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A REPLY TO PROFESSOR KIRGIS

James A. Martin†

Traditionally rejoinders are marked by brevity and praise of the opposition. I will adhere to both traditions. One is always pleased that his writing has been read; one is doubly satisfied to discover that it has merited response. When the response is as able as that of Professor Kirgis,[1] the original author is thrice blessed—and a little apprehensive.

Professor Kirgis and I disagree on two points: (*1*) the proper constitutional basis for limitations on state choice-of-law rules, and (*2*) the proper standards for such limitations. My Article[2] suggested that the traditional position on the first issue—that due process supplies the constitutional limit for a state's conflicts rules—is not analytically supportable. I suggested that the full faith and credit clause supplies a more logical basis for limitation, since full faith and credit analysis emphasizes deference to the interests of other jurisdictions.

My argument took *Home Insurance Company v. Dick*[3] as a model. I argued that the Texas statute in question, which limited the power of contracting parties from shortening the statute of limitations by agreement, was not unfair *in vacuo*. Therefore, Texas could fairly apply the statute even when there was very little connection between Texas and the transaction. That we intuitively bridle at such an imposition of Texas law does not mean that fairness is the issue. I argued that a decent deference to the interests of the other jurisdiction (Mexico, in this case) would explain intuitive agreement with the result of the *Dick* case. Such deference to the interests of other jurisdictions traditionally rests on full faith and credit notions.[4]

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[1] Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94 (1976) [hereinafter cited as Kirgis].

[2] Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185 (1976).

[3] 281 U.S. 397 (1930). The facts of that case are summarized by Professor Kirgis at Kirgis 97-98.

[4] Mexico is not a state for purposes of the full faith and credit clause. I argued, however, for reasons not here relevant, that the conflicts cases involving foreign states should be governed by the same principles applicable to cases involving only states of the United States. Martin, *supra* note 2, at 199–200.

Professor Kirgis seems to agree with my analysis insofar as it disposes of fairness as the fundamental rationale for the result in *Dick*. He differs by suggesting that, in addition to fairness and procedural regularity, due process has another component: the limitation of state power. As examples of this power-limitation principle, he cites cases imposing limitations on a state's taxing power[5] and personal-jurisdiction cases[6] in which due process furnished the basis for decision. I will not elaborate here on my earlier discussion of the relationship between limitations on choice of law and limitations on personal jurisdiction, but will address a few words to the issue of the state's taxing power.

I agree that the proper limitation on a state's power to tax derives from the due process clause of the fourteenth amendment. I do not believe it follows, however, that a general limitation-of-power principle, inherent in due process, applies in resolving *private* disputes. In the tax area there are two adversaries: the state and the taxpayer. States seldom have an interest in limiting the power of another state's taxation of individuals.[7] Thus, full faith and credit seems inapposite. On the other hand, *fairness* is quite relevant. It is not *fair* for the Soviet Union to tax a cottage industry in downstate Illinois selling only to local buyers. It is not *fair* for Illinois to tax a local worker in Irkutsk. Our sense of fairness leads us to expect the possibility of a quid pro quo for our tax dollars. Moreover, we question the fairness of a sovereign that both imposes a tax scheme and adjudicates its applicability to particular situations. The opportunities for overreaching are great, so the rules limiting the sovereign's power must be drawn with fairness very much in mind.

I would argue that the tax cases do not demonstrate that the limitation of state power is an independent component of due process. Unlike the *Dick* case, the tax cases can be explained in terms of fairness. If there is an element of due process that limits a state's power to apply its own presumptively fair law, it originated in the

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[5] National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967); Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959); Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954); Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940); Aldens, Inc. v. Packel, 524 F.2d 38 (3d Cir. 1975), *cert. denied sub nom.* Aldens, Inc. v. Kane, 425 U.S. 943 (1976); Griffin, Inc. v. Tully, 404 F. Supp. 738 (D. Vt. 1975), *prob. juris. noted*, 424 U.S. 907 (1976). See the discussion in Kirgis 96 nn.6 & 7.

[6] Hanson v. Denckla, 357 U.S. 235 (1958); International Shoe Co. v. Washington, 326 U.S. 310 (1945). See the discussion in Kirgis 96 n.5.

[7] In a few cases, of course, states would have such an interest if the assets of the taxed person were inadequate to satisfy all the state's tax claims.

very cases discussed in our two Articles. I disagree with the reasoning of those cases. In contrast to the development of such an ad hoc role for due process, alien to its traditional role, the full faith and credit clause readily supplies a consistent rationale for conflicts cases.

What difference does it make which rationale guides the exercise of state power in conflicts cases? In a sense it does not matter. The argument is as idle as the infamous dispute on the terpsichorean talents of angels. My preference for the full faith and credit approach arises from two peripheral considerations: (*1*) the approach avoids distorting the law of due process which has developed outside the conflicts area; and (*2*) it focuses on the interests of states other than the forum, as due process does not. This latter focus is so essential to current choice-of-law thinking that any theoretical framework for limiting choice-of-law rules that ignores it is almost per se inadequate.[8]

The results of cases are what ultimately matter. The important issue, then, concerns the standards for deciding future cases—the ones that we can still do something about. In this respect Professor Kirgis and I are not at odds. He proposes more detailed standards than I and asserts that my standards are too vague. I agree that in general briefer statements of the applicable standards make their application more difficult. But greater detail does not guarantee easy application; witness part (c) of Professor Kirgis's second standard, which calls for a court determination when "the severity of the forum rule is all out of proportion to the benefit derived from the forum by the affected party."[9] I do not quarrel with that standard, but it is not clearer than my own standards.

In discussing specific examples, Professor Kirgis and I reach the same results on all but one of the hypothetical cases: the application of the New York no-fault insurance law to out-of-state drivers with out-of-state insurers.[10] I admit that I am uncomfortable with the result that I reach in this case. It bothers me more, however, that New York could alter the terms of a contract made by two non-New Yorkers, simply because one of them committed a tort within the state. Two points stand out in my mind: (*1*) I find it

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[8] Current choice-of-law thinking postdates the first of the cases raising the due process framework for constitutional limits. But even those cases are recent, and one of the original purposes of the full faith and credit clause related to limitations on choice of law. B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 197–201 (1963).

[9] Kirgis 104.

[10] *Id.* at 129-30.

hard to justify New York interference with an insurance contract that has virtually no connection with the state; and (2) I believe that Professor Kirgis's own standards point in the same direction as mine do.

Professor Kirgis identifies three New York interests in this hypothetical case: (*1*) decongestion of New York courts by reducing automobile accident litigation through the destruction of tort liability; (2) speedy provision of payments to medical creditors; and (*3*) nondiscriminatory treatment of injured motorists regardless of the state where they reside or where their insurance was issued. But the first interest is inapplicable. New York courts are no more congested if tort liability is denied without imposing liability on the insurer of the out-of-state injured driver. Consideration of New York's interest in providing for its medical creditors is appropriate only if the insurance company's liability is assumed. Provision for medical creditors from proceeds of a totally out-of-state contract that does not give any right to those funds is at worst perverse and at best unjustified without a better reason for interfering with the out-of-state contractual relationship. The third interest, of nondiscrimination, is applicable only if New York's refusal to interfere with an insurance contract with which it has no connection is considered discriminatory. But New York does not *discriminate* among drivers by applying law that is otherwise applicable to their insurers.

Professor Kirgis also notes that the insurance company derives a benefit from the motorist's peregrinations in New York, thereby satisfying his standard of derived benefit, suggested in part 2(a) of his rules.[11] This notion is simply untenable. If I bet with my neighbor that life on Mars exists, my benefit (or loss) is not "attributable" to some hypothetical Martian government, giving it the right to declare the bet void on Martian public policy grounds or to alter the terms of the bet. Even if my friend is a future astronaut, the benefits from the wager entered into *here* are not attributable to Mars. Insurance contracts are essentially wagering contracts of this sort between an insurance company and the insured: *if* you are held liable where you travel, the insurance company agrees to pay any judgment that someone obtains against you. The New York law rewrites that contract to say that the insurance company must pay the insured, not for the insured's *liability* (basing calculations

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[11] *Id.* at 103.

for their likelihood on the insured's driving record), but rather for the insured's *injuries* (which are just as likely to be the result of someone else's driving abilities). If I were an insurance company, I would search in vain for the benefit that I derived from New York under such an arrangement.

The rational solution to such a problem—given that New York has abolished tort liability—provides the parties with litigation in the state of contracting. The courts of that state may then appropriately modify its insurance law to provide for the situation in which the state of the accident has abolished tort liability.

There are many things left to say—a defense of my use of *Skiriotes v. Florida*[12] and *Banco Nacional de Cuba v. Sabbatino*,[13] for example—but the main points have been made: Professor Kirgis's distinction between due process limitations and full faith and credit limitations is consistent with expressions in the case law, but it is that distinction that I intended to attack in the first place. I see somewhat greater utility (including logical consistency) in adhering to a full faith and credit analysis, but put more emphasis on results. To the extent that Professor Kirgis's tests provide more useful detail than mine, I welcome them. Even where we disagree on one specific case, I find support for my position in his standards. Whatever our differences, however, they cannot mask the value and rigor of his Article, and I am honored to have furnished the catalyst for it.

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[12] 313 U.S. 69 (1941).
[13] 376 U.S. 398 (1964).