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ON TERRITORIALITY AND SOVEREIGNTY: SYSTEM SHOCK AND CONSTITUTIONAL CHOICE OF LAW

*Aaron D. Twerski**

INTRODUCTION

I have not taught conflict of laws for the past two years. I confess that after twelve years with the subject, I believed that I was suffering from "burn out." The symptoms were there: My attitude toward the judicial decisions shifted from sharply critical to sardonic and cynical. It seemed that interest analysis had become a game, with little intellectual integrity. The work product of the courts did not reflect the marvelously balanced and mature thinking of David Cavers¹ nor the brutal honesty of Brainard Currie.² In fact, few

* Visiting Professor, Boston University School of Law, Professor of Law, Hofstra University. B.S., University of Wisconsin; J.D., Marquette University. The Author gratefully acknowledges the assistance of Shlomo Twerski, a member of the *Hofstra Law Review*.

1. See, e.g., D. CAVERS, *THE CHOICE-OF-LAW PROCESS* (1965); Cavers, *Cipolla and Conflicts Justice*, 9 DUQ. L. REV. 360 (1971); Cavers, *A Critique of the Choice-Of-Law Problem*, 47 HARV. L. REV. 173 (1933). Professor Cavers' writing demonstrates a serious concern that interest analysis may lead to the adoption of a "personal law" which would operate in derogation of territorial considerations. D. CAVERS, *supra*, at 135, 150-59, 293, 299-300, 303. My territorial bias is a good bit stronger than that of Professor Cavers. See Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQ. L. REV. 373 (1971).

2. All the scholarly criticism of the work of Professor Currie notwithstanding, his work so devastated traditional theory that it became the catalytic agent for a revolution in conflicts law. For a collection of some of his more influential works, see B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963). Although he has been understandably viewed as heavily doctrinaire, see, e.g., Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 395-97 (1980); von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 933-41 (1975); Twerski, Book Review, 61 CORNELL L. REV. 1045, 1049-51 (1976), Currie demonstrated a willingness to make peace with common sense decisions. He did so even though this jeopardized the foundations of his theoretical structure. Thus, his reading of *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961), as a "moderate and restrained interpretation" of forum law, Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 757 (1963), was widely perceived as a breach of his insistence that courts should not weigh interests. See, e.g., Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROB. 732, 734 n.9; von Mehren, *supra*, at 940. Nor did Currie flinch from abandoning his supposed plaintiff bias

courts appeared to be taking the subject seriously. A heavy dose of state chauvinism bolstered at times by reliance on the "better rule of law" approach had turned one of the most intellectually exciting areas of the law into an arid wasteland.³ It became difficult to take the subject seriously when the courts treated it in a cavalier fashion. Silly interest analysis seemed to be an affront to the important jurisprudential problems which underlie choice of law and an insult to the political structure of federalism. A respite was clearly in order.

Having committed myself to teaching conflicts again this year, I had hoped that I would find that the "silly season" had come to a close and that the subject was being accorded the honor and dignity that it deserved. There was good reason for optimism. The United States Supreme Court had indicated in *World-Wide Volkswagen Corp. v. Woodson*,⁴ and *Rush v. Savchuk*,⁵ that, at least with regard to the law of personal jurisdiction, the due process clause placed restrictions on the heretofore unbridled exercise of power by state courts.⁶ It would not have taken a herculean effort to have placed

when he believed that to do so would result in "unprincipled eclecticism." D. CAVERS, *supra* note 1, at 38. For a discussion of *Bernkrant*, see note 35 *infra*.

3. See, e.g., *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973); *Wallis v. Mrs. Smith's Pie Co.*, 261 Ark. 622, 550 S.W.2d 453 (1977); *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973); *Gagne v. Berry*, 112 N.H. 125, 290 A.2d 624 (1972); *Erwin v. Thomas*, 264 Or. 454, 506 P.2d 494 (1973); *Labree v. Major*, 111 R.I. 657, 306 A.2d 808 (1973); *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

It should be noted that Professor Leflar has cautioned against automatic application of forum law through utilization of the "better rule of law" approach. See Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 298 (1966).

4. 444 U.S. 286 (1980).

5. 444 U.S. 320 (1980).

6. *World-Wide Volkswagen* reiterated the dual themes which have formed the Court's traditional grounds for restraining state court jurisdiction—fairness to the defendants and limitations on state sovereignty. Of the two, it is clear that state sovereignty considerations predominated:

[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution. . . . [T]he framers . . . intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

444 U.S. at 293. The Court then noted: "Even if the defendant would suffer minimal or no inconvenience . . . the Due Process Clause, acting as an *instrument of interstate federalism*, may sometimes act to divest the State of its power to render a valid judgment." *Id.* at 294 (emphasis added). This appears to be the consensus of both those who agree and disagree with the opinion. See Brillmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 84-85; Redish, *Due Process, Federalism, and Personal*

analogous restrictions on the more outrageously chauvinistic choice-of-law process.⁷ There was certainly a widespread belief in the trade that the Supreme Court had not granted certiorari in *Allstate Insurance Co. v. Hague*⁸ in order to affirm the decision of the Minnesota court.⁹

The educated prognosticators, myself included, were wrong. Why the Court capitulated to unrestrained state chauvinism is anyone's guess.¹⁰ The Court probably surrendered because it did not be-

Jurisdiction: A Theoretical Evaluation, 75 Nw. U.L. REV. 1112, 1118-20 (1981). Professor Redish's analysis is particularly revealing since he finds no historical support for the proposition that the due process clause was intended to serve as an instrument of federalism. *Id.* at 1120-33. It is clear that Redish would not support the denial of jurisdiction in *World-Wide Volkswagen* on "fairness to the defendant" grounds alone. *Id.* at 1137-42.

Since it is the thesis of this article that state sovereignty considerations expressed in territorial terms should severely limit the application of interest analysis to cases arising from heavily localized fact patterns, it is necessary to comment briefly on Professor Redish's thesis that interstate federalism considerations have no constitutional basis. There are differing views as to the importance of finding an explicit textual reference in the Constitution to support limitations on state power due to federalism. I agree with the position that even absent the due process clause, the inherent structure of a federal union imposes constitutional limitations on the extraterritorial reach of a state's jurisdictional power. *See* C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 8-23 (1969); Brilmayer, *supra*, at 85; Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 13 n.72 (1975).

7. Numerous commentators have made the point that the consequences of a choice-of-law decision have equal or greater impact than the mere assertion of jurisdiction. *See, e.g.*, Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 880 (1980); Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1589-92 (1978); Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33, 82 (1978). It is thus difficult to understand how sovereignty/territoriality considerations which were so crucial to the *World-Wide Volkswagen* rationale were almost totally disregarded in *Hague*. *See* *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

8. 444 U.S. 1070 (1980), *granting cert. to* 289 N.W.2d 43 (Minn. 1978).

9. *See* Martin, *supra* note 6, at 887-88. The broad consensus of articles in this symposium indicate disapproval of the decision in *Hague*. In any event, my informal discussions with colleagues in the conflicts field prior to the Supreme Court's disposition of *Hague* uncovered a strong sentiment that the case would be reversed.

10. The plurality did state "that for 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." 449 U.S. at 312-13 (Brennan, J., joined by White, Marshall, and Blackmun, JJ.). The application of this test to the facts in *Hague*, however, leaves little hope that constitutional control of choice of law is anything but a mirage. In aggregating the Minnesota contacts in *Hague*, the Court recognized interests that interest analysts themselves have discounted. Elsewhere in this symposium, Professors von Mehren and Trautman demonstrate that none of the three general conflicts approaches justify the *Hague* decision. *See* von Mehren & Trautman, *Constitutional Control of Choice of Law: Some Reflections on Hague*, 10 HOFSTRA L. REV. 35, 39-44 (1981). Professor Weintraub, who accepts the Court's result, does so by elevating the after-acquired residence contact to prominence, with the other interests cast in supporting roles. *See* Weintraub, *Who's Afraid of Constitutional Limitations on Choice of*

lieve that any of the analytical tools available for resolving the problem¹¹ were capable of curbing the excesses in the numerous choice-of-law approaches in vogue today without creating total havoc in the field. Further, there was good reason to treat constitutional choice-of-law questions with caution. Ill considered decisions in this area have haunted the reputations of even the most illustrious Justices of the Court.¹² I believe, however, that the Court was wrong and that it could have found any number of stratagems to strike down the Minnesota court's application of its own law.¹³ Even if the Supreme Court was unprepared to reach this decision, it would have been far better for the Court to have thrown up its hands in despair, conceding that it was unable to restrain interest analysis. Instead, the Court took the position that it would invalidate the choice of law of a state which had "no significant contact . . . creating state interests,"¹⁴

Law?, 10 HOFSTRA L. REV. 17, 24-31 (1981). Yet, the plurality itself refrains from such heavy reliance on this interest. 449 U.S. at 318-19 (citing *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936)).

Finally, the denial of certiorari in *Rosenthal v. Warren*, 414 U.S. 856, *denying cert. to* 475 F.2d 38 (2d Cir. 1978), gives additional weight to the conclusion that even the most localized fact patterns will not impose limitations on choice of law. In *Rosenthal*, a New York federal court ignored a Massachusetts limited recovery wrongful death statute in favor of unlimited recovery under New York law despite the fact that the defendant was a Massachusetts doctor whose malpractice was performed in a Massachusetts hospital. For a different perspective on *Rosenthal*, see Silberman, *Can the State of Minnesota Bind the Nation? Federal Choice of Law After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 103, 110-14 (1981).

11. See, e.g., Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94 (1976); Martin, *A Reply to Professor Kirgis*, 62 CORNELL L. REV. 151 (1976); Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185 (1976) [hereinafter cited as Martin, *Constitutional Limitations*]; Reese, *supra* note 6; Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449 (1959).

12. Justice Holmes wrote that "the Constitution and the first principles of legal thinking allow the law of the place where a contract is made to determine the validity and the consequences of the act." *Mutual Life Ins. Co. v. Liebong*, 259 U.S. 209, 214 (1922); see, e.g., *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149-50 (1934); *N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357, 375-77 (1918). Justice Brandeis, who dissented in *Dodge*, *id.* at 377 (Brandeis, J., dissenting), was the author of the Court's opinion in *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932).

13. The plurality could merely have declined to aggregate contacts which admittedly, see 449 U.S. at 319 (post-occurrence change of residence insufficient by itself) or conceivably, see *id.* at 320 n.29 (no view expressed as to sufficiency of other contacts) were insufficient contacts when standing alone. Indeed, the arguments in favor of each of the three stated interests are so strained that the reader is left puzzled as to why the Court felt compelled to reach the decision it did, unless the Court intended to signal state courts that it desired to wash its hands of constitutional control of choice of law.

14. *Id.* at 308.

and proceeded to find that the most specious of interests will satisfy constitutional demands. What the Court did was to fill the pages of the United States Reports with some of the silliest rhetoric imaginable.¹⁵ It gave dignity to arguments that would cause snickers if not ribald laughter if expressed in any other area of the law. Only those whose hides have been toughened by constant exposure to these non-sensical arguments would react otherwise. The court's opinion in *Hague* has left conflict of laws among those subjects which law students have dubbed with the adjective "Mickey Mouse."

A TERRITORIAL VIEW OF THE FACTS

Ralph Hague died of injuries suffered when a motorcycle on which he was a passenger was struck from behind by an automobile. The accident took place in Pierce County, Wisconsin. The operator of both the automobile and the motorcycle, as well as the decedent, were all Wisconsin residents. At the time of the accident the decedent resided in Hager City, Wisconsin, which is near the locus of the

15. See Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979). Professor Monaghan relates the following anecdote:

Taking Supreme Court opinions seriously emerged as a topic of discussion at a lunch I attended last year with several Supreme Court law clerks. Somehow we came round to a particular three-judge district court case which I confidently opined was "certain" to be reversed on the basis of principles announced in prior opinions. The clerks were models of politeness and circumspection; never once did they even intimate that the judgment would (by divided vote) be affirmed. But shortly after I had announced my views of that case, one of the clerks began to prod me, asking whether I simply took the Court's opinions "too seriously." I allowed that I had been around long enough to recognize that my notions of principled adjudication had all they could do to survive in the Supreme Court, given the force of the conflicting pressures on that body. Turning to a former student, I then engaged in what I thought to be an outstanding example of the Socratic dialogue:

Q: When you were on the law review, did you take seriously what was said in Supreme Court opinions?

A: Yes.

Q: When you spent the summer clerking for the X firm, did you take seriously what was said in Supreme Court opinions?

A: Yes.

Q: When you clerked on the Court of Appeals, did you take seriously what was said in Supreme Court opinions?

A: Yes.

Q: When you go into practice next year, will you take seriously what is said in Supreme Court Opinions?

A: Yes.

Q: Do you think it is a little odd that the only institution that does not take seriously what is said in Supreme Court opinions is the Supreme Court itself?

A: (A smile).

Id. at 1-2 (footnote omitted).

accident.¹⁶ Neither the operator of the motorcycle nor the operator of the automobile carried valid insurance,¹⁷ but fortunately for the decedent's wife, Wisconsin law mandated uninsured motorists coverage.¹⁸ The decedent was the owner of three cars, all insured by Allstate under insurance contracts entered into in Wisconsin. The uninsured motorist coverage was limited to \$15,000 for each automobile. Mrs. Hague argued that the uninsured motorist coverage for all three automobiles should be stacked, permitting her to recover \$45,000 against the insurance company.¹⁹ The insurance contract, however, had a provision which disallowed stacking, and at the time the provision was drafted, Wisconsin law upheld the right of insurers to contract for antistacking clauses.²⁰

If at this point the widow were to suggest that the antistacking clause be invalidated because the neighboring state of Minnesota would strike down the clause, one would raise one's eyebrows and ask, "So what? What has that got to do with this case?" Mrs. Hague would respond that the Minnesota rule should prevail because (1) her husband commuted to work in Minnesota for fifteen years; (2) the defendant insurance company was doing business in Minnesota; and (3) subsequent to the death of her husband, Mrs. Hague married a Minnesota resident and moved to Minnesota.

Had I been judging this case, I would have reacted in the following manner: I would have first wished Mrs. Hague a hearty Mazel Tov on her remarriage, fairly certain that she did not choose a husband based on his home state's laws relating to stacking. I would have been totally unimpressed with the fact that Allstate was doing business in Minnesota, since Allstate was doing business in all fifty states, and its business in Minnesota was totally unrelated to the Wisconsin insurance contracts. Finally, I would have questioned the relevance of Mr. Hague's employment to his Wisconsin insurance contracts.

THE AFFECTED INTERESTS

I will not expend any energy analyzing the argument that doing business in a state is grounds for application of that state's law.

16. 289 N.W.2d 43, 44 (Minn. 1978), *aff'd on rehearing, id.* at 50 (Minn. 1979), *aff'd*, 449 U.S. 302 (1981).

17. *Id.* at 45.

18. WIS. STAT. ANN. § 632.32(4) (West 1980).

19. 289 N.W.2d at 45.

20. See *Nelson v. Employers Mut. Cas. Co.*, 63 Wis. 2d 558, 217 N.W.2d 670 (1974).

Whatever is to be said in favor of jurisdiction based on generally affiliating circumstances,²¹ there is nothing to be said for it as a choice-of-law principle. No scholar has, to my knowledge, supported such an approach.²² The less said about it the better.

The employment relationship and the post-accident change of domicile deserve more serious discussion because they point to interests which have been accorded weight by both courts and scholars.²³ Interest analysts argue that a state has an interest worthy of having its law applied when there will be social consequences in the state or when the state will in some way be affected. The *Hague* plurality found that this approach has constitutional significance:

That Mr. Hague was not killed while commuting to work or while in Minnesota does not dictate a different result. To hold that the Minnesota Supreme Court's choice of Minnesota law violated the Constitution for that reason would require too narrow a view of Minnesota's relationship with the parties and the occurrence giving rise to the litigation. An automobile accident need not occur within a particular jurisdiction for that jurisdiction to be connected to the

21. See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). In regard to the possibility of limitations on *Perkins* imposed by the Court in *Shaffer v. Heitner*, 433 U.S. 186 (1977), see *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979). For a pre-*Shaffer* analysis of *Perkins*, see von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1178-79 (1966).

22. See generally Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315, 1320 (1981); Silberman, *supra* note 6, at 97-98.

23. Post-occurrence change of residence was raised in *Gore v. Northeast Airlines, Inc.*, 373 F.2d 717 (2d Cir. 1967); *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968); *Haines v. Mid-Century Ins. Co.*, 17 Wis. 2d 442, 177 N.W.2d 328 (1970). It was taken into account as a factor in applying forum law in both *Miller* and *Haines*. Several scholars have argued that it may legitimately be considered when applying interest analysis. See R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 6.28 (2d ed. 1980); Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 U.C.L.A. L. REV. 181, 241-42 (1977); Note, *Post Transaction or Occurrence Events in Conflict of Laws*, 69 COLUM. L. REV. 843, 865 (1968).

The employment relationship giving rise to a supposed interest in the welfare of Minnesota employees, conferring upon them the benefits of Minnesota's antistacking policy, has not to my knowledge ever been stretched to create a legally cognizable multistate interest. Analogues in conflicts literature are, however, not hard to find. Courts have given credence to interests that are equally implausible. See, e.g., *Hernandez v. Burger*, 102 Cal. App. 3d 795, 802, 162 Cal. Rptr. 564, 568 (1980) (California held Mexico has interest in limiting liability of California drivers in order to increase tourist trade in case of Mexican plaintiff injured in Mexico by California driver); *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965). (New York suggested Colorado had interest in applying its host-guest rule to grant injured parties in other cars priority over ungrateful guests). See generally B. CURRIE, *supra* note 2, at 703-04; Brilmayer, *supra* note 22, at 1327 n.60.

occurrence. Similarly, the occurrence of a crash fatal to a Minnesota employee in another state is a Minnesota contact. If Mr. Hague had only been injured and missed work for a few weeks the effect on the Minnesota employer could have been palpable and Minnesota's interest in having its employee made whole would be evident. Mr. Hague's death affects Minnesota's interest still more acutely, even though Mr. Hague will not return to the Minnesota workforce. *Minnesota's workforce is surely affected by the level of protection the State extends to it, either directly or indirectly. Vindication of the rights of the estate of a Minnesota employee, therefore, is an important state concern.*²⁴

Similarly, with regard to Mrs. Hague's post-accident change of domicile, the Court said:

Respondent's residence and subsequent appointment in Minnesota as personal representative of her late husband's estate constitute a Minnesota contact which gives Minnesota an interest in respondent's recovery, an interest which the court below identified as full compensation for "resident accident victims" to keep them "off welfare rolls" and able "to meet financial obligations."²⁵

My initial reaction to these arguments is that they are pure unadulterated foolishness. They were manufactured to meet the exigencies of the case, and were limited only by the imagination of counsel and by the guile of the Court. The Supreme Court could have said as much and dismissed these arguments as sheer sophistry.²⁶ The Court need not be taken for the town fool.²⁷ Wisconsin law clearly had claim to application, and should not have been set aside by arguments which were devoid of elementary common sense. If federalism and state sovereignty are issues to be dealt with seriously by the

24. 449 U.S. at 314-15 (emphasis added) (footnotes omitted).

25. *Id.* at 319 (quoting 289 N.W.2d at 49).

26. If the Minnesota court sought to apply its antistacking policy to favor a plaintiff who stayed for one night in a Minnesota motel on the premise that it would assure payment of Minnesota motel bills, I believe that the Supreme Court would not recognize such a policy as a valid multistate interest to oust the otherwise applicable Wisconsin law, even if Minnesota considered payment of motel bills a legitimate domestic interest. Professor Brilmayer has sought to develop a litmus test for the validity of states' assertions of interest. For an evaluation of her position, see text accompanying notes 42-63 *infra*.

27. Although there was mention made of the employment relationship in the Minnesota Supreme Court opinion, 289 N.W.2d at 47, the Minnesota court did not develop the notion that the "well being of its workplace" was affected. Thus, the United States Supreme Court was responsible for creating this interest out of whole cloth. Commentators have questioned the appropriateness of the Court's creating interests when the state had not done so. *See, e.g.,* Brilmayer, *supra* note 22, at 1319-20; Weintraub, *supra* note 10.

Supreme Court in a choice-of-law case, the Court should demand palpable reasons rather than empty verbalizations before setting aside the law of the only state that had any apparent claim to application. Nevertheless, let us assume that Minnesota's interests truly were affected. Should that alone be a sufficient basis for the application of Minnesota's law?

Consider the following hypothetical. I am a visiting professor at Boston University Law School on leave for the year from Hofstra University Law School. When I accepted the visitorship at Boston University, I did so with the understanding that I would be commuting from New York. Several nights each week I take lodging in a Boston motel. The motel attracts other academics such as myself who teach in the intellectually rich Boston area. Assume that the room next to mine is rented to a music professor who insists on playing classical jazz at 2:00 a.m. Assume further that when I moved in I introduced myself to my neighbor and told him that I was a New York domiciliary; he informed me that he too hailed from the Empire State.

Assume that as a result of my neighbor's noisemaking I become irritable and crotchety. When I return home to New York I become impossible to live with for two days until I get enough sleep. Assume further that Massachusetts does not recognize a cause of action for loss of consortium arising from nuisance actions, but that New York does. Would it be legitimate for New York to apply its own law to this case simply because New York's interests are affected?²⁸ I

28. Those commentators who would treat common domicile (or domicile with similar laws) as false conflicts cases would disagree with the suggestion that it would be unconstitutional for New York to apply its consortium rule to the Massachusetts based injury. See D. CAVERS, *supra* note 1, at 148-59; R. WEINTRAUB, *supra* note 23, §§ 6.9-6.12, at 280-91. See generally e.g., *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

Rule one of *Neumeier* provides that in host-guest cases, the law of the common domicile shall govern. Although the *Neumeier* rules are not necessarily dispositive in non-host-guest situations, they do reflect a strong opinion that the common domicile problem can be resolved by a simple rule. See Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 319, 333-34 (1972); cf. Twerski, *Neumeier v. Kuehner: Where Are the Emperor's Clothes*, 1 HOFSTRA L. REV. 104, 108 (1973).

Casey v. Manson Constr. & Eng'r Co., 247 Or. 274, 428 P.2d 898 (1967) has interesting ramifications for the resolution of the hypothetical offered in text. In *Casey*, the plaintiff and her husband were domiciled in Oregon, a loss of consortium jurisdiction. The plaintiff was injured on an employment project in Washington; the defendants were both corporations located in Washington, a no loss of consortium jurisdiction. The defendants were also licensed to do business in Oregon. The court could have sought to treat the Washington corporation, which did business in Oregon, as a partial Oregon domiciliary. It did not. Instead it focused on

would think not, even though the likelihood is that the interests of New York are truly implicated: When I don't get a good night's sleep I am not to be lived with, and if this were to happen week after week, New York's interest in domestic tranquility could be seriously affected. Why then should it be unconstitutional to apply New York law to grant loss of consortium recovery for nuisance?

In order to answer this question, it would be helpful to step back a bit and take note of the distance that has been traveled in choice-of-law thinking over the past several decades. In the 30's and 40's, when the thinking of the first *Restatement* was dominant, Cook and Cavers professed that it was unwise to determine the application of law to a given set of interstate facts without examining the policy of the supposedly conflicting laws.²⁹ There was much to be learned by examining how the policies behind the conflicting laws related to the facts of the case at bar. This approach thereby added a policy dimension to the analysis of interstate fact-law patterns.

In *Hague* we have come full circle, as the decision evidences an approach to the choice-of-law process that subordinates considera-

the heavily localized activity of the defendant in this case. Since the construction project was Washington based, the court found that Washington had a substantial interest in applying its law denying recovery to conform with the defendant's legitimate expectations. The court's language is instructive:

Washington has a legitimate concern with whether her residents engaged in a construction job there—in this case a job related to the public interest—should be disappointed in their reasonable expectation that the extent of their liability for negligent conduct in Washington be governed by the law of that state, regardless of the domicile of the injured plaintiff.

Id. at 291, 428 P.2d at 906 (emphasis added). The court was concerned with the expectation that the law of a state in which localized activity had taken place should govern, whatever that law may be. Since loss of consortium is primarily a derivative damages issue, it cannot affect expectations at the primary behavior level. If this line of reasoning were to be followed, the strong Massachusetts localization of the fact pattern in the hypothetical would demand the application of Massachusetts law. *But see* D. CAVERS, *supra* note 1, at 156-57. It is difficult to evaluate the Oregon court's opinion of the role that the localization of the events would play in its decision in *Erwin v. Thomas*, 264 Or. 455, 506 P.2d 494 (1973). In *Erwin*, the defendants were Oregon residents while the plaintiff and her injured husband were Washingtonians. The accident occurred in Washington. The Oregon court decided that neither Oregon nor Washington had a vital interest in applying its own law. As a matter of convenience, Oregon law, granting recovery, was applied. *Id.* at 458-60, 506 P.2d at 496-97. There is no indication in *Erwin* whether the facts were heavily localized in Washington or whether there was nothing more than a two-vehicle crash in Washington.

It should be noted that the more dated authority focused on the place of injury rather than the impact on the marital relations. *See, e.g.,* *Sesito v. Krop*, 297 F.2d 33 (7th Cir. 1961); *Jordan v. States Marine Corp.*, 257 F.2d 232 (9th Cir. 1958); *McVickers v. Chesapeake O. Ry.*, 194 F. Supp. 848 (E.D. Mich. 1961).

29. *See* D. CAVERS, *supra* note 1; W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICTS OF LAWS* (1942).

tion of the facts of the case to consideration of state interests and policies. Before the conflicts revolution, we were prepared to analyze choice-of-law cases without paying significant attention to policy. Today we are prepared to talk about social policy and how law affects interests of states without paying significant attention to the interstate fact pattern. This approach raises serious constitutional problems. State sovereignty implies a right of a state legal system to govern essentially local disputes. A dispute does not change from local to interstate in nature merely because effects will be felt in other jurisdictions. In a federal system which provides for a constitutional right of free travel and which zealously protects interstate commerce, there is almost no local transaction that does not have some interstate ramifications. To say, therefore, that all interstate ramifications that can be expressed in the form of some state interest are sufficient to create a choice-of-law question would establish insanity as the norm for all litigation. Such is not the way of the world. In short, I believe that before a court can apply interest analysis it must have before it a case which is not essentially local in character.

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 conflicts case is a wild card—a highly irregular occurrence which cannot become the norm without seriously disturbing the regular operation and expectancies of the legal system. 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.*³⁰

30. In a poetic mood I once observed:

When I wake in the morning I expect the sun to shine. In the evening, I expect darkness to fall. Do these expectations have juridical significance? I believe they do. Those positing an interest analysis would argue that their significance arises from the fact that expectations affect conduct. I undertake certain activities with an awareness of the amount of light that will be available to me. I suggest, however, that expectations play a far more potent role in our life style. There is a regularity and rhythm to life in which the familiar—the habitual plays a vital role. At times it

It is because of this concern that the discussion of expectations in the plurality, concurring, and dissenting opinions in *Hague* is a great disappointment to me. Noting that Mr. Hague's policy was for automobile insurance, and that the defendant was a multistate automobile insurer, the opinions conclude that there was no unfair surprise and no disappointed expectations.³¹ If, however, party expectations are alone relevant, and a court is not required to consider expectations arising from the inherent structure of federalism, it becomes too easy to isolate some factor that can justify applying a state's law. 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.³²

SYSTEM SHOCK

If state sovereignty implies an ability to control the legal result of essentially local controversies, then events that are centered from genesis to conclusion within the geographical limits of one sovereign cannot casually be removed from the lawmaking domain of that sovereign. The presumption is clearly in favor of the territorial result. Separating the law from the flesh and blood of the case would de-

affects conduct but even when it does not affect conduct, it affects our sense of tranquillity [*sic*]. A meteor streaking along in the sky thousands of miles from us is of interest because it is a departure from the norm. We can take this departure from the norm with a fair degree of equanimity. If, however, we should go outside on a clear night in which the moon is clearly visible and find no stars it would upset us no end. It would upset us not because we depend on starlight, but because we have the right to believe in the regularity of nature.

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 [*sic*] 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 a 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.

Twerski, *supra* note 1, at 381-82 (footnote omitted). See also von Mehren, *supra* note 2, at 945.

31. 449 U.S. at 317-18 (plurality opinion), 329-30 (Stevens, J., concurring in the judgment), 336 (Powell, J., joined by Burger, C.J., & Rehnquist, J., dissenting).

32. It would have been helpful if the Court had focused on the expectation question as I have defined it. That would have highlighted the essentially local nature of the controversy and raised the question whether the application of Minnesota law meets the minimum standards of what Professor von Mehren has rightly called "comprehensibility." von Mehren, *supra* note 2, at 945.

mean the authority and dignity of the sovereign in which the events took place. Anyone who has ever taught conflict of laws will agree that interest analysis accomplishes just that result. We all know too well the disbelief with which interest analysis is received by students. It takes several classes to convince them that the considerations which today have become standard fare are to be treated seriously. The credibility gap stems, in my opinion, from their inability to accept the idea that a sovereign could have its lawmaking authority over a controversy, which has transpired within its geographical bounds, so facilely removed.

Consider the following fact pattern as an example of this point: Marcia and Catherina, both New York residents, were students at Michigan State University; they met for the first time when they were assigned to be roommates in the dormitory. Several months into the school semester they decided to take a weekend trip to Detroit. Enroute they were involved in an automobile accident. Immediately following the accident the police took Catherina and Marcia to a Michigan hospital, where Catherina died as a result of the injuries she suffered in the crash. Marcia was driving at the time of the accident; the car was registered and insured in New York. Under New York law a guest may recover from a host driver by proving ordinary negligence on the part of the driver. In Michigan there is a guest statute in force which requires that a guest prove willful misconduct or gross negligence in order to recover. Since the case involved a potential reckless homicide, the police investigated and found that Marcia was merely negligent and that criminal charges could not be brought.

Those familiar with conflicts cases will recognize a striking similarity between these facts and *Tooker v. Lopez*.³³ The majority in *Tooker* held that New York law governed, finding that the case was a false conflict with Michigan law having no claim to application.³⁴ It is hard to imagine a greater insult to the sovereignty of Michigan. The set of events was wholly contained within Michigan: The students had oriented their lives in Michigan for a rather long period of time, they had begun their trip and were to have ended it in Michigan, and Michigan had a statute on point. Further, the legal order of

33. 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 319 (1969). Conflicts cognoscenti will readily recognize that the hypothetical varies somewhat from the actual facts in *Tooker*. They were changed to help dramatize the territorial implications of the case. The changed facts would in no way have altered the opinion of the New York Court of Appeals.

34. *Id.* at 576, 249 N.E.2d at 398, 301 N.Y.S.2d at 525.

Michigan had been involved in the case in many ways, including a police investigation of the crash, consideration of criminal prosecution, and a decision that the driver had not acted recklessly.³⁵ And yet the New York law, granting a recovery, was applied. The notion that New York domiciliaries can bring their legal rights along with them to another jurisdiction, even for a relationship which did not have its origin in New York, presents the spectacle of two individuals who meet for the first time in Michigan and form a temporary government in exile for the purpose of avoiding the Michigan host-guest statute. No intellectualization of hypothetical or real interests can overcome the facts in this case.

I find the assault on sovereignty to be so extreme and the corresponding shock to the expectations of the legal system so onerous in *Tooker* that the full faith and credit clause is brought into play.³⁶ For the same reason, I believe that sovereign shock demands the result in *Bernkrant v. Fowler*,³⁷ and the reversal of such cases as

35. In the hypothetical variant set forth, the Michigan police investigated whether the driver was reckless or merely negligent. Although the purpose of this investigation was to determine criminal liability rather than civil responsibility, the State still examined the very conduct relevant to the issue of host-guest recovery. There is nothing logically inconsistent with this aspect of the conduct being of interest to Michigan in the criminal context and irrelevant to it in the civil context. Under interest analysis, criminal liability would focus on the conduct of the defendant, a matter which Michigan has a clear interest in regulating. The civil action, however, focuses not on conduct *qua* conduct, but as a predicate to recovery. Since Michigan does not seek to protect insurers who have covered New York domiciliaries from potential collusive action, there is no reason to prevent recovery. Nonetheless, there is a touch of irony in Michigan, the locus of the accident, investigating the very conduct which it believes should be the sole element for determining recovery and finding that it is absent from the scene, and then contending that it has no interest in the civil side of that issue. See Twerski, *supra* note 28, at 110 (host-guest issue may have regulatory purpose).

36. There has been much discussion on whether the due process clause or full faith and credit clause should govern issues of federalism. See note 6 *supra*. My own predilection is for the full faith and credit clause which is a superior tool for controlling questions dealing with the inherent structure of federalism. Accord, Martin, *Constitutional Limitations*, *supra* note 11, at 186. But see Kirgis, *supra* note 11, at 150 (both due process and full faith and credit clauses provide meaningful choice-of-law limitations).

37. 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961). I do not mean to suggest that if California had a true procedural policy that it could not refuse to enforce the oral contract in *Bernkrant*. It is my intent, however, to disagree with Justice Traynor when he states: "We have no doubt that California's interest in protecting estates being probated here from false claims based on alleged oral contracts to make wills is constitutionally sufficient to justify the legislature's making our statute of frauds applicable to all such contracts sought to be enforced against such estates." *Id.* at 594, 360 P.2d at 909, 12 Cal. Rptr. at 269 (citations omitted).

It will be recalled that *Bernkrant* was decided on two possible fact patterns: (1) all parties were domiciled in Nevada when the oral contract to make a will was made, *id.*; and (2) the defendant was a California domiciliary at the time of the contract. *Id.* at 596, 360 P.2d at 910,

Rosenthal v. Warren,³⁸ *Lilienthal v. Kaufman*,³⁹ and *Blamey v. Brown*.⁴⁰ It goes without saying that I also believe that *Hague* was a constitutionally unsound decision.

There is another reason that helps buttress this conclusion. There has been much discussion in the literature and the judicial opinions of the hypothetical and highly ephemeral nature of the interests which support application of forum law.⁴¹ Professor Brilmayer has recently suggested that in reviewing choice-of-law decisions, the Supreme Court should not address the sufficiency of any given interest, but should rather address the simple *existence* of the interest at the domestic level.⁴² She argues convincingly that the failure to do this will turn constitutional control of choice of law into a mockery.⁴³ Constitutional law would be at the mercy of state courts

12 Cal. Rptr. at 270. Under either of these alternatives it is clear that the entire transaction was centered in Nevada and that only its law had a claim to application.

To clarify my position, if the law-fact pattern were reversed so that the entire transaction was centered in California, and the defendant then moved to Nevada where oral contracts to make a will are valid, I would argue that the contract must be invalidated and that such a result would be constitutionally mandated. See Twerski, *Choice-of-Law in Contracts—Some Thoughts on the Weintraub Approach*, 57 IOWA L. REV. 1239, 1240-42 (1972). This hypothetical variant of *Bernkrant* squarely raises the substantive choice-of-law question since Nevada, the enforcing state, has no statute of frauds. It thus has no procedural policy to rely on. If California's statute of frauds has substantive goals, then by enforcing the contract it would be setting aside the only territorially applicable law. See Cavers, *Oral Contracts to Provide By Will and the Choice-of-Law Process: Some Notes on Bernkrant*, in PERSPECTIVES OF LAW—ESSAYS FOR AUSTIN WAKEMAN SCOTT 38, 60 (R. Pound, E. Griswold & A. Sutherland eds. 1964).

38. 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973). Professor Reese also believed that *Rosenthal* was wrongly decided. Reese, *supra* note 6, at 1605.

39. 239 Or. 1, 395 P.2d 543 (1964). See also Reese, *supra* note 6, at 1597.

40. 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980).

41. Professor Rosenberg's strong statement on this topic remains to this day unrebutted by the interest analysts. Commenting on *Kell v. Henderson*, 26 A.D.2d 595, 270 N.Y.S.2d 552 (1966), he said:

Searching for governmental interests presupposes that the purposes behind substantive rules are so clear, so singular, so unequivocal that we can hope to discover them with some certainty and some consensus. This is at odds with reality. Even the simple rules that raise rights and duties with regard to personal injuries are a composite of thrusts and counter-thrusts of many kinds. For instance there are many substantive rules favoring recovery for negligent injuries; but contributory negligence, assumption of risk, workmen's compensation exclusions and other rules are opposed to recovery. To try to bring all the huffing and puffing together into a policy that runs clearly in one direction and that has a measurable intensity that permits comparing it with some contrary policy is, in my judgment, pure fantasy.

Rosenberg, *Two Views on Kell v. Henderson*, 67 COLUM. L. REV. 459, 464 (1967); accord, Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 559-60 (1971).

42. Brilmayer, *supra* note 22, at 1336.

43. *Id.* at 1335.

which could create arbitrary or non-existent state interests for the sole purpose of resolving a choice-of-law problem. For example, Professor Brilmayer demonstrates the invalidity of Minnesota's employment interest in *Hague*.⁴⁴ The connection between Mr. Hague's Minnesota employment and the antistacking provision in the insurance contract had no domestic relevance, which, she claims, is the necessary minimum for application of interest analysis.⁴⁵ Without domestic relevance, an alleged state interest serves only to control the result in a choice-of-law case, and thus invades the sovereignty of another state without any implications for the forum. It is, she contends, the proverbial cheap shot.⁴⁶

I find it uncomfortable to criticize a fellow territorialist; we are still so few in number that we can hardly enjoy the luxury of attacking the work product of those in our own camp.⁴⁷ I fail, however, to understand why a state may not have an interest in a multistate case which does not stem from the same source as its domestic interests. It is one thing to say that a court must recognize bona fide domestic interests and carefully review multistate interests to assure that states do not carelessly disregard the interests of other states. It is quite another to proclaim that the multistate policies of the several states should be discounted entirely.⁴⁸ A multistate case does, after all, involve more than one state; it raises concerns about how one is to treat a visitor, a stranger, or a halfbreed fact pattern. Why can Minnesota not legitimately concern itself with the employment con-

44. *Id.* at 1341-47.

45. *Id.* at 1328-33.

46. Professor Brilmayer maintains:

As in commerce clause cases, constitutional limits regarding credit to judgments, jurisdiction, and choice of law exist because states are likely to be insufficiently sensitive to the needs of the federal system. It would thus be inconsistent with these limitations to give states effective authority to decide their scope. Peculiarly multistate policies are suspect in ways that domestic policies are not, for the political safeguards accompanying adoption of domestic rules are absent. A state presumably formulates its internal law after careful consideration of all sides of the issue; proponents of each side are represented in the decision-making process. But there are no similar constraints on the formulation of multistate policy. Because a state does not bear the costs of its own overreaching, one state is unlikely to consider adequately the federal interest in protecting the needs of others.

Id. at 1325-26 (footnote omitted).

47. Things are looking better for territorialists. The works of Professors Reese, Martin, Kirgis and even perhaps Professor Silberman have a distinct territorialist cast. *See* Kirgis, *supra* note 11; Martin, *Constitutional Limitations*, *supra* note 11; Reese, *supra* note 6; Silberman, *supra* note 6.

48. *See* Brilmayer, *supra* note 22, at 1326, 1335.

tact in a multistate situation even if Minnesota would disregard that contact in a domestic situation? Yet, Brilmayer proclaims that the choice-of-law process only becomes operative if a state has regulated the underlying issue at the domestic level.⁴⁹ She ultimately perceives a multistate interest as insufficient to justify applying a state's law because this interest will impact on other states and their right to control matters legitimately within their domain.⁵⁰ Thus, the pertinent question is not whether a forum has good reason to apply its law, but whether the application of the forum's law is an intrusion on another state's legitimate right to govern.

In short, Professor Brilmayer argues convincingly as follows: (1) If a contact with a state expressing an interest in a multistate case is one which the state utilizes for the regulation of purely domestic cases, then the interest is beyond constitutional attack.⁵¹ (2) The Supreme Court's function is to satisfy itself of the *existence* of such a domestic interest, rather than pass on the *sufficiency* of the interest.⁵² (3) Although the Supreme Court must defer to domestic interests which are found to have objective existence, the Court cannot constitutionally defer to a state's multistate policies; this would give the states control over matters which are peculiarly within the province of the Court.⁵³ (4) Domestic policies must be evaluated with care, since under modern interest analysis, domestic interests are often multistate policies in disguise.⁵⁴ Brilmayer fails, however, to adequately answer the following questions: (1) What should be the constitutional limits of a state's multistate policies?⁵⁵ (2) If, as Brilmayer infers, a state's multistate policies may never go beyond incidental domestic regulation, why is this an appropriate limitation? (3) Why should a state with an objectively verifiable domestic interest be beyond constitutional attack when another state with the same interest, expressed as part of a multistate policy, would be in violation of the due process clause? The intrusion into the sovereignty of the state whose law would otherwise apply would be identical in both

49. *Id.* at 1328-41. It should be noted that Professor Brilmayer makes allowance for choice-of-law policy to operate within constitutional constraints, once the existence of a domestic regulatory policy has been established. *Id.* at 1327-28.

50. *Id.* at 1329-30.

51. *Id.* at 1336.

52. *Id.*

53. *Id.* at 1318-28.

54. *Id.* at 1328-31.

55. Brilmayer suggests that other constitutional restraints may limit choice-of-law policy even if a domestic regulatory interest is established. *Id.* at 1348-49.

cases.

I do not mean to suggest that cases can be readily found in which states have expressed the desire to regulate at the multistate level despite the absence of a domestic analogue.⁵⁶ Nonetheless, the argument is theoretically correct and of immense practical significance since every choice-of-law case is in truth a case in which the state has no domestic analogue. In *Tooker v. Lopez*,⁵⁷ why is it significant that New York has an interest in permitting host-guest re-

56. Professor Brilmayer has called my attention to *Jones v. Helms*, 101 S. Ct. 2434 (1981), a case in which the Court upheld a Georgia statute which provides that a parent who willfully and voluntarily abandons his or her dependent child is guilty of a misdemeanor, but that those parents who commit the offense (child abandonment) within Georgia and thereafter leave the state are guilty of a felony. The statute was attacked as an infringement of the constitutional right to travel.

Jones bears some relevance to the issue of whether a state may have a separate cognizable multistate interest even though it does not regulate at the domestic level. The fact that Georgia penalizes extraterritorial abandonment more seriously than it does in-state abandonment would seem to support the thesis that domestic regulation need not be the *sine qua non* for a multistate interest. Indeed, the Georgia Supreme Court in *Garren v. State*, 245 Ga. 323, 264 S.E.2d 876 (1980), said that penalty enhancement serves "the legislative purpose of causing parents to support their children since the General Assembly could have concluded that the parental support obligation is more difficult to enforce if the parent charged with child abandonment leaves the state." *Id.* at 325, 264 S.E.2d at 878 (citations omitted).

Although *Jones* does suggest some support for my thesis, the thrust of the Court's reasoning was that the defendant's guilty plea to the felony was an acknowledgement that he had committed a misdemeanor before he left Georgia. *See* 101 S. Ct. at 2440. The Court said that it was aware of no authority that suggests that a person who has committed an offense punishable by imprisonment has an unqualified right to leave the jurisdiction prior to arrest or conviction. *Id.* By utilizing this rationale, the Court is cutting back on the multistate interest and assimilating the fleeing with the domestic crime.

I admit that it is difficult to identify cases where multistate interests have mandated the application of domestic law in the absence of a domestic interest. As I have indicated in text, however, there is no reason that Minnesota could not decide to regulate out-of-state employees on the basis of their employment contact even though it regulated domiciliaries on the basis of non-employment contacts. Thus, for example, it might assure adherence to its automobile insurance coverage requirements at the domestic level by requiring all Minnesota residents to register and insure their cars in-state. It might also mandate that permanent employees, who use their cars for daily commuting, register their cars in Minnesota and obtain the degree of coverage required by Minnesota as a prerequisite to registration. Indeed, Minnesota's concerns might be significantly different: For residents it might seek to provide minimum levels of protection in the best sense of state paternalism. For out-of-staters it might impose similar or scaled down benefits to assure that the state does not have to bear the burden of their hospitalization.

The arguments presented here are of only theoretical importance. The true difficulty with the Brilmayer argument stems from its unwillingness to recognize that choice-of-law policies must play an important constitutional role in limiting a state with an objectively verifiable domestic interest from stepping on the sovereignty of another state which is the territorial center of the events.

57. 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

covery in a purely domestic case? Why should the resolution of that question be significant in determining the legitimate reach of New York's policy and the appropriateness of its invasion of the sovereignty of Michigan? Professor Brilmayer does not claim that her thesis is the sole test for constitutional choice of law.⁵⁸ She admits that constitutional values other than sovereignty may be implicated and may require the preference of one state's interest over another.⁵⁹ Nonetheless, it is quite clear that she views the domestic-relevance test as the one which will establish the base line for sovereignty concerns.⁶⁰ If a state does not regulate at the domestic level it cannot regulate at the conflicts level. However, as Professor Brilmayer has so brilliantly demonstrated in an earlier article,⁶¹ domestic regulation tells us nothing about a state's interest at the conflicts level. The two are totally unrelated. To now suggest that domestic regulation should become the operative test for sovereignty at the conflicts level is, if not illogical, certainly ironic. Too little information is provided by the inquiry to make it the test for concerns which must perforce be the primary limiting factor to prevent states from running wild and destroying the balanced structure of a federal union.

At one point, Professor Brilmayer notes that "[e]ach state has a prima facie right to regulate domestic contacts—person, property, or events affiliated with the state—but a state generally has no business regulating circumstances connected only with other states."⁶² In view of the conflicts issue, the latter half of this statement begs the question. There is more to be gained by defining the prima facie right of a state to regulate local controversies. The concepts of state sovereignty and territorial integrity are crucial to this inquiry. The solution does not lie in characterizing multistate interests as less worthy of recognition than true domestic interests; both will have to take a back seat to territorial considerations when a case is sufficiently localized in its facts. I believe that Professor Brilmayer will find that the implications of her analysis will drive her further into the territorialist camp.

If Professor Brilmayer were correct in her contention that the existence of domestic interests is a necessary predicate to application of a state's law, then she would also be correct in the methodology

58. See Brilmayer, *supra* note 22, at 1348-49.

59. *Id.*

60. *Id.*

61. Brilmayer, *supra* note 2, at 398-99.

62. Brilmayer, *supra* note 22, at 1330.

she has presented for determining the existence of such domestic interests. If, however, conflict or multistate interests are sufficient, and the only prerequisite to the application of those interests is that they be legitimate, then we face a very different problem. The source of the problem is the application of law to a multistate fact pattern, a unique situation which entails defining the state's interest in a multistate setting. There is, as yet, no simple method of verifying the legitimacy of such an interest. The only check is the Supreme Court, which has now indicated that it is not prepared to exercise this supervisory power in any meaningful way. Thus, an institutional imbalance exists: On the one hand, we have solid territorial fact patterns which implicate state sovereignty at a significant level; on the other hand, we have interests which are inherently unverifiable.⁶³ It will do no good to point to purely domestic cases to help verify these interests. When we seek the application of the domestic law to the multistate fact pattern, we are by definition facing a question not addressed by domestic law. I am not suggesting that if some method of verification became available that the attack on state sovereignty resulting from interest analysis would suddenly become palatable to me. Rather, I only wish to point out a fact of life. State sovereignty has been undermined by interest analysis, permitting the erosion of the sovereign's lawmaking authority in cases in which the territorial dimension of the case was unquestionable, and the multistate interests were both ephemeral and unverifiable.

63. My colleague, Professor Henderson, in a manuscript tentatively entitled *Beyond Fairness and Efficiency in Tort Theory: A Process Perspective* (to be published in *Cornell Law Review*, 1982), identifies four norms necessary for optimal adjudicative behavior in tort litigation. They are comprehensibility, verifiability, conformability, and manageability. He argues that when litigation routinely disregards these norms it loses credibility. Henderson demonstrates that courts limit the scope of their substantive rules by assuring themselves that such rules do not overstep these process norms.

In regard to verifiability, Henderson contends that if litigants are to be given an opportunity to present proofs in support of their arguments, the rules of decision must refer to facts that can be verified objectively. Another threat to verifiability relates to the need for courts to address "What would have happened if . . . ?" questions. When attention focuses on events that never occurred and circumstances that never existed, he contends that proof gives way to speculation.

The Henderson arguments are of more than passing interest to conflicts jurisprudence. If we reject Professor Brilmayer's approach that the constitutional validity of interest analysis is to be decided on the basis of domestic relevance, then we are faced with highly speculative multistate interests competing with territorially oriented fact patterns. The interests *qua* interests are unverifiable. Their legitimacy cannot be checked against any norm except common sense. That would be a difficult enough burden even if there was evidence that judges checked out these notions with their spouses. It is a fortiori questionable when these unverifiable interests must displace the law of a jurisdiction in which the entire transaction was centered.

PURPOSEFULNESS

Hague has drawn heavy fire from many sources.⁶⁴ Professors Reese and Martin have, in this symposium and elsewhere, expressed their displeasure with the "anything goes" approach.⁶⁵ Professor Silberman's provocative contribution to this symposium acknowledges the need for constitutional limitations in cases where the state claims a domiciliary interest in its plaintiff as the sole source of its claim to the application of its law. She suggests that before a defendant can be subjected to foreign law, it is necessary to establish "the purposefulness of a particular party's activity in relationship to the events in question."⁶⁶ She contends that even some of the more extreme plaintiff-oriented choice-of-law holdings have paid heed to the principle of non-unilateralism even when the ostensible reason for application of forum law was the forum's interest in its own plaintiff.⁶⁷

There is no question that if the Supreme Court were to adopt Silberman's approach it would be going a long way toward addressing the territorial concerns which I have expressed. I remain, however, convinced that it would not fully resolve the problem. For example, consider my Boston motel hypothetical. If my jazz playing neighbor were told that by playing to all hours of the morning he was affecting my domestic tranquility in New York, and he were to reply, "Twerski, I hate your guts; I hope your wife divorces you," would that not demonstrate sufficient purposefulness toward affecting New York events to meet Professor Silberman's test for constitutional choice of law? I would think so. It would, however, remain for me an essentially local Massachusetts controversy to be governed by Massachusetts law.

CONCLUSION

Hague has forced me to confront the question whether my territorial approach to choice of law has constitutional dimensions. I have concluded that it does. Before a case is subject to any choice-of-law doctrine, the case must have an interstate character; it must be other than a purely local transaction. The mere fact that some other state

64. E.g., Brilmayer, *supra* note 22; Davies, *A Legislator's Look at Hague and Choice of Law*, 10 HOFSTRA L. REV. 171 (1981), von Mehren & Trautman, *supra* note 10.

65. Martin, *supra* note 11; Martin, *The Constitution and Legislative Jurisdiction*, 10 HOFSTRA L. REV. 133 (1981); Reese, *supra* note 6; Reese, *The Hague Case: An Opportunity Lost*, 10 HOFSTRA L. REV. 195 (1981).

66. Silberman, *supra* note 10, at 119.

67. *Id.* at 110-14.

can find some interest—real or imagined—in the case cannot be enough to alter its local nature and prevent the application of the law of the sovereign in which the transaction took place. If the opposing philosophy is adopted, then all cases, even the most domestic in nature, become potential conflicts cases. This problem is not one of unfairness to the parties alone; it goes much deeper. It focuses on the role of law in governing the daily lives of persons who ordered their transactions and activities under the rule of a given sovereign. *Hague* pays these considerations no heed, and, for that reason, it makes no sense.