from one party's breach of an implied duty of safe carriage, the proper cause of action lay under the appropriate wrongful death statute. The real issue, according to the court, was not tort versus contract, but rather the applicability of the Massachusetts wrongful death limitation. The court indicated in a lengthy "dictum" that recovery-limitation questions are procedural, and thus the law of the forum, New York, applied to the recovery aspect of the cause of action. At the same time, the court made it clear that the tail was wagging the dog—that the question was procedural because that characterization was necessary to make New York law applicable. The desire to apply New York law stemmed from the strong New York policy, expressed in its constitution,¹²⁶ against limitations on wrongful death recoveries. Barely a year later, in *Davenport v. Webb*,¹²⁷ the New York Court of Appeals withdrew the "procedural" characterization and relied more forthrightly on the simple proposition that New York public policy demanded nonrecognition of the Massachusetts \$20,000 limitation. One can criticize the New York court on the ground that its statements about procedure and public policy were dicta, or that something is procedural or substantive without respect to policy considerations, but these are matters for the New York courts. The question for present purposes was that raised in *Pearson v. Northeast Airlines, Inc.*¹²⁸ Litigated in a federal district court in New York, *Pearson* arose out of the same crash involved in *Kilberg* and virtually identical facts. Unless it found that the *Kilberg* choice of law violated the federal Constitution, the court was bound to follow that precedent.¹²⁹ (The constitutional issue apparently had not been

¹²⁶ N.Y. CONST. art. I, § 16; *id.* art. I, § 18 (1894).

¹²⁷ 11 N.Y.2d 392, 395, 183 N.E.2d 902, 904, 230 N.Y.S.2d 17, 19-20 (1962).

¹²⁸ 309 F.2d 553 (2d Cir. 1962).

¹²⁹ This respect by federal courts for state precedent is required by *Klaxon Co. v. Stentor Elect. Mfg. Co.*, 313 U.S. 487 (1941), which was recently reaffirmed by the Supreme Court in *Day & Zimmerman, Inc. v. Challoner*, 96 S. Ct. 167 (1975).

raised in the New York state courts.) In the *en banc* opinions, only the full faith and credit clause was relevant; both sides in *Pearson* apparently had conceded that there were enough contacts to justify application of New York law to the entire case under the rule of *Dick*.

The dissent in *Pearson* argued that New York was entitled to ignore Massachusetts law altogether, but was not allowed to make an award "under" Massachusetts law without the limitations contained therein.¹³⁰ As the majority found, this contention is unconvincing. A similar assertion appears in *Order of Commercial Travelers v. Wolfe*,¹³¹ but that and the other fraternal-benefit-society cases are *sui generis*. *Dépeçage* is not per se unconstitutional. Since New York could have amended its statutes or modified its case law to provide for a recovery (as the dissent admitted), the only remaining issue was whether or not New York could achieve an admittedly constitutional result by common-law reasoning that was arguably improper. This is an academic question. The spirit of *Erie* seems to indicate that the result rather than the reasoning should bind the federal courts, and the result here was constitutional.¹³²

Kilberg and *Pearson* are important precursors to the more recent Second Circuit case of *Rosenthal v. Warren*.¹³³ *Rosenthal* also involved the applicability of the Massachusetts wrongful death limitation, which by that time had moved upward to \$50,000.¹³⁴ Unlike those in *Kilberg* and *Pearson*, however, the contacts with New York in *Rosenthal* were not very substantial. Dr. Rosenthal, a citizen of New York, was examined in Boston by Dr. Warren. Eight days after Dr. Warren performed an operation on him, Dr. Rosenthal died in a hospital while under Dr. Warren's care. Dr. Rosenthal's widow brought an action seeking \$1,250,000 for wrongful death. Jurisdiction over the insurer was obtained through the New York attachment procedure first allowed in *Seider v. Roth*.¹³⁵ Jurisdiction

¹³⁰ 309 F.2d at 566.

¹³¹ 331 U.S. 586, 625 (1947).

¹³² B. CURRIE, *supra* note 5, at 695.

¹³³ 475 F.2d 438 (2d Cir. 1973).

¹³⁴ The relatively recent upward revision of the recovery limitation, MASS. GEN. LAWS ch. 299, § 2 (1959), made it difficult to argue that the Massachusetts law was some sort of holdover not really expressive of modern legislative intent in Massachusetts. After a series of upward revisions, the limitation was finally removed in 1973. MASS. GEN. LAWS ch. 229 (1973 Supp.).

¹³⁵ 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). Similar to the method used in the *Dick* case (*see* note 11 *supra*), this procedure is fairly typical of the means used to obtain personal jurisdiction in most borderline full faith and credit cases. Since the contact requirements are similar (R. LEFLAR, *supra* note 3, at 121-25), the forum interest necessary to

over a second defendant, the hospital, was obtained by service on an officer soliciting funds in New York City. In 1969, the basic general surgeon's liability premium was \$192 in Massachusetts, but was \$1,139 in New York. The hospital for which the doctor worked treated patients from various states including about sixty-six percent from Massachusetts and about eight percent from New York. It billed itself in the 1969 annual report as being "not a local or community hospital in the usual sense because its patients came from literally everywhere."¹³⁶

The Second Circuit panel considered two issues: whether New York would refuse to apply the Massachusetts limitation under the circumstances, and whether a refusal would meet constitutional requirements. The first issue was muddled by the New York decision in *Neumeier v. Kuehner*,¹³⁷ which postdated *Kilberg*. Although *Neumeier* dealt with guest statutes, it had announced rules whose rationale suggested applicability to issues other than guest statutes. One of those rules, if freed from its restriction to guest statutes, could be applicable to the *Rosenthal* situation:

When the driver's [defendant's] conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile.¹³⁸

The court in *Rosenthal* concluded, by reasoning not here relevant, that the *Neumeier* rules did not cover wrongful death limitations. It then stated that New York's interest constitutionally justified the refusal to honor the Massachusetts limit in the *Rosenthal* setting. The court concluded that it saw "no constitutional difference between death on the *Pearson* airplane, death in a taxicab on the way from the airport and death on the operating table."¹³⁹ This position is specious to the point of absurdity. The ample contacts and interests of New York in *Pearson*, with the Massachusetts corporation doing voluminous business in New York, selling a ticket to *Pearson* in New York, and starting the ill-starred

justify a choice of law will generally suffice for specific *in personam* jurisdiction. *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964), however, suggests that there are cases in which a certain state's law may be applied even though the contacts justifying such an application are insufficient for jurisdiction over the company. Although jurisdiction was not at issue in *Clay*, the case is clearly distinguishable from *McCee* and looks more like *Hanson*. See note 79 *supra*.

¹³⁶ 475 F.2d at 440.

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

¹³⁸ *Id.* at 128, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 70.

¹³⁹ 475 F.2d at 447.

flight there, starkly contrast the court's anemic show of contacts and interests in *Rosenthal*: New York domicile for the plaintiff and decedent; solicitation of some funds in New York; and the "national" character of its patients, staff, and reputation.¹⁴⁰ These contacts and interests do not make *Rosenthal* a *Pacific Employers*-type case. No critical events happened within the state. The solicitation of funds, unrelated to the case and apparently small scale, is not a "contact" in the usual sense. Just as the plaintiff's domicile in the *Dick* case was insufficient to justify application of Texas law, the interest given by the New York residence of plaintiff and defendant was not a sufficient contact. Thus, if the application of New York law can be justified in *Rosenthal*, it is because the interests of New York are relatively strong and those of Massachusetts are weak. Such is not the case. Although the New York interests are strong (as evidenced by its constitutional ban on wrongful-death recovery limitations),¹⁴¹ the interest of Massachusetts in protecting its defendant-residents is obvious. In some contexts the "national" reputation of the Massachusetts clinic might diminish the Massachusetts interest (as did the national scope of the insurance company's business in *Clay*), but the talk of "national character" in the brochure the court quoted constituted no more than puffing. Two-thirds of the clinic's patients came from Massachusetts¹⁴²—enough to establish a serious local interest. Although the court's emphasis on interests was welcome, this misbalancing was unfortunate. It might have been avoided if the court had realized that cases like *Pearson* and *Kilberg* involved substantial New York contacts, putting them into the *Pacific Employers* category, while *Rosenthal* falls into the *Watson-Clay* category, where forum interests must be strong and intrusions into the interests of other states must be minor.

C. No-Fault Insurance

Under the New York no-fault insurance law an insurer that does business in New York is subject to the effect of the law with respect to a New York accident even if the insured motorist is a non-New Yorker and even if the policy covering the motorist was not issued in New York.¹⁴³ More specifically, "[e]very insurer

¹⁴⁰ *Id.* at 446.

¹⁴¹ *Id.* at 444.

¹⁴² *Id.* at 440.

¹⁴³ N.Y. INS. LAW §§ 670-77 (McKinney Supp. 1974). The restriction to insurance companies that do business in New York is inconsistent with the purpose of the New York statute. There is no more New York interest in providing compensation to a nonresident

authorized to transact, or transacting business in this state" that sells an auto insurance policy "in any state or Canadian province" shall include coverage for, among others, its own insured, whether negligent or otherwise, for injuries from accidents happening in New York, "and every such policy shall be construed as if such coverage were embodied therein."¹⁴⁴ This "coverage" imposes liability on the company for losses to the insured (up to \$50,000) even if the policy provides for indemnification rather than loss coverage.¹⁴⁵ The act thus imposes liability when it would otherwise not exist, specifically in cases in which the policy issued in another state covers the insured for liability but not for personal injury.

The operation of the no-fault insurance law resembles the "unrealistic hypothetical" in which Louisiana attempts to impose substantive liability upon foreign insurers.¹⁴⁶ Because it would pose a more serious invasion of the interests of other states than did the direct-action statute in *Watson*, the hypothetical statute would violate the full faith and credit clause even though the interests of Louisiana were identical to those in *Watson*. The New York no-fault law, by imposing substantive liability on the out-of-state insurer of the non-New Yorker, runs afoul of the same difficulties suffered by the hypothetical statute.

In approving a no-fault law, the New York legislature wished to abolish tort liability and substitute insurance coverage in certain

insured by a company that does business in New York than to one insured by a company that does not. It is far more difficult to obtain jurisdiction over a company not doing business in New York, but in at least some cases the existence of company assets in New York should ameliorate the problem. Even though doing business is necessary to uphold the nonresident provision on the basis of Justice Frankfurter's consent theory, the expressed rationale of the majority opinion in *Watson* indicated that "doing business" was not required. Thus, the distinction between companies doing business in New York and those not doing business in New York does not satisfy the underlying purpose of the statute, is not always necessary because of jurisdictional limitations, and is not necessary to avoid due process or full faith and credit problems. At least a modest equal protection objection to the provision could be based on these observations.

In a very recent New York opinion, *Montgomery v. Daniels*, 44 U.S.L.W. 2271 (N.Y. Ct. App., Nov. 25, 1975), the New York Court of Appeals rejected such an equal protection argument. Its decision was based, however, on the assumption (contrary to my own conclusion) that New York can regulate in any case involving an insurer doing (unrelated) business in the state and cannot regulate in any case involving an insurer not doing business in the state. With such an assumption, it was easy for the court to conclude that there was a rational basis for the unequal treatment of the two kinds of cases.

¹⁴⁴ N.Y. Ins. Law § 676 (McKinney Supp. 1975).

¹⁴⁵ *Id.*

¹⁴⁶ See text accompanying note 83 *supra*. A difference between New York law and the Louisiana hypothetical is that insurance companies doing business in New York and also issuing policies elsewhere could presumably exclude New York coverage altogether in those latter policies. In the Louisiana hypothetical there was no such opportunity.

cases. It did not want a New York defendant's liability *vel non* to turn on whether the plaintiff was from New York. Thus the act bars claims of non-New Yorkers as well as New Yorkers. New Yorkers, however, have the alternative of their own insurance coverage; non-New Yorkers would not, unless the statutory provision in question were included. The difficulty with the New York approach, however, is that it tries to accommodate a New York interest by controlling insurance contracts with a minimum of New York contacts. In the process it imposes substantive liabilities that are far in excess of what was allowed in *Watson*. Requiring an insurance company doing business in Texas with a Texan to compensate the Texan in a manner contrary to Texas law, as the New York law does, is at best altruistic and at worst an example of intermeddling. In *Watson*, at least, Louisiana was trying to provide for compensation of its own residents; here, New York is extending the principle to nonresidents. That New York provides compensation to Texas accident victims is to its favor, but that New York does so by disrupting Texas contractual relations to the detriment of one not originally having such obligations toward the accident victim diminishes the attractiveness of the approach. The problem is essentially one for the state where the contract of insurance is made. That state ought to require companies insuring its citizens to consider the varying patterns of liability that those citizens will encounter as they travel in other states.

CONCLUSION

Due process, in its emphasis upon the relationship between the state and the individual, provides an inadequate theoretical basis for limiting a state's choice of law. Full faith and credit, on the other hand, seems tailor-made for such purposes. This observation does not require abandonment of the case law on the subject, even though that case law for the most part purports to follow due process standards. The cases, along with a general full faith and credit approach, suggest that courts must look beyond such issues as "fairness" and "unfair surprise," or the "justifiable expectations of the parties," and concentrate on the interests of the states involved. Because the due process approach generally associated with the area already concentrates on the law of the forum, more emphasis is needed on the competing interests of other jurisdictions. A weighing of these considerations and a sympathetic reading of leading cases suggest the following rules:

The forum may apply its law to the substantive questions of a case whenever (a) the party resisting application of that law has acted in the forum or derived from the forum relatively direct benefits, or (b) there is some weaker connection between the defendant and the forum, and the forum's interests are relatively strong compared to interests of other states that would be dis-served by the application of forum law.

Although the 1930's witnessed a retreat from rigid limitations on a state's opportunity to apply its own law to cases with which it had contact, it should not be assumed that such a trend should be extended indefinitely, or that the considerations supporting such a trend are similarly valid today. Forty years ago, tolerance for parochialism may have been warranted because it involved few costs and because it provided doctrinal simplicity. However, in the ensuing years, the greater mobility of our people, and their greater tendency to engage in multistate activities has increased the number of conflicts cases that arise, and thus decreased the justification for accepting parochialism.

Meanwhile, other areas of the law have grown apace. When the approach that allows a state to apply its own law in marginal cases is augmented by expanded bases of personal jurisdiction and the mechanism of the class action, the combination raises the specter of massive invasions by one state into the policies of another, rigidly enforced by the rules of full faith and credit to judgments.¹⁴⁷ The result thus obtained would be attributable not to a national process of comparing interests but to a race to the courthouse. Progress lies with more limitation, not less, and with a requirement that in applying its own law the state give proper regard to the interests of other states.

¹⁴⁷ When a claim has been reduced to judgment, the enforcing state is allowed to inquire only as to the jurisdiction of the rendering court over the parties.