

# Risk Regulation, Extraterritoriality, and Domicile: The Constitutionalization of American Choice of Law, 1850–1940

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## ABSTRACT

This Article examines the developments leading to the U.S. Supreme Court's decisions in the 1930s that legitimated the extraterritorial application of state law in civil litigation. Today, these decisions are thought of as having established the basic constitutional limitations on choice-of-law rulings by state courts. But they are better understood as the culmination of an historical process in which the Court first proscribed the extraterritorial application of statutory rules of decision, and then, as the economic relevance of state boundaries receded and the regulatory function of state-created rules of decision increased in importance, emphatically retreated from that position. The 1930s decisions led to a new conception of choice of law in which a party's domicile—in particular, the state's power to apply its rules of decision to protect or regulate its own—came to play as important a role as the territorial locus of particular events in resolving conflicts of laws. This conception, which remains central to much of modern conflicts law, contrasts sharply with the Court's unwillingness (reinforced by recent decisions) to take domiciliary interests into account when determining the constitutional limitations on personal jurisdiction.

Before the Civil War, the jurisprudence of conflict of laws did not, by and large, credit the possibility that the Constitution limited a court's power to apply forum law to a dispute. Since the rules of decision applicable in antebellum private-law litigation were largely based on common law and other nonmunicipal sources of law, there was little occasion for invoking the Full Faith and Credit Clause as a limitation on state courts' application of *lex loci* principles. The key development in altering this conception was the enactment, around 1850, of state statutes altering or creating rules of decision for certain kinds of civil litigation. These statutes—in particular, the wrongful death statutes and, later, the employers' liability acts—were largely directed to the increasing risk of catastrophic injury and loss in an industrializing society. State courts confronting the multijurisdictional problems raised by these statutes concluded that they could not be applied extraterritorially—that is, to injuries incurred outside the forum.

The Supreme Court showed only occasional interest in the issue of extraterritoriality until some states began to enact regulations protecting local policyholders from forfeiture provisions in the life insurance policies issued by the major insurers in the Northeast. The Court in 1914 and 1918 struck down as unconstitutional the application by Missouri courts of the state's protective statutes to insurance agreements deemed to have been made outside of Missouri. Thus a proscription of extraterritoriality, married to the then-prevailing doctrine of liberty of contract, briefly entered the law of the

Constitution. These principles concerning extraterritoriality, based as they were on the formalist notion that only one state has regulatory authority over a given event or transaction, were eventually undermined by the widespread enactment of workers' compensation laws. In the three 1930s cases considering the legitimate scope of such compensation statutes, Justice Stone (building on earlier opinions authored by Justice Brandeis) decisively affirmed the authority of a state to apply its workers' compensation statute to injuries suffered outside the state. At a stroke, these decisions interred the idea that only one state has regulatory authority over a given event or transaction; eliminated the relevance of extraterritoriality as a touchstone for constitutional analysis of state courts' authority to apply forum law in civil lawsuits; and provided crucial support for an emerging model of conflict of laws in which state interests—most notably, a concern for state domiciliaries—supplanted territoriality per se as the principal consideration.

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## INTRODUCTION

The most important change wrought by the revolution in American choice-of-law doctrine during the second half of the twentieth century<sup>1</sup> is the increased emphasis on party domicile in resolving conflicts of laws. Before the 1960s, courts adhered to territorial or *lex loci* principles, which emphasized the territorial location of particular events in resolving contract and tort conflicts,<sup>2</sup> such as *lex loci contractus* (“the law of the place where the contract was made”) or *lex loci delicti* (“the law of the place of the wrong”).<sup>3</sup> Since nineteenth-century jurists believed that the common law of contract and tort rested on universal norms and transnational customary practices, rather than on the sovereign lawmaking prerogative of particular states, there was no need to consider a party’s political relationship with a given state—her citizenship or domicile—in resolving conflicts of laws in those areas. The desire to protect or regulate a forum domiciliary provided no justification for the forum’s extraterritorial application of state statutes that supplanted or abrogated common law rules of decision, which jurists regarded for a century or more as wholly impermissible. But with the advent of modern policy-based approaches to conflicts, considerations of party domicile moved to center stage in American choice of law, and extraterritoriality in the application of statutory rules of decision lost its taint of per se illegitimacy. The Supreme Court has essentially validated this state of affairs, upholding as constitutional the application of forum law in cases involving a forum domiciliary even when another state possessed demonstrably greater connections with the transaction.<sup>4</sup>

1. See SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* (2006).
2. Party domicile had long played a central role in rules governing conflicts in such areas as family law, personal property, and the law of trusts and estates. In the classic private-law fields of contracts and torts, however, English and American conflicts traditionally regarded party domicile as irrelevant.
3. To say that courts adhered to these principles is not to deny that they frequently found ways of manipulating those principles to avoid results they disliked.
4. The Supreme Court—perhaps mindful of Privileges and Immunities concerns—has never flatly held that the forum’s interest in regulating for the benefit of its own domiciliaries is, considered alone, a sufficient condition for the constitutionality of applying forum law. It is clear, however, that domiciliary interests are among those that will establish the connections with the forum that are requisite for the application of forum law. See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 319 (1981) (plurality opinion) (“Respondent’s residence and subsequent appointment in Minnesota as personal representative of her late husband’s estate constitute a Minnesota contact which gives Minnesota an interest in respondent’s recovery . . . .”); *Watson v. Emp’ts Liab. Assurance Corp.*, 348 U.S. 66 (1954) (“[T]his Court has in a series of cases held that more states than one may seize hold of local activities which are part of multistate transactions and may regulate to protect interests of its own people, even though other phases of the same transactions might justify regulatory legislation in other states.”).

The substantial displacement of locus by domicile in modern choice of law, and the concomitant legitimization of extraterritoriality in choice of law, reflect the post-Realist tenets that, even in the domain of private law, rules of decision applicable in civil litigation represent the purposeful regulatory policy of the state, and that more than one state may have a cognizable interest in regulating a particular transaction. In a sense, this change in American law governing multijurisdictional disputes is but another shift in the centuries-long dialectic between a conception of law as essentially personal in nature (in which a person “carries her law” with her wherever she may go) and one that regards its scope as territorial.<sup>5</sup> But what makes the modern transformation in the law of legislative jurisdiction all the more intriguing is that, in the closely analogous context of personal jurisdiction, the Supreme Court has recently reaffirmed its commitment to the primacy of territorial sovereignty, as well as the importance of a defendant’s purposeful consent to the power of the forum, in determining whether the forum may constitutionally assert authority over a defendant in a civil case. That principle implicitly rules out any meaningful role for the plaintiff’s domicile in the analysis, which would bring into play the forum’s interest in providing a local tribunal for the adjudication of claims made by its own residents.<sup>6</sup> Territorial sovereignty

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5. See KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 9 (2009) (“[I]t was a well-established mediaeval idea that man took his own law with him when he went to strange lands.”) (internal quotation marks omitted); Simeon L. Guterman, *The Principle of the Personality of Law in the Early Middle Ages: A Chapter in the Evolution of Western Legal Institutions and Ideas*, 21 U. MIAMI L. REV. 259 (1966); Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 302–03 (1953) (noting that legal thinking “gradually shift[ed] from a personal to a territorial basis”).
  6. In *J. McIntyre Machinery v. Nicastro*, 131 S. Ct. 2780 (2011) (plurality opinion), the New Jersey Supreme Court had thought it unacceptable to require a New Jersey domiciliary, injured in his home state in the ordinary course of performing his job there, to sue McIntyre (a British company) in an English court in order to receive compensation: “It would be unreasonable to expect that plaintiff’s only form of relief is to be found in the courts of the United Kingdom . . . .” *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 593–94 (N.J. 2010). But the U.S. Supreme Court held in *Nicastro* that such considerations were unavailing and that personal jurisdiction over the defendant was lacking in the courts of New Jersey. *Nicastro*, 131 S. Ct. at 2789, 2791 (noting the fact that “the plaintiff would suffer substantial hardship if forced to litigate in a foreign forum” is not “controlling” in the personal jurisdiction analysis and that the State’s “interest in protecting its citizens from defective products” is “doubtless strong, but the Constitution commands restraint before discarding liberty in the name of expediency.”) (citations omitted) (internal quotation marks omitted). This was so even though some of the Court’s previous decisions have suggested the relevance of forum and plaintiff interests in the personal jurisdiction calculus. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (noting that such factors as “the forum [s]tate’s interest in adjudicating the dispute” and “the plaintiff’s interest in obtaining convenient and effective relief” could play a role in determining the constitutionality of a given assertion of personal jurisdiction).

and the requirement that the defendant “purposefully avail”<sup>7</sup> herself of that sovereignty trump domicile and the state’s interest in giving its own plaintiffs a local forum.

The subordination of domicile and state interests to considerations of consent and territorial sovereignty in the personal jurisdiction cases obviously contrasts sharply with the modest constitutional limitations governing choice of law—that is, the doctrines governing legislative as opposed to judicial jurisdiction.<sup>8</sup> Modern choice-of-law methodologies will often result in the application of substantive law that either (1) favors a forum domiciliary or (2) disfavors a nondomiciliary whose connection with the forum is tenuous at best.<sup>9</sup> Such exorbitant applications of forum law, the *bête noire* of many conflicts scholars, reflect a jurisprudential approach that is at least as loose-jointed (not to say provincial) as the assertions of personal jurisdiction that the Court has rejected in recent cases. Yet governing Supreme Court doctrine continues to validate the constitutionality of such choice-of-law rulings in all but the most extreme cases.<sup>10</sup> This discrepancy between the Court’s approach to constitutional limitations on personal jurisdiction and its approach to constitutional limitations on choice of law is

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7. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (“[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”).
  8. The term “legislative jurisdiction” has never been a precise synonym for “choice of law” or “conflict of laws” in American jurisprudence. Choice of law concerns the question of what source of law should apply in litigation, usually civil litigation, and questions concerning legislative jurisdiction in our federal system can certainly arise in other contexts, such as the scope of state power to regulate directly matters outside the state’s boundaries. For an illuminating discussion, see Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057 (2009). In this Article, I use the term “legislative jurisdiction” solely with reference to the problem of choice of law—which means, practically speaking, limits on the power of a court to apply forum law in civil disputes.
  9. The classic examples involve insurance agreements in which the plaintiff-policyholder’s current domicile in the forum is used as a basis for the application of favorable forum law, even though the plaintiff’s relocation to the domicile occurred after the events giving rise to the cause of action. *See, e.g., Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (holding that application of Minnesota law that required “stacking” of policies to plaintiff’s insurance claim was constitutional, though decedent, plaintiff, and defendant insurer were all domiciliaries of Wisconsin at the time policy was issued and plaintiff only relocated to Minnesota after a fatal accident); *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964) (holding that application of forum law to void policy requirement that claims be brought within twelve months was constitutional, though plaintiff was domiciliary of a different state at the time policy was issued).
  10. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Court held that it was unconstitutional for the Kansas courts to apply forum law en masse in a class action with respect to individual claims as to which neither plaintiff nor defendant had any cognizable connection with the state of Kansas. But the Court in *Shutts* did not retreat from decisions like *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), in which the application of Wisconsin law was upheld based on rather tenuous connections between the plaintiff and the forum.

particularly striking in light of the fact that both the minimum contacts test for personal jurisdiction and the forgiving test for the constitutionality of choice of law were established in opinions written by a single Justice (later Chief Justice)—Harlan Fiske Stone—and reflected a common jurisprudential position concerning territorial boundaries on state authority. Both *International Shoe v. Washington* (1945)—the case that established the minimum contacts test—and *Alaska Packers v. Industrial Accident Commission* (1935)<sup>11</sup>—the decision that liberated state courts to apply forum law to many disputes arising from events occurring outside the forum<sup>12</sup>—broke with traditional approaches to jurisdiction that had emphasized strict territorial limitations on state sovereignty. Each decision reflected an effort to draw a new blueprint for the allocation of decisional authority in a world featuring both pervasive regulation and strong patterns of social and economic interpenetration among the states.

For a variety of reasons, the Court has shown little interest in reshaping the current doctrine of constitutional limitations on choice of law so as to reconcile it with the doctrine governing personal jurisdiction.<sup>13</sup> But the story of how the Court more than three quarters of a century ago came to its position that the forum's application of its own law is presumptively constitutional makes the Court's current approach to personal jurisdiction, with its single-minded focus on the defendant and its lionization of territorial sovereignty, seem anomalous and even anachronistic. In this Article—which outlines a constitutional history of American choice-of-law doctrine—I explore the historical roots of the Court's decisions in *Alaska Packers* and other 1930s decisions establishing the undemanding constitutional limits on choice-of-law rulings by state courts. Previous scholarship has not adequately acknowledged the importance of those 1930s decisions in the evolution of modern American federalism.<sup>14</sup> Of course, conflicts scholars know that, by easing traditional territorial limits on the forum's application of its

11. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532 (1935).

12. *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493 (1939), also written by Justice Stone, broadened the constitutional authority of state courts to apply forum law even further, but for my purposes *Alaska Packers* represents the more significant break with prior law.

13. Given both the enormous number of disputes that touch more than one jurisdiction and the amorphous quality of the choice-of-law methodologies used by many state courts, a more exacting constitutional standard for choice of law would likely generate a large volume of appeals of choice-of-law rulings on constitutional grounds that the Supreme Court is no doubt reluctant to superintend. And to require state courts, on constitutional grounds, to dispense with the focus on domiciliary interests that now animates many of their choice-of-law decisions would be essentially to negate a large part of the jurisprudence of conflicts law that has emerged during the last three-quarters of a century.

14. For a recent exception, see Louise Weinberg, *Unlikely Beginnings of Modern Constitutional Thought*, 15 U. PA. J. CONST. L. 291, 303–19 (2012).

own statutory law, the 1930s decisions prefigured the post-1950 choice-of-law methodologies that emphasized states' interests in the application of their law—notably, their interests in the protection (or regulation) of their own domiciliaries.<sup>15</sup> But we know far less about the prehistory of those 1930s decisions and the way in which epochal changes in the nature and conception of law in the nineteenth-century United States first aroused concerns about the extraterritorial application of state statutes and later made necessary the abandonment of strict territorial limits on the scope of state law. Today, the view that extraterritoriality<sup>16</sup> in the application of the forum's rules of decision violates fundamental principles of law and sovereignty no longer haunts conflict-of-laws doctrine (even though many continue to think that territorial choice-of-law rules make the most sense); nor, in this post-*Erie* era, do we distinguish for this purpose between statutory and decisional law as sources for those rules of decision. But the same cannot be said for American jurisprudence in the nineteenth century, which took a very different view of extraterritoriality and municipal law. Recognition of this fact is crucial to understanding the development of American choice-of-law doctrine and of constitutional limits on the power of state courts to apply forum law in the twentieth century.

The conceptual development of American choice of law during the last century and a half is, at bottom, the story of the law governing personal injuries and

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15. See, e.g., Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 19–30 (1958); Weinberg, *supra* note 14, at 303–19.

16. “Extraterritoriality,” in the context of choice of law, has usually referred to the forum’s practice of applying its own law to events occurring outside the forum—for example, when the forum applies the forum’s own standard of care to the behavior of an alleged tortfeasor who acted outside the forum. As recounted in the second half of this Article, it has become unrealistic to strictly limit the scope of a state’s rules of decision to events occurring within the state. American conflicts law, as a result, has largely abandoned the notion that extraterritorial application of state rules of decision in civil cases is presumptively illegitimate (although some states still employ choice-of-law rules that emphasize the territorial locus where the events or behavior giving rise to a cause of action took place). Limitations on extraterritoriality, however, remain important with respect to multijurisdictional cases in the international sphere. The “presumption against extraterritoriality” places strong limits on the application of U.S. law in civil cases by American courts where the events giving rise to the cause of action arose in another country. See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1668–69 (2013) (holding that the federal Alien Tort Statute does not apply to events occurring abroad). As this Article makes clear, however, extraterritoriality in the context of choice of law has, at times, had a second meaning as well: It can refer to the fact that compelling the forum to apply foreign law in a particular case involves a kind of extraterritorial imposition on the forum. Although this usage of “extraterritoriality” is not common today, it has strong historical roots. See *infra* text accompanying note 55 (discussing the meaning of extraterritoriality in JOSEPH STORY’S COMMENTARIES ON THE CONFLICT OF LAWS, *infra* note 48); see also *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 540 (1935) (“The California statute does not purport to have any extraterritorial effect, in the sense that it undertakes to impose a rule for foreign tribunals . . .”).



the emergence of new ways of managing risk of catastrophic loss in an industrial economy. Of particular significance is the episodic displacement, beginning in the mid-nineteenth century, of traditional common law rules of decision by statutory rules applicable in civil litigation over industrial accidents. As legal scholar Ernest Bruncken observed nearly a century ago, “the gradual substitution . . . of statutory for customary rules in private law” after the mid-nineteenth century is one of the most significant developments in the history of American law.<sup>17</sup> Despite the numerous calls for codification of the common law in the antebellum period, the notion that legislatures might specify their own rules of decision in the traditional domain of private law, and thus appropriate the private civil lawsuit as a site for the implementation of the state’s legislative policy, took hold only fitfully. But in the second half of the nineteenth century, the proliferation of wrongful death statutes and, later, of employers’ liability laws (which abrogated common law defenses such as assumption of risk or the fellow-servant rule in personal injury litigation) marked a new direction in the source and nature of the law governing civil disputes over accidental death and injury, especially in the industrial context.<sup>18</sup> Since states enacted such laws at different times and in different forms, questions concerning the legitimate scope of legislative jurisdiction—what today we would call conflicts of laws—inevitably resulted in cases where the forum differed from the locus<sup>19</sup> and only one of these had enacted the statute.

It is conventional today to regard such purposeful legislative reforms of the common law as, at a minimum, efforts by the state to protect (or regulate the behavior of) its own residents.<sup>20</sup> A modern conflicts scholar is thus apt to conclude that such laws can validly be applied for the benefit of a forum domiciliary even

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17. Ernest Bruncken, *The Common Law and Statutes*, 29 YALE L.J. 516, 516 (1920).

18. See *infra* Part III.A–B.

19. For purposes of stylistic economy, I use the slightly archaic terminology of “forum” and “locus” throughout this Article. The locus is the place where an event that traditional choice-of-law doctrine regarded as being of paramount importance occurs; for example, the doctrine of *lex loci delicti* specifies that, in a tort case, the law of the place where the wrong occurred (the locus) should govern. The forum refers to the court hearing the case or, more generally, to the state in which that court sits. The phrase “forum law,” as I use it here, refers not to the technical doctrine of *lex fori* (as in, “Matters of procedure are governed by the law of the forum”), but to the common disposition of courts to apply the substantive law of the forum to protect or regulate a forum domiciliary who is a party in the case. Thus, when I say that the court “applied forum law” to protect the plaintiff, a domiciliary of the forum, that is usually shorthand for saying that the court applied the law of the plaintiff’s domicile—which happened to be that of the forum.

20. See, e.g., *Phillips v. General Motors Corp.*, 995 P.2d 1002, 1012 (Mont. 2000) (“One of the central purposes of Montana’s product liability scheme is to prevent injuries to Montana residents caused by defectively designed products.”). In *Phillips*, the Montana Supreme Court applied Montana law to a wrongful death suit although the automobile accident at issue occurred in Kansas.

when the accident occurred outside the forum. But for nineteenth-century courts, territorial boundaries on legislative jurisdiction in what were still regarded as the private-law domains of tort and contract remained impervious to considerations of party domicile and the state's desire to protect or regulate its own. Indeed, the very fact that late nineteenth-century legal rules concerning wrongful death and employers' liability were instituted by statute was what heightened concerns about the extraterritorial application of state law.<sup>21</sup> Statutes, unlike the principles that resulted from the accretion of rulings by common law courts, were considered by post-Civil War jurists to be exercises of a state's *political* jurisdiction. No state, in the view of most late-nineteenth-century jurists, had the power to project its statutory rules of decision into the territory of another state.<sup>22</sup> The scenario that usually triggered judicial observations to this effect was the effort of plaintiffs to rest their claims for accidental injury or death on the forum's wrongful death or employers' liability statute, although the accident had occurred outside the forum.<sup>23</sup> Before the early twentieth century, courts almost uniformly rejected these efforts, as well as the notion that the forum's protective or regulatory interest with respect to its own domiciliaries could justify such extraterritorial applications of state law. Interestingly, these concerns about extraterritoriality and limits on legislative jurisdiction had arisen rarely, if at all, in American law before 1850, largely because statutory displacement of common law rules of decision in civil litigation was infrequent and common law principles (even when the common law rule of one state might differ from that of another) were still regarded as being grounded in custom and consent rather than as emanations of the sovereign state.

We have mistaken, or missed entirely, the significance of these statutes and the extraterritoriality problems they raised for the history of conflicts law—indeed, for the history of the concepts underlying American civil adjudication. Modern

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21. For a discerning discussion of this development that reaches conclusions somewhat different from my own, see James Y. Stern, Project, *Choice of Law, the Constitution, and Lochner*, 94 VA. L. REV. 1509 (2008).

22. See *McCarthy v. Chi., Rock Island & Pac. R.R. Co.*, 18 Kan. 46, 48 (1877) ("Generally, all laws are coextensive, and only coextensive with the political jurisdiction of the law-making power."). A virtually identical passage previously appeared in *Whitford v. Panama Railroad Co.*, 23 N.Y. 465, 471 (1861). See also *Beach v. Bay State Steamboat Co.*, 30 Barb. 433, 439 (N.Y. Gen. Term 1859) (commenting on "the general principle of the territorial limit of political jurisdiction").

23. See, e.g., *Ala. Great S. R.R. Co. v. Carroll*, 11 So. 803 (Ala. 1892) (holding that Alabama railroad employee had no cause of action against Alabama railroad under Alabama's Employers' Liability Act, which abrogated fellow-servant doctrine, when accident and injury occurred in Mississippi); *State v. Pittsburgh & Connellsville R.R. Co.*, 45 Md. 41, 47 (1876) ("[T]he Courts here will never apply to acts done in a foreign jurisdiction, which may not be unlawful there, the arbitrary rules that shall have been prescribed by our Legislature, with respect to rights and remedies, wholly at variance with the settled rules of the common law.").

conflicts scholars, absorbed in late twentieth-century debates concerning the relative merits of “territoriality” and “interest analysis” as approaches to choice of law, have invariably viewed the manner in which nineteenth-century courts and legal scholars confronted the problem of extraterritorial application of these statutes as classic, if not dogmatic, examples of the territorial approach to choice of law, now often derided as a formalist relic. But contemporary jurists did not typically label these problems as “conflicts of laws,” in the modern sense of deciding which of two states should supply the rule of decision in a dispute plausibly affecting both. To late nineteenth-century jurists, the question of territorial limits on a state’s exercise of its political jurisdiction was not simply a matter of determining the proper *lex loci* reference<sup>24</sup> in a conflicts case; it constituted a foundational problem of legal and political legitimacy. Judges and scholars took those territorial limits very seriously, but they found those limits in international law, learned treatises, the political theory of sovereignty, or simply their own common sense—not in the U.S. Constitution. The notion that the Full Faith and Credit Clause or any other federal constitutional provision might limit the power of state courts to apply the forum’s municipal rules of decision in ordinary *in personam* litigation arising from events occurring outside the forum is an innovation of the early twentieth century.

For a brief period in the 1910s, the Supreme Court did in fact identify constitutional limitations on the scope of state statutes altering rules of decision applicable in civil litigation. Its foil was yet another legislative approach to the problem of managing risk of catastrophic loss: application by Missouri state courts of the state’s own consumer protection statutes limiting the enforceability of forfeiture clauses and other provisions in individual life insurance policies that could prove disastrous for unwary policyholders. Although the Court had never expressed much interest in the extraterritoriality issues raised by the wrongful death and employers’ liability statutes,<sup>25</sup> Missouri’s imposition on the contractual

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24. *Lex loci* is a Latin term meaning “the law of the place.” It is a principle dictating application of the law of the locus in multijurisdictional disputes; specific *lex loci* rules determine the proper locus reference for particular types of claims (for example, *lex loci contractus* specifies that the law of the place of contract should apply; *lex loci delicti* specifies that the law of the place of injury should apply). In a legal system, such as ours today, in which all rules of decision are municipal in their nature and source, the *lex loci* principle is synonymous with a territorial approach to choice of law. Well into the nineteenth century, however, not all civil disputes were regarded as calling for municipal or local law; the *lex loci* was the proper choice-of-law reference only for those types of cases that were local in nature, while other sources of nonmunicipal law were appropriate for certain other kinds of cases not local in nature. See William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517–21 (1984).

25. Cf. *Dennick v. R.R. Co.*, 103 U.S. 11 (1880), discussed *infra* Part III.A.

freedom of the great Northeastern insurance companies proved unacceptable to the Court—but only as to policies that had been “made” in those companies’ home states (usually New York). The resulting doctrine not only placed untenable weight on such arbitrary factors as where a contract had been “made”; it also gave rise to one of the more peculiar (if also shorter-lived) constitutional rights ever identified by the Supreme Court—the right to make a contract with someone in another state. This novel doctrine traded on historical concerns about extraterritoriality, a concept seemingly based on the sovereign dignity of states vis-à-vis other states, and the Court’s decisions accordingly featured some tentative invocations of the Full Faith and Credit Clause. But the essence of the doctrine was the right of contracting individuals to be free from state interference. To the Court, Missouri’s attempt to regulate insurance policies extraterritorially was a constitutional affront not to the state of New York (whose law regarded such policy provisions as enforceable), but to the contractual autonomy of private parties. It is as close as the Court ever came to constitutionalizing a private space for contractual activity, all but immune from state regulation.

Beginning in 1918, Justice Brandeis, joined later by Justice Stone, mounted a rearguard and ultimately successful effort to dethrone this rigid conception of extraterritoriality and persuade the Court that multiple states could have legitimate policy interests (including protection of their domiciliaries) in applying their statutory law to particular events occurring outside their borders. The final development leading to the establishment of modern constitutional principles governing choice of law and to the recharacterization of extraterritoriality problems as conventional conflict-of-laws questions was the widespread enactment of yet another response to the problem of injuries suffered by industrial employees—state workers’ compensation statutes.<sup>26</sup> Whereas the earlier tort and contract cases involving extraterritoriality had been conceived in terms of whether a single state could apply its statute to events said to have occurred beyond its borders, the ubiquitous compensation statutes inescapably confronted courts with situations in which there was a choice between two exercises of state statutory authority—the state where the injury had occurred and the state where the employment relationship had been formed. By 1930, the formalist view that only one state could possess legislative jurisdiction over a particular transaction or occurrence had become untenable given the frequency of job-related injuries occurring in one state arising out of an employment relationship formed in another. The question raised in the 1910s insurance Supreme Court cases, whether

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26. I use the term “workers’ compensation” in this Article, although from the 1910s to the 1970s the conventional term was “workmen’s compensation.”

application of a state statute could legitimately deprive a person of private contractual rights acquired elsewhere, had given way to the question of which of two exercises of municipal regulatory authority could and should govern a dispute that plausibly implicated both.

By 1939, Justice Stone had crafted for the Court an approach that disavowed dogmas on extraterritoriality and focused instead on the legitimate interests a state might have in applying its own law to a dispute. Those interests, which included the state's right to protect (or regulate) its own domiciliaries, retained their force even as to certain events occurring beyond the state's boundaries; and the notion that all litigable controversies fell within the exclusive legislative jurisdiction of a single state—the foundation of strict limitations on the territorial scope of legislative jurisdiction—was exposed as unsustainable. The same conceptual transition was at work in *International Shoe Co. v. Washington*,<sup>27</sup> which supplanted an approach to personal jurisdiction (based on *Pennoyer v. Neff*<sup>28</sup>) that presumed that at most one state could assert adjudicative authority over a given nonconsenting defendant at a given time. Those who today debate the relative merits of territoriality and domicile in structuring state adjudicative authority—including those members of the Court who have revived territorial sovereignty and purposeful consent as touchstones in the analysis of personal jurisdiction—would do well to consider the historical logic underlying the Court's choice-of-law decisions in the 1930s.

Seen in the light of what preceded it, the Supreme Court's decisions in the 1930s workers' compensation cases, usually regarded as foundational statements about constitutional limitations on choice of law, actually represent the empowerment of the states in providing and applying rules of decision for the benefit of their domiciliaries and for the regulation of those acting within the state.<sup>29</sup> With the dethronement of the concept of extraterritoriality and the contemporaneous assimilation of common law to statute law in *Erie*, the entire question of the legitimate scope of forum law (statutory or otherwise) for the first time moved squarely into the domain of choice of law as we conceive that concept today. Stone's focus on state interests prefigured the general approach that would revolutionize American conflicts law in the second half of the twentieth century, as the notion that rules of decision applicable in civil litigation, whether statutory or common law in origin, were purposeful statements of state policy became a staple of American legal thought.

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27. 326 U.S. 310 (1945).

28. 95 U.S. 714 (1877).

29. Cf. Stephen Gardbaum, *New Deal Constitutionalism and the Unbackling of the States*, 64 U. CHI. L. REV. 483, 561–63 (1997).

The merits of the Supreme Court's current approach to personal jurisdiction, in particular whether that approach should be harmonized with the Court's position on constitutional limitations on choice of law, is a subject beyond the scope of this Article. The emphasis here is on how, over the course of almost a century, strict limitations on the extraterritorial application of state rules of decision in civil litigation first emerged and then yielded to a conception that credited party domicile, among other things, as a warrant for the state's application of forum law to events occurring beyond the boundaries of the state. The recent personal jurisdiction cases, however, do indicate just how relevant this largely forgotten story is to current conceptions of the limits on states' adjudicative authority. Wittingly or not, the Court may implicitly be discrediting a hard-won constitutional norm—specifically, that states should have ample power to assert their jurisdiction in protection or regulation of their own citizens—that took generations of experience with the changing realities of American law and society to establish.

In Part I of this Article, I recount the conventional story of how modern American conflicts theory developed, which has informed previous scholarly analyses of the constitutional limitations on the power of a state court to apply forum law.<sup>30</sup> In Part II, I discuss the features of conflict-of-laws doctrine in the antebellum United States, in particular the preeminence during that period of contract and commercial disputes in the corpus of reported decisions raising conflicts issues. Traditional private-law norms of custom and consent remained central to the resolution of such conflicts; accordingly, constitutional principles based on state sovereignty within the federal system, in particular full faith and credit, had little relevance to the problem of choice of law. Part II.C considers the first stirrings of concern about the problem of extraterritoriality in American law and politics; before the Civil War, these concerns did not involve the exorbitant application of forum law in civil litigation, the modern bugaboo of choice of law, but rather the fear that the forum would be compelled to recognize the rights of foreign-chartered corporations or that it would be compelled to recognize an individual's status as enslaved pursuant to the law of another state. Parts III.A and III.B treat the emergence of statutory causes of action in the context of industrial accidents—namely, the wrongful death and employers' liability laws—and the problem of extraterritorial application of state statutes that ensued. These statutes confronted courts for the first time with the problem of the forum's ex-

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30. In theory, any choice-of-law ruling, even one that resulted in the application of foreign law, could be so indefensible as to violate the Constitution. In practice, the rulings that push against constitutional limits, or at least raise the hackles of conflicts scholars, invariably involve the questionable application of forum law. Hence I use the phrase "the power of a court to apply forum law," or some variant thereof, synonymously with "the problem of constitutional limits on choice of law."

traterritorial, and thus exorbitant, application of its own statutory rules of decision. Part III.C considers the Supreme Court's establishment in the 1910s of constitutional limitations on the power of a state to apply its consumer protection statutes to insurance policies made elsewhere, even with respect to resident policyholders—a threat to then-dominant conceptions of freedom of contract. Part III.D takes up the emergence of worker's compensation statutes, the problems of extraterritoriality and choice of law that they raised, and the Supreme Court's eventual abandonment in the 1930s of extraterritoriality as a touchstone for constitutional limitations on the exercise of legislative jurisdiction.

### I. AUGMENTING THE “BEALE-TO-CURRIE” NARRATIVE IN THE HISTORY OF AMERICAN CONFLICTS LAW

The standard history of American conflict-of-laws theory<sup>31</sup> is familiar, if a bit stylized: Until the mid-twentieth century, choice-of-law doctrine was relentlessly territorial in approach. The applicable law in a case featuring multijurisdictional connections should be that of the state where some significant and legally predefined event took place. This basic and longstanding *lex loci* principle was given a theoretical and systematic formulation in the scholarship of Joseph Beale, who attempted to ground the territorial doctrine in a theory of vested rights.<sup>32</sup> Beale's approach was influential and formed the basis for the (First) Restatement of Conflict of Laws in 1934, for which he was Reporter. Legal scholars of a Realist persuasion, however, had begun to critique Beale and his territorial system even before publication of the Restatement.<sup>33</sup> The main points of this critique were that Beale's formalist, jurisdiction-selecting approach ignored the way in which courts actually decided conflicts problems; that its inattention to the actual substantive content of the laws competing for recognition made little sense; that it made claims of formal completeness that were intellectually unsustainable; and that it paid too little attention to the problem of mediating the substantive poli-

31. This story appears, in one form or another, in numerous scholarly articles and casebooks on American conflicts law. See, e.g., HERMA HILL KAY, LARRY KRAMER & KERMIT ROOSEVELT, *CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS* 6, 148–50 (9th ed. 2013); Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2454–65 (1999).

32. JOSEPH HENRY BEALE, *A TREATISE ON THE CONFLICT OF LAWS OR PRIVATE INTERNATIONAL LAW* 110–11 (1916). For Beale's discussion of his theory of vested rights, see *id.* at 105–07.

33. See, e.g., David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924); Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924).

cies embodied in the conflicting laws of the competing states in a particular multijurisdictional situation.

Eventually, the legal scholar Brainerd Currie, building on these Realist critiques, proposed a full-blown alternative to the territorial approach, known as “interest analysis.”<sup>34</sup> Currie’s approach suggested that a variety of state interests in the application of its law—not just the location of a particular event like the signing of a contract—can and should be taken into account in resolving conflicts problems. In particular, a state might well have an interest in applying its law when one of the parties is a state domiciliary, even if certain crucial events in the case occurred outside the state. This focus on domicile in basic contract and tort conflicts, as well as a certain systemic presumption favoring the application of forum law, vividly distinguishes Currie’s approach from Beale’s. Modern conflicts law (which varies from state to state) has not adopted Currie’s ideas in toto, but much of it (notably the Restatement (Second) of Conflict of Laws) credits the idea of state interests and the relevance of party domicile in resolving conflicts. With that trend has come a reduced emphasis on territoriality as such. These developments, in turn, have not pleased all conflicts scholars. The imprecise and case-specific calculus of interests that characterizes judicial resolution of conflicts using the modern approach strikes some as lacking a basic feature of “law,” since it is so ad hoc in nature and does little to advise parties ex ante what their rights might be. Moreover, some dislike what they see as the provinciality of a conflicts approach that in practice leans toward both (1) the application of forum law and (2) the protection of forum domiciliaries. In any case, choice-of-law doctrine as actually applied is now a hodgepodge: Some states still adhere to a territorialist, rule-based approach for at least certain kinds of claims, while a larger number of states opt for the more amorphous, multifactor approach characteristic of the various modern theories.

This conventional narrative, accurate enough as an account of events since the 1930s, eschews virtually any consideration of American conflicts law prior to Beale’s adumbration of the vested rights approach in the first decades of the twentieth century.<sup>35</sup> The relative inattention to pre-Beale ideas—not to say

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34. For a comprehensive explanation of interest analysis, see Herma Hill Kay, *A Defense of Currie’s Governmental Interest Analysis*, 215 RECUEIL DES COURS 9 (1989). Currie’s development of the interest analysis idea is documented in BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

35. There have been, of course, a number of scholarly treatments of Joseph Story’s *COMMENTARIES ON THE CONFLICT OF LAWS* (1834), the early history of the Full Faith and Credit Clause, and other historical developments lying outside the Beale-to-Currie narrative. See Kurt H. Nadelmann, *Joseph Story’s Contribution to American Conflicts Law: A Comment*, 5 AM. J. LEGAL



reported cases before the twentieth century—concerning the problem of multijurisdictional disputes in American courts has obscured the ways in which gradual changes in basic conceptions of law and governance have affected the law of conflicts. Even the best-informed historical accounts of American conflicts law have been slow to acknowledge that the nature of conflicts jurisprudence in any given historical period is determined largely by the types of legal disputes that are likely to raise conflicts problems in that period. After all, to have a conflicts problem, one needs a dispute that somehow touches more than one jurisdiction as well as a relevant difference between the rules of decision specified by those two jurisdictions. The types of disputes meeting those conditions have been different at different times in American history. The conceptual premises underlying American conflicts law have never been static; they are reshaped in response to the emergence of new claims and new patterns of personal and economic activity.

Accordingly, the problem of choice of law in the domestic context, as courts and scholars analyze it today, rests on some basic current assumptions (enumerated below) about the nature of law that are seldom acknowledged explicitly and that have not always characterized American legal thought. Only by bringing those contemporary assumptions into the foreground—that is, by historicizing them—can we fully grasp the process by which American law concerning the permissible scope of legislative jurisdiction first embraced strong principles of territoriality in the late nineteenth century and then relaxed those principles in favor of an approach that acknowledged the relevance of state domicile.

First: All law applicable in American courts, whether common law or statutory law, is municipal law—defined as positive law emanating from, and pertaining to, a particular sovereign state or nation. Therefore, the choice-of-law problem as it emerges today in American courts is that of choosing, among all the states that have cognizable connections to the case, the one whose municipal law should apply to the disputed issue (assuming that the respective rules differ in a way that would matter to the outcome of the case).

Second: The rules of choice of law are themselves a body of municipal law belonging to the state. The rules of choice of law constitute forum law; state courts apply their own conflict-of-laws principles, not those specified by general principles, the law of nations, or some other extrinsic or transnational source.

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HIST. 230 (1961). But that narrative continues to motivate most modern treatments of conflicts issues.

Third: Although some states still use, and some scholars still advocate, choice-of-law rules that are territorial in nature—rules that specify in advance the locus of particular events as the proper choice-of-law reference in particular kinds of cases—almost no one today thinks that the extraterritorial application of municipal rules of decision (for example, application of the forum's rule on the availability of punitive or noneconomic damages to accidents that occurred outside the forum) is per se a violation of the Constitution or of basic principles of sovereignty. There is a difference between saying (as some do) that territoriality is the preferred approach to choice of law and saying (as few if any do) that application of the law of a state other than that of the state where the events give rise to the cause of action is somehow *ultra vires* or a legal impossibility. A corollary to this acceptance of the extraterritorial application of state rules of decision is that the domicile of the parties to a dispute is presumptively a legitimate consideration in the choice-of-law analysis, even if courts and scholars differ as to the weight it should be given vis-à-vis that which is given to the locus of events underlying the claim. The crediting of domicile as a legitimate consideration is, with respect to conflicts analysis in contract and tort cases, sharply at variance with nineteenth-century legal conceptions.

Fourth: It is today a common and unremarkable phenomenon for states to enact statutes that alter existing rules of decision applicable in civil disputes or that even create new causes of action altogether. Thus, the civil lawsuit has long since ceased to be the domain solely of private law distinct from the legislature's concerns; it is also a site for the legislature's expression and implementation of its policies with respect to regulation of behavior, compensation of victims, and so on. As Ernest Bruncken's earlier-quoted remark suggests, the advent of the statutorily created cause of action or rule of decision is a signal development in the history of American law. It is important to distinguish, as an exercise of state lawmaking power, the phenomenon of the statutory rule of decision applicable in civil litigation from other exercises of statutory authority, such as direct regulation; extraterritorial application of statutory rules of decision finds greater acceptance today than do state efforts to regulate extraterritorially in a more direct fashion.<sup>36</sup>

Fifth: Since rules of decision applicable in civil litigation are the law of the state, and since we are apt to think of those rules of decision as expressing the sovereign policy choices of that state, existing constitutional limitations on choice of law (particularly as imposed by the Full Faith and Credit Clause) rest largely on

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36. See generally Florey, *supra* note 8.

the notion that an exorbitant application of the forum's own law is an affront to the sovereign power of another state whose law is being disregarded.<sup>37</sup>

None of these basic assumptions characterized American legal thought two hundred years ago, and most of them became conventional only sometime after the Civil War. Inattention to this fact has lent an element of ahistoricism to scholarly treatments of the history of American conflicts law. Of particular importance is the emergence of territorial limitations on state statutes during the period between the Civil War and publication of the First Restatement in 1934, an historical development whose significance has largely been lost in the debates over territorialism in choice of law occupying conflicts scholars throughout much of the twentieth century. By the time of Currie's seminal writings in the 1950s and 1960s, the jurisprudential distinction between rules of decision created by statute and those specified by the common law had largely faded from view. The demise of that distinction made it possible for Currie to disparage as "capricious" and sometimes "incredibly perverse"<sup>38</sup> the results of a conflicts method that made the place of particular events its touchstone and that (at least with respect to traditional common law actions in tort and contract) ignored party domicile altogether.

But there had been an internal logic to the earlier theory's distinction between the exercises of political jurisdiction (by the enactment of statutory causes of action) that are necessarily limited by the state's boundaries and common law causes of action in tort and contract to which domicile was irrelevant because they were universally recognized and thus transitory. These nineteenth-century conceptions formed essential background both to Beale's highly formalized vested rights theory and to the line of early twentieth-century Supreme Court decisions condemning extraterritoriality, decisions whose underpinnings had become anachronistic by the 1930s. Changes in the basic conception of law, and not some incoherence intrinsic to the idea of territorialism, made the failings of a strictly territorial approach to conflicts visible. Just as historians have come to understand *Swift v. Tyson*<sup>39</sup> and the concept of "general law" on their own terms,

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37. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 322 (1981) (Stevens, J., concurring) ("The Full Faith and Credit Clause . . . direct[s] that a State, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other States and avoid infringements upon their sovereignty."). Admittedly, the Court has in more recent cases merged its analysis of the Due Process Clause and the Full Faith and Credit Clause, respectively, in its assessment of the constitutional limits on choice of law, obscuring somewhat the specific function fulfilled by the Full Faith and Credit Clause in this context. See *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985).

38. Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 240–44 (1958).

39. 41 U.S. 1 (1842).

rather than just a silly mistake corrected by the *Erie* decision,<sup>40</sup> a better understanding of the legal attitude toward extraterritoriality in post-Civil War jurisprudence can temper the triumphalism one sometimes finds in historical accounts of modern American conflicts law.

## II. CONFLICT OF LAWS, THE CONSTITUTION, AND EXTRATERRITORIALITY BEFORE THE CIVIL WAR

When conflicts scholars argue today about constitutional limitations on choice of law, or simply about fundamental legitimacy in choice of law, what they most often have in mind is the problem of exorbitant or provincial applications of forum law by state courts.<sup>41</sup> Before the late nineteenth century, however, few lawyers or judges claimed that the Constitution limited the power of state courts to apply the forum's municipal rules of decision in civil litigation.<sup>42</sup> Moreover, antebellum jurists rarely expressed concern over the possibility that the application of municipal law<sup>43</sup> by the forum amounted to impermissibly giving

40. See, e.g., Fletcher, *supra* note 24, at 1576.

41. See, e.g., Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundation of Choice of Law*, 92 COLUM. L. REV. 249, 310–12 (1992). To be sure, Laycock and others have also argued that a preference for forum domiciliaries (as distinct from a preference for forum law) is an additional malady promoted by modern approaches to choice of law. John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981). Practically speaking, however, constitutional limitations on choice of law only emerge in situations where the forum has applied forum law, since only under those conditions—the failure to apply the law of a nondomiciliary's state—can a party plausibly raise an objection under the Due Process Clause or Full Faith Credit Clause to the forum's choice-of-law determination. Douglas Laycock and John Hart Ely have argued that the possible discrimination against nondomiciliaries that is facilitated by modern choice-of-law methodologies gives rise to Article IV Privileges and Immunities concerns, but this argument has not yet been adopted by the courts. See Laycock, *supra*, at 261–88; Ely, *supra*. Of course, frequently the effect of an arguably exorbitant application of forum law is to favor a forum domiciliary. See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302.

42. I exclude from consideration cases in which the Constitution appeared to confer exclusive or superior lawmaking authority on Congress. See, e.g., *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

43. As previously mentioned, in this Article, I use the term “municipal law” to refer to law that emanates from a particular sovereign state or nation as opposed to law with a transnational source and putatively universal application such as the law merchant, the law of nations, or the common law as conceived before the mid-nineteenth century. Hendrik Hartog's definition of “municipal laws” in eighteenth-century law, drawing on Blackstone, is useful here: “[T]he English equivalent of the *jus civile* of continental law . . . ‘a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.’” HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870, at 190 (1983) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 44–53 (Oxford, Clarendon Press, 1765–69)). It is close to the term “positive law,” but it is perhaps more correct to say that legal positivism regards all law as in some sense municipal law. In some nineteenth-century

extraterritorial effect to that law; to them, the evils worked by extraterritoriality consisted, if anything, in compelling the forum to give effect to legal rights and relationships created elsewhere. Thus, the two concepts that paved the way for today's doctrines concerning constitutional limits on choice of law—(1) that a state's "political jurisdiction" is limited to the state's territorial borders and (2) that the Constitution bars a court's exorbitant application of forum law—became integrated into the field of conflict of laws only in the late nineteenth and early twentieth centuries and then only haltingly. To appreciate the significance of these developments, it's important to consider briefly the ways in which choice of law,<sup>44</sup> and the nature of law as applied in civil disputes more generally, were conceived by American judges and lawyers before the Civil War.

#### A. The Preeminence of Contract and Commercial Law in the Early American Jurisprudence of *Lex Loci*<sup>45</sup>

American courts confronted the issue of *lex loci*, familiar to civil law jurists for centuries, virtually from the day independence was declared.<sup>46</sup> The *lex loci*, however, was the solution to only one of the several types of choice-of-law problems that arose with some frequency in antebellum civil litigation. Today, the problem of choice of law is to determine which state's municipal rule of decision should apply in a case where more than one has a plausible claim to application. Well into the nineteenth century, however, the problem of determining the proper source for the rule of decision to govern in a civil case had a broader dimension, sometimes involving bodies of law that were transnational, not municipal, in nature. Most early nineteenth-century American jurists considered such transnational bodies of law as the law merchant, maritime law, the laws of war, and other portions of the law of nations to be staples of American jurisprudence. In certain cases, for example, a court might conclude that the proper rule of

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sources "municipal law" is used more or less synonymously with "local law," but this can be confusing because "local law" can also mean "the law of the locus," or the place where a particular event occurred.

44. I use the phrase "choice of law" throughout this Article when referring to the problem of identifying the proper rule of decision for a case with multijurisdictional elements, although the term (and, one might argue, the precise concept) was not in general use before the late nineteenth century. Dicey was among the first to employ the term "choice of law" as preferable to the terms, hitherto more frequently used, "conflict of laws" or "private international law." A.V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 13 (Boston, The Boston Book Co. 1896).

45. I treat the matters discussed in this Part at greater length in a forthcoming book on the history of American choice-of-law doctrine. See CLYDE SPILLINGER, CONFLICT AND PLURALISM: CHOICE OF LAW IN AMERICAN LEGAL HISTORY (forthcoming 2016).

46. See Nadelmann, *supra* note 35, at 234–35.

decision was to be found in the law merchant, not in the municipal law of a particular state or nation. Although American courts relying on such transnational bodies of law characteristically regarded them as having been incorporated into the common law rather than possessing an independent authoritative force, those bodies of law did not thereby acquire the sovereign characteristics of municipal law; they remained species of universal or transcendental law.<sup>47</sup>

The *lex loci*, as the phrase implies, was the appropriate choice-of-law reference when the legal issue was local in its nature or significance. The most obvious example was the principle that title to real property should be determined by the *lex loci rei sitae* (the law of the place where the real property is situated). But the most frequently litigated *lex loci* questions in the antebellum period concerned contract and commercial law, the areas of civil litigation most likely to raise multijurisdictional problems at this time.<sup>48</sup> The common law jurisprudence of contract and commercial law before the Civil War was strongly influenced by principles of custom and consent rather than municipal fiat,<sup>49</sup> and the same emphasis on party intention was reflected in the prevailing doctrine of *lex loci contractus* for conflicts in contract law. Thus, in *Robinson v. Bland*, a 1760 decision on conflict of laws in contract cases that was frequently cited by American courts, Lord Mansfield observed, “[T]he general rule established *ex comitate et jure gentium* is, that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception, where the parties (at the time of making the contract) had a view to a different kingdom.”<sup>50</sup> Early American courts frequently

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47. For a lucid discussion of these matters, see Fletcher, *supra* note 24, at 1517–21. See also William P. LaPiana, *Swift v. Tyson and the Brooding Omnipresence in the Sky: An Investigation of the Idea of Law in Antebellum America*, 20 SUFFOLK U. L. REV. 771, 781 (1986); RANDALL BRIDWELL & RALPH U. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW* 51–56 (1977) (discussing the law of nations, maritime law, and commercial law in the federal courts in the first half of the nineteenth century); Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 813–15 (1955).

48. The *Foreign Contracts* chapter in Joseph Story’s *COMMENTARIES ON THE CONFLICT OF LAWS* occupies 115 pages, more than twice as much space as he devoted to any other topic. JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* 193–307 (Boston, Hilliard, Gray, and Co. 1834) [hereinafter *STORY, CONFLICT OF LAWS*]. By the time of the third edition in 1846, that number had grown to 282 pages, again far in excess of any other chapter. JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* 353–634 (Boston, Charles C. Little & James Brown, 3d ed. 1846).

49. See Stern, *supra* note 21, at 1520–21 (“Private law rules, particularly common law rules of property and contract, had been understood as ‘facilitative of the will of the parties, rather than inherently regulatory in their own right.’”) (quoting DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* 268 (1998)); BRIDWELL & WHITTEN, *supra* note 47, at 61–62.

50. *Robinson v. Bland*, (1760) 96 Eng. Rep. 141 (K.B.) 141 (emphasis added). Similarly, Mansfield’s decision in *Mostyn v. Fabrigas*, stating the principle that certain rules of decision in the domain of

cited these principles when resolving particular *lex loci* problems in the area of contract and commercial law. A familiar example involved unpaid bills of exchange, in which the state where the bill was drawn and the state where the bill was refused provided different interest rates by statute. In such cases, the Pennsylvania Supreme Court concluded, “[t]he parties must be supposed to have in contemplation the law of the place, where the contract is made, and it necessarily forms a part of the contract.”<sup>51</sup> Whether in simple contract cases, where the *lex loci contractus* applied, or in more complex commercial disputes, where transnational principles ascribed to the “law merchant” held sway, the solutions to choice-of-law problems remained rooted in principles of custom, consent, and transnational commercial practice rather than in the sovereign prerogative of the lawmaking state.<sup>52</sup>

Basic conceptions concerning the source of legal obligation were, to be sure, in transition throughout the first half of the nineteenth century.<sup>53</sup> The importance placed by early American courts on individual intention and customary practices, rather than on sovereign municipal authority, in the resolution of *lex loci* problems is a matter of emphasis and degree. The municipal law of the state obviously had its place in civil adjudication, in conflicts cases as elsewhere. The very existence of a *lex loci* problem suggested that the law, even the common law, could be different in different places, and plainly this was sometimes because of positive lawmaking and not just the accretion of custom. Moreover, *lex loci* problems, even those involving common law claims, sometimes involved consideration of state statutes, which were the paradigm case of municipal law. In fact, the example of interest rates on unpaid bills of exchange mentioned in the preceding paragraph—in which the courts justified the *lex loci contractus* rule by referring

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tort law were “transitory” (in other words, enforceable in any jurisdiction where the defendant might be found and sued), focused less on the respect owed to the municipal law of foreign sovereigns than on the willing acts of individuals and the universal (rather than local) nature of the rights they claimed. *Mostyn v. Fabrigas*, (1774) 98 Eng. Rep. 1021 (K.B.) 1023–24. Mansfield’s rulings on conflict-of-laws questions between 1760 and 1775 marked the first sustained engagement with these issues by English common law courts. The traditional, and somewhat provincial, view of those courts had been that those courts applied only English law. For a fascinating historical analysis of *lex loci* conceptions in English law, see Alexander N. Sack, *Conflicts of Laws in the History of the English Law*, in 3 *LAW: A CENTURY OF PROGRESS 1835–1935*, at 342, 395–401 (Alison Reppy ed., 1937).

51. *Hazellhurst v. Kean*, 4 Yeates 19, 20 (Pa. 1804); see also *Foden v. Sharp*, 4 Johns. 183 (N.Y. Sup. Ct. 1809); *McCandlish v. Cruger*, 2 S.C.L. (2 Bay) 377 (S.C. Ct. App. 1802) (citing *Robinson v. Bland*, (1760) 96 Eng. Rep. 141 (K.B.) 141); Nadelmann, *supra* note 35, at 235.

52. See BRIDWELL & WHITTEN, *supra* note 47, at 61–68.

53. This is a major theme, of course, of MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860* (1977), especially the discussion of “the emergence of an instrumental conception of law.” See *id.* at 1–30.

to the parties' likely intentions—resulted in the application of a state statute that specified the governing interest rate.<sup>54</sup> And, of course, there was much more to early American civil jurisprudence than contract and commercial law, and resolution of interstate conflicts in some areas—for example, in the areas of domestic relations and status (typically governed by the *lex loci domicilii*)<sup>55</sup>—traded less on the consent of private parties than on the authority of the state to regulate the behavior of its own denizens. But the multijurisdictional disputes arising in these areas of law prior to the Civil War were less common than those raised by contract and commercial law. These noncontractual conflicts did not give rise to a more comprehensive conception that a court's failure to apply foreign law when called for by *lex loci* principles infringes the sovereign prerogative of the locus state. In fact, American jurists in the early nineteenth century tended to treat the problems of *lex loci* as belonging to the discrete legal areas in which they arose, rather than as an autonomous, trans-substantive doctrine (conflict of laws) in its own right. It was not until the 1820s that American legal commentators began conceiving conflict of laws more systematically as a general doctrine rather than a series of *lex loci* principles specific to separate areas of law like contract and property.<sup>56</sup>

54. That municipal enactment, nevertheless, was ancillary to the underlying common law claim for enforcement of the contract; it was an acknowledgment of local economic conditions, not a legislatively created cause of action or rule of decision specifying the parties' substantive rights and duties. Thus the court's conclusion that the statutory interest rate of the state where the contract had been made should apply was based not on recognition of that state's sovereign right to have its law applied, but on the parties' own likely expectations. A similar analysis would apply to *lex loci* problems concerning which state's usury statute should apply to a contract specifying a particular rate of interest; the applicable usury statute was ancillary to the underlying contract, whose presumptive enforceability was based on the parties' intent. See, e.g., *Van Schaick v. Edwards*, 2 Johns. Cas. 355 (N.Y. 1801); *Hosford v. Nichols*, 1 Paige Ch. 220 (N.Y. Ch. 1828). For the distinctive *lex loci* problems created by insolvency statutes, see *infra* at 30–32.

55. See, e.g., *Barrera v. Alpuente*, 6 Mart. (n.s.) 69, 70 (La. 1827) (holding that the law of the domicile governs "the state and condition of the minor"); *Barber v. Root*, 10 Mass. 260, 265 (1813) (holding that the conduct and regulation of married persons are governed by *lex loci domicilii*); *Harvey v. Richards*, 11 F. Cas. 746, 762 (C.C.D. Mass. 1818) (Story, J.) (holding that distribution of intestate's estate was governed by *lex loci domicilii*). Until sectional bonds began to fray in the 1840s, most state courts abided by the principle that a slave emancipated by the law of his newly acquired domicile should be regarded as free in every state. See, e.g., *Rankin v. Lydia*, 9 Ky. (2 A.K. Marsh.) 813, 821 (1820). See generally PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* (Morris S. Arnold ed., 1981).

56. See BRIDWELL & WHITTEN, *supra* note 47, at 61 (stating that conflict of laws was not "a process of adjudication or reasoning separate from commercial law or any other subject area; it was simply an inseparable part of all subject areas"). The first systematic treatment of conflict of laws in the United States is SAMUEL LIVERMORE, *DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS* (1828).



### 1. The Original Constitution and Choice of Law

The foregoing discussion suggests that the sovereign lawmaking prerogative of a locus state, which was central to post-Civil War doctrines barring extraterritorial application of state statutes, did not loom large in principles governing multijurisdictional disputes before that time. Among other things, this explains why the Constitution played no role until late in the nineteenth century in the analysis of *lex loci* problems. Some modern commentators, whose frame of reference is the latter-day concern with the exorbitant application of forum law and the consequent disregard of foreign law, have argued that the Constitution (in particular, the Full Faith and Credit Clause) was understood to limit the choice-of-law rulings of state courts from the moment the Constitution was ratified in 1789.<sup>57</sup> The scholarly debate over this originalist contention has largely focused on the drafting history of the Clause at the 1787 convention, particularly the meaning of the phrase “public acts” as used in the Clause, and the interesting interrelationship between the Full Faith and Credit and Bankruptcy Clauses in the drafting of the Constitution.<sup>58</sup> But one does not need to pore over the documents of the 1787 Convention to see that the argument that such constitutional limitations were thought to exist at the time rests on twentieth-century conceptions of legal authority and rules of decision in civil disputes and would have seemed a non sequitur to jurists in 1800.

Even assuming that the phrase “public acts” in the Full Faith and Credit Clause refers to statutes, the statutory cause of action was a rarity at best in the eighteenth-century United States. By the same token, rules of decision founded on the common law represented not sovereign acts of a state that sister-state courts disregarded at their constitutional peril, but the residue of an adjudicative process that courts on both sides of the Atlantic had engaged in for centuries.<sup>59</sup>

57. See Laycock, *supra* note 41, at 290–95; see also Roosevelt, *supra* note 31, at 2513. I remain more persuaded by Kurt H. Nadelmann’s conclusion from the Clause’s drafting history that the Full Faith and Credit Clause was not intended to apply to the *lex loci* rulings of state courts. Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33 (1957). It should be added that Laycock’s argument concerning the constitutional limits on choice of law is largely a normative one; his historical or originalist contentions about the Full Faith and Credit Clause and choice of law are not essential to his argument.

58. See, e.g., Laycock, *supra* note 41, at 290–310; Nadelmann, *supra* note 35; Douglas G. Baird, *Bankruptcy Procedure and State-Created Rights: The Lessons of Gibbons and Marathon*, 1982 SUP. CT. REV. 25, 29–34; 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 543–57 (1953).

59. Daniel J. Hulsebosch, *Writs to Rights: “Navigability” and the Transformation of the Common Law in the Nineteenth Century*, 23 CARDOZO L. REV. 1049, 1050–56 (2002) (describing change in

The “Faith” and “Credit” of which the Clause speaks is due to the formal legal pronouncements (whether “judicial proceedings,” “public acts,” or something else) of a state qua state; the articulation of common law principles by state courts (as distinct from the judgments entered by those courts) would not have been seen as constituting such state pronouncements. Indeed, it is difficult to find any suggestion by courts or commentators in the late eighteenth century that the process of common law adjudication by state courts, including their *lex loci* rulings, should be subjected to limiting principles by the federal Constitution.<sup>60</sup> There were, to be sure, important limitations on the *lex loci* rulings of state courts, but contemporary jurists found these in the very cosmopolitan sources from which courts drew their *lex loci* principles—the law of nations, the writings of learned jurisconsults, the nature of sovereignty—not in the Constitution. In other words, unlike today, there was no set of constitutional metaprinciples limiting the power of courts in their *lex loci* rulings that was distinct from the *lex loci* principles themselves.<sup>61</sup>

The origins of twentieth-century ideas about constitutional limits on choice of law lay in post-1850 concerns about the extraterritorial application of state statutes—in particular, state statutes creating new causes of action or altering common law rules of decision for civil disputes. Before the 1840s, the creation of such statutory rules of decision was very much the exception; the notion that the legislature might recruit the private civil lawsuit as a site for the specification and implementation of state law and policy did not become conventional until much later.<sup>62</sup> Even the most ardent pre-Civil War advocates of codification had (apart from simplifying the arcane rules governing feudal tenures and estates in land) few concrete proposals for substantive reform of the common law, preferring to focus on more general questions of access to justice, the undemocratic nature of lawmaking by courts, and the conservative and self-serving mindset of the

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conception of common law from a set of procedures to a set of doctrinal categories of substantive law during the first third of the nineteenth century).

60. The limitations placed on state authority by the original U.S. Constitution all appear addressed to the actions of state legislatures or executives, not to their judiciaries. See U.S. CONST. art. I, § 9.

61. The one intimation that such a constitutional metaprinciple might exist came in the Supreme Court's important bankruptcy decisions in 1819 and 1827. See sources cited *infra* note 72 and accompanying text.

62. If the uneven enactment of married women's property acts in the 1830s and 1840s, perhaps the best-known antebellum example of legislative reform of common law principles, produced multijurisdictional disputes, such cases did not show up in the reported cases prior to the emergence of the wrongful death statutes, discussed *infra* notes 92–133 and accompanying text. See generally Richard H. Chused, *Married Women's Property Law: 1800–1850*, 71 GEO. L.J. 1359 (1983).

bar.<sup>63</sup> Under these circumstances, constitutional limitations had no real place in the domain of courts' rulings on *lex loci*. The best evidence that the Constitution was not understood to place limits on the choice-of-law rulings of state courts before the Civil War is that the proposition went entirely unmentioned by Joseph Story, both in his *Commentaries on the Conflict of Laws* (1834) and in his *Commentaries on the Constitution* (1833).<sup>64</sup>

## 2. The Law of Bills and Notes, Bankruptcy, and the Limits of Consent as a Touchstone for *Lex Loci* Problems

The increasing divergence among the states in their common law, together with the rapid growth in statutory law, gradually raised the profile of municipal law at the expense of more transnational sources of law (although American jurists continued to expound upon the universal nature of many common law doctrines into the early twentieth century).<sup>65</sup> Rapid developments in the law of negotiable instruments and in the law of insolvency undermined reliance on the parties' intentions in resolving conflicts of laws, even in the domain of contract and commercial law. Multiple-jurisdiction questions concerning the rights of third parties in relation to a bill of exchange, such as the holder-in-due-course problem raised by *Swift v. Tyson*,<sup>66</sup> provide a clear example. The holder in due course had not been present at the time of the making of the bill, and frequently the maker knew nothing of him at the time; it was therefore futile to inquire into the holder's intentions at the time of the bill's making as a way of resolving a conflict between different sources of law concerning the holder's rights.<sup>67</sup> Conflicts

63. See CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* 84 (1981) (radical codifiers "focused on procedural aspects of the law and the complexity with which substantive rights were stated rather than those rights themselves"); Robert W. Gordon, Book Review, 36 VAND. L. REV. 431, 434 (1983) (reviewing COOK, *supra*) (noting that radical codifiers "shared with the 'orthodox' defenders of the common law the belief that the task of law reform was to clarify the law as it was, to prune out obsolete rules, but not otherwise to bring about substantive rule change").

64. See David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1654 (2009); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986*, at 70 n.115 (1990) ("Justice Story's influential treatises spoke of full faith and credit only in the context of judgments.").

65. See, e.g., Lewis A. Grossman, *Langdell Upside-Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anticodification*, 19 YALE J.L. & HUMAN. 149, 158 (2007) (describing Carter's insistence that common law was "custom" and that "the customs of the people were universal") (inner quotation marks omitted).

66. 41 U.S. 1 (1842).

67. For a demonstration of the myriad *lex loci* problems to which bills of exchange could lead, involving the competing rights of drawer, drawee, acceptor, payee, and subsequent holders, see the lengthy discussion in JOSEPH STORY, *COMMENTARIES ON THE LAW OF BILLS OF*

of laws involving bankruptcy discharges (for example, where the debtor and creditor were from different states) did not necessarily involve strangers to the original transaction, yet they too strained the concepts of intention and consent almost to the breaking point.<sup>68</sup> State statutes governing insolvency were plainly creatures of municipal or local law, a fact underscored by their sheer transience and the numerous differences among them.<sup>69</sup> A creditor entering into a transaction in the debtor's state was only in the most factitious sense evidencing his intention to be bound by a later bankruptcy proceeding held in that state discharging the debt (possibly even an ex parte proceeding of which he had had no notice), pursuant to a statute that may have had no analogue in his own state.<sup>70</sup>

The prospect of giving such bankruptcy discharges extraterritorial effect, by applying them to out-of-state creditors, did give rise to the Supreme Court's one intimation prior to the Civil War that the Constitution might disapprove the extraterritorial application of state law. The principal holdings in the Court's great bankruptcy decisions in 1819 and 1827 were that the Bankruptcy Clause did not bar states from enacting their own insolvency laws, and that application of such a state insolvency law to discharge debts contracted subsequent to the law's enactment did not violate the Contracts Clause.<sup>71</sup> In addition, however, a

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EXCHANGE 139–98 (Boston, Charles C. Little & James Brown, 1843). On the complexities of applying the legal principle of negotiability in a federal system, see TONY ALLAN FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY 36–52 (1979).

68. This discussion of antebellum bankruptcy law, about which a substantial scholarly literature has developed, is necessarily truncated. For a fuller discussion, see Clyde Spillenger, *From Private Intention to State Sovereignty: The Formative Era in American Choice of Law* (April 2015) (unpublished manuscript) (on file with author).
69. The statutory law of insolvency changed frequently in almost every state, as debtor interests and creditor interests fought for political control. *See generally* PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA* 9–12, 188–89 (1974); BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* 71–77 (2002).
70. Nevertheless, in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 260–261 (1827), the U.S. Supreme Court held that state bankruptcy laws were consistent with the Contracts Clause if applied to debts incurred after enactment of the statute, since a party to a contract is presumed to be conversant with all the laws of the state where he made his contract. Of course, this highly attenuated conception of notice and consent is now a regular feature of the constitutional analysis of state choice-of-law rulings. *Compare* *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964), *with* *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936).
71. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819) (holding that retroactive application of a state bankruptcy violates the Contracts Clause); *McMillan v. McNeill*, 17 U.S. (4 Wheat.) 209 (1819) (holding that bankruptcy discharge under Louisiana law of debt contracted in South Carolina, when both parties were South Carolina residents at the time the contract was made, violates the Contracts Clause on the authority of *Sturges v. Crowninshield*); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827) (holding that neither the Bankruptcy Clause nor the Contracts Clause bars states from enacting insolvency laws and applying them prospectively).

confusing coda to the Court's set of seriatim opinions in *Ogden v. Saunders* held that even prospective application of a state bankruptcy law could not operate to discharge debts incurred to an out-of-state creditor. But the constitutional foundation for this conclusion remained obscure, and the problem of bankruptcy discharges and their interstate effect never gave rise to a well-defined theory of limitations on the extraterritorial or exorbitant application of state law, whether based on the Constitution or on the law of nations.<sup>72</sup> In short, there was little in American law or legal commentary before the Civil War to suggest that *lex loci* problems—in today's terminology, the application by state courts of forum law—were governed by the Constitution or by other sources of metalaw

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72. In *Ogden*, a bare majority of the Court held that state bankruptcy laws were constitutional provided that they applied only to contracts formed after the statute's enactment. *Ogden*, 25 U.S. (12 Wheat) 213. Justice Johnson, however, added a brief "cadenza" to the seriatim opinions treating the Bankruptcy Clause and Contracts Clause issues, in which he explained that, notwithstanding the general upholding of state insolvency statutes as applied prospectively, application of the discharge as against the specific creditor in *Ogden, Saunders*, was improper. *Ogden*, 25 U.S. (12 Wheat.) at 358–69. The reason was that Saunders was a citizen of Kentucky, and Ogden's debt to him had been discharged by a bankruptcy proceeding under the laws of New York. Oddly, though, Justice Johnson's conclusion was based on Article III of the Constitution, which he apparently believed conferred *exclusive* jurisdiction on the federal courts to hear cases between citizens of different states. *Id.* It is inconceivable that Chief Justice Marshall and Justice Story, who are recorded as having concurred with the result reached by Johnson's opinion as to the specific debt owed to Saunders, could have agreed with this reading of Article III. *Id.* at 369. A perhaps stronger constitutional justification lay in Johnson's brief suggestion that the forum in which the discharge was issued had no power to compel the appearance of an out-of-state creditor, an observation speaking to the issue of personal jurisdiction. *Id.* at 285. Although there was at the time of *Ogden* no Due Process Clause limiting the power of the states to assert jurisdiction over out-of-state defendants, the Court in *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 234 (1864), essentially read Johnson's opinion in *Ogden* to establish the following proposition: "Insolvent laws of one State cannot discharge the contracts of citizens of other States, because they have no extraterritorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceeding, has no jurisdiction in the case." Since an out-of-state creditor could thus effectively consent to the application of the forum's bankruptcy process by voluntarily appearing in the action, *Ogden*, at least as read in *Baldwin*, did not impose indefeasible constitutional limits on extraterritorial application of the forum's bankruptcy process. *Id.* For a brief but lucid discussion of this aspect of *Ogden* (including reference to Justice Johnson's "cadenza"), see DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 154–56 (1985). Chief Justice Marshall had opined privately as early as 1814 that application of bankruptcy discharges to "contracts made out of the state" would be constitutionally troubling. Letter from John Marshall to Bushrod Washington (Apr. 19, 1814), *quoted in* R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* 258 (2001); VIII *The Papers of John Marshall* 34–35 (Charles Hobson, ed., 1995). One should recall that bankruptcy discharges, when raised as a defense in actions to recover on bills and notes, resembled a problem in the enforcement of judgments rather than the application of a foreign cause of action or rule of decision; this makes it difficult to regard the problem of interstate application of such discharges as a clear example of extraterritorial application of state law in the sense contemplated by the limitations on legislative jurisdiction articulated later in the nineteenth century.

such as the law of nations. It was not until the late 1850s, with the proliferation of state wrongful death statutes, that American jurists began to articulate a general theory limiting the application of state statutes to events occurring within their borders—and, even then, principles of general law, not the Constitution, were seen as the source of such limitations.

### B. Story, Comity, and the Two Kinds of Extraterritoriality

As noted, one of the oddities of the scholarly claim that the Constitution (in particular, the Full Faith and Credit Clause) operated to limit the application of forum law by state courts from the very moment of its ratification in 1788 is that the idea was never so much as suggested by Joseph Story in his epochal *Commentaries on the Conflict of Laws*.<sup>73</sup> More important, the very theoretical foundation of Story's 1834 treatise—the theory of comity, which went largely unchallenged in American law until Joseph Beale criticized it beginning in the late nineteenth century—by definition rejected externally imposed and enforceable limitations on the forum's power to reject foreign law (and instead apply forum law). If principles deriving from the Constitution or from any other source outside the rules of *lex loci* themselves were actually understood to limit the choice-of-law rulings of state courts, then Story's theory of comity would have been seriously weakened.

Story did, it is true, make central to his theory certain principles concerning extraterritoriality that, to a modern reader, might suggest limitations on the power of a court to apply forum law. Even before 1834, Story and other American jurists had cited the legal axiom associated with the civilian Ulrich Huber that a state or nation's laws could have no extraterritorial effect of their own force (*ex proprio vigore*).<sup>74</sup> In his treatise, Story yoked this maxim to the principle of comity, which he employed to explain when and why courts do, or should (not *must*), apply foreign law in cases where the appropriate conflict-of-laws rule directs them to. When, later in the nineteenth century, judges and scholars professed to find, in principles of general law, limitations on the extraterritorial

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73. STORY, CONFLICT OF LAWS, *supra* note 48. Nor did Story mention the idea in his previous work, JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Boston, Hilliard, Gray, and Co. 1833).

74. See, e.g., *Pearsall v. Dwight*, 2 Mass. (1 Tyng) 84, 88 (1806); *Milne v. Moreton*, 6 Binn. 353, 373 (Pa. 1814). Story's own distillation of the principles of Huber and the other civilians was this: "[E]very nation possesses an exclusive sovereignty and jurisdiction within its own territory. . . . [N]o state or nation can, by its laws, directly affect, or bind property out of its own territory, or persons not resident therein, whether they are natural born subjects, or others." STORY, CONFLICT OF LAWS, *supra* note 48, at 19, 21.

application of state statutes by the forum (a crucial precursor to the development of constitutional limitations on choice of law in the twentieth century), they were apt to cite the *ex proprio vigore* doctrine of Huber and Story.<sup>75</sup>

But to interpret Story's explication of the *ex proprio vigore* doctrine as a denial to the forum of the power to apply its own law in situations where the cause of action arose elsewhere is to overlook the import of his theory of comity. In linking that theory with the *ex proprio vigore* doctrine, Story was not principally concerned with the characteristic problem of present-day choice of law—limits on the power of a court to apply forum law to a dispute. Instead, the thrust of Story's discussion had been to offer a theoretically coherent explanation for the fact that courts do sometimes apply foreign law, despite the fact that foreign law has no force *ex proprio vigore*. Late nineteenth-century jurists would come to worry about the threat to the sovereignty of the locus posed by the forum's extraterritorial application of its own law, but the sovereignty that loomed largest in Story's analysis was that of the forum, not that of the locus. Moreover, the Huberian principles retailed by Story did not, even on their own terms, rule out extraterritorial application of a state's law in the regulation of its own citizens; as civil law jurisconsults had acknowledged for centuries, person as well as place could justify application of a nation's law in certain cases.<sup>76</sup>

Underlying Story's pragmatic exposition of the various choice-of-law rules that should apply with respect to different kinds of disputes was the view that a foreign state had no enforceable prerogative, natural or otherwise, to have its law applied in the forum—not that the forum lacked power to apply its own law to such disputes as came within its judicial jurisdiction. Thus, the forum might

75. See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877); DAVID RORER, AMERICAN INTER-STATE LAW 167–68 (Levy Mayer ed., 1879).

76. See, e.g., *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824) (Story, J.) (“The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. . . . [H]owever general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction.”); STORY, CONFLICT OF LAWS, *supra* note 48, at 22–24 (noting that “every nation has a right to bind its own subjects by its own laws in every other place,” but clarifying that such right pertains to the nation’s “own claim to and exercise of sovereignty over” its subjects, not to the “right to compel or require obedience to such laws on the part of other nations”); David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT 7, 38–39 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011); John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT’L L. 351, 357 (2010) (“Like territory, nationality has been recognized as a permissible basis for [legislative] jurisdiction throughout U.S. history.”). Story’s observations in *The Apollon* and in his conflicts treatise drew on civil law scholarship treating comity among nations, but there is nothing in his *Commentaries* to suggest that he thought different principles operated in the domestic context within the United States. See STORY, CONFLICT OF LAWS, *supra* note 48.

decline to enforce a foreign-created right or choose to enforce it while explicitly reserving the power not to do so. Story seems even to have ratified the power of the forum to proceed to apply its own law even when the applicable *lex loci* rule pointed elsewhere, as suggested by his approving quotation from the Louisiana Supreme Court's famous decision in *Saul v. His Creditors*, a decision whose emphasis on forum prerogative would fit very comfortably with the presumption in favor of forum law characteristic of Brainerd Currie's choice-of-law approach.<sup>77</sup>

How far Story would have gone in embracing, at least as a matter of raw power, the more aggressive forms of forum prerogative seen in post-1950 American choice-of-law rulings remains a matter of conjecture. It is clear, however, that his emphasis on comity was not principally directed to limiting the forum's power to apply its own law in the manner envisioned by later critics of extraterritoriality in the application of state statutes. For Story, both the practical realities of state sovereignty and the contestability of many *lex loci* rules ruled out the possibility of dogmatic metaprinciples forbidding application by the forum of its own law. This pragmatic conception contrasts sharply with the attitudes that would be taken by many jurists between the Civil War and the New Deal concerning the extraterritorial application of state statutes providing rules of decision for civil cases.

### C. Extraterritoriality in the Antebellum Republic: The Foreign Corporation and the "Interstate Slave"

An aversion to extraterritoriality, in the modern sense of a court's applying the forum's municipal law to events occurring outside the forum, did not leave a strong imprint on American law prior to the Civil War. Nevertheless, certain problems of extraterritoriality did arise in antebellum law and politics, and these,

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77. Story's quotation from *Saul v. His Creditors* reads:

[T]he comity of nations . . . is, and ever must be uncertain. . . . [N]o nation will suffer the laws of another to interfere with her own, to the injury of her citizens . . . . [I]n the conflict of laws, it must be often a matter of doubt which [country's law] should prevail, and that *whenever that doubt does exist, the court which decides, will prefer the law of its own country, to that of the stranger.*

*Saul v. His Creditors*, 5 Mart. (n.s.) 569, 596 (La. 1827) (emphasis added); STORY, CONFLICT OF LAWS, *supra* note 48, at 29 (quoting *Saul v. His Creditors*, 5 Mart. (n.s.) 569, 596 (La. 1827)). The decision in *Saul* provoked Samuel Livermore, attorney for the losing party, to compile his 1827 treatise, the first in the United States concerning conflict of laws. On *Saul* and Livermore, see ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICT OF LAWS 28–34 (1992). See also HORWITZ, *supra* note 53, at 246–48 (discussing *Saul*, Livermore, and Story's approving citation of *Saul*).



in an indirect way, influenced a later generation of jurists who cautioned against the extraterritorial application of forum law in civil litigation. When antebellum jurists and other public figures warned of the dangers of extraterritoriality, their concern about sovereignty was that a court adjudicating a dispute might be compelled to apply the municipal law of another jurisdiction. Two issues vividly raised this danger in American law and politics before the Civil War: (1) the foreign corporation and (2) chattel slavery. In both situations, the possibility that a court might be compelled to give effect to a legal status or to rights that had been created by another state not only emerged in civil litigation, but also made a strong impression on the politics of law and American federalism.

*Corporations.* Before the Civil War, the forum's resistance to recognizing the legal prerogatives of corporations chartered in other states was at times very firm, especially with respect to foreign-chartered banks.<sup>78</sup> In *Bank of Augusta v. Earle*,<sup>79</sup> the Supreme Court, speaking through Chief Justice Taney, emphatically ratified the "artificial entity" theory of corporations, holding that states were entitled to refuse recognition to foreign corporations should they enact a statute clearly expressing such a policy.<sup>80</sup> Taney's analysis, like that of contemporaries expounding on the problem of the foreign corporation, was steeped in the language of extraterritoriality and comity. But the dreaded extraterritoriality was that of imposing foreign-created rights and powers on the forum. The Court emphatically reaffirmed the principle thirty years later in *Paul v. Virginia*.<sup>81</sup> "If . . . the Constitution could be construed to secure to citizens of each State in other States the peculiar privileges conferred by their laws, an extra-territorial operation would be given to local legislation utterly destructive of the independence and the

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78. This resistance seems to have been based less on the anticorporation sentiment held by some parts of the Jacksonian coalition than on a desire to protect local competitors. See, e.g., *Pennington v. Townsend*, 7 Wend. 276, 279 (N.Y. Sup. Ct. 1831) (applying New York statute to bar New Jersey corporation from engaging in banking business in New York). See generally GERARD CARL HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW* 36–49 (1918).

79. 38 U.S. (13 Pet.) 519 (1839).

80. Chief Justice Taney's opinion stated:

[A] corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation [sic] can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty.

*Id.* at 588. While holding that the Privileges and Immunities Clause did not require the state of Georgia to permit a Pennsylvania-chartered corporation to do business within her borders, Chief Justice Taney held that a state wishing to exclude a foreign corporation must do so by an explicit provision in its statutes. *Id.* at 593.

81. 75 U.S. (8 Wall.) 168 (1869).

harmony of the States.”<sup>82</sup> The foreign corporations in *Bank of Augusta* and *Paul* might complain that it was the *forum* that was giving its own laws a provincial and exorbitant application by subjecting the corporation to onerous or discriminatory regulations or by excluding it altogether. But this argument made little impression on the Court. *Paul* in particular would constitute an important precedent when the Court, toward the end of the century, began to read the proscription on extraterritoriality as a limit on the forum’s power to regulate in-state business conducted by out-of-state businesses.

*Slavery.* The bogey of extraterritoriality figured even more prominently in the national debates over slavery. Antislavery rhetoric in the 1840s and 1850s increasingly drew on the fear that slavery was being forced upon Northern states (and U.S. territories) through the actions of states (and their citizens) whose laws had created slave status in individuals. This was one of the important connotations of the antislavery slogan “slavery local, freedom national” and the principal import of *Somerset’s Case*<sup>83</sup> as interpreted by antislavery lawyers in the United States: Only municipal law could legally create the status of slavery, and local law (such as that establishing slave status) had no force *ex proprio vigore* in another jurisdiction. When the Supreme Court in *Prigg v. Pennsylvania*<sup>84</sup> held that the Fugitive Slave Clause barred state tribunals from applying forum law to emancipate or impede the rendition of fugitive slaves, it was in effect enjoining upon Northern states the extraterritorial application of Southern slave law. By the late 1850s, this invasion of forum prerogative had become intolerable to many Northerners, and catalyzed fears that the South was conspiring to fasten slavery upon the North. Even the *Dred Scott* decision,<sup>85</sup> however, did not contend that states lacked the constitutional authority to determine the status—slave or free—of those properly brought before their tribunals who were not alleged to be fugitives—that is, sojourners and those who had attained residence on free soil.<sup>86</sup>

In both situations—the foreign corporation and the sojourning or fugitive slave—an outcry had arisen concerning the power of the locus to compel another state to recognize the legal rights and powers the locus state had created by its

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82. *Id.* at 181.

83. *Somerset v. Stewart*, (1772) Lofft 1, 98 Eng. Rep. 499 (K.B.). The scholarly literature on *Somerset*, which I will not canvass here, is enormous and continues to grow. For the use of *Somerset* in the constitutional arguments of antislavery lawyers before the Civil War, see WILLIAM W. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 40–45, 189–96 (1977).

84. 41 U.S. 539 (1842).

85. 60 U.S. 393 (1857).

86. The Court in *Strader v. Graham*, 51 U.S. 82, 93–94 (1850), held that the status within the forum of a slave who had sojourned from the forum to a free state and then returned to the forum, was a question for the forum, unimpeded by the Constitution.

positive, municipal law. Extraterritoriality per se—as well as the broader question of the limits placed on state court's *lex loci* decisions, whether by the Constitution or by sources of general law—was thus concerned more with possible coercion of the forum than with possible abuse by the forum. This state of affairs changed significantly in the post-Civil War period. The change was catalyzed by the emergence and proliferation of a new kind of state statute, designed to carry out the state's regulatory and protective policy, by altering traditional common law rules of decision applicable in civil cases. This development would trigger a widespread concern among jurists about the extraterritorial application of state statutes, which in turn led to the first real effort by the Supreme Court to establish constitutional limitations on the reach of forum law.

### III. INDUSTRIAL ACCIDENTS, STATUTORY INNOVATION, AND THE CHALLENGE OF EXTRATERRITORIALITY

Most of the seminal choice-of-law cases of the last 125 years—the kinds of cases that show up in conflicts casebooks—have been tort rather than contract cases.<sup>87</sup> The reason for this is plain: Since the Civil War, the core issues of civil liability for personal injury and death have been an agendum for public policy, and hence a subject for diverse forms of state regulation, to a far greater extent than basic contract law.<sup>88</sup> The episodic enactment of statutes governing wrongful death and workers' compensation, automobile liability regimes (including guest statutes), medical malpractice, punitive and noneconomic damages, and mass torts, combined with a rise in interstate mobility and the proliferation of cross-border and other interstate torts, has generated major conflicts problems since the second half of the nineteenth century. Even those Supreme Court cases raising multijurisdictional problems in contract law have mostly involved state law regulating contracts for insurance of various kinds;<sup>89</sup> although they are often formally

87. A brief list of such notable conflicts cases in the field of tort law would include *Alabama Great Southern R.R. Co. v. Carroll*, 11 So. 803 (Ala. 1892), *Grant v. McAuliffe*, 264 P.2d 944 (Cal. 1953), *Loucks v. Standard Oil Co.*, 120 N.E. 198 (N.Y. 1918), the long line of guest statute cases inaugurated by *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963), *Bernhard v. Harrah's Club*, 546 P.2d 719 (Cal. 1976), *Alaska Packers Ass'n v. Industrial Accident Commission*, 294 U.S. 532 (1935), *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493 (1939), and *Hughes v. Fetter*, 341 U.S. 609 (1951). I include workers' compensation cases in this category, because the regime of workers' compensation directly replaced the tort system for employee injuries in most states.

88. A related reason for the relative paucity of contract cases among the major conflicts cases of the last 150 years is that parties can contract around most uncertainties concerning the governing substantive contract law, for example by incorporating choice-of-law provisions.

89. Among these cases are *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869), *Hooper v. California*, 155 U.S. 648 (1895), *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), *N.Y. Life Insurance Co. v. Head*, 234

treated as contract questions, they are closely related to the problems of tort law because they are likewise a legal instrument for managing the risk of loss.

The appearance of wrongful death statutes and employers' liability laws during the second half of the nineteenth century, combined with steady increases in the cross-border mobility of workers and others faced with the risk of industrial injury, triggered juristic concerns about the extraterritorial application of state law. Statutes, unlike the accretion of rulings by common law courts, were considered by post-Civil War jurists to be exercises of a state's *political* jurisdiction. Although international lawyers today are more likely to use the terms "legislative jurisdiction" or "jurisdiction to prescribe," the phrase "political jurisdiction" connotes even more vividly the nature of the sovereign interests at stake. Just as no state, as per *Bank of Augusta v. Earle*,<sup>90</sup> had the constitutional privilege of projecting into another state the corporate legal status created by its own positive enactment, no state, in the view of late nineteenth-century jurists, had the power to project its statutory rules of decision into the territory of another state. As stated by the Supreme Court of Kansas in 1877, "Generally, all laws are coextensive, and only coextensive, with the political jurisdiction of the law-making power."<sup>91</sup> Whereas in the antebellum context the question of extraterritoriality typically arose in the context of the forum's attempt to reject rights created by the locus, the problem of the extraterritorial application of a statute creating rules of decision for industrial accidents often concerned the power of the forum to apply its own rule of decision to events occurring outside the state. Unlike acts of incorporation, the rules enacted by these statutes had been created specifically to alter or supplement common law rules of decision in civil litigation between private parties. They were also efforts to implement the state's beneficent or regulatory policy, presumably with reference to the state's own domiciliaries, and this fact brought the question of sovereignty and the prospect of impinging on the prerogative of a sister state to center stage.

It is easy to miss the significance of these statutes and the extraterritoriality problems they raised for the history of conflicts law, because contemporary jurists

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U.S. 149 (1914), *N.Y. Life Insurance Co. v. Dodge*, 246 U.S. 357 (1918), *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934), *John Hancock Mutual Life Insurance Co. v. Yates*, 299 U.S. 178 (1936), *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954), *Carroll v. Lanza*, 349 U.S. 408 (1955), *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. 179 (1964), and *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981).

90. 38 U.S. (13 Pet.) 519 (1839).

91. *McCarthy v. Chi., Rock Island & Pac. R.R. Co.*, 18 Kan. 46, 48 (1877). A virtually identical passage previously appeared in *Whitford v. Panama R.R. Co.*, 23 N.Y. 465, 471 (1861). See also *Beach v. Bay State Steamboat Co.*, 30 Barb. 433, 439 (N.Y. Gen. Term 1859) (commenting on "the general principle of the territorial limit of political jurisdiction").

did not typically label them as conflict-of-laws or *lex loci* problems, in the modern sense of deciding which of two states should supply the rule of decision in a dispute. Rather, the problem was to determine the permissible territorial scope of a particular state statute creating a cause of action that had not been recognized by the common law, a subtly different concept. Late nineteenth-century courts and commentators concluded, almost without exception, that wrongful death and employers' liability statutes could not be given extraterritorial effect. Their basis for saying so was not the Constitution, which they rarely mentioned when discussing the limits on legislative jurisdiction. Rather, when jurists even bothered to identify the authority for these limits, they cited international law, learned treatise writers, the nature of sovereignty, or simply their own common sense. The notion that the Full Faith and Credit Clause or any other federal constitutional provision might bar application of the forum's municipal rules of decision in ordinary *in personam* litigation arising out of events occurring outside the forum came into vogue only in the first third of the twentieth century. And it was not until the widespread adoption of workers' compensation statutes that the Supreme Court was able to intelligibly articulate the relevance of the Full Faith and Credit Clause to exercises of legislative jurisdiction by the states.

#### A. The Wrongful Death Statutes

The first American wrongful death statute providing for a civil remedy was enacted in New York in 1847, and by the end of the nineteenth century virtually every state had one.<sup>92</sup> The statutes provided a cause of action (in some states limited to widows) for the death of a person killed because of another's negligence, a remedy that had been only spottily available under the common law.<sup>93</sup> Owing to the increasing interstate mobility of the American population, particularly among railroad workers, fatal accidents sometimes occurred in a state different from the forum (the forum state in these cases was usually the domicile of the plaintiff and

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92. New York's 1847 statute was modeled closely on Lord Campbell's Act, enacted by Parliament the previous year. Massachusetts had passed a wrongful death statute in 1840, but it provided a criminal remedy rather than a cause of action for civil litigation and applied only to wrongful deaths attributable to the negligence of common carriers and their employees. See John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 LAW & SOC. INQUIRY 717, 733–34 (2000).

93. On the common law prelude to the wrongful death statutes, see Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043 (1965), reprinted in WEX S. MALONE, *ESSAYS ON TORTS* 39–74 (1986). For a brilliant analysis of the way in which the wrongful death laws embodied a conception of the "free labor family," see Witt, *supra* note 92, at 721.

the decedent). States' wrongful death statutes differed from one another, sometimes in fundamental ways, though more often in matters of detail.<sup>94</sup>

The usual multijurisdictional problem arose from the impracticality of litigating a wrongful death claim in the locus when the decedent's death occurred while he was transiently in a state other than his domicile. Apart from the expense of litigation in a remote place and, sometimes, the difficulty of establishing jurisdiction over the defendant in the locus, the formal legal limitations on the power of an administrator appointed under the laws of the decedent's domicile sometimes barred him from initiating proceedings in another state.<sup>95</sup> Under these circumstances, suit was frequently brought in the state of the decedent's domicile, assuming that the defendant was subject to jurisdiction there. But courts had to confront the specter of a statute's extraterritorial application whether the plaintiff raised a claim under the law of the locus (because the forum had no wrongful death statute) or raised one under the law of the forum (because the locus had no such statute). By consenting to recognize rights arising under the law of the locus, the forum would be conferring extraterritorial effect on that law; and if the forum applied its own statute to events occurring outside the forum, it would be giving the forum's statute extraterritorial effect.

*Application in the Forum of the Statute of the Locus.* So novel did this new statutory cause of action seem to post-Civil War jurists that, for a brief period, some claimed that the forum could not even validly apply the wrongful death statute of the foreign locus—that is, that such causes of action were not transitory. The common law right of action for damages based on the defendant's negligence had long been regarded as transitory, enforceable in any forum where personal jurisdiction over the defendant could be established.<sup>96</sup> But jurists were at first reluctant to regard wrongful death claims as transitory, mostly because the source of the cause of action was municipal law (a statute), and its

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94. The wrongful death statutes differed from one another in such particulars as the legal beneficiaries of the claim, the measure of damages, the person entitled to bring the claim, and the limitations period. See FRANCIS B. TIFFANY, *DEATH BY WRONGFUL ACT: A TREATISE ON THE LAW PECULIAR TO ACTIONS FOR INJURIES RESULTING IN DEATH* xvii-xlv (1893) (containing a useful comparative summary of the state wrongful death statutes as of the book's publication date). Until the end of the nineteenth century, at least some states retained the common law rule barring civil actions for death.

95. See, e.g., *Richardson v. N.Y. Cent. R.R. Co.*, 98 Mass. 85, 92 (1867) (holding that the wrongful death action based on the statute of the locus could not be brought in the forum because a "succession in the right of action, not existing by the common law, cannot be prescribed by the laws of one state to the tribunals of another"). Note how this formulation echoed the aforementioned principle that the forum could not be compelled to recognize foreign-created rights.

96. See Arthur K. Kuhn, *Local and Transitory Actions in Private International Law*, 66 U. PA. L. REV. 301, 303 (1918).

departure from common law principles marked it as “peculiar.”<sup>97</sup> What made common law causes of action in contract or tort transitory was their foundation in “universal” law rather than the municipal law of the locus, and the new-fangled wrongful death cause of action did not qualify.<sup>98</sup> A few courts thus denied that they had any authority to enforce claims that were based on foreign wrongful-death statutes even though the claims were brought by forum domiciliaries.<sup>99</sup> More often, courts declined to enforce such claims based on the remedial novelty of the statutes, concluding that they lacked power to appoint an executor or administrator for prosecution of the claim as specified by the foreign statute,<sup>100</sup> or they enforced the claim only if the foreign statute and the forum’s statute were “substantially alike.”<sup>101</sup> In 1880, the Supreme Court rejected this judicial squeamishness about enforcement of foreign wrongful-death claims in *Dennick v. Railroad Company*,<sup>102</sup> holding that “when the act is done for which the law says the person shall be liable . . . and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal

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97. See *Richardson*, 98 Mass. at 89 (1867) (“The right of property which the [New York wrongful death] statute defines is of a very peculiar nature.”); *Whitford v. Panama R.R. Co.*, 23 N.Y. 465, 468 (1861) (“These statutes have introduced a principle wholly unknown to the common law . . . .”); *RORER*, *supra* note 75, at 155 (“[A] species of actions of modern origin, which are alike unknown to the common law and to the ordinary body of the *qui tam* and other statutory actions.”).
98. See *RORER*, *supra* note 75, at 155 (“[Transitory common law causes of action] are based on contract rights or personal injuries recognized as such by the principles of universal law. These are maintainable in all countries, wherever there are tribunals that take cognizance of and vindicate such rights and injuries; not, however, because of the local law of such countries, but because of the universal law, which gives and vests such right of action, and which exists everywhere, whether locally enacted or not.”) (footnote omitted).
99. *Willis v. Mo. Pac. Ry. Co.*, 61 Tex. 432, 434 (1884) (“[W]here the right of action does not exist except by reason of statute, it can be enforced only in the state where the statute is in existence and where the injury has occurred.”); see also *RORER*, *supra* note 75, at 155–56, 158 (discussing “the impossibility of enforcing [wrongful death statutes] in other States, even by *comity*”) (emphasis in original).
100. See, e.g., *Richardson*, 98 Mass. at 91–92 (“The remedy which the statute of New York gives to the personal representatives of the deceased, as trustees of a right of property in the widow and next of kin, is not of such a nature that it can be imparted to a Massachusetts executor or administrator, *virtute officii*, so as to give him the right to sue in our courts, and to transmit the right of action from one person to another in connection with the representation of the deceased.”); *Woodard v. Mich. S. & N. Ind. R.R. Co.*, 10 Ohio St. 121 (1859). Another rationale sometimes employed was that the wrongful death statute was penal in nature, and courts do not enforce the penal statutes of other states.
101. *Leonard v. Columbia Steam Navigation Co.*, 84 N.Y. 48 (1881); THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 312–13 (2d ed. 1888). This requirement of similarity was rooted in the English rule, which lasted into the twentieth century, that a foreign rule of decision in tort was enforceable in the forum only if the forum’s law itself recognized the same rule of decision.
102. 103 U.S. 11 (1880).

process or by voluntary appearance.”<sup>103</sup> Judicial resistance to enforcement of foreign wrongful-death claims did not wholly disappear for another three quarters of a century,<sup>104</sup> but after *Dennick* the problem gradually faded in importance.<sup>105</sup> Party domicile remained irrelevant, however, to the problem of enforcing foreign-created rights in tort precisely because the foundation of transitory rights of action was their universal character.

*Application of the Forum's Statute to Deaths Occurring Outside the Forum.* The more difficult and significant question was whether an administrator might sue under the forum's wrongful death statute when the decedent had been wrongfully killed in another state, which did not recognize a cause of action for wrongful death. This was the question that maps most clearly onto the modern conflict-of-laws concern about the exorbitant application of forum law. By 1880, the answer given by virtually all post-Civil War jurists was that the administrator could not maintain such an action: If the decedent had been wrongfully killed in a state that did not recognize a cause of action for wrongful death, the state in which suit was brought could not give effect to its own wrongful death statute even if the plaintiff, decedent, or the wrongdoer were a forum domiciliary.<sup>106</sup> Courts gave a variety of rationales for this conclusion, all based on the conceptual distinction between statutes and common law. These rationales were based not on the federal Constitution, but rather on the following syllogism: In order to support a finding of liability, the defendant's behavior must be legally wrongful under the law of the place where he acted; the forum presumes that the common law is in force in the locus unless the plaintiff shows otherwise; the common law did not recognize a claim for wrongful death; the plaintiff could not show that there was a statutory cause of action under the law of the locus; thus, there was no right for the plaintiff to enforce.<sup>107</sup>

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103. *Id.* at 17.

104. See *Hughes v. Fetter*, 341 U.S. 609 (1951) (holding that Wisconsin courts violated the Full Faith and Credit Clause by not entertaining a wrongful death claim that arose under the laws of Illinois, where the fatal accident had taken place).

105. Because *Dennick* was a diversity case and the question presented was one of general law, the decision did not bind the state courts. After *Dennick* was decided, state courts began to treat wrongful death claims as transitory in the same manner as common law tort claims. See, e.g., *Herrick v. Minneapolis & St. L. Ry. Co.*, 16 N.W. 413, 413 (Minn. 1883) (“[W]e do not see why the transitory character of the action, or the jurisdiction of the courts of another state to entertain it, can in any manner be affected by the question whether the right of action is statutory or common law.”); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC 844 n.(a), 845 (8th ed. 1883) (repudiating the distinction between common law and statutory torts concerning their transitory nature, which had been “exploded” by the *Dennick* decision).

106. See sources cited *supra* note 119 and accompanying text.

107. For example, as the court stated in *Selma, Rome & Dalton R.R. Co. v. Lacy*:



Yet by abjuring any consideration of the plaintiff's domicile, this syllogism failed to come to grips with one of the avowed purposes of the wrongful death statutes: compensation to the wife and children of the decedent.<sup>108</sup> These statutes had been enacted by individual states specifically to redress a perceived deficiency in the common law, and this strongly implied that the state was asserting a distinct sovereign prerogative for the benefit of its own residents. Paradoxically, the very distinction between wrongful-death and common law negligence claims that jurists cited in their admonitions against extraterritorial application of the former—the fact that wrongful-death statutes, unlike the common law, represented municipal law and an exercise of the state's political jurisdiction—also served to highlight the state's protective or remedial purpose in providing such a right of action. Wasn't the state's concern for its domiciliaries entitled to respect even when that person's decedent met his fate outside the state?

Judge Thomas Clerke of the New York Supreme Court certainly thought so. In one of the earliest cases to consider the possible extraterritorial application of a state's wrongful death statute, *Beach v. Bay State Co.*,<sup>109</sup> Judge Clerke upheld the application of New York's statute to a fatal steamboat accident occurring in Massachusetts's waters:

It cannot be denied that any one state or nation has a right *to give its citizens redress* for any personal injury committed without, as well as within, its territorial limits, when it obtains the means of exercising jurisdiction on the wrong-doer. . . . The authority of the state, in this respect, is not curtailed because the redress is given by statute, instead of having been permitted by the common law. They are both, alike, the

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[I]n the absence of any . . . allegation [concerning the law of Alabama, where the death occurred], the Courts of this State will presume that the common law applicable to the alleged cause of action, is of force in that State. By the common law, the plaintiff could not have maintained her action against the defendant for the death of her husband. The right of the plaintiff to recover damages for the homicide of her husband is conferred by a special statute of this State . . . . But the statute of this State has no extra territorial operation, and the Courts of this State cannot administer it for the purpose of redressing injuries inflicted in the territory of Alabama. If it had been affirmatively shown that the law of the foreign jurisdiction in which the injury was done, was similar to that of our own as to the alleged cause of action, then it would have presented a different question.

43 Ga. 461, 462–463 (1871).

108. See Witt, *supra* note 92, at 743–44.

109. 27 Barb. 248 (N.Y. Gen. Term 1858). In *Beach*, the decedent, a resident of New York City, was killed in an accident while riding on the defendant's ferry service from Massachusetts to New York City. His widow asserted a cause of action based on the New York law against the defendant, a Massachusetts corporation; the accident had taken place in the waters of Massachusetts, whose wrongful death statute did not at the time provide a civil remedy. *Id.* Then, as today, the New York Supreme Court was the court of first instance, not the state's highest appellate court.

expression of the supreme power, equally entitled to obedience and respect. . . .

[T]hese statutes . . . are entirely remedial, and they are calculated to be most beneficial in their operation—not only in their compensatory effect in warding off, at least for a season, the destitution of many a family bereft of its provider, but in preventing the frequent occurrence of the melancholy disasters, which are too often the result of the most culpable carelessness and disregard of human life.

I can see no reason to infer that the legislature intended to confine the operation of these acts, in their remedial features, to injuries committed within the territorial limits of this state, so as to exempt persons, natural or artificial, residing in other States, provided the necessary steps are taken to obtain jurisdiction over such persons.<sup>110</sup>

Judge Clerke's opinion, like the Panasonic TVs of the 1970s, proved to be just slightly ahead of its time. His emphasis on the compensatory and deterrence rationales underlying the statute's enactment, and on the state's interest in protecting its own domiciliaries, would become standard issue in conflicts doctrine during the twentieth century, as would his observation that both statute and common law are expressions of the state's lawmaking power. But the New York appellate panel did not share his views and swiftly reversed his decision:

It necessarily results from the independent sovereignty of different states or nations, that the laws of one state or nation can have no force or effect without its own territorial limits, and within the territory of another state or nation, without the consent of the latter. . . . If the legislature of two states or nations could pass laws for each other, to be enforced, *proprio vigore*, within the territorial limits of each other, both nations would instantly cease to be sovereign. . . . The well known distinction between . . . transitory and local actions . . . assumes and is founded on this state or national territorial legislative limitation. . . . Personal injuries or torts [as distinguished from statutory actions for wrongful death] are transitory . . .<sup>111</sup>

*Beach* was an intriguing preview of the ferment in conceptions of legislative jurisdiction that would revolutionize the law governing multijurisdictional disputes in the United States, notably the field of conflict of laws, in the twentieth century. This new problem of determining the territorial scope of statutory causes of action that had been designed for the welfare of a state's own residents pitted

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110. *Id.* at 250 (emphasis added).

111. *Beach v. Bay St. Steamboat Co.*, 30 Barb. 433, 434–35 (N.Y. Gen. Term 1859) (appellate panel) (emphasis added) (citations omitted).

Taney-era conceptions of legislative sovereignty, associated with decisions like *Charles River Bridge* (1837)<sup>112</sup> and *Providence Bank v. Billings* (1830),<sup>113</sup> against a tradition of legal conservatism that regarded with suspicion legislative incursions into the domain of private law. In overturning Judge Clerke's ruling in *Beach*, the appellate panel cited Story's conflicts treatise and its reference to the *ex proprio vigore* doctrine. But while the panel was correct to observe that "[t]he passage of laws is the highest act of sovereignty," Story's theory of comity had, if anything, emphasized the sovereignty of the forum, not that of the locus. The Taney-era decision that had most clearly engaged the problem of extraterritoriality, *Bank of Augusta v. Earle*,<sup>114</sup> had reaffirmed the authority of the forum to repel the legal privileges that had been conferred by a sister state on one of its own (albeit a corporation). Perhaps it was because of these tensions in the reigning doctrine of state legislative sovereignty that the appellate panel in *Beach* conceded the correctness of Judge Clerke's assertion that "[any] one state or nation has a right to give its citizens redress for any personal injury committed without as well as within its territorial limits, when it obtains jurisdiction on the wrong-doer," instead resting its decision on a canon of statutory interpretation that today might be called a presumption against extraterritoriality: Since the text of New York's wrongful death statute said nothing about its extraterritorial effect, the statute must be interpreted not to apply extraterritorially.<sup>115</sup> The appellate panel's denial of extraterritorial effect to the New York statute while conceding power to the legislature to provide explicitly for such extraterritorial effect thus marked an expedient but uneasy middle position; the decision rested on the supposed limits on the forum's legislative sovereignty while also acknowledging the legislature's power to transcend such limits.

The reluctance of the appellate panel in *Beach* to allow considerations of domicile to serve as a justification for extraterritorial application of the New York wrongful death statute rested on more than mere dogmatism about respecting territorial boundaries. After all, the same respect that Judge Clerke insisted be accorded to New York's rule was, by rights, due as well to Massachusetts's rule of no civil liability for a Massachusetts ferry company. Carried to its logical end, the argument from domicile was, at best, a draw; both plaintiff and defendant might

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112. 36 U.S. 420 (1837).

113. 29 U.S. 514 (1830).

114. 38 U.S. (13 Pet.) 519 (1839).

115. *Beach*, 30 Barb. at 437 (appellate panel). Judge Clerke had likewise premised his holding on an examination of the statute, except that his canon of construction was a presumption in favor of extraterritoriality. *Beach*, 27 Barb. at 249–51. Most wrongful death statutes said nothing about their extraterritorial reach.

reasonably rely on the rules established by their respective states of domicile.<sup>116</sup> What, though, if both plaintiff (or decedent) and defendant were forum domiciliaries? Might extraterritorial application of the New York statute then be justified? In *Crowley v. Panama Railroad Co.*<sup>117</sup>—decided at about the same time of the appellate panel’s ruling in *Beach*—Justice E. Darwin Smith of the New York Supreme Court rejected this possibility:

That the [New York wrongful death statutes] cannot affect foreign corporations, or citizens or residents of other states, and give rights of action against them enforceable in our courts, for acts done in other states and countries, is, I think, quite [clear]. . . . But the question remains, may not these acts apply, *as between citizens of this state*, where the neglect or wrongful act causing the death took place in another state or country. . . . Would [the wrongdoer’s] return to this state, *ipso facto*, subject him to an action under our statute? I think not.<sup>118</sup>

Thus, the New York courts had respectfully considered the argument from domicile, but had rejected it. The territorial locus of the defendant’s behavior was the determining factor.

After the decisions of the New York courts in *Beach* and *Crowley*, courts and commentators held without exception that the forum may not apply its own wrongful death statute to accidents occurring outside the forum.<sup>119</sup> A few of the decisions, like the panel’s in *Beach*, hedged the matter slightly by noting that the forum’s statute had not explicitly provided for extraterritorial application, thus

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116. There is, of course, something contrived about crediting the defendant’s reliance interest where wrongful death is concerned, as though an actor might craft her behavior in such a way to ensure that any negligence on her part results in the victim’s death, rather than a nonfatal but compensable injury.

117. 30 Barb. 99 (N.Y. Gen. Term 1859). In *Crowley*, a New York decedent met his death in New Granada while he was a passenger on the railroad of the defendant, a New York corporation.

118. *Id.* at 107 (emphasis added).

119. See, e.g., *Armstrong v. Beadle*, 1 F. Cas. 1138 (C.C.D. Cal. 1879) (No. 541) (holding that California’s wrongful death statute has no extraterritorial application); *McCarthy v. Chicago, Rock Island & Pac. R.R. Co.*, 18 Kan. 46 (1877); *Allen v. Pittsburgh and Connellsville R.R. Co.*, 45 Md. 41, 47 (1876) (“[T]he Courts here will never apply to acts done in a foreign jurisdiction, which may not be unlawful there, the arbitrary rules that shall have been prescribed by our Legislature, with respect to rights and remedies, wholly at variance with the settled rules of the common law.”); *Hover v. Penn. Co.*, 25 Ohio St. 667 (1874); *Selma, Rome & Dalton R.R. Co. v. Lacy*, 43 Ga. 461 (1871); THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 296 (3d ed. 1874) (“No action can be maintained upon one of these statutes if the deceased person received the fatal injury at a place not within the limits of the state by which such statute was enacted . . . .”); TIFFANY, *supra* note 94, at 250 (“Since the right of action for death is statutory, it follows that, if the death occurred outside the state which enacted the statute, no action can be maintained by virtue of it.”).

implying that the state legislature did have power to do so.<sup>120</sup> None of the decisions, even those rendered after ratification of the Fourteenth Amendment in 1868, were based on the federal Constitution. Nevertheless, taken as a whole, the state court decisions strongly intimated that extraterritorial application of the death statutes would be of doubtful legitimacy according to widely understood principles on the limits of legislative jurisdiction. Judge Clerke's argument that the victim's domicile might legitimate the forum in applying its statute extraterritorially was not credited elsewhere.<sup>121</sup> The better part of a century would pass after their initial encounter with the multijurisdictional problems generated by the wrongful death statutes before American courts began systematically to incorporate considerations of domicile into their resolution of conflicts of law in tort cases. That step would be the single most important marker of the move from a territorial to an interest-oriented approach to American choice of law after World War II.

The strong animus against extraterritoriality and concomitant de-emphasis of domicile exhibited by American jurists in the wrongful death cases was a direct precursor of Joseph Beale's vested rights theory of choice of law, a remorselessly territorial approach that was subjected to relentless academic criticism during the twentieth century. But the late nineteenth-century insistence on territorial limitations on legislative jurisdiction was itself a new development, not simply preordained by existing doctrine, and the question is why judges and scholars so emphatically chose this path. Admittedly, jurists could, and at times did, reference Story's maxims (themselves purportedly drawn from Ulrich Huber and other continental jurisprudes) when rejecting extraterritoriality: "[E]very nation possesses an exclusive sovereignty and jurisdiction within its own territory. . . . [N]o state or nation can, by its laws, directly affect, or bind property out of its

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120. See, e.g., *Armstrong*, 1 F. Cas. at 1138 ("[T]here is nothing in the statute to indicate that it was intended to operate beyond the limits of the state."); *Needham v. Grand Trunk Ry. Co.*, 38 Vt. 294, 308 (1865) (stating that "it is not reasonable to suppose that our legislature, in the passage of the act in question, intended to provide that" the statute applied to wrongful deaths occurring outside the state). Other legal authorities in the late nineteenth century likewise expressed the general proscription on extraterritoriality in terms of a presumption or a clear statement rule. See, e.g., JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION 129 (1882), cited in Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 674 n.58 (2013).

121. See *McCarthy*, 18 Kan. at 53 ("The fact . . . that the intestate lived in Kansas at the time of his employment, and died in this state, is immaterial in the decision of the questions presented. The wrongful acts were all committed in Missouri."); *Needham*, 38 Vt. at 307 ("The fact that the intestate was a citizen of this state at the time of the injury is entirely immaterial . . ."); SHEARMAN & REDFIELD, *supra* note 119, § 296 ("It makes no difference . . . that both parties to the injury were citizens of the state by which the statute was enacted.").

own jurisdiction, or persons not resident therein . . . ”<sup>122</sup> But, as argued above, Story had articulated these principles in the course of expounding the *ex proprio vigore* principle by way of explaining why the forum might choose, though it was not compelled, to apply foreign law. The problem of whether the forum might apply its own statutory rule of decision to events occurring outside the forum was a new and different one, and that possibility was hardly foreclosed by Story’s framework, given his commitment to the theory of comity and the *ex proprio vigore* doctrine.

Moreover, there was certainly precedent in American jurisprudence for the application of forum law in a way that might be termed “extraterritorial.” For example, the majority view had long been that descent of personal property, whether under a will or in the case of intestacy, should be governed by the *lex loci domicilii*.<sup>123</sup> This meant that, where the matter was adjudicated in the state of the decedent’s domicile and concerned personal property in another state, the application of forum law would have a kind of extraterritorial effect with respect to that property. It was also conventional for the *lex loci domicilii* to govern questions of capacity, including capacity to contract;<sup>124</sup> in theory, this rule could serve to defeat the engagements of parties elsewhere even as to agreements that had been made in their own states. The fact that domicile could validly trump locus in these areas is due partly to the fact that the laws governing them had traditionally been regarded as “personal” rather than “real” by civil law jurisprudence, which exercised an important influence on conflicts learning in the United States.<sup>125</sup> Yet state rules of law on descent of personal property and capacity to contract were as much an exercise of the state’s protective or regulatory policy with respect to its own residents as were the wrongful death statutes. The question is why the extraterritoriality problem posed by the wrongful death statutes provoked so different, and so emphatic, a response from courts.

The answer seems closely connected with the fact that American judges and lawyers remained ambivalent about the use of legislative power to intervene substantively in the private-law adjudication process and to alter the rules of the

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122. STORY, CONFLICT OF LAWS, *supra* note 48, at 19, 21; *see also* *Beach v. Bay St. Steamboat Co.*, 30 Barb. 433, 438 (N.Y. Gen. Term 1859) (appellate panel). These were the same axioms that Justice Field, citing Story, would set forth in *Pennoy v. Neff*, 95 U.S. 714, 722–23 (1877) (citing STORY, CONFLICT OF LAWS, *supra* note 48).

123. FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAWS 425–26 (Philadelphia, Kay & Brother 1872); STORY, CONFLICT OF LAWS, *supra* note 48, at 394–95, 403; *Desesbats v. Berquier*, 1 Binn. 336 (Pa. 1808).

124. STORY, CONFLICT OF LAWS, *supra* note 48, at 64–67.

125. *See* WHARTON, *supra* note 123, at 81–120 (concerning questions of status and capacity); *id.* at 422–25 (concerns succession to movables).

common law, and not just in the multijurisdictional context. Renewed calls for codification in the later nineteenth century provoked renewed defenses of the common law from conservative lawyers and jurists,<sup>126</sup> and, to a greater extent than in the pre-Civil War period, there were now visible examples of the intrusion of legislatures into the sphere of private law to ameliorate the harms of industrial capitalism, such as the wrongful death statutes. Common law rules of decision, especially in the realm of contract and tort, had been predicated on universal norms rooted in custom and consent; statutory rules of decision represented legislative fiat, apt to be arbitrary and lacking in the ethical foundations that underlay judge-made law. Hence the widely applied canon that “statutes in derogation of the common law are to be strictly construed,” which, as Roscoe Pound complained in 1908, reflected the view that legislation is “out of place in the legal system . . . an alien element to be held down to the strictest limits and not to be applied beyond the requirements of its express language.”<sup>127</sup> That a legislature would create a new civil cause of action was novel enough in itself; that it would visibly alter a preexisting common law rule underscored the fact that the legislature was implementing a policy that might confound what were assumed to be the individual’s reasonable expectations.

The prospect of extraterritorial application of the new statutory tort claims may have seemed particularly disturbing to lawyers trained to regard private law remedies as rooted in universal or customary norms. The wrongful death cause of action applied, in principle, to parties with no preexisting relationship, and this vividly distinguished those claims from the classic illustrations of *lex loci domicilii* such as descent of personal property and capacity to contract. Remote though the possibility might seem, parties to a contract could at least protect their interests by first inquiring as to their counterpart’s legal capacity to contract. Even the *lex loci domicilii* rule for descent of personal property was premised on the testator’s (or intestate decedent’s) presumed intent that his personal property be distributed according to the laws of his domicile. By contrast, the cause of action for wrongful death, at least in litigation between erstwhile strangers, lacked this element of will

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126. The best known defender of the common law in the late nineteenth century was James Coolidge Carter. See JAMES C. CARTER, *THE PROPOSED CODIFICATION OF OUR COMMON LAW* (N.Y., Evening Post Job Printing Office 1884); JAMES C. CARTER, *THE PROVINCES OF THE WRITTEN AND THE UNWRITTEN LAW* (N.Y., Banks & Bros. 1889); JAMES COOLIDGE CARTER, *LAW: ITS ORIGIN, GROWTH, AND FUNCTION* (Beard Books 2000) (1907). As Lewis Grossman has shown, Carter was no mere defender of business interests, but an avatar of Mugwump jurisprudence who fought as hard for ethical behavior in public life as for the unique virtues of the common law. Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 *LAW & HIST. REV.* 577 (2002).

127. Roscoe Pound, *Common Law and Legislation*, 21 *HARV. L. REV.* 383, 385 (1908).

or consent.<sup>128</sup> There was something startling, even unfair, about subjecting an actor to liability pursuant to the statute of another state when the law of the state where he had acted—the common law, supposedly the reflection of society’s deeply rooted norms—would not have done so.<sup>129</sup> Moreover, although American jurists had acknowledged that certain extraterritorial applications of U.S. law “as regards its own citizens” could be justified under the law of nations,<sup>130</sup> the assumption underlying this principle seems to have been that such rules of law would be penal, prohibitory, or regulatory in nature. Late nineteenth-century jurists may have thought that extraterritorial application of the forum’s rule of decision in order to *protect* rather than regulate the forum’s domiciliary—which would likely have the collateral effect of penalizing or regulating the adverse party who had acted in reliance on the locus’s validation of his conduct—presented a different and less justifiable situation.<sup>131</sup>

Thus, in an age in which fairness to individuals in the modern due process sense had not yet become common constitutional currency, the language of sovereignty and territorial limitation served to protect the individual’s freedom from arbitrary disturbance of his reasonable expectations concerning his common law rights and duties. Something similar was at work in *Pennoyer v. Neff*,<sup>132</sup> decided

128. Robert Rabin has observed that a generalized fault principle in the domain of personal injury, as distinguished from duties owed within particular kinds of status relationships, emerged only gradually and fitfully during the latter part of the nineteenth century. See Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981).

129. The argument that application of a foreign wrongful death statute amounted to unfair surprise was, of course, quite attenuated. The common law of the locus certainly made simple negligence actionable, meaning that the only thing saving the actor from liability under the law of the locus was the fact that the victim did not survive.

130. *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824).

131. Thus, international law has long recognized that nationality may form a legitimate basis for the exercise of legislative jurisdiction—that the forum may apply its penal or prohibitory law to its own national, even if it is to reprehend or regulate that person’s behavior while in another country. But the legitimacy of legislative jurisdiction based on the “passive personality” principle—that is, based on the nationality of the person affected by putatively wrongful behavior abroad—is far less securely established under international law. See Knox, *supra* note 76, at 357. Similarly, late nineteenth-century jurists may have looked askance at extraterritorial application of statutory rules of decision in the protective, as distinct from the prohibitory, mode. Cf. Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9, 14 (1966) (attributing to the fourteenth-century civilian Bartolus the principle that “personal statutes” may have extraterritorial effect only if they are “prohibitive” rather than “permissive” in nature). Of course, this raises the question of why extraterritorial application of the forum’s wrongful death statute in a case like *Crowley v. Panama Railroad Co.*, 30 Barb. 99 (N.Y. Gen. Term 1859), where both plaintiff and defendant were New York citizens, should be disapproved. See *supra* note 117 and accompanying text; cf. *EEOC v. Arab Am. Oil Co.*, 499 U.S. 244 (1991) (holding presumption against extraterritorial application of U.S. law was not overcome with respect to Title VII’s employment discrimination provisions, although both plaintiff and defendant were American nationals).

132. 95 U.S. 714 (1877).



during roughly the same period, in which the Court deployed a robust language of territoriality to protect rights that pertained most obviously to the individual defendant. Both of these examples of categorical thinking—allocating regulatory power rigidly among the states, and sharply dividing the public domain legitimately subject to legislative power from the private domain presumptively free from it—would become staples of classical legal jurisprudence in the late nineteenth century.<sup>133</sup> The Supreme Court would make the connection explicit in its extraterritoriality/liberty-of-contract decisions, discussed below, between 1895 and 1918.

## B. The Employers' Liability Acts

In the late nineteenth century, several states enacted statutes designed to abrogate the common law defenses that had often stymied railroad employees in their efforts to sue their employers for injuries suffered in the course of their employment; these became known as “employers’ liability acts.”<sup>134</sup> Chief among the defenses abrogated by these statutes was the fellow servant rule, but most of the statutes also substantially modified defenses based on assumption of risk or contributory negligence.<sup>135</sup> Since many railroad lines passed through more than one state and some states contiguous to those that had passed liability acts retained the common law rules of liability, multijurisdictional problems were inevitable. When applied in multijurisdictional situations, the employers’ liability acts confronted courts with the same questions raised by the wrongful death statutes—notably, their extraterritorial effect.

133. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 17 (1992) (“Late-nineteenth-century reasoning brought categorical modes of thought to their highest fulfillment.”); *id.* at 10–11 (discussing classical jurisprudence’s emphasis on the “distinction between public and private law”); WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937*, at 4–7 (1998) (discussing the categorical quality of Classical Legal Thought).

134. An informative description and analysis of the state employer liability acts is found in Wex S. Malone, *American Fatal Accident Statutes—Part I: The Legislative Birth Pains*, 4 *DUKE L.J.* 673, 710–18 (1965), reprinted in WEX S. MALONE, *ESSAYS ON TORTS* 75–116 (1986).

135. See Malone, *supra* note 134, at 710–14. As with the wrongful death statutes, England set the pattern for the employers’ liability acts, in 1880; six American jurisdictions followed suit over the next twenty-five years. See CONRAD RENO, *A TREATISE ON THE LAW OF EMPLOYERS’ LIABILITY ACTS*, at iii (Cambridge, H. O. Houghton & Co. 1896) [hereinafter RENO I]; CONRAD RENO, *A TREATISE ON THE LAW OF THE EMPLOYERS’ LIABILITY ACTS OF NEW YORK, MASSACHUSETTS, INDIANA, ALABAMA, COLORADO, AND ENGLAND*, at v (2d ed. 1903) [hereinafter RENO II]; see also 1–2 FRANK F. DRESSER, *THE EMPLOYERS’ LIABILITY ACTS AND THE ASSUMPTION OF RISKS IN NEW YORK, MASSACHUSETTS, INDIANA, ALABAMA, PENNSYLVANIA, COLORADO, AND ENGLAND* (1902, 1908).

Since the basic conceptual work had already been done by courts considering the wrongful death statutes, there was little judicial disagreement about the basic principles applicable to the employers' liability acts. Courts were willing to regard a statutory cause of action under the employers' acts as transitory; a plaintiff injured in a state where such an act was in force would be permitted to raise a claim thereunder in any state where the defendant was subject to jurisdiction.<sup>136</sup> Since the common law defenses had been legislatively abrogated in the state of injury, the defendant could not plead those defenses. As with the wrongful death statutes, however, courts quickly determined that the forum could not apply its own employers' liability act to injuries suffered outside the state. One decision applying this principle has become particularly well known to conflicts scholars—*Alabama Great Southern Railroad Co. v. Carroll*.<sup>137</sup> In *Carroll*, an Alabama railroad employee was injured, allegedly due to the negligence of a fellow employee, while working as a brakeman on the defendant's railroad, an Alabama corporation. The injury occurred while the train was in Mississippi on a route that had begun in Tennessee and passed through Alabama. Alabama had enacted an employers' liability act several years previously; the common law, including the fellow servant rule, remained in force in Mississippi. The Alabama Supreme Court ruled that the Alabama statute did not (and could not) apply and that the plaintiff was not entitled to recovery under the law of Mississippi, where the accident occurred.

*Carroll* is featured prominently in most of today's conflicts casebooks to illustrate the key features and the shortcomings of a territorial approach to choice of law.<sup>138</sup> Since both plaintiff and defendant were domiciliaries of Alabama, and since the fellow employee's negligence arguably occurred in Alabama as well,<sup>139</sup> the Alabama Supreme Court's refusal to apply its own statute to the dispute appears quite wrongheaded to a modern reader; the fact that the injury occurred in Mississippi rather than Alabama seems to have been mere chance.

136. See, e.g., *Chicago & E.I.R. Co. v. Rouse*, 52 N.E. 951 (Ill. 1899); *Herrick v. Minneapolis & St. L. Ry. Co.*, 16 N.W. 413 (Minn. 1883); 1 DRESSER, *supra* note 135, at 40–51; RENO II, *supra* note 135, §§ 251–53.

137. *Ala. Great S. R.R. Co. v. Carroll*, 11 So. 803 (Ala. 1892).

138. See, e.g., R. LEA BRILMAYER, JACK L. GOLDSMITH & ERIN O'HARA, *CONFLICT OF LAWS: CASES AND MATERIALS* 15 (6th ed. 2011); HERMA HILL KAY, LARRY KRAMER KERMIT ROOSEVELT, *CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS* 6 (9th ed. 2013); PETER HAY, RUSSELL J. WEINTRAUB & PATRICK J. BORCHERS, *CONFLICT OF LAWS: CASES AND MATERIALS* 483 (13th ed. 2009); LUTHER L. MCDOUGAL, III, ROBERT L. FELIX & RALPH U. WHITTEN, *AMERICAN CONFLICTS LAW* 19 (5th ed. 2001).

139. In *Carroll*, the alleged negligence of the plaintiff's fellow servant in inspecting a chain linking two of the railroad's cars could conceivably have taken place in Tennessee, Alabama, or both. *Carroll*, 11 So. at 804.

Because liability for serious injury in a nineteenth-century industrial setting is perhaps the central exhibit in any argument that American law has become more humane over time, most readers of the case sense some injustice in *Carroll*'s result (although it takes a moment for them to realize that their outrage is not so much at the rule of *lex loci delicti* as at the substance of Mississippi's fellow servant rule). Finally, the tone of the court's opinion in *Carroll* is oddly strident, as though the suggestion that Alabama's employers' liability act might apply extraterritorially were somehow barbaric. All these things have helped to make *Carroll* seem something of a caricature of formalistic reasoning.

It is misleading, however, to cast *Carroll* solely as a choice-of-law case akin to those that lawyers are apt to encounter today. Central to the *Carroll* opinion were then-conventional notions that (subject to certain limitations) common law rights in tort are transitory in nature, while causes of action created or modified by statute are limited to events occurring within the enacting state. The question was not which of the two states should supply the rule of decision in the case; it was whether the plaintiff had stated a cause of action at all.<sup>140</sup> Mississippi, where the injury occurred, obviously gave the plaintiff no cause of action, since there the fellow servant rule still prevailed. The Alabama statute, for its part, could confer on the plaintiff no cause of action since the injury occurred outside of Alabama. Alternatively, the defense of the fellow servant rule, operative under the law of the place where the accident occurred, was itself a transitory rule of decision that must be credited by the Alabama courts. The conceptual difference between this framing of the problem and that in which the court, in the modern fashion, "chooses" Mississippi law according to a territorial choice-of-law rule may be subtle, but it is historically important. In the analysis of *Carroll* that is typical today, what appears to be the conclusion of the Alabama Supreme Court that "the law of the place of injury must apply" in a personal injury case is vulnerable to any number of critiques, including its inattention to the question of domicile and the arbitrariness of focusing on the place of injury when the injury might just as easily have occurred in another state. Some of the opinion's language supports this critical reading. But the *Carroll* court's recognition of the limits on the extraterritorial application of state statutes was quite conventional in light of contemporaneous views of the political jurisdiction of states.<sup>141</sup> Few modern scholarly discussions of

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140. The reasoning here is similar to that employed in Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301 (1989).

141. See *Balt. & Ohio Sw. Ry. Co. v. Read*, 62 N.E. 488, 488 (Ind. 1902); *RENO I*, *supra* note 135, at 312; *RENO II*, *supra* note 135, at 484. *Carroll* was not without its contemporary critics. See *RENO I*, *supra* note 135, at 316–17 (suggesting that application of the forum's liability statute should not be regarded as impermissibly extraterritorial if the negligent acts, as distinct from injury, occurred within the forum). But this criticism did not alter the basic principle condemning extraterritorial

*Carroll* historicize the court's opinion in this way. When, in the 1930s, the Supreme Court altered not only the constitutional jurisprudence of choice of law, but also the essential foundation of choice of law itself, it did so by repudiating this limitation on the political jurisdiction of states.

As with the wrongful death statutes, the problem of the liability acts and their territorial reach never came before the U.S. Supreme Court. We cannot know how the Court would have ruled on such a question, but state decisions limiting the territorial reach of these states did not rely on state or federal constitutional provisions. Even the Alabama Supreme Court in *Carroll*, with all its fervor in condemning extraterritoriality, did not suggest that the federal Constitution operated to limit the legislative jurisdiction of the states vis-à-vis that of other states. It would take a different kind of state statute to awaken the Supreme Court to the possibility that the Constitution did, in fact, have something to say about extraterritoriality.

### C. Statutory Innovation in Contract Law: The Regulation of Insurance

The issue that eventually forced the problem of extraterritoriality onto the Supreme Court's agenda late in the nineteenth century was state regulation of the foreign insurance company. Significant state regulation of the insurance industry (especially the life insurance industry) emerged after the Civil War,<sup>142</sup> a time when the Supreme Court became newly concerned about the deleterious impact of protectionist state legislation on the functioning of a national market for various products.<sup>143</sup> As it happened, the Court in 1868 excluded the insurance business from the definition of "commerce," giving states a green light to enact protectionist legislation in the area of insurance without having to fear that they were violating the Commerce Clause.<sup>144</sup> But by the 1880s, some states had begun to regulate the local activities of foreign life insurance companies, not for reasons of economic protectionism, but to protect consumers from the dangers

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application of the forum's statute; it simply refined the meaning of "extraterritorial." Party domicile remained irrelevant to the calculus. See Nelson, *supra* note 120, at 676 & n.63.

142. See MORTON KELLER, *THE LIFE INSURANCE ENTERPRISE, 1885-1910: A STUDY IN THE LIMITS OF CORPORATE POWER* 7-11, 187-213 (1963); Philip L. Merkel, *Going National: The Life Insurance Industry's Campaign for Federal Regulation After the Civil War*, 65 BUS. HIST. REV. 528 (1991).

143. Charles W. McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903*, 53 BUS. HIST. REV. 304 (1979); Charles W. McCurdy, *American Law and the Marketing Structure of the Large Corporation, 1875-1890*, 38 J. ECON. HIST. 631 (1978).

144. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869).

lurking in the typical life insurance policy.<sup>145</sup> Because state laws limiting the effect of forfeiture provisions and other common stipulations in insurance policies directly affected the contracts entered into by policyholders, the Court reacted aggressively to the prospect of extraterritorial application of those laws—not so much because of the offense that might be given to the locus (the state, say, where the contract had been made), but because of the sovereign individual’s presumptive right to enter into enforceable agreements free from state interference. The Court prohibited states from giving extraterritorial effect to these consumer protection laws despite the fact that it had already held such laws to be constitutional when applied to contracts made within the state.

### 1. Marine Insurance and the Shadow of *Allgeyer v. Louisiana* (1897)

The foreign-chartered corporation had epitomized the problem of extraterritoriality as it arose in antebellum law and politics.<sup>146</sup> In *Bank of Augusta v. Earle*,<sup>147</sup> the Supreme Court had explicitly embraced the “artificial entity” theory of the corporation, holding that states were under no constitutional obligation to recognize the legal rights of a corporation chartered elsewhere. And when the Court reaffirmed this holding in *Paul v. Virginia*, the foreign corporation that had been subjected to an expensive and discriminatory bond requirement by Virginia was a company dealing in insurance.<sup>148</sup> Through the first decades of the nineteenth century, the most important forms of insurance were marine and property policies (principally as protection against fire and other natural calamities).<sup>149</sup> By the time the legitimacy of the corporate form for profit-making ventures had become generally recognized in the 1830s, it was obvious that insurance companies were private, moneymaking enterprises of growing importance in the American economy. The successful companies commanded considerable assets and frequently stimulated the flight of precious capital from localities lacking viable competitors. Lingering populist suspicion of corporations, meanwhile, had found a voice in the view, ratified in *Bank of Augusta*, that no state need recognize the privileges of corporations chartered elsewhere. Not surprisingly, several states

145. KELLER, *supra* note 142, at 194–95.

146. See sources cited *supra* note 78 and accompanying text.

147. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588 (1839).

148. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869).

149. See JONATHAN LEVY, *FREAKS OF FORTUNE: THE EMERGING WORLD OF CAPITALISM AND RISK IN AMERICA* 21–59 (2012) (describing marine insurance in antebellum U.S.); *id.* at 61 (noting that in 1844 “there was very little life insurance in America” in comparison with England); Fletcher, *supra* note 24, at 1555 (noting “the commercial importance of American marine insurance” in the early 1800s).

enacted statutes designed to penalize or exclude altogether foreign insurance companies, including the Virginia statute at issue in *Paul*.<sup>150</sup>

Many of these statutes embodied a kind of economic protectionism that stood in tension with the Constitution's commitment to an unimpeded national commercial market.<sup>151</sup> As Charles McCurdy demonstrated in a classic 1979 study, the Supreme Court after the Civil War struck down a variety of state laws that hindered the ability of manufacturers to deploy new marketing techniques to create national markets for their products. Such laws, even when not nakedly protectionist or discriminatory, constituted an impermissible burden on interstate commerce.<sup>152</sup> But the Court, beginning with its 1869 decision in *Paul*, steadfastly declined to view contracts for insurance as commerce, and thus upheld the power of states to regulate and even exclude foreign insurance companies.<sup>153</sup> Requirements that a foreign insurance company acquire a license and post a bond, even a prohibitive one, in order to do business within the state passed constitutional muster. But within a generation after *Paul*, a mixture of ideas pertaining to extraterritoriality and liberty of contract would supplant the Commerce Clause as the lens through which the Court viewed state regulation of foreign insurance transactions, leading to a dramatic reversal in the constitutional fate of those state efforts.

In *Paul*, it was the corporation's claim (and, implicitly, the claim of the state that had chartered it) to extraterritorial recognition that was denied; the regulatory authority of the forum was upheld. The forum's requirement that foreign insurance companies obtain a license and post a bond before doing business within the state thus represented a constitutionally legitimate rejection of the extraterritorial operation of local legislation. But a foreign insurer's attempt to sell an insurance policy in the forum was an effort to form a specific contractual agreement with a willing local policyholder (who might even have initiated the transaction himself). Such efforts were facilitated by the late nineteenth-century practice of large insurance companies of working through local agents and regional branch

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150. HENDERSON, *supra* note 78, at 101.

151. On protectionist state insurance legislation, see Merkel, *supra* note 142, at 532–34.

152. Charles W. McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869–1903*, 53 BUS. HIST. REV. 304, 309–14 (1979).

153. In Justice Field's view, an insurance policy was not a commodity or article of commerce, but simply a contract, "governed by the local law." *Paul*, 75 U.S. at 183. The Court reaffirmed *Paul* several times before 1900. See, e.g., *Liverpool & London Life & Fire Ins. Co. v. Massachusetts*, 77 U.S. (10 Wall.) 566 (1870); *Fire Ass'n of Philadelphia v. New York*, 119 U.S. 110 (1886); *Hooper v. California*, 155 U.S. 648 (1895). The Court did not overrule *Paul*'s holding concerning the "commercial" character of insurance until 1944. See *United States v. S.E. Underwriters Ass'n*, 322 U.S. 533, 553 (1944).

offices to secure policies for aspiring policyholders.<sup>154</sup> Some states responded to such nullification of local policy by criminalizing those efforts. Unlike licensing requirements, these criminal laws applied specifically to attempts to form insurance contracts by individuals. By the 1890s, the Court had come to interpret these restrictions, however consonant they might be with the Commerce Clause, as efforts to interfere with contractual freedom.

In *Allgeyer v. Louisiana*,<sup>155</sup> the Court invalidated, on liberty-of-contract grounds, the Louisiana conviction of a local resident for procuring a marine insurance policy from a New York company. For the first time, the Court associated the evils of extraterritoriality with the forum's application of forum law to a case having foreign elements, rather than with efforts to force foreign law upon the forum (although it is important to remember that the case involved application of state criminal law rather than civil rules of decision). In *Allgeyer*, a Louisiana resident contracted with a New York insurer to provide an open marine insurance policy with respect to bales of cotton (situated in Louisiana) thereafter to be identified on a case-by-case basis by Allgeyer. The Supreme Court held that application to Allgeyer of Louisiana's statute criminalizing the procuring of a policy from an out-of-state insurer that had not complied with the state's licensing requirements violated Allgeyer's constitutional rights.

It proved difficult for the Court to articulate precisely what Louisiana had done in *Allgeyer* that violated the Constitution. The Court, reaffirming the principle of *Paul*, conceded that the state could constitutionally bar foreign corporations altogether from doing business in the state and thus, presumably, interfere with the right of its own citizens to form contracts with such corporations.<sup>156</sup> Thus, liberty of contract alone could not explain why Louisiana's prosecution of Allgeyer was unconstitutional. But the extraterritorial application of Louisiana's regulation provided the crucial additional ingredient:

[A]lthough it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the State may be regulated, and sometimes prohibited when the contracts or business conflict with the policy of the State as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case *outside of the limits and jurisdiction of the State*, and which are also to be performed outside of such jurisdiction . . . . The mere fact that a citizen may be

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154. See KELLER, *supra* note 142, at 67–69 (discussing the use of agents and branch offices in the life insurance industry).

155. 165 U.S. 578 (1897).

156. 165 U.S. at 583.

within the limits of a particular State does not prevent his making a contract outside its limits while he himself remains within it. . . . The contract in this case was thus made. It was a valid contract, made outside of the State, to be performed outside of the State, although the subject was property temporarily within the State.<sup>157</sup>

The principle of *Bank of Augusta* and *Paul*—that the forum was under no compulsion to permit a foreign corporation to operate there—was tacitly giving way to the doctrine that the forum could do nothing to inhibit such corporations from making agreements with the forum’s residents, so long as the contract could be said to have been “made outside” the forum’s territorial boundaries.

Precisely because a contract was involved, the premises underlying *Allgeyer* differed from those on which the state cases governing extraterritorial application of the wrongful death and employers’ liability laws were based. In those tort cases, invocation of the *ex proprio vigore* doctrine or similar language about sovereignty necessarily implied that the sin of extraterritoriality lay in its infringement on the prerogative of other sovereigns, notably the locus. In *Allgeyer*, by contrast, there was little suggestion in the Court’s opinion that New York law had been disrespected or that the sovereign prerogatives of the State of New York had been offended by the application of Louisiana’s law. Although the Court, echoing the opinion of the Supreme Court of Louisiana, had emphasized that the policy was a “New York contract,”<sup>158</sup> the sole significance of this detail was that it placed the contract outside of Louisiana’s power to regulate. The sovereignty offended by Louisiana’s actions in *Allgeyer* was, rather, the sovereignty of the two contracting parties. Louisiana’s law must yield, not to the law of another state, but to what jurists sometimes called the “law of the contract”<sup>159</sup>—a rule of

157. *Id.* at 591–92 (emphasis added) (citation omitted). The Court in *Allgeyer* distinguished *Hooper v. California*, 155 U.S. 648 (1895), in which Hooper, the local agent for an out-of-state insurance company, had been convicted under a California statute barring the procurement of an insurance policy from a foreign insurance company for a local resident. Hooper, unlike *Allgeyer*, was deemed to have acted within the regulating state and thus constitutionally subject to the forum’s statute.

158. 165 U.S. at 584 (quoting *State v. Allgeyer*, 18 So. 904, 905 (La. 1895)).

159. See, e.g., *N.Y. Life Ins. Co. v. Cravens*, 178 U.S. 389, 394 (1900) (“law of the contract”); *id.* at 395 (“law of the policy”); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 259 (1827) (Washington, J.) (“It is, then, the municipal law of the state, whether that be written or unwritten, which is emphatically the law of the contract made within the state, and must govern it throughout, wherever its performance is sought to be enforced. It forms, in my humble opinion, a part of the contract, and travels with it wherever the parties to it may be found.”). The phrase “the law of the contract” thus exhibited the ambiguity so often found in the conceptions underlying contract law—an uncertainty regarding the relative significance of private choice and state fiat in determining the rights created by private agreement. In *Allgeyer*, a necessary predicate for the defendant’s right to escape criminal liability was the existence of New York law permitting his actions, but it was the parties’ intentional act of making their contract “in” New York and thus



validation that would be presumed to obtain no matter where the contract had been made or was to be performed, unless a state acting within the legitimate scope of its police powers (that is, with respect to contracts made within the state) dictated otherwise. The interests at stake in the insurance cases had subtly changed, from a foreign corporation's claim to do business within the state (a right that had no constitutional basis, as per *Paul*), to the right of the forum's own citizen to make and enforce a contract. Accordingly, the *Allgeyer* Court rested its conclusion on the Fourteenth Amendment's Due Process Clause, saying nothing about the Full Faith and Credit or Commerce Clauses.

Even at the height of liberty of contract, the Supreme Court acknowledged that states retained ample police power to regulate private agreements.<sup>160</sup> But the presumptive background principle, that contracts are to be enforced according to their terms, was not just another emanation of a state's positive law. The transitory nature of claims to enforce contracts (and the irrelevance of domicile to the *lex loci contractus* rule) reflected the belief that such claims were based on universal and not on municipal law. The significance of the fact that the contract in *Allgeyer* was a "New York contract" (however factitious this supposition might be) was not that New York's law must be given effect, as though the presumptive enforceability of agreements were merely a policy of the State of New York; it was that the parties to the contract justifiably relied on the fact that the state where they made the contract imposed no barriers to its enforcement.

If the parties to a contract lacked the legal autonomy to trump all impediments the *loci contractus* might erect to enforcement of their agreements, the Court's decision in *Allgeyer* and subsequent cases made clear that an autonomy nearly as valuable to contracting parties remained constitutionally protected: The right to evade a state's police power by making the contract outside the state's boundaries. Of course, at least one state, the state where the contract had been made (such as New York in the *Allgeyer* situation), would retain constitutional authority to regulate the contract under its police power; no policy agreement was absolutely immune to all state regulation. But in practice this meant little with respect to contracts made by the large insurers incorporated in the Northeast states, whose laws were generally hospitable to the insurers' efforts to create and

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incorporating New York law into their agreement that animated the defendant's right. It is clear that, in *Allgeyer* and the subsequent insurance cases discussed in the text, the Court's accent was on the sovereignty of the contracting parties rather than the sovereign prerogative of New York.

160. See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908); *N.Y. Life Ins. Co.*, 178 U.S. 389; see also LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 423 (3d ed. 2005) ("On the whole, labor laws were upheld; most were never even questioned."); *id.* at 415 (suggesting that regulations governing the insurance industry were almost universally upheld).

sustain a nationwide market for their policies.<sup>161</sup> And the analysis in *Allgeyer* embodied the formalist assumption that at most one state had the authority to regulate any given transaction. In effect, all that an enterprising insurance lawyer had to do to defeat local bond and licensing requirements after *Allgeyer* was to engage in transactions outside the locus with willing local residents. Though *Paul* was reaffirmed in *Allgeyer* and remained good law until 1944,<sup>162</sup> *Allgeyer*, practically speaking, spelled the end of state power to prevent out-of-state insurance corporations from operating within the forum.

Even before the ruling in *Allgeyer*, however, state regulation of insurance had begun to move in the direction of protecting consumers (policyholders), and not just local competitors, in the realm of insurance. The liberty-of-contract language of *Allgeyer* proved broad enough to limit the power of states to regulate extraterritorially in the consumer-protection mode as well.

## 2. Life Insurance Policies: The Road to *Head* (1914) and *Dodge* (1918)

The significance of *Allgeyer* for state regulatory power did not become fully apparent until almost twenty years later. *Allgeyer* and its predecessor, *Hooper v. California*,<sup>163</sup> involved local statutes that were likely motivated by protectionist considerations—both California and Louisiana were concerned with supporting local providers of marine insurance<sup>164</sup>—and the decision could be defended as a way of promoting an unimpeded national market without disturbing *Paul v. Virginia*. With the unprecedented expansion of life insurance in the late nineteenth century, however, state regulation moved from mere economic protectionism to

161. This is not to say that New York and other states abjured regulation of the large insurance concerns, particularly with respect to life insurance. After the notorious Armstrong investigation of 1905, New York enacted a number of thoroughgoing reforms of the life insurance industry. By and large, though, these reforms focused on regulating the political activities of the state's life insurance companies, controlling the companies' investment practices, reforming management practices, and protecting shareholders' rights. See KELLER, *supra* note 142, at 257. Although the New York reforms included a requirement that a standard policy form be used, *id.*, the *Head* and *Dodge* cases, discussed in the text, revealed that New York did not impose onerous requirements concerning policy loans and the possible forfeiture of accrued reserves.

162. *United States v. S.E. Underwriters Ass'n*, 322 U.S. 533, 533 (1944). The *South-Eastern* case overruled *Paul's* holding that insurance did not constitute commerce for purposes of the Commerce Clause, though it did not explicitly overrule the doctrine of *Bank of Augusta* and *Paul* that foreign corporations have no constitutional right to recognition of their locally created rights in the forum.

163. *Hooper v. California*, 155 U.S. 648 (1895).

164. See Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 387–88, 388 n.47 (concluding that the Louisiana legislature “probably” enacted the statute in *Allgeyer* “to shield in-state insurance companies from out-of-state competitors” but might have been “designed to protect consumers from fraudulent insurance practices”); WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830–1900*, at 152–53 (1982).

consumer protection.<sup>165</sup> Life insurance offered far greater potential for calamitous missteps on the part of ordinary policyholders, notably the consequences of a failure to pay a premium on time. Some states enacted laws that were designed to protect their own residents from the traps for the unwary that often reposed in the form adhesive contracts offered by the large Northeastern insurers. Often these laws had the effect of voiding policy provisions that limited recovery while leaving the benefits intact. Moreover, whereas the licensing provisions of *Allgeyer* resulted in criminal litigation, legal challenges to the consumer protection statutes were raised by insurers in civil lawsuits brought by policyholders or their beneficiaries to enforce their right to benefits under the insurance policy.<sup>166</sup> Application of the forum's consumer protection statute in such cases thus raised the specter of extraterritoriality, just as the wrongful death statutes and employer's liability acts had done. The move from legislative protection of local competitors to protection of consumers eventually exposed the far-reaching potential of *Allgeyer's* marriage of liberty of contract with territorial limits on state regulation.

The law of Missouri, whose aggressive efforts at protecting local policyholders wound up in the Supreme Court on several occasions, mandated that if a policyholder had made at least two timely payments of premiums, defaulted on a subsequent premium, and died within sixty days of the default, the beneficiary recover the accrued value of the policy "as if there had been no default in the payment of premium, anything in the policy to the contrary notwithstanding."<sup>167</sup> The law addressed the not uncommon situation in which the insured and his family overlooked a policy payment during the crowded and stressful weeks before his death, an omission that could drastically reduce the accrued value of the policy. In *Equitable Life Assurance Society v. Pettus*,<sup>168</sup> the Court, relying on *Paul v. Virginia*, upheld the statute as a legitimate exercise of Missouri's police power; if Missouri could bar the insurer from doing any business at all within the state, it could condition its business on submitting to the state's regulation of the contract.<sup>169</sup> Nine years later, when another life insurance company sought to

165. See generally KELLER, *supra* note 142, at 187–242.

166. In the most common scenario, a policyholder could sue the insurance company that had denied her claim based on a forfeiture provision that the law of the policyholder's state purported to nullify. By contrast, the challenges in *Hooper* and *Allgeyer* to state laws restricting the activities of foreign insurers within the state arose in the context of a criminal proceeding.

167. *Equitable Life Assurance Soc'y v. Pettus*, 140 U.S. 226, 233 (1891) (quoting Missouri statute).

168. *Id.* *Pettus* is also known as *Equitable Life Assurance Society v. Clements*.

169. See also *Nw. Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243 (1906) (upholding application of a Missouri statute to a Minnesota insurer doing business in Missouri, which provided that misrepresentations on an application for life insurance could only invalidate the policy if a jury determined that the misrepresentation contributed to the occurrence of the event causing death); *Orient Ins. Co. of Hartford v. Daggs*, 172 U.S. 557 (1899) (upholding application to a Connecticut property insurer

circumvent the effect of the *Pettus* holding by including in the policy a clause selecting New York law to govern any disputes, the Court again upheld the application of Missouri's ant forfeiture law.<sup>170</sup>

But the Court, applying the reasoning in *Allgeyer* without citing it explicitly, emphasized in *Pettus* that "the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri; and, consequently, that the policy is a Missouri contract, and governed by the laws of Missouri."<sup>171</sup> This analysis, based on contemporary formalist conventions concerning the time and place of offer and acceptance, resulted in vindication of Missouri policy in *Pettus*, but gave insurance company lawyers an invitation to turn the *lex loci contracti* reasoning to their own advantage in future multistate disputes with policyholders.<sup>172</sup> The other shoe dropped in *New York Life Insurance Co. v. Head*<sup>173</sup> and *New York Life Insurance Co. v. Dodge*,<sup>174</sup> which declared unconstitutional the application of Missouri's statute to policy contracts that had been "made" beyond Missouri's borders.

*Head* and *Dodge* involved a policy provision that governed the ability of a policyholder to obtain a loan from the company, using his policy as collateral.<sup>175</sup> In *Head*, the plaintiff's father, a domiciliary of New Mexico, applied for and received a life insurance policy at New York Life's office in Kansas City, Missouri while he was there temporarily. Some years later, in New Mexico, Head's father transferred the policy to Head. She subsequently sought and received a loan from New York Life, using the policy as collateral. Eventually, she defaulted on a loan payment and on a premium due under the policy, whereupon New York Life, in accordance with New York law, deducted the entire balance of the loan and the unpaid premium from the accumulated surplus on the policy. The loan agreement referred to New York law in specifying the consequences of default on the

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doing business in Missouri a Missouri statute providing that insurer could not, upon claim of loss, deny that the property was worth less than what it had been valued in the policy).

170. *N.Y. Life Ins. Co. v. Cravens*, 178 U.S. 389 (1900).

171. *Pettus*, 140 U.S. at 232.

172. See John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 690, 829 (2001) ("By the 1880s and 1890s, commercial life insurance companies had become extremely sophisticated in drafting life insurance policies.").

173. *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149 (1914).

174. *N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918).

175. The New York Life Insurance Company had begun offering such policy loans in 1892, as permitted by New York law. KELLER, *supra* note 142, at 59–60. Such policy loans represented an attractive investment for the insurers, since the loans were secured by accumulated reserves on the policy. See WILLIAM JOSEPH GRAHAM, *THE ROMANCE OF LIFE INSURANCE: ITS PAST, PRESENT AND FUTURE, WITH PARTICULAR REFERENCE TO THE EPOCHAL INVESTIGATION ERA OF 1905–1908*, at 194–95 (1909).

loan. New York Life argued that the loan agreement should be regarded as an independent “New York contract” and not as merely subsidiary to the original policy, which itself was concededly a “Missouri contract.”<sup>176</sup> Missouri law provided that, upon default on the loan payment under circumstances like those in the case, New York Life was obliged first to take, from the accumulated surplus on the policy, an amount sufficient to cover the unpaid premium, so as to continue the policy. Enforcement of this ant forfeiture provision would have made the policy valid as of the time of Head’s death. The U.S. Supreme Court, reversing the Missouri Supreme Court,<sup>177</sup> held that the loan agreement was an independent contract, made in New York, to which Missouri’s ant forfeiture provision could not constitutionally be applied. This was so although the Court did not deny that the original insurance policy constituted a “Missouri contract” that was within Missouri’s power to regulate.

As in *Allgeyer*, specifying the precise part of the Constitution that had been violated proved difficult. Chief Justice White condemned what the Missouri courts had done because it gave Missouri power, not simply to regulate what was conceded for purposes of argument to be a Missouri contract, but “to affect the parties to such original contract with a perpetual contractual paralysis following them outside of the jurisdiction of the State of original contract by prohibiting them from doing any act or making any agreement concerning the original contract not in accord with the law of the State where the contract was originally made.”<sup>178</sup> In other words, Missouri was asserting the power “to extend the operation of its statutes beyond its borders into the jurisdiction of other States, so as in such other States to destroy or impair the right of persons not citizens of Missouri to contract, although the contract could in no sense be operative in Missouri and although the contract was sanctioned by the law of the State where made.”

What made this unconstitutional?

[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of

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176. The loan application itself stipulated that the loan agreement, once issued, would be considered a “New York contract.” *Head*, 234 U.S. at 154. In its opinion upholding application of the Missouri statute to the loan agreement, the Missouri Supreme Court referred to the initial insurance policy as unquestionably a “Missouri contract” and concluded that the loan agreement was “subsidiary” to the initial policy, subjecting the loan agreement as well to Missouri law. *Head v. N.Y. Life Ins. Co.*, 147 S.W. 827, 831, 832 (Mo. 1912), *rev’d*, 234 U.S. 149 (1914).

177. *Head*, 234 U.S. at 150.

178. *Id.* at 161.

which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound. The principle however lies at the foundation of the full faith and credit clause and the many rulings which have given effect to that clause.<sup>179</sup>

For the first time in this line of cases, the Court referred to the Full Faith and Credit Clause and intimated that enforcement of Missouri's law would conflict with "the jurisdiction of the State of original contract."<sup>180</sup> Nevertheless, liberty of contract remained the touchstone of the analysis in *Head*. Since the Court could not, without overruling at least two prior cases, hold Missouri's statute unconstitutional as an infringement of freedom of contract when applied to contracts made in Missouri, this liberty of contract was the special kind that the Court had defined in *Allgeyer*: the right of a citizen of a state to make contracts beyond the state's borders, unimpeded by extraterritorial application of the forum's regulatory statutes. In *Head*, a proscription against extraterritoriality and the doctrine of liberty of contract were both necessary conditions for a finding of unconstitutionality even though neither, standing alone, would have been sufficient.

Because neither the plaintiff nor her father had been a domiciliary of Missouri, the result in *Head* was not necessarily a rank injustice. But the situation was different in *New York Life Insurance Co. v. Dodge*,<sup>181</sup> in which the Court made its concern for liberty of contract even more explicit. As in *Head*, the decedent in *Dodge* had taken out a policy on his own life, had taken a loan on the accumulated surplus, and had defaulted on the policy by failing to pay a premium; and, as in *Head*, the policy had been issued in Missouri, and the possible application of Missouri's ant forfeiture law was therefore involved. Unlike in *Head*, however, the policyholder's beneficiary, like the policyholder, was at all relevant times a domiciliary of Missouri. The Court in *Dodge* found that the Missouri courts'

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179. *Id.* (footnote omitted).

180. *Id.* Chief Justice White's idiosyncratic view of the Full Faith and Credit Clause also appeared in his opinion for the Court in *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531 (1915), a case dealing with the multijurisdictional aspects of yet another post-Civil War legal effort to mitigate the risks of catastrophic loss: the fraternal benefit association. For a number of reasons—including the facts that these cases involved corporate charters that purported contractually to bind a group of members rather than just individuals, and that *Green* can be read as involving full faith and credit to judgments rather than constitutional limitations on choice of law—I regard the fraternal benefit association cases as peripheral to my account of the emergence of constitutional limitations on choice of law, although no historical account of full faith and credit and choice of law can wholly ignore them. Ten years after *Green*, Justice Holmes relied on its holding in his opinion for the Court in *Modern Woodmen of Am. v. Mixer*, 267 U.S. 544, 551 (1925). For a definitive historical analysis of the fraternal benefit associations, see Witt, *supra* note 172, at 777–841.

181. *N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918).

application of the Missouri antiforfeiture provision so as to continue the policy in force was unconstitutional. In his majority opinion, Justice McReynolds conceded that the policy itself was a “Missouri contract” and thus subject to Missouri’s regulatory statutes.<sup>182</sup> But he concluded that the loan agreement was a separate “New York contract”: “[C]ompetent parties consummated the loan contract now relied upon *in New York* where it was to be performed.”<sup>183</sup> Thus, the Missouri courts’ application of Missouri law was not only extraterritorial but unconstitutional. Again the Court was strangely diffident about specifying the precise part of the Constitution that had been violated:

Under the laws of New York, where the parties made the loan agreement now before us, it was valid; also it was one which the Missouri Legislature could not destroy or prevent a citizen within its borders from making beyond them by direct inhibition . . . As construed and applied by [the Missouri courts, the Missouri anti-forfeiture statute] transcends the power of the State. To hold otherwise would permit destruction of the right—often of great value—freely to borrow money upon a policy from the issuing company at its home office and would, moreover, sanction the impairment of that liberty of contract guaranteed to all by the Fourteenth Amendment.<sup>184</sup>

Despite its apparent concern about the extraterritorial application of Missouri law, the Court made no reference to any constitutional provision—even the Full Faith and Credit Clause—that could speak persuasively to the problem of such extraterritoriality. As in *Head*, the sovereignty competing with Missouri’s was that of the private contracting parties, not that of the State of New York. Even to the majority in *Dodge*, it must have seemed a mere contrivance to draw the line between constitutionality and unconstitutionality by making a metaphysical inquiry into where a contract is “made”; the Court’s real concern was with freedom of contract. Yet, as in *Head*, the Court’s tentative language demonstrated that liberty of contract alone could not account for the decision in *Dodge*, because the Court would likely have upheld, on the authority of *Pettus*, the Missouri statute as applied to a case wholly domestic to Missouri. A constitutional proscription of extraterritoriality, while inadequately theorized in *Dodge*, remained in some way essential to the decision.

*Dodge* called forth a forceful dissent from Justice Brandeis, the first of several opinions that helped to undermine extraterritoriality as a constitutional linchpin and set the stage for Justice Stone’s decisive opinions in the 1930s concerning

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182. *Id.* at 372–73.

183. *Id.* at 373 (emphasis added).

184. *Id.* at 376–77.

constitutional limits on legislative jurisdiction. Brandeis first disputed that the loan agreement was in fact a “New York contract,” then attempted to distinguish the *Head* case (which had been decided prior to his accession to the Court and which he plainly regarded as a poor decision).<sup>185</sup> But his most significant move was to reject the framework of extraterritoriality and to reconceive the question in terms of Missouri’s right to carry into effect its public policy in behalf of its own residents:

There is no constitutional limitation by virtue of which a statute enacted by a State in the exercise of the police power is necessarily void, if, in its operation, contracts made in another state may be affected. . . . [T]o sustain the contention made by the company in this case would deny to a State *the full power to protect its citizens* in respect to insurance, a power which has been long and beneficently exercised.<sup>186</sup>

Brandeis’s dissent in *Dodge* resonated, of course, with his well-known defense of state experimentation in the amelioration of social and economic problems. From a different perspective, however—that of later conflict-of-laws doctrines—its importance lay in its emphasis in the multijurisdictional setting on the state’s power to legislate for the welfare of its own domiciliaries. In this framework, the touchstone for constitutional limitations on a state’s legislative jurisdiction was not simply the territorial location of arbitrarily specified events, but the political relationship between the state and the person(s) regulated or protected. By contrast, in cases like *Allgeyer*, *Head*, and *Dodge*, the Court had seen that political relationship as irrelevant; the state’s police power was authoritative (if not necessarily plenary) when the contract had been made within the state and void when it had been made outside it. Far from crediting the state’s interest in protecting its domiciliaries—a characteristic feature of modern conflict-of-laws methodologies that the Court would later ratify—the Court appeared to regard such efforts as offensive paternalism.<sup>187</sup>

Brandeis’s approach in *Dodge* prefigured the emphasis on domiciliary interests (the state’s “full power to protect its citizens”) that would become a basic feature of modern choice-of-law methodologies. Accordingly, it rejected the assumption underlying the Court’s analysis, so characteristic of the categoricalism

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185. *Id.* at 384 (Brandeis, J., dissenting). Brandeis distinguished *Head* on the ground that the insured in *Head* “was not a citizen or resident of Missouri and does not appear ever to have been within the state except at the time when the application was made and the policy delivered[,]” and that “the insured had assigned the policy to his daughter, who was a citizen of New Mexico and, so far as appears, had never been within the State of Missouri.” *Id.*

186. *Id.* at 382, 385 (emphasis added).

187. In *Aetna Life Insurance Co. v. Dunken*, 266 U.S. 389, 395–400 (1924), the Court reaffirmed its analysis in *Head* and *Dodge*.



of what historians have termed “Classical Legal Thought,”<sup>188</sup> that one and only one state possessed authority to regulate a particular event in a particular place. Justice Stone would develop Brandeis’s ideas further in his opinions in the 1930s cases on workers’ compensation that played a crucial role in setting the modern constitutional boundaries on choice of law. For the moment, however, *Dodge* seemed to have established strict territorial limitations on the scope of state statutes altering common law rules of decision, at least in cases involving private contracts.<sup>189</sup>

### 3. Limits on State Interests Even Brandeis (and Stone) Could Accept: *Home Insurance Co. v. Dick* (1930)

In his *Dodge* dissent, Brandeis had suggested that protection of its own resident policyholders could justify application of the forum’s statute to events occurring outside the state. He conceded, however, that the forum could not constitutionally confer the protections of its own law on a domiciliary who had relocated there after the policy had been agreed to and gone into effect, or to whom the policy had been transferred by the original policyholder who had no connections to the forum. This was so even though, by the time litigation ensued, that new state might, with some justice, claim a protective interest in its domiciliary. The situation raising this problem, both in Brandeis’s time and later, concerned insurance policy provisions that required claims to be brought within a specified period, usually one year, after occurrence of the event. Those provisions might be valid and enforceable in the states of domicile and contract formation at the time the contract was made, but void under the law of the state to which the plaintiff moved (or of the state of the subsequent transferee) and subsequently claimed the loss. In *Home Insurance Company v. Dick* (1930)<sup>190</sup> and *John Hancock Mutual Life Insurance Company v. Yates* (1936),<sup>191</sup> Brandeis wrote opinions for the Court holding that the connections between the transaction and the forum necessary to justify the application of forum law were not established simply by the plaintiff’s residence in the forum at the time he commenced litigation there.

188. HORWITZ, *supra* note 133, at 17 (“Late-nineteenth-century reasoning brought categorical modes of thought to their highest fulfillment.”); WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937*, at 4–7 (1998) (discussing the categorical quality of Classical Legal Thought).

189. The Court remained willing to accept that, if analysis revealed that the relevant agreement had been “made” in Missouri, its law could constitutionally be applied. *Mut. Life Ins. Co. of N.Y. v. Liebing*, 259 U.S. 209, 210 (1922).

190. 281 U.S. 397 (1930).

191. 299 U.S. 178 (1936).

Brandeis thus acknowledged limits on the power of the forum to apply its statute, but in doing so he shifted the focus of the analysis from formal restraints on extra-territoriality to a looser conception of the connections the parties and the transaction might have with the forum.

In *Dick*, the original insured had purchased a boat from a Mexican seller for use in Mexican waters and subsequently purchased an accident insurance policy from a Mexican insurer there. The insurance contract specified that any claims for loss brought under the policy were to be made within one year of the loss. The insured then sold the boat (along with the insurance policy) to Dick, then present in Mexico but a permanent resident of Texas. The boat was subsequently lost in Mexican waters, and Dick failed to make a claim under the policy until after a year had elapsed. A Texas law, however, made any limitation provisions in insurance contracts unenforceable if it specified that the lawsuit had to be commenced within a period of less than two years. Dick then brought an action against the Mexican insurer in Texas state court.<sup>192</sup> The Texas courts applied Texas law to void the policy provision that claims had to be made within one year of the loss. Speaking through Brandeis, the Supreme Court held that the Texas court's application of Texas law violated the Due Process Clause of the Fourteenth Amendment:

All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of reinsurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. . . . The fact that Dick's permanent residence was in Texas is without significance. At all times here material he was physically present and acting in Mexico. Texas was therefore without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law.<sup>193</sup>

The Mexican insurer, having entered into an agreement (valid and enforceable under Mexican law) with a Mexican resident to insure a Mexican risk, had a Due Process right not to have the law of another state, with which it (and

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192. Dick actually established *in rem* jurisdiction in the Texas court by garnishing the debt allegedly owed the insurer by two New York companies (that had agents in Texas) serving as reinsurers for the Mexican insurer. *Dick*, 281 U.S. at 402. Brandeis's opinion in *Dick* was somewhat ambiguous as to whether it was the Mexican insurer or the New York reinsurers whose constitutional rights had been violated. The property seized was that of the New York parties, but it was the Mexican insurer that had made the contract whose limitation provision had been nullified by the Texas courts. *Id.* at 397, 407.

193. *Id.* at 408.

its transaction) had no cognizable connection, applied so as to void a bargained-for provision of the contract that protected its interests.

It may appear odd to hear Brandeis singing the song of due process and the rights of contract and property and denying the power of a state to apply its own law. But his opinion in *Dick* actually reinforced the position he had taken in his dissent in *Dodge*, subtly reorienting the Court's analysis of legislative jurisdiction. His position in *Dodge* had been based on Missouri's constitutional prerogative to legislate "beneficently" on behalf of its citizens.<sup>194</sup> The predicates for that prerogative were missing in *Dick*: "At all times here material [Dick] was physically present and acting in Mexico. Texas was therefore without power to affect the terms of contracts so made." Brandeis carefully avoided resting his analysis on a disapproval of extraterritoriality as such; what was significant to him was that *nothing* of relevance to the insurance policy had been done in Texas, not simply that the contract had not been made there. He made it clear that the state retained authority to regulate even contracts made outside the state in cases where the requisite connection with the forum was established. And in an often overlooked passage, he gave a broad hint that a state's protective or regulatory interest in its own domiciliary was a factor to be considered in determining the legitimate scope of forum law:

We need not consider how far the State may go in imposing restrictions on the conduct of its own residents, and of foreign corporations which have received permission to do business within its borders; or how far it may go in refusing to lend the aid of its courts to the enforcement of rights acquired outside its borders. It may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.<sup>195</sup>

The *Dodge* holding remained good law after *Dick* since the end result in *Dick* was to vindicate the Mexican insurer's contractual rights, not to insist on the application of Mexican law. But Brandeis buried his one citation of *Dodge* in a footnote's innocuous string cite.<sup>196</sup> *Dodge*'s global imprecations against the exercise of legislative jurisdiction to regulate contracts made outside the state, and its lionizing of liberty of contract, he left unmentioned.<sup>197</sup> And Brandeis dispensed

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194. N.Y. Life Ins. Co. v. Dodge, 246 U.S. 357, 385 (Brandeis, J., dissenting).

195. *Dick*, 281 U.S. at 410.

196. *Id.* at 408.

197. The distinction may appear subtle, and a bit formal, but it is important: Brandeis in *Dick* emphasized the post hoc nature of the Texas courts' action in applying Texas law to a transaction that had been effectuated wholly without reference to Texas by parties who at the time the contract was made had no reason to think that Texas might be involved. *Dick*, 281 U.S. at 407–08. By contrast, the Court in *Dodge* had posited a zone of absolute liberty from a state's regulatory rules so

altogether with any characterization of the insurance agreement as a “Mexican contract” or of the reinsurance contracts as “New York contracts.” That his opinion in *Dick* denied the authority of the Texas courts to apply Texas law to the case meant only that he regarded a posttransaction move to the forum as insufficient to establish a cognizable interest in the protection of its new domiciliary.

Today, the conventional view of *Dick* is that it established Due Process limits on choice of law by disapproving the unfair surprise to a party occasioned by unwarranted application of the forum’s disadvantageous law.<sup>198</sup> But the analysis in *Dick*, like that in *Head* and *Dodge*, concerned the permissible territorial scope of legislative jurisdiction, not constitutional limits on conflict of laws. In fact, Brandeis does not appear to have thought that *Dick* was about “conflict of laws” or “choice of law” (two phrases that do not appear in his opinion in *Dick*) at all. In one of his earliest majority opinions upon joining the Court, Brandeis had written in *Kryger v. Wilson* that the state court’s “mistaken application of doctrines of the conflict of laws” could raise no constitutional question, “being purely a question of local common law.”<sup>199</sup> Neither party in *Dick* mentioned *Kryger* in its brief, nor did Brandeis cite it in his opinion. There is no suggestion in the *Dick* opinion that Mexican law rather than Texas law should have applied; the problem was simply that Texas had unwarrantably applied its statute to nullify rights for which the parties had contracted. By 1930, however, it had begun to dawn on some scholars that *Dodge*, *Dick*, and other decisions about the permissible scope of legislative jurisdiction had implications for contemporary conflict-of-laws doctrine.<sup>200</sup> Two reasons for this development are (1) that Joseph Beale’s rigidly territorial approach to conflicts was, by the mid-1920s, being subjected to strong academic criticism<sup>201</sup> and (2) that jurists had increasingly come to reject the conceptual distinction between statutory rules of decision (which had been conceived of as exercises of legislative or “political” jurisdiction) and those rooted in the common law (which had been the traditional raw material of American conflict-of-laws doctrine).<sup>202</sup> *Dick*, we can see in retrospect, represented a moment of

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long as the contract was “made” outside the state. *Dodge*, 246 U.S. at 372–77 (Brandeis, J., dissenting).

198. Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1126–29 (1981); Russell J. Weintraub, *Due Process and Full Faith and Credit Limitations on a State’s Choice of Law*, 44 IOWA L. REV. 449, 457 (1959).

199. *Kryger v. Wilson*, 242 U.S. 171, 176 (1916).

200. See, e.g., E. Merrick Dodd, Jr., *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533 (1926); G.W.C. Ross, *Has the Conflict of Laws Become a Branch of Constitutional Law?*, 15 MINN. L. REV. 161 (1931).

201. See, e.g., Cook, *supra* note 33; Lorenzen, *supra* note 33.

202. See, e.g., *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533–34 (1928) (Holmes, J., dissenting) (“The common law so far as it is enforced in a

transition in which the Court was emerging only gradually from a worldview that treated the permissible scope of legislative jurisdiction as a problem of legal and political legitimacy that was largely distinct from conflict of laws as such.<sup>203</sup>

#### 4. Liberty of Contract, Extraterritoriality, and the National Market for Insurance

The insurance cases underscored the new, if temporary, significance that the concept of extraterritoriality had come to assume in American constitutional law, particularly where private commercial transactions were concerned. When Joseph Story had considered in 1812 whether a state bankruptcy law should operate to discharge debts that had been incurred outside the state, he based his reasoning on pragmatic considerations concerning the likely intentions of contracting parties, the needs of commercial intercourse, and the fact that more than one sovereign might well have a legitimate interest in the matter—not on constitutional or universal dogmas concerning the limits on the legislative jurisdiction of states.<sup>204</sup> To the extent that antebellum jurists concerned themselves with the legitimate scope of state legislative jurisdiction at all, it was to sustain rather than deny the power of the forum to apply its own law; Story's theory of comity in his 1834 conflicts treatise had specified that the forum must, in the nature of things, have the last word. Even courts denying extraterritorial effect to the wrongful death statutes had sometimes acknowledged that legislatures retained the power explicitly to provide that such statutes had extraterritorial effect.<sup>205</sup> Cases like *Head* and *Dodge*, foreshadowed by the Supreme Court's decision in *Allgeyer*, reflected a very different conception. In none of these cases did application of the forum's law constitute unfair surprise from the insurer's *ex ante* perspective. All three cases involved statutes that were unquestionably constitutional when applied in a purely domestic situation. Nevertheless, the Supreme Court ruled in each case that application of the forum's statute was an unconstitutional assertion of legislative

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State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.”).

203. In 1936, Brandeis wrote the opinion in *John Hancock Mutual Life Insurance Co. v. Yates*, 299 U.S. 178 (1936), which again stuck down the attempt of the forum to give the plaintiff the benefit of the forum's policyholder-protective statute, when the policyholder's beneficiary had only moved to the forum after the policy had gone into effect. Brandeis's opinion in *Yates*, unlike that in *Dick*, referenced the Full Faith and Credit Clause, which Brandeis in the interim had, in *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932), discussed *infra*, recruited in the effort to mark out the limits of legislative jurisdiction in the context of workers' compensation.

204. *Van Reimsdyk v. Kane*, 28 F. Cas. 1062 (C.C.D.R.I 1812) (Story, J.).

205. See *Beach v. Bay St. Steamboat Co.*, 30 Barb. 433, 437 (N.Y. Gen. Term 1859) (appellate panel).

jurisdiction. Something important had changed from the time of Story's 1834 treatise.

Part of the answer, of course, lies in the intervening enactment of the Fourteenth Amendment, which, as applied by the Court, made federal constitutional limitations on the actions of state governments a pervasive and familiar part of the legal landscape. That amendment had fortified the Court in *Pennoyer v. Neff*<sup>206</sup> in identifying rigid territorial restrictions on the power of state courts to assert personal jurisdiction over nonresident defendants. Equally important, however, were two other jurisprudential developments. The first was the specific nature of the liberty-of-contract reasoning that came to prevail in the late nineteenth and early twentieth centuries—a juristic zeal to identify zones to which private contracting parties, even when one or both were citizen of the forum, could retreat and thus evade the interference of the regulating state. The state's police power concededly included regulation (up to a point) of private contractual relations, but the individual must have the autonomy to escape its clutches by making his engagements beyond its borders. What is today accomplished by enforcement of contractual choice-of-law clauses (which, ironically, the Court regarded in 1900 as ineffective to trump the power of the forum to apply its public policy regulating agreements for life insurance made within the territorial limits of the forum<sup>207</sup>) was accomplished circa 1915 by the expedient of “making” one's contract within the boundaries of a state that regulated with a light hand, if at all, even if the place of making was, by this time, largely a matter of formalities and fictions.<sup>208</sup>

Something more than contractual liberty in the abstract, however, seems to have played a role in the Court's decisions in *Allgeyer*, *Head*, and *Dodge*. After all, the Court's commitment to liberty of contract in this era was far from absolute, and these insurance cases did not feature contracts for employment, the specific area where the Court's insistence on limiting the police power of the states was strongest.<sup>209</sup> What the insurance cases did feature, however, was the attempt of a

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206. 95 U.S. 714 (1877).

207. *N.Y. Life Ins. Co. v. Cravens*, 178 U.S. 389, 398 (1900).

208. Some sense of the arbitrariness of formalist efforts to determine the “place of contracting” can be found in the spectacular array of rules determining the place of contract for different kinds of agreements in the RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 311-331 (1934). A contemporary Realist critique of the instability of these ideas as applied in cases like *Allgeyer*, *Head*, and *Dodge* is Nathan Greene, *The Allgeyer Case as a Constitutional Embrasure of Territoriality*, 2 ST. JOHN'S L. REV. 22 (1927).

209. See Charles W. McCurdy, *The Roots of “Liberty of Contract” Reconsidered: Major Premises in the Law of Employment, 1867-1937*, 1984 SUP. CT. HIST. SOC'Y Y.B. 20, 24 (arguing that, in the eyes of courts considering the validity of protective labor legislation during the “*Lochner* Era,” “contracts of employment were somehow special and therefore distinguishable from commercial contracts where the presumption of constitutionality applied when legislatures intervened”).

business enterprise to exploit a national market. As noted above, the Court had, after the Civil War, deployed the Commerce Clause to strike down what it regarded as provincial or protectionist attempts by states to obstruct the local marketing efforts of out-of-state businesses. But the Court in *Paul v. Virginia* had held that the marketing of insurance was not commerce, rendering the Commerce Clause useless to invalidate local regulation of out-of-state insurance companies whether in the protectionist or the consumer-protective mode. By the time *Allgeyer* was decided, and certainly by the time of *Head* and *Dodge*, the Court may well have become frustrated by the rule of *Paul* and have sought a way to strike down local interference with the national marketing efforts of the large insurance companies without overruling *Paul*. Although the Court did not make these national market concerns explicit in *Allgeyer*, *Head*, and *Dodge*, they may have stiffened the Court's resolve to give liberty of contract an expansive reading in these cases.<sup>210</sup>

Unable to rely on the Commerce Clause, the Court eventually recruited the Full Faith and Credit Clause, which seems better adapted than the Fourteenth Amendment's Due Process Clause to the problem of extraterritoriality and exorbitant application of forum law, in aid of its analysis in the insurance cases. But the Court's gravitation to the Full Faith and Credit Clause in this line of cases was halting and uneasy. A violation of the Full Faith and Credit Clause assumes that a state has failed to give sufficient "faith" and "credit" to the positive legal action (judgment or public act) of another state. But traditional common law conceptions—which a conservative judiciary, confronted with the advance of state regulation in the late nineteenth and early twentieth centuries, at times hardened into constitutional principle—did not typically ascribe the presumptive enforceability of private agreements to the positive law of the state in which they had been reached. In the absence of interdiction by the state, a contract freely arrived at was enforceable because the parties had consented to it, not because the locus deemed it to be so. Hence the distinctive phrase frequently used by lawyers and judges well into the twentieth century: the "law of the contract."<sup>211</sup> When the Court said that the contract in *Head* or in *Dodge* was a New York contract, or

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210. James Y. Stern makes the excellent point that, had other business enterprises been excluded from the reach of the dormant Commerce Clause in the way that insurance was in *Paul v. Virginia*, 75 U.S. 168 (1868), courts might have limited the extraterritorial application of state regulation in those other areas as well. Stern, *supra* note 21, at 1518–19. A feature of the insurance cases that is essential to the story recounted here, however, is that the state regulation was challenged in ordinary contract litigation in which the challenged regulation formed a rule of decision. Whether challenges to other sorts of state regulation with respect to other businesses would have arisen in the same manner is a matter of speculation.

211. See sources cited and text accompanying *supra* note 160.

even that it was to be governed by New York law, it was not saying that the Missouri courts in those cases had acted unconstitutionally by failing to apply New York rather than Missouri law to the dispute or by disrespecting the sovereign authority of the state of New York. That would have been to constitutionalize the rule of *lex loci contractus* for choice of law, and the Court gave no indication that it meant to do this. The Court's point, rather, was that by forming a contract in New York, the parties had made an agreement fully intending that the contract would have the meaning and effect that New York law (or absence of law) had stated it would have and that Missouri's interference with this act by the parties therefore violated their private contractual rights.

The line of Supreme Court decisions epitomized by *Head* and *Dodge* had pitted one state's heterodox regulation of the contractual relationship against a regime of free contract whose foundation, in the view of conservative jurists, still seemed to lie in universal rather than municipal sanction. Even Brandeis's opinion in *Dick* continued to conceive the problem as one of territorial limits on the power of legislatures to displace this contractual autonomy of individuals, although he had successfully disposed of the rigid conception of extraterritoriality in marking these limits. What the Court had not yet considered as of 1930 was a case in which differing regulatory rules of decision were supplied by each of two states and which thus presented a conflict between two municipal rules of law. It was the advent of such cases that rendered obsolete the conceptual framework used by the Court in cases from *Allgeyer* to *Dunken*, that enabled first Justice Brandeis and then Justice Stone to inter the notion that the Constitution restricts the "political jurisdiction" of the state to its territorial boundaries, and that ultimately swept all these legal problems into the category of conflict of laws. This new line of cases concerned the most important statutory incursion on the common law of the early twentieth century: the workers' compensation statutes.

D. The Workers' Compensation Cases: *Clapper* (1932), *Alaska Packers* (1935), and *Pacific Employers* (1939)

1. Workers' Compensation Statutes and Extraterritoriality

It seems peculiar that workers' compensation should have been the vehicle for the reorientation of conflicts law. Conflict of laws was lawyers' law, applied in common law courts. The tribunals established by most workers' compensation statutes, by contrast, represented the advance guard of early twentieth-century administrative process, their structure and basic principles designed as an alternative to traditional adjudication. Few seem to have contemplated that the administrative tribunal of one state might enforce rights created by the workers'



compensation statute of another, and enforcement by the forum of foreign-created rights was perhaps the central problem of conflict of laws. Yet it was precisely the self-conscious rejection of the precepts of the common law in dealing with industrial injuries by the workers' compensation regime—as well as its emergence at the very moment when liberty-of-contract ideas were losing their hold on American law—that dramatized the interstate conflicts generated by the compensation statutes.

The earlier wrongful death and employers' liability statutes had taken as their starting point the retrospective and fault-based approach of the common law litigation system; their focus was on eliminating barriers to recovery that had been erected by courts. The workers' compensation statutes, by contrast, operated more directly on employers, most obviously by compelling them to contribute to the state fund. Legislatures, faced with the task of devising an administrative apparatus wholly unknown to common law adjudication, grappled more consciously with the actual conditions of industrial employment than had those who crafted the earlier statutes. In particular, they recognized that work-related injuries might sometimes occur in states other than that where the employment relationship had been formed. Whereas most of the original wrongful death and employers' liability statutes had not provided explicitly for situations in which an injury was suffered out of state, many of the workers' compensation laws explicitly provided for extraterritorial application.<sup>212</sup> Others were interpreted by state courts to apply extraterritorially,<sup>213</sup> a move that courts had explicitly declined to make with respect to the wrongful death and employers' liability statutes.

The explicit extraterritorial reach of some workers' compensation statutes heightened the likelihood of conflicts with the law of other states; two state

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212. *See, e.g.*, *Hagenback v. Leppert*, 117 N.E. 531, 533 (Ind. App. 1917) (interpreting Indiana compensation statute providing that employers and employees subject to the statute “shall be bound by the provisions of the act whether injury by accident or death resulting from such injury occurs within the state or in some other state or in a foreign country”); *Quong Ham Wah Co. v. Indus. Accident Comm’n*, 192 P. 1021, 1022 (Cal. 1920) (interpreting California compensation statute providing that statute would apply to “all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employé is a resident of this state at the time of the injury and the contract of hire was made in this state”). *See generally* Annotation, 3 A.L.R. 1351 (1919); Annotation, 59 A.L.R. 735 (1929); SAMUEL A. HARPER, *THE LAW OF WORKMEN’S COMPENSATION* 567–68 (2d ed. 1920) (identifying the territorial scope of all compensation statutes by state *circa* 1920).

213. *See, e.g.*, *Kennerson v. Thames Towboat Co.*, 94 A. 372, 376, 378 (Conn. 1915) (applying Connecticut compensation statute to injuries suffered out of state although there was “no clearly expressed intention in [the statute] that the contract authorized should operate without the state”); *Anderson v. Miller Scrap Iron Co.*, 170 N.W. 275 (Wis. 1919) (interpreting Wisconsin compensation statute, which was silent on the question of its application outside the state, to apply extraterritorially).

statutes could, by their terms or by judicial interpretation, apply to a single case. In the formalist ideal of late nineteenth-century jurisprudence, state compensation statutes might have been conceived as applying exclusively to injuries suffered within the forum, but, in an age featuring an ever-larger number of interstate employees, this was plainly impractical as well as undesirable to many states. The upshot was that any situation in which an employee was injured in the course of his employment in a state different from that in which the employment relationship had been created might be subject to the regulatory authority of more than one state. Adding to the confusion was the fact that some compensation statutes purported, or were judicially interpreted, to be exclusive in their application, meaning that they claimed to oust any other legislative jurisdiction over the matter. Yet another variable was whether a given statute limited its benefits to residents of the state.<sup>214</sup>

In dealing with the myriad problems of extraterritoriality generated by the workers' compensation acts, courts sought refuge in analogies to more familiar common law ideas. Because elimination of the fault requirement and deployment of a novel administrative process made the new regime appear to be a radical departure from the common law, most courts declined to apply *lex loci delicti* principles in resolving the extraterritoriality problems.<sup>215</sup> A second possibility was to regard the statutory compensation remedy as having been incorporated into the employment contract and to apply *lex loci contractus* principles to resolve the conflicts. Most courts, however, were reluctant to adopt this reasoning, observing that the liability imposed by a state's compensation scheme was created by statute, not by the party's private agreement. Most courts settled on a third conception, concluding that the availability of a workers' compensation remedy arose out of the unique *relationship* of employer and employee.<sup>216</sup> This meant that

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214. California's statute, for example, explicitly limited its benefits for injuries suffered outside the state to resident employees, but the California Supreme Court interpreted the statute as applying to nonresidents as well so as to avoid a potential clash with the Privileges and Immunities Clause of Article IV of the U.S. Constitution. *Workmen's Compensation, Insurance and Safety Act of 1917*, 1917 Cal. Stat. 832, ch. 586; *Quong Ham Wah Co. v. Indus. Accident Comm'n*, 192 P. 1021, 1027 (Cal. 1920).

215. *Compare Johnson v. Nelson*, 150 N.W. 620, 621 (Minn. 1915) ("[P]laintiff's cause of action is . . . one in tort. . . . [He] must resort to the law as it is in [the state of injury]."), *with Anderson v. Miller Scrap Iron Co.*, 170 N.W. 275, 279 (Wis. 1919) ("[T]he principles which are applicable to actions *ex delicto* should not be applied to claims arising under the Workmen's Compensation Act . . ."). *See also Kennerson v. Thames Towboat Co.*, 94 A. 372, 378 (Conn. 1915) (explaining that workers' compensation claims are not to be regarded as in the nature of actions *ex delicto*).

216. *See Cudahy Packing Co. v. Parramore*, 263 U.S. 418, 423 (1923) (stating that "Workmen's Compensation legislation rests upon the idea of status, not upon that of implied contract").

rights and obligations appertaining to that relationship would follow the parties and apply wherever the worker might be injured.

The “relationship” conception of employer and employee had venerable roots in the common law of master and servant. But the entire formalist characterization project in the context of worker’s compensation was built on an increasingly anachronistic worldview in which one and only one state could legitimately supply the rule of decision for any given dispute. In *Alabama Great Southern Railroad Co. v. Carroll*, the Alabama Supreme Court had been able to dismiss the extraterritorial application of Alabama employers’ liability act by decreeing that the statute must be read as if it began with the qualifying phrase, “When a personal injury is received in Alabama by a servant or employe [sic].”<sup>217</sup> But some states were now providing explicitly that their workers’ compensation acts applied to injuries suffered elsewhere. Political and social realities were making both (1) the proscription of extraterritoriality and (2) the related notion that only one state’s law had legitimate application to any dispute obsolete as constitutional touchstones. When the Supreme Court in 1932 took up the problem of competing workers’ compensation statutes for the first time, Brandeis’s majority opinion interred only the first of these notions. With Justice Stone’s majority opinions in workers’ compensation cases in 1935 and 1939 the entire edifice fell.

## 2. Brandeis, Workers’ Compensation, and the Employer-Employee Relationship: *Bradford Electric Light Co. v. Clapper* (1932)

The U.S. Supreme Court first encountered the problem of competing workers’ compensation regimes in *Bradford Electric Light Co. v. Clapper*.<sup>218</sup> Leon Clapper, a Vermont resident, had been employed in Vermont as a lineman by Bradford Electric, a Vermont company. Part of Bradford Electric’s service area lay in New Hampshire, and the company sent Clapper to New Hampshire to replace some fuses. Clapper was accidentally electrocuted while doing this work in New Hampshire. The differing features of the Vermont and New Hampshire workers’ compensation statutes made the question of the governing law in the subsequent legal dispute a complex problem. In particular, New Hampshire’s statute, unlike Vermont’s, gave the injured employee the choice of submitting a compensation claim or filing an ordinary common law negligence action in state court. Clapper’s widow filed such an action in New Hampshire court. Bradford Electric pleaded as a defense its right under the Vermont statute (and the

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217. Ala. Great S. R.R. Co. v. Carroll, 11 So. 803, 807 (Ala. 1892).

218. 286 U.S. 145 (1932).

contract of employment) to have the Vermont administrative compensation scheme constitute the exclusive remedy available to the plaintiff. In an opinion by Brandeis, the Supreme Court ruled that the New Hampshire courts' dismissal of Bradford Electric's defense and their application of the New Hampshire statute violated the Full Faith and Credit Clause.

Why did the actions of the New Hampshire courts bother the Supreme Court, especially Brandeis? One could scarcely condemn as extraterritorial New Hampshire's application of its own law to an accident and death that had taken place within the state. Nor did application of the New Hampshire statute run afoul of *Dick*: New Hampshire had, by any measure, meaningful connections with the dispute in *Clapper*, and Bradford Electric, which had itself sent the decedent in New Hampshire to do his work, could not have been unfairly surprised by the application of New Hampshire law to events arising out of that work.<sup>219</sup> The crucial ingredient in the Court's decision in *Clapper* was Brandeis's apparent zeal to fortify the effectiveness of workers' compensation, a reform he had supported since well before its initial adoption in New York in 1910.<sup>220</sup> It is clear from his opinion that he viewed both New Hampshire's preservation of the option to select a common law remedy and, more generally, the possibility that the law of some other state might displace the compensation remedy of the state where the employment agreement had been reached, as threats to effective implementation of good compensation policy: Were Vermont law not to be applied, its "effectiveness . . . would be gravely impaired. For the purpose of that Act, as of the workmen's compensation laws of most other states, is to provide, in respect to persons residing and businesses located in the State, not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate."<sup>221</sup> (He expressed no corresponding concern about ensuring the effectiveness of the statute of New

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219. It is thus notable that Brandeis did not rest the Court's decision in *Clapper* on *Dick* and its Due Process Clause analysis. *Id.* at 145–46.

220. As John Witt has shown, Brandeis did have some misgivings about the compensation regime, but hoped it might be implemented in a way that promoted worker participation and industrial democracy. JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 150 (2004). Brandeis had publicly criticized the decision of the New York Court of Appeals in *Ives v. South Buffalo Railway Co.*, 94 N.E. 431 (N.Y. 1911) (striking down New York's workers' compensation statute as unconstitutional). Louis D. Brandeis, Letter to the Editor, 26 *SURVEY* 198 (April 29, 1911); Louis D. Brandeis, *The Living Law*, Address Before the Chicago Bar Association (Jan. 3, 1916), available at <http://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/business-a-profession-chapter-21>.

221. *Clapper*, 286 U.S. at 159.

Hampshire, whose interest in the matter he summarily (and uncharacteristically) dismissed as “only casual.”<sup>222</sup>)

Brandeis’s preference for a rule applying the workers’ compensation statute of the state where the parties had made their agreement had the merit of efficiency and practicality; it made policy sense to have all compensation disputes between a given employer and given employee, regardless of where he might be sent to do his work, resolved by the process of a single state.<sup>223</sup> But to constitutionalize that preference, and thus require the New Hampshire courts in *Clapper* to substitute Vermont’s statute for its own, was too dogmatic a response to this new problem the Court was facing: that of mediating between claims based on statutes from two different states, each of which had plausible arguments for asserting regulatory authority. Previous judicial encounters with the problem of extraterritoriality—the wrongful death and employers’ liability acts, and the insurance cases like *Allgeyer* and *Dodge*—had focused strictly on the limits on application of the forum’s statute. Condemning the application of forum law in such cases did not result in application of a statute of the locus. In *Clapper*, however, two statutes were involved, both purporting to apply to the case. To deny that the forum could constitutionally apply its own statute was, in effect, to require it to apply the other.

As conceived by the Court and the parties in *Clapper*, the question was whether the New Hampshire courts were required to recognize, as a defense, the operation of the Vermont statute (which precluded any other remedy but that provided by the statute). This framing of the problem in effect drew on a conception of legislative jurisdiction in which but one state could have authority to regulate an event or dispute. It did not contemplate an analysis in which one state’s law might have a better, or worse, claim to application than the other’s. The difference in conception may appear to a modern reader to be a matter of semantics. But it underscores that, conceptually, the workers’ compensation cases marked a transition in multijurisdictional problems from a concern with legislative jurisdiction (can the forum’s statute legitimately apply to this case?) as such to a choice-of-law analysis (which state’s law should apply?).

In order to demonstrate that the New Hampshire courts were constitutionally required to recognize the employer’s defense under Vermont’s statute, Brandeis had to confront two distinct problems of extraterritoriality. First, he had to explain why it was even constitutional for Vermont’s compensation statute

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222. *Id.* at 162.

223. For one thing, that state could always be said to have been within the contemplation of the parties at the time of the agreement. See John Fabian Witt, Note, *The Transformation of Work and the Law of Workplace Accidents, 1842–1910*, 107 YALE L.J. 1467, 1469 (1998).

to apply to injuries outside the state (a problem that would, in theory, have been raised even if it had been a Vermont court applying that law). Given his dissent in *Dodge*, this seemed simple to Brandeis: “[O]bviously, the power of Vermont to effect legal consequences by legislation is not limited strictly to occurrences within its boundaries.”<sup>224</sup> Obvious though it may have seemed to him, this was itself new ground for the Court.<sup>225</sup> The legal, political, and economic developments of seventy-five years had dramatically weakened the foundations of the rigid principle that a state’s “political jurisdiction” was strictly limited by its territorial boundaries; at a stroke, Brandeis in *Clapper* swept away the remains.

Explaining why the New Hampshire courts were constitutionally compelled in *Clapper* to admit a defense based on Vermont’s compensation statute was, however, a substantially more difficult task. To compel New Hampshire to apply Vermont law was to subject New Hampshire to the legislative or political jurisdiction of Vermont. This second species of extraterritoriality—requiring recognition of foreign law so as to deprive the forum of the ability to apply its own—was the type that had been condemned in antebellum law; Story’s version of comity seemingly ratified the power of New Hampshire to reject it. Although a few earlier cases had suggested that the Full Faith and Credit Clause might compel the forum in certain instances to apply another state’s law,<sup>226</sup> no case had imposed such an obligation as to personal injuries or deaths that had occurred in the forum.<sup>227</sup> Brandeis’s justification for doing so in *Clapper* was to emphasize the employer-employee relationship (“status”) in characterizing the compensation remedy:

[R]ecognition [Brandeis might more properly have said “compelled recognition”] in New Hampshire of the rights created by the

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224. *Clapper*, 286 U.S. at 156.

225. State courts, however, had been making the same point for over two decades, or virtually since enactment of the first workers’ compensation statutes. See, e.g., *Post v. Burger & Gohlke*, 111 N.E. 351 (N.Y. 1916).

226. See, e.g., *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531, 546 (1915) (holding it unconstitutional for New York to increase assessment rates for a mutual benefit society created pursuant to a Massachusetts statute); *Converse v. Hamilton*, 224 U.S. 243 (1912) (holding it unconstitutional for Wisconsin courts to refuse to enforce right conferred by Minnesota statute on receiver to sue stockholders for double liability). Because of the unique issues raised by the state statutes at issue in *Green* and *Converse*, I do not regard those cases as establishing full faith and credit obligations on the states to apply rules of decision created by foreign statutes more generally. But see *Dodd*, *supra* note 200, at 550–52 (describing *Green* and *Converse* as early examples of the Supreme Court’s apply the Full Faith and Credit Clause to state statutes).

227. Compare this to Justice Stone’s observation in his concurring opinion in *Clapper*: “The full faith and credit clause has not hitherto been thought to do more than compel recognition, outside the state, of the operation and effect of its laws upon persons and events within it.” *Clapper*, 286 U.S. at 163–64 (Stone, J., concurring).

Vermont act, cannot, in any proper sense, be termed an extraterritorial application of that Act. Workmen's compensation acts are treated, almost universally, as creating a statutory relation between the parties—not, like employer's liability acts, as substituting a statutory tort for a common law tort. . . . The mere recognition by the courts of one state that parties by their conduct have subjected themselves to certain obligations arising under the law of another state is not to be deemed an extra-territorial application of the law of the state creating the obligation.<sup>228</sup>

There is some irony in Brandeis's reliance on one formalism (characterization of the compensation remedy as involving a "relationship") in order to dispense with another (the disapproval of extraterritoriality).

The analysis in *Clapper* was unconvincing because Brandeis's ultimate goals were in tension with one another. His dislike of the New Hampshire statute and his desire to provide an efficient solution to the problem of conflicting compensation regimes led him to deny constitutional authority to New Hampshire to provide Clapper's widow a judicial remedy; hence his strenuous effort to dismiss the significance of the fact that the death had occurred in that state. But as his dissent in *Dodge* made plain, Brandeis was also concerned to affirm the authority of a state to legislate in the interest of its residents. In most cases, like *Clapper* itself, these two goals could be reconciled because the state where the statutory relation had been created or was centered would ordinarily be the state of the worker's residence. But not always. Brandeis thus offered this qualification: "We have no occasion to consider whether *if the injured employee had been a resident of New Hampshire, or had been continuously employed there, or had left dependents there*, recovery might validly have been permitted under New Hampshire law."<sup>229</sup> *Clapper* thus left open the possibility that the forum was within its constitutional power to apply forum law where the plaintiff or decedent was a forum domiciliary, even if it meant displacing the workers' compensation law of the state where the employment relationship had been formed. This, it would turn out, was the

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228. *Id.* at 157–58 (majority opinion) (footnote omitted). For his assertion that workers' compensation statutes should be conceived as speaking to the relation between the parties, Brandeis cited the Court's decision in *Cudaby Packing Co. v. Parramore*, 263 U.S. 418 (1923). Brandeis also referenced this concept when he asserted that the compensation statutes spoke to the question of status/relationship, not to tort: "The relation between Leon Clapper and the company was created by the law of Vermont; and as long as that relation persisted its incidents were properly subject to regulation there," by which Brandeis meant that relevant Vermont law regulating their relationship should apply wherever either party might go while acting within the scope of their relationship. *Clapper*, 286 U.S. at 158. On Brandeis's use of the status/relationship idea in *Clapper*, see Stern, *supra* note 21, at 1527–28.

229. *Clapper*, 286 U.S. at 163 (emphasis added).

crux of the matter. Brandeis's casual reference to the domicile of Leon Clapper and his survivors foreshadowed a shift in the American law of legislative jurisdiction, one articulated more explicitly by Justice Stone in the *Alaska Packers* and *Pacific Employers* cases—a shift that underlay the interest-based approach to American choice of law developed later in the century.

### 3. Reorienting Conflict of Laws: Stone, *Alaska Packers* (1935), and *Pacific Employers* (1939)

In *Clapper*, the Supreme Court faced up to the reality that employers frequently sent employees out of state to do their jobs. But it was the employment of seasonal, migrant labor that dramatized the frequent unfairness of a rule that would limit an injured worker to his remedy under the law of the place where the injury was suffered. This was the problem considered by the Court in *Alaska Packers Association v. Industrial Accident Commission of California*,<sup>230</sup> three years after *Clapper*. *Alaska Packers* was a large employer of workers, many of them seasonal, in the cannery industry in Alaska. For years the company, using the notorious contracting system, had arranged for the recruitment and transportation of temporary workers, many of them “bird-of-passage” aliens, from the port of San Francisco to Alaska. One of the most important early state-court decisions on the application of workers’ compensation statutes, decided by the California Supreme Court in 1920, had involved the company.<sup>231</sup> In a typical scenario, the worker would sign a contract with *Alaska Packers* in San Francisco—sometimes on the boat transporting him to Alaska—according to which he would work during the canning season in Alaska and then return to San Francisco to be paid his wages. The agreement also stated that the worker would be bound by the provisions of the Alaska workers’ compensation statute in the event of an on-the-job injury.<sup>232</sup>

230. 294 U.S. 532 (1935).

231. *Quong Ham Wah Co. v. Indus. Accident Comm’n*, 192 P. 1021 (Cal. 1920).

232. Labor in the Pacific Coast canning industry was dominated first by the Chinese in the late nineteenth century, followed by Japanese and then Filipino workers, with other ethnic groups (such as Mexicans) represented in smaller numbers. For an account of the emergence of the contracting system and the myriad problems of organizing workers in the industry, see CHRIS FRIDAY, *ORGANIZING ASIAN-AMERICAN LABOR: THE PACIFIC COAST CANNED-SALMON INDUSTRY, 1870–1942* (1994); see also Gene Viernes, *Here’s How They Created the Salmon Canning Industry*, 4 INT’L EXAM’R (SEATTLE), Feb. 28, 1977; Gene Viernes, *The Asian Labor Forces: Sliming and Butchering Fish in the Alaska Canneries*, 4 INT’L EXAM’R (SEATTLE), Mar. 31, 1977, at 5; Gene Viernes, *The Contract Labor System in the Canneries*, 4 INT’L EXAM’R (SEATTLE), Apr. 30, 1977; Gene Viernes, *Union Ends Reign of Cannery Contractors*, 4 INT’L EXAM’R (SEATTLE), June 30, 1977, at 10.



In the *Alaska Packers* case, Juan Palma, a resident of Mexico, signed such an agreement and traveled to Alaska, where he suffered an injury during the course of his employment. As the Court pointed out, the California compensation tribunal was the only one in which Palma could reasonably be expected to file; an injured seasonal worker, having been contractually guaranteed transportation back to California along with fellow workers after their few months of labor, was hardly likely to stay on by himself in Alaska in order to seek administrative compensation for his injury, important witnesses to which may no longer have been in the state. Upon his return to California at the end of the canning season, Palma filed a workers' compensation claim with the California Industrial Accident Commission, and, when he received an award, *Alaska Packers* appealed.

At first glance, *Alaska Packers* should have been a trivial case. If, as Brandeis had stated in *Clapper*, application of the law of the state where the employment relationship had been created (there, Vermont) was constitutionally required in workers' compensation cases, it must certainly be constitutionally permitted for California in *Alaska Packers* to apply its own law since the employment relationship had been created there. But Justice Stone, writing for the Court in *Alaska Packers*, was not content to rest the decision simply on the authority of *Clapper*. He had not joined Brandeis's opinion in *Clapper*, writing a separate concurrence in which he disagreed that New Hampshire was constitutionally compelled to apply Vermont's workers' compensation statute.<sup>233</sup> Stone did not explicitly contest *Clapper*'s characterization of the workers' compensation problem as one involving the employment relationship, but he plainly thought this an inadequate basis for determining the scope of the state's constitutional authority to regulate.

If the "relationship" reasoning seemed a bit formalistic in *Clapper*, it was downright unreal under the circumstances presented in *Alaska Packers*, in which the making of boilerplate, take-it-or-leave-it contracts with workers transiently in California was but a convenience to ensure a reliable supply of temporary, low-wage labor, and the necessary transportation, for employment in Alaska. Stone thus turned in a more fruitful direction. He first deflected any lingering concerns about extraterritoriality by defining extraterritoriality as the imposition of foreign law upon the forum, not as the attempt to apply forum law to events occurring outside the forum: "The California statute does not purport

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233. *Clapper*, 286 U.S. at 163–65 (Stone, J., concurring). Stone was able to style his separate opinion in *Clapper* as a concurrence in the result because *Clapper* was a diversity case that had come up through the federal courts. He based his conclusion on the somewhat contrived assumption that the New Hampshire courts, had the case been litigated there, would have applied Vermont law, and that the federal district court sitting in diversity should therefore have done so as well. He was thus able to avoid deciding the constitutional issue, although he took the opportunity to contest at length Brandeis's analysis of the Full Faith and Credit Clause.

to have any extraterritorial effect, in the sense that it undertakes to impose a rule for foreign tribunals, nor did the judgment of the state supreme court give it any.”<sup>234</sup> Alaska tribunals, were the case to be presented to them, remained free to apply Alaska law to the matter. But California retained precisely the same prerogative: “[T]he compensation acts of either jurisdiction may, consistently with due process, be applied in either . . . .”<sup>235</sup> In principle, this put the Court’s imprimatur on the very kind of extraterritoriality that it had condemned as unconstitutional in *Allgeyer* and *Dodge*. Stone cited those cases without explicitly repudiating them, simply distinguishing them by conveniently (if opportunistically) noting that Palma’s employment contract had been made in California. But the message was clear. The post-Civil War proscription of the extraterritorial application of the forum’s statutory law had rested on the premise that only one state had legislative jurisdiction over any legal dispute. Stone had matter-of-factly disposed of that premise.

Stone went on to distinguish two constitutional arguments: (1) a due process challenge to the extraterritorial application of California law to the events in *Alaska Packers* and (2) a full faith and credit argument that the California tribunal must give effect to a defense based on Alaska’s statute. As to the first argument, Stone held not only that states are not barred from regulating extraterritorially, but also (building on contemporaneous developments in due process jurisprudence) that California’s effort to regulate in this case was rational and not capricious. In doing so, he endorsed the idea of a state’s “interest,” particularly its protective interest, in applying its law to a multistate dispute:

The probability is slight that injured workmen, once returned to California, would be able to retrace their steps to Alaska, and there successfully prosecute their claims for compensation. Without a remedy in California, they would be remediless, and there was the danger that they might become public charges, both matters of grave public concern to the state. California, therefore, had a *legitimate public interest in controlling and regulating this employer-employee relationship* in such fashion as to impose a liability upon the employer for an injury suffered by the employee, and in providing a remedy available to him in California. In the special circumstances disclosed, the state had *as great an interest in affording adequate protection to this class of its population as to employees injured within the state*.<sup>236</sup>

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234. *Alaska Packers*, 294 U.S. at 540.

235. *Id.* at 544.

236. *Id.* at 542–43 (emphasis added).

The language of “interest” would become a familiar feature of the interest analysis approach to choice of law championed by Brainerd Currie.

What interests? The circumstances in *Alaska Packers*—the brokering of migrant labor agreements in California in contemplation of employment in Alaska—did not allow Stone to lay stress on California’s interest in providing for her own domiciliaries: Palma was a resident of Mexico who had appeared only transiently in California. Stone was therefore compelled to rely on the state’s interest in avoiding public charges, a familiar if somewhat stylized argument in the police power tradition, in validating California’s power. He also observed that since *Alaska Packers* was gathering a coterie of workers in San Francisco (albeit through the services of a third party), the employer-employee relationship was subject to regulation by California. But after the Court’s decision in *Alaska Packers*, the most important such state interest in modern choice of law would become the state’s interest in legislating beneficently on behalf of its own residents—the concept that Brandeis had emphasized in his dissent in *Dodge*. In deciding *Allgeyer*, *Head*, and *Dodge*, the Court had declined to credit the notion that a state’s distinct interest in the welfare of its residents counted for anything in marking out the territorial limits on the state’s legislative power; if the Court took note of the regulated party’s citizenship at all in those cases, it was only to underscore the Court’s revulsion at the paternalism the state’s regulation seemed to represent. But in light of his own concurring opinion in *Clapper*, in which the concept of citizenship loomed large in his analysis of the scope of state legislative power, it is clear that one principle driving Stone’s due process analysis in *Alaska Packers* was the state’s right to protect its own.<sup>237</sup> Stone’s opinion in *Alaska Packers*, prefigured by Brandeis’s opinion in *Dodge* and the last sentence of his *Clapper* concurrence, thus had the effect of bringing residence or domicile to center stage of the analysis.

Simply acknowledging California’s constitutional power to apply its statute in *Alaska Packers* did not end the analysis: Stone then had to confront the employer’s argument that full faith and credit required application of *Alaska’s* statute as a defense. That is, one might acknowledge California’s constitutional authority to regulate yet conclude that, as a matter of constitutional law, it must yield to Alaska. It is here that Stone confronted more directly the reality that the cases involving multijurisdictional application of workers’ compensation statutes invariably involved two competing laws. To credit the defendant’s argument that it was

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237. Stone had said in *Clapper* that Vermont’s interest in the application of its law “derived from the fact that the status [employer and employee] is that of its citizens.” *Clapper*, 286 U.S. at 164 (Stone, J., concurring).

constitutionally entitled to recognition of the Alaska statute as a defense in the California proceeding was, by definition, to deny California the enforcement of *its* statute. The insurance cases like *Head* and *Dodge* had not raised this problem directly because the Court saw itself as vindicating the parties' right to contract with one another, not the sovereign prerogative of the state where the contract was made to have its policy enforced. Having cast the problem in *Alaska Packers* as one of vindicating the state's legitimate policy or interest—and having acknowledged that both California and Alaska had such a valid interest in application of its law—Stone proceeded to make the statement for which his *Alaska Packers* opinion is best known:

To the extent that California is required to give full faith and credit to the conflicting Alaska statute, it must be denied the right to apply in its own courts a statute of the state, lawfully enacted in pursuance of its domestic policy. . . . A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.<sup>238</sup>

That “absurd result” was the logical consequence of applying, to a case calling for a choice between two applicable laws, an analytic structure based on the notions that legislative jurisdiction extended only to the boundaries of the state and that only one state had authority to regulate a given event or transaction. With the decision in *Alaska Packers*, both of those formal notions had been laid to rest. Although the language of the Court in *Alaska Packers* continued to acknowledge only vaguely that the problem was, ultimately, one of “choice of law” or “conflict of laws,” its holding made inevitable the absorption of the extra-territoriality/legislative jurisdiction problem into the larger field of conflict of laws. When the *Erie* decision in 1938 dispelled the notion that common law rules are any less an exercise of the sovereign lawmaking authority of states than are statutes, the concept of legislative or “political” jurisdiction as a distinct category, at

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238. *Alaska Packers*, 294 U.S. at 545, 547. Douglas Laycock has argued that Stone's statement about the implications of the “rigid and literal enforcement” of the Full Faith and Credit Clause is a “straw man” and fails to confront the real implications of the Clause for choice of law. Laycock, *supra* note 41, at 295–96; see also Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1862–63 (2005). But Laycock's observation results from looking backward at *Alaska Packers* through a lens grounded in the debates over interest analysis in choice of law. As argued in the text, the new conceptual questions raised by the advent of pervasive state regulation circa 1935 made Stone's assertion quite apt, even if not adequate to resolve all the constitutional questions about choice of law that would eventually emerge.

least in the sense of providing rules of decision to be enforced in civil litigation, was all but dead. Four years later, Stone refined the *Alaska Packers* analysis in *Pacific Employers Insurance Co. v. Industrial Accident Commission*,<sup>239</sup> holding that the Court would not engage in a comparative assessment of state interests in determining the constitutionality of a state tribunal's application of its own statute; the presence of a cognizable state interest was, constitutionally speaking, a sufficient condition for the application of forum law. Not surprisingly, Brainerd Currie would later find in *Alaska Packers* and *Pacific Employers* solid support for a unilateralist approach to choice of law that strongly favored the application of forum law.<sup>240</sup>

Underlying the move from a strictly territorial approach in choice of law to one emphasizing state purposes and policies is a jurisprudential change that concerns more than just the importance of a state's interest in its own domiciliaries. Currie's approach is called "interest analysis," not "domicile analysis"; a variety of state interests, not just those defined in terms of party domicile, might be relevant to resolving conflicts, such as a state's interest in regulating behavior within its borders. Moreover, the Supreme Court, even as it has empowered state courts to apply forum law in almost all situations since the 1930s, has never held explicitly that a state's protective interest in its own citizens is, standing alone, a sufficient condition for the constitutionality of applying that state's law to a dispute. Nevertheless, it is clear that consideration of party domicile is now a ubiquitous feature of choice of law, and that this constitutes the most conspicuous change from how jurists regarded the problem of choice of law and legislative jurisdiction a century ago. The judicial provincialism licensed by this sea change in the law of conflicts, and a consequent invitation to forum shopping, are two reasons why some scholars have regretted the undemanding full faith and credit standard for the application of forum law that *Alaska Packers* and *Pacific Employers* today represent.<sup>241</sup>

It bears emphasis, however, that the Supreme Court had never, prior to the 1930s workers' compensation cases, considered the question of constitutional

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239. 306 U.S. 493 (1939).

240. Currie, *supra* note 15, at 19–30; see also Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 6 (1984) ("On the doctrinal level, the opinions in *Alaska Packers* and *Pacific Employers* promoted a reorientation of the conflict of laws.").

241. Laycock, *supra* note 41, at 310–15; Roosevelt, *supra* note 31, at 2507, 2514–15; see also John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981). It should be noted that Laycock and Roosevelt are more critical of certain Supreme Court cases validating the exorbitant application of forum law on the authority of *Alaska Packers* and *Pacific Employers*, such as *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), than they are of *Alaska Packers* and *Pacific Employers* themselves. See Laycock, *supra* note 41, at 257–58; Roosevelt, *supra* note 31, at 2506–07, 2514.

limitations on choice of law in the modern sense of determining which of two rules of decision, each with a plausible claim to application, must apply. Although a few scholars in the 1920s had begun to see that cases like *Head*, *Dodge*, and *Dick* had implications for conflict of laws,<sup>242</sup> and despite the tendency of modern conflicts scholars to assume that the basic concepts underlying the field before 1930 were largely the same as what they are today, it was not until the proliferation of the workers' compensation statutes, and the problems of extraterritoriality that they generated, that the Supreme Court made the connection. However one views the elevation in importance of domiciliary interests in choice of law that *Alaska Packers* and *Pacific Employers* ultimately licensed, the 1930s workers compensation decisions represented the Court's belated acknowledgment of the various interests justifying application of a state's rule of decision in a litigated case, even in the social domains (such as contract and personal injury) once thought to be the preserve of "private" law, founded on universal norms of custom and consent.

### CONCLUSION

Stone's opinion in *Alaska Packers* encapsulated the changes, both political and conceptual, that had facilitated a new approach to the problem of legislative jurisdiction in the United States. Extraterritorial application of statutorily created rules of decision had arisen only episodically before the proliferation of wrongful-death and employers' liability statutes in the post-Civil War period. Those legislative modifications of common law rules provoked jurists to posit strict territorial limitations on the exercise of a state's legislative or "political" jurisdiction. Meanwhile, the Supreme Court, between 1895 and 1930, erected a rigid, if ill-defined, constitutional barrier to application of the forum's antitorfeiture statutes to insurance contracts made beyond the territorial limits of the forum. In each of these jurisprudential streams, the domicile of one or both parties played little role; the state's traditional authority to legislate for the benefit of its residents—at least insofar as such legislation created rules of decision applicable in traditional common law litigation—lost its force when asserted with respect to events occurring beyond the boundaries of the state.

The widespread enactment of workers' compensation statutes helped to change all that. Those statutes not only produced a regular stream of disputes featuring multistate connections, as it became more common for employers to dispatch their employees to another state for work there; they epitomized the

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242. Dodd, *supra* note 200, at 553–54, 562; Ross, *supra* note 200, at 177–78, 180.

state's power to regulate specifically for the benefit (or regulation) of its own residents. Although both Brandeis and Stone adhered, each for his own purposes, to an archaic doctrinal emphasis on the status relationship that had been created between employer and employee, after *Clapper* and *Alaska Packers* it could no longer be denied that more than one state had legitimate political jurisdiction over a wide variety of events and disputes spanning more than one state. The notion that the territorial location of events alone could reliably define the limits of state power to regulate by means of rules of decision applicable in civil litigation was now dead.

In its place, a variety of state prerogatives, including the state's power to protect (or constrain) its own domiciliaries, had emerged. Moreover, with the *Erie* decision three years after *Alaska Packers*, any meaningful distinction between rules of decision created by statute and those created by the common law process ceased to have force. These developments moved an array of multistate legal problems that, prior to the 1930s, had been understood in terms of the territorial limits on state power into the domain of choice of law as we understand that concept today. With *Alaska Packers* and subsequent cases seemingly removing most of the constitutional constraints on the forum's application of its own statute, the conditions for an interest-oriented approach to choice of law—one that placed especial emphasis on domicile and on the presumptive legitimacy of applying forum law—were in place.

That (now-Chief) Justice Stone was dealing with cognate concerns when he authored the Court's opinion in *International Shoe v. Washington*,<sup>243</sup> establishing the minimum contacts standard for personal jurisdiction, seems clear. Among other things, *International Shoe*, like *Alaska Packers*, meant that it was no longer tenable to maintain that only one state possessed regulatory authority with respect to a particular situation; in the case of *International Shoe*, the subject was judicial rather than legislative jurisdiction. And, of course, after *International Shoe*, strict territorial limitations would no longer be the order of the day where personal jurisdiction is concerned. Drawing all the connections between *International Shoe* and *Alaska Packers*—as well as with other jurisdictional matters in the context of American federalism that occupied the Court during Stone's tenure—is a task for another time. Consideration of the history of legislative jurisdiction discussed in this Article, however, suggests that the Court's modern dismissal of the forum's interests in its own domiciliaries as a factor in the analysis of personal jurisdiction, and its revivification of a strict territorialism, border on atavism. At the very least, they betray an institutional forgetfulness about the social and

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243. 326 U.S. 310 (1945).

historical factors that led the Court in the 1930s to acknowledge that a state's legitimate interest in the application of its lawmaking authority extends outward, beyond its own borders, as well as inward, to the protection and regulation of its own citizens.