VISIONS OF FAIRNESS—THE RELATIONSHIP BETWEEN JURISDICTION AND CHOICE-OF-LAW

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In the past decade, the Supreme Court has evinced a strong interest in problems of both personal jurisdiction and choice-of-law. The Court has approached the two issues quite differently. Substantial constitutional limitations have been imposed upon state power in the jurisdictional context; in the choice-of-law area, by contrast, state standards have been left largely undisturbed. Scholarly criticism of this dichotomy has been quite common, with a number of commentators contending that limitations on the choice-of-law process should be at least as stringent as those imposed on the exercise of personal jurisdiction.

This Article takes a different view, arguing that in scrutinizing jurisdictional decisions more closely the Court has adopted an entirely plausible hierarchy of values. The Article begins by briefly outlining recent developments in the constitutional standards for both personal jurisdiction and choice-of-law. It proceeds to analyze the arguments of the Court's critics, focusing on the nature of the considerations which generate both types of restrictions. Contending that these limitations reflect a particular concept of fairness, the Article concludes by asserting that this concept of fairness is adequately vindicated through restrictions on personal jurisdiction rather than on choice-of-law.

I. CURRENT LAW

A. *Jurisdiction*

As virtually every law student knows, the modern law of personal jurisdiction originated with the case of *International Shoe Co. v. Washington.*[1] *International Shoe* established the rule that a state may assert jurisdiction only over those defendants who "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend '[t]raditional notions of fair play and substantial justice'."[2] In the post-Warren era, the Court has been extremely active in refining this standard, deciding no fewer than eleven major personal jurisdiction cases in a decade.[3]

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1. 326 U.S. 310 (1945).

2. *Id.* at 316.

3. The eleven cases are Asahi Metal Indus. Co. v. Superior Ct., 107 S. Ct. 1026 (1987); Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Burger King Corp. v. Rudzewicz, 471 U.S. 462

From these cases, a well-developed framework for analysis has emerged. Under this framework, a state court may rely on either of two theories to support the assertion of jurisdiction over a nonconsenting defendant.

First, judicial authority may rest on the concept of "general jurisdiction"—the idea that the court would have jurisdiction over the defendant for all purposes. General jurisdiction requires that the plaintiff show that the defendant has maintained a "continuous and systematic" relationship with the forum state. *Perkins v. Benguet Consolidated Mining Corp.*[4] and *Helicopteros Nacionales de Colombia v. Hall*[5] (*Helicol*) establish the parameters of the doctrine.

The defendant in *Perkins*—a Warren Court decision—was a corporation chartered by the government of the Philippine Islands. During the Japanese occupation of World War II, the corporation carried on a continuous and systematic, but limited, part of its general business in the state of Ohio. The Ohio activities of the corporation included directors' meetings, business correspondence, banking, stock transfers, payment of salaries, and purchasing of machinery for mining operations. Under these circumstances, the Supreme Court held that the due process clause did not prevent the Ohio courts from asserting postwar jurisdiction over the corporation—even though the action did not relate to or arise out of the corporation's Ohio activities.

Helicol suggests the limits of the reach of general jurisdiction. The case was a Texas action arising from a Peruvian helicopter accident. The defendant, a Colombian corporation, contracted to provide helicopter transportation for a Peruvian consortium, which in turn was the alter ego of a joint venture headquartered in Houston. The defendant sent its executive officer to Houston to negotiate the transportation contract; accepted checks drawn on a Texas bank; purchased helicopters, equipment and training sessions from a Texas manufacturer; and sent personnel to that manufacturer's facilities. The Court held that these contacts were insufficient to support the assertion of personal jurisdiction under the rubric of general jurisdiction.[6]

The Court has dealt with problems of "specific jurisdiction" more often than with general jurisdiction issues. Invocation of specific jurisdiction is based on connections with the specific case before the court. The basic parameters of the *International Shoe* doctrine in the specific jurisdiction context are largely defined by three cases: *World-Wide Volkswagen Corp. v. Woodson*,[7] *Keeton v. Hustler Magazine, Inc.*,[8] and *Burger King Corp. v.*

(1985); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Calder v. Jones, 465 U.S. 783 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Insurance Corp. of Ireland v. Compagnie de Bauxites de Guinee, 456 U.S. 694 (1982); Rush v. Savchuk, 444 U.S. 320 (1980); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Kulko v. Superior Ct. of Cal., 436 U.S. 84 (1978); and Shaffer v. Heitner, 433 U.S. 186 (1977).

4. 342 U.S. 437 (1952).

5. 466 U.S. 408 (1984).

6. *Helicol*, 466 U.S. at 415-16 n.10. The decision not to consider the issue of specific jurisdiction was questionable. *See* Maltz, *Reflections on a Landmark*: Shaffer v. Heitner *Viewed from a Distance*, 1986 B.Y.U. L. REV. 1043, 1063-64 & n.57.

7. 444 U.S. 286 (1980).

8. 465 U.S. 770 (1984).

Rudzewicz.[9]

In *World-Wide Volkswagen*, the plaintiffs, New York residents, purchased an automobile from the defendants in Massena, New York. The following year, the plaintiffs decided to move to Arizona. En route to their new home, they had an accident in Oklahoma and one of the plaintiffs suffered severe injuries. The plaintiffs sued on a products liability theory in Oklahoma state court.

The plaintiffs based their jurisdictional argument on the theory of actual foreseeability. They reasoned that because of the nature of the product, the defendants should have foreseen the possibility that it would be used in another state and cause injury there. Thus, notwithstanding the fact that the relevant defendants had no other contacts with the forum state, the plaintiffs contended that the assumption of jurisdiction in *World-Wide Volkswagen* was consistent with constitutional norms.

Speaking for a six-member majority, Justice White disagreed, conceding that "foreseeability is [not] wholly irrelevant." White was speaking of *legal* rather than actual foreseeability. He argued that the critical issue is not "the mere likelihood that a product will find its way into the forum State" but rather, the likelihood that "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[10] In turn, this type of foreseeability was to be determined by reference to the judicial interpretations of the *International Shoe* standards. Finding a lack of the necessary "affiliating circumstances,"[11] White concluded that these standards had not been met in *World-Wide Volkswagen*.

Keeton provides a useful counterpoint to *World-Wide Volkswagen*. The former was a libel action in the federal district court for the state of New Hampshire. The defendant was an Ohio corporation whose principal place of business was in California; its only connection with New Hampshire was that a small proportion of the total number of magazines that it produced (some of which contained the allegedly libelous statements) were sold in that state. The plaintiff was a New York resident; her only connection with the forum was that her name appeared on the masthead of several magazines which were distributed in New Hampshire. Only a small portion of the damages that the plaintiff claimed were allegedly suffered in the forum state. Nonetheless, the Court unanimously held that the fourteenth amendment did not prevent the New Hampshire courts from asserting jurisdiction over the defendant, arguing that because the defendant had "continuously and deliberately" exploited the New Hampshire market, it must anticipate being "haled into court" there to defend a libel action based on the contents of its magazine.[12]

The same theme dominated the Court's analysis of *Burger King*. In that case the defendant had entered into a franchise agreement with a Florida corporation. Both parties contemplated a continuing relationship; more-

9. 471 U.S. 462 (1985).
10. *World-Wide Volkswagen*, 444 U.S. at 295-98.
11. *Id.* at 295.
12. *Keeton*, 465 U.S. at 781 (citation omitted).

over, the agreement required payments to be made in Miami, Florida. Throughout the negotiations, however, the defendant had remained in his home state of Michigan; indeed, he had never been physically present in the state of Florida. Nonetheless, the Court held that in a lawsuit over an alleged breach of the franchising agreement, the Florida courts could constitutionally assert personal jurisdiction over the defendant. The majority opinion reasoned that

> where the contacts [with the forum] proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State . . . he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.[13]

Taken together, *World-Wide Volkswagen*, *Keeton* and *Burger King* clearly establish the primacy of the concept of "purposeful availment" in the analysis of specific jurisdiction cases. In *World-Wide Volkswagen*, jurisdiction was barred because the only contact was that created by "unilateral activity of those who claim some relationship with [the] nonresident defendant." By contrast, where, as in *Keeton* and *Burger King*, the defendant himself created the relationship, the assertion of jurisdiction was held constitutional. While admittedly leaving some close cases unclear, these principles provide clear guidance in most situations involving domestic defendants.

Although purposeful availment is the dominant influence in specific jurisdiction analysis, other factors have at times played a role in the Court's approach. No defendant has been forced to appear in a forum with which he has not voluntarily associated himself; at the same time, however, purposeful availment alone has occasionally been insufficient to support an assertion of jurisdiction. The recent decision in *Asahi Metal Industry Co. v. Superior Court*[14] provides a prime example of this phenomenon.

Asahi Metal Industry began as a products liability action. The suit arose from a motorcycle accident which occurred in California. The cause of the accident was a rear tire blowout. The rider of the motorcycle sued, among others, Cheng Shin Rubber Industrial Co., Ltd., the Taiwanese manufacturer which had produced the tube within the tire. The defendant made twenty percent of its total United States sales in California. Cheng Shin in turn filed a cross-complaint seeking indemnity from Asahi, the manufacturer of the tube's valve assembly. Asahi, a Japanese corporation, sold 1,350,000 valve assemblies to Cheng Shin in the period from 1978 to 1982; in addition, numerous other manufacturers selling their product in California incorporated the Asahi valve assemblies into their tubes. Asahi itself, however, had no offices, property or agents in California and neither solicited business nor made any direct sales in that state.

Reversing the California Supreme Court, the United States Supreme

13. *Burger King*, 471 U.S. at 476 (citations omitted).
14. 107 S. Ct. 1026 (1987).

Court unanimously held that the due process clause prevented California from asserting jurisdiction over Asahi. The Court was deeply divided on the question of whether the Japanese manufacturer could be said to have purposefully availed itself of the privilege of doing business in California. Justice O'Connor, joined by Chief Justice Rehnquist and Justices Powell and Scalia (the O'Connor group), argued that the position of Asahi was analogous to that of the defendant in *World-Wide Volkswagen*. They contended that since Asahi itself had not made the choice to send its products to California, the assertion of jurisdiction was unconstitutional.[15] By contrast, Justice Brennan, joined by Justices White, Marshall and Blackmun (the Brennan group), argued that once a manufacturer introduces its product into the stream of commerce with the knowledge that the product will eventually be used in the forum state, the requirement of purposeful availment is satisfied.[16] While Justice Stevens declined to reach the issue, he indicated that he would have adopted an intermediate approach, basing the constitutional analysis on the "volume, value and the hazardous character of the components" at issue.[17] Joined by Justices White and Blackmun, Stevens suggested that, in most circumstances, he would have found jurisdiction over a manufacturer such as Asahi constitutionally permissible.[18] Thus five members of the Court appeared to believe that Asahi's activities constituted purposeful availment; the holding that California lacked jurisdiction therefore turned on other factors.

The portion of Justice O'Connor's opinion that all the Justices except Justice Scalia supported describes these factors. In that part of her opinion, Justice O'Connor concluded that whatever one's view of the purposeful availment issue, the assertion of jurisdiction would offend traditional notions of fair play and substantial justice.[19] The opinion recited the familiar litany of factors to be considered in personal jurisdiction analysis: "the burden on the defendant, the interests of the forum state . . . , the plaintiff's interest in obtaining relief . . . , the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies."[20] In finding the assertion of jurisdiction improper, Justice O'Connor relied heavily on two factors which derived from the international scope of the jurisdictional problem: "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system" and the potential implications for federal foreign policy.[21] The near-unanimous opinion also focused on the distance which the defendant would be forced to travel to defend himself and the fact that the rider's claim against Cheng Shin had been settled, leaving only the indemnity issue to be adjudicated. O'Connor argued that since no California resident was a party to the cross-claim, the interest of the state in the resolution of the claim was slight, and thus insufficient to justify the imposition of the

15. *Id.* at 1031-33 (opinion of O'Connor, J.).
16. *Id.* at 1035-38 (opinion of Brennan, J.).
17. *Id.* at 1038 (opinion of Stevens, J.).
18. *Id.*
19. *Id.* at 1033-35 (opinion of O'Connor, J.).
20. *Id.* at 1034 (opinion of O'Connor, J.).
21. *Id.* at 1034-35 (opinion of O'Connor, J.).

serious burdens on Asahi.[22]

The failure of the majority opinion to address the purposeful availment issue is unprecedented in post-Warren Court due process jurisprudence. *Asahi*, however, does not seem to presage a general diminution of the importance of that concept to the Court's jurisdictional analysis. For the O'Connor group, the lack of purposeful availment led to the same conclusion even if assertion of jurisdiction had been fair in all other respects; moreover, the Brennan group saw the case as a "rare" example of a case in which purposeful availment was insufficient to confer jurisdiction.[23] Thus for at least eight of the Justices on the Court, purposeful availment remains the most important element in almost all specific jurisdiction cases; the key question dividing them is what constitutes purposeful availment.[24]

B. *Choice-of-Law*

While much less voluminous than the case law dealing with personal jurisdiction, the Supreme Court's actions on the choice-of-law issue are quite revealing. The three major cases are *Allstate Insurance Co. v. Hague*,[25] *Phillips Petroleum Co. v. Shutts*,[26] and *Wortman v. Sun Oil Co.*[27] *Hague* was a dispute arising from a Wisconsin accident between a motorcycle and an automobile. All participants in the accident were Wisconsin residents, including a rider on the motorcycle who was killed in the accident. The driver of the automobile was uninsured; the decedent, by contrast, carried insurance on three automobiles which he owned. Each of the separate policies included uninsured motorist coverage [UMC].

Choice-of-law issues became important because subsequent to the accident, the wife of the decedent, who was also the personal representative of his estate, remarried and moved to Minnesota. She brought an action against the insurance company in Minnesota state court. The substantive question in the case was whether the decedent's estate was allowed to aggregate ["stack"] the three UMC clauses or was to be limited to the amount provided by only one of the policies. Under Minnesota law, stacking was allowed; by contrast, the Minnesota court found that Wisconsin law did not permit stacking.[28] Applying the five choice-influencing considerations described by Professor Leflar,[29] the Minnesota Supreme Court held that the Minnesota rule should govern the action.

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22. *Id.*

23. *Id.* at 1035 (opinion of Brennan, J.).

24. The one exception to the general pattern is *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), discussed *infra* at text accompanying notes 37-38. *Shutts*, however, dealt with the assertion of jurisdiction over members of a *plaintiff* class—a situation which the Court recognized as *sui generis*. *Shutts*, 472 U.S. at 806-14. Thus the principles developed in that case have little significance for the constitutional limitations on the assertion of jurisdiction over *defendants*.

25. 449 U.S. 302 (1981).

26. 472 U.S. 797 (1985).

27. 108 S. Ct. 2117 (1988).

28. This conclusion was questionable. *See* Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law*, 10 HOFSTRA L. REV. 17, 18-24 (1981).

29. *See, e.g.*, Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966).

A badly-split United States Supreme Court held that the Minnesota decision did not violate the Constitution. Seven of the eight participating Justices agreed that the relevant issue under both the due process and full faith and credit clauses was whether the state has "a significant contact, or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[30] Four of the seven Justices argued that Minnesota passed this test because the decedent had been employed in Minnesota (although the accident was totally unrelated to his employment); the insurance company had been present and doing business in Minnesota; and the plaintiff became a Minnesota resident prior to the initiation of the lawsuit.[31] Three justices found these contacts insufficient to justify the application of Minnesota law.[32]

Justice Stevens cast the decisive fifth vote for affirmance. Stevens argued that in order to be constitutional, a state choice-of-law decision must pass two tests. First, the decision must not be "totally arbitrary or . . . fundamentally unfair to either litigant."[33] Second, the decision must not be one which "threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State."[34] Stevens concluded that the application of Minnesota law was not inconsistent with either standard. Thus, he joined the plurality in finding that the Minnesota decision should not be overturned.[35]

The *Hague* decision clearly indicated that the Court did not intend to overturn a large number of state choice-of-law decisions; indeed, even the dissenters conceded that the Constitution provided only a "modest check on state power" to make such decisions.[36] *Shutts*, however, demonstrated that a majority of the Court is committed to imposing some minimal constraints on state authority over this subject.

Shutts was a plaintiff class action suit involving a dispute over royalties from natural gas leases. The action began in Kansas state court. Ninety-nine percent of the leases and ninety-seven percent of the plaintiffs had no connection with the state of Kansas; further, the defendant was a Delaware corporation whose principal place of business was in Oklahoma. Nonetheless, the Kansas courts asserted jurisdiction over all parties to the transaction and held that Kansas law would govern all of the claims in the class action.

On the jurisdictional issue, the Supreme Court unanimously affirmed the Kansas judgment. With only Justice Stevens dissenting, however, the Court reversed on the choice-of-law issue, holding that the application of Kansas law to those claims having no connection to the state would be arbi-

30. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981) (opinion of Brennan, J.); *id.* at 332 (Powell, J., dissenting).

31. *Id.* at 313-20 (opinion of Brennan, J.).

32. *Id.* at 332-40 (Powell, J., dissenting).

33. *Id.* at 326 (opinion of Stevens, J.).

34. *Id.* at 322-26 (opinion of Stevens, J.).

35. The *Hague* decision was the subject of an enormous amount of scholarly commentary. For examples, see two symposia: 10 HOFSTRA L. REV. 1-211 (1981); 14 U.C. DAVIS L. REV. 841-917 (1981).

36. *Hague*, 449 U.S. at 332 (Powell, J., dissenting).

trary and unfair, and thus unconstitutional.[37]

Some commentators viewed *Shutts* as a significant landmark in the development of the Court's choice-of-law jurisprudence.[38] But even without later developments, *Shutts* should have provided little solace to those who have urged the Court to aggressively supervise state choice-of-law decisions.[39] From the Court's perspective, the case presented the most extreme configuration of facts possible—a situation in which the transactions at issue had no contacts whatsoever with the forum.[40] Moreover, the Court explicitly reaffirmed its commitment to the principles embraced by a majority of the Justices in *Hague*.[41] Thus, even after *Shutts*, the Court did not appear ready to assume an active role in supervising state choice-of-law decisions.

Wortman dramatically reconfirmed this point. The facts in the case were essentially identical to those in *Shutts*. After the *Shutts* decision, the Kansas courts in *Wortman* faced two issues not resolved by that case. The first was an entirely new choice-of-law problem—the question of which statute of limitations should apply. The second involved the proper application of the Court's mandate in *Shutts*. While the *Shutts* Court had directed the Kansas courts to apply the law of other states to the plaintiffs' claims for interest on the royalties owed them, it had not established the substantive rate of interest to be applied.

On the statute of limitations issue, the Kansas courts adhered to the traditional rule of the *Restatement of Conflict of Laws*.[42] Concluding that the issue was wholly procedural, the state supreme court ruled that Kansas law should apply.[43] Thus, although the action would have been time-barred in the states in which the oil leases were located [the claim states], the state court allowed the action to proceed in the Kansas courts.

In at least formal obedience to *Shutts*, the court then proceeded to examine the law of the claim states on interest rates. The general rule in three of those states was that the defendant would have been liable for either no interest or less interest than provided by Kansas law. The *Wortman* court, however, determined that each of the claim states would have found this case to fall within an exception to the general rule and adopted an interest rate that, perhaps not coincidentally, was the same as that provided by Kansas law.[44]

The Supreme Court affirmed both of these holdings. While all of the

37. *Shutts*, 472 U.S. at 814-23.

38. *See, e.g.*, Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity*, 62 N.Y.U. L. REV. 651, 682-88 (1987); Shreve, *Interest Analysis as Constitutional Law*, 48 OHIO ST. L.J. 51 (1987).

39. *See, e.g.*, Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872 (1980); Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 753 (1987).

40. This characterization is challenged in Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67, 93-96 (1988).

41. *Hague*, 472 U.S. at 818-19.

42. RESTATEMENT OF CONFLICT OF LAWS §§ 603-605 (1934).

43. Wortman v. Sun Oil Co., 241 Kan. 226, —, 734 P.2d 1190, 1195 (1987), *aff'd*, 108 S. Ct. 2117 (1988).

44. *Wortman*, 734 P.2d at 1193, *citing* Shutts v. Phillips Petroleum Co., 240 Kan. 764, 732 P.2d 1186 (1987).

Justices agreed that the Kansas decision on the statute of limitations point was constitutional, they differed sharply on the proper analysis of the issue. Justice Brennan, joined by Justices Marshall and Blackmun, followed the pattern of *Hague* and engaged in a complex discussion of the various state interests at stake in the statute of limitations context.[45] By contrast, Justice Scalia's majority opinion took a quite different approach. Justice Scalia first noted that a long line of decided cases supported the constitutionality of the Kansas decision.[46] He also went further, however, rejecting the notion that constitutional constraints on choice-of-law should be updated to conform to modern conflicts theory.[47] The majority opinion also explicitly concluded that choice-of-law decisions on a wide variety of issues denominated "procedural" by the *Restatement of Conflict of Laws* and *Restatement (Second) of Conflict of Laws* would be immune from constitutional scrutiny.

Justice Scalia was equally deferential in dealing with the Kansas court's treatment of the interest rate issue in *Wortman*. The Court held that it would disturb a construction of a foreign state's law only if a contrary rule was "clearly established [and] brought to the [forum] court's attention."[48] Since none of the relevant state court decisions explicitly contradicted the Kansas court's characterizations of the law of the other states, the majority found no constitutionally-mandated reason for disturbing these characterizations.

After *Wortman*, it seems settled that interventions such as those in *Shutts* will be rare indeed. *Hague* holds that a state is free to apply its own law in any case with which it has even the slightest connection; *Wortman* obviates even this modest requirement for matters which have historically been deemed procedural. Further, under *Wortman* the scrutiny of the forum's characterization of another state's law will be virtually nonexistent. In short, constitutional scrutiny of choice-of-law decisions is much less stringent than that applied to assertions of personal jurisdiction.

II. THE RELATIONSHIP BETWEEN JURISDICTION AND CHOICE-OF-LAW—THE CONVENTIONAL ANALYSIS

A. *The View of the Court*

The Supreme Court views jurisdiction and choice-of-law as separate issues. *Shutts* is a classic example; after finding that the Kansas court could constitutionally exercise jurisdiction, the Court conducted an entirely separate analysis in holding that the application of Kansas law would be unconstitutional. In taking this approach, the Court simply followed the approach laid out in *Shaffer v. Heitner*[49] and *Keeton v. Hustler Magazine*.[50] In *Shaffer*, the issue was whether the state of Delaware had jurisdiction over the officers and directors of a Delaware corporation in a derivative action

45. *Wortman*, 108 S. Ct. at 2128 (Brennan, J., concurring in part and concurring in the result in part).
46. *Wortman*, 108 S. Ct. at 2121.
47. *Id.* at 2125.
48. *Id.* at 2126.
49. 433 U.S. 186 (1977).
50. 465 U.S. 770 (1984).

brought against them. The Court conceded *arguendo* that Delaware had a manifest interest in regulating the activities of those in fiduciary relationship with its domestic corporations, and that such an interest "may support the application of Delaware law [to the controversy]."[51] Nonetheless, *Shaffer* held that the state lacked the authority to assert jurisdiction over the defendants.

Conversely, in *Keeton*, the defendants claimed that the New Hampshire statute of limitations was uniquely unfavorable to them, and that this factor should influence the Court's jurisdictional decision. The Court unanimously rejected this argument, asserting that "[t]he question of the applicability of New Hampshire's statute of limitations . . . presents itself in the course of litigation only after jurisdiction over [the defendant] is established, and we do not think that choice of law concerns should complicate or distort the jurisdictional inquiry."[52]

B. *The Views of the Commentators*

Numerous scholars have taken the contrary position, contending that the Court should recognize a formal relationship between doctrines of jurisdiction and choice-of-law. The late Professor Martin, for example, argued that the same constitutional standards should govern both jurisdictional and choice-of-law issues.[53] Professor Silberman goes even further, suggesting that choice-of-law decisions should be subject to greater federal scrutiny than jurisdictional decisions.[54] By contrast, Professor Stein envisions a more complex relationship; he would not only subject jurisdiction and choice-of-law decisions to similar standards, but would modify jurisdictional theories to make them more compatible with the doctrine of interest analysis developed in the context of nonconstitutional choice-of-law theory. He aptly summarizes the position of those who believe that the Supreme Court should recognize a relationship, asserting that "[c]hoice of law and choice of jurisdiction are not significantly different issues."[55]

While differing on details, these arguments all reflect the belief that jurisdictional and choice-of-law issues are inextricably linked, and that this link suggests the need for greater federal supervision of the latter. On at least one point the commentators are correct; limitations on the reach of a court's jurisdictional authority necessarily have important implications for choice-of-law decisions. The major constitutional problems in choice-of-law analysis arise when a forum applies its domestic law to a dispute which has little relationship to the forum state. While one can hypothesize a situation

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51. *Shaffer*, 433 U.S. at 215.
52. *Keeton*, 465 U.S. at 778.
53. Martin, *supra* note 39.
54. Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978).
In a later commentary, Silberman suggests that the federal restraints on choice-of-law should rest on a common law basis, rather than be viewed of constitutional magnitude. Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints after* Allstate Insurance Co. v. Hague, 10 HOFSTRA L. REV. 103, 129-30 (1981).
55. Stein, *supra* note 39, at 753. *See also, e.g.*, Peterson, *Proposals of Marriage Between Jurisdiction and Choice of Law*, 14 U.C. DAVIS L. REV. 869 (1981); Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978).

in which a forum will choose the law of another state which is unrelated to the cause of action, it is difficult to conceive of a real world context in which such a decision would be made. Thus if he wished, one could obviate all constitutional choice-of-law problems by imposing jurisdictional limitations; if a court has no jurisdiction, it cannot unconstitutionally impose its own law on a dispute. In this sense, jurisdiction and choice-of-law are inevitably related.

This point emerges markedly from the structure of current law. Courts uphold jurisdictional claims resting on the theory of specific jurisdiction only if the defendant has deliberately taken some action which connects the transaction at issue to the forum. Where such a connection is established, the use of the forum's law is constitutional under virtually any of the theories which have been advocated. Thus constitutional choice-of-law problems arise only where jurisdiction is based on the concept of general jurisdiction.[56]

Moreover, restrictions on jurisdiction would actually be the most efficient device for controlling choice-of-law decisions. While conflicts scholars generally speak confidently of the ability of a court to apply "the law" of another state, this confidence is not entirely justified. As *Wortman* demonstrates, the rule of law which the courts of state B would apply to a given case is never certain until the relevant court rules on the point at issue; at best, a court in state A can only guess at the judgment that a state B court would render on that issue. The only truly authoritative resolution would come from state B itself. Thus, if one wishes to protect a party entitled to the "law" of state B, the solution in general ought to be to require the case to be heard in the courts of that state.

Taken alone these considerations would point not to increased federal scrutiny of choice-of-law decisions *per se*, but rather to incorporation of choice-of-law considerations into the jurisdictional calculus. But in any event, the current dichotomy between the law of jurisdiction and choice-of-law decisions requires additional justification. The remainder of this Article will provide such a justification.

III. JURISDICTION AND CHOICE-OF-LAW—A REVISED APPROACH

In making their arguments, scholars such as Martin, Silberman and Stein discuss two different types of issues. One set of concerns relates to interstate relations; the other, fairness to the parties. To properly evaluate their contentions, these issues must be addressed separately.

A. *Federalism*

The structure of constitutional limitations on choice-of-law clearly involves important issues of federalism. In the absence of federal constitutional constraints, state courts deciding cases before them [rendering states] may apply any rule of law that they find appropriate. Any federal standard that limits this discretion is an important limitation on the sovereign author-

56. *See* Shreve, *supra* note 38, at 59-60.

ity of the states. In this sense, the development of federally-imposed choice-of-law rules has implications for the basic structure of federal/state relations.

More typically, however, those who argue for significant constitutional limitations on state choice-of-law decisions focus on the impact that such decisions have on the sovereign courts in states other than that in which the initial decision is rendered [nonrendering states]. They contend that limitations on the discretion of rendering states are necessary to preserve the sovereign prerogatives of nonrendering states.[57] In discussing this argument, the precise nature of the issues under consideration must be carefully defined. First, one must recognize that in a typical damage action the forum is not and cannot be attempting to control the future actions of the parties before it; instead, the court is simply determining the current rights of the parties based on actions which have already taken place. Thus, it is inappropriate to describe the question as whether the forum can regulate activities with which it has no contact; a court can hardly "regulate" that which has already taken place. It can only determine the present consequences of past activities and relationships.

Second, the analysis must carefully separate issues of pure power from issues of extraterritorial enforcement of judgments. Typically, those who would marry the constitutional analyses of problems of jurisdiction and choice-of-law do not distinguish between the power of a state court to adjudicate a case and the impact of that adjudication on subsequent litigation in other states. Implicitly or explicitly, they seem to assume that the judgment of the first state with constitutional authority to hear an action must be followed by all other states. Indeed, the title of Professor Silberman's analysis of *Hague* is *"Can the State of Minnesota Bind the Nation?."*[58]

Such an analysis reflects the influence of the venerable rule of *Fauntleroy v. Lum*.[59] In *Fauntleroy*, two citizens of Mississippi had entered into a cotton futures contract in that state. After the ultimate defendant declined to fulfill his part of the bargain, the parties first submitted the dispute to arbitration; the arbitrator ruled in favor of the plaintiff. When the defendant was temporarily in Missouri, the plaintiff obtained personal jurisdiction over him and brought suit on the award in the Missouri courts. Although in Mississippi the futures contract violated both civil and criminal statutes, the Missouri courts ruled in favor of the plaintiff and awarded damages.

The plaintiff then sought to enforce the Missouri judgment in Mississippi. Notwithstanding the illegality of the underlying transaction under Mississippi law, the Supreme Court by a 5-4 margin held that the full faith and credit clause required the Mississippi courts to enforce the Missouri judgment. Writing for the majority, Justice Holmes concluded that "as the jurisdiction of the Missouri court is not open to dispute the judgment cannot be impeached in Mississippi even if it went upon a misapprehension of the Mississippi law."[60]

57. *See* Martin, *supra* note 39, at 881; Stein, *supra* note 39, at 738-48.
58. Silberman, *supra* note 52.
59. 210 U.S. 230 (1908).
60. *Id.* at 237 (citations omitted).

Certainly, if one wholeheartedly embraces the *Fauntleroy* analysis, any choice-of-law or jurisdictional decision must be presumed to have extraterritorial consequences. Nonetheless, the question of what constitutional constraints should be placed on a court in these contexts remains analytically separate from the extraterritorial impact of any judgment which might be rendered. Indeed, at the margins at least, the philosophy underlying the Holmes analysis is controversial. While some commentators have suggested that the full faith and credit clause requires all constitutionally valid judgments to be respected by all other courts in the Union,[61] others dispute this conclusion.[62] Further, there is no logical reason to connect the full faith and credit issue with the power issue; the unity of the nation will not necessarily be threatened if state A is allowed to render and enforce a judgment within its own borders, but state B is not required to respect that judgment. Indeed, in some limited contexts—the enforcement of injunctions, for example—many courts hold that such a regime already prevails.[63] In any event, arguments against the extraterritorial enforceability of judgments should be considered separately from those against the power of a court to decide a case or to apply a particular legal principle to that case. If in some context forcing state B to respect the judgment of the state A courts unduly infringes upon the sovereignty of state B, then the answer is not to deprive the state A courts of jurisdiction or to limit their discretion in matters of choice-of-law. Instead, the solution is simply to leave state B free to disregard the state A decision.

When the power of the state A courts is considered separately from issues of interstate enforceability, problems of undue infringement on the prerogatives of states other than the forum disappear from the analysis of jurisdictional and choice-of-law problems. By definition, the only question is whether the governmental authorities of state A have the power to determine the rights and liabilities of persons *while those persons are within state A*. After they leave state A, the judgment can only affect them if it is given extraterritorial impact. As already noted, the latter is a separate issue. In this context, if the state A courts are required to bow to the authority of the governing body of some other state, it is an infringement on the sovereignty of state A. *Only* the government of state A and the national government have power over persons while they are within state A territory. Conversely, because the state A judgment cannot be enforced against persons in state B without the interposition of the authority of the state B government, the state A judgment cannot have an adverse impact on the sovereign status of that government. In short, while issues of interstate relations might legitimately be considered in the context of enforceability issues, they have no

61. *See* R. LEFLAR, AMERICAN CONFLICTS LAW § 224 (3d ed. 1977); Currie, *Suitcase Divorce in the Conflict of Laws: Simmons, Rosenstiel and Borax*, 34 U. CHI. L. REV. 26, 48 (1966).

62. Foster, *Recognition of Migratory Divorces: Rosenstiel v. Section 250*, 43 N.Y.U. L. REV. 429, 433 (1968); Powell, *And Repent at Leisure*, 58 HARV. L. REV. 930, 936 (1945). *See also* May v. Anderson, 345 U.S. 528, 535-36 (1953) (Frankfurter, J., concurring).

63. *See* James v. Grand Trunk Western R.R., 14 Ill. 2d 356, 152 N.E.2d 858, *cert. denied*, 358 U.S. 915 (1958); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102, comment c & reporter's note (1969).

place in discussions of the initial limitations on the power of state courts to adjudicate cases and to choose rules to govern those adjudications.

B. *The Fairness Argument*

Fairness arguments also figure prominently in the attempt to link constitutional limitations on choice-of-law to jurisdictional standards. Professor Martin summarized the argument on this point:

> [F]rom the defendant's perspective, it seems irrational to say that due process requires minimum contacts with the forum state merely to hale him into the forum's court while allowing more tenuous contacts to upset the very outcome of the case. Simple fairness seems to demand that when the forum's intrusion is much more destructive of his interests, as when it applies its own law, the forum be held to at least as high a standard as is exacted in the jurisdiction cases.[64]

Professor Silberman puts the point more succinctly: "To believe that a defendant's contacts with the forum should be stronger for jurisdictional purposes than for choice-of-law is to believe that an accused is more concerned with where he will be hanged than whether."[65]

Both of these accounts equate the degree of unfairness to the defendant with the extent of the tangible burden placed upon him. Certainly this is one plausible measurement of fundamental unfairness. It is, however, not the only conceivable measure of the nature of the unfairness with which the Constitution should be concerned.

The development of other areas of constitutional law illustrates this point. The application of the fourteenth amendment to restrictions on welfare rights provides a particularly instructive analogy. *Goldberg v. Kelly*[66] requires states to provide extensive procedural protections to welfare beneficiaries who are in danger of being deprived of their benefits. At the same time, however, *Dandridge v. Williams*[67] and its progeny[68] demonstrate that the Constitution allows states to restrict or eliminate access to welfare benefits for virtually any reason, so long as that reason is not one which is specifically proscribed by the Constitution.

The *Goldberg/Dandridge* dichotomy exemplifies the attitude of the Supreme Court toward two different visions of fairness. *Goldberg* embodies the Court's solicitude for the notion of "forum fairness"—the notion that one has a constitutional right to have his claim adjudicated by a procedure calculated to be just to him. *Dandridge*, by contrast, stands as a prominent reminder of the Court's general unwillingness to use the Constitution as a vehicle to mandate "rule fairness"—that is, specific substantive results.[69]

The difference in the approaches of the Supreme Court to personal jurisdiction and choice-of-law cases, respectively, embodies the same dichot-

64. Martin, *supra* note 39, at 880.
65. Silberman, *supra* note 52, at 53.
66. 397 U.S. 254 (1970).
67. 397 U.S. 471 (1970).
68. *E.g.*, Schweiker v. Wilson, 450 U.S. 221 (1981); Jefferson v. Hackney, 406 U.S. 535 (1972).
69. *See generally* Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59 (1981).

omy. Personal jurisdiction analysis reflects the interaction between two competing concepts of forum fairness. On one side is the widely-shared idea that each plaintiff should generally be allowed to choose the forum in which he pursues his claim. The justifications for this notion are rarely articulated; the power of the plaintiff in this regard may, however, reflect a desire to provide a counterbalance for other advantages enjoyed by the defendant. At the outset of a lawsuit, the defendant is not required to do anything in order to prevail. By contrast, the plaintiff bears the burden of proving his case. The preference for the forum-choice of the plaintiff at least gives him the opportunity to choose the venue in which he discharges the necessary burden.

Ranged against these considerations is the view that, in addition to the other procedural protections provided by the fourteenth amendment, the defendant should not be required to submit to the decision of the procedural arm of a sovereign with whom he has no connection. The purposeful availment standard developed by the Court provides a balance between these two concerns. The central point is that both concerns reflect issues of forum fairness.[70]

By contrast, an attempt to assert substantial control over the choice-of-law process would introduce a quite different factor into the equation. Rather than being concerned only with forum fairness, the constitutional analysis would include a strong element of rule fairness. Given the difference in the nature of the issues, there is nothing inconsistent or incoherent in the establishment of one standard to measure the constitutionality of assertions of personal jurisdiction and a quite different standard to assess the constitutionality of choice-of-law determinations.[71]

Related concerns justify the Court's refusal to consider choice-of-law issues in the development of its personal jurisdiction jurisprudence. A contrary view would require the Court to further invade the plaintiff's traditional right to choose a forum in order to serve the value of rule fairness—a value which can be effectuated substantially, albeit not perfectly, through direct limitations on choice-of-law. Thus, the Court's decision to separate the two issues is entirely plausible.

This conclusion only begins the inquiry into the proper constitutional analysis of choice-of-law problems. To reject the notion that the standard for jurisdictional issues is necessarily controlling leaves the question of what standard *should* control. The remainder of this Article will address that issue.

IV. RULE FAIRNESS AND CONSTITUTIONAL LIMITATIONS ON CHOICE-OF-LAW

To evaluate the role of rule fairness in the jurisprudence of choice-of-law limitations, one must first define precisely what conception of fairness is

70. For a perceptive analysis of the role of the concept of fairness in personal jurisdiction theory, see Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293 (1987).

71. Brilmayer, Haverkamp, Logan, Lynch, Neuwirth & O'Brien, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 774-79 (1988) reaches a similar conclusion.

involved. The most obvious conception might be labeled the "vested right" theory. Under this theory, the argument would be that a party has a vested interest in having a particular rule of law applied to his case. This conception of fairness rather plainly underlies the Court's reasoning in the much-discussed case of *Home Insurance Co. v. Dick*.[72] *Dick* began as a Texas lawsuit concerning an insurance policy covering a ship. A Mexican insurance company issued the policy to a Mexican resident, who assigned it in Mexico to the plaintiff, a Texas domiciliary. The policy covered the ship only while it operated in Mexican waters. Any loss was payable in Mexico, as were the premiums on the policy.

The difficulty in *Dick* was that the policy required that any suit on the policy be commenced within one year of the alleged loss—a time limitation the plaintiff did not satisfy. Under Mexican law, the limitation was enforceable; under Texas law, by contrast, the limitation was invalid. Applying their own law, the Texas courts allowed the action to proceed.

The Supreme Court reversed. The decision was based on the theory that because all of the relevant contacts with the contract were with a jurisdiction in which the time limitation was legal, the defendant had a legitimate, enforceable expectation that the limitation would be honored everywhere: "[w]hen . . . the parties have expressly agreed upon a time limit on their obligation, a statute which invalidates the agreement and directs enforcement of the contract after the time has expired increases their obligation and imposes a burden not contracted for."[73] Thus, the Court concluded that the Texas decision constituted a deprivation of property without due process of law.

Dick was decided in an era in which vested-right type theories were prominent in many areas of constitutional law.[74] Under more modern conceptions, the limitations on choice-of-law imposed by such a theory would logically be almost nonexistent. For in order for the vested right theory to make any sense at all, the party claiming the right must have that right in *every* forum in which he might be sued. In other words, at the time he entered into the relevant transaction, the party claiming the right must have had a constitutionally-protectable expectation that no court would apply a particular rule of law to his case.

To define situations in which the adversely-affected party (P) possesses the requisite expectations under this conception of fairness would be quite difficult. Cases in which no constitutional problem should exist are more easily described. Conflicts scholars normally focus on the case in which the transaction has substantial connections with the forum state and the forum applies its own law. Obviously, in such a situation P has no constitutional complaint. At the time he consummated the relevant transaction, P obviously knew or should have known that an unfavorable rule of law might be held to govern the transaction.

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72. 281 U.S. 397 (1930).

73. *Dick*, 281 U.S. at 409.

74. *See* Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185 (1976); Sedler, *supra* note 69, at 67.

The same considerations would also control the case in which the forum has no substantial connection to the transaction but has the same substantive rule as a jurisdiction which does have such a connection. Since the other forum could have constitutionally applied the rule to him, P cannot have a vested right not to have that rule applied. Thus, the decision of an unrelated forum to apply the same rule should not be held to violate the due process clause under a vested right analysis.

Finally, and perhaps most significantly, the vested right theory would have to contend with the possibility that the jurisdiction most closely related to the transaction would change its own law and adopt the unfavorable rule to which P objects. If such a change in the rule were constitutional, then P logically could have no vested right in the rule. Thus, under the vested right theory, a forum would have to be allowed to apply its own rule if the application of the rule by *any* forum would be constitutional.

Under this analysis, even the *Shutts* Court went too far. Obviously, in that case, the Court sought to preserve a small element of rule fairness in its analysis of choice-of-law problems. Vested right analysis, however, does not support the Court's conclusion. Admittedly, in *Shutts* there was good reason to believe that some of the states which possessed substantial connections with the relevant transactions had substantive rules which were different from that of Kansas—rules which redounded to the detriment of the defendant.[75] There was no suggestion, however, that it would violate the Constitution for those states to change their rules and adopt a position identical to that which a Kansas court would take. In the absence of such a showing, one could hardly argue that the plaintiffs had a protectable interest in having any specific substantive rules applied to their claim.

In short, if constitutional limitations on choice-of-law are to be justified on the basis of rule fairness, some other conception of "fairness" must be devised. The most promising candidate is the idea of "horizontal" fairness—the theory that because a certain rule would be applied in case A, it should also be applied in case B. The most nearly analogous example would be the jurisprudence developed under the privileges and immunities clause of article IV—the comity clause.[76] The comity clause does not restrict the general authority of states to adopt substantive rules. It does, however, require that with respect to certain "fundamental" interests, a state may not discriminate between its own citizens and citizens of other states. In choice-of-law terms, with respect to these interests, a state court is forced to choose the same rule to govern the rights of residents and nonresidents. In short, the comity clause embodies a principle of horizontal fairness.

As it is restricted only to "fundamental" rights, the reach of the comity clause is quite limited. Moreover, in a certain sense the analysis of the type of problems presented by cases such as *Hague* and *Shutts* turns the comity clause on its head; rather than being *required* to give nonresidents the benefit of a rule of law that it would apply to its own citizens, the forum is being

75. *See Shutts*, 472 U.S. at 816-18.

76. *See* Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981).

forbidden to apply its own law. The theory seems to be that (in the simplest case) principles of horizontal fairness require that certain issues be decided the same way in state A as they would be in state B.[77] In essence, the forum is directed to act as if it were the representative of some other sovereign than that from which its power is derived.

This vision of horizontal fairness is difficult to defend. A forum's view of rule fairness is embodied in its state law. Further, under all mainstream theories, the state could constitutionally apply that law to resident defendants. Thus, the imposition of limitations on state power under a horizontal fairness would require the state to discriminate *against* its own citizens by applying a more favorable rule under some circumstances to nonresident defendants. Such an argument has little appeal as a source for constitutional principle.

In short, all of the arguments for substantial constitutional limitations on choice-of-law are weak. Indeed, even the narrow intervention in *Shutts* is difficult to justify. The more stringent standards urged by many commentators are even less defensible.

CONCLUSION

The constitutional issues raised by choice-of-law problems are quite different from those involved in personal jurisdiction analysis. The former implicates only issues of rule fairness; the latter, by contrast, is primarily concerned with the concept of forum fairness. Thus, the dissonance between the Court's respective approaches to the two problems is more apparent than real. Accordingly, the decision to impose substantial constraints on the reach of personal jurisdiction while leaving choice-of-law virtually unconstrained is not only plausible, but entirely within the mainstream approach of constitutional analysis.

77. The more common and complicated example would require the courts of state A to apply the law of one of a number of other states, rather than one specific state.