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ENGAGING WITH PROFESSOR TWERSKI IN
THE CHOICE OF LAW REVOLUTION

Robert A. Sedler*

INTRODUCTION

I am very honored to have the privilege of contributing to a festschrift commemoration of the extraordinary career of Professor Aaron Twerski. Professor Twerski and I are both octogenarians, with me being a few years older and Professor Twerski still being active as he approaches the age at which I retired.1 As I find myself saying more often these days, “We go back a long way together.” The time I am focusing on in this writing is the early 1970s, when there was a dramatic change and ongoing debate about the proper approach courts should take in resolving issues of choice of law. While some of the debate found its way into judicial decisions, it was most intense among academic commentators, and it was here that I engaged in an ongoing debate with Professor Twerski about choice of law in torts cases. As the presentations in this festschrift demonstrate, Professor Twerski is one of the nation’s leading scholars in tort law. But at the time of the choice of law revolution and, at times, later, he was also heavily engaged in advocating for a territorially-based approach to choice of law. At the same time, I was heavily engaged in advocating for the interest analysis approach to choice of law based on a consideration of the policies and interests of the involved states. But I was also working in constitutional law, and as time passed, I mostly abandoned conflicts scholarship in favor of constitutional law.


1. Continuing to work as an octogenarian calls to mind Benjamin the donkey in George Orwell’s Animal Farm. He says to the other animals: “Donkeys live a long time. None of you has ever seen a dead donkey.”
In any event, Professor Twerski and I were engaged in the choice of law revolution by sponsoring symposia for the law reviews of the law schools where we were teaching at that time. The subject matter of each symposium was a major decision in a conflicts torts case in the state where one of us was teaching. We recruited other conflicts commentators to join us in the symposia. The first was hosted by the Duquesne Law Review in 1971, where Professor Twerski was teaching at the time, and revolved around the 1970 decision of the Pennsylvania Supreme Court in *Cipolla v. Shaposka.* The second, which focused on the decision of the Kentucky Court of Appeals in *Foster v. Leggett,* was held by the *Kentucky Law Journal,* where I was teaching at the time. Finally, the third symposium, centered on the New York Court of Appeals’ decision in *Neumeier v. Kuehner,* was hosted in 1973 by the *Hofstra Law Review,* where Professor Twerski was then teaching. All three cases involved the long-repealed guest statutes, which were prevalent in at least half the states at that time. The guest statutes barred a suit by a guest passenger against the host for ordinary negligence and instead required a showing of gross negligence or wanton and willful conduct.

The facts of the three cases were similar in that the operative events took place in what I, at the time, called functional, socio-economic, and mobility areas. This simply meant areas that cut across state lines but were connected in terms of the day-to-day activities of the people who lived there. In *Cipolla,* it was Delaware County, Pennsylvania, and Wilmington, Delaware. In *Foster,* it was Portsmouth, Ohio, and Russell, Kentucky. And in *Neumeier,* it was Buffalo, New York, and Fort Erie, Ontario.

In *Cipolla,* the plaintiff, Cipolla, was a resident of Pennsylvania, which did not have a guest statute, and the defendant, Shaposka, was a resident of Delaware, which did. They were friends who attended school together in Delaware, and the accident took place in Delaware when Shaposka was driving Cipolla back home to Pennsylvania. By pre-arrangement, Shaposka was served with process in Pennsylvania while he and Cipolla were playing golf. In *Foster,* the plaintiff, Foster, was a resident of Kentucky, which did not have a guest statute, and the defendant, Leggett, was a resident of Ohio, which did. They were both employed by a railroad in Kentucky and had been dating for about a year. Leggett frequently stayed at a hotel in Russell, Kentucky. The accident occurred on a planned trip from Russell to Columbus, Ohio, and the parties planned to return to Russell that evening. In *Neumeier,* Kuehner, a resident of Buffalo, New York, drove his automobile to Fort Erie, Ontario, where he picked up Neumeier, who resided there, for a

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3. *Foster v. Leggett,* 484 S.W.2d 827 (Ky. 1972).
planned trip to a beach in Ontario and back again to Fort Erie. On the way there, a train struck the automobile, and both men were killed. Neumeier’s estate sued Kuenher and the railroad in New York. Ontario had a guest statute, but New York did not. Kuenher’s estate pleaded the Ontario guest statute as an affirmative defense, and the railroad interposed defenses in reliance on the guest statute.

From virtually the first time I taught conflicts, I was an advocate of the interest analysis approach to choice of law, first developed by the late Brainerd Currie. The approach is based on a consideration of the policies underpinning the laws of the involved states and the interest of each state in having its law applied in the particular case in order to implement those policies. There are three interest situations:

1. the false conflict, where only one state has a real interest in having its law applied in the particular case in order to implement its policies;
2. the true conflict, where both states have such an interest; and
3. the unprovided-for case, where neither state has such an interest.

Cipolla and Foster presented the true conflict in that the plaintiff was from a recovery state, and the defendant was from a non-recovery state. Neumeier presented the unprovided-for case since the plaintiff was from a non-recovery state, and the defendant was from a recovery state.

Under the interest analysis approach, in the false conflict, the court should apply the law of the interested state. A number of commentators favor this solution to the false conflict, even though they were not disposed to apply the interest analysis to the true conflict. Currie maintained that in the true conflict, the forum should apply its own law in order to advance its own policies and interests. I agree with this approach. This is a rational and functionally sound way for a court to resolve a true conflict, and it produces functionally sound and fair results in practice. In the situation of the

7. Neumeier, 286 N.E.2d at 455.
10. The following discussion of Currie’s interest analysis approach can be found in Robert A. Sedler, Moffatt Hancock and the Conflict of Laws: An American-Canadian Perspective, 37 U. TORONTO L.J. 62, 64–68 (1987) [hereinafter Sedler, Moffatt Hancock and the Conflict of Laws].
13. See the discussion in Sedler, Governmental Interest Approach, supra note 11, at 218–33. It should be noted that fairness to the parties is an independent consideration in the choice of law
unprovided-for case, which I will discuss at greater length in connection with *Neumeier*, the choice of law issue cannot be resolved solely with reference to the interests of the involved states because, by definition, neither state has a real interest in having its law applied to the point in issue.\textsuperscript{14}

Put differently, the interest analysis approach can identify the unprovided-for case, but it cannot, as such, provide a means for its resolution.\textsuperscript{15} My submission is that most of the time, the unprovided-for case can be resolved by looking to the common policy of the involved states. Usually, the point as to which the laws of the involved states differ will involve a substantive rule that is an exception to the common policy reflected in what may be called the general law of both states. Since the state whose law represents an exception to that common policy has no interest in having its law applied in the circumstances of the particular case, the common policy should come to the fore, and the exception should not be recognized. In *Neumeier*, for example, New York, along with every other state, has a policy of allowing recovery for negligence.\textsuperscript{16} At that time, Ontario and some states made an exception to that policy by requiring proof of a higher standard of wrongdoing when the victim was a passenger in the host’s automobile.\textsuperscript{17} The only state interested in allowing that exception is the defendant’s home state,
and when it does not do so, the common policy of both states in allowing recovery should come to the fore, and the plaintiff should recover regardless of whether suit is brought in New York or in Ontario.\footnote{18}

I now turn to the cases with which we were engaged at the time of the choice of law revolution. As stated above, my approach to resolving the choice of law issue in these cases was interest analysis. Professor Twerski’s approach was what I called the “territorial principle,” or as he put it simply, “territorialism.” It went far beyond the narrow, territorially-based single event of the original Restatement of the Conflict of Laws. Rather, he would look to what he called the “time and space” aspects of the case, focusing on the state where the legally significant events occurred and the law the parties expected to govern their litigation. Here, he states:

Law is no stranger to human activity. If we live in a world of nature—we also live in a world of law. A Delaware driver, on a trip in Delaware expects Delaware law to apply. He may be driving a Pennsylvania guest to his home in Pennsylvania but his expectations prior and subsequent to any accident is that whatever the Delaware law may be it will apply to him. It is immaterial whether it affects his conduct. People have a right to expect regularity and rhythm from the law. If this is what those who argue for certainty as a conflict of law value are concerned with then they have a point in their favor. . . . To demean “time and space” in the law of conflicts is to deny an important facet of the human experience. Delaware drivers driving in Delaware deserve Delaware law—for better or for worse. When the bizarre becomes the norm—we destroy the norm. The schizophrenic is the human symbol of this distorted point of view. It behooves those who advocate fragmented choice-of-law theory to reconsider normal expectancies as an appropriate function of the law.\footnote{19}

\footnote{18. See the discussion of the unprovided-for case in Sedler, Governmental Interest Approach, supra note 11, at 233–36.  
19. Aaron D. Twerski, Enlightened Territorialism and Professor Cavers: The Pennsylvania Method, 9 DUQ. L. REV. 373, 382 (1971). Professor David Cavers of Harvard Law School, whose writings on the conflict of laws stretched back to the 1930s, published a book, DAVID F. CAVERS, THE CHOICE OF LAW PROCESS (1965), in which he set forth an approach he called “principles of preference,” which was a combination of territorialism and the interest analysis. For example, in the false conflict situation, he advocated for the application of only the interested state’s law. In the true conflict and unprovided-for case scenarios, he would generally look to the law of the state where the accident occurred. On the issue of guest statute liability, he would look to the law of the state where the guest-host relationship was formed. Professor Twerski said that, at this point, he found himself “pushed to an even stronger territorial bias than Cavers” and that “[i]f the territorial considerations which I have developed earlier have any validity then they cannot be side-tracked by synthetic relationships which have no ‘time and space’ dimensions.” Twerski, supra, at 390 (emphasis omitted).}
I. THE CHOICE OF LAW REVOLUTION: A DECADE-LONG DEBATE BETWEEN TERRITORIALISM & INTEREST ANALYSIS

A. OPPOSING SIDES OF THE FALSE CONFLICT

Professor Twerski demonstrates his view of territorialism by discussing the New York Court of Appeals’ decision in Tooker v. Lopez, another guest statute case. Two New York students at Michigan State University were driving a New York-registered and insured automobile on a trip from East Lansing to Detroit. There was an accident on the trip, resulting in the death of the two students. At that time, Michigan had a guest statute, and New York did not. In terms of the interest analysis, this was the false conflict situation, and New York law allowing recovery should be applied. The New York Court of Appeals so held and established the principle that New York would apply the law of the only interested state in the false conflict situation. Professor Twerski strongly disagreed with the result in Tooker, arguing that the sole purpose of the Michigan guest statute was to prevent fraud against the insurance company by the colluding host and guest. And at this point, he set forth the regularity and rhythm argument quoted above. Territorialism, as advocated by Professor Twerski, is based on the factual connection between legally significant events and has nothing to do with the residence of the parties, the policies and interests of the involved states, or anything other than the factual connection. In Cipolla, all the legally significant facts were connected with Delaware, and in Tooker, all the legally significant facts were connected with Michigan. In both cases, territorialism required application of the law of the defendant’s home state, denying recovery.

For me, Tooker, as a false conflict, was an easy case. Only Michigan had a real interest in having its law applied on the issue of guest-host immunity. Cipolla was not that easy for me because I had earlier raised the question of whether it was constitutionally permissible for the plaintiff’s home state to apply its law imposing liability against a defendant from a non-liability state where the accident occurred in the defendant’s home state and where there was no factual connection between the accident and the plaintiff’s home state. I said:

This much of the territorial principle seemingly remains, that a state may not apply its law solely on the ground that the plaintiff is a resident of that state. If defendant did nothing in the forum, the causing of an injury to the

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22. See Tooker, 249 N.E.2d at 398.
23. See Twerski, supra note 19, at 380.
forum’s resident would not be a sufficient constitutional contact to justify
the forum’s applying its own law.24

There were no cases supporting this proposition, and I had come across
only two cases involving this situation, where there were some factual
contacts with the plaintiff’s home state, which was also the forum, and
the forum applied its own law allowing recovery. Nonetheless, reluctant as I had
been to argue in this vein and to make this obeisance to territorialism, I stayed
with this position through two major law review articles and a score of
conflicts cases.

When I had to confront the issue in Cipolla, I reluctantly concluded that
I was incorrect in my earlier view and that I could abandon this vestige of
territorialism and take my stand as a pure anti-territorialist and disregard the
significance of a state line.25 I began my analysis of the problem presented in
Cipolla by looking at what I called the existential legal component of the
case. This meant looking at the case in behavioral and practical realities and
seeing how the law responds to those realities. First, I looked at the reality of
the state line separating southeastern Pennsylvania and northern Delaware.
Of course, that line is legally and factually real in that people recognize that
a different sovereignty exists on either side of the state line. As Professor
Twerski has contended, it is not unreasonable to expect people to be subject
to the law of the state where they are at the time of acting.

But people do not live their day-to-day lives expecting legal
consequences, and the decision to cross a state line will usually not depend
on legal considerations.26 As the facts in Cipolla make clear, Delaware
County, Pennsylvania, and Wilmington, Delaware, are part of the same
socio-economic and mobility area. However, the state line separating
Delaware County and Wilmington is not real insofar as the day-to-day lives
of the people living in the area are concerned. Query, therefore, whether legal

24. Robert A. Sedler, Characterization, Identification of the Problem Area and the Policy-
is a modified version of a previous publication prepared for the symposium hosted by the Duquesne
Law Review. The symposium focused specifically on the significance of this case. See Robert A.
Sedler, The Territorial Imperative: Automobile Accidents and the Significance of a State Line, 9
26. There is a constitutional right to travel from state to state, and a state cannot impose an undue
burden on the right. The components of the constitutional right of interstate travel are set out by the
Supreme Court in Saenz v. Roe, 526 U.S. 489, 500–03 (1999). Moreover, in functional, socio-
economic, and mobility terms—as opposed perhaps to political ones—people do not live in or
identify with a state as much as they do with a particular area, which, depending on geography, may
be wholly within a particular state. Having lived the first twenty-four years of my life in Pittsburgh,
I have some idea of the different functional areas that exist in Pennsylvania. As a Pittsburgher, I
thought of myself as living in western Pennsylvania or in a tri-state area that included northern West
Virginia and eastern Ohio. Philadelphia, which was six hours away by automobile on the
Pennsylvania Turnpike, was in this sense as remote from Pittsburgh as Washington or New York.
consequences should depend on the existence of a state line that is not functionally real.

Second, in legal contemplation and case name, this was a suit between Michael Cipolla and John Shaposka, Jr. Michael considered John a tortfeasor, and John considered Michael an unwanted guest, as evidenced by the fact that he was asserting the defense of guest-host immunity. But, as everyone knows, the suit, in reality, was between Michael and John’s insurance company, the Allstate Insurance Company of Valley Forge, Pennsylvania. Thus, the real defendant was a Pennsylvania corporation or at least a company with its principal place of business there. If we disregard the fiction that the suit was between Michael and John—John was served with process while he and Michael were playing golf together27—we would find that both the plaintiff and defendant were Pennsylvania parties, and, in terms of the interest analysis at least, this case would present the false conflict, and Pennsylvania law, imposing liability, should apply.

Finally, there is the undisputable fact that if the accident occurred on the Pennsylvania side of the state line—the parties were traveling to Pennsylvania at the time—suit could have been brought in Pennsylvania, and Pennsylvania would have applied its own law. When I first thought about this point, I reasoned that it may not seem rational that the result in a case should depend on whether the accident occurred on this side or that side of a state line. Nonetheless, state lines do exist, and such a result could be considered “the price of federalism.” But on further reflection, I concluded that if the only reason to attach independent significance to the state line is that this is “the price of federalism,” we have fallen prey to circular reasoning. It is not “the price of federalism” unless we are willing to pay that price, and we do not have to pay it unless we are willing to say that a federal system requires that we attach independent significance to the existence of a state line.

I then concluded that I had made a mistake in thinking in terms of “sufficient constitutional contacts.” As a constitutional law commentator, I should have focused on due process principles of reasonableness and fairness and recognized that consideration of factual contacts was relevant only to the extent that those contacts related to reasonableness and fairness. Totally eliminating the notion of sufficient constitutional contacts, I would say that the forum may apply its own law on the ground that the plaintiff is a resident of that state where: (1) the fact of residency gives it an interest in applying its law to the issue as to which a conflict exists, and (2) the application of its law does not produce fundamental unfairness or defeat the legitimate expectations of the other party.28

27. Deposition of M.F., Cipolla, Record, p. 23.
28. We will see that the Supreme Court subsequently held that this is the standard to determine the constitutionality of a state’s applying its own law. See the discussion of constitutional limitations in Allstate Insurance Co. v. Hague, 449 U.S. 302, 304–39 (1981), infra notes 74–97, and accompanying text.
Applying this standard to the situation in *Cipolla*, I conclude that Pennsylvania should apply its own law on the issue of guest-statute immunity and allow the plaintiff to recover. Pennsylvania has a real interest in applying its law since the plaintiff is a Pennsylvania resident, and the consequences of the accident will be felt by the plaintiff in Pennsylvania. If there is a conflict between Pennsylvania’s policy of allowing compensation to an accident victim and Delaware’s policy of protecting insurance companies and perhaps reducing Delaware insurance rates, there is no valid reason why Pennsylvania should defer to Delaware’s policy and no rational way by which a court can decide which policy should be preferred. There is nothing unfair about the application of Pennsylvania law here. The nominal defendant’s insurance policy covers guest-host accidents in other states, which is a requirement of Delaware law, and the fact that Delaware has a guest statute would only affect the loss experience that was the basis of those states peripherally, if at all. Based on considerations of policy and fairness, I would argue that Pennsylvania should have applied its law.

In *Cipolla*, then, Professor Twerski’s application of territorialism and my application of the interest analysis would lead the courts to diametrically opposite results.

B. **LIKE BROKEN ENDS OF A CIRCLE: AGREEMENT BETWEEN TERRITORIALISM & THE INTEREST ANALYSIS IN *Foster v. Leggett***

At our second symposium, hosted by the *Kentucky Law Journal*, based on the decision of the Kentucky Court of Appeals in *Foster v. Leggett*,29 Professor Twerski’s territorialism and my interest analysis found common ground and led to the same result.

The facts were connected with the functional social, economic, and mobility areas of northern Kentucky and southern Ohio, separated only by the Ohio River.30 John Leggett and Helen Stringer were both employed by the C&O Railroad in Russell, Kentucky. Leggett lived in Portsmouth, Ohio, but often rented a room by the week at the Russell YMCA and would stay there two to five nights a week. Russell and Leggett, both divorced, had been dating for about a year before the fatal accident in which they were both killed during a planned trip from Russell to Columbus, Ohio, about 100 miles away. They had planned to return to Russell that evening.

Ohio had a guest statute that would have barred recovery here. Kentucky did not and would have allowed the guest passenger to recover against the host on the basis of ordinary negligence. The lower court held that Ohio law

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30. *Id.* at 828.
applied to the issue of guest-host immunity. A divided Court of Appeals held that Kentucky law applied and reversed.

For me, this was again the true conflict, as in Cipolla, with the victim from a recovery state and the defendant from a non-recovery state, and Kentucky should apply its own law to the issue of guest-host immunity in order to implement the recovery policies reflected in that law. For Professor Twerski, the issue was a bit more complex. He stated:

Choice of Law cases such as Foster raise sensitive problems as to the appropriate law to be applied when people have arranged their lives such that their fortunes are touched by the jurisprudential systems of two states. Surely all the facts which give color to their interstate activity are worthy of consideration. . . . Hopefully, when we step back to view the mosaic in its entirety, the pictorial representation will be a revealing one.

He concluded:

When one steps back and seeks to evaluate this factual pattern certain themes come through loud and clear. This case has ‘Kentucky’ writ over it in large bold letters. It is not that the factual contacts are predominantly in Kentucky (although that is true enough). . . . On the day in question the defendant picked up his girl friend and entered into a host-guest relationship in Kentucky (not something to be sneezed at when the issue is host-guest liability). The trip was to take the plaintiff and defendant to a place in Ohio which was not home to either of them. This is not a case of an Ohio defendant driving a Kentucky plaintiff around the block in defendant’s home town. The parties are both, so to speak, in strange country for purposes of this trip. The trip began in Kentucky and was to end there, were it not for the fatal crash. The relationship, goals and ends of this trip were oriented to Kentucky from its very inception to its planned conclusion, shattered only by the realities of an Ohio accident.

However, he then proceeds to criticize the decision because the approach of the Kentucky Court of Appeals was to hold that Kentucky law applied whenever the case presented “enough contacts” with Kentucky. He refers to the “enough contacts” approach as an approach like the interest analysis that “purports to provide a methodology that will resolve all problems on the

31. Id.
32. Professor Twerski’s discussion of the facts is more extensive than my discussion of the facts. See Aaron D. Twerski, To Where Does One Attach the Horses?, 61 KY. L. J. 393, 396–97 (1972); Robert A. Sedler, Judicial Method is “Alive and Well”: The Kentucky Approach to Choice of Law in Interstate Automobile Accidents, 61 KY. L. J. 378, 379 (1973) [hereinafter Sedler, Judicial Method is “Alive and Well”]. Given the underlying premises of Twerski’s territorialism, the totality of the facts is more important than the particular facts that are relevant to determining a state’s interest in applying its law in order to implement in the particular case the policies reflected in that law.
33. Twerski, supra note 32, at 396.
34. Id. at 397–98.
35. Foster, 484 S.W.2d at 829.
basis of a single dominant factor, be it factual or theoretical.”

He goes on to say that “Given the very strong factual connections with Kentucky one might have expected that the Kentucky Court would have developed legal reasoning to reflect the relationship, contacts and expectancies which were centered in Kentucky.”

In this connection, he strongly criticizes the earlier Kentucky case of *Arnett v. Thompson*, where the notion of “enough contacts” first surfaced. He notes that the court recognized “a substantial argument for Ohio law to be dispositive . . . since the host was covered by Ohio insurance and the immunity was designed for Ohio spouses.” He then says that “the major policy reason” was the “medical creditor rationale”: Kentucky has an interest in seeing that in accidents resulting from the negligence of Kentucky, the plaintiffs are compensated for the cost of medical treatment in Kentucky. He continues by observing that, “Professor Sedler has questioned the validity of this interest and has made the commonsense observation that if two Kentucky residents injured in Ohio are entitled to Kentucky law, perhaps two Ohio residents injured in Kentucky are entitled to Ohio law.”

Professor Twerski and I are thus in agreement not only as to the result in *Foster* but also as to the result in *Arnett*. As Professor Twerski noted, I had addressed that situation earlier when Kentucky first abandoned the place of the wrong rule and moved toward a policy-centered approach. This was the case of *Wessling v. Paris*, where two Kentucky parties were involved in an accident in Indiana, which had a guest statute, while Kentucky did not. Following the lead of the New York Court of Appeals in the seminal case *Babcock v. Jackson*, the Kentucky Court of Appeals abandoned the place of the wrong rule and adopted a policy-centered approach to choice of law. In *Wessling*, the Court limited its decision to the fact-law pattern presented in that case. In an extensive discussion of that decision and its application in subsequent cases, I dealt with a situation where two residents of a guest statute state—here, Indiana—were involved in an accident in Kentucky. In that situation, I stated that Kentucky’s interest in allowing recovery to the Indiana plaintiff was questionable. In this day and age, he would return to Indiana and not become a “public charge” in Michigan. I also noted that

37. *Id.* at 398.
40. *Id.*
45. *Id.* at 120–21.
even if the plaintiff incurred medical bills to local creditors, which would be less likely because of the availability of medical insurance, the amount of medical recovery forms only a small amount of the award. My conclusion was that the state of injury, in applying its law to allow recovery to the out-of-state plaintiff, was more theoretical than real and that Indiana did not have a real interest in applying its law to the point at issue. In terms of interest analysis, this case was like the false conflict in Babcock and Wessling, and Indiana law should apply as the law of the only interested state. I followed this rationale in my discussion of Arnett. Here, I stated:

My own view is that the state of injury has no real interest in applying its law here and that it should defer to the policy of the parties’ home state. In this day and age, the accident victim will get back home, and the social and economic consequences of the accident will be felt in his home state. He will not become a public charge in the state of injury. The purpose of tort recovery is not to provide reimbursement for medical creditors, since medical loss forms such a small part of the total recovery. The only real interest I see here is with the parties’ home state, and in my view, its law denying recovery should be applied.

In any event, following completely different approaches, like broken ends of a circle, we agreed with the decision of the Kentucky court in Foster that Kentucky law should apply.

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46. Id. at 121.
47. See id. at 125.
48. Sedler, Judicial Method is “Alive and Well,” supra note 32, at 383. Some additional facts, which I call “impact facts,” were not explicitly addressed in the opinion and may not have been relevant but could have potentially influenced the decision. These facts, initially covered in my work entitled Sedler, Judicial Method is “Alive and Well,” supra note 32, at 383–84, have been included here for further consideration. I have always felt that the primary reason for the court’s decision in Arnett was the realization that the parties, although Ohio residents, were “Kentuckians at heart.” This was indicated to me by the first sentence of the opinion, which says, “Carl A. Arnett and Edna, his wife, residents of Ohio, while visiting relatives in Kentucky were involved in an automobile accident . . . .” Arnett v. Thompson, 433 S.W.2d 109, 112 (Ky. 1968). The accident happened in the eastern part of the state, and to anyone familiar with the social and economic conditions prevailing there at the time (and, to an extent, today), no more need be said. Large numbers of eastern Kentuckians had emigrated to the cities of Ohio, Michigan, Indiana, and elsewhere to find employment that was not available in the heart of Appalachia’s poverty belt. But they retained their ties to eastern Kentucky and considered themselves “Kentuckians at heart.” On weekends and holidays, they would return home, as demonstrated by the traffic on Interstate 75 south from Cincinnati on any Friday evening. The Arnettts were no exception, as my research for this article disclosed. Carl Arnett was a native Kentuckian who went to Ohio to get a job. The Arnettts returned to Kentucky almost every weekend, and what is even more interesting is that they did not go back to Ohio after the accident. I wonder if their being “Kentuckians at heart” and returning to Kentucky almost every weekend, coupled with the fact that the accident occurred there, might have influenced Professor Twerski’s application of territorialism in this case in favor of Kentucky’s law. And my view of real interests could have influenced me to conclude that because the parties were Kentuckians at heart, Kentucky had a real interest in applying its law allowing recovery for their benefit. In any event, the court in Arnett decided the question before it and held that when two non-residents from a non-recovery state are involved in an accident in Kentucky, Kentucky’s law allowing recovery applies. Arnett, 433 S.W.2d at 113.
C. Resolving the Unprovided-For Case

The agreement did not last in our third symposium built around the 1972 New York Court of Appeals decision in Neumeier v. Kuehner. This was another guest statute case where Kuehner, a New York resident, picked up Neumeier, an Ontario resident, for a trip in Ontario and then back to Neumeier’s home. On the way to their destination, the vehicle was struck by a train, and both were killed. New York law allowed full recovery. Ontario had a guest statute, and the defendant—through his insurer—and the railroad asserted the Ontario guest statute as a defense. As I have stated previously, in terms of the interest analysis, this is the unprovided-for case in that neither state has a real interest in applying its law to the point at issue. The plaintiff’s home state would have a real interest in allowing its resident to recover, but its law protects the out-of-state defendant. The defendant’s home state would have a real interest in applying its law to protect the defendant and the insurer from liability, but its law allows recovery for the out-of-state plaintiff. Thus, neither state has a real interest in applying its law to the point at issue. So, while interest analysis can identify the unprovided-for case, it cannot, as such, provide a means of resolution.

The Court, in an opinion by Chief Judge Fuld, held that the Ontario guest statute applied. The Court distinguished Tooker and the seminal Babcock case on the ground that in those cases, both parties were from New York, whereas in this case, the plaintiff was from Ontario. It did not matter that the driver’s liability insurance policy covered the vehicle when driving in Ontario or that the New York rule might be considered the “better rule.” What was important here was that applying New York law “does not advance any New York State interest nor the interest of any New York State domiciliary.”

Judge Fuld then moved on, citing his concurring opinion in Tooker, to what he called the “next stage in the evolution of the law,” “the formulation of a few rules of general applicability, promising a fair level of predictability.” The rules were applicable in guest statute cases but could be applied in most conflicts torts cases. The first rule was “When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the

50. Neumeier, 286 N.E.2d at 455.
51. Id.
52. See the discussion, supra notes 14–19 and accompanying text.
54. Id. at 457–58.
55. Id.
56. Id. at 457.
standard of care which the host owes to guests."\textsuperscript{57} This rule is supported by the holdings in \textit{Babcock} and \textit{Tooker} with respect to parties from a recovery state. The New York court had not yet decided the situation where both parties are from a non-recovery state, but I agree with the result, per my discussion of \textit{Arnett}.\textsuperscript{58} This is the false conflict because the only state having a real interest in applying its laws to the issue of guest-host immunity is the parties’ home state, where the consequences of the accident and of allowing or denying recovery will be felt by the parties and the insurer.

The second rule covers the true conflict and makes the result dependent on the state where the accident occurred:

When the driver’s conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed on him under the tort law of the state of the victim’s domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.\textsuperscript{59}

This was the same result that the Pennsylvania Supreme Court reached in \textit{Cipolla}, contrary to that which the Kentucky Court of Appeals reached in \textit{Foster}. At this point, the New York Court of Appeals had not yet decided a case presenting this factual situation.\textsuperscript{60}

The third rule covers the unprovided-for case and, as indicated by the result in \textit{Neumeier} itself, generally looks to the state where the accident occurred.

In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.\textsuperscript{61}

The third rule, of course, was applicable here. Applying this rule, the court concluded Ontario law should apply because the accident occurred there and because “ignoring Ontario’s policy requiring proof of gross

\textsuperscript{57} Id.
\textsuperscript{58} See the discussion, supra notes 38–48 and accompanying text.
\textsuperscript{59} \textit{Neumeier}, 286 N.E.2d at 457–58.
\textsuperscript{60} In \textit{Pryor v. Swarner}, 445 F.2d 1272 (2d Cir. 1971), applying New York law, the court took New York law based on Fuld’s concurring opinion in \textit{Tooker} and held that where the plaintiff was a resident of New York, which did not have a guest statute, and the defendant was a resident of Florida, which did, and the accident occurred in Ohio, which also had a guest statute, during a trip that began in Ohio and was to end in New York, the New York court would allow the guest statute defense.
\textsuperscript{61} \textit{Neumeier}, 286 N.E.2d at 458.
negligence in a case which involves an Ontario-domiciled guest at the expense of a New Yorker does not further the substantive law purposes of New York.”\textsuperscript{62}

The result in \textit{Neumeier} is territorial-based. The applicable law in this unprovided-for case is the law of the state where the accident took place on a trip from one part of the state to another part of the state. As \textit{Neumeier} indicates, that will usually be the result under the third \textit{Neumeier} rule. The second way \textit{Neumeier} is territorial-based is that it looks to the state where the accident occurred in the true conflict situation, but it differs little from the place of the wrong rule advocated for by the traditional approach. The first \textit{Neumeier} rule is pure interest analysis, looking to the domicile of the involved parties, and has nothing to do with territoriality.

Professor Twerski says that in a case like \textit{Neumeier}, where there are no domiciliary interests to protect, “the entire structure of [the] interest analysis crumbled. Having defined the interests as domiciliary oriented when you run out of domiciliaries to protect you run out of interests. The emperor indeed stands naked for all to see.”\textsuperscript{63} He also maintains that there is a flaw in the belief that rules of law are domiciliary oriented. Regardless of what may have motivated the Ontario guest statute,

\[\text{[o]nce the statute is in force, the ramifications of its existence may far surpass the primary motivational factor. The statute in actual operation becomes a strong moralizing statement to the populace of Ontario, and indeed perhaps to all those who pass through Ontario, that Ontario views insurance collusion with great distaste and that as a state it reacts negatively to the possibility of its occurrence. This statement can legitimately be made by Ontario to its plaintiffs, defendants [sic] or visitors involved in auto accidents in Ontario. It is legitimately debatable how far and to which persons Ontario should address itself (that is the choice of law question); but its interests can be and undoubtedly are directed to more than its domiciliaries.}\textsuperscript{64}

Professor Twerski, pleased with the result in \textit{Neumeier}, stated:

The court first looked at the interests and found that this was a case where interest analysis could provide precious little in the way of guidance. The court then went on to state rather clearly that it could not see how it could rationally refuse to apply Ontario law to an Ontario guest for an accident taking place in Ontario. The court frankly acknowledged a territorialist bias. Having advocated a territorialist orientation to choice-of-law, \textit{Neumeier} in

\textsuperscript{62} \textit{Id.} at 458. The court went on to note that the application of New York law in this case would result in the exposure of New York residents to greater liability than was imposed on resident users of Ontario’s highways, and asked, rhetorically, “[w]as the New York rule really intended to be manna for the entire world?” \textit{Id.} at 458–59.


\textsuperscript{64} \textit{Id.} at 110.
a sense bore out my prediction that courts would soon tire of simplistic interest analysis and would begin paying attention to the territorial dimensions of fact-patterns coming before them.\textsuperscript{65}

However, he was not pleased with Judge Fuld’s use of rules as “the method for accomplishing the recognition of territorialism.”\textsuperscript{66} The rules set forth in Neumeier, he says, are “neither fish nor fowl” and pay allegiance to two systems: the interest analysis and \textit{lex loci delicti}.\textsuperscript{67} He concluded: “And it is here that I throw up my hands in despair because I can make no principled sense out of choice-of-law methodology—New York style.”\textsuperscript{68}

He continued, contending that “courts did not like where the interest analysis was taking them,\textsuperscript{69} and he went on to find territorialism in their decisions. He states:

Where the territorial considerations [become] substantial in any given case the courts began inventing interests to support the results they felt would be just. Thus pure interest analysis gave way to \textit{ad hoc} interest analysis. But, if what was behind the creation of \textit{ad hoc} interest analysis was in truth territorial considerations, it was only a matter of time before the truth would [come] out. \textit{Neumeier v. Kuehner} is such a case. The court acknowledged that the facts were Ontario oriented and applied Ontario law.\textsuperscript{70}

In these three cases, Professor Twerski has applied territorial considerations and reached results that were clearly consistent. In Cipolla and Neumeier, the facts were centered in Delaware and New York, respectively. In Foster, the facts were somewhat different, leading to his conclusion that the facts were centered in Kentucky and the case had Kentucky written all over it.\textsuperscript{71}

My approach to the interest analysis led to the conclusion that in all three cases, the law of the state allowing recovery should apply. In Cipolla and Foster, this was the true conflict, and the plaintiff’s home state—where the consequences of the accident and of allowing or denying recovery would be felt by the plaintiff—had a real interest in applying its law to allow recovery. In Neumeier, which presented the unprovided-for case, I looked to the common policy of New York and Ontario, both of which allowed recovery based on negligence. However, Ontario made an exception in guest statute cases to protect the defendant and the insurer. Since the defendant and insurer here were from New York, the law of which imposed liability, the common policy would come to the fore, and recovery would be allowed.\textsuperscript{72}

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\textsuperscript{65} Id. at 115 (citations omitted).
\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} Id. at 121.
\textsuperscript{70} Id. at 122 (citations omitted).
\textsuperscript{71} Twerski, supra note 32, at 397.
\textsuperscript{72} See discussion supra notes 16–18 and accompanying text.
Twerski says that the flaw in my approach is that there is no common policy when it comes to guest statute liability and that rules of law are domicile-oriented. Again, he is asserting territorialism to defeat my approach, which is based on the policies and interests of the involved states. And when it comes to liability for an automobile accident, the interested states are the states where the parties reside and where the consequences of the accident will be felt by the parties and the insurer.

Our different approaches to choice of law in tort cases—territorialism for Twerski and the interest analysis for Sedler—have led us to different results in the three cases that were the subject of the symposia.

II. CONSTITUTIONAL LIMITATIONS ON CHOICE OF LAW: ALLSTATE INSURANCE CO. V. HAGUE

My next interaction with Professor Twerski occurred in 1981 following the United States Supreme Court’s decision on constitutional limitations on choice of law in Allstate Insurance Co. v. Hague. This was the first time in almost twenty years that the Supreme Court granted certiorari in a case presenting that issue, and the last time that the Court had heard such a case, its approach appeared to be one of “judicial abstention,” imposing few, if any, limits on a state court’s decision to apply its own law in a conflicts case.

Allstate involved residents of a functional economic and social mobility area between Minnesota and Wisconsin. The decedent resided in Wisconsin but commuted daily to his workplace in Minnesota. He died of injuries received in a Wisconsin accident when a motorcycle on which he was a passenger was struck from behind by an automobile. The operators of both

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73. Twerski, supra note 63 at 109–11.
75. Clay v. Sun Ins. Co., 377 U.S. 179 (1964). In that case, a resident of Illinois purchased an insurance contract for personal property from a company doing business in Illinois and Florida. Months later, he moved to Florida, where the loss occurred. The policy contained a provision barring suits on claims after twelve months. The provision was valid under Illinois law but invalid under Florida law. The Florida court applied its own law to invalidate the provision. The insurance company claimed that the application of Florida law in this case violated due process and full faith and credit. The Supreme Court held that Florida’s application of its own law was constitutionally permissible since the insured was a resident of Florida when the loss occurred, and the insurance company continued the coverage after the move.

At an earlier time, for roughly twenty years through the mid-1930s, the Supreme Court appeared to be imposing significant limitations on the power of the state courts to make choice of law decisions. The limitations were imposed under the Fourteenth Amendment’s Due Process Clause and the Full Faith and Credit Clause of Art. IV, Sec. 1. Beginning in the mid-1930s, the Court turned around, so to speak, and in case after case, rejected the contention that a decision of a state court to apply its own law. The “rise and fall” of constitutional limitations on choice of law paralleled the rise and fall of constitutional limitations on state economic regulation. See generally the discussion and review of cases in Robert A. Sedler, Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism, 10 Hofstra L. Rev. 59, 62–68 (1981) [hereinafter Sedler, The Perspective of Constitutional Generalism].
vehicles, which were uninsured, were Wisconsin residents. The decedent had three Wisconsin automobile insurance policies with Allstate, each including a provision for $15,000 in uninsured motorist coverage. After the decedent’s death, his wife moved to Minnesota and was appointed the personal representative of the decedent’s estate there. She sued Allstate in Minnesota, seeking to recover under the uninsured motorist provisions of the policies. Minnesota law permitted “stacking,” so she would be entitled to recover $45,000 for the fatal accident. Wisconsin law apparently did not permit “stacking,” and if Wisconsin law applied, recovery would be limited to $15,000. The Minnesota courts held that Minnesota law applied to the question of “stacking” and allowed the higher recovery.\(^{76}\)

Much to the surprise of many constitutional commentators, the Supreme Court granted certiorari to “determine whether the Due Process Clause of the Fourteenth Amendment or the Full Faith and Credit Clause of Art. IV, Sec. 1 of the United States Constitution bars the Minnesota Supreme Court’s choice of substantive Minnesota law....”\(^{77}\) Professor Twerski said, and I agree, that “[t]here was certainly a widespread belief in the trade that the Supreme Court had not granted certiorari in \textit{Allstate Insurance Co. v. Hague} in order to affirm the decision of the Minnesota Supreme Court.”\(^{78}\) But he then said, “The educated prognosticators, myself included, were wrong.”\(^{79}\)

In a 5-3 decision, the Court upheld as constitutional the application of Minnesota law in this case. The plurality opinion of Justice Brennan, joined by Justices White, Marshall, and Blackmun, treated the test under due process and full faith and credit to be coextensive and stated that test as follows: “[F]or a state’s substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”\(^{80}\) Justice Brennan then identified three contacts that Minnesota had with the parties, which, in the aggregate, rendered constitutionally permissible the application of Minnesota law on the question of stacking. Those contacts were:

1. the decedent’s regular employment in Minnesota and his daily commute to his Minnesota workplace while covered by the uninsured motorist provisions of the insurance policies;

\(^{76}\) The foregoing summary of the facts in \textit{Allstate} is taken from \textsc{Robert A. Sedler, Across State Lines: Applying The Conflict of Laws to Your Practice} 109 (Section of General Practice Am. Bar Ass’n 1989), and portions of the following discussion were originally published in Sedler, \textit{The Perspective of Constitutional Generalism}, supra note 75, at 70–74.

\(^{77}\) \textit{Allstate}, 449 U.S. at 304 (citations omitted).


\(^{79}\) \textit{Id.}

\(^{80}\) \textit{Allstate}, 449 U.S. at 312–13.
2. Allstate’s doing business in Minnesota and Minnesota’s interest in regulating Allstate’s relationship with a long-time member of the Minnesota workforce; and

3. the widow’s post-occurrence change of residence to Minnesota and her position as the decedent’s court-appointed representative.\(^{81}\)

This led to the conclusion that “In sum, Minnesota has a significant aggregation of contacts with the parties and the occurrence, creating state interests, such that application of its law was neither arbitrary nor fundamentally unfair.”\(^{82}\) It should be noted that Justice Brennan appears to be using the concept of “interest” more broadly to include the “generalized interest” of a state in applying its law based on the factual contacts the parties and the transaction have with the state.\(^{83}\)

In other words, the forum can apply its own law or the law of another state based either on the state’s interest in applying its own law in order to implement the policy reflected in that law or on the basis of the state’s factual contacts with the underlying transaction.

Justice Stevens, concurring, stated that the tests for due process and full faith and credit were somewhat different but found that both tests were satisfied here so that the application of Minnesota law on the issue of stacking was fully constitutional.\(^{84}\) Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, dissented. The dissenters stated that they agreed with the doctrinal position of the Brennan plurality but disagreed with its application to the facts. They maintained that for the application of the forum’s law to be

\(^{81}\) Id. at 313–19.

\(^{82}\) Id. at 320.

\(^{83}\) For example, a state’s application of the “place of the wrong” rule to govern the liability of two non-residents involved in an accident in that state would be based on a constitutional contact with that state and so would be constitutionally permissible. See e.g., Carroll v. Lanza, 349 U.S. 408 (1955). And so is the residence of one of the parties involved in an out-of-state accident. As Justice Brennan stated, “An automobile accident need not occur within a particular jurisdiction for that jurisdiction to be connected with the occurrence. The injury or death of a resident of State A in State B is a contact of State A with the occurrence in State B.” Allstate, 449 U.S. at 314–15, n.20. I previously addressed this point in Sedler, The Perspective of Constitutional Generalism, supra note 75, at 73 n.71, and Robert A. Sedler, Continuity, Precedent and Choice of Law: A Reflective Response to Professor Hill, 38 WAYNE L. REV. 1419, 1447 n.148 (1992) [hereinafter Sedler, Continuity, Precedent and Choice of Law].

\(^{84}\) He said that there would be a violation of due process only when the application of a state’s laws would be totally arbitrary or fundamentally unfair, which was not the case here since the insurance policy provided for coverage throughout the United States and it was foreseeable that the laws of states other than Wisconsin could govern particular claims under the policy. Allstate, 449 U.S. at 326–31 (Stevens, J., concurring). He then contended that full faith and credit, in certain instances, required that one state respect the sovereignty of another state and refrain from applying its own laws. Here, Wisconsin’s sovereignty could not be infringed by applying Minnesota law because the insurance policy’s coverage of accidents occurring in other states deprived Wisconsin of any interest in insisting that the contract be interpreted in accordance with Wisconsin law. Id. at 323–26. I have adapted the foregoing discussion from Sedler, The Perspective of Constitutional Generalism, supra note 75, at 71.
constitutional, the forum state must have a legitimate policy interest in the outcome of the litigation and concluded that the application of Minnesota law in this case did not further a legitimate state interest.85

The Hofstra Law Review put together a symposium built around the Allstate decision. There were ten commentators, including six of the most venerable conflicts authorities, and some who had come along later, which included Professor Twerski and myself. It is fair to say that the collective writings of all the commentators spanned the breadth of conflicts scholarship at that time.

However, I will focus on the differing views of Professor Twerski and myself. Not surprisingly, Professor Twerski’s advocacy of territorialism led to the conclusion that the only law that could possibly be applied in this case was Wisconsin law. He stated:

It has been my contention throughout that some cases are so heavily centered in one jurisdiction that they never lose their essentially local character. While I have expressed this idea in different ways, my main contention has been that expectations have to be looked at in a perspective broader than that of the parties to the transaction. Law is no stranger or interloper in the life of man in society. Rather, it is an integral part of man’s experience, with a regularity and normalcy attendant to it. . . . The notion that any state which is affected by the operation of another state’s law may by that interest alone become a potential source for the governing law means that there exists no such thing as a local controversy clearly governable by local law. All cases become potential conflicts cases. . . . Decisions such as Hague will therefore demonstrate to the world that no one has a right to expectations in a choice-of-law case. And, as long as a case has some interstate ramifications, then even localized cases have choice-of-law potential.86

His criticism of the Supreme Court’s decision in Allstate is scathing. He says that the Court “capitulated to unrestrained state chauvinism,” that it “fill[ed] the pages of the United States Reports with some of the silliest rhetoric imaginable,” and that it “gave dignity to arguments that would cause snickers if not ribald laughter if expressed in any other area of the law.”87

While I have not verified this recently, I recall that, during the symposium, most of the other commentators in the symposium were also critical of the Allstate decision.

Unlike the other commentators, I was not critical of the decision. But unlike the other commentators, I did not approach the decision from what may be called a “conflicts perspective”—a perspective that assumes that constitutional limitations on choice of law are necessary to promote “conflicts justice” and to accommodate the conflicting interests in a federal

85. Id. at 332–39 (Powell, J., dissenting).
86. Twerski, supra note 78, at 159–60 (emphasis in original) (citations omitted).
87. Id. at 151, 153.
system. They then would find such limitations inhering in the Due Process and Full Faith and Credit Clauses of the United States Constitution. The debate among the conflict of laws commentators revolved around the extent and the respective roles of the Due Process and Full Faith and Credit Clauses in imposing constitutional limitations.\(^8\)

I, on the other hand, teach constitutional law as well as conflicts and approach constitutional limitations on choice of law from the perspective of constitutional generalism. The perspective of constitutional generalism considers constitutional structure and doctrine and general principles of constitutional interpretation and applies them to constitutional limitations on choice of law. Under this approach, it is not assumed that the Constitution imposes limitations on the power of state courts to make choice of law decisions simply because such limitations are necessary to promote “conflicts justice” or to accommodate the conflicting interests of states in a federal system. Rather, the fundamental inquiry is whether such limitations properly can be found to inhere in particular provisions of the Constitution. Constitutional generalism considers the broad, organic purpose and function of the Due Process and Full Faith and Credit Clauses, the “original understanding” of the framers, and the doctrine that the Court has developed in applying these provisions in other contexts. The question is whether these clauses should be interpreted as placing any limitations on the power of state courts to make choice of law decisions, and if so, what those limitations should be.\(^9\) My submission was that when constitutional limitations on choice of law are approached from the perspective of constitutional generalism, the Constitution should be interpreted as placing only the most minimal limitations on the power of state courts to make choice of law decisions and that, in our constitutional system, there should not be any significant constitutional limitations on choice of law.\(^9\)

The issue in \textit{Allstate} involved the liability of the insurance company on a property insurance contract. The applicable standard of review is rational basis, under which the application of a state’s law need only be rationally related to the advancement of a legitimate governmental interest and not be fundamentally unfair.\(^9\) Clearly, the applicable Minnesota law in this case is neither arbitrary nor fundamentally unfair—it regulates an insurance

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88. See the discussion and citations to the comments of constitutional commentators in Sedler, \textit{The Perspective of Constitutional Generalism}, supra note 75, at 59–60, nn.3–4.

89. \textit{Id.} at 60 (citations omitted).

90. \textit{Id.} at 61 (citations omitted). I said that the Court in \textit{Allstate} did not focus sufficiently on the analysis suggested by the perspective of constitutional generalism. As in earlier cases involving constitutional limitations on choice of law, the Court treated conflicts issues as an independent “specialized area” that is not dealt with in terms of general principles of constitutional interpretation and the consistent application of constitutional doctrine. \textit{Id.} However, the result in \textit{Allstate} and the rationale and application of the formulations in both the Brennan and Stevens opinions are fully consistent with the perspective of constitutional generalism. \textit{Id.} at 83.

91. \textit{Id.} at 77 (citations omitted).
company licensed to do business in Minnesota. Since Allstate has availed itself of the privilege of doing business in Minnesota, Minnesota has wide latitude in regulating the business activities of Allstate, where those business activities impact Minnesota’s interests. The insurance policy covered the vehicle when it was driven in Minnesota as well as in Wisconsin. It is reasonable for Minnesota to be concerned about the welfare of the insured, a member of the Minnesota workforce, and the insured’s dependents. This gives Minnesota a constitutionally sufficient “interest” in applying its own law to determine the amount of recovery under the insurance contract, which became even stronger when the insured’s dependents became residents of Minnesota. Minnesota is now affected by the social and economic consequences of the accident in which the insured was involved. For all these reasons, the application of Minnesota law in this case is not arbitrary.  

It is equally clear that the application of Minnesota law on the issue of stacking in this case is not fundamentally unfair to Allstate. Precisely because Allstate does business in Minnesota, it cannot claim unfair surprise by being subject to the requirements of Minnesota insurance law. Moreover, under Wisconsin law, Allstate was required to cover the insured’s vehicles while being driven in all other states and could, therefore, foresee the application of any state’s law on the issue of stacking.  

The Brennan opinion did not distinguish between due process and full faith and credit as constitutional limitations on choice of law. The concurring opinion by Justice Stevens did, saying that full faith and credit required that when a state was acting as the forum for litigation, it respect the interests of other states and avoid infringement on their sovereignty. But, he went on to say, the clause does not rigidly require the forum state to apply foreign law whenever another state has an interest, but since the forum is a sovereign in its own right, it may attach paramount importance to its own legitimate interests. Rather, “the Clause should not invalidate a state court’s choice of forum law unless that that choice threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State.” Here, there was no threat to national unity by the application of Wisconsin law because the insurance policy covered accidents that might occur in another state. This being so, Wisconsin had no interest in ensuring that contracts formed in Wisconsin in reliance on Wisconsin law be interpreted in accordance with that law.

92. Id. at 77–82 (citations omitted).
93. Id. at 82–83 (citations omitted).
95. Id. at 323 (citations omitted).
96. Id. at 324–26 (citations omitted). The Powell dissent contended that due process required there be “reasonable policy-related contacts” in choice-of-law cases and rejected all the contacts deemed significant by the Brennan plurality. Id. at 337–40 (Powell, J., dissenting). See the
Allstate was a constitutional case. And while conflict of laws commentators may criticize the result from a conflicts perspective, the constitutional result is fully consistent with constitutional doctrine and precedent relating to due process and full faith and credit. It is, therefore, the result that is called for from the perspective of constitutional generalism. 97

III. CONFLICTING POLICIES & UNFAIRNESS: THE UNIQUE CONFLICTPOSEDBYCONTRIBUTIONCASES

Some years later, Professor Twerski and I had a final interaction with respect to choice of law. The year was 1994, and by this time, Professor Twerski had moved to Brooklyn Law School, and I had moved to Wayne State University Law School. The Brooklyn Law Review, with the assistance of Professor Twerski, presented a symposium on the New York Court of

97. As we have summarized the result in Allstate, a state may constitutionally apply its own law as a matter of due process and full faith and credit (1) whenever it has a real interest in applying its own law in order to implement the policies reflected in that law and the application of its law is not fundamentally unfair to the other party, or (2) it has significant factual contacts with the underlying transaction. In effect, the constitutional test covers both choice of law decisions based on interest and fairness and choice of law decisions based on territorialism.

In Allstate, the Court discussed two older cases going back to the 1930s in which the forum's choice of its own law was held unconstitutional at the time and would be unconstitutional under the Allstate standard. See Home Ins. Co. v. Dick, 281 U.S. 397 (1930); John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936). I have previously discussed the details of these cases, some of which is reprinted here. See Sedler, Constitutional Limitations, supra note 75, at 86–92. In Allstate, the Court referred to these cases as being “instructive as extreme examples of selection of forum law” and that in both cases, “the selection of forum law rested exclusively on the presence of one nonsignificant forum contact.” Allstate, 449 U.S. at 309–11 (footnote omitted). The Court stated:

Dick and Yates stand for the proposition that if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional. Dick concluded that nominal residence—standing alone—was inadequate; Yates held that a postoccurrence change of residence to the forum state—standing alone—was insufficient to justify application of forum law.

Id. at 310–11.

Following Allstate, the Court has dealt with other cases involving constitutional limitations on choice of law. In Phillips Petroleum v. Shutts, 472 U.S. 797 (1985), for example, the Court invalidated on due process grounds a Kansas state court’s application of Kansas law to govern all the claims in a class action to recover interest on suspended royalty claims for gas leases involving some 28,000 plaintiff-residents in all the different states and some foreign countries. Since Kansas had no connection with practically all the leases and practically all the plaintiffs, the application of Kansas law to govern all the claims was “sufficiently arbitrary and unfair as to exceed constitutional limits.” Phillips Petroleum, 472 U.S. at 822. In Sun Oil Co. v. Wortman, 486 U.S. 717 (1988), involving the same factual situation as in Shutts, the Court held that neither due process nor full faith and credit precluded Kansas as the forum from following the traditional view that the question of the statute of limitations is one of procedure, to be determined entirely by the law of the forum. And in the recent case of Franchise Tax Board of Cal. v. Hyatt, 139 S. Ct. 1485 (2019), the Court held that full faith and credit requires Nevada to recognize the California law of sovereign immunity in a suit against a California governmental agency. The Court overruled its earlier decision to the contrary in Nevada v. Hall, 440 U.S. 410 (1979).
Appeals’ decision in Cooney v. Osgood Machinery, Inc. The essential facts were that a Missouri resident, Cooney, was injured while working near a machine that had been manufactured in New York and was eventually sold to the Missouri company that employed Cooney. Not satisfied with Missouri’s limited workers’ compensation benefits, Cooney sued the New York seller of the defective machine in New York, which in turn sought contribution from Cooney’s Missouri employer. Missouri followed the overwhelmingly majority rule that an employer who provides workers’ compensation for the employee is immune not only from a suit by the injured employee but also from any contribution claim by a third party who may be liable to the injured employee.

Professor Twerski hails the result in Cooney as the triumph of territorialism. He notes that, as in Cooney, in the classic contribution case, the underlying tortious conduct that causes injury to the plaintiff and gives rise to the lawsuit is territorially centered in one jurisdiction. Moreover, the Missouri employer had no contact with the New York seller, and the New York party seeking contribution “did nothing to affiliate itself with Missouri.” And he says that contribution conflicts, such as Cooney, “do not bring into play interstate relationships involving activities of both parties that somehow touch the concerned jurisdictions.” He goes on to assert that the contribution cases present to the courts “policy conflicts of the highest order.” They do not involve conflicts based on “antiquated rules” but instead “raise the question of who ought to bear the cost for institutional immunities.” In these circumstances, says Twerski, the contribution cases necessarily cause courts to choose sides. If the New York court was going to deny recovery to the New York plaintiff, it must bow to the territorial principle, which is what the New York Court of Appeals did in Cooney.

Like Professor Twerski, I agree with the result in Cooney, but not surprisingly, my agreement has nothing to do with territorialism. Rather, it is that the application of New York law to deny contribution from the Missouri employer would be unfair. I have always insisted that fairness is an independent choice of law consideration and that a state will not apply its

100. Cooney, 612 N.E.2d at 283.
102. Id. at 1355–56.
104. Id. at 1356–57. He concludes: “Ultimately, contribution cases pit interest analysis against territorialism in its most raw and naked form. There is no place to hide. In this conflict, within Conflicts analysis, courts cannot honestly pay allegiance to both regimes.” Id. at 1357.
own law despite a real interest in doing so when the application of that state’s law would be unfair to the other party.105 In the tort area, fairness relates to foreseeability and reliance. The application of a state’s law may produce unfairness if the party against whom that state’s law is applied could not reasonably foresee the application of that law at the time that party acted, and in the circumstances presented, the party was entitled to rely on the law of another state and conform its conduct to the requirements of that state’s law. Although such cases will be fairly rare, when they do occur, the forum will displace its own law despite a real interest in having that law applied. To this extent, considerations of fairness are necessarily built into the interest analysis approach.106 In the situation presented in Cooney, the courts have


106. Id. at 241. Recall that in Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), the Court invalidated on due process grounds a Kansas state court’s application of Kansas law to govern all claims in a class action to recover interest on suspended royalty claims for gas leases involving some 28,000 plaintiff-residents all located in different states and some foreign countries. Since Kansas had no connection with practically all the leases and practically all the plaintiffs, applying Kansas law to govern all the claims was “sufficiently arbitrary and unfair as to exceed constitutional limits.” Phillips Petroleum, 472 U.S. at 822.

In the cases to which I am referring, the application of the forum’s law may not have been so fundamentally unfair as to violate due process, but it would have been sufficiently unfair that the forum refrained from applying its own law. See the discussion and review of these cases in Sedler, Interest Analysis, “Multistate Policies,” and Considerations of Fairness, supra note 105, at 241–43. In Offshore Rental Co. v. Continental Oil Co., 583 F.2d 721 (Cal. 1978), where a “key employee” of a California corporation was injured while at the Louisiana facilities of a Louisiana company, the California court refused to apply a purported California statute (later found not to exist) allowing the recovery of damages for an injury to a “key employee.” In Barrett v. Foster Grant Co., 450 F.2d 1146 (1st Cir. 1971), the court refused to apply a New Hampshire law imposing a higher duty of care against a Massachusetts landowner who was sued by the employee of a New Hampshire contractor for injuries sustained while working on the defendant’s Massachusetts land. The court emphasized that the Massachusetts landowner was entitled to rely on the Massachusetts standard of care when acting on the Massachusetts land. In Blakesly v. Wolford, 789 F.2d 236 (3d Cir. 1986), the court held that when a Pennsylvania resident by rearrangement went to Texas to have a complicated procedure performed by a Texas oral surgeon, her lawsuit against the oral surgeon for damages resulting from the procedure was governed by Texas law on the issues of informed consent and limitations on malpractice damages. The court emphasized that the plaintiff traveled voluntarily to Texas to have the procedure performed and, accordingly, the defendant was entitled to rely on the Texas law of informed consent and limited liability for damages. In Bader v. Purdon, 841 F.2d 38 (2d Cir. 1988), New York parents were visiting friends in Ontario and left their small child unsupervised. The child was injured by the friends’ dog. The parents brought suit against their friends (realistically, against the friends’ homeowners insurance company), and the insurer sought to recover contribution and indemnity from the allegedly negligent parents. This was permitted under Ontario law but not under New York law. The court applied Ontario law. Here, one could properly contend that applying New York law to the issue of contribution and indemnity would have been unfair to the dog owners, the nominal defendants in this case. Because they acted in Ontario, they were entitled to rely on Ontario law and conform their conduct to the requirements of Ontario law, under which the parents were responsible for the child’s protection. Thus, the dog owners would not have to be concerned about the child’s safety while the parents were present. Portions of the foregoing discussion have been taken from my article entitled Robert A. Sedler, A
universally held that the tort liability of an employer to an employee who is covered by worker’s compensation or liability to a third party for contribution resulting from a work-related injury is determined by the law of the state where the employer has taken out workers’ compensation covering the particular employee. This result is embodied in what I have called the ninth rule of choice of law.\textsuperscript{107} Viewed from this perspective, then, \textit{Cooney} is not a difficult case. In the fact-law pattern presented in \textit{Cooney}, the New York Court of Appeals, like all the other courts presented with this fact-law pattern, should have and did apply Missouri’s workers’ compensation law.

A case like \textit{Cooney} also brings me to what I have called the judicial method and rules of choice of law. While I am a strong proponent of the interest analysis as the preferred approach to choice of law, I have also emphasized the judicial method in conflicts cases. The judicial method relates to what I see as the function of a court in a conflicts case, which is to provide functionally sound and fair solutions to the relatively few cases that arise in practice for which a court has to make a choice of law decision. Under the judicial method, a court should render the choice of law decision with reference to the fact-law pattern of the particular case. The decision in that case would serve as a precedent for decisions in other cases presenting the same fact-law pattern, and the decision’s rationale would serve as a guide to the resolution of future cases presenting different fact-law patterns. In time, depending on the number and kinds of cases that arose, a body of conflicts law would emerge in each state through the normal workings of binding precedent and \textit{stare decisis}.\textsuperscript{108}

The criteria for the choice of law decision should be based on policy considerations and fairness to the parties. The rationale here is the criteria for deciding to displace the forum’s own law and to look to the law of another state—either solely or in part—for the rule of decision in the case should relate to the underlying justification for such displacement. The forum’s law should be displaced in a particular case only when either policy considerations, such as recognition of the legitimate interest of another state in having its law applied, or a concern for fairness, such as protecting the reasonable expectations of the parties, dictate the displacement of the forum’s law in favor of the law of another state. In the absence of such considerations, the law of the forum should apply, just as it would in a purely domestic case.\textsuperscript{109}

\textit{Real World Perspective on Choice of Law}, 48 MERCER L. REV. 781 (1997) [hereinafter Sedler, \textit{A Real World Perspective on Choice of Law}].

\textsuperscript{107} See the discussion, infra note 111, and accompanying text.


Under the judicial method and the policy-centered conflict of laws, then, the choice of law process would operate in accordance with the following premises:

1. the basic law is the law of the forum, which will be applied in the absence of valid reasons for its displacement;
2. the choice of law decision will be made with reference to the fact-law pattern in the particular case; and
3. the choice of law decision will be based on policy considerations and fairness to the parties.¹¹⁰

The operation of the judicial method in practice will lead to the development of what I have called “rules of choice of law.” I distinguish rules of choice of law from choice of law rules, both the broad, state-selecting rules of the traditional approach, or narrow, policy-based rules, such as the Neumeier rules. They are not formulated by a court and applied a priori to the facts of a particular case. By contrast, a rule of choice of law emerges from the decisions of the courts in the actual cases coming before them for decision. Thus, a rule of choice of law may be considered a true precedent. The rules of choice of law that I have identified are based solely on the results of the decided cases. They are not based on the courts’ explanations for their decisions in these cases or on the application of the particular approach that the courts are purportedly applying. And the courts generally do not refer to rules of choice of law as such. They are simply my efforts to find rules for the results that the courts have reached in deciding torts conflicts cases.¹¹¹

¹¹⁰ Id. at 1325–26.
¹¹¹ See the more extended discussion of rules of choice of law in Sedler, Reflections on Cooney v. Osgood Machinery, supra note 99, at 1327–39. It does seem significant to me that in the torts area, all courts that have abandoned the traditional approach have reached fairly uniform solutions in the different fact-law patterns presented to them for decision. When the courts have differed, the differences are sufficiently clear as to indicate “majority” and “minority” views, as in other areas. I first developed nine rules of choice of law in Robert A. Sedler, Rules of Choice of Law versus Choice of Law Rules: Judicial Method in Conflicts Torts Cases, 44 Tenn. L. Rev. 975 (1977). I reviewed them again and added a tenth rule for products liability cases in Robert A. Sedler, Choice of Law in Conflicts Torts Cases: A Third Restatement or Rules of Choice of Law?, 75 Ind. L.J. 615 (2000). The first nine rules of choice of law are summarized in Sedler, Reflections on Cooney v. Osgood Machinery, supra note 99, at 1331–34, and reprinted here. The first and most “universal” rule of choice of law followed by all courts that have abandoned the traditional approach is that where two residents of the forum are involved in an accident in another state, the law of the forum applies. The second and also universally followed rule of choice of law is that when two parties from a recovery state are involved in an accident in a non-recovery state, recovery will be allowed.

The third rule of choice of law covers the situation where two parties from a non-recovery state are involved in an accident in a recovery state. Here, suit will be brought in the recovery state under its long-arm act since, if it is brought in the home state, that state’s courts will apply its own law denying recovery. In the cases where suit is brought in the recovery state, the courts are divided, with the majority of courts applying their own law allowing recovery. While I do not think that the recovery state has a real interest in applying its law to allow recovery, the courts that do apply their
The *Cooney* case is an addendum, so to speak, to my engagement with Professor Twerski. It does demonstrate that our debate over the preferred approach to tort choice of law cases continued through the 1990s. And, as sometimes happens, like broken ends of a circle, we agreed on the outcome despite arriving there by very different means.112

**CONCLUSION**

It has been my great privilege to be asked to contribute to this festschrift in honor of Professor Aaron Twerski. We go back a long way together in our academic and personal relationship, and we have been able to participate with very different views in the development of modern conflicts law. Our very own law emphasize the forum’s “better law” and the even-handed treatment of non-residents injured in the forum.

The fourth rule of choice of law covers the true conflict, where the accident occurs in the plaintiff’s home state, either because of an act done there, as in the ordinary automobile case, or because of an act done elsewhere that created a foreseeable risk of harm in the forum and in fact has caused such harm. Here, the plaintiff will sue in the home state, and in this true conflict, the forum will apply its own law allowing recovery. The fifth and sixth rules of choice of law cover the true conflict where the accident occurs in the defendant’s home state. Here, the result usually depends on whether suit can be brought in the plaintiff’s home state. Where suit can be brought in the plaintiff’s home state, either because the defendant is a corporation doing substantial business there or because the underlying accident had substantial contacts with the plaintiff’s home state, or where the defendant can be served in the plaintiff’s home state, usually, but not always, the forum will apply its own law allowing recovery. If, however, suit is brought in the defendant’s home state, that state will always apply its own law dening recovery.

The seventh rule of choice of law is that where the law of the state in which an act or omission occurs reflect an admonitory or regulatory policy, the defendant will be held liable even if the act causes harm in another state. It may be noted that in that situation, the out-of-state defendant will be subject to suit in the state of injury under its long-arm act.

The eighth rule of choice of law deals with the unprovided-for case. Recovery will usually be allowed even when the accident occurs in the victim’s home state, but there are some exceptions, as in *Neumeier*.

The ninth rule of choice of law covers the situation in *Cooney*. It is that the tort liability of an employer to an employee who is covered by worker’s compensation or liability to a third party for contribution is determined by the law of the state where the employer has taken out worker’s compensation to cover the particular employee.

112. I last taught Conflicts in the 2017–2018 academic year. Beginning in the 2018 and 2019 academic years, I took three years of phased retirement, during which I taught two constitutional law courses in the Fall semester. When I left conflicts, my recollection was that about ten states continued to follow the traditional approach with the place of the wrong rule in conflicts torts cases, and the overwhelming majority of states that had abandoned the traditional approach followed the Restatement (Second)’s state of the most significant relationship, with its combination of factual contacts and choice of law considerations and general choice of law principles of Section 6 (usually, but not always, the courts following the Restatement (Second) ended up applying the law of the forum when the forum had a real interest in applying its law in order to implement the policies reflected in that law), some state followed the interest analysis with variations, such as California’s comparative impairment, and some followed Robert A. Leflar’s choice-influencing considerations. These different approaches are discussed in SEDLIER, supra note 76, at 29–43.
different views have come together on occasion in our agreement on the results in some cases. This is the essence of legal scholarship.\footnote{113}

\footnote{113} I cannot leave this festschrift without mentioning a collaboration with Professor Twerski. In the late 1980s, there was a proposal by the American Bar Association and proposed legislation in Congress to consolidate the litigation of “mass torts” in a single federal court and require that court to apply the law of a “single designated jurisdiction.” Professor Twerski undertook to challenge this litigation from a conflict of laws perspective and enlisted me to join him in the endeavor by adding a constitutional perspective. To my recollection, the proposed legislation was opposed by both the plaintiffs’ and defendants’ bars, and Professor Twerski secured a grant from the Lawyers for Civil Justice, a defendants’ bar organization, to support our research. We published an article in the Marquette Law Review, Robert A. Sedler & Aaron D. Twerski, The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain, 73 MARQ. L. REV. 76 (1989). This was followed by a response by the bill’s sponsors, Congressmen Robert W. Kastenmeier and Charles Gardner Geyh, both of whom were former members of the House Committee on Courts, Intellectual Property, and the Administration of Justice, in Robert W. Kastenmeier & Charles G. Geyh, The Case in Support of Legislation Facilitating the Consolidation of Mass-Accident Litigation: A View from the Legislature, 73 MARQ. L. REV. 535 (1989). We then drafted a response. See Robert A. Sedler & Aaron D. Twerski, State Choice of Law in Mass Tort Cases: A Response to “A View from the Legislature,” 73 MARQ. L. REV. 625 (1990). We state our objections to the displacement of state choice of law by a federally imposed law of a single designated jurisdiction rule as follows:

First, the requirement that the law of a single designated jurisdiction governs all claims arising out of the same mass tort would improperly intrude on state sovereignty. Such an intrusion would deny states the power to determine what substantive law applies to the resolution of these cases, and in many instances would require the sacrifice of vital state interests. Second, in practice, because of constitutional constraints on what state’s law can be selected to apply in a conflicts case, a federal imposed law of a single jurisdiction rule for mass torts would run counter to progressive trends in choice of law and would impose a choice of law straitjacket in mass tort cases. In the vast majority of cases, the court would be forced to choose either the totally discredited law of the place of the wrong rule of the First Restatement or an equally rigid rule of law of the place of conduct. In some cases, the court will simply run out of law, in that there will be no single designated jurisdiction whose law could constitutionally be applied to govern all the claims in the particular mass tort case.

Id. at 627 (citations and internal quotation marks omitted). I am not suggesting that our articles had anything to do with it, but Congress never enacted the proposed legislation or any other law governing choice of law in mass torts cases.