Conflict of Laws (Linda Silberman, Fall 2010)

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# TRADITIONAL THEORIES IN CHOICE OF LAW

## +General

1. COL – study of the allocation of lawmaking competence among the sovereign states or nations
2. Developed in the interstate context, methodology then transferred over a bit to international context.
   1. Despite very particular transnational problems (choice of forum clauses, broader role for party autonomy, regulatory area)
3. When a legislature acts, normally acting on a single jx’al model. Not thinking of applying it to other jxs. Mostly their own.
4. General principles
   1. Personal Law Principle – law attached to you at place of birth, carry around with you (also like domicile)
      1. Each state has the rightful power of regulating the status and condition of its subjects.
   2. Principle of Territoriality – law is territorial in application, all persons in territory subject to it. Concepts of sovereignty.
5. Other principles
   1. Just Law/Better rule
      1. But not predictable, totally subjective, not uniform across judges, competency of judge to say which is better, better for whom?
6. Why have rules?
   1. Predictability, uniformity, certainty, consistency.
7. Does LAW refer to
   1. The internal or domestic law, OR
   2. Conflicts law

## +Black Letter Law

## Torts

### *Alabama Great Southern RR v. Carroll* (1892) pg 1

* 1. Accident in MS (-), most contacts and suit in AL (+). Unclear where the negligence occurred. Applied law of place of accident.
     1. Π tried to argue the ee K incorporated AL recovery act. Rejected – would lead to absurd results.
  2. B/c a tort, use law of the place of injury.
     1. Theory – why? Back to for whom the law was written?

### Restatement 1

* 1. § 377 – tells us what the place of wrong is – the injury, not the negligence, because the injury completes the tort.
  2. § 380 – (Exception)
     1. Whereby the law of the place of the wrong, the liability creating character of the ∆’s conduct relies on a standard of care for where you are acting, standard created by statute, law will be of forum (of where you acted)
     2. Where required by law to act or not act, won’t be liable in the laws of another state.

1. ***Horn v. North British Railway Co***. (Scotland 1878) pg 6
   1. Issue of damages. Scotland (+), England (-).
   2. Says law of forum – damages are procedure.
   3. RE § 585: matters of procedure are governed by the forum
      1. Still law?

## Contracts

1. General rule: place of contracting/making governs
   1. Respects value of the intention of the parties.

### *Milliken v. Pratt* (Mass 1878) pg 14

* 1. Wife signed guaranty in Mass (-), performance, goods, K dated, in Maine (+). Q of if K is valid, as married women can’t K in Mass.
  2. Court looking to law of Maine – applies internal law.
     1. RE § 311 – law of the forum decides where the K was made – “place of making”
     2. Here, Mass law thinks K was made in Maine, so applies Maine law to K.
  3. Possibly motivated bc Mass had since changed their law, married woman could K. Otherwise, could have said was against public policy.
     1. RE: no action can be maintained that was created in another state if it contrary to the strong public policy of the forum.

1. Protective laws (wife can’t K, spendthrift, mental capacity) – how much do we give to the intention of the parties to go around the law?
   1. Law of domicile – rejected or embraced in RE? § 338?
2. Choosing law
   1. In US, generally can’t choose totally different law in totally domestic cases
      1. Exception, NY statute 5-1401 – over $250k, can agree NY law governs. But forum has to respect it. Also statute to consent to NY jx, but has to be more than $1mm.
         1. Probably for big business transactions.
   2. England, can generally choose. If no express choice, law with the closest and most real connection to the transaction.
3. Alt rules
   1. Whichever would validate the K.
      1. Again, intent – parties must have intended to have a K.

### Rome Convention

* 1. 1991, to prevent forum shopping, begin formation of COL in Europe

### Rome Regulation

* 1. COME BACK TO THIS, END OF CLASS 4, WITH REG AND CONV.

## Property, Wills and Intestate Succession

### *In re Estate of Mary Barrie* (Iowa 1949, cert denied) pg 20

* 1. Barrie made a will in IL, but wrote void on it, also in IL. Addressed land in both Iowa and IL. Under IL law, IL court said will was void and she died intestate.
  2. Q: was this judgment binding on Iowa court for the Iowa land?
     1. No.
     2. No FFC problem – argue that IL never had jx over Iowa land.
  3. Anything COL with property – SITUS RULE
     1. Capacity to convey, ability to transfer, wills, spousal shares, etc.
     2. So Iowa law applies for the revocation in regard to the Iowa land.
     3. (Generally applies to real and personal property, but in will and testate issues, if personal property, use law of domicile at death)

### Situs rule

* 1. Territoriality.
  2. But weird to have multiple laws applying to a will.
  3. Issue of when when sale of goods.
     1. RE addresses this – at time of sale/foreclosure/receipt

### Domicile at Death

* 1. All property goes to a single law. Fit expectations?
  2. Appropriate for intestacy and spousal share?
     1. Where the relationship presumably was.
     2. But why not law of spouse, if protecting them?
  3. RE 2 – modernized definitions of DOMICILE
     1. Wife same as husband unless special circumstances.
     2. Single and married – domicile of choice.
     3. Citizenship/nationality
  4. Domicile doesn’t always have same definition across contexts.

1. Where will is executed.
   1. Really only works if a will –not for intestacy.

### *White v. Tennant* (WV 1888) pg 25

* 1. Man died intestate in WV, π his siblings, ∆ wife and father in law. Question of whether domiciled in WV (wife gets all) or PA (wife gets half). Had just moved to PA, wife sick in WV, saying with family there when died.
  2. Held: PA domicile
  3. LS – two part test
     1. (1) Residence – things were there
     2. (2) Intention to remain – had intended to move to PA.

### *In re Estate of Evan Jones* (Iowa 1921) pg 28

* 1. J born in Wales, became US citizen in Iowa for long time, sold everything, moving back to Wales, died on Lusitania en route. Domicile? Π is his bastard child – Wales, gets nothing, Iowa, gets it all.
     1. Held, Iowa is domicile.
  2. Q: domicile of origin or domicile of choice?
     1. Domicile shift when you leave, or when you arrive?
        1. General rule – get new domicile when you arrive.
     2. English rule – if returning to native domicile, reverts the moment you leave. Motivated by native allegiance. Rejected here.

## Public Policy

### *Loucks v. Standard Oil* (NY 1918) pg 34 [Cardozo]

* 1. Π and ∆ from NY, acc in Mass (-). Suit in NY. Mass limits damages in wrongful death, turns on the *culpability* of the ∆. Under RE 1, place of injury, Mass law.
  2. ∆ arguing it’s a penal law, state shouldn’t apply the penal law of another state. Also that it violates the public policy of NY.
     1. If so, would DECLINE JX.
  3. “Courts are not free to refuse a foreign right at the pleasure of the judge, to suit the individual notion of expediency or fairness” (pg 37)
     1. Has to violate some fundamental, prevalent notion of justice for the courts to close their doors.
  4. Apply Mass law.

### Penal Laws - Exception

* 1. Don’t enforce of other states
     1. Different b/c can extradite – always a forum in which to prosecute.
  2. Const. Art 3 § 2 – requires trials for crimes to be prosecuted where committed.
     1. 6th amend- jury trial, in place of crime.
     2. Can apply law of other states though.

### Full Faith and Credit

* 1. Applies to public ACTS. Not laws.
  2. No public policy exception
     1. Only exception is issues involving land (bc of jx?)
  3. Exception if the judgment is penal?
     1. Huntington v. Attrill – what is penal?
     2. Penal within the rules of private int’l law.
     3. Really tough in the sister state context to find anything that is penal.
  4. Claim vs. Judgment
     1. Claim – practical implications such as evidence, arguments, etc. Implicates public policy more, but in judgment, court not being asked to do anything but execute the judgment.
     2. Judgment – no such implications. Concerns of comity.

1. Act of States Doctrine
   1. Won’t judge the actions of foreign countries when they are acting in their own country. Peculiarly US notion.
   2. Holzer (pg 39) – German π and ∆, ∆ dismissed π from job b/c of Aryan Decree, suit on K brought in NY, π argues decree against public policy (essentially strike down German statute). Dismissed, π can’t be helped.

### Public Law Taboo – won’t entertain

* 1. What is? Antitrust. Securities.
  2. Certain things that conceptually are tied to a public regulatory regime, even when enforced by private individuals.
     1. Courts saying won’t enforce these claims, or even judgment.s Changing though.

### Revenue Rules

* 1. Historically states wouldn’t enforce tax claims or judgments of other states. Question of intruding on sovereignty, lack of competence. Changed in US.
     1. LS – doesn’t like the sovereignty argument. And if a judgment, court doesn’t have much obligation.
  2. Can bring a sister state tax claim, and will enforce a sister state judgment.
  3. What about tax of foreign countries.

### *RJR Nabisco* (2d Cir 2005) Supp.

* 1. RICO claim, civil and criminal statute, private action against US cig manufacturers who were shipping in a way to avoid foreign taxes. Π is the EU.
  2. Pasquantino – US was π (so criminal case), alcohol smuggling scheme, SC upheld conviction, doesn’t violate revenue rule
  3. This is a civil case, said RICO violates the Revenue Rule.
     1. Distinguish from Pasquantino – that was a criminal charge, was the US bringing it. Cong passed statute. Not same concern of judiciary involving itself in things it shouldn’t be/foreign relations.
     2. Was punishment, not an attempt at restitution.
  4. What is the sovereignty concern? EU asking us to enforce their laws? But it’s a US statute.
  5. Real problem – would involve an assessment of damages/tax in another country.
     1. Irrelevant in crim case – just show damage, not calculate them.

### Marriage cases

* 1. Showing a different role for public policy. While it meant a dismissal in Loucks, used here to justify a difference choice of law rule.
     1. (not necessarily law of forum state, but state with strong claims to have their laws applied)
  2. RE 134 – if any affect of marriage is deemed sufficiently offensive to the latter state, latter state can refuse to give affect.
     1. Brings in public policy.
  3. Place of celebration
     1. Does encourage marriage evasion. But there’s an out if abhorrent.
     2. Value? Predictable, clear, efficient rule.
     3. LS- often, place of celebration may have no interest in the couple, ridic to apply their law.
  4. RE2 § 284 – most significant relationship with the spouses. Presumptive law is where the marriage was contracted. LS likes.
  5. LS also likes domicile at the time of marriage.

### *In re May’s Estate* (NY 1953) pg 855

* 1. Uncle and niece from NY, go to RI get married – exception there in law for Jewish faith. Lived in NY, 35 years, child challenges marriage b/c wants to be executor.
  2. Unclear how far NY law covers (also penal law) – just NY, or all places? Some statutes clearly say the marriage would be invalid upon return.
     1. B/c unclear, court falls back on default place of celebration rule.
     2. Facts probably driving this case- almost estoppel.
     3. Could have an “out” even w place of celebration – if abhorrent to public morality. Not saying it’s that abhorrent.
  3. Dissent – they intentionally evaded NY law, penal statute as evidence that viewed as abhorrent.
  4. Differs from Wilkins below – here, collateral attack on marriage. Totally different analysis.

1. Same Sex Marriage
   1. DOMA- first time Fed attempting to define marriage.
   2. FFC – is marriage a judgment?

### *Wilkins v. Zelchiowski* (NJ 1958) pg 858

* 1. Under age couple in NJ, go to IN where legal to marry.
  2. Purpose behind NJ rule? Protect children, give parents greater control. IN interest here? Money?
  3. Said IN has no purpose to have IN law apply in this case.
     1. Not saying strong public policy of the forum, but the strong public policy of the state that had the most significant relationship to the couple/their domicile.

1. *Dalip Singh Bir’s Estate* pg 859
   1. Decedent had two wives in India, he’d moved to US. Claim to his will, but our laws don’t recognize 2 wives.
   2. Court recognizes both wives – this isn’t an evasion case, no public policy problem because didn’t bring the polygamy to the US.
   3. Would also come out this way under RE2 – strongest relationship is India, India would recognize.
2. Hypo of ss couple from NY, married in Mass, want benefits in NY. Analyze: place of celebration unless abhorrent? Not penal, as it was in Mays. RE2 – not recognized, as Mass has no purpose in this couple.

## How To Interpret/Apply Foreign Law

1. Saudi hypo
   1. US π, Del corp ∆, injury in Saudi Arabia. Suit in NY, where ∆ does business. What to do?
      1. Who figures out foreign law? Π, court, ∆?
         1. Can be expensive and complicated.
      2. Apply forum law unless someone objects? Under what theory?
         1. If whole law, then NY COL would say look to place of accident.
      3. What if place of accident has bad/no law? Rudimentary justice – want to restitute those that are harmed.
   2. (In actual case, court told π to introduce evidence as to SA law)
2. How to ascertain and apply foreign law?
   1. Certification statutes – with sister states, and sometimes Mex and Can, can ask the other court to help give an opinion on an issue of law.
3. Party intending to raise issues of foreign law – have to give notice in pleadings
   1. NY and Fed law (44.1)
      1. 44.1 – doesn’t help much. Says issue of law, not fact. Doesn’t say who burden is on. Doesn’t mention presumptions.
4. Court may consider any relevant source, including testimony, in determining what the law is.
   1. Determination is a ruling of law (not a jury), can be appealed.

## +Escape Devices

## Renvoi

1. What’s the point?
   1. Pros
      1. Attempt to achieve uniformity
      2. If a state wouldn’t apply their own law to the facts, why should the forum? But what if neither wants their laws applies?
   2. Con
      1. No real principle where you break the circle
      2. Tough to figure out the conflicts of law of another place.
2. You want to find the primary forum, because you want to achieve the result you would.
3. US generally rejects renvoi in COL doctrine
   1. (rejects as in doesn’t accept?)
   2. RE2- when the forum is a “naked” forum (no connection to parties/actions) and all the other states would concur, then apply renvoi.

### *In re Annesley* (Chancery Division 1926) pg 41

* 1. English C, lived in France for 40 yrs. English form will, made in France. Will says she’s domiciled in England, but court ignores, can’t change by words.
     1. French law – legitime – have to give some to heirs
     2. English – dispose of however you want.
  2. Court says she’s domiciled in France – using forum law to determine domicile (though would not be domiciled in France under French law)
     1. *On the issue of domicile, foreign law has no application*.
     2. So apply French law.
  3. Only applying internal law, but since France has no internal law for non-French domiciliaries (which is how they see her), there is an absence of applicable French law. French look back to the English.
     1. So they would apply British law, which would apply French law. The question is, will they accept the reference back (renvoi).
  4. First step – applying French law (primary forum).
  5. First reference – French law applying British law (says a French domicile, sends back to French law)
  6. Second reference/renvoi – British law applying French law and France accepting the renvoi.
     1. Determines France would accept the renvoi and applies French law as if the decedent had been a
  7. French doing a Partial Renvoi – look only to English internal law, which says is a domiciliary of France.
     1. “when foreign choice of law rules refer to the internal law of another state”
  8. English Full Renvoi – look to France’s whole law.
     1. When consider foreign whole law
  9. Reject - by considering foreign internal law only

### *Schneider’s Estate* (NY Surrogate’s Court 1950) pg 48 [Frankenthaler]

* 1. Dual US and Swiss C, domiciled in NY, land in Swiss. Died, ∆ sold land and tried to dispose of in a manner contrary to Swiss law. Though now money, still treated as land.
  2. Swiss as primary forum (really should be a situs case, NY shouldn’t even hear it…but not actually land anymore, so why even use situs rule to say Swiss primary forum?)
     1. Law of situs requires to look to whole law of country, so look to whole Swiss law.
     2. Swiss legitime does not apply to dual nationals who are domiciled elsewhere. No Swiss applicable law.
        1. So applies NY law.
           1. Weird – in Annesley, when no French law, they looked to French COL (which said British law), but here, didn’t. Just applied NY.

### *U. Chicago v. Dater* (Mich 1936) pg 46

* 1. Capacity to K case (court just assumes K characterization), question of whether to apply IL or Mich law. Most of the contacts in IL, just happened to be signed in Mich.
  2. Mich would say IL law – applies whole law. IL, after *Burr*, says K was made in Mich, Mich law.
     1. Renvoi. Settles on Mich law.
  3. LS – judge missed the point. Forum uses law to determine the place of K, then should only look to the internal law. They *know* the K was made in IL.
     1. But weird to apply the internal law of another state when they wouldn’t themselves – that’s the point of renvoi, to avoid that.

### [Statutory Renvoi] *Richards v. US* (1962) supp

* 1. Crash in MO (- damage limit), but negligent practices in OK (+ no damage limit). Statute says the law of the place where the act or omission occurs. What is meant by “law?”
  2. Court says the whole law applies.
     1. Looks to statute as a whole, leg history – purpose of the statute.
     2. FTCA – trying to make it so you can treat the US govt like an individual.
        1. Compare to Fed Reservation Act/Cont. Shelf Case – trying to extend the boundaries of what a state governs to include parks (so only apply internal law? LS – Richards and Cont. Shelf two differing precedents)

## Characterization

1. RE1 says nothing about characterization.
   1. RE2 – use domicile for spousal immunity.

### *Haumschild v. Continental Casualty Company* (WI 1959) pg 52

* 1. WI couple, accident in CA. CA has a spousal immunity rule. Looks like classic place of injury case, use law of CA. But, is SI really about tort, or here, an issue of family law governed by the law of domicile?
     1. Until this case, WI thought tort, CA family law.
        1. Concurrence – WI looks to CA, law just doesn’t apply, so renvoi back to WI.
  2. Maj – renvoi gen not accepted, find a different path.
     1. Changes characterization to family law, so law of **domicile**. WI law applies.
  3. How to characterize – tort or family law?
     1. Policy underlying the competing rules? Protect family unity, or deterrence against insurance fraud

### *Mertz v. Mertz* (NY 1936) pg 58

* 1. Accident in CT, couple residents in NY, sue in NY. NY SI law. Mirror to *Haumschild*.
  2. Characterizes SI as about “**capacity**”
     1. Ability to sue as separate from the underlying cause.
     2. So though CT law might apply, wife has no capacity to sue under NY law.
     3. “It recognizes the wrong but denies remedy for such wrong by attaching to the person of the spouse a disability to sue. No other State can, outside of its own territorial limits, remove that disability or provide by its law a remedy available in our courts which our law denies to other suitors.”
  3. This (capacity) is a judgment on procedural grounds, no res judicata, same as if had said this suit is against our public policy under *Loucks*, would dismiss, could possibly bring in CT.
     1. If say law of domicile, you have a judgment on the merits. Preclusive.

### *Levy v. Daniel’s U-Drive* (CT 1928) pg 61

* 1. Rent car in CT, CT company, accident in Mass. CT statute imposes liability on company if driver is neg. CT forum.
     1. Avoid place of injury by arguing this is about a K (driver and company)
        1. Saw this argument before in Carroll, but court said of course it wasn’t a K!
  2. Court accepts that this is about the K.
     1. Do a kind of interest analysis kind of thing.
        1. Risk distribution – tort!
        2. CT – trying to cover companies in CT. Mass interest? None really. Mass may have rejected a similar statute to try to encourage car rentals in Mass – not about accidents at all.
     2. Not a brilliant conclusion to say K.
  3. Would be same result if the company was in Mass and the injury in CT? Still say K?
     1. Would CT now have a deterrence interest and Mass one of protecting their companies – true conflict?

## Substance vs. Procedure

1. Another characterization game
   1. LS doesn’t really like the terms procedure and substance
   2. Procedure – rules of the forum

### *Levy v. Steiger* (Mass 1919) pg 66 [De Courcy}

* 1. Accident in RI, all in Mass.
     1. BoP in RI is on π, while BoP in Mass is on ∆, for contrib. neg.
  2. Question if Mass uses its own BoP rule (procedural) or is it substantive and RI’s should apply?
     1. **Court says BoP is procedural**. Won’t change substantive law of negligence.
     2. **Transplanted category problem** – procedural means different things in different contexts!

1. Determining if Sub or Proc
   1. No difference in outcome (then Proc) – want to avoid forum shopping
      1. But not true for BoP!
      2. Diff in outcome – not an assured/certifiable difference
   2. Administrative concerns – tough to apply elsewhere
      1. BoP not hard to look up, doesn’t change nature of jud. system.
   3. Primary rules (pre-litigation conduct) versus rules during litigation
   4. Areas of minutiae.
2. ***Sampson v. Channell*** (1st 1940) pg 444
   1. Acc in ME, π in ME, ∆ in Mass, in Mass fed court.
      1. Mass puts BoP on ∆, fed rule is different.
      2. Levy doesn’t bind the fed court.
   2. Says BoP is substantive.
      1. But doesn’t apply law of accident, applies Mass law and Levy.
      2. Characterize BoP for interstate conflicts as procedural.
         1. Fed viewing as state would, so BoP of state.
   3. **BoP is procedural for conflicts purposes, but substantive for Erie purposes**.

### *Grant v. McAuliffe* (CA 1953) pg 67 [Traynor]

* 1. Acc in AZ, all people from CA, suit in CA
     1. CA – tortfeasor dies doesn’t matter
     2. AZ- tortfeasor dies, cause doesn’t really survive – all assets to family, protected.
  2. RE says substantive, but pre-RE, it wasn’t, so unclear.
     1. **Court characterizes as procedural**
        1. Says survival is not an essential part of the CoA, it exists on it’s own, really just part of the remedy. Apply forum.
           1. AZ took away a remedy, not a right.
     2. Possibly wanted to change CoL rule, not really about procedure – about law of domicile?
        1. Easy here bc both from CA. Harder if CA π and AZ ∆ - each state has an interest.
  3. False conflict case – only one state w/real interest

### *Kilberg* (NY 1961) pg 129 [Desmond]

* 1. Acc and ∆ in Mass, plane took off from NY, suit in NY
     1. Mass has a damage limit on the death statute (same statute as Loucks), NY has no limit and Const says no limit.
  2. Π sued on K theory (wants NY law), fails, so Mass law applies.
     1. **BUT, court says the damage limit is offensive to the public policy, and therefore treats the limit is procedural/remedial**. Makes no sense.
        1. If PP, you don’t hear the case.
        2. No housekeeping policy to call it procedural.
  3. So applies Mass statute, by NY damages limit (which is none) – half faith and credit.
     1. RE diff – limitations in wrongful death statute, you use it.
  4. **Transition case into more modern CoL analysis**/rules
     1. Seems that court wants a different CoL rule, that the place of accident is totally fortuitous.
     2. Fuld concur – should be about significant contacts
     3. Judges starting to look to the purposes behind the rules.
  5. Rejected in *Barkanic*?

1. ***Harding*** (UK) supp
   1. Π English, ∆ Aus, married in UK, on trip in Aus, serious accident. Π injured, ∆ owned car and had liability insurance. Π sues her in England (to get to insurance co)
   2. Q of damages. Aus much less than Eng.
      1. Trial applies Eng law, Appeals reverses saying damages are not procedural (dissent – Eng more appropriate law)
      2. House of Lords reverses – **should be procedural**.
   3. Hoffman opinion
      1. Distinguishes btwn the head of damage (pain and suffering, actual damage) which is substantive, and quantification (how you add it up, including damage limits) which are more procedural.
   4. Expectations in Aus – where insurance was.

### Rome II

* 1. Art 4 – main tort article – law where the accident occurs.
     1. But, 4(2) Habitual residence – kind of like common domicile
  2. Damage
     1. Art 15(c) scope of coverage, includes damages
  3. **Harding essentially reversed by Rome II**.

## Statutes of Limitations

1. What is an SOL
   1. Give this right for a period of time only. Balance of right to sue and protecting ∆ from indefinite liability.
   2. Also about managing court’s docket and caseload.
      1. Harder to then justify using the longer SOL?
   3. Hard to investigate a matter after a certain amount of time, can’t fairly try the case.
2. Bc so many cases say procedural, may be best way to forum shop!

### *Bournias v. Atlantic Maritime* (2d 1955) pg 75 [Harlan]

* 1. Case in admiralty, so *Guaranty* doesn’t apply.
  2. *Guaranty Trust* – fed court applies SOL of state where it sits.
  3. Ship here, but everything else in Panama. Employment dispute under Panamanian Labor Code.
     1. Use SOL of Panama statute (1yr), whereas doctrine of laches looks to real harm, reliance, and unfairness to see if claim is stale.
  4. *Erie* developments – emphasis on difference of outcome, Harlan focuses on this.
     1. And RE1 always treats SOL as procedural.
        1. Exception if state that created the right made the SOL the condition of the right – limits the right (wrongful death usually has a built in SOL, don’t split it off)
  5. **Analysis**, asking of SOL modifies the right or not
     1. Doesn’t have to be pleaded. Doesn’t tell us much.
     2. Language of statute?
     3. What does the foreign court do? Too complicated.
     4. **Specificity Test** – if general, can split/procedural, if specific, then substantive.
        1. SOL in Pan. Labor Code specific to those provisions, but not to this provision. General 🡪 **procedural**.
  6. Unsatisfying result. Could have looked to reasons behind SOL or have dismissed.
     1. Only way to really justify is if could show that Panama reason for the SOL was for housekeeping. Hard to make that judgment.

1. **LS’s Favorite Case**
   1. K by oral agreement in MO, π about to foreclose on ∆, ∆ asked for extension, π granted, but nothing in writing. MO π, NY ∆ and forum.
      1. Both states have statute of frauds.
   2. **Court says NEITHER SoF applies**!
      1. Characterizes MO as procedural (“no action shall be brought”) and therefore not applying
         1. May have made more sense if said “in MO”
      2. Says NY is substantive (“every K not in writing shall be void’) and would apply only to NY K’s.
2. **Repose statutes** – run from the time the product was first purchased
   1. Treat same as SOL?
      1. Argue that repose more about protecting ∆s, less about court management – presumptively substantive?

### *Baxter* (CT 1994) pg 95

* 1. OR π, gun made in CT, sent to OR distributor, suit in CT.
     1. CT longer SOL. Repose in OR is 8 yrs, CT 10.
  2. Was in 2nd Cir, D Ct had said OR statute was repose, what would the state do? Sent to state court for answer
  3. **Held – CT can apply its own statute of repose bc it’s procedural/housekeeping**.
     1. Jump to say repose and SOL are not that different.
     2. Court uses **specificity rule**
        1. But looking at the OR statute and it’s purpose, not SOL in general. If OR statute to protect OR manufacturers, maybe this is right?
           1. Or maybe
        2. But, isn’t CT statute to protect CT *consumers*?
           1. CT- maybe about deterrence?
        3. So neither really has an interest.

### *West v. Theis* (ID 1908) pg 79

* 1. Cause of action in KS, ∆ left for along time, suit in ID where π can finally get jx over.
  2. Borrowing statute – if CoA arose in another state and by the laws of the other state is SOL barred, cannot be maintained, unless in favor of an ID C who had the CoA from the time it accrued.
  3. Tolling statute – if ∆ leaves the state, the time stops, re-starts upon return.
     1. Court says applies to people who hadn’t been in state before.
     2. So π not barred bc ∆ in KS and WA so long, just recently tolling in ID
  4. **Court borrows the SOL AND the tolling from KS**
  5. Purpose of a borrowing statute?
     1. Correct the overbreadth of tolling (∆ could be forever subject to suit if keeps moving), so use SOL of state where ∆ could have been sued
        1. But negated if you borrow the tolling too?
     2. Reverses the notion that SOL is procedural
        1. Better to say “the SOL of the otherwise applicable law would apply” rather than accrued.

### *Mack Trucks Inc*. (3d 1996) pg 81

* 1. Accident, judgment against Mack in FL, paid. M suing B for indemnity in PA fed. ∆ arguing SOL. Applying PA COL, PA usually applies SOL of the forum.
     1. Statutory exception for borrowing statute – if barred where it arose
  2. Q – where and when the final significant event that is essential to a suable claim occurs.
     1. Here, when Mack satisfied the judgment, in FL. FL SOL, Mack not w/in time, loses.
  3. Dissent – this is an action btwn the manufacturer and supplier, took place in PA, use that SOL. FL has no interest here.
  4. **Use a borrowing statute only in a situation where your own statute would allow the suit to be brought**. (usually).
     1. If your SOL bars the claim, can use that.

1. **Look to notes on Problem**

### RE1 – SOL as procedural

### RE2 – § 142

* 1. (1) Forum applies own SOL if bars the claim
  2. (2) Forum applies its own permitting unless
     1. (a) maintenance of the claim would serve no substantial interest of the forum; and
     2. (b) the claim would be barred under the SOL of a state having a more significant relationship to the parties and the occurrence.
  3. (**meant to stop forum from applying own longer SOL unless has a really good reason to do it**)

### Uniform Limitations Act

* 1. Sees SOL as balancing rights and liability, a substantive thing.
  2. If forum has shorter SOL, still apply the SOL of applicable law, even if longer.

### Rome II

* 1. Art 15 – Scope of the law applicable
     1. (h) – whatever the rules which govern the underlying right will apply (substantive).

# MODERN APPROACHES TO CHOICE OF LAW

## + Interest Analysis in Torts

## The Range of Modern Thinking

### Currie

* 1. Courts shouldn’t “weigh” competing interests
     1. Identify state policies, is the policy implicated, is it a true or false conflict?
  2. When a court in a true conflict holds a foreign law applicable, it is holding it’s own policy interest inferior. Should apply **forum law**.
     1. Willing to live with forum shopping
  3. In situation with true conflict and a disinterested forum, apply the law that is the closest to forum law (*Potter*)

### Cavers

* 1. Territorialist once finds a true conflict
  2. 7 principles for true conflicts cases
     1. (1) Where the liability laws of the state of injury set a higher standard of conduct or of financial protection against injury than do the laws of the state where the person causing the injury has acted or had his home, the laws of the state of injury should determine the standard and the protection applicable to the case, at least where the person injured was no so related to the person causing the injury that the question should be relegated to the law governing the relationship.
        1. Cavers attributes this principle to his “territorialist bias”
     2. (2) Where the liability laws of a state in which the defendant acted and caused an injury set a lower standard of conduct or of financial protection than do the laws of the home state of the person suffering the injury, the laws of the state of conduct and injury should determine the standard of conduct or protection applicable to the case, at least where the person injured was not so related to the person causing the injury that the question should be relegated to the law governing the relationship.
        1. By entering the state, the visitor has exposed himself to the risks of the territory and should not expect to subject persons living there to a financial hazard not created by their law
     3. (3) Where the state in which a defendant acted has established special controls, including the sanction of civil liability, over conduct of the kind in which the defendant was engaged when he caused a foreseeable injury to the plaintiff in another state, the plaintiff, though having no relationship to the defendant, should be accorded the benefit of the special standards of conduct and of financial protection in the state of the defendant’s conduct, even though the state of injury had imposed no such controls or sanctions
        1. This is designed for the implementation, in multistate situations, or a special scheme of regulation
     4. (4) Where the law of a state in which a relationship has its seat has imposed a standard of conduct or of financial protection on one party to that relationship for the benefit of the other party which is higher than the like standard imposed by the state of injury, the law of the former state should determine the standard of conduct or of financial protection applicable to the case for the benefit of the party protected by that state’s law
     5. (5) Where the law of a state in which a relationship has its seat has imposed a standard of conduct or of financial protection on one party to that relationship for the benefit of the other party which was lower than the standards imposed by the state of injury, the law of the former state should determine the standard of conduct or financial protection applicable to the case for the benefit of the party whose liability that state’s law would deny or limit [NB: Cavers disapproves of this principle]
     6. (6) Where, for the purpose of providing protection from the adverse consequences of incompetence, heedlessness, ignorance, or unequal bargaining power, the law of a state has imposed restrictions on the power to contract or to convey or encumber property, its protective provisions should be applied against a party to the restricted transaction where (a) the person protected has a home in the state (if the law’s purpose were to protect the person) and (b) the affected transaction or protected property interest were centered there or, (c) if it were not, this was due to facts that were fortuitous or had been manipulated to evade the protective law.
     7. (7) If the express (or reasonably inferable) intention of the parties to a transaction involving two or more states is that the law of a particular state which is reasonably related to the transaction should be applied to it, the law of that state should be applied if it allows the transaction to be carried out, even though neither party has a home in the state and the transaction is not centered there. However, this principle does not apply if the transaction runs counter to any protective law that the preceding principle would render applicable or if the transaction includes a conveyance of land and the mode of conveyance or the interests created run counter to applicable mandatory rules of the situs of the land.

1. **Griswold**
   1. Territorialist
2. **Rheinstein**
   1. Expectation of the parties
3. **Reese**
   1. Judge: most significant relationship with the occurrence and the parties (RE2)
   2. Professor: look to conduct and status of the parties.
4. **Twerski**
   1. Base rule should be **territorial**
      1. States should have a right to enforce their laws, doesn’t lose that just bc the person is from another state.
   2. Saying something is false/true conflict shouldn’t be dispositive.
   3. No such thing as a no interest case – presumptuous to tell a state that its sense of morality is irrelevant to events that have transpired within it.
      1. Fact that some say cases are “no interest” reveals how ridiculous this all is.
5. **Sedler**
   1. **Anti-territorialist**. Laws don’t affect people’s decisions to cross state lines.
   2. Talks about a common policy of recovery – kind of odd.
   3. Apply law of π’s residence if suit brought there and isn’t unfair.
6. **Weintraub**
   1. In true conflicts cases, presumption for the **law that favors the π**.
   2. Exceptions if law is anachronistic or the state with the favorable law doesn’t have sufficient contacts to make application reasonable.
7. **Baxter**
   1. **Principle of comparative impairment** – to what extent will the purpose underlying a rule be impaired by non application to cases of a particulary category? State whose policy would be most impaired by non-application should have its law applied.
8. **Leflar**
   1. **Choice influencing considerations**
   2. (1) predictability of results
   3. (2) maintenance of interstate & int’l order
   4. (3) Simplification of the judicial task
      1. Applying complex laws of other states isn’t great
   5. (4) Advancement of the forum’s governmental interests
      1. Reasons supporting the law in question and that state’s factual contacts – do they match?
   6. (5) Application of the better rule of law
      1. Applicable in no-interest and some true conflict cases.
9. **Von Mehren**
   1. Principle of compromise – if laws conflict, split the difference.
   2. No court has followed this.
10. FIVE IMAGINARY CASES
    1. On other outline

## The New York Experience

### *Kilberg* (NY 1961) pg 129 [Desmond]

* 1. discussed above. Transition case – court rejects place of wrong with regard to MA damage limits, but under the guise of public policy

### *Pearson v. Northeast Airlines* (2d 1962) pg 135 [Kaufman]–

* 1. Kilberg ok – NY can const apply the MA wrongful death statute but not the damage limit.
  2. Fear that a contrary result would “freeze” the lex loci delicti rule to const status.
  3. NY can examine each issue in litigation – if had to apply the entire MA statute, FFC would be oppressive to legit and lawful state interests.
  4. **Friendly Dissent** – once a legislature creates a transitory right, it should receive uniform enforcement from other states – this is half faith and credit.

### *Babcock v. Jackson* (NY 1963) pg 145 [Fuld]

* 1. NY π guest in driver’s car, started in NY, went to Ontario, accident, suit in NY.
  2. Host-guest statutes
     1. ON – if a passenger, cannot sue
  3. Apply NY law, reject H-G statute.
     1. **Center of gravity/grouping of contacts approach** (J. Reese). Embraces RE2 in that place of injury isn’t only factor.
        1. But has a little bit of each imaginary case.
     2. NY interest – tortfeasor compensate guest for injuries
     3. ON interest – prevent fraudulent claims against insurance companies, not applicable here.
     4. False Conflict.
  4. Van Voorhis dissent – you have given us no principle of law.

### *Dym v. Gordon* (NY 1965) pg 152 [Burke]

* 1. CO H-G statute, can only recover if show willful/wanton conduct.
     1. Π and ∆ from NY, but summer students in CO. Acc in CO. Other car from Kansas.
  2. **Court rejects contacts counting and applies interest analysis**
     1. “feels” like a CO case – seems like sig contacts
     2. NY interest – compensating NY πs
     3. CO – relationship formed there, protecting negligent ∆
        1. Really an interest? Possibly a false conflict.
        2. If interest, then a true conflict
           1. Cavers 1st Principle – place of injury where the standard of conduct is less strict.
  3. Fuld dissent = inconsistent w/Babcock, reject’s maj’s characterization of CO’s interest. Think NY has stronger interest.
  4. Desmond dissent – doesn’t like the contacts/interest stuff, wants a rule. Thinks this is against NY policy.

### *Macey v. Rozbicki* (NY 1966) pg 162 [Desmond]

* 1. ∆ and π live in NY, ∆ summer home in ON, there for 3 months, π for 10 days, acc in ON
  2. Looks like Dym, but comes out other way – applies NY law.
     1. **Significant contacts**, says relationship was in NY.
     2. Not an interest analysis case.
  3. Keating concur – only residency and place of insurance should matter, would overturn Dym. Sounds like Rheinstein, expectations.

1. ***Kell v. Henderson*** (NY 1966) pg 160
   1. Opposite facts of Babcock, which had applied NY law. Applies NY law anyway! How to reconcile?
2. ***Farber v. Smolack*** (1967) pg 165 [Bergan]
   1. ∆ NY dom, loaned car to brother, accident in NC while driving to FL. Brother’s negligence shown
      1. NY law – π can recover against owner
      2. NC - rule is merely one of evidence, no guarantee as to result
   2. Apply NY law
      1. Both statutes have language about “in the state,” but read more broadly
      2. (full circle from *Carroll*, where they read “in the state” into statute.
   3. LS – easy case – NC has no connection. Any rule trying to protect car owner inapplicable. False conflict.

### *Tooker v. Lopez* (NY 1969) pg 173 [Keating]

* 1. Dym revisited. Car and insur in NY, Tooker and Lopez NY doms, acc in MI, Silk MI dom, all students in MI. Host guest relationship estab in MI.
     1. NY – full recovery
     2. MI – only for willful and wanton neg.
  2. Interest analysis case – apply NY law.
     1. NY interest in recovery for NY dom
     2. MI – no interest in whether a NY π is denied recovery. Only interest is denying fraudulent claims (Dym characterized CO statute wrong), which can’t be vindicated here with NY insurer.
        1. But, the next case with MI passenger?
  3. **Fuld concurrence** – lays down some guidelines for H-G statutes (just H-G statutes? Will later move them up in *Neumeier*)
     1. **Rule #1**: When H and G are dom in same state and car is registered there, that state’s law.
        1. Essentially common domicile rule
        2. Cases 1 and 5 of imaginary cases. False conflict
     2. **Rule #2:** If driver’s conduct occurs in his state of domicile, and would not be liable in that state, should not be liable under tort law of the victim’s domicile. Conversely, if guest injured in own state where driver had come in, driver can’t use own law as defense.
        1. Like place of accident.
        2. True conflict.
     3. **Rule #3**: Other situations, law of place of accident, unless can show that displacing the rule will advance the relevant state law purposes without problems/uncertainty.
  4. Note that these rules are only for LOSS ALLOCATION (damage limits, vicarious liability, immunity (*Schultz*)). Idea that state’s interest and parties’ reliance are less important.
     1. Not always clear when a rule is loss allocating or conduct regulating 0 some are both.
  5. Breitel dissent: fear of personal tort law being carried with π wherever they go. If place of accident only adventitious, then don’t apply forum law (Babcock and Farber), but this isn’t adventitious. Worried about Silk.

### *Neumeier v. Kuehner* (NY 1972) pg 181 [Fuld]

* 1. Fuld, gone from concurring in Tooker to majority here, makes the Neumeier Rules precedent (see above)
  2. Guest from a non-recovery state (ON), host from a recovery state (NY), accident in Ontario.
     1. Would be third rule.
     2. But court goes into interest analysis. You’d think no interest, but court says in fact ON’s law isn’t about protecting ∆’s against insurance fraud, but to protect driver’s from ungrateful guests, so ON has an interest. False conflict, apply ON law.
     3. Purpose of NY law is to COVER liability, not CREATE it.
        1. “Was the NY rule really intended to be manna for the entire world?”

1. ***Labree v. Major*** (RI 1973) pg 193
   1. Same fact pattern as Neumeier, but different result – rejects the third rule – still do interest analysis.
      1. If ∆ is from a state that allows the π to recover, then π should - ∆’s state is the only state with an interest in protecting ∆, and they don’t, so don’t protect ∆.
2. *Iller v. Miller* pg 171
   1. NY protects ∆, but π and forum there
   2. ME doesn’t protect ∆, ∆ there and accident.
   3. NY applies NY law! Says ∆ moved there after accident, so ME not as interested anymore. Made it a Rule 1 case?

### Cipolla v. Shaposka (PA 1970) pg 190

* 1. Rule 2 case, but not in NY.
     1. PA – Forum, π, no H/G statute
     2. DE - ∆, H/G relationship, accident, H/G statute.
  2. True conflict. PA wants to compensate it’s π, DE wants to protect it’s ∆ and insurance companies.
  3. Apply DE law, 2 rationales
     1. ∆ acting in his home state, should be able to rely on that law. (Cavers and Neumeier 2)
        1. Seems unfair to apply π law (also a jx issue. ∆ submitted to PA jx here, but if not, might not have jx, would violate DP?)
     2. DE contacts are greater 🡪 greater interest.
        1. Also a bit of contact counting?

1. *Foster v. Leggett* (KY 1972) pg 192
   1. True conflict, apply forum law – like Currie.
2. ***Milkovich v. Saari*** (MN 1973)
   1. Π and ∆ from Ontario, accident occurs MN, π hospitalized in MN for 12 months.
   2. Adopts Leflar’s “choice influencing considerations” (better rule of law)
   3. Dissent fears forum shopping.

### Later NY Cases

### *Schultz v. Boy Scouts of America* (NY 1985) pg 205

* 1. Reverse Babcock or reverse Tooker (but about charitable immunity)
     1. LS – “everything they do is wrong” about this case.
  2. NJ: children of NJ π’s, abuse by monk in NJ and NY, ∆, charitable immunity law, place of son’s suicide, relationship.
  3. NY: Abuse at camp, no charitable immunity
  4. OH: Franciscans ∆ incorp, allows liability of negligent hiring, but no one really arguing for this law.
  5. Court says the charitable immunity rule is loss allocating (though we’d argued earlier that immunity might encourage charities to exist in NJ – but you could make that argument for almost any immunity and activity).
  6. Apply NJ law (Neum. 3? For the Franciscans, 1 for the other ∆?)
     1. They discuss public policy, but rejects that argument (if ever a time to invoke PP, isn’t sexual abuse of children the time?)
     2. But, seems to say that if they did invoke PP, would apply their own law, not dismiss.
     3. Discussing interests and PP on top of Neum rules – seems to miss fact that interests are incorporated into Neum rules.
  7. Dissent – describes NY as having a conduct regulating rule, not just about loss allocation,

### *Cooney v. Osgood Machinery* (NY 1993) pg 225 [Kaye]

* 1. MO: Er, Ee, Accident
  2. NY: Osgood (∆), sale by ∆. Forum
  3. Worker’s comp award in MO. Under scheme, can’t sue Er, but can sue 3rd party.
     1. ∆ wants contribution from Er. Question is whether your can go around the limitation of suing the Er. MO – no, NY – yes.
     2. ∆ sues Er in NY, general jx.
        1. NY could const apply own law, but don’t.
  4. Neum Rule 2
     1. ∆ is in a state that limits his liability, victim is in a state that compensates. True conflict. Go with place of injury.
     2. **But is applying MO law const? Seller had no idea could be in MO, could’t be sued there bc no jx**.

### *Barkanic* (2d 1991) supp

* 1. Π (DC) killed in the crash of a Chinese plane in China. Question of whether Chinese law applies. Foreign Sovereign Immunities Act- no federal COL, apply state law
  2. Court, using the NY choice-of-law rules, concludes that Kilberg is no longer good law and courts would apply the law of the place of the accident (Chinese law) per Neumeier Rule #2
     1. Believes that NY Court of Appeals would apply Neumeier to all loss distribution rules
  3. Public policy exception does not apply because, under Schultz, there needs to be enough contacts with NY to implicate that public policy
     1. Note – good to talk about PP when talking about Neum, bc court will consider it.

### *Pescatore* (2d 1996) supp

* 1. After After plane crash in Scotland, ∏ (OH) sues for misconduct against the NY Δ. OH permits recovery for loss of society, and NY does not
  2. NY choice of law principles: OH law governs
     1. Although the Neumeier rule #3 would point to Scotland, any interest that Scotland has in the application of its laws is minimal; furthermore, it is unclear that the “place of the wrong” is, in fact, Scotland here
     2. Although this is a “true conflict,” there is little evidence that the ∏ had any contact with NY; furthermore, the harm suffered by the plaintiff occurred in OH
     3. (My notes say NY and Ohio similar, so when host and guest states are really similar, treat as if a common domicile)
  3. Restatement choice of law principles: OH law governs
     1. The “interest analysis” in the Restatement coincides with the NY choice-of-law rules

### Rome II (law applicable to non-contractual obligations)

* 1. (**More content neutral** – doesn’t really look to purposes behind rules)
  2. Article 1: Regulation does not apply to “evidence and procedure”
  3. Article 4: law in which the damage occurs governs
     1. Exception 1: when the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time the damage occurs, the law of that country will apply
     2. Exception 2: When it is clear that the tort is “manifestly closer connected” with another country
        1. This might be based on a preexisting relationship between the parties, such as a contract
  4. Article 5: deals with product liability (general place where the person sustaining the damage had her habitual residence)
  5. Article 16: nothing shall restrict the application of overriding mandatory provisions
  6. Article 17: account shall be taken of the rules of safety and conduct which were in force at the place and time of the event giving rise to liability
     1. (note, doesn’t mandate use of that law)
  7. Article 20: multiple liability: if one of the debtors already satisfied the claim, their right in getting compensated from other debtors is governed by the law of the first debtor’s obligation to the π.
  8. Article 24: exclusion of renvoi
  9. Article 26: application of a provision of a law may be refused if such application is manifestly incompatible with the forum’s public policy.

### Restatement II

* 1. Starts with the **most significant relationship**, look at all these factors
     1. Seems to be law of the place of injury *unless*…
     2. Has a lot of presumptive rules though
        1. Spousal exemptions
        2. Charitable immunity
  2. How to measure sig relationship?
     1. Judge Reese – counting, Professor Reese – interest analysis.

## + Interest Analysis in Contracts

1. Generally
   1. More flexibility than with other issues
   2. Validity – look to place of making
   3. Performance – look to place of performance
   4. Rule of Validity – use the law that validates the K.

### *Auten v. Auten* (NY 1954) pg 246 [Fuld]

* 1. A transition case toward significant relationship
  2. Couple was married in England. Δ deserted ∏, ∏ signed an agreement in NY obligating the Δ to pay child support. ∏ sued in England to have support agreement enforced and received a judgment; Δ contended that this suit operated as a repudiation of the agreement
     1. NY law – suit repudiates agreement, English law, can still sue.
  3. Court applies English law, kind of a center of gravity analysis. Separates analysis of execution of K and performance of K, though notes that both would lead to English law. Almost all contacts in England.
     1. England also has an interest in prescribing and governing these obligations and ensuring the wife/kids have support.

### *Haag v. Barnes* (NY 1961) pg 249 [Fuld]

* 1. Support agreement explicitly send that Illinois law would apply; relationship occurred in NY, although the child was born in IL and the defendant worked in IL. ∆ was paying under agreement, but π wanted more. Suing in NY – under NY law, bc agreement was never approved by court, would be invalid. Would be fine under IL law.
  2. Court applies IL law on ground of intention of parties.
     1. Even w/o expressly saying IL law, probably would have – agreement made there, child born there, not against PP of IL.

### RE § 188 – law of state with most significant relationship to parties and acts.

* 1. Evaluate contacts according to their relative importance w/respect to a particular issue – look to place of contracting, place of negotiation of the contract, place of performance, location of the subject-matter of the contract, and domicile of the parties
  2. Really not that different from counting contacts or center of gravity. Kind of all the same.
  3. Also has **presumptive rules for particular Ks** (Life insurance, services, sales, shipping) 🡪 apply the presumptive rule unless another state has a more important interest
     1. Not as strict as “manifestly incompatible” in Rome Reg.
  4. Also **presumptive rules for particular issues**
     1. Details of performance – law of place of performance
     2. Capacity to K – law of § 188, but usually upheld if would have capacity under law of domicile.

### *Lilienthal v. Kaufman* (OR 1964) pg 232

* 1. Spendthrift trust, put into guardianship. ∆ a spendthrift, had been adjudicated as such in OR, made promissory notes (K) with π in CA.
     1. CA: π, loan, payment, no spendthrift law
     2. OR: ∆, forum, law that spendthrifts can’t make K’s.
  2. Court sees true conflict – OR in protecting the spendthrift and CA in seeing its citizen creditors paid.
     1. So goes with the law of the forum.
  3. Analyzes several methodologies
     1. RE1 – place of making or performance – CA
     2. Validation – CA
        1. But this is about capacity, doesn’t make as much sense to apply this rule
     3. Procedural rule – doesn’t pass the laugh test.
     4. Public policy – but not Loucks-esque PP, but PP as interest analysis – policy behind the laws.
     5. RE2 – most sig contacts. Feels like CA, but how do you know?
  4. Baxter’s comparative impairment – would look to what the lender knows, seems more fair.

### *Bernkrant v. Fowler* (CA 1961) pg 239

* 1. Agreement that G would forgive π’s debts in his will if they refinanced their debts to him, did, he died, didn’t forgive. Π sues, statute of frauds issue.
     1. K would be valid in NV but not CA
  2. Applies NV law, claiming NV has a substantial interest – says false conflict bc π’s not bound to know CA law (G’s domicile) might apply to them (more like a reasonable expectations than an interest argument). Construed CA’s interest narrowly
     1. Should be a true conflict, in that CA has an interest in protecting G from claims that aren’t proved.
     2. This blurs the line between true and false conflicts – how to know when we are going to construe narrowly?
  3. Question whether this is really a K law or is this property, and whether the law is procedural or substantive.
  4. Note: NV had a “dead man’s statute” (can’t introduce evidence that decedent could not rebut – procedural) that would have prevented π from recovering – so π could not have recovered if full law of either state applied.

## + Choice Directed Solutions

## Party Autonomy in Contracts

1. **Express Choice of Law**
   1. **RE1**- not allowed
   2. **English** much more open to it.
      1. *Vital Food Products* – don’t need any connection with England to provide for English law in a K.
   3. **Civil law tradition** – generally accepted if had some connection
   4. RE2 – accepted
      1. Objective of contracts is to protect the expectations of the parties and make it possible for them to predict their rights and liabilities.
         1. Int’l law, scope of laws not always clear, makes sense to clarify. Global economy calls for a broader role for party autonomy.
      2. Note – RE2 says that if you choose a law that invalidates the K, we’re going to assume you made a mistake and not apply that law.
         1. **Uses both validation and autonomy**.
   5. When should we NOT adhere to choice of law?
      1. K’s of adhesion?
      2. If court can’t understand the law to be applied?

### RE2 § 187: (prevalent view)

* 1. (1) the law applies if it something they could have explicitly said in the K (so the words in this agreement have the meaning of the Oxford dictionary – rather than writing out all the meanings, or interpreted by the laws of a state)
     1. Essentially just **shorthand definitions**.
  2. (2) Addresses more problematic issues – capacity to contract, validity, formality, etc. **Choice is still allowed, but must be a reasonable relationship between the law chosen and the parties/transaction**, and it **can’t be contrary to a fundamental policy** of a state which has a materially greater interest and whose law would have been applied absent the choice of law.
     1. Note – you will always do a § 188 analysis – how else to determine if something is against the fundamental policy?

### Rome Regulation

* 1. Applies to all conflict of law cases with members of the Euro community.
  2. Art. 3.3: “the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement”
     1. These were “overriding mandatory” rules in the Rome Convention – overriding should be understood as more demanding.
  3. Art. 3.4: if all the elements are in one or more member states, parties’ choice of law shall not prejudice the application of provisions of community law that cannot be derogated from.

### NY § 5-1401

* 1. If meet certain qualifications, then can stipulate NY law.
     1. $250k contract
  2. But remember, still forum applying this law, choosing what it means
     1. Hence, § 5-1402 – choice of forum
        1. But $1m minimum
  3. Should always include forum and law!!
     1. And know what your forum’s choice of law rules are.

1. **UCC § 1-105, 2-302**
   1. Can choose the law if there is a reasonable relationship, otherwise the forum law applies if it has a reasonable relationship.
2. Oregon
   1. Can choose law even if no relationship, no $ minimum
      1. But, won’t apply if prohibited or required in state where performed, or if contravenes an established fundamental policy
3. Texas
   1. Can choose a law of any state for application for transactions over $1m as long as a reasonable relationship.
      1. Don’t have fundamental policy part- don’t want to be in the business of balancing.

### *Potter* (SDNY 1976) pg 272 [Weinfeld]

* 1. K in PR with an IN manufacturer and a PR dealer, chose IN law. PR statute protects dealer from being unilaterally terminated. Suite in NY.
  2. Apply RE2 bc see this as an issue of validity, not interpretation. Look to RE2 § 187, in part 2 (not shorthand) – have a substantial relationship w/IN, question if whether it is contrary to fundamental policy (of PR).
     1. Say yes, is contrary. Strike the choice of law. Now, have no choice of law, look to RE2 § 188, absence of choice of law 🡪 apply most sig relationship (because a true conflict).
     2. Most sig relationship is PR.
  3. Unclear what it is that makes a policy fundamental
     1. Seems like it doesn’t have to rise to the same level as *Loucks*.

### *Siegelman* (2d 1955) pg 259 [Harlan]

* 1. Π injured on a ship, ticket says English law and 1 yr SOL. Ship agent so no need to sue, we’re negotiating, then SOL runs. Under maritime law, agent would have waived SOL, English law, irrelevant.
  2. Clause said “all questions arising on this K shall be decided” by English law.
     1. Arguably, this doesn’t *arise* on the K.
        1. Is this just splitting hairs? House of Lords recent case, going to interpret this broadly.
  3. Court applies English law, though the issue is more closely akin to validation (RE2?) than contract interpretation (apply chosen law).
  4. Dissent
     1. Believes that the K does not cover post-injury conduct
     2. Also a K of adhesion, can’t say that π really agreed to the choice of law.

## Choice of Forum

1. RE2 § 80 (pg 311)
   1. “*The parties’ agreement as to the place of the action will be given effect unless it is unfair or unreasonable*.”
      1. Zapata – interprets unfair/unreasonable to mean fraud, overreaching, or that chosen forum is seriously inconvenient (to court, as inconvenience to parties is foreseeable?).
2. **Prorogation** – will a court, by the parties conferring jx on it through their K, accept the case?
3. **Derogation** – Will a court hear a case in derogation of a choice of forum clause, or will they enforce the choice of forum?

### *Zapata* cases (UK and FL, 1960s) pg 290

* 1. Admiralty case. Z got Unterweser to tow its rig from LA to Italy, problems off coast of FL. K agreed to English forum (but not law) (forum helpful with boats bc can end up anywhere, English courts experienced commercial courts, move cases quickly). Z sues in FL, U in England.
  2. Prorogation – should English hear it?
     1. Can consent to English jx.
     2. If you were ∆, would argue forum non – no connection with transaction or parties.
     3. Article 19 – a country may make a declaration that they don’t want no connection cases.
        1. But not what England has done.
  3. Derogation- should American court dismiss?
     1. Do dismiss. Strong reasons to honor party choices, follow RE2, not unreasonable or unjust.
     2. Put themselves on other side – if forum had designated them, would take the case.
  4. LS – int’l character of this crucial – even more important for parties to have predictability and certainty.
  5. Federal law precedent, use in any case using federal standard.

### *Schute v. Carnival Cruise Lines* (1991) supp

* 1. Admiralty. CoF for FL on a cruise ticket, injury in Mexican waters, π wants to sue in home state of WA.
     1. Unclear if WA would even have judicial jx because accident in Mex.
  2. Court upholds clause, despite it being a K of adhesion
     1. Special interest for ∆ to limit for a – if huge crash, would be sued everywhere (though could consolidate)
     2. Eliminate jx battling – clear rule where suit could be brought .
     3. FL not an alien forum - ∆’s home.
  3. Because federal standard, states can come out differently.

### Hague Choice of Court Convention

* 1. Failed attempt at world wide agreement on jx and judgments – 10yr effort!
  2. It’s a compromise, addresses most basic things – not as thorough as NY Convention for arbitration.
     1. US has signed, but has not implemented through statute.
  3. **Art. 5 Prorogation**:
     1. The designated court in a COR shall have jx, unless the agreement is null and void under the [whole] law of that state.
     2. Art. 19 – state can say won’t accept jx for no connection cases.
        1. Federal systems – each state decides policy on this – publish list of each state’s decision.
  4. **Art. 6 Derogation**
     1. Court not designated shall dismiss unless null and void under the chosen law
        1. Like renvoi – look to chosen court’s whole law, see what they would do.
  5. **Art. 8 & 9 Recognition**
     1. Judgment will be enforced
     2. 9 – exceptions: null and void, manifestly incompatible with the PP of where you’re trying to have it enforced.

## Agreements to Arbitrate

1. Arbitration
   1. Fair? No appeal, parties have to pay for the arbitrators. Arbs decide facts and law. Is confidential. Usually arbs are experts in the field.
   2. Closest to an int’l court you can get. Arbs can come from different systems (common law or civil law), more sensitive to the way issues are approached.
   3. Arbs decide the procedure to be used.

### NY Convention (UN Convention on Arbitration)

* 1. Honors agreements to arbitrate and enforces arbitration awards
  2. US has signed on.
  3. **Art. 1 Scope**
     1. Will only enforce if award made in a country that is also a member (most countries are)
  4. **Art. 2 Agreements**
     1. 2.1 Recognize if concerning a subject matter capable of settlement by arb.
        1. Leave to nat’l law to determine if something is capable of settlement by arb.
     2. 2.3 – unless agreement is null and void
        1. Under whose laws?
  5. **Art. 5 Awards enforcement**
     1. By and large, enforce, but exceptions.
     2. 5.2 – if not capable of settlement by arb under law of that country, or if against public policy.

### *Scherk* (1974) pg 315

* 1. Trademarks dispute btwn US and German companies, claim under US securities laws, agreement for arb in Paris w/IL law applying. Π sues in IL.
     1. Why not just apply Zapata? 🡪 nature of arb, as opposed to adjudication.
  2. Securities laws – provisions for SEC to bring actions, sometimes private enforcement.
     1. Wilko v. Swan – SCOTUS said can’t arbitrate these kinds of claims
     2. But this is an int’l agreement, Wilko was purely domestic.
  3. Enforces the arb agreement.
  4. Dissent – if null and void, don’t have to enforce arb agreement
     1. § 29a of the SEA makes agreements to arb liabilities under § 10 of the act void and inoperative.
  5. Does the choice of law – Illinois – mean that US securities law also apply?
  6. End of day, really came down to need for certainty and predictability.
     1. US can’t have int’l trade and commerce exclusively on US terms.
     2. Suggests a nat’l case might be different.
        1. But, SC has since overruled Wilko – can arb even domestic securities cases.

### *Mitsubishi v. Soler* (1985) pg 322

* 1. Joint venture with Chrysler (Swiss) and Mitsubishi (Japan), cars sold through dealer Soler (PR), agreement that disputes will be settled by arb in Japan.
     1. M brings suit in PR to compel arb, S counterclaims for breach of K, defamation, breach of PR dealer statute, and anti-trust.
     2. District court allows most to go to arb, except antrust.
  2. SC – **allows anti-trust to go to arb**.
     1. Need for predictability.
     2. Antitrust not so complicated that it can’t be arbitrated.
  3. Mitsubishi conceded US anti-trust law would apply – had to, if hadn’t, would have effectively made the agreement a waiver of a party’s rights under anti-trust law and would have been void for public policy.
     1. **Choice of forum and choice of law can’t operate as an effective waiver of rights** (here under securities law).
        1. Effective argument if trying to get out of arb or choice of law.
  4. If this was a court rather than arb, note that courts don’t normally apply the foreign public laws of other countries
     1. Securities laws thought of as public law.
  5. Currently, **reach of US sec laws (Morrison v. Nat’l Aus Bank) is limited – only applies to when the transaction is IN the US**.

## Decedent Estates

1. Inter vivos transactions – situs of the property. Testamentary dispositions – domicile of decedent at death.
2. NY EPTL
   1. § § 3-5.1
      1. (b)(1) – situs rule for real property
      2. (b)(2) – personal property – where decedent domiciled at death
      3. (c)- validity rule for formal validity
         1. Lots of alternative references, trying to ensure validity.
            1. Also (d)
      4. (f) – revocation. Barrie’s estate
         1. Only for personal property
      5. (h) – for a non-New Yorker, if put some property in NY, can elect to have it governed by the laws of NY
         1. Comes up in the Clark case.
   2. § 7-1.10
      1. Settlor can choose to have NY law govern the trust.
         1. Trust must be in the state.
3. **Forced share** – requires a certain amount of estate to go to surviving spouse or children
   1. US – can disinherit your children.
4. Does seem to be a line drawn between inter vivos transactions of property (uses situs of the property) and the issues involving wills and estates (use domicile of decedent at death)

### *Wyatt v. Fulrath* (NY 1965) pg 338 [Bergan]

* 1. Couple in Spain, opened a survivorship account (all money goes to surviving spouse) in NY. He dies.
  2. 2 questions
     1. Does NY or Spanish law apply to the community property in the NY account?
     2. Which law applies to money she transferred to NY account from London after her spouse died?
  3. NY – all jointly held property goes to spouse. Spanish law, half goes to spouse and at least 2/3 remaining half to children.
  4. Question of how to characterize – if K, then where the K is (NY), if trust, property (law of domicile when moveables were acquired), estate (where decedent was domiciled at death)
     1. RE2 in world of characterization.
  5. Held
     1. Apply NY law to joint account
        1. NY has right to say whether it will apply its own law to property of foreigners
        2. Recognize physical and legal submission of the property to NY laws.
        3. SITUS rule.
     2. Money transferred after – not in NY at time of death, should be governed under English law – kind of renvoi, what would E do?
  6. Dissent – this is contrary to law that says personal property should be governed as to title by the laws of his domicile.

### RE2

* 1. **§ 263** – Apply the law of the domicile of decedent at death – kind of renvoi.
     1. (Is this right?)
  2. **§ 269** – Validity of a trust as to matters of testamentary disposition, domicile at death.
     1. But allowed to designate for trust provisions. If no designation, then law of the domicile, or the local law of the trust IF it will sustain the validity of the trust.
  3. **§ 270** – can’t violate the strong public policy.
     1. Not that won’t hear the case, but that we’ll strike down certain validity provisions in favor of the PP of the domicile (or state with most sig relationship).

### *Shawmut* (Mass 1950) pg 343

* 1. VT law – limit on inter vivos tranfers that would effectively disinherit spouse – don’t care if it happens in your lifetime.
  2. Mass – if transfer during lifetime, then your spouse has no claim to it.
  3. Settlor, domiciled in VT, tranfers property to formal trust in Mass.
  4. Traditional, apply law of situs – Mass.
     1. Was an inter vivos transfer.

### *Estate of Clark* (1968) pg 346 [Fuld]

* 1. Will by husband, a VA domiciliary, property in VA and NY, said will and testamentary dispositions should be governed by law of NY. Left most property to mom, trust for widow. Ok under NY law, under VA law, widow has right to elect to renounce will and get intestate share.
  2. Court says right to elect is not a testamentary disposition, not governed by express choice of law clause.
  3. Distinguishes Wyatt and Hutchinson – inter vivos transfers aren’t unilateral decisions like this affecting the non-decisionmaker.
     1. Also talks about VA interest in protecting surviving spouses
        1. Moving toward interest analysis?
     2. Why do we look to law of domicile of decedent rather than surviving spouse, as we’re looking out for their interests?

1. ***Estate of Crichton*** pg 359
   1. NY, decedent and spouse, forum. Law – 1/3 to spouse
   2. LA – property, ½ to spouse.
   3. Wife trying to argue law of situs of property, but court says it’s an elective share, so use domicile at death.
      1. Cited in Clark.

### *Watts v. Lanari* [Watts 1] (France 1964) pg 351

* 1. L died, left child (π/M) from first marriage and a second wife. Estate all over world. Handwritten will left most to wife.
     1. French law – can only leave ¼ to 2nd wife, other ¾ to kids. Can’t inter vivos as a way around.
  2. No one a French C, but L was domiciled there, much of estate there. Said personal property was situated in the domicile of the deceased, and though gifts and joint bank accounts were valid in the countries where they were formed, they were void as against public policy.
  3. Held for daughter.

### *Watts v. Swiss Bank Corp* [Watts 2] (NY 1970) pg 354 [Breitel]

* 1. Q whether to rehear case or enforce French decision.
  2. 2nd wife had died, her brother bringing claim, arguing shouldn’t be precluded by French decision as a different party – court said no, same nexus of facts and he’d had practical control of all (including French) proceedings.
  3. Upholds French decision – just bc French choice of law was different than NY would have done, it doesn’t justify non-recognition.

### *Estate of Renard* (NY 1981) pg 361

* 1. R born in France, worked in NY for 30 years, became US C, retired and moved to Paris, left most of estate in NY. Will in Paris designating NY law. Son is a dual C. Arguing that under Clark, French forced heirship law should apply (domicile at death).
  2. § 3-5.1(h) – application of NY law.
     1. Court applies this.
     2. In Clark, didn’t apply, but differentiating between forced heirship and elective share.
        1. Dissent – this line doesn’t work.
  3. Also examined interests – NY has a strong interest, encouraging people to invest here, uphold transactions, connections with R. France really has no interest as son is domiciled in CA. What if he’d been a French dom?
     1. Doesn’t rule on this ground. Rules on statutory alone.

### *Rigdon v. Pittsburgh Tank* (La. App. 1996) Supp

* 1. Statutory CoL, about how to analyze.
  2. **Decapage** – concept of analyzing issues by issue, even if issues have different laws. So here, would separate the immunity law and the conduct law.

# Constitutional and International Aspects of Choice of Law

## + The Constitution and Choice of Law

1. Test:
   1. **For a state’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or sig aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair**.
      1. *Allstate v. Hague*
   2. If you have a justification for applying your own analysis, consistent with DP, then it won’t be a violation of FFC to apply your own law.
2. *Kryger v. Wilson* (1916) pg 397 [Brandeis]
   1. Choice of law is not an appropriate federal matter.
3. Elements of Const
   1. DP of 14A and 5A
      1. Imply a fairness requirement in choice of law.
   2. FFC
   3. Contract clause
      1. Prevents impairment of K – if you make a K in one state and another state tries to interfere, could it violate this?
   4. Commerce
      1. Burdens on interstate commerce?

## Early cases:

* 1. using const provisions to find a choice of law rule – want uniformity and predictability on a national scale. If had stayed at const level, would have prevented any of the modern analyses we have now.
  2. *NY Life Insurance v. Dodge* (1918) pg 397
     1. Court seems to say that applying the law of the place of contract required by DP of 14A.
        1. De facto overruled later.
  3. *Commercial Travelers v. Wolf*
     1. Similar to Dodge, but said had to apply the law of incorporation as a matter of FFC
  4. *Bradford v. Clapper* (1932) pg 385
     1. Workers comp. Says a violation of FFC to fail to recognize the place of relationship.
     2. Overruled by Carroll v. Lanza pg 400

### *Alaska Packers*

* 1. Start of modern cases
  2. Ee-Er relationship in CA, work in AK, ee agreed to be bound by AK worker’s comp scheme, but then filed in CA.
  3. SC – state of emp relationship CAN apply its own law, even if accident elsewhere.

### *Pacific Employers*

* 1. Ee-Er relationship in Mass, accident in CA. Using AK Packers to argue for apply law of place of relationship.
  2. Court says can ALSO apply the law of the place of accident.
     1. **If you have a policy/interest in applying your own law, you don’t have to apply some other state’s law – not a violation of FFC to apply your own law**.
        1. Where Currie got his interest analysis.
  3. Fall of Const to mandate laws.

1. Limited areas where FFC may mandate a single law
   1. Area of corporations
      1. Internal affairs rules
      2. Might be exclusive control by the state of incorp.

### *Home Insurance Co. v. Dick* (1930) pg 382 [Brandeis]

* 1. Insurance policy, almost all events in Mex, policy assigned to a TX π (original holder in NY?), TX forum. Policy says have to sue within 1 yr, TX law strikes all SOL’s less than 2 yrs.
  2. SC – can’t apply TX law. The one year limit is substantive, not procedural.
     1. Applying TX law violates DP, as all connection is w/Mex.
     2. “*It may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them*.”
  3. Matter that TX assignee is after the fact (post transaction)?
     1. Really about trying to protect the expectations of the parties.
     2. No voluntary association with TX.
  4. Open question: is an interest by a state in it’s π a justification for imposing liability? Do you need some kind of expectation/consent/purposeful conduct by ∆?

### *Watson v. Employers Liability Corp* (1954) pg 392 [Black]

* 1. Injury in LA, though insurance policy negotiated and executed in different state. Can LA law apply?
  2. Yes. Not unconst.
     1. Dick not saying you have to impose the law of the place of K.
     2. If state has an interest, can apply own law.
        1. More interest analysis in FFC and DP.

### *Clay v. Sun Insurance* (1964) pg 395 [Douglas]

* 1. K for property, world wide insurance policy made in Ill, insured moves to FL, loss there. FL strikes down short limitation period.
  2. Court – FL can apply law
     1. Interests of FL
     2. Expectations of ∆ - worldwide policy, could expect a loss there.

## Modern Cases

### *Allstate v. Hague* (1981) pg 402 [Brenna]

* 1. Decedent WI resident, accident and ∆ in WI, insurance and cars in WI. 3 cars, question of whether you can stack the policy (can in MN, not WI). Π, widow, remarries and moves to MN.
  2. Which law?
     1. Π can argue like Kilberg, PP to allow stacking – but doesn’t really rise to that level.
     2. RE2 – contacts and interests
        1. WI interest in not allowing stacking?
           1. Π paid premiums, so not fear of windfall.
           2. ∆ not really a WI ∆, more national
           3. Cars and insurance took place
        2. MN
           1. Protect interests of residents. But she wasn’t at time.
           2. Decedent worked there – but this wasn’t related to work
           3. Allstate does biz – but do it everywhere.
     3. If say true conflict
        1. Special relationship, territoriality, and comparative impairment would all say WI.
        2. Currie law of forum or Leflar’s better law would get you MN.
  3. Applies MN law.
     1. Messy conflict of laws, maj not sure about what they’re doing.
  4. Dissent – disagrees with how maj characterizes MN contacts – really no interest there, and you shouldn’t count the post-transaction move by π.
     1. Really, there is NO interest here for MN.

### *Phillips Petroleum v. Shutts* (1985) pg 421

* 1. Famous jx case regarding opt out for class actions, back interest owed by Phillips (DE Corp, principal biz in OH), some biz in KS. 3% of class are from KS, most are TX and OK. Question of applicable rate of back interest to be allowed – can KS apply its own law?
  2. KS arguments to apply own law would be efficient to apply a single law and that ∆ is doing biz in KS, so interest in regulating (even if most activity and parties aren’t there)
  3. SC – Under *Allstate* test, not enough interest for KS to apply its own law.

### *Sun Oil Co. v. Wortman* (1988) pg 422 [Scalia]

* 1. **Court says that a forum state can apply its SOL even without a connection – procedural**.
     1. Ironic, that fed courts still have to apply the State’s SOL, even if the state says it is procedural.
  2. Also says that it is not enough that a state misconstrue the law of another state – rather, the misconstruction must contradict the law of the state which is clearly established.
     1. **No one is going to supervise COL**.
     2. You can ask for certification of law by different state.

## Obligation to Provide a Forum

* 1. ***Huges and Fetter*** (1951) pg 367 [Black]
     1. WI π and ∆, Ill accident, WI court dismisses (on merits!) saying won’t entertain another state’s wrongful death statute.
     2. SC – **refusal to apply another state’s laws is a violation of FFC**.
        1. Distinguishes from AK Packers – hasn’t chosen to apply own law, but made itself a disinterested forum.
        2. Note: state can’t restrict application of its statute to w/in the state
  2. ***Wells*** (1953) pg 374
     1. **FF&C does not compel the forum state to use the period of limitation of a foreign state**; this was not altered by *Hughes*.
        1. This isn’t about discriminating between in and out of state accidents.

## + Jurisdiction Re-examined in light of Choice of Law

1. **General**
   1. *Shutts* – just bc Kansas has jx on basis of doing business, that is not enough for COL.
   2. Should COL have any impact on whether you TAKE jx?
      1. Doctrinal answer is no, but there is a concern that if you allow jx, parties will get a COL they may not have expected.
   3. *Hanson*, leading case
      1. SC sees as separate questions.
         1. Set of Q’s for jud jx
            1. Focus on connection of ∆ and the forum.
            2. In US, injury alone not enough – must also be some purposeful conduct by the ∆.
         2. Set of Q’s for COL.
   4. **Jx is very important bc the forum is going to apply its own choice of law rules**.
      1. Need to think about what state to bring case, look to COL and see what they’ll do.
      2. Also for SOL – will forum apply its own or different approach.
         1. Sun Oil – can’t prevent a forum from applying its own, doesn’t mean it will.
   5. Real fights in jud jx comes in the int’l cases – US has broad discovery, jury trials, class actions)
   6. **Jx is a matter of state law in the first instance** – have to look to the statutes of the state.
      1. CA – will take jx whenever not unconst (full long arm)
      2. **Ask if jx fits within the statute, and whether it’s const**.
         1. Also sometimes common law bases of jx, not always reflected formally in statute.
   7. **Alternate approach** to jx could have been: do COL analysis, and if const to apply your own law, you should be able exercise jx, as a mechanism to apply your own law.
      1. Black’s Int’l Shoe concurrence – Power to tax? Yes. Ok, 🡪 jx.
2. In US, variety of places now where you can sue the D. And that means that your knowledge of COL and what COL the forum is going to use becomes more important. It isn’t that the place of injury substitutes for all of these basis

### *Asahi*

* 1. Court holds unconst to apply jx. **Seem to be saying they want another step beyond min contacts – is it reasonable**?
     1. Look to burden to ∆, interest to forum state, π’s interest in relief, interstate judicial system’s interest, nat’s interest of US.
        1. Look at this gestalt, ask if reasonable to exercise jx.
        2. But question of what law should be applied is NOT one of the elements in deciding if something is fair or not.
     2. Doesn’t seem to be a special test for foreign ∆’s.
     3. Unclear if it also applies for general jx.

### *Hanson v. Denckla*

* 1. SC- you must have independent jx over each ∆. Not enough to only have it over one – doesn’t bring the other in.
     1. Fact that we would apply our own law is not a basis for jx over a particular party.
  2. EU – if you have jx over ∆1 and there is another related ∆2, you get jx over ∆2 by reason of their relationship.

### *Sinochem* (2007)

* 1. Very complicated jud jx question in the case
  2. SC dodges, says even if const we wouldn’t hear it anyhow because of FNC.
     1. Counter to all we’ve learn – why bother analyzing if can just dismiss on FNC?

1. Piper Aircraft
   1. Can’t say the law of one place is better than another, and make that as a reason for hearing or not dismissing on FNC.
2. **Note that in US, if you transfer from one federal forum to another, the COL of Forum A goes with the case**.
   1. Van Dusen (1964) pg 457

## + Choice of Law in the Federal Courts

### *Klaxon*

* 1. When a fed court is sitting in diversity, they apply state law. **Klaxon 🡪 also apply state choice of law rule**s.
     1. Can apply own procedural rules – really just about the conduct of the parties in the court, not meant to effect outcome, doesn’t go to the REAL behavior of parties.
     2. Emphasis on uniformity between state and fed court – don’t want forum shopping.
  2. Erie and Swift – question of whether the law of the several states included the common law.
     1. Erie – Yes.
  3. Was Erie a const decisions?
     1. Rules of Decision Act – says laws of the states, but doesn’t necessarily say which state.
     2. Does SOP require that a fed court shouldn’t have the power to make law to pick which state laws?
        1. LS rejects – forum always applies own COL rule – argue that fed court isn’t applying fed law.
        2. LS – if Erie is const based, we would change Klaxon
  4. Arguments in favor of Klaxon
     1. Prevent fed/state forum shopping
        1. But still interstate
  5. Arguments against
     1. Fed courts in a good position to umpire, might get more guidance in COL
     2. Not going to get uniformity anyhow – courts have to guess at interests
     3. Sacrificed fed uniformity to get state uniformity.

### *Shady Grove*

* 1. Shifting away from concerns about forum shopping (?)
  2. If you can find a federal rule on point in the FRCP, unless the rulemaker has overstepped their bounds, then the rule will apply.
  3. (this is the NY class action case, NY law says if a penalty, can’t have a CA)
  4. Fed rule trumps.
     1. If, in every statute where NY gives a penalty, they said No Class Actions, would probably change result.

### *Ferens* (3d 1987) pg 463 [Kennedy]

* 1. Have to apply the transferor COL regardless of whether the π or the ∆ asks for the transfer.
     1. Seems counterintuitive, totally allows forum shopping (here, was trying to get around a bad SOL, state said procedural, went with it)
     2. But if you didn’t allow it to transfer, π would never ask and you would allow litigation in this totally inconvenient forum (π prefers to litigate far away than lose the claim)

## Choice of Law in Aggregate Litigation

1. Different kinds
   1. Generally individual cases that are consolidated
   2. Class actions
2. § 1407 – allows courts to consolidate for pre-trial
   1. Recent case, SC says you can’t just keep the consolidated cases after that! Have to use 1404 transfer
      1. So may be consolidated, and then sent back to original forum.
3. Modern Aircraft
   1. Had to do COL analysis for each ∆.

### Multiparty, Multiforum Trial Jx Act

* 1. Allows for min diversity where claims arise from a single accident – and ∆ can remove from a related case to fed court
  2. Nationwide service
  3. Can be heard any place where a sig portion of the accident took place.
  4. **Question: What choice of law rule should apply in a statute like this**?
     1. Statute is silent.
     2. Some thought would be good to have a fed COL rule, for when a fed court was hearing a case that a state court could not get.
     3. Hasn’t really come up yet.

### Nationwide Class Actions

* 1. Appropriate to change COL approach when dealing with a CA or aggregate litigation?
     1. Depends on how you think of CAs – just aggregating single claims, more of a procedural device. Or an entity in itself?
        1. Schein – whole point is to find claims that are similar, criticizes notion that CAs are entities.
     2. But recent AZ case, go with RE1 place of injury normally, but with CAs, go with place of biz of ∆. Defensible?
  2. Problem with nationwide class actions, is that if the law is totally different, no longer have a common question of law, can’t certify.

### CAFA – Class Action Fairness Act

* 1. Says nothing about which choice of law rule should apply.
  2. Any CA with an aggregate amount of more than $5mm and (min?) diversity can be brought or removed to fed court.
     1. Most nationwide CA’s will end up there.
  3. Result that fewer CAs are certified though – meant as an anti-CA bill.

1. Are fed courts bound by state COL rules in CAs? Should they be?
   1. LS thinks the argument that fed courts should be bound by Klaxon should fail.
      1. Will still forum shop – pic the state law you like best, sue, know you’ll be removed.
      2. But, if have a federal COL rule, still needs to take into account varying state interests.

## + Conflicts in the International Arena

### Anti-trust and security cases

* 1. Different, in not asking about whether to apply forum or some other state law, but whether we should apply US law or no law at all.
  2. Public Law Taboo.
     1. Public law – have greater sanctions, treble damages in antitrust cases. A penal element.
     2. Sovereign authority is different with these kinds of laws than with tort or K.
     3. Sensitivities about evaluating public and tax laws, potentially offending the foreign sovereign.
     4. LS- COL methodology takes these into account.

1. Conflict analysis is more of an interest balancing between US law and foreign regulatory scheme
   1. Result – you either apply US law or dismiss.

### RE3

* 1. A bit outdated, but the Bible. Used as a norm, here and internationally.
  2. § 402
     1. Various bases on which to justify using own law
        1. Territoriality – Conduct directed at or injury
        2. Domicile
     2. These are necessary, but not sufficient.
  3. § 403
     1. Can’t do it if exercise of the “jx to prescribe” would be unreasonable.
     2. Kind of looks like § 6 of RE2 – significant relationship
     3. Interest analysis-y, but still really vague.

### *EEOC v. Aramco* (SCOTUS) supp

* 1. Lebanese US C, hired by Aramco to work in Saudi Arabia, was dismissed, said bc of national origina.
  2. Action under Title VII?
     1. SC said no, not meant to apply to C’s when employed abroad
        1. Statute said it wouldn’t apply to aliens abroad, left open possibility of application to C’s
           1. Rely on canon of presumption against extra-territoriality
           2. Say Cong only concerned w/domestic issues.
  3. Cong overruled shortly thereafter – Title 7 reaches ee’s aborad
     1. But, provides an exemption if would violate the law of the foreign country.

### *Hartford* *Fire*

* 1. **Presumption against extra-territoriality not written in stone**.
  2. Anti-trust action against insurers, ∆’s are 4 major domestic insurance companies, some foreign companies, and Lloyds of London. Domestic protected bc regulated by state insurance companies, foreign didn’t have this benefit.
  3. Arguing US anti trust didn’t apply to them
     1. Carried out activities in London market in full compliance with English law, want a place of conduct rule.
     2. Π arguing that the injury was in the US
  4. Souter – this isn’t a true conflict because you could comply with both laws.
     1. Doesn’t really understand “true conflict”
     2. Basically, US has an interest, apply US law.
     3. Would be wrong under RE3 403(3)
        1. Wrinkle – Comment E – required only when compliance with both is *impossible*. Lowenfeld not sure how it got in there!
  5. Scalia dissent – finds interest balancing in 403(2).
     1. Both have actual interests here.

### *Morrison v. Nat’l Aus Bank* (SCOTUS) Supp

* 1. Question – when can US sec law be the basis of a claim in US court?
     1. Will it extend to US investors who buy on a foreign market, and/or foreign investors who buy on a US market?
  2. Here, F-cubed case – foreign investors, a foreign transaction, on a foreign exchange.
  3. SCOTUS – limits reach, **only when the security is traded on the US market**
     1. Goes beyond F-cubed case – all agreed that went too far.
     2. 5 justices restricted even more.
        1. Presumption against E-T.
        2. Look to statute, possibly limiting.
  4. Addresses “no conflict” – can’t say that just because foreign regime isn’t as strict that there isn’t a conflict.
     1. Where 17 amicus from other countries against application of US law.

## + Recognition and Enforcement of Judgments

### FFC

* 1. With respect to claims/laws, a lot of room for the forum to pursue its own policies or interests and not honor another state’s law.
  2. Not so with judgments
     1. Once a judgment, almost no room for any other state’s interests to be asserted.
  3. Even though same language. Justifiable?
     1. Interest balance is different.
     2. This is *Fauntleroy*.

### *Fauntleroy* (1908) pg 639

* 1. Arb award in MO that would not have been available in MS, all contacts in MS. Rejects PP exception to FFC
     1. Mandates enforcement
  2. Result – must raise all issues in Forum 1
  3. Now – arb award known to not be a judgment.

1. ***Baker***
   1. Reaffirms Fauntleroy
   2. Takeaway - **the argument that a US judgment somehow violates the public policy of the 2nd state does NOT matter for purposes of FFC**.
2. EU Reg. Art. 33 and 34
   1. Similar to FFC. But, defenses you can assert to judgments.
   2. Major – if such recognition is manifestly contrary to public policy of state where recognition is sought.
      1. Not in U.S.

### *Yarborough* (1933) pg 647

* 1. GA court said a final order on child support, party tries to get more in S. Carolina where they’d just moved.
     1. Bc final order, can’t modify.
  2. Cong, 28 USC 1738(b) – if you want any modification of **family law support decrees, have to modify it in Forum 1. Same goes for custody decrees**.
     1. Forum 1 has continuing exclusive jx.

### *Thomas v. WA Gas and Light* (1980) pg 663

* 1. Maybe an exception for **worker’s comp**?
     1. There, goes before a board, the board can only apply the law before them, so there is no choice of law analysis.
     2. **Same FFC**
        1. **Forum 1 only purported to consider application of VA law, so don’t give FFC determinations (that Forum 2 law is preempted) that the board had no authority to make**.
           1. So, can bring workers comp claim in DC.
     3. If ee had lost the first suit, probably wouldn’t have allowed the second judgment, as that would have undermined the first.

1. **Only thing open in Forum 2** 
   1. **That Forum 1 never had jx over you**.
   2. Only for **default** situations - ∆ never came into the forum state
      1. ***Baldwin*** – if you come in and challenge jx and lose, you were heard. Done.
   3. Very risky – if you’re wrong about jx, you never get a chance to argue the merits.
   4. EU Reg – jx argument must be raised in Forum 1, always.

## Foreign Country Judgments

1. US Approach
   1. Pretty liberal with recognition and enforcement of judgments.
      1. Some countries don’t let you at all (maybe can use judgment as evidence)
   2. Often not reciprocated with our judgments
      1. Part of reason arb is so attractive – general principal of recognition of arb award and very limited ground for non-recognition.

### *Hilton v. Guyot* (1895) pg 684

* 1. Cited all the time, definition of comity.
  2. US ∆ w/biz in France, judgment against it by French court for French π. ∆ arguing against enforcement in US.
     1. Argues wasn’t voluntarily before court, French system is whack (no oath, cross examination), didn’t get a jury trial, some evidence wouldn’t have been allowed in US – all rejected.
     2. Argument about fraud – go back to France and have them look at it.
  3. Defense that works – look at French statute, don’t think they would enforce a US judgment for a US π against a French ∆.
     1. Comity. **If you won’t enforce ours, we won’t enforce yours**.
     2. Dissent – gov’t should decide this, not us.

1. Hilton not binding – later Ct App case, Johnston, recognized a French judgment as precluding a NY suit w/o any requirement of reciprocity.
   1. Pre-Erie, so in that common law cloud. (don’t fully follow)
2. Today
   1. **Only about 8 states that have a reciprocity req** – but have to look to each state.
   2. Most states don’t require reciprocity.

### Uniform Act

* 1. **§ 1 Definitions**
     1. Technically only applies to money judgments, but often applies to others
        1. Does not apply to taxes, penalties, family support. (not saying can’t, but need authorization elsewhere)
  2. **§ 4 Grounds for non-recognition**
     1. (a)(1) if not done with impartial tribunals or if procedures are incompatible with DP
        1. Some kind of int’l standard of DP, not strict US
  3. **§ 4(2) Mandatory non-recognition** 
     1. if court didn’t have jx over
        1. § 5 defines personal jx
  4. **§ 4(c) Discretionary**
     1. Public policy – if the cause of action upon which it is based is repugnant
        1. What if cause of action is fine, but the judgment is repugnant?
     2. Can’t be that every constitutional principle has to apply to every foreign judgment (DP, jury trial, etc) otherwise we’d never apply foreign judgments.
        1. Libel case from England – is the 1A different?
           1. There, US has no interest in furthering US policy – all happened outside US..
           2. Might have been different if a US ∆ or total censorship.

## Family Law

### *Williams*

* 1. Two couples from small town, one of each goes to NV, get divorced, then come back.
  2. Why does NV have jx over the marriage?
     1. **Think of marriage as like property traveling with the spouse** s(though we don’t for debts).
     2. **For divorce, forums just never consider applying another state’s laws**.
        1. Though, would have made sense if we’d said matrimonial domicile.

### *Williams II*

* 1. Challenging jx in the first forum – was π really domiciled in NV so that NV would have jx (∆ defaulted in first forum, can raise this)
     1. What is the standard of domicile?
        1. Can’t use NC standard.
        2. Not clear if SC is really looking to NV’s standard.
           1. Not surprising that NC, after the couple returned, said, no, you didn’t intend to stay and there’s no domicile.

Easy looking back, but intent is tough to prove.

1. Some foreign countries don’t have a domicile requirement, but both parties must consent (Mexico, Haiti, Virgin Islands)
   1. But then problem of recognition.
      1. Not under Uniform Recognition Act (only money)
      2. FFC not applicable
      3. Comity – some states DO recognize (including NY).
         1. NJ doesn’t. strategy – get divorced in Mex, ask for recognition in NY, then claim FFC in NJ.
   2. No state will recognize an ex parte divorce from another country.
2. Support Cases

### *Estin* (1948) pg 796

* 1. **Divisible divorce**: a state may have the power to exercise jx to give the divorce, but doesn’t have jx to deal with any of the economic consequences of the divorce – maintenance, child support, equitable distribution of property.

1. EU Reg
   1. Can get jx if it is the domicile of the party seeking support.
      1. This would be unconst in US.

### Child Custody

* 1. Jx over custody? At one point, was where the child was – kind of like property, determining the rights of the thing.
     1. Phenomenon of seize and run.

### *May v. Anderson* (1953) pg 826

* 1. **If going to alter the rights of another spouse vis a vis a child, you have to have personal jx over the other spouse**.
     1. Now the clear RULE in the US.
  2. Remember FFC, must give SAME FFC – if modifiable in Forum 1, then Forum 2, if has jx, can also modify it.
     1. Fear that someone can run anywhere to modify.
     2. May change this. Also, limited by personal jx.
  3. BUT 🡪 **UCCJEA**
     1. **§ 202 Exclusive continuing jx**
        1. **No one else can modify unless Forum 1 no longer has jx**.
        2. Other states under § 306 have to recognize it. And if you want to change it, the state that entered the original judgment is the one that modifies unless it’s lost ALL connection with the case
     2. Actually uniform, adopted by all.