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CHOICE OF LAW BASED ON THE SEAT OF THE RELATIONSHIP

BY JACK DAVIES* AND STEPHEN R. RATHKE**

In 1869 the German jurist I. C. von Savigny wrote of choice of law: "the whole problem comes to be—*To discover for every legal relationship (case) that legal territory to which, in its proper nature, it belongs or is subject (in which it has its seat).*"¹

During the choice of law revolution of the 1960's a similar analysis was used to solve conflict-of-laws problems in the famous case of *Dym v. Gordon*.² Although both parties were domiciled in New York, and the auto was registered and insured in New York, a four-judge majority of the New York Court of Appeals applied the Colorado guest statute in a lawsuit which arose out of a Colorado accident. The court found the legal relationship of guest-passenger to host-driver decisive: "Since the relationship itself is the reason for the special treatment, we conclude that the jurisdiction where the relationship was seated had the primary interest in having its laws applied."³

This is not much authority for a seat of the relationship approach, especially since the Savigny theme is treated as worthy of only a one-sentence synopsis in most conflict texts; the rationale of *Dym* was abandoned by the very court which rendered the decision.⁴ Nonetheless, the objective of this article is to establish that seat of the relationship should be the basic tool with which to solve choice-of-law problems. To achieve this objective, the article will reassert the preeminence of territorial sovereignty in conflict of laws;⁵ it will then show the utility of solving choice-of-law problems by correlating the legal relationships with both territoriality

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1. I. VON SAVIGNY, *THE CONFLICT OF LAWS* 133 (2d ed. W. Guthree transl. 1880) (emphasis in original).

2. 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

3. *Id.* at 126, 209 N.E.2d at 795, 262 N.Y.S.2d at 467.

4. *See Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

5. *See generally* RESTATEMENT, *CONFLICT OF LAWS* (1934) and note 9

and the new concept of "governmental interest" which dominates current choice-of-law thought.⁶

Issue-by-Issue Choice of Law

Before the compatibility of the governmental interest principle and territoriality can be more fully discussed, it is necessary to focus on a profound modern change in conflict of laws. Formerly the law applicable to a case was selected all at once from one jurisdiction. Now choice of law is made issue-by-issue. When the issues of an interstate case involve a number of rules of law, the choice-of-law process must choose not between jurisdiction A and jurisdiction B, but rather between legal rules A₁ and B₁, A₂ and B₂, A₃ and B₃ and so forth.⁷ This change has opened the field of choice of law to precise analysis and to an accurate and logical theory. Past efforts to determine all choices of law in a case by a single spin of the wheel frustrated rational analysis of actual cases. It also prevented development of a coherent theory for choice of law. We now know that choice-of-law issues can be solved only through an understanding of the separate, fundamental factors involved in each issue. The value of the issue-by-issue choice of law is that choices can be made considering both the policy objectives of the specific rules in conflict (the governmental interest behind each rule) and the geographic facts of the case which are relevant to *each* issue.

Territorial Imperative

Governmental interest analysis and territoriality have been described as contradictory and incompatible.⁸ But the division of

6. See B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963) [hereinafter cited as B. CURRIE]; A. EHRENZWEIG, *CONFLICT OF LAWS* 347-53 (1962) [hereinafter cited as A. EHRENZWEIG]; R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 407 (1971) [hereinafter cited as R. WEINTRAUB]; Cavers, Cheatham, Currie, Ehrenzweig, Leflar, Reese, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963).

7. RESTATEMENT (SECOND) CONFLICT OF LAWS § 188(2) (1971) provides: "These contacts are to be evaluated according to their relative importance with respect to the particular issue." See also RESTATEMENT (SECOND) CONFLICT OF LAWS § 145.

8. Typical are comments by Professors Robert Sedler and Albert Ehrenzweig. "In *Neumeier* . . . the court retreated considerably back to territorialism. It changed its approach to one of 'narrow choice of law rules,' which were based only in part upon interest analysis and in which considerations of territoriality . . . predominated." Sedler, *Interstate Accidents and the Unprovided For Case: Reflections on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 125,

the world into sovereign or semi-sovereign legal territories creates conflict of laws. Without territoriality the problems of choice of law would be nonexistent.⁹ The recently identified governmental interest principle of conflict of law itself arises out of the sovereignty of territorial jurisdictions. Territoriality is the essence of the modern governmental interest focus in the choice of law.

The traditional approach to choice-of-law issues is characterized by Professors Roger Cramton, David Currie and Herma Hill Kay in their conflicts casebook as the need to locate "territorially the relevant event or thing."¹⁰ The traditional territorial-

131 (1973). "Yet while quite acceptable in a field like enterprise tort law which resists a more 'functional' regime, this territorial approach, if generally taken, would indeed mean turning back the clock." Ehrenzweig, *A Counter-Revolution in Conflicts Law: From Beale to Cavers*, 80 HARV. L. REV. 377, 400 (1966). See note 6 *supra*.

9. Demonstrating the validity of this proposition, RESTATEMENT (SECOND) CONFLICT OF LAWS (1971) states in part:

§ 1. *Reasons for the Rules of Conflict of Laws.*

The world is composed of territorial states having separate and differing systems of law. Events and transactions occur, and issues arise, that may have a significant relationship to more than one state, making necessary a special body of rules and methods for their ordering and resolution. . . .

§ 2. *Subject Matter of Conflict of Laws.*

Conflict of Laws is that part of the law of each state which determines what effect is given to the fact the case may have a significant relationship to more than one state. . . .

§ 3. *State Defined.*

As used in the Restatement of this Subject, the word "state" denotes a *territorial unit* with a distinct general body of Law. (Emphasis added.)

See also R. CRAMTON, D. CURRIE, AND H. KAY, CONFLICT OF LAWS, (2d ed. 1975) [hereinafter cited as R. CRAMPTON, D. CURRIE, AND H. KAY] wherein the following relevant discussion is found:

The world is divided into an inordinate number of neat geographical boxes: Arkansas, Liechtenstein, the Island of Shina. Each makes its own laws to govern its own affairs, and each has a system for adjudicating its own disputes. But people, especially within a federal nation, pay little attention to political boundaries. The California hiker orders boots from L. L. Bean in Freeport, Maine. The French tourist is murdered by a man from Hoboken, New Jersey, on a Greek ship in Tokyo harbor. The Pakistani brings two wives to live with him while he goes to college in Brooklyn. Deciding whose business it is to resolve disputes arising out of such transactions is the problem we call conflict of laws.

Id. at XIII. Note that without a preliminary screening based on territorial factors, lawyers and judges would have to examine for every case the substantive rules of all the jurisdictions of the world.

10. See R. CRAMPTON, D. CURRIE, AND H. KAY, note 9 *supra*, at 15.

ists found that event or thing at the place of the wrong, the place of contracting, the situs of property, the domicile of some person, or the place of trial.¹¹ Modern courts and scholars write as if they reject territoriality.¹² But the modernists do not abandon territoriality; they merely reject the traditional vested rights rules as to what factor is relevant in applying territoriality. In practice they have developed a new territoriality, the magic contact almost invariably being the residence of a party.¹³ The search for "the relevant event or thing" has moved beyond the Restatement of Law, Conflict of Laws (1934), but the search ought not stop at residence.

Some criteria are needed to evaluate the utility of whatever is proposed to serve the territorial imperative in the choice-of-law process. The event or thing should be legally relevant, of course. Its territorial home should be relatively easy to establish. It must not be so metaphysical or transient that it cannot be legally assigned to one or another political jurisdiction. (But that does not mean it must be physical, like the spot at which a plane crashes or a contract is signed.) When used in real life, it should produce results consistent with those past cases whose outcomes have most successfully withstood critical examination. Illustrative cases later in this article demonstrate that legal relationships can meet these territorial criteria.

Legal Relationships and Governmental Interests

Legal relationships universally underlie legal rules, because each legal rule is designed to affect a kind of legal relationship.¹⁴

11. See generally RESTATEMENT, CONFLICT OF LAWS (1934).

12. See note 8 *supra*.

13. See *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969), wherein the court stated:

Michigan has no interest in whether a New York plaintiff is denied recovery against a New York defendant where the car is insured here [New York].

Id. at 575, 249 N.E.2d at 398-99, 301 N.Y.S.2d at 525. See also Twerski, *Neumeier v. Kuehner: Where are the Emperor's Clothes?*, 1 HOFSTRA L. REV. 104, 107 (1973), wherein it is stated:

In evaluating interests Currie and his academic followers placed tremendous emphasis on the *interest of the domicile state of the parties in granting or denying recovery*. . . . [Rules] either protected a domiciliary interest or did not. It was as simple as all that.

Id. at 107.

14. The reader should make this assumption in lieu of what would certainly be a pedantic and inconclusive marshalling of authority. Reading

Some relationship provides the "target" for every rule of law. In formulating rules of law, courts and legislatures intend to have an impact on the interaction between persons. Applying a legal rule to a situation invariably has consequences to the interrelationships of the legal entities involved.

Throughout his classic work, *Fundamental Legal Conceptions*,¹⁵ Professor Wesley Newcomb Hohfeld used the term "jural relations" as the generic term for the fundamental legal conceptions with which he dealt. Professor Walter Wheeler Cook described Professor Hohfeld's concepts as "the 'lowest common denominators' in terms of which all legal problems can be stated, and stated so as to bring out with greater distinctness than would otherwise be possible the real questions involved."¹⁶ When this central role of relationships or jural relations in our legal system is recognized, their significance to the choice of law can be understood.

When a modernist asserts that choices of law must be made to further the appropriate governmental interests of the jurisdictions involved, he really means that the legal rules and thus the public policy of the jurisdictions should be asserted only if it is legitimate to have the rule applied. Since the sovereignty of the

Hohfeld, *Some Fundamental Legal Conceptions As Applied In Judicial Reasoning*, 23 YALE L.J. 16 (1913), and Hohfeld, *Some Fundamental Legal Conceptions As Applied In Judicial Reasoning*, 26 YALE L.J. 710 (1917), will assist in making the assumption and will suggest the great variety of relationships underlying our rules of law. Hohfeld's view of the applicability of his concepts of "jural relations" to trust law seems to fit the field of choice of law as well. He wrote:

Indeed, it would be virtually impossible to consider the subject of trusts . . . at all adequately without, at the very threshold, analyzing and discriminating the various fundamental conceptions that are involved in practically every legal problem. In this connection the suggestion may be ventured that the usual discussions of . . . jural interests seem inadequate (and at times misleading) for the very reason that they are not founded on a sufficiently comprehensive and discriminating analysis of *jural relations* in general. Putting the matter in another way, the tendency and the fallacy—has been to treat the specific problem as if it were far less complex than it really is; and this commendable effort to treat as simple that which is really complex has, it is believed, furnished a serious obstacle to the clear understanding, the orderly statement, and the correct solution of legal problems. In short, it is submitted that the right kind of simplicity can result only from more discriminating analysis.

W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 26 (1919).

15. *Id.*

16. W. COOK, *INTRODUCTION*, W. HOHFELD, *FUNDAMENTAL LEGAL CON-*

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jurisdiction is territorial — it stops at the state line — there must be a legitimacy-creating contact of a territorial nature. Thus a government's interest is to apply the public policy it has adopted to those relationships which it ought to regulate based on its territorial sovereignty. A jurisdiction's legal rule should be applied only to regulate a relationship appropriately subject to its sovereign power. Relationships arising or centered within a jurisdiction are properly subject to that jurisdiction's rules.

THE SEAT OF THE RELATIONSHIP FORMULA

To utilize the seat of the relationship for choice of law, three basic problems must be solved. (A) What are the choice-of-law issues? (B) What is the relevant legal relationship for each issue? (C) Where should that legal relationship be seated territorially? These may be resolved by a five-step process:

A. To find choice-of-law issues:

1. Identify all jurisdictions which because of territorial connections might be the appropriate source of one or more rules of law applicable to the case.
2. From these jurisdictions pick out sets of legal rules which are relevant to the issues of the case and which are divergent. Recognize that to make a choice of law on each set of conflicting rules requires a separate decision from the choice on the other sets.

B. To find the legally relevant relationship for each separate choice-of-law question:

3. Decide what policy objectives prompted lawmakers to enact the divergent rules and what relationship they intended to affect through application of the rules.

C. To match the territorial elements of the case to the identified relationship:

4. Evaluate each jurisdiction's governmental (policy-making) interest in affecting the relationship in light of its territorial connections to the origination or continuation of the relationship and, based on this evaluation, select the most legitimate jurisdictional seat for the relationship.

D. To choose the appropriate rule from the set of divergent rules:

5. Apply the rule of the jurisdiction in which the identified relationship has been seated.

The New Restatement and Seat of the Relationship

Having led the law astray with its Conflicts Restatement in 1934, the American Law Institute set out to repair the damage in the early 1950's. The Second Restatement was promulgated in 1969.¹⁷ The basic rule of the new Restatement is that the law of jurisdiction with the "most significant relationship" to an issue should be applied.¹⁸ "Most significant relationship" by itself is an empty phrase which must pick up meaning from courts and scholars.¹⁹ Written in the midst of the choice-of-law revolution, it is not surprising that the phrase turned out to be a vague catch-all, standing for all the modern and semi-modern choice-of-law formulations. With the phrase "most significant relationship," lawyers and judges have been asked to make sophisticated determinations of what factual connections to a jurisdiction justify application of its rule on an issue in conflict. Each lawyer is left in the wilderness²⁰ with little more than a platitude to guide him back to civilization, although the Restatement does provide some pointers:

17. The reporter for the Restatement Second was Willis L. M. Reese. Although Professor Reese tried to keep abreast of the conflicts revolution, each of his redrafts came out a few months too late and met blistering criticism for not reflecting what courts and scholars had done while the draft was at the printer. The final draft then came out too soon, before the finishing touches of the revolution were recorded. The Restatement resembles a chick half out of its shell. It does not restate the law as it was, as it is, or as it will be.

18. RESTATEMENT (SECOND) CONFLICT OF LAWS (1971) sets forth the most significant relationship rule:

§ 145. *The General Principle.*

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the *most significant relationship* to the occurrence and the parties. . . .

§ 188. *Law Governing in Absence of Effective Choice by the Parties.*

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the *most significant relationship* to the transaction and the parties. . . .

RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 145, 188 (1971) (emphasis added).

19. Cavers calls it "question-begging." D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 207 (1965). Ehrenzweig is more cutting. He calls it "nenihilism," "meaningless generalization" and "circular," all on one page. A. EHRENZWEIG, *supra* note 6, at 351. Weintraub, apparently in praise, says it is a "flexible tool." R. WEINTRAUB, *supra* note 6, at 4.

20. Justice Roger Traynor in the introduction to A. EHRENZWEIG, *supra* note 6 submits: "In Conflict of Laws the wilderness grows wilder, faster than the honey bees and the men can keep it under control."

(2) Contacts to be taken into account . . . include: (a) the place the injury occurred, (b) the place the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) *the place where the relationship, if any, between the parties is centered.*²¹

In one respect, however, the emptiness of the phrase may be an advantage, because seat of relationship analysis can fit within it. Lawyers, if they wish, can find the "most significant relationship" by the seat of relationship formula. Particular attention is directed to clause (d) in the Restatement,²² which directs attorneys and judges to an examination of *the place where the relationship, if any, between the parties is centered*. In time, this one consideration may swallow the whole ambiguous phrase of the Second Restatement. Strengthening this possibility is the obvious failure of the Restatement reporters to focus their full intellectual energies on the idea contained in the clause and on its potential ramifications. This failure becomes obvious considering the two words "if any." The focus of the reporters was clearly on such special relationships as host driver-guest passenger, rather than on the more general relationships such as tortfeasor-victim. But there is always some relationship between plaintiff and defendant; and if special relationships are relevant to choice of law, why should not more universal relationships also be relevant? The question is rhetorical. Since there is always a relationship underlying conflicting rules, clause (d) has universal applicability. Under cross-examination Professor Reese, the reporter for the Second Restatement, would find it impossible to defend inclusion of the words "if any" in clause (d). At the least, aided by the formula offered in this article, "the place where the relationship . . . is centered" provides a convenient way to think about every choice of law problem.

ILLUSTRATIVE APPLICATIONS OF THE FORMULA

The following illustrations show how the seat-of-the-relationship formula leads to resolution of conflicts problems. To facilitate presentation and understanding of the formula, the cases are presented in groups in which the relevant territorial factors are of

21. RESTATEMENT (SECOND) CONFLICT OF LAWS § 145 (1971) (emphasis added).

22. Regrettably, a parallel to clause (d) does not appear in the contracts portion of the RESTATEMENT (SECOND) CONFLICT OF LAWS § 188 (1971).

similar character or in which the analysis requires a particular kind of flexibility.

Event-Connected Problems

This category includes issues for which the relevant relationship arises from a single occurrence. The justification for applying the law of the jurisdiction where the relationship originated — that is, where the event occurred — is that the legislature and courts of a state cover the territory of the state with an umbrella of public policy which extends to all events within the state. In this category, the rules of law in conflict represent public policy objectives relating to the particular event, rather than to continuing affiliations, to citizenship, to property, or to court procedures.

The first and second illustrations provide an immediate contrast between cases using the seat-of-the-relationship formula and cases in which courts have been misguided in their use of the governmental interest analysis. The courts in these two cases apparently were so eager to set aside the defects of the old rules that they missed the continuing significance of territorial factors other than residences of the parties.

Fabricius v. Horgen.²³ Four residents of Iowa were killed in a head-on collision caused by Horgen, a resident of Iowa but a stranger to the four victims. The accident occurred in Minnesota.

- (1) Iowa and Minnesota have territorial connections to the case.
- (2) The set of rules between which a choice must be made are:
 - (a) The Minnesota \$25,000 wrongful death statute, and
 - (b) The Iowa rule denying any significant recovery for wrongful death.
- (3) These rules, designed to set levels of tort recovery, are aimed at the relationship of tortfeasor to victim.
- (4) This relationship arose and is seated in Minnesota where these strangers collided.
- (5) The Minnesota rule will be applied.

This result is contrary to the result reached by the Iowa Supreme Court in 1965. *Fabricius* demonstrates the deficiency of

a governmental interest analysis which does not include a clear comprehension of territorial considerations. The Iowa court in four different places in its opinion recited that "all the parties are from Iowa."²⁴ Elsewhere it asserted: "Minnesota has no conceivable interest in the remedy available. . . ."²⁵ But governments have interests in nonresidents as well as in residents. The United States Constitution compels states to have interests in nonresidents as well as in residents. Governments also have interests in events. Minnesota has a governmental interest in the consequences for all those affected by the sudden death of four adults on a Minnesota highway. The Iowa court took too narrow a view of the concerns of its neighboring state.

The error of the Iowa court is made clearer by playing the law professors' game of fact-shifting. If the residence of any of the innocent victims were a jurisdiction other than Iowa, Minnesota's rule or one similar to the forum would most likely be applied.²⁶ Similarly, if negligent Horgen hailed from anywhere but Iowa, Minnesota law would clearly apply to all the claims. Most astounding of all, if the Iowa orphans had brought their action in Minnesota, rather than in Iowa, the privileges and immunities clause and the equal protection clause of the Federal Constitution²⁷ would have mandated application of Minnesota law, because the fortuitous event that these Iowa decedents were killed by another Iowan would be an inadequate reason for a Minnesota court to deny them the benefits of Minnesota law as it relates to a Minnesota event.²⁸

*Reich v. Purcell.*²⁹ Mrs. Reich, a resident of Ohio, was killed

24. *Id.* at 270, 276, 278, 132 N.W.2d 411, 415, 416.

25. *Id.* at 276, 132 N.W.2d at 415.

26. This observation represents a rather cynical but realistic attitude shared by the authors. That is, under the modern approaches which emphasize residence, the law of the victims' residence would probably be applied. However, when confronted with conflicts problems, forum courts often consciously avoid the morass of conflicts theories and simply apply forum law.

27. "The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states." U.S. CONST. art. IV, § 2. "[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1. See B. CURRIE, *supra* note 6, at 445; Currie and Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960).

28. See B. CURRIE, *supra* note 6 wherein the author states:

Yet the moment a state announces that the benefits of its laws will be reserved exclusively, or even primarily, for its own citizens or residents, problems of discrimination arise.

Id. at 445.

29. 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

in a collision in Missouri caused by the negligence of Purcell, a resident of California. The parties were strangers to one another.

- (1) Ohio, California, and Missouri have territorial connections to the case.
- (2) The conflicting rules among which a choice must be made are:
 - (a) The Missouri rules establishing a limit on wrongful death damages of \$25,000,
 - (b) the California rule of unlimited damages, and
 - (c) the Ohio rule of unlimited damages.
- (3) These rules, designed to fix levels of tort recovery, are aimed at the relationship of tortfeasor to victim.
- (4) The relationship arose and is seated at the place of collision in Missouri. There was no prior connection between the parties.
- (5) Missouri's rule will be applied to further its policy of limited wrongful death claims.

The California court applied Ohio law in this case, based on the residence of the decedent. It overlooked the territorial factors actually relevant to the rules in conflict. The case might have been tried in a Missouri court³⁰ and a Missouri court could not deny to Purcell, a California resident, the statutory wrongful death limit which would have been available to a defendant from Missouri in identical circumstances. The privileges and immunities clause bars such discrimination based solely on nonresidence.³¹

Negotiation-Connected Problems

A course of negotiations underlies most contract issues. "Negotiation" is a more useful term for our purposes than "contract" because many times the issue is whether negotiation results in a contract obligation. Seating the relationship will also be done more thoughtfully if the whole course of dealing is examined. This avoids an old-fashioned focus on the moment at which contract obligations become fixed. The case that follows illustrates the point well; the issue is whether there is legal obligation without a formal contract.

30. Purcell could have forced trial in Missouri by commencing an action in Missouri prior to Reich's California suit. The wrongful death claim then would have become a compulsory counterclaim in the Missouri action.

31. See B. CURRIE, *supra* note 6, at 445, 524.

*Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mutual Life Insurance Co.*³² Decedent, a resident of North Carolina, sought to purchase from defendant Fidelity \$100,000 of life insurance. All negotiation was carried on in Washington through their respective agents. The home office of Fidelity in Pennsylvania was slow to act on decedent's application and he died before other insurance was obtained.

- (1) North Carolina, Pennsylvania, and the District of Columbia have territorial connections to the case.
- (2) The rules among which a choice must be made are:
 - (a) The North Carolina rule permitting recovery of damages arising from unreasonable delay in processing insurance applications,
 - (b) the Pennsylvania rule denying recovery of damages arising from delay in processing applications, and
 - (c) an assumed District of Columbia rule denying recovery of damages from delay. (The court did not discuss the District rule in its opinion).
- (3) The purpose of these rules is to regulate insurance companies in the promptness with which they act on applications for insurance. The target relationship is insurance company to applicant for insurance.
- (4) The relationship arose and is seated in the District of Columbia where the decedent's agent sought out Fidelity's agent and negotiated for coverage.
- (5) The District rule will be applied to this Washington business transaction.

The *Lowe's* court, using the "most significant relationship" test,³³ applied Pennsylvania law because that was where the "delay" took place. But the existence or nonexistence of a duty to act promptly is what must be determined. That duty existed because of the relationship arising out of the business conversations in Washington, or it did not exist at all.

Affiliation-Connected Problems

The modern approach to conflicts provides an escape from traditional error on choice-of-law issues where a legally relevant re-

³². 319 F.2d 469 (4th Cir. 1963).
³³. 18. at 474.

relationship preexists the tort or contract transaction giving rise to the cause of action. While the new conflicts theory permits courts to give appropriate significance to these preexistent relationships, it has not provided the analytical guidance required for consistently logical results. The seat-of-relationship formula requires the lawyer to focus on the various relationships in the following multiple relationship cases.

*Alabama Great Southern Railroad Co. v. Carroll.*³⁴ Carroll lived in Alabama where he was hired by the defendant railroad to serve as brakeman on trains running in Alabama and Mississippi. He was injured on the job in Mississippi.

- (1) Mississippi and Alabama have territorial connections to the case.
- (2) The rules in conflict are:
 - (a) The Mississippi rule denying employer liability for fellow servant negligence, and
 - (b) the Alabama employers' liability act imposing liability.
- (3) The policy objective of these rules is to define the legal liabilities running between employers and employees in cases of fellow servant injuries. The employer-employee is the target relationship affected by application of the rule.
- (4) The employer-employee relationship in this case arose and is seated in Alabama where the employee was hired, was paid, and worked.
- (5) The Alabama rule will be applied to further the Alabama policy of employer compensation for on-the-job injury.

The result is contrary to the original case, which has been a favorite target of those attacking the vested rights theory. The case illustrates one facet of the proposition that preexisting relationships often condition the obligations arising from a later event. Here an employer-employee relationship was formed. There was no intention in the formation of that relationship that employee Carroll should be injured by accident, although such injury was certainly foreseeable. When the foreseeable but unintended injury occurred, the employer's liability arose from the employment

relationship and the rules of law relating thereto, rather than from the general law applicable to torts.

*Haumschild v. Continental Casualty Co.*³⁵ Mr. Haumschild drove negligently in California, injuring his wife. They live in Wisconsin.

- (1) California and Wisconsin have territorial connections to the case.
- (2) The rules between which a choice must be made are:
 - (a) the California rule of interspousal immunity, and
 - (b) the Wisconsin rule permitting actions between spouses.
- (3) The policy objective of the rules is to regulate, as each state believes necessary, the assertion of legal claims by one spouse against another in order to promote marital harmony. The marital relationship is the target of the rules.
- (4) This relationship is seated at the marital domicile in Wisconsin.
- (5) Wisconsin's rule will be applied.

*Kilberg v. Northeast Airlines.*³⁶ Kilberg was killed in a plane crash in Massachusetts. He lived in New York and purchased his ticket there.

- (1) New York and Massachusetts have territorial connections to the case.
- (2) The conflicting rules of law between which a choice must be made are:
 - (a) The Massachusetts \$15,000 wrongful death limitation, and
 - (b) the New York rule placing no maximum on wrongful death recoveries.
- (3) The policy objective of the rules is to regulate recovery in cases of wrongful death. The relationship affected is the relationship of carrier to passenger, which is the source of the liability.

³⁵ 7 Wis. 2d 130, 45 N.W.2d 814 (1959).

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

- (4) The relationship between Kilberg and the airline arose from Kilberg's arrangement of the trip in New York. It is seated there.
- (5) New York's rule will be applied to further its policy of full compensation for death.

The ticket office should not be treated mechanically as the seat of the relationship. The relationship of carrier to passenger probably should be seated at the passenger's place of business for business trips and at the passenger's residence for pleasure trips. Neither chance nor manipulation can then affect choice of law. The advertising inducements of airlines reach into home and office, so seating the relationship in this way is not unfair to airlines.

A parallel exists between the *Kilberg* case and the *Carroll* case. In *Carroll*, the affiliation relationship arose from employment; in *Kilberg*, the affiliation arose from the purchase of an airline ticket. In each case injury was not an intended consequence, but injury was foreseeable. When the foreseeable injury occurred, the obligations arising from that injury differed from the obligations which would have existed independent of the employment or the contract of carriage. For example, had the airplane in which Kilberg perished crashed into an interstate bus, killing bus passengers from a number of states, the airline liability arising from those deaths would be measured by the law of the place of the crash. No preexisting relationship between the airline and bus passengers would exist to make the law of any other jurisdiction legally relevant.

Palmer v. Fisher.³⁷ A businessman from Illinois made disclosures in Illinois to his accountant. The disclosed information subsequently became relevant to an action in Florida.

- (1) Illinois and Florida have territorial connections to the case.
- (2) The rules between which a choice must be made are:
 - (a) The rule of Illinois that communications to an accountant are privileged, and
 - (b) the rule of Florida that communications to an accountant are not privileged.
- (3) The objective of the rule of privilege is to encourage full disclosure between a client and his business coun-

selors. The rule is directed at the relationship between client and accountant in a similar manner as the rule of attorney-client privilege is directed at the relationship between lawyers and clients.

- (4) The relationship arose and is seated in Illinois where accountant and client maintain their businesses.
- (5) The privilege rule of Illinois will be applied to further its policy of full disclosure to business counselors.

To be effective in its "substantive" purpose of encouraging communications between clients and accountants, the privilege must be secure from attack in foreign courts. The *Palmer* court arrived at this appropriate result by dubious substance-procedure characterization.

Most rules of law affect an obligation in one way or another—its existence, size, duration, offsets, or limitations. Therefore, most rules relevant to a case affect some relationship or obligation between plaintiff and defendant. The rule of privilege is unusual in that it does not relate to the liability of defendant to plaintiff, but serves an independent purpose. This case and its privilege rule illustrate that the relevant relationship is not always one between the plaintiff and the defendant.

Intermediary-Connected Problems

In many cases the plaintiff and the defendant do not have direct contact, but rather come into a legal relationship involving liability through a third party. The intermediary may have contact with the plaintiff in one state and with the defendant in another. A choice-of-law issue arises when one involved jurisdiction has a rule which imposes liability while another involved jurisdiction imposes no liability, lesser liability, or liability upon a different theory.

The first step toward resolution of the conflict is to decide whether the rule favoring the claimant is primarily a rule to provide compensation or primarily a rule to deter wrongful conduct. A rule for compensation takes precedence over a no-recovery or lesser-recovery rule when the victim is injured in the jurisdiction promulgating the rule for compensation. The policy of compensation should apply only if the victim is under the umbrella of compensatory law when the injury occurs. On the other hand, a rule designed to punish a defendant for wrongful conduct should be imposed only if the defendant's conduct occurred in the

jurisdiction promulgating the deterring rule. The policy objectives of a rule designed to deter are connected to the place of acting.³⁸

*Hunter v. Derby Foods.*³⁹ Dean purchased a can of unwholesome corned beef in Ohio and died there after eating it. Derby, a New York distributor, had purchased the canned meat in Argentina. The meat was resold in Ohio to a wholesaler, then to the retailer from whom Dean made his purchase.

- (1) Argentina, New York, and Ohio have territorial connections with the case.
- (2) The rules between which a choice must be made are:
 - (a) The assumed rule of Argentina that food distributors are liable only for negligently selling unwholesome food,
 - (b) the similar rule of New York, and
 - (c) the Ohio rule of strict liability for selling unwholesome food.
- (3) The policy of the jurisdiction where the injury occurred is to insure compensation when a relationship of victim to manufacturer or seller exists. That relationship is affected by application of the rule.

38. At first it may seem that a compensatory rule of the jurisdiction in which the injury occurs will always be applied. The victim is entitled to the umbrella of policy of wherever he is when injury occurs. But consider this exception: Jones, a resident of Indiana, buys spoiled meat in Indiana from an Indiana meat packer whose entire business is located in Indiana, operating and existing pursuant to Indiana Laws. When Jones subsequently drives to Ohio and eats the spoiled meat, he suffers injury.

It is important to note that the place of sale and the place of injury are different. Ohio, the jurisdiction where the injury occurred, has a rule of strict liability for the sale of spoiled meat evidencing a policy of compensation. Indiana, the jurisdiction where the meat packer's business activities are centered, has a rule of deterrence imposing liability only where negligence is found. It may seem that Ohio strict liability law would apply since Jones was under the umbrella of Ohio compensatory law when the injury occurred. But this is not the correct result. The rules in conflict are designed to affect the relationship of manufacturer to victim. That relationship originated in Indiana where the sale was made. The relationship was preexisting or continuous when the injury fortuitously occurred in Ohio. Seat of relationship recognizes preexisting relationships as a valid factor in choice of law. Thus it is fairer to apply the law of Indiana, the state where the ongoing relationship had its inception and where the meat packer conducts his business.

- (4) This relationship, underlying a rule of liability without fault, arose and is seated in Ohio where the injury was suffered.
- (5) The strict liability rule of Ohio will be applied.

The *Hunter* case illustrates a principle applicable to product liability cases. If liability at the place of injury is based on strict liability, that rule should be applied regardless of the rule at the place of manufacture. A manufacturer sending products into a strict liability state should not have less liability exposure there than other businesses because of its home state rule of more limited responsibility. On the other hand, if the state of injury bases liability on negligent manufacture (fault), a rule of compensatory liability at the place of manufacture should not be applied. This is because the policy where the injury occurs is not so strict. The policy seeks only to deter careless manufacture. To export a strict liability rule along with the products of a jurisdiction would impose an inequitable burden on that state's businesses.

*Schmidt v. Driscoll Hotel.*⁴⁰ The Driscoll Hotel, managers of the Hookum Cow Bar, illegally sold drinks in Minnesota to Sorenson who was obviously drunk. Sorenson and Schmidt then drove into Wisconsin where an accident occurred as a result of Sorenson's drunken driving. Schmidt was injured and sued the Minnesota bar under Minnesota's dram shop act.

- (1) Wisconsin and Minnesota have territorial connections to the case.
- (2) The rules in conflict are:
 - (a) Minnesota's dram shop act holding bars liable for injury suffered as a result of illegal liquor sales, and
 - (b) Wisconsin's rule of no dram shop liability.
- (3) The place of injury imposes no liability and the place of the jurisdiction where the illegal sale took place has as its policy the imposition of liability to deter bar operators from such sales. The relationship at which the rules are directed is that between the bar and the victim of its drunken patron.
- (4) The relationship, underlying a rule designed to deter illegal sales, arose and is seated in Minnesota at the place of the illegal sale.

(5) Minnesota's rule will be applied.

Since the liability is premised on wrongful conduct, the illegal sale is the more significant territorial contact. This reasoning holds up when the facts are transposed. If the sale were made in Wisconsin and the injury were suffered in Minnesota, liability based on the Minnesota dram shop act should not be imposed on the Wisconsin bar.

*Williams v. Rawlings Truck Lines, Inc.*⁴¹ Goldberger sold a car to Rivera in New York, but failed to remove the license plates as required by New York law. Rivera took the car to the District of Columbia where his negligent driving injured Williams, a resident of New Jersey. Williams joins Goldberger as a defendant.

- (1) New York, New Jersey, and the District of Columbia have territorial connections to the case.
- (2) The rules between which a choice must be made are:
 - (a) The New York rule that one who sells a motor vehicle continues to be liable as owner of the vehicle until his New York plates are removed from the car,
 - (b) the District of Columbia rule that actual sale of a vehicle terminates the owner's liability, and
 - (c) the New Jersey rule which is the same as the District of Columbia rule.
- (3) The peculiar New York rule is designed to deter evasions of its compulsory auto insurance law. The relationship it is aimed at is the relationship of an uninsured car owner and the victim of his negligence. If Rivera continued to be a New York resident after purchasing the car, he was an evader of the mandatory insurance law, and the target relationship was present in this case.
- (4) The relationship arose in New York where Goldberger committed the prohibited act of transferring his car without removing the registration plates. It is appropriate to seat the relationship there to further the purpose of the rule.
- (5) New York law will be applied.

This case sharply defines the governmental interest foundation for the seat-of-the-relationship formula. Discussion of this case by conflicts commentators purporting to embrace the governmental interest analysis is surprisingly deficient in not asking the obvious question: why did New York require the owner to remove the plates from an automobile he sold? The formula compels that question. Once that relevant question is asked, a logical resolution of the case is within reach.

Residence-Connected Problems

Each person carries with him a number of legal statuses, *e.g.*, taxpayer, voter, candidate, spouse, parent, child, which his home jurisdiction may have a policy interest in affecting. Technical domicile was over-emphasized by the old conflicts rules and residence now is over-emphasized by the new conflicts cases. Nonetheless, home is a valid basis for choice of law on many issues.

*White v. Tennat.*⁴² After a lifetime spent in West Virginia, decedent moved to Pennsylvania. Fifteen days after the move he died. His widow immediately moved back to West Virginia to live with her family. Decedent's brothers and sisters are also West Virginia residents.

- (1) Pennsylvania and West Virginia have territorial connections to the case.
- (2) The rules between which a choice must be made are:
 - (a) The intestacy rule of Pennsylvania giving fifty percent of the estate to a widow without children and fifty percent to collateral heirs, and
 - (b) the West Virginia intestacy rule giving one hundred percent to the widow.
- (3) The policy of the conflicting rules is to determine the appropriate apportionment of an intestate decedent's estate among his heirs. The target relationship is heir to heir.
- (4) The decedent is central to this legal problem. In light of his insignificant connections with Pennsylvania it is appropriate to seat the relationship in West Virginia, the jurisdiction of his more dominant residence.
- (5) The intestacy rule of West Virginia will be applied to further its public policy of distribution of estate assets among relatives.

This result is inconsistent with the actual decision in the *White* case, which has been criticized by most commentators as foolish, mechanical and unjust. If the Pennsylvania connections with the decedent were to be increased bit-by-bit, a point would be reached at which the seat of the relationship should shift from West Virginia to Pennsylvania. At that hard-to-determine point the seat of the relationship becomes Pennsylvania and the rule of intestate succession for Pennsylvania is more appropriate than the rule of West Virginia. A case *should* become more difficult as the facts become more mixed and inconclusive. One objective of the seat-of-the-relationship formula is to allow for legitimate doubt, confusion, and dissent in the borderline case, rather than pretending a mechanical rule can give an automatic and easy answer. Another objective of the formula is to achieve, in an easy case like *White*, a just result as simply as the facts of the given case warrant.

*In re Barrie's Estate.*⁴³ Decedent executed a will in 1928 in Illinois. She died in 1944, having been a resident of Illinois throughout the period after the will was executed. Upon her death the will was found with the word "void" written across its face. Decedent's estate included land in Iowa.

- (1) Illinois and Iowa have territorial connections to the case.
- (2) The conflicting rules between which a choice must be made are:
 - (a) The Illinois rule invalidating a will when the testator writes "void" across its face, and
 - (b) the Iowa rule holding that a will is not cancelled by the word "void."
- (3) The policy objectives of the conflicting rules are to interpret the intent of a testator in taking action which might or might not represent revocation of a will. The target relationship is intestacy heirs to beneficiaries under the will.
- (4) The decedent is central to this legal problem, so the relationship should be seated at her home in Illinois.
- (5) Illinois law will be applied to further its policy of allowing its residents to cancel wills by writing "void."

In the *Barrie* case, the Iowa court held that the will was void as to all estate assets—except the Iowa land. By giving undue credence to the idea that the jurisdiction wherein the land is situated should have its law applied to the disposition of that land, the Iowa court produced an anomalous result with respect to the overall validity of the will.

Grant v. McAuliffe.⁴⁴ Plaintiff and Pullen collided in Arizona. Both were residents of California, but strangers to one another. After the accident Pullen died.

- (1) Arizona and California have territorial connections to the case.
- (2) The rules of law between which a choice must be made are:
 - (a) The Arizona rule that a tort action may not be brought against the estate of a decedent, and
 - (b) the California rule that such actions may be maintained.
- (3) The purpose of the Arizona rule is to protect estate assets for more deserving beneficiaries than tort claimants. The rule is aimed at the relationship between the tort claimant and others claiming the assets in Pullen's estate.
- (4) The seat of this relationship is in California where the relationships connected with Pullen's estate arose. It is California where Pullen had resided and where his estate is being administered.
- (5) California's rule will be applied to further its policy of compensating legitimate tort claimants out of the estates of residents.

Of course *Grant* was seeking payment from an auto insurer. Since he was not seeking recovery out of Pullen's general estate assets, the relationship which should be present to make the Arizona rule applicable is not present in the facts of this case. The rule of non-survival of tort actions is inappropriate in auto insurance cases. Its application in such cases is a defect of Arizona law. Courts, however, should not manipulate choice of law to avoid the bad laws of Arizona or any other state.

*In the Matter of the Estate of Sendonas.*⁴⁵ Decedent was predeceased by two brothers and a sister in Greece. The two brothers had natural children surviving while the sister was survived by an adopted child. Decedent, domiciled in Washington at death, owned land in Washington.

- (1) Greece and Washington have territorial connections to the case.
- (2) The rules between which a choice must be made are:
 - (a) The rule of Washington that adopted children inherit from collateral heirs as do natural children, and
 - (b) the rule of Greece that adopted children cannot inherit from collateral heirs of the adopting parent.
- (3) The policy of the conflicting rules relates to the role of an adopted child in the extended family. The target relationship is that of family member with other family members.
- (4) This relationship is seated in Greece where the adopted child was added to the family by adoption and where the family lived.
- (5) The rule of Greece will be applied.

This result is contrary to the actual *Sendonas* decision. The Washington court applied the situs-of-property rule to decree Washington land in a manner consistent with the Washington adoption rule. The purpose of the Greek rule is to protect the claims of inheritance by members of the family against the claims of someone brought into the family through adoption. The potential for mischief involves the family, not the property. The home jurisdiction of the family should make the policy judgment of whether it prefers the benefit of extending the status of full family membership to adopted children or prefers to avoid the risk of mischievous adoption. The facts of this case could be reversed to put the family in Washington and the land in Greece. The more modern Washington adoption rule then would apply under the seat-of-the-relationship theory, but not under the reasoning of the *Sendonas* court. The *Sendonas* facts are instructive, because they demonstrate that the search is for the appropriate rule, not the "better" rule.

Property-Connected Problems

It is only a matter of time until the conflicts revolution overturns the situs rule applied in *Sendonas* and traditionally applied to property cases. But there will be a few issues for which the location of the property should determine the applicable rules.

*Sherman v. Estey Organ Co.*⁴⁶ Sherman was mortgagee of New Hampshire land. The mortgage, executed in Vermont, conformed to Vermont law but did not contain language required by New Hampshire law. A New Hampshire statute made a mortgage without the prescribed language void "against any person except the mortgagor." The Estey Organ Co., under a bill of sale from Sherman's mortgagor, claimed title to lumber from the land in an action in Vermont.

- (1) Vermont and New Hampshire have territorial connections to the case.
- (2) The rules between which a choice must be made are:
 - (a) The rule of Vermont validating the form of mortgage recorded in this case, and
 - (b) the rule of New Hampshire that for a mortgage of record to be valid notice to good faith purchasers, it must contain the omitted language.
- (3) The policy objective of the New Hampshire rule is to preserve the consistency of its land records. The target of the rule is the relationship between competing claimants to an interest in the land.
- (4) The relationship is seated in New Hampshire where the land and the title records are located.
- (5) New Hampshire's rule will be applied to further its policy on recording of mortgages.

Procedure-Connected Problems

Traditionally problems involving court procedures have been resolved by characterizing the issue as one of procedure to be determined by forum law.⁴⁷ Because the characterization was made issue by issue, traditional practice produced reasonably satisfactory results consistent with a seat-of-the-relationship analysis.

46. 69 Vt. 355, 38 A. 70 (1897).

47. RESTATEMENT, CONFLICT OF LAWS §§ 584-625 (1934). The procedural classification was also used, or misused, as an escape from the rigid vested rights rules. See B. CURRIE, *supra* note 6, at 128.

Levy v. Steiger.⁴⁸ Levy and Steiger, residents of Massachusetts, collided in Rhode Island. Levy brought a negligence action in Massachusetts.

- (1) Massachusetts and Rhode Island have territorial connections to the case.
- (2) The rules between which a choice must be made are:
 - (a) The Massachusetts rule that a defendant relying on contributory negligence has the burden to prove the negligence of the plaintiff, and
 - (b) the Rhode Island rule that a plaintiff must affirmatively prove he was free of negligence.
- (3) The two rules represent divergent policies on how best to discover facts in a court trial. The relationship underlying these rules is the relationship of litigant to litigant.
- (4) The relationship is seated in Massachusetts where the court sits.
- (5) The Massachusetts rule will be applied so as not to impose the Rhode Island technique of fact finding upon a Massachusetts court.

Double-Purpose Rules

Sometimes a rule of law has two or more distinct objectives. The goal may be to affect different relationships. The separate target relationships may turn out to be territorially centered in different jurisdictions. The following illustrations show how the formula can be adjusted to this complexity.

Leroux v. Brown.⁴⁹ Brown contracted in France to work for Leroux for longer than one year. He did not perform, but returned to England. Leroux brings an action for damages in England.

- (1) England and France have territorial connections to the case.
- (2) The rules between which a choice must be made are:
 - (a) The English rule that employment contracts which cannot be performed within a year must be in writing, and
 - (b) the French rule that no writing is required.

48. 233 Mass. 600, 124 N.E. 477 (1919).

49. 13 C.B. 801, 824, 138 Eng. Rep. 1119, 1129 (1852).

- (3) The statute of frauds has two purposes. The first is a "substantive" purpose to increase commercial certainty by requiring written contracts. The business relationship between the parties underlies the rule in this aspect. The second purpose is to protect courts from perjuries. The relationship of litigant to litigant underlies the rule in this procedural aspect.
- (4) The business relationship is seated in France where negotiation for the employment occurred and where the work was to be done. The litigant to litigant relationship is seated in England where the court sits.
- (5) The validity of the contract will be determined by French law so as to further French policy of enforcing obligations. The English court will further its procedural policy by dismissing the action procedurally—without prejudice to an action by Leroux to enforce his substantively valid claim in some court less sensitive to the hazards of perjury.

This result is consistent with the original case, in which there was a non-suit without prejudice.

*Bournias v. Atlantic Maritime Co., Ltd.*⁵⁰ Bournias was a Panamanian employed on a Panamanian ship. Under the Panama Labor Code he became entitled to exemplary payments from the ship owner. More than a year after his entitlement, he brought an action in a United States district court in New York.

- (1) The United States and Panama have territorial connections to the case.
- (2) The rules between which a choice must be made are:
 - (a) The Panama one-year statute of limitations, and
 - (b) the longer statute of limitations of United States admiralty law.
- (3) The statute of limitations has two purposes directed at different relationships. The first is a "substantive" purpose to give legal peace from obligations of the past. The relationship which calls the rule into the case for this purpose is employer to employee. The second is a "procedural" purpose—to protect the court from stale disputes. The relationship of litigant to litigant underlies the statute of limitations in this objective.

- (4) The employer-employee relationship arose and is seated in Panama, where the duty which was breached arose. The litigant-to-litigant relationship is seated in the United States where the admiralty court sits.
- (5) The Panama statute will be applied to give the ship owner substantive peace from the "ancient" obligation as intended by Panama's public policy.

The *Bournias* court actually applied the longer forum statute to revive a barred claim. This frustrated Panama's policy of peace after a year. When the forum statute of limitations is shorter, a claim within its bar should be dismissed *without prejudice*. This furthers the procedural objective of avoiding stale claims, while not precluding assertion of the substantively valid claim in a court not so sensitive to older claims.

CONCLUSION

The choice-of-law field is now and has been in a dismal state.⁵¹ Scholars continue to propose theories too complex for courts, practitioners and fellow scholars. The usually helpful American Law Institute in the Second Restatement has offered an empty phrase. Ironically, the Second Restatement contains a full chapter on technical rules for determination and application of domicile,⁵² which are irrelevant if the phrase "most significant relationship" is to be the test.

The seat-of-relationship formula proposed in this article is offered in the hope that it avoids both oversimplification and pedantic sophistication. By describing step-by-step what questions to think about, it may lead lawyers to sensible conclusions. In time, cases decided (and explained) on the basis of the formula should produce precedents which will provide guides for expanded use of the formula. This article, we hope, is a start toward rational analysis.

51. Professor William Prosser characterized conflicts scholarship with his usual candor:

The realm of conflict laws is a dismal swamp filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer is quite lost when engulfed and entangled in it.

Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

52. The Restatement (Second) CONFLICT OF LAWS Chap. 2 (1971).

