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BOOK REVIEW

Back to Conflicts Basics: CHOICE OF LAW AND MULTISTATE JUSTICE by Friedrich K. Juenger

*Reviewed by Stanley E. Cox**

Chief Justice Stone is reported to have said that the study of conflict of laws is a good substitute for a more formal course on legal jurisprudence.¹ Conflicts theories, among other things, at their heart address issues of how “true” laws are, how much respect governments should give to other sovereigns or to private agreements, and what role the judiciary should play as lawmaker or law interpreter. Discussions about how to choose law are in essence discussions about what constitutes justice. A good book on conflicts should provoke foundational thinking about such issues and other basics of the conflicts discipline. *Choice of Law and Multistate Justice*² does.

I. A QUICK OVERVIEW

Professor Juenger’s thesis is that the only sensible choice-of-law theory is to apply the best substantive law to interstate and international disputes.³ Whether one agrees or disagrees with this thesis, it is refreshing to read a conflicts monograph that argues consistently at the foundational level and pursues its thesis from introduction to conclusion. Borrowing

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1. See Paul A. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1210 (1946).

2. FRIEDRICH K. JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE* (1993).

3. *Id.* at 236.

from his multitudinous prior conflict writings⁴ and specifically building on his Hague General Course on private international law,⁵ Professor Juenger presents in this book the essence of his conflicts theory, and attacks others' conflicts theories. For those already familiar with Professor Juenger's views, *Choice of Law and Multistate Justice* productively distills and reinforces. For those not so familiar with Professor Juenger's previous, significant contributions to the literature, *Choice of Law and Multistate Justice* serves as an impressive introduction to his conflicts thinking while straightforwardly setting forth his conflicts ideology.

The book is divided into five chapters. The introduction sets forth the facts of three illustrative cases⁶ and introduces conflicts terminology. Chapter I provides a historical overview, emphasizing the recurrence of fundamental conflicts themes. Professor Juenger also introduces in this chapter the sub-theme that more modern theories have added little or nothing to conflicts jurisprudence. Chapter II criticizes what Professor Juenger categorizes as the classical multilateralist approach, for vainly seeking to develop rules identifying which geographically based law must be applied to a conflicts dispute. Chapter III criticizes the twentieth-century, American conflicts revolution, both for pretending that it has developed anything new, but more fundamentally for failing to resolve conflicts problems. Although this chapter pours the most vitriol on interest analysis as a form of narrow-minded unilateralism, it also indicts other theories, such as the proper law approach (merely reviving another form

4. See *id.* at 242 (collecting works in the bibliography section of the book); FRIEDRICH K. JUENGER, *THE LEX MERCATORIA AND THE CONFLICT OF LAWS*, in *LEX MERCATORIA & ARBITRATOR* (Thomas E. Carbonneau ed., 1990); Friedrich K. Juenger, *Babcock v. Jackson Revisited: Judge Field's Contribution to American Conflicts Law*, 56 ALB. L. REV. 727 (1993); Friedrich K. Juenger, *The Complex Litigation Project's Tort Choice-of-Law Rules*, 54 LA. L. REV. 907 (1994); Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1 (1984); Friedrich K. Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U. ILL. L. REV. 105; Friedrich K. Juenger, *A Page of History*, 35 MERCER L. REV. 419 (1984); Friedrich K. Juenger, *Supreme Court Intervention in Jurisdiction and Choice of Law: A Dismal Prospect*, 14 U.C. DAVIS L. REV. 907 (1981); Friedrich K. Juenger, *What Now?*, 47 OHIO ST. L.J. 509 (1985).

5. Professor Juenger initially delivered these lectures in 1983, and they were published in Volume 193 of the Academy's *Collected Courses*. See JUENGER, *supra* note 2, at ix.

6. Professor Juenger uses the following three cases to demonstrate how his conflicts theory works and the types of problems that any conflicts theory must address. *In re Paris Air Crash of Mar. 3, 1974*, 399 F. Supp. 732 (C.D. Cal. 1975) (involving a mass tort); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (involving multinational corporations, an incident in international waters, and a choice of forum clause); *Cardo v. Cardo*, Judgment of 11 July 1968, 94 BGE II 65 (involving a domestic relations case with spouses of different nationalities); see also *infra* notes 55-96 and accompanying text (discussing how Professor Juenger's and the author's choice-of-law approaches would resolve these cases).

of failed multilateralism)⁷ and the Second Restatement (a jumbling together of disparate theories and portions of theories).⁸ In Chapter IV Professor Juenger reexamines the failings and occasional successes of competing theories in light of his belief that only theories allowing teleology to play a significant de facto role in conflict decisions will be implemented by courts. Finally, Chapter V more explicitly explains and defends the teleological/better law approach and concludes by explaining how Professor Juenger's theory would resolve the three cases introduced at the beginning of the book.

II. THREE CHEERS FOR SOLUTIONS

Before criticizing Professor Juenger's better law argument in more detail, it is important to praise Professor Juenger for advocating a conflicts solution rather than just attacking others' offerings. A readiness to explain how real cases should be decided is something anyone disposed to enter the "dismal swamp"⁹ of conflicts theorizing should be prepared to do.¹⁰ To be sure, Professor Juenger's strong criticism of his opponents' views constitutes a significant amount of attempted "weeding" of the conflicts garden, but just as importantly, he also attempts to plant in the garden.¹¹ It is important to plant, rather than just weed, for two reasons having to do with both the practical application and the underlying force of conflicts theory.

On the practical side, courts apply conflicts theories to real cases. Courts employ, or at least say they are employing, theories such as vested rights, most significant connection, interest analysis, or better law to cases involving multistate elements.¹² A theorist who only attacks the inade-

7. See JUENGER, *supra* note 2, at 97, 128-31.

8. See *id.* at 105-06, 142-43.

9. See William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953), quoted in JUENGER, *supra* note 2, at 1.

10. For the most recent attempt by a diverse panel of conflicts and procedure scholars to apply their theories to various facts, see the forthcoming symposium on "Jurisdiction, Justice and Choice of Law for the 21st Century," including applications by Robert Bone, Patrick Borchers, Robert Brussack, Stephen Burbank, Larry Kramer, Harold Maier, Linda Mullenix, Martin Redish, Linda Silberman, Michael Solimine, Allan Stein, Russell Weintraub, and the author to various hypothetical and real facts in 29 NEW ENG. L. REV. (forthcoming 1995). The symposium issue is the written work product of a conference held at New England School of Law on October 28-29, 1994.

11. See David F. Cavers, 56 HARV. L. REV. 1170, 1172-73 (1943) (using the weeding and garden metaphor, while reviewing WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942)).

12. For a recent argument that conflicts theory is largely irrelevant to the decisions that courts make in cases involving multistate facts, see Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949 (1994).

quacies of others' theories provides nothing that is likely to prompt a busy court to change the way it adjudicates. Courts can utilize Professor Juenger's ideas. His factual examples help readers understand what his theory means and how it should be applied.

On the foundational side, until and unless a conflicts theorist attempts to answer rather than merely raise conflicts problems, a strong risk exists that the theorist does not yet fully appreciate the problems that any conflicts theory attempts to address. It is easy to criticize a theory for not adequately promoting interstate harmony, for denigrating predictability concerns, or for downplaying justice in the individual case. But a conflicts theory inevitably emphasizes certain aspects of conflicts problems over others.¹³ The honest developer or proponent of a theory recognizes that her theory cannot solve all of the potential concerns in the conflicts situation equally well.

The attacked theorist who is honest about what she is advocating may respond in one of two ways. She may either explain why the concerns *not* adequately addressed by her position do not truly matter,¹⁴ or, alternatively, that her theory correctly prioritizes the different aspects of conflicts doctrine that jostle against each other for attention. Instead of just criticizing others' theories for not perfectly "solving" some single aspect of the conflicts conundrum, the more complete theorist shows that she understands the interrelatedness of conflicts doctrines by demonstrating, via application, what she would emphasize at the expense of other aspects of conflicts dogma. When Professor Juenger applies his theory to real fact patterns, he thereby allows others to demonstrate whether they could solve the problems better. He also demonstrates that he, at least partially,¹⁵ appreciates the interrelated nature of conflicts problems.

13. The common wisdom, for instance, is that a rule-type, multilateralist theory like vested rights emphasizes predictability, uniformity, and respect for the interests of other sovereigns. Conversely, a theory such as better law is thought to emphasize fairness to individual litigants.

14. For example, one could argue that these concerns are insoluble under any theory for resolving conflicts.

15. I argue, in contrast to Professor Juenger's approach, that limited sovereignty places important restrictions on a state's or nation's ability to apply law to interstate or international facts. See *infra* notes 26-54 and accompanying text. This criticism may be viewed as indicting Professor Juenger for failing to explore: (1) the interrelation of choice of law with the need to place restrictions on jurisdiction; and (2) the problems of recognition of foreign judgments, once choice-of-law decisions have been made. See P.E. Nygh, *Book Review*, 67 *AUSTR. L. J.* 802, 803 (1993) (criticizing *Multistate Justice* for failing to address sufficiently the interrelationship between jurisdiction, recognition, and choice of law). Professor Juenger's decisions to downplay the ramifications of what I believe are related doctrines, however, seem to be deliberate rather than an oversight, and motivated by his uncompromising view that the primary goal of conflicts jurists should be to do substantive justice.

III. PROFESSOR JUENGER'S ARGUMENT FOR BETTER LAW

Professor Juenger places substantive concerns atop his conflicts hierarchy, hence the emphasis on multistate *justice* in the book title. Professor Juenger always prefers multistate justice over cold rules, interstate harmony, or presumed predictability. In attacking other theories, Professor Juenger contends that emphasizing better substantive law does not lead to any greater interstate disharmony or lack of predictability than exists under other theories.¹⁶ Professor Juenger's faith is that, through an emphasis on the substantive result, other aspects of conflicts theory necessarily will fall into place.

In establishing his argument, Professor Juenger categorizes all conflicts theories into one of three types: multilateralist, unilateralist, or substantive law approach.¹⁷ Professor Juenger views the essence of the multilateralist approach as seeking, from among competing domestic laws, for one that, based on particular litigation contacts, most appropriately governs the dispute. He thus herds together into the same multilateralist flock proponents of all forms of seat-of-relationship tests (such as Savigny), adherents to vestedness (such as Beale), and proponents of nationality or domicile as the controlling basis for choice of law.¹⁸ Professor Juenger also characterizes as multilateralist more modern choice-of-law theories, such as the Second Restatement, that, though purporting to balance competing considerations, merely choose from among competing domestic laws the one deemed appropriate for the particular issue involved in the conflicts litigation. In Professor Juenger's view, the common failing of all such multilateralist approaches is their doomed search for the one domestic law that best fits the particular cross-boundary transaction being litigated. Because a *domestic* law seldom properly fits an interstate transaction, the vain search by multilateralists for a single connecting factor to take precedence in selecting such an irrelevant law always hinders, rather than assists, the search for multistate justice.¹⁹

Professor Juenger similarly faults unilateralism for misguidedly attempting to apply domestic law to interstate transactions. The essence of unilateralism, in Professor Juenger's view, is to myopically focus on how

16. See, e.g., JUENGER, *supra* note 2, at 156.

17. See *id.* at 45-46. Professor Juenger's teleological approach is the substantive law approach against which he evaluates the two other forms of competing theories.

18. See *id.* at 41-42 (discussing Mancini's nationality theories).

19. Additionally, so long as multilateralists disagree as to what connecting factors should take precedence to determine what one law should be applied to a transaction (and there is always likely to be such disagreement, Savigny and Beale to the contrary), multilateralists cannot achieve even the lesser "virtue" of predictability for interstate transactions sometimes advocated on behalf of multilateralist systems.

far the domestic laws of a particular forum are designed to reach. This attempt almost always founders because most domestic laws were not designed to reach international facts. Therefore, the attempt to construe their reach usually stretches them beyond recognition.²⁰ Alternatively, even if one sovereign's domestic laws could be construed to reach international fact patterns, these laws do not necessarily have the substantive content that would best accomplish multistate justice. The parochialism of extending one nation's law as far as it can reasonably be stretched is not, in Professor Juenger's view, the best way to accomplish true justice.²¹

Professor Juenger equates, as quintessential unilateralists, the often-overlooked German conflicts scholar Wächter and the seldom-overlooked American conflicts scholar Brainerd Currie. Although Professor Juenger, like many other conflicts scholars, has particularly sharp words of criticism for Currie's ideas and methodology,²² when unilateralist theory is applied to facts, Professor Juenger does not strongly fault unilateralists for ignoring the concerns of other potentially interested jurisdictions. In Juenger's view, the natural "homing tendency" that judges applying most conflicts theories use sometimes can lead to improved interstate justice. By ignoring the more or less arbitrary requirements that multilateralists espouse, and instead applying forum law of superior substantive content, the unilateralist, in Professor Juenger's view, sometimes indirectly achieves something approximating multistate justice.²³ But such results are not due to any inherent strength of unilateral theory or technique since, according to Professor Juenger, unilateralism lacks coherent or defensible foundations. Rather the *lex fori* justice sometimes achieved by unilateralism derives serendipitously and randomly from the fact that unilateralism necessarily rejects the arbitrary rules advocated by multilateralists.

In sum, multilateralists and unilateralists are alike, according to Professor Juenger, in that both vainly seek to identify *domestic* law that should apply to interstate transactions.²⁴ Instead, both theories should be abandoned, and focus should be placed on the unique nature of the interstate or international occurrences that give rise to conflicts problems. The conflicts situation cries out for the formation of new law that transcends sovereignty (i.e., transcends the domestic situation), and more appropriately addresses interstate or international concerns.²⁵ It is no accident that

20. See JUENGER, *supra* note 2, at 133-35.

21. See *id.* at 136.

22. See *infra* note 99.

23. See, e.g., JUENGER, *supra* note 2, at 148, 157, 161-62. *But cf. id.* at 139.

24. See, e.g., *id.* at 154.

25. See *id.* at 136, 160-61.

Professor Juenger starts and closes his book with approving reference to the flexibility achieved by the ancient Roman *praetor peregrinus*, who fashioned a *ius gentium* that was not local law, but special substantive law designed to address the problems presented by non-domestic situations. The proper formulator of successful conflicts decisions, in Professor Juenger's model, is the sensitive judge freed from the constraints of sovereignty to fashion enlightened substantive law appropriate for the multi-state situation.

IV. A RESPONSE DEFENDING UNILATERALISM (OR THREE CHEERS FOR LIMITED SOVEREIGNTY)

The way a problem is constructed often determines its resolution. By defining multilateralism and unilateralism as firmly focused upon limited domestic law rather than upon multistate substantive justice, Professor Juenger reserves to his preferred version of teleology the only chance to accomplish true substantive justice. If multilateralists always seek arbitrary rules pointing to imperfect domestic laws, while unilateralists similarly never rise above interpretation and application of purely domestic law, then Professor Juenger correctly insists that the answer to conflicts problems lies elsewhere. If Professor Juenger's categorizations, however, mistakenly shade these other theories rather than fashion full-bodied portraits, or if his vision of transcendent substantive law is itself wraith-like or otherwise evanescent, then it may be that the contrast between what is achievable under alternative theories is not so stark as Professor Juenger paints it to be.²⁶

I leave it to others to explain how a multilateral approach may incorporate transcendent substantive content as an important component of its

26. I do not mean to criticize unduly Professor Juenger's or any other writer's attempt to paint broadly and clearly. To borrow the William James' insight, if the conflicts world without imposed order is merely buzzing, bumbling confusion, only by attempting to discern or impose some order on that world do we offer the possibility of accomplishing a form of justice that means more than happenstance in the individual case. By also writing as if conflicts theory matters, I agree with Professor Juenger that the attempt to impose order on conflicts cases is a worthwhile effort. See, e.g., Stanley E. Cox, *Razing Conflicts Facades to Build Better Jurisdiction Theory: The Foundation—There Is No Law but Forum Law*, 28 VAL. U. L. REV. 1 (1993) (suggesting that recognizing the interrelationship of jurisdiction and the ability to apply forum law is the foundational starting place for the construction of sensible jurisdictional theory).

methodology.²⁷ Instead, albeit with reservation,²⁸ I accept Professor Juenger's implied invitation to defend unilateralist approaches to choice of law. Professor Juenger's dismissal of unilateralism and defense of transcendent better law seem never to answer satisfactorily two related foundational questions about conflicts situations: (1) by what authority do judges render conflicts decisions; and (2) why should those who did not render a conflicts decision respect it?

Presumably, for Professor Juenger, the need to fashion law to fit multi-state fact patterns is what empowers judges to create it, and the effectiveness or moral and rational force of superior substantive law is what makes it binding on other communities. Accordingly, Professor Juenger is hostile to theories that claim to limit a judge's ability to fashion the proper interstate or international law. Professor Juenger does not hide his distaste for legal positivism;²⁹ he advocates, in the American context, that courts overrule *Erie Railroad Co. v. Tompkins*³⁰ and reinstitute the *Swift v. Tyson*³¹ approach of creating and applying the best substantive law possible.³²

27. See, e.g., Russell J. Weintraub, *Choosing Law with an Eye on the Prize*, 15 MICH. J. INT'L L. 705 (1994) (critiquing Professor Juenger's views from a largely multilateral perspective). As an example of an eclectic multilateralist approach, the Second Restatement provides through its mandate to consider "the needs of the interstate and international systems" and "the basic policies underlying the particular field of law," enough flexibility for a court to fashion particular substantive rules that somewhat transcend normal domestic law application. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). I emphasize, however, that I do not make such a defense for multilateralism, only that it arguably can be made. I also emphasize that I am not entirely comfortable with the dichotomous (or trichotomous) categorizations into schools or camps that we conflicts scholars seem so eager to make. By defining those who hold different theories as "les autres," we invite ourselves to stop listening to anything significant (or significantly different from others we previously have lumped into their camp) the others might say. For purposes of this review, however, I place myself within the unilateralist camp that Professor Juenger has constructed, and I attempt to defend that position in terms that try to respond to Professor Juenger's arguments.

28. See *supra* note 27.

29. See JUENGER, *supra* note 2, at 159.

30. 304 U.S. 64 (1938).

31. 41 U.S. 1, 18-19 (1842) (holding that a federal court may exercise independent judgement and is not bound by state common law), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

32. JUENGER, *supra* note 2, at 165-67. Patrick Borchers, a former student of Professor Juenger, recently revived the *Erie* debate specifically as it relates to conflict of laws decisions. Borchers argues that *Erie* may not rest on any currently defensible constitutional premise and advocates that federal courts therefore should feel free to fashion federal common law to govern interstate conflicts. See Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79 (1993).

In defending a form of unilateralism, I do not deride Professor Juenger's search for transcendent substantive law as a vain quest for a "brooding omnipresence in the sky."³³ I agree with Professor Juenger that the forum always should fashion the best substantive law possible to address any litigation properly before it. This does not mean, however, that the forum should seek law outside of its own sphere of influence or should try to apply law to situations outside of its proper sphere of influence. Because I fear that Professor Juenger's transcendent law approach invites forums to do both, I prefer a version of what he no doubt would label unilateralism.

It may prove helpful to compare the search for multistate justice with the problems of governmental injustice that Henry David Thoreau more generally explored in *Civil Disobedience*.³⁴ Thoreau's ultimate quest was for better law, which meant, for him, engaging in and encouraging the best possible course of conduct, independent of what any particular government advocated or permitted. He rejected any positivism that claims for government alone the right to define superior moral conduct. As Thoreau wrote, "[c]an there not be a government [of] . . . conscience?"³⁵ One does not have to accept Thoreau's *individualist*, no-government solution to believe that government has no monopoly on truth or justice. Whether based in sectarian or religious communities, families (however defined), or individuals, there are alternative sources of "law," in the broad sense of standards that should guide persons' (or businesses' or even governments') conduct. The government has no monopoly on justice.

Although Professor Juenger attacks unilateralism as synonymous with a form of all-encompassing positivism, he seems to proceed on the assumption that governments can and always should fashion and apply "better law."³⁶ His solution to alleged parochialism is essentially to cre-

33. See *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

34. I ask readers to indulge a former high school English teacher in this comparison. Legal ideas often must push their way into my mind alongside, through, and always significantly colored by my earlier immersion in other forms of writing and argument. It is still true, for example, that I have taught American transcendentalism to far many more 11th graders than I have taught conflicts to law students. This prior life experience necessarily shapes (and hopefully improves) my current views.

35. Henry David Thoreau, *Civil Disobedience*, in *WALDEN AND OTHER WRITINGS OF HENRY DAVID THOREAU* 665 (Brooks Atkinson ed., 1992)

36. Compare, however, Professor Juenger's strong insistence that party autonomy trumps any forum interest in applying its own law to contract disputes. If party autonomy is a form of government non-intervention, Professor Juenger strongly supports party autonomy as better law. See JUENGER, *supra* note 2, at 135, 213-20. Party autonomy, however, also could be a form of affirming another state's regulatory interests and the parties' right to affiliate with that other government. Alternatively, party autonomy, if conditioned

ate super law. It is not necessarily an improvement on a misguided or parochial form of justice, however, to create a larger hammer. To compare again to Thoreau, the central tension in the search for justice, multi-state or otherwise, is that government is sometimes necessary to improve justice, but is itself often inherently the source of injustice.³⁷

Theoretically, Thoreau believed that government was unnecessary, since every person possesses the spark of the divine, and thereby is capable of properly directing his conduct. When men behave as angels there will be no need for government. But in the meantime, "speak[ing] practically and as a citizen,"³⁸ Thoreau asked for "not at once no government, but *at once* a better government. Let every man make known what kind of government would command his respect, and that will be one step toward obtaining it."³⁹ This realistic aspect of Thoreau's approach insisted that the government to which he was subject (not in a moral but a literal sense) apply the best laws possible. Since Thoreau's starting point was that government most often hindered rather than promoted true morality, however, Thoreau found inherent tension regarding how much justice (even of the best kind) government should administer or enforce.

For a unilateralist, by implication, the best justice might sometimes be no justice at all. A unilateral approach does not require that the home government always administer law to all facts. Cases can be dismissed because the forum does not believe that it has a right to apply law to this conduct.⁴⁰ These ideas of limited sovereignty should, in fact, be at the heart of the conflicts enterprise. A forum that recognizes that it should not attempt to solve all of the world's problems should stop trying to act as if it can. The multilateralism that Professor Juenger criticizes as a vain search for the most interested jurisdiction is, from a limited sovereignty perspective, more fundamentally dangerous because it seemingly empowers the forum to apply law despite the recognition that the case does not directly implicate the forum's regulatory interests. The forum in such situations would do better to leave the parties alone.

Professor Juenger and I apparently agree that it does not make sense for the forum to substitute another jurisdiction's laws where the forum

on no serious violations of public policy, could be merely an alternative version of forum law.

37. Thoreau, *supra* note 35, at 667.

38. *Id.* at 668.

39. *Id.* (emphasis in original).

40. Cf. Larry Kramer, *The Myth of the "Unprovided For" Case*, 75 VA. L. REV. 1045, 1048-64 (1989) (arguing that most "unprovided for" situations are mislabelled because "no law to apply" means nothing more than dismissal for failure to state a claim upon which relief can be granted, and further arguing that in most cases called "unprovided for" there really is law that is meant to apply).

decides it could apply better law.⁴¹ We probably even agree as to the content of law that courts should apply in many such situations.⁴² We probably disagree over whether the forum always has legitimacy to apply this better law. I believe that the forum always must first ask whether it should adjudicate the controversy at all. If it should, then it should apply the best law possible. I would, however, label the law applied "forum law," while it appears Professor Juenger would resist this labelling.

Is this a difference merely of semantics? I am not so sure. On the one hand, the historical models Professor Juenger provides for courts fashioning better law involve *single* sovereigns applying their own laws to situations in which they thought they had a right to rule. *Swift v. Tyson*, for example, ultimately is explicable under a view that federal courts have a constitutional grant of authority to fashion substantive law for diversity situations.⁴³ Similarly, the *ius gentium* that Professor Juenger so lauds is in reality Roman courts merely applying Roman law to situations involving Roman trade interests.⁴⁴ To this extent, then, there is no significant difference in result between the better law Professor Juenger advocates and the version of unilateralism I defend here. What he calls better law without regard to domestic law, I simply call the forum reformulating and fashioning its own law to govern situations that it determines implicate its regulatory interests.

41. Professor Juenger, to his credit, also recognizes and discusses the difficulty of a forum ever being able to apply another's law accurately. See JUENGER, *supra* note 2, at 83-86, 157-59. Whereas Professor Juenger apparently sees these problems as support for his view that courts should develop transcendent substantive law for multistate situations, I see those truths as support for the idea that the forum never should attempt to apply another's law. See Cox, *supra* note 26.

42. I imagine there are also many situations where we do *not* agree. I am not, however, here arguing for an absolute form of moral relativism (excuse the oxymoron), that insists that no truth is possible and that we should therefore allow each government to do as it pleases within its own sphere of influence. To me, such a view brings vested rights back full circle, but in a relativistic vein.

43. *Swift v. Tyson* is, in other words, an argument for non-preemptive, but clearly *federal* common law. Cf. Borchers, *supra* note 32 (arguing that purpose of federal diversity jurisdiction was to provide access to a different substantive decision maker than would be available in a state system). Granted, the *Swift* Court may have seen itself fashioning law in accord with international rather than domestic principles, and for a larger commercial market. See, e.g., *Swift v. Tyson*, 41 U.S. 1, 19 (1842) ("The law respecting negotiable instruments may be truly declared in the language of Cicero . . . to be in a great measure, not the law of a single country only, but of the commercial world."), *overruled by Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). My point in text is not that the courts involved viewed themselves as domestic courts, but rather that the legitimacy of the judgments they issued can best be explained retrospectively as resting on the fact that they did not attempt to adjudicate beyond their spheres of influence.

44. The fact that these were specialized Roman tribunals that applied law different from that applied in other contexts does not to my mind make them any less Roman.

On the other hand, when Professor Juenger discusses the potential for multistate justice, he seems to advocate a role for courts broader than that which I condone under my version of unilateralism. In the international context especially, Professor Juenger seems to envision courts that fashion law apart from any sense of ceded sovereignty and without any concern for why a particular court should be hearing a particular controversy.⁴⁵ Professor Juenger's courts apparently derive their power from a form of the brooding omnipresence in the sky. His hope is the same as that rejected in *Erie*—that better law will displace inferior law because of the combined forces of forum shopping⁴⁶ and the persuasive power of its superior merit.⁴⁷

It would be incorrect to dismiss Professor Juenger's arguments as outdated attempts to revive a failed doctrine. In fact, no one has probably ever explicitly attempted his approach. If I read him correctly, Professor Juenger encourages courts *with open eyes* to issue judgments unconstrained by any sense of pursuing forum goals.⁴⁸ I do not think *Swift v. Tyson* or the *praetor peregrinus* operated in this manner.⁴⁹ Professor Juenger's position is *post-positivist*, *post-realist*, *post-relativist* advocacy of absolutely better law. In the pre-eras, courts may have believed that they pursued the same truth, or they may have believed that they all were pursuing truth within their exclusive spheres of influence, or they may have just imperialistically assumed that their laws were truth. Whatever their beliefs, courts likely did not believe that they could fashion law without regard to the interests of either their own state or other states. Pre-courts did not have to articulate or respond to assumptions about the importance of state boundaries or sources of legitimacy; post-courts do.

45. See JUENGER, *supra* note 2, at 169.

46. Cf. Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 574 (1989) (arguing that the existence of forum shopping should prompt a re-orientation of choice-of-law rules that will serve the ends of substantial justice). I also do not object to forum shopping, but more for reasons related to what in the United States context might be discussed under notions of federalism.

47. See JUENGER, *supra* note 2, at 193-94. *Erie* judged as empirically unsound this hope that superior federal common law would induce states to change their common law rules. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74-77 (1938). Ultimately, the notion that one form of laws will replace another depends not only on persuasive force, but also on whether other courts will recognize and enforce the judgments forum shoppers have won. See also *supra* note 15.

48. See JUENGER, *supra* note 2, at 46, 220 (discussing LEX MERCATORIA and Professor Juenger's promotion of party autonomy); Friedrich K. Juenger, *The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons*, 42 AM. J. COMP. L. 381 (1994). I thank Professor Russell Weintraub for drawing this recent article to my attention.

49. See *supra* notes 43-44 and accompanying text.

Professor Juenger's assertion that modern⁵⁰ courts may fashion absolutely better law is a bolder version of fashioning better law than the unthinking assumptions and workings of *Swift v. Tyson* or the *ius gentium*.

I am ultimately troubled by unfettered discretion to formulate better law, not because I am against better law, but because I am wary of unfettered discretion.⁵¹ As previously intimated, a supporter of limited sovereignty might criticize boundless positivism *or* boundless better law for issuing decisions about matters that sometimes would be better left alone. The key issue that Professor Juenger's version of better law does not address is the need for jurisdictional limits. My form of unilateralism recognizes that because the forum always applies its own law to matters before it, the forum must have a good reason for hearing a case. The argument that the forum can formulate wonderful law may not persuade a unilateralist who is wary of governments issuing judgments.

Professor Brilmayer's sometimes criticized⁵² arguments regarding the need for rights based limitations on choice of law⁵³ seem similar to what I criticize Professor Juenger for leaving out. The need for some legitimizing contact with the litigation, or for some relationship with the parties against whom law is applied, serves as an important check⁵⁴ on the tendency of a court to adjudicate against the whole world. This limitation has special relevance when the court, as I believe it is encouraged to do under Professor Juenger's version of better law, primarily asserts the need for better law rather than asks, as I believe it should, whether *it* should formulate better law for this dispute. Perhaps the differences be-

50. Or perhaps I should say post-modern, given recent jurisprudential debate.

51. This does not necessarily mean that legislative will should rein in the courts, whatever "legislative will" means. The argument over which arm of the state should have precedence in formulating the state's laws is a significantly different argument from whether the state should be applying its laws, whoever formulates them, to facts that come before its courts.

52. See, e.g., Patrick J. Borchers, *Professor Brilmayer and The Holy Grail*, WIS. L. REV. 465 (1991) (reviewing LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTION*); cf. Harold G. Maier, *Baseball and Chicken Salad: A Realistic Look at Choice of Law*, 44 VAND. L. REV. 827 (1991) (arguing that Professor Brilmayer's rights-based arguments are more appropriate for determining jurisdiction than for choosing law). I also have severely criticized Professor Brilmayer's unrelated arguments about the helpfulness of game theory to choice-of-law jurisprudence. See Cox, *supra* note 26, at 72-76.

53. See LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* 191-230 (1991).

54. The check may be minimal, compare Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 470-78 (1982) (emphasizing the limited nature, yet the force of the Court's limits) with Borchers, *supra* note 32, at 482-89 (criticizing the weaknesses of rights based limits); but still should force a court to acknowledge and take responsibility for its decisions, and in some instances prevent the court from taking jurisdiction of cases. It is beyond the scope of this review to sketch out what should be the limits on a court's jurisdiction to hear cases and apply its law to them.

tween us are minimal or even non-existent, but I am far from certain of this. The omission from *Choice of Law and Multistate Justice* of any discussion of jurisdictional checks, and the painting of unilateralism in a way that fails to recognize that the forum may change its law (in response to interstate facts) so as to make forum law better, seem to me significant omissions from Professor Juenger's strong thesis.

V. COMPARING "BETTER LAW" AND *LEX FORI* RESOLUTION OF THE SAME CASES

One way to explore whether the differences between Professor Juenger's conflicts methodology and my approach are minimal or significant is to compare the way we would resolve the three cases he uses to frame *Choice of Law and Multistate Justice*. In all of the cases, my approach is different from Professor Juenger's, but it would not necessarily lead to different substantive results. The same result as under Professor Juenger's better law approach could be achieved under more unilateral methodology, if, under my approach, the forum first found that it had a legitimate interest in applying its law to the interstate dispute (i.e., had jurisdiction to resolve the dispute) and then also agreed to shape forum law the same way Professor Juenger advocates.

A. *The Paris Air Crash Case*

Professor Juenger believes that mass torts and complex litigation cases decisively demonstrate the advantages of a teleological approach.⁵⁵ In the Ermenonville disaster,⁵⁶ a Turkish commercial aircraft designed and manufactured in the United States, carrying primarily non-Americans, crashed after takeoff from Paris, killing all 333 passengers and 13 crew members aboard. The plaintiffs sued in United States courts and primarily alleged defective design and manufacture.⁵⁷ The California judge before whom all United States cases (involving 337 decedents) were consolidated ruled that California law governed the issues of liability⁵⁸ and damages.

55. See, e.g., Friedrich K. Juenger, *The Complex Litigation Project's Tort Choice-of-Law Rules*, 54 LA. L. REV. 907 (1994); Friedrich K. Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U. ILL. L. REV. 105.

56. See *In re Paris Air Crash* of Mar. 3, 1974, 399 F. Supp. 732 (C.D. Cal. 1975); *In re Paris Air Crash* of Mar. 3, 1974, 423 F. Supp. 367 (C.D. Cal. 1976); JUENGER, *supra* note 2, at 2, 48-52, 208-13.

57. The plaintiffs also sued the United States under the Federal Tort Claims Act for alleged improper certification of the airplane or failure to inspect and/or require modifications before it was sold abroad.

58. See *Paris Air Crash*, 399 F. Supp. at 742.

Professor Juenger believes that this judge explicitly and transparently should have assumed the role of multinational decision maker and should not have manipulated *Klaxon* and *Van Dusen* to seek a particular substantive law.⁵⁹ Freedom from positivist constraints would have allowed the judge to evaluate and compare various nations' compensation systems critically and to fashion one best suited for air crashes. In Professor Juenger's view, the law that most fully compensates plaintiffs is obviously the appropriate law.⁶⁰ He contends that the California federal judge in *Air Crash* should not have pretended to apply a mixture of federal and California pro-plaintiff law, but instead explicitly should have shaped international law to promote plaintiff recovery.

I agree wholeheartedly with Professor Juenger's insistence that deceptive conflicts rules should not mask the real basis for a court's decision. If a trial court can pretend to consider other sovereigns' interests while promoting only forum interests, or if a judge can manipulate conflicts rules to achieve a substantive result out of line with supposedly governing precedent, there is something wrong with the conflicts system. In fact, the *Air Crash* judge seemed to recast domicile-emphasizing, California interest analysis decisions,⁶¹ ignored differences in the states' choice-of-law systems from which pieces of the consolidated litigation originated,⁶² and created federal interests in the litigation that would not withstand *Challoner* criticism.⁶³ Such masquerades should be avoided and exposed rather than encouraged.

These deceptions arise because the courts whose substantive law allegedly has been applied do not necessarily review judges who determine the applicable substantive law. As the judge in *Air Crash* emphasized,

The law on "choice of law" . . . is a veritable jungle, which, if the law can be found out, leads not to a "rule of action" but a reign of chaos dominated in each case by the judge's "informed guess" as to what some *other* state than the one in which he sits *would* hold its law to be.⁶⁴

Professor Juenger and I apparently agree that it would be better for appellate courts to review substantive content rather than the way lower courts apply inherently manipulable and unpredictable conflicts rules.

59. See JUENGER, *supra* note 2, at 210-12.

60. See *id.* at 212. He also asserts that the International Encyclopedia's promotion of such tort law represents a well reasoned justification for that law, as well as an indication of the trend in that direction.

61. See *Paris Air Crash*, 399 F. Supp. at 741-45.

62. See *id.* at 749.

63. See *id.* at 745-47.

64. *Id.* at 739 (emphasis in original).

Under his better law approach, both the trial and appellate *Air Crash* courts would focus only on fashioning a substantive rule that best serves justice in air crash cases.

Under *lex fori*, a trial court similarly always knows that its decisions will be reviewed for substantive law content.⁶⁵ Under *lex fori*, however, courts cannot shape substantive law for multistate cases without explicitly acknowledging that this shaping is a matter of *forum* policy. Both Professor Juenger and I agree that the *Air Crash* judge improperly invented a federal concern to remove the case from normal California law on recovery. Professor Juenger acknowledges, but does not emphasize, that this is a tragedy for the development of California law. A more straightforward substantive opinion, Professor Juenger correctly contends, "would have helped the California Supreme Court to decide [a subsequent case raising related issue] and might have prompted it to scuttle entirely the outdated rule that disallows recovery for grief."⁶⁶ *Lex fori* forces the court to recognize now that it is always making *forum* substantive policy. It is not just that the *Air Crash* case might help California develop better law in a future case. When the *Air Crash* court properly acknowledges that it has power only to apply California law, the *Air Crash* case directly becomes the vehicle through which California courts can reshape California tort law.

Under Professor Juenger's approach, on the other hand, once the dispute assumes an international characterization, forum policy apparently is abandoned and the sole concern becomes what rule is best for all such cases, regardless of where they are brought.⁶⁷ Instead, I believe it is important to question why a particular forum should hear the case. In a case involving a foreign airline crash carrying primarily foreign passen-

65. I set aside *Erie* situations as beyond the scope of this article.

66. JUENGER, *supra* note 2, at 212.

67. Professor Juenger's book is actually ambiguous regarding how broadly he would look for sources to fashion appropriate substantive law. My assumption that he would not be constrained to any particular group of sovereigns' laws but would use existing sovereigns' laws only as inspiration to fashion appropriate international law gives him the benefit of the doubt. In fact, Professor Juenger sometimes promotes alternative reference law, i.e., using the best law available from those of any of the arguably interested jurisdictions. See *id.* at 195-97; *cf. id.* at 213. A heading that reads "The Ermenonville Disaster: Alternative Reference" in fact precedes the *Air Crash* discussion. *Id.* at 208. I read Professor Juenger as only offering alternative reference as a way station for judges who may not yet feel comfortable taking the full plunge into teleology. Alternative reference is antithetical to a truly teleological approach, since alternative reference limits the judge to a selection from domestic laws, none of which, according to Professor Juenger's larger thesis, may actually be designed to address international problems. If Professor Juenger is seriously promoting alternative reference methodology in its own right, this would be a serious inconsistency in his choice-of-law system.

gers, the court should have to justify the forum interest in applying law to the whole case. Professor Juenger seems comfortable with the *Air Crash* pro-plaintiff recovery result because he thinks that any court hearing such a case should fashion this substantive result. I am comfortable with the result because California had a right to impose its recovery law against manufacturers and designers significantly connected to California. Moreover, I also believe that pro-plaintiff recovery law strikes the best policy balance between manufacturers and victims for products liability tort claims. By jumping to the policy balance without first considering whether the forum may apply its law to the particular case before it, Professor Juenger's approach would allow anyone anywhere to hear complex litigation cases.

The *Air Crash* case actually is an easy one for application of forum (California) law because the plaintiffs brought the suit solely in products liability,⁶⁸ the defendants acted in California regarding products liability harms,⁶⁹ and the non-California airline later stipulated to a negotiated amount of liability on cross-claims not based on products liability.⁷⁰ I confess, however, that most complex litigation fact patterns will not allow so cleanly for a single forum to claim that every aspect of the case triggers its regulatory interests. Had the *Air Crash* plaintiffs been freed of the Warsaw Convention constraints⁷¹ and able to sue the airline for negligence, California would not easily have claimed that it could apply its airline conduct laws to Turkish airline actions so tangentially connected or arguably unconnected to California.

For Professor Juenger, the obvious non-local nature of complex litigation merely writes the conflicts problem large. In his view, a conflicts problem inherently transcends one state's or nation's jurisdiction, and therefore requires larger law. Complex litigation's obvious square peg fit with the round holes of conflicts rules (including *Erie* constraints) confirms that we should abandon those outmoded positivist methods of addressing conflicts problems and instead embrace a frankly transcendent and teleological approach.

There is, however, a possible opposite response to the problems raised by complex litigation. Professor Juenger's assumption that it is beneficial for a single forum or a single tribunal to decide all issues arising out of,

68. This was done to skirt the Warsaw Convention limitations on recovery against the airline. See *id.* at 208.

69. See *In re Paris Air Crash* of Mar. 3, 1974, 399 F. Supp. 732, 737, 744 (C.D. Cal. 1975).

70. See *id.* at 738.

71. See *supra* notes 68-70; see also JUENGER, *supra* note 2, at 49-52

for example, an air crash could be challenged as unsound.⁷² It is at least logically possible to argue that the basic problem with multidistrict complex litigation is that we allow it to exist at all. Perhaps we should not have multidistrict panels that attempt to consolidate into a single forum pieces of litigation that the same sovereign's laws cannot govern. If we took limited jurisdiction seriously, perhaps a sovereign's courts should hear only those pieces or aspects of litigation that its laws can govern.

I admit that such a view of limited jurisdiction runs counter to notions of convenience, judicial economy, and same transaction or occurrence logic that have dominated civil litigation and federal court efforts of the modern era.⁷³ Professor Juenger openly embraces the modern trends. He also correctly recognizes that once a judge has de facto substantive control of complex litigation, we can expect that judge to fashion substantive law, regardless of what the conflicts "rules" say. Both Professor Juenger and I believe that we should openly recognize this reality rather than mask it by conflicts rules that are inherently capable of manipulation. The main difference between our perspectives is that whereas Professor Juenger views cases such as *In re "Agent Orange" Product Liability Litigation*⁷⁴ as a model for future judges,⁷⁵ I view such results as reason to pause and to rethink whether we are headed in the right direction.

B. *The Damaged Oil Rig Case*

Professor Juenger correctly contends that depriving a court of otherwise valid jurisdiction poses problems for conflicts theorists who empha-

72. A mass disaster case, such as an airline crash, often *can* fit within the regulatory interests of a single jurisdiction (either the place of injury or place of the design and manufacture). The combined efforts of dispersed actors, such as in DES or asbestos cases, that create diffused harms are the more difficult type of complex litigation scenario.

73. Neither is there room in this brief review emphasizing Professor Juenger's approaches to detail why we should consider reversing consolidation efforts that today we take for granted, nor room to explain the extent to which I am willing to follow to conclusion the implications of such an approach. In a future article I hope to explore the problems inherent in consolidating, through complex litigation procedures, cases that one sovereign's laws cannot govern in good faith.

74. *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690 (E.D.N.Y. 1984). In this case veterans and their dependents filed health claims for their exposure to defoliants in southeast Asia. The United States Court of Appeals for the Second Circuit previously reversed Judge Weinstein's decision that preemptive federal common law should apply. In *In re Agent Orange* Judge Weinstein asserted that, under *Van Dusen v. Barrack*, each individual jurisdiction that had transferred a case to him would adopt a national consensus law of liability, which, not being extant, Judge Weinstein would fashion particularly for this case. As in most complex litigation matters, once the judge had made substantive law rulings, the bulk of the cases settled.

75. See JUENGER, *supra* note 2, at 165-67.

size sovereignty.⁷⁶ I find *The Bremen v. Zapata Off-Shore Co.*⁷⁷ to be indeed a hard case to swallow, and I read the combined message of *The Bremen* and *Carnival Cruise Lines v. Shute*⁷⁸ negatively rather than positively. Although Professor Juenger also disagrees with *Shute*,⁷⁹ he generally promotes party autonomy as better law, believes *The Bremen* Court correctly emphasized practicality over doctrine,⁸⁰ and considers presumptions against party autonomy parochial and contrary to modern commercial trends and necessities.⁸¹

In *The Bremen*, the Zapata Off-Shore Company sued the German owner of the tug, M/S Bremen, for allegedly damaging an oil rig the Bremen towed during stormy weather from Louisiana through the Gulf of Mexico towards Italy. When the Bremen, at Zapata's request, towed the damaged rig to Tampa, Zapata sued the German owner and attached the tug in this American port. The owner argued that the action should be dismissed because a clause in their contract provided for exclusive jurisdiction in English courts. Alternatively, the owner argued that another contract clause relieved the owner of any negligence liability. The United States Supreme Court directed that the case be dismissed based on the forum selection clause.

Professor Juenger praises the Court for enforcing the forum selection clause without concern for what substantive law the courts would apply,⁸² and without requiring that the selected forum have a direct interest in the controversy.⁸³ Certainly, inconsistent nation-state laws pose a problem for international, especially commercial international, actors who desire certainty in their business dealings. Allowing parties whose transactions cross state boundaries to stipulate their own law sometimes gives them what they substantively want, plus the predictability that they may want even more. Professor Juenger contends that such party autonomy presumptively constitutes better law.

Professor Juenger recognizes an exception to party autonomy when an apparent agreement exists between parties of unequal bargaining

76. See *id.* at 213.

77. 401 U.S. 1 (1971).

78. 499 U.S. 585 (1991). In *Shute*, the Court enforced form language in a passenger ticket for a cruise from Los Angeles to Puerto Vallerte, Mexico, against a Washington state passenger. It required the consumer to bring all suits against the cruise line company in its American headquarters state, Florida.

79. See JUENGER, *supra* note 2, at 219 n.1345.

80. See *id.* at 215.

81. See *id.* at 214-15.

82. See *id.* at 215-17.

83. See *id.* at 215.

strength.⁸⁴ To his credit, Professor Juenger also recognizes that the presence within his theory of “two *opposing* substantive policies—party autonomy and the protection of the weaker party—offers food for thought.”⁸⁵ It is unclear how much protection from apparent agreement Professor Juenger would give to a weaker party or exactly how he defines a weaker party. If he means only that unequal bargaining power raises questions about whether parties really did agree, this does not yet prove why law upon which parties really do agree is the best law to govern their transactions.

It is not obvious under a teleological system why a law is “better” when it allows the parties to do what they want, even only between themselves.⁸⁶ Professor Juenger’s version of party autonomy makes most teleological sense when foolish state sovereigns prevent the parties from choosing a superior law. In situations, however, where the parties deliberately choose an “inferior” law rather than the best substantive law available, should not the judicial system paternalistically intervene to insist on a more just form of justice than to what the parties have agreed?

A *lex fori* approach that emphasizes limited sovereignty better explains why party autonomy to choose substantive law should be presumed to be good, or at least why such party agreements might cause a court to pause seriously before applying its normal version of forum law. Limited sovereignty necessarily implies a high degree of party autonomy. The state does not presumptively have a right to intrude on peoples’ lives, since others beside the state can fashion justice. Regardless of the content of law that parties use to govern themselves outside of the judicial system, the states might properly leave the parties alone. State legislatures did

84. *Id.* at 219.

85. *Id.* (emphasis added).

86. The last qualifier is an important one. Two parties’ agreement regarding the applicable law for their relations *affecting others* should not bind the others when the others seek better law. A bank and an organized crime syndicate, for example, might agree to launder illegally obtained proceeds offshore; this agreement should not bind those who originally obtained the proceeds or those affected by the crimes from asserting rights against the proceeds. An agreement by all parties in a products liability manufacturing and distribution chain, including the purchasing consumer, should not bind another person ultimately hurt by a defective product. I do not understand Professor Juenger to argue otherwise.

Nevertheless, although Professor Juenger derides state interests as intruding upon party autonomy, it may be that state interests are a surrogate for the interests of others affected by a contract between two principals. Even in the case of a towing agreement between two commercial enterprises, the dispute’s resolution surely affected others. I do not necessarily endorse the technique, but I understand this to be the real justification behind interest analysis recognition of state interests outside of the principals involved in a dispute.

not intend their contract or tort law to apply in all situations, just in those that parties cannot resolve on their own.

A *lex fori* focus, however, also emphasizes that courts must always measure party agreements against the *forum's* views about the propriety of negotiations leading to an agreement and the content of law actually selected. Forum selection clauses are suspect because they are inherently contradictory regarding the parties' faith in governments' abilities to fashion law governing their conduct. The parties are not unequivocally saying to government, "stay out of our lives because you have no right to be here," but rather "we trust only one particular government to treat us fairly." Behind the supposed neutrality of the forum selection clause often stands the desire to avoid application of a particular sovereign's law.

This is arguably what happened in *The Bremen*. An American corporation owned the towed rig and used it off the coast of Louisiana. One might legitimately expect an American admiralty court to exercise jurisdiction over disputes regarding such rig's proper towing. Precedent on point held that United States admiralty courts should invalidate clauses attempting to absolve a shipper of negligence liability.⁸⁷ As Professor Juenger correctly notes, *The Bremen* provided the Court an opportunity to rethink and overrule this prior precedent.⁸⁸ It declined. The Court did not directly reshape or reconsider forum law, even though the case directly implicated forum regulatory policies. Instead, *The Bremen* imported needless inconsistency into virtually identical party autonomy situations. A party who places a forum selection clause in an agreement to avoid forum law will achieve that result, whereas a party who explicitly "chooses" non-forum law via a separate clause but includes no forum selection clause, will likely get "normal" United States law.

It would have been better if the Court had directly reexamined whether commercial parties' agreements should cause a court to rethink or reshape its "normal" substantive law policies. Under a *lex fori* view, when a court enforces a private agreement according to its substantive terms, this converts the private agreement into a form of forum law. In situations where the state only weakly believes in its substantive common law rules (treating them as default rules) and more strongly believes that people should fulfill their promises to each other, the state may wish to enforce private agreements not egregiously at odds with normal default provisions. In fact, this is the state's larger forum law regarding contracts, not the particular default rules. On the other hand, if the state feels less

87. See *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955).

88. See JUENGER, *supra* note 2, at 217-18 & n.1335.

strongly about the value of holding parties to their promises, or feels more strongly that its policy judgments about rule content should be implemented, the state might properly tell the parties that the only law it can apply is normal default forum law.

Whichever way the court would resolve this tension between encouraging parties to determine their own fate and ensuring that forum rule content is always the best available, a *lex fori* forum would take seriously the responsibility to do justice between the parties. Normally, this would mean keeping the case before the tribunal and applying either the parties' law or some other version of forum law.⁸⁹ Dismissing a case based solely on a forum selection clause evades judicial responsibility to determine what truly constitutes justice. The predictable result is the reflexive and arguably unjust enforcement of forum selection clauses that the United States Supreme Court has adopted in *The Bremen's* wake.⁹⁰

C. "Foreigner" Divorces

When Professor Juenger describes the benefits of teleology in marital dispute resolutions, he could as easily be speaking of the benefits of *lex fori*. Indeed, as his subsection heading indicates, *lex fori* and better law appear to be equivalent terms when referring to the proper way to decide who should be able to divorce whom.⁹¹ As Professor Juenger concedes, "Since few states are prepared to grant divorces in multistate cases on terms more favorable than those made available by domestic law, in this particular context teleology spells forum law preference."⁹²

Accordingly, I agree wholeheartedly with Professor Juenger's criticism of rigid and dogmatic European divorce rules, which attempted to hold persons to the more restrictive divorce laws of their former residence or of their continuing nationality.⁹³ The mistake of such conflicts rules is to sacrifice forum judgment about appropriate divorce standards on the al-

89. A forum might dismiss a case, knowing that another forum would apply substantive law, where it simply did not believe that its courts should grant relief between the parties for such disputes. In the same way that the forum usually leaves the parties to resolve their disputes extrajudicially, such dismissal with knowledge that another forum might entertain the suit would treat other forums merely as extrajudicial resolvers of disputes.

90. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988); *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991).

91. See JUENGER, *supra* note 2, at 220.

92. *Id.* at 228; see also *id.* at 223 ("forum-centered approaches are far better suited [than classical approaches] to accommodate the relevant societal concerns"); *id.* at 226 ("resulting judge-made rules were satisfactory only because of their intrinsic forum preference").

93. See *id.* at 220, 228.

tar of mythical comity or supposed unity of status based on an arbitrary connecting factor (nationality). A forum with which persons are at current significantly connected should treat *all* those significantly connected alike when deciding if divorce is appropriate. This is merely another way of saying that when a situation implicates forum regulatory interests, the forum should apply forum law.

In the *Cardo* case, Professor Juenger applauds the Swiss court's decision to apply divorce-favoring law,⁹⁴ asserting that this is an example of better law combining with forum bias to produce a correct result.⁹⁵ *Lex fori* logic alone could as easily and correctly have achieved this result. The *Cardo* spouses lived in Switzerland, although the wife retained her French nationality and the husband retained his Italian nationality. Under *lex fori* analysis, a Swiss court properly could allow the parties to divorce under Swiss law without regard to whether France or Italy would recognize the divorce. Whereas the *Cardo* court apparently applied French law to the extent it conformed with Swiss law,⁹⁶ under *lex fori*, the court should just straightforwardly apply Swiss law because the case involved Swiss domiciliaries. The reason to compare and consult foreign law is not to give it any effect in its own right, but to look for suggestions to improve Swiss law. The end result is neither an international divorce law suited to all people and all places nor limited just to those who happen to have interstate connections. Rather, the end result is a law limited to Swiss domiciliaries that nevertheless is the most fair divorce law on the merits that the Swiss court can fashion.

VI. OTHER PLUSES AND MINUSES (OR 1 1/2 CHEERS FOR JUENGER'S EMPHASES ON HISTORY AND COMPARATIVE LAW)

Although not central to his argument for better law, Professor Juenger runs as sub-theme through his book that many modern scholars have neglected the writings of continental and other foreign nation scholars regarding choice of law. In a variation of Santayana's famous truism,⁹⁷ Professor Juenger repeatedly argues that those who have failed to study the history of continental conflicts theorists will replicate their doomed mistakes.

This emphasis on historical and comparative conflicts theory is both a strength and weakness of the work. As a strength, these emphases mean

94. *See id.* at 3.

95. *See id.* at 220.

96. *See id.* at 222.

97. "Those who cannot remember the past are condemned to repeat it." George Santayana, in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 703 (Emily Morrison Beck ed., 15th ed. 1980).

that Professor Juenger usually gets to the heart of any competing theory by linking it to a similar theory that has already been propounded abroad. In this way, Professor Juenger highlights for his readers a wonderful wealth of names and materials to serve as starting points for further foreign exploration. I agree wholeheartedly with Professor Juenger's implied comparativist message that one better understands one's own conflict culture as he bathes in the writings of a different time period or culture. Distance from home via temporary immersion in the less familiar brings perspective that hopefully leads to insight into larger truth. But Professor Juenger goes too far in two related implications: (1) that no one who has not similarly immersed himself in conflicts history and comparative conflicts writings can speak with authority; and (2) that once one *has* immersed himself in this literature, he will realize that none of the newer theorists say anything worthwhile.⁹⁸

It is difficult for one like myself not yet among the "baptized" to refute the implication of a lack of sufficient immersion in proper conflicts materials. This difficulty is probably my main discomfort about this (or any other) form of elitism. How can one know that the claimed essential knowledge is really relevant until and unless one has mastered it? And must one then master everything before one can speak? The practical academic pressures of publication require conflicts theorists to write without having read *everything* relevant. More fundamentally, it seems inappropriate to demand that others compete with you only on your terms.

On the other hand, it would be obvious pretension for any theorist to claim supreme importance and absolute originality for his own works, especially when the universe of writing is so large and the scope for application literally is the universe. Perhaps this pretension is primarily what irks Professor Juenger about his non-comparativist colleagues,⁹⁹ a com-

98. See JUENGER, *supra* note 2, at 43-46, 138.

99. Professor Juenger seems most pointedly to attack Brainerd Currie for allegedly being both unread and unoriginal. As someone who did not pursue conflicts issues while Professor Currie was still alive, I sometimes am at a loss to understand the depth of feeling, both positive and negative, that those who either battled with or fought alongside him feel towards him. I suspect that some of the vituperation has as much to do with personality conflicts as with the merits of Currie's conflicts works. At any rate, based solely on my print acquaintance with Brainerd Currie, it seems Professor Juenger's criticisms are too harsh. Currie seems always to have acknowledged his debt to those from whom he borrowed ideas or to those who influenced him. That he was unaware of other scholars to whom he does not acknowledge debt seems only to indicate that he independently came up with the amalgamation of ideas that became interest analysis. The fact that Currie is a forceful writer and publicist of his own ideas seems non-unique to law professors. If Professor Wächter said the same thing, he apparently did not say it as persuasively. Because the courts of Professor Wächter's era did not largely adopt his ideas does not necessarily mean American courts were wrong to jump on the Currie bandwagon. The ideas of any

plaint with which I could concur. But to borrow from another set of transcendentalist essays, one need not always travel to discover truth;¹⁰⁰ one can learn large truths from diligent planting in backyard pedestrian plots.¹⁰¹ It seems, therefore, a fairer demand to insist only that the non-baptized hold and offer their theories with tentativeness and humility, recognizing that their views might be modified, confirmed, deepened, or abandoned as they gain different and additional insights. The conflicts theorist who knows only twentieth-century American writers would undoubtedly improve her perspective through wider reading. Her writing, however, is not necessarily wrong because she is not fully read, nor should she necessarily remain silent when she thinks she has something to say.

Accordingly, I think that Professor Juenger is also only partly right about there being nothing new under the conflicts sun. If prior theorists truly have already said everything about conflicts, then all of us, Professor Juenger included, need only cite the writings of these purported greats of previous centuries. Professor Juenger's better law doctrine, however, is *not* merely a rehashing of the *ius gentium*. I have previously suggested that one of the particularly bold aspects of Professor Juenger's thought is that he is a *post*-proponent of absolutely better law.¹⁰² Thus, he argues for better law as an alternative to what he considers failed experiments with other theories. Necessarily, therefore, his knowledge of those failed experiments is part of his rationale for why better law is now truly better. To the extent that times and circumstances change, a theory that speaks to the current state of conflict affairs is never quite the same as previous incarnations that bore the same name.

A more modest version of the same point is to insist at the very least that there is value in every generation applying and therefore making alive theories that previously spoke to other fact patterns important to previous generations. Whether newer writers really develop new theory or only apply old theory to new contexts, what they have to say still can be important to courts deciding what to do with present cases, and to professors attempting to create better conflicts of law theories. Professor Juenger, however, largely omits from his book the newer variations on

theorist should be criticized primarily on their merits rather than on the basis that others previously propounded in similar form.

100. See RALPH WALDO EMERSON, SELF-RELIANCE 81-83 (Gene Dekovic ed., 1975) ("Traveling is a fool's paradise My giant goes with me wherever I go.").

101. HENRY DAVID THOREAU, WALDEN 326-28 (J. Lyndon Shanley ed., Princeton Univ. Press 1971).

102. See *supra* notes 48-50 and accompanying text.

conflicts themes that scholars of the last two to three decades have offered.¹⁰³

I do not fault Professor Juenger for not including more recent writers to the same extent he cites his contemporaries or predecessors—every work must have reasonable cutoffs. But to the extent he implies that he omits more recent American writers because they have nothing worthwhile to say, he is probably mistaken.¹⁰⁴ Still, as I have emphasized earlier, the Juengerian insistence that there are no really new conflicts ideas is a partial strength as well as weakness of *Multistate Justice*. If I quarrel with Professor Juenger's selective footnote omissions, it is still refreshing to be reminded constantly and convincingly in text that at its heart, the conflicts doctrines are indeed variations on a few themes. These themes can be set forth simply rather than esoterically, and debated at their foundational level without regard necessarily to who should receive credit for the original or quintessential promulgation.

VII. CONCLUSION

Choice of Law and Multistate Justice succeeds because it addresses conflicts doctrine at a foundational level, argues that one conflicts approach has more merit than others, and attempts to address counter-arguments in a historical and comparativist framework as well as via logical refutation. Although I disagree with Professor Juenger's ultimate conclusions, I wholeheartedly endorse the meaningful mental dialogue his book requires in response to its reading. This book is a fitting monument to a man who has contributed and continues to contribute much to the conflicts debate. It is must reading for anyone who writes and teaches in the field.

103. Certainly Professor Juenger cites to post-1970 American works. But aside from citations to his own works or to those of his pupil Professor Borchers, most of these citations either have an international emphasis or are works that emphasize the inadequacies of interest analysis. In short, Professor Juenger's citations to the most recent American conflicts scholarship are selective at best and at worst seem to be frozen in the time period of Currie, Cavers, and Cook.

104. This footnote is where I should cite all recent works or authors to which Professor Juenger should have responded but did not in his monograph. My goals are much less ambitious. Since I would offend anyone not here included by an omission, I mention only *examples* indicating that others have found the current American conflicts landscape less barren than Professor Juenger indicates. See, e.g., Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L. J. 1, 2 n.5 (1991) (citing works by Brilmayer, Dane, Kramer, and Singer); Sterk, *supra* note 12, at 949-50 (speaking of a recent "renaissance in choice of law theory," citing works by Brilmayer, Dane, Kramer, and Weinberg as examples of reconceptualizing scholarships, and citing additional works by Laycock, Mullenix, Posnak, Sedler, Singer, Weintraub, and Juenger as indicating vigor of *current* debate).