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THE IDEOLOGIES OF FORUM SHOPPING— WHY DOESN'T A CONSERVATIVE COURT PROTECT DEFENDANTS?

GEORGE D. BROWN*

In this Article, Professor George Brown identifies a seeming inconsistency in the Supreme Court's treatment of federal-state private law forum shopping and state-state private law forum shopping. Professor Brown notes that the Court has been explicit in its condemnation of federal-state forum shopping, but apparently accepts, and even encourages, state-state private law forum shopping. This is strange behavior from a conservative Court, since forum shopping threatens traditional conservative values such as the desire to curtail the proliferation of lawsuits and a general pro-defendant stance. Furthermore, Erie Railroad Co. v. Tompkins clearly rejected forum shopping. Professor Brown reconciles these seemingly contrary positions by explaining that Erie's basic rationale was adherence to federalism. If vigorous state regulation of private matters was Erie's objective, then rejection of federal-state private law forum shopping and acceptance of state-state forum shopping are consistent with the spirit and rationale of Erie. Professor Brown concludes that the apparent paradox created by the Court's position of forum shopping merely reflects the triumph of states' rights over defendants' rights and adherence to a federalism reading of Erie.

Erie was something more than an opinion which worried about "forum-shopping and avoidance of inequitable administration of the laws," although to be sure these were important elements of the decision. I have always regarded that decision as one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems. Erie recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority

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must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs.

—Justice John M. Harlan¹

I. INTRODUCTION

Whatever *Erie Railroad Co. v. Tompkins*² had to say about forum-shopping, there is plenty of it going on.³ Under current theories of personal jurisdiction plaintiffs are frequently free to sue in more than one state. State substantive laws differ, and under current choice of law theories litigants are often able to secure the benefits of forum selection. In cases with multi-state dimensions the result is a bonanza for plaintiffs, offering them an elaborate set of options that one writer recently described as a "forum shopping system."⁴ Judge J. Skelly Wright's earlier description of the practice as a "national legal pastime"⁵ seems, if anything, more accurate today than when he offered it.

This Article focuses on the role of the United States Supreme Court in establishing the parameters of this system. The Court must frequently deal with forum-shopping in a number of contexts other than shopping between states. When confronted with shopping between the state and federal systems, the Court exhibits strong opposition. The best-known cases are those that deal with shopping by public law plaintiffs. Decisions on *Younger* abstention,⁶ federal habeas corpus,⁷ and the Eleventh

1. *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring) (citation and footnote omitted). For a discussion of *Erie* see *infra* text accompanying notes 37-97.

2. 304 U.S. 64 (1938).

3. Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 2 (1991); Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 553 (1989).

4. Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 68 (1991).

5. Judge J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 333 (1967).

6. *Younger v. Harris*, 401 U.S. 37 (1971). *Younger* involved an attempt by an indicted state defendant to secure a federal injunction against the state proceeding on the ground that the underlying state statute violated the Federal Constitution. The Court held that federal judicial intervention of this type would run afoul of equity doctrine and the principles of federalism. *Id.* at 43-47. The doctrine of *Younger* abstention refers generally to a prohibition on federal court intervention in pending state proceedings when those proceedings involve an important state interest, the person seeking federal relief is a party to the state proceedings, and the federal question presented can be fully considered in the state courts.

7. *E.g.*, *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1721 (1992) (limiting right to a federal evidentiary hearing only to only those defendants who can show either: (1) cause for failure to develop the facts in state court proceedings and actual prejudice resulting from that failure, or (2) that a fundamental miscarriage of justice would result); *Colman v. Thompson*, 111 S. Ct. 2546, 2564-65 (1991) (holding that comity and federalism concerns prohibit federal habeas review of a state court denial of a prisoner's constitutional claim if the state court's decision rests on a state procedural default independent of the federal question).

Amendment⁸ represent strong, albeit implicit condemnations of federal-state public law forum-shopping. In dealing with federal-state private law forum-shopping the Court is explicit in its condemnation.⁹ In the face of apparent state-state private law forum-shopping, however, major decisions such as *Sun Oil Co. v. Wortman*¹⁰ seem to accept the practice, perhaps even to encourage it. Is the Court hopelessly inconsistent, or does it perceive a distinction between good forum-shopping and bad?

Anything other than a broad condemnation seems strange from a Court generally viewed as conservative. Forum-shopping threatens such conservative values as the desire to avoid the proliferation of lawsuits, a distrust of manipulation of the system to achieve substantive ends (at least by plaintiffs), and a general pro-defendant tilt. The principal victims of state-state forum-shopping are interstate corporate entities,¹¹ an interest group that the Court might be expected to favor. Moreover, forum-shopping runs contrary to *Erie*. That case was a blatant example of successful federal-state forum-shopping by a private law plaintiff, until Justice Brandeis thwarted the maneuver, overruling the long line of cases that permitted it.¹² Everyone knows what the Court held in *Erie*, but analysts differ sharply as to its fundamental rationale.¹³ If the emphasis is on fairness, the spirit of *Erie* may well carry over to condemn state-state private law forum-shopping. If vigorous state regulation of private law matters is the goal, perhaps state forum-shopping serves that goal.

This Article emphasizes the federalism reading of *Erie* and develops the thesis that this interpretation helps explain why the Court is opposed to forum-shopping in the federal-state public and private law contexts while seemingly supportive of the state-state private law variant. In all three contexts the ultimate winners are the states and their courts. It is

8. *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (holding that the Eleventh Amendment generally bars federal courts from awarding retroactive monetary relief against states).

9. The Court's most frequent practice in dealing with the matter is to refer to the twin aims of *Erie* as the avoidance of forum-shopping and the inequitable administration of the laws. *E.g.*, *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 n.6 (1988); *id.* at 33 (Scalia, J., dissenting.)

10. 486 U.S. 717 (1988). For a discussion of *Sun Oil*, see *infra* text accompanying notes 338-49.

11. Juenger, *supra* note 3, at 557-58 ("[L]arge enterprises began to feel the pull. Because they do business nationwide, such companies have contacts with numerous states, which broadens plaintiffs' options considerably."); Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1691 (1990) ("[F]orum shopping seems likely to be available primarily in cases in which the defendants are large entities with contacts in many forums.").

12. See *Erie R.R. v. Tompkins*, 304 U.S. 64, 74-78 (1938) (discussing the political and social defects of the *Swift v. Tyson* doctrine and the discrimination that resulted from it).

13. See Earl M. Maltz, *Choice of Forum and Choice of Law in the Federal Courts: A Reconsideration of Erie Principles*, 79 KY. L.J. 231, 237-39 (1990-91).

hardly surprising that with a conservative Court this would be the end result. The Article also explores alternative and possibly complementary explanations for the Court's actions. Part of the answer lies in its reluctance to enter the seemingly endless swamp of conflict of laws disputes,¹⁴ as well as a general aversion to expansive interpretation of constitutional provisions. There is, however, an alternative explanation that seems out of character with most of what we know about the Burger-Rehnquist Court: the view that the Court accepts private law forum-shopping because it favors the results of pro-plaintiff states.¹⁵ It is unlikely that a conservative Court favors these results, and even more unlikely that it is a willing participant in a quasi-nationalized system of private law to achieve such results. While it is still necessary to explain the pro-forum-shopping paradox, federalism offers a better explanation than another paradox.

The Article's analysis of the Court's position on state-state forum-shopping has important implications for the field of conflict of laws, in particular for the freedom of forum states to utilize a variety of approaches which permit them to choose their own law. Understanding how the Court's position evolved suggests that the Court is likely to remain there. Because of the Court's strong attachment to a vigorous, diverse federalism, it will probably neither abandon the permissive approach of cases like *Sun Oil* and *Allstate Insurance Co. v. Hague*¹⁶ nor develop alternative approaches under which state choice of law policies are seriously threatened. Overruling *Klaxon Co. v. Stentor Electric Manufacturing Co.*¹⁷ and allowing the lower federal courts to create a federal common law of conflicts, for example, would run counter to the ideal of state primacy across the entire domain of private law. Stricter constitutional standards—*Allstate* with teeth—would push the Supreme Court into declaring the best result in conflict cases. Here again an *Erie*-based federalism points toward a hands-off attitude. It is unlikely that Congress will act to provide a national solution.¹⁸ Thus, the forum-shopping debate will remain the province of state courts and academic commentators.

14. See Gottesman, *supra* note 3, at 2-3 n.5.

15. See Weinberg, *supra* note 4, at 68-69. This seems to be the implication of Professor Weinberg's article, in which she discusses the Supreme Court's role in "shoring up" the forum-shopping system. *Id.* at 68. In her other writings, however, to which she cites at this point, she does not directly advance this hypothesis. See *id.* at 69 n.87.

16. 449 U.S. 302 (1981). For a discussion of *Allstate*, see *infra* text accompanying notes 314-28.

17. 313 U.S. 487 (1941) (holding that in diversity cases, federal courts must decide questions of conflicts of law according to the rules prevailing in the state in which they sit).

18. See *infra* text accompanying notes 425-51.

Part II of the Article advances a definition of forum-shopping that focuses on the plaintiff's choice of a jurisdiction for substantive law advantages, and develops an analysis of *Erie* as a case with both pro- and anti-forum-shopping dimensions. Part III focuses on forum-shopping between state courts, reviews the debate over this practice, and explores at some length the emerging view that forum-shopping advances important goals within the legal system. Part IV is an inquiry into the ideology of litigation. The focus is on the conservative position and on whether conservative animosity toward public law plaintiffs extends to private law litigation. To the extent this tilt does carry over, the analysis indicates that conservatives ought to disapprove strongly of forum-shopping, a quintessential plaintiff's maneuver. Part V considers the Burger-Rehnquist Court's contribution to this area: articulation of a number of positions that permit state-state forum-shopping to flourish. The thesis is developed that this seeming paradox reflects a triumph of states' rights over defendants' rights. The Court, I contend, adheres to an *Erie*-based vision of federalism in which the states retain the primary role in private law. They are encouraged to assert their regulatory authority aggressively. The result is a highly diverse legal climate in which forum-shopping is not just an inevitable by-product but also a sign that the system is working as it should, in ways that are quite consistent with *Erie*.

II. *ERIE* AND FORUM-SHOPPING—A FUNDAMENTAL YET AMBIVALENT DECISION

A. *Defining Forum-Shopping—The Ferens Paradigm*

The concept of "forum-shopping" is exceedingly difficult to define because it encompasses a broad range of actions by plaintiffs and defendants.¹⁹ The plaintiff makes the initial forum choice, but the defendant may be able to trump it through such devices as removal from state to federal court,²⁰ transfer from one federal court to another,²¹ or dismissal from a state court on *forum non conveniens* grounds.²² A party may seek to derive advantage not only from the substantive law, but also from the

19. See Note, *supra* note 11, at 1679 ("[T]he methods and permutations of forum shopping are almost limitless.").

20. 28 U.S.C. § 1441 (1988) (authorizing removal to federal courts of cases within their original jurisdiction).

21. 28 U.S.C. § 1404(a) (1988) (authorizing transfer of cases within federal court system). The dismissal of a case on the *forum non conveniens* ground is a device primarily used in state courts.

22. The current *forum non conveniens* doctrine is the subject of much debate. See, e.g., *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 678-79 (Tex. 1990) (denying *forum non conveniens* dismissal on grounds that legislature statutorily abolished doctrine in wrongful death and personal injury actions arising out of incidents in foreign countries or states).

attitudes of different judges and juries, the length of court dockets, and the geographical convenience to itself and its adversary.²³

This Article deals with forum choices by private law plaintiffs to obtain favorable substantive law. The focus is on law shopping because the availability of more than one law to govern a large number of disputes with no international aspects is a striking aspect of our federal legal system. It poses difficult doctrinal problems since evaluating law shopping forces us to balance important values of party fairness against possibly competing values of federalism. The focus on plaintiffs reflects their first strike advantage as the initiators of litigation. Even when defendants can thwart the choice of forum they may not be able to alter the plaintiff's initial choice of law.²⁴ Moreover, it is the plaintiff's ability to subject the defendant to more than one governing law—the evil against which Justice Harlan cautioned in *Hanna*²⁵—that poses the problem of forum-shopping in its starkest terms.

Even thus restricted, forum-shopping remains difficult to define. A plaintiff may choose a forum that happens to have favorable law for reasons unrelated to that law. In other cases we might expect the plaintiff to sue in a particular forum regardless of the content of its law. The notion with which this Article deals is that of seeking substantive law advantages that are somehow unfair. I will use the following, admittedly loose definition: A plaintiff engages in forum-shopping when she brings suit in a particular jurisdiction when other forums are equally or more valid given the location of the parties and the transaction or occurrence, and the choice seems motivated primarily by a desire for favorable law.

*Ferens v. John Deere, Inc.*²⁶ is a recent illustration of this kind of forum-shopping. Plaintiff was injured while using one of defendant's machines at his farm in Pennsylvania. He and his wife did not sue until the Pennsylvania statute of limitations for tort claims had expired. While they were still able to sue in Pennsylvania under an alternative theory, they (through their lawyer) apparently viewed the tort claim as the heart of the case. They brought a tort suit against Deere in a federal district court in Mississippi, whose state's longer statute of limitations did not bar the claim.²⁷ They then moved pursuant to section 1404 of Title 28²⁸

23. Note, *supra* note 11, at 1678-79.

24. Under the rule laid out in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), when the defendant in a diversity case initiates a transfer under 28 U.S.C. § 1404(a) (1988), the transferee court is to apply the state law which would have been applied by the transferor court. *Van Dusen*, 376 U.S. at 639.

25. *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

26. 494 U.S. 516 (1990).

27. *Id.* at 519-20.

to transfer the tort claim to a federal court in Pennsylvania.

The trip to Mississippi is a clear example of forum-shopping under most definitions, including the one offered here. The plaintiffs chose a forum that even they regarded as inappropriate in order to secure the benefits of its law. The case is particularly striking because the vagaries of the system gave them a double bonus: Mississippi law in a Pennsylvania (federal) court. Outrage over the maneuver back to Pennsylvania—dubbed by Justice Scalia the “file-and-transfer ploy”²⁹—should not obscure the key element of the case: the fact that the legal system allowed the plaintiffs to shop for Mississippi law, or some other favorable law,³⁰ in the first place. *Ferens* is obviously a paradigm; there will be other cases where the definition works less well. When the plaintiff sues in his home state, for example, determining whether forum-shopping has occurred is problematic. It may be impossible to tell whether the plaintiff shopped for law given the many other reasons for suing there. Even if he did, the system may regard suing at home as a special privilege which plaintiffs generally should enjoy.³¹ Suing the defendant in *his* home state³² is also problematic, given the argument that defendants can have no quarrel with being subjected to the legal regime they have chosen.³³ Despite the gray areas, enough relatively clear cases remain to indicate that forum-shopping merits discussion.³⁴ If anything, the phenomenon appears to be occurring more frequently.³⁵ Anyone who has survived the first year of law school and grappled with *Erie*³⁶ is likely to wonder how this can possibly be so.

28. In order to secure the transfer the plaintiffs had to argue that moving the case from their chosen forum satisfied the statutory standard which invokes “the convenience of parties and witnesses, [and] the interest of justice.” 28 U.S.C. § 1404(a) (1988).

29. *Ferens*, 494 U.S. at 538 (Scalia, J., dissenting).

30. *Id.* at 527.

31. See *Gulf Oil Corp. v. Gilbert Storage & Transfer*, 330 U.S. 501, 507-09 (1947) (discussing relationship between plaintiff's privilege of choosing forum and motion to dismiss on grounds of *forum non conveniens*).

32. *E.g.*, *Johnson v. Spider Staging Corp.*, 87 Wash. 2d 577, 583, 555 P.2d 997, 1002-03 (1976) (allowing plaintiff to take advantage of a more favorable law in a product liability suit by bringing suit in Washington, defendant's home state, concerning an accident that took place in Kansas).

33. *Tomlin v. Boeing Co.*, 650 F.2d 1065, 1072 (9th Cir. 1981).

34. Indeed, as noted, Professor Weinberg describes the current situation as a “forum shopping system.” See *supra* note 4 and accompanying text.

35. See Gottesman, *supra* note 3, at 1; Juenger, *supra* note 3, at 553-54.

36. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

B. *Erie*: A Case of Forum-Shopping

Despite Justice Harlan's observations in *Hanna*,³⁷ the view is often advanced that *Erie* is a case that worried about forum-shopping.³⁸ The facts are a classic example of the practice as defined above. Tompkins was injured by a train while he walked along the Erie's tracks in Pennsylvania. Under the law of Pennsylvania he was a trespasser to whom the railroad owed only a minimal duty of care. Other states, however, would treat the railroad as owing him a duty of ordinary care. Under the rule of *Swift v. Tyson*,³⁹ a federal court could apply what it viewed as the most appropriate principle of "general law" without regard to the law of any particular state. Under these circumstances Tompkins obviously did not wish to sue in a Pennsylvania state court. Suit in any other state would have been risky because that court would probably apply the law of the place of injury under then-accepted principles of choice of law.⁴⁰ Thus, plaintiff's best chance to invoke favorable law was in a federal trial court.⁴¹ He took that chance, obtained the favorable law, and ended up with a verdict of \$30,000.00. The Supreme Court, however, seized the case as the vehicle to overrule *Swift*, thus ending this particular brand of forum-shopping.

Although *Erie* is a landmark opinion,⁴² its basis is far from clear. Justice Brandeis, for the majority,⁴³ began by accepting the argument that *Swift* rested on "erroneous" statutory construction and that the Rules of Decision Act required federal courts generally to follow state common-law rules.⁴⁴ The next section of the opinion elaborated on the undesirability of the *Swift* rule by discussing the "mischievous results"⁴⁵

37. Indeed, Justice Harlan noted that forum-shopping and inequitable administration of the laws was a part of *Erie*. *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

38. The Supreme Court's formulation is that the twin aims of *Erie* were the avoidance of forum-shopping and inequitable administration of the laws. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 n.6 (1988); *id.* at 33 (Scalia, J., dissenting); see e.g., *Walker v. Armco Steel Corp.*, 446 U.S. 740, 744-45 (1980).

39. 41 U.S. (16 Pet.) 1 (1842).

40. Under the rule of the *First Restatement of Conflicts*, it was widely accepted that the law of the place of the accident governed. *RESTATEMENT (FIRST) OF CONFLICT OF LAWS* § 378 (1934).

41. JOHN J. COUND ET AL., *CIVIL PROCEDURE* 346-47 (5th ed. 1989) (casebook) (discussing forum-shopping aspects of *Erie*).

42. E.g., Donald L. Doernberg, *Juridical Chameleons in the "New Erie" Canal*, 1990 UTAH L. REV. 759, 761 n.16; Richard D. Freer, *Erie's Midlife Crisis*, 63 TUL. L. REV. 1087, 1088 (1989).

43. Of the eight participating Justices, five joined in the majority, one concurred, and two dissented.

44. *Erie R.R. v. Tompkins*, 304 U.S. 64, 72-73 (1938).

45. *Id.* at 74-77. The opinion noted that rights varied according to the court in which an

to which it had led. The opinion might have stopped there, but Brandeis went further and declared the rule of *Swift* unconstitutional. In the oft-cited third section of the opinion, he stated:

There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.⁴⁶

Erie's ambiguities are several and obvious. If the decision rests on statutory grounds, the constitutional portion may be unnecessary dictum.⁴⁷ Even if it is constitutionally based, the Court confused the matter by failing to cite directly any provision of the Constitution and by placing some of the apparent constitutional analysis in the portion of the opinion that rests on other grounds. One can find in the opinion possible invocations of the doctrines of due process, equal protection, separation of powers, and federalism.

There is a tendency in recent scholarship to downgrade *Erie's* importance. The opinion has been treated as essentially ambiguous,⁴⁸ largely a matter of statutory construction,⁴⁹ and a statement of the proposition that constitutional limits imposed on the national government extend to its courts.⁵⁰ The notion that the case is not of fundamental importance may also reflect a perception that the so-called "*Erie* problem" of the applicability of state and federal procedural rules in diversity is not a matter of fundamental importance.⁵¹ Perhaps *Erie* is little more than a case that worried about forum-shopping. Even so, it is important to understand why the Court thought the practice was bad, perhaps un-

action was brought and that "the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen." *Id.* at 75.

46. *Id.* at 78.

47. See *id.* at 82 (Butler, J., dissenting) ("No constitutional question was suggested or argued below or here.").

48. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 927 (1986).

49. See MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER* 29-46 (1991). Professor Redish views the issue of federal common law as governed entirely by the Rules of Decision Act, 28 U.S.C. § 1652 (1988). Under this view *Erie's* importance stems from its correction of the earlier, erroneous view that federal courts could fashion federal common law. Professor Redish seems to attach little, if any, importance to the constitutional dimensions of *Erie*.

50. Doernberg, *supra* note 42, at 796-97.

51. Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 828 (1989) (referring to the issue of the applicability of state or federal procedural rules in diversity as a "dreary little side issue").

constitutional, especially given the fact that so much forum-shopping has survived *Erie*. Moreover, the notion that the case is a lot more than a case concerned about forum-shopping will not go away. Like Justice Harlan, an array of commentators continue to treat it as a fundamental statement about the American legal system.⁵² At this point it seems desirable to focus on the important principles that underlie *Erie* and to examine how they bear on forum-shopping.

C. *Erie and Fundamental Values*

In recent years there has been considerable interest among federal courts scholars in *Erie* as a separation of powers case.⁵³ The principal question has been whether *Erie* stands as a bar to the making of common law by *federal* (as opposed to state) courts, and whether that prohibition is grounded in the doctrine of separation of powers.⁵⁴ The third section of the opinion begins as follows: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state."⁵⁵ Taken literally, the quotation indicates that federal courts do not possess any lawmaking power, a position buttressed by Article I of the Constitution's conferral of the legislative power upon Congress.⁵⁶ Some Supreme Court Justices and academic commentators seem to follow this route, leading to debate over a possible "New *Erie* Doctrine" barring substantive lawmaking by federal courts.⁵⁷ Counter arguments abound, of course, including the undeniable observation that the post-*Erie* Supreme Court has explicitly fashioned federal common law in several important decisions.⁵⁸

This interpretation of *Erie* is interesting, particularly to federal courts teachers,⁵⁹ but the main debate over *Erie*'s fundamental basis has

52. See, e.g., Akhil Amar, Book Review, 102 HARV. L. REV. 688, 694 (1989) (reviewing HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (3d ed. 1988)).

53. In recent years a body of thought called "New *Erie*" has emerged in which *Erie* is interpreted not only as a case about federalism, but also as a separation of powers case requiring federal courts to refrain from making common law. See Doernberg, *supra* note 42, at 764-70.

54. *Id.* For a general discussion of the separation of powers aspect of the problem, see Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985).

55. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

56. U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.").

57. See Doernberg, *supra* note 42, at 764-70.

58. E.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-27 (1964) (applying federal common law of international relation); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (applying federal common law governing proprietary interests of United States).

59. The issue of federal common law was the subject of papers presented at the 1991

occurred between those who view it as primarily an individual rights-fairness decision and those who view it as grounded primarily in federalism.⁶⁰ The best-known elaboration of the fairness rationale is Professor John Ely's celebrated article *The Irrepressible Myth of Erie*.⁶¹ Ely saw the Court as concerned with "the unfairness of subjecting a person involved in litigation with a citizen of a different state to a body of law different from that which applies when his next door neighbor is involved in similar litigation with a co-citizen."⁶² The Brandeis opinion does refer several times to the "discrimination"⁶³ that the existence of federal general law under *Swift* engendered. For Ely the problem is the conferral of unfair advantage on those litigants who can obtain federal jurisdiction.

Ely discusses, but rejects, a somewhat different individual rights reading of *Erie* that focuses on the unfairness to defendants of being subject to different bodies of law depending on whether a resident or nonresident invoking diversity files suit.⁶⁴ This is the "conflicting orders" rationale to which Justice Harlan referred in *Hanna*.⁶⁵ Ely rebuts it by contending that potential defendants can usually manage to comply with both orders by adhering to the more demanding one⁶⁶ and by noting that this sort of thing occurs all the time under modern conflicts thinking.⁶⁷

Certainly concerns of individual rights and fairness play a role in *Erie*. Judging by its language, however, the constitutional value underlying the opinion is federalism. Brandeis invokes the "autonomy and independence of the States"⁶⁸ and asserts that under *Swift* the federal courts "invaded rights which in our opinion are reserved by the Constitution to the several States."⁶⁹ The Tenth Amendment is at the core of the opinion.⁷⁰ Indeed, although Ely downplays the federalism side of

meeting of the Federal Courts Section of The Association of American Law Schools, published in 12 PACE L. REV. 227 (1992).

60. Maltz, *supra* note 13, at 237-39 (discussing arguments advanced by the two sides).

61. John H. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

62. *Id.* at 712; see Peter Westin & Jeffrey S. Lehman, *Is There Life For Erie After the Death of Diversity?*, 78 MICH L. REV. 311, 379 (1980) (discussing fairness rationale of *Erie*).

63. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74-76 (1938).

64. Ely, *supra* note 61, at 712-13.

65. *Id.*; see *Hanna v. Plumer*, 380 U.S. 460, 474-78 (1965) (Harlan, J., concurring). The term "conflicting orders" is Professor Ely's.

66. Ely, *supra* note 61, at 711.

67. *Id.* Modern conflicts theories permit the law of more than one state to apply in a wide variety of interstate transactions. See *infra* text accompanying notes 152-61.

68. *Erie*, 304 U.S. at 78 (quoting *Baltimore & Ohio Ry. Co. v. Baugh*, 149 U.S. 368, 401 (1893)).

69. *Id.* at 80.

70. "The powers not delegated to the United States by the Constitution, nor prohibited by

Erie,⁷¹ other writers view this aspect of *Erie* as important. Professors Earl Maltz and Alan Stein, for example, treat the case as an affirmation of the limited role of the national government.⁷² Under this view the victim in the trial court was neither Congress nor the railroad (or analogous plaintiffs who could not derive similar windfalls); it was the state governments, whose sovereignty over matters of general private law had been infringed. In sum, one can find in *Erie* application of the important values of separation of powers, fairness, and federalism. Perhaps the decision contains elements of all three, and its ambiguities add to its mystique.⁷³ If we treat these values separately, at least for purposes of analysis, we can now examine the broader bearing of *Erie* on forum-shopping.

D. *Erie and Forum-Shopping*

Is *Erie* a general condemnation of *all* forms of forum-shopping? At least one commentator has argued that it is.⁷⁴ The same reading is implicit in Justice Harlan's views quoted at the beginning of this Article.⁷⁵ Whenever a plaintiff can subject a defendant to two different sets of substantive laws there is a potential for uncertainty on the latter's part. But a look at what goes on in our legal system indicates that one must distinguish between federal-state forum-shopping and state-state forum-shopping. Compare the actions of *Tompkins* and *Ferens*. Each sought to obtain the application of a favorable law; each went to federal court. *Tompkins* failed because the federal court lacked "power" to provide it. *Ferens* and his wife succeeded because the federal courts of the state in which they sued were obliged to "replicate"⁷⁶ the forum-shopping opportunities that state made available.

Indeed, it is *Erie* and its successors, particularly *Klaxon Co. v. Stentor Electric Manufacturing Co.*,⁷⁷ that made the whole ploy possible. *Erie* tells the Mississippi federal court it cannot fashion federal law.

it to the states, are reserved to the States respectively, or to the people." U.S. CONST. amend, X.

71. Ely, *supra* note 61, at 704 (suggesting that *Erie* discusses the Constitution and federalism only to "demonstrate that its function in '*Erie* concepts' is no different from its function respecting other issues of federal powers").

72. Maltz, *supra* note 13, at 239-42; Allan R. Stein, *Erie and Court Access*, 100 YALE L. J. 1935, 1940-41 (1991).

73. See Amar, *supra* note 52, at 694-702.

74. Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 641 (1974).

75. See *supra* note 1 and accompanying text.

76. *Ferens v. John Deere Co.*, 494 U.S. 516, 527 (1990).

77. 313 U.S. 487, 494-98 (1941); see *supra* note 17.

Klaxon tells that court it must follow whatever choice of law rules Mississippi would utilize. It is obviously necessary to reconsider the fundamental principles of *Erie* to determine why the distinction between impermissible and permissible forum-shopping is so strong. If we focus on the separation of powers reading, the answer is easy. Federal-state forum-shopping is bad because the plaintiff seeks to have the federal court act beyond its powers. This reading has little or no bearing on the state-state problem. Even if the state law plaintiff, as in *Ferens*, goes to a federal court, he is only asking it to do what a court of that state could do. *Erie*'s prohibition on making federal common law simply does not extend to the application of state common law in diversity cases.

The fairness-individual rights reading of *Erie* appears, at first glance, to support a general anti-forum-shopping stance. The obvious argument is Justice Harlan's "conflicting orders" contention with its overtones of due process.⁷⁸ If defendants should not be put in this position it cannot make much difference whether the alternative set of orders comes from the federal government or from a second state. Perhaps, however, the whole conflicting orders danger is, in Ely's phrase, "overdrawn"⁷⁹ because defendants can anticipate it. More importantly, the post-*Erie* Supreme Court has repeatedly acted on the assumption that state-state forum-shopping is not condemned by *Erie*. What is surprising is the relative lack of elaboration on why this is so; evidently the Court finds no problem in this particular conflicting orders situation.

What about the fairness variant of the individual rights reading? Does it bear on state-state forum-shopping? Suppose that Tompkins had been accompanied by Smith and that her citizenship prevented her from suing the railroad in federal court. It does seem unfair that he gets access to a second body of law and she does not. Giving him that bonus is not essential to the purpose of the diversity jurisdiction—providing a neutral forum for litigants who might need it.⁸⁰ This reading of *Erie* has no bearing on state-state forum-shopping as long as all litigants can forum-shop in all states on an equal basis. This was true for the *Ferens*. They had the same statute of limitations to which any plaintiff in Mississippi would have been subject.

The issue becomes increasingly complicated, and the fairness reading of *Erie* seems more on point if some plaintiffs have a different law applied than others based on their citizenship. This is a frequent occur-

78. In *Erie* Justice Brandeis noted that the rule of *Swift* had led to uncertainty about the primary law. *Erie R.R. v. Tompkins*, 304 U.S. 64, 77 (1938); see Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 505-06 (1954).

79. Ely, *supra* note 61, at 711.

80. *Id.* at 713.

rence under modern choice of law theories. A key variable is the presumed interests of different states in a transaction or occurrence with multistate elements.⁸¹ Thus, if the driver in an accident injures two guests from states with different statutes on the rights of automobile guests, one of the plaintiffs may be able to shop for a forum that will give more favorable law based on her citizenship.⁸² Is this hypothetical any less wrong than the *Tompkins-Smith* hypothetical? Arguably the answer is yes because different citizenship brings about a difference in applicable state law. A goal of the federal system is to leave private law largely in state hands. Persons who do not like the law of their own state can act to change it.⁸³ Federal common law applied on a rolling basis depending on the citizenship pattern of a particular case lacks this element of direct political connection. Everyone is a federal citizen, but that is not the variable that triggers federal law. (Perhaps coalitions of interest groups with views on federal common law would emerge over time, but the process would be highly diffuse at best.)

In the guest hypothetical, the guest from the pro-plaintiff state would seek to sue in that state or in one that would follow its law. The other guest would try to shop for a state that would disregard the limits imposed by his law, perhaps on grounds of public policy.⁸⁴ State citizenship may play a role in determining what opportunities for forum-shopping exist, but whatever *Erie* had to say about fairness does not seem to condemn this state of affairs.⁸⁵ *Erie* is about fairness only to the extent that *Tompkins* sought a law that bore no rational relationship to his citizenship—a classic violation of equal protection principles. The same is true of any plaintiff utilizing diversity jurisdiction to obtain a federal rule of law. This suggests that the real problem with the law *Tompkins* sought is that it would have come from a sovereign with no justification for making it. In other words, *Erie* is primarily about federal versus state lawmaking, and thus the fairness reading loses much of its force. One can make this point another way by supposing that the post-*Swift* Court

81. Gottesman, *supra* note 3, at 5-6.

82. See, e.g., *Tooker v. Lopez*, 24 N.Y.2d 569, 580, 249 N.E.2d 394, 400-01, 301 N.Y.S.2d 519, 528 (1969) (discussing possibility that two guests might each be subject to a different law).

83. *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 199-200, 480 N.E.2d 679, 686, 491 N.Y.S.2d 90, 96-97 (1985) ("[P]laintiffs . . . have chosen to identify themselves" with the law of the state of which they are citizens).

84. *Id.* at 202-04, 480 N.E.2d at 685-87, 491 N.Y.S.2d at 98-100 (noting that a forum may refuse to apply an otherwise controlling foreign law if it is against the public policy of the forum state).

85. Professor Ely has raised the question whether conflicts rules favoring a state's own residents over those of other states violate the values expressed in the Privileges and Immunities Clause. John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 191 (1981).

had opened the federal courts to all general law claimants regardless of citizenship. This practice could not be attacked on fairness grounds—everyone would have access to this law. The thrust of *Erie* is that no one should have access to it.

Analysis of *Erie* as a federalism case is slightly complicated by uncertainty over whether the Court viewed the subject of that case as beyond the power of the national government or only beyond the power of its courts. If the subject is viewed as the tort duties of an interstate railroad then congressional power seems to exist.⁸⁶ Perhaps the Court viewed federal judicial power as not co-extensive with that of Congress.⁸⁷ Perhaps the Court viewed the matter as a question of federal power over the domain of general law.⁸⁸ Either way, the denial of federal judicial power to fashion common law furthers important federalism values (as well as illustrating how closely national separation of powers is linked to those values).⁸⁹ The states retain their primary role over private law. Their courts are of equal status with their legislatures, and the federal courts—which make law more quickly and easily than the federal legislature⁹⁰—cannot displace them as private law articulators.

Viewed as a federalism decision, *Erie*'s condemnation of federal-state forum-shopping is essential to furthering Tenth Amendment values and preserving the Hart and Wechsler concept of the "interstitial" nature of federal law.⁹¹ *Erie* may not be applicable to state-state forum-shopping at all. In *Guaranty Trust Co. v. York*,⁹² Justice Frankfurter said that "[t]he operation of a double system of conflicting laws in the same state is plainly hostile to the reign of law."⁹³ It is *Erie*'s version of federalism that makes this so, not any other emanations from that case about the rule of law. In sum, none of the three readings of *Erie* as a statement of fundamental values appears to say much about state-state forum-shop-

86. Ely, *supra* note 61, at 701 n.51.

87. Doernberg, *supra* note 42, at 796-97.

88. Ely, *supra* note 61, at 704; see Weinberg, *supra* note 51, at 812.

89. Professor Redish has described federalism and separation of powers as "inextricably intertwined." REDISH, *supra* note 49, at 30-31. Each doctrine serves to limit the scope of the national government. Federalism disperses power to the states, while separation of power restrains the capacity of the national government to act in a sweeping manner.

90. George D. Brown, *Federal Common Law and The Role of the Federal Courts in Private Law Adjudication—A (New) Erie Problem?*, 12 PACE L. REV. 229, 235 (1992).

91. PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 533-34 (3d ed. 1988). The current edition of this classic casebook preserves the original authors' view of the legal system as one in which state law is predominant and federal law serves mainly to fill in gaps.

92. 326 U.S. 99 (1945). *Guaranty Trust* rejected the notion of a separate set of federal equity principles applicable in diversity cases.

93. *Id.* at 112.

ping. One can infer some condemnation from the defendant's rights component of the fairness-individual rights reading, but it seems the weakest link of that overall view of the case. Most arguments based on defendants' expectations are weakened by the general circularity problem that defendants can legitimately be held to duties that are imposed legitimately on them. The railroad could expect to be sued in federal court by plaintiffs seeking the benefit of the general law. What made that law illegitimate was not surprise to the defendant, but the command of a sovereign organ not authorized to make it. As for the fairness component of the fairness-individual rights reading, I have argued above that it has little bearing on state-state forum-shopping and that to a large extent it collapses into the federalism reading.

Analysis might stop here, resting on the notion that *Erie* is a strong condemnation of federal-state forum-shopping, but is essentially neutral about the state-state variant. I would like to explore briefly the possibility that *Erie* actually favors this kind of forum-shopping. *Erie* envisages a legal system in which the states play the primary role in developing private law, and their courts are equal partners with their legislatures in that development. State courts may be better suited for this role than federal courts because they hear a broader range of disputes and because their differing modes of organization—elected versus appointed judges, for example—encourage nonuniform solutions to similar problems. Thus, American common law will often vary from state to state, reflecting both the differences in state values and the different organs used to express those values. These differences comprise one of the hallmarks of our system. As Brilmayer and Lee contend, we expect states to be different.⁹⁴ These differences help to ensure that states play their laboratory role in bringing about growth and change in the law. Our federated common-law system—ensured by *Erie*—is far more dynamic than one in which large chunks of common law come from the national courts, particularly if that brand of law is binding on all jurisdictions under the Supremacy Clause.⁹⁵

Does forum-shopping reinforce this system? Theoretical arguments can be advanced that it reduces the pressure for national solutions by giving highly motivated plaintiffs alternative channels of recourse, and that change is accelerated because these plaintiffs push vanguard states

94. Lea Brilmayer & Ronald D. Lee, *State Sovereignty and the Two Faces of Federalism: A Comparative Study of Federal Jurisdiction and the Conflict of Laws*, 60 NOTRE DAME L. REV. 833, 852 (1985).

95. See U.S. CONST. art. VI; Field, *supra* note 48, at 897 ("[T]he application of federal common law should not in theory differ according to whether a state or federal court has jurisdiction over a dispute.").

even further in a pro-plaintiff direction. However, this may be a wash, both because pushing some states too far in this direction may lead to calls for pro-defendant national solutions, and because if these plaintiffs could not go to other forums they would direct their energies to changing the law where they could sue. Indeed, the law would change and grow even if forum-shopping were eliminated. States would differ, and whenever a litigant in state A thought the law of state B preferable, she would argue it to the courts of A. Cross-fertilization might actually increase. Perhaps a federalistic argument for forum-shopping can be cast in economic terms. Overtly pro-plaintiff states may seek to be the locus of lawsuits, viewing that as the source of some form of benefit.⁹⁶ The kind of free-wheeling federalism that *Erie* envisages encourages states' efforts to maximize this perceived benefit.

It is not necessary, however, to analyze the matter in such rarified terms. *Erie* encourages aggressive regulation by those states that wish to conduct themselves that way. Permissive theories of choice of law are the engine that drives much contemporary forum-shopping. They often are based on the notion that a state's broad application of its own law furthers the goals of that law.⁹⁷ Thus, encouraging forum-shopping furthers assertion of state interests. It helps states differ from one another. Choice of law is seen as closely bound to substantive law. It can also be seen as an important common-law field in and of itself, one of those fields that *Erie* intended to leave in state hands. The system should take a hospitable view of the existence of a number of conflicts theories, including those that engender forum-shopping.

Perhaps one need not go this far. Perhaps *Erie* is simply neutral about state-state forum-shopping. Even so, its presence demonstrates that *Erie* is working. Of course, the practice of state-state forum-shopping is controversial and has engendered a vigorous debate even though it is one on which *Erie* has had little direct impact.

96. Justice Kennedy appeared to have envisioned this situation in his majority opinion in *Ferens v. John Deere Co.*, 494 U.S. 516, 528 (1989) ("Applying the transferee law, to the extent that it discourages plaintiff-initiated transfers, might give States incentives to enact similar laws to bring in out-of-state business that would not be moved at the instance of the plaintiff.").

97. See *Johnson v. Spider Staging Corp.*, 87 Wash. 2d 577, 583, 555 P.2d 997, 1002-03 (1976) (applying the forum state's law furthers Washington policy of deterring tortious conduct).

III. THE FORUM-SHOPPING DEBATE AND THE ROLE OF THE NEW CONFLICTS

A. *Anti-Forum-Shopping—The Classical Position*

A vigorous debate over the merits of forum-shopping is taking place within the American legal system. The widespread assumption that the practice is harmful, however, has obscured the extent and even the existence of this debate. Thus, it makes sense to begin this section with an examination of the anti-forum-shopping position, which I will refer to as the classical view. It is found in academic commentary⁹⁸ and in enough state court opinions⁹⁹ that one could conclude that a general presumption against forum-shopping is an accepted principle of the common law—a background understanding that guides the operation of the entire legal system. Indeed, the classical view seems primarily to rest on implicit assumptions, perhaps reflecting the notion that it is so obvious as not to need justification. Nonetheless, with the aid of recent commentary¹⁰⁰ one can flesh out its bases.

At the heart of the classical view lies a desire for fairness to the defendant. Forum-shopping is seen as subjecting the defendant to unanticipated and perhaps unforeseeable risks. The classic statement is that of Professor Hart who contended that the law can speak with "only one ultimately authoritative voice . . ."¹⁰¹ One could state this desire in due process terms, as Justice Harlan's *Hanna* concurrence suggests.¹⁰² However, the classical view appears to rest more on a view of fairness as a sub-constitutional value, perhaps based on consideration of efficiency, rather than on a constitutionally based view of defendants' rights. Thus Professor Gottesman states that "the system frustrates rational planning. Parties cannot know when they act what law governs their behavior, for that depends upon post-act events such as the plaintiff's choice of fo-

98. See, e.g., DAVID W. LOUISELL ET AL., *PLEADING AND PROCEDURE, STATE AND FEDERAL* 499 (6th ed. 1989) (discussing choice of law limits under Due Process and Full Faith and Credit provisions of the Constitution).

99. E.g., *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 201, 480 N.E.2d 679, 686-87 (1985) (discussing policies that disallow forum shopping); *Neumeier v. Keuhner*, 31 N.Y.2d 121, 129, 286 N.E.2d 454, 458 (1972) (refusing to "sanction[] forum shopping [which would] allow[] a party to select a forum which could give him a larger recovery than the court of his own domicile."); see also *Reich v. Purcell*, 67 Cal. 2d 551, 555, 432 P.2d 727, 730, 63 Cal. Rptr. 31, 34 (1967) ("[I]f the choice of law were made to turn on events happening after the accident, forum shopping would be encouraged.").

100. See Weinberg, *supra* note 4, at 64-65 (assuming that choice of forum by plaintiff breaches desired "neutrality"); Note, *supra* note 11, at 1680-89.

101. Hart, *supra* note 78, at 489.

102. *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring) (discussing possible "debilitating uncertainty in the planning of everyday affairs").

rum.”¹⁰³ He sees this as imposing “significant costs.”¹⁰⁴

Systemic concerns such as a desire for efficient use of judicial resources also underlie the classical view. Every forum is likely to be biased in favor of its own law, but a recurrent theme is that for any particular lawsuit there is one natural or best forum where the case ought to be brought.¹⁰⁵ For example, documents and witnesses may be located primarily in one jurisdiction.¹⁰⁶ Justice Jackson’s famous opinion in *Gulf Oil Corp. v. Gilbert*¹⁰⁷ noted that “[a]dministrative difficulties follow for the courts when litigation is piled up in congested centers instead of being handled at its origin.”¹⁰⁸ On a more general level, he posited that there was “a local interest in having localized controversies decided at home.”¹⁰⁹ The common-law doctrine of *forum non conveniens*¹¹⁰ and its federal codification in Title 28 § 1404(a)¹¹¹ reflect this view of a natural forum¹¹² and also constitute powerful weapons that defendants can use when plaintiffs seek to avoid that forum. Professor Gottesman argues that plaintiffs’ efforts to secure an advantageous law may entail the additional cost of extensive litigation over what law applies.¹¹³ In sum, the

103. Gottesman, *supra* note 3, at 12.

104. *Id.* at 13.

105. See, e.g., *Johnson v. Chicago, Burlington & Quincy R.R.*, 243 Minn. 58, 73, 66 N.W.2d 763, 773 (1954) (adopting *forum non conveniens* “to send the cause of action back where . . . it belonged or to some other court where the trial could be more equitably held”); *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 691 (Tex.) (Gonzalez, J., dissenting) (discussing “sound doctrine” of *forum non conveniens*), *cert. denied*, 111 S. Ct. 671 (1990).

106. David E. Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 512-14 (1990) (proposing that courts consider only the location of documents and witnesses when deciding whether to transfer a case).

107. 330 U.S. 501 (1947). In *Gulf Oil*, a resident of Virginia filed suit in the federal district court of New York City against a Pennsylvania corporation that conducted business in both Virginia and New York. The plaintiff sought damages for the destruction of his warehouse by a fire the defendant negligently caused. The New York court recognized that it had diversity jurisdiction, but, on *forum non conveniens*, refused to let the suit proceed in New York. Recognizing that all the events had taken place in Virginia, that most of the witnesses resided there, and that the plaintiff could establish jurisdiction over the defendant in both state and federal courts in Virginia, the Supreme Court held that the district court did not abuse its discretion by dismissing the suit. *Id.* at 509-12.

108. *Id.* at 508.

109. *Id.* at 509.

110. See generally Allan R. Stein, *Forum Non Conveniens and the Redundancy of the Court-Access Doctrine*, 133 U. PA. L. REV. 781, 795-831 (1985) (tracing the development of *forum non conveniens* in the United States).

111. 28 U.S.C. § 1404(a) (1988).

112. See, e.g., Stein, *supra* note 110, at 842-44 (arguing that the court with the greatest interest in the controversy should exercise jurisdiction).

113. Gottesman, *supra* note 3, at 11-12. In this way, the party who wins the race to the courthouse can choose the law most favorable to her position. *Id.*

classical view insists that parties should take what the system gives them, including the applicable law.

In addition to concerns of efficiency and fairness, there are other strands to the classical position, which are sometimes related to these core values. A widespread ability on the part of plaintiffs to forum-shop may constitute an unfair tilt or outright bias of the system in their favor.¹¹⁴ The ideal here is one of procedural neutrality in which the system of adjective law furnishes the disputants a "level playing field"¹¹⁵ on which to resolve their disputes. Notions of substantive neutrality are also at work: the legal system ought to strive for uniform rules that treat similar cases in a similar manner.¹¹⁶ A Pennsylvania tort may be subject to different rules than a Mississippi tort. But the Pennsylvania tort ought to be subject to the same rule regardless of the state in which it is litigated. The forum-shopper can be seen as one who manipulates loopholes in the system to thwart both ideals of neutrality to hurt the defendant. This manipulation may create popular doubt about the fairness of the system.¹¹⁷ Perhaps it is a form of unethical harassment of the defendant.¹¹⁸ Finally, forum-shopping may also create tensions in the federal system.¹¹⁹ Taken together these various rationales suggest that there is considerable force behind an anti-forum-shopping principle, or at least a presumption against the practice.

B. Pro-Forum-Shopping—The Revisionist Position

Advocates of forum-shopping are increasingly entering the debate. I have labeled their view the revisionist position because only recently have commentators come forward with sophisticated arguments to support the practice of state-state forum-shopping.¹²⁰ One can find, however, a

114. See *id.* at 13.

115. Note, *supra* note 11, at 1685.

116. *Id.* at 1685-89.

117. *Id.* at 1690.

118. *Id.*

119. *Cf. Allstate Ins. Co. v. Hague*, 449 U.S. 302, 323-24 (1981) (Stevens, J., concurring). Justice Stevens noted that application of forum law may violate the Full Faith and Credit Clause by infringing on the sovereignty of an interested state. To take this position it is necessary to construe the Clause's reference to "the public Acts, Records, and Judicial Proceedings" of the states as extending to their common-law doctrines. *Id.* at 320 n.1 (Stevens, J., concurring) (quoting U.S. CONST. art. VI, § 1). Justice Stevens argued that the clause "should not invalidate a state court's choice of forum law unless that choice threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State." *Id.* at 323 (Stevens, J., concurring).

120. Weinberg, *supra* note 4, at 87-94; Note, *supra* note 11 at 1695-96. Writing in 1989, Professor Juenger described the entire subject of forum-shopping as a neglected area. Juenger, *supra* note 3, at 553-54.

recurrent theme in common-law opinions that is directly supportive of the practice: the maxim that the plaintiff is master of his forum.¹²¹ As the maxim suggests, courts have sometimes been willing to look at the question of forum selection solely from the plaintiff's perspective and to let her call the shots without focusing on the precise reason that the plaintiff should have this power. Much of the recent formulation of the revisionist position represents an elaboration of this perspective focusing on the law to be applied.

The starting point for revisionists is a general rebuttal of the arguments that are made against forum-shopping. Professor Ely's critique of the Harlan-Hart fairness thesis¹²² is an important component of a revisionist defense of forum-shopping. Defendants subject to differing standards of law can adjust their conduct in anticipation of suit under the higher standard, as long as the rules in question do not order mutually inconsistent activities.¹²³ This is particularly true of large interstate business entities, and it is primarily these entities that are the likely targets of forum-shopping.¹²⁴ Evolving rules of general jurisdiction may well subject them to suit in all fifty states.¹²⁵ Knowing this they can plan accordingly.

Revisionism also calls into question the classical position's heavy reliance on the concept of a natural forum. In interstate situations there may be several forums where elements of the litigation are centered such that each could be the natural one. Even though one forum will often have the stronger claim, a cornerstone of modern theories of personal jurisdiction is the possibility of suit in more than one state.¹²⁶ As Justice Brennan put it, "The defendant has no constitutional entitlement to the best forum or, for that matter, to any particular forum."¹²⁷ On a more general level, efficiency-based arguments against the expenditure of resources caused by forum-shopping must contend with the possibility that these expenditures are offset by social gains from the plaintiff's choice of

121. See *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913).

122. Ely, *supra* note 61, at 714-17. The Harlan-Hart thesis is that it is unfair to subject individuals to two different sets of standards governing a single activity.

123. Stein, *supra* note 72, at 1951.

124. Note, *supra* note 11, at 1692 (noting that businesses can exercise forum-shopping power by deciding where to incorporate).

125. Gottesman, *supra* note 3, at 10. For an excellent discussion and critique of general jurisdiction, see Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 630-43 (1988).

126. See *COUND et al.*, *supra* note 41, at 120 n.1; see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 483 n.26 (1985) ("[M]inimum contacts analysis presupposes that two or more states may be interested in the outcome of a dispute.").

127. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 301 (1980) (Brennan, J., dissenting).

a law that permits recovery.¹²⁸ At this level the debate seems to encounter "nearly insurmountable philosophical and empirical barriers."¹²⁹

As for the notion that forum-shopping produces an unfair pro-plaintiff bias, revisionists might well reply that those who advance it simply want to introduce a pro-defendant bias.¹³⁰ The process cannot be neutral. As Professor Louise Weinberg puts it, "It would be comforting to believe that taking a litigational advantage from plaintiffs simply levels the playing field. But we have seen that litigation has little neutral ground. A single litigation is a zero-sum game."¹³¹ This reasoning undercuts notions of procedural as well as substantive neutrality.¹³² Indeed, the classical aversion to forum-shopping may reflect formalist assumptions about an even-handed, above-the-battle legal system that are weakened seriously by modern, realist analysis.¹³³

Revisionists can poke other holes in the classical position. For example, whether the general public knows or cares about lawyers' tactics in the arcane field of choice of law is open to question.¹³⁴ Rather than harassing the defendant, the plaintiff's lawyer who seeks out favorable law may be seen as fulfilling the duty to represent one's client zealously.¹³⁵ Similarly, arguments based on federalism may be an illusion. While the state whose law is not applied loses a degree of sovereignty, it is offset by the forum's gains in governmental power through the ability to apply its law. The revisionists might well stop here, contending that they have presented enough viable arguments to rebut fully any generalized presumption against forum-shopping. They can also point to the frequency of forum-shopping as evidence that courts tolerate and even approve the practice, and that invocations of an anti-forum-shopping

128. Note, *supra* note 11, at 1692.

129. *Id.* at 1692 n.116.

130. Weinberg, *supra* note 4, at 64, 71.

131. *Id.* at 71.

132. See Note, *supra* note 11, at 1687-89 (discussing how advantages accruing to both sides can undercut the ideal of neutrality in the legal system).

133. *Id.* at 1685-87.

The realists recognized that legal decision makers are influenced by political, personal and nonstatutory and non-precedent-based considerations. . . . [I]t remains difficult for the legal system to confront [these factors]. Acceptance of forum shopping would require that the legal system recognize its own insurmountable systemic dependence on such "nonlegal" considerations. This result threatens not only the concept of the rule of law, but also the image of apolitical neutrality that the legal system tries to create.

Id. at 1687.

134. *Id.* at 1684 n.58.

135. *Id.* at 1688-90 (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981)); Juenger, *supra* note 3, at 571-72.

principle are only lip-service, usually designed to justify a result the court wants to reach anyway.¹³⁶

It is important to note, however, that the revisionist position can be stated in far more positive terms. Forum-shopping can be viewed as a desirable practice, furthering important interests of the plaintiff and advancing a number of systemic goals as well. The plaintiff and the defendant may well not stand on equal ground in terms of their choice of law. The plaintiff seeks to invoke a substantive law under which her claim will be upheld. As a general matter the legal system favors the provision of a remedy for those who seek such goals as the enforcement of contracts and compensation for injuries.¹³⁷ One commentator describes the legal system as committed "to party-driven litigation and to the provision of a remedy for every injury,"¹³⁸ and contends that "[t]ranscending the selective and formalistic aversion to forum-shopping can enhance the possibility of pluralistic methods of remedying wrongs."¹³⁹ In other words, the plaintiff is someone whom "the system" wants to win the contest.

Plaintiffs may derive other, less tangible benefits from being able to choose the forum. These can be grouped loosely under the heading of "litigant autonomy."¹⁴⁰ As Professor Judith Resnik states, "Implicit in litigants autonomy is concern about respect for individual dignity. To enhance dignity, government should provide individuals with choices about protection and assertion of their rights."¹⁴¹ To the extent that litigation serves the political function of establishing and articulating society's legal norms,¹⁴² choosing one's forum can even be seen as a form of participation in the political process.

Beyond the individual plaintiff's well being, systemic values are implicated. Professor Weinberg depicts the plaintiff as a "private attorney general."¹⁴³ That is, society not only wants justice in the individual case, but also the deterrence¹⁴⁴ that victory will set in motion. Apart from any

136. Note, *supra* note 11, at 1684-85.

137. See Weinberg, *supra* note 4, at 67.

138. Note, *supra* note 11, at 1695.

139. *Id.* at 1696.

140. Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 306 (1988). It should be noted that Professor Chemerinsky is using the term largely in the context of public law litigation.

141. Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 847 (1984).

142. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (arguing that a settlement is not a perfect substitute for a judgment because settlement does not give force to the values of authoritative texts).

143. Weinberg, *supra* note 4, at 70.

144. Judith A. McMorrow, *Who Owns Rights: Waiving and Settling Private Rights of Action*, 34 VILL. L. REV. 429, 456-59 (1989) (asserting that the effect of deterrence requires application of authority by either government or private litigants).

effect on the substantive law, it may be that plaintiffs perform an important social function simply by bringing suit. Our society needs lawsuits to further shared goals and to provide the vehicle for elaborating them.¹⁴⁵ Forum-shopping is an acceptable form of incentive to plaintiffs.

These arguments represent what might be called the cutting edge of the forum-shopping debate. They are provocative, but not definitive. Whether lawsuits should be encouraged, for example, or viewed as a major social problem is the subject of considerable controversy.¹⁴⁶ Surely they are a mixed blessing. On the substantive side, I am not convinced that one can discuss the values of "the sovereign"¹⁴⁷ as manifestly pro-plaintiff in an area like torts where there are fifty state sovereigns with wide ranges of opinion on how to strike the balance between plaintiffs and defendants. Where one stands on forum-shopping may be the product of where one stands on substantive law, a point to which I will return in Part IV. One commentator states that "[a]ssuming that forum-shopping plaintiffs invoke substantive rules that are socially beneficial, the net effect of forum shopping is greater enforcement of the law and protection of plaintiffs *legitimate* interests."¹⁴⁸ A lot rides on the words "assuming" and "legitimate." Where one stands on forum-shopping may also reflect where one stands with respect to current theories of choice of law. These theories help make the broad extent of the practice possible.¹⁴⁹ They also provide an important doctrinal justification for injecting a pro-plaintiff tilt into the system of interstate adjudication.

C. *Pro-Forum-Shopping—The Pivotal Role of the New Conflicts*

Professor Weinberg describes the current mechanics of interstate lit-

145. See Fiss, *supra* note 142, at 1085; Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 69-71 (1983) (viewing contemporary trends in litigation as society's adaptive response to changing conditions like an increasingly mobile and better educated public).

146. Recently a number of conservative authors have criticized the amount of litigation in American society. Walter Olson's writings typify this school of thought. In his book, *The Litigation Explosion*, he declares that the increase in litigation is the result of a deliberate experiment in deregulation which has been "a disaster, an unmitigated failure." He continues, "The unleashing of litigation in its full fury has done cruel, grave harm and little lasting good." WALTER K. OLSON, *THE LITIGATION EXPLOSION—WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* 2 (1991).

147. Weinberg, *supra* note 4, at 65.

148. Note, *supra* note 11, at 1693 (emphasis added).

149. Juenger, *supra* note 3, at 558-59. Forum-shopping for law advantages, the type of forum-shopping discussed here, is possible only if different forums can give the plaintiff different laws.

igation as a "forum shopping system."¹⁵⁰ A number of factors converge to make things easy for plaintiffs. These include relaxed standards of personal jurisdiction, the general obligation of states to provide a forum, choice of law theories that encourage the use of forum law, and minimal scrutiny by the Supreme Court of state choice of law decisions.¹⁵¹ In this subsection I will focus on the pivotal role of modern choice of law theories. Academic writing in this field has helped fuel courts' inherent tendency to prefer their own law. Even when judges would probably have done so on their own, the commentators have furnished them with a handy justification. Modern conflicts thinking is largely pro-plaintiff in result. To some extent it rests on assumptions about substantive law that are also pro-plaintiff.

Much has been written on the "new conflicts"¹⁵² and I will treat it briefly. Because the field is so amorphous, a degree of generality is necessary. The essence of the development is a rejection of the old conflicts as developed by Professor Joseph Beale and embodied in the *First Restatement*.¹⁵³ The old conflicts sought to have all jurisdictions apply the same law to a given set of facts, based on where certain events occurred. Key aspects of the new conflicts include challenging of the goal of uniformity;¹⁵⁴ asserting that any choice of law inquiry must include the content of competing laws, not just territorial considerations;¹⁵⁵ analyzing the interests of the various states potentially concerned with any transaction;¹⁵⁶ and acknowledging that a forum's preference for its own law is a valid part of the choice process.¹⁵⁷ The new conflicts succeeded in eroding the authority of the *First Restatement*, but could not produce a single methodology to replace it. There is some uncertainty as to how many methodologies are now in use, but there appear to be at least four.¹⁵⁸

150. Weinberg, *supra* note 4, at 68.

151. Gottesman, *supra* note 3, at 10; Weinberg, *supra* note 4, at 68. Professor Weinberg notes as additional factors the enforceability and preclusive effect of any judgment the plaintiff secures. *Id.*

152. For a useful introduction and citation of authorities, see Gottesman, *supra* note 3, at 2-9.

153. ROBERT A. LEFLAR ET AL., *AMERICAN CONFLICTS LAW* § 4, at 6-7 (4th ed. 1986).

154. Juenger, *supra* note 3, at 554.

155. David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 208 (1933).

156. Gottesman, *supra* note 3, at 5-6.

157. LEFLAR et al., *supra* note 153, § 106, at 295. Advancement of the forum's governmental interest is one of Professor Leflar's five frequently cited choice-influencing considerations. It should be noted that Professor Leflar does not advocate automatic application of forum law. *Id.* at 297.

158. Gene R. Shreve, *In Search of a Choice-of-Law Reviewing Standard—Reflections on Allstate Insurance Co. v. Hague*, 66 MINN. L. REV. 327, 340-41 (1982). Shreve notes "four choice-of-law methodologies now generally in use: the late Professor Currie's government in-

The result is a cornucopia of opportunities for forum-shopping in any case in which there is more than one state with an interest in the matter that might justify application of its law. The plaintiff's shopping will consist generally of a twofold search for a jurisdiction with a favorable substantive law and a choice of law theory that will point to the application of that law. Any of the modern methodologies would facilitate this endeavor, including the seemingly neutral *Second Restatement*.¹⁵⁹ That the plaintiff may be able to choose *among* different theories enhances the range of options.¹⁶⁰ Indeed, the plaintiff may not even be seeking the forum's substantive law if its choice of law will do the trick. As Professor Gottesman explains, "A knowledgeable counsel, before filing suit, can survey the choice of law rules of the states in which service can be effected, and sue in the state whose choice of law rules are likely to result in application of the substantive law most favorable to her client's cause."¹⁶¹

The new conflicts is thus pro-plaintiff in result. To some extent it seems pro-plaintiff in intent. For example, there is considerable interest in applying the "better rule of law" in choice of law cases.¹⁶² The concept is generally associated with Professor Leflar, who describes the matter this way: "When a court finds itself faced with a choice between . . . anachronistic laws hanging on in one state, and realistic modern rules in another state, both states having substantial connection with the facts, it would be surprising if the court's choice did not incline toward the superior law."¹⁶³ It would also not be surprising if a court taking this approach viewed as better the law favoring the plaintiff. There are also suggestions in academic writing of a meta-law, a legal system reflecting "the totality of values produced and distributed in the national community."¹⁶⁴ Academics, at least, may feel strongly that this broader law

terest analysis, Professor Leflar's choice influencing considerations, the *First Restatement*, [and] the *Second Restatement*." *Id.* at 341; see *Ferens v. John Deere Co.*, 494 U.S. 516, 538 & n.2 (1990) (Scalia, J., dissenting) (describing the difference among state choice of law principles as "kaleidoscopic" and noting the existence of 10 different theories).

159. Shreve, *supra* note 158, at 343-44.

160. Gottesman, *supra* note 3, at 9-10 (observing that there is a "tendency in some states to slide back and forth between approaches in reaction to the equities of the cases before them").

161. *Id.* at 10.

162. *E.g.*, *Clark v. Clark*, 222 A.2d 205, 209 (N.H. 1966). In *Clark*, a New Hampshire spouse sued her husband based on an accident in Vermont. *Id.* at 206. The court chose the more favorable New Hampshire law, based in part on its view that that rule was better. *Id.* at 210.

163. LEFLAR et al., *supra* note 153, § 107, at 299.

164. ROBERT A. LEFLAR ET AL., *AMERICAN CONFLICT LAW, CASES AND MATERIALS* 284 (2d ed. 1989) (quoting Luther L. McDougal III, *Comprehensive Interest Analysis Versus Reformulated Governmental Interest Analysis: An Appraisal in the Context of Choice-of-Law*

should advance the values that plaintiffs present. One can find a forceful articulation of underlying pro-plaintiff views in the work of Professor Weinberg. She argues that plaintiffs will choose the law that is better,¹⁶⁵ not just better for them, but also for the long-term interests of the broader community. "When the forum subordinates its own law to some foreign defense, it opts against deterring, regulating, punishing, or even declaring wrongful the alleged injuring and violative conduct of the defendant."¹⁶⁶ Thus, "a structured, habitual avoidance of forum law in favor of law relied on by defendants means a structural bias against law enforcement."¹⁶⁷

Not everyone views the pro-plaintiff tilt of the new conflicts favorably. Aspects of the new conflicts have been criticized, to cite only one writer, as non neutral, "loose-textured" and "easily . . . manipulated," favoring forum bias and "parochialism," and "amenable to result-oriented judicial manipulation."¹⁶⁸ A broad debate over the general validity of the new conflicts is taking place. This section has focused on two sets of players in the past and present debate: the academics and the state courts. However, the Supreme Court has played an equally important role: It has let the whole thing happen. *Allstate*,¹⁶⁹ for example, constitutes what one set of writers describes as "surely the most expansive choice of law decision in Supreme Court history."¹⁷⁰ Without this hands-off attitude forum-shopping would not be able to flourish. This appears to be a surprising stand for a staunchly conservative Court. The remainder of this Article explores that proposition.

IV. PRIVATE LAW PLAINTIFFS IN A CONSERVATIVE COURT—THE IDEOLOGIES OF LITIGATION

A. *A Conservative Supreme Court—The Public Law Dimensions*

The proposition that a conservative majority is now in control of the Supreme Court has been so widely accepted as to constitute a truism. Despite the emergence in the 1991-1992 term of a moderate-centrist group with considerable power and influence,¹⁷¹ the Court's views re-

Problems Concerning Contributory and Comparative Negligence, 26 UCLA L. REV. 439 (1979)) (the quoted passage appears to have been omitted from the article as published in UCLA LAW REVIEW).

165. Weinberg, *supra* note 4, at 66.

166. *Id.* at 70.

167. *Id.* at 71.

168. Shreve, *supra* note 158, at 342-44.

169. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

170. Brilmayer & Lee, *supra* note 94, at 849.

171. Linda Greenhouse, *Moderates on Court Defy Predictions*, N.Y. TIMES, July 5, 1992,

main generally conservative. Some disagreement exists over how far the Court moved in this direction under the Chief Justiceship of Warren Burger.¹⁷² Even if it did not bring about a "counter-revolution,"¹⁷³ the High Court of the 1970s and early 1980s moved far enough away from the positions and approaches of the Warren Court that it can be labeled as somewhat conservative. The conservative triumph came in the late 1980s with the elevation of William Rehnquist to Chief Justice and the appointment of conservative Justices by Presidents Reagan and Bush. These Presidents set out to change the direction of the Court and to roll back the Warren legacy.¹⁷⁴ Whether its key point is the arrival of Justice Anthony Kennedy,¹⁷⁵ or that of Justice David Souter,¹⁷⁶ the transformation was viewed as largely complete even before Justice Clarence Thomas joined the Court.¹⁷⁷ Again, the emergence of the moderate-centrist group may require some tempering of the notion of a transformation.

While these statements receive general acceptance, they mask considerable uncertainty about what a "conservative" Supreme Court means. Obviously the terms "conservative" and "liberal" pose definitional problems in any context.¹⁷⁸ Decisions by the current Court often show the conservative Justices at odds with each other.¹⁷⁹ Conservative

§ 4 (Magazine), at 1; Dick Lehr, *Centrist Troika Slows the Right on High Court*, BOSTON GLOBE, July 3, 1992, at 1. These authors describe Justices Kennedy, O'Connor, and Souter as the moderate centrists. For valuable academic analyses, see Robert H. Smith, *Justice Souter Joins the Rehnquist Court: An Empirical Study of Supreme Court Voting Patterns*, 41 KAN. L. REV. 1 (1992); Kathleen M. Sullivan, *Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

172. BERNARD SCHWARTZ, *THE NEW RIGHT AND THE CONSTITUTION* 258-61 (1990) (describing the power of centrists on the Burger Court).

173. See, e.g., Anthony Lewis, *Foreword to THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (Vincent A. Blasi ed., 1982) (noting the Burger Court's respect for *stare decisis*).

174. See HERMAN SCHWARTZ, *PACKING THE COURT* 3-9 (1988) (noting President Reagan's opportunity to appoint more judges than any other president in history).

175. See Russell W. Galloway, *The Court's Shifting To the Right*, L.A. DAILY J., Oct. 2, 1989, at 6 (characterizing Justice Kennedy as having the second most conservative voting record during his first full term).

176. See Russell W. Galloway, *With David Souter Newly Seated on the High Court, Conservative Judicial Activists Will Have a Heyday*, L.A. DAILY J., Oct. 17, 1990, at 6 (characterizing Justice Souter as the crucial fifth vote for conservative judicial activism).

177. To liberal critics, at least, Justice Thomas has emerged as the arch conservative. See *Justice Thomas, the Freshman*, N.Y. TIMES, July 5, 1992, § 4, at 10 (criticizing Justice Thomas as injudicious and characterizing his arguments as boilerplate attacks on political opponents).

178. See, e.g., Robert Glennon, *Will the Real Conservatives Please Stand Up?*, A.B.A. J., Aug. 1990, at 49.

179. E.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2875 (1992) (Scalia, J., dissenting) (In the opinion of the Court, Justices O'Connor, Kennedy, and Souter "rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice."); *id.* at 2883 (Scalia, J., dissenting) (analogizing the *Casey* decision to *Dred Scott*).

legal theorists disagree sharply over such issues as whether a jurisprudence of original intent is possible; whether the judiciary should be aggressive in its protection of economic liberties;¹⁸⁰ and whether or not judicial conservatism should distrust the results of majoritarian political processes.¹⁸¹ Despite the lack of a unified conservative philosophy on all issues, I believe that one can give an accurate general outline of the Court's conservative bent, as that term is used in describing American judicial institutions, based on the Court's decisions interpreting the Constitution. Indeed, attempts to analyze the Court as an ideological entity have focused almost exclusively on this aspect of its activities.¹⁸² This emphasis is not surprising both because constitutional law is the most visible part of the Court's work and because the Court does not generally perform common-law functions as do state courts.¹⁸³

Significant themes in conservative legal doctrine include the general notion of a restrained or nonactivist judiciary, the importance of original intent in construing any constitutional provision, the central roles which the structural values of federalism and separation of powers play in the constitutional scheme, and the inherent legitimacy of majoritarian decision-making processes.¹⁸⁴ These principles are not applied by the Court with perfect consistency, but they recur enough to produce patterns of results both in terms of the availability of federal courts and the results public law litigants are likely to receive there. Tightening access to the federal courts is an important element of Burger-Rehnquist Court jurisprudence,¹⁸⁵ and a clear reversal of Warren Court tendencies. A restrictive approach to standing is the most widely discussed component of this development, including a major decision last term restricting standing in environmental suits.¹⁸⁶ Liberal critics have lambasted the standing cases

180. See generally STEPHEN MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* 47 (1986) (discussing the tension between the general conservative distrust of judicial activism and the desire of some conservatives for aggressive judicial protection of economic liberties).

181. *Id.* at 21-37.

182. See, e.g., SCHWARTZ, *supra* note 174, at 4-7.

183. For purposes of this discussion, I will put to one side the question of whether constitutional adjudication is a form of common law making.

184. For an important articulation of conservative legal doctrine sounding many of these themes in the early stages of the Reagan Administration, see PATRICK B. MCGUIGAN & RANDALL R. RADER, *A BLUEPRINT FOR JUDICIAL REFORM* 1-107, 181-281 (Patrick B. McGuigan & Randall R. Rader eds., 1981).

185. See generally Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 327-45 (1989) (reviewing methods the Court has used to limit the scope of federal jurisdiction).

186. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2137-40 (1992); cf. *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3187-89 (1990). These cases are important in their emphasis on the need for plaintiffs to demonstrate individualized harm. For example, in *National Wild-*

as embodying the "agenda" of the new right.¹⁸⁷ Conservative commentators had long sought this result¹⁸⁸ and at an earlier point had even sought to limit the jurisdiction of federal courts over constitutionally sensitive matters.¹⁸⁹

Despite attempts to limit the federal judicial function, cases and issues still manage to end up in court one way or another. Thus, in attempting to understand the Supreme Court's conservatism, it is necessary to focus on the substantive results it reaches. The significant themes of a conservative Court are a deference to majoritarian processes and a tendency to interpret individual rights restrictively when a litigant asserts that majoritarian processes have infringed upon a constitutional right. Litigants asserting such rights won some notable victories in the 1991-1992 term,¹⁹⁰ but the overall trend has been the other way. Well-known recent cases include the upholding of restrictions on the availability of abortions,¹⁹¹ validating a locality's banning of totally nude dancing,¹⁹² and a broadening of police ability to search without a valid warrant.¹⁹³ The rights of criminal defendants have been a frequent target. In 1991, for example, the Court upheld custodial detention of up to forty-eight hours for suspects arrested without a warrant.¹⁹⁴ The conservative majority has authored a series of decisions restricting the ability of state prisoners to seek review of their convictions via federal habeas

life Federation, use of a large area of land did not create an interest in preventing harm to a particular tract within that area. *National Wildlife*, 110 S. Ct. at 3189.

187. Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 659 (1985).

188. Doug Bandow, *The Conservative Judicial Agenda: A Critique*, in *ECONOMIC LIBERTIES AND THE JUDICIARY* 257, 265 (James A. Dorn & Henry G. Manne eds., 1987).

189. See generally Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 895-922 (1984) (discussing the renewed interest in unsettled constitutional issues and the wave of "jurisdiction-stripping bills" introduced in Congress between 1981 and 1982).

190. *E.g.*, *Lee v. Weisman*, 112 S. Ct. 2791, 2796 (1992) (holding that a public school's requirement that students silently stand during "nonsectarian" prayer at graduation ceremony violates the Establishment Clause).

191. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2796 (1992) (upholding provisions of Pennsylvania's abortion statute regarding informed consent, a 24-hour waiting period, parental consent, and record-keeping but invalidating a spousal notification requirement).

192. *Barnes v. Glen Theater, Inc.*, 111 S. Ct. 2456, 2457 (1991) (holding that an Indiana public decency law prohibiting totally nude dancing does not violate the First Amendment).

193. *United States v. Leon*, 468 U.S. 897, 926 (1984) (recognizing constitutionality of a good-faith exception to the Fourth Amendment exclusionary rule).

194. *County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1670 (1991) (holding that judicial determination of probable cause within 48 hours of arrest is "prompt" under the Fourth Amendment).

corpus.¹⁹⁵ One liberal critic, surveying the wreckage, declares that "[t]he Court already has damaged severely the constitutional right of privacy and reproductive autonomy, turned the clock back on civil rights, restricted free speech and free exercise of religion, and weakened the rule against unreasonable searches and seizures."¹⁹⁶

But what makes these decisions "conservative," other than the tautology that they are the product of a conservative Court? The tautology has some usefulness. These are not the sort of decisions that we expected or received from the Warren Court. Beyond that, one can say that these decisions generally are congruent with the conservative views of the electorate that voted for Presidents Ronald Reagan and George Bush. The Court's deference to political processes translates, whether coincidentally or not, into the upholding of the results those processes reach. The processes may have attained those results explicitly, in the form of laws, or implicitly, for example, in the approval of strong police measures to curb crime. The message to the losers in those processes is that they cannot turn to the federal courts as an additional governmental arena in which to fight the entire battle again in the name of the Constitution. The majority really does rule.

Liberals, of course, criticize the Court for being too conservative. A recurrent theme of these criticisms is that the Court's results inevitably produce harm to certain groups, not just to random sets of losing parties. The Court is often accused of having an "agenda" that targets a spectrum of politically underrepresented and powerless classes.¹⁹⁷ Restrictive jurisdictional doctrines, for example, are viewed as anti-civil rights, harmful to public interest litigants, and designed to work "against the disadvantaged and powerless classes, those who cannot afford a better attorney, the have-nots as opposed to the haves."¹⁹⁸ This criticism, whether or not one accepts its premises and tone, helps capture the essence of the Burger-Rehnquist Court's conservatism: It has downgraded the role of litigation in the federal courts as an instrument of social change and redistributive efforts on behalf of those who lack power in the political process. This stance reinforces the existing social order, and ensures that any changes to it will take place slowly and that those changes will be acceptable to current majorities.

195. See, e.g., Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 798-814 (1992).

196. Russell W. Galloway, *Balance of Power*, A.B.A. J., May 1991, at 74, 75.

197. Levit, *supra* note 185, at 321-22.

198. *Id.* at 363 (footnotes omitted).

B. *Public Law Forum-Shopping*

In some of the Court's public law decisions we can discern a possible connection between conservatism and attitudes towards forum-shopping. There is a direct relationship between rights and the ability to enforce them. Doctrines that prevent or limit judicial enforcement of a right have a significant effect on the value and force of that right. Considerable attention has been focused on decisions of the Burger-Rehnquist Court that deprive federal rights asserters of a *federal* judicial forum, but do permit enforcement in a state court.¹⁹⁹ The different forums may well take different views of the nature and extent of the right involved. Thus it has been argued, notably by Professor Michael Wells,²⁰⁰ that the Court's supposed jurisdictional doctrines are a form of de facto control over the content of the underlying right. One way of looking at these cases is that the persons against whom these doctrines operate represent what might be called public law forum-shoppers. They seek the federal forum precisely because they perceive it as more likely to vindicate the federal right.²⁰¹

The cases can be divided into three groups. Some plaintiffs attempt a preemptive strike against the state judicial machinery before it is used against them. Preemptive strikers run the risk of being hit with *Younger* abstention.²⁰² If the state judicial proceeding is viewed as already pending and certain other criteria are met,²⁰³ the federal plaintiff will be remitted to the state court system for assertion, as a defendant, of her

199. See generally Richard H. Fallon Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1251 (1988) (discussing the tension between nationalist ideals, which point toward hearing such cases in a federal court, and federalism ideals, which emphasize the role of state courts).

200. See Michael Wells, *Is Disparity a Problem?*, 22 GA. L. REV. 283, 327 (1988) ("[T]he Court . . . can, at a very general level, enforce changes in their perception of the proper balance to be drawn between the values underlying competing state and individual claims in constitutional cases."). For a view of the role of state courts in enforcing individual rights, see Symposium, *"The Law of the Land": The North Carolina Constitution and State Constitutional Laws*, 70 N.C. L. REV. 1701 (1992).

201. See Wells, *supra* note 200, at 285-86. To the extent that the federal courts are viewed as systematically more favorable to federal claims, the public law plaintiff resembles the private law plaintiff shopping between different laws.

202. In *Younger v. Harris*, 401 U.S. 37, 54 (1971), the federal plaintiffs sought to enjoin state officials from proceeding with prosecutions pending against them. The Supreme Court held that principles of comity and federalism stand as a strong bar to any such injunctive relief in federal court. See *supra* note 6.

203. See generally CHARLES A. WRIGHT, *THE LAW OF FEDERAL COURTS* § 52A, at 320-30 (4th ed. 1983) (discussing the *Younger* doctrine and related case law). The other criteria are the presence of the plaintiff as a party in the state proceeding, the presence of an important state interest, and the opportunity for the plaintiff to raise the federal issues before the state court.

federal claim. There are several justifications for the *Younger* doctrine, but the Court usually rests its invocation on grounds of comity and federalism, particularly the ability of state courts to adjudicate federal claims.²⁰⁴

A second group comprises cases in which federal plaintiffs (or petitioners) seek a second bite of the apple with respect to matters already litigated in a state court.²⁰⁵ The most familiar example involves use of the federal habeas corpus petition to seek federal trial court review of a state criminal conviction.²⁰⁶ Another example is attempts by federal civil rights plaintiffs to litigate claims that might have been raised in an earlier state proceeding, or to relitigate particular issues decided by a state court which are relevant to those claims.²⁰⁷ The Court is quite hostile to second-bite plaintiffs. Its substantial restriction of habeas corpus is well-known. The extensive line of cases rests on such themes as the special role of state courts in criminal matters, the general importance of respect for state courts, the importance of the trial as the place for the assertion and decision of claims, and general notions of conservation of judicial resources.²⁰⁸ In the civil context, *res judicata* has the same negative effect on the efforts of second-biters.

A third group is composed of some individuals who are classic concurrent jurisdiction civil rights plaintiffs. These are individuals with federal claims against whom no state proceedings are pending or have been brought. They wish to assert their claims in a federal trial court and seek either damages or equitable relief. Many of these plaintiffs get that forum. However, despite the availability of concurrent jurisdiction and the generalized remedy provided by § 1983,²⁰⁹ they may be blocked by a jurisdictional doctrine and sent to state court. The most important of these

204. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 602 (1975). In *Huffman* the Court extended *Younger* abstention to cases which are not criminal prosecutions. In that case it ordered deference to a state civil nuisance proceeding. *Id.*

205. In some situations, the state disposition is that of an administrative tribunal.

206. *See* 28 U.S.C. § 2254 (1988).

207. *E.g.*, *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (holding that the previously litigated issue regarding the validity of a police search collaterally estopped defendant from bringing a civil rights action based on the search).

208. *See, e.g.*, *Keeny v. Tamayo-Reyes*, 112 S. Ct. 1715, 1718 (1992) (stating that rules deserve "respect" and that federal habeas litigation "places a heavy burden on scarce judicial resources"); *McClesky v. Zant*, 111 S. Ct. 1454, 1469 (1991) (stating that federal attacks on state convictions frustrate state's sovereign powers and good faith efforts to uphold constitutional rights while placing a "heavy burden on scarce judicial resources"); *Francis v. Henderson*, 425 U.S. 536, 538-39 (1976) (discussing the "appropriate exercise" of the federal courts' power to entertain applications for writ of habeas corpus).

209. 42 U.S.C. § 1983 (1988). This statute is the basic authorization for suits against state and local governments and officials for deprivation of rights secured by the federal Constitution and laws. Jurisdiction over § 1983 suits is available under 28 U.S.C. § 1331 (1988).

doctrines is the Eleventh Amendment.²¹⁰ The current Court views suits against states in federal court based on federal law as a significant intrusion on state sovereignty.²¹¹ It has interpreted the Amendment broadly, diminishing the availability of monetary relief against state officials.²¹² There are other doctrines that can send the classic civil rights plaintiff to state court, notably *Pullman* abstention,²¹³ although its status in the current Court is uncertain.²¹⁴

In all three categories of cases, the Court's actions limit federal-state forum-shopping by public law plaintiffs. On the surface the governing policies do not have much to do with the anti-forum-shopping side of *Erie*. The plaintiff is not trying to surprise the defendant by getting a different law, nor are some plaintiffs seeking favorable law not available to other analogous plaintiffs. It is true that the Court invokes "federalism," but the ideal is different from the regulatory federalism fostered by *Erie*. *Erie* emphasizes the primacy of the states in developing private law norms. In the public law forum-shopping cases the norm comes from the federal government, and the federal courts will remain the primary expositors of that norm. What the Court's jurisdictional doctrines reflect is concern for the role of state courts as supervisors of their governments and the role of the federal courts in supervising both. Thus, what links these cases with *Erie* is a federalism-based desire to preserve the status of state courts against incursion by federal tribunals.

Still, the public law cases do involve some elements of forum-shopping. To an extent the Court's attitude toward them may reflect notions analogous to preference of the natural forum. The cases are viewed as belonging in state court, and the Supreme Court rebuffs plaintiffs' attempts to maximize their chance of winning by shopping for a different

210. U.S. CONST. amend XI. ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by citizens or subjects of any Foreign State.").

211. See generally George D. Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 GEO. L.J. 363, 364-68 (1985) (arguing that in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 926 (1985), the Court tacitly rejected the view that "Congress has the authority to remove whatever protection the states do receive under the eleventh amendment").

212. E.g., *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (holding that the Eleventh Amendment bars a federal court from ordering retroactive payment of benefits offered under the federal-state program of Aid to the Aged, Blind, and Disabled).

213. The doctrine takes its title from *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 498-500 (1941), in which the Court stated that federal court abstention is required when state law is uncertain and state court's clarification of state law might make a federal court's constitutional ruling unnecessary.

214. See George D. Brown, *When Federalism and Separation of Powers Collide—Rethinking Younger Abstention*, 59 GEO. WASH. L. REV. 114, 151-52 (1990).

forum. Perhaps the results in public law cases illustrate a general aversion to forum-shopping as defined in this Article. After all, plaintiffs' desire for federal court is based on the hope of a different view of the law. It should also be noted that the Court attaches little value to any notion of litigant choice. Indeed, one commentator has called for a revision of doctrine in this area based on the principle of litigant choice.²¹⁵ As discussed above, that principle is an important component of arguments for forum-shopping. Perhaps the public law forum-shopping decisions should be seen as attempts to influence the content of substantive law. Even so, it is noteworthy that the Court has utilized an anti-forum-shopping approach as a means to achieve conservative outcomes. The question to which we can now turn is whether this approach might carry over to forum-shopping by private law plaintiffs.

C. *Are Conservatives Pro-Defendant?*

1. Private Law Plaintiffs and Conservatives—An Ideology of Hostility?

An initial, general question is how conservatives view private law plaintiffs. The meaning of "conservative" in the private law context is discussed less and debated less than in the public law context. It is frequently asserted that conservatives favor defendants.²¹⁶ Professor Weinberg, in reviewing recent developments in federal common law, describes that law as moving in a conservative, anti-plaintiff direction: "Today's federal common law tends to be a common law of begrudged remedies and generous defenses. . . . A new, youthful defendant-oriented judiciary is having its impact."²¹⁷ Let us assume that the conventional wisdom is correct and examine some possible reasons underlying this pro-defendant stance.

Conservatives may proceed from a belief that the substantive law has developed to a point where it is tilted unfairly in favor of plaintiffs. Writing in the conservative publication *Benchmark*, Gordon Crovitz has advanced the view that "expanding liability for defendants is best understood as a continuation by the courts of the New Deal political notion of law as 'social justice.'"²¹⁸ This critique has several strands: a view of

215. See generally Chemerinsky, *supra* note 140, at 236 (proposing that "litigants with federal constitutional claims should generally be able to choose the forum, federal or state, in which to resolve their disputes").

216. E.g., Gottesman, *supra* note 3, at 14-15 (discussing the case for federal choice of law statutes in the context of "the present climate of increasingly conservative courts").

217. Weinberg, *supra* note 51, at 850.

218. L. Gordon Crovitz, *Torturing Torts: Common Law Activism in the States*, 4 BENCHMARK 35, 36 (1988).

the law as redistributive (away from groups conservatives presumably favor); concern that abandonment of notions of negligence and consent de-emphasizes respect for individualist values; and disapproval of the fact that these changes emanate from the courts.²¹⁹ These criticisms are aimed, in particular, at pro-plaintiff developments in tort law.²²⁰

Apart from substantive issues, conservative views of private law differ from liberal views in that they strongly disfavor litigation. Liberals tend to view litigation, including private lawsuits, as desirable and socially beneficial.²²¹ Recent conservative writings manifest an intense dislike for private litigation. The emphasis on the deleterious impact of lawsuits is seemingly separate and distinct from views about the substantive law. Perhaps the best known of these efforts is the report of the President's Council on Competitiveness, generally known as the "Quayle Report."²²² The Report documents the extent of litigation in America,²²³ describes what it perceives as abuses of the litigation process,²²⁴ and argues that tort suits in particular are consuming resources and impairing America's competitive position.²²⁵ Walter Olson's recent book, *The Litigation Explosion—What Happened When America Unleashed the Lawsuit*, sounds many of the same themes and also contends that extensive litigation wreaks social harm by turning beneficial relationships into adversarial ones.²²⁶ Peter Huber's book, *Galileo's Revenge: Junk Science in the Courtroom*, takes aim at manipulative tactics by plaintiffs' attorneys in the tort field.²²⁷ Legal conservatives tend to focus extensively on the perceived caseload crisis in American courts,²²⁸ viewing it as a serious problem in and of itself as well as a reflection and cause

219. *Id.* at 35-37.

220. Crovitz relies heavily on the writings of Huber and Priest. *See, e.g., id.* at 35-41 (citing PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988); George Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 46 (1985)).

221. *E.g.,* Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 96 n.4 (1988).

222. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA* (1991).

223. *Id.* at 1.

224. *Id.* at 3-6.

225. *Id.* at 1-4.

226. OLSON, *supra* note 146, at 2.

227. PETER W. HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* *passim* (1992).

228. *See, e.g.,* RICHARD A. POSNER, *THE FEDERAL COURTS—CRISIS AND REFORM* 59-168 (1985). Judge Posner argues that the federal judicial system is seriously overloaded and focuses on the effects of this "crisis" at the appellate level. *Id.* at 59-129. The existence of such an overload is also an argument for taking cases out of the district courts. *See* George D.

of other problems. Analysis of what might be called the ideologies of litigation suggests a number of reasons for the conservative stance in addition to those stated explicitly.

Critics may view litigation as potentially redistributive. A large volume of suits—the caseload crisis—may indicate dissatisfaction with the existing social order and represent an attempt to change it. In a landmark article on *Why The "Haves" Come Out Ahead*,²²⁹ Professor Marc Galanter argues that making litigation difficult benefits the "haves." For example, an "overload increases the cost and risk of adjudicating and shields existing rules from challenge, diminishing opportunities for rule-change. This tends to favor the beneficiaries of existing rules."²³⁰ Conservatives might be seen as having an instinctive opposition to those who bring (and especially those who are seen as fomenting) litigation.²³¹

On the other hand, the "have-nots" and their champions (loosely defined as liberals) may perceive litigation as an attractive vehicle for changing rules.²³² Thus, arguing from the have-not perspective, Professor Galanter advocates facilitating litigation through an increase in institutional resources "such that there is timely full-dress adjudication of every claim put forward."²³³ He predicts opposition from the beneficiaries of the existing system.²³⁴ The parallels with substantive law suggested by this analysis are striking. Conservatives look at the rights assertor (the plaintiff) with suspicion, viewing him as a seeker of redistribution, which they oppose, or an agent of social change, which threatens their position. It is particularly galling that plaintiffs seek these advantages from the courts as opposed to the more political branches in which conservatives, presumably, enjoy greater advantages.²³⁵

I think, however, that the entire issue of conservative attitudes toward private law litigation is considerably more complex than the above analysis suggests. If, for example, conservatives are the beneficiaries of

Brown, *Nonideological Judicial Reform and Its Limits—The Report of the Federal Courts Study Committee*, 47 WASH. & LEE L. REV. 973, 988-89 (1990).

229. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, LAW & SOC'Y REV., Fall 1974, at 95.

230. *Id.* at 121 (footnote omitted).

231. See Crovitz, *supra* note 218, at 42 (arguing that numerous reforms, including forcing the losing party to pay all legal fees and court costs of the winning party, are necessary to reduce the volume of litigation).

232. Galanter, *supra* note 229, at 137.

233. *Id.* at 139.

234. *Id.* at 140.

235. Cf. *id.* at 135-44 (discussing tendency of political process to favor entrenched interest groups and suggesting strategies for reform).

existing rules, why would they be hostile to those who invoke them? (A partial answer may be that with some rules they have made an accommodation that includes a low level of enforcement, and that increased enforcement, even of favorable rules is viewed as harmful.) Similarly, if conservatives benefit from the caseload crisis,²³⁶ why are they so strongly in favor of measures to reduce it? On a more general level, it seems counterintuitive to view conservatives as opposed to courts. For example, courts play an important role in protecting property rights and securing the enforceability of commercial agreements. Indeed, a libertarian conservative contends in a recent book that courts are one of "three and only three" essential governmental functions²³⁷ and that "proper civil courts are the most crucial need of a civilized society."²³⁸

Conservatives considering the matter thoroughly might acknowledge that their opposition to private law litigation is focused on a limited group of private suits as opposed to generalized opposition to public law litigation.²³⁹ We can pursue the inquiry by utilizing Professor Galanter's typology of litigants and lawsuits. He divides litigants into "one-shotters" and "repeat players."²⁴⁰ There is some correlation between "one-shotters" and "have-nots" and between "repeat players" and "haves," although Galanter is careful to point out it is not an equation.²⁴¹ Suits then break down into four classes: one-shotters versus one-shotters; repeat players versus repeat players; repeat players versus one-shotters; and one-shotters versus repeat players. It would seem that conservatives would be neutral about the first two classes and might even look favorably upon the third, which Professor Galanter finds the most numerous.²⁴² The only question mark is suits by one-shotters against repeat players. Professor Galanter contends that the most frequent example is personal injury suits²⁴³ and cites, among other examples, cases of welfare client versus agency and tenant versus landlord.²⁴⁴

Perhaps it is these types of suits that generally represent the characteristics conservatives find threatening. The recent conservative writings

236. Under Professor Galanter's line of reasoning, conservatives benefit from the fact that have-nots cannot pursue their claims. Professor Levit argues that conservatives use the crisis to keep disfavored cases out of court. Levit, *supra* note 185, at 345.

237. LEONARD PEIKOFF, *OBJECTIVISM: THE PHILOSOPHY OF AYN RAND* 365 (1991).

238. *Id.*

239. Conservatives who want the courts to defend economic liberties presumably are not hostile to public law litigation advancing such claims.

240. Galanter, *supra* note 229, at 97.

241. *Id.* at 103-04.

242. *Id.* at 108.

243. *Id.* at 110.

244. *Id.* at 107.

discussed above do focus on tort suits and on the redistributive-reformist nature of some private litigation. Perhaps they represent an effort to identify "bad" lawsuits and deal with them as a class. I offer these observations primarily to show that probing the ideologies of litigation raises doubts about an automatic pro-defendant stance on the part of conservatives. Let us take as a working hypothesis, however, that conservatives exhibit some tendencies of this position. We then can consider the extent to which this view is found in the decisions of the current, conservative Court, and how it might be expected to carry over, and does carry over, to the Court's decisions on forum-shopping.

2. Private Law Plaintiffs in a Conservative Court

Has the Court shown in the private law context the same hostility toward plaintiffs (rights asserters) that it has shown in the public law context? Some commentators suggest that it has.²⁴⁵ In the public law context, of course, the analysis is facilitated by the fact that the Court's position on the substantive law invoked is often known. It is usually the ultimate maker of that law. Thus, it is possible to identify relationships between content and enforcement. This is much less the case in private law matters, where the principal source of judge-made law is the state courts. The lower federal courts also play a significant role, but much of their contribution comes from diversity cases based on state law. The Supreme Court's contributions to private law are less frequent and, in many federal areas, are heavily affected by issues of statutory construction and doctrines of administrative law.²⁴⁶ One way to discern possible Supreme Court attitudes toward private law plaintiffs is to examine "federal courts law" and related areas concerning access to federal courts and the conduct of federal civil trials. Examination of several specific issues in these broad categories lends support to the view that the Court shows some tendency to disfavor civil plaintiffs.

A frequently cited illustration of this tendency is the Court's interpretation of Federal Rule of Civil Procedure 56 governing summary judgment.²⁴⁷ In *Celotex Corp. v. Catrett*,²⁴⁸ for example, the Court made it easier for defendants to obtain summary judgement on an issue as to

245. See, e.g., Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 28-37 (1982) (small claims class actions); Levit, *supra* note 185, at 363.

246. A typical labor law case, for example, will present important issues along these lines based on the National Labor Relations Board's direct participation as a party or its overall policy in the area. Nonetheless, it is possible to examine labor law decisions as a means of determining whether the court shows a pro-business attitude. See, e.g., Galloway, *supra* note 196, at 75-76.

247. In a trilogy of cases decided in 1986, the Supreme Court addressed the standards for summary judgment. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty*

which the plaintiff has the burden of proof. Despite seemingly contrary language in the landmark case of *Adickes v. S.H. Kress & Co.*,²⁴⁹ the Court in *Celotex* ruled that the defendant can obtain summary judgment on such an issue without introducing any evidence of its own. The defendant, according to Justice Rehnquist, can discharge its burden by "showing"—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case."²⁵⁰ *Celotex* and other recent summary judgment cases have been criticized as taking "an already effective pro-defendant rule of civil procedure and mak[ing] it strikingly more pro-defendant."²⁵¹ Critics have seen the summary judgment cases as illustrative of a broader procedural "counterrevolution" benefitting civil defendants.²⁵² According to these critics this development is not an example of procedural neutrality; the pro-defendant biases are intended.²⁵³

Another area in which the current Court has taken a markedly pro-defendant stance is decisions on forum selection clauses (F.S.C.).²⁵⁴ Under an F.S.C. the parties to a transaction or relationship agree in advance to litigate all resultant disputes in a particular forum or set of fora. Although the device gives both parties the planning advantage of knowing this information in advance of any litigation, the F.S.C. generally is viewed as pro-defendant in operation.²⁵⁵ It helps the defendant blunt plaintiff's law-seeking advantages and provides considerable convenience to defendants facing multiple litigation. The Supreme Court has wel-

Lobby, Inc., 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574 (1986).

248. 477 U.S. 317 (1986).

249. 398 U.S. 144 (1970). In *Adickes* the Court took a pro-plaintiff position, imposing substantial evidentiary burdens on defendants seeking to negate plaintiffs' factual case at the summary judgment stage. *Id.* at 153-61.

250. *Celotex*, 477 U.S. at 325.

251. Stempel, *supra* note 221, at 160.

252. E.g., D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35, 39 (1988). Professor Risinger does not limit this observation to the Supreme Court, but also includes the lower federal courts.

253. *Id.*; Stempel, *supra* note 221, at 161.

254. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1528 (1991) (holding that forum selection clause contained in form passage contract was reasonable and enforceable); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 23 (1988) (holding that federal law governs district court decision whether to give effect to forum-selection clause in diversity action); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (holding that a forum selection clause is controlling unless enforcement would be unreasonable and unjust). For a discussion of forum selection clauses see LEFLAR et al., *supra* note 153, § 49, at 156-59.

255. Gottesman, *supra* note 3, at 14-15. For a hypothetical illustration of a potential defendant's use of a forum selection clause, see Freer, *supra* note 42, at 1092-94.

comed F.S.C.s with open arms. According to Justice Kennedy, such clauses are of great benefit to the parties and conserve important judicial resources.²⁵⁶ The recent decision in *Carnival Cruise Lines, Inc. v. Shute*²⁵⁷ offers a striking example of the Court's attitude toward F.S.C.s. The defendant cruise line's tickets contained a standard clause requiring all litigation against it to be brought in a court located in Florida. The plaintiff bought a ticket in the state of Washington and suffered injury in international waters during a cruise that departed from Los Angeles.²⁵⁸ The Court ordered enforcement of the clause despite contentions of disparate bargaining power and severe inconvenience to the plaintiffs.²⁵⁹ Justice Stevens in dissent chided the majority for abandoning the strong admiralty and common-law tradition of protecting plaintiffs' litigation opportunities in the face of claims that they have been bargained away.²⁶⁰ *Carnival* certainly goes beyond the current Court's initial endorsement of F.S.C.s in *The Bremen v. Zapata Off-Shore Co.*²⁶¹—a case in which the Court emphasized that the parties were of equal bargaining power and each might expect to be sued.²⁶²

The Burger-Rehnquist Court's approach to a wide range of standard "federal courts" issues also shows a pro-defendant tilt. Consider the related areas of federal common law and implied rights of action. The Court has adhered to the position that federal common law can be fashioned in only a limited number of areas. In *Miree v. DeKalb County*²⁶³ it refused to allow the creation of such law in an action between a private plaintiff and a local government entity.²⁶⁴ In *City of Milwaukee v. Illinois*²⁶⁵ the Court announced a restrictive approach to federal environmental common law.²⁶⁶ It has taken a similar approach in implied right of action cases in which the plaintiff seeks private judicial enforcement of a statute which imposes federal duties but does not provide for this

256. *Ricoh*, 487 U.S. at 33 (Kennedy, J., concurring) (noting that F.S.C.s save litigants costs and "relieve courts of time consuming pretrial motions").

257. 111 S. Ct. 1522 (1991).

258. *Id.* at 1524.

259. *Id.* at 1526-28.

260. *Id.* at 1529-31 (Stevens, J., dissenting); see also John M. Kirby, Note, *Consumer's Right to Sue at Home Jeopardized Through Forum Selection Clause in Carnival Cruise Lines v. Shute*, 70 N.C. L. REV. 888, 915 (1992) (arguing that Court failed to analyze clause for adhesion and due process violation).

261. 407 U.S. 1 (1972).

262. *Id.* at 12-14.

263. 433 U.S. 25 (1977).

264. *Id.* at 31-33.

265. 451 U.S. 304 (1981).

266. *Id.* at 332 (noting that Congress supplanted federal common law with the establishment of an expert administrative agency).

method of enforcement. Although the cases on this subject are not uniform, the current Court has curtailed sharply the availability of implied rights.²⁶⁷

The cases in both areas reflect a concern for separation of powers.²⁶⁸ Federal common law also poses problems of federalism.²⁶⁹ In operation, at least, these cases also work to the benefit of defendants. Plaintiffs are unhappy with whatever other remedies are available, either under state law or through federal administrative processes, and they seek federal judicial relief against the defendant. The Court's denial preserves the existing balance. Concern for defendants may be express. For example, in condemning implied rights of action Justice Powell argued that they upset a balance struck by Congress and impose costs upon defendants which only Congress should impose.²⁷⁰ When a plaintiff seeks the creation of federal common law, the Court tends to deny the request. In *Boyle v. United Technologies Corp.*,²⁷¹ however, it departed from general practice and authorized creation of federal common law in favor of a private defendant—a defense contractor.²⁷² The Court reasoned that the defendant's interests were closely related to those of the United States.²⁷³

One need not stop here. Hostility toward private civil plaintiffs can be found across the range of federal jurisdiction. The Court has construed the "arising under" requirement of § 1331²⁷⁴ narrowly, treating as nonfederal a plaintiff's claim under state law that purportedly incorporated federal standards.²⁷⁵ Diversity jurisdiction has also been treated narrowly.²⁷⁶ The Court's strict approach to pendent party jurisdic-

267. For an example of a recent decision showing the restrictive approach to implied rights of action, see *Thompson v. Thompson*, 484 U.S. 174, 187 (1988).

268. See generally George D. Brown, *Of Activism and Erie—The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617, 627-40 (1984) (discussing relationship of implied right and federal common law cases).

269. See Field, *supra* note 48, at 890 n.29 ("States' sphere of influence is lessened when federal common law plays a broad role.").

270. *Cannon v. University of Chicago*, 441 U.S. 677, 730-31 (1979) (Powell, J., dissenting).

271. 487 U.S. 500 (1988).

272. *Id.* at 511-13.

273. *Id.* at 505-07.

274. 28 U.S.C. § 1331 (1988) (granting district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States").

275. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 817 (1986).

276. *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973) (holding that each plaintiff in a diversity class action must separately satisfy the minimum amount in controversy requirement specified in 28 U.S.C. § 1332(a)); *Snyder v. Harris*, 394 U.S. 332, 336 (1969) (emphasizing that enactment of FEDERAL RULE OF CIVIL PROCEDURE 23 did not change scope of jurisdiction of federal district courts).

tion²⁷⁷—since rejected by Congress—frustrated both public law²⁷⁸ and private law plaintiffs.²⁷⁹ Commentators have seen in the Court's approach to class actions evidence of hostility toward these suits, which are essentially a plaintiff's device.²⁸⁰

The pattern is not monolithic. The Court's receptivity toward Rule 11 of the Federal Rules of Civil Procedure²⁸¹ may reflect a perception that the rule favors defendants²⁸² although awards of sanctions in favor of a plaintiff are possible.²⁸³ Similarly, in the complex area of applying the doctrine of res judicata to suits under federal antitrust law and parallel state laws the decisions point in both directions.²⁸⁴ Still, a significant portion of the Court's output in the areas discussed is anti-plaintiff. Analysts may well differ on whether these decisions reflect neutral application of generally neutral principles, a desire to harm identifiable groups of plaintiffs, or a general desire to restrict the ambit of federal courts. Even if the last concern is the key element, it is impossible to say how much it represents a worry about caseloads, a desire to conserve federal judicial resources for presumably more deserving cases, a desire to keep state courts in the forefront of private law litigation, or a general unarticulated antipathy toward all plaintiffs.

The search for judicial motives has its limits, but the pattern of results is clear. Let us in any event take as proved the following general

277. *Finley v. United States*, 490 U.S. 545, 553 (1989) (holding that the FTCA does not provide federal district court with jurisdiction over defendants other than the United States).

278. *Aldinger v. Howard*, 427 U.S. 1, 17 (1976) (holding that the joinder of a municipal corporation "for purposes of asserting a state-law claim not within federal diversity jurisdiction is without the statutory jurisdiction of the district court").

279. *Finley*, 490 U.S. at 545.

280. See, e.g., Chayes, *supra* note 245, at 26-45 (discussing hostility, with some exceptions, of Burger Court).

281. Rule 11 allows courts to sanction the attorney who signs a document submitted to a court if the document alleges facts that a "reasonable inquiry" would have disproved, is not "warranted by existing law" or a good-faith argument for change in law, or is filed for an "improper purpose." FED. R. CIV. P. 11.

282. Stephen Labaton, *Solution to Wasteful Lawsuits Becomes a Problem*, N.Y. TIMES, June 14, 1992, § 4, at 2 (discussing growing volume of Rule 11 litigation).

283. In *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123 (1991), the Court affirmed an award of sanctions against a defendant. The opinion upheld the application of sanctions in a diversity case under the trial court's inherent judicial power, even though some of the sanctions could have been imposed under Rule 11, and state law would not have permitted the sanction. *Id.* at 2136.

284. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 386 (1985) (holding that 28 U.S.C. § 1738 requires district courts first to look to state law to determine the preclusive effect of a state judgment); *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 395 (1981) (holding that res judicata bars relitigation of an unappealed adverse judgment even when other plaintiffs in similar actions against common defendants have successfully appealed the judgments against them).

propositions: The Court is conservative; this conservatism has included a significant degree of hostility toward public law plaintiffs; and to a considerable extent, this attitude has manifested itself in the case of private law plaintiffs as well. Applying these propositions to the specific issue of forum-shopping by private law plaintiffs, we would expect the Court to be hostile as well.

D. *The Court's Anti-Forum-Shopping Stance*

In the federal-state context the Court has indeed manifested a hostile attitude, emphasizing *Erie's* proscription of federal-state forum-shopping. A recent example is the refusal in *Walker v. Armco Steel Corp.*²⁸⁵ to apply a Federal Rule of Civil Procedure in the face of a conflicting state provision. The plaintiff filed his complaint within the period provided by the state statute of limitations.²⁸⁶ He argued that he therefore had complied with the statute of limitations because Federal Rule 3 provides that "[a] civil action is commenced by filing a complaint with the court."²⁸⁷ The defendant, however, invoked the rest of the state provision, which required the issuance of summons within the limitations period and service within sixty days of issuance. The Court agreed with the defendant, reasoning in part that the state requirements were closely bound up with the substantive state law of the statute of limitations.²⁸⁸ Since the plaintiff had not complied with the latter part of the state provision, his case could not remain in federal court.²⁸⁹

The most significant aspects of the *Walker* decision are the Court's somewhat strained reading of Rule 3 and its unwillingness to follow the nationalistic sweep of *Hanna v. Plumer*.²⁹⁰ The Court insisted that Rule 3 simply does not address the running of statutes of limitations, despite the fact that knowing whether the time period has been met is one of the most important reasons why one needs to know when an action has been commenced.²⁹¹ In the Court's view, "in diversity actions Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run."²⁹² *Hanna* pointed toward a broad application of the Rules, emphasizing that they derive their legitimacy from Congress'

285. 446 U.S. 740 (1980).

286. *Id.* at 742.

287. *Id.* at 743 (citing FED. R. CIV. P. 3).

288. *Id.* at 751.

289. *Id.* at 751-53.

290. 380 U.S. 460 (1965).

291. *Walker*, 446 U.S. at 750-51.

292. *Id.* at 751 (footnote omitted).

powers over the federal courts.²⁹³ In particular *Hanna* seemed to cast doubt on *Ragan v. Merchants Transfer & Warehouse Co.*,²⁹⁴ an earlier *Erie* case in which the Court resolved a problem analogous to that of *Walker* in favor of state law.²⁹⁵

As the analysis in Part II suggests, these cases can be viewed as the application of *Erie* to questions of state and federal regulatory power over various aspects of diversity cases.²⁹⁶ Thus it is not surprising that *Hanna*, a product of the Warren Court, took a nationalist approach. *Walker* is a return to the post-*Erie* emphasis on state powers. Obviously, there are implications for forum-shopping that flow from these regulatory concerns. Any attempt to make the federal court function like the state court "a block away"²⁹⁷ serves federalism goals of allocating regulatory power and also deters shopping for the federal court by those plaintiffs who would benefit from the particular practice in question. Apart from the result in *Walker*, the Court's language in a number of cases continues to emphasize the anti-forum-shopping goals of *Erie*.²⁹⁸ Although not discussed explicitly, there is also an anti-forum-shopping dimension to many of the "federal courts" cases discussed above. Plaintiffs who seek the creation of federal common law are shopping for a substantive advantage over the law offered in a state forum. The same is true of some implied rights plaintiffs and also may be true of plaintiffs who seek potential federalization of their case through a broad reading of "arising under."²⁹⁹ A close relationship exists between applicable law and choice of forum.

As noted, a more direct, albeit implicit, aversion to the practice can

293. 380 U.S. at 473-74.

294. 337 U.S. 530, 533-34 (1949) ("We cannot give [a cause of action] longer life in the federal court system than it would have had in the state court without adding something to the cause of action.").

295. See *Hanna*, 380 U.S. at 476-77 (Harlan, J., concurring) (suggesting that *Ragan* be overruled). The lower court in *Walker* felt obliged to follow *Ragan*, but recognized the apparent conflict between it and *Hanna*. *Walker v. Armco Steel Corp.*, 592 F.2d 1133, 1136 (10th Cir. 1979), *aff'd*, 446 U.S. 740 (1980).

296. See generally Stein, *supra* note 72 (addressing the tension in diversity cases between federal and state regulation of court access, including the issues of personal jurisdiction, capacity, venue, *forum non conveniens*, transfer, and statutes of limitations).

297. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) (explaining *Erie*'s central thesis "that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of a State court a block away should not lead to a substantially different result").

298. See *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1222 (1991); *Ferens v. John Deere Co.*, 494 U.S. 516, 523 (1990); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 n.6 (1988). The Court's practice, as shown in these cases, is to refer to *Erie*'s "twin aims": avoidance of forum-shopping and inequitable administration of the laws.

299. Such plaintiffs may feel that they have a better chance for a broad interpretation of possible federal claims in a federal court.

be found in the public law forum-shopping cases. In the private law context a similar attitude can be found in the forum selection clause decisions. An F.S.C. represents primarily anticipatory forum-shopping by a potential defendant as well as an effort to thwart any such tactics by the potential plaintiff.³⁰⁰ The Court's attitude toward *forum non conveniens* also proves instructive. Although § 1404(a)³⁰¹ essentially has eliminated use of that doctrine by the federal courts in domestic cases,³⁰² it can still arise in international litigation. In *Piper Aircraft Co. v. Reyno*³⁰³ the Court invoked the doctrine to frustrate an attempt at international forum-shopping. The Court paid mere lip service to the notion of respecting the plaintiff's choice of forum and treated as relatively unimportant the plaintiff's desire to seek favorable law.³⁰⁴ *Piper* represents an endorsement of *forum non conveniens*. As demonstrated by the several opinions in the Texas Supreme Court's recent landmark decision in *Dow Chemical Corp. v. Castro Alfaro*,³⁰⁵ favorable attitudes towards *forum non conveniens* correlate closely with unfavorable attitudes toward forum-shopping by plaintiffs.³⁰⁶

Certainly one would expect conservatives to take a dim view of forum-shopping. It can be seen as the quintessential pro-plaintiff device, representing manipulation of the system to achieve windfall recoveries and deprive defendants of advantages on a level playing field. The defendants involved are generally interstate corporate entities, classic "repeat players." Conservatives are also likely to be attracted by the formalistic notions of law that forum-shopping threatens. Certainly they are not attracted by such pro-forum-shopping premises as the desirability of litigation or the notion that plaintiffs inherently represent the better view of the law. Therefore one would expect the Burger-Rehnquist Court to manifest across-the-board opposition to forum-shopping and to attempt to crush the practice in whatever shape. When it comes to state-state forum-shopping by private law plaintiffs, however, the picture becomes considerably more complex.

300. Freer, *supra* note 42, at 1092-93.

301. 28 U.S.C. § 1404(a) (1988).

302. See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 91 (1985).

303. 454 U.S. 235 (1981).

304. *Id.* at 249 n.15. It should be noted that the real parties in interest in *Piper* were foreign nationals, and that this element of the case undercut respect for the choice of forum.

305. 787 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991).

306. Compare *id.* at 689 (Doggett, J., concurring) ("The parochial perspective embodied in the doctrine of *forum non conveniens* enables corporations to evade legal control merely because they are transnational.") with *id.* at 697 (Cook, J., dissenting) (likening forum-shopping plaintiffs to "turn-of-the-century wildcatters" and maintaining the necessity of *forum non conveniens* to counter the risk of exposing Texans to suits "of any plaintiff, no matter how distant from Texas is that plaintiff's home or cause of action").

V. STATE-STATE FORUM-SHOPPING AND THE BURGER-RHENQUIST COURT: HOW STATES RIGHTS TRIUMPHED OVER ANTI-FORUM-SHOPPING CONCERNS

A. *The Court's Pivotal Role—The Cases*

Choice of law practices in the state courts are the main impetus behind the current wave of forum-shopping. As with other forms of state governmental action, however, the federal Constitution has the potential to impose significant limits. Throughout the twentieth century the Court has held that the Due Process Clause³⁰⁷ and the Full Faith and Credit Clause³⁰⁸ restrain a state's ability to apply its own law to a case before its courts.³⁰⁹ As the states aggressively applied their laws to a widening range of situations, the Supreme Court's willingness to intervene and devise meaningful limits based on these clauses became a pivotal factor in the growth of forum-shopping.

At one point, the Court applied the Constitution strictly—not only as a limit on a state's application of its own law, but also as a directive about which law it should apply.³¹⁰ Subsequent cases abandoned this approach. The Court struck down application of forum law when the forum state had little or no relationship to the matter at issue,³¹¹ but took the fundamental step of recognizing that "a set of facts giving rise to a lawsuit . . . may justify, in constitutional terms, application of the law of more than one jurisdiction."³¹² This recognition helped lay the foundations for the choice of law revolution.³¹³ Prior to the 1980s, however, the Court had not considered at any length the relationship between that revolution as it developed in the state courts and constitutional doctrine on choice of law. *Allstate Insurance Co. v. Hague*³¹⁴ provided an opportunity for that consideration.

Allstate arose out of a vehicle accident in Wisconsin involving Wis-

307. U.S. CONST. amend. XIV, § 1.

308. U.S. CONST. art. IV, § 1.

309. The Court's general approach is not to distinguish between the scope of these two clauses in choice of law cases. See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.10 (1981). But see *id.* at 322 (Stevens, J., concurring) (advocating different inquiry for each clause).

310. E.g., *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 157-59, 163 (1932) (directing a New Hampshire court to afford full faith and credit to a defense available under the Vermont Compensation Act where parties had incorporated Vermont law into their employment contract).

311. *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930).

312. *Allstate*, 449 U.S. at 307.

313. See *supra* text accompanying notes 150-70 (discussing changes in choice of law theories).

314. 449 U.S. 302 (1981).

consin residents. The widow of a deceased victim had remarried and moved to Minnesota. She sued the deceased's insurance company in a Minnesota state court under an uninsured motorist clause of his policy.³¹⁵ His policy covered three automobiles. Minnesota law would allow her to "stack"—to recover up to three times the limit for each automobile. Wisconsin law did not allow stacking.³¹⁶ The Minnesota courts applied Minnesota law.³¹⁷ The Supreme Court ruled, in a plurality opinion,³¹⁸ that the choice of law decision was constitutionally permissible. The Court stressed that its role was not to second guess the choice of law reasoning of the state courts, but only to examine whether that reasoning stayed within constitutional boundaries.³¹⁹ It described those boundaries in the following terms: to apply its law a state must have a "significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction."³²⁰ It found significant contacts in the decedent's commute to work in Minnesota, his widow's Minnesota residency, and the defendant insurance company's business transacted in Minnesota.³²¹ The dissent accepted the general framework, but would have found the contacts present in *Allstate* insufficient to satisfy it.³²²

If the plot of *Allstate* was "The Choice of Law Revolution Meets the Constitution," the clear winner was the Revolution. All the Justices agreed on applying only what the dissenters called a "modest check on state power."³²³ The plurality's statement of the test, utilizing the requirement of "significant," appears to have some teeth, but its application indicated that the test was easily met. Minnesota's contacts were more tangential than significant. Of equal importance is the plurality's apparent embrace of the changes in state choice of law practices. The opinion seems to tie the requirement of contacts creating "interests" directly to the rise of interest analysis in choice of law.³²⁴ There is a clear implication that older constitutional decisions are irrelevant because they

315. *Id.* at 305.

316. *Id.* at 306.

317. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 49 (Minn. 1978), *aff'd*, 449 U.S. 302 (1981).

318. Eight Justices participated in the decision. Justice Brennan wrote for a plurality of four, including Justices White, Marshall, and Blackmun. Justice Stevens concurred, and Justice Powell dissented with Chief Justice Burger and Justice Rehnquist.

319. *Allstate*, 449 U.S. at 307.

320. *Id.* at 308.

321. *Id.* at 313-19.

322. *Id.* at 332 (Powell, J., dissenting).

323. *Id.*

324. *See id.* at 324-25 n.11 (discussing the dominant role of interest analysis in modern choice of law theory).

relied on a territorial view of choice of law discredited by modern theories.³²⁵

Moreover, the opinion cites with apparent approval a number of expansive state choice of law decisions.³²⁶ *Allstate* represents only the opinion of four Justices; however, Justice Stevens, who concurred, would have gone even further in upholding forum application of forum law in all cases. He advocated attaching "a presumption of validity to a forum State's decision to apply its own law to a dispute over which it has jurisdiction."³²⁷ On balance, *Allstate* merits Brilmayer and Lee's description as "the most expansive choice of law decision in Supreme Court history."³²⁸ Modern choice of law approaches give states extraordinary latitude in finding interests. In theory, a court might apply its own highly pro-plaintiff law to an out-of-state transaction involving out-of-state defendants to signal in-state defendants that it takes that law very seriously and thus deter their future conduct. If the Supreme Court is willing to equate claimed interests with contacts, then anything goes.

Allstate, however, is not the Court's last word. In *Phillips Petroleum Co. v. Shutts*³²⁹ the Court applied the *Allstate* test to strike down an application of forum law. The question is how much significance to attach to *Shutts*. The case was a class action brought by gas leaseholders against the lessee producer arising out of a royalty dispute. The leaseholders lived in all fifty states; the leases covered land in several states, primarily Texas and Oklahoma. The Supreme Court reversed the Kansas Supreme Court's decision that Kansas law applied to all class members. The Court held that Kansas lacked any interest in claims involving non-Kansas leases.³³⁰ Kansas's interest in regulating the defendant's in-state activities³³¹ did not extend to these other leases. Moreover, the parties executing non-Kansas leases would not have expected Kansas law to apply.³³²

Does *Shutts* demonstrate that *Allstate* really does impose meaningful limits on state choice of law practices? At first blush, the answer seems to be yes. The Court explicitly recognized the relationship between choice of law and forum-shopping and indicated a clear desire not to

325. *Id.*

326. *Id.* at 314-15 n.19, 316-17 n.22.

327. *Id.* at 326 (Stevens, J., concurring in judgment).

328. Brilmayer & Lee, *supra* note 94, at 849.

329. 472 U.S. 797 (1985).

330. *Id.* at 822.

331. *Id.* at 819.

332. *Id.* at 822.

encourage the practice.³³³ There were arguments for application of Kansas law. That state was concerned with the defendant's conduct toward its residents, and that conduct was involved in the case before its courts. Moreover, in a nationwide class action there are practical advantages to be derived from applying one law to the claims of the entire class.³³⁴ The key is how one applies the logic of class actions to *Shutts*. If the plaintiffs are viewed as a single entity, subjected to a single act on the defendant's part, it could be contended that the law of any of the states across which that act was spread could apply. The Court, however, analyzed the class claim as an aggregation of individual claims and weighed the constitutionality of "application of Kansas law to every claim in this case."³³⁵ Texas leaseholders unhappy with payments on a Texas lease could not get Kansas law applied to their grievance by suing in Kansas courts. The Court treated their membership in a class represented by Kansas plaintiffs as not affecting their out-of-state status. This approach treats the class action defendant as if it had been sued by individuals, or groups of individuals, rather than by one monolithic entity.³³⁶

From a choice of law perspective, *Shutts* serves mainly to establish the outer bounds of *Allstate*: A forum may not apply its substantive law solely by virtue of being the forum to a matter otherwise unconnected with it. The fact that the defendant carries on similar activities within the state does not give the state a regulatory interest over unconnected out-of-state activities. The latter point has the potential to develop into a significant limitation. It might place roadblocks in the way of state courts that wish to impose liability under their own law upon their own corporations for actions committed out of state.³³⁷ Perhaps, however, being a corporation's home state confers a greater regulatory interest than Kansas had in Phillips.

The possibility that the Court views *Shutts* as a serious limit on state choice of law practices, remote in the case itself, is even more remote after *Sun Oil Co. v. Wortman*.³³⁸ The fact pattern was similar to *Shutts*. The question before the Court was whether Kansas could apply its statute of limitations to claims involving non-Kansas leases to which it could

333. *Id.* at 820.

334. *Id.* at 820-23.

335. *Id.* at 822 (emphasis added).

336. See Chayes, *supra*, note 245, at 28 (discussing whether class action should be treated as aggregation of individual claims or suit by "a single jural entity").

337. See *Tomlin v. Boeing Co.*, 650 F.2d 1065, 1071-72 (9th Cir. 1981) (applying pro-plaintiff Washington law to an out-of-state tort committed by a resident defendant).

338. *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988); Weinberg, *supra* note 4, at 68-69 (asserting that "[a]fter *Wortman* any choice of law will be constitutional, apparently, as long as it is effected by some traditional, 'subsisting' choice of law rule").

not apply its substantive law. The Court upheld application of the Kansas statute. Justice Scalia's opinion for the majority³³⁹ was relatively brief on this point. It emphasized the historical practice of treating statutes of limitation as procedural and reaffirmed the general understanding that the forum state is constitutionally free to apply its procedural rules to cases before it. Widespread historical practice played the key role in his due process analysis.³⁴⁰ The overall tone of his opinion is one of "hands off" where state conflict of laws decisions are concerned. He reiterated the general proposition found in *Allstate* that in many instances the law of more than one state can constitutionally apply.³⁴¹ In response to the argument that statutes of limitations might be regarded as substantive under modern choice of law theories, he refused to permit the Court to "embark upon the enterprise of constitutionalizing choice-of-law rules, with no compass to guide us beyond our own perceptions of what seems desirable."³⁴²

Justice Brennan, concurring, seemed willing to engage in some inquiry along these lines,³⁴³ but after broaching the subject backed off quickly and concluded that the forum state had sufficient "procedural interests" to satisfy the *Allstate* test.³⁴⁴ Justice Brennan did manifest a desire to see the Court play some role in reviewing state choice of law decisions and indicated that the Court's "current test" provides a standard.³⁴⁵ His disagreement with the majority concerned the possibility of a more searching inquiry in future choice of law cases. He saw the Court's deferential approach as extending to "purely substantive issues."³⁴⁶ His particular concern was with the apparent validation of any practice that is widespread and traditional. Of course, the new conflicts law has introduced new modes of analysis that can be used to justify use of forum substantive law. This widespread practice might be invoked by the Court in the future as partial evidence that such modes satisfy due

339. Justice Scalia delivered the opinion of the court, in Part I of which all participating members joined, in Part II in which Chief Justice Rehnquist and Justices White, Stevens, and O'Connor joined, and in Part III in which Justices Brennan, White, Marshall, Blackmun, and Stevens joined. Justice Brennan filed an opinion concurring in part and concurring in the judgment, in which Justices Marshall and Blackmun joined. Justice O'Connor filed an opinion concurring in part and dissenting in part on the ground that the Kansas Supreme Court had not adequately considered what the law of the other states was, in which Chief Justice Rehnquist joined. Justice Kennedy took no part in the consideration or decision of the case.

340. See *Sun Oil*, 486 U.S. at 723-29.

341. *Id.* at 727.

342. *Id.* at 727-28.

343. See *id.* at 735-36 (Brennan, J., concurring in part and concurring in the judgment).

344. *Id.* at 736-37 (Brennan, J., concurring in part and concurring in the judgment).

345. *Id.* at 740-42 (Brennan, J., concurring in part and concurring in the judgment).

346. *Id.* at 740 (Brennan, J., concurring in part and concurring in the judgment).

process concerns. The *Sun Oil* majority seemed bent on circumscribing the Court's role in choice of law review. In addressing the case before it the majority reached out, in dictum, to list other arguably procedural matters on which the forum state can apply its own laws.³⁴⁷ The whole tone of the opinion is that the states set the standard for acceptable practices and that any alteration of those practices should come from the states themselves or, perhaps, from Congress.³⁴⁸

Sun Oil does not point entirely in one direction. Two members of the Court indicated the question would be harder if the states in which the claims arose considered statutes of limitation to be part of their substantive law.³⁴⁹ As noted, the three concurring Justices envisaged a broader Supreme Court role in choice of law cases. In analyzing the case's significance these nuances must be discussed, as well as the result and the apparent thrust of the majority opinion. But nuances are not enough. Much stronger Supreme Court action is necessary to brake the forum-shopping momentum in state courts. The natural inclination of those courts to apply their own law has been encouraged, perhaps intensified, by academic theories. In this context, anything less than a tough federal standard and a willingness to enforce it will leave the wave of forum-shopping largely unabated.

The analysis in this subsection has, thus far, examined the Burger-Rehnquist Court's choice of law cases. The next logical step might seem to be an in-depth review of the Court's cases on personal jurisdiction. After all, forum-shopping cannot occur unless the defendant can be sued in the forum, and the post-*International Shoe*³⁵⁰ developments in constitutional standards are often cited as a factor in the growth of forum-shopping.³⁵¹ My inclination, however, is to take the current status of personal jurisdiction as a given. The focus of this Article is on shopping for law. It may well be that once the forum has obtained jurisdiction the choice of law battle is often over, given the proclivity of courts to decide to apply their own law. That state of affairs exists, however, largely because there is no meaningful check on those decisions. If choice of law practices are viewed as a problem, the way to address that problem is through supervision of these practices. As Professor Shreve states, "Ju-

347. *Id.* at 728.

348. *Id.* at 728-29.

349. *Id.* at 743 (O'Connor, J., concurring in part and dissenting in part). Chief Justice Rehnquist joined Justice O'Connor's opinion.

350. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *International Shoe* is the major Supreme Court decision in the development of states' authority to sue defendants regardless of their presence at the time of suit.

351. See, e.g., Gottesman, *supra* note 3, at 2.

risdictional doctrine is a poor surrogate for choice-of-law review.”³⁵²

In this respect, I tend to side with the view that personal jurisdiction and choice of law are conceptually distinct.³⁵³ Two other points lead to downplaying the significance of recent personal jurisdiction cases. *Allstate* presented the Court with the opportunity to make new constitutional doctrine in response to new state court practices. Personal jurisdiction, on the other hand, represents an area of extensive ongoing dialogue between the Supreme Court and the states governed by such earlier landmark decisions as *International Shoe* and *Hess v. Pawloski*.³⁵⁴ Given the strong pro-jurisdiction thrust of these decisions, the current Court would have had to mount an extensive counter-revolution to reduce forum-shopping this way. A second point is that to some extent the Court has tried. As one authority notes, “After *Hague* it seems clear that the Due Process Clause allows states extraordinary latitude in developing choice-of-law rules. The due process restrictions on state jurisdiction are considerably greater than those on choice of law.”³⁵⁵ The Court has taken a restrictive approach to such pro-plaintiff staples as the stream-of-commerce theory³⁵⁶ and the concept of general jurisdiction.³⁵⁷ Overall the cases are mixed with plaintiffs and defendants each winning victories.³⁵⁸ Given the realities of a highly interdependent interstate economy, the Court is unlikely to cut down much further on the ability of plaintiffs to sue in more than one state. In my view that serves to underscore the importance of choice of law cases as the main vehicle for dealing with state-state forum-shopping for favorable law.

There is, however, another group of cases in which the Supreme Court has played an important role in “shoring up” the present sys-

352. Shreve, *supra* note 158, at 355.

353. See *Allstate*, 449 U.S. at 317 n.23 (discussing the relationship between the two concepts).

354. 274 U.S. 352, 356 (1927) (concluding that a nonresident motorist may be subject to the forum state's jurisdiction in suits arising from auto accidents in the forum state).

355. COUND et al., *supra* note 41, at 107.

356. *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 112 (1987). Writing for a plurality of the court, Justice O'Connor stated:

[T]he “substantive connection” . . . between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed towards the forum state The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state.

Id. (Citations omitted).

357. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418 (1984) (denying general jurisdiction over corporation that had occasional contacts with state).

358. Compare *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 487 (1985) (plaintiff victory) with *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980) (defendant victory).

tem.³⁵⁹ These cases concern the role of the federal courts in state law cases where forum-shopping is a potential factor. In this area the Court has striven to apply *Erie*, but not to prevent state-state forum-shopping. The Court has emphasized *Erie*'s condemnation of federal-state forum-shopping in cases presenting questions of state-state forum-shopping by plaintiffs in the federal courts. The Court has relied on *Erie*'s ideal of uniformity to preserve whatever opportunities for state-state forum-shopping would already have existed in the state system. It may, indeed, have acted to enhance them. On a more fundamental level, it has continued the post-*Erie* practice of refusing to allow defendants to utilize the federal court system as a vehicle for negating plaintiffs' state law shopping advantages.

Let us reconsider the situation facing the Court in *Ferens*. If plaintiffs had brought the tort claim in a Pennsylvania federal court that court would have acted like a Pennsylvania state court and dismissed it. If they had brought suit in a Mississippi federal court and remained there that court would, under *Klaxon v. Stentor*,³⁶⁰ have applied Mississippi choice of law principles and retained the case under the Mississippi statute of limitations. The plaintiffs, however, did neither of these things. They started in Mississippi but ended up in Pennsylvania federal court with a Pennsylvania case that the courts of that state would not have heard. Justice Scalia in dissent argued that this violated the principle of uniformity within Pennsylvania.³⁶¹ Justice Kennedy, writing for the majority, insisted that it was only a by-product of *Erie*. The *Ferens* could go to Mississippi and forum-shop there. The federal court in Mississippi "had to replicate"³⁶² this opportunity. He saw the case as illustrating the *Erie*-based neutrality of the diversity jurisdiction. Plaintiffs get to keep what the states have already given them.

Let us for a moment accept the neutrality principle. It should not follow from this principle that plaintiffs can go to federal court and get more forum-shopping advantages than they would have gotten in state court. Is that not what the *Ferens* did? The Mississippi state courts could not have given them a transfer to Pennsylvania with the Mississippi statute of limitations. Thus the principle of neutrality was arguably violated.³⁶³ The *Ferens* majority relied heavily on *Van Dusen v. Bar-*

359. Weinberg, *supra* note 4, at 68-69 (viewing forum-shopping as "suggest[ing] an implicit national policy in favor of safe and fair interstate commerce").

360. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

361. *Ferens v. John Deere Co.*, 494 U.S. 516, 535-36 (1990) (Scalia, J., dissenting).

362. *Id.* at 527.

363. Maltz, *supra* note 13, at 257-58. It is true that the result does not give them any different law than they could already have gotten in Mississippi. However, the transfer makes

rack³⁶⁴ for the proposition that § 1404(a) embodies a policy of not letting transfer "deprive parties of state-law advantages."³⁶⁵ The holding of *Van Dusen*, and a cornerstone of modern federal practice, is that in a § 1404(a) transfer of a diversity case the transferee court applies the law of the transferor court's state.³⁶⁶ The Court's reasoning has been that a contrary result would not only deprive plaintiffs of state law advantages, but would also permit § 1404 to become an instrument for defendant forum-shopping.³⁶⁷ Suppose, however, that the courts of the transferor state would have dismissed the plaintiff's case on grounds of *forum non conveniens*. The defendant is stuck with the law of a state which the plaintiff could not have gotten in that state. In other words, the policy of neutrality-replication, which the current Court upholds consistently, may also give plaintiffs more forum-shopping opportunities than they would get in the states.³⁶⁸ It is hard to believe that *Erie* requires that.

For that matter, what is wrong with forum-shopping by defendants? It is not clear that any reliance factor on the part of the plaintiffs is substantially weakened as long as the law of a significantly related state is applied. If the advocates of forum-shopping wish to downplay reliance on the part of defendants, the argument cuts both ways. *Erie* does seem to point toward uniformity within states in terms of diversity plaintiffs not getting substantive law advantages from the federal court, but does that carry over to defendants? Might not defendants have a claim to use the diversity jurisdiction to negate the advantages plaintiffs receive from the state court, at least when those advantages are perceived as unfair? The classic area in which these questions are posed is the question of federal choice of law rules in diversity cases and the continuing vitality of *Klaxon v. Stentor*.³⁶⁹ *Klaxon* forbids any such development. Recent cases have shown that the Court continues to view *Klaxon* as a pivotal decision.³⁷⁰ Indeed, the Court summarily reaffirmed the validity of *Klaxon* in 1975.³⁷¹ I raise these matters at this point primarily to illustrate how *Erie*, the quintessential anti-forum-shopping case, has been ap-

it much more likely that they will in fact take advantage of their initial ability to shop in Mississippi. Mississippi could not have given them this combination of law plus ability to use it in Pennsylvania.

364. 376 U.S. 612, 639 (1964).

365. *Ferens*, 494 U.S. at 523.

366. FRIEDENTHAL, *supra* note 302, at 215-16.

367. *Ferens*, 494 U.S. at 523.

368. This point was reserved in *Van Dusen*, 376 U.S. at 639-40.

369. 313 U.S. 487, 496 (1941).

370. *E.g.*, *Ferens*, 494 U.S. at 527-28; *Stewart Org., Inc. v. Ricoh*, 487 U.S. 22, 37 (1988) (Scalia, J., dissenting).

371. *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975).

plied to guarantee to plaintiffs that opportunities for state-state forum-shopping are available equally, if not more so, to them in federal as well as state court. As for those opportunities themselves, the Court's constitutional choice of law cases ensure that they will grow and prosper.

B. Might the Cases Have Come Out Differently?

One might have expected something different from a conservative Supreme Court. It has repeatedly emphasized the anti-forum-shopping dimension of *Erie*, without drawing any explicit distinction between federal-state and state-state aspects. In the public law area it has developed numerous doctrines that are strongly anti-forum-shopping in operation. In private law litigation the Court has often shown a general hostility to plaintiffs and has given hints that it disapproves of forum-shopping. It is true that one can find language on personal jurisdiction that appears to look favorably upon the practice,³⁷² but the overall thrust of the relevant cases outside the state-state area points in the direction of accepting and furthering an anti-forum-shopping principle. The question that arises is whether that principle could have carried over to the choice of law cases—the decisions that have played such a direct and pivotal role in fostering the practice of shopping between state laws.

Allstate is obviously the key. The Court could have started with the premise that any case potentially involving forum-shopping requires some scrutiny, at least if the court below appears to have strained to apply forum law by manipulating choice of law doctrine. The Court might have formulated a different test. For example, it could have focused on whether Minnesota's regulatory sphere over the activities of insurance companies extended to the situation presented in the case. Professor Shreve has suggested an approach that focuses on whether the forum state "has a policy which it has some demonstrable interest in advancing."³⁷³ Other formulations are, of course, possible.

However, the actual *Allstate* test could have reined in state choice of law practices, at least if the Court had applied the qualifier "significant" to the contacts it found. The most questionable aspect of the *Allstate* decision is the application of the test, allowing what the dissent characterized as "trivial" contacts³⁷⁴ to justify application of Minnesota law. That state's concern for its out-of-state workers may not stretch to the

372. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1989) ("The victim of a libel, like the victim of any other tort, may choose to bring suit in any forum with which the defendant has 'certain minimum contacts . . .'" (citations omitted)).

373. Shreve, *supra* note 158, at 351.

374. 449 U.S. at 332 (Powell, J., dissenting).

insurance dimensions of out-of-state automobile accidents.³⁷⁵ Of course it is possible that the insurance company was not surprised by the application of Minnesota law because it did business there and could expect Minnesota law to apply to some policy disputes.³⁷⁶ This analysis might be extrapolated to stand for the proposition that an interstate business can never complain about the application to it of the law of any state in which it does business, whether or not the particular suit is related to in-state business. That is not much of a limit. If the case comes down to Minnesota's desire to give the benefit of its law to its plaintiff, the Court might well have said that is not enough of an interest to justify exercising that form of sovereignty. That interest was particularly weak given that the plaintiff had moved to Minnesota after most of the relevant events had occurred.³⁷⁷

Striking down Minnesota's application of its law would have focused on the weakness of its claim to exercise sovereignty rather than on any effort to identify and weigh Wisconsin's competing interests. Perhaps the Court would have had to discern from the facts at least a *prima facie* case for the application of some law other than that of the forum.³⁷⁸ The facts suggest this solution,³⁷⁹ and suggest as well the classic combination of forum-shopping and judicial manipulation.³⁸⁰ Had the Court wanted to carve out a strong role in the face of the states' new aggressiveness in applying their own law, it might have seized *Allstate* as an easy case in which to do so.

Deciding *Allstate* differently would have been the first step in sending that message to the states. *Shutts* would have been decided as it was, but the message of that case would have been a re-enforcement of *Allstate*—a statement that “we really mean it”—rather than a footnote-like

375. See Frederic L. Kirgis, Jr., *A Wishful Thinker's Rehearing in the Hague Case*, 10 HOFSTRA L. REV. 1059, 1064-65 (1982).

376. All of the justices in *Allstate* agreed on this point. See *Allstate*, 449 U.S. at 317-18; *id.* at 329-30 (Stevens, J. concurring); *id.* at 337-38 (Powell, J., dissenting).

377. See Kirgis, *supra* note 375, at 1063.

378. Professor Shreve suggests consideration of the standard that, at least in cases in which the application of a conflicting law of another, *interested* state is an option, “a state may constitutionally apply its law only in situations in which the state has a policy which it has some demonstrable interest in advancing.” Shreve, *supra* note 158, at 351.

379. *But see* Louise Weinberg, *Conflicts Cases and the Problem of Relevant Time: A Response to the Hague Symposium*, 10 HOFSTRA L. REV. 1023, 1028 (1982) (arguing strength of Minnesota's interest).

380. This analysis, of course, raises the definitional problem of forum-shopping: Can we regard plaintiff Hague as having forum shopped when she sued in her own state? In his dissent, Justice Powell raised the question of whether accepting her post-accident move would encourage people to change citizenship in order to shop for law. *Allstate*, 449 U.S. at 337 (Powell, J., dissenting).

decision establishing that there are outer limits even under a permissive approach. The opinion notes that in the situation of "land and royalty owners" in one state there is no expectation that the law of a different state would control disputes.³⁸¹ This was an easy case for a territorial approach. The Court might well have moved beyond it to discuss the more general question of limits on the application of forum law to interstate entities doing business in the forum. The observation that "Kansas certainly has an interest in regulating petitioner's conduct in Kansas"³⁸² provided a nice opening for discussing what Kansas could not do and why.

Sun Oil also could have been decided as it was. A somewhat different opinion would have been called for, emphasizing even more the narrow scope of the issue before the Court: whether a forum state can apply its statute of limitations to claims unrelated to it when the related state considers the statute of limitations a procedural issue.³⁸³ To demonstrate that *Allstate* really does have teeth, it also would have been desirable for the Court to avoid the general hands-off tone of the majority opinion.

I do not insist that the Court should have resolved these issues in this manner as a matter of sound constitutional-conflicts law. Scholars are sharply divided over how *Allstate* should have been decided.³⁸⁴ My point is that it could have done so. The issue before the Court was an open one: What should be the constitutional response to widespread state acceptance of choice-of-law theories leading to a preference for forum law? *Allstate* presented a set of facts inviting a strong response. Had the Court seized this opportunity, the result would be a quite different climate for private law state-state forum-shopping.

How far the Court might have gone in curbing the role of the federal courts as auxiliaries to that forum-shopping is an open question. *Ferens* seems wrongly decided. If one accepts the proposition that the plaintiffs got more in the federal system then they would have had in the state

381. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985).

382. *Id.* at 819 (emphasis added).

383. In particular, the Court, under this analysis, would not have reached out in dictum to validate other choice of law practices. Again, the matter is one of tone rather than results. In this respect I agree with Professor Weinberg that the *Sun Oil* case greatly relaxes choice of law standards. See Weinberg, *supra* note 4, at 68-69.

384. For example, Professor Weinberg asserts that *Allstate* was correctly decided, and that Minnesota law was the proper law of the case. See Weinberg, *supra* note 379, at 1028-29. Professor Silberman thinks that *Allstate* was wrongly decided, and advocates limits on choice-of-law "as a matter of federal common" law. Linda Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 103, 104-05 (1981). Professor Kirgis believes that *Allstate* was wrong as a matter of constitutional law because applying the Minnesota rule violated due process. Kirgis, *supra* note 375, at 1062.

system, the result violates classic *Erie* goals of preventing *federal-state* forum-shopping. The *Ferens* problem of plaintiff-initiated transfers may not arise with great frequency. A more important question is whether the Court should have used that case to re-examine the *Van Dusen* rule concerning defendant-initiated transfers. Without departing from the neutrality-uniformity approach to *Erie*, one might ask whether plaintiffs get more here as well when a federal court transfers a case that a state court would have dismissed on *forum non conveniens* grounds. Perhaps it makes sense not to complicate the law of § 1404 transfers. Perhaps a *per se* rule is better than individualized inquiries into whether the plaintiff or the defendant initially sought federal court. Time spent on such collateral matters diverts judicial resources from the underlying suit. The Court is unlikely to take any such step, especially since current § 1404(a) practice under *Van Dusen* reflects well-established rules of statutory construction.

If the Court really wanted to take a fresh look at whether defendant forum-shopping violates *Erie* policies, a re-examination of *Klaxon* would have provided a better vehicle. Allowing creation of federal choice of law rules in diversity cases would give defendants an extraordinary set of opportunities to escape plaintiff forum-shopping. Defendants would take advantage of these opportunities through removal, since plaintiffs would not start in the federal court if they feared unfavorable choice of law rules. This puts the federal trial courts in the position of *negating* plaintiffs' state law opportunities. Removal is, however, a defendant's device, and the function of diversity jurisdiction is to help parties who may face unfairness in the state courts. *Klaxon* is taken to stand for the proposition that *Erie* blocks any such pro-defendant development,³⁸⁵ even though *Erie* was a case of forum-shopping by the plaintiff.

Even if the Court considered this step and went so far as to restate *Erie* as primarily a case about regulatory federalism, *Klaxon* would survive re-examination. The uniformity-neutrality application of *Erie* makes sense because it prevents undermining of the significant governmental role played by the courts of the forum state when they adjudicate cases applying their law. Choice of law doctrines are a part of that law. For the federal courts not to apply them would take away an important chunk of the state's regulatory authority. Once again the regulatory-federalism and the fairness-forum-shopping readings of *Erie* lead to the same end result.

It is worth noting that a supposedly pro-defendant Supreme Court has neither reexamined the role of the lower federal courts as aiders and

385. Ely, *supra* note 61, at note 125.

abetters of state-state forum-shopping, nor considered the possible use of those courts as neutral forums to cut back on the practice. These are, of course, secondary issues in the broader debate over forum-shopping. They arise only because the state courts are engaged so extensively in encouraging the practice. Still, it is striking that *Erie* plays such a significant role in the acceptance in *Ferens* of state-state forum-shopping. Perhaps the Court reads *Erie*'s view of federalism as neutral toward this kind of state judicial activity, or even supportive of it. The question is whether this reading of *Erie*, supposedly a constitutional case about the power of federal courts, carries over to the recent constitutional cases on choice of law and the power of state courts.

C. *The Federalism Factor and the Inconsistency Critique*

The result of these cases is to leave matters in the hands of the states, and the Court's language makes it clear that is its intent.³⁸⁶ In other words, in any clash between a defendant-oriented anti-forum-shopping principle on the one hand and the rights and prerogatives of the forum state on the other, the Court comes down firmly on the side of the state. Federalism, defined broadly as the importance of ensuring the states' primary role over a broad sphere of domestic governance, is the dominant variable.

To understand the role of the federalism factor let us reconsider cases that seem to reflect either an anti-forum-shopping principle or a general pro-defendant tilt. An obvious starting point is *Erie* itself and the post-*Erie* cases concerning whether to apply federal or state law in diversity.³⁸⁷ An important element of these cases is pro-defendant results in the face of potential forum-shopping by plaintiffs. At the same time the pro-defendant result advances *Erie*'s federalism goal: state governance in the face of federal authority. Pro-plaintiff, anti-state results occur when the Court discerns a strong federal policy linked to Congress³⁸⁸ or the Constitution.³⁸⁹ Most of the post-*Erie* cases antedate the current Court, but *Walker*, decided in 1980, fits the pattern. The same tendencies can be seen in the current Court's unwillingness to fashion federal common

386. *E.g.*, *Sun Oil Co. v. Wortman*, 486 U.S. 717, 728-29 (1988) ("If current conditions render it desirable that forum States no longer treat a particular issue as procedural for conflict of laws purposes, those States can themselves adopt a rule to that effect . . .").

387. *E.g.*, *Walker v. Armco Steel Corp.*, 446 U.S. 740, 741-44 (1980); *Hanna v. Plumer*, 380 U.S. 460, 461-64 (1965); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 543-45 (1949); *Ragan v. Merchants Marine Transfer & Warehouse Co.*, 337 U.S. 530, 531-32 (1949).

388. *Hanna*, 380 U.S. at 472-73 (linking the provisions of the Federal Rules of Civil Procedure to congressional power over the federal courts).

389. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537-39 (1958) (linking federal court jury practice to the constitutional guarantee of a jury trial).

law. The defendant prevails, and state authority wins out over federal. The notable exception is *Boyle v. United Technologies Corp.*³⁹⁰ There the Court created federal common law to help a defendant whose status was closely related to the federal government.³⁹¹ *Boyle* is a break in the pattern, but it is a case in which federalism and pro-defendant concerns are in direct opposition.³⁹² When both pull in the same direction *Boyle* suggests a pro-defendant outcome is likely.

In a number of cases indicating an anti-forum-shopping or a pro-defendant tilt the Court may simply not see any federalism interest present. Two of its forum selection clause decisions were admiralty cases governed by federal law.³⁹³ The Court's desire to uphold and encourage F.S.C.s also manifested itself in *Stewart Organization, Inc. v. Ricoh Corp.*,³⁹⁴ a diversity case that presented the issue of the role of F.S.C.s in a § 1404(a) transfer motion. Justice Scalia, in dissent, argued that under *Erie* the Court should have looked at the law of the forum state to resolve the initial question of the clause's validity.³⁹⁵ The majority, eager to promote F.S.C.s, treated the entire issue as governed by § 1404(a).³⁹⁶ As in *Boyle*, the pro-defendant, nationalist position prevailed. Once again, the point is that a clash between federalism and a pro-defendant interpretation of national law poses a difficult choice for the Court.³⁹⁷ Certainly, when federalism is out of the equation one can see a strong tendency toward a pro-defendant stance in such areas as summary judgment and implied rights of action, although the latter may also be analyzed as a variant of federal common law.³⁹⁸

This analysis helps us understand why the Court's state-state forum-shopping (choice of law) cases tend to favor the plaintiff. The Court probably does not discern in these cases any national interest cutting one way or the other. In *Boyle* and *Ricoh* a perceived national interest augmented the inherent pro-defendant tilt.³⁹⁹ In choice of law cases the

390. 487 U.S. 500 (1988).

391. *Id.* at 504-13.

392. Justice Brennan dissented in *Boyle*. His argument for a pro-plaintiff result is based in part on considerations of federalism. See *id.* at 517 (Brennan, J., dissenting).

393. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 3 (1972).

394. 487 U.S. 22 (1988).

395. *Id.* at 35-37 (Scalia, J., dissenting).

396. *Id.* at 28-32.

397. It is worth noting that in all F.S.C. cases the Court's decision favored the party invoking the clause who was also the defendant.

398. See *Brown*, *supra* note 268, at 628-29.

399. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504-05 (1988); *Ricoh*, 487 U.S. at 32.

Court apparently does perceive a dominant federalism interest—that of the state that wishes to regulate through adjudication of the dispute and application of its law. Federalism encourages states to govern, and that is what the forum state is trying to do. The Court's federalism also implies an attitude of deference on the part of the national government when assertions of state power are challenged as violative of constitutional guarantees. The federalism variable drives the plaintiff's side of the equation and works to counter any pro-defendant bias on the part of the Court. State-state forum-shopping is fundamentally different from federal-state forum-shopping because the latter impairs state governance, while the former reflects the differences state governance fosters.⁴⁰⁰ The Court's hands-off policy may seem like that of a neutral umpire, making sure only that individual states do not go too far. Alternatively, if vigorous assertions of state power are the likely result, the umpire's apparent neutrality will encourage forum states to follow their natural inclination to apply their own law.

In the area of personal jurisdiction a debate has long raged over whether the issues should be approached from the perspective of individual rights or from the perspective of federalism.⁴⁰¹ One might expect the development of an analytical framework in which personal jurisdiction issues are based on considerations of the defendant's rights, while choice of law issues focus on the impact of the forum state's action on the federal system. One of the striking features of *Allstate* is the relative lack of concern for the interests of the non-asserting state. Of the two relevant constitutional provisions—the Due Process Clause and the Full Faith and Credit Clause—it is the latter that is directed at those interests. Justice Stevens, in his concurring opinion, advocated a Full Faith and Credit analysis under which the Court should not “invalidate a state court's choice of forum law unless that choice threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another state.”⁴⁰² That test seems unlikely to invalidate choice of forum law, and it appears to be where the Court has ended up. The Court's relative lack of concern for the non-asserting state is a widely noted aspect of its constitutional choice of law cases.⁴⁰³ I think that it tells a lot

400. One might inquire into whether state governance produces net benefits or incurs overall costs depending on whether or not the benefits to pro-plaintiff states from increased litigation outweigh the losses to pro-defendant states. In this context, at least, I find such inquires somewhat speculative.

401. See *Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 702-03 n.10 (1982). The Court stated that personal jurisdiction is a matter of personal rights rather than a federalism issue. *Id.*

402. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 323 (1981) (Stevens, J., concurring).

403. *E.g.*, *Brilmayer & Lee*, *supra* note 94, at 849.

about the Court's vision of interstate federalism. The emphasis is not on protecting states from each other but rather on encouraging them to act. Vigorous assertions of state regulatory authority are a sign that the system is working, rather than a danger sign of possible state parochialism.

Although *Erie* is not cited in the choice of law cases, its vision of federalism manifests itself there as well. The dominant private law role of the states and their courts remains relatively immune from federal intervention, in this context intervention in the name of constitutional guarantees. Looking at the matter in this way also reminds us of the reasons why *Erie*'s condemnation of federal-state forum-shopping does not carry over very far to the state-state variant. Surprise and uncertainty on the defendant's part can be present there as well, but that seems the weakest of *Erie*'s possible anti-forum-shopping arguments. The existence of a federal system in which often more than one state will have a claim of authority to regulate multistate transactions or occurrences means that parties are often subject to more than one law. Whatever weight the fairness reading of *Erie* has, it does not extend to state-state forum-shopping, at least as long as all plaintiffs have presumptive access to the forum's law regardless of citizenship. In sum, the constitutional choice cases permit and perhaps foster state-state forum-shopping. They differ from cases in which federalism and defendant's rights are on the same side and differ as well from cases in which federalism is largely absent. The Court's treatment of state-state forum-shopping does not run afoul of *Erie* and, indeed, seems consistent with its vision of federalism. Federalism is the dominant variable in the forum-shopping equation.

In developing this argument I have focused on the Court's cases dealing with forum-shopping in the private law context. My premise has been that *Erie* is the fundamental precedent to grapple with in evaluating the Court's treatment of the practice. Other writers, however, have emphasized the Court's decisions showing apparent hostility toward public law forum-shopping and have contended that this attitude is inconsistent with its hospitable approach in the private law context. Citing *Younger v. Harris*,⁴⁰⁴ one commentator notes that "the Supreme Court denounces state-federal forum-shopping on grounds of comity and parity," but that "it countenances interstate forum shopping."⁴⁰⁵ According to this writer, "Courts offer little justification for differential treatment of state-federal and interstate forum-shopping. It is not clear, for instance, why concerns about factors such as comity should play any greater role in the

404. 401 U.S. 37 (1971); see *supra* note 6.

405. Note, *supra* note 11, at 1682.

former context than in the latter.”⁴⁰⁶ Similarly, Brilmayer and Lee describe the Court as manifesting a “laissez-faire treatment of the forum shopping problem,” which they find “strikingly at odds with recent Burger Court opinions which disapprove of a moving party’s efforts to obtain a federal forum.”⁴⁰⁷

My disagreement with these writers is over their apparent willingness to lump all forms of the practice together under one general heading—“the forum-shopping problem.” State-state forum-shopping by private law plaintiffs presents different questions from federal-state forum-shopping by such plaintiffs. Use of the federal court system to obtain substantive advantages not available in the state courts implicates different constitutional values than does using one state’s courts to obtain substantive advantages not available in another state’s courts. Public law forum-shopping is different from both private law variants. Cases such as *Younger* present issues of the role of the state courts in enforcing national constitutional norms, the role of the federal government in overseeing the operation of state government, and the role of the federal trial courts in supervising the work of state courts. The role of federal trial courts also looms large in federal-state private law forum-shopping cases. State-state private law cases present the Court with the issue of its own role: when should it step in to police exercises of authority by state courts that may threaten the governmental balance between the states as well as treat defendants unfairly?

Younger’s invocation of comity⁴⁰⁸ rests on the recognition that the national government—armed with weapons such as the Supremacy Clause,⁴⁰⁹ and possessing a nationwide system of courts to enforce its commands—can swallow up the states as independent entities if not contained. The Court’s opposition to public law forum-shopping prevents that from happening: comity is close to a constitutional value aimed at protecting the states. *Erie* reflects a similar concern in a different context: the need to prevent the lower federal courts from intruding upon the private lawmaking sphere of the states and their courts.

In the context of state-state forum-shopping there is essentially no threat to the vertical balance between the national government and the states and not much threat to the horizontal balance among the states. A number of factors serve to keep state judicial power in check, including doctrines of personal jurisdiction, *forum non conveniens* dismissals and

406. *Id.* at 1683.

407. Brilmayer & Lee, *supra* note 94, at 839.

408. *Younger*, 401 U.S. at 44.

409. U.S. CONST. art. VI, cl. 2.

restraints in state choice of law practices. States sometimes do exhibit comity toward each other in this respect.⁴¹⁰ Interstate comity is a desirable attitude, but choice of law cases do not present the Court with an inherent imbalance that elevates comity to an imperative. The *Erie*, *Younger*, and *Allstate* cases must be seen as presenting different issues. The current Court is anti-forum-shopping in the first two, but tolerant of it, even encouraging, in the third. Once one recognizes the essential differences between the issues, the apparent inconsistencies in the cases disappear. Indeed, the states and their courts emerge as the victors in all three.

D. Some Alternative Explanations

Although the federalism explanation for the Court's approach to forum-shopping strikes me as the most persuasive one, there are others that merit consideration. What the Court does and does not do may reflect the fact that its general authority over private law issues is limited. When state courts act on matters of state law, the Supreme Court can intervene only if the state court has transgressed constitutional boundaries. On the other hand, in the context of *Younger* and, to a lesser extent, in *Erie*, the Court is imposing subconstitutional principles as well as exercising its control over the lower federal courts.⁴¹¹ State courts do many things in private law adjudication that the conservative Supreme Court Justices probably do not like. Punitive damages are an example. The award of punitive damages is a major target of conservative critiques of the role of litigation in American society.⁴¹² Yet when the issue was before the Court in 1991, in a somewhat egregious case,⁴¹³ the Court upheld the particular award as well as the general practice, suggesting the imposition of only modest restraints on state judicial systems.⁴¹⁴

410. A principal thesis of Professor Weinberg's recent article on choice of law is that the states are moving increasingly toward a comity-based approach. See Weinberg, *supra* note 4, at 60.

411. *Erie*, for example, can be seen as a case of statutory construction guided by principles of federalism. The result in *Younger* can be viewed as the product of principles of comity and federalism that derive ultimately from the Constitution but whose application in that case could be overruled by Congress.

412. See, e.g., OLSON, *supra* note 146, at 82-83 (noting litigants' preference for jurisdictions perceived to have sympathetic juries and large verdicts).

413. *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991). In this case the amount of the punitive damages award was more than four times greater than the compensatory award. *Id.* at 1037, 1046. The Supreme Court admitted that this differential might make the case "close to the line." *Id.* at 1046.

414. *Id.* at 1046. The Court found limits in the trial judge's instructions to the jury, the presence of post-verdict trial court review, and the availability of appellate review. *Id.* at 1044-46. Justice O'Connor, in dissent, described these protections as "so lacking in fundamental

Even if one concedes the general point that the Court's ability to deal with state-state forum-shopping is limited (although the Court might use subconstitutional invocation of a general anti-forum-shopping principle to curb use of the *federal* courts as auxiliaries to state-state forum-shopping), it is necessary to examine the constitutional provisions that the Court can use to curtail state courts' freedom to apply their own law. Whether the Due Process and Full Faith and Credit Clauses are different in scope with respect to this matter is not clear. In any event, it has been suggested that whatever limits they do impose are quite modest.⁴¹⁵ The Court's opinions support this view. Of course, the Court itself could change that, but to do so would require something of an "activist" approach. An aggressive application of the Due Process Clause to choice of law issues, for example, would require the type of expansive judicial role that the conservative Justices reject.⁴¹⁶

The judicial activism concern suggests a related explanation for the Court's hands-off attitude. Policing state court choice of law decisions would require extensive Supreme Court involvement in what many see as the conflict of laws "swamp."⁴¹⁷ The cases that come before state courts present a plethora of highly fact-specific problems. Laying down general principles with meaningful content could consume a substantial amount of the Court's limited resources. The Justices may well feel that in conflict cases there is no middle ground between telling the state courts what laws they cannot apply and frequent use of a weighing process to tell them what laws they must apply.⁴¹⁸ All three of these perspectives help understand the Court's approach to choice of law and its resultant role in forum-shopping. They supplement the federalism thesis offered in this Article. The judicial activism point is particularly complementary to it.

fairness that the propriety of any specific award is irrelevant." *Id.* at 1056 (O'Connor, J., dissenting).

415. *E.g.*, Robert A. Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 *HOFSTRA L. REV.* 59, 85 (1981) (arguing that under due process analysis, application of state law is arbitrary only where the state lacks an interest in applying its laws or where it lacks a significant factual link to the "underlying transaction"); *id.* at 100 (arguing that, under the Full Faith and Credit Clause, application of one state's law over another state's can be limited only where the "federal interest in national unity" is threatened).

416. One can find an illustration of this point in Justice Scalia's opinion in *Sun Oil Co. v. Wortman*, 486 U.S. 717, 729-30 (1988). His opinion on the somewhat analogous issue of personal jurisdiction in *Burnham v. Superior Court*, 495 U.S. 604 (1990), reflects some of the same concerns. *Id.* at 627 (reasoning that the Court cannot in the name of due process compel states to abandon "the in-state-service basis of jurisdiction").

417. As Professor Gottesman points out, choice of law doctrine seems to have become more than a little swampy. Gottesman, *supra* note 3, at 2 n.5.

418. *Cf.* Gottesman, *supra* note 3, at 20 n.73 (noting the possibility of a weighing process as opposed to the no-significant-interest test).

The Court can be seen as faithful to general structural-institutional principles, even at the price of ignoring interests it otherwise would be disposed to protect.

Professor Louise Weinberg has offered a somewhat different, and highly challenging, explanation for the Court's apparent deference to pro-plaintiff results reached by state courts in this area. As noted, she is an eloquent defender of forum-shopping, in particular on the ground that plaintiffs are "private attorney[s] general"⁴¹⁹ whose successes help prevent "systemic denials of law enforcement [that] *pro tanto* encourage predatory or injurious conduct."⁴²⁰ She sees the Supreme Court as having played an active role in developing "mechanisms of interstate litigation" that are strongly pro-plaintiff.⁴²¹ These mechanisms work to ensure the prevalence of widely shared, pro-plaintiff views of both contracts and torts. For her, the system's great merit is that it

reflects national policies that for other reasons are not implemented in national legislation. These are rational national policies in favor of safe and fair interstate commerce. The structure of the litigation system as it has evolved strongly suggests an implicit national policy in favor of the forum's unilateral enforcement of local law.⁴²²

The apparent notion of the Supreme Court as co-conspirator in the pro-plaintiff nationalization of American law strikes me as suspect. In terms of content one would expect the Court to favor pro-defendant solutions, an observation with which Professor Weinberg has seemed to agree in another context.⁴²³ The Court's aversion to federal judicial lawmaking suggests that it would want national policies on these issues to come from Congress, if they are to come from a federal organ at all. Professor Weinberg is right that the hands-off policy works, at least in the short and mid-term,⁴²⁴ to maximize the influence of the assertive states. That seems to be a price the Court is willing to pay for the diversity of federalism rather than any implicit endorsement of (state) national consensus law. At any rate, Professor Weinberg offers an intriguing perspective on the mystery of the Court's seemingly pro-plaintiff stance.

419. Weinberg, *supra* note 4, at 70.

420. *Id.* at 71.

421. *Id.* at 69.

422. *Id.*

423. *See* Weinberg, *supra* note 51, at 850.

424. It is possible that over time pro-defendant interests would band together to work for national solutions that would undercut the pro-plaintiff policy of the assertive states. *See* Gottesman, *supra* note 3, at 29-30.

E. The Future of Forum Shopping—Is an Alternative Federal Solution Likely?

For the reasons offered above it seems that the Court is likely to retain its stance. That means that the present pro-forum-shopping climate will continue, unless the states themselves change course.⁴²⁵ There are, at least in theory, two alternative sources of federal intervention in choice of law that could change the content of that field and thus the climate. This closing subsection will examine each of them briefly and demonstrate why neither is likely to happen.

The first approach is to put the lower federal courts into the picture by having the Supreme Court, or Congress, declare that they have the power to formulate choice of law rules as a matter of federal common law. They could do this not only in diversity cases, but in any case presenting the requisite interstate elements, and their rules would be binding on the states under the Supremacy Clause.⁴²⁶ Because they would be binding regardless of the court in which the case was brought, there would be no danger of forum-shopping. The lower federal courts would formulate these principles free of state parochialism in order to further the national goal of eliminating biases between citizens and friction among states. Perhaps the federal common law need not contain specific choice of law rules, but only broad guidelines and restraints.⁴²⁷

Would such a proposal be constitutional? As long as Congress possesses the power to declare such rules, it can probably delegate that power. Indeed, delegation is the rationale for much of the federal common law that currently exists.⁴²⁸ Although the issue is not entirely free from doubt, there are strong arguments that Congress possesses power in this field.⁴²⁹ Whether the Supreme Court would accept such lawmaking without a delegation is considerably more questionable. The Court has consistently treated judge-made federal common law as a highly restricted field, not co-extensive with the unexercised powers of Congress. It recently summarized the limits in the following terms:

A few areas involving "uniquely federal interests," are so committed by the Constitution and laws of the United States to fed-

425. See Weinberg, *supra* note 4, at 60.

426. Field, *supra* note 48, at 897 n.64.

427. See Silberman, *supra* note 384, at 130.

428. *Id.* at 129-30.

429. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 (1988); Gottesman, *supra* note 3, at 23-28; Shreve, *supra* note 158, at 338. One possible source of power is the Full Faith and Credit Clause. It authorizes Congress to "by general laws prescribe the manner in which [state] acts, records and proceedings shall be proved, and the effect thereof." U.S. CONST. art. IV, § 1.

eral control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called “federal common law.”⁴³⁰

Choice of law may not fit these seemingly rigorous criteria. The United States is not present in any party or proprietary capacity.⁴³¹ Nor does the field seem to present the direct interstate clash present in a boundary dispute.⁴³² In any event, the Court’s current strong inclination to leave the choice of law field in the hands of the state courts makes it exceedingly unlikely that it would give the lower federal courts license to roam in the area.

If somehow the lower federal courts did become active in this area, their involvement would pose serious questions for the federal judicial system. An important question would be whether a choice of law case would “arise under” the laws of the United States⁴³³ so that all cases presenting a choice of law issue could be brought in federal court. If one applies the strict test advocated by Justice Holmes—a case arises under “the law that creates the cause of action”⁴³⁴—these cases could only be brought in state court, unless there was an independent source of federal jurisdiction such as diversity. Of course, the Holmes test is not the only approach to the “arising under” issue,⁴³⁵ and Congress could constitutionally provide that all cases in which federal choice of law rules could be formulated could be brought initially in federal court.⁴³⁶

Either solution raises serious questions, however. On the one hand, if the goal of federalizing choice of law is to put the lower federal courts in the picture, it would seem that the parties should have the option of placing choice cases in those courts.⁴³⁷ On the other hand, many of these cases would present a tail-wagging-the-dog situation—state law cases in federal court due only to the presence of a choice of law issue. Indeed,

430. *Boyle v. United Technologies Corp.*, 480 U.S. 500, 504 (1988).

431. *See Clearfield Trust Co. v. U.S.*, 318 U.S. 363, 367 (1943) (discussing importance of providing uniform rules when the interests of the United States are present).

432. *Hinderleder v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 94-98 (1938).

433. Field, *supra* note 48, at 897.

434. *American Well Works Co. v. Lane & Bowler Co.*, 241 U.S. 257, 260 (1916).

435. *See, e.g., CHARLES A. WRIGHT, LAW OF FEDERAL COURTS* 3-93 (4th ed. 1983) (discussing different formulations of the test).

436. The outer bounds of constitutionally permissible federal question jurisdiction were established in *Osborn v. Bank of The United States*, 22 U.S. (9 Wheat.) 738, 762-63 (1824). Under the test formulated in *Osborn* it is certainly sufficient if a proposition of federal law is part of the case.

437. As long as a choice of law case arose under the laws of the United States, the defendant could remove it to federal court without regard to its citizenship. *See* 28 U.S.C. § 1441(b) (1988).

one of the purposes of a strict approach to "arising under" is to keep marginally federal cases in the state courts. The point has even greater weight when one considers the mounting concern over the size of federal court dockets.⁴³⁸ Perhaps authorizing federal adjudication of choice disputes only in cases otherwise cognizable in the lower courts would provide enough federal decisions to keep the states in line. Even so, the Supreme Court probably would have to review a number of these decisions, given the need for uniformity of this new federal law. This raises questions of the Supreme Court's own docket⁴³⁹ and of reconciling a federal law of conflicts with an obvious desire by the Court to stay out of the field. Action by the Court in the federal common law direction strikes me as exceedingly unlikely.

It is conceivable that Congress simply would authorize the federal courts to do something in this area, although such an open-ended delegation seems problematic and unlikely. The possibility of congressional action brings up a second form of federal intervention that could alter the current choice of law picture: passage of a statute containing choice of law provisions. Professor Gottesman, based on a review and critique of current choice of law practices and the resultant encouragement of forum-shopping, recently submitted an extremely well-developed proposal for Congressional action.⁴⁴⁰ He would have Congress enact relatively specific provisions,⁴⁴¹ perhaps after "convening a panel of conflicts scholars of varying viewpoints to make proposals as to what a federal law should contain and to counsel Congress on the dangerous implications of proposals that emanate from others."⁴⁴² The result of Congress' deliberations would be federal law supreme in both state and federal courts, but Congress could keep the latter from being flooded by providing that cases not otherwise within federal jurisdiction would not "arise under" the choice of law provisions.⁴⁴³ If Congress adopted indeterminate standards it might also have to "create a centralized federal tribunal to which choice of law questions could be referred from federal and state trial courts."⁴⁴⁴ Gottesman prefers relatively specific standards in the legislation, in part to avoid this particular mechanism,⁴⁴⁵ and in part to prevent

438. See, e.g., POSNER, *supra* note 228, at 169.

439. See, e.g., Gottesman, *supra* note 3, at 37; Shreve, *supra* note 158, at 344.

440. Gottesman, *supra* note 3, at 16-50.

441. *Id.* at 41-49.

442. *Id.* at 35.

443. *Id.* at 36-37.

444. *Id.* at 39.

445. *Id.* at 41.

the Supreme Court from being "smothered"⁴⁴⁶ by the need to review lower court decisions, especially those of state courts.⁴⁴⁷

Professor Gottesman is forthright in recognizing the drawbacks to his proposal, but feels that they can be overcome. The problems it would raise, if enacted, strike me as daunting indeed. Sorting out the roles of the federal and state courts here seems as difficult as in the case of the federal common law proposal. The prospect of the specialized tribunal becoming the focal point of extensive satellite litigation is also troublesome.⁴⁴⁸ As Professor Gottesman recognizes, much would turn on the specificity of what Congress enacted. It may be that the nature of the field does not lend itself to detailed legislative solutions, and that the move away from the *First Restatement*⁴⁴⁹ toward frequently indeterminate standards reflects this fact.

More fundamental, however, is the question of whether Congress should enter the field at all. We tend to view federalization of a field of domestic law as something of a last resort, a course of action to be embarked upon only when state governance has broken down or proven generally inequitable. The problem of forum-shopping, engendered by state choice of law governance, may simply not rise to the level of urgency that justifies national legislation. It has been argued that the current choice of law system functions fairly well in operation despite doctrinal rough spots.⁴⁵⁰ One can agree with Professor Gottesman that forum-shopping is a problem and that it presents considerable unfairness.⁴⁵¹ Perhaps, however, the interstate entities who are its principal victims have learned to adjust with minimal dislocation. National action, by either Congress or the federal courts, is a drastic step. Moreover it would seem to run directly counter to the spirit of *Erie* and its reaffirmation of the states' primary role in private law. Choice of law is an important component of state governance through the common law. No doubt it sometimes leads to untidy, even unfair, results, but that is a price we pay for our federal system. The Supreme Court has been conservative, in the best sense of the word, in leaving a large portion of the forum-shopping debate in the hands of the states.

446. *Id.* at 37.

447. *Id.* Professor Gottesman is concerned with the possibility that state courts might manipulate any set of federal rules in order to continue arriving at current results.

448. Professor Gottesman recognizes this prospect and proposes ways to deal with it. *Id.* at 40-41.

449. See *supra* text accompanying notes 152-70 for a discussion of this development.

450. See generally Robert A. Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS. 10, 26 (Spring 1977).

451. Gottesman, *supra* note 3, at 11-16.

VI. CONCLUSION

Forum-shopping to obtain substantive law advantages is a complex issue. The classical view that it is an outright evil is no longer universally accepted, if indeed it ever was. State court choice of law practices often favor forum-shopping. Substantial arguments have been advanced to justify the practice, particularly contentions based on the desirability of moving the underlying law in a pro-plaintiff direction. In many respects these arguments break down into a conservative-liberal debate. The role of the current conservative Supreme Court in this debate manifests complexities of its own. At times the Court has taken an anti-forum-shopping approach, explicitly in its reading of *Erie*'s application to private law federal-state forum-shopping, and implicitly in cases such as *Younger* dealing with public law federal-state forum-shopping.

Private law state-state forum-shopping presents a separate set of issues. The Court appears to have recognized this and has permitted, perhaps encouraged, the practice to flourish in this context. This may seem a surprising step for a conservative Court, but when one considers the Court's overriding commitment to federalism the apparent inconsistencies disappear. *Erie*, with its vision of a dominant role for states and their courts in private law matters, provides the key to understanding the Court's approach to all three forms of forum-shopping. Although the Court probably will continue to practice a hands-off approach toward constitutional review of state choice of law practices, there are proposals for alternative federal solutions. *Erie*'s federalism argues against these proposals as well. Forum-shopping is a problem; state choice of law practices do abet it. When it comes to federal intervention, however, the cure seems worse than the disease.